

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)
Enviroplastics International) PUBLIC DOCUMENT
)

**COMPLAINT COUNSEL'S MOTION FOR SANCTIONS BASED ON RESPONDENT'S
REFUSAL TO COMPLY WITH THE COURT'S JANUARY 10, 2014 ORDER**

Pursuant to Rule 3.38, Complaint Counsel respectfully requests that the Court sanction ECM BioFilms ("ECM") for its gross noncompliance with the Court's January 10 Order that it disclose its revenues by customer. ECM produced a list of customer names on January 16, and then—only after Complaint Counsel raised the issue—a list of revenues on January 20 (a federal holiday). However, the belatedly-disclosed revenue list identifies customers by number only, not by name, whereas the customer list identifies customers by their names only—no numbers.

*Compare CCX-A:1 (excerpt of customer name list) with CCX-A:2 (excerpt of revenue list).*¹

This renders it impossible to determine revenues per customer.

Under Rule 3.38, such gamesmanship is sanctionable for three reasons. First, the Court granted Complaint Counsel's motion and specifically rejected ECM's position that it could withhold "revenues by customer." Order at 8. Second, ECM's noncompliance is unjustified. Third, the sanctions sought are reasonable given the material withheld. Specifically, we need revenue information to take discovery quickly, to ensure a representative customer sample, and to address issues associated with the potential remedy. Accordingly, we ask the Court to: (a) bar ECM from arguing that any sample is unrepresentative; (b) bar ECM from making any revenue-related argument concerning potential remedies, and (c) extend Complaint Counsel's fact discovery deadline by whatever amount of additional time ECM takes to comply with the Order.

¹ Complaint Counsel's exhibits and the attachments thereto as referred to as "CCX-:_."

BACKGROUND

Almost two months ago, on November 26, 2013, Complaint Counsel served ECM with interrogatories. CCX-A:3. As relevant here, Interrogatory No. 1 asked ECM to list its customers (and distributors). *See id.* at 5. Interrogatory No. 2 provided: “For each customer or distributor identified in Interrogatory 1, list ECM’s revenue per customer or distributor per year.” *Id.* As the Court is aware, ECM did not respond, and instead motions practice ensued concerning both interrogatories. Among other things, ECM argued that revenues were irrelevant because its claims “do not vary based on revenues generated.”² Complaint Counsel disputed this position and contended that revenues by customer were important to our ability to take discovery from a representative subset of ECM’s customers.³

In its January 10 Order, the Court analyzed these issues in detail. *See Order* at 7-8. The Court ultimately held that ECM’s argument that its “revenues per customer are not relevant” was “unpersuasive.” *See id.* at 7. As the Court concluded, “Respondent has failed to demonstrate that ECM’s **revenues by customer** should not be disclosed in discovery.” *Id.* at 8 (emphasis added). The Court also ordered ECM to disclose its customer list by January 16.

ECM disclosed its customer list on January 16, but not its revenues by customer. *See CCX-A:1* (redacted excerpt of customer name list). The next day, Complaint Counsel raised this omission. CCX-A:4 at 2 (highlighted passage). On January 20, a federal holiday, ECM disclosed what it characterized as “a complete listing of **revenues by receipt** from 2009 to the present[.]”⁴ CX-A:5 (emphasis added); *see also CCX-A:2* (redacted excerpt of revenue list). As ECM is aware, the revenue list relates sales to “customer numbers,” whereas the customer list does not include customer numbers. Put differently, ECM produced a list of customers, and a list of sales figures, but no way to relate the two.⁵ As a result, ECM’s production is useless.⁶

² *See* ECM’s Motion for Protective Order (Dec. 13, 2013) at 5.

³ *See* Complaint Counsel’s Opposition & Cross-Motion (Dec. 30, 2013) at 4.

⁴ Complaint Counsel never agreed to this date limitation.

⁵ In essence, ECM produced a code with no key.

LEGAL STANDARD

Under Rule 3.38, sanctions are proper if: “(1) production of the requested material has been mandated by a specific discovery order issued by an ALJ . . . and directed at the party . . . from whom the material is sought; (2) the party’s failure to comply is unjustified; and (3) the sanction imposed ‘is reasonable in light of the material withheld and the purposes of Rule 3.38(b).’” *In the Matter of Polypore Int’l, Inc.*, No. 9327, 2009 FTC LEXIS 92, *5-*6 (F.T.C. May 1, 2009) (quoting *In re Int’l Tel. & Tel. Corp.*, 104 F.T.C. 280, 449 (1984)) (Court’s emphasis omitted).

ARGUMENT**I. The Court Ordered ECM To Disclose Revenues Per Customer.**

On January 10, the Court denied ECM’s Motion for a Protective Order concerning various issues (including revenues per customer), and granted Complaint Counsel’s cross-motion to compel. As detailed above, the Court analyzed the parties’ positions, found ECM’s “unpersuasive,” and held that ECM failed to demonstrate that its “revenues by customer should not be disclosed[.]” Order at 7-8. Thus, “production of the requested material has been mandated by a specific discovery order issued by an ALJ[.]” *Polypore Int’l.*, 2009 FTC LEXIS 92, at *5.

II. ECM’s Failure To Comply Is Unjustified.

ECM has not justified its failure to comply with the January 10 Order. In this instance, the Court overruled ECM’s objections and required it to respond to Interrogatory No. 2. The

⁶ During the meet and confer regarding this issue, ECM stood by its production as fully compliant with the Court’s January 10 Order. As ECM explained it, its production complies with the spirit of the Court’s Order while also respecting the concerns behind ECM’s objections. See CCX-A ¶ 2. In reality, the Court’s Order overruled ECM’s objections and the production of useless revenue information violates both the Order’s spirit and its letter. More likely than the far-fetched explanation ECM provided, ECM disagrees with the Order and seeks an opportunity to relitigate the Court’s decision (or to set up an eventual contempt finding that the Commission would review pursuant to Rule 3.42(h), see CCX-A:6 (“We have reviewed the ALJ’s Order issued today, and we intend to exhaust all avenues of review with respect to certain portions of that decision.”) (emphasis added)).

fact that ECM apparently believes it can still assert objections the Court overruled does not justify violating this Court’s orders.

III. The Sanctions Sought Are Reasonable Given the Material Withheld.

Because the proposed sanctions relate directly to the need for the material, they are “reasonable in light of the material withheld and the purposes of Rule 3.38(b)[.]” *Polypore Int’l*, 2009 FTC LEXIS 92, *5-*6 (quotation omitted). First, Complaint Counsel sought the still-withheld discovery to help ensure that it obtained discovery from a representative customer sample. Preventing ECM from disputing whether a sample is representative thus ties the consequence closely to the misconduct.

Second, revenue per customer information may be relevant to the fencing-in relief available, particularly if ECM argues that it deceived only a subset of its customers who paid it relatively little.⁷ Barring ECM from making any revenue-related argument concerning potential remedies responds directly to this possibility.

Third, we also sought the discovery at issue so that we could proceed with discovery from customers more quickly; the more information we have about ECM’s relationships with its customers, the less discovery Complaint Counsel needs and the faster we can move forward. Therefore, extending Complaint Counsel’s deadline for completing fact discovery (but not ECM’s) by whatever amount of additional time ECM takes to comply with the Order ameliorates the prejudice that ECM’s delay would otherwise produce.⁸

Significantly, Rule 3.38(b) allows the Court “to attach weight to a party’s intransigence,” *In the Matter of Beatrice Foods Co.*, No. 9112, 1980 FTC LEXIS 204, *4 (F.T.C. May 21,

⁷ Cf. *Telebrands, Corp. v. FTC*, 457 F.3d 354, 359 (4th Cir. 2006) (considering “gross sales” as one factor relevant to whether the misconduct was serious enough to support the fencing-in relief the Commission imposed).

⁸ This request for relief is also significant given the status of discovery generally. Shortly, Complaint Counsel will file an omnibus motion to compel regarding all of its outstanding document requests (of which ECM has responded to almost none). During yesterday’s meet and confer, ECM would provide no commitment regarding its discovery obligations other than a promise to comply with those obligations, as ECM interprets them, before discovery closes on April 3. CCX-A ¶ 3.

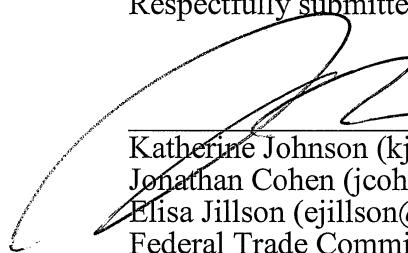
1980), and allowing ECM to play discovery games without consequence would disserve this important objective. Accordingly, the sanctions sought are reasonable.

CONCLUSION

For these reasons, Complaint Counsel respectfully asks the Court to (a) bar ECM from arguing that any customer sample is unrepresentative in any way; (b) bar ECM from making any revenue-related argument concerning potential remedies, and (c) extend Complaint Counsel's deadline for completing fact discovery (but not ECM's) by whatever amount of additional time ECM takes to comply with the Order.

Dated: January 27, 2014

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

MEET AND CONFER CERTIFICATION

Complaint Counsel conferred with opposing counsel in a good faith effort to resolve by agreement the issues raised by the motion, but the parties were unable to reach such an agreement. The conference took place telephonically on January 21, 2014, at 1:00 PM. Katherine Johnson, Jonathan Cohen, and Elisa Jillson participated on Complaint Counsel's behalf. Jonathan Emord, Peter Arhangelsky, and Lou Caputo participated on ECM's behalf.

DATED: January 27, 2014

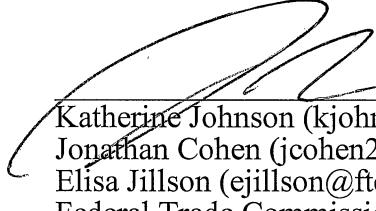


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STATEMENT REGARDING CONFIDENTIALITY

Exhibit A, Attachment 1 contains customer names and other information from which the names of ECM's customers arguably could be inferred. Exhibit A, Attachment 2 contains revenue information that ECM requested Complaint Counsel keep confidential. Accordingly, Complaint Counsel will submit a public version with only these two attachments redacted.

DATED: January 27, 2014



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ECM BioFilms, Inc.,) Docket No. 9358
a corporation, also d/b/a)
Enviroplastics International)

)

[PROPOSED] ORDER
GRANTING COMPLAINT COUNSEL'S MOTION FOR DISCOVERY SANCTIONS

This matter having come before the Chief Administrative Law Judge on January 22, 2014, upon a Motion for Sanctions by Complaint Counsel, and having considered all supporting and opposing submissions, and for good cause appearing, it is hereby ORDERED that Complaint Counsel's Motion Is GRANTED.

It is FURTHER ORDERED that (a) ECM is barred from arguing that any sample of information taken from its consumers is unrepresentative; (b) ECM is barred from making any revenue-related argument concerning potential remedies, and (c) Complaint Counsel's deadline for completing fact discovery is extended by the number of days from January 16, 2014 until the date ECM complies fully with this Court's January 10 Order. ECM's deadline for completing fact discovery remains April 3, 2014.

SO ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2014, I caused a true and correct copy of the foregoing to be served as follows:

One electronic copy to the **Office of the Secretary**, and one copy through the FTC's e-filing system:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Room H-159
Washington, DC 20580
Email: secretary@ftc.gov

One electronic 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**:

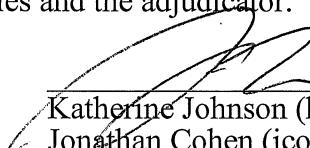
Jonathan W. Emord
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Lou Caputo
Emord & Associates, P.C.
3210 S. Gilbert Road, Suite 4
Chandler, AZ 85286
Email: lcaputo@emord.com

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: January 28, 2013


Katherine Johnson (kjohnson3@ftc.gov)
Jonathan Cohen (jcohen2@ftc.gov)
Elisa Jillson (ejillson@ftc.gov)
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600 Pennsylvania Ave., N.W. M-8102B
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EXHIBITS IN SUPPORT OF
COMPLAINT COUNSEL'S MOTION FOR SANCTIONS BASED ON RESPONDENT'S
REFUSAL TO COMPLY WITH THE COURT'S JANUARY 10, 2014 ORDER

Complaint Counsel Exhibit A

CCX-A

**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)	CONFIDENTIAL
Enviroplastics International)	
)	

**DECLARATION OF JONATHAN COHEN IN SUPPORT COMPLAINT COUNSEL'S
MOTION FOR SANCTIONS BASED ON RESPONDENT'S REFUSAL TO COMPLY
WITH THE COURT'S JANUARY 10, 2014 ORDER**

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

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. I am an attorney of record in the above-captioned matter, and I have personal knowledge of the facts set forth herein.

2. During the meet and confer yesterday, ECM stood by its production as fully compliant with the Court's January 10 Order. As ECM explained it, its production complies with the spirit of the Court's Order while also respecting the concerns behind ECM's objections.

3. Also during yesterday's meet and confer, ECM would provide no commitment regarding its discovery obligations other than a promise to comply with those obligations, as ECM interprets them, before discovery closes on April 3.

4. Attachment 1 hereto are true and correct copies of excerpts from ECM's production of its customer list.

5. Attachment 2 hereto are true and correct copies of excerpts from ECM's revenue production.

6. Attachment 3 hereto is a true and correct copy of Interrogatories Complaint Counsel served to ECM on November 26, 2013.

7. Attachment 4 hereto is a true and correct copy of an email from Jonathan Cohen to various persons, dated January 17, 2014 at 2:13 PM.

8. Attachment 5 hereto is a true and correct copy of an email from Peter Arhangelsky to various persons, dated January 20, 2014 at 4:25 PM.

9. Attachment 6 hereto is a true and correct copy of an email from Peter Arhangelsky to various persons, dated January 10, 2014 at 4:35 PM.

Executed this 21st of January 2014 in Washington, D.C.



Jonathan Cohen
Complaint Counsel

**Complaint Counsel
Exhibit A
Attachment 1**

CCX-A:1

**Complaint Counsel
Exhibit A
Attachment 2**

CCX-A:2

**Complaint Counsel
Exhibit A
Attachment 3**

CCX-A:3

**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)
Enviroplastics International)
)

**COMPLAINT COUNSEL'S FIRST SET OF
INTERROGATORIES TO ECM BIOFILMS, INC.**

Pursuant to Rule 3.35 of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings, Complaint Counsel requests that Respondent ECM Biofilms, Inc. ("ECM") respond to these Interrogatories within **30** days and furnish the requested information to Complaint Counsel at the Federal Trade Commission, 600 Pennsylvania Avenue, NW, M-8102B, Washington, DC 20580, or at such time and place as may be agreed upon by all counsel.

INSTRUCTIONS

1. Unless otherwise specified, the time period covered by an Interrogatory shall not be limited and all information responsive to the Interrogatory, regardless of dates or time period involved, shall be provided.
2. Each Interrogatory should be set forth in full preceding the answer to it and should be answered separately and fully in writing, under oath.
3. All answers shall be served within 30 days after service of these Interrogatories.
4. These Interrogatories seek information that is in your knowledge or possession, or under your actual or constructive custody or control, whether or not such information is located in the files of, or possessed by your individual officers, directors or employees, and whether or

not such information is received from or disseminated to any other person or entity including attorneys, accountants, directors, officers, employees, independent contractors, or volunteers.

5. To the extent that an Interrogatory may be answered by referencing a document, it is permissible to attach the document as an exhibit to the answer and refer to the document in the answer. If any such document contains more than one page, you must refer to the page and section where the relevant reference(s) can be found. 16 C.F.R. § 3.35(c).

6. Where an Interrogatory requests an answer or portion of an answer that already has been supplied in response to another Interrogatory, the answer or portion of the answer need not be supplied a second time. It is sufficient to specify the responses that contain the answer, and supply any additional information necessary to answer the Interrogatory.

7. All objections to any Interrogatory must be raised in your initial response or otherwise waived.

8. If you object to any Interrogatory or a part of any Interrogatory, state the Interrogatory or part to which you object, state the exact nature of the objection, and describe in detail the facts upon which you base your objection. If any Interrogatory cannot be answered in full, it shall be answered to the fullest extent possible and the reasons for the inability to answer fully shall be provided. If you object to any Interrogatory on the grounds of relevance or overbreadth, you shall provide all responsive information that is concededly relevant to the parties' claims or defenses or the requested relief. For each Interrogatory that cannot be answered in full, you shall describe the efforts made to locate information needed for such answer.

9. If any documents are not identified in response to an Interrogatory on grounds of privilege, submit together with such claim a schedule of the items withheld which states

individually for each item withheld: (a) the type, title, specific subject matter, and date of the item; (b) the names, addresses, positions, and organizations of all authors and recipients of the item; and (c) the specific grounds for claiming that item as privileged. If only part of a responsive document is privileged, all non-privileged portions of the item must be identified.

10. These Interrogatories are continuing in character so as to require you to produce additional information promptly upon obtaining or discovering different, new or further information before the close of discovery. Further instructions pertinent to a particular Interrogatory appear in parentheses within or following that Interrogatory.

11. You are hereby advised that Complaint Counsel will move, if any party files any dispositive motion, or at the commencement of trial, to preclude you from presenting evidence regarding responsive matters you have failed to set forth in your answers to these Interrogatories.

DEFINITIONS

Notwithstanding any definition below, each word, term, or phrase used in these Requests is intended to have the broadest meaning permitted under the Federal Trade Commission's Rules of Practice.

1. "All" means and includes "any and all."
2. "And" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the request any information that might otherwise be construed to be outside its scope.
3. "Any" means and includes "any and all."
4. "Biodegradation" and any variation thereof means decomposition into elements found in nature by the action of living organism such as bacteria or fungi.

5. “Document” or “documents” are synonymous in meaning and equal in scope to the usage of the terms as defined by 16 C.F.R. 3.34(b), and includes, without limitation, any written material, whether typed, handwritten, printed or otherwise, and whether in draft or final form, of any kind or nature, or any photograph, photostat, microfilm or other reproduction thereof, including, without limitation, each note, memorandum, letter, release, article, report, prospectus, memorandum of any telephone or in-person conversation, any financial statement, analysis, drawing, graph, chart, account, book, notebook, draft, summary, diary, transcript, computer database, computer printout, or other computer-generated matter, contract or order, laboratory report, patent, trademark or copyright, and other data compilations from which information can be obtained. Electronic mail is included within the definition. A draft or non-identical copy is a separate document.
6. “ECM” shall mean ECM Biofilms, Inc., including without limitation, its agents, employees, officers, or anyone else acting on its behalf.
7. “ECM Additive” means the plastic additive manufactured by ECM, including but not limited to “Masterbatch Pellets.”
8. “ECM Plastic” means any plastic treated with or incorporating an ECM Additive.
9. “Plastic” means conventional, commercial application polyolefins (any of the polyethylenes and polypropylenes), EVAs, PVCs, PETs, PSs, PUs and any combination of these resins.
10. “Regarding” means and includes affecting, concerning, constituting, dealing with, describing, embodying, evidencing, identifying, involving, providing a basis for,

reflecting, regarding, respecting, stating, or in any manner whatsoever pertaining to that subject.

11. "You" and "your" means ECM.

INTERROGATORIES

1. Identify, by business name, individual contact, address, and telephone number, all customers who have purchased any ECM Additive, including customers who purchased any ECM Additive from distributors, in which case, also provide the name, address, and telephone number of the distributor from whom the customer purchased the ECM Additive.

2. For each customer or distributor identified in Interrogatory 1, list ECM's revenue per customer or distributor per year.

3. List all current and former employees of ECM by name and title and specifically identify which current and former employees of ECM have communicated with any of the customers and distributors identified in Interrogatory 1.

4. Identify, by name and title, all current and former employees of ECM who have communicated with any laboratory or other testing facility regarding testing of the ECM Additive or ECM Plastic.

5. If you contend that you provided your customers, distributors, or potential customers with verbal information during the sales process regarding the rate and extent of the Biodegradability of the ECM Additive or ECM Plastics, or regarding the ability of ECM Additives to initiate, cause, enable, promote, or enhance the Biodegradation of ECM Plastics, describe such information.

6. Identify, by name, title, and business name, the current and former ECM employees and the customers, distributors, or potential customers involved in any communications described in Interrogatory 5.

Dated: November 26, 2013

Respectfully submitted,

/s/ Katherine Johnson
Katherine Johnson (202) 326-2185
Elisa K. Jillson (202) 326-3001
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Mailstop M-8102B
Washington, DC 20580

CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2013, I caused a true and correct copy of the paper original of the foregoing Complaint Counsel's First Set of Interrogatory Requests to ECM BioFilms, Inc. to be served as follows:

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.

/s/ Katherine Johnson
Katherine Johnson
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Ave., NW, M-8102B
Washington, DC 20580
Telephone: (202) 326-2185
Facsimile: (202) 326-2558
Email: kjohnson3@ftc.gov

**Complaint Counsel
Exhibit A
Attachment 4**

CCX-A:4

Cohen, Jonathan

From: Cohen, Jonathan
Sent: Friday, January 17, 2014 2:13 PM
To: 'Peter Arhangelsky'; 'Jonathan Emord'; 'Lou Caputo'
Cc: Jillson, Elisa; Johnson, Katherine
Subject: ECM: Document Requests & Other Outstanding Issues
Attachments: Complaint Counsel's Preliminary Witness List.pdf

Counsel,

We served most of the document requests at issue on November 27, and your production is now three weeks overdue (and counting). The Court's January 10 order compelled ECM to produce its customer list – which you did late yesterday. But nothing in the Court's order requires us to accept vastly less than what the FTC's Rules entitle us to. Furthermore, nothing in the Court's order allows you to produce whatever you intend to produce *whenever* convenient for you. We're extremely concerned that the effect of your proposal will be that, whatever you produce, you will produce it shortly before discovery closes. Accordingly, we respectfully decline your proposal for the reasons articulated below, but offer our last, best accommodation, with the sincere hope that you'll accept. As I suspect we've already made clear, we'd obviously rather move forward quickly than have to return to the Court again.

With respect the specifics of your proposal:

1. Customer Contacts – This issue is separate from whether ECM has to comply with our document requests. We received your customer list yesterday evening. We'll let you what subset we intend to contact after we've had an opportunity to review and analyze the list and, potentially, after we've had an opportunity to review and analyze your document production. In all events, we'll give ECM enough time to notify its customers or seek emergency relief from the Court before we contact any customer on the list you produced yesterday evening. Again, however, the customer contacts issue has nothing to do with ECM's obligation to produce its own responsive documents.
2. Temporal Limitation – As you know, our pre-complaint investigation covers the period from January 1, 2008 forward. In the interest of accommodation, we'll incorporate your proposed January 1, 2009 limit into our final proposal.
3. Customer Correspondence – Your proposal is replete with problems; we'll simply note that, even if an "email only" production was satisfactory (and it isn't), you aren't proposing to produce these documents by any particular time. Even if you believe that these are the only documents we're entitled to, it's still the case that they're three weeks overdue (with no end in sight).
4. Scientific, Technical, & Otherwise Responsive Documents – There's some room for negotiation here; we agree that you don't have to produce to us anything you've produced already during the pre-complaint investigation (in fact, you don't even have to negotiate that, we volunteer that you don't have to re-produce anything, with respect to these subjects or otherwise). And keywords may be appropriate for finding responsive scientific, technical and other responsive documents.

Here's our last, best offer, and a bit about why we think you should at least consider it seriously:

- (1) From the outset, accepting this offer would discharge your obligations under all outstanding document requests.

(2) Subject to the “Enhanced Clawback” agreement described below, you give us the entire MS Access correspondence database (in native form) by January 24. ECM does not need to search its archives for original correspondence. We’ll take the summaries. If you want, you can remove from the database anything you believe in good faith is non-responsive or privileged (in fact, you should have started this process some time ago, and maybe you have).

(3) In light of the fact that we’re agreeing to take only summaries, you: (a) stipulate to the authenticity of the documents produced; (b) waive any objection that we reasonably could have met if ECM had produced the original correspondence; and (c) waive any right to use any document from the archives.

(4) You get an “Enhanced Clawback” agreement with respect to the MS Access database. The only reason you’ve given us as to why you can’t produce the database with customer communications is that it might also contain privileged information. Accordingly, we would agree to the following terms, in addition to whatever rights you have under the FTC Rules and other authority: (a) if you discover that you produced anything privileged, ECM is entitled to claw it back immediately (we’ll delete it from the database and certify to you that we’ve done so); (b) if we discover anything that a reasonable attorney might consider privileged, we’ll “claw it back” to you immediately, even if its reasonably debatable whether it’s privileged or not (again, we’ll delete it from the database and certify to you that we’ve done so); (c) the presence of an arguably privileged document in the database will not constitute a waiver of any sort; (d) we’ll store the documents in a manner that limits access to case team members only, as opposed to FTC staff generally; (e) subject to applicable law, we’ll destroy the database as soon as possible when this litigation concludes; and (f) we’ll consent to having the Court enter this Enhanced Clawback agreement as a stipulated order.

(5) With respect to our requests for scientific or technical information—and every other outstanding document request—we’ll give you 50 words, phrases, or Boolean sets of words or phrases to search. No negotiation, no time-consuming back-and-forth (although if you want to add to our list, you’re welcome to do so). You search everything ECM has for scientific and technical information, and all other outstanding document requests, and give us the results by the end of the month. You agree that ECM can’t use anything it doesn’t produce at that time.

(6) Everything above is limited to January 1, 2009 forward – exactly as you’ve requested.

As I mentioned, we hope you’ll accept this proposal. Initially, with respect to the correspondence that’s been at the center of this dispute, ECM’s burden is—literally—near zero. All ECM has to do is copy its database and send it to us. If ECM needs help uploading the database to an FTP site, we’ll ask our technical support staff to help you (at our expense). Depending on how smoothly things go, we’re talking about an hour or two of effort and potentially no expense to ECM. Even at worst, the time and expense to ECM will be negligible. We’ll do all the hard work on our end. Mr. Sinclair can walk away knowing that he got a much better deal than the law entitles him to, or than most other litigants receive. Furthermore, ECM gets the date restriction it wants. ECM gets to avoid searching its archives for correspondence. And ECM gets to limit its production on all other outstanding requests to whatever the 50 search terms hit—which means we’ll never see potentially tens of thousands of responsive documents.

Although we believe that both sides discharged their “meet and confer” obligation through Tuesday’s lengthy call about the issue, we’re happy to speak with you again at 10:00 AM Tuesday. If we’re unable to reach an agreement by that time, we’ll promptly seek relief.

There are three other issues. First, ECM has not responded to our interrogatory seeking annual revenues per customer (or distributor), although ECM’s response was due several weeks ago. On January 10, the Court held that ECM “has failed to demonstrate that ECM’s revenues by customer should not be disclosed in discovery.” Order at 8. There’s no point to moving to compel this same information a second time, so we’re really out of options. Although we will meet and confer with you about this on Tuesday morning, we assume you won’t consent to the imposition of sanctions against ECM, so we anticipate seeking such sanctions on Tuesday afternoon. Obviously, if you have a change of heart about this, please let us know.

Second, with respect to your proposed redactions, we have no objection, subject to your agreement that we're not waiving or limiting any right to object to any improper redactions in the future. Assuming we're in agreement, please go ahead and inform the Court accordingly.

Third, after we noticed ECM's corporate deposition on January 24, you objected to that date. On our call Tuesday, we were close to an agreement to move the deposition back almost a month, to February 18. You told us that you would confirm that date with Mr. Sinclair, ECM's designee, and get back to us Wednesday, but it's Friday afternoon, and we haven't heard from you. Although our February 18 offer remains open, the January 24 deposition notice remains effective.

Thanks,

Jonathan Cohen

Enforcement Division | Bureau of Consumer Protection | Federal Trade Commission
600 Pennsylvania Avenue, N.W., M-8102B Washington, D.C. 20580
(202) 326-2551 | jcohen2@ftc.gov

**Complaint Counsel
Exhibit A
Attachment 5**

CCX-A:5

Cohen, Jonathan

From: Peter Arhangelsky <PArhangelsky@emord.com>
Sent: Monday, January 20, 2014 4:25 PM
To: Johnson, Katherine
Cc: Jillson, Elisa; Cohen, Jonathan; Jonathan Emord; Lou Caputo
Subject: ECM Supplemental Production
Attachments: ECM-FTC-001860-1904.pdf; Customer Certificate 121013.doc

Dear Katherine—Attached please find ECM's further response to your discovery request numbers: 1-6, 9, and 10 (First RFPs); 1 (Second RFPs); and Interrogatory 2 (First set). The response consists of a complete listing of revenues by receipt from 2009 to the present, and supplemental promotional and technical material. The financial information and pricing is confidential under the Protective Order and is so marked. It may not be disclosed publicly or on the public docket.

Sincerely,

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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**Complaint Counsel
Exhibit A
Attachment 6**

CCX-A:6

Cohen, Jonathan

From: Peter Arhangelsky <PArhangelsky@emord.com>
Sent: Friday, January 10, 2014 4:35 PM
To: Johnson, Katherine
Cc: Jonathan Emord; Jillson, Elisa; Cohen, Jonathan; 'Lou Caputo'
Subject: RE: ECM Response to FTC First Set of Requests for Production of Documents

Katherine,

I respond here to your email from yesterday and Jonathan's email from January 9th at 2:24pm Eastern, both concerning electronic discovery. We have reviewed the ALJ's Order issued today, and we intend to exhaust all avenues of review with respect to certain portions of that decision. However, as applicable here, Judge Chappell predicated part of his ruling on your willingness to "negotiate search terms to reduce the number of responsive materials..." See ALJ Opp. at 8. The information I provide below should further that purpose.

As for the Microsoft Access database, the program generates reports in PDF format. We were provided with the PDF reports, and those are what we disclosed. Because the PDF files are generated directly from the database program (e.g., printed to PDF), the content of those documents does not differ in any respect to the information contained within the database.

The number 142,078 reflects the total number of entries in ECM's database. For our initial production, ECM screened its notes by selecting only prospective customers. The entries were not screened or retrieved using keywords and, so, those notes reflect the sum total of all material correspondence reported in the database for the entities selected. The balance of the 142,078 entries includes information concerning all of ECM's former customers, inactive customers, and active customers. ECM can provide those records, subject to some agreement that will limit the breadth of information as per the Judge's ruling today. We assume from your representations before the ALJ that you will honor your offer to limit the scope of discovery and, to the extent that assumption is incorrect, we intend to file a motion for reconsideration.

As I mentioned in my prior email, ECM does not sort its archived email files. ECM employees preserve their emails by printing into PDF files at the end of each day (or occasionally after several days). Each single archived PDF thus contains information among various contacts and subjects, i.e., a day's worth of unsorted information. Employees do this for inbound and outbound messages separately and, so, each day results in two archived files. To provide you with the original email files referenced in our recent 1,200 page disclosure, someone must search each archived PDF file (which number in the thousands), and then manually extract every responsive page from the larger PDF documents which also contain unrelated messages. We can generally estimate that of the 142,078 database notations (including files already produced), at least two-thirds to three-quarters of those entries will correlate with email files. So take the 8,540 notes from our recent production as an example. Even if only 5,600 of those notes represent email correspondence, ECM would need to manually search each master PDF file from the days in question to find and then extract each of the 5,600 specific emails. The dates involved spanned from 2006 and 2011, which might therefore involve thousands of archived master PDF files. If these discovery demands continue with ECM's other customers, ECM would be required to search for and manually extract perhaps over one hundred thousand emails.

That task alone could require weeks to complete at substantial cost to ECM, even with a team of staffers assigned. As it stands, ECM's President, Bob Sinclair, is the only employee who can perform the bulk of this work. Rule 3.31(c)(2) specifically guards against the harms from this type of massive discovery burden, particularly when the "burden and expense of the proposed discovery on a party ... outweigh its likely benefit." That seems quite applicable here, given that you can examine the notations, and maybe compare those notes with a sampling of actual email files to verify completeness. To be clear, ECM is not stating that it refuses to provide original email files or attachments. However

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because the discovery burden is so substantial, ECM needs you to narrow your discovery requests within reasonable limits, as contemplated by the Judge's Order. For instance, ECM can extract and disclose certain files or documents that relate to specific issues or contacts (e.g., through global keyword inquiries). That work remains burdensome, but far less so than a comprehensive production of all files.

ECM will not provide its entire archived folder for your review because those comingled files contain highly sensitive, irrelevant, and privileged information, which would include documents and correspondence between attorneys and personal contacts. The best means to limit ECM's burden is to prepare narrow discovery requests that fit within Rules 3.37(a) and 3.31(c)(2). In this instance, your requests fail under Rule 3.31(c)(2)(i) and (iii) because the burden on ECM is extraordinary when compared to the relative benefit you get from documents that only confirm the notes in ECM's database.

I hope this sheds light on our concerns so that we can develop a joint resolution. Please let us know if you have any questions, or if you would like to discuss.

Best,

Peter A. Arhangelsky, Esq. | EMORD & ASSOCIATES, P.C. | 3210 S. Gilbert Rd., Ste 4 | Chandler, AZ 85286
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From: Johnson, Katherine [mailto:kjohnson3@ftc.gov]
Sent: Thursday, January 09, 2014 1:02 PM
To: Peter Arhangelsky
Cc: Jonathan Emord; Jillson, Elisa; Cohen, Jonathan; 'Lou Caputo'
Subject: RE: ECM Response to FTC First Set of Requests for Production of Documents

Peter:

I appreciate the clarification that this document was not prepared for litigation, and reflects records as maintained in the ordinary course of ECM's business. The reason I described them as "unrepresentative" is because you informed us that the document contains only 8,540 separate notes out of 142,078. We have no idea how you or ECM selected the 8,540 notes that were produced. Do these represent the complete log of all communications with all of ECM's potential customers during that timeframe? If not, what subset does this represent and how was it selected?

We stand by our position that we are entitled to all of the underlying communications with potential customers, not just the summaries of those communications. We are not trying to increase the burden on ECM or you. One way to reduce the burden is for ECM to produce its entire archived database subject to a clawback agreement for privileged or protected documents. If there is no way to partition the archive to give us only the portion that pertains to prospective/non-current customers, then I think we need further discussion to understand how ECM maintains its archived files.

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: Thursday, January 09, 2014 10:39 AM

To: Johnson, Katherine

Cc: Jonathan Emord; Jillson, Elisa; Cohen, Jonathan; 'Lou Caputo'

Subject: RE: ECM Response to FTC First Set of Requests for Production of Documents

Katherine,

Preliminarily, we note that our December 27th production was an initial disclosure. As we stated in our response, we intend to supplement that production with responsive documents, particularly after the ALJ resolves the pending discovery dispute. The summaries we produced come from ECM's Microsoft Access database, and reflect the system by which ECM logs files. ECM employees are instructed to accurately input all relevant information from verbal and written correspondence into the database. ECM relies on those notations, not the original emails, to log activities and discussions with external parties. The summaries in ECM's database were therefore entered in the ordinary course of business. I am confused by your use of the term "unrepresentative" to describe those entries. Can you explain what you meant before we reply directly on that point? For instance, if you suggest that the summaries were prepared in anticipation of litigation, or for litigation purposes, we can clarify that they were not.

To the extent the original emails exist, production of all such files imposes a considerable burden. Bob Sinclair is essentially the only ECM employee who can perform this task. While ECM logs its correspondence in the notations we produced, it does not sort the original files that are ultimately archived (which are rendered unnecessary to ECM by the summary notations). All original email files are initially transferred to a global correspondence folder where they remain for a short time, and then eventually archived for backup. To produce an email referenced in the notations, someone must manually search all archived folders for keywords that hit on the original file. That process is incredibly time consuming, and would eventually yield volumes of cumulative documents (in the tens of thousands). Production of "all responsive documents" could therefore require weeks of Bob's time at a substantial loss for ECM.

If anything, our initial production evidences the exceptionally overbroad nature of your discovery requests. We have discussed this issue with you before, to wit, the fact that your overbroad requests reach every document in ECM's control. You requested all documents related to "ECM Additives." Part of our pending motion for a protective order seeks to limit the expansive nature of your document requests to a manageable level. We had hoped that our recent production would provide you enough information to narrow your requests, balancing your need for information with ECM's discovery burdens. Your instant request for production of tens of thousands of documents, regardless of their relevance, and at considerable expense to ECM, only supports our motion for a protective order. For instance, rather than select from a subset of the 900+ prospective customers disclosed, or a subset of documents by file type or keyword, you have demanded everything, including emails that have nothing to do with the core issues in controversy. That approach also belies any claim that you would reasonably limit discovery of ECM's existing customers if given complete access.

We are happy to discuss at some point this week. Our position is that we have already sought relief from your document requests and, until the ALJ rules on this pressing issue, your requests that are governed by that motion are unwarranted. If, on the other hand, you can suggest limiting principles designed to reach specific information, we can discuss with our client the feasibility of proceeding. I see no reason why we cannot agree to narrow discovery with respect to the potential customers ECM just disclosed.

Best,

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From: Johnson, Katherine [<mailto:kjohnson3@ftc.gov>]
Sent: Wednesday, January 08, 2014 1:45 PM
To: 'Lou Caputo'; Peter Arhangelsky
Cc: Jonathan Emord; Jillson, Elisa; Cohen, Jonathan
Subject: RE: ECM Response to FTC First Set of Requests for Production of Documents

Lou and Peter:

After reviewing the document production ECM-FTC-000648-001859, we understand that these are summaries of communications between individuals at ECM and potential customers. You have requested that we select from this incomplete, and potentially unrepresentative set of information to "ascertain which individual records [Complaint Counsel] finds relevant and about which they desire further information and/or documentation." ECM must produce all responsive documents and make available the actual communications, not just the summaries.

If you think this requires further discussion over the phone, please let me know what your availability is like tomorrow.

Katherine

Katherine E. Johnson, Attorney
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600 Pennsylvania Avenue, NW
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Direct Dial: (202) 326-2185
Fax: (202) 326-2558
Email: kjohnson3@ftc.gov

From: Lou Caputo [<mailto:lcaputo3@gmail.com>]
Sent: Friday, December 27, 2013 4:54 PM
To: Johnson, Katherine; Jillson, Elisa; Cohen, Jonathan
Cc: Jonathan Emord; Peter Arhangelsky
Subject: ECM Response to FTC First Set of Requests for Production of Documents

Dear Katherine,

Please find attached ECM's Responses and Objections to your First Set of Requests for Production of Documents. Attachment A is also included. Attachment A contains material responsive to most all of your requests and is described further in ECM's pleading. Attachment A is over 1200 pages. ECM continues, however, to search for additional materials responsive to your Requests.

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I left a voicemail with Jonathan (Cohen) earlier this morning, but have not heard back. I wanted to speak with him about file formatting and his concerns noted in prior emails. The files produced in Attachment A are in PDF, which is how ECM maintains such records in the course of its regular business.

I will be out of the office next week, but Peter is available to discuss how best to resolve file conversion issues.

Please let us know if you have any questions.

Thanks,

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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