

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES
Washington, D.C.



In the Matter of

ECM BioFilms, Inc.,
a corporation, also d/b/a
Enviroplastics International,

Respondent.

Docket No. 9358

PUBLIC VERSION REDACTED

**ECM BIOFILMS' OPPOSITION TO O.W.S. INC.'S MOTION TO QUASH AND/OR
LIMIT SUBPOENA DUCES TECUM**

Respondent ECM BioFilms, Inc. ("ECM") hereby opposes non-party O.W.S. Inc.'s ("OWS") Motion to Quash. In its subpoena ECM seeks information within the scope of Rule 3.31(c)(1). Even so, ECM twice revised the subpoena to narrow requests and reduce attendant production burdens. OWS has refused to supply any requested documents, despite the accommodations made. The OWS documents, including tests, letters, presentations, and review articles are relied upon by Complaint Counsel. The documents are relevant to ECM's defense. This Court has made clear that its Protective Order Governing Discovery Material, attached to the ECM subpoena, affords adequate protection for non-disclosure of confidential information. *See generally* Dkt. No. 9358, ALJ Protective Order at ¶6 (Oct. 22, 2013). Consistent with that Order, the Court should deny OWS's motion.¹

¹ *See* Complaint Counsel's "Limited Opposition to O.W.S.'s Motion to Quash," arguing that "O.W.S.' motion should be denied at least in part because O.W.S. is likely to have [relevant] information . . ."

OWS is not entitled to an award of expenses because OWS has not met its burden of showing that the Subpoena imposes “unreasonable” costs. *In the Matter of R.R. Donnelley & Sons Co. et al.*, 1991 FTC LEXIS 248, at *3 (F.T.C. June 6, 1991).

BACKGROUND

Respondent’s Subpoena to OWS:

On February 13, 2014, ECM served a valid subpoena *duces tecum* at the domestic address for OWS. *See* Exh. RX-A-1. OWS is a private company based in Gent, Belgium, that, among other operations, performs biodegradability and compostability tests of various articles. O.W.S. lists two points of contact: one in Belgium and one in the United States. *See* Exh. RX-B. On February 27, 2014, one day before its production deadline, Ms. Haaker, counsel for OWS, contacted ECM by email and explained that the U.S. address on the OWS website was invalid, but that she would accept service on behalf of OWS if ECM issued a revised subpoena. *See* Exh. RX-C. On February 27, ECM counsel spoke with OWS counsel concerning the subpoena, service of same, and OWS’s desired limitations to scope. *See* Exh. RX-N. Although ECM’s requests of OWS were reasonably calculated to discover relevant information, and thus within Rule 3.31(c)(1), ECM agreed to limit the scope of the document requests; and on February 28, 2014, served OWS with amended requests. *See* Exh. RX-A-2. RX-A-3. OWS counsel then contacted ECM on March 6th and requested more limits. *See* Exh. RX-D; RX-E. Without any basis in fact, OWS counsel accused ECM of subpoenaing OWS maliciously. *See* Exh. RX-E at 4; RX-F. To avoid unnecessary motions practice, ECM responded immediately and offered to narrow the scope yet again. *See* Exh. RX-G. OWS counsel had claimed that Request No. 5 would require a search “literally encompassing 98% of OWS’s business.” *See* Exh. RX-E at 6.

ECM greatly limited that request. *See* Exh. RX-G at 2. Ms. Haaker even acknowledged that conversations between counsel had been “productive.” *See* Exh. RX-H.

On March 11, ECM and OWS Counsel spoke again, and ECM agreed to further reductions in scope. *See* Exh. RX-N. Refusing to consider those, and unwilling to produce *any* of the requested documents, OWS filed its Motion to Quash on March 12. *See* Dkt No. 9358, OWS Mot. to Quash (Mar. 12, 2014). ECM nevertheless unilaterally limited the scope of its requests that same day in a conscientious attempt to reduce further any production burden. *See* Exh. RX-I. ECM counsel acted in good faith, endeavoring to balance ECM’s need for relevant documents with OWS’s concerns.

Importance of OWS to the Instant Action

OWS testing, industry affiliations, financial interests, and bias are relevant to allegations contained in the Complaint and ECM’s defenses. Complaint Counsel has relied repeatedly on OWS reports in depositions and pleadings.

Regarding testing, [REDACTED]

Regarding OWS bias, OWS is an industry player that issues certifications for the Biodegradable Products Institute (“BPI”), a direct competitor of ECM that markets a competing technology, compostable products. *See* O.W.S. Mot. to Quash at 6-7. OWS is financially tied to, and supportive of, BPI, a proponent of “compostable” technologies and outspoken critic of plastics containing ECM’s additive. Specifically, OWS certifies competing plastic products so manufacturers can obtain BPI’s “logo” for their product. *See* Dkt. No 9358, R. Tillinger Aff. at ¶12 (Mar. 12, 2014); RX-E (“Often, all or part of the testing the customer submits for certification has been performed by O.W.S.”). Further, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] OWS participates along with BPI on ASTM Subcommittee D20.96, the same committee that sets standards used in evaluations of ECM products. *See* O.W.S. Mot. to Quash at 7.

ARGUMENT

A. THE INFORMATION ECM REQUESTS IS RELEVANT AND/OR CALCULATED TO LEAD TO RELEVANT INFORMATION

Discovery is permitted if “reasonably expected to yield information relevant to the allegations in the complaint, to the proposed relief, or to the defenses of the respondent.” 16 CFR § 3.31(c)(1). OWS is required to produce documents “reasonably expected to be ‘generally relevant to the issues raised by the pleadings.’” *In the Matter of Rambus, Inc.*, 2002 WL 31868184, at *2 (F.T.C. Nov. 18, 2002) (quoting *In re Kaiser Aluminum & Chem. Corp.*, 1976

FTC LEXIS 68, at *4 (F.T.C. Nov. 12, 1976)). There is no precedential or rule limit that excludes confidential material. Confidential materials are not exempt, rather this Court has promulgated a confidentiality order, duly served upon OWS, that secures confidences from public disclosure. *See* ALJ Scheduling Order ¶ 7.

The discovery rules, basic fairness, and due process support the conclusion that ECM should be afforded discovery of all information about possible bias or conflicts of those from whom evidence is offered against ECM. *See, e.g.*, Exh.'s RX-L-1; RX-L-2; RX-L-3; RX-L-4; RX-L-5; RX-L-6. To that end, OWS production is directly relevant. ECM asks for information relevant to, *inter alia*: (1) O.W.S. evaluation of plastic products containing the ECM additive;

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Facts already in ECM's possession reveal those inquiries warranted, including [REDACTED]

[REDACTED]

[REDACTED] *See* Exh.'s RX-M-1; RX-M-2; RX-K-1; RX-L1-5.

B. THE SUBPOENA IS NOT OVERLY BURDENSOME

OWS bears a "heavy" burden, recognized by this Court, to show that ECM's subpoena is unreasonable and should be denied. *See In the Matter of Rambus, Inc.*, 2002 WL 31868184, at *3 (F.T.C. Nov. 18, 2002); *see also* ECM BioFilms, Dkt. 9358, March 13, 2014 Order, at 2 (citing *In the Matter of Polypore Int'l, Inc.*, 2008 WL 4947490 155, at *6 (F.T.C. Nov. 14, 2008)). "The burden is no less for a non-party." *Rambus Inc.*, 2002 WL 31868184 at *3 (citing

In re Flowers Indus., Inc., 1982 FTC LEXIS 96, at *14 (F.T.C. Mar. 19, 1982)). “Breadth alone is not sufficient justification to refuse enforcement of a subpoena.” *Id.*

OWS argues that it cannot “search customer records to discern whether another customer’s material contained an ECM additive or related to ECM.” *See* O.W.S. Mot. to Quash, at 4. OWS exaggerates its burden. *See* R. Tillinger Aff. ¶ 6 (compliance would require contacting every OWS customer). Its argument would swallow the rule, *see* Rule 3.34; and, further, contrary to the argument, ECM sought only documents and materials obtainable through reasonable means, such as limited keyword searches. *See* Exh. RX-I. But, fundamentally, burden does not excuse non-production. *See In the Matter of Phoebe Putney Health Sys., Inc. et al.*, 2013 WL 2444708, at *2 (F.T.C. May 28, 2013) (“[e]ven where a subpoenaed third party adequately demonstrates that compliance with a subpoena will impose a substantial degree of burden, inconvenience, and cost, that will not excuse [production that] appears generally relevant to the issues. . .”) (citation omitted).

Further, the inconvenience to OWS is generally “outweighed by the public interest in seeking the truth in every litigated case.” *U.S. v. Int’l Bus. Machs. Corp.*, 66 F.R.D. 186, 189 (S.D.N.Y. 1974) (quoting *Coverly Oil Co. v. Cont’l Oil Co.*, 340 F.2d 993, 999 (10th Cir. 1965)). ECM has a right to discover all evidence relevant to this action. *See Apicella v. McNeil Labs., Inc.*, 66 F.R.D. 78, 82 (E.D.N.Y. 1975) (stating that “[t]he right of litigants to discover and present relevant evidence in civil litigation is given great weight in federal courts”). ECM has no choice but to participate in this litigation; and it has a right to obtain material calculated to lead to evidence necessary for its defense. Furthermore, the Court’s Protective Order fully anticipates OWS’s concerns and provides for them. Accordingly, this Court should compel OWS to comply with the Subpoena.

Although under no obligation, ECM has repeatedly limited, and has even forgone, certain requests to ease OWS's burden. Each of ECM's narrowed requests is relevant and cannot be narrowed further without compromising the discovery of matters germane to this proceeding. Depending entirely on speculative assertions, OWS has offered no direct evidence required to meet its heavy burden to prove that production will in fact impose undue burden. *See Kaiser Aluminum*, 1976 FTC LEXIS 68 at *18 (stating that a general, unsupported claim of burden is not persuasive).

C. CONFIDENTIAL DOCUMENTS ARE NOT EXEMPT

"The fact that information sought by a subpoena may be confidential does not excuse compliance." *Rambus Inc.*, 2002 WL 31868184 at *4 (quoting *Kaiser Aluminum*, 1976 FTC LEXIS 68 at *9); *see also F.T.C. v. Rockefeller, et al.*, 441 F. Supp. 234, 242 (S.D.N.Y. 1977), *aff'd* 591 F.2d 182 (2d Cir. 1979) (holding that an objection to a subpoena on grounds that it seeks confidential information "poses no obstacle to enforcement"). Under FTC's Rules, "a showing of general relevance is sufficient to justify production of documents containing confidential information and no further showing of 'need' is necessary." *Id.* (quoting *Kaiser Aluminum*, 1976 FTC LEXIS 68 at *10-11; *Flowers Indus.*, 1982 FTC LEXIS 96 at *8).

"The protective order entered in this case ameliorates [OWS's] concerns." *Id.*; *see also In the Matter of N. Tex. Specialty Physicians*, 2004 WL 527340, at *3 (F.T.C. Jan. 30, 2004) (explaining that "[t]he provisions of the Protective Order adequately protect the confidential documents of third parties through a number of safeguards."). Further, OWS's status as "a third party does not diminish these principles, especially in light of the need ... to obtain the sought-after information for [a] defense and 'the public interest in seeking the truth in every litigated case.'" *Id.* (quoting *Kaiser Aluminum*, 1976 FTC LEXIS 68 at *15). In his Order, citing *In re*

Lab. Corp. of Am., 2011 FTC LEXIS 22, at *5 (Feb. 17, 2011) his Honor recognized that, “[t]he fact . . . discovery might result in the disclosure of sensitive competitive information is not a basis for denying such discovery.” ALJ Order at 5. He concluded, “[e]ven if ECM’s customer information is considered confidential . . . , Respondent’s contention that such information is therefore protected from discovery is without merit.” *Id.* For any documents that do contain confidences, OWS may follow the Protective Order, label the documents as confidential, and be confident in the knowledge that his Honor strictly enforces that Order’s provisions.

D. OWS IS NOT ENTITLED TO COSTS

OWS has the burden to demonstrate that ECM’s subpoena is unreasonable. *In the Matter of Intel Corp.*, 2010 WL 2332726, at *2 (F.T.C. May 28, 2010) (quoting *F.T.C. v. Dresser Indus., Inc.*, 1977 WL 1394, at *5 (D.D.C. 1977)). A subpoenaed party “can be required to bear reasonable costs of compliance with the subpoena.” *R.R. Donnelley & Sons Co. et al.*, 1991 FTC LEXIS 248, at *1–2. OWS must absorb the “reasonable expenses of compliance as a cost of doing business.” *Id.* Reimbursement is proper only for “unreasonable” costs. *Id.* at *3 (citations omitted). OWS has supplied no evidence sufficient to prove unreasonable costs.

The Respondent in *Polypore Int’l* subpoenaed The Moore Company (“Moore”). *See in the Matter of Polypore Int’l*, 2009 WL 569708, at *1 (F.T.C. Feb. 3, 2009). Moore asserted arguments of burden comparable to those of OWS. Moore argued that subpoena compliance would destroy its company. *Id.* Moore also asked the court for “reimbursement for all costs of compliance with Respondent’s subpoena.” *Id.* at *4. The court rejected the request, reciting that Moore had not demonstrated that estimated costs were unreasonable or unduly burdensome. *Id.* at *5.

Here, as in Moore, OWS has failed to meet its burden. OWS offers nothing more than self-serving speculation that it has incurred expenses in opposing the subpoena. *See* Motion to Quash, at p. 5. Those fees appear themselves unreasonable given the nature and scope of the subpoena, but even were they reasonable, they do not prove that unreasonable costs were incurred in *supplying the requested documents*, which is the probative factor. The alleged “costs” are not germane to production itself; they concern OWS’s gratuitous decision to contest ECM’s right to the information. Moreover, OWS’s interaction with counsel suggests bad faith, having first indicated a willingness to produce documents requested if limited in scope, OWS then shifted and moved to quash the entire subpoena.

CONCLUSION

For the foregoing reasons, ECM respectfully requests that O.W.S.’s Motion to Quash be denied.

Respectfully submitted,



Jonathan W. Emord (jemord@emord.com)
EMORD & ASSOCIATES, P.C.
11808 Wolf Run Lane
Clifton, VA 20124
Telephone: 202-466-6937
Facsimile: 202-466-6938

DATED: March 21, 2014

STATEMENT CONCERNING CONFIDENTIALITY

ECM's Counsel hereby states that the content of the foregoing Opposition and its exhibits contain confidential information under this Court's Protective Order and, so, ECM hereby files this Opposition and its exhibits as "Confidential."

Respectfully submitted,



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STATEMENT CONCERNING RULE 3.45(E)

Pursuant to Rule 3.45(e), ECM advises that certain Exhibits appended to its Opposition have been designated Confidential by third parties under the standing Protective Order in this action. Should the Commission intend to disclose in a final decision certain confidential exhibits in this Opposition, notice should be given to the following:

- For Exhibits: RX-K-1; RX-L-2; RX-L-4
Gary Hellinger, CEO
Gary Plastic Packaging Corp. & Garyline div.
1340 Viele Avenue, Bronx, NY 10474
- For Exhibits: RX-M-1; RX-M-2
Michael Zall, Esq., Counsel on behalf of BPI
Two Yorkshire Drive
Suffern, NY 10901

Steve Mojo
Biodegradable Products Institute
331 West 57th Street, Suite 415
New York, NY 10019

- For Exhibit: RX-K-2
John H. Masterson and John Griffin, Esq.
Covidien, PLC
15 Hampshire Street
Mansfield, MA 02048

Respectfully submitted,


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11808 Wolf Run Lane
Clifton, VA 20124
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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2014, I caused a true and correct copy of the foregoing, **ECM BIOFILMS' OPPOSITION TO O.W.S. INC.'S MOTION TO QUASH AND/OR LIMIT SUBPOENA DUCES TECUM AND FOR AN AWARD OF EXPENSES**, to be served as follows:

One hardcopy original and one courtesy copy to the **Office of the Secretary** through UPS overnight mail:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Room H-113
Washington, DC 20580
Email: secretary@ftc.gov

One electronic courtesy copy to the **Office of the Administrative Law Judge**:

The Honorable D. Michael Chappell
Administrative Law Judge
600 Pennsylvania Ave., NW, Room H-110
Washington, DC 20580

One electronic copy to **Counsel for Complainant**:

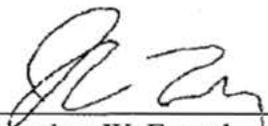
Katherine Johnson (kjohanson3@ftc.gov)
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Washington, D.C. 20580

Elisa Jillson (ejillson@ftc.gov)
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Washington, D.C. 20580

Jonathan Cohen (jcohen2@ftc.gov)
Federal Trade Commission
600 Pennsylvania Avenue, NW
Mail stop M-8102B
Washington, D.C. 20580

I further certify that I retain a paper copy of the signed original of the foregoing document that is available for review by the parties and adjudicator consistent with the Commission's Rules.

DATED: March 21, 2014


Jonathan W. Emord
EMORD & ASSOCIATES, P.C.
11808 Wolf Run Lane

Clifton, VA 20124
Telephone: 202-466-6937

RESPONDENT
EXHIBIT
RX-A-1



A Professional Corporation

WASHINGTON | VIRGINIA | PHOENIX

11808 WOLF RUN LANE
CLIFTON, VA 20124

3210 S. GILBERT ROAD
SUITE 4
CHANDLER, AZ 85286
(602) 388-8899 | FAX (602) 393-4361

1050 SEVENTEENTH STREET, N.W.
SUITE 600
WASHINGTON, D.C. 20036
(202) 466-6937 | FAX (202) 466-6938

February 13, 2014

Lou F. Caputo, Esq.
602.388.8901
lcaputo@emord.com

VIA UPS

Organic Waste Systems, Inc.
7155 Five Mile Road
Cincinnati, OH 45230

Re: In the Matter of ECM BioFilms, Inc., Docket No. 9358

Dear Sir or Madam:

Pursuant to the Federal Trade Commission's Rules of Practice, please find enclosed Respondent ECM BioFilms, Inc.'s subpoena *duces tecum* to O.W.S. This subpoena requests the production of documents and other materials. Included with the subpoena is Schedule A, which describes the instructions and specific requests of Respondent and a copy of the Protective Order issued in this matter.

Please provide all requested documents no later than February 28, 2014. We welcome you to contact us with questions.

Sincerely,

Jonathan W. Emord
Peter A. Arhangelsky
Lou F. Caputo



SUBPOENA DUCES TECUM

Provided by the Secretary of the Federal Trade Commission, and
Issued Pursuant to Commission Rule 3.34(b), 16 C.F.R. § 3.34(b)(2010)

<p>1. TO</p> <p>General Counsel and/or other Executive for Organic Waste Systems 7155 Five Mile Road Cincinnati, OH 45230</p>	<p>2. FROM</p> <p style="text-align: center;">UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
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This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things, at the date and time specified in Item 5, and at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

<p>3. PLACE OF PRODUCTION</p> <p>Emord & Associates, P.C. 3210 S. Gilbert Road, Suite 4 Chandler, AZ 85286</p>	<p>4. MATERIAL WILL BE PRODUCED TO</p> <p>Peter Arhangelsky</p>
	<p>5. DATE AND TIME OF PRODUCTION</p> <p>February 28, 2014, 5:00 PM EST</p>

<p>6. SUBJECT OF PROCEEDING</p> <p>In the matter of ECM BioFilms, Inc., Docket No. 9358</p>

<p>7. MATERIAL TO BE PRODUCED</p> <p>See Attached Schedule A for description of all documents and materials.</p>
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<p>8. ADMINISTRATIVE LAW JUDGE</p> <p>Chief Administrative Law Judge D. Michael Chappell</p> <p>Federal Trade Commission Washington, D.C. 20580</p>	<p>9. COUNSEL AND PARTY ISSUING SUBPOENA</p> <p>Jonathan W. Emord, Peter Arhangelsky, Lou Caputo</p> <p>Emord & Associates, P.C. for Respondent ECM BioFilms, Inc.</p>
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<p>DATE SIGNED</p> <p>2/13/14</p>	<p>SIGNATURE OF COUNSEL ISSUING SUBPOENA</p> <p><i>Lou F. Caputo</i></p>
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GENERAL INSTRUCTIONS

APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena must comply with Commission Rule 3.34(c), 16 C.F.R. § 3.34(c), and in particular must be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed before the Administrative Law Judge and with the Secretary of the Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 9, and upon all other parties prescribed by the Rules of Practice.

TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to counsel listed in Item 9 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from counsel listed in Item 9.

A copy of the Commission's Rules of Practice is available online at <http://bit.ly/FTCRulesofPractice>. Paper copies are available upon request.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

**SCHEDULE "A" TO SUBPOENA DUCES TECUM DIRECTED TO
ORGANIC WASTE SYSTEMS, INC. (UNITED STATES HQ)**

INSTRUCTIONS

- A. Unless otherwise specified, the time period covered by a numbered request shall be limited to the time period extending from January 1, 2007 until the present date, unless differently stated therein.
- B. Documents must be delivered to Counsel for Respondent at the following address:
- Emord & Associates, P.C.,
3210 South Gilbert Road, Suite 4
Chandler, AZ 85286
- C. A complete copy of each document should be submitted even if only a portion of the document is within the terms of the numbered request. The document shall not be edited, cut or expunged and shall include all covering letters and memoranda, transmittal slips, appendices, tables or other attachments.
- D. All information submitted shall be clearly and precisely identified as to the numbered request(s) to which it is responsive. Pages in the submission should be numbered consecutively, and each page should be marked with a unique "Bates" document tracking number.
- E. Documents covered by these numbered requests are those which are in your possession or under your actual or constructive custody or control, whether or not such documents were received from or disseminated to any other person or entity, including attorneys, accountants, directors, officers and employees.
- F. Documents that may be responsive to more than one numbered request need not be submitted more than once. However, your response should indicate, for each document submitted, each numbered request to which the document is responsive. Identification shall be by the Bates number if the documents(s) were so numbered when submitted or by author and subject matter if not so numbered.
- G. If any of the documentary materials requested in these numbered requests are available in machine-readable form (such as floppy or hard disks, drums, core storage, magnetic tapes or punch cards), state the form in which it is available and describe the type of computer or other machinery required to read the documents involved. If the information requested is stored in a computer or a file or record generated by a computer, indicate whether you have an existing program that will print the information in readable form and state the name, title, business address and telephone number of each person who is familiar with the program.
- H. All objections to these numbered requests, or to any individual request, must be raised in the initial response or otherwise waived.

- I. The Federal Trade Commission's Rules of Practice describes withholding requested material responsive to a subpoena under Rule 3.38A. For your convenience, Rule 3.38A states:

(a) Any person withholding material responsive to a subpoena issued pursuant to §3.34 or §3.36, written interrogatories requested pursuant to §3.35, a request for production or access pursuant to §3.37, or any other request for the production of materials under this part, shall assert a claim of privilege or any similar claim not later than the date set for production of the material. Such person shall, if so directed in the subpoena or other request for production, submit, together with such claim, a schedule which describes the nature of the documents, communications, or tangible things not produced or disclosed - and does so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim. The schedule need not describe any material outside the scope of the duty to search set forth in §3.31(c)(2) except to the extent that the Administrative Law Judge has authorized additional discovery as provided in that paragraph.

(b) A person withholding material for reasons described in §3.38A(a) shall comply with the requirements of that subsection in lieu of filing a motion to limit or quash compulsory process.

- J. The Federal Trade Commission's Rules of Practice describes motions to quash and/or limit subpoenas under Rule 3.34(c). For your convenience, Rule 3.34 states in relevant part:

(c) *Motions to quash; limitation on subpoenas.* Any motion by the subject of a subpoena to limit or quash the subpoena shall be filed within the earlier of 10 days after service thereof or the time for compliance therewith. Such motions shall set forth all assertions of privilege or other factual and legal objections to the subpoena, including all appropriate arguments, affidavits and other supporting documentation, and shall include the statement required by §3.22(g). Nothing in paragraphs (a) and (b) of this section authorizes the issuance of subpoenas except in accordance with §§3.31(c)(2) and 3.36.

- K. Some documents that you are requested to provide may be confidential. In the Protective Order dated October 22, 2013, Chief Administrative Law Judge D. Michael Chappell ordered that a party conducting discovery from third parties shall provide such third parties a copy of the Protective Order so as to inform third parties of his, her, or its rights. *See* ALJ Protective Order at 2, ¶4. Accordingly, a copy of the Protective Order is attached with this subpoena.
- L. If any requested material is withheld based on a claim of privilege, submit together with such claim a schedule of the items withheld. For each item withheld, the schedule should state: (a) the item's type, title, specific subject matter and date; (b) the names, addresses, positions and organizations of all authors or recipients of the item; and (c) the specific grounds for

claiming that the item is privileged. If only part of a responsive document is privileged, all non-privileged portions of the document must be submitted.

DESCRIPTION OF DOCUMENTS REQUESTED

Please produce the original or copies of the following documents (the term "documents" shall include all records, books of account, worksheets, checks, instructions, specifications, manuals, reports, books, periodicals, pamphlets, publications, raw and refined data, memoranda, graphs, drawings, notes, lab books, advertisements, list studies, meeting minutes, working papers, transcripts, magnetic tapes or discs, punch cards, computer printouts, letters, correspondence¹, agreements, drafts of agreements, telegrams, email, drafts, proposals, employee records, customer records, log files recommendations, and any other data recorded in readable and/or retrievable form, whether typed, handwritten, reproduced, magnetically recorded, coded, or in any other ay made readable or retrievable):

1. All documents concerning² ECM BioFilms, Inc.³
2. All correspondence between O.W.S. and any employee, representative, or distributor of ECM BioFilms, Inc.
3. All documents sent or received by OWS employees making reference to ECM BioFilms, Robert Sinclair, or ECM BioFilms Master Batch Pellets

¹ The term "correspondence" is intended, used, and defined in its broadest sense allowable under the FTC Rules of Practice. Such term includes, but is not limited to embrace emails, documents appended to emails, reports and any other written or electronic document of any kind that is communicated from the subpoena recipient or its agents to any and all other persons and entities.

² The term "concerning" is intended, used, and defined in its broadest sense allowable under the FTC Rules of Practice and should be considered to be synonymous with regarding, relating to, mentioning, discussing, referencing, implicating, explaining, or about the documents subject to any and all individual requests in this subpoena.

³ ECM BioFilms Inc. is an American corporation with its principal place of business at Victoria Place – Suite 225, 100 South Park Place, Painesville, Ohio 44077, United States.

4. All documents concerning Gary Plastic Packaging Corporation⁴ (GPPC) and/or any test or report (including any and all notes and raw data) performed or written for GPPC, including, but not limited to, "Study GLH-2: Review of Several Documents, Reports and Statements on Biodegradation of ECM Masterbatch Pellets."

5. All documents concerning any test or report (including any and all notes and raw data) performed or written about a product or substance containing any product of ECM BioFilms, Inc., including "ECM Masterbatch Pellets."

6. All documents concerning any test or report (including any and all notes and raw data) performed or written about products or substances claims to be biodegradable.

7. All correspondence between O.W.S. and any employee or representative or officer of GPPC.

8. All correspondence between O.W.S. and any member, employee, representative, or officer of the United States Federal Trade Commission.

9. All documents concerning the education, training, and experience of Mr. Bruno de Wilde.

10. A list of all tests and reports authored by Mr. de Wilde.

11. All employee evaluations of Mr. de Wilde.

12. All documents written or authored by Mr. de Wilde concerning biodegradable plastics.

13. All documents concerning the education, training, and experience of Mr. Richard Tillinger.

14. All employee evaluations of Mr. Tillinger.

⁴ Gary Plastic Packaging is an American company located at 1340 Viele Avenue, Bronx, NY 10474, United States.

15. A list of all tests and reports authored by Mr. Tillinger.
16. All documents written or authored by Mr. Tillinger concerning biodegradable plastics.
17. All documents concerning or related to any version of the American Society of Testing and Materials' ("ASTM") testing methods D5511 and D5526.

INSTRUCTIONS FOR COMPLIANCE BY DELIVERY OF DOCUMENTS

If documents are delivered by hand, overnight delivery service, certified mail, or any other means your response shall be accompanied by an affidavit, executed by you that provides:

The names, addresses, positions, and organizations of all persons whose files were searched and all persons who participated in or supervised the collection of the documents⁵, and a brief description of the nature of the work that each person performed in connection with the collecting the documents.

A statement that the search was complete and that responsive documents are being produced.

A statement as to whether the documents were made at or near the time of the occurrence of the matters set forth in such documents, kept in the course of your regularly conducted business, whether it was your regular practice to make and keep such documents, and the custodian of records and/or other executive(s) and/or employees of O.W.S who have knowledge of such matters, can authenticate the documents and materials produced, and who can testify to such matters.

A statement as to whether any document called for by the subpoena has been misplaced, lost or destroyed. If any document has been misplaced, lost, or destroyed, identify: type of documents the date (or approximate date) of the documents, subject matter of the documents, all persons to whom it was addressed, circulated, or shown; its date of destruction, or when it was lost or misplaced; the reason it was destroyed, lost or misplaced; and the custodian of the documents on the date of its destruction, loss, or misplacement.

⁵ "Document" and "documents" as used in this Attachment are defined in this subpoena's "Description of Documents Requested" section.

A declaration that states:

I declare (or certify, verify, or state) under penalty of perjury that the forgoing is true and correct.

Executed on [date].

[Signature of party executing the declaration]

Respectfully submitted,

/s/ Jonathan W. Emord

Jonathan W. Emord, Esq.

EMORD & ASSOCIATES, P.C.

11808 Wolf Rune Lane

Clifton, VA 20124

Ph: 202-466-6937

Fx: 202-466-6938

Em: jemord@emord.com

Counsel to ECM BioFilms, Inc.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

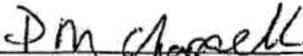
In the Matter of)
)
ECM BioFilms, Inc.,)
a corporation, also d/b/a)
Enviroplastics International,)
Respondent.)

DOCKET NO. 9358

PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL

Commission Rule 3.31(d) states: "In order to protect the parties and third parties against improper use and disclosure of confidential information, the Administrative Law Judge shall issue a protective order as set forth in the appendix to this section." 16 C.F.R. § 3.31(d). Pursuant to Commission Rule 3.31(d), the protective order set forth in the appendix to that section is attached verbatim as Attachment A and is hereby issued.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: October 22, 2013

ATTACHMENT A

For the purpose of protecting the interests of the parties and third parties in the above-captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material ("Protective Order") shall govern the handling of all Discovery Material, as hereafter defined.

1. As used in this Order, "confidential material" shall refer to any document or portion thereof that contains privileged, competitively sensitive information, or sensitive personal information. "Sensitive personal information" shall refer to, but shall not be limited to, an individual's Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver's license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual's medical records. "Document" shall refer to any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the possession of a party or a third party. "Commission" shall refer to the Federal Trade Commission ("FTC"), or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding.
2. Any document or portion thereof submitted by a respondent or a third party during a Federal Trade Commission investigation or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as confidential material for purposes of this Order. The identity of a third party submitting such confidential material shall also be treated as confidential material for the purposes of this Order where the submitter has requested such confidential treatment.
3. The parties and any third parties, in complying with informal discovery requests, disclosure requirements, or discovery demands in this proceeding may designate any responsive document or portion thereof as confidential material, including documents obtained by them from third parties pursuant to discovery or as otherwise obtained.
4. The parties, in conducting discovery from third parties, shall provide to each third party a copy of this Order so as to inform each such third party of his, her, or its rights herein.
5. A designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph 1 of this Order.

6. Material may be designated as confidential by placing on or affixing to the document containing such material (in such manner as will not interfere with the legibility thereof), or if an entire folder or box of documents is confidential by placing or affixing to that folder or box, the designation "CONFIDENTIAL – FTC Docket No. 9358" or any other appropriate notice that identifies this proceeding, together with an indication of the portion or portions of the document considered to be confidential material. Confidential information contained in electronic documents may also be designated as confidential by placing the designation "CONFIDENTIAL – FTC Docket No. 9358" or any other appropriate notice that identifies this proceeding, on the face of the CD or DVD or other medium on which the document is produced. Masked or otherwise redacted copies of documents may be produced where the portions deleted contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been deleted and the reasons therefor.

7. Confidential material shall be disclosed only to: (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including consultants, provided they are not affiliated in any way with a respondent and have signed an agreement to abide by the terms of the protective order; and (e) any witness or deponent who may have authored or received the information in question.

8. Disclosure of confidential material to any person described in Paragraph 7 of this Order shall be only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever, provided, however, that the Commission may, subject to taking appropriate steps to preserve the confidentiality of such material, use or disclose confidential material as provided by its Rules of Practice; sections 6(f) and 21 of the Federal Trade Commission Act; or any other legal obligation imposed upon the Commission.

9. In the event that any confidential material is contained in any pleading, motion, exhibit or other paper filed or to be filed with the Secretary of the Commission, the Secretary shall be so informed by the Party filing such papers, and such papers shall be filed *in camera*. To the extent that such material was originally submitted by a third party, the party including the materials in its papers shall immediately notify the submitter of such inclusion. Confidential material contained in the papers shall continue to have *in camera* treatment until further order of the Administrative Law Judge, provided, however, that such papers may be furnished to persons or entities who may receive confidential material pursuant to Paragraphs 7 or 8. Upon or after filing any paper containing confidential material, the filing party shall file on the public record a duplicate copy of the paper that does not reveal confidential material. Further, if the protection for any such material expires, a party may file on the public record a duplicate copy which also contains the formerly protected material.

10. If counsel plans to introduce into evidence at the hearing any document or transcript containing confidential material produced by another party or by a third party, they shall provide advance notice to the other party or third party for purposes of allowing that party to seek an order that the document or transcript be granted *in camera* treatment. If that party wishes *in camera* treatment for the document or transcript, the party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives such notice. Except where such an order is granted, all documents and transcripts shall be part of the public record. Where *in camera* treatment is granted, a duplicate copy of such document or transcript with the confidential material deleted therefrom may be placed on the public record.

11. If any party receives a discovery request in any investigation or in any other proceeding or matter that may require the disclosure of confidential material submitted by another party or third party, the recipient of the discovery request shall promptly notify the submitter of receipt of such request. Unless a shorter time is mandated by an order of a court, such notification shall be in writing and be received by the submitter at least 10 business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the submitter of its rights hereunder. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Order to challenge or appeal any order requiring production of confidential material, to subject itself to any penalties for non-compliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission. The recipient shall not oppose the submitter's efforts to challenge the disclosure of confidential material. In addition, nothing herein shall limit the applicability of Rule 4.11(e) of the Commission's Rules of Practice, 16 CFR 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

12. At the time that any consultant or other person retained to assist counsel in the preparation of this action concludes participation in the action, such person shall return to counsel all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing confidential information. At the conclusion of this proceeding, including the exhaustion of judicial review, the parties shall return documents obtained in this action to their submitters, provided, however, that the Commission's obligation to return documents shall be governed by the provisions of Rule 4.12 of the Rules of Practice, 16 CFR 4.12.

13. The provisions of this Protective Order, insofar as they restrict the communication and use of confidential discovery material, shall, without written permission of the submitter or further order of the Commission, continue to be binding after the conclusion of this proceeding.

RESPONDENT

EXHIBIT

RX-A-2



A Professional Corporation

WASHINGTON | VIRGINIA | PHOENIX

11808 WOLF RUN LANE
CLIFTON, VA 20124

3210 S. GILBERT ROAD
SUITE 4
CHANDLER, AZ 85286
(602) 388-8899 | FAX (602) 393-4361

1050 SEVENTEENTH STREET, N.W.
SUITE 600
WASHINGTON, D.C. 20036
(202) 466-6937 | FAX (202) 466-6938

February 28, 2014

Lou F. Caputo, Esq.
602.388.8901
lcaputo@emord.com

VIA EMAIL

Christine Haaker, Counsel to
O.W.S, Inc.
(e): Christine.Haaker@thompsonhine.com

Re: In the Matter of ECM BioFilms, Inc., Docket No. 9358

Dear Ms. Haaker:

We understand that you represent O.W.S., Inc. and have agreed to accept service on behalf of O.W.S., Inc. Pursuant to the Federal Trade Commission's Rules of Practice, please find enclosed Respondent ECM BioFilms, Inc.'s amended subpoena *duces tecum* to O.W.S. This subpoena requests the production of documents and other materials. Included with the subpoena is Schedule A, which describes the instructions and specific requests of Respondent and a copy of the Protective Order issued in this matter.

Please provide all requested documents no later than March 14, 2014. We welcome you to contact us with questions.

Sincerely,



Jonathan W. Emord
Peter A. Arhangelsky
Lou F. Caputo



SUBPOENA DUCES TECUM

Provided by the Secretary of the Federal Trade Commission, and
Issued Pursuant to Commission Rule 3.34(b), 16 C.F.R. § 3.34(b)(2010)

<p>1. TO</p> <p>O.W.S., Inc. C/O Counsel, Ms. Christine Haaker</p>	<p>2. FROM</p> <p style="text-align: center;">UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
--	--

This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things, at the date and time specified in Item 5, and at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

<p>3. PLACE OF PRODUCTION</p> <p>Emord & Associates, P.C. 3210 S. Gilbert Road, Suite 4 Chandler, AZ 85286</p>	<p>4. MATERIAL WILL BE PRODUCED TO</p> <p>Peter Arhangelsky</p>
	<p>5. DATE AND TIME OF PRODUCTION</p> <p>March 14, 2014, 5:00 PM EST</p>

<p>6. SUBJECT OF PROCEEDING</p> <p>In the matter of ECM BioFilms, Inc., Docket No. 9358</p>

<p>7. MATERIAL TO BE PRODUCED</p> <p>See Attached Schedule A for description of all documents and materials.</p>
--

<p>8. ADMINISTRATIVE LAW JUDGE</p> <p>Chief Administrative Law Judge D. Michael Chappell</p> <p>Federal Trade Commission Washington, D.C. 20580</p>	<p>9. COUNSEL AND PARTY ISSUING SUBPOENA</p> <p>Jonathan W. Emord, Peter Arhangelsky, Lou Caputo Emord & Associates, P.C. for Respondent ECM BioFilms, Inc.</p>
---	---

<p>DATE SIGNED</p> <p>2/28/14</p>	<p>SIGNATURE OF COUNSEL ISSUING SUBPOENA</p>
-----------------------------------	--

GENERAL INSTRUCTIONS

APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena must comply with Commission Rule 3.34(c), 16 C.F.R. § 3.34(c), and in particular must be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed before the Administrative Law Judge and with the Secretary of the Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 9, and upon all other parties prescribed by the Rules of Practice.

TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to counsel listed in Item 9 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from counsel listed in Item 9.

A copy of the Commission's Rules of Practice is available online at <http://bit.ly/FTCRulesofPractice>. Paper copies are available upon request.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

SCHEDULE "A" TO SUBPOENA DUCES TECUM DIRECTED TO

O.W.S., INC.

INSTRUCTIONS

- A. Unless otherwise specified, the time period covered by a numbered request shall be limited to the time period extending from January 1, 2007 until the present date, unless differently stated therein.
- B. Documents must be delivered to Counsel for Respondent at the following address:

Emord & Associates, P.C.,
3210 South Gilbert Road, Suite 4
Chandler, AZ 85286
- C. A complete copy of each document should be submitted even if only a portion of the document is within the terms of the numbered request. The document shall not be edited, cut or expunged and shall include all covering letters and memoranda, transmittal slips, appendices, tables or other attachments.
- D. All information submitted shall be clearly and precisely identified as to the numbered request(s) to which it is responsive. Pages in the submission should be numbered consecutively, and each page should be marked with a unique "Bates" document tracking number.
- E. Documents covered by these numbered requests are those which are in your possession or under your actual or constructive custody or control, whether or not such documents were received from or disseminated to any other person or entity, including attorneys, accountants, directors, officers and employees.
- F. Documents that may be responsive to more than one numbered request need not be submitted more than once. However, your response should indicate, for each document submitted, each numbered request to which the document is responsive. Identification shall be by the Bates number if the documents(s) were so numbered when submitted or by author and subject matter if not so numbered.
- G. If any of the documentary materials requested in these numbered requests are available in machine-readable form (such as floppy or hard disks, drums, core storage, magnetic tapes or punch cards), state the form in which it is available and describe the type of computer or other machinery required to read the documents involved. If the information requested is stored in a computer or a file or record generated by a computer, indicate whether you have an existing program that will print the information in readable form and state the name, title, business address and telephone number of each person who is familiar with the program.
- H. All objections to these numbered requests, or to any individual request, must be raised in the initial response or otherwise waived.

I. The Federal Trade Commission's Rules of Practice describes withholding requested material responsive to a subpoena under Rule 3.38A. For your convenience, Rule 3.38A states:

(a) Any person withholding material responsive to a subpoena issued pursuant to §3.34 or §3.36, written interrogatories requested pursuant to §3.35, a request for production or access pursuant to §3.37, or any other request for the production of materials under this part, shall assert a claim of privilege or any similar claim not later than the date set for production of the material. Such person shall, if so directed in the subpoena or other request for production, submit, together with such claim, a schedule which describes the nature of the documents, communications, or tangible things not produced or disclosed - and does so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim. The schedule need not describe any material outside the scope of the duty to search set forth in §3.31(c)(2) except to the extent that the Administrative Law Judge has authorized additional discovery as provided in that paragraph.

(b) A person withholding material for reasons described in §3.38A(a) shall comply with the requirements of that subsection in lieu of filing a motion to limit or quash compulsory process.

J. The Federal Trade Commission's Rules of Practice describes motions to quash and/or limit subpoenas under Rule 3.34(c). For your convenience, Rule 3.34 states in relevant part:

(c) *Motions to quash; limitation on subpoenas.* Any motion by the subject of a subpoena to limit or quash the subpoena shall be filed within the earlier of 10 days after service thereof or the time for compliance therewith. Such motions shall set forth all assertions of privilege or other factual and legal objections to the subpoena, including all appropriate arguments, affidavits and other supporting documentation, and shall include the statement required by §3.22(g). Nothing in paragraphs (a) and (b) of this section authorizes the issuance of subpoenas except in accordance with §§3.31(c)(2) and 3.36.

K. Some documents that you are requested to provide may be confidential. In the Protective Order dated October 22, 2013, Chief Administrative Law Judge D. Michael Chappell ordered that a party conducting discovery from third parties shall provide such third parties a copy of the Protective Order so as to inform third parties of his, her, or its rights. See ALJ Protective Order at 2, ¶4. Accordingly, a copy of the Protective Order is attached with this subpoena.

L. If any requested material is withheld based on a claim of privilege, submit together with such claim a schedule of the items withheld. For each item withheld, the schedule should state: (a) the item's type, title, specific subject matter and date; (b) the names, addresses, positions and organizations of all authors or recipients of the item; and (c) the specific grounds for

claiming that the item is privileged. If only part of a responsive document is privileged, all non-privileged portions of the document must be submitted.

DESCRIPTION OF DOCUMENTS REQUESTED

Please produce the original or copies of the following documents (the term "documents" shall include all records, books of account, worksheets, checks, instructions, specifications, manuals, reports, books, periodicals, pamphlets, publications, raw and refined data, memoranda, graphs, drawings, notes, lab books, advertisements, list studies, meeting minutes, working papers, transcripts, magnetic tapes or discs, punch cards, computer printouts, letters, correspondence¹, agreements, drafts of agreements, telegrams, email, drafts, proposals, employee records, customer records, log files recommendations, and any other data recorded in readable and/or retrievable form, whether typed, handwritten, reproduced, magnetically recorded, coded, or in any other ay made readable or retrievable):

1. All documents and correspondence concerning² ECM BioFilms, Inc.,³ Robert Sinclair, and/or ECM BioFilms Master BatchPellets
2. All documents and correspondence concerning any test or report (including any and all notes and raw data) performed or written for Gary Plastic Packaging Corporation⁴

¹ The term "correspondence" is intended, used, and defined in its broadest sense allowable under the FTC Rules of Practice. Such term includes, but is not limited to embrace emails, documents appended to emails, reports and any other written or electronic document of any kind that is communicated from the subpoena recipient or its agents to any and all other persons and entities.

² The term "concerning" is intended, used, and defined in its broadest sense allowable under the FTC Rules of Practice and should be considered to be synonymous with regarding, relating to, mentioning, discussing, referencing, implicating, explaining, or about the documents subject to any and all individual requests in this subpoena.

³ ECM BioFilms Inc. is an American corporation with its principal place of business at Victoria Place – Suite 225, 100 South Park Place, Painesville, Ohio 44077, United States.

⁴ Gary Plastic Packaging is an American company located at 1340 Viele Avenue, Bronx, NY 10474, United States.

(GPPC) including, but not limited to, "Study GLH-2: Review of Several Documents, Reports and Statements on Biodegradation of ECM MasterBatch Pellets."

3. All correspondence between O.W.S. and any member, employee, representative, or officer of the United States Federal Trade Commission.

4. All correspondence between O.W.S. and any member, employee, and/or representative of the Biodegradable Products Institute ("BPI").

5. All documents concerning any test or report (including any and all notes and raw data) performed or written related to the biodegradability of plastic products under ASTM standards D5511, D5526, and D5338 or equivalent standard.

6. All documents concerning the education, training, experience, and employee evaluations of Mr. Bruno de Wilde.

7. All documents written or authored by Mr. de Wilde concerning plastic products claiming to be biodegradable with the use of an additive product, including, but not limited to ECM's additive (MasterBatch Pellets).

8. All documents concerning the education, training, experience, and employee evaluations of Mr. Richard Tillinger.

9. All documents, including tests and reports, written or authored by Mr. Tillinger concerning plastic products claiming to be biodegradable with the use of an additive product, including, but not limited to ECM's additive (MasterBatch Pellets).

10. All documents and correspondence concerning any amendments, vote(s), and/or "negatives" related to ASTM standards D5511, D5526, and D5338.

INSTRUCTIONS FOR COMPLIANCE BY DELIVERY OF DOCUMENTS

If documents are delivered by hand, overnight delivery service, certified mail, or any other means your response shall be accompanied by an affidavit, executed by you that provides:

The names, addresses, positions, and organizations of all persons whose files were searched and all persons who participated in or supervised the collection of the documents⁵, and a brief description of the nature of the work that each person performed in connection with the collecting the documents.

A statement that the search was complete and that responsive documents are being produced.

A statement as to whether the documents were made at or near the time of the occurrence of the matters set forth in such documents, kept in the course of your regularly conducted business, whether it was your regular practice to make and keep such documents, and the custodian of records and/or other executive(s) and/or employees of O.W.S. who have knowledge of such matters, can authenticate the documents and materials produced, and who can testify to such matters.

A statement as to whether any document called for by the subpoena has been misplaced, lost or destroyed. If any document has been misplaced, lost, or destroyed, identify: type of documents the date (or approximate date) of the documents, subject matter of the documents, all persons to whom it was addressed, circulated, or shown; its date of destruction, or when it was lost or misplaced; the reason it was destroyed, lost or misplaced; and the custodian of the documents on the date of its destruction, loss, or misplacement.

A declaration that states:

I declare (or certify, verify, or state) under penalty of perjury that the forgoing is true and correct.

Executed on [date].

[Signature of party executing the declaration]

Respectfully submitted,

/s/ Jonathan W. Emord

Jonathan W. Emord, Esq.
EMORD & ASSOCIATES, P.C.
11808 Wolf Rune Lane
Clifton, VA 20124

⁵ “Document” and “documents” as used in this Attachment are defined in this subpoena’s “Description of Documents Requested” section.

Ph: 202-466-6937

Fx: 202-466-6938

Em: jemord@emord.com

Counsel to ECM BioFilms, Inc.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of)	
)	
ECM BioFilms, Inc.,)	DOCKET NO. 9358
a corporation, also d/b/a)	
Enviroplastics International,)	
Respondent.)	

PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL

Commission Rule 3.31(d) states: "In order to protect the parties and third parties against improper use and disclosure of confidential information, the Administrative Law Judge shall issue a protective order as set forth in the appendix to this section." 16 C.F.R. § 3.31(d). Pursuant to Commission Rule 3.31(d), the protective order set forth in the appendix to that section is attached verbatim as Attachment A and is hereby issued.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: October 22, 2013

ATTACHMENT A

For the purpose of protecting the interests of the parties and third parties in the above-captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material (“Protective Order”) shall govern the handling of all Discovery Material, as hereafter defined.

1. As used in this Order, “confidential material” shall refer to any document or portion thereof that contains privileged, competitively sensitive information, or sensitive personal information. “Sensitive personal information” shall refer to, but shall not be limited to, an individual’s Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver’s license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual’s medical records. “Document” shall refer to any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the possession of a party or a third party. “Commission” shall refer to the Federal Trade Commission (“FTC”), or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding.
2. Any document or portion thereof submitted by a respondent or a third party during a Federal Trade Commission investigation or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as confidential material for purposes of this Order. The identity of a third party submitting such confidential material shall also be treated as confidential material for the purposes of this Order where the submitter has requested such confidential treatment.
3. The parties and any third parties, in complying with informal discovery requests, disclosure requirements, or discovery demands in this proceeding may designate any responsive document or portion thereof as confidential material, including documents obtained by them from third parties pursuant to discovery or as otherwise obtained.
4. The parties, in conducting discovery from third parties, shall provide to each third party a copy of this Order so as to inform each such third party of his, her, or its rights herein.
5. A designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph 1 of this Order.

6. Material may be designated as confidential by placing on or affixing to the document containing such material (in such manner as will not interfere with the legibility thereof), or if an entire folder or box of documents is confidential by placing or affixing to that folder or box, the designation "CONFIDENTIAL – FTC Docket No. 9358" or any other appropriate notice that identifies this proceeding, together with an indication of the portion or portions of the document considered to be confidential material. Confidential information contained in electronic documents may also be designated as confidential by placing the designation "CONFIDENTIAL – FTC Docket No. 9358" or any other appropriate notice that identifies this proceeding, on the face of the CD or DVD or other medium on which the document is produced. Masked or otherwise redacted copies of documents may be produced where the portions deleted contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been deleted and the reasons therefor.

7. Confidential material shall be disclosed only to: (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including consultants, provided they are not affiliated in any way with a respondent and have signed an agreement to abide by the terms of the protective order; and (e) any witness or deponent who may have authored or received the information in question.

8. Disclosure of confidential material to any person described in Paragraph 7 of this Order shall be only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever, provided, however, that the Commission may, subject to taking appropriate steps to preserve the confidentiality of such material, use or disclose confidential material as provided by its Rules of Practice; sections 6(f) and 21 of the Federal Trade Commission Act; or any other legal obligation imposed upon the Commission.

9. In the event that any confidential material is contained in any pleading, motion, exhibit or other paper filed or to be filed with the Secretary of the Commission, the Secretary shall be so informed by the Party filing such papers, and such papers shall be filed *in camera*. To the extent that such material was originally submitted by a third party, the party including the materials in its papers shall immediately notify the submitter of such inclusion. Confidential material contained in the papers shall continue to have *in camera* treatment until further order of the Administrative Law Judge, provided, however, that such papers may be furnished to persons or entities who may receive confidential material pursuant to Paragraphs 7 or 8. Upon or after filing any paper containing confidential material, the filing party shall file on the public record a duplicate copy of the paper that does not reveal confidential material. Further, if the protection for any such material expires, a party may file on the public record a duplicate copy which also contains the formerly protected material.

10. If counsel plans to introduce into evidence at the hearing any document or transcript containing confidential material produced by another party or by a third party, they shall provide advance notice to the other party or third party for purposes of allowing that party to seek an order that the document or transcript be granted *in camera* treatment. If that party wishes *in camera* treatment for the document or transcript, the party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives such notice. Except where such an order is granted, all documents and transcripts shall be part of the public record. Where *in camera* treatment is granted, a duplicate copy of such document or transcript with the confidential material deleted therefrom may be placed on the public record.

11. If any party receives a discovery request in any investigation or in any other proceeding or matter that may require the disclosure of confidential material submitted by another party or third party, the recipient of the discovery request shall promptly notify the submitter of receipt of such request. Unless a shorter time is mandated by an order of a court, such notification shall be in writing and be received by the submitter at least 10 business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the submitter of its rights hereunder. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Order to challenge or appeal any order requiring production of confidential material, to subject itself to any penalties for non-compliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission. The recipient shall not oppose the submitter's efforts to challenge the disclosure of confidential material. In addition, nothing herein shall limit the applicability of Rule 4.11(e) of the Commission's Rules of Practice, 16 CFR 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

12. At the time that any consultant or other person retained to assist counsel in the preparation of this action concludes participation in the action, such person shall return to counsel all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing confidential information. At the conclusion of this proceeding, including the exhaustion of judicial review, the parties shall return documents obtained in this action to their submitters, provided, however, that the Commission's obligation to return documents shall be governed by the provisions of Rule 4.12 of the Rules of Practice, 16 CFR 4.12.

13. The provisions of this Protective Order, insofar as they restrict the communication and use of confidential discovery material, shall, without written permission of the submitter or further order of the Commission, continue to be binding after the conclusion of this proceeding.

RESPONDENT
EXHIBIT
RX-A-3

From: Lou Caputo
To: "Christine.Haaker@thompsonhine.com"
Cc: [Peter Arhangelsky](#)
Subject: O.W.S. Subpoena Duces Tecum
Date: Friday, February 28, 2014 5:15:00 PM
Attachments: [Subpoena \(O.W.S.\) \(amended\).pdf](#)

Hi Christine,

As we discussed, please find attached our amended subpoena to O.W.S., Inc. I will be out of the office all of next week, however, I will be periodically checking my email. Please let me know of any questions concerning the subpoena and I will be happy to discuss.

Thank you very much,

Lou

Lou Caputo | EMORD & ASSOCIATES, P.C. | 3210 S. Gilbert Rd., Ste 4 | Chandler, AZ 85286 Firm: (602) 388-8901 | Facsimile: (602) 393-4361 | www.emord.com

NOTICE: This is a confidential communication intended for the recipient listed above. The content of this communication is protected from disclosure by the attorney-client privilege and the work product doctrine. If you are not the intended recipient, you should treat this communication as strictly confidential and provide it to the person intended. Duplication or distribution of this communication is prohibited by the sender. If this communication has been sent to you in error, please notify the sender and then immediately destroy the document.

RESPONDENT
EXHIBIT
RX-B



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Fax: +32 (0)9 233 28 25
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mail@ows.be

Opening hours:
Mo-fr: 08h30-12h30 & 13h15-17h30
(GMT+1 / GMT+2 in summer)



Contact us

O.W.S. Inc.

Ms. Norma McDonald
North America Sales Manager
7155 Five Mile Road
Cincinnati, OH 45230
USA
Tel: +1 513 535 6760
Fax: +1 513 233 3395
norma.mcdonald@ows.be

Parking & directions

O.W.S. is easily accessible by public transport. We are located at about 1.3 kilometers from the 'Dampoort' train station in Gent.

More detailed directions can be found below.

- ➔ [Parking & entrance](#)
- ➔ [Directions](#)

Last name *

Firstname *

Email *

Company *

Country *

Subject *

Message *

Fields with * are required

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- *Auditing, Controlling & Sorting (ACS)*
- *Sustainability Assessment & Compensation Services (SACS)*

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RESPONDENT
EXHIBIT
RX-C

February 27, 2014

Via Electronic Mail

Jonathan W. Emord
Peter A. Arhangelski
Lou F. Caputo
3210 S. Silbert Rd., Suite 4
Chandler, AZ 85286

RE: *In the Matter of ECM BioFilms, Inc.*, Federal Trade Commission Docket No. 9358

Mr. Emord:

Please be advised that our firm represents O.W.S. Inc. ("O.W.S."). A subpoena addressed to Organic Waste Systems, Inc. was delivered to 7155 Five Mile Rd., Cincinnati, OH 45230 (the "Subpoena") in regard to the above-captioned case. A copy of that Subpoena is attached for your reference.

Service of the Subpoena is ineffective. No entity named Organic Waste Systems, Inc. exists at the address to which the Subpoena was delivered. Organic Waste Systems, Inc., is a recently formed (October 31, 2013) corporation that exists under the laws of California.

In the event that you intended to serve the Subpoena to O.W.S., and ultimately decide to serve a subpoena on O.W.S, our firm will accept service on behalf of O.W.S. and work with you in regard to any necessary production. However, if you intend to serve a subpoena on O.W.S. similar to the Subpoena, to streamline the process and avoid potential issues in advance, we ask that you reconsider the breadth of the requests. As written, the Subpoena requests in several instances information that is completely unrelated to ECM BioFilms, Inc., as well as information that in all likelihood is confidential and proprietary to the recipient as well as the recipient's customers, which may be subject to confidentiality and non-disclosure agreements.

Please feel free to contact me if you have any questions or if you would like to discuss this matter.

Sincerely,



Christine Haaker

Christine.Haaker@ThompsonHine.com 937.443.6635 (facsimile) 937.443.6822 (telephone)

770500.2

THOMPSON HINE LLP
ATTORNEYS AT LAW

Austin Landing I
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Dayton, Ohio 45342-4934

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Fax: 937.443.6635

Resp. Opp. to O.W.S. Mot. to Quash
Exh. RX-C

THOMPSON
HINE

Enclosures

RESPONDENT
EXHIBIT
RX-D

From: [Haaker, Christine](#)
To: [Lou Caputo](#)
Cc: [Peter Arhangelsky](#)
Subject: RE: O.W.S. Subpoena Duces Tecum
Date: Thursday, March 06, 2014 9:49:59 AM
Importance: High

Lou,

We have major issues with the Subpoena. In many ways, I am hoping inadvertently, you have drastically gone well beyond even the scope of the prior subpoena. For example, No. 5 would involve hundreds of customers and thousands of unrelated products, subject to confidentiality agreements. I have to tell you, this Subpoena seems to telegraph a clear intent to harass and tortiously interfere with the business of my client. I understand you are out of the office, but we need to discuss. When would be a good time?

Best,

Christine

From: Lou Caputo [mailto:LCaputo@emord.com]
Sent: Friday, February 28, 2014 7:15 PM
To: Haaker, Christine
Cc: Peter Arhangelsky
Subject: O.W.S. Subpoena Duces Tecum

Hi Christine,

As we discussed, please find attached our amended subpoena to O.W.S., Inc. I will be out of the office all of next week, however, I will be periodically checking my email. Please let me know of any questions concerning the subpoena and I will be happy to discuss.

Thank you very much,

Lou

Lou Caputo | EMORD & ASSOCIATES, P.C. | 3210 S. Gilbert Rd., Ste 4 | Chandler, AZ 85286 Firm: (602) 388-8901 | Facsimile: (602) 393-4361 | www.emord.com

NOTICE: This is a confidential communication intended for the recipient listed above. The content of this communication is protected from disclosure by the attorney-client privilege and the work product doctrine. If you are not the intended recipient, you should treat this communication as strictly confidential and provide it to the person intended. Duplication or distribution of this communication is prohibited by the sender. If this communication has been sent to you in error, please notify the sender and then immediately destroy the document.

Resp. Opp. to O.W.S. Mot. to Quash
Exh. RX-D

RESPONDENT
EXHIBIT
RX-E

March 7, 2014

Via Electronic Mail

Lou F. Caputo
3210 S. Silbert Rd., Suite 4
Chandler, AZ 85286

RE: *In the Matter of ECM BioFilms, Inc.*, Federal Trade Commission Docket No. 9358
(the "Proceeding")

Dear Lou:

As you know, I contacted you on February 27, 2014 in regard to a subpoena purportedly served on "Organic Waste Systems, Inc." and that was improperly delivered to 7155 Five Mile Rd., Cincinnati, OH 45230. I offered that if you intended to serve a subpoena on my client, O.W.S. Inc. ("O.W.S."), I would accept service. I asked that if you did intend to serve a similar subpoena on O.W.S. that you consider narrowing the Requests. Following your receipt of the email, you telephoned me and we discussed why several of the subpoena Requests were objectionable. As indicated, my client has no interest in the Proceeding and in all ways intends to be cooperative to the extent Requests are reasonable.

Last Friday evening, February 28, 2014, you sent a revised subpoena to me for O.W.S. via electronic mail (the "Subpoena"). While I appreciate your cooperation and willingness to discuss the Requests, and that you did make some revisions, you have also expanded the Subpoena's scope, making it more broad in many respects. I hope that we can cooperatively work to narrow the Subpoena Requests and will do my best to elaborate reasons therefore herein in the hope that we can avoid motion practice.

General Information

O.W.S. is an independent testing company that serves hundreds of clients and processes thousands of tests of materials and products. The vast majority of O.W.S.'s clients require strict confidentiality. O.W.S. does not own the testing information, it is the information of the customers. Many of these customers are competitors of your client.

The market for testing the biodegradation of plastic materials and products is very small. O.W.S. has a strong reputation in this market and is trusted by its customers. This strong reputation and

Christine.Haaker@ThompsonHine.com 937.443.6635 (facsimile) 937.443.6822 (telephone)

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Resp. Opp. to O.W.S. Mot. to Quash
Exh. RX-E

March 7, 2014

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the trust placed in O.W.S. by its customers are based on and exist, in large part, because of O.W.S.'s strict adherence to the protection of its customers' confidential and proprietary business information and data. O.W.S. actively markets its services to customers and potential customers by assuring them that the customer owns the data and that their data is protected. In fact, O.W.S. has exercised this policy on multiple occasions to protect *your client's* own data. If O.W.S. were compelled to reveal customer information against the customer's will, *even under the protective order*, that disclosure of customers' proprietary and confidential information would significantly damage the reputation of O.W.S. in the marketplace, and would cause irreparable harm to and possibly destroy its business with North American customers. This cannot be emphasized strongly enough. O.W.S.'s business critically depends on the trust its customers place in O.W.S., and that trust will be broken by revealing their information. We ask that you consider this information as you review the objections and concerns set forth below.

Instructions

We have the following concerns with your "Instructions":

- **C:** This Instruction requires that if a document contains a portion that is responsive and a portion that is not, the entire document should nonetheless be wholly produced without redaction. We could not agree to this. For example, if an email discussed ECM BioFilms, Inc. ("ECM") in one paragraph but contained five other paragraphs that had absolutely nothing to do with ECM, we would redact the other non-responsive paragraphs, indicating to you such redactions. Will you agree to this procedure?
- **D and F:** These Instructions require the correlation of documents to each Request. We will attempt to comply, however, to the extent documents correlate to repeated Requests, we believe that this Instruction would be overly burdensome to a third party. Will you agree with our approach?
- **E:** This Instruction expressly seeks production of documents to and from attorneys. A Request specifically directed to seeking attorney-client privileged documents is in and of itself objectionable at the outset and seems directed to invading privilege. Unless a document is directly responsive to a Request, is not otherwise objectionable and is being withheld solely for privilege, we will not log it on a privilege log. Pursuant to 16 CFR 3.31(c)(2), we will not review nor log any documents generated in the process of the prior subpoena or this Subpoena. Will you agree with our approach?
- **H:** This Instruction seeks to deem any objection not raised in O.W.S.'s initial response—this letter, for example—waived. O.W.S. hereby expressly reserves the right to make any and all timely objections in compliance with the Commission's Rules.

March 7, 2014

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- **L:** This Instruction seeks to require what are essentially answers to interrogatories in regard to documents withheld for privilege. O.W.S. will comply with the requirements of the Commission's Rules, no more.

The Requests**1. All documents and correspondence concerning ECM BioFilms, Inc., Robert Sinclair, and/or ECM BioFilms Master Batch Pellets.**

This Request is very broad and unduly burdensome to even search for. Further, the Request does not appear to be limited to the subject matter of the Proceeding, which I understand to relate to the question of whether ECM additives and ECM plastics advertised as biodegradable are in fact biodegradable. To this end, you should know that O.W.S. has not performed tests for ECM since approximately 2000. While a product submitted by an O.W.S. customer for testing could contain an ECM additive, O.W.S. may or may not be told this by the customer. O.W.S. conducts thousands of tests for hundreds of customers and has no way to reasonably search customer records to pull out information regarding whether a customer's product being tested contained an ECM additive or related in some way to ECM.

This Request may also involve confidential and proprietary information of O.W.S. and of O.W.S. customers, many of which are competitors of your client, which would have no bearing on the Proceeding. O.W.S. would also, in all likelihood, owe strict contractual duties of non-disclosure and confidentiality to such customers, placing O.W.S. in an untenable position of being in breach of contract and violating the trust and confidence of its clients. Further, the testing information is the customers' property, not O.W.S.'s to disclose. Disclosure could only serve to harm O.W.S. and not serve to support any claim or defense in the Proceeding. Moreover, some of our customers are attorneys who hire O.W.S. for privileged and confidential testing, subject to the work product doctrine. O.W.S. has no right or ability to violate its agreement with such customers, whose testing may relate to competitors of your client. Even the disclosure of a mention of ECM by such customers would violate the competitive rights of those customers.

O.W.S. has no problem producing documents in which ECM, Robert Sinclair, and/or ECM BioFilms Master Batch Pellets are discussed in non-confidential/protected communications that are not customer specific, to the extent they can be readily located. O.W.S. cannot produce documents in breach of customer contracts and confidences, or in violation of privileges not held by O.W.S., but by the customers. Nor can O.W.S. feasibly contact every such customer to either obtain permission to produce under the Protective Order or to allow such customers to intervene.

March 7, 2014

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To try to even go through all customer documents to determine whether they could be responsive at the outset is an insurmountable task.

You should know that O.W.S. has received documents that suggest that ECM or someone advocating for ECM appears to have taken old O.W.S. test reports for ECM and altered them to change the conclusions. We will produce these documents assuming this Request is not otherwise limited or deleted.

Will you agree to limit this Request to exclude documents concerning O.W.S. customers other than ECM and to limit this Request to documents concerning ECM, Mr. Sinclair and or the Master Batch Pellets that are non-customer specific (not confidential) to the extent readily located?

2. **All documents and correspondence concerning any test or report (including any and all notes and raw data) performed or written for Gary Plastic Packaging Corporation (GPPC) including, but not limited to, "Study GLH-2: Review of Several Documents, Reports and Statements on Biodegradation of ECM MasterBatch Pellets."**

This Request also does not appear to be limited to the subject matter of the Proceeding. Because this Request may also involve confidential and proprietary information of GPPC, we have contacted GPPC and understand that GPPC has already produced this information to you in this Proceeding. Therefore, this Request appears to also be repetitive of information you have already directly obtained. O.W.S. would not have anything more than GPPC on this issue.

Will you agree to withdraw this Request?

3. **All correspondence between O.W.S. and any member, employee, representative, or officer of the United States Federal Trade Commission.**

This Request also does not appear to be limited to the subject matter of the Proceeding. Because this Request may also involve confidential and proprietary information of GPPC, we have contacted GPPC and understand that GPPC has already produced this information to you in this Proceeding. Therefore, this Request appears to also be repetitive of information you have already directly obtained. O.W.S. would not have anything more than GPPC on this issue.

March 7, 2014
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Will you agree to withdraw this Request?

4. All correspondence between O.W.S. and any member, employee, and/or representative of the Biodegradable Products Institute (“BPI”).

This is a new Request that was not even alluded to in the prior subpoena.

This Request is very broad and unduly burdensome to even search for. Further, the Request does not appear to be limited to the subject matter of the Proceeding. This Request may also involve confidential and proprietary information of O.W.S. and of customers, many of which are competitors of your client, which would have no bearing on the Proceeding. Further, the testing information is the customers’ property, not O.W.S.’s to disclose. O.W.S. would also, in all likelihood, owe strict contractual duties of non-disclosure and confidentiality to such customers, placing O.W.S. in an untenable position of being in breach of contract and violating the trust and confidence of its clients. This could only serve to harm O.W.S. and not serve to support any claim or defense in the Proceeding. Moreover, some O.W.S. customers are attorneys who hire O.W.S. for privileged and confidential testing, subject to the work product doctrine. O.W.S. has no right or ability to violate its agreement with such customers, whose testing may relate to competitors of your client.

Some background is in order. O.W.S. deals with the BPI on three separate levels. On one level, O.W.S. deals with the BPI *on behalf of O.W.S. customers* in regard to such customers’ Request for certification of their own products. The BPI administers a certification mark (logo) for compostable products. Many O.W.S. customers seek this certification. Often, all or part of the testing the customer submits for certification has been performed by O.W.S. Communications with the BPI on behalf of O.W.S. customers involve confidential and proprietary information belonging to the customers, many of whom are direct competitors of your client. This confidential and proprietary information can include, but is not limited to, material or product formulations, product construction, manufacturing techniques, testing results, and marketing plans. These discussions relate to the customers’ own products and are unrelated to ECM and unrelated to the Proceeding in any way.

On a second level, O.W.S. participates, along with one representative of the BPI, on subcommittee D20.96 of the American Society for Testing and Materials (“ASTM”). Mr. Sinclair also participates on this subcommittee and is fully aware of these activities and the business of the subcommittee, and has full access to communications related thereto.

March 7, 2014

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Finally, on a third level, some O.W.S. customers are members of the BPI. The BPI is, according to their website (www.bpiworld.org), a not-for-profit association of individuals and groups from government, industry and academia. Their stated purpose is to “educate manufacturers, legislators and consumers about the importance of scientifically based standards for compostable materials which biodegrade in large composting facilities.” The BPI’s website currently lists 147 members. O.W.S. is not a member of the BPI, but, as stated, some of O.W.S.’s customers are members. Thousands of correspondence documents exist between O.W.S. and these customers in the normal course of O.W.S.’s business with such customers in their own commercial capacities, not in their capacity as members of BPI. This correspondence has nothing whatsoever to do with your client or the Proceeding. The membership of those customers in the BPI is merely coincidental to the existence of the documents. These customers are competitors of ECM and the documents contain confidential or proprietary information including, but not be limited to, material or products formulations, product construction, manufacturing techniques, testing results, and marketing plans.

O.W.S. will not search for or produce documents merely because the source or recipient of the document may be a member of the BPI. O.W.S., however, will search for and produce responsive correspondence with employees of BPI to the extent the documents pertain to ECM.

Will you agree to this limitation?

5. All documents concerning any test or report (including any and all notes and raw data) performed or written related to the biodegradability of plastic products under ASTM standards D5511, D5526, and D5338 or equivalent standard.

This Request is very broad and unduly burdensome to even search for, literally encompassing approximately 98% of O.W.S.’s business. Further, the Request does not appear to be limited to the subject matter of the Proceeding. This Request involves confidential and proprietary communications with customers, many of whom are competitors of your client, which would have no bearing on the Proceeding. O.W.S. also owes, in most cases, strict contractual duties of non-disclosure and confidentiality to such customers, placing O.W.S. in an untenable position of being in breach of contract and violating the trust and confidence of its clients. Further, the testing information is the customers’ property, not O.W.S.’s to disclose. Disclosure could only serve to harm O.W.S. and not serve to support any claim or defense in the Proceeding. Moreover, some O.W.S. customers are attorneys who hire O.W.S. for privileged and confidential testing, subject to the work product doctrine. O.W.S. has no right or ability to violate its agreement with such customers, whose testing may relate to competitors of your client.

March 7, 2014

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Production of documents in response to this Request would cause irreparable harm to the reputation of O.W.S. and tortiously interfere with the relationship between O.W.S. and its customers.

Again, some background information is in order. This Request literally seeks information related to hundreds of customers and thousands of tests on products wholly unrelated in any way to your client. As you know, 16 CFR 3.31(c)(1) allows discovery only when it is “reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.” The Proceeding relates only to ECM’s products and ECM’s marketing of those products. The Proceeding does not deal with any other company’s product. Furthermore, nowhere in *Answer and Affirmative Defenses of Respondent EEM Biofilms, Inc.*; *Respondent's Answers to Complaint Counsel's First Request for Admissions*; or *Respondent's Supplemental Answers to Complaint Counsel's First Request for Admissions ECM Biofilms, Inc.*; did ECM raise any issue regarding other companies’ products.

Producing documents in response to this Request would cause O.W.S. to violate customer confidentiality, proprietary, and non-disclosure agreements. Given that in most cases, these O.W.S. customers are direct competitors of ECM, this Request appears to be directed at obtaining a competitive advantage for ECM, causing harm to O.W.S. customers and, therefore, harm to the relationships between O.W.S. and its customers.

O.W.S. will provide any responsive tests for ECM. Otherwise, ECM must narrow this Request and identify what it is actually looking for. If there is testing for a particular product/customer, ECM should go directly to that customer for such information. Will you agree to eliminate or rephrase this Request?

6. All documents concerning the education, training, experience, and employee evaluations of Mr. Bruno de Wilde [sic].

Neither Mr. Bruno De Wilde nor O.W.S. is a party to the Proceeding. Neither are on trial. This Request for information regarding his education, training, experience and employee evaluations is not in any way related to the scope of the Proceeding and will not lead to any information relevant to any claim or defense in the Proceeding. Moreover, this Request clearly seeks information, at least in part, that would be confidential to Mr. De Wilde. We cannot determine any valid basis for the information Requested.

March 7, 2014

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However, to the extent O.W.S. has a biography or a CV for Mr. De Wilde, O.W.S. will produce it. Will you agree to so limit the Request?

7. All documents written or authored by Mr. de Wilde [sic] concerning plastic products claiming to be biodegradable with the use of an additive product, including, but not limited to ECM's additive (MasterBatch Pellets).

This Request is very broad and unduly burdensome to even search for. The words "written or authored by" are incredibly broad and could include every email, every test, and every comment Mr. De Wilde ever made in the context of O.W.S. Further, the Request is not limited to the subject matter of the Proceeding. This Request may also involve confidential and proprietary communications with customers, some of which are competitors of your client, which would have no bearing on the Proceeding. O.W.S. would also, in all likelihood, owe strict contractual duties of non-disclosure and confidentiality to such customers, placing O.W.S. in an untenable position of being in breach of contract and violating the trust and confidence of its clients. This could only serve to harm O.W.S. and not serve to support any claim or defense in the Proceeding. Moreover, some of our customers are attorneys who hire O.W.S. for privileged and confidential testing, subject to the work product doctrine. O.W.S. has no right or ability to violate its agreement with such customers, whose testing may relate to competitors of your client. Production of documents in response to this Request would cause irreparable harm to the reputation of O.W.S. and tortiously interfere with the relationship between O.W.S. and its customers.

As you are aware, 16 CFR 3.31(c)(1) allows discovery only when it is "reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." The Proceeding relates only to ECM's products and ECM's marketing of those products. The Proceeding does not deal with any other company's product. Furthermore, nowhere in *Answer and Affirmative Defenses of Respondent EEM Biofilms, Inc.*; *Respondent's Answers to Complaint Counsel's First Request for Admissions*; or *Respondent's Supplemental Answers to Complaint Counsel's First Request for Admissions ECM Biofilms, Inc.*; did ECM raise any issue regarding other companies' products.

Producing documents in response to this Request would cause O.W.S. to violate customer confidentiality, proprietary, and non-disclosure agreements. Given that in most cases, these O.W.S. customers are direct competitors of ECM, this Request appears to be directed at obtaining a competitive advantage for ECM, causing harm to O.W.S. customers and, therefore, harm to the relationships between O.W.S. its customers.

March 7, 2014

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If you are seeking presentations or published materials of Mr. De Wilde, to the extent they relate to ECM, O.W.S. will produce them. Otherwise, ECM must narrow this Request and identify what it is actually looking for. Will you agree to eliminate or rephrase this Request?

8. All documents concerning the education, training, experience, and employee evaluations of Mr. Richard Tillinger.

Neither Mr. Tillinger nor O.W.S. is a party to the Proceeding. Neither are on trial. This Request for information regarding his education, training, experience and employee evaluations is not in any way related to the scope of the Proceeding and will not lead to any information relevant to any claim or defense in the Proceeding. Moreover, this Request clearly seeks information, at least in part, that would be confidential to Mr. Tillinger. We cannot determine any valid basis for the information Requested.

However, to the extent O.W.S. has a biography or a CV for Mr. Tillinger, O.W.S. will produce it. Will you agree to so limit the Request?

9. All documents, including tests and reports, written or authored by Mr. Tillinger concerning plastic products claiming to be biodegradable with the use of an additive product, including, but not limited to ECM's additive (MasterBatch Pellets).

This Request is very broad and unduly burdensome to even search for. The words "written or authored by" are incredibly broad and could include every email, every test, and every comment Mr. Tillinger ever made in the context of O.W.S. Further, the Request is not limited to the subject matter of the Proceeding. This Request may also involve confidential and proprietary communications with customers, some of which are competitors of your client, which would have no bearing on the Proceeding. O.W.S. would also, in all likelihood, owe strict contractual duties of non-disclosure and confidentiality to such customers, placing O.W.S. in an untenable position of being in breach of contract and violating the trust and confidence of its clients. This could only serve to harm O.W.S. and not serve to support any claim or defense in the Proceeding. Moreover, some of our customers are attorneys who hire O.W.S. for privileged and confidential testing, subject to the work product doctrine. O.W.S. has no right or ability to violate its agreement with such customers, whose testing may relate to competitors of your client. Production of documents in response to this Request would cause irreparable harm to the reputation of O.W.S. and tortiously interfere with the relationship between O.W.S. and its customers.

March 7, 2014

Page -10-

Producing documents in response to this Request would cause O.W.S. to violate customer confidentiality, proprietary, and non-disclosure agreements. Given that in most cases, these O.W.S. customers are direct competitors of ECM, this Request appears to be directed at obtaining a competitive advantage for ECM, causing harm to O.W.S. customers and, therefore, harm to the relationships between O.W.S. its customers.

If you are seeking presentations or published materials of Mr. Tillinger, to the extent they relate to ECM, O.W.S. will produce them. Otherwise, ECM must narrow this Request and identify what it is actually looking for. Will you agree to eliminate or rephrase this Request?

10. All documents and correspondence concerning any amendments, vote(s), and/or “negatives” related to ASTM standards D5511, D5526, and D5338.

This Request is very broad and unduly burdensome. Further, the Request is not limited to the subject matter of the Proceeding. Mr. Sinclair himself is involved in these amendments, votes and/or “negatives.” There is no reason that O.W.S. should be burdened with providing information to ECM well within its reach, particularly given that Mr. Sinclair is on the ASTM subcommittee and would have received similar information.

Will you agree to eliminate this Request?

Protective Order

Because a number of our issues with the Requests relate to the confidential and proprietary information of O.W.S. and/or its customers, we would like to address the inadequacy of the Protective Order attached to the Subpoena. As explained, many of the documents Requested by the Subpoena contain sensitive and confidential information of O.W.S. customers, many of whom are direct competitors of ECM, such as material or products formulations, product construction, manufacturing techniques, testing results, and marketing plans. O.W.S. customers and O.W.S. would be harmed by the release of this information. The Protective Order does not consider the specific nature of O.W.S.’s business, the crucial relationships between O.W.S. and its customers and the trust on which those relationships are built, or how those relationships would be harmed by releasing customer information, *even under the standard Protective Order*. In any event, the Protective Order would not serve to excuse the complete lack of relevance of the Requested documents to the Proceeding.

March 7, 2014

Page -11-

Expenses

Even if the scope of the Subpoena Requests are narrowed considerably, O.W.S. will still incur significant costs in complying with the Subpoena. In addition to the labor involved in searching, compiling, and marking documents, O.W.S. has already and will continue to incur significant legal costs as a direct result of the Subpoena.

While a subpoenaed party may be expected to absorb some reasonable costs, unreasonable costs, particularly in relation to the size of the company, are to be borne by the party and the party's counsel issuing the subpoena according to the Commission. O.W.S. is a relatively small company, and the effort to comply will pull people away from the conduct of business for its customers. This will delay the performance of testing and perhaps cause customers to go elsewhere for their testing, thereby significantly harming revenues from that testing. Furthermore, legal fees alone to respond to this Subpoena will amount to a significant percentage of total annual revenues for O.W.S. In addition, there will be the cost of the manpower required to search company records for documents relevant to the Subpoena. These costs of legal fees, time and expense of personnel, and potential lost business might possibly reduce the company to losing money in 2014. O.W.S., if forced to respond to any overly burdensome Requests, will seek payment of expenses to do so.

Conclusion

O.W.S. does not sell products in ECM's industry. O.W.S. has no interest in the Proceeding and will not be affected by the outcome of the Proceeding, regardless of that outcome. To the extent that ECM seeks information regarding ECM's customers' products that utilize ECM additives and testing thereof, ECM should obtain that information directly from ECM's customers. Moreover, O.W.S. cannot be made into some involuntary form of expert for ECM. From the scope of the Subpoena Requests, the only conclusions we can come to, as I said in my email yesterday, are that ECM's intent is to harass, burden and harm O.W.S. for some reason in this process and/or achieve competitive information and thereby competitive advantage. For the reasons set forth herein, we ask that you agree to withdraw and/or modify the Requests as stated.

I sent an email to you yesterday asking to discuss these issues and have not heard back from you. Given that the deadline for filing a Motion is fast approaching, can you please contact me as soon as possible? If you can discuss this weekend, please send me an email and we can arrange a time.

THOMPSON
HINE

March 7, 2014
Page -12-

Sincerely,



Christine Haaker

cc: Jonathan W. Emord (via Electronic Mail)
Peter A. Arhangelski (via Electronic Mail)

RESPONDENT
EXHIBIT
RX-F

From: [Haaker, Christine](#)
To: [Lou Caputo](#)
Cc: [Jonathan Emord](#); [Peter Arhangelsky](#); [Smith, Jeremy](#)
Subject: RE: In the Matter of ECM BioFilms, Inc.
Date: Monday, March 10, 2014 2:22:00 PM
Attachments: [image004.jpg](#)
[image001.jpg](#)
Importance: High

Counsel,

Can you please respond to my email and letter from Friday?

Thank you.

Christine

Christine M. Haaker | Partner | **Thompson Hine LLP**
10050 Innovation Drive, Suite 400 | Dayton, Ohio 45342
Office: 937.443.6822 | **Mobile:** 937.609.8418
Fax: 937.443.6635 | **Email:** Christine.Haaker@ThompsonHine.com
Web: <http://www.ThompsonHine.com>

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Atlanta | Cincinnati | Cleveland | Columbus | Dayton | New York | Washington, D.C.



From: McPherson, Mari
Sent: Friday, March 07, 2014 5:23 PM
To: lcaputo@emord.com
Cc: jemord@emord.com; parhangelsky@emord.com; Haaker, Christine
Subject: In the Matter of ECM BioFilms, Inc.

Please see the attached from Christine Haaker.

Mari McPherson, Secretary | **Thompson Hine LLP**
Austin Landing I
Suite 400
10050 Innovation Drive
Dayton, Ohio 45342-4934
Office: 937.331.6099 | **Fax:** 937.443.6910

Visit our new website at www.ThompsonHine.com.

RESPONDENT
EXHIBIT
RX-G

From: Lou Caputo
To: Christine.Haaker@thompsonhine.com
Cc: Peter.Arhangelsky
Subject: Docket No. 9358, Third-Party Subpoena To O.W.S.
Date: Monday, March 10, 2014 3:39:00 PM
Attachments: [102213 Protective Order.pdf](#)

Hi Christine,

Thank you for your letter. We appreciate your comments concerning the OWS subpoena. We respond as follows.

The FTC has challenged whether certain ASTM standards, particularly D5511 or D5526, are viable methods for demonstrating real-world biodegradability in plastics. The FTC's Complaint alone has engendered an exceptionally broad scope of what may be considered relevant topics and information. The FTC has used OWS documents (commissioned by third parties) against ECM in this proceeding. OWS has apparently prepared (or assisted in the preparation of) promotional materials designed to discredit or challenge ECM's marketing claims. The information sought in ECM's subpoena of OWS is calculated to lead to the adduction of relevant evidence in this case and, as such, ECM has a right to that information.

You make several general points in your letter. You state that searching for information will be overly burdensome to O.W.S. You explain that certain responsive materials are confidential. You reference documents that may be altered and seemingly ascribe malicious and fraudulent intent onto ECM and/or any representative or advocate without specificity or examples of proof. We are very concerned with those allegations that lack any foundation or explanation, and ECM disputes to the fullest extent each such statement or suggestion. You further allege that ECM seeks a competitive advantage through its subpoena schedule. We find this allegation highly dubious considering that it presupposes that ECM somehow wanted, invited, and/or planned for the federal government to launch an unparalleled attack on ECM. ECM is the respondent in this action, not a civil plaintiff. The information it requests in the subpoena is relevant to its defense against FTC allegations. ECM therefore has a right to that information under 16 C.F.R. 3.31(c) and 3.34, and will promptly seek an order compelling your response and, if necessary, for sanctions unless the information we seek is supplied in accordance with the subpoena.

In light of your concerns about scope and burden, we propose the following changes to provide relief without compromising the provision of information needed in ECM's defense:

Instructions:

C: This instruction stands.

D: To expedite disclosure, O.W.S. need not list which documents are responsive to a certain request.

E: We do not seek documents protected by the attorney-client privilege.

Request No. 1: This request stands.

Request No. 2: This request is eliminated.

Request No. 3: This request stands.

Request No. 4: This request stands, however, the temporal limitation is reduced to documents that were created on or after January 1, 2010. FTC agents have spoken directly with BPI members about material issues present in this case. Among other reasons, this request is relevant to investigating the relationship and association between O.W.S. and the BPI as well as investigating bias.

Request No. 5: This Request is rephrased as follows:

“Since January 1, 2010, all documents concerning any test or report (including any notes and raw data) performed or written to the biodegradability of plastic products under ASTM standards D5511 and D5526 for ECM and/or a plastic product containing the ECM additive.”

Request No. 6: This request stands.

Request No. 7: This request is eliminated.

Request No. 8: This request stands.

Request No. 9: This request is eliminated.

Request No. 10: This request is rephrased as follows:

“Since January 1, 2010, all documents and correspondence concerning any amendments, vote(s); and/or ‘negatives’ related to ASTM standard D5511 and D5526.”

We understand that O.W.S. has concerns about confidentiality. The FTC’s Rules contemplate disclosure by third-parties of information that is considered confidential, and the Rules and the ALJ’s Protective Order also provides mechanisms for protecting sensitive material if material disclosed is confidential. We have sent you a copy of the protective order; and I include another copy with this email for convenience. Please follow all requirements and directions of the ALJ in his Protective Order, which ECM will abide by to the fullest extent.

I welcome discussing this matter further but full production must be received on or before March 24, 2014. Please let me know of a convenient time for us to speak by phone.

Sincerely,

Lou

PUBLIC DOCUMENT

Lou Caputo | EMORD & ASSOCIATES, P.C. | 3210 S. Gilbert Rd., Ste 4 | Chandler, AZ 85286 Firm: (602) 388-8901 | Facsimile: (602) 393-4361 | www.emord.com

NOTICE: This is a confidential communication intended for the recipient listed above. The content of this communication is protected from disclosure by the attorney-client privilege and the work product doctrine. If you are not the intended recipient, you should treat this communication as strictly confidential and provide it to the person intended. Duplication or distribution of this communication is prohibited by the sender. If this communication has been sent to you in error, please notify the sender and then immediately destroy the document.

RESPONDENT

EXHIBIT

RX-H

From: [Haaker, Christine](#)
To: [Lou Caputo](#)
Cc: [Peter Arhangelsky](#); [Smith, Jeremy](#)
Subject: RE: Docket No. 9358, Third-Party Subponea To O.W.S.
Date: Monday, March 10, 2014 3:47:19 PM

Lou,

Thank you for your response. I have not reviewed it in full yet but will. I would like to speak on this in the morning if you are available? Please give me a time. I thought we had a productive call the last time we spoke and perhaps we will be able to work out our issues. The most important issue for my client is that its business cannot be harmed in this process. Divulging its customers' testing information will result in loss of business. O.W.S. is firmly convinced of this, therefore production of its customers' information is out of the question. If there are specific customers that I can get to quickly with requests that they consent to disclosure, that may change things. The timing here is an issue with our Motion having to be filed by Wednesday. Also, you mention 3/24 below. Are you expecting production 3/24 or 3/14?

I look forward to speaking with you in the morning.

Best,

Christine

From: Lou Caputo [mailto:LCaputo@emord.com]
Sent: Monday, March 10, 2014 6:39 PM
To: Haaker, Christine
Cc: Peter Arhangelsky
Subject: Docket No. 9358, Third-Party Subponea To O.W.S.

Hi Christine,

Thank you for your letter. We appreciate your comments concerning the OWS subpoena. We respond as follows.

The FTC has challenged whether certain ASTM standards, particularly D5511 or D5526, are viable methods for demonstrating real-world biodegradability in plastics. The FTC's Complaint alone has engendered an exceptionally broad scope of what may be considered relevant topics and information. The FTC has used OWS documents (commissioned by third parties) against ECM in this proceeding. OWS has apparently prepared (or assisted in the preparation of) promotional materials designed to discredit or challenge ECM's marketing claims. The information sought in ECM's subpoena of OWS is calculated to lead to the adduction of relevant evidence in this case and, as such, ECM has a right to that information.

You make several general points in your letter. You state that searching for information will be overly burdensome to O.W.S. You explain that certain responsive materials are confidential. You reference documents that may be altered and seemingly ascribe malicious and fraudulent intent onto ECM and/or any representative or advocate without specificity or examples of proof. We are very concerned with those allegations that lack any foundation or explanation, and ECM disputes to the fullest extent each such statement or suggestion. You further allege that ECM seeks a competitive advantage through its subpoena schedule. We find this allegation highly dubious

considering that it presupposes that ECM somehow wanted, invited, and/or planned for the federal government to launch an unparalleled attack on ECM. ECM is the respondent in this action, not a civil plaintiff. The information it requests in the subpoena is relevant to its defense against FTC allegations. ECM therefore has a right to that information under 16 C.F.R. 3.31(c) and 3.34, and will promptly seek an order compelling your response and, if necessary, for sanctions unless the information we seek is supplied in accordance with the subpoena.

In light of your concerns about scope and burden, we propose the following changes to provide relief without compromising the provision of information needed in ECM's defense:

Instructions:

C: This instruction stands.

D: To expedite disclosure, O.W.S. need not list which documents are responsive to a certain request.

E: We do not seek documents protected by the attorney-client privilege.

Request No. 1: This request stands.

Request No. 2: This request is eliminated.

Request No. 3: This request stands.

Request No. 4: This request stands, however, the temporal limitation is reduced to documents that were created on or after January 1, 2010. FTC agents have spoken directly with BPI members about material issues present in this case. Among other reasons, this request is relevant to investigating the relationship and association between O.W.S. and the BPI as well as investigating bias.

Request No. 5: This Request is rephrased as follows:

"Since January 1, 2010, all documents concerning any test or report (including any notes and raw data) performed or written to the biodegradability of plastic products under ASTM standards D5511 and D5526 for ECM and/or a plastic product containing the ECM additive."

Request No. 6: This request stands.

Request No. 7: This request is eliminated.

Request No. 8: This request stands.

Request No. 9: This request is eliminated.

Request No. 10: This request is rephrased as follows:

“Since January 1, 2010, all documents and correspondence concerning any amendments, vote(s); and/or ‘negatives’ related to ASTM standard D5511 and D5526.”

We understand that O.W.S. has concerns about confidentiality. The FTC’s Rules contemplate disclosure by third-parties of information that is considered confidential, and the Rules and the ALJ’s Protective Order also provides mechanisms for protecting sensitive material if material disclosed is confidential. We have sent you a copy of the protective order; and I include another copy with this email for convenience. Please follow all requirements and directions of the ALJ in his Protective Order, which ECM will abide by to the fullest extent.

I welcome discussing this matter further but full production must be received on or before March 24, 2014. Please let me know of a convenient time for us to speak by phone.

Sincerely,

Lou

Lou Caputo | EMORD & ASSOCIATES, P.C. | 3210 S. Gilbert Rd., Ste 4 | Chandler, AZ 85286 Firm: (602) 388-8901 | Facsimile: (602) 393-4361 | www.emord.com

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RESPONDENT
EXHIBIT
RX-I

From: Lou Caputo
To: Christine.Haaker@thompsonhine.com
Cc: [Peter Arhangelsky](#)
Subject: Docket No. 9358, Third-Party Subpoena to O.W.S.
Date: Wednesday, March 12, 2014 3:01:00 PM

Hi Christine,

Thank you again for your call yesterday. We have discussed the points raised in the call with our client. As previously explained, ECM did not choose nor desire for the FTC to file its Complaint. ECM regrets that the FTC has instituted such an action against ECM and seemingly the biodegradable plastics industry generally. The FTC, not ECM, has defined the permissible scope of materials issues, and as such, which information and materials may lead to relevant information. Notwithstanding, at multiple junctures, we have now attempted to work with O.W.S. to reduce any burden associated with responding to ECM's subpoena. ECM further agrees to limit remaining Requests as follows:

Instructions:

C: This Instruction stands with your requested exception that O.W.S. need not produce extraneous portions of a single that are both (1) non-responsive to a Request; and (2) do not relate in any way to the context and/or subject matter that is responsive to the Request. For example, O.W.S. need not produce subsequent portions of an email chain that are irrelevant, non-responsive and provide no context to the responsive content.

D: No change from 3/10/14 email.

E: No change from 3/10/14 email.

Request No. 1. All documents and correspondence concerning ECM BioFilms, Inc., Robert Sinclair, and /or ECM BioFilms MasterBatch Pellets.

Request No. 3. All correspondence between O.W.S. and any members, employee, representative or officer of the United States Federal Trade Commission.

Request No. 4. Since January 1, 2010, all correspondence between O.W.S. and Steve Mojo of the Biodegradable Products Institute ("BPI").

Request No. 5. Since January 1, 2010, all documents concerning any test or report (including any notes and raw data) performed or written to the biodegradability of plastic products under ASTM standards D5511 and D5526 for ECM and/or a plastic product containing the ECM additive.

Request No. 6. All documents concerning the education, training, and experience of Mr. Bruno De Wilde.

Request No. 8. All documents concerning the education, training, and experience of Mr. Richard Tillinger.

Resp. Opp. to O.W.S. Mot. to Quash
Exh. RX-I

Request No. 10. Since January 1, 2010, all documents and correspondence (except correspondence in which Robert Sinclair or other ECM employee was a party to such correspondence) concerning any amendments, vote(s); and/or 'negatives' related to ASTM standard D5511 and D5526.

Through these final modifications, ECM has strived to limit (1) the time and effort of O.W.S. personnel to search for documents; and (2) documents containing sensitive materials. We understand that O.W.S. protests disclosing documents and materials that display content under confidentiality agreements between O.W.S. and third party customers. You have not described, however, concrete details concerning how O.W.S. maintains its records and why searches for the above materials would be excessive. Further, and notwithstanding that you say that O.W.S. is a small firm, there is no indication from you as to how computer key-word searches and similar methods would be insufficient to locate responsive documents. Finally, as we discussed, O.W.S. is not the only testing firm to receive a third-party subpoena in this matter. Other firms have expressed similar concerns and submitted documents under a confidential designation. Please note that given such circumstances and without any ability to understand why such narrowed production would be unreasonable or excessive, ECM may contest recoupment of costs without proper and/or sufficient legal basis and context. Given the facts that you have explained and are known to us, we do not consider it likely that O.W.S. would succeed in a challenge to the above requests.

We have extended the date for O.W.S. to respond to ECM's subpoena by March 24, 2014. Please submit materials by that time.

Sincerely,

Lou Caputo | EMORD & ASSOCIATES, P.C. | 3210 S. Gilbert Rd., Ste 4 | Chandler, AZ 85286 Firm: (602) 388-8901 | Facsimile: (602) 393-4361 | www.emord.com

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Resp. Opp. to O.W.S. Mot. to Quash
Exh. RX-I

RESPONDENT

EXHIBIT

RX-J

**CONFIDENTIAL – SUBJECT TO
PROTECTIVE ORDER**

REDACTED

RESPONDENT

EXHIBIT

RX-K-1

**CONFIDENTIAL – SUBJECT TO
PROTECTIVE ORDER**

REDACTED

RESPONDENT

EXHIBIT

RX-2

**CONFIDENTIAL – SUBJECT TO
PROTECTIVE ORDER**

Resp. Opp. to O.W.S. Mot. to Quash
Exh. RX-K-2

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

REDACTED

RESPONDENT

EXHIBIT

RX-L-1

**CONFIDENTIAL – SUBJECT TO
PROTECTIVE ORDER**

REDACTED

RESPONDENT

EXHIBIT

RX-L-2

**CONFIDENTIAL – SUBJECT TO
PROTECTIVE ORDER**

REDACTED

RESPONDENT

EXHIBIT

RX-L-3

**CONFIDENTIAL – SUBJECT TO
PROTECTIVE ORDER**

REDACTED

RESPONDENT

EXHIBIT

RX-L-4

**CONFIDENTIAL – SUBJECT TO
PROTECTIVE ORDER**

Resp. Opp. to O.W.S. Mot. to Quash

Exh. RX-L-4

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

REDACTED

RESPONDENT

EXHIBIT

RX-L-5

**CONFIDENTIAL – SUBJECT TO
PROTECTIVE ORDER**

Resp. Opp. to O.W.S. Mot. to Quash
Exh. RX-L-5

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

REDACTED

RESPONDENT

EXHIBIT

RX-L-6

**CONFIDENTIAL – SUBJECT TO
PROTECTIVE ORDER**

Resp. Opp. to O.W.S. Mot. to Quash

Exh. RX-L-6

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

REDACTED

RESPONDENT

EXHIBIT

RX-M-1

**CONFIDENTIAL – SUBJECT TO
PROTECTIVE ORDER**

Resp. Opp. to O.W.S. Mot. to Quash

Exh. RX-M-1

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

REDACTED

RESPONDENT

EXHIBIT

RX-M-2

**CONFIDENTIAL – SUBJECT TO
PROTECTIVE ORDER**

Resp. Opp. to Mot. to Quash

Exh. RX-M-2

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

REDACTED

RESPONDENT
EXHIBIT
RX-N

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES
Washington, D.C.

In the Matter of

ECM BioFilms, Inc.,
a corporation, also d/b/a
Envioplastics International,

Respondent.

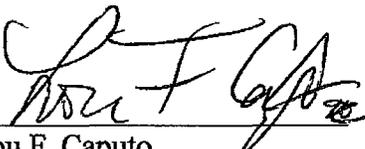
Docket No. 9358

**DECLARATION OF LOU CAPUTO IN SUPPORT OF RESPONDENT ECM'S
MOTION TO COMPEL AND FOR SANCTIONS**

In accord with 28 U.S.C. § 1746, I declare under penalty of perjury that the following is true and correct:

1. I am over the age of eighteen years and I make this affidavit on personal knowledge of its contents and in further support of Respondent's Motion for a Protective Order.
2. I am employed by the law firm Emord & Associates, P.C., which represents ECM BioFilms in matters before the Federal Trade Commission. I am an attorney of record in the above-captioned case.
3. On February 27, 2014, I spoke by phone with Ms. Christine Haaker concerning ECM's subpoena to O.W.S., service of that subpoena, and about O.W.S.'s request to limit the subpoena's scope.
4. On March 11, 2014, I spoke by phone with Ms. Christine Haaker concerning ECM's subpoena to O.W.S. and about O.W.S.'s request to limit the subpoena's scope. ECM agreed to consider further reductions in scope of its subpoena to O.W.S.

5. **Exhibit RX-A-1** hereto is a true and correct copy of a subpoena *duces tecum* sent to O.W.S., Inc. (Organic Waste Systems) on February 13, 2014.
6. **Exhibit RX-A-2** hereto is a true and correct copy of a subpoena *duces tecum* sent to O.W.S., Inc. on February 28, 2014.
7. **Exhibit RX-A-3** hereto is a true and correct copy of an email sent by me to Christine Haaker on February 28, 2014.
8. **Exhibit RX-C** hereto is a true and correct copy of a letter received by ECM from O.W.S. via email from Christine Haaker on February 27, 2014.
9. **Exhibit RX-D** hereto is a true and correct copy of an email received by ECM from Christine Haaker on March 6, 2014.
10. **Exhibit RX-E** hereto is a true and correct copy of a letter received via email by ECM from Christine Haaker on March 7, 2014.
11. **Exhibit RX-F** hereto is a true and correct copy of an email received by ECM from Christine Haaker on March 10, 2014.
12. **Exhibit RX-G** hereto is a true and correct copy of an email sent by me to Christine Haaker on March 10, 2014.
13. **Exhibit RX-H** hereto is a true and correct copy of an email sent by me to Christine Haaker on March 12, 2014.


Lou F. Caputo
Respondent's Counsel

Executed this 21st day of March 2014 in Chandler, Arizona.