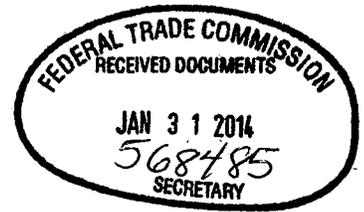


ORIGINAL



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

**COMPLAINT COUNSEL’S REPLY TO RESPONDENT’S RESPONSE TO MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

Pursuant to the Court’s January 30<sup>th</sup> Order, Complaint Counsel respectfully files this reply to Respondent’s opposition to our Motion to Compel. ECM’s opposition misrepresents our ongoing discovery dispute in three key ways. First, ECM claims that there are no ripe document requests, even though there are thirteen outstanding document requests from Complaint Counsel’s November 27 RFPD.<sup>1</sup> See CCX-A:1. Second, ECM mischaracterizes the parties’ proposals, portraying its proposal as a production “pledge[]” that Complaint Counsel has ignored and Complaint Counsel’s proposal as an unreasonable demand for all of ECM’s files. Third, ECM falsely accuses Complaint Counsel of misleading the Court.

ECM’s opposition offers no valid reason why ECM should not immediately produce the relevant and responsive documents it has now withheld for more than a month. Significantly, the controlling facts remain uncontested: (1) ECM has produced few documents; (2) ECM has not produced any documents related to current customers (other than the customer list and de-linked revenue list) or a host of other topics; and (3) ECM’s “burden” results from its unreasonable position that the CEO himself must search for the documents in a time-consuming manner. Moreover, the Court should reject ECM’s proposal as they specifically designed it to omit

<sup>1</sup> Capitalized terms not defined herein have the meanings set forth in the Motion to Compel.

responsive and relevant information critical to our case. We ask the Court to grant the relief requested in Complaint Counsel's Motion to Compel.

## **BACKGROUND**

### **A. ECM Falsely Asserts There Are No Outstanding RFPDs.**

ECM argues that Complaint Counsel's motion "lacks an essential factual predicate: a pending document request for which production was denied." Opp. at 1. This is false for two reasons. First, Complaint Counsel withdrew only one of fourteen RFPDs. Thus, thirteen requests from the November 27 RFPD remain pending (Request 1-12, 14), and eleven of these (1-8, 11-12, and 14) address customer communications. Second, all thirteen remaining RFPDs reach documents beyond customer communications, and ECM has produced little in response. See Mot. at 2 (detailing ECM's paltry production).

Specifically, Requests 1-8, 11-12 and 14 target highly relevant information, including customer communications. Each requests all "documents"—defined to include "[e]lectronic mail" as well as any responsive "memorandum of telephone or in-person conversations, . . . summary, . . . computer database, . . . other data compilations from which information can be obtained"—related to different topics, such as substantiation, claims, and sales strategy. CCX-A:1 at 4.<sup>2</sup> The customer communications contained in the Summary Database and the Email Archive are clearly responsive to these Requests. For example:

- Request 1 (for documents regarding product efficacy for biodegradation) reaches customer communications in which ECM explains how its product causes plastic to biodegrade.
- Request 2 (for documents regarding biodegradable marketing) covers communications in which ECM advises customers on using the logo, certificate, website claims to promote "biodegradable" plastic.

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<sup>2</sup> The breadth of this definition is consonant with Commission Rule 3.34(b), which defines document to include "written materials, electronically stored information, and tangible things."

- Request 3 (for documents regarding time for biodegradation) includes communications in which ECM explains to customers the expected length of time to complete biodegradation.
- Request 4 (for documents regarding disposal conditions) covers communications in which ECM responds to customer questions about whether the product will biodegrade in a landfill.
- Request 5 (for documents regarding two ASTM standards) reaches communications in which ECM provides customers information about its ASTM D5511 and D5526 testing (or lack thereof).
- Request 6 (for documents regarding claims that ECM Additives cause biodegradation) covers communications in which ECM advises customers about the type of biodegradable claims it can make thanks to use of the ECM product.
- Request 7 (for documents that disprove or call into question ECM's claims) includes communications in which a customer asks ECM whether its product will truly enable biodegradation even though tests do not show such results.
- Request 8 (for documents regarding any tests conducted on ECM Additives or products containing the ECM Additives) reaches communications in which customers notified ECM of their own testing of plastic containing the ECM additive.
- Request 11 (for documents about consumer perception of the ECM additive and biodegradability) touches on communications in which customers comment on how end-use consumers demand ECM-treated plastics because they will biodegrade rapidly.
- Request 12 (for documents that support or call into question that customers are sophisticated) covers communications demonstrating customers' knowledge (or ignorance) of landfill conditions, test methods, biodegradation, etc.
- Request 14 (for documents regarding sales strategy) would include communications in which ECM tells a potential downstream customer (*e.g.*, a supermarket) of its plan to pitch the ECM additive to plastic bag manufacturers who will sell to the supermarket.<sup>3</sup>

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<sup>3</sup> Complaint Counsel withdrew Request 13, which called broadly for customer communications "regarding ECM Additives," because Complaint Counsel recognized that Request 13 was not as targeted as its other requests. Moreover, Request 13 was unnecessary as the other Requests would elicit the relevant customer communications.

Thus, ECM's assertion that Request 13 was "the only one seeking customer correspondence," Opp. at 1, is simply inaccurate. Moreover, ECM's argument appears to be disingenuous, for two reasons. First, ECM itself identified customer communications contained in the Summary Database and Email Archive as responsive to Requests 1-4, 6, 8, 10, 12-14. *See* CCX-A:2 at 6-27; *see also id.* at 2 ("[The Summary Database excerpt] is responsive to nearly all areas of Complaint Counsel's Requests."). Second, even though we withdrew Request 13 on January 14, ECM continued to negotiate over the terms of the production (including, at a minimum, Summary Database information) through January 21. If ECM truly believed no document request were pending, it had no reason to volunteer production of documents.

Finally, ECM's myopic focus on customer communications overlooks a key aspect of all thirteen pending RFPDs: they reach a host of documents other than customer communications (*e.g.*, internal emails, memos, reports, emails with testing facilities, and advertising and marketing materials). Significantly, in response to these remaining thirteen Requests, ECM has produced less than 2000 pages: a redacted excerpt of the Summary Database (*see* Mot. at 2),<sup>4</sup> a handful of marketing documents (*see id.*), and 500 documents produced almost two years ago (*see* Opp. at 2).

**B. ECM Mischaracterizes the Parties' Proposals.**

The Opposition confuses ECM's proposed production, made during the parties meet-and-confer on January 21, for an agreed-upon production.<sup>5</sup> *See* Opp. at 1. At no point did Complaint Counsel agree to ECM's outrageous terms. *See* Mot. at 3-4 (explaining proposal).

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<sup>4</sup> The redacted excerpt of the Summary Database is a 1212-page PDF, and thus makes up the bulk of the material produced to Complaint Counsel.

<sup>5</sup> ECM argues that Complaint Counsel failed to satisfy its meet-and-confer obligation. In fact, we met and conferred with ECM about these issues on January 21.

ECM also mischaracterizes Complaint Counsel's proposals, claiming we "adamantly insisted" that ECM produce all of its files, "regardless of relevance or privileged content." Opp. at 4. In a similar vein, ECM describes us as refusing "to honor [our] pledge to the Court" to limit burdensome discovery. Opp. at 4. Both accusations are nonsense. Complaint Counsel initially proposed limiting production to documents in the Summary Database and Email Archive responsive to 50 search terms. *See* Mot. at 2. To further reduce the burden on ECM (and speed production), Complaint Counsel then proposed to accept the Summary Database with detailed clawback protections for privileged documents in lieu of searching the Summary Database, and only use the 50 search terms for documents contained in the Email Archive. *See id.* at 3.

In short, ECM's Opposition creates a straw man of uncompromising Complaint Counsel and an unjustly maligned defendant. The January emails between counsel tell an entirely different story, *see* Mot. at 2-4 (citing CCX-A:2, A:3, A:4), and provide a more accurate record than ECM's *ad hominem* attacks.

### **C. ECM Falsely Claims that Complaint Counsel Misled the Court.**

ECM further attempts to divert attention from its production failures by impugning Complaint Counsel's honesty in a number of ways. Below is our response to each of ECM's baseless accusations:

- ECM states that we "omitted...the fact that ECM has pledged to Complaint Counsel, and is committed to disclose in production . . . its entire database." Opp. at 1. We did not. Our motion explained ECM's offer in detail and why it was clearly unacceptable. *See* Mot. at 3.
- ECM accuses Complaint Counsel of failing to disclose to the Court that ECM produced its current customer list. Opp. at 2. We did not. Complaint Counsel filed a separate motion discussing this very topic two days before filing our Motion to Compel. *See* Complaint Counsel's Mot. for Sanctions. Moreover, the customer list was produced in response to an Interrogatory, and, therefore, is not relevant to the Motion to Compel's arguments regarding RFPDs.

- ECM states that we “falsely plead[ed]” that ECM’s response is nearly a month late. Opp. at 3. Much of the production is more than a month late. ECM’s response was due on December 27. Despite this, ECM still has not produced any internal communications, any information from the Email Archive, or any new scientific or technical data.
- According to ECM, Complaint Counsel are “hypocri[tes],” Opp. at 4, because they produced 62,000 documents (more than 30 times what ECM has produced) 11 days after the deadline. The slight delay was due to the fact that we converted our files into the format that ECM requested.
- ECM claims that Complaint Counsel “conveniently omits the fact that . . . customer discovery was premature” until the Court ruled on ECM’s motion for a protective order. Opp. at 4. In fact, Complaint Counsel addressed this specious argument in the Motion to Compel. *See* Mot. at 7 n. 10.
- ECM states that Complaint counsel “misrepresents” a meeting with ECM counsel regarding ECM’s proposed discovery schedule. Opp. at 6. ECM conflates the proposals counsel has traded. The emails between counsel throughout January are the best record of what actually happened. *See* Mot. at 2-4 (citing CCX-A:2, A:3, A:4).

Significantly, however, none of these false accusations goes to the heart of the dispute: whether ECM can make a showing of undue burden. ECM fails to address this issue because it cannot make that showing.

## ARGUMENT

### **A. ECM Has Failed To Establish That Burden and Expense Outweigh the Benefit of Producing Documents Critical to This Case.**

Relevant discovery may be curtailed only if that “[t]he burden and expense of the proposed discovery” outweigh its likely benefit. 16 C.F.R. § 3.31(c)(2)(iii). This is a rare circumstance. *See In re Polypore Int’l, Inc.*, 2009 FTC LEXIS 41, at \*10 (Jan. 15, 2009) (“Even where a . . . party adequately demonstrates . . . a substantial degree of burden, inconvenience, and cost, that will not excuse producing [relevant] information . . .”). Indeed, a party can demonstrate undue burden only if it provides “specific information regarding the burden or expense involved in producing the requested documents.” *In re Lab. Corp. of Am.*, 2011 FTC LEXIS 31, at \*8 (Feb. 28, 2011). An “unsupported statement that the requests would take

months and tens or even hundreds of thousands of dollars to comply with” does not establish undue burden. *Id.*; see also *In re Polypore*, 2009 FTC LEXIS 41, at \*10.

In our Motion to Compel, we explained the critical relevance of the requested documents and why ECM cannot show undue burden. Mot. at 3-7. Nothing that ECM argues in its Opposition alters that analysis. Significantly, ECM does not dispute that both the Summary Database and the Email Archive contain relevant, responsive documents. Instead, CEO Robert Sinclair declares that only he can search for responsive documents at enormous cost in time and money. Opp., RX-A at ¶¶ 9-14. This is nothing more than a series of “unsupported statement[s]” that do not demonstrate burden. *Cf. In re Lab. Corp. of Am.*, 2011 FTC LEXIS 31, at \*8. First, other than stating that he is “responsible for maintaining the archived files,” *id.* ¶ 12, Sinclair fails to explain why the CEO himself must search the files. Second, Sinclair fails to explain why ECM must search “each of the over 28,000 master PDF files,” *id.* ¶ 10, rather than simply searching the server housing the Email Archive. Third, Sinclair does not explain why PDF files cannot be searched simultaneously, either by using Adobe itself or the company’s operating system software (*e.g.*, Windows search function). Fourth, Sinclair does not provide any facts about the cost and availability of other search options, such as using a production database and/or hiring a litigation support firm.

In short, Sinclair’s declaration simply demonstrates that ECM has unreasonably elected burden. *Cf.* Mot. at 5-7 (collecting cases stating that party cannot evade discovery through poor operating decisions). An incomplete record should not be the price of ECM’s foolhardy decisions.<sup>6</sup>

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<sup>6</sup> ECM also states the entire Email Archive contains 28,000 files, but we have agreed that it needs to produce documents only from January 1, 2009 forward. ECM does not specifically say

**B. The Court Should Reject ECM's Proposal.**

ECM's proposed production would delay and skew the record in this case. By producing only emails that Complaint Counsel identifies from Summary Database review, ECM would be able to withhold highly relevant information. For example, Exhibit CCX-A:2,<sup>7</sup> a highly relevant string of emails between a professor, a distributor, an ECM customer, and an ECM employee, which calls into question whether ECM has support for its claims, would not be produced, unless two conditions were met. First, the Summary Database entry would have to fully convey the significance of the email, so that Complaint Counsel would know to request it. Second, ECM would have to timely produce the email in response to Complaint Counsel's request. Under such regime, it is likely that highly relevant documents—critical to understanding this case—would remain solely in ECM's possession.

**CONCLUSION**

For all the reasons stated above, the Court should grant Complaint Counsel's Motion to Compel.

Dated: January 22, 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

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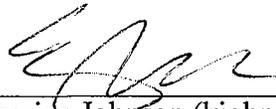
how far back the Email Archive goes, but presumably this system has been in place since 1998. Thus, it should not need to search each of the 28,000 files.

<sup>7</sup> Complaint Counsel received this email from ECM during the pre-complaint investigation. FTC staff requested all of ECM's relevant emails. It received emails from a single month for only two custodians. This email was among them.

**STATEMENT REGARDING CONFIDENTIALITY**

Exhibit A, Attachment 3 contains information from which the names of ECM's customers arguably could be inferred. Accordingly, Complaint Counsel will submit a public version with only this attachment redacted.

DATED: January 31, 2014

  
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

**CERTIFICATE OF SERVICE**

I hereby certify that on January 31, 2014, I caused a true and correct copy of the foregoing to be served as follows:

One hardcopy original and two electronic courtesy copies (on CDs) to the **Office of the Secretary:**

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

Two electronic courtesy copies (on CDs) and one paper 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:**

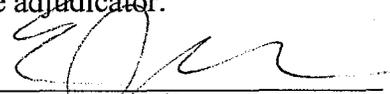
Jonathan W. Emord  
Emord & Associates, P.C.  
11808 Wolf Run Lane  
Clifton, VA 20124  
Email: jemord@emord.com

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](mailto: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 31, 2013

  
\_\_\_\_\_  
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

**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**

**EXHIBITS IN SUPPORT OF COMPLAINT COUNSEL'S  
REPLY TO RESPONDENT'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION  
TO COMPEL RESPONDENT TO PRODUCE DOCUMENTS**

**Complaint Counsel  
Exhibit A**

**CCX-A**

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

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

**DECLARATION OF ELISA JILLSON IN SUPPORT OF COMPLAINT COUNSEL'S  
MOTION TO COMPEL RESPONDENT TO PRODUCE DOCUMENTS**

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. Attachment A:1 hereto is a true and correct copy of Complaint Counsel's First Set of Requests for Production of Documents, dated November 27, 2013.
  
3. Attachment A:2 hereto is a true and correct copy of ECM Biofilms, Inc. ("ECM")'s Responses to Complaint Counsel's First Set of Requests for Production of Documents.
  
4. Attachment A:3 hereto is a true and correct copy of an email string among Thomas Nealis, Monica [name redacted by ECM], Tom [name redacted by ECM], Dave [name redacted by ECM], and Ramani Narayan, dated August 31, 2010 (bottom email) through September 8, 2010 (top email), that ECM produced to FTC Staff during the pre-complaint investigation and Bates-stamped ECM-FTC-000326 – ECM-FTC-000330. ECM redacted information and has not provided Complaint Counsel with an unredacted version.

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

Executed this 31<sup>st</sup> day of January 2014 in Washington, DC.

  
\_\_\_\_\_  
Elisa Jillson  
Complaint Counsel

**Complaint Counsel  
Exhibit A  
Attachment 1**

**CCX-A:1**



3. If you object to a portion or an aspect of any Request, state the grounds of your objection with specificity and respond to the remainder of the Request.

4. If, in answering these Requests, you encounter any ambiguities when construing a request, instruction, or definition, your response shall set for the matter deemed ambiguous and the construction used in responding.

5. Where a claim of privilege is asserted in responding or objecting to any discovery requested in these Requests and information is not provide on the basis of such assertion, you shall, in your response or objection, identify the nature of the privilege (including work product) which is being claimed. When any privilege is claimed, you shall indicate, as to the information requested, whether (a) any documents exist, or (b) any communications took place, and (c) also provide the following information for each such document in a "privileged documents log" or similar format:

- a. the type of document;
- b. the general subject matter of the document;
- c. the date of the document;
- d. the author(s) of the document;
- e. the addressee(s) and any other recipient(s) of the document; and
- f. the custodian of the document, where applicable.

6. If the requested documents are maintained in a file, the file folder is included in the request for production of those documents.

7. These Requests for Production seek documents not already produced by you pursuant to the FTC's letter requests. To the extent responsive documents have already been produced by you, you should so indicate and include the Bates Number identifying the

documents responsive to that Request. If the document previously produced by you was wholly or partially redacted, please provide an unredacted copy, or the basis for claiming privilege or other protection as described in Instruction No. 5. If the document includes charts or graphs, provide color copies of such documents.

8. Every Request for Production herein shall be deemed a continuing Request for Production, and Respondent is to supplement its answers promptly if and when you obtain responsive documents which add to or are in any way inconsistent with Respondent's initial production.

#### 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. "Advertisement" means any written or verbal statement, illustration, or depiction that is designed to effect a sale or create interest in the purchasing of goods or services, whether it appears on the Internet, in email, on packaging, in a brochure, newspaper, magazine, pamphlet, leaflet, webinar, circular, mailer, book insert, free standing insert, letter, catalog, poster, chart, billboard, point of purchase material (including, but not limited to, a display or an item worn by salespeople), fact sheet, film, slide, radio, broadcast or cable television, audio program transmitted over a telephone system, program-length commercial, or in any other medium.
3. "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.

4. "Any" means and includes "any and all."

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 Plastics" means plastics that contain ECM Additives.

9. "Regarding" means and includes affecting, concerning, constituting, dealing with, describing, embodying, evidencing, identifying, involving, providing a basis for, reflecting, relating to, respecting, stating, or in any manner whatsoever pertaining to that subject.

### REQUESTS

#### Request 1

Provide all documents regarding the efficacy of the ECM Additive in initiating, causing, enabling, promoting, or enhancing the biodegradation of plastics containing the ECM Additive.

**Request 2**

Provide all documents regarding whether or how to market ECM Additives as capable of initiating, promoting, causing, enhancing, or enabling the biodegradation of plastic.

**Request 3**

Provide all documents regarding the duration of time for complete biodegradation of a plastic product containing the ECM Additive.

**Request 4**

Provide all documents regarding whether and how plastics containing ECM Additives will biodegrade in different disposal conditions.

**Request 5**

Provide all documents regarding ASTM D5511 or ASTM D5526.

**Request 6**

Provide all documents regarding any express or implied claims that ECM Additives initiate, cause, enable, promote, or enhance the biodegradation of plastics containing the ECM Additive, and specifically including the following representations:

- a. ECM Plastics will completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal;
- b. ECM Plastics will completely break down and decompose into elements found in nature within a reasonably short period of time in a landfill;
- c. ECM Plastics will completely break down and decompose into elements found in nature within a nine months to five years in a landfill;
- d. ECM Plastics will completely break down and decompose into elements found in nature within one year in a landfill; and

- e. ECM Plastics have been shown to perform as stated in (a) through (d) under various scientific tests including, but not limited to, ASTM D5511.

**Request 7**

Provide all documents that tend to call into question or disprove any express or implied claims that ECM Additives initiate, cause, enable, promote, or enhance the biodegradation of plastics containing the ECM Additive.

**Request 8**

Provide all documents regarding any tests conducted on ECM Additives or plastics containing ECM Additives purporting to show biodegradability of ECM Additives or plastics containing ECM Additives.

**Request 9**

Provide copies of each different ECM advertisement (including those disseminated to or by ECM distributors) that represents, expressly or by implication, that ECM Additives initiate, cause, enable, promote, or enhance biodegradation of plastic.

**Request 10**

Provide copies of any materials relating to any ECM Additive made available to any ECM Additive distributor or customer, including, but not limited to: packaging, clipart, seals, logos, other marketing materials, instructions or suggestions regarding making marketing claims, or instructions for the use or marketing of the ECM Additive.

**Request 11**

Provide all documents, whether prepared by or for ECM or any other entity, including any advertising agency, regarding consumer perception, comprehension, or recall (including, but

not limited to, copy tests, marketing or consumer surveys and reports, penetration tests, recall tests, audience reaction tests, and communication tests) of:

- a. any advertisement, whether disseminated or not, that represents, expressly or by implication, that ECM Additives initiate, promote, or enhance biodegradation of plastic; and/or
- b. biodegradability in general.

**Request 12**

Provide all documents that support or call into question your contention that your customers or distributors are sophisticated purchasers.

**Request 13**

Provide all communications with customers, distributors, potential customers, or potential distributors regarding ECM Additives.

**Request 14**

Provide all documents regarding your strategy for selling the ECM Additive to customers or distributors, including any documents used for verbal sales communications or in preparation for verbal sales communications.

Dated: November 27, 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 27, 2013, I caused a true and correct copy of the paper original of the foregoing *Complaint Counsel's First Set of Requests for Production of Documents* 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](mailto:jemord@emord.com)

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

Lou Caputo  
Emord & Associates, P.C.  
3210 S. Gilbert Road, Suite 4  
Chandler, AZ 85286  
Email: [lcaputo@emord.com](mailto: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](mailto:kjohnson3@ftc.gov)

**Complaint Counsel  
Exhibit A  
Attachment 2**

**CCX-A:2**

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

In the Matter of

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

Respondent.

Docket No. 9358

**RESPONDENT'S RESPONSES AND OBJECTIONS TO  
COMPLAINT COUNSEL'S FIRST SET OF REQUESTS FOR PRODUCTION OF  
DOCUMENTS**

Pursuant to the Federal Trade Commission's Rules of Practice ("Rules"), 16 C.F.R. 3.37, Respondent ECM BioFilms, Inc. ("ECM") submits its Responses and Objections to Complaint Counsel's First Set of Requests for Production of Documents ("Requests").

ECM objects generally to the proposed breadth and scope of Complaint Counsel's Requests. They are overbroad and overly burdensome in that they seek materials and information that are cumulative, redundant, and irrelevant. Further, they seek information at issue in ECM's Motion for Protective Order, which is currently before the ALJ. ECM maintains a small workforce and does not have the resources to discover, review, and categorize such massive volumes of information within the response time requested. Notwithstanding, ECM recognizes the need for disclosure on topics under the Rules and endeavors in good faith to comply. To that end, ECM discloses Attachment A with this Response.

ECM has consistently explained that its sales are generally made through personal communication. Attachment A contains summaries of interactions between ECM and prospective customers with which ECM has not entered a confidentiality agreement from January 1, 2006 – December 31, 2011. Attachment A includes 8,540 separate notes. There are approximately 142, 078 other such entries total in ECM's records. Compiling the entries in Attachment A and reviewing them consumed significant employee time at the sacrifice of work for ECM. Attachment A is responsive to nearly all areas of Complaint Counsel's Request. ECM continues to search its records for additional responsive data and will provide it under reasonable circumstances soon after it is discovered. ECM proposes that Complaint Counsel review Attachment A, ascertain which individual records it finds relevant and about which they desire further information and/or documentation. Complaint Counsel can then describe precisely those records about which they seek more information. ECM will then proceed to discover and disclose the responsive documents and information to Complaint Counsel.

**GENERAL OBJECTIONS**

1. ECM objects to Complaint Counsel's Requests to the extent that they call for information, materials, and documents protected from disclosure pursuant to sections 3.31(c)(2)-(4) of the Rules.
2. ECM objects to Complaint Counsel's Requests to the extent that they call for information, materials, and/or documents protected from disclosure by the attorney-client privilege, the work product doctrine, or any other applicable privilege.
3. ECM objects to the Instructions and Definitions to the extent they purport to impose greater obligations on ECM than those imposed by the Rules, including, but

not limited to Rule 3.31 and/or Rule 3.37. ECM will provide answers and responses consistent with the Rules when the Instructions and Definitions deviate from the Rules.

4. ECM objects to Complaint Counsel's Requests to the extent they call for disclosure of its trade secrets and/or confidential and proprietary commercial and financial information. ECM will provide responses containing its confidential and proprietary information subject to the terms of the Protective Order Governing Discovery Material issued by Judge Chappell on October 22, 2013.

5. ECM objects to Complaint Counsel's Requests to the extent they are overly broad, vague, ambiguous, unduly burdensome, oppressive, and are not reasonably calculated to lead to the discovery of admissible evidence.

6. ECM objects to Complaint Counsel's Requests to the extent that they call for information previously provided to Complaint Counsel or information that may be less onerously obtained through other means.

7. ECM objects to Complaint Counsel's Requests to the extent they are not relevant to the pending proceeding against ECM.

8. ECM reserves all of its evidentiary objections or other objections to the introduction or use of any response at any hearing in this action and does not, by any response to any Request, waive any objections to that Request, stated or unstated.

9. ECM does not, by its response to any Request, admit to the authenticity or validity of any document.

10. ECM objects to Complaint Counsel's Requests on the ground that ECM's discovery and analysis are ongoing, and ECM reserves the right to assert additional objections, as appropriate, and to amend or supplement these objections and responses as appropriate.

11. ECM's objections and responses are based on its understanding or interpretation of Complaint Counsel's Requests and the language used therein. To the extent Complaint Counsel challenges those interpretations, or to the extent ECM derives a different understanding or interpretation of the language used, ECM reserves the right to supplement any of these objections or responses accordingly.

12. ECM objects to Complaint Counsel's Requests to the extent that such inquiries seek production of information, materials, and documents precluded from disclosure under Rule 3.31A(e), including information derived from consulting experts. Similarly, ECM objects to the Requests to the extent they seek premature disclosure of expert discovery. Consistent with Rules 3.31 and 3.31A, and the standing Protective Order in this case, ECM will provide such information at an appropriate time.

13. ECM objects to the definition of the term "plastic" to the extent that Complaint Counsel seeks to limit the universe of scientific facts, products, and polymers, in any way that narrows the generally accepted scientific definition or understanding of the term.

14. ECM objects to these document requests to the extent they are qualified with words such as "all" or other similar expansive language, because such language causes the requests to be overly broad and global, vague and ambiguous, and unduly burdensome.

15. ECM objects to these Requests due to their use of the inherently ambiguous phrases “within a reasonably short period of time after customary disposal” and “within a reasonably short period of time within a landfill” which render the requests including the phrases incomprehensible. ECM objects to these Requests due to their use of the term “biodegradable” and other similar and/or related terms. Such terms are vague and ambiguous. This includes, but is not limited to, the fictive notion that consumers interpret the term “biodegradable” to mean that a product must completely break down within a one-year period.

The foregoing general objections shall apply to each of the following Requests whether or not restated in the response to any particular response.

### **SPECIFIC OBJECTIONS AND RESPONSES**

#### **REQUEST NO. 1**

Provide all documents regarding the efficacy of the ECM Additive in initiating, causing, enabling, promoting, or enhancing the biodegradation of plastics containing the ECM Additive.

**RESPONSE:** ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to this Request because it is vague, ambiguous, and overbroad. Subject to those foregoing general and specific objections, ECM responds as follows.

ECM has previously provided the following documents:

- ECM-FTC-000015
- ECM-FTC-000016
- ECM-FTC-000017
- ECM-FTC-000022 - ECM-FTC-000061

- ECM-FTC-000069 - ECM-FTC-000080
- ECM-FTC-000081 - ECM-FTC-000088
- ECM-FTC-000106 - ECM-FTC-000230
- ECM-FTC-000231 - ECM-FTC-000241
- ECM-FTC-000244 - ECM-FTC-000322
- ECM-FTC-000390 - ECM-FTC-000401
- ECM-FTC-000402 - ECM-FTC-000480
- ECM-FTC-000481 - ECM-FTC-000482
- ECM-FTC-000483
- ECM-FTC-000484 - ECM-FTC-000485
- ECM-FTC-000486
- ECM-FTC-000487
- ECM-FTC-000488 - ECM-FTC-000490
- ECM-FTC-000492
- ECM-FTC-000497 - ECM-FTC-000509
- ECM-FTC-000510 - ECM-FTC-000516
- ECM-FTC-000550

ECM has also discovered and is providing documents contained in Attachment A that are responsive to this request. Such records are provided as they are kept in the usual course of ECM's business.

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM's Motion for a Protective Order, filed on December 13, 2013, ECM objects to the disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

**REQUEST NO. 2**

Provide all documents regarding whether or how to market ECM Additives as capable of initiating, promoting, causing, enhancing, or enabling the biodegradation of plastic.

**RESPONSE:** ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to this Request because it is vague, ambiguous, and overbroad. Subject to those foregoing general and specific objections, ECM responds as follows.

ECM has previously provided the following documents:

- ECM-FTC-000015
- ECM-FTC-000016
- ECM-FTC-000017
- ECM-FTC-000018 - ECM-FTC-000059
- ECM-FTC-000022 - ECM-FTC-00006
- ECM-FTC-000069 - ECM-FTC-000080
- ECM-FTC-000081 - ECM-FTC-000088
- ECM-FTC-000106 - ECM-FTC-000230
- ECM-FTC-000231 - ECM-FTC-000241
- ECM-FTC-000244 - ECM-FTC-000322
- ECM-FTC-000323 - ECM-FTC-000325
- ECM-FTC-000326 - ECM-FTC-000331
- ECM-FTC-000332 - ECM-FTC-000338
- ECM-FTC-000339 - ECM-FTC-000351
- ECM-FTC-000385 - ECM-FTC-000389
- ECM-FTC-000390 - ECM-FTC-000401
- ECM-FTC-000402 - ECM-FTC-000480
- ECM-FTC-000481 - ECM-FTC-000482
- ECM-FTC-000483
- ECM-FTC-000484 - ECM-FTC-000485
- ECM-FTC-000486
- ECM-FTC-000487
- ECM-FTC-000488 - ECM-FTC-000490
- ECM-FTC-000493 - ECM-FTC-000496
- ECM-FTC-000497 - ECM-FTC-000509
- ECM-FTC-000510 - ECM-FTC-000516
- ECM-FTC-000550

ECM has also discovered and is providing documents contained in Attachment A that are responsive to this request. Such records are provided as they are kept in the usual course of ECM's business.

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM's Motion for a Protective Order, filed on December 13, 2013, ECM objects to the disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

**REQUEST NO. 3**

Provide all documents regarding the duration of time for complete biodegradation of a plastic product containing the ECM Additive.

**RESPONSE:** ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to this Request because it is vague, ambiguous, and overbroad. Subject to those foregoing general and specific objections, ECM responds as follows.

ECM has previously provided the following documents:

- ECM-FTC-000015
- ECM-FTC-000016
- ECM-FTC-000017
- ECM-FTC-000022 - ECM-FTC-000061
- ECM-FTC-000069 - ECM-FTC-000080
- ECM-FTC-000081 - ECM-FTC-000088
- ECM-FTC-000106 - ECM-FTC-000230

- ECM-FTC-000231 - ECM-FTC-000241
- ECM-FTC-000244 - ECM-FTC-000322
- ECM-FTC-000332 - ECM-FTC-000338
- ECM-FTC-000339 - ECM-FTC-000351
- ECM-FTC-000390 - ECM-FTC-00040
- ECM-FTC-000402 - ECM-FTC-000480
- ECM-FTC-000481 - ECM-FTC-000482
- ECM-FTC-000483
- ECM-FTC-000484 - ECM-FTC-000485
- ECM-FTC-000486
- ECM-FTC-000487
- ECM-FTC-000488 - ECM-FTC-000490
- ECM-FTC-000497 - ECM-FTC-000509
- ECM-FTC-000510 - ECM-FTC-000516
- ECM-FTC-000550

ECM has also discovered and is providing documents contained in Attachment A that are responsive to this request. Such records are provided as they are kept in the usual course of ECM's business.

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM's Motion for a Protective Order, filed on December 13, 2013, ECM objects to the disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

**REQUEST NO. 4**

Provide all documents regarding whether and how plastics containing ECM Additives will biodegrade in different disposal conditions.

**RESPONSE:** ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to this Request because it is vague, ambiguous, and overbroad. Subject to those foregoing general and specific objections, ECM responds as follows.

ECM has previously provided the following documents:

- ECM-FTC-000015
- ECM-FTC-000016
- ECM-FTC-000017
- ECM-FTC-000069 - ECM-FTC-000080
- ECM-FTC-000081 - ECM-FTC-000088
- ECM-FTC-000106 - ECM-FTC-000230
- ECM-FTC-000231 - ECM-FTC-000241
- ECM-FTC-000244 - ECM-FTC-000322
- ECM-FTC-000332 - ECM-FTC-000338
- ECM-FTC-000339 - ECM-FTC-000351
- ECM-FTC-000390 - ECM-FTC-000401
- ECM-FTC-000402 - ECM-FTC-000480
- ECM-FTC-000481 - ECM-FTC-000482
- ECM-FTC-000483
- ECM-FTC-000484 - ECM-FTC-000485
- ECM-FTC-000486
- ECM-FTC-000487
- ECM-FTC-000488 - ECM-FTC-000490
- ECM-FTC-000492
- ECM-FTC-000497 - ECM-FTC-000509
- ECM-FTC-000510 - ECM-FTC-000516
- ECM-FTC-000550

ECM has also discovered and is providing documents contained in Attachment A that are responsive to this request. Such records are provided as they are kept in the usual course of ECM's business.

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the

parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM's Motion for a Protective Order, filed on December 13, 2013, ECM objects to the disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

**REQUEST NO. 5**

Provide all documents regarding ASTM D5511 or ASTM D5526.

**RESPONSE:** ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to this Request because it is vague, ambiguous, and overbroad. Subject to those foregoing general and specific objections, ECM responds as follows.

ECM has previously provided the following documents:

- ECM-FTC-000015
- ECM-FTC-000017
- ECM-FTC-000058 - ECM-FTC-000061
- ECM-FTC-000069 - ECM-FTC-000080
- ECM-FTC-000081 - ECM-FTC-000088
- ECM-FTC-000081 - ECM-FTC-000088
- ECM-FTC-000106 - ECM-FTC-000230
- ECM-FTC-000231 - ECM-FTC-000241
- ECM-FTC-000244 - ECM-FTC-000322
- ECM-FTC-000323 - ECM-FTC-000325
- ECM-FTC-000326 - ECM-FTC-000331
- ECM-FTC-000402 - ECM-FTC-000480
- ECM-FTC-000483
- ECM-FTC-000487
- ECM-FTC-000497 - ECM-FTC-000509

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the parties if additional documents are discovered.

**REQUEST NO. 6**

Provide all documents regarding any express or implied claims that ECM Additives initiate, cause, enable, promote, or enhance the biodegradation of plastics containing the ECM Additive, and specifically including the following representations:

- a. ECM Plastics will completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal.

**RESPONSE:** ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to this Request because the phrase “within a reasonably short period of time after customary disposal” is so ambiguous as to be incomprehensible; it therefore renders the request incompetent. Subject to those foregoing general and specific objections, ECM responds as follows.

ECM has previously provided the following documents:

- ECM-FTC-000015
- ECM-FTC-000016
- ECM-FTC-000017
- ECM-FTC-000022 - ECM-FTC-000061
- ECM-FTC-000069 - ECM-FTC-000080
- ECM-FTC-000081 - ECM-FTC-000088
- ECM-FTC-000106 - ECM-FTC-000230
- ECM-FTC-000231 - ECM-FTC-000241
- ECM-FTC-000244 - ECM-FTC-000322
- ECM-FTC-000332 - ECM-FTC-000338
- ECM-FTC-000339 - ECM-FTC-000351

- ECM-FTC-000385 - ECM-FTC-000389
- ECM-FTC-000390 - ECM-FTC-000401
- ECM-FTC-000402 - ECM-FTC-000480
- ECM-FTC-000481 - ECM-FTC-000482
- ECM-FTC-000483
- ECM-FTC-000484 - ECM-FTC-000485
- ECM-FTC-000486
- ECM-FTC-000487
- ECM-FTC-000488 - ECM-FTC-000490
- ECM-FTC-000497 - ECM-FTC-000509
- ECM-FTC-000510 - ECM-FTC-000516

ECM has also discovered and is providing documents contained in Attachment A that are responsive to this request. Such records are provided as they are kept in the usual course of ECM's business.

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM's Motion for a Protective Order, filed on December 13, 2013, ECM objects to the disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

- b. ECM Plastics will completely break down and decompose into elements found in nature within a reasonably short period of time in landfill.

**RESPONSE:** ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to this Request because the phrase "within a reasonably short period of time in landfill" is

so ambiguous as to be incomprehensible; it therefore renders the request incompetent.

Subject to those foregoing general and specific objections, ECM responds as follows.

ECM has previously provided the following documents:

- ECM-FTC-000015
- ECM-FTC-000016
- ECM-FTC-000017
- ECM-FTC-000022 - ECM-FTC-000061
- ECM-FTC-000069 - ECM-FTC-000080
- ECM-FTC-000081 - ECM-FTC-000088
- ECM-FTC-000106 - ECM-FTC-000230
- ECM-FTC-000231 - ECM-FTC-000241
- ECM-FTC-000244 - ECM-FTC-000322
- ECM-FTC-000332 - ECM-FTC-000338
- ECM-FTC-000339 - ECM-FTC-000351
- ECM-FTC-000385 - ECM-FTC-000389
- ECM-FTC-000390 - ECM-FTC-000401
- ECM-FTC-000402 - ECM-FTC-000480
- ECM-FTC-000481 - ECM-FTC-000482
- ECM-FTC-000483
- ECM-FTC-000484 - ECM-FTC-000485
- ECM-FTC-000486
- ECM-FTC-000487
- ECM-FTC-000488 - ECM-FTC-000490
- ECM-FTC-000497 - ECM-FTC-000509
- ECM-FTC-000510 - ECM-FTC-000516
- ECM-FTC-000550

ECM has also discovered and is providing documents contained in Attachment A that are responsive to this request. Such records are provided as they are kept in the usual course of ECM's business.

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM's Motion for a Protective Order, filed on December 13, 2013, ECM objects to the

disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

- c. ECM Plastics will completely break down and decompose into elements found in nature within nine months to five years in a landfill.

**RESPONSE:** ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to this Request because it is vague, ambiguous, and overbroad. Subject to those foregoing general and specific objections, ECM responds as follows.

ECM has previously provided the following documents:

- ECM-FTC-000015
- ECM-FTC-000016
- ECM-FTC-000017
- ECM-FTC-000022 - ECM-FTC-000061
- ECM-FTC-000069 - ECM-FTC-000080
- ECM-FTC-000081 - ECM-FTC-000088
- ECM-FTC-000106 - ECM-FTC-000230
- ECM-FTC-000231 - ECM-FTC-000241
- ECM-FTC-000244 - ECM-FTC-000322
- ECM-FTC-000332 - ECM-FTC-000334
- ECM-FTC-000385 - ECM-FTC-000389
- ECM-FTC-000390 - ECM-FTC-000401
- ECM-FTC-000402 - ECM-FTC-000480
- ECM-FTC-000481 - ECM-FTC-000482
- ECM-FTC-000483
- ECM-FTC-000484 - ECM-FTC-000485
- ECM-FTC-000486
- ECM-FTC-000487
- ECM-FTC-000488 - ECM-FTC-000490
- ECM-FTC-000497 - ECM-FTC-000509
- ECM-FTC-000510 - ECM-FTC-000516

ECM has also discovered and is providing documents contained in Attachment A that are responsive to this request. Such records are provided as they are kept in the usual course of ECM's business.

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM's Motion for a Protective Order, filed on December 13, 2013, ECM objects to the disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

- d. ECM Plastics will completely break down and decompose into elements found in nature within one year in a landfill.

**RESPONSE:** ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to this Request because it is vague, ambiguous, and overbroad.

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged documents responsive to this Request at a time mutually convenient to the parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM's Motion for a Protective Order, filed on December 13, 2013, ECM objects to the disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

- e. ECM Plastics have been shown to perform as stated in (a) through (d) under various scientific tests including, but not limited to, ASTM D5511.

**RESPONSE:** ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to this Request because it is vague, ambiguous, and overbroad. Subject to those foregoing general and specific objections, ECM responds as follows.

ECM has previously provided the following documents:

- ECM-FTC-000015
- ECM-FTC-000016
- ECM-FTC-000058 - ECM-FTC-000061
- ECM-FTC-000069 - ECM-FTC-000080
- ECM-FTC-000081 - ECM-FTC-000088
- ECM-FTC-000106 - ECM-FTC-000230
- ECM-FTC-000231 - ECM-FTC-000241
- ECM-FTC-000244 - ECM-FTC-000322
- ECM-FTC-000402 - ECM-FTC-000480
- ECM-FTC-000483
- ECM-FTC-000486
- ECM-FTC-000497 - ECM-FTC-000509

ECM has also discovered and is providing documents contained in Attachment A that are responsive to this request. Such records are provided as they are kept in the usual course of ECM's business.

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM's Motion for a Protective Order, filed on December 13, 2013, ECM objects to the

disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

**REQUEST NO. 7**

Provide all documents that tend to call into question or disprove any express or implied claims that ECM Additives initiate, cause, enable, promote, or enhance the biodegradation of plastics containing the ECM Additive.

**RESPONSE:** ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to this Request because it is vague, ambiguous, and overbroad. Subject to those foregoing general and specific objections, ECM responds as follows. There are no documents that “call into question or disprove any express or implied claims” referenced in this request.

ECM has provided responsive documents, and such documents speak for themselves concerning their nature or content. ECM will provide additional responsive documents at a time and place mutually convenient to the parties, and consistent with the ALJ’s ruling on ECM’s pending motion for a protective order.

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM’s Motion for a Protective Order, filed on December 13, 2013, ECM objects to the disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

**REQUEST NO. 8**

Provide all documents regarding any tests conducted on ECM Additives or plastics containing ECM Additives purporting to show biodegradability of ECM Additives or plastics containing ECM Additives.

**RESPONSE:** ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to this Request because it is vague, ambiguous, and overbroad. Subject to those foregoing general and specific objections, ECM responds as follows.

ECM has previously provided the following documents:

- ECM-FTC-000015
- ECM-FTC-000022 - ECM-FTC-000061
- ECM-FTC-000069 - ECM-FTC-000080
- ECM-FTC-000081 - ECM-FTC-000088
- ECM-FTC-000106 - ECM-FTC-000230
- ECM-FTC-000231 - ECM-FTC-000241
- ECM-FTC-000244 - ECM-FTC-000322
- ECM-FTC-000402 - ECM-FTC-000480
- ECM-FTC-000481 - ECM-FTC-000482
- ECM-FTC-000483
- ECM-FTC-000484 - ECM-FTC-000485
- ECM-FTC-000488 - ECM-FTC-000490
- ECM-FTC-000497 - ECM-FTC-000509

ECM has also discovered and is providing documents contained in Attachment A that are responsive to this request. Such records are provided as they are kept in the usual course of ECM's business.

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM's

Motion for a Protective Order, filed on December 13, 2013, ECM objects to the disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

**REQUEST NO. 9**

Provide all copies of each different ECM advertisement (including those disseminated to or by ECM distributors) that represents, expressly or by implication, that ECM Additives initiate, cause, enable, promote, or enhance biodegradation of plastic.

**RESPONSE:** ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM objects to the request for “advertisements” as that term calls for a legal conclusion the sufficiency of which is in controversy. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to the extent that such request implies that ECM possesses or exerts any degree of control over such advertisements displayed, produced, or endorsed by third-party distributors. ECM objects to this Request because it is vague, ambiguous, and overbroad. Subject to those foregoing general and specific objections, ECM responds as follows: ECM has provided responsive documents, and such documents speak for themselves concerning their nature or content. ECM will provide additional responsive documents at a time and place mutually convenient to the parties, and consistent with a final and binding Order on ECM’s pending motion for a protective order.

**REQUEST NO. 10**

Provide copies of any materials relating to any ECM Additive made available to any ECM Additive distributor or customer, including, but not limited to, packaging, clipart,

seals, logos, other marketing materials, instructions or suggestions regarding making marketing claims, or instructions for the use or marketing of the ECM Additive.

**RESPONSE:** ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to this Request because it is vague, ambiguous, and overbroad. Subject to those foregoing general and specific objections, ECM responds as follows.

ECM has previously provided the following documents:

- ECM-FTC-000001 – ECM-FTC-000012
- ECM-FTC-000015
- ECM-FTC-000016
- ECM-FTC-000017
- ECM-FTC-000018 - ECM-FTC-000021
- ECM-FTC-000022 - ECM-FTC-000061
- ECM-FTC-000062 - ECM-FTC-000068
- ECM-FTC-000069 - ECM-FTC-000080
- ECM-FTC-000081 - ECM-FTC-000088
- ECM-FTC-000106 - ECM-FTC-000230
- ECM-FTC-000243
- ECM-FTC-000244 - ECM-FTC-000322
- ECM-FTC-000385 - ECM-FTC-000389
- ECM-FTC-000390 - ECM-FTC-000401
- ECM-FTC-000402 - ECM-FTC-000480
- ECM-FTC-000481 - ECM-FTC-000482
- ECM-FTC-000483
- ECM-FTC-000484 - ECM-FTC-000485
- ECM-FTC-000486
- ECM-FTC-000487
- ECM-FTC-000488 - ECM-FTC-000490
- ECM-FTC-000492

ECM has also discovered and is providing documents contained in Attachment A that are responsive to this request. Such records are provided as they are kept in the usual course of ECM's business.

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM's Motion for a Protective Order, filed on December 13, 2013, ECM objects to the disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

**REQUEST NO. 11**

Provide all documents, whether prepared by or for ECM or any other entity, including any advertising agency, regarding consumer perception, comprehension, or recall (including, but not limited to, copy tests, marketing or consumer surveys and reports, penetration tests, recall tests, audience reaction tests, and communication tests) of:

- a. Any advertisement, whether disseminated or not, that represents, expressly or by implication, that ECM Additives initiate, promote, or enhance biodegradation of plastic; and/or
- b. Biodegradability in general.

**RESPONSE:** Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM's Motion for a Protective Order, filed on December 13, 2013, ECM objects to the disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

ECM objects to such Request to the extent that it seeks production of information, materials, and documents precluded from disclosure under Rule 3.31A(e), including information derived from consulting experts. Similarly, ECM objects to the Requests to the extent they seek premature disclosure of expert discovery. Consistent with Rules 3.31 and 3.31A, and the standing Protective Order in this case, ECM will provide such information at an appropriate time.

**REQUEST NO. 12**

Provide all documents that support or call into question your contention that your customers or distributors are sophisticated purchasers.

**RESPONSE:** ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to this Request because it is vague, ambiguous, and overbroad. Subject to those foregoing general and specific objections, ECM responds as follows.

ECM has previously provided the following documents:

- ECM-FTC-000015
- ECM-FTC-000016
- ECM-FTC-000017
- ECM-FTC-000022 - ECM-FTC-000061
- ECM-FTC-000062 - ECM-FTC-000068
- ECM-FTC-000069 - ECM-FTC-000080
- ECM-FTC-000081 - ECM-FTC-000088
- ECM-FTC-000243
- ECM-FTC-000244 - ECM-FTC-000322
- ECM-FTC-000323 - ECM-FTC-000325
- ECM-FTC-000326 - ECM-FTC-000331
- ECM-FTC-000332 - ECM-FTC-000338
- ECM-FTC-000339 - ECM-FTC-000351
- ECM-FTC-000352 - ECM-FTC-000355
- ECM-FTC-000356 - ECM-FTC-000361

- ECM-FTC-000363 - ECM-FTC-000380
- ECM-FTC-000385 - ECM-FTC-000389
- ECM-FTC-000390 - ECM-FTC-000401
- ECM-FTC-000402 - ECM-FTC-000480
- ECM-FTC-000481 - ECM-FTC-000482
- ECM-FTC-000483
- ECM-FTC-000484 - ECM-FTC-000485
- ECM-FTC-000486
- ECM-FTC-000487
- ECM-FTC-000488 - ECM-FTC-000490
- ECM-FTC-000492
- ECM-FTC-000493 - ECM-FTC-000496

ECM has also discovered and is providing documents contained in Attachment A that are responsive to this request. Such records are provided as they are kept in the usual course of ECM's business.

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM's Motion for a Protective Order, filed on December 13, 2013, ECM objects to the disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

**REQUEST NO. 13**

Provide all communications with customers, distributors, potential customers, or potential distributors regarding ECM Additives.

**RESPONSE:** ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM objects to disclosure of any such documents that would fall outside the limitations that ECM requested in its Motion for a Protective Order, filed on

December 13, 2013. ECM further objects to the Request because it is overly burdensome, and would impose an expense that substantially outweighs any benefit. ECM objects to the extent that such Request implies that ECM possesses or exerts any degree of control over such customers, distributors, potential customers, or potential distributors. ECM objects to this Request because it is vague, ambiguous, and overbroad. Subject to those foregoing general and specific objections, ECM responds as follows.

ECM has previously provided the following documents:

- ECM-FTC-000015
- ECM-FTC-000016
- ECM-FTC-000017
- ECM-FTC-000018 - ECM-FTC-000021
- ECM-FTC-000081 - ECM-FTC-000088
- ECM-FTC-000243
- ECM-FTC-000323 - ECM-FTC-000325
- ECM-FTC-000326 - ECM-FTC-000331
- ECM-FTC-000332 - ECM-FTC-000338
- ECM-FTC-000339 - ECM-FTC-000351
- ECM-FTC-000352 - ECM-FTC-000355
- ECM-FTC-000356 - ECM-FTC-000361
- ECM-FTC-000363 - ECM-FTC-000380
- ECM-FTC-000385 - ECM-FTC-000389
- ECM-FTC-000481 - ECM-FTC-000482
- ECM-FTC-000483
- ECM-FTC-000484 - ECM-FTC-000485
- ECM-FTC-000486
- ECM-FTC-000487
- ECM-FTC-000488 - ECM-FTC-000490
- ECM-FTC-000493 - ECM-FTC-000496

ECM has also discovered and is providing documents contained in Attachment A that are responsive to this request. Such records are provided as they are kept in the usual course of ECM's business.

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM's Motion for a Protective Order, filed on December 13, 2013, ECM objects to the disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

**REQUEST NO. 14**

Provide all documents regarding your strategy for selling the ECM Additive to customers or distributors, including any documents used for verbal sales communications or in preparation for verbal sales communications.

**RESPONSE:** ECM hereby incorporates by reference each General Objection as if set forth here in full. ECM further objects to the extent that such Request would impose a burden and expense that substantially outweighs any benefit. ECM objects to this Request because it is vague, ambiguous, and overbroad. Subject to those foregoing general and specific objections, ECM responds as follows.

ECM has previously provided the following documents:

- ECM-FTC-000015
- ECM-FTC-000016
- ECM-FTC-000017
- ECM-FTC-000018 - ECM-FTC-000021
- ECM-FTC-000022 - ECM-FTC-000061
- ECM-FTC-000062 - ECM-FTC-000068
- ECM-FTC-000106 - ECM-FTC-000230
- ECM-FTC-000244 - ECM-FTC-000322
- ECM-FTC-000390 - ECM-FTC-000401
- ECM-FTC-000402 - ECM-FTC-000480
- ECM-FTC-000481 - ECM-FTC-000482
- ECM-FTC-000483

- ECM-FTC-000484 - ECM-FTC-000485
- ECM-FTC-000486
- ECM-FTC-000487
- ECM-FTC-000488 - ECM-FTC-000490
- ECM-FTC-000492

ECM has also discovered and is providing documents contained in Attachment A that are responsive to this request. Such records are provided as they are kept in the usual course of ECM's business.

Discovery is ongoing; ECM will produce any additional relevant, responsive, non-privileged document responsive to this Request at a time mutually convenient to the parties if additional documents are discovered. To the extent ECM discovers the existence of relevant documents responsive to this Request that are the subject of ECM's Motion for a Protective Order, filed on December 13, 2013, ECM objects to the disclosure of such documents. ECM will not disclose such documents unless and until required by a final and binding Order.

DATED this 27th day of December 2013

Respectfully submitted,

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

**CERTIFICATE OF SERVICE**

I hereby certify that on December 27, 2013, I caused a true and correct copy of the paper original of the foregoing **RESPONDENT'S RESPONSES AND OBJECTIONS TO COMPLAINT COUNSEL'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS** to be served as follows:

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

Katherine Johnson  
Division of Enforcement  
Bureau of Consumer Protection  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Mail stop M-8102B  
Washington, D.C. 20580  
Email: [kjohnson3@ftc.gov](mailto:kjohnson3@ftc.gov)

Elisa Jillson  
Division of Enforcement  
Bureau of Consumer Protection  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Mail stop M-8102B  
Washington, D.C. 20580  
Email: [ejillson@ftc.gov](mailto:ejillson@ftc.gov)

Jonathan Cohen  
Division of Enforcement  
Bureau of Consumer Protection  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Mail stop M-8102B  
Washington, D.C. 20580  
Email: [jcohen2@ftc.gov](mailto:jcohen2@ftc.gov)

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

/s/ Jonathan W. Emord  
Jonathan W. Emord  
EMORD & ASSOCIATES, P.C.  
11808 Wolf Run Lane  
Clifton, VA 20124  
Telephone: 202-466-6937  
Facsimile: 202-466-6938

**Complaint Counsel  
Exhibit A  
Attachment 3**

**CCX-A:3**

**Thomas Nealis**

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**From:** [REDACTED] Tom [REDACTED]  
**Sent:** Wednesday, September 08, 2010 10:16 AM  
**To:** Thomas Nealis  
**Subject:** Our Conversation - ASTM Standards

Tom, I am sending the emails below as an "FYI" so you have the latest information from us. Monica, our Salesperson for Sam's and P&G, has been talking with ASTM directly. I am not sure if you will learn much from the email below but I want you to see it anyway.

I think we are arriving at a point where we are going to have to do some physical testing of our products with bio case to put some issues to rest. Do you agree with my conclusion? Or, can we continue to march on as we are now?

Assuming we have to do some testing, can you tell me what that test(s) should be; for how long; and how much (ballpark) estimate it would cost to complete it?

We will discuss these questions too. I have conference call now but will call you later in the day.

Tom

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**From:** [REDACTED] Monica  
**Sent:** Tuesday, September 07, 2010 4:48 PM  
**To:** [REDACTED] Dave; [REDACTED] Tom  
**Subject:** RE: Our Conversation - ASTM Standards

Dave: I believe is very good that ASTM is talking to us and has an interest in helping us, a good sign. I agree it is a lot to digest but if we are going to make claims that our packs are biodegradable I strongly suggest we try to get some of what they are asking for, done. Some of these requirements should come from your supplier, but I don't think their responsibility is to get involved in testing their additive in our cases, that is something that needs to be done by us and should be documented.

Let me know if you need anything else from me.

The rest will come tomorrow.

Best Regards

**Monica [REDACTED] g**

***Territory Manager - California***

***Sr. Manager National Accounts***

[REDACTED]

a [REDACTED] Group Company

PH: [REDACTED]

Fax: [REDACTED]

[REDACTED] m

[REDACTED] m

[REDACTED] n

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**From:** [REDACTED] Dave  
**Sent:** Tuesday, September 07, 2010 4:39 PM  
**To:** [REDACTED] Monica; [REDACTED] Tom  
**Subject:** RE: Our Conversation - ASTM Standards

WOW. There is a lot here to digest. I strongly suggest we get a conference call with our supplier to get his input in all of this. Basically we are the middle man right now between them and the customer. THEY need to help us help sell this stuff.

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**From:** [REDACTED] Monica  
**Sent:** Tuesday, September 07, 2010 3:35 PM  
**To:** [REDACTED] Tom; [REDACTED] Dave  
**Subject:** FW: Our Conversation - ASTM Standards

Tom – Dave: My conversations with AST continues as I am trying to see what we need to do to get their backing so we can get back in to conversations with the “big guys”.

Below is an e-mail I received from my contact and the person in charge of ASTM Standards for Plastic. Please read and let me know if you have any questions or comments. I will be sending you on a separate e-mail standards D5511, D5509 and D638 as he will be e-mailing them to me tomorrow.

Regards

**Monica [REDACTED] g**

***Territory Manager - California***

*Sr. Manager National Accounts*

[REDACTED]

a [REDACTED] Group Company

PH: [REDACTED]

Fax: [REDACTED]

[REDACTED] m

[REDACTED] m

[REDACTED] n

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**From:** Ramani Narayan [mailto:narayan@msu.edu]  
**Sent:** Tuesday, August 31, 2010 10:37 AM  
**To:** [REDACTED] Monica  
**Subject:** RE: Our Conversation – ASTM Standards

Monica: Thanks for the information you have provided me, I also visited your web site and that help me further to understand your products and your interest to obtain ASTM support to claim biodegradation of your packaging.

Unfortunately, there are some fundamental misconceptions that needs to be cleared up and in all probability not presented to you appropriately. Specifically let's address the two ASTM standards D 5511 and D5209. You were right in the way you addressed D6400 in relations to your company's products and although it does apply to any plastic packaging, we need to look at other aspects of your products biodegradation before getting into anything specific.

ASTM D5511 is a "test method". It teaches how to conduct the test under high solids anaerobic digester conditions and how to accurately and correctly report on the **rate and extent of biodegradation** under these conditions. Since it is test methods there is no pass or fail criteria established. So stating that the product "complies" or "meets" the test has no meaning. What are the results of the" test". Is it 0% or 20% or 50% or 90% biodegradation as per the reporting requirement in the test method ASTM D5511. If the results show 90%+ biodegradation in ASTM D5511, then a claim of complete biodegradability under high solids anaerobic digester conditions is valid and warranted. If the result of the "test method" shows only 10-20% biodegradation and it levels off with nothing or very little happening, then a claim of "biodegradability" is not accurate and misleading.

Assuming that your products comply with ASTM D5511 is inaccurate, unless you also provide the results of the test and show 90% + biodegradation. In that context, may I also suggest that you independently have the product tested as per ASTM D5511 and check out the results of the test. Many major manufacturers have and are doing their own testing and validation and finding that the results show little or no biodegradation in ASTM D5511 or D5526 (accelerated landfill conditions).

I note from your web site that you are a manufacturer of molded plastic parts. So let me give you another analogy from that and you can have your testing done and discussed. ASTM D638 is a test method for measuring tensile properties of plastics. It is a test method that teaches how to conduct a tensile test, how to prepare test specimens, and how to report tensile data. I do not think your company would say that our molded product "complies" with D638, but would state that using D638, our molded product shows the following results of tensile strength, elongation to break modulus etc. Based on these results, our product meets the requirements of your application – remember the results of the test could give very high tensile strength, or very poor tensile strength.

Another word of caution, "extrapolation" of data is being used to convince that the product is completely biodegradable in anaerobic landfill environment. By stopping the test at 10% or 20% biodegradation and drawing a straight line extrapolation to show that the product will completely biodegrade in 9 months or 5 years is scientifically erroneous and misleading, especially if the biodegradation is slowly leveling off and reaching a plateau with no more biodegradation happening. Again, your engineering folks would clearly understand this.

The Standards are not "material or product" specific, it answers the question as to whether microorganisms present in the target disposal environment is capable of **completely** utilizing/assimilating the plastic substrate as food in a reasonably defined time period. Fundamental biology/biochemistry taught in high school and college freshman classes teaches how to quantitatively measure the microbial assimilation which forms the basis for not only the ASTM standards but EN and ISO standards as well.

Maybe we can now review the data obtained by you using D5511 and D5209 and answer the question as to what percent biodegradation is obtained and in what time frame. I look forward to discussing this with you further.

Best wishes

*Ramani Narayan*

ASTM Director of Research.

University Distinguished Professor