ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

COMPLAINT COUNSEL'S RENEWED MOTION TO COMPEL AND MOTION FOR SANCTIONS

Pursuant to Rules 3.37 and 3.38, Complaint Counsel respectfully requests that the Court enter an order compelling Respondent to provide its Email Archive immediately and sanctioning Respondent for its failure to abide by its discovery obligations and our agreement pertaining to outstanding discovery. In consideration for Complaint Counsel's withdrawal of its January 23 motion to compel production of documents ("Motion"), Respondent agreed, *inter alia*, to produce all responsive documents from its Email Archive by February 21, 2014.[1] Respondent's counsel notified us on February 20 that it would not produce more than 50,000 pages (more than half of the production) until March 14, 2014.[2]

Respondent's unjustified failure to comply with its discovery obligations or adhere to the parties' agreement unfairly prejudices Complaint Counsel's efforts to obtain timely discovery. Accordingly, we ask the Court to enter an order (1) compelling ECM to produce the rest of the Email Archive immediately; (2) overruling and deeming waived all of ECM's objections to the outstanding document requests and claims as to privilege; (3) amending the Scheduling Order to

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1 Any capitalized terms used and not defined herein have the meanings set forth in the Motion to Compel.

2 As of Feb. 27, Respondent produced a total of 51,518 pages, up from 45,000 as of the 21st.

allow Complaint Counsel additional time to conduct fact discovery with respect to the late-produced documents; (4) granting Complaint Counsel the right to conduct additional depositions in Washington, DC with respect to the late-produced documents; and (5) prohibiting ECM from affirmatively introducing any of the late-produced documents in support of its case, its affirmative defenses, or in rebuttal. The grounds for the requested relief are more fully set forth below.

BACKGROUND

A. ECM's Prior Refusal to Produce Most Responsive Documents.

Complaint Counsel's First Request for Production of Documents ("RFPD") requested, among other things, documents relating to ECM-customer communications and to the functioning of, substantiation for, and perception of the additive technology. *See* Mot. to Compel at Ex. CCX-A:1. ECM had 30 days to respond. Rule 3.38(b). On the December 27, 2013, response date, ECM had only produced a handful of documents. *See* Mot. to Compel at 2.

ECM claimed searching and producing its documents was burdensome. Complaint Counsel made numerous concessions to alleviate the claimed burden on Respondent and engender a timely response. *Id.* These efforts culminated in a proposal in which ECM would merely have to produce the Summary Database and documents responsive to 50 search terms. *Id.* at 3. ECM rejected this offer, making a counter-proposal that would have left us completely at the mercy of ECM's timetable. *Id.* 3-4.

B. The Motion to Compel and the Parties' Agreement Resolving the Motion.

On January 23, we filed the Motion for an order requiring ECM to turn over its responsive documents immediately, or accept our final proposal. *See generally id.* After fully briefing the issue but before the Court ruled on the merits, ECM agreed to provide the remainder of the Summary Database entries before ECM's deposition, and all of the responsive documents

from its Email Archive by February 21st, before the deposition of three key witnesses.[3] *See* CCX- A:1 (email exchange between parties' counsel); CCX-A:2 (2/6/14 letter from Respondent's counsel); *see also* Withdrawal of Mot. to Compel, filed February 7, 2014 ("Withdrawal"). In exchange, we agreed to withdraw the Motion. *Id.* On February 20, a day before the remaining Email Archive production was due, Respondent's counsel informed us orally that ECM would not produce more than half of the responsive documents until March 14th. CCX-A:3 (2/21/14 email from Respondent's counsel).

LEGAL STANDARD

Under Rule 3.37, ECM's responses to the RFPD were due within 30 days. Rule 3.38(b) provides that "[i]f a party . . . fails to comply with any discovery obligation . . . the Administrative Law Judge . . . may take such action in regard thereto as is just" to remedy the prejudice suffered by the other party. 16 C.F.R. § 3.38(b). The Court may order, among other things, that "the [non-compliant] party may not introduce into evidence or otherwise rely, in support of any claim or defense, upon . . . the documents." *See* 16 C.F.R. § 3.38(b)(4).

Sanctions are appropriate where the party's failure to comply is unjustified. *See, e.g., In re Polypore Int'l, Inc.*, 2009 WL 1353457, * 2-3; *In re The Grand Union Co.*, 1983 WL 486347, *208, 102 F.T.C. 812, 1089 (1983).[4] The sanction imposed must be reasonable in light of the material withheld and be tailored to mitigate the prejudice suffered. *Id.* Sanctions are particularly appropriate when a party delays the production of documents on the cusp of discovery cut-off and impending depositions. *In re Heritage Bond Litig.*, 223 F.R.D. 527, 530 (C.D. Cal. 2004) (*citing Payne v. Exxon Corp.*, 121 F.3d 503, 508 (9th Cir. 1997)).

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[3] Complaint Counsel noticed the deposition of Thomas Nealis (ECM sales manager), Alan Poje (former ECM employee), and Dr. Timothy Barber (scientist) to take place the first week of March.

[4] Prior to 2009, the Commission required a showing that the party against whom sanctions were sought had violated a court order in addition to unjustified non-compliance. Now, as a prerequisite to ordering relief, the moving party need only show that the party failed to comply "with any discovery obligation imposed by [the] rules." Rule 3.38.

ARGUMENT

A. ECM Failed to Abide by its Discovery Obligation and the Parties' Agreement.

Under Rule 3.37, ECM's responses to the RFPD were due on December 27, 2013. After several rounds of failed negotiations, Complaint Counsel filed the Motion. In consideration for our agreement to withdraw the Motion, Respondent specifically agreed to produce the entire Email Archive, subject only to a few limitations, by February 21st. *See* CCX-A:1-2; *see also* Withdrawal at 1-2. Despite the parties' agreement, ECM produced less than half of the documents in the Email Archive on the deadline, and informed us that it will not complete its production until March 14. This excessive delay is exactly the prejudice that Complaint Counsel sought to avoid when it filed the Motion.

Prior to our Motion, ECM offered to produce documents on a rolling basis from the Email Archive between the end of January and Mid-March. We rejected this offer because ECM would not guarantee it would complete the production before the close of discovery. Mot. to Compel at 3-4. ECM then offered to produce the documents by February 21, and we reached an agreement based on that promise. *See* Withdrawal at 1-2. As we explained in our Motion and reply, there are several outstanding discovery requests. Mot. to Compel at 5; Reply at 2-4, filed February 6, 2014. These now will be more than two months late.

B. The Proposed Sanctions are Warranted.

Sanctions under Rule 3.38 are warranted where "the party's failure to comply is unjustified; and [] the sanction imposed 'is reasonable in light of the material withheld and the purposes of Rule 3.38(b).'" *See Polypore*, 2009 WL 1353457, * 2-3; *Grand Union*, Dkt. 9121, 1983 WL 486347, *208 (July 18, 1983). Here, both requirements are easily satisfied.

1. ECM's failure to comply is unjustified.

An unjustified failure to comply with a discovery obligation arises where the explanation for non-compliance is inadequate. *Grand Union*, 1983 WL 486347, *208; *see also In re Amrep Corp.*, Dkt. 9018, Ruling Re Alleged Deficiencies in Respondent's Compliance with Complaint

Counsel's Subpoenas *Duces Tecum* (April 21, 1976) ("Amrep Order") at 3-4.[5] ECM's refusal to produce these documents consistent with our agreement is completely unjustified and follows a pattern of resistance to our discovery efforts.

First, ECM refused to produce any documents at all until the Court ruled on the motion pertaining to discovery directed at its customer lists. Next, ECM refused to produce its current customer communications from the Summary Database. Then, ECM refused to produce revenues by customer, requiring the Court to order it to do so. ECM next refused to produce the Email Archive because searching it is supposedly burdensome for the CEO. And finally, most recently, it sought another protective order to prevent third-party discovery directed at its current customers.

Despite its obligation to produce these highly relevant and probative documents by February 21, ECM offered only one reason for the delay: its CEO and President, who is taking on the primary responsibility for reviewing the files contained in the Email Archive, has underestimated the scope of responsive documents.[6] CCX-A:3. This rehashing of its prior burden argument stems from ECM's unreasonable position that the CEO himself must search the documents for privilege and responsiveness, thus protracting the time it takes to produce documents. Mot. to Compel at 5-7. Moreover, ECM now has had over three months to review and produce these documents. This explanation for non-compliance is inadequate. Amrep Order at 4 (ALJ found respondents' assertion that subpoenaed material had to be manually retrieved from 50,000 files inadequate when respondent had nearly a half-year to perform the search).

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[5] Pursuant to the Court's November 21, 2013 Scheduling Order, a copy of the Amrep Order is attached hereto as CCX-A:4.

[6] Respondent's counsel also suggests that our depositions of ECM, the CEO, and the CFO are to blame for the delay. *See* CCX-A:3. But this completely ignores that these depositions were noticed well before the parties reached an agreement. It also ignores Respondent's obligation to investigate and ensure it could comply with the terms of the agreement and to notify us in a timely manner when it became clear it could not.

2. The proposed sanctions are reasonable and tailored to address the harm.

The proposed sanctions must be "reasonable in light of the material withheld and the purposes of Rule 3.38(b)." 16 C.F.R. § 3.38(b)(4). The purpose of Rule 3.38(b) is to promote discovery. *In re Int'l Tel. & Tel. Corp.*, 104 F.T.C. 280 (1984); Dkt. 9000, 1984 WL 565367, *128 (July 25, 1984). As explained in our Motion, it is beyond dispute that the documents at issue are necessary to guide further fact discovery. Mot. to Compel at 5. The Rules do not countenance a production so late as to defeat their purpose. *See In re Basic Research LLC*, 2004 FTC LEXIS 248 (Dec. 29, 2004) (granting motion to compel where "rolling production" led to several-month delay).

Unlike most federal court litigation, this administrative litigation has a discovery schedule that is too short to allow any party unilaterally and materially to delay responding to discovery requests. Even if ECM produces the Email Archive by March 14, we will have less than three weeks before the April 3rd discovery cut-off. This is insufficient time to review the documents, fashion and serve appropriate additional requests for admissions, or conduct depositions of any fact witnesses based on the contents of the documents. Furthermore, the February 28 deadline to issue subpoenas *duces tecum*, interrogatories, and document requests will have long-since passed.

a. ECM Should Produce the Email Archive Immediately.

Respondent agreed to produce the Email Archive by February 21, and failed to notify us that it would not be able to comply until a day before the production was due. Although an order compelling ECM to produce its Email Archive immediately is a necessary first step, it will not fully mitigate the prejudice caused by ECM's delay.[7] Accordingly, we propose additional sanctions to address and remedy each consequence of ECM's conduct.

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[7] Complaint Counsel agreed to withdraw its only means of compelling ECM to comply with its discovery obligations in a timely manner based on ECM's illusory promise. No matter what happens now, ECM will not produce the documents on any timeframe other than the one it unilaterally chose. In fact, Respondent emphasized in the meet-and-confer that this motion will not accelerate ECM's production anyway.

b. The Court Should Overrule ECM's Objections and Deem its Privileges Waived.

Sanctions are particularly appropriate when a party is deprived of any meaningful opportunity to follow up on information or incorporate it into its litigation strategy, such as when a party delays the production of documents as the discovery cut-off date rapidly approaches and depositions are imminent. *In re Heritage Bond Litig.*, 223 F.R.D. at 530. Loss of objections and privileges are appropriate sanctions when a party fails to timely respond to a document request.[8] "Any other result would . . . completely frustrate the time limits contained in the [ ] rules and give license to litigants to ignore the time limits for discovery without any adverse consequences." *RE/MAX Int'l, Inc. v. Trendsetter Realty, LLC, Civ.* No. H–07–2426, 2008 WL 2036816, *5 (S.D. Tex. May 9, 2008).

Any order to compel production also must preclude ECM from capitalizing on further delay. ECM's agreement to produce the Email Archive was subject only to certain limitations to remove confidential and privileged information. CCX-A:1-2. Given ECM's inability (or refusal) to conduct these reviews in a timely fashion, the appropriate remedy is for the Court to overrule and deemed waived ECM's objections and privileges for these documents.[9]

c. ECM Has Consented to An Extension of Fact Discovery.

The Scheduling Order set February 28 as the deadline to issue *duces tecum*, interrogatories, and document requests. Respondent concedes our need to extend fact discovery. CCX-A:3. But this concession alone is inadequate to address all of the other prejudices identified herein. Thus, we request extending the fact discovery deadline (for Complaint Counsel only) to address the prejudice from not having the documents in time to conduct necessary discovery.

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[8] *See, e.g., Enron Corp. Sav. Plan v. Hewitt Assoc., LLC,* 258 F.R.D. 149, 156-159 (S.D. Tex. 2009) (and cases cited therein).

[9] Complaint Counsel previously agreed to accept documents without review and subject to a clawback agreement. *See* Mot. to Compel at 3.

We also request that if the documents show a need for further questioning of those witnesses deposed after February 21, the Court order that (1) Complaint Counsel may notice second depositions as it sees fit; the depositions shall be conducted (2) at the FTC's offices in Washington, DC, and (3) at Respondent's expense. Complaint Counsel is spending significant amounts of time and money to travel to Ohio to depose three key witnesses. If additional depositions are necessary because ECM breached its agreement, ECM should bear the burden of time and expense.

d. ECM Should be Prohibited from Using Late-Produced Documents.

ECM agreed to provide these documents by February 21. By waiting until a day before the production was due under the agreement, when it would have been obvious much sooner that it would not meet the deadline, ECM maximized the prejudice of the delay, stalling this motion to compel and the discovery process in general. During this time, ECM has had possession of these documents to prepare its case. It should not be able to benefit from its dilatory conduct. Therefore, we seek an order prohibiting ECM from affirmatively introducing or relying on any of the late-produced documents. *See* 16 C.F.R. § 3.38(b)(4).

CONCLUSION

For these reasons, Complaint Counsel respectfully asks the Court to order Respondent to produce the Email Archive and enter an appropriate order.

Dated: February 28, 2014

Respectfully submitted,

/s/ Katherine Johnson
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

STATEMENT CONCERNING MEET AND CONFER

The undersigned counsel certifies that Complaint Counsel conferred with Respondent's counsel in a good faith effort to resolve by agreement the issues raised by Complaint Counsel's Renewed Motion to Compel and Motion for Sanctions. On February 27, 2014, Complaint Counsel (Katherine Johnson, Jonathan Cohen, and Elisa Jillson) and Respondent's Counsel (Jonathan W. Emord, Peter A. Arhangelsky, and Lou Caputo) communicated by email about the issues that gave rise to these motions. Complaint Counsel (Katherine Johnson and Jonathan Cohen) and Respondent's Counsel (Peter A. Arhangelsky) communicated by telephone on February 28, 2014. The parties have been unable to reach an agreement on the issues raised in the attached motion.

Dated: February 28, 2014

Respectfully submitted,

/s/ Katherine Johnson

Katherine Johnson (kjohnson3@ftc.gov)
Jonathan Cohen (jcohen2@ftc.gov)
Elisa Jillson (ejillson@ftc.gov)
Federal Trade Commission
600 Pennsylvania Ave., N.W. M-8102B
Washington, DC 20580
Phone: 202-326-2185; -2551; -3001
Fax: 202-326-2551

CERTIFICATE OF SERVICE

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

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

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

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

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

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

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

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

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

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: February 28, 2013

/s/ Katherine Johnson
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

Complaint Counsel Exhibit A

CCX-A

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

DECLARATION OF KATHERINE JOHNSON IN SUPPORT OF COMPLAINT COUNSEL'S RENEWED MOTION TO COMPEL AND MOTION FOR SANCTIONS

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

1. I am over 18 years of age, and I am a citizen of the United States. I am employed by the Federal Trade Commission ("FTC") as an attorney in the Division of Enforcement in the Bureau of Consumer Protection. I am an attorney of record in the above-captioned matter, and I have personal knowledge of the facts set forth herein.

2. Attachment A:1 hereto is a true and correct copy of an email string between parties' counsel.

3. Attachment A:2 hereto is a true and correct copy of a letter dated February 6, 2014, from Respondent's counsel.

4. Attachment A:3 hereto is a true and correct copy of an email dated February 21, 2014 from Respondent's counsel.

5. Attachment A:4 hereto is a true and correct copy of the Ruling Re Alleged Deficiencies in Respondent's Compliance with Complaint Counsel's Subpoenas *Duces Tecum* filed April 21, 1976, in *In re Amrep Corp.*, Dkt. 9018.

Executed this 28th of February 2014 in Washington, D.C.

Katherine Johnson
Complaint Counsel

Complaint Counsel
Exhibit A
Attachment 1

CCX-A:1

From: Johnson, Katherine
To: "Jonathan Emord"; Cohen, Jonathan; Peter Arhangelsky
Cc: Jillson, Elisa; Lou Caputo
Subject: RE: ECM Biofilms, No. 9358
Date: Friday, February 07, 2014 10:07:00 AM

Jonathan:

Thank you for the clarification. Based on the corrections and clarifications below, we agree to withdraw our motion to compel. I can't promise it will be done by noon, but we can notify the Court by the end of the day.

However, we need clarify one point. By designating the material confidential it becomes "attorneys eyes only." This includes, under paragraph 7 of the protective order, "personnel retained by the Commission as experts or consultants for this proceeding." Thus, to the extent that the Email Archive yields documents that our experts in this case would need to consider in forming their opinions, *e.g.*, tests conducted by ECM customers, they will be shared with our experts.

Katherine

Katherine E. Johnson, Attorney
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Mail stop M-8102B
Washington, DC 20580
Direct Dial: (202) 326-2185
Fax: (202) 326-2558
Email: kjohnson3@ftc.gov

From: Jonathan Emord [mailto:JEmord@emord.com]
Sent: Friday, February 07, 2014 9:56 AM
To: Cohen, Jonathan; Peter Arhangelsky
Cc: Jillson, Elisa; Johnson, Katherine; Lou Caputo
Subject: RE: ECM Biofilms, No. 9358
Importance: High

Dear Jonathan:

Concerning your interest in obtaining international customer correspondence, we have conferred with our client and can represent on ECM's behalf that it will be providing you with all of its correspondence with international customers and all of its customer specific revenue information with those customers, to the extent not already supplied, for the period between January 1, 2009 and the present. We hereby correctively amend our email of yesterday to delete the word "domestic."

Second, to the extent ECM still has internal email files, those will be included in the email archives

that will be produced. If ECM employees did not include their emails in the archived correspondence PDFs, ECM will not have those records. Furthermore, as Peter stated, ECM's internal written correspondence is generally limited.

Please note, under the protective order in this case, we designate all of the correspondence between ECM and its customers as well as the revenue listings as highly confidential. We note, in particular, that this information cannot be shared with experts, particularly in light of the fact that almost all experts in this field have direct or indirect fiduciary duties to or financial ties with competitors of ECM.

I hope this answers your questions. Please let me know on or before Noon Eastern today if you will withdraw the pending motion to compel. If you decide against that course, or if we do not hear from you by Noon Eastern, we will file the surreply shortly thereafter.

Sincerely,

Jonathan W. Emord

From: Cohen, Jonathan [mailto:jcohen2@ftc.gov]
Sent: Thursday, February 06, 2014 8:12 PM
To: Peter Arhangelsky
Cc: Jillson, Elisa; Johnson, Katherine; Jonathan Emord; Lou Caputo
Subject: RE: ECM Biofilms, No. 9358

Peter,

Two quick questions (and my co-counsel may have others):

(1) What's the basis for limiting the production to "domestic" ECM customers? You didn't mention that limit this afternoon.

(2) I understand you've indicated that there may be very few internal communications. However, to the extent they exist, are they all included within the "customer correspondence files" you describe in the second paragraph?

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

From: Peter Arhangelsky [mailto:PArhangelsky@emord.com]
Sent: Thursday, February 06, 2014 7:42 PM
To: Cohen, Jonathan

Cc: Jillson, Elisa; Johnson, Katherine; Jonathan Emord; Lou Caputo
Subject: RE: ECM Biofilms, No. 9358

Counsel:

We agree to the terms of the joint motion, even if the court will not accept it. You also have our consent to withdraw the joint motion.

As we discussed this afternoon, I have attached our discovery letter. Please inform us if you have questions. Should we fail to agree by tomorrow at Noon Eastern, we will be obliged to file our Surreply. However submission of that brief should not limit our ability to reach an agreement on these points.

Sincerely,

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

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From: Cohen, Jonathan [mailto:jcohen2@ftc.gov]
Sent: Thursday, February 06, 2014 4:32 PM
To: Peter Arhangelsky; Jonathan Emord
Cc: Jillson, Elisa; Johnson, Katherine
Subject: RE: ECM Biofilms, No. 9358

Counsel,

(1) Do we have your agreement to the terms of the joint motion (along with Peter's clarification at 1:47 EST this afternoon), even if the Court will not accept the motion now?

(2) As it's a joint motion, do we have your consent to withdraw it?

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

From: Pelzer, Lynnette
Sent: Thursday, February 06, 2014 5:23 PM
To: Cohen, Jonathan; Jillson, Elisa; Johnson, Katherine; Arhangelsky, Peter; Emord, Jonathan
Cc: Arthaud, Victoria; Gebler, Hillary; Gross, Dana

Subject: RE: ECM Biofilms, No. 9358

Dear Counsel,

Per Judge Chappell, the above pending joint motion is too speculative or uncertain at this time to be granted. However, to alleviate the parties' concerns, in the event the discovery deadline needs to be extended at some point, a joint motion at that time will be considered favorably. Accordingly, the best practice at this time would be for the parties to file a Notice of Withdrawal of this pending joint motion.

From: OALJ
Sent: Thursday, February 06, 2014 3:52 PM
To: Arthaud, Victoria; Gebler, Hillary; Pelzer, Lynnette
Subject: FW: ECM Biofilms, No. 9358

From: Cohen, Jonathan
Sent: Thursday, February 06, 2014 3:51:37 PM
To: OALJ
Cc: Jillson, Elisa; Johnson, Katherine
Subject: ECM Biofilms, No. 9358
Auto forwarded by a Rule

Please see the attached Joint Motion To Reset the Fact Discovery Deadline, and an accompanying transmittal letter. We have forwarded hard copies as well.

Thanks,

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

Complaint Counsel
Exhibit A
Attachment 2

CCX-A:2

A Professional Corporation
WASHINGTON, D.C. | VIRGINIA | PHOENIX
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CLIFTON, VA 20124

3210 S. GILBERT ROAD
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(202) 466-6937 | FAX (202) 466-6938

Peter A. Arhangelsky, Esq.
602.334.4416
parhangelsky@emord.com

February 6, 2014

VIA EMAIL:
Katherine Johnson (kjohnson3@ftc.gov)
Elisa Jillson (ejillson@ftc.gov)
Jonathan Cohen (jcohen2@ftc.gov)
U.S. Federal Trade Commission
600 Pennsylvania Ave., NW, M-8102B
Washington, D.C. 20580

Re: No. 9358, In re ECM BioFilms; Document Production

Dear Counsel:

This letter follows our conversation of February 6, 2014 concerning Respondent ECM's discovery response. The production defined in this letter will render moot Complaint Counsel's pending Motion to Compel Production of Documents (filed January 23, 2014).

ECM shall produce the entirety of its customer correspondence files contained in its archived electronic storage for the period of January 1, 2009 through January 1, 2014. That production will include all files contained in ECM's electronic storage or database related to all domestic ECM customers. That production will be limited in the following ways. First, ECM will redact or expurgate its customers' confidential business information to the extent that information is defined by mutual confidentiality agreements executed with certain ECM customers. Second, ECM will redact or expurgate all information subject to privilege, including, e.g., the attorney work product privilege, the attorney-client privilege, and trade secret privileges. Third, because ECM will be required to produce bulk documents under short deadlines, ECM shall designate all correspondence with customers (and associated files) as confidential under the standing protective order. Thereafter ECM will refine its designations.

ECM will timely respond to Complaint Counsel's second set of discovery requests, and provide all responsive documents under Complaint Counsel's first set of discovery requests, subject to the aforementioned limitations. ECM will produce all scientific and technical documents responsive to your discovery demand if those documents (1) are possessed by ECM and (2) were not already produced in prior productions.

ECM will produce its archived files on a rolling basis, meaning as it is retrieved and immediately after it is reviewed by counsel, on or before February 21, 2014. Thus, ECM agrees to complete the production by February 21, 2014, subject to its obligation and right to amend or supplement discovery under 16 C.F.R. § 3.31(e). ECM will produce the remainder of its Microsoft Access database summations (encompassing all emails, faxes, and phone calls from January 1, 2009 to the present) on or before February 12, 2014. ECM will not produce the MS Access notations in native format because the program produces records in PDF format, which have been supplied to Complaint Counsel in a "reasonably usable form." *See* 16 C.F.R. § 3.37(c)(ii); *see also* 16 C.F.R. § 3.37(c)(iii) ("[a] party need not produce the same electronically stored information in more than one form").

ECM provides this proposal in a good faith effort to resolve outstanding discovery disputes. The Court has imposed a 1pm Eastern deadline on February 7, 2014 to consider any surreply ECM may file in response to Complaint Counsel's pending Motion to Compel. ECM intends to file a Motion for Leave to File a Surreply no later than 12:00pm Eastern, February 7, 2014, unless Complaint Counsel agrees to withdraw or moot the pending motion before that time.

Please do not hesitate to contact us with any questions.

Sincerely,

Jonathan W. Emord
Peter A. Arhangelsky
Counsel to Respondent ECM BioFilms, Inc.

Complaint Counsel
Exhibit A
Attachment 3

CCX-A:3

From: Peter Arhangelsky
To: Johnson, Katherine
Cc: Cohen, Jonathan; Jonathan Emord; Lou Caputo; Jillson, Elisa
Subject: ECM Document Production Scheduling
Date: Friday, February 21, 2014 7:22:41 PM

Counsel:

Per our discussion yesterday afternoon, February 20, 2014, ECM must extend the time for document production beyond February 21st. As of February 6th, the date we last conferred regarding this production (excluding our discussion yesterday), our client estimated before delving into the PDF files that production would embrace at least tens of thousands of pages. Now, having produced tens of thousands of pages, it is clear that the remaining responsive documentation is far greater. ECM has provided 31,764 pages of responsive information to date. It provided 5,400 pages yesterday. By Monday, ECM will have added approximately 13,000 pages, bringing its production to about 45,000 pages. That production includes all documents still in ECM's possession exchanged with customers and third parties. Despite extraordinary efforts, ECM must still process at least another 50,000 pages. ECM President Bob Sinclair testified that he is primarily responsible for gathering the responsive data. ECM's operations were disrupted this week during depositions which delayed Mr. Sinclair's efforts. Because of those interruptions, and the significant volume of responsive material discovered, ECM will require until March 14, 2014 to complete its document production. ECM will consent or agree to an extension of fact discovery to adjust for its revised production schedule. The scope of ECM's production offered under its February 6, 2014 letter remains unchanged.

Also, under our obligation to supplement discovery responses, we have additional information to report concerning the universe of discoverable electronic information. In May 2013, ECM's offices suffered a "brownout" power surge that destroyed most of its electronic systems and compromised electronic data. ECM was able to recover its server data, but was unable to recover files saved on individual workstations. ECM replaced those five workstations in June 2013. The universe of responsive electronic data is therefore drawn from those files that were backed-up to the server. We will produce documents related to ECM's electronic losses in our next production expected this evening or over the weekend. In anticipation of that production, we request that your IT litigation department forward a new upload link.

Please let us know if you wish to discuss this further.

Best,

Peter A. Arhangelsky, Esq. | **Emord & Associates, P.C.** | 3210 S. Gilbert Rd., Ste 4 | Chandler, AZ 85286
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communication has been sent to you in error, please notify the sender and then immediately destroy the document.

Complaint Counsel Exhibit A Attachment 4

CCX-A:4

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

AMREP CORPORATION,
a corporation.

DOCKET NO. 9018

RULING RE ALLEGED DEFICIENCIES IN RESPONDENT'S COMPLIANCE WITH COMPLAINT COUNSEL'S SUBPOENAS DUCES TECUM

Complaint Counsel obtained a substantial subpoena duces tecum to discover Respondent's files in June 1975 and a brief supplementary subpoena in November 1975. Much was turned over by Respondent but after protracted negotiations certain deficiencies are still alleged by Complaint Counsel to exist. They filed a "Report On Deficiencies, etc." dated November 12, 1975 and a slightly reduced "Report" dated April 8, 1976, seeking a compliance order as a prelude to the applications of sanctions under Rule §3.38. Under date of April 12, 1976 Respondent in effect answered the motion for a compliance order, by moving to deny Complaint Counsel's motion.

June 1975 Subpoena Duces Tecum

Eleven specifications of this subpoena are said to have been entirely unanswered (#1, 3, 17, 21, 27) or inadequately answered (#2, 6, 8, 12, 19, 22). In fact, however, Complaint Counsel's concern is not really the absence of answers but the truthfulness of answers. Of the first group, Specification #1, for example, called for minutes and other records of meetings of various groups, including Respondent's Marketing Committee (relative to land advertising and sales), Pricing Committee (relative to land pricing policies), and Board of Directors, (relative to acquisition and resale of land, etc.) Respondent's return revealed nothing about its much used "dinner party sales system" and Complaint Counsel say that is incredible.

Respondent answers that its responsive documents mention no "dinner party sales system" because no such documents were located, despite diligent search therefor. We are not at liberty to disregard this affirmation of Respondent's counsel just because Complaint Counsel have their suspicions. Indeed, as we read the specification involved we ourselves would not be very surprised to find that a document referring to Respondent's "dinner party system" might well fail to meet all the other requirements of such a complex specification. In any event we have the word of Respondent's Counsel that they found nothing responsive to return which referred to the "dinner party sales system". Complaint Counsel adduce not the slightest evidence to the contrary.

Of the second group, Specification #2, for example, called for complaints to Respondent, details, internal documents commenting thereon, disciplinary actions taken and responses to the complainant concerning sales practices of Respondent's sales persons. Respondent's return revealed only one series of complaint letters from a single consumer out of the thousands of customers involved. Complaint Counsel are incredulous. Respondent answers that Complaint Counsel approved the letters sent out to Respondent's subsidiaries for responsive matter and affirm that all responses thereto were included in the subpoena return. It is one thing to be suspicious -- and the ratio of complaints to customers may, indeed, seem unusual for any sales project -- but suspicion is no substitute for proof of a false return.

Returns responsive to the other specifications follow about the same pattern. Complaint Counsel point to none or negligible returns to demands for sales procedure manuals (#3), engineering studies (#6), proposed or existing utility maps (#12), land appraisals (#17), sales training aids (#19), tape recordings or transcripts of dinner parties or sales meetings (#21), specified slides and homesite films (#27), etc. In all cases Respondent's answer is simple. Diligent search was made and what was found was produced.

Assuming the truth of these assertions, as we must do in the absence of proof to the contrary, even the pitifully meagre returns to this subpoena provide insufficient ground for a supplementary compliance order by the Administrative Law Judge. Nor would they ground sanctions under Rule §3.38,

which is concerned only with the wilful withholding of discovery. Respondent cannot be compelled to turn over what it does not have and accordingly Complaint Counsel's motion for a compliance order looking to application of sanctionsunder Rule 3.38 for wilful withholding of discovery in response to the June 1975 subpoena duces tecum is hereby DENIED.

November 1975 Subpoena Duces Tecum

The second subpoena duces tecum, however, is a horse of a different color. This one specified production of:

> "Such books, records and documents, or in lieu thereof, a computer tabulation that will disclose
>
> 1. the names, addresses and account numbers of all purchasers of land in AMREP Corporation's subdivisions (Rio Rancho Estates, Silver Spring's Shores, Oakmont Shores and El Dorado at Santa Fe) who sold or assigned their contracts to purchase land to a third party; and
>
> 2. the names, addresses and account numbers of the purchaser of each such contract;
>
> during the period January 1, 1969 to date."

Such evidence would obviously go to the extent to which any resale market exists for lots purchased in AMREP Corporation's subdivisions, an issue raised by paragraphs 13 and 14 of the Complaint which Complaint Counsel denominate "one of the central issues of this case."

Although Complaint Counsel's application for this subpoena made it clear that resales by AMREP customers who had already obtained title */ can be discovered via county land records and were not the chief concern of this subpoena, the only responsive document returned by Respondent was a computer printout of transfers by paid-in (deeded?) purchasers at Rio Rancho. Nothing was produced regarding transfers by

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*/ Apparently the evidence will show that AMREP policy was to retain title until installment payments were completed.

Rio Rancho purchasers still paying on their contracts and nothing at all was produced for purchasers at Silver Springs Shores, Oakmont or El Dorado at Santa Fe. This is obviously a very serious deficiency.

Respondent's excuse for non-production is merely that no computer printouts of the missing information exist. However, Respondent's answer dated April 12, 1975 (p. 2) concedes that "such information might be ascertainable by a manual inspection of all of respondent's customer files consisting of in excess of 50,000 files." Those files are thus responsive to the specification of the November subpoena duces tecum and Respondent is clearly in default for failure to produce either the files or the documents in each or a verified summary thereof which would yield the necessary information. The absence of any summary records, if such be the case, is no excuse for this default. Although the files may be voluminous, Respondent has had nearly a half-year to make its file search but it has apparently done nothing.

Accordingly, the Administrative Law Judge will now proceed to findings of fact and a preclusionary order under Rule §3.38. The findings will be to the effect that (1) the withheld evidence, if produced, would have been adverse to the relevant contentions of Respondent; and (2) there is no satisfactory resale market for the lots of land sold by Respondent at any of the four projects which are the subject of this Complaint. (3) Respondent will further be precluded from using or introducing in evidence for any purpose any document which would have been responsive to the specification of the November 1975 subpoena. Complaint Counsel will submit detailed drafts of both findings and the preliminary order within 10 days and Respondent may comment and/or object within 10 days thereafter before final adoption of such findings and order by the Administrative Law Judge.

Paul R. Teetor
Administrative Law Judge

April 21, 1976