

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



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

Docket No. 9358

PUBLIC DOCUMENT

**COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENT’S
MOTION FOR PROTECTIVE ORDER AND CROSS-MOTION TO COMPEL
RESPONDENT TO DISCLOSE CUSTOMER AND DISTRIBUTOR NAMES**

Pursuant to Commission Rules 3.31 and 3.38, Complaint Counsel respectfully requests that the Court order Respondent to disclose the identity of its customers and distributors immediately. This relief is proper for two reasons. First, customer identities are critical to Complaint Counsel’s claims and Respondent’s defenses. Limiting discovery to a fraction of Respondent’s customer list will substantially prejudice Complaint Counsel and impair the Court’s ability to evaluate a meaningful record. Second, Respondent will suffer no significant economic harm even if Complaint Counsel contacts every customer. This litigation is no secret to Respondent’s customers; as ECM CEO Robert Sinclair himself bragged to the press— notwithstanding the contrary implication in his declaration—he contacted **each** ECM customer about the FTC’s allegations.¹ In short, Respondent cannot meet its burden of demonstrating potential harm from providing its customer list, and therefore must produce this highly relevant material.

¹ See Exhibit 1 to Declaration of Katherine Johnson (“Johnson Decl.”), J. Carroll, “CEO Says FTC’s Claims Denigrate His Firm,” *Plastic News* (Nov. 20, 2013) (“*Plastic News Article*”), at 3.

BACKGROUND

A. Claims and Defenses

As relevant here, the Complaint (Count III) alleges that Respondent provided its customers and distributors the means and instrumentalities (*i.e.*, “biodegradable” logos and certificates of biodegradability) to deceive end-use consumers. Additionally, Respondent contends it supplemented promotional materials with verbal communications that altered the net impression of its advertising.² Furthermore, Respondent asserts that its customers are “sophisticated,” which makes them more difficult to deceive.³ Given the means and instrumentalities claim, the net impression issue, and the “sophisticated consumer” defense, Respondent’s communications with its customers—and their understanding of those communications—are critical to this case.

B. ECM’s Refusal To Produce Necessary Information

Notwithstanding the importance of this information and the requirement that ECM identify everyone “likely to have discoverable information” relevant to the claims and defenses at issue, *see* Rule 3.31(b)(1), ECM’s initial disclosure **did not identify a single customer**. *See* Johnson Decl. Ex. 3, at 1-3 (E-mail string between counsel, Nov. 25, 2013). Despite Complaint Counsel’s efforts to negotiate, ECM refused to supplement its disclosures. *Id.* Complaint Counsel then served discovery seeking ECM’s customer list, information about orders, and Respondent’s communications with customers. Again, ECM refused to comply. *Id.* at 4-7 (E-mail string between counsel, Dec. 2-3, 2013); *see also id.* at 8-11 (E-mail string between counsel,

² *See, e.g.*, Answer at ¶ 4 (“The FTC is obliged to consider the net impression of ECM’s promotions as a whole, and that includes the direct discussions and sales presentations with its customers”); Johnson Decl. Ex. 2, Hrg. Tr. 17:5-7 (“[M]ost of the communications with the select group of customers is verbal interaction”; *id.* at 17:10-12 (“[W]e look at the net impression, it must include the interactions that are verbal.”)).

³ *See, e.g.*, Answer at ¶ 4 (“ECM’s actual customer base . . . is highly sophisticated”); Hrg. Tr. 21:8-10 (“The customer is fully informed of the evidence . . . [T]hey’re not fools. They’re sophisticated.”); *id.* at 28 (“ . . . ECM’s manufacture [sic] and distributor customers are sophisticated buyers who have a very well [sic] biochemical engineering understanding of the additive they buy”).

Dec. 12-13, 2013). In a final effort at compromise, Complaint Counsel offered to notify ECM before contacting customers and limit its requests in other respects. *Id.* at 12-15 (E-mail from Katherine Johnson to Respondent’s counsel, Dec. 6, 2013). Respondent refused and sought a protective order.

ARGUMENT

I. The Information Sought Is Necessary to Both Parties’ Claims and Defenses.

For three reasons, access to the full customer list is essential.⁴ First, the full list is necessary to identify customers who passed on ECM’s logos and certificates. Complaint Counsel may contact a subset of customers either by choosing those likely to have forwarded deceptive claims based on business size or type, or by random sampling and extrapolation to the full customer population. Alternatively, we may search customer websites, other advertising, or locate products at retail stores.⁵ Either way, we need the customer list to formulate a strategy, and it would be patently unfair to allow ECM to conceal its customers or otherwise dictate how Complaint Counsel proceeds.⁶

⁴ There should be no dispute that customer lists are relevant. *See, e.g., Market Dev. Corp.*, No. 9067 C, 1977 FTC LEXIS 76, at *3 (denying motion to quash subpoena for customer list); *Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, No. 1:12-CV-296, 2013 U.S. Dist. LEXIS 23797, at *3-4 (N.D. Ind. Feb. 21, 2013) (ordering disclosure of customer list, subject to “Attorneys’ Eyes Only” order); *Joint Tech., Inc. v. Weaver*, No. 11-846, 2013 U.S. Dist. LEXIS 12509, at *17-18 (W.D. Okla. Jan. 30, 2013) (compelling customer list); *Tama Plastic Indus. v. Pritchett Twine*, No. 8:12CV324, 2013 U.S. Dist. LEXIS 9607, *18-19 (D. Neb. Jan. 24, 2013) (same); *Asch/Grossbardt Inc. v. Asher Jewelry Co.*, No. 02 Civ. 5914, 2003 U.S. Dist. LEXIS 2837, at *7-9 (S.D.N.Y. Feb. 27, 2003); *ABC Rug & Carpet Cleaning Serv. v. ABC Rug Cleaners, Inc.*, No. 08 Civ. 5737, 2009 U.S. Dist. LEXIS 2314, at *10-12 (S.D.N.Y. Jan. 14, 2009) (ordering disclosure of customer list where relevance outweighed risk of potential economic harm).

⁵ With access to the full customer list, Complaint Counsel may be able to identify ads from enough customers that Complaint Counsel need not contact many customers directly. This would not only save Complaint Counsel’s resources, but also the resources of ECM’s customers who would otherwise need to comply with subpoenas. Disclosing the customer list is thus an effective way to contain litigation costs.

⁶ *Cf. Arlans Agency v. Gossett*, No. 93-2395/94-1079, 1995 U.S. App. LEXIS 1175, at *7 n.3 (6th Cir. Jan. 19, 1995) (“[E]ach party is responsible for his own litigation strategy.”). Granting ECM a protective order—which offers contact with 10 customers, a mere 3% of the customer base—ensures that Complaint Counsel cannot effectively show that ECM provided customers the means and instrumentalities to deceive consumers.

Second, a complete list is necessary to evaluate ECM's claim that its verbal communications altered customers' net impression. Neither Complaint Counsel nor the Court must accept ECM's self-serving characterizations of these communications. We need discovery to uncover the truth through the adversary process. Likewise, Complaint Counsel (and the Court) should not be forced to accept ECM's self-serving claim that its communications to all customers are the same. Resp. Mem. at 4; Sinclair Decl. ¶ 12. The mere fact that ECM's CEO says something does not make it true.

Third, Complaint Counsel needs a complete list to determine which customers—if any—are “sophisticated” and whether ECM's claims misled them. ECM raised this defense, and to evaluate it, Complaint Counsel must take discovery directly from these ostensibly sophisticated customers and evaluate their communications with ECM. Moreover, customer sophistication may vary depending on the customer's size, what products it makes, what resources it has, and many other variables. To ascertain which customers are likely to have the most probative information, Complaint Counsel needs the entire list.

However, rather than comply with its discovery obligations, ECM urges the Court to limit Complaint Counsel to contact with only 10 **former** customers from an unrepresentative list of 50 former customers (comprised of customers “who do not have orders pending” and excluding “ECM's top 10 revenue generating clients,” Resp. Mem. at 1). This represents less than 3% of ECM's current and former customers.⁷ Allowing ECM to restrict Complaint Counsel to a cherry-picked subset of its business ensures an incomplete record, whereas ordering ECM to comply with basic discovery obligations avoids this problem. Put simply, the Court should not permit ECM to flout its discovery obligations and dictate Complaint Counsel's litigation strategy.

⁷ ECM refused to disclose exact numbers, but indicated that it has approximately 260 current customers and more than 50 former customers.

II. ECM Cannot Establish That Disclosing Its Customer List Would Cause Any Harm.

Respondent must establish that the discovery “is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure.” *Roberson v. Bair*, 242 F.R.D. 130, 136 (D.D.C. 2007) (internal quotations omitted). Here, the disputed discovery is critical, *see supra*, and Respondent cannot demonstrate potential harm for three reasons. First, Mr. Sinclair already told Respondent’s customers about this litigation. Second, the Protective Order will keep trade secrets from competitors. Finally, Complaint Counsel will meet its obligation to make reasonable discovery accommodations.⁸

A. ECM Will Not Suffer Any Economic Harm.

ECM’s concern about its customers’ reaction to Complaint Counsel’s inquiries is overblown. CEO Robert Sinclair proudly proclaimed he has spoken to each current customer about the litigation. *See* Johnson Decl. Ex. 1, *Plastic News* Article (“Once his company knew the FTC was going to make its complaint, Mr. Sinclair said he spoke to each of the company’s current customers. ‘I told them we were going to fight it, because we believe in what we’re doing,’ he said. ‘I think, and time will tell, but **I believe every single one of them will stay by us.**’”) (emphasis added). Mr. Sinclair also issued a press release available on Respondent’s website and gave several interviews about this litigation. *See id.* at 4-19 (compilation of news articles).⁹

Given Mr. Sinclair’s disclosures, a recent decision from the Southern District of New York is instructive. In *Tiffany & Co. v. Costco Wholesale Corp.*, the Court ordered Costco to produce a customer list with each of the names of the 2,500 customers. No. 13 Civ. 1041, 2013 U.S. Dist. LEXIS 150495, *7 (S.D.N.Y. Oct. 18, 2013) (denying motion for protective order). Costco argued that it would suffer “extreme prejudice” resulting in “competitive disadvantage” if

⁸ Importantly, having the entire customer list is the only way for us to engage in an iterative e-discovery process that will allow us to limit the number of requested customer communications and reduce the burden on Respondent.

⁹ If ECM’s customers are as sophisticated as ECM claims, they also would be familiar with this litigation from the FTC’s press release and subsequent media coverage.

Tiffany were to contact each (or many) of its customers for interviews about Costco's advertising. *Id.* at *3. The court observed that the specter of harm to customers and the customer-Costco relationship was insufficient to outweigh the relevance of the information—particularly because Costco's fears were likely overstated: Costco had already notified its customers of the litigation. *Id.* at *5-6. Likewise, disclosing ECM's customer list will not cause any harm because Respondent's customers already know about this litigation and that Complaint Counsel might contact them.

Furthermore, not only is ECM's position belied by Mr. Sinclair's own conduct, the notion that ECM will lose customers Complaint Counsel contacts is purely speculative. Respondent claims that customers Complaint Counsel contacted have "ceased doing business with [Respondent]," *see* Resp. Mem. at 5, but Respondent omits the most salient fact: they stopped doing business with ECM because they were the subjects of FTC investigations and accepted consent orders prohibiting deceptive biodegradable claims.¹⁰ As far as Complaint Counsel is aware, none of ECM's current customers are similarly situated.

Finally, ECM asserts that customers' supposed subpoena-response costs would cause "cessation of business relationships with ECM." *Id.* at 3. This argument is nonsensical because ending business with Respondent will not inoculate customers against subpoenas. Indeed, if Respondent's argument had merit, then customer lists would always be exempt from discovery. In reality, courts routinely require parties to produce them. *See supra* at 3 n.4.

B. The Protective Order Will Protect Any Trade Secrets From Competitors.

ECM cites a series of irrelevant "trade secret" decisions, but there is "no absolute privilege for trade secrets." *M-I LLC v. Stelly*, 733 F. Supp. 2d 759, 801 (S.D. Tex. 2010) (citation omitted); *see also Market Dev. Corp.*, No. 9067 C, 1977 FTC LEXIS 76, *2 (FTC Oct.

¹⁰ *See Am. Plastic Manuf., Inc.*, No. 1223291; *MacNeill Eng'g Co., Inc.*, No. 1223292. Respondent asserts that the FTC contacted three of Respondent's customers. Complaint Counsel is only aware of contacting two.

12, 1977) (“There is no privilege against producing . . . sensitive business information.”).¹¹

Obviously, the FTC is not a trade competitor, and the Protective Order ensures that Complaint Counsel cannot make Respondent’s customer list available to its competitors. Complaint Counsel is willing to negotiate reasonable enhanced protections from disclosure if ECM deems it necessary.

C. Complaint Counsel Remain Willing To Cooperate With ECM To Alleviate Any Minor Burden.

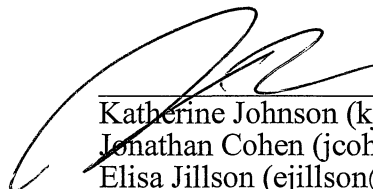
As Complaint Counsel has already proposed, if ECM produces its customer list, Complaint Counsel will limit its contacts to a subset of customers; give Respondent advance notice of such contacts; and negotiate search terms to reduce the number of customer communications responsive to discovery requests. However, Complaint Counsel cannot coordinate with ECM to make these accommodations until Respondent produces its list.

CONCLUSION

For these reasons, Complaint Counsel respectfully asks the Court to order Respondent to disclose a complete customer list, and to deny Respondent’s motion entirely.

Dated: December 30, 2013

Respectfully submitted,



Katherine Johnson (kjohnson3@ftc.gov)
Jonathan Cohen (jcohen2@ftc.gov)
Elisa Jillson (ejillson@ftc.gov)
Federal Trade Commission
600 Pennsylvania Ave., N.W. M-8102B
Washington, DC 20580
Phone: 202-326-2185; -2551; -3001
Fax: 202-326-2551

¹¹ The notion that its customer list is a “trade secret” is dubious given Mr. Sinclair’s casual disclosure of customer names in press photos. See Johnson Decl. Ex. 1, *Plastic News* Article (including photo with a smiling Sinclair posing with several of his customers’ products (with product names clearly visible)).

CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2013, I caused a true and correct copy of the foregoing Complaint Counsel's Motion to Place Discovery Motions on the Public Record to be served as follows:

One electronic copy through the FTC E-File system and one electronic courtesy copy 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.gov

One paper and 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 the Respondent:**


Jonathan W. Emord
Emord & Associates, P.C.
11808 Wolf Run Lane
Clifton, VA 20124
Email: jemord@emord.com

Peter Arhangelsky
Emord & Associates, P.C.
3210 S. Gilbert Road, Suite 4
Chandler, AZ 85286
Email: parhangelsky@emord.com

Lou Caputo
Emord & Associates, P.C.
3210 S. Gilbert Road, Suite 4
Chandler, AZ 85286
Email: lcaputo@emord.com

I further certify that I possess a paper copy of the signed original of the foregoing document that is available for review by the parties and the adjudicator.

Date: December 30, 2013



Jonathan Cohen
Complaint Counsel

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

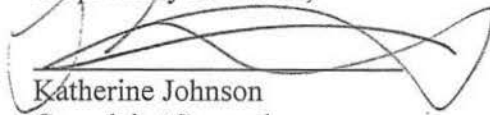
In the Matter of)	
)	
ECM BioFilms, Inc.,)	Docket No. 9358
a corporation, also d/b/a)	PUBLIC DOCUMENT
Enviroplastics International)	
)	

**COMPLAINT COUNSEL'S STATEMENT REGARDING MEET AND CONFER
PURSUANT TO SCHEDULING ORDER**

The undersigned counsel certifies that Complaint Counsel has met and conferred with counsel for Respondent ECM BioFilms, Inc., in a good faith effort to resolve by agreement the issues raised by Respondent's Motion for a Protective Order and Complaint Counsel's Opposition and Cross-Motion to Compel. On November 25, December 2-3, 12-13, Complaint Counsel (Katherine Johnson and Elisa Jillson) and Respondent's Counsel (Jonathan W. Emord, Peter A. Arhangelsky, and Lou Caputo) communicated by email about the issues that gave rise to these motions. Complaint Counsel (Katherine Johnson and Elisa Jillson) and Respondent's Counsel (Jonathan W. Emord, Peter A. Arhangelsky, and Lou Caputo) communicated by telephone on December 5 and 11 (only Arhangelsky for Respondent on December 11). Despite the good faith efforts of counsel to confer regarding these discovery issues, Complaint Counsel was unable to reach a resolution with Respondent's counsel and we remain at an impasse.

Dated: December 20, 2013

Respectfully submitted,



Katherine Johnson
Complaint Counsel
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Mailstop M-8102B
Washington, DC 20580

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)
)
)

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

Docket No. 9358
PUBLIC DOCUMENT

**DECLARATION OF KATHERINE JOHNSON IN SUPPORT OF COMPLAINT
COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR PROTECTIVE
ORDER AND CROSS-MOTION TO COMPEL RESPONDENT TO DISCLOSE
CUSTOMER AND DISTRIBUTOR NAMES**

I, Katherine Johnson, declare:

1. I am over 18 years of age, and I am a citizen of the United States. I am employed by the Federal Trade Commission ("FTC") as an attorney in the Division of Enforcement in the Bureau of Consumer Protection. My work address is 600 Pennsylvania Ave., NW, Mailstop M-8102B, Washington, DC 20580. I am an attorney of record in the above-captioned matter, and I have personal knowledge of the facts set forth herein.

2. Attached hereto as Exhibit 1, is a true and correct copy of press articles related to this matter received by me through the FTC's press office.

3. Attached hereto as Exhibit 2, is a true and correct copy of the final transcript of the initial scheduling conference held by this Court on November 21, 2013, that I received from the official court reporter.

4. Attached hereto as Exhibit 3, is a true and correct copy of various emails between Complaint Counsel and Respondent's Counsel.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 20th of December 2013 in Fairfax, VA.


Katherine Johnson
Complaint Counsel

Exhibit 1

Plastics News

CEO says FTC's claims degrade his firm

By: **Jeremy Carroll**

November 20, 2013



PAINESVILLE, OHIO — Saying the science is on his side and the Federal Trade Commission is "out of the loop," the CEO of ECM BioFilms Inc. pushed back against allegations the company misrepresented the biodegradability of its products.

The 16-year-old company believes it has properly advertised its biodegradable additives, ECM

MasterBatch Pellets, President and CEO Robert Sinclair said in an interview at the firm's headquarters in Painesville.

In a 16-page complaint, the FTC alleges the company has made unsubstantiated claims about biodegradability. According to the FTC, the product "will not completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal."

Before an update to the Green Guides in 2012, ECM BioFilms used marketing materials to say the product would break down in landfills in a time period between nine months and five years. In October 2012, when the Green Guides were updated, the company changed its language, putting an asterisk on its marketing materials when using the word "biodegradable," pointing to the fact that it will take longer than a year for the material to biodegrade in landfills.

"We thought we were the poster boys of following the Green Guides," Sinclair said.

The pellets ECM manufactures in Illinois are used in all sorts of products, including golf tees, bags, highlighters and water bottles.

PUBLIC DOCUMENT

Normal plastic does not biodegrade because typical bacteria and algae are not able to break down the material.

"Their acids and enzymes can't take these mega molecules and break them down far enough. So they need some help, and that's where our stuff comes in," Sinclair said. "Instead of the bacteria cell moving on, he hangs around for a little bit. And some more bacteria joins in, and all of a sudden they start making a biofilm."

That biofilm will eventually break down the plastic, he said. The materials break down in aerobic and anaerobic settings, Sinclair said, making landfills an acceptable destination for the plastics. During the biodegradation, the material gives off gas that is captured at many landfills for various uses, including making new resins or fuel.

He said the company went through ASTM 5511 testing that proves the product breaks down, but FTC said those tests do not properly replicate landfill conditions.

"The test results they provided to us, we believe, don't substantiate the claims they are making," said Katherine Johnson of the FTC's Bureau of Consumer Protection in a telephone interview.

"The commission does not believe ASTM 5511 simulates conditions found in landfills," Johnson said. "An ASTM 5511 test would not be adequate substantiation that a product would biodegrade in a landfill, at least if they relied on that protocol alone."

Sinclair said the company had asked what tests FTC would recommend, but was not given any options.

"We'll test to whatever," he said.

Johnson said FTC would look at any tests the company would conduct, but does not recommend tests for marketers.

"There are tests out there that could establish that plastic will biodegrade or these kinds of treated plastics will biodegrade in landfills," she said.

Sinclair said the objections were raised over how much moisture was used in the conducted tests.

"The moisture only affects the rate. It's not affecting the extent of biodegradation," he said. "If something is biodegradable, and it's in conditions where other things are biodegrading, it's going to biodegrade fully. It's just a matter of time."

PUBLIC DOCUMENT

And that "matter of time" might be key to the whole issue. FTC said the product will not break down in a "reasonably short period of time." ECM BioFilms thinks its product falls into that time frame, because under various conditions, it might take grass more than a year to biodegrade.

According to the new Green Guides, a plastic product can be labeled biodegradable if it can fully break down within one year of disposal. That restriction is unreasonable, Sinclair said.

"They talk about a reasonable time being a year or less — it's really insanity," he said. "The FTC, they're out of the loop. Purposely, they've been put out of the loop by interested parties. ... They don't get it. What they are doing is, they are basing things on information from the late '80s and early '90s. They haven't changed with the times. This technology is all different now.

"The truth is, the reason we are going to fight this out is, science is on our side," Sinclair said.

Once his company knew the FTC was going to make its complaint, Sinclair said he spoke to each of the company's current customers.

"I told them we were going to fight it, because we believe in what we're doing," Sinclair said. "I think, and time will tell, but I believe every single one of them will stay by us."

About two-thirds of the company's business is in the U.S., CFO Kenneth Sullivan said.

"Before they start buying our product, they test," Sullivan said about ECM BioFilms' customers. "They are not unsophisticated companies."

ECM BioFilms is challenging the commission's finding and a hearing is set for June 18 before an administrative law judge. That ruling could be appealed back to the FTC. That group's ruling could then be appealed to a federal appeals court.

"Of course we have to expense a huge amount of money. And they know that," Sinclair said. "And they've sullied our name. They have all the bargaining chips as far as that goes."

Link: <http://www.plasticsnews.com/article/20131120/NEWS/131129999>

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1 of 100 DOCUMENTS

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eWorldWire

October 30, 2013 Wednesday 12:15 AM EST

LENGTH: 609 words

HEADLINE: ECM BioFilms Responds to FTC Complaint: Claims Agency Overlooked Credible Scientific Evidence and Its Own Rules

BYLINE: ECM BioFilms

BODY:

Oct 30, 2013 (eWorldWire: Delivered by Newstex)

ECM BioFilms Inc. (ECM) today announced that it would defend itself against an administrative complaint filed by the Federal Trade Commission (FTC) staff against the company. The FTC action alleges that ECM made misleading claims that plastic products produced utilizing ECM's additive technology are biodegradable after customary disposal under most conditions including landfills because ECM lacks proof that the product eliminates 100 percent of plastics within one year of application.

"We disagree with the charge," said ECM President Robert Sinclair. "We have the scientific evidence that plastic products manufactured with our additives will fully biodegrade in landfills that accept municipal solid waste and in reasonable periods of time. A reasonable timeframe for landfill biodegradation is not one year, as the FTC changed their Green Guides to read as of October 1 of last year, but can be as much as decades. Even though we vehemently disagree with this arbitrary one year limit for landfills, we changed our claims from the unqualified 'biodegradable' claim to qualified biodegradability claims last year right after the newly revised Green Guides came out. Now the FTC is going further and is disregarding the consensus scientific view, as expressed in the ASTM Standard Test Methods, that the results of these tests are reflective of what will occur in real-world landfills."

"The FTC overlooks landfills as an important source of renewable energy," added Sinclair.

In the United States, renewable energy from the capture and use of the landfill gases produced by anaerobic biodegradation is over eight times as great as all the solar power generated. Manufacturing plants and other institutions all over the U.S. and the world are using this energy source to replace the energy they would be using from non-renewable sources. An example of this trend is the GM Orion Assembly Plant near Detroit, Mich., that derives 40 percent of its total energy needs from landfill gas. Furthermore, this practice is promoted through the Environmental Protection Agency (EPA) in their Landfill Methane Outreach Program (LMOP). If all of the currently non-biodegradable plastics disposed of in landfills were instead biodegradable by incorporating ECM's additive technology, the renewable energy yield of these same landfill facilities would increase by over 20 percent.

ECM BioFilms Responds to FTC Complaint: Claims Agency Overlooked Credible Scientific Evidence and Its Own Rules eWorldWire October 30, 2013 Wednesday 12:15 AM EST

An expert in the study of landfills, Dr. Ronald Sahu, performed an independent evaluation of the product and concluded that "biodegradation of plastics modified by **ECM** Additive is not only assured, it is unavoidable in municipal landfills." Dr. Sahu concluded that it is unquestionable that the **ECM BioFilms'** additive technology allows the microorganisms in all municipal landfills to biodegrade plastic products' polymer structure, causing a mass loss of plastic material by the biota's conversion of its hydrocarbons into biogases.

"We are a small, moderately successful company with an exciting product that is the right product at the right time, and we find ourselves in the crosshairs of an aggressive and arbitrary enforcement action by a regulatory agency that has somehow overlooked credible scientific evidence, as well as its own rules," **Sinclair** concluded. "In effect, should the **FTC** prevail, consumers and the environment lose."

ECM BioFilms is available online at <http://www.ecmbiofilms.com>.

HTML: <http://www.eworldwire.com/pressreleases/212885>

PDF: <http://www.eworldwire.com/pdf/212885.pdf>

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LOAD-DATE: October 30, 2013



2 of 100 DOCUMENTS

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Plastics News
Print Version

November 4, 2013

SECTION: Pg. 1 Vol. 25

LENGTH: 562 words

HEADLINE: ECM BioFilms bucking FTC allegations

BYLINE: Jeremy Carroll

BODY:

The U.S. **Federal Trade Commission** has taken aim at five plastics companies, alleging they used false or misleading claims of biodegradability. But one of those companies plans to fight the charges, saying it will win in the long run.

In an announcement of the action, the **FTC** said **ECM BioFilms** Inc., American Plastic Manufacturing, Champ, Clear Choice Housewares Inc. and Carnie Cap Inc. all made unsupported claims that their plastic products were biodegradable, the agency said. All but **ECM BioFilms** have agreed to a consent pact.

ECM BioFilms, based in Painesville, Ohio, claims that plastic products made with its additives will biodegrade in biologically active environments after more than a year. The company uses an asterisk on its marketing materials when using the word "biodegradable," pointing to the fact that it will take longer than a year for the material to biodegrade in landfills.

According to **FTC's** latest Green Guides, a company is allowed to market a product as biodegradable without a qualifier if the product breaks down in less than a year. **FTC** does not have guidelines on how to market products with a qualifier, according to **ECM BioFilms**.

"We believe fully that we're going to win in the long run," **ECM BioFilms** President **Robert Sinclair** said in an interview.

ECM BioFilms bucking FTC allegations Plastics NewsPrint Version November 4, 2013

He said the company has independent tests proving the products biodegrade in atmospheres that mimic landfills. A previous notice on its products said they would biodegrade in nine months to five years.

"[The **FTC**] can't get themselves around it. They are going against the science," **Sinclair** said.

The **FTC** alleges that **ECM BioFilms** is misrepresenting its products with claims that plastics made from the additives are biodegradable and will completely break down "within a reasonably short period of time," that the plastics will biodegrade in a landfill and that scientific tests prove the firm's claims.

The complaint says **ECM** should be prohibited from making the claims.

Two of the other companies named by **FTC**, Seattle-based American Plastic Manufacturing and Champ (a brand of MacNeill Engineering Co. Inc. of Marlborough, Mass.) are customers of **ECM**. American Plastic Manufacturing sold plastic shopping bags that were marketed as biodegradable and Champ sold plastic golf tees marketed as biodegradable, according to the **FTC**.

Clear Choice Housewares of Leominster, Mass., and Carnie Cap of East Moline, Ill., are facing similar allegations. **FTC** said Clear Choice Housewares was a customer of another additive manufacturer, Bio-Tec Environmental LLC, and marketed "biodegradable" plastic food-storage containers. Carnie Cap used an additive manufactured and marketed by Ecologic for its plastic rebar cap covers that claimed to be "100 percent biodegradable," **FTC** said.

None of those companies face a financial penalty, but they have agreed to stop using the marketing.

FTC said the action is to ensure compliance with the agency's Green Guides.

"It's no secret that consumers want products that are environmentally friendly, and that companies are trying to meet that need," said Jessica Rich, director of the **FTC** Bureau of Consumer Protection, in a statement. "But companies that don't have evidence to support the environmental claims they make about their products erode consumer confidence and undermine those companies that are playing by the rules."

FTC has scheduled a June hearing for **ECM**.

LOAD-DATE: November 7, 2013



5 of 100 DOCUMENTS

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CRAIN'S
CLEVELAND BUSINESS
Crain's Cleveland Business
Print Version

November 25, 2013

SECTION: Pg. 7 Vol. 34

LENGTH: 940 words

HEADLINE: Head of **ECM BioFilms** says **FTC** has 'sullied our name';
Company denies that it made unsubstantiated claims about biodegradability of its products

BYLINE: JEREMY CARROLL

BODY:

Saying science is on his side and the **Federal Trade Commission** is "out of the loop," the CEO of **ECM BioFilms** Inc. has pushed back against allegations the company misrepresented the biodegradability of its products.

The 16-year-old company believes it properly has advertised its biodegradable additives, **ECM MasterBatch Pellets**, said president and CEO **Robert Sinclair** in an interview at the company's headquarters in Painesville.

In a 16-page complaint, the **FTC** alleges **ECM BioFilms** has made unsubstantiated claims about biodegradability. According to the **FTC**, the product "will not completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal."

Before an update last year to the **FTC's** "Green Guides," **ECM BioFilms** used marketing materials to say the product would break down in landfills in a time period between nine months and five years. In October 2012, when the Green Guides were updated, the company changed its language, putting an asterisk on its marketing materials when using the word "biodegradable," noting that it will take longer than a year for the material to biodegrade in landfills.

"We thought we were the poster boys of following the Green Guides," Mr. **Sinclair** said.

The pellets **ECM BioFilms** manufactures in Illinois are used in various products, including golf tees, bags, highlighters and water bottles.

Head of ECM BioFilms says FTC has 'sullied our name'; Company denies that it made unsubstantiated claims about biodegradability of its products Crain's Cleveland BusinessPrint Version N

Normal plastic does not biodegrade because typical bacteria and algae are not able to break down the material.

"Their acids and enzymes can't take these mega molecules and break them down far enough. So they need some help, and that's where our stuff comes in," Mr. **Sinclair** said. "Instead of the bacteria cell moving on, he hangs around for a little bit. And some more bacteria joins in, and all of a sudden they start making a **biofilm**."

That biofilm eventually will break down the plastic, he said. The materials break down in aerobic and anaerobic settings, Mr. **Sinclair** said, making landfills an acceptable destination for the plastics. During the biodegradation, the material gives off gas that is captured at many landfills for various uses, including making new resins or fuel.

Mr. **Sinclair** said the company went through ASTM 5511 testing that proves the product breaks down, but the **FTC** said those tests do not properly replicate landfill conditions.

"The test results they provided to us, we believe, don't substantiate the claims they are making," said Katherine Johnson of the **FTC's** Bureau of Consumer Protection in a telephone interview.

"The commission does not believe ASTM 5511 simulates conditions found in landfills," Ms. Johnson said. "An ASTM 5511 test would not be adequate substantiation that a product would biodegrade in a landfill, at least if they relied on that protocol alone."

Test prep

Mr. **Sinclair** said the company had asked what tests the **FTC** would recommend, but was not given any options.

"We'll test to whatever," he said.

Ms. Johnson said the **FTC** would look at any tests the company would conduct, but does not recommend particular tests.

"There are tests out there that could establish that plastic will biodegrade or these kinds of treated plastics will biodegrade in landfills," she said.

Mr. **Sinclair** said objections were raised over how much moisture was used in the conducted tests.

"The moisture only affects the rate. It's not affecting the extent of biodegradation," he said. "If something is biodegradable, and it's in conditions where other things are biodegrading, it's going to biodegrade fully. It's just a matter of time."

And that "matter of time" might be key to the whole issue. **FTC** said the product will not break down in a "reasonably short period of time." **ECM BioFilms** thinks its product falls into that time frame, because under various conditions, it might take less than a year to biodegrade.

According to the new Green Guides, a plastic product can be labeled biodegradable if it can fully break down within one year of disposal. That restriction is unreasonable, Mr. **Sinclair** said.

"They talk about a reasonable time being a year or less - it's really insanity," he said. "The **FTC**, they're out of the loop. Purposely, they've been put out of the loop by interested parties. ... They don't get it. What they are doing is, they are basing things on information from the late '80s and early '90s. They haven't changed with the times. This technology is all different now.

"The truth is, the reason we are going to fight this out is, science is on our side," Mr. **Sinclair** said.

Once his company knew the **FTC** was going to make its complaint, Mr. **Sinclair** said he spoke to each of the

Head of ECM BioFilms says FTC has 'sullied our name'; Company denies that it made unsubstantiated claims about biodegradability of its products Crain's Cleveland BusinessPrint Version N

company's current customers.

"I told them we were going to fight it, because we believe in what we're doing," he said. "I think, and time will tell, but I believe every single one of them will stay by us."

'All the bargaining chips'

About two-thirds of the company's business is in the United States, said chief financial officer Kenneth Sullivan.

"Before they start buying our product, they test," Mr. Sullivan said about **ECM BioFilms'** customers. "They are not unsophisticated companies."

ECM BioFilms is challenging the commission's finding and a hearing is set for June 18, 2014, before an administrative law judge.

That ruling could be appealed back to the **FTC**. That group's ruling could then be appealed to a federal appeals court.

"Of course we have to expense a huge amount of money. And they know that," Mr. **Sinclair** said. "And they've sullied our name. They have all the bargaining chips as far as that goes."

Jeremy Carroll is a staff reporter with Plastics News, a sister publication of Crain's Cleveland Business.

LOAD-DATE: November 28, 2013



7 of 100 DOCUMENTS

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ICIS Chemical Business

November 18, 2013

SECTION: MARKET INTELLIGENCE

LENGTH: 1153 words

BYLINE: Joe Kamalick

BODY:

QUOTE: "We do have the scientific evidence that plastic products manufactured with our additives will fully biodegrade in landfills"

PHOTO CAPTION: **FTC** probes claims of biodegradability

PHOTO CREDIT: Rex Features

STANDFIRST: Authorities challenge claims that products will decompose in landfill in a short time

The US **Federal Trade Commission (FTC)** has launched a new wave of enforcement actions against plastics and additives producers who contend that their products are biodegradable.

In what may prove to be a benchmark case, the **FTC** has alleged that a plastics and additives producer, **ECM Biofilms**, misrepresented its products and additives by claiming that they were biodegradable and would completely break down within a reasonably short time after disposal.

The commission also alleged that **ECM**, of Painesville, Ohio, improperly claimed that its plastics are biodegradable in landfills and that "various scientific tests prove **ECM's** biodegradability claims".

Lastly, **FTC** said that by distributing its promotional materials to its customers and distributors, **ECM** provided them "with the means to deceive consumers" about the biodegradability of its products.

ICIS Chemical Business November 18, 2013

"The complaint alleges that these purportedly biodegradable plastics do not in fact biodegrade within a reasonably short period of time after disposal in a landfill," the **FTC** said in charging **ECM**.

In addition, the commission "alleges that **ECM** has no substantiation to support its claims that its additive makes plastic biodegradable". But **ECM** president **Robert Sinclair** rejected the **FTC** charges and said his company would "vigorously defend itself" against the commission's allegations.

"We are bewildered by the charges," **Sinclair** said. "We do have the scientific evidence that plastic products manufactured with our additives will fully biodegrade in landfills ... and in reasonable periods of time."

It all comes down to what is considered a "reasonable period".

Sinclair said that he vehemently disagrees with **FTC's** criteria of just one year for "a reasonable time frame for landfill biodegradation". **Sinclair** argues that, based on real-world experience and science, a reasonable period for landfill degradation could be decades.

Despite that wide difference of opinion on degradation time frames, **Sinclair** said that **ECM** adjusted its biodegradability claims to comply with the revised Green Guides issued last year.

The "Green Guides" are non-obligatory criteria issued in revised form by the **FTC** in October 2012. The commission says the guides are designed "to help marketers ensure that the claims they make about the environmental attributes of their products are truthful and non-deceptive".

But now, said **Sinclair, the FTC** has moved the goal posts, changing what had been an undetermined "reasonable time" criteria in the earlier Green Guides to a sharply restrictive one-year standard.

The **FTC**, he said, "is going further and is disregarding the consensus scientific view, as expressed in the ASTM Standard Test Methods, that the results of these tests are reflective of what will occur in real-world landfills."

The international American Society for Testing and Materials (ASTM) sets thousands of voluntary consensus standards to ensure product quality and safety and to enhance consumer confidence.

The commission also targeted two of **ECM's** customers, American Plastic Manufacturing of Seattle, Washington, and the Champ Company, located at Marlborough, Massachusetts, alleging that the two firms could not claim that their plastic end-use products were biodegradable "based on the use of additives sold by **ECM**".

The FTC also charged two other manufacturers of end-use plastic products - unrelated to **ECM** - with making "false and unsubstantiated claims" that additives made their products "quickly biodegradable in landfills" or that they were "100% biodegradable".

The four firms were charged with "misrepresenting that plastics treated with additives are biodegradable, biodegradable in a landfill, biodegradable in a certain time frame, or shown to be biodegradable in a landfill or that various scientific tests prove their biodegradability claims" and that the companies "lacked reliable scientific tests to back up these claims".

In consent agreements accepted by all four end-use plastic product manufacturers, each firm is barred for 20 years "from making biodegradability claims unless the representations are true and supported by competent and reliable scientific evidence". If during the 20-year period of the consent decrees the firms should again cross the **FTC's** line of biodegradability, they could face large fines.

"Consistent with the Green Guides, the companies must have evidence that the entire plastic product will completely decompose into elements found in nature within one year after customary disposal ... before making any unqualified biodegradable claim", the **FTC** said.

ICIS Chemical Business November 18, 2013

Noting that the action against **ECM** and some of its customers is the first that **FTC** has launched under the new Green Guides, **FTC** attorney Katherine Johnson said that "We are concerned that these false claims of biodegradability could become more widespread absent the actions that we're taking".

Johnson is the **FTC's** lead attorney in the case against **ECM**.

As the enforcement action against EMC and some of its customers shows, manufacturers of end-use plastic products are equally vulnerable to **FTC** enforcement actions on biodegradability issues as are additives producers.

"They are as liable as the additives producers," said Johnson. If end-use product manufacturers "pass along biodegradability claims from the additives manufacturer, they are responsible for ensuring that those claims are substantiated".

Sinclair is sympathetic to his two customers who signed consent deals with the **FTC** in the case, saying they had to sign in order to avoid the costs of litigation.

"Most of our customers are major firms, and they understand that the **FTC** is jumping into a controversy that they shouldn't be in, that they, the **FTC**, are on the wrong side of the science," he said.

Although the four end-use plastic product manufacturers were not fined or otherwise penalised, the **FTC's** Johnson said the consent agreement approach is an effective deterrent.

"The deterrence is in these companies' exposure to possible civil penalties if they engage in the same misrepresentations in the future," she said, adding: "We've found that getting them under a [consent agreement] order is a good way to effect compliance."

But **ECM** isn't going along.

Sinclair said his company will contest the **FTC** charges in administrative proceedings before the commission. An **FTC** administrative law judge will hear the case. If that in-house judge rules in favor of the commission, EMC would have to appeal to the **FTC** commissioners themselves.

If the commissioners then rule against EMC, the company could at last take the case into federal court for a first-time hearing outside of the **FTC**.

It could take years.

LOAD-DATE: November 19, 2013



9 of 100 DOCUMENTS

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Chemical News & Intelligence

November 7, 2013 Thursday

LENGTH: 1269 words

HEADLINE: INSIGHT: US targets claims of biodegradable in plastics

BODY:

By Joe Kamalick

US is changing criteria for biodegradable plastics WASHINGTON (ICIS)--The US **Federal Trade Commission** ([1]**FTC**) has launched a new wave of enforcement actions against plastics and additives producers who contend that their products are biodegradable.

In what may prove to be a benchmark case, the [2]**FTC** has alleged that a plastics and additives producer, [3]**ECM Biofilms**, misrepresented its products and additives by claiming that they were biodegradable and would completely break down within a reasonably short time after disposal.

The commission also alleged that **ECM**, of Painesville, Ohio, improperly claimed that its plastics are biodegradable in landfills and that "various scientific tests prove **ECM's** biodegradability claims".

Lastly, **FTC** said that by distributing its promotional materials to its customers and distributors, **ECM** provided them "with the means to deceive consumers" about the biodegradability of its products.

"The complaint alleges that these purportedly biodegradable plastics do not in fact biodegrade within a reasonably short period of time after disposal in a landfill," the **FTC** said in charging **ECM**.

In addition, the commission "alleges that **ECM** has no substantiation to support its claims that its additive makes plastic biodegradable".

But **ECM** president **Robert Sinclair** rejected the **FTC** charges and said his company would "vigorously defend itself" against the commission's allegations.

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"We do have the scientific evidence that plastic products manufactured with our additives will fully biodegrade in landfills ... and in reasonable periods of time," **Sinclair** said.

INSIGHT: US targets claims of biodegradable in plastics Chemical News & Intelligence November 7, 2013 Thursday

It all comes down to what is considered a "reasonable period".

Sinclair said that he vehemently disagrees with **FTC's** criteria of just one year for "a reasonable time frame for landfill biodegradation". **Sinclair** argues that, based on real-world experience and science, a reasonable period for landfill degradation could be decades.

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The "[4]Green Guides" are non-obligatory criteria issued in revised form by the **FTC** in October 2012. The commission says the guides are designed "to help marketers ensure that the claims they make about the environmental attributes of their products are truthful and non-deceptive".

But now, said **Sinclair**, the **FTC** has moved the goal posts, changing what had been an undetermined "reasonable time" criteria in the earlier Green Guides to a sharply restrictive one-year standard.

The **FTC**, he said, "is going further and is disregarding the consensus scientific view, as expressed in the ASTM Standard Test Methods, that the results of these tests are reflective of what will occur in real-world landfills."

The international American Society for Testing and Materials ([5]ASTM) sets thousands of voluntary consensus standards to ensure product quality and safety and to enhance consumer confidence.

The commission also targeted two of **ECM's** customers, American Plastic Manufacturing of Seattle, Washington, and the Champ Company, located at Marlborough, Massachusetts, alleging that the two firms could not claim that their plastic end-use products were biodegradable "based on the use of additives sold by **ECM**".

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INSIGHT: US targets claims of biodegradable in plastics Chemical News & Intelligence November 7, 2013 Thursday

products are equally vulnerable to **FTC** enforcement actions on biodegradability issues as are additives producers.

"They are as liable as the additives producers," said Johnson. If end-use product manufacturers "pass along biodegradability claims from the additives manufacturer, they are responsible for ensuring that those claims are substantiated".

Sinclair is sympathetic to his two customers who signed consent deals with the **FTC** in the case, saying they had to sign in order to avoid the costs of litigation.

He said the **FTC** case against EMC has not had broad effect on his customers.

"We keep our customers informed, and we told them that this was in the works," he said, adding that "as far as we know, there's no customers that we've lost."

"Most of our customers are major firms, and they understand that the **FTC** is jumping into a controversy that they shouldn't be in, that they, the **FTC**, are on the wrong side of the science," he said.

Although the four end-use plastic product manufacturers were not fined or otherwise penalised, the **FTC's** Johnson said the consent agreement approach is an effective deterrent.

"The deterrence is in these companies' exposure to possible civil penalties if they engage in the same misrepresentations in the future," she said, adding: "We've found that getting them under a [consent agreement] order is a good way to effect compliance."

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If the commissioners then rule against EMC, the company could at last take the case into federal court for a first-time hearing outside of the **FTC**.

It could take years.

"We are prepared to go the distance," **Sinclair** said. "They are so wrong, they are on the wrong side of the science. So we got to go to court, yes."

Paul Hodges studies key influences shaping the chemical industry in [6]Chemicals and the Economy Bookmark John Richardson and Malini Hariharan's [7]Asian Chemical Connections blog

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LOAD-DATE: November 8, 2013



10 of 100 DOCUMENTS

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Plain Dealer (Cleveland, OH)

October 30, 2013 Wednesday

SECTION: A; Pg. 012

LENGTH: 344 words

HEADLINE: Company fights **FTC** over 'green' complaint

BODY:

A Painesville company and the **Federal Trade Commission** are battling over the company's claims that its additives make plastic biodegradable.

The **FTC** announced Tuesday that it had filed an administrative complaint against **ECM BioFilms**, which sells additives to plastics manufacturers. The agency claims the additives don't break down plastics fast enough to meet its guidelines for eco-friendly claims.

"We are fighting this completely," said Bob **Sinclair**, **ECM**'s president, who said the agency has abandoned science for folklore. "They're just substituting their ideas for the scientific community's."

The **FTC** last fall changed its Green Guides, which warn marketers about the kinds of broad "eco-friendly" claims the agency could consider to be deceptive.

The updated guides say that for a company to claim a product is biodegradable, it must either prove the product will break down into natural elements within a year or specifically qualify its claims.

At the time of the change, the agency cautioned companies against making biodegradability claims for items destined for landfills or recycling facilities, because those disposal methods could add to the time it takes for a product to break down.

"We feel we are following the Green Guides," **Sinclair** said, noting that the company changed its claims when the guides went into effect to reflect a range of years that it might take for products to break down, depending on the environment.

He said he hoped to rally others to join the fight against the **FTC**'s interpretation of the guides. "This is a new industry. ... The consent orders they want us to sign would put us out of business."

The **FTC** said it had simultaneously filed administrative complaints against plastic-bag maker American Plastic

Company fights FTC over 'green' complaint Plain Dealer (Cleveland, OH) October 30, 2013 Wednesday

Manufacturing: golf-tee maker Champ; Clear Choice, which makes reusable food containers; and Carnie Cap Inc., which makes what it claimed were biodegradable rebar cap covers.

The **FTC** also announced that AJM Packaging Corp. had agreed to a consent order to substantiate claims it makes for its paper plates, cups and napkins.

GRAPHIC: Garbage is seen at Cleveland's Ridge Road waste transfer station, Thursday, June 14, 2012. Mayor Frank Jackson wants to build a waste-to-energy plant at this site. In this area, recyclables are processed and trash is prepared for shipment to landfills. (Marvin Fong / The Plain Dealer)

LOAD-DATE: October 31, 2013

Exhibit 2

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FEDERAL TRADE COMMISSION

In the Matter of)
ECM BioFilms, Inc.,)
a corporation, also d/b/a) Docket No. 9358
Envioplastics International,)
Respondent.)
-----)

November 21, 2013
2:06 p.m.

INITIAL PREHEARING CONFERENCE

BEFORE THE HONORABLE D. MICHAEL CHAPPELL
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C.

Reported by: Josett F. Whalen, RMR-CRR

1 APPEARANCES:

2

3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:

4 KATHERINE JOHNSON, ESQ.

5 ELISA K. JILLSON, ESQ.

6 Federal Trade Commission

7 Bureau of Consumer Protection

8 Division of Enforcement

9 600 Pennsylvania Avenue, N.W.

10 Washington, D.C. 20580-0000

11 (202) 326-2185

12 kjohnson3@ftc.gov

13

14 ON BEHALF OF RESPONDENT:

15 JONATHAN W. EMORD, ESQ.

16 Emord & Associates, P.C.

17 1050 17th Street, N.W.

18 Suite 600

19 Washington, D.C. 20036

20 (202) 466-6937

21 jemord@emord.com

22

23

24

25

1 P R O C E E D I N G S

2 - - - - -

3 JUDGE CHAPPELL: Call to order Docket 9358,
4 In Re ECM BioFilms, Inc.

5 I'll start with the appearances of the parties,
6 government first.

7 MS. JOHNSON: At the podium, Your Honor?

8 JUDGE CHAPPELL: You can either move here or
9 just stand and speak into the microphone.

10 MS. JOHNSON: Good afternoon, Your Honor.
11 Katherine Johnson for complaint counsel.

12 MS. JILLSON: And Elisa Jillson for complaint
13 counsel.

14 JUDGE CHAPPELL: And for respondent?

15 MR. EMORD: Jonathan Emord on behalf --

16 JUDGE CHAPPELL: You need to speak to address
17 the court or I don't hear you.

18 MR. EMORD: I'm sorry, Your Honor?

19 JUDGE CHAPPELL: You need to stand when you
20 speak to address the court.

21 MR. EMORD: All right.

22 Jonathan Emord on behalf of respondent's
23 counsel.

24 JUDGE CHAPPELL: Thank you.

25 Our office will e-mail courtesy copies of

1 orders to the parties, and these will be courtesy
2 copies. Official service is made by the
3 Office of the Secretary.

4 I'll need each party to designate no more than
5 two individuals to receive communications from the
6 OALJ, so I'll need you to send an e-mail to
7 oalj@ftc.gov to inform us of the e-mail addresses of
8 the two individuals you want to designate to receive
9 communications from my office.

10 The scheduling order in the case was e-mailed to
11 the parties. I see that there are no revisions
12 suggested or modifications. Is that correct?

13 MR. EMORD: That is correct, Your Honor.

14 MS. JOHNSON: Yes, Your Honor.

15 JUDGE CHAPPELL: Okay. The order will be
16 issued, pursuant to the rules, no later than Monday.

17 The trial is limited in time, and pursuant to
18 rule 3.41(b), we're limited to no more than 210 hours.
19 I'll need the parties to come up with a system or a
20 mechanism to keep track of time.

21 Let's talk about settlement discussions.

22 Who wants to give me a status?

23 MS. JOHNSON: I will, Your Honor,
24 Katherine Johnson for complaint counsel.

25 We've -- we've had settlement discussions over

1 the -- before this case even began. We did have our
2 mandatory meeting prior to this scheduling conference.
3 We've talked about it. The parties are not in agreement
4 over settlement.

5 JUDGE CHAPPELL: Not in agreement over what
6 "a short period of time" means?

7 MS. JOHNSON: We didn't discuss it to that level
8 of detail, Your Honor.

9 JUDGE CHAPPELL: You didn't get that far. Okay.
10 Thank you.

11 Anything to add to that?

12 MR. EMORD: I just would concur.

13 JUDGE CHAPPELL: Okay. At this time I'll allow
14 each side to make a presentation or overview of their
15 case, limited to 15 minutes.

16 Because this hearing is open to the public, to
17 the extent there is any confidential information
18 involved, I don't want you to reveal it at this
19 hearing.

20 I'll start with the government. Go ahead,
21 whenever you're ready.

22 MS. JOHNSON: Thank you, Your Honor.

23 Your Honor, this is a simple and
24 straightforward case. ECM makes express and implied
25 claims about its additives that are untrue and

1 unsubstantiated.

2 ECM's violations of the FTC Act are clear, and
3 the remedies that we seek in this case are warranted.

4 Your Honor, ECM would like you to think that
5 this case is about the First Amendment, but as the
6 Supreme Court stated in Central Hudson, there is no
7 First Amendment protection for deceptive commercial
8 speech.

9 So what are ECM's claims and why are they
10 deceptive?

11 By and large, ECM's claims are express. ECM
12 made two slightly different express claims over time.

13 The first one was prior to October 2012. ECM
14 claimed that plastics treated with the ECM additive will
15 completely biodegrade in nearly all landfills in a
16 period of time of nine months to five years.

17 After the release of the FTC's revised
18 Green Guides, ECM modified its claim to state that
19 plastics treated with the ECM additive would completely
20 biodegrade in most landfills in some period of time
21 greater than a year.

22 Both of these claims are false and
23 unsubstantiated.

24 Further, with its logos and certificates, ECM
25 passed along express and implied claims through its

1 customers and its distributors to end-use consumers that
2 were also false and unsubstantiated.

3 JUDGE CHAPPELL: Did you say that the new claim
4 said some period of time greater than one year?

5 MS. JOHNSON: Yes, Your Honor.

6 JUDGE CHAPPELL: And you said that's false?

7 MS. JOHNSON: Yes, Your Honor.

8 The -- it's false because they continued to make
9 express claims throughout their entire Web site that
10 still said the nine-month-to-five-year claim, and it's
11 false because things don't require -- I mean, if you're
12 talking, you know, things -- all things at all time will
13 eventually biodegrade, that's correct, so --

14 JUDGE CHAPPELL: So greater than one year can be
15 a long time.

16 MS. JOHNSON: It could be, but it would be a
17 meaningless claim if it didn't mean anything -- didn't
18 mean about a year.

19 JUDGE CHAPPELL: I also saw a phrase throughout
20 the complaint "a short period of time."

21 How do you define "a short period of time"?

22 MS. JOHNSON: Well, we don't need to define
23 "a short period of time here," Your Honor, because ECM
24 made express claims of nine months to five years, so
25 just focused on the claims, the express claims that ECM

1 made --

2 JUDGE CHAPPELL: Well, you need to answer my
3 question.

4 MS. JOHNSON: Oh, sure.

5 JUDGE CHAPPELL: What do you think "a short
6 period of time" means?

7 MS. JOHNSON: Me personally or the government?
8 Your Honor, the short, you know --

9 JUDGE CHAPPELL: No. You're speaking for
10 complaint counsel.

11 MS. JOHNSON: Yes, yes. Yes, Your Honor.

12 So if you're talking about the language "in a
13 reasonable period of time," that language in the --
14 there's some guidance in the Green Guides that says
15 consumers would understand that to mean a period of
16 time of one year -- of about one year for an unqualified
17 claim.

18 So if ECM's claims were that its product is --
19 you know, once added to a plastic makes the plastic
20 biodegradable, then -- and that claim gets passed down
21 to consumers, consumers can reasonably interpret that to
22 mean in one year in a landfill.

23 JUDGE CHAPPELL: Okay. If I understood you
24 earlier, it's your position that whatever period of time
25 is necessary is not an issue in the case, since you said

1 you don't need to prove it?

2 MS. JOHNSON: To prove?

3 Can you repeat the question, Your Honor. I'm
4 sorry.

5 JUDGE CHAPPELL: I asked you how do you define
6 "a short period of time" and you said you don't need to
7 prove that.

8 MS. JOHNSON: For purposes of the claims that
9 ECM is making that we're challenging, the express
10 claims, we will not need to prove because they -- these
11 claims are express. They expressly say nine months to a
12 year.

13 JUDGE CHAPPELL: So we don't need to have any
14 evidence on these consumer surveys you referred to where
15 consumers seem to think it means a year or less?

16 MS. JOHNSON: To the extent that our
17 allegations are that ECM made implied claims, these
18 unqualified biodegradable claims, through its logos and
19 certificates that it passed down from its distributors
20 to end-use consumers, then it's -- at the very least,
21 they intended to convey the express claims that they
22 were making on their Web site, and if they -- or they
23 also -- or excuse me -- and they also could -- could
24 have -- excuse me -- those claims could reasonably have
25 been interpreted by consumers, which was the ultimate

1 intended audience, to mean one year or less, then we
2 will put on extrinsic evidence about that.

3 JUDGE CHAPPELL: All right. Go ahead.

4 MS. JOHNSON: So as I was saying, Your Honor,
5 ECM in its answer admits that the claim -- admits its
6 claim that plastics treated with its additive will
7 completely biodegrade in landfills. ECM's marketing
8 materials, its brochures, its fliers, its Web site,
9 repeatedly make express claims that this process will
10 happen in nine months to five years.

11 As an example, of these express claims that ECM
12 has on its Web site, I'm going to read a direct quote
13 from ECM's marketing materials:

14 "Plastic products made with our additives will
15 break down in approximately nine months to five years in
16 nearly all landfills."

17 And another quote from its marketing materials:

18 "The time frame of between nine months to five
19 years will give a good general idea for most
20 conditions."

21 These claims leave little room for ambiguity or
22 interpretation. Even after ECM revised its claim on its
23 Web site to state that plastics treated with its
24 additive would take some period of time greater than a
25 year, this nine-month-to-five-year language remained

1 unaltered throughout its Web site.

2 JUDGE CHAPPELL: So you're saying that it
3 wouldn't biodegrade in five years?

4 MS. JOHNSON: Yes, Your Honor.

5 JUDGE CHAPPELL: All right.

6 MS. JOHNSON: So why are these claims deceptive?
7 There are two reasons. ECM's are false, and ECM's
8 claims are not supported by competent and reliable
9 scientific evidence.

10 For the falsity, there are two reasons why these
11 claims are false. First has to do with the blending
12 process that ECM uses. The process of physically
13 blending the additive in with a conventional plastic
14 doesn't change the underlying chemical characteristics
15 of the conventional plastic.

16 JUDGE CHAPPELL: Let's hold on a second.

17 What competent and reliable scientific evidence
18 does the government say is required?

19 MS. JOHNSON: They would need to have testing
20 that was appropriate and would substantiate the kinds
21 of claims that they're making. They're making claims
22 of complete biodegradation. They need to have tests
23 that show either, you know, complete, full
24 biodegradation of the tested sample, or they could have
25 a test that could run up to 90 percent perhaps.

1 I mean, there are the science -- the testimony
2 that we'll put on through our expert will explain that
3 there are ways to substantiate these kinds of claims.
4 Or they could make qualified claims that fit the kinds
5 of testing that's out there for this, you know, to test
6 these kinds of additives.

7 JUDGE CHAPPELL: All right.

8 MS. JOHNSON: So we will put on testimony from
9 a leading expert in plastics engineering who also has a
10 specialty in biodegradable polymers, and he will
11 explain that it normally takes hundreds of thousands of
12 years for conventional plastics to biodegrade and that
13 the reason for this just has to do with chemical
14 characteristics of plastics, conventional plastics.

15 And the expert will further explain that the
16 blending process that ECM employs is a physical blend
17 of the additive with the conventional plastics. It's
18 still 99 percent conventional plastic that's inherently
19 nonbiodegradable, and he'll explain that there's nothing
20 about the process that ECM uses that would change the
21 chemical characteristics of the conventional plastic to
22 make it more susceptible to biodegradation after adding
23 the 1 percent additive.

24 So he'll explain that there's nothing about
25 ECM's process that would reduce the normal thousands of

1 years or hundreds of thousands of years that it would
2 take a conventional plastic to biodegrade, to reduce
3 that period to just a mere five years.

4 So the other reason why these claims are false
5 is that things just don't biodegrade very quickly in
6 landfills. And we are going to put on testimony from a
7 leading expert in landfill management and design. He's
8 highly respected in his field.

9 And he's going to explain that there are two
10 factors that affect the rates of biodegradation, the
11 presence of oxygen and the presence of moisture.

12 And he'll explain that landfills are generally
13 anaerobic environments that lack oxygen and that
14 biodegradation that takes place in anaerobic conditions
15 naturally takes place slower and much more slowly than
16 it would take place in the presence of oxygen.

17 So, for instance, something that would
18 decompose fully or biodegrade fully in a compost
19 environment that's oxygen rich in a few months could
20 take as long as years to decades to fully biodegrade in
21 a landfill.

22 The expert will also explain why moisture
23 affects the rate of biodegradation and that the
24 operational requirements of landfills today restrict
25 the amount of liquid infiltration and the amount of

1 moisture that can get into -- that could be added to
2 landfills and that by restricting infiltration of liquid
3 and the addition of liquid into landfills further slows
4 down the biodegradation process.

5 So by and large, landfills in the United States
6 have conditions that naturally slow down
7 biodegradation -- the rate of biodegradation.

8 And our expert, our landfill expert, will also
9 explain that these dry anaerobic conditions are not an
10 antiquated view of landfills but apply to most
11 landfills in the United States today.

12 So ECM's claim that plastics treated with their
13 additives will fully biodegrade in less than five years
14 in a landfill is tantamount to saying that it will
15 biodegrade faster than most organics will in a landfill,
16 and that claim is simply false.

17 In addition to the claims being false, the
18 claims are unsubstantiated, for two reasons. ECM didn't
19 use tests that were designed to support their claims,
20 and the data that they have from the testing that they
21 did conduct is invalid and can't support any reliable
22 conclusions.

23 So for the first point, the tests were not
24 designed to support their claims, the expert testimony
25 that we'll present will explain that the scientific

1 consensus is that the test methods that ECM used cannot
2 support claims of complete or full biodegradation, and
3 it cannot support claims of biodegradation in
4 landfills.

5 Even -- second, even if these tests could
6 support those claims, the tests were performed so
7 shoddily, so poorly that any of the data coming out of
8 those tests just can't be trusted. It's unreliable, and
9 so any of the results that we see just don't prove
10 anything.

11 Your Honor, as I stated in the beginning, this
12 case is straightforward. ECM makes remarkable claims
13 that it can take conventional plastics that would
14 normally take hundreds to thousands of years to fully
15 biodegrade and turn these plastics into plastics that
16 will biodegrade completely in five years in a landfill.

17 If these claims were true, it would be truly
18 revolutionary. It would revolutionize the plastics
19 industry. It would be a boon to environmentally
20 conscious consumers. But these claims simply are not
21 true, and quite frankly, they fly in the face of
22 scientific consensus, and they're unsubstantiated.

23 These claims clearly violate the FTC Act, and we
24 are entitled to the relief that we are seeking here.

25 Thank you, Your Honor.

1 JUDGE CHAPPELL: Go ahead.

2 MR. EMORD: Thank you, Your Honor.

3 A brief background of who the client is here and
4 who the respondent is.

5 Respondent ECM BioFilms, Enviroplastics
6 International, was founded in 1988 following its
7 owners' discovery of an additive that causes plastics
8 in biologically active environments to be attractive to
9 colonies of microorganisms whose acidic by-products and
10 enzymatic activity cause plastics to degrade.

11 JUDGE CHAPPELL: Are these products intended for
12 use anywhere other than a landfill?

13 MR. EMORD: They can be used anywhere that is in
14 an external environment and they can cause plastics to
15 degrade.

16 The principal aspect of this --

17 JUDGE CHAPPELL: Is there a target market for
18 the product?

19 MR. EMORD: Plastics manufacturers.

20 The government misconstrues who our target is
21 and who we advertise to. We advertise exclusively to a
22 very sophisticated market of plastic manufacturers and
23 distributors to plastics manufacturers.

24 JUDGE CHAPPELL: All right. Just so I'm clear,
25 because I'm coming in here with no idea of this other

1 than what I've read in pleadings, this is a product --
2 these pellets, for example, go into the hopper before
3 the plastic is extruded and manufactured. It's not
4 something you add in a pile of plastic that's going to a
5 landfill.

6 MR. EMORD: No. It is -- the product is given
7 to the plastics manufacturer. We're not the plastics
8 manufacturer.

9 The plastics manufacturer incorporates the
10 product in a 1 percent load or more of the product into
11 the -- 99 parts plastic, one part additive. It is
12 equally diffused throughout the product, throughout the
13 plastic. And it is then indefinitely used in the
14 marketplace for whatever. By the time it gets to a
15 landfill or other biologically active environment, it
16 then causes degradation.

17 The degradation occurs in anaerobic
18 environments. The product is designed to work in
19 anaerobic environments, not aerobic. It doesn't depend
20 on thermal degradation. It doesn't depend upon
21 photodegradation from the sun. It actually works
22 underneath in the landfill, and it hastens the
23 degradation of the plastic.

24 JUDGE CHAPPELL: If there's no oxygen, what is
25 the catalyst?

1 MR. EMORD: The catalyst is this enzymatic
2 activity which takes place because of the kinds of
3 anaerobic organisms that are attracted to this specific
4 ingredient, which I won't describe for reasons, trade
5 secret reasons. But that ingredient induces the
6 creation of these colonies.

7 It also does not depend upon the induction to
8 take place on a surface of the plastic per se. It can
9 happen on the sides. It can happen underneath. It
10 doesn't -- because it's evenly distributed throughout.

11 And these plastic manufacturers that are buying
12 this are very savvy. They are not the public.

13 JUDGE CHAPPELL: Let me ask you, what are the
14 typical uses? Are you aware are those, for example,
15 garbage bags or Tupperware bowls? What's a typical use
16 of it?

17 MR. EMORD: Well, you can use it in any kind of
18 plastic. The thing is, depending upon the thickness
19 and the variety of plastic, that determines the
20 relative level of degradation. Thick -- large, thick
21 plastics will degrade slower. Thin plastics will
22 degrade faster. And it is all dependent upon the
23 level, degree, quality and quantity of plastic.

24 Furthermore, in the Web site for this company
25 and overtly in their representations to their

1 clients -- which, by the way, most of the communication
2 with this select group of customers is verbal
3 interaction and it's almost constant. The manufacturer
4 is interacting with the company. The company is
5 interacting with the manufacturers. And that is the
6 principal -- you know, if we look at the net impression,
7 the overall net impression, it must include the
8 interactions that are verbal.

9 JUDGE CHAPPELL: But you're aware the Web site
10 is available to anybody; right?

11 MR. EMORD: The Web site anybody can go to.

12 JUDGE CHAPPELL: Anybody can click on that --

13 MR. EMORD: Sure.

14 JUDGE CHAPPELL: -- and then they can get some
15 idea in their head and go to Target, Kohl's, and say,
16 Look, this might have that in there and --

17 MR. EMORD: There would be a very big disconnect
18 because it's not promoted to consumers at all, so a
19 consumer buying a product in a store would not know that
20 it is an ECM ingredient-containing plastic. They just
21 wouldn't know.

22 JUDGE CHAPPELL: Although there might be a
23 biodegradation claim on a box of Hefty trash bags.

24 MR. EMORD: But that wouldn't be ECM's claim.
25 That would be a third-party claim.

1 As far as the product is concerned, the
2 additive-infused plastics, when they're in contact with
3 other biodegrading organic material, such as exists in
4 biodigesters and landfills, become a catalyst for the
5 breakdown of long hydrocarbon chains present in
6 petrochemical plastics.

7 And as I said, the mechanism is not
8 photodegradation. It's not thermal degradation. It's
9 dependent upon the enzymatic and acidic transformation
10 of plastic polycarbons.

11 And the -- one of the remarkable things about
12 this -- and this is fully consistent -- the process is
13 recognized and encouraged by the Environmental
14 Protection Agency in EPA regulation. You can see EPA
15 Landfill Methane Outreach Program.

16 One of the things that is extraordinary about
17 this, quickly, is that the by-products of this process
18 include the production of methane gas, and so this
19 leads landfills to be able to engage in renewable
20 energy production.

21 And you'll see from the evidence in this case
22 that that renewable energy production actually is
23 taking place and that the product, when tested,
24 establishes that it actually does produce methane
25 by-products, when the product is tested under the

1 American Society for Testing and Materials standard, the
2 only standard that exists.

3 JUDGE CHAPPELL: What does methane production
4 have to do with the degradation claim?

5 MR. EMORD: As the polycarbons degrade, one of
6 the by-products of the enzymatic interaction with the
7 polycarbons is the production of methane gas. And it
8 is an extraordinary thing. It actually is the case
9 that you can measure the production of the methane gas,
10 so if you were to take an active and a control --

11 JUDGE CHAPPELL: So the methane gas presence is
12 a marker that it's working?

13 MR. EMORD: It is. It is a marker that it's
14 working.

15 And the standards, you know, it's -- they don't
16 mention any standards, the government doesn't. And the
17 standards exist. And we have the American Society for
18 Testing and Materials that has come up with several
19 standards, and this product was tested under them,
20 D5209 -- and I could go on and on with the numbers. I
21 don't think that you probably care to hear that now.

22 But there were 12 studies and reports done
23 testing ECM's additive and finished plastics products
24 under anaerobic, aerobic, and composting conditions and
25 also electron microscopy of plastics showing visual

1 signs of biodegradation and biota formation.

2 Well, contrary to the staff's complaint, ECM
3 tells customers that it does not guarantee particular
4 time periods or rates of biodegradation.

5 JUDGE CHAPPELL: Are you taking issue with some
6 of the Web page captures, some of the advertisements
7 that are in the complaint?

8 MR. EMORD: They exist, but they're not in full
9 context. We do not have a net impression because, for
10 example, just to give you an example, what they don't
11 cite here that's on the ECM Web site, under Life
12 Expectancy of Products Manufactured with ECM
13 MasterBatch Pellets, is this statement, for example:

14 "Biodegradation is a natural process that
15 occurs around the world but at various speeds due to
16 various conditions. Plastics with ECM's additive
17 behave like sticks, branches or trunks of trees. Due
18 to this fact, we do not guarantee any particular time
19 because the time depends on the same factors that the
20 biodegradation of woods and most other organic materials
21 on earth depend."

22 JUDGE CHAPPELL: But are you referring by
23 asterisk to that disclaimer where the claims are made?

24 MR. EMORD: That's right.

25 JUDGE CHAPPELL: Right where I see --

1 MR. EMORD: Directly after that statement comes
2 the point that she's mentioning, directly after that
3 statement.

4 And furthermore, again, the net impression,
5 there's this interaction with the customer, and as the
6 evidence will show, the customer is fully informed. No
7 one is deceived here. The customer is fully informed
8 of the evidence.

9 And it is explained to them that, look -- and
10 they're not fools. They're sophisticated. They know
11 that, hey, look, a landfill in one location in the
12 United States where conditions are certain are going to
13 be different from a landfill that's in another location
14 in the United States. They're going to understand that
15 within a landfill, degrees, levels, rates of
16 biodegradation differ within the landfill itself.

17 There is -- the extraordinary thing is, the
18 ordering paragraph 1(A), the ordering paragraph
19 subsection, specifically prospectively puts a cease and
20 desist order on this client that says, Hey, you cannot
21 say that there's biodegradation unless it's within a
22 year. Or they can say alternatively, you could say
23 that I suppose, if I read this correctly, provided that
24 you reveal the exact rate of biodegradation or that the
25 biodegradation occurs in a certain manner by a specific

1 rate.

2 And the point here is that this is impossible.
3 It is impossible for anyone in the world to give that
4 specificity. You can't pinpoint it because the
5 environment is so extraordinarily diverse and the
6 conditions are so diverse.

7 So when this company communicates with its
8 customers, with those who purchase the product and use
9 the product, this is transparent. They know that, and
10 they also know from us we are not guaranteeing
11 degradation in any specific landfill or other site with
12 any specific rate.

13 Now, in ideal conditions or in the best
14 landfill sites or in certain parts of a landfill site,
15 then this ideal model of between nine months and five
16 years could apply. But that's not what the message is
17 to the actual customer.

18 JUDGE CHAPPELL: Let's talk about the customer.

19 MR. EMORD: All right.

20 JUDGE CHAPPELL: How does -- let's talk about
21 the supply chain.

22 How does someone buy this product?

23 MR. EMORD: Say I'm a plastics manufacturer,
24 and I'm interested in finding a product that can
25 improve the biodegradation of my plastics for a number

1 of reasons, but that's my interest. I'll look over the
2 whole market. I'll probably -- because I'm a plastics
3 manufacturer, I probably will myself test different
4 varieties.

5 JUDGE CHAPPELL: That's not really what I'm
6 getting at.

7 MR. EMORD: All right.

8 JUDGE CHAPPELL: Is it only available through
9 the company?

10 MR. EMORD: Through the company and through
11 distributors that sell to plastics manufacturers.

12 JUDGE CHAPPELL: So if I'm a consumer -- and I
13 don't know anything about your Web site. I've seen the
14 complaint. But can I make an order and put it on a
15 credit card from the Web site?

16 MR. EMORD: No. Huh-uh. Consumers can't buy
17 this. No way.

18 JUDGE CHAPPELL: So you're telling me you have
19 controlled distribution.

20 MR. EMORD: Absolutely. We don't sell to
21 consumers. A consumer couldn't use it. It can only be
22 used if it's put in plastic during the manufacturing
23 process. Unless you have a manufacturing plant in your
24 house. Then you're not a consumer really. You're a
25 plastics manufacturer.

1 JUDGE CHAPPELL: Are there biodegradation claims
2 in the contract, in the sales contract?

3 MR. EMORD: Good question. I don't know,
4 Your Honor. I would have to check for you.

5 JUDGE CHAPPELL: But it's a target audience.
6 It's controlled.

7 MR. EMORD: Yes.

8 JUDGE CHAPPELL: But you don't know if the
9 distributors are doing a background check; you don't
10 know if it's someone making meth in a trailer out in the
11 desert or someone who is actually manufacturing plastic
12 products.

13 MR. EMORD: Oh, yes, we do. There's a lot of
14 interaction between the customer and the company. This
15 is a complicated thing.

16 JUDGE CHAPPELL: So every customer is vetted
17 before there's a sale.

18 MR. EMORD: Every customer is vetted. And
19 orders are huge. I mean, orders are not small. When
20 orders are placed, they're in huge quantitative amounts.
21 The typical individual could never afford to purchase
22 this stuff, couldn't happen.

23 I mean, you know, Bill Gates could, but he
24 probably would be too smart. He'd say, Hey, I've got a
25 plastics manufacturing plant.

1 But anyway, when all the evidence is in,
2 Your Honor, the record will show that ECM's
3 representations, in context, the overall net impression
4 is truthful and support supported by more than a
5 reasonable basis.

6 The record will show that ECM's customers are
7 not deceived but are edified by ECM, made well aware of
8 all the material facts.

9 The record will lay a clear foundation for the
10 conclusion that ECM at all times possessed a reasonable
11 basis for its advertising representations, which
12 representations, when viewed in context rather than the
13 selective excerpting, are truthful in every material
14 aspect.

15 Without first establishing that a generally
16 accepted scientific standard of measure exists other
17 than those offered by the American Society for
18 Testing and Materials biodegradation, as is required
19 by Removatron and other cases -- that's a
20 1989 First Circuit case -- the staff is demanding a
21 level of substantiation far in excess of the scientific
22 standards required and accepted for biodegradation in
23 this industry, a level of substantiation that causes
24 suppression of truthful, nonmisleading representations
25 protected by the First Amendment against government

1 inhibition and suppression.

2 The representations ECM makes to its
3 sophisticated manufacturer and distributor customers are
4 indispensable not only for the survival of this company
5 but also for the continuing achievement of reductions in
6 plastics pollution, major environmental policy objective
7 for this nation.

8 In the complaint paragraph 1, the staff
9 misconstrues its First Amendment obligation to rely on
10 reasonable claim qualifications, as is required by
11 Pearson v. Shalala and its progeny. Instead, the
12 relief it calls for would compel prospective reliance on
13 unreasonably restrictive and misleading qualifications,
14 qualifications unreflective of the supportive science
15 and without regard to the sophistication of the
16 manufacturer customers of the product, causing
17 suppression of truthful commercial information and,
18 indeed, inducing a misunderstanding and false impression
19 by ECM's manufacturer customers.

20 In particular, not to the exclusion of other
21 objections, but complaint ordering paragraph 1(A) would
22 prospectively prohibit ECM from making any statement in
23 promotion that its product biodegrades unless complete
24 biodegradation would occur within one year or it
25 identifies a precise time and rate that achieves the

1 biodegradation completely.

2 Those restrictions are patently unreasonable and
3 speech suppressive in light of the fact that ECM
4 explains to its customers three specific things, among
5 others: that its product may not cause complete
6 decomposition into elements within one year; that the
7 time for complete decomposition into elements cannot be
8 calculated because it depends on multiple variables,
9 including the activity of microorganisms, varying
10 environmental conditions, that differ from location to
11 location and landfill to landfill and the nature, mass
12 and composition of each unique plastic product
13 manufactured; and that complete decomposition of the
14 plastics infused with at least 1 percent load of ECM's
15 additive will occur, albeit precisely when that occurs
16 is dependent upon exogenous factors in the environment.

17 It is literally impossible to satisfy what the
18 staff is demanding in its cease and desist order. Even
19 were ECM to do the entirely impracticable and
20 unaffordable job of testing each of its products over
21 many years in every landfill nationwide, that would not
22 suffice, because conditions vary based on the locations
23 of the plastics within individual landfills.
24 Consequently, no set rate or set time of complete
25 decomposition could ever be established.

1 In short, rather than rid the market of falsity
2 through disclosure of information, the order the staff
3 seeks will replace disclosure with the suppression of
4 information indispensable to informed choice and will
5 cause the suppression of constitutionally protected
6 commercial speech.

7 It also limits ECM to communication of false
8 information to its customers, namely that the ECM
9 additive will not continue to decompose when the
10 evidence reveals that it will.

11 When the representations made by ECM are viewed
12 in context, FTC's complaint proves to be false in at
13 least five respects.

14 First, ECM does not guarantee that complete
15 degradation will occur in every landfill environment
16 within a precise number of months or years. Instead,
17 ECM explains that its product biodegrades plastics at
18 variable rates, depending on the environmental
19 conditions present, but all plastics infused with at
20 least 1 percent load of the ECM additive will completely
21 biodegrade in any biologically active environment over
22 time. In context and from the overall net impression,
23 ECM's promotions are truthful and nonmisleading in every
24 material respect.

25 Second, contrary to FTC's statement in its

1 complaint, ECM does not sell its product to end-use
2 consumers, as we discussed.

3 Third, ECM's manufacturer and distributor
4 customers are sophisticated buyers who have a very
5 well-developed biochemical engineering understanding of
6 the additive they buy and the plastics life cycles in
7 general. Those sophisticated purchasers are more likely
8 to understand the scientific facts and have a realistic
9 impression of plastics biodegradation.

10 Fourth, ECM's representation that its product
11 causes plastics to degrade is backed by testing
12 performed in accordance with the generally accepted
13 testing methods, indeed the only testing methods
14 generally accepted in the scientific community and the
15 industry.

16 You can always pontificate about the need for
17 more evidence. The question is whether there's a
18 reasonable basis. And there is ample evidence to
19 support the conclusion that there is a reasonable
20 basis.

21 Finally, you will hear from well-qualified
22 experts who will testify at the hearing that the
23 testing methods and results used to assess the
24 effectiveness of ECM's additive are indeed
25 scientifically sound and reliable. Indeed, they will

1 testify of their professional opinion that plastics
2 infused with at least 1 percent load of the ECM additive
3 biodegrade completely in all biologically active
4 landfills.

5 Thank you, Your Honor.

6 JUDGE CHAPPELL: Ms. Johnson, what's your
7 position on who the customers are?

8 MS. JOHNSON: Your Honor, our position is that
9 its customers -- that -- I don't disagree with what
10 Mr. Emord said, that they do -- ECM does sell its
11 plastic additive directly to plastics manufacturers. It
12 either does it directly or through its distributors.

13 But ECM provides these distributors and its
14 customers marketing materials, logos, and certificates
15 of biodegradability that are intended to validate these
16 claims of biodegradability and to be passed down to
17 end-use consumers.

18 And the customers can use the logo, the ECM logo
19 that says "ECM biodegradable," and put it in their
20 advertisement of their own plastic products that
21 incorporate these additives, you know -- and for
22 instance, in one of the consent agreements that we
23 filed, there was an exhibit attached showing a capture
24 of a Web site that contained an ECM logo with
25 "biodegradable" and another one that contained a

1 certificate of biodegradability, so clearly the
2 customers of ECM use and rely on these materials that
3 ECM provides them to communicate these claims to
4 consumers.

5 And consumers can then use the logos and
6 information that it's an ECM additive and go back to
7 ECM's Web site and see what kinds of claims ECM is
8 communicating.

9 And as far as Mr. Emord's point that the claims
10 that we've taken are out of context, we attached the
11 entire Web site, and you'll see in the context of all of
12 the --

13 JUDGE CHAPPELL: No, no, I didn't ask for
14 rebuttal of everything, just the one point.

15 MS. JOHNSON: Okay. Yes, Your Honor.

16 JUDGE CHAPPELL: Anything further?

17 MR. EMORD: I would just point out that we have
18 no control, influence or decisional authority over any
19 advertising done by a third party. The third parties,
20 people who purchase the product, are on their own. If
21 they wish to make a representation, it's their dollar.
22 The FTC, if it doesn't like it, should go over after
23 them. We're not responsible for it. We have no
24 contractual power over them regarding it. We don't have
25 any contractual --

1 JUDGE CHAPPELL: You don't know if they're going
2 after them or not; right?

3 MR. EMORD: Pardon me?

4 JUDGE CHAPPELL: You don't know if they're going
5 after them.

6 MR. EMORD: I always suspect.

7 JUDGE CHAPPELL: Anything further?

8 MS. JOHNSON: Not unless you'd like me to
9 present rebuttal on some of the things that Mr. Emord
10 said.

11 JUDGE CHAPPELL: No.

12 Anything further?

13 MR. EMORD: No, Your Honor.

14 JUDGE CHAPPELL: All right. Hearing nothing
15 further, until our next session, we are adjourned.

16 (Whereupon, the foregoing initial prehearing
17 conference was concluded at 2:45 p.m.)

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1 C E R T I F I C A T I O N O F R E P O R T E R

2

3 DOCKET/FILE NUMBER: 9358

4 CASE TITLE: ECM BioFilms, Inc.

5 HEARING DATE: November 21, 2013

6

7 I HEREBY CERTIFY that the transcript contained
8 herein is a full and accurate transcript of the notes
9 taken by me at the hearing on the above cause before the
10 FEDERAL TRADE COMMISSION to the best of my knowledge and
11 belief.

12

13 DATED: NOVEMBER 22, 2013

14

15

16 JOSETT F. WHALEN, RMR

17

18

19 C E R T I F I C A T I O N O F P R O O F R E A D E R

20

21 I HEREBY CERTIFY that I proofread the transcript
22 for accuracy in spelling, hyphenation, punctuation and
23 format.

24

25

ELIZABETH M. FARRELL

Exhibit 3

From: [Jonathan Emord](#)
To: [Johnson, Katherine](#); [Lou Caputo](#); [Jillson, Elisa](#)
Cc: [Peter Arhangelsky](#)
Subject: RE: Respondent Initial Disclosures
Date: Monday, November 25, 2013 2:21:44 PM

ECM has a total of 6 employees. We reiterate that the four listed in your Appendix A are the only company employees possessed of discoverable information. It is the purpose of formal discovery to adduce the extent of discoverable information, which may bring to light others possessed of information you or we think appropriately discoverable, but of initial disclosures to reveal those presently known likely to possess discoverable information in relation to the complaint, proposed relief, and defenses, not in relation to speculation as to what may be our, or your, legal theories or positions. Initial disclosures are not a substitute for formal discovery. The company confirms those four are the only ones known by its executives to possess discoverable information as of this date. Best,

Jonathan W. Emord | Emord & Associates, P.C. | 11808 Wolf Run Lane | Clifton, VA 20124
Firm: (202) 466-6937 | Direct: (703) 543-8292 | Facsimile: (202) 466-6938 | www.emord.com

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From: Johnson, Katherine [mailto:kjohnson3@ftc.gov]
Sent: Monday, November 25, 2013 11:05 AM
To: Jonathan Emord; Lou Caputo; Jillson, Elisa
Cc: Peter Arhangelsky
Subject: RE: Respondent Initial Disclosures

No, I don't. So your position is that those are the only people at ECM that have discoverable information? I just want to be sure I'm understanding your position correctly. We only listed the people we know of, but certainly there's additional sales staff, distributors, and even customers, that have discoverable information. You gave a whole presentation on how the customers are informed to great detail about the product, certainly we're entitled to know who is disseminating that information to the customers, and who the customers are.

Katherine E. Johnson, Attorney
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Mail stop M-8102B
Washington, DC 20580
Direct Dial: (202) 326-2185
Fax: (202) 326-2558
Email: kjohnson3@ftc.gov

From: Jonathan Emord [mailto:JEmord@emord.com]
Sent: Monday, November 25, 2013 1:00 PM
To: Johnson, Katherine; Lou Caputo; Jillson, Elisa

Cc: Peter Arhangelsky
Subject: RE: Respondent Initial Disclosures

Hi Katherine—The names, addresses, phone numbers, and counsel of the current and former employees are precisely the same as you have listed on your disclosure as Appendix A. Do you really want us to type that same information and send it to you?

Jonathan W. Emord | Emord & Associates, P.C. | 11808 Wolf Run Lane | Clifton, VA 20124
Firm: (202) 466-6937 | Direct: (703) 543-8292 | Facsimile: (202) 466-6938 | www.emord.com

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From: Johnson, Katherine [<mailto:kjohnson3@ftc.gov>]
Sent: Monday, November 25, 2013 10:56 AM
To: Lou Caputo; Jillson, Elisa
Cc: Jonathan Emord; Peter Arhangelsky
Subject: RE: Respondent Initial Disclosures

Lou, this fails to meet Respondent's obligation to provide the names, and if known, the address and telephone number of each individual. We are in no position to know which of ECM's current and former employees have discoverable information and listing them by category is not enough. Please amend your disclosures to include this information as is required under the Rules.

Katherine E. Johnson, Attorney
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Mail stop M-8102B
Washington, DC 20580
Direct Dial: (202) 326-2185
Fax: (202) 326-2558
Email: kjohnson3@ftc.gov

From: Lou Caputo [<mailto:LCaputo@emord.com>]
Sent: Monday, November 25, 2013 12:40 PM
To: Johnson, Katherine; Jillson, Elisa
Cc: Jonathan Emord; Peter Arhangelsky
Subject: Respondent Initial Disclosures

Hi Katherine,

Please find attached Respondent's Initial Disclosures.

Best,

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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From: [Johnson, Katherine](#)
To: ["Peter Arhangelsky"](#)
Cc: [Jillson, Elisa](#); [Jonathan Emord](#); [Lou Caputo](#)
Subject: RE: In the Matter of ECM BioFilms, Inc., Dkt. No. 9358: Depositions
Date: Tuesday, December 03, 2013 3:19:00 PM

Peter:

We agree with your assessment that the Scheduling Order compels electronic service only, so now that the Court has finally entered the order, there is no need to waive hardcopy service because it is not required.

Complaint Counsel does not agree, however, that the discovery requests are overbroad, cumulative, or duplicative. Each of these requests “may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses” of ECM. Rule 3.31(c)(1). The discovery sought is essential to Complaint Counsel’s ability to respond to ECM’s sophisticated-customer defense. The requests are not duplicative and Complaint Counsel has no other way of gathering this information.

- **Specifically, ECM has put at issue the identity of its customers and distributors – whether they are “sophisticated” purchasers. To assess the validity of this argument, Complaint Counsel need to know who all of ECM’s customers are (Rog 1) and how significant their business is (Rog 2). In addition, the revenue generated from deceptive advertising (Rog 2) is relevant to the proposed relief.**
- **ECM has argued that it provided its customers with information about its additive (verbally and in other communications) apart from the information found in ECM’s promotional materials. To assess the validity of this argument regarding verbal communications, Complaint Counsel need to know what this verbal information consists of (Rog 5) and who has knowledge of such communications (Rog 6). To assess the validity of this argument regarding other communications, Complaint Counsel need to see ECM’s communications with customers and distributors regarding the additive.**

We are not proposing, nor do we intend, to talk to all of ECM’s customers. But which ones we do talk to must be of our own choosing based on criteria that we have decided is defensible and relevant. That being said, we would agree to (1) keep the customer list and related information confidential and non-public; (2) limit the number of customers we communicate with after determining a relevant sample size based on the entire customer list; and (3) limit the look back period to January 1, 2008. This covers the period of the investigation (see FTC access letter). Complaint Counsel also agrees to the following search terms (and any variations thereof) to identify relevant documents:

- Biodegradable, **degradable**
- **Anaerobic, aerobic**
- ASTM, ISO
- Analysis, test, study, **examination, assessment**

- Claim, advertisement, promotion, **marketing**
- Bacteria, microorganism, biofilm, biota, or fungi,
- Landfill, municipal solid waste, MSW, biodigester, bioreactor, **compost**
- Such other terms to which counsel reasonably agree: **years, months, time, “some period,” Green Guides, sophisticated, D5511, D5526, rate, extent, method, extrapolate, polymer, microtech research**

Thursday at 4 p.m. Eastern is fine for a meet and confer.

Katherine E. Johnson, Attorney
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Mail stop M-8102B
Washington, DC 20580
Direct Dial: (202) 326-2185
Fax: (202) 326-2558
Email: kjohnson3@ftc.gov

From: Peter Arhangelsky [mailto:PARhangelsky@emord.com]
Sent: Monday, December 02, 2013 6:10 PM
To: Johnson, Katherine
Cc: Jillson, Elisa; Jonathan Emord; Lou Caputo
Subject: RE: In the Matter of ECM BioFilms, Inc., Dkt. No. 9358: Depositions

Hi Katherine:

We will confer with our client concerning deposition dates. Please note that ECM's owner, Bob Sullivan, is out of the office through Wednesday with limited access to email. We would like to schedule a teleconference to confer on several discovery points, and we suggest this Thursday at 4PM Eastern. Please let us know if you are available then. We should have a window for depositions identified by then.

I have also attached Respondent's First Set of Interrogatories. Please inform us if you will waive hardcopy service. For future discovery exchanges, we interpret Judge Chappell's scheduling order (page 4, paragraph 2) to effect a standing waiver of hardcopy service under Rule 4.4(b). If you share that understanding, we will henceforth accept discovery files through PDF service exclusively.

Finally, we would like to discuss the scope of your Interrogatories Nos. 1, 2, 5, and 6, and Document Request No. 13, to the extent you seek information concerning ECM customers generally. ECM has many customers. Probing each customer for relevant information is an overbroad request, and one likely to burden ECM's business significantly. ECM has grounds to object under Rule 3.31(c), and because the requests would require disclosure of sensitive business information of little relevance to this action. Because we think the end result will yield cumulative or duplicative information, we would propose a limited disclosure that accommodates the interests of both parties and avoids the need for motions. ECM is prepared to disclose the information you requested for 26 of its

significant customers (from within the past 4 years), which represents a representative sampling of roughly ten percent of its total active customer base over that time period. Without waiving privileges and other objections, ECM would provide email correspondence between ECM and 5 of those customers over the relevant time period (4 years). Emails and written correspondence would be produced from relevant information over the relevant time period as determined through keyword searches, including the following search terms (includes all derivatives):

- Biodegradable
- ASTM, ISO
- Analysis, test, study
- Claim, advertisement, promotion
- Bacteria, microorganism, biofilm, biota, or fungi,
- Landfill, municipal solid waste, MSW, biodigester, bioreactor
- Such other terms to which counsel reasonably agree

We think that production would assure you that the universe of remaining information does not differ substantially and, so, additional requests are redundant. Please let us know if you would accept such a proposal in place of the broad discovery requests currently in place, which seek information unlimited in scope (temporally and substantively).

Thank you,

Peter

Peter A. Arhangelsky, Esq. | EMORD & ASSOCIATES, P.C. | 3210 S. Gilbert Rd., Ste 4 | Chandler, AZ 85286

Firm: (602) 388-8899 | Direct: (602) 334-4416 | Facsimile: (602) 393-4361 | www.emord.com

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From: Johnson, Katherine [<mailto:kjohnson3@ftc.gov>]

Sent: Monday, December 02, 2013 8:08 AM

To: Jonathan Emord; Lou Caputo; Peter Arhangelsky

Cc: Jillson, Elisa

Subject: In the Matter of ECM BioFilms, Inc., Dkt. No. 9358: Depositions

Jonathan:

We'd like to notice depositions for the folks at ECM that we identified in our Initial Disclosures, as well as ECM itself. We will send along the topics for ECM with the notice, but we would like to firm up a week sometime at the end of February or beginning of March for the depositions. We wanted to reach out to you to see availability and preference for location. We have offices in Cleveland that

are available to us. Or, if your client is willing, we could hold them here in DC. Please let me know by COB tomorrow what your client's preference is.

Thanks,
Katherine

Katherine E. Johnson, Attorney
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Mail stop M-8102B
Washington, DC 20580
Direct Dial: (202) 326-2185
Fax: (202) 326-2558
Email: kjohnson3@ftc.gov

From: [Peter Arhangelsky](#)
To: [Johnson, Katherine](#)
Cc: [Jillson, Elisa](#); [Jonathan Emord](#); [Lou Caputo](#)
Subject: FW: In the Matter of ECM BioFilms, Inc., Dkt. No. 9358: Deficiencies in ECM's Response to Complaint Counsel's First Set of RFAs and Initial Disclosures
Date: Friday, December 13, 2013 1:39:59 PM
Attachments: [Delivery delayedRE In the Matter of ECM BioFilms Inc. Dkt. No. 9358 Deficiencies in ECM's Response to Complaint Counsel's First Set of RFAs and Initial Disclosures.msg](#)

From: Peter Arhangelsky
Sent: Thursday, December 12, 2013 5:14 PM
To: 'Johnson, Katherine'
Cc: Jillson, Elisa; Cohen, Jonathan; Jonathan Emord; Lou Caputo
Subject: RE: In the Matter of ECM BioFilms, Inc., Dkt. No. 9358: Deficiencies in ECM's Response to Complaint Counsel's First Set of RFAs and Initial Disclosures

Hi Katherine,

Thank you again for your time yesterday. Concerning the RFA responses, we intend to carefully consider each of your points and issue a prompt response. If we find a revised response will clarify our objections or correct any misunderstanding, we will issue that revision expeditiously. Please allow us to respond by Monday close of business (Dec. 16).

We disagree that ECM has displayed any "pattern of inadequate discovery responses." ECM has a well-founded objection to the production of its customer names and information. We disagree that ECM was under any obligation under Rule 3.31(b)(1) to disclose that information, particularly given the concerns we have with the overbroad and burdensome scope of discovery. This issue is subject to a legal dispute. We asked you to provide a formal discovery request, in part, to preserve the record for a suitable objection, should that become necessary. Rule 3.31(b)(1) does not somehow vitiate the protections in paragraph (c)(2), or compel the production of information subject to privilege or objection.

Similarly, ECM's identification of employee names was not deficient. All of the relevant names were in your initial disclosures. We could have simply retyped that information. However ECM has only six employees, and the overwhelming majority of relevant information is in the control or possession of Robert Sinclair (President) and Ken Sullivan (CFO). Given the contents of your initial disclosures, ECM's employee information seemed to fall squarely within Section 3.31(c)(2)(ii).

I need to update you with ECM's position concerning disclosure of its complete customer list. In our call yesterday, we had discussed whether ECM would agree to disclose its entire list of customers (inactive and active), subject to an eventual agreement as to the number of customers you would contact directly. We understand that you seek the entire customer list in exchange for that limitation (which would be negotiated later). Given the imminent risk of irreparable harm, and the remaining gap between the parties' proposed limitations, ECM cannot release its entire customer list in response to your discovery requests. Because the complete customer list was a condition precedent to further negotiations on this point, I think we will be unable to reach an agreement here. ECM will bring this matter before the ALJ in a motion for a protective order.

Please let us know if you would like to discuss.

Best,

Peter

Peter A. Arhangelsky, Esq. | EMORD & ASSOCIATES, P.C. | 3210 S. Gilbert Rd., Ste 4 | Chandler, AZ 85286

Firm: (602) 388-8899 | Direct: (602) 334-4416 | Facsimile: (602) 393-4361 | www.emord.com

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From: Johnson, Katherine [<mailto:kjohnson3@ftc.gov>]

Sent: Thursday, December 12, 2013 2:58 PM

To: Jonathan Emord; Lou Caputo; Peter Arhangelsky

Cc: Jillson, Elisa; Cohen, Jonathan

Subject: In the Matter of ECM BioFilms, Inc., Dkt. No. 9358: Deficiencies in ECM's Response to Complaint Counsel's First Set of RFAs and Initial Disclosures

All:

I am writing to follow up on our conversation yesterday with Peter regarding the customer list and other discovery issues.

As I mentioned briefly in our call yesterday, we have some concerns with ECM's responses to our Requests for Admissions. Specifically, several of ECM's responses either (1) do not appear to include good faith partial denials or qualifications; and/or (2) do not fairly meet the substance of the requested admission. These deficiencies violate Rule 3.32(b); we request that you remedy them immediately. Below are descriptions of deficiencies in four of ECM's Responses to Complaint Counsel's Requests for Admission.

Responses to RFAs 4 and 5: We requested that ECM admit that a certificate (RFA 4) and a logo (RFA 5) are representative of those ECM provided to at least some of its customers. ECM's denial of each request is inconsistent with ECM's representations to us during the investigation. In our August 30, 2011 access letter ("Access Letter," see attached), we requested *all* materials (including promotional and marketing materials) made available to its customers and distributors. See Access Letter, Request 5. In response, ECM provided the documents that we identified in our Requests for Admission as CX-000001 and CX-000002, thereby representing to Commission staff that these documents represented all such materials ECM made available to its customers and distributors. See ECM Response dated Sept. 26, 2011. ECM's responses to RFAs 4 and 5 thus create a discrepancy which ECM has a good faith obligation to dispel through a partial

denial or qualification.

Response to RFA 6: We requested that ECM admit that the documents identified as ECM-FTC-000001 – 000241 constitute all of the scientific studies and tests that ECM submitted in response to the Access Letter. ECM denied the request, stating that there are documents that substantiate its claims other than those ECM supplied. This response does not fairly meet the substance of the requested admission. The RFA does not ask whether there are other substantiation materials that support ECM’s claim. Rather, it merely requests an admission that the identified documents are all the tests and studies that *ECM submitted* to the FTC in response to the Access Letter.

Response to Authentication RFA 3: We requested that ECM authenticate the information contained its website. ECM’s denial is contrary to information ECM provided us during our investigation and to ECM’s own answer to the complaint. In our Access Letter, we asked ECM to “[p]rovide copies of each different ECM advertisement . . . that represents . . . that ECM Additives initiate, promote, or enhance biodegradation of plastic.” See Access Letter Request 4. ECM responded, in part, by identifying numerous pages from its website, www.ecmbiofilms.com. See ECM Response dated Sept. 26, 2011. In its answer to the complaint, ECM admitted that “it advertises and promotes the ECM Product through its website at www.ecmbiofilms.com” These dual representations (via the 2011 letter and the answer) that the ECM website contains promotional materials cannot be reconciled that ECM’s contention in its Response to Authentication RFA 3 that the information contained on the ECM website “was not for promotional reasons, but instead for informational and/or educational purposes” only.

We are particularly concerned about the deficiencies in ECM’s Responses to Complaint Counsel’s Requests for Admission because they appear to continue a pattern of inadequate discovery responses that began with ECM’s initial disclosures. We brought the deficiencies in ECM’s initial disclosures to your attention in our November 25, 2013 email and we reiterate them here:

Customer Names: Rule 3.31(b)(1) provides that “respondent’s counsel shall . . . provide . . . (1) The name, and, if known, the address and telephone number of each individual *likely to have discoverable information relevant to the allegations of the Commission’s complaint, to the proposed relief, or to the defenses of the respondent.*” (emphasis added). In ECM’s answer and in its statement to the court during the initial scheduling conference, ECM repeatedly asserted that its customers are sophisticated plastic manufacturers and distributors, and that ECM made qualifying claims to these sophisticated customers. ECM thus made clear that the identity and sophistication of its customers are central to ECM defenses. ECM is therefore required to identify its customers as individuals “likely to have discoverable information relevant . . . to the defenses of respondent.”

Employee Names: Similarly, ECM was required to divulge the name of all of its employees. ECM in fact did not disclose a single employee name; it merely stated that Complaint Counsel had identified all persons with “direct knowledge of all discoverable information,” and that “[o]ther individuals may exist who possess information that is redundant of that possessed by [the employees Complaint Counsel identified.]”

Please respond via email stating whether you intend to cure these deficiencies. Please let us know if you would like to arrange a time for another meet and confer to discuss the deficiencies in ECM's discovery responses. As to the customer name issue that we discussed yesterday and that we again highlight in this email, we look forward to hearing from you by COB today, as Peter indicated.

Sincerely,
Katherine

Katherine E. Johnson, Attorney
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Mail stop M-8102B
Washington, DC 20580
Direct Dial: (202) 326-2185
Fax: (202) 326-2558
Email: kjohnson3@ftc.gov

From: [Johnson, Katherine](#)
To: ["Peter Arhangelsky"](#)
Cc: [Jillson, Elisa](#); [Jonathan Emord](#); [Lou Caputo](#)
Subject: RE: In the Matter of ECM BioFilms, Inc., Dkt. No. 9358: Depositions
Date: Friday, December 06, 2013 4:17:00 PM

Peter and Lou:

As promised, I am following up on our conversation from yesterday regarding the scope of our discovery requests. ECM appears to be concerned that allowing the FTC to contact its customers could be disruptive to its business. You propose to alleviate this potential problem by having your client select which of its customers it will disclose to us. This is not acceptable for all the reasons I expressed yesterday and in my prior email. We need and are entitled to the entire customer list with the revenue information that we asked for. ECM has no legal grounds to object to the request for the customer list, particularly in light of the affirmative defenses it has raised.

However, in light of ECM's concerns and to quickly resolve this issue, we would agree to:

1. limit the initial number to no more than 50 customers, provided however, that we reserve the right to contact additional customers as and if necessary (this was suggested by Jonathan); and
2. provide ECM the names of the 50 customers that we select from the list prior to contacting them. We would also agree to limit our document requests 13 and 14, and interrogatory request numbers 1 and 2 to those current customers that we contact and those you independently decide to contact or may call to testify.

Obviously, our requests reach former and potential customers (including distributors) as well. I am taking from ECM's concern that the identity of former and potential customers/distributors will be provided to us, as well as the communications and other information that we requested. Although we agreed to limit the time period of the review until January 1, 2008, this limitation would not apply to any communications or information related to the following companies: Proctor & Gamble, Kimberly Clark, K-Mart, Pepsi, Dole Foods, and Nike.

In order for this process to work, ECM must supply the customer list immediately. This is an iterative process. We need time to select the sample, provide the names, and give ECM sufficient time to pull the email and other communications before the response deadline. Please let me know whether this approach is acceptable by the end of business Monday.

Also, this email serves to confirm in writing the other prior agreements we have in place to (1) exclude all communications between Complaint Counsel and Kelly Dye in connection with the prior investigation; and (2) refrain from producing a privilege log, unless and until a specific claim of privilege or protection is challenged.

Katherine

Katherine E. Johnson, Attorney
Division of Enforcement

Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Mail stop M-8102B
Washington, DC 20580
Direct Dial: (202) 326-2185
Fax: (202) 326-2558
Email: kjohnson3@ftc.gov

From: Peter Arhangelsky [mailto:PARhangelsky@emord.com]
Sent: Monday, December 02, 2013 6:10 PM
To: Johnson, Katherine
Cc: Jillson, Elisa; Jonathan Emord; Lou Caputo
Subject: RE: In the Matter of ECM BioFilms, Inc., Dkt. No. 9358: Depositions

Hi Katherine:

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I have also attached Respondent's First Set of Interrogatories. Please inform us if you will waive hardcopy service. For future discovery exchanges, we interpret Judge Chappell's scheduling order (page 4, paragraph 2) to effect a standing waiver of hardcopy service under Rule 4.4(b). If you share that understanding, we will henceforth accept discovery files through PDF service exclusively.

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Thank you,

Peter

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From: Johnson, Katherine [<mailto:kjohnson3@ftc.gov>]

Sent: Monday, December 02, 2013 8:08 AM

To: Jonathan Emord; Lou Caputo; Peter Arhangelsky

Cc: Jillson, Elisa

Subject: In the Matter of ECM BioFilms, Inc., Dkt. No. 9358: Depositions

Jonathan:

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Thanks,

Katherine

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