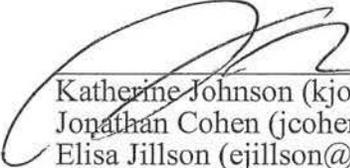




**MEET AND CONFER CERTIFICATION**

Complaint Counsel conferred with opposing counsel in a good faith effort to resolve by agreement the issues raised by the motion, but the parties were unable to reach such an agreement. The conference took place telephonically on April 18, 2014, at approximately 12:30 PM. Jonathan Cohen participated on Complaint Counsel's behalf. Lou Caputo participated on ECM's behalf. Jonathan Cohen and Lou Caputo had another teleconference regarding these issues later that afternoon, and the parties' continued negotiations via electronic mail.

DATED: April 21, 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

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

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

Docket No. 9358

**[PROPOSED] ORDER  
GRANTING COMPLAINT COUNSEL’S MOTION FOR AN EMERGENCY  
PROTECTIVE ORDER**

This matter having come before the Chief Administrative Law Judge on April 21, 2014, upon an Emergency Motion for a Protective Order by Complaint Counsel, and having considered all supporting and opposing submissions, and for good cause appearing, it is hereby ORDERED that Complaint Counsel’s Motion Is GRANTED.

It is ORDERED that third party depositions be divided into confidential and non-confidential segments based on the designations that exist when the deposition begins.

It is FURTHER ORDERED that ECM’s officers and employees may not attend portions of third party depositions related to information that the third party has designated “confidential” prior to the deposition. Subject to the Protective Order, ECM’s officers and employees may attend the non-confidential portions of the deposition.

SO ORDERED:

\_\_\_\_\_  
D. Michael Chappell  
Chief Administrative Law Judge

**CERTIFICATE OF SERVICE**

I hereby certify that on April 21, 2014, I caused a true and correct copy of the foregoing to be served as follows:

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

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

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

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

One electronic copy to **Counsel for the Respondent**:

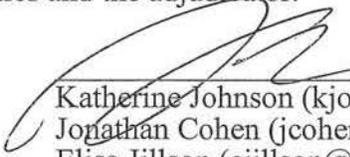
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Email: [lcaputo@emord.com](mailto:lcaputo@emord.com)

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: April 21, 2014

  
Katherine Johnson ([kjohnson3@ftc.gov](mailto:kjohnson3@ftc.gov))  
Jonathan Cohen ([jcohen2@ftc.gov](mailto:jcohen2@ftc.gov))  
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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**

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

**MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL’S EMERGENCY  
MOTION FOR A PROTECTIVE ORDER**

Pursuant to Rule 3.31(d), Complaint Counsel respectfully requests that the Court limit the attendance of Respondent ECM Biofilms, Inc.’s (“ECM’s”) officers at depositions when such attendance would violate the Court’s October 22, 2013 Protective Order. Specifically, subject to one exception not relevant here,<sup>1</sup> Paragraph 7 prohibits disclosing third party information designated “confidential” to ECM itself (as opposed to its attorneys). Relying on the Court’s Protective Order, numerous third party subpoena recipients (and potential deponents) designated their document productions “confidential.” However, ECM informed us Thursday evening “that ECM’s President, Bob Sinclair, will appear at all noticed fact depositions between April 28 and May 8.” CX-A:1. If he attends these depositions in their entirety,<sup>2</sup> we cannot use many critical “confidential” documents deponents have produced during the depositions. This would severely impair our ability to conduct meaningful discovery.

For three reasons, the Court should grant the requested relief. First, contrary to ECM’s claim, Rule 4.1(a)(2)(i) permits a corporate officer to represent his corporation *pro se*—but it

---

<sup>1</sup> ECM’s employees may view third party confidential materials in their capacity as “witness[es] or deponent[s] who may have authored or received the information in question.” Protective Order ¶ 7(e).

<sup>2</sup> Complaint Counsel does not object to Mr. Sinclair attending depositions during ECM’s counsel’s questioning (assuming, of course, that ECM’s attorneys examine the deponent without disclosing confidential information), or during other questioning not involving confidential information. However, depending on the deponent, our examinations will involve materials designated “confidential.”

does not confer a right for officers to attend depositions when counsel represents the corporation. Second, the Protective Order prevents Mr. Sinclair from receiving confidential information, but depositions of third parties necessitate that we ask deponents about such material. Third, preventing such questioning would significantly prejudice Complaint Counsel, whereas preventing Mr. Sinclair's attendance during that questioning would not prejudice ECM. The other option ECM proposes—allowing the questioning in principle, but debating third parties' confidentiality designations during the depositions—would violate the Court's Protective Order, the rights of third party subpoena respondents, and Complaint Counsel's ability to take reasonably uninterrupted testimony.

### BACKGROUND

#### **A. Upcoming Depositions and the Court's Protective Order**

After overcoming multiple attempts to block discovery from ECM's customers, Complaint Counsel issued various document subpoenas approximately one month ago. Most subpoena recipients requested that we treat their responses as confidential under the Protective Order. After reviewing the subpoena returns, we began noticing various depositions. The first three include:

- (1) April 28: Island Plastic Bags (Honolulu);
- (2) April 29: Down To Earth (Honolulu); and
- (3) May 1: FP International (San Francisco).<sup>3</sup>

CXA:2-4 (subpoena excerpts). Significantly, like most third parties, these deponents have designated their documents "confidential."<sup>4</sup> CX-A:5-6. Furthermore, several third parties have

---

<sup>3</sup> Complaint Counsel has already made travel and other arrangements for all three depositions. Complaint Counsel cleared the upcoming dates with ECM several days before ECM notified us that Mr. Sinclair would attend.

<sup>4</sup> Down To Earth made an oral request. *See* CX-A ¶ 2. Most third parties made written requests, although only some stamped individual documents. Significantly, many responded without counsel (including Island Plastic Bags and FP International), and they may not have understood the precise process associated with designating material "confidential." *See* Protective Order ¶ 6. We have complied with all requests for confidentiality, even when arguably defective, because only the Court can determine whether third parties have sufficiently invoked their rights to obtain the Protective Order's benefits.

expressed concerns to us that ECM will cause them competitive injury if ECM receives certain trade secrets. *See* CX-A:7.

The Court’s Protective Order addresses these concerns by providing that “[c]onfidential material shall be disclosed **only**” to five identified groups of people—none of which include Respondent’s officers or employees.<sup>5</sup> Indeed, Paragraph 7 excludes Respondent’s employees twice. First, it permits disclosure to “outside counsel of record for any respondent, [and] their associated attorneys and other employees of their law firms, **provided they are not employees of the respondent.**”<sup>6</sup> Second, it permits disclosure of confidential materials to experts “**provided they are not affiliated in any way with a respondent.**”<sup>7</sup> Thus, neither Complaint Counsel nor ECM’s attorneys may disclose confidential information to ECM, whether the disclosure occurs through deposition questioning or otherwise.

#### **B. ECM’s Initial Position Regarding Confidentiality Designations**

Prior to the instant dispute, ECM took the position (correctly) that—however overbroad its own confidentiality designations might be—only the Court could change those designations. As the Court will recall, this led to our December 26 Motion To Place Discovery Motions on the Public Record, which the Court granted in material part on January 14. Significantly, we did not debate confidentiality designations with ECM and then unilaterally determine whether ECM had over-designated material; rather, we moved the Court, afforded ECM an opportunity to oppose our motion,<sup>8</sup> and, most important, afforded the Court the opportunity to decide the issue.

Furthermore, citing the Protective Order, ECM has twice refused to allow Complaint Counsel to produce to a third party subpoena recipient documents ECM produced to us that reflect communications **solely between ECM and the subpoena recipient.** CX-A:8-9. For instance, less than a week ago, we asked ECM:

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<sup>5</sup> (Emphasis added).

<sup>6</sup> Protective Order ¶ 7(c) (emphasis added).

<sup>7</sup> *Id.* at ¶ 7(d) (emphasis added).

<sup>8</sup> Which it did.

Down To Earth has asked us to disclose communications between ECM and Down To Earth. Please advise us whether ECM will waive the “confidential” designation for the limited purpose of providing these documents to Down To Earth’s counsel.

CX-A:8. ECM responded: “ECM does not consent to or authorize the release of those documents to Down To Earth and will not waive the confidential status of them (each was marked confidential under the Protective Order).” *Id.* Even assuming, as is likely, that Down To Earth over-designated materials, the Court should not permit ECM to flip-flop between demanding strict compliance with the Protective Order and taking a more relaxed approach whenever changing theories suits its interests.

**C. ECM’s Position Regarding Confidentiality Designations In Light of the Upcoming Depositions**

Now confronted with the issue regarding Mr. Sinclair’s deposition attendance, ECM will not agree that “whatever the deponent entity deems confidential as of the start of the deposition [will be] deemed confidential” during the deposition.<sup>9</sup> *See* CX-A:10. Thus, ECM contemplates that its counsel (and/or Mr. Sinclair) will discuss with often-unrepresented deponents what should be “confidential” during the deposition, and the results of that dialogue would determine (potentially on a document-by-document basis) when Mr. Sinclair must leave the room, and when he can re-enter.

Additionally, although ECM pays lip service to its Protective Order obligations, it asserts that Mr. Sinclair will remain present in the deposition regardless if ECM believes the confidentiality designation would impair ECM’s alleged constitutional right to have an officer present during civil depositions. *See id.* (“If the deponents do not agree to change their designations, we cannot allow these erroneous or overbroad designations to so easily overcome ECM’s right to be present during the depositions.”); *see also* CX-A:11 (citing Mr. Sinclair’s alleged “right to appear . . . under the Due Process Clause”).

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<sup>9</sup> ECM also asserts that it has “no idea” what is designated “confidential,” CX-A:7, although we produced everything we received from third parties to ECM, including requests for confidential treatment.

## LEGAL STANDARD

Under Rule 3.31(d), the Court may issue any “order which justice” requires to protect the interests of Compliant Counsel and third parties during the discovery process. Although Compliant Counsel must show “good cause” for the relief sought,<sup>10</sup> the “heavy burden of showing why discovery should be denied” does not apply here, because we are not “resisting discovery of relevant information.”<sup>11</sup> Rather, Compliant Counsel only seeks to enforce the Protective Order.

## ARGUMENT

### **I. ECM Officers Have No Absolute Right To Attend Third Party Depositions.**

ECM mistakenly refers to Rule 4.1(a)(2)(i) as authorizing Mr. Sinclair’s attendance. *See* CX-A:1. However, Rule 4.1 governs “appearances,” and three attorneys have already appeared to represent ECM. Rule 4.1(a)(2)(i) also allows that “[a] corporation or association may be **represented** by a *bona fide* officer thereof upon a showing of adequate authorization.” (Emphasis added). Thus, this provision changes the traditional rule that a corporation may only appear in court through counsel<sup>12</sup> by allowing a non-attorney officer to represent the corporation before the Commission.<sup>13</sup> *See In the Matter of E. Detective Academy, Inc.*, 78 F.T.C. 1428, 1971 FTC LEXIS 367, \*63 (F.T.C. June 30, 1971) (“Section 4.1(a)(2) [provides] that ‘A corporation or association may be represented by a *bona fide* officer thereof upon a showing of adequate authorization.’ It is clear that respondents’ choice to take advantage of this provision and to represent themselves was freely and consciously made.”); *In the Matter of Wayne Phillips*, 1990

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<sup>10</sup> *In the Matter of ECM BioFilms, Inc.*, 2014 FTC LEXIS 47, \*3 (F.T.C. Mar. 18, 2014).

<sup>11</sup> *Id.* at \*3-\*4.

<sup>12</sup> *See, e.g., Rowland v. California Men’s Colony*, 506 U.S. 194, 201-02 (1993) (“It has been the law for the better part of two centuries . . . that a corporation may appear in the federal courts only through licensed counsel”).

<sup>13</sup> To the extent any arguable ambiguity exists, Section 4.1(a)(2)(i) appears between 4.1(a)(1), which governs attorney admission, and 4.1(a)(2)(ii), which allows experts to cross-examine other experts under certain circumstances. Thus, exactly as its title suggests, Section 4.1 is addressed to admission, not attendance.

FTC LEXIS 330, \*1-\*2 (F.T.C. Sept. 21, 1990) (“ASI shall obtain counsel or shall appoint an officer pursuant to § 4.1(a)(2) of the Rules of Practice who is located in the United States and who shall enter an appearance as its representative[.]”). Accordingly, Rule 4.1(a)(2) affords Mr. Sinclair a right to represent ECM, not an absolute right to attend depositions when he already has well-qualified and effective counsel.<sup>14</sup>

## **II. The Protective Order Prohibits Mr. Sinclair’s Attendance During Questioning About Confidential Material.**

As explained above, the Protective Order prohibits both Complaint Counsel and ECM’s counsel from disclosing third parties’ confidential materials to ECM’s officers and employees. Furthermore, although corporate officers generally may attend depositions, confidentiality concerns provide a sufficient basis to exclude them. *See, e.g.*, 8A FED. PRAC. & PROC. CIV. § 2041 (2013) (“One situation in which it may be desirable to limit the persons who are to be present is when a deposition or other form of discovery is likely to elicit confidential information that could be harmful in the hands of a competitor.”) (collecting cases); *see also Compaq Computer v. Packard Bell Elec.*, 163 F.R.D. 329, 339 (N.D. Cal. 1995) (restricting party representatives from depositions of a third party that would involve “commercially sensitive” information). The need to comply with the Protective Order and the interest in respecting non-parties’ designations is good cause to enter the requested relief.

## **III. ECM’s Various Proposals Are Unlawful, Substantially Prejudicial, or Both.**

### **A. Effectively Prohibiting Complaint Counsel From Using Confidential Documents During Depositions Would Be Substantially Prejudicial.**

Many subpoena respondents have designated materials “confidential”<sup>15</sup> – and often the most important documents. Indeed, in many (if not all) cases, a significant portion of Complaint Counsel’s examination of third parties will involve their internal documents, or documents they

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<sup>14</sup> *See also In the Matter of Koppers Co., Inc.*, 74 F.T.C. 1621, 1968 FTC LEXIS 286, \*15-\*16 (F.T.C. Nov. 1, 1968) (rejecting argument “that all officers of the party respondent must be permitted to attend [depositions] as a matter of right”) (footnote omitted).

<sup>15</sup> CX-A ¶ 3.

shared with their own customers, all of which they have designated “confidential” in reliance on this Court’s Protective Order. These documents are often very significant; for instance, such documents may include ECM’s customers’ analyses of ECM’s claims, or they may exhibit ECM’s claims being forwarded from ECM’s customers to other entities in the stream of commerce. If Complaint Counsel cannot ask questions about these documents, we cannot conduct useful examinations and our ability to prepare our case will be prejudiced.

In contrast, enforcing the Protective Order will not prejudice ECM. Its counsel will attend the depositions and represent ECM’s interests. Furthermore, under the Protective Order, ECM is not entitled to receive information third parties designated as “confidential.” As such, its failure to obtain information it is not allowed to have cannot be “prejudice.”

**B. Debating Confidentiality Designations *During Depositions* Would Violate the Protective Order, the Rights of Third Party Subpoena Respondents, and Complaint Counsel’s Right To Reasonably Uninterrupted Testimony.**

Sorting out what is “confidential” during the deposition is unlawful and unfair for several reasons. First, ECM must comply with the Protective Order no matter how strong its argument is that third parties have improperly designated materials as “confidential.” Second, the correct procedure—and the one that protects third parties’ rights—is to move the Court to resolve the issue (exactly as Complaint Counsel did in December).<sup>16</sup> This enables the affected party an opportunity to be heard, and allows the Court the chance to rule. ECM should have filed such a motion weeks ago, and its failure to do so is neither our responsibility nor that of the deponents.<sup>17</sup>

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<sup>16</sup> As we have told ECM, Complaint Counsel likely would support such relief, as we agree that third parties have over-designated materials (although ECM consistently has done the same).

<sup>17</sup> Indeed, given the unique relationship between ECM and FP International (“FP”), *see* CX-A:9 at 2 to Complaint Counsel’s Opposition to ECM’s Second Motion for a Protective Order (Feb. 28, 2014), ECM has always known that, if the Court permitted depositions, FP was likely to be deposed. FP responded to our subpoena on March 28 and requested confidential treatment, *see* CX-A:6, and if ECM thought FP had improperly designated documents, ECM should have sought *in camera* inspection and relief from the Court in a timely manner.

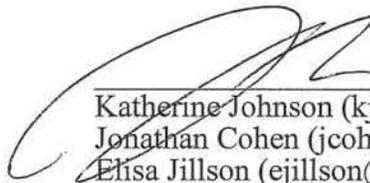
Third, because ECM will not agree to respect confidentiality designations that exist when the depositions begin, ECM intends to challenge them during the depositions. ECM thus would place immense pressure on often-unrepresented deponents, who may hesitate to ask Mr. Sinclair to leave in the presence of his attorneys. Furthermore, it is unclear whether Mr. Sinclair must leave during the debate over whether particular questions involve confidential material (this is another potential disruption). Fourth, because ECM will not accept the designations as they exist when the deposition begins, Complaint Counsel may be forced to stop the deposition repeatedly to allow Mr. Sinclair in and out of the room. Whatever ECM's intent, the effect of ECM's position is that there would be numerous interruptions, both from colloquy over designations, and from Mr. Sinclair's likely frequent arrivals and departures.<sup>18</sup> By far, the easiest approach is to divide each examination into confidential and non-confidential portions, much as an examination involving *in camera* materials would occur at trial.

**CONCLUSION**

For these reasons, we respectfully ask the Court to order that the depositions be divided into confidential and non-confidential segments based on the designations that exist when the deposition begins.

Dated: April 21, 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

---

<sup>18</sup> For Complaint Counsel, it would be easier to have Mr. Sinclair observe the entire deposition rather than enter and exit the room—but we cannot agree to violate the Protective Order or abrogate third parties' rights without notice.

**CERTIFICATE OF SERVICE**

I hereby certify that on April 21, 2014, I caused a true and correct copy of the foregoing to be served as follows:

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

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

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

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

One electronic copy to **Counsel for the Respondent**:

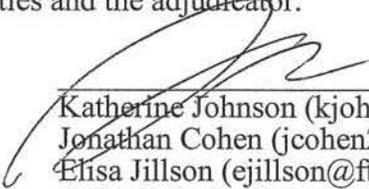
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Chandler, AZ 85286  
Email: [lcaputo@emord.com](mailto:lcaputo@emord.com)

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: April 21, 2014

  
Katherine Johnson ([kjohnson3@ftc.gov](mailto:kjohnson3@ftc.gov))  
Jonathan Cohen ([jcohen2@ftc.gov](mailto:jcohen2@ftc.gov))  
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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.,	)	Docket No. 9358
a corporation, also d/b/a	)	
Enviroplastics International	)	<b>PUBLIC DOCUMENT</b>
	)	

**EXHIBITS IN SUPPORT OF COMPLAINT COUNSEL'S  
EMERGENCY MOTION FOR A PROTECTIVE ORDER**

# **Complaint Counsel Exhibit A**

**CX-A**



12. Attachment 9 hereto are true and correct copies of emails between Jonathan Cohen and Peter Arhangelsky dated March 24, 2014 and March 25, 2014.

13. Attachment 10 hereto is a true and correct copy of an email from Peter Arhangelsky to Complaint Counsel dated April 20, 2014.

14. Attachment 11 hereto is a true and correct copy of an email from Lou Caputo to Complaint Counsel dated April 18, 2014.

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



Jonathan Cohen  
Complaint Counsel

**Complaint Counsel  
Exhibit A  
Attachment 1**

**CX-A:1**

**From:** Peter Arhangelsky <PARhangelsky@emord.com>  
**Sent:** Thursday, April 17, 2014 7:55 PM  
**To:** Johnson, Katherine  
**Cc:** Cohen, Jonathan; Jillson, Elisa; Lou Caputo; Jonathan Emord  
**Subject:** Dkt. No. 9358; Fact Witness Depositions

Counsel:

This email serves as formal notice that ECM's President, Bob Sinclair, will appear at all noticed fact depositions between April 28 and May 8. See Rule 4.1(a)(2). Under Rule 4.1(a), Mr. Sinclair will appear and represent the interests of the corporation in his capacity as a bona fide officer.

Sincerely,

**Peter A. Arhangelsky, Esq.** | EMORD & ASSOCIATES, P.C. | 3210 S. Gilbert Rd., Ste 4 | Chandler, AZ 85286  
Firm: (602) 388-8899 | Direct: (602) 334-4416 | Facsimile: (602) 393-4361 | [www.emord.com](http://www.emord.com)

NOTICE: This is a confidential communication intended for the recipient listed above. The content of this communication is protected from disclosure by the attorney-client privilege and the work product doctrine. If you are not the intended recipient, you should treat this communication as strictly confidential and provide it to the person intended. Duplication or distribution of this communication is prohibited by the sender. If this communication has been sent to you in error, please notify the sender and then immediately destroy the document.

**Complaint Counsel  
Exhibit A  
Attachment 2**

**CX-A:2**



# SUBPOENA AD TESTIFICANDUM DEPOSITION

Provided by the Secretary of the Federal Trade Commission, and  
Issued Pursuant to Rule 3.34(a), 16 C.F.R. § 3.34(a) (2010)

1. TO Island Plastic Bags, Inc. c/o Adrian Hong 99-1330 Koaha Pl. Aiea, HI 96701	2. FROM  <div style="text-align: center; font-weight: bold; padding: 10px 0;">             UNITED STATES OF AMERICA              FEDERAL TRADE COMMISSION           </div>
--	--

This subpoena requires you to appear and give testimony at the taking of a deposition, at the date and time specified in Item 5, and at the request of Counsel listed in Item 8, in the proceeding described in Item 6.

3. PLACE OF DEPOSITION  United States Attorney's Office 300 Ala Moana Blvd., #6-100 Honolulu, HI 96850	4. YOUR APPEARANCE WILL BE BEFORE  Complaint Counsel and other designated counsel
	5. DATE AND TIME OF DEPOSITION  April 28, 2014 at 8:45 AM

**6. SUBJECT OF PROCEEDING**

In re: ECM Biofilms, Inc., Docket No. 9358

Please see attached schedule for deposition topics pursuant to 16 C.F.R. 3.33(c)(1)

7. ADMINISTRATIVE LAW JUDGE  The Honorable D. Michael Chappell  <div style="text-align: center;"> <b>Federal Trade Commission</b>  <b>Washington, D.C. 20580</b> </div>	8. COUNSEL AND PARTY ISSUING SUBPOENA  Complaint Counsel Katherine Johnson (202) 326-2185 Jonathan Cohen (202) 326-2551 Elisa Jillson (202) 326-3001
---	---

DATE SIGNED  <div style="font-size: 1.5em; font-family: cursive;">4/15/14</div>	SIGNATURE OF COUNSEL ISSUING SUBPOENA  
---	---

### GENERAL INSTRUCTIONS

**APPEARANCE**

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

**MOTION TO LIMIT OR QUASH**

The Commission's Rules of Practice require that any motion to limit or quash this subpoena must comply with Commission Rule 3.34(c), 16 C.F.R. § 3.34(c), and in particular must be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed before the Administrative Law Judge and with the Secretary of the Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 8, and upon all other parties prescribed by the Rules of Practice.

**TRAVEL EXPENSES**

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to Counsel listed in Item 8 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Counsel listed in Item 8.

A copy of the Commission's Rules of Practice is available online at <http://bit.ly/FTCRulesofPractice>. Paper copies are available upon request.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

**RETURN OF SERVICE**

*I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)*

- in person.*
- by registered mail.*
- by leaving copy at principal office or place of business, to wit:*

Fed Ex, per FTC Rule 4.4(a)(2)

*on the person named herein on:*

(Month, day, and year)

(Name of person making service)

(Official title)

**Complaint Counsel  
Exhibit A  
Attachment 3**

**CX-A:3**



# SUBPOENA AD TESTIFICANDUM DEPOSITION

Provided by the Secretary of the Federal Trade Commission, and  
Issued Pursuant to Rule 3.34(a), 16 C.F.R. § 3.34(a) (2010)

1. TO Down To Earth All Vegetarian Organic & Natural c/o Franklin A. Santana, Marketing Director 2525 South King Street Honolulu, HI 96826	2. FROM  <p style="text-align: center;"><b>UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</b></p>
--	--

This subpoena requires you to appear and give testimony at the taking of a deposition, at the date and time specified in Item 5, and at the request of Counsel listed in Item 8, in the proceeding described in Item 6.

3. PLACE OF DEPOSITION  United States Attorney's Office 300 Ala Moana Blvd., #6-100 Honolulu, HI 96850	4. YOUR APPEARANCE WILL BE BEFORE Complaint Counsel and other designated counsel
	5. DATE AND TIME OF DEPOSITION April 29, 2014 at 8:45 AM

6. SUBJECT OF PROCEEDING

In re: ECM Biofilms, Inc., Docket No. 9358

Please see attached schedule for deposition topics pursuant to 16 C.F.R. 3.33(c)(1)

7. ADMINISTRATIVE LAW JUDGE  The Honorable D. Michael Chappell  Federal Trade Commission Washington, D.C. 20580	8. COUNSEL AND PARTY ISSUING SUBPOENA  Complaint Counsel Katherine Johnson (202) 326-2185 Jonathan Cohen (202) 326-2551 Elisa Jillson (202) 326-3001
--	---

DATE SIGNED 	SIGNATURE OF COUNSEL ISSUING SUBPOENA 
-----------------	---

### GENERAL INSTRUCTIONS

#### APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

#### MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena must comply with Commission Rule 3.34(c), 16 C.F.R. § 3.34(c), and in particular must be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed before the Administrative Law Judge and with the Secretary of the Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 8, and upon all other parties prescribed by the Rules of Practice.

#### TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to Counsel listed in Item 8 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Counsel listed in Item 8.

A copy of the Commission's Rules of Practice is available online at <http://bit.ly/FTCRulesofPractice>. Paper copies are available upon request.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

**RETURN OF SERVICE**

*I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)*

- in person.*
- by registered mail.*
- by leaving copy at principal office or place of business, to wit:*

Fed Ex, per FTC Rule 4.4(a)(2)

*on the person named herein on:*

(Month, day, and year)

(Name of person making service)

(Official title)

**Complaint Counsel  
Exhibit A  
Attachment 4**

**CX-A:4**



## SUBPOENA AD TESTIFICANDUM DEPOSITION

Provided by the Secretary of the Federal Trade Commission, and  
Issued Pursuant to Rule 3.34(a), 16 C.F.R. § 3.34(a) (2010)

<p>1. TO Free-Flow Packaging International, Inc. c/o James Blood, SVP &amp; General Counsel 34175 Ardenwood Boulevard, Suite 201 Fremont, California 94555</p>	<p>2. FROM  <b>UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</b></p>
--	--

This subpoena requires you to appear and give testimony at the taking of a deposition, at the date and time specified in Item 5, and at the request of Counsel listed in Item 8, in the proceeding described in Item 6.

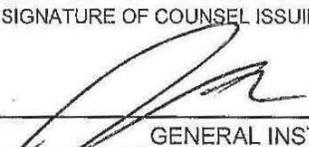
<p>3. PLACE OF DEPOSITION  Federal Trade Commission 901 Market Street, Suite 570 San Francisco, California 94103</p>	<p>4. YOUR APPEARANCE WILL BE BEFORE Complaint Counsel and other designated counsel</p> <hr/> <p>5. DATE AND TIME OF DEPOSITION May 1, 2014 at 9:00 AM</p>
--	--

6. SUBJECT OF PROCEEDING

In re: ECM Biofilms, Inc., Docket No. 9358

Please see attached schedule for deposition topics pursuant to 16 C.F.R. 3.33(c)(1)

<p>7. ADMINISTRATIVE LAW JUDGE  The Honorable D. Michael Chappell  Federal Trade Commission Washington, D.C. 20580</p>	<p>8. COUNSEL AND PARTY ISSUING SUBPOENA  Complaint Counsel Katherine Johnson (202) 326-2185 Jonathan Cohen (202) 326-2551 Elisa Jillson (202) 326-3001</p>
--	---

<p>DATE SIGNED  4/15/14</p>	<p>SIGNATURE OF COUNSEL ISSUING SUBPOENA  </p>
-------------------------------------	---

### GENERAL INSTRUCTIONS

#### APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

#### MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena must comply with Commission Rule 3.34(c), 16 C.F.R. § 3.34(c), and in particular must be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed before the Administrative Law Judge and with the Secretary of the Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 8, and upon all other parties prescribed by the Rules of Practice.

#### TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to Counsel listed in Item 8 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Counsel listed in Item 8.

A copy of the Commission's Rules of Practice is available online at <http://bit.ly/FTCRulesofPractice>. Paper copies are available upon request.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

**RETURN OF SERVICE**

*I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)*

- in person.*
- by registered mail.*
- by leaving copy at principal office or place of business, to wit:*

Fed Ex, per FTC Rule 4.4(a)(2)

*on the person named herein on:*

(Month, day, and year)

(Name of person making service)

(Official title)

**Complaint Counsel  
Exhibit A  
Attachment 5**

**CX-A:5**

Elisa Jillson

Federal Trade Commission

600 Pennsylvania Ave, NW, Mailstop M-8102B

Washington, DC 20580

Adrian Hong, General Manager

Island Plastic Bags, Inc.

99-1330 Koaha Place

Aiea, HI 96701

Dear Ms. Jillson,

This letter is in reply to the subpoena sent by you on behalf of the Federal Trade Commission (FTC) to Island Plastic Bags, Inc. regarding Docket Number 9358. The company has complied with the subpoena to the best of its abilities given the limited timeframe and the limitations of our resources. Contained in the packet that this letter was sent in should be the following, which you have requested:

[REDACTED]

[REDACTED]

[REDACTED] It would have been an enormous effort to collect a sample of each bag. In addition, some of the bags are custom specifications that the company does not keep in stock. [REDACTED]

[REDACTED] The set up and take down costs to make one bag as a sample for each specification is too prohibitive. Instead, the company has provided eight samples of [REDACTED]

[REDACTED]

[REDACTED] The following is a list of the samples you should have received as well as the packing sample you should have received:

- Bags
  1. BD366017N – 36X60 17 Microns Natural
  2. BD11622T (Uncut) – 11X6.5X22 White T-Shirt
  3. BD434817N – 43X48 17 Microns Natural
  4. BD10620T – 10X6X20 White T-Shirt
  5. BD334016N – 33X40 16 Microns Natural

6. BD243315W – 24X33 15 Microns White Tall Kitchen Liner
  7. BD242408N – 24X24 8 Microns Natural
  8. BD85163T – 8X5X16 3 Mil White T-Shirt
- Retail Packaging
    1. Tall Kitchen Liner Retail Packaging

[REDACTED]

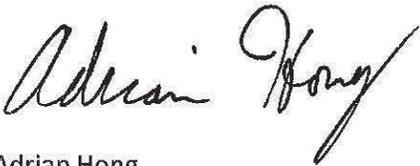
We have provided documents and emails regarding the marketing of [REDACTED] products on the flash drive contained within this packet. Unfortunately, we do not have the capability of complying with the Bureau of Consumer Protection's (BCP) electronic format guidelines. Island Plastic Bags is a small privately held corporation with only four office staff with a total staff of sixteen. We do not have the resources or expertise to comply with BCP's guidelines nor do we have enough time to gain such expertise given the tight timeframe of the subpoena. Please note I have put the confidential documents (emails) in the folder labeled "CONFIDENTIAL - FTC DOCKET NO. 9358." The following is included in the flash drive:

- Webpages & Website Photos
  - IPBFTC001 – IPBFTC009
- ECM Certification
  - IPBFTC010 & IPBFTC026
- Company's ECM Promotional Material
  - IPBFTC025, IPBFTC029 IPBFTC030, IPBFTC032, & IPBFTC043
- [REDACTED]
  - IPBFTC011
    - Attachment – IPBFTC012
  - IPBFTC013 – IPBFTC024
  - IPBFTC027
  - IPBFTC033
  - IPBFTC034 & IPBFTC036
    - Attachment – IPBFTC035
  - IPBFTC037 –IPBFTC042
  - IPBFTC044
  - IPBFTC045
    - Attachment – IPBFTC046
  - IPBFTC047
    - Attachment – IPBFTC048
  - IPBFTC049
    - Attachment – PBFTC054
  - IPBFTC050
    - Attachment – IPBFTC051
  - IPBFTC052

- Attachment – IPBFTC055
- IPBFTC053
  - Attachment – IPBFTC028
- IPBFTC056
  - Attachment – IPBFTC057

Should you have any questions or comments regarding the information and samples provided as part of the aforementioned subpoena, please do not hesitate to email me at [adrianhong@gmail.com](mailto:adrianhong@gmail.com) or call me at 808-484-4046.

Sincerely,

A handwritten signature in cursive script that reads "Adrian Hong". The signature is written in black ink and is positioned above the printed name.

Adrian Hong



Company.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on March 24th, 2014.

Adrian Hory, General Manager  
(Name, Title)

**Complaint Counsel  
Exhibit A  
Attachment 6**

**CX-A:6**



34175 Ardenwood Blvd.  
Suite 201  
Fremont, CA 94555  
Phone (650) 261-5300  
Fax (650) 361-1713  
<http://www.fpintl.com>

*Free-Flow Packaging International, Inc.*

March 28, 2014

Elisa Jillson  
Jonathan Cohen  
Federal Trade Commission  
600 Pennsylvania Ave. NW, M-8102B  
Washington, DC 20580

Re: In the Matter of ECM BioFilms, Inc, Docket No. 9358  
Subpoena Duces Tecum

Dear Ms. Jillson and Mr. Cohen:

I have enclosed the following in response to the Subpoena dated March 17, 2014, issued to FP International at our Thornton, Illinois, plant:

1. Certification of Compliance;
2. Privilege Log;
3. Responses to Subpoena.

Please note that the documents submitted in response to the Subpoena are confidential documents of FP International.

As I mentioned to Mr. Cohen in our telephone call last week, I will be on vacation next week but will return the following week.

Sincerely,

A handwritten signature in black ink, appearing to read 'James Blood', written over a large, stylized flourish.

James Blood  
SVP and General Counsel

**Complaint Counsel  
Exhibit A  
Attachment 7**

**CX-A:7**



## FEDERAL TRADE COMMISSION

Katherine Johnson  
600 Pennsylvania Ave. NW, M-8102B  
Washington, DC 20580  
(202) 326-2185; kjohnson@ftc.gov

Elisa Jillson  
600 Pennsylvania Ave. NW, M-8102B  
Washington, DC 20580  
(202) 326-3001; ejillson@ftc.gov

Jonathan Cohen  
600 Pennsylvania Ave. NW, M-8102B  
Washington, DC 20580  
(202) 326-2551; jcohen2@ftc.gov

April 18, 2014

VIA ELECTRONIC MAIL

Jonathan W. Emord  
Emord & Associates, P.C.  
11808 Wolf Run Lane  
Clifton, VA 20124

Peter Arhangelsky  
Lou Caputo  
Emord & Associates, P.C.  
3210 S. Gilbert Road, Suite 4  
Chandler, AZ 85286

RE: *In the Matter of ECM BioFilms, Inc., No. 9358*  
*Emord & Associates' Confidentiality Obligations*

Counsel,

Several attorneys representing ECM's customers have raised concerns with Complaint Counsel regarding your firm's obligations under the October 22, 2013 Protective Order. As you know, various third parties produced documents to Complaint Counsel designated "confidential," and we produced them to you in accordance with our obligations. Significantly, however, the Protective Order only permits disclosure to "outside counsel of record for any respondent, [and] their associated attorneys and other employees of their law firms, provided they are not employees of the respondent."<sup>1</sup> Likewise, you may disclose such materials to experts "provided they are not affiliated in any way with a respondent."<sup>2</sup> Subject to one exception irrelevant here,<sup>3</sup> the Protective Order prohibits

<sup>1</sup> Protective Order ¶ 7(c) (emphasis added).

<sup>2</sup> *Id.* at ¶ 7(d) (emphasis added).

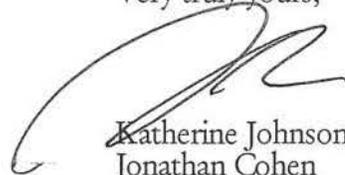
<sup>3</sup> ECM's employees may view third party confidential materials in their capacity as "witness[es] or deponent[s] who may have authored or received the information in question." Protective Order ¶ 7(e).

Emord & Associates, P.C.  
*In the Matter of ECM BioFilms, Inc.*, No. 9358  
Page 2

Emord & Associates, P.C. ("the Emord Firm") from disclosing confidential materials to any employee or officer of ECM Biofilms, Inc. ("ECM") including, without limitation, ECM CEO Robert Sinclair.

Significantly, the Emord Firm is solely responsible for complying with this aspect of the Protective Order, and for the financial consequences of any noncompliance. Complaint Counsel has no evidence that the Emord Firm has shared, or will share, any confidential materials with Mr. Sinclair. However, to facilitate production from third parties and avoid any possible misunderstanding, we reiterate that the Protective Order prohibits the Emord Firm from disclosing confidential materials to Mr. Sinclair or anyone else at ECM.

Very truly yours,

A handwritten signature in black ink, appearing to be 'Katherine Johnson', written over a horizontal line.

Katherine Johnson  
Jonathan Cohen  
Elisa Jillson

**Complaint Counsel  
Exhibit A  
Attachment 8**

**CX-A:8**

**From:** Peter Arhangelsky <PARhangelsky@emord.com>  
**Sent:** Wednesday, April 16, 2014 5:10 PM  
**To:** Cohen, Jonathan  
**Cc:** Jillson, Elisa; Johnson, Katherine; Lou Caputo; Jonathan Emord  
**Subject:** RE: Down To Earth

Counsel:

Concerning your request that we authorize the release of the documents ECM supplied in response to discovery that reference or relate to Down to Earth, ECM does not consent to or authorize the release of those documents to Down to Earth and will not waive the confidential status of them (each was marked confidential under the Protective Order).

Thanks,

**Peter A. Arhangelsky, Esq.** | EMORD & ASSOCIATES, P.C. | 3210 S. Gilbert Rd., Ste 4 | Chandler, AZ 85286  
Firm: (602) 388-8899 | Direct: (602) 334-4416 | Facsimile: (602) 393-4361 | [www.emord.com](http://www.emord.com)

NOTICE: This is a confidential communication intended for the recipient listed above. The content of this communication is protected from disclosure by the attorney-client privilege and the work product doctrine. If you are not the intended recipient, you should treat this communication as strictly confidential and provide it to the person intended. Duplication or distribution of this communication is prohibited by the sender. If this communication has been sent to you in error, please notify the sender and then immediately destroy the document.

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**From:** Cohen, Jonathan [<mailto:jcohen2@ftc.gov>]  
**Sent:** Tuesday, April 15, 2014 5:57 PM  
**To:** Lou Caputo; Peter Arhangelsky; Jonathan Emord  
**Cc:** Jillson, Elisa; Johnson, Katherine  
**Subject:** ECM: Down To Earth

Counsel for Down To Earth has asked us to disclose communications between ECM and Down To Earth. Please advise us whether ECM will waive the “confidential” designation for the limited purpose of providing these documents to Down To Earth’s counsel.

Thanks,

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

**Complaint Counsel  
Exhibit A  
Attachment 9**

**CX-A:9**

**From:** Peter Arhangelsky <PARhangelsky@emord.com>  
**Sent:** Tuesday, March 25, 2014 1:14 PM  
**To:** Cohen, Jonathan; Jonathan Emord; Lou Caputo  
**Cc:** 'Robin Powers'; 'Jonathan Rothschild'; Johnson, Katherine; Jillson, Elisa  
**Subject:** RE: ECM Biofilms, No. 9538 (PPC Industries)

Counsel:

ECM does not agree to waive the confidential status of documents it marked confidential under the Protective Order for the purpose of providing those documents to parties outside the FTC. We will not agree to vitiating the privilege. That includes all confidential information from within ECM's database.

Best,

**Peter A. Arhangelsky, Esq.** | EMORD & ASSOCIATES, P.C. | 3210 S. Gilbert Rd., Ste 4 | Chandler, AZ 85286  
Firm: (602) 388-8899 | Direct: (602) 334-4416 | Facsimile: (602) 393-4361 | [www.emord.com](http://www.emord.com)

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**From:** Cohen, Jonathan [<mailto:jcohen2@ftc.gov>]  
**Sent:** Monday, March 24, 2014 3:32 PM  
**To:** Jonathan Emord; Peter Arhangelsky; Lou Caputo  
**Cc:** 'Robin Powers'; 'Jonathan Rothschild'; Johnson, Katherine; Jillson, Elisa  
**Subject:** ECM Biofilms, No. 9538 (PPC Industries)

Counsel,

The attorneys representing PPC Industries have requested that we provide them with communications between ECM and PPC. As you know, ECM produced to us PDF images from a database apparently logging such communications, as well as (possibly) copies of the communications themselves. We'd be glad to provide this material to PPC, but ECM has designated it all "confidential." Please let me know if we may disclose it to PPC.

Thanks,

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

**Complaint Counsel  
Exhibit A  
Attachment 10**

**CX-A:10**

---

**From:** Peter Arhangelsky <PARhangelsky@emord.com>  
**Sent:** Sunday, April 20, 2014 12:29 PM  
**To:** Cohen, Jonathan  
**Cc:** Johnson, Katherine; Jillson, Elisa; Lou Caputo; Jonathan Emord  
**Subject:** RE: Docket No. 9358

Hi Jonathan,

We agree with the general proposition that ECM's representative will not be present in the room when "confidential" information is discussed, but we cannot agree that "whatever the deponent entity deems confidential as of the start of the deposition is deemed confidential..." That would be absurd, particularly because we have no idea what those designations are at this point. Please note that FP International apparently designated *every* document they supplied as "confidential" (without stamping individual documents). That includes ECM's marketing materials, emails with ECM, and other obviously public or non-privileged information. If the deponents do not agree to change their designations, we cannot allow those erroneous or overbroad designations to so easily overcome ECM's right to be present during the depositions.

We will engage deponents' counsel immediately next week in an effort to lift certain confidentiality designations for the limited purpose of these depositions. However, again, if they refuse, we cannot allow their unilateral judgment on "confidentiality" to dictate ECM's rights. If we need to "litigate those designations," we will do so; and that must obviously happen *before* the depositions occur. If Bob is erroneously excluded from the deposition, we think that is a substantial violation of the Rules and an irreparable deprivation of due process. This may require a postponement to the deposition schedule. Either that, or, if you prefer not to change your travel arrangements, we can take on the confidentiality issues as they arise during the depositions.

As I mentioned, an overwhelming amount of information deemed "confidential" by the third party deponents is not confidential. There is no good faith, non-frivolous argument to claim that an ECM-authored document (for instance) cannot be discussed in front of ECM's representative simply because the third party labeled it "confidential." So while we understand your desire to resolve these issues rapidly in advance of the depositions, and we very much appreciate your cooperation last week, we cannot agree to your exact proposal below, and we do not see the point in threatening a premature motion for Monday. If anything, the best way to resolve this is to cooperate in our effort to clarify confidential designations with the third parties.

We can certainly talk again on Monday. But our priority is to reach deponents' counsel so we can sort this all out (hopefully) in a manner than works for everyone.

Best,

**Peter A. Arhangelsky, Esq.** | EMORD & ASSOCIATES, P.C. | 3210 S. Gilbert Rd., Ste 4 | Chandler, AZ 85286  
Firm: (602) 388-8899 | Direct: (602) 334-4416 | Facsimile: (602) 393-4361 | [www.emord.com](http://www.emord.com)

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**From:** Cohen, Jonathan [<mailto:jcohen2@ftc.gov>]  
**Sent:** Friday, April 18, 2014 4:19 PM

**To:** Lou Caputo  
**Cc:** Johnson, Katherine; Jillson, Elisa; Jonathan Emord; Peter Arhangelsky  
**Subject:** RE: Docket No. 9358

Lou,

We do not have an agreement, at least not yet. We will file on Monday unless you agree in an unambiguous way to the following (genuinely reasonable) proposal:

- (1) Whatever the deponent entity deems confidential as of the start of the deposition is deemed confidential throughout the deposition no matter what (thus, no one debates “confidential” designations during the deposition).
- (2) ECM can do whatever it likes to encourage third parties to drop “confidential” designations prior to their depositions, or to litigate those designations.
- (3) ECM will notify Compliant Counsel a reasonable time before the deposition begins if the deponent has altered its “confidential” designations.
- (4) No ECM officer or employee will be in the room during portions of our examination that relate to information designated “confidential.”
- (5) Complaint Counsel will act in good faith to segregate confidential portions of the deposition, so that Mr. Sinclair (or ECM’s other non-attorney representative) does not have to leave and return unnecessarily. You acknowledge that process won’t be perfect.
- (6) ECM and its counsel similarly will act in good faith not to use the confidentiality issues to unnecessarily impair the flow of testimony. We acknowledge that process won’t be perfect.

Maybe this is what you mean, in which case, we do, in fact, have an agreement. But please make that clear. I’m here for a little while longer if it would be helpful to talk. I’d also be glad to speak with you over the weekend. We don’t want unnecessary motions practice either.

Thanks,

**Jonathan Cohen**

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

---

**From:** Lou Caputo [<mailto:LCaputo@emord.com>]  
**Sent:** Friday, April 18, 2014 6:51 PM  
**To:** Cohen, Jonathan  
**Cc:** Johnson, Katherine; Jillson, Elisa; Jonathan Emord; Peter Arhangelsky  
**Subject:** Docket No. 9358

Jonathan,

We reviewed your letter correspondence from earlier this afternoon. Notwithstanding the tone of your letter and the implications therein, we continue to abide by the standing Protective Order in this case. We will not share confidential materials with ECM or Mr. Sinclair in preparation for the upcoming depositions of ECM customers. Concerning those depositions, we will speak with our client about your position that the deponent has the final word about whether information, documents, and materials are “confidential.” We disagree that material authored by or shared with ECM is “confidential” such that Bob would need to leave the room when you discuss that information (e.g., ECM marketing brochures, etc.). That could lead to Bob’s unnecessary exclusion for large portions (if not all) of the depositions.

**PUBLIC DOCUMENT**

We plan to speak with deponents' counsel next week to discuss Mr. Sinclair's presence during the depositions. We hope to narrow their concerns over confidential information, and we will update you promptly. We otherwise think the parties are in agreement concerning Bob's attendance generally and, so, motions practice should be unnecessary.

Best,

**Lou Caputo | EMORD & ASSOCIATES, P.C.** | 3210 S. Gilbert Rd., Ste 4 | Chandler, AZ 85286 Firm: (602) 388-8901 |  
Facsimile: (602) 393-4361 | [www.emord.com](http://www.emord.com)

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**Complaint Counsel  
Exhibit A  
Attachment 11**

**CX-A:11**

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**From:** Lou Caputo <LCaputo@emord.com>  
**Sent:** Friday, April 18, 2014 3:08 PM  
**To:** Cohen, Jonathan; Peter Arhangelsky; Jonathan Emord  
**Cc:** Jillson, Elisa; Johnson, Katherine  
**Subject:** RE: Dkt. No. 9358; Fact Witness Depositions

Counsel,

We agree that Bob may be asked to leave the deposition room for certain discussions of “confidential” material. We also note your willingness to structure the deposition in a reasonable order to avoid confusion and interruptions. We disagree with the “confidential” nature of some information to be discussed, including, for example, Island Bags’ decision to mark “confidential” many documents authored by ECM and provided to them by ECM. We therefore expect that Bob will exercise his right to be present for discussions of that type of information, which we can say generally embodies documents and facts already disclosed or known to ECM.

Although the protective order does not differentiate, we think a distinction can be drawn between “confidential” information and “attorneys eyes only” information, just as the Federal Courts routinely do in their protective orders. Perhaps the deponents can dictate whether they seek Bob’s absence at the time of questioning. We have no objection to Bob’s exclusion during discussions that clearly touch on information confidential *to the deponent* (as opposed to ECM or the parties generally). Because we are essentially in agreement, we think motions practice is unnecessary. We do request, however, that the interpretation of the phrase “confidential” be construed as narrowly as the rules and protective order permit so that we respect Bob’s right to appear under Rule 4.1(a), Rule 3.33, FRCP 26 & 30, FRE 615(b), and the Due Process Clause of the U.S. Const.

We also need to request that a telephone line be available in each of the deposition rooms to facilitate the participation of counsel over long-distance as necessary.

Best,

**Lou Caputo | EMORD & ASSOCIATES, P.C.** | 3210 S. Gilbert Rd., Ste 4 | Chandler, AZ 85286 Firm: (602) 388-8901 | Facsimile: (602) 393-4361 | [www.emord.com](http://www.emord.com)

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---

**From:** Cohen, Jonathan [<mailto:jcohen2@ftc.gov>]  
**Sent:** Friday, April 18, 2014 7:33 AM  
**To:** Peter Arhangelsky; Jonathan Emord; Lou Caputo  
**Cc:** Jillson, Elisa; Johnson, Katherine  
**Subject:** RE: Dkt. No. 9358; Fact Witness Depositions

Counsel,

We’ve left a voicemail at your office. Please call us about the issue below as soon as possible, and we suggest that Mr. Sinclair not make travel arrangements before you speak with us.

Thanks,

**Jonathan Cohen**

Enforcement Division | Bureau of Consumer Protection | Federal Trade Commission  
600 Pennsylvania Avenue, N.W., M-8102B Washington, D.C. 20580  
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**From:** Peter Arhangelsky [<mailto:PArhangelsky@emord.com>]

**Sent:** Thursday, April 17, 2014 7:55 PM

**To:** Johnson, Katherine

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

**Subject:** Dkt. No. 9358; Fact Witness Depositions

Counsel:

This email serves as formal notice that ECM's President, Bob Sinclair, will appear at all noticed fact depositions between April 28 and May 8. *See* Rule 4.1(a)(2). Under Rule 4.1(a), Mr. Sinclair will appear and represent the interests of the corporation in his capacity as a bona fide officer.

Sincerely,

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