PUBLIC DOCUMENT

UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

ORIGINAL

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

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR *IN CAMERA* TREATMENT OF PROPOSED TRIAL EXHIBITS

Respondent ECM Biofilms, Inc.'s ("Respondent's") Motion for *in camera* treatment is both substantively and procedurally defective. The motion fails procedurally—and should be denied outright—because Respondent failed to meet and confer with respect to any of the thirty-seven exhibits it seeks to hide from public view. The meet and confer process is critical with respect to a motion like this one, where the parties likely could have compromised rather than litigated,[1] and where the failure to attempt compromise unnecessarily burdens the Court.[2]

The motion fails substantively for three reasons. First, Respondent improperly attempts to assert the alleged confidentiality interests of third parties that have not sought relief. Second, with the exception of one document for which Respondent's supporting declaration provides some analysis, *see* Ex. A ¶ 8, Respondent's claims that public disclosure will cause "serious injury" are conclusory and insufficient to satisfy Respondent's substantial burden. Third, even if a document contains information requiring *in camera* treatment, the proper relief is to redact the confidential portions so the public will have access to all non-confidential information.

[1] Among other things, Complaint Counsel would have followed the guidance the Court already provided the parties regarding confidentiality in its January 14, 2014 order, and the Court's April 24, 2014 Order. Complaint Counsel does not object to any information that falls within the ambit of these orders receiving *in camera* treatment.

[2] Complaint Counsel expects that, collectively, both parties will seek to offer over 1,500 exhibits. If ECM will not meet and confer with us, the pretrial process is likely to be extremely difficult.

BACKGROUND

On July 8, Respondent filed a motion seeking *in camera* treatment for thirty-seven documents. The motion does not contain the required meet and confer certification. *See* Scheduling Order ¶ 4. Respondent did not attempt to meet and confer with Complaint Counsel. Respondent's motion attaches a declaration from its CEO alleging serious injury, *see* Motion, Ex. A, but the declaration includes analysis with respect to only one document, *see* Motion, Ex. B. Significantly, as discussed below, the declaration does not explain why allegedly confidential documents cannot be redacted, *see* Motion, Ex. A, and the declaration often appears to assert the alleged interests of third parties, *see id.* at 5 ("CCX-568. This potential exhibit contains information from **FP International** discussing **FP International**'s customers and their orders of products manufactured with ECM additive. ECM requests that this exhibit remain confidential until 8/1/2017.") (emphasis added).[3]

LEGAL STANDARD

It is Respondent's "heavy" burden to prove that the information is a trade secret or otherwise confidential—the public interest in open proceedings is presumed. *Miller v. Indiana Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994) (characterizing the burden as "heavy" and emphasizing that the "strong presumption of openness does not permit the routine closing of judicial records to the public"); *see also United States v. Pickard*, 733 F.3d 1297, 1302 (10th Cir. 2013) (assigning the burden to "[t]he party seeking to overcome the presumption of public access"). Respondent must "make a clear showing that the information concerned is sufficiently secret and sufficiently material to their business that disclosure would result in serious completive injury." *In re General Foods Corp.*, 95 F.T.C. 352, 1980 FTC LEXIS 99, at *10 (Mar. 10, 1980).

[3] Notably, this document (CCX-568) is an email exchange between FP International ("FP") and ECM. The document was used at FP's deposition. Upon receiving notice from Complaint Counsel that we intended to use materials designated confidential, FP contacted us through counsel. Following discussion, FP indicated that it would not seek *in camera* treatment of its deposition and the exhibits thereto.

ARGUMENT

I. RESPONDENT FAILED TO MEET AND CONFER WITH COMPLAINT COUNSEL.

The Court's Scheduling Order applies the meet and confer requirement to all motions (other than motions to dismiss or motions for summary decision). *See* Order ¶ 4 (Nov. 21, 2013). Respondent's motion does not include a meet and confer statement because Respondent did not meet and confer, and the Scheduling Order makes plain that motions that "fail to include such a separate [meet and confer] statement may be denied on that ground." *Id.* Significantly, in the context of a motion seeking *in camera* relief for thirty-seven documents, the meet and confer requirement is especially important. Many documents raise unique issues that are not always readily apparent,[4] and the most efficient approach to address pretrial issues like this one is for the parties to sit down (perhaps telephonically) and proceed document-by-document. Instead, Respondent asks the Court to do the parties' job. Because this is inefficient and unnecessary, Respondent's motion should be denied.

II. RESPONDENT HAS NOT MET ITS SUBTANTIAL BURDEN.

A. Respondent Cannot Assert Third Parties' Alleged Confidentiality Interests.

"A party must show that it has standing to assert a claim of confidentiality or privilege belonging to a third party," *Krumwiede v. Brighton Assocs., L.L.C.*, No. 05-C-3003, 2006 WL 2644952, *3 (N.D. Ill. Sept. 12, 2006). Respondent, however, neither made nor attempted to make such a showing. As discussed above, Respondent frequently attempts to assert third parties' alleged confidentiality interests. *See* Motion, Ex. A. To provide an additional example, Respondent seeks *in camera* treatment for RX-84, *see id.* at ¶ 9(a), which is a single email from another company (3M) to ECM. The email contains 3M's response to Respondent's position **regarding** trade secrets (as opposed to trade secrets themselves). Indeed, 3M does not even explain what Respondent's position is. The entire email is inappropriate for *in camera* treatment—but if anyone has a confidentiality interest in this correspondence, it is 3M, not

[4] For instance, some documents appear in more than one place on the various exhibit lists. Others contain information that has been disclosed elsewhere. Respondent should have at least attempted to narrow the issues before seeking relief.

Respondent. In short, Respondent has not established any basis to assert third parties' alleged confidentiality interests. *See, e.g.*, *Burton Mech. Contractors v. Foreman*, 148 F.R.D. 230, 234 (N.D.Ind.1992) ("[T]here is no indication that [the challenging party] has standing in this action to assert the rights of [the discovery-producing third parties] with respect to the protection of their proprietary or confidential business information.").

B. Respondent's Conclusory Declaration Fails To Satisfy Its Burden.

"[I]t is axiomatic that nebulous and conclusory allegations of confidentiality and business harm are insufficient to carry the movant's burden." *Wall Indus., Inc. v. United States*, 5 Cl. Ct. 485, 487 (1984) (citations omitted); *see also Beastie Boys v. Monster Energy Co.*, 983 F.Supp.2d 354, 368 (S.D.N.Y. 2014) ("The Court will not accept conclusory claims of the need for confidentiality[.]"). Respondent's declaration simply reasons that the biodegradable polymers industry is highly competitive, and therefore disclosure of the thirty-seven identified documents allegedly would cause competitive injury. *See* Motion, Ex. A ¶¶ 7-9. With the exception of one document that Respondent places in context, *see id.* ¶ 8, the declaration then merely provides one conclusory sentence regarding each document, *see id.* ¶ 9. This comes nowhere close to satisfying the "heavy burden" Respondent must satisfy to keep trial exhibits from public view. Accordingly, Respondent's motion should be denied.

C. Any Documents That Contain Confidential Information Should Be Redacted Where Possible.

Finally, Respondent has not established that documents containing alleged trade secrets could not be redacted, thereby enabling the maximum public disclosure. Indeed, it is sometimes the case that a document contains both an alleged trade secret (for instance, a customer name, or pricing information) that has nothing to do with this case, along with other communications relevant to the issues the Court will decide. In such instances, it would best serve the public interest to redact only the irrelevant and genuinely confidential information, rather than making the entire document subject to *in camera* treatment. Because Respondent's motion does not

distinguish between the confidential and non-confidential portions of the documents at issue,[5] it should be denied for this reason as well.

CONCLUSION

For the foregoing reasons, the Court should deny Respondent's motion.

Dated: July 15, 2014

Respectfully submitted,

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[5] This is something the parties could have accomplished had Respondent sought a meet and confer.

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 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 (although Complaint Counsel received an error message when attempting to file):

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**:

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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: July 15, 2014

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