

ORIGINAL

PUBLIC DOCUMENT

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

PUBLIC

**RESPONDENT'S OPPOSITION TO COMPLAINT COUNSEL'S
MOTION FOR SANCTIONS**

Respondent, ECM BioFilms, Inc. ("ECM"), hereby opposes Complaint Counsel's Motion for Sanctions filed January 22, 2014. The ordering paragraph on page 9 of this Court's January 10, 2014 Order compelled ECM to produce to Complaint Counsel all of its customer names by January 16, 2014. ECM complied with that order, delivering the full list of names to Complaint Counsel on January 16. See Compl. Exh. CCX-A:1. The January 10 Order does not compel production of revenues per customer. On that basis alone, the motion for sanctions fails because the necessary predicate of a production order is missing. Moreover, the underlying interrogatory propounded by Complaint Counsel, Interrogatory No. 2, seeks: "For each customer or distributor identified in Interrogatory 1, list ECM's revenue per customer or distributor per year." Compl. Exh. CCX-A:3. That very information ECM supplied to Complaint Counsel on January 20. Finally, Complaint Counsel has withheld the material fact that ECM has agreed with Complaint Counsel to supply its entire database of contemporaneous summations of every email, facsimile, and phone call with every ECM customer since January 1, 2009, which includes all notations concerning every verbal, facsimile, or email contact with *every customer*. From that

information Complaint Counsel can determine everything it needs to know about the typicality, subject matter, and frequency of claims made to every customer. There is therefore no basis for sanctions, and Complaint Counsel's instant motion is not made in good faith.

BACKGROUND

On November 26th, Complaint Counsel served Respondent with interrogatories. Interrogatory No. 1 asked ECM to identify all of its customers. *See* Compl. Mot. for Sanctions, Ex. CCX-A:3. Interrogatory No. 2 requested, "... ECM's revenue per customer or distributor per year." *Id.* ECM timely objected to those requests on December 3, 2013, just days after receiving Complaint Counsel's submission (Complaint Counsel served the discovery requests the day before Thanksgiving). In meet and confer conversations on December 5th (and several times thereafter), Complaint Counsel categorically refused to limit its discovery in any substantive way. ECM therefore sought a protective order on December 13, 2013, more than two weeks before its deadline to respond to Complaint Counsel's discovery requests. *See* ECM Mot. for Protective Order (Dec. 13, 2013). ECM replied timely to Complaint Counsel's discovery requests on December 23rd and 27th, but took the position that provision of customer discovery was premature until his Honor ruled on ECM's motion for a protective order.

On January 10, his Honor denied ECM's motion for a protective order, and granted Complaint Counsel's cross-motion to compel production of ECM's customer names. *See* Order Denying Resp.'s Mot. for Prot. Order (Jan. 10, 2014). By its express terms, that Order is limited to Complaint Counsel's first interrogatory:

Complaint Counsel's Cross-Motion to Compel does not seek any relief beyond obtaining Respondent's complete customer list, as encompassed by Interrogatory 1, above. Thus, it does not appear that Complaint Counsel's Cross-Motion to Compel is directed at Interrogatories 2 or 6, or Document Request 13.

Id. at 2; *see also id.* at 9 (ordering only that “Respondent shall provide a complete customer list as requested by Complaint Counsel’s Interrogatory 1 ... no later than January 16, 2014”). In ordering ECM to release its customer names, his Honor relied on Complaint Counsel’s representation that they would cooperate with Respondent’s Counsel in specific ways: (1) to “choose a subset of . . . customers and limit [their] contacts to this subset” and (2) to “limit [the discovery] in a manner that conserves both parties resources.” *Id.* at 7 (citing Complaint Counsel’s Reply); *id.* at 8 (“Complaint Counsel responds that it is prepared to negotiate ... to reduce the number of responsive materials”).

Out of court, Complaint Counsel has not limited its discovery as it promised to the court. ECM is a small company with [REDACTED] of whom bear principal responsibility for locating all responsive documents. Despite the fact that customer discovery was premature until this Court’s January 10, 2014 Order, and that ECM has been willing to disclose substantial documents concerning its interactions with customers, Complaint Counsel has erroneously painted ECM as a non-compliant party. Following his Honor’s January 10, 2014 Order, ECM timely provided its entire customer list to Complaint Counsel. On January 20, 2014, ECM provided a list of revenues for each of its customers identified in response to Complaint Counsel’s Interrogatory No. 1. The revenues are a complete set of receipts for all ECM customers from January 1, 2009 to the December 31, 2013.¹ *See* CCX-A:2.

In a meeting with Complaint Counsel on January 16, 2014, ECM pledged to produce its entire database of customer correspondence, which includes a contemporaneously recorded

¹ Complaint Counsel now argues that it never agreed to a temporal limitation through 2009. Yet in the email exhibit attached as CCX-A:4, at 1, Complaint Counsel clearly states that they would accept a January 1, 2009 limitation. Complaint Counsel did not object to that temporal limitation in any meet and confer meeting had between the parties when ECM stated that temporal limitations were necessary to limit ECM’s discovery burden.

summation of every ECM client interaction (e.g., every email, facsimile, and telephone call) had with *every* ECM customer since January 1, 2009. *See* RX-A, Declaration of R. Sinclair, at ¶ 7. The database notes are the most accurate and comprehensive compilation of information concerning ECM's interactions with its customers, and they reveal the frequency and substance of all client contacts. The database is in fact an extraordinary daily compilation of relevant data, which includes information few other small companies maintain in their ordinary course of business. ECM pledged to gather all of that information and provide it to Complaint Counsel between January 31, 2014 and March 15, 2014. The day following that agreement, Complaint Counsel filed this instant motion for sanctions. Complaint Counsel makes no mention of that agreement in their motion.

ARGUMENT

“[S]anctions under Rule 3.38 should be imposed *only if* (1) production of the requested material has been mandated by a subpoena or specific discovery order issued by an ALJ or the Commission and directed at the party (or its officer or agent) 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 Osf Healthcare Sys., A Corp., & Rockford Health Sys., A Corp.*, 9349, 2012 WL 665030 (F.T.C. Feb. 22, 2012) (emphasis added). Here the Court should deny Complaint Counsel's motion because (1) ECM did not violate a “specific discovery order;” (2) ECM's January 20th production of revenue information is a complete response to Complaint Counsel's actual Interrogatory 2 and was entirely consistent with the January 10th Order; and (3) the sanctions Complaint Counsel request are unreasonable.

**A. Complaint Counsel's Motion Lacks A Necessary Factual Predicate
Because ECM Has Not Failed To Comply With A Discovery Order**

By its express terms, this Court's January 10 Order is limited to Complaint

Counsel's Interrogatory 1, which asks for a complete list of ECM's customer names.

ECM complied with that Order when, on January 16, it supplied Complaint Counsel the complete listing. Consequently, the essential foundation for sanctions predicated on the notion that ECM did not comply with the Court's January 10 Order is missing.

Second, the other request Complaint Counsel propounded to ECM, Interrogatory No. 2, asks for precisely what ECM has supplied to Complaint Counsel. That interrogatory asks for a "list [of] ECM's revenue per customer or distributor per year" for "each customer or distributor identified in Interrogatory 1." *See* Compl's Mot. for Sanctions, Exh. CCX-A:3. ECM provided its list of ECM's revenue per customer or distributor per year since January 1, 2009. *See id.* at Exh. CCX-A:2. It has not created a document that supplies information tying each revenue generated to a named customer, nor is it obliged to create such a document.

Third, there is no order in place commanding ECM to produce the precise document to which Complaint Counsel says it is entitled. The January 10, 2014 order on counsel's motion to compel commands ECM to produce its complete list of customer names only. ECM did that by January 16th, as required by the Order.

Fourth, to the extent the Order discussed ECM's production of revenue related information, it concluded that the information was relevant to the issue of damages. *See* Jan. 10 Order at 7-8. The ECM list of revenues it has supplied to Complaint Counsel gives all revenue totals needed for a damages calculation, which are sufficient to identify the volume of ECM sales over time.

Fifth, to the extent the January 10 Order discussed a more general relevance of the

revenue-related information, it was as a means to help identify customer-specific claims or the frequency of communication with customers. Complaint Counsel did not inform the Court of the material fact that ECM has agreed to disclose its contemporaneous summation of every ECM customer interaction (email, phone, and fax), which provides all specific claims for every customer every day from January 1, 2009 to the present, thus fulfilling that evidentiary need precisely. That evidence will be supplied January 31 and March 15 as per agreement with Complaint Counsel, long before the close of discovery. Even were Complaint Counsel correct in its assumption that ECM corresponds differently or more frequently with larger customers, that would be revealed to Complaint Counsel through ECM's contemporaneous summation database.

B. Complaint Counsel's Request for Relief Conflicts With Representations Made to This Court

To the extent the January 10 Order discussed the burden imposed on ECM by production of customer-related information, his Honor trusted Complaint Counsel's promise in its Reply to lessen that burden. *See* Jan. 10 Opinion and Order, at 4, 7, 8. Before the Court, Complaint Counsel made that pledge but out of Court Complaint Counsel has reneged on it, failing despite repeated ECM requests to identify any subset of customers or any appropriate limit on the scope of discovery that would lessen ECM's burden. *See* Compl. Exh. CCX-A:4, at 2. In the alternative, rather than limiting discovery requests to reasonable levels, Complaint Counsel has proposed that ECM hire a third party litigation consultant at substantial cost to the company to manage the extreme production burdens imposed by Complaint Counsel's document requests which seek literally every file ECM has in its possession.

C. The Relief Requested by Complaint Counsel Is Not Commensurate with the Discovery Issues Presented

The relief requested in Complaint Counsel's motion is calculated to maximize the prejudicial impact on ECM's case and alleviate the burden of proof on Complaint Counsel under the statutory standard of proof in these cases. *See* 16 C.F.R. § 3.43(a) ("[C]ounsel representing the Commission ... shall have the burden of proof"); *FTC v. Garvey*, 383 F.3d 891, 901 (9th Cir. 2004) (citing *FTC v. Pantron I*, 33 F.3d 1088, 1096 (9th Cir. 1994)). Complaint Counsel seeks to bar ECM from contesting whether the customers Complaint Counsel selects are somehow representative, and limit ECM's arguments concerning remedies. That relief is unreasonable because it conflicts with the statute and invites a misprision of justice through decisional bias. The relief would resolve issues of fact in Complaint Counsel's favor, when such a remedy is plainly inconsistent with and disproportionate to any purported prejudice (left unarticulated) that could be experienced by Complaint Counsel.

First, the revenue information released by ECM is already adequate to determine potential damages, because it reveals precisely the amounts paid by each customer to ECM since January 1, 2009.

Second, Complaint Counsel has not shown that the revenue information it now seeks is necessary to develop a "representative" sample of ECM customer contacts, not when counsel has ECM's entire customer list and will soon have a database replete with contemporaneous summations of every ECM email, facsimile, and phone call since January 2009. Complaint Counsel argues that it needs more revenue information to "take discovery quickly, to ensure a representative customer sample, and to address issues associated with the potential remedy." Compl. Mot. at 1. That statement is belied by the fact that by agreement with Complaint Counsel, ECM is supplying its entire database of contemporaneous customer contacts, in

substantially the same format as those contacts excerpted in Exhibit A to ECM's earlier-filed Opposition to Complaint Counsel's Cross-Motion to Compel (Dec. 31, 2013).

Third, Complaint Counsel ignores the palpable burden ECM suffers when Complaint Counsel causes all of ECM's major customers to become entangled in this dispute, deviating from Complaint Counsel's clear promise to this Court that it would contact only a subset of all customers identified by ECM. Complaint Counsel has not explained why the less burdensome alternative of the database entries along with witness testimony and evidence gleaned from a subset of ECM customers is not sufficient to vet fully the claims made, or identify representative customers, particularly because the claims concerning biodegradation are substantively and materially indistinguishable customer to customer, a fact that should be apparent when Complaint Counsel reviews ECM's database files. Complaint Counsel does not explain why tying revenues to each specific customer is reasonably demanded when through discovery it will possess all information needed to know precisely what claims were made to each customer served by ECM from January 1, 2009 forward.

In light of the fact that the database entries, not revenues, are the best evidence of ECM interactions with its customers, and the corresponding absence of any sound basis for the indirect revenue evidence, there remains only one possible motive for Complaint Counsel's insistence on ECM's creation of a customer associated revenue listing: to choose targets for subpoena based on amount of payment made to ECM, not content of claims made by ECM. That illegitimate choice enables Complaint Counsel to intimidate ECM's principal accounts and cause present and substantial business disruption and economic injury to ECM before any adjudication of fault and without judicial temperament to constrain the injury. ECM draws [REDACTED]

[REDACTED]

██████████ See RX-A, at ¶ 3. ██████████

██████████ after the FTC publicized its action against ECM. *Id.* at ¶ 4. ECM's ongoing financial burden outweighs Complaint Counsel's desire to target top accounts solely for the sake of expeditious discovery. *See id.* at ¶¶ 5-7. Justice demands that this illegitimate abuse of discovery be stopped consistent with the limitations in Rule 3.31(c)(2).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that his Honor deny Complaint Counsel's Motion for Sanctions.

Respectfully submitted,

/s/ Jonathan W. Emord

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DATED this 31st day of January 2014.

STATEMENT CONCERNING CONFIDENTIALITY

The undersigned Respondent's Counsel hereby states that the content of certain exhibits referenced in the foregoing Opposition contain information properly designated "confidential" under the standing Protective Order in this case. Accordingly, ECM submits this public redacted version with content redacted.

DATED: January 31, 2014.

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

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 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** through the e-filing system:

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

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

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

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

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Jonathan Cohen (jcohen2@ftc.gov)
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Washington, D.C. 20580

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

DATED: February 4, 2014

/s/ Jonathan W. Emord
Jonathan W. Emord
EMORD & ASSOCIATES, P.C.
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RX-A
(EXHIBIT A)

**CONFIDENTIAL DOCUMENT SUBJECT TO
PROTECTIVE ORDER**

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

CONFIDENTIAL

DECLARATION OF ROBERT SINCLAIR

I, ROBERT SINCLAIR, under penalty of perjury, hereby state as follows:

1. I am over the age of eighteen years and I make this affidavit on personal knowledge of its contents and in further support of Respondent's Opposition to Complaint Counsel's Motion to Compel.

2. I am the President and Chief Executive Officer of ECM BioFilms, Inc., an Ohio company founded in 1998. As ECM's President and CEO, I have personal knowledge of ECM's daily operations.

3. [REDACTED]

[REDACTED]

[REDACTED] See Attachment A.

4. [REDACTED]

[REDACTED]. See Attachment B.

5. [REDACTED]

[REDACTED]. A copy of

ECM's latest financial statement is attached as Attachment B. [REDACTED]

[REDACTED]

6. ECM's customers are aware of the FTC case, and the consent decrees the FTC obtained against two of ECM's customers. Having experienced the expense and time necessary to address even an inquiry from the FTC directly, [REDACTED]

[REDACTED]

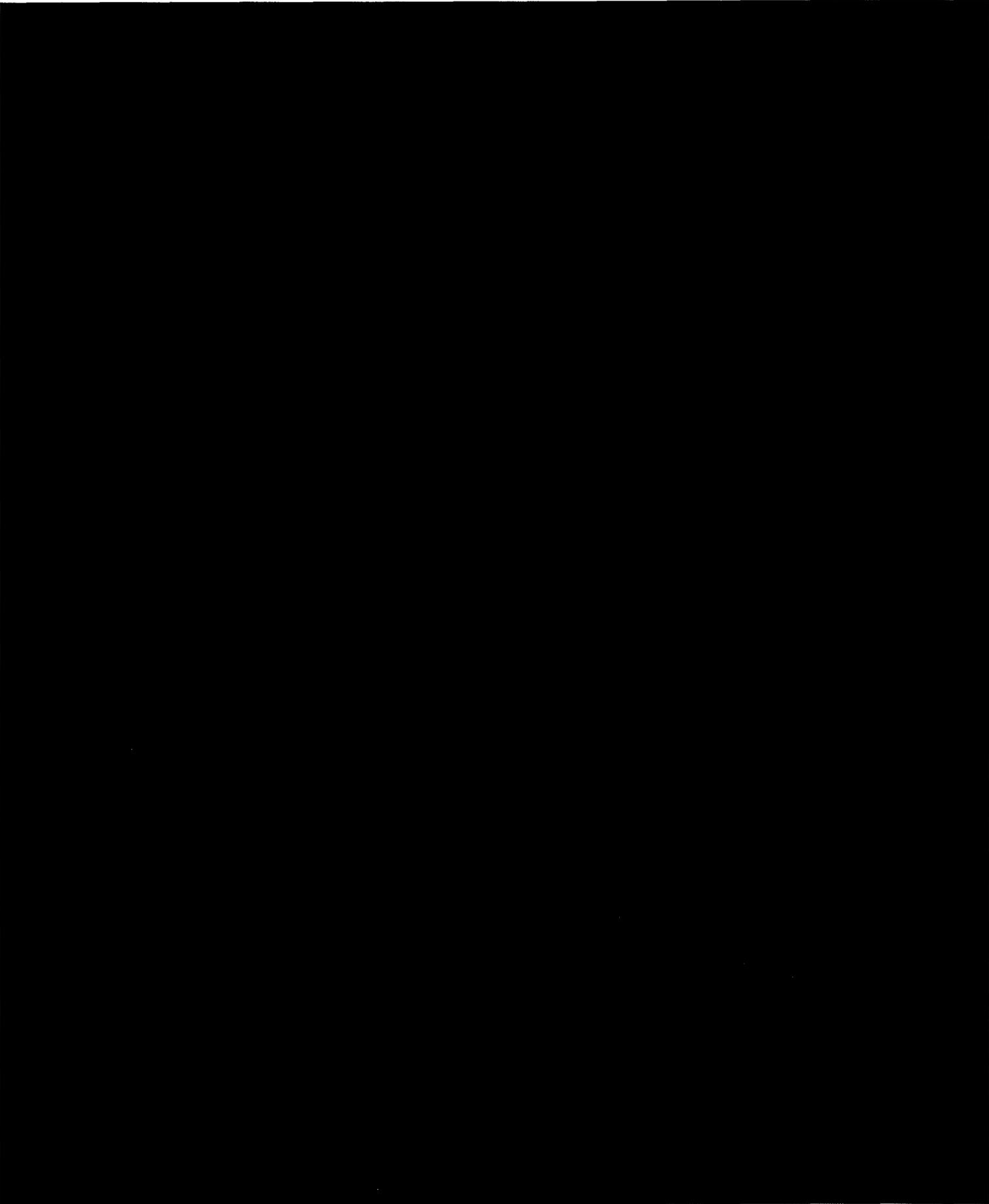
7. ECM logs and maintains summation records of every email, facsimile, and phone call with every one of its customer accounts in its Microsoft Access Database. See Attachment C (excerpted database notes). That information includes all customer interactions, including all claims made by email, facsimile, and phone by ECM to each client.

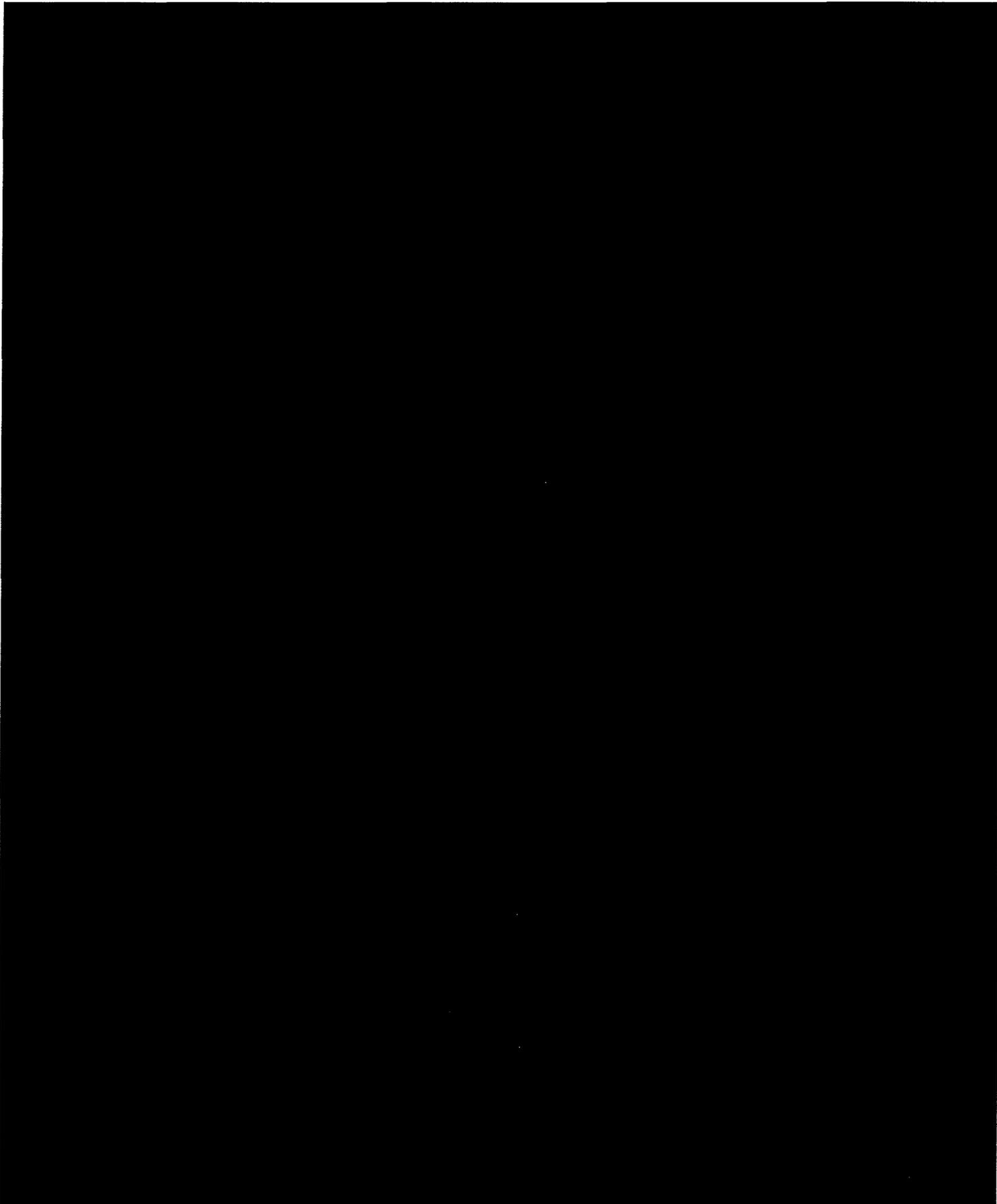
Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 27th day of January, 2014.

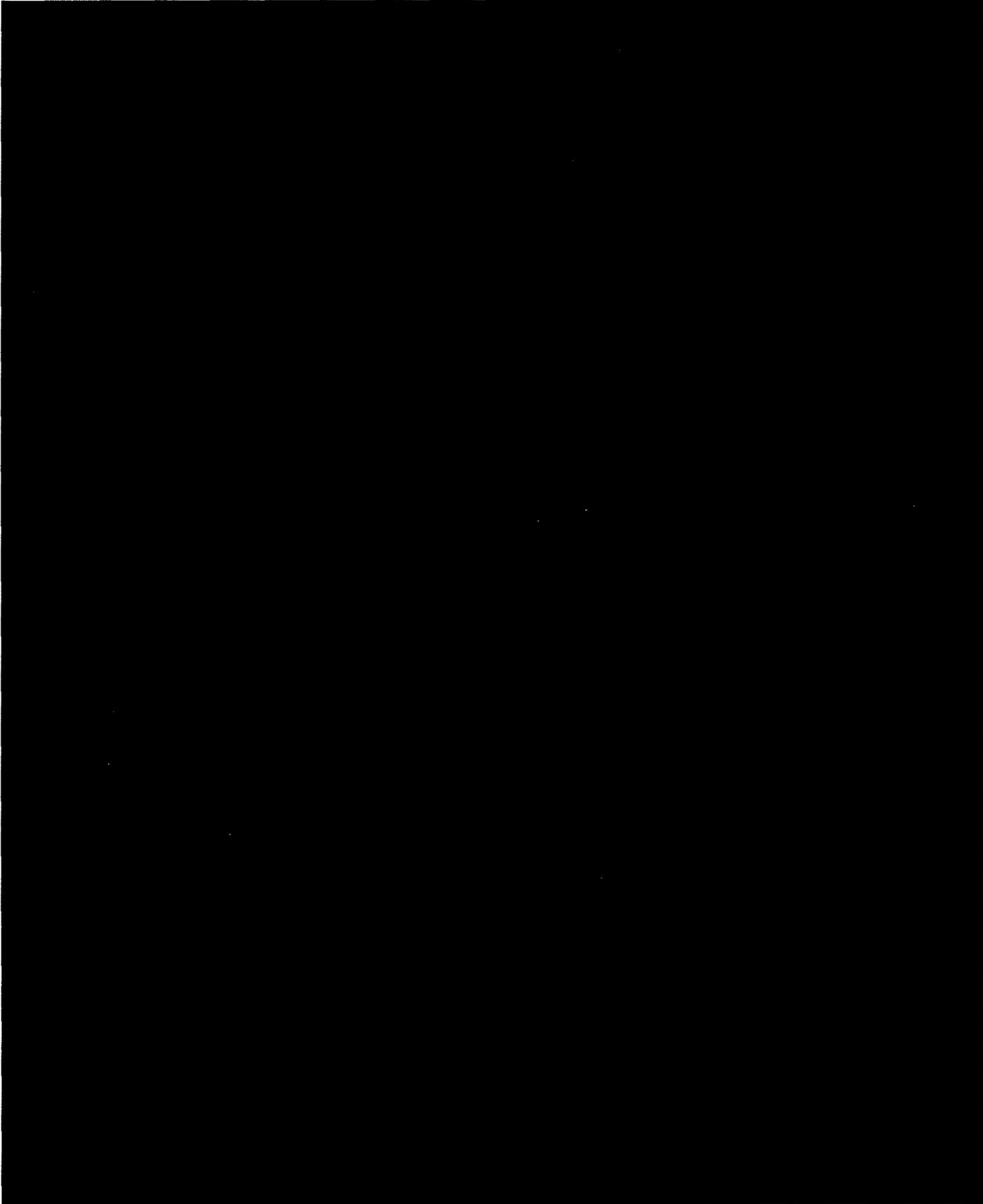

Robert Sinclair

RX-A:1
(ATTACHMENT A)

**CONFIDENTIAL DOCUMENT SUBJECT TO
PROTECTIVE ORDER**







RX-A:2
(ATTACHMENT B)

**CONFIDENTIAL DOCUMENT SUBJECT TO
PROTECTIVE ORDER**

