

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

**ECM BIOFILM’S OPPOSITION TO COMPLAINT COUNSEL’S MOTION TO
COMPEL AND FOR SANCTIONS**

ECM BioFilms, Inc. (“ECM”) hereby opposes Complaint Counsel’s Motion to Compel and for Sanctions, filed February 28. The motion is late-filed and stale. ECM will complete production of all responsive documents by March 14. Complaint Counsel has thus chosen to move for an order compelling production between March 7 (the earliest date by which this Court could act following the March 6 receipt of ECM’s timely opposition) and March 14. The Scheduling Order sets April 3 as the deadline for completion of discovery, Scheduling Order at 1, and there is no rule requiring production to be completed by February 21 or any day in March before March 14.

On February 20, ECM informed Complaint Counsel that ECM’s repeated entries into its PDF files to extract responsive documents revealed that the PDFs included more responsive documents, and that the extraction process was more cumbersome, than anticipated (thereby necessitating additional time to complete production, from February 21 to March 14). *See* Ex. 1 (Affidavit of Peter Arhangelsky, Esq.); Compl.Counsel’s Motion to Compel and for Sanctions, Ex. A, Attachment 3 at 1 (Feb. 28, 2014). Although informed on February 20, Complaint

Counsel sat on its motion for 8 days, until February 28 (and both held a meet and confer and filed its motion that same day). On February 20, and again in the meet and confer on the 28th, Respondent's Counsel agreed to a volitional extension of the April 3 fact discovery deadline if needed to guard against the remote possibility of prejudice arising from the slight production delay.

Given that complete production will occur by March 14, it strains credulity to discern what possible benefit could come to Complaint Counsel or this Court by ordering production be completed on some day between March 7 and 14. Contrary to Complaint Counsel's recitation of the facts, the record here is one of voluminous, continuous and diligent production. *See* Ex. 1, Attachment A. If remaining production were in fact urgently needed on February 21, one would have expected Complaint Counsel to file its motion on February 20 (when it was informed of the delay) or 21, but instead Complaint Counsel languished for an entire week, belying its contention of urgency.¹ On that record of laxity is this Court to deprive ECM of a week to complete production when ECM has since December supplied over 65% of all responsive documents remaining through weekly document transfers to Complaint Counsel? *See* Ex. 2 at 3 (Affidavit of Robert Sinclair).

Only one of ECM's six employees (Robert Sinclair) possesses the technical ability and acumen to extract the responsive documents from the PDFs. *Id.* at 1. Moreover, the responsive

¹ As of February 11, 2014, Complaint Counsel possessed complete production of ECM's contemporaneous database summations. Those summations include all material content not only of every email but also of every material fax and phone interaction had with ECM customers between January 1, 2009 and December 31, 2013. Those files are thus materially inclusive of the files now being produced and belie any contention of prejudice. That production may explain why Complaint Counsel experienced no sense of urgency to file on the 20th. Moreover, Complaint Counsel took 14 hours of deposition testimony from ECM's President, 7 of its Chief Financial Officer Ken Sullivan, and another 7 hours of its Sales Director Thomas Nealis, predicated in no small part on ECM's database summations.

documents in the PDFs are not themselves transferable and, so, must be copied into transferrable files, document by document. *Id.* at 2. March 14 is the earliest date by which ECM can physically achieve complete production, but to ensure as prompt production as possible, ECM produced all of its contemporaneous database summations as of January 31 and has been producing all correspondence with clients in chunks of thousands and tens of thousands of pages, as soon as they are extracted from the PDFs. *Id.* at 3. At present Complaint Counsel possesses over 65% of the universe of responsive documents (not less than 50% as Complaint Counsel misrepresents to this Court).

There is no precedent that supports a production order and sanctions against a party on this record of diligent production and with complete production set for March 14. ECM has consistently produced responsive documents in accordance with the rules, just not as fast as Complaint Counsel would like. On this record and in light of the fact that complete production will occur by March 14, well before the April 3 close of fact discovery, grant of the present motion would be an unprecedented and draconian measure.

I. COMPLAINT COUNSEL’S MISREPRESENTATION OF THE FACTUAL RECORD AND LAXITY CONTRIBUTING TO DELAY

As the docket reflects, on December 13, 2013, ECM moved for a protective order in response to Complaint Counsel’s November 27, 2014 demand for production of its customer lists, customer specific revenues, and total correspondence files. The point of ECM’s motion was, in part, that Complaint Counsel’s discovery demands were unduly burdensome; thus ECM pled for relief from burden under Rule 3.31(d). Through several discovery motions, ECM has explained that unlimited discovery concerning ECM’s customer base threatens to cause ECM irreparable financial harm. On January 10, 2014, the court ruled against ECM on the customer lists, and on February 4, 2014, the court ruled against ECM on the customer specific revenues.

Until those discovery rulings, the validity and scope of Complaint Counsel's document requests were in issue. On January 16, 2014, ECM produced its customer lists and on February 6, 2014 it produced its revenues (adding on February 14, 2014 foreign customer accounts and revenues upon Complaint Counsel's request dated February 6th). ECM and Complaint Counsel held a meet and confer on January 16th to discuss production of all ECM correspondence. ECM tried without success to get Complaint Counsel to honor its pledge, captured in this Court's January 10th Order at 5-8, to reduce ECM's production burden. *See* Or. Denying Respondent's Mot. For Protective Or. and Granting Compl. Counsel Cross-Motion to Compel at 7 (Jan. 10, 2014) (Complaint Counsel promising to "limit the discovery in a manner that conserves both parties' resources"). Complaint Counsel refused to reduce the burden and, so, a motion to compel followed. *See* Compl. Counsel's Mot. for Sanctions for Refusal to Comply with the Ct.'s Jan. 10, 2014 Or. (Jan. 28, 2014). Before that motion was acted upon, ECM agreed despite the burden to produce all correspondence files from January 1, 2009 to December 31, 2013. Independent of that dispute, on February 11, 2014 ECM completed its production to Complaint Counsel of all contemporaneous database summations containing all substantive customer emails, faxes, and phone interactions between January 1, 2009 and December 31, 2013. On February 5, 2014, ECM agreed to supply Complaint Counsel, on a rolling basis, all correspondence contained in archived PDFs by February 21 (which then, before extensive entry into the archived PDFs, appeared doable). That very day, ECM began extracting the emails and producing them as they were extracted. The production schedule is attached, showing production of tens of thousands of pages of emails, culminating in a present total of 72,448 pages. *See* Ex. 1, Attachment A. Informed on February 20 that production would require until March 14, Complaint Counsel sat on the matter for over a week before filing its motion. That

eight day delay belies any serious claim of prejudice. Complaint Counsel thus contributed by its own laxity to a postponement of this court's consideration until a time very nearly the point at which the motion would be moot (the earliest the court could rule is March 7 and production will be complete by March 14).

II. COMPLAINT COUNSEL MISCONSTRUES RULE 3.37 AND IS "GUILTY" OF VIOLATING ITS OWN MISCONSTRUCTION

Complaint Counsel contends ECM violated Rule 3.37 by producing responsive documents after 30 days.² Complaint Counsel misconstrues Rule 3.37. Under its construction, even if (as here) a party moves for a protective order to alleviate burden pursuant to Rule 3.31(d), it must turn over contested documents before the Court rules. Neither Rule 3.37 nor any other rule or decision of this agency supports that construction. Indeed, by its wording Rule 3.37 plainly contemplates disputes over discovery that are the subject of motion to be ruled upon by the court *ab initio*.

Rule 3.37(b) requires that a "response" be given a document production request by no later than 30 days after receipt of the request, and ECM timely gave its written response containing objections. That response can come in the form of objections and/or motions for protective order, which are "responses" so long as they are filed within 30 days of request receipt. Under the rule, production is anticipated to follow objection or court order, lest the rule would deny the very relief sought by objection or motion.

Contrary to Complaint Counsel's contentions, ECM timely responded to each of its two document production requests and moved rapidly for judicial decision on points of discord. On

² Complaint Counsel supplied a written response to ECM's document production request of December 3, 2013, within 30 days but supplied the vast majority of responsive documents after 30 days, on January 13, 2014. Apparently Complaint Counsel would have one rule apply to itself and another to Respondent.

November 27th, Respondent received Complaint Counsel's first document production request and responded to it on December 27th. On January 15th, Respondent received Complaint Counsel's second document production request and responded to it on February 17th. Both written responses occurred within 30 days. ECM therein timely objected to production of the PDF files here in issue and moved on December 13, 2014 for a protective order. On January 10, 2014, this Court ruled that ECM's customer lists be turned over, but did not rule on ECM's request that the unlimited scope and time for production of the PDF files be subject to limits. ECM complied with the Court's order by producing the customer lists and customer specific revenue lists. On January 16, 2014, and January 31, 2014, ECM also provided to Complaint Counsel its entire database summations containing all substantive emails, faxes, and phone interactions with its customers. Despite meet and confer sessions at which ECM called on Complaint Counsel to honor its promise to this Court (recited in the Court's Jan. 10, 2014 Order, at 7) to accept reasonable limits on the scope of its demand for all ECM emails, Complaint Counsel refused and filed a motion to compel. During the pendency of that motion, ECM agreed, despite the burden, to produce all correspondence files. Thus far, 72,448 pages of correspondence files have been produced with all remaining coming by March 14.

III. THERE IS NO FAILURE TO COMPLY AND NO JUSTIFICATION FOR COMPELLING PRODUCTION SOONER THAN MARCH 14

The movant bears the burden of justifying sanctions. *See Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 167 F.R.D. 90, 109 (D. Colo. 1996) (the burden of proof remains with the moving party, even where the movant seeks lesser sanctions). In the discovery context, sanctions are justified on proof of wilful refusal to comply with a rule or order (meaning the absence of good cause for non-compliance), not on a record of continuous good faith production. Here, ECM has met all discovery deadlines as prescribed by the rules, has proceeded in good

faith to seek judicial relief from onerous burdens, and has complied with all court orders. Moreover, ECM is producing all responsive documents as fast as it can. There is no non-production. Complete production will be achieved by March 14.

Moreover, in the single instance in which ECM deviated from its agreement with Complaint Counsel (not a rule and not an order), it has done so solely based on the timing of complete production, not on the scope of what is produced, and solely because of necessity. There is in this nothing that would justify sanctions.

Complaint Counsel asks the Court to overrule summarily and deem waived all of ECM's objections and claims of privilege. That draconian sanction has never before been granted on a record of diligent, on-going, and good faith production. *See First Sav. Bank, F.S.B. v. First Bank Sys., Inc.*, 902 F. Supp. 1356, 1361 (D. Kan. 1995) (noting that "waiver of a privilege is a serious sanction most suitable for cases of unjustified delay, inexcusable conduct, and bad faith").

Complaint Counsel asks the Court to amend the scheduling order to allow Complaint Counsel additional time to conduct fact discovery and that ECM be denied the right to introduce into evidence any documents delivered to Complaint Counsel after February 21. Because as of February 11, 2014, ECM produced all of its contemporaneous database summations of all substantive emails, faxes and phone interactions with customers, Complaint Counsel's unsupported assertions of prejudice are superficial, inadequately supported with facts demonstrating true hardship. Nevertheless, for specific good cause shown, ECM has already stated that it is perfectly willing to accommodate a reasonable request for additional fact discovery. The date of February 21 is neither required by rule nor by order of this Court. Consequently, there is no justification for denying ECM the opportunity to move into evidence or rely upon documents it supplies to Complaint Counsel after that date and by March 14.

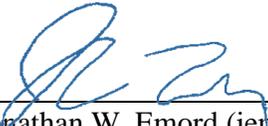
Moreover, the 15 business days from February 21 to March 14 within which ECM is producing all remaining responsive documents is well before the April 3 discovery deadline and, so, is not prejudicial to Complaint Counsel.

Complaint Counsel asks the Court to grant the right to conduct additional depositions in Washington, D.C. germane to the late-produced documents, knowing the costs of transporting the witnesses to DC constitutes a hardship for them. Complaint Counsel has not proven a specific need to justify deviation from the Scheduling Order and has in fact deposed all witnesses it has desired to depose, replete with all substantive email, fax, and phone interactions from ECM's database summations. Indeed, ECM's principals have been extensively examined (the deposition of Robert Sinclair, for example, was 14 hours over two days, that of Ken Sullivan, 7 hours, and that of Thomas Nealis was 7 hours), belying the notion that Complaint Counsel lacked information sufficient to conduct extensive examinations. We therefore request that the Court demand that if Complaint Counsel wishes to perform a specific deposition past the Scheduling Order deadline that it move for leave so to do and explain why it was not able to perform the deposition within the time set in the Scheduling Order.

IV. CONCLUSION

For the foregoing reasons, ECM respectfully requests that Complaint Counsel's motion to compel and for sanctions be denied.

Respectfully submitted,



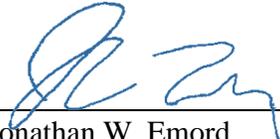
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DATED this 6th day of March 2014.

STATEMENT CONCERNING CONFIDENTIALITY

The undersigned Respondent's Counsel hereby states that the content of the foregoing Opposition and its exhibits do not contain confidential information under this Court's Protective Order and, so, ECM hereby files this Opposition and its exhibits to the public docket.

DATED: March 6, 2014



Jonathan W. Emord
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Telephone: 202-466-6937

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2014, I caused a true and correct copy of the foregoing to be served as follows:

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

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

DATED: March 6, 2014


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Respondent's Exhibit 1

(RX-1)

**UNITED STATES OF AMERICA
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Respondent.

Docket No. 9358

PUBLIC

DECLARATION OF PETER A. ARHANGELSKY

I, Peter A. Arhangelsky, declare under penalty of perjury that the following is true and correct to the best of my knowledge, information, and belief.

1. I am attorney with the firm Emord & Associates, P.C. and am one of counsel representing ECM BioFilms, Inc. in the above-referenced proceeding.
2. The meet and confer conferences with Complaint Counsel described in the ECM pleading entitled, “Respondent’s Opposition to Complaint Counsel’s Motion to Compel and for Sanctions” are accurate in all material respects.
3. I or attorneys working under me at Emord & Associates, P.C. have supplied all documents produced by ECM BioFilms, Inc. to Complaint Counsel as reflected in Attachment A hereto.
4. On February 20, 2014, after receiving word from Robert Sinclair of an unanticipated volume of documents for production and difficulty of extracting those documents from archived PDF files, I informed Complaint Counsel in person after the conclusion of Sinclair’s deposition that production of all responsive documents was not possible by the parties’ previously agreed to date of February 21 and that production would be completed by March 14,

2014. I also informed Complaint Counsel that ECM would continue to produce documents daily as they were extracted between February 21 and March 14.

Executed on: March 6, 2014

/s/ Peter A. Arhangelsky
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Respondent's Exhibit 1 Attachment A

(RX-1:A)

ATTACHMENT A

Timeline of ECM Production

- **December 27, 2013**: ECM produces to Complaint Counsel **1,212 pages** from its contemporaneous summation database, containing all material content of emails, faxes, and phone call interactions with customers.
- **January 16, 2014**: ECM produces to Complaint Counsel its unredacted customer list.
- **January 20, 2014**: ECM produces to Complaint Counsel its list of revenues for each customer and **45 pages** of additional responsive documents.
- **January 31, 2014**: ECM produces to Complaint Counsel **2,458 pages** from its contemporaneous summation database, containing all material content of emails, faxes, and phone call interactions with customers.
- **February 6, 2014**: ECM produces to Complaint Counsel its customer specific revenue list.
- **February 11, 2014**: ECM produces to Complaint Counsel all remaining pages, **1,439 pages**, from its contemporaneous summation database, containing all material content of emails, faxes, and phone call interactions with customers.
- **February 18, 2014**: ECM produces to Complaint Counsel **20,566 pages** of customer correspondence.
- **February 21, 2014**: ECM produces to Complaint Counsel **5,389 pages** of additional customer correspondence.
- **February 24, 2014**: ECM produces to Complaint Counsel **13,183 pages** of additional customer correspondence.
- **February 26, 2014**: ECM produces to Complaint Counsel **6,571 pages** of additional customer correspondence.
- **March 4, 2014**: ECM produces to Complaint Counsel **14,475 pages** of additional customer correspondence.
- **March 6, 2014**: ECM Produces to Complaint Counsel **6,456 pages** of additional customer correspondence.

Total Number of Pages Produced to Complaint Counsel since December 27, 2013: **72,448**.

/s/ Peter A. Arhangelsky

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Respondent's Exhibit 2

(RX-2)

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

Docket No. 9358

PUBLIC

AFFIDAVIT OF ROBERT SINCLAIR

I, Robert Sinclair, declare under penalty of perjury that the following is true and correct to the best of my knowledge, information, and belief:

1. I am the President and CEO of ECM BioFilms, Inc.
2. I am the only person employed by ECM BioFilms, Inc. who both understands how to access and extract correspondence from the PDF files that are archived in our computers and who understands whether any particular content in those files falls outside the scope of the agreed-to production by either being privileged, trade secret-related or otherwise prohibited from transmission to others by ECM's mutual confidentiality agreements entered into with customers.
3. Each archived folder for a calendar quarter contains hundreds of files. Each file in turn contains from several to tens of emails any number of which may contain customer correspondence.
4. ECM stores its archived email files, including all customer correspondence, in PDF file formats. A PDF is a Portable Document Format, which is a file that provides an electronic image of text and graphics that looks like a printed document and can be

viewed, printed, and electronically transmitted. Individual emails within larger PDF files cannot be separately viewed. Rather, those emails must be manually “extracted” from the larger PDF files, or surrounding information must be deleted. While PDF content can be located through keyword searches, ECM cannot automatically separate responsive information from the protected or clearly non-responsive information. That process must be manual.

5. ECM employees have always been instructed to convert their emails daily (or weekly, as time permits) into PDF format and upload those final files into correspondence folders on ECM’s server. ECM stores its correspondence PDF files within a typical Windows “folder.” When an ECM employee converts his or her email, he or she basically “prints” the file into a PDF image. The PDF is like a hardcopy printout. Attachments are not able to be printed in bulk in this way so the ECM employees save them separately in whatever folder is appropriate for the subject matter or source and often with a different name. Though the PDF an email shows an “attachment” as an image in the printout, it is not actually attached or linked to the PDF image.
6. In order to comply with Complaint Counsel’s demand for production of all correspondence between ECM and its customers between January 1, 2009 and December 31, 2013, I have had to take all of the potentially responsive PDF files from within each of ECM’s correspondence archive file folders and combine them into one larger (but still manageable) PDF file for each calendar quarter. I have then had to review that master PDF and manually remove information that is privileged, contains proprietary consumer data subject to our confidentiality agreements, or falls clearly beyond the scope of this action (e.g., information concerning ECM’s 401(k) program or employee benefits).

7. Before I began my daily effort to extract the correspondence files from the PDFs, I anticipated the project to be completed by February 21, since commencing the work from late January to February 20th, I discovered both that the volume of responsive materials and the ensuing file sizes imposed a time burden greater than I had anticipated, and the speed with which I can extract and save to a production file each responsive email or other document exceeds my original estimation.
8. To date, I have completed extraction of all correspondence files from January 1, 2009 through October 2011.
9. Over half way through the responsive files, I can now predict complete production will be achieved by March 14, 2014. I am spending 7 to 12 hours daily, including on the weekends, performing this function. It is time consuming and laborious work. I cannot produce the files any faster than I am. It was physically impossible for me to produce all of the responsive files by February 21.
10. As I complete file extraction and save it to a production file, I dispatch the production file to my attorneys who then redact customer credit card information, customer proprietary formulae, and attorney-client correspondence among other privileged information, affix bates stamps, and then send the files immediately to Complaint Counsel upon Complaint Counsel's establishment of a link for large file reception. Under that model, we have efficiently delivered production files to counsel at least weekly, often including productions ranging from 5,000-20,000 pages of responsive information. As of March 6, 2014, ECM has produced to Complaint Counsel 72,448 pages of responsive documents.

Executed on: 3/6/14


Robert Sinclair