

ORIGINAL



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION

PUBLIC

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

Docket No. 9358  
Honorable D. Michael Chappell

**NON-PARTY MOTION TO QUASH SUBPOENA DUCES TECUM**

Pursuant to 16 C.F.R. § 3.34 and Rule 3.34(c) of the Rules of Practice for Adjudicative Proceedings before the United States Federal Trade Commission, Bio-Tec Environmental, LLC ("Bio-Tec"), a non-party to this proceeding, files the following Motion to Quash and/or Limit Subpoena.

**I. INTRODUCTION**

On February 14, 2014, Bio-Tec was served with a Subpoena Duces Tecum issued February 13, 2014 at the behest of Respondent ECM BioFilms, Inc. ("ECM"). (A copy of the Subpoena is attached as Exhibit 1).

The Subpoena calls for the search of eight years of records (including electronically stored records) from January 1, 2006 to the present and the production of any records which even mention "ECM", its principal, or its product name, among other things. Such a request of a non-party might potentially involve tens of thousands of records, all to what end? The apparent claim of the FTC is that ECM's Product does not work, or does not work as ECM has claimed. ECM, as the owner of the product most certainly has in its possession and from its testing reports and partners, test documents which demonstrate the efficacy of its products and substantiate its

representations. It is indeed curious, and suspect, that ECM is attempting to validate its product claims based on records of its competitor. Furthermore, ECM already has Bio-Tec's copyright protected test results as shown by the cease and desist letter from its counsel to ECM (Exhibit 2), yet is apparently requesting production of such records from Bio-Tec in ¶ 4(a)-(d). The Subpoena should be quashed in its entirety, or at least should be limited in several significant respects.

Bio-Tec moves to quash or limit the Subpoena on three main grounds. First, the Subpoena is overly broad and unduly burdensome; seeks materials which are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence; and requests records already in Respondent's possession. Second, much of the requested documents are trade secret protected, confidential and proprietary records and therefore should be protected from discovery, particularly from its competitor, ECM. Third, assuming even that the scope of the Subpoena was manageable, and the responsive documents were discovery relevant and not privileged, the timing of the Subpoena and the short time frame for response make compliance impossible. Additional time to respond was requested, but denied.

## **II. ARGUMENT**

### **A. Authority and General Objections to Subpoena.**

First, and importantly, Bio-Tec is not a party to this proceeding, and has no direct interest in its outcome. The Subpoena would be burdensome even if issued against a party. Because it is issued against a non-party, it is unreasonably burdensome, and should be either quashed in its entirety or dramatically limited.

The FTC's Rules of Practice and relevant federal regulations provide that "[p]arties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to

the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.”

FTC Rule of Practice 3.31(c)(1); 16 C.F.R. § 3.31(c)(1). Further, the Administrative Law Judge may limit the use of discovery if he determined that:

(i) The discovery sought from a party or third party is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(iii) The burden and expense of the proposed discovery on a party or third party outweighs its likely benefit.

FTC Rule of Practice 3.31(c)(2); 16 C.F.R. § 3.31(c)(2). Like a federal court, an Administrative Law Judge in an FTC proceeding should quash or limit any subpoena that is unduly burdensome or requires the disclosure of privileged or confidential and proprietary information, or information rising to the level of trade secrets. 16 C.F.R. § 3.31(c)(1)(iii) (use of subpoena and other discovery methods “shall be limited by the Administrative Law Judge” where the “burden and expense of the proposed discovery outweigh its likely benefit”); 16 C.F.R. § 3.31 (c)(2) (authorizing Administrative Law Judge to “enter a protective order denying or limiting discovery to preserve” a privilege); Fed. R. Civ. P. 45(c)(3) (a court “shall quash or modify the subpoena if it ...requires disclosure of privileged or other protected matter... [or] subjects a person to undue burden”). Moreover, an Administrative Law Judge has the power to modify the subpoena and limit the scope of permissible discovery. 16 C.F.R. § 3.31(d)(1) (authorizing Administrative Law Judge to “deny discovery or make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense”); *see also* Fed. R. Civ. P. 26(c) (court may grant a protective order to protect a party from annoyance, embarrassment, oppression, or undue burden or expense.) *See also*

*Murphy v. Deloitte & Touche Group Ins. Plan*, 619 F. 3d 1151, 1163 (10<sup>th</sup> Cir., 2010) (discovery has “never been a license to engage in an unwieldy, burdensome and speculative fishing expedition.”).

Information is not discoverable if it is not relevant. Fed. R. Civ. P. 26(b)(1). Further “discovery in Commission adjudicatory proceedings under Part 3 of the Commission’s Rules is limited to matters that are relevant to the allegations of the Commission’s complaint, to the relief proposed therein, or to the Respondents’ defenses, none of which is at issue in this Discovery Motion. See 16 C.F.R. 93.31.”

Further, the requests are drafted so broadly as to render compliance nearly impossible. For example, Request No. 1 seeks all documents “concerning” ECM which is “defined in its broadest sense allowable under FTC Rules...” and “...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...” (See fn. 2, p. 3). This expansive definition of “concerning, which is imported into Requests 4 and 5 as well, seems to demand that documents be scrutinized to determine if a record is “about” some other request. Discovery request are overbroad, even if some responsive information is conceivably relevant, when only a fraction of the millions of documents requested are relevant. *Nugget Hydroelectric L.P. v. Pacific Gas & Elec. Co.*, 981 F.2d 429, 438-39 (9<sup>th</sup> Cir. 1992).

In order to comply with these requests, Bio-Tec would be required to search through potentially a mountain of materials covering an eight year period, to determine if a record “concerns” ECM in some possible way (fn. 2 of Subpoena) and to review the documents for responsiveness and privilege, create a comprehensive privilege log, and comply with the lengthy instructions contained in Respondents’ Subpoena regarding production. These efforts would

require significant resources from Bio-Tec and would disrupt its normal business operations. Responding to these requests is an unreasonable and monumental undertaking that could not be completed within the time allotted, if at all. Accordingly, the burden and expense required to comply with Respondents' Subpoena far outweighs any benefit that Respondents could hope to obtain, particularly in view of Respondent's responsibility to provide its proof of product efficacy.

For these reasons, Bio-Tec respectfully requests that Respondents' Subpoena be quashed in its entirety.

### **III. RESPONSES AND OBJECTIONS TO DOCUMENT REQUESTS**

Bio-Tec incorporates by reference the arguments made above its Motion to Quash Subpoena Duces Tecum. In addition, Bio-Tec hereby adopts and incorporates by reference the following General Objections into each of its specific objections to Respondents' Subpoena.

#### **GENERAL OBJECTIONS**

1. Bio-Tec objects to Respondents' Subpoena to the extent that it seeks to impose obligations on Bio-Tec that exceed or modify the requirements of the FTC's Rules of Practice, the FTC's governing regulations, and other applicable rules of procedure.

2. Bio-Tec objects to Respondents' Subpoena on the grounds that it is overbroad and seeks the production of documents that are neither relevant to the subject matter of this proceeding, nor reasonably calculated to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Respondent.

3. Bio-Tec objects to Respondents' Subpoena on the grounds that it is duplicative and harassing because the subpoena seeks information and documents that are or should be in Respondents' possession, custody, or control.

4. Bio-Tec objects to Respondents' Subpoena to the extent it seeks documents that are protected by the attorney-client privilege, work product doctrine, the common interest privilege, and other applicable privileges, immunities, and duties of confidentiality belonging to Bio-Tec.

5. Bio-Tec objects to Respondents' Subpoena on the grounds that it seeks information or documents that constitute, contain, or refer to trade secrets or other confidential business and commercial information of Bio-Tec, including commercially sensitive information. Bio-Tec further objects to Respondents' Subpoena to the extent that it seeks information or documents that are subject to confidentiality provisions or obligations between Bio-Tec and others that may not be disclosed without notice to/or consent of the parties to such contracts or otherwise.

Specific Objections to Document Request

Bio-Tec asserts the following specific objections to the categories of documents the Subpoena requires to be produced:

**1. All documents concerning ECM BioFilms, Inc.**

Bio-Tec incorporates the objections stated above, including its objection to the essentially unlimited scope of the definition of "concerning" encrypted into this request for production spanning an eight year time period. Clearly, the request fails to identify with any reasonable particularity the items requested and undoubtedly includes records already in the possession of ECM. Bio-Tec does not have any ECM documents but identifies the cease and desist letter from Bio-Tec's counsel to ECM, requesting that it desist from using Bio-Tec protected information in the sale and representation of ECM's product. Bio-Tec further objects that the requested

discovery is overly broad, seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant evidence, is unduly burdensome, harassing and oppressive.

**2. All correspondence between Bio-Tec Environmental and any employee, representative, or distributor of ECM BioFilms, Inc.**

Bio-Tec incorporates the objections as stated above. Additionally, ECM should have in its possession, custody or control the correspondence and communications referred to and therefore the requested information is obtainable from sources which are less expensive and burdensome. Bio-Tec specifically references the cease and desist letter attached as an exhibit in response to this request. Bio-Tec further objects that the requested discovery is overly broad, seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant evidence, is unduly burdensome, harassing and oppressive.

**3. All documents sent or received by Bio-Tec Environmental making reference to ECM BioFilms, Robert Sinclair, or ECM BioFilms Master Batch Pellets.**

Bio-Tec incorporates the objections stated above and further states that the request is overly broad, seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant evidence, is unduly burdensome, harassing and oppressive. This request also seeks information which is privileged and protected from disclosure pursuant to the privileges asserted in paragraphs 4 and 5, above.

**4. All documents concerning any test, imaging work, or report (including any and all notes and raw data) performed or written for products containing the ECM additive, including but not limited to:**

**a. SEM Imaging of EPS samples completed for Bio-Tec Environmental**

**(3/6/07)**

- b. **SEM Imaging of green PET bottles completed for Bio-Tec Environmental**  
(2/8/07)
- c. **SEM imaging of bubble wrap completed for Bio-Tec Environmental**  
(12/12/06)
- d. **SEM imaging of PVC samples completed for Bio-Tec Environmental**  
(3/5/07)

The specifically identified items (a-d) are the subject of the cease and desist letter attached as Exhibit 2. It is therefore apparent that ECM has the items requested, all of which are protected intellectual property of Bio-Tec. Bio-Tec incorporates the objections stated above, including as stated in paragraphs 4 and 5, and further states that the requested information is neither relevant nor reasonably calculated to lead to the discovery of relevant evidence, is unduly burdensome, harassing and oppressive.

**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."**

Bio-Tec incorporates the objections as stated above. Bio-Tec further objects that the requested discovery is overly broad, seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant evidence, is unduly burdensome, harassing and oppressive, and further asserts that such documents, if any, are protected by the privileges asserted in paragraphs 4 and 5, above.

**6. All correspondence between Bio-Tec Environmental and any employee or representative or officer of the University of New Mexico.**

Bio-Tec incorporates the objections as stated above. Bio-Tec further objects that the requested discovery is overly broad, seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant evidence, is unduly burdensome, harassing and oppressive, and further asserts that such documents, if any, are protected by the privileges asserted in paragraphs 4 and 5, above.

**7. All correspondence between Bio-Tec Environmental and any member, employee, representative, or officer of the United States Federal Trade Commission.**

Bio-Tec incorporates the objections as stated above. Bio-Tec further objects that the requested discovery is overly broad, seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant evidence, is unduly burdensome, harassing and oppressive. Additionally, the information, if any, submitted by Bio-Tec to the FTC contain and constitute trade secrets and highly confidential information of Bio-Tec, and as such submitted in accordance with 15 U.S.C. § 57B-2(c) and (f). Such information, if any, was submitted in reliance on the request that all such information and communications be treated as confidential and exempt from disclosure, and Bio-Tec did not consent to the disclosure of such information. Bio-Tec asserts the privileges and objections stated in paragraphs 4 and 5 above.

**The Existing Protective Order Does Not Adequately Protect Bio-Tec**

While Bio-Tec respectfully requests that the Subpoena be quashed, in the event it is required to search for records, neither the Subpoena nor the protective order address the payment of costs associated with engaging in such an expansive search. As a non-party to these proceedings, Bio-Tec is entitled to obtain all of its reasonable costs, expenses and attorneys' fees in addressing this subpoena. In the event Bio-Tec is required to produce information

responsive to the Subpoena, even if its scope is narrowed considerably, the cost of production will be substantial, requiring the work of numerous employees reviewing, organizing, and copying thousands and thousands of documents. Further, Bio-Tec has incurred and will continue to incur legal expenses contesting the scope of the Subpoena. Under Fed. R. Civ. P. 45, the issue is whether the subpoena imposes expenses on a non-party, and if so, whether those expenses are significant.

### **III. CONCLUSION**

For the foregoing reasons, non-party Bio-Tec respectfully requests that the Administrative Law Judge quash Respondent's Subpoena in its entirety. If the Subpoena is not quashed in its entirety (1) Bio-Tec should not be required to produce documents over an eight year period; (2) the overly broad document requests should be narrowed considerably; (3) Bio-Tec should not be required to produce confidential information, but if required to do so, only under a narrowly-drawn protective order; and (4) ECM should reimburse Bio-Tec's expenses related to responding to the Subpoena.

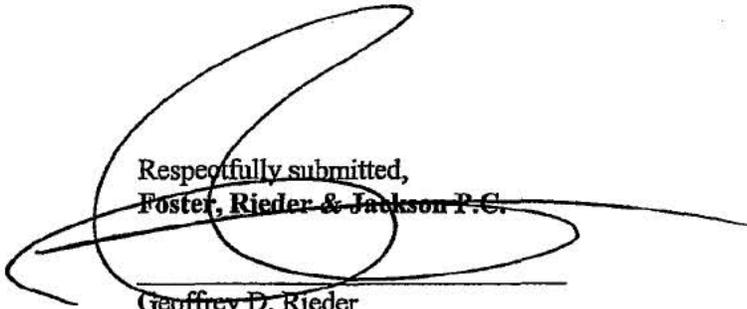
### **IV. CERTIFICATE OF CONFERENCE**

Pursuant to FTC Rule of Practice 3.34(c) and 16 C.F.R. § 3.34(c), Bio-Tec hereby certifies that it has conferred with counsel for Respondent by phone in an attempt to resolve by agreement the issues raised herein. On Monday, February 24, 2014, undersigned counsel for Bio-Tec and Lou Caputo, counsel for Respondent, conferred by telephone in an attempt to resolve the issues regarding Respondent's Subpoena. Despite this effort, counsel have been unable to reach agreement on the issues.

WHEREFORE, PREMISES CONSIDERED, Bio-Tec respectfully requests the Subpoena Duces Tecum be quashed and/or limited, and that it be awarded its reasonable

attorney's fees and costs, as well as such other relief, both legal and equitable, to which it may show itself justly entitled.

Dated: February 24, 2014



Respectfully submitted,  
~~Foster, Rieder & Jackson P.C.~~

---

Geoffrey D. Rieder  
Attorney for Non-Party, Bio-Tec  
Environmental, LLC  
201 Third Street NW, Ste 1500  
Albuquerque, NM 87102  
(505) 767-0577  
[Geoff@frjlaw.com](mailto:Geoff@frjlaw.com)

**CERTIFICATE OF SERVICE**

I hereby certify that on February 24, 2014, I caused a true and copy of the foregoing to be served as follows:

One electronic copy to Counsel for Respondent:

Lou Caputo  
Emord & Associates  
3210 S. Gilbert Rd., Ste 4  
Chandler, AZ 85286  
LCaputo@emord.com

On February 28, 2014, I caused a true copy through the FTC's e-filing system to the Office of the Secretary:

Donald S. Clark, Secretary  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Room H-113  
Washington, DC 20580  
Email: [secretary@ftc.com](mailto:secretary@ftc.com)

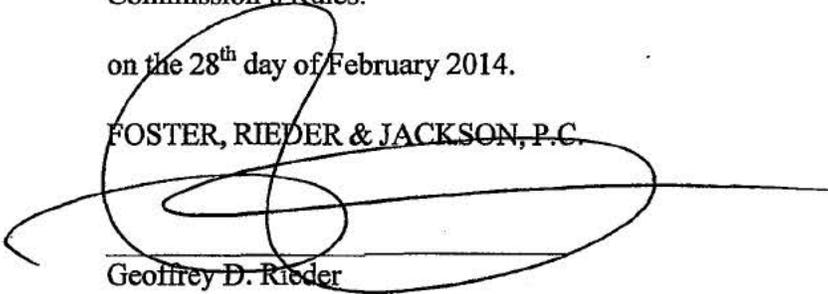
On February 28, 2014, one electronic copy to the Office of the Administrative Law Judge:

The Honorable D. Michael Chappel  
Administrative Law Judge  
600 Pennsylvania Ave., NW, Room H-110  
Washington, DC 20580  
Email: [oalj@ftc.com](mailto:oalj@ftc.com)

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.

on the 28<sup>th</sup> day of February 2014.

FOSTER, RIEDER & JACKSON, P.C.



Geoffrey D. Rieder



# 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)

<b>1. TO</b> General Counsel and/or Executive for Bio-Tec Environmental, LLC 7009 Prospect Ave NE, Suite 202 Albuquerque, NM 87110	<b>2. FROM</b>  <p style="text-align: center;"><b>UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</b></p>
--	---

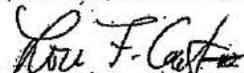
This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things, at the date and time specified in Item 5, and at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

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

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

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

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

<b>DATE SIGNED</b> 2/13/14	<b>SIGNATURE OF COUNSEL ISSUING SUBPOENA</b> 
-------------------------------	---

### 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

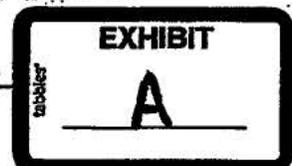
The Commission's Rules of Practice require that any motion to limit or quash this subpoena must comply with Commission Rule 3.34(c), 16 C.F.R. § 3.34(c), and in particular must be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition 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**

**BIO-TEC ENVIRONMENTAL, LLC**

**INSTRUCTIONS**

- A. Unless otherwise specified, the time period covered by a numbered request shall be limited to the time period extending from January 1, 2006 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, correspondence<sup>1</sup>, 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 way made readable or retrievable):

1. All documents concerning<sup>2</sup> ECM BioFilms, Inc.
2. All correspondence between Bio-Tec Environmental and any employee, representative, or distributor of ECM BioFilms, Inc.
3. All documents sent or received by Bio-Tec Environmental making reference to ECM BioFilms, Robert Sinclair, or ECM BioFilms Master Batch Pellets.

---

<sup>1</sup> 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.

<sup>2</sup> 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.

4. All documents concerning any test, imaging work, or report (including any and all notes and raw data) performed or written for products containing the ECM additive, including, but not limited to:

- a. SEM Imaging of EPS samples completed for Bio-Tec Environmental (3/6/07)
- b. SEM Imaging of green PET bottles completed for Bio-Tec Environmental (2/8/07)
- c. SEM imaging of bubble wrap completed for Bio-Tec Environmental (12/12/06)
- d. SEM imaging of PVC samples completed for Bio-Tec Environmental (3/5/07)

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 correspondence between Bio-Tec Environmental and any employee or representative or officer of the University of New Mexico.

7. All correspondence between Bio-Tec Environmental and any member, employee, representative, or officer of the United States Federal Trade Commission.

#### **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 documents<sup>3</sup>, and a brief description of the nature of the work that each person performed in connection with the collecting the documents.

---

<sup>3</sup> "Document" and "documents" as used in this Attachment are defined in this subpoena's "Description of Documents Requested" section.

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 Bio-Tec Environmental 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 foregoing 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](mailto: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.

  
**PEACOCK MYERS, P.C.**  
INTELLECTUAL PROPERTY LAW SERVICES  
TECHNOLOGY COMMERCIALIZATION

**FILE COPY**

Deborah A. Peacock, P.E. 1,2,3  
Jeffrey D. Myers 1,2,3  
Janeen Vilven-Doggett, Ph.D. 1,2  
Roger E. Michener, Ph.D. 2,4,5,6  
Philip D. Askenazy, Ph.D. 8  
Registered Patent Agent  
Justin R. Jackson 1,2  
Hilary A. Noskin, Ph.D. 1,2,4  
Samantha A. Updegraff 1,2  
Diane E. Albert, Ph.D. 2  
Stephen A. Slusher, Of Counsel 1,2  
Steve M. McLary, Of Counsel 1,7

February 23, 2010  
VIA FED EX

  
U.S. and International Intellectual Property  
Full-Service Intellectual Property Services  
Patents, Trademarks and Copyrights  
Searches and Prosecution  
Biotechnology Law  
Computer and Internet Law  
Art and Entertainment Law  
Trade Secrets and Policies  
Intellectual Property Litigation  
Licensing and Technology Commercialization  
Intellectual Property and Business Strategy  
Corporate and Commercial Transactions  
Venture Capital, Securities and Due Diligence

Robert Sinclair  
ECM Biofilms, Inc.  
1 Victoria Square, Suite 304  
Painesville, Ohio 44077 U.S.A

**Re: Our Client: Bio-Tec Environmental, LLC ("Bio-Tec")  
Bio-Tec Copyrights**

Dear Mr. Sinclair:

We represent Bio-Tec in copyright and related intellectual property matters. Our client has recently discovered that ECM Biofilms, Inc. ("ECM Biofilms") is passing off as its own, the University of New Mexico SEM imaging of various plastic products reports ("reports") that are owned by Bio-Tec. ECM Biofilms is sending Bio-Tec's reports to potential customers to market its own product.

Copyrights

The unauthorized use of Bio-Tec's reports constitutes copyright infringement under 17 U.S.C. § 501 et seq. Our client is entitled to recover damages against ECM Biofilms based on its infringement of our client's copyrights for the reports and SEM photos.

False Statements

Distributing the reports as if they were owned by and performed for ECM Biofilms is misleading to potential customers. It is clear that this false representation is intended to (and actually does) confuse and misdirect customers seeking products based on the reports. Your use of the reports is unlawful and constitutes unfair competition, fraud, false advertising, misrepresentation, interference with contractual relations, business libel, and deception.

1 Registered U.S. Patent & Trademark Office  
2 Admitted New Mexico Bar  
3 Admitted Colorado Bar  
4 Admitted Washington D.C. Bar  
5 Admitted Pennsylvania Bar  
6 Admitted New York and New Jersey Bars  
7 Admitted Indiana and Ohio Bars  
8 Registered U.S. Patent & Trademark Office (non-attorney)

201 Third Street NW - Suite 1340  
Albuquerque, New Mexico 87102-3368  
Post Office Box 26927  
Albuquerque, New Mexico 87125-6927



Telephone (505) 998-1500  
Fax: (505) 243-2542  
Info@PeacockLaw.com  
www.PeacockLaw.com

Robert Sinclair  
February 23, 2010  
Page 2

Deceptive Trade Practices

We are aware that ECM Biofilms is representing to customers that ECM Biofilms' Master Batch additive is the same as Bio-Tec's EcoPure™ additive. This statement is false and deceptive. The EcoPure™ additive is a proprietary formulation developed for Bio-Tec. The two additives are not the same and are not equivalent. Further, ECM Biofilms is confusing customers by stating that the Bio-Tec's reports also describe the Master Batch additive since the two additives are the same. Confusing customers by stating that the products are the same, when they are not, and then representing to customers that the Bio-Tec reports also apply to the Master Batch additive, which they do not, constitutes deceptive trade practice.

We believe that our client has an exceptionally strong case against you. Accordingly, we demand that you immediately take the following steps:

- (1) Immediately discontinue any use of the reports.
- (2) Return to Bio-Tec all Bio-Tec reports in your possession or in ECM Biofilm's possession.
- (3) Pay to our client all sales you have made on all products that have been sold at least in part because of the reports.

If you will not immediately comply with the above, or take substantial steps toward such compliance as may be agreed upon, we will not hesitate to advise our client to file suit against you.

We ask that you respond to this letter by March 5, 2010.

Very truly yours,



Jancen Vilven-Doggett, PhD.  
Direct Line: (505) 998-6134  
E-mail: [jvilven@peacocklaw.com](mailto:jvilven@peacocklaw.com)

cc: Bio-Tec Environmental, LLC

From: Origin ID: ONMA (505) 988-8147  
Loi Hessinger  
Peacock Myers  
201 Third Street NW  
Suite 1340  
Albuquerque, NM 87102



Ship Date: 23FEB10  
ActWgt: 0.3 LB  
CAD: 9887535/NET3010

Delivery Address Bar Code

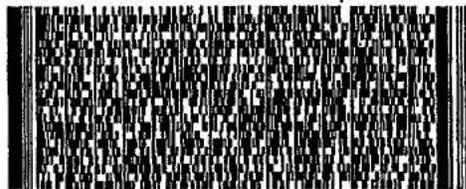


SHIP TO: (440) 350-1400 BILL SENDER

**Robert Sinclair**  
**ECM Biofilms, Inc.**  
**1 VICTORIA PL STE 304**

**PAINESVILLE, OH 44077**

Ref # 32560-1019  
Invoice #  
PO #  
Dept #



TRK# 7932 9608 2432  
0201

THU - 25 FEB A2  
\*\* 2DAY \*\*

44077

OH-US

CLE

**SJ LNNA**



9882/CTD/0728

**After printing this label:**

1. Use the 'Print' button on this page to print your label to your laser or inkjet printer.
2. Fold the printed page along the horizontal line.
3. Place label in shipping pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.

**Warning:** Use only the printed original label for shipping. Using a photocopy of this label for shipping purposes is fraudulent and could result in additional billing charges, along with the cancellation of your FedEx account number.

Use of this system constitutes your agreement to the service conditions in the current FedEx Service Guide, available on fedex.com. FedEx will not be responsible for any claim in excess of \$100 per package, whether the result of loss, damage, delay, non-delivery, misdelivery, or misinformation, unless you declare a higher value, pay an additional charge, document your actual loss and file a timely claim. Limitations found in the current FedEx Service Guide apply. Your right to recover from FedEx for any loss, including intrinsic value of the package, loss of sales, income interest, profit, attorney's fees, costs, and other forms of damage whether direct, incidental, consequential, or special is limited to the greater of \$100 or the authorized declared value. Recovery cannot exceed actual documented loss. Maximum for items of extraordinary value is \$500, e.g. jewelry, precious metals, negotiable instruments and other items listed in our Service Guide. Written claims must be filed within strict time limits, see current FedEx Service Guide.

# FedEx Shipment Receipt

## Address Information

<b>Ship to:</b> Robert Sinclair ECM Biofilms, Inc. 1 VICTORIA PL STE 304  PAINESVILLE, OH 44077-3406 US 440-350-1400	<b>Ship from:</b> Lori Hessinger Peacock Myers 201 Third Street NW Suite 1340 Albuquerque, NM 87102 US 5059986147
--	---

## Shipping Information

Tracking number: 793296082432  
Ship date: 02/23/2010  
Estimated shipping charges: 17.25

## Package Information

Service type: FedEx 2-Day  
Package type: FedEx Envelope  
Number of packages: 1  
Total weight: 0.3LBS  
Declared value: 0.00USD  
Special Services:  
Pickup/Drop-off: Drop off package at FedEx location

## Billing Information

Bill transportation to: Sender  
Your reference: 32560-1019  
P.O. no.:  
Invoice no.:  
Department no.:

Thank you for shipping online with FedEx ShipManager at fedex.com.

### Please Note

FedEx will not be responsible for any claim in excess of \$100 per package, whether the result of loss, damage, delay, non-delivery, misdelivery, or misinformation, unless you declare a higher value, pay an additional charge, document your actual loss and file a timely claim. Limitations found in the current FedEx Service Guide apply. Your right to recover from FedEx for any loss, including intrinsic value of the package, loss of sales, income interest, profit, attorney's fees, costs, and other forms of damage whether direct, incidental, consequential, or special is limited to the greater of \$100 or the authorized declared value. Recovery cannot exceed actual documented loss. Maximum for items of extraordinary value is \$500, e.g., jewelry, precious metals, negotiable instruments and other items listed in our Service Guide. Written claims must be filed within strict time limits; Consult the applicable FedEx Service Guide for details.  
The estimated shipping charge may be different than the actual charges for your shipment. Differences may occur based on actual weight, dimensions, and other factors. Consult the applicable FedEx Service Guide or the FedEx Rate Sheets for details on how shipping charges are calculated.