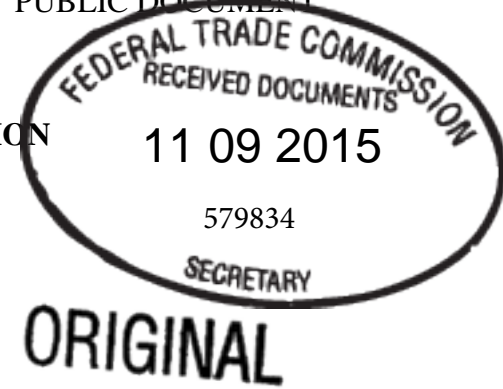


UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION



COMMISSIONERS: Edith Ramirez, Chairwoman  
Julie Brill  
Maureen K. Ohlhausen  
Terrell McSweeney

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

**RESPONDENT ECM BIOFILMS' MOTION FOR *IN CAMERA* TREATMENT OF  
INFORMATION IN ECM'S APPLICATION FOR STAY**

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*Counsel for Respondent ECM BioFilms, Inc.*

**RESPONDENT’S MOTION FOR *IN CAMERA* TREATMENT OF INFORMATION IN  
ECM’S APPLICATION FOR STAY**

Respondent ECM BioFilms, Inc. (ECM), under Rules 3.45(b) and 4.2(c)(2) of the Commission’s Rules of Practice, hereby requests *in camera* treatment of information contained within its Application for Stay of the Commission’s Order.<sup>1</sup>

**INTRODUCTION**

On December 18, 2015, the Commission issued a Final Order limiting ECM’s ability to market its only commercial product. Contemporaneous with this Motion, ECM has filed its Application for Stay Pending Judicial Review (the “Application”). *See* Application. To fully and fairly apprise this Commission of all relevant bases for relief, ECM provided the Commission with confidential information concerning the {

} Public disclosure of that

competitively sensitive information would cause ECM serious and actual injury, as discussed herein below. Therefore, ECM respectfully requests that the Commission grant *in camera* status to the information at issue.

**LEGAL STANDARD**

The Commission may order that material, or portions thereof, offered into evidence be subject to *in camera* treatment. 16 C.F.R. § 4.2(c)(ii)(2). “In Commission proceedings, requests

---

<sup>1</sup> In accordance with Rule 4.2(c)(2), ECM submits contemporaneously with this Motion a separate set of only those pages which contain confidential information. *See* Exhibit A. The information at issue is identified with bold font and brackets. ECM has also contemporaneously filed its full and complete Application for Stay, and it will file a redacted public version of same. This filing is designated “Confidential” because it discusses and features content that would otherwise be designated confidential if the Commission grants the requested relief.

for *in camera* treatment must show that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved.” *In the Matter of Evanston Nwern. Healthcare Corp.*, 2005 WL 593177, at \*1 (F.T.C. Feb. 9 2005) (citations omitted). “That showing can be made by establishing that the documentary evidence is sufficiently secret and sufficiently material to the applicant's business that disclosure would result in serious competitive injury, and then balancing that factor against the importance of the information in explaining the rationale of Commission decisions.” *Id.* (quotations and citations omitted).

In determining whether to grant *in camera* treatment of certain material that will cause competitive injury, the Commission weighs five of the six factors first articulated in *Bristol-Myers*:

- (1) the extent to which the information is known outside of his business;
- (2) the extent to which it is known by employees and others involved in his business; [...]
- (4) the value of the information to him and to his competitors;
- (5) the amount of effort or money expended by him in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

*Matter of Bristol-Myers Co.*, 90 F.T.C. 455 (1977); modified by *Matter of Gen. Foods Corp.*, 95 F.T.C. 352, at \*3–4 (1980) (removing the third factor). “A party must make a clear showing that the information concerned is sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury.” *In the Matter of Polypore Int'l, Inc.*, 2011 WL 668505 (Feb. 11, 2011) (citation omitted). “The showing may consist of extrinsic evidence or, in certain instances, may be inferred from the nature of the documents themselves.” *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184 (1961).

Documents that have met that standard and been granted *in camera* status by the FTC include “a recent financial audit; business strategy documents; [and] financial and cost data”

where that data “has been maintained as confidential and disclosure of the information would result in a clearly defined, serious injury to respondents.” *Evanston*, 2005 WL 593177 at \*3; *see also Matter of E.I. DuPont de Nemours & Co.*, 97 F.T.C. 116 (1981) (granting *in camera* status to documents containing “earnings, profit, operative return and cost information about respondent’s ... business”). ECM seeks confidential status for similar information, which was similarly granted protection from public disclosure during discovery before the ALJ. *See Protective Order Governing Discovery Material* (Oct. 2, 2013).

### **ARGUMENT**

ECM is a small company with six employees that competes in a competitive plastics market. *See* Declaration of Robert Sinclair, attached as Exhibit B, at ¶ 3. It sells additives that render plastic materials biodegradable. *See* Application at 13–26. ECM faces substantial competition from other additive manufacturers selling competing technologies, each vying for a limited consumer market of plastics manufacturers. *See* Exhibit B at ¶ 4. The market for plastic additive technologies is particularly competitive because the clients (plastics manufacturers) open long-term accounts and infrequently change business partnerships once established. *See* Exhibit B at ¶ 5. For that reason, ECM has maintained strict confidentiality of its sensitive financial information, which could provide two critical issues for ECM if disclosed publicly. First, ECM’s competition would use that information to ECM’s detriment. ECM’s financial data contains valuable information on market demand and pricing. When combined with public information concerning ECM pricing, competitors could determine the specifics of ECM’s holdings and account structures. Second, ECM’s competitors can provide ECM’s information to customers, using that information to negotiate against ECM in the open market.

Since FTC's proceedings began, ECM has been {  
  
} See Exhibit B at ¶ 5. That { is due in part to the fact that  
it is not difficult for companies that use products like the ECM additive to switch to a  
competitor's product. See *id.* Competitors have seized on ECM's troubles with the FTC, and  
used information apparent from the investigation against ECM's interests. For example, largely  
because of ECM's entanglement with the FTC, {  
  
} e-mail correspondence, attached as Exhibit  
C.<sup>2</sup>

The content ECM would designate *in camera* is information only available to ECM's  
Officers and Directors. That information includes specific facts on ECM's financial condition,  
such as incomes, losses, and number of customers. See Exh. A. ECM requests that its Profit and  
Loss projections, historical revenues, loan amounts, loan payments, and litigation costs remain  
confidential. See Exh. A (detailing ECM's revenues, yearly Ordinary Net Incomes, Professional  
Expenses, etc.). That sensitive financial information is of the type normally kept confidential by  
private, closely held corporations. ECM requests that statements concerning ECM's prospective  
marketing strategies remain confidential. See Exh. A (stating what claims ECM intends to make  
and not to make in the future and stating that ECM {  
  
} Those marketing strategies have not yet been discussed

---

<sup>2</sup> The ALJ previously designated this document for *in camera* status. See Protective Order Governing Discovery Material (Oct. 2, 2013), attached as Exhibit D; see also Respondent's Renewed Motion for *In Camera* Treatment of Certain Proposed Trial Exhibits (Aug. 1 2014) (published on [ftc.gov](https://www.ftc.gov) with this document redacted in its entirety), available at <https://www.ftc.gov/system/files/documents/cases/140801ecmmtn.pdf> (last visited Nov. 6, 2015). ECM requests that the Commission likewise designate this document for *in camera* status.

with customers or disclosed publicly. Revelation of that information to competitors would encourage negative marketing strategies designed to lure ECM's remaining businesses.

Prosecution by the Commission for consumer deception issues should not mandate disclosure of a respondent's sensitive commercial and financial information.

Four of the five *Bristol-Myers* factors weigh heavily against public disclosure of ECM's designated content. The facts at issue are entirely unknown outside of ECM's officers and directors, as not even ECM's employees are privy to that information. *See* Exhibit B at ¶ 6; *see General Foods*, 95 F.T.C. 352 at \*2 (holding that where a respondent can show that the information at issue is unknown to general employees the Commission should grant *in camera* status to that information). Further, the information at issue is valuable to ECM's competitors. *See* Exhibit B at ¶ 6. ECM competitors can use the information at issue to influence ECM's customers, the names of which are now publicized.<sup>3</sup> Evidence of {

} Lastly, the information ECM designates confidential cannot be acquired or developed by anyone other than ECM. *See General Foods*, 95 F.T.C. 352 at \*2 (holding that where a respondent can show that the information at issue is unavailable from other source the Commission should grant *in camera* status to that information); *Evanston*, 2005 WL 593177 at \*2 ("The declarations demonstrate that the information for which in camera treatment is sought has been maintained as confidential and disclosure of the information would result in a clearly defined, serious injury to respondents.").

Finally, public disclosure of ECM's information is not necessary for the Commission to explain or clarify its rationale in ruling on ECM's request for a stay. *Id.* at \*3 (explaining that

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<sup>3</sup> The identities of ECM's customers are now public because of this proceeding, despite ECM's efforts to keep that information confidential. *See* Order Denying Respondent's Motion for Protective Order and Granting Complaint Counsel's Cross-Motion to Compel (Jan. 10 2014).


“the principal countervailing considering weighting in favor of disclosure should be the importance of the information in explaining the rationale of [the Commission’s] decision”). The information is only relevant insofar as it concerns ECM’s Application for a Stay. The Commission has already provided its rationale on the merits of this proceeding in a lengthy opinion. The issues presented in ECM’s Application do not rest solely on ECM’s financial prejudice. ECM’s Application presents evidence on seven other factors to be assessed when determining whether the Commission should grant a stay. ECM’s irreparable financial harm is one factor in the decision, which can be assessed and explained by the Commission without disclosing the details featured in ECM’s Application.

ECM requests that the information at issue be granted *in camera* treatment for three years. *See Order, supra* n. 3 (stating that “[w]here in camera treatment is granted for business records ... it is typically provided for two to five years”). ECM anticipates that three years is sufficient time for this case to be resolved in its entirety, rendering the status of the information at issue moot.

### **RELIEF**

For the foregoing reasons ECM respectfully requests this Court grant in Camera treatment to that information attached within Exhibit A for a period of three years.

Respectfully submitted,



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Jonathan W. Emord (jemord@emord.com)  
EMORD & ASSOCIATES, P.C.  
11808 Wolf Run Lane  
Clifton, VA 20124  
Telephone: 202-466-6937  
Facsimile: 202-466-6938

DATED: November 9, 2015

**CERTIFICATE OF SERVICE**

I hereby certify that this is a true and correct copy of Respondent ECM BioFilms' Motion for *In Camera* Treatment of Certain Information in Application for Stay, and that on this November 9, 2015, I caused the foregoing to be served **electronically** to the following:

Donald Clark  
600 Pennsylvania Ave., NW  
Suite 172  
Washington, DC 20580

I hereby certify that this is a true and correct copy of Respondent ECM BioFilms' Application to Stay the Final Order Pending Judicial Review, and that on this November 9, 2015, I caused the foregoing to be served electronically to the following:

Jonathan Emord  
Emord & Associates, P.C.  
jemord@emord.com  
Respondent

Peter Arhangelsky  
Emord & Associates, P.C.  
parhangelsky@emord.com  
Respondent

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Complaint

Eric Awerbuch

Attorney

# **EXHIBIT A**

**PAGES FROM RESPONDENT'S  
MOTION FOR IN CAMERA  
TREATMENT**

**RESPONDENT’S MOTION FOR *IN CAMERA* TREATMENT OF INFORMATION IN  
ECM’s APPLICATION FOR STAY**

Respondent ECM BioFilms, Inc. (ECM), under Rules 3.45(b) and 4.2(c)(2) of the Commission’s Rules of Practice, hereby requests *in camera* treatment of information contained within its Application for Stay of the Commission’s Order.<sup>1</sup>

**INTRODUCTION**

On December 18, 2015, the Commission issued a Final Order limiting ECM’s ability to market its only commercial product. Contemporaneous with this Motion, ECM has filed its Application for Stay Pending Judicial Review (the “Application”). *See* Application. To fully and fairly apprise this Commission of all relevant bases for relief, ECM provided the Commission with confidential information concerning the {

} Public disclosure of that

competitively sensitive information would cause ECM serious and actual injury, as discussed herein below. Therefore, ECM respectfully requests that the Commission grant *in camera* status to the information at issue.

**LEGAL STANDARD**

The Commission may order that material, or portions thereof, offered into evidence be subject to *in camera* treatment. 16 C.F.R. § 4.2(c)(ii)(2). “In Commission proceedings, requests

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<sup>1</sup> In accordance with Rule 4.2(c)(2), ECM submits contemporaneously with this Motion a separate set of only those pages which contain confidential information. *See* Exhibit A. The information at issue is identified with bold font and brackets. ECM has also contemporaneously filed its full and complete Application for Stay, and it will file a redacted public version of same. This filing is designated “Confidential” because it discusses and features content that would otherwise be designated confidential if the Commission grants the requested relief.

Since FTC's proceedings began, ECM has been

} See Exhibit B at ¶ 5. That { } is due in part to the fact that it is not difficult for companies that use products like the ECM additive to switch to a competitor's product. See *id.* Competitors have seized on ECM's troubles with the FTC, and used information apparent from the investigation against ECM's interests. For example, largely because of ECM's entanglement with the FTC, one of its larger customers sought to switch from ECM to a competitor in 2013. See PPC e-mail correspondence, attached as Exhibit C.

The content ECM would designate *in camera* is information only available to ECM's Officers and Directors. That information includes specific facts on ECM's financial condition, such as incomes, losses, and number of customers. See Exh. A. ECM requests that its Profit and Loss projections, historical revenues, loan amounts, loan payments, and litigation costs remain confidential. See Exh. A (detailing ECM's revenues, yearly Ordinary Net Incomes, Professional Expenses, etc.). That sensitive financial information is of the type normally kept confidential by private, closely held corporations. ECM requests that statements concerning ECM's prospective marketing strategies remain confidential. See Exh. A (stating what claims ECM intends to make and not to make in the future and stating that ECM {

} Those marketing strategies have not yet been discussed with customers or disclosed publicly. Revelation of that information to competitors would encourage negative marketing strategies designed to lure ECM's remaining businesses.

Prosecution by the Commission for consumer deception issues should not mandate disclosure of a respondent's sensitive commercial and financial information.

Four of the five *Bristol-Myers* factors weigh heavily against public disclosure of ECM's designated content. The facts at issue are entirely unknown outside of ECM's officers and directors, as not even ECM's employees are privy to that information. *See* Exhibit B at ¶ 6; *see General Foods*, 95 F.T.C. 352 at \*2 (holding that where a respondent can show that the information at issue is unknown to general employees the Commission should grant *in camera* status to that information). Further, the information at issue is valuable to ECM's competitors. *See* Exhibit B at ¶ 6. ECM competitors can use the information at issue to influence ECM's customers, the names of which are now publicized.<sup>2</sup> Evidence of {

} Lastly, the information ECM designates confidential cannot be acquired or developed by anyone other than ECM. *See General Foods*, 95 F.T.C. 352 at \*2 (holding that where a respondent can show that the information at issue is unavailable from other source the Commission should grant *in camera* status to that information); *Evanston*, 2005 WL 593177 at \*2 ("The declarations demonstrate that the information for which in camera treatment is sought has been maintained as confidential and disclosure of the information would result in a clearly defined, serious injury to respondents."). Finally, public disclosure of ECM's information is not necessary for the Commission to explain or clarify its rationale in ruling on ECM's request for a stay. *Id.* at \*3 (explaining that "the principal countervailing considering weighting in favor of disclosure should be the importance of the information in explaining the rationale of [the Commission's] decision"). The information is only relevant insofar as it concerns ECM's Application for a Stay. The Commission has already provided its rationale on the merits of this proceeding in a lengthy

---

<sup>2</sup> The identities of ECM's customers are now public because of this proceeding, despite ECM's efforts to keep that information confidential. *See* Order Denying Respondent's Motion for Protective Order and Granting Complaint Counsel's Cross-Motion to Compel (Jan. 10 2014).

**PAGES FROM SINCLAIR  
DECLARATION IN SUPPORT OF  
MOTION FOR IN CAMERA  
TREATMENT**

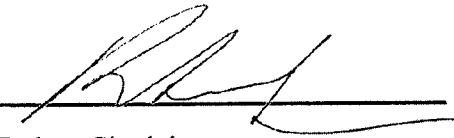
competitive because the clients, who are all plastics manufacturers, generally open long-term accounts and infrequently change business partnerships once established.

5. The FTC proceedings {

}

6. The facts for which ECM requests *in camera* status, contained within Exhibit A to the Motion, are known only to ECM's officers and directors and not to other employees of ECM. Public disclosure of that information would be valuable to ECM's competitors because ECM's competitors could use that information to dissuade ECM customers from continuing to do business with ECM in favor of ECM's competitors.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 6<sup>th</sup> day of October, 2015.



Robert Sinclair



**PAGES FROM EXHIBIT C TO  
RESPONDENT'S MOTION FOR IN  
CAMERA TREATMENT**

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**PAGES FROM RESPONDENT'S  
APPLICATION FOR STAY**

1. For the first time in FTC history, the “fencing-in” relief ordered restrained scientifically supported and truthful speech concerning biodegradability without reasoned explanation.

2. For the first time in FTC history, FTC effectively amended an industry guidance through adjudication without notice to, or comment from, the affected industry and has through this decision imposed on all industry regulatees an impracticable and scientifically invalid standard as a condition precedent for use of the unqualified term “biodegradable” in advertising.

The complexity of this case and difficult legal questions, as evidenced by the differing opinions of the ALJ, the majority of the Commission, and Commissioner Ohlhausen make a stay appropriate. *See N. Tex. Specialty Physicians*, 141 F.T.C. 10, at \*2 (2006) The numerous unprecedented actions will be evaluated by the United States Court of Appeals as this matter proceeds to judicial review. Because so many material aspects of the Decision are unprecedented, it behooves the Commission to impose a stay to preserve the status quo ante while the United States Court of Appeals determines whether the novel actions comply with the First Amendment, the Federal Trade Commission Act, and the Administrative Procedure Act. As explained below, the Decision imposes a prior restraint on truthful speech in violation of constitutional limits on agency power, and it exceeds FTC statutory and procedural limits. The unprecedented aspects of the Decision not only raise substantial constitutional, statutory, and administrative law issues, they also {

} The Final Order imposes limits on

truthful scientific speech concerning ECM's product in a manner that renders ECM incapable of representing to the public the accurate scientific record. On that same scientific record, the ALJ held that ECM's product efficacious, substantiated by "competent and reliable scientific evidence." ALJID at 284.

Nowhere in the record is there proof of a palpable risk of harm to consumer health or safety created or caused by the advertising at issue in this matter. Indeed, the ALJ found that there was no evidence of injury or harm to end-consumers, which factual finding is uncontroverted. *See* ALJID at 300–01 nn. 58–59, attached as Exh. A. The { } to ECM caused by the Decision, when balanced against the absence of provable risk to consumer health or safety, and the public's interest in judicial finality at the Circuit level, tilt the equitable balance strongly in favor of imposition of a stay of the Decision pending appeal.

#### **STANDARD FOR GRANTING A STAY**

"Pursuant to Rule 3.56(c) of the Commission's Rules of Practice, an application for a stay is evaluated on four factors: (1) the likelihood of the applicant's success on appeal; (2) whether the applicant will suffer irreparable harm if a stay is not granted; (3) the degree of injury to other parties if a stay is granted; and (4) whether the stay is in the public interest." *In the Matter of N.C. Bd. of Dental Exam'rs*, 2012 WL 588756, at \*1 (F.T.C. Feb. 10, 2012) (citing 16 C.F.R. § 3.56(c)).

#### **THE STAY STANDARD IS SATISFIED ON THIS RECORD**

Under agency law, a stay is appropriately granted when the law has been applied to a complex factual record (here involving several novel elements, not least of which is a previously untested and untried Google consumer survey), which complexity and novelty could have resulted in an alternative outcome. *In the Matter of Novartis Corp.*, 128 F.T.C. 233, 235 (1999)

*North Texas*, 141 F.T.C. 10 at \*2. Under this method of evaluating the likelihood of success on the merits, a stay is appropriate in this case.

There is an inherent conflict of interest present when the very same decision makers who have ruled against a party on the merits are asked to determine whether there is a likelihood of that party's success on appeal. Whether a just, independent assessment is ever possible in such a circumstance is open to question. Nevertheless, based solely on the law, ECM is likely to succeed on appeal based on the controlling constitutional, statutory, and administrative law here in issue because, *inter alia*, the Final Order violates ECM's First Amendment right to claim a verified fact, that its additive accelerates biodegradation of plastic products (when in fact the scientific record in this case proves that very point), and because the Commission's Five Year Rule is arbitrary, capricious, and contrary to the generally accepted scientific definition of the term "biodegradability." The Commission's position concerning the science of biodegradation and biodegradation testing is inconsistent with Complaint Counsel's own expert testimony, including an expert from the EPA who embraced the very "accelerated" gas evolution testing that so amply supported the ALJ's finding of ECM's product efficacy.

ECM will suffer irreparable harm absent a stay. The Decision limits the constitutional freedom to communicate the essential functionality of ECM's product (its ability to accelerate biodegradation of plastics), and also portends {

} A stay is therefore equitable and essential to maintain the status quo ante pending judicial review.

The public interest weighs in favor of a stay because the Decision violates ECM's rights under the Constitution, the FTC's enabling statute, and the Administrative Procedure Act, and because there is no evidence of record that anyone who was allegedly misled by ECM's unqualified biodegradable claim actually suffered any harm or injury. Moreover, by establishing the new Five Year Rule, the Decision has an *in terrorem* effect or chilling effect on the entire biodegradable plastics industry, inducing self-censorship and also eliminating the sale of products that are demonstrably beneficial to the environment.

#### **A. ECM is Likely to Succeed on Appeal**

“[A]rguable difficulties arising from the application of the law to a complex factual record can support a finding that a stay applicant has made a substantial showing on the merits.” *Novartis*, 128 F.T.C. at 235. A complex factual record exists where the Commission must “evaluate numerous scientific studies of consumer behavior...” *North Texas*, 141 F.T.C. 10 at \*2. A respondent sufficiently shows a likelihood of success on appeal where the Commission's application of a complex factual record to the law is vulnerable to alternative reasonable applications. *Id.*; *Novartis*, 128 F.T.C. at 235. The ALJ's decision is in stark contrast to the Commission's Decision. In the realm of consumer deception adjudications, the Commission has never before so dramatically departed from an ALJ ruling on a core claim, particularly a decision as robust and well-developed with record support as the ALJ's Initial Decision in this case. The ALJ noted 1,539 findings of fact, many of which directly contradict substantial portions of the Decision, but were never addressed by the Commission (or even cited in the Decision).



divergent interpretations from different divisions within the EPA constituted evidence that the agency had not provided fair notice).

**Absent a Stay, ECM will Suffer Irreparable Financial and Constitutional Harm**

“A party seeking a stay must show, with particularity, that the alleged injury is substantial and likely to occur absent a stay.” *North Carolina Board*, 2012 WL 588756 at \*2.

**1. Absent a Stay, ECM Will Suffer Irreparable Financial Injury**

Irreparable injury exists where “economic harm[] threaten[s] the very existence of the movant’s business ...” *F.T.C. v. Church & Dwight Co., Inc.*, 75 F. Supp. 2d 81, 86 (D.D.C. 2010). ECM is a small company of six employees. ALJFF ¶ 154. {

} *See*

Decl. of Robert Sinclair, attached as Exh. H; Decl. of Kenneth Sullivan, attached as Exh. I. {

} Exh. H at

¶¶ 11, 13. The FTC’s Decision harms broadly the entire biodegradable plastics industry, but directly, substantially, and immediately ECM. Absent a stay of the Order pending judicial review, {

} Exh. H at ¶¶ 11–12, 15–17. Thus, denial of a stay could likely deny ECM meaningful judicial review of the agency decision—something to which all parties are, of right, entitled to receive.

Since the FTC initiated proceedings against ECM in this matter, {

} Exh. I at ¶¶ 4–5.

ECM {

} Exh. H at ¶ 13. ECM's {f

} Exhibit I at ¶ 5. It has 6 employees,

whereas before this matter ECM employed 7 individuals (local residents in or around the Painesville, Ohio community). *Id.* at ¶ 7. ECM operates in a highly competitive market. Exh. H at ¶ 12. One competitor's loss is another's gain. Moreover, ECM customers are manufacturing entities that {

}

ECM {

}

On that point, immediate implementation of the Commission Decision (without a stay) harms both ECM and the public interest. The record reflects no proof that actual consumers have ever been deceived by ECM's "biodegradable" claim and reflects substantial scientific evidence of ECM product efficacy. The relatively short period of time necessary to achieve closure following judicial review is thus insignificant compared {

} Moreover, given the multiplicity of entirely

unprecedented applications of law in the Decision that raise constitutional, statutory, and

Court has passed on the unprecedented actions of the Commission. Without a Stay, {  
} and immediate and irreparable harm in the  
form of deprivation of its First Amendment right to communicate truthful information. Finally,  
no evidence of record suggests that a Stay would result in consumer injury or harm.

Respectfully submitted,



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Jonathan W. Emord (jemord@emord.com)  
EMORD & ASSOCIATES, P.C.  
11808 Wolf Run Lane  
Clifton, VA 20124  
Telephone: 202-466-6937  
Facsimile: 202-466-6938

DATED: November 6, 2015

**PAGES FROM SINCLAIR  
DECLARATION IN SUPPORT OF  
APPLICATION FOR STAY**

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

**COMMISSIONERS:**      **Edith Ramirez, Chairwoman**  
                                 **Julie Brill**  
                                 **Maureen K. Ohlhausen**  
                                 **Terrell McSweeney**

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

**DECLARATION OF ROBERT SINCLAIR IN SUPPORT OF RESPONDENT’S  
MOTION FOR *IN CAMERA* TREATMENT OF INFORMATION IN ECM’S  
APPLICATION FOR STAY**

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

1. I am over the age of eighteen years and I make this declaration on personal knowledge of its contents and in further support of Respondent’s Motion for *In Camera* Treatment of Information in ECM’s Application for Stay (the “Motion”).

2. I am the President and CEO of ECM BioFilms, Inc. As a result of my job responsibilities, I have extensive experience with the operations of ECM BioFilms, Inc.

3. ECM currently has six employees.

4. ECM faces substantial competition from other additive manufacturers selling competing technologies, each competing for a limited consumer market of plastics manufacturers. The market for plastic additive technologies, such as ECM’s, is particularly

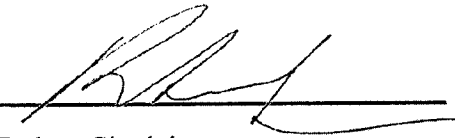
competitive because the clients, who are all plastics manufacturers, generally open long-term accounts and infrequently change business partnerships once established.

5. The FTC proceedings {

}

6. The facts for which ECM requests *in camera* status, contained within Exhibit A to the Motion, are known only to ECM's officers and directors and not to other employees of ECM. Public disclosure of that information would be valuable to ECM's competitors because ECM's competitors could use that information to dissuade ECM customers from continuing to do business with ECM in favor of ECM's competitors.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 6<sup>th</sup> day of October, 2015.



Robert Sinclair

**PAGES FROM SULLIVAN  
DECLARATION IN SUPPORT OF  
APPLICATION FOR STAY**

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

**COMMISSIONERS:**      **Edith Ramirez, Chairwoman**  
                                 **Julie Brill**  
                                 **Maureen K. Ohlhausen**  
                                 **Terrell McSweeney**

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

**DECLARATION OF KENNETH C. SULLIVAN IN SUPPORT OF RESPONDENT’S  
APPLICATION FOR STAY PENDING JUDICIAL REVIEW**

I, Kenneth C. Sullivan, declare under penalty of perjury that the following is true and correct to the best of my knowledge, information, and belief:

1. I am over the age of eighteen years and I make this declaration on personal knowledge of its contents and in further support of Respondent’s Application for Stay Pending Judicial Review.

2. I am the Vice President and Chief Financial Officer of ECM BioFilms, Inc. As a result of my job responsibilities, I have extensive knowledge of the finances of ECM BioFilms, Inc.

3. I have reviewed the Commission’s October 11, 2015 Order and Opinion. Based on my knowledge and position with ECM, I have determined that the Order will {

}



4. The FTC litigation against ECM has {

5. In 2011, ECM had {


6. To {

}

7. ECM is a small company that had 7 employees in 2011 and has since reduced staff to its current level of 6 employees. ECM {

}

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of October, 2015.



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Kenneth C. Sullivan





# **EXHIBIT B**

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

**COMMISSIONERS:**      **Edith Ramirez, Chairwoman**  
                                 **Julie Brill**  
                                 **Maureen K. Ohlhausen**  
                                 **Terrell McSweeney**

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

**DECLARATION OF ROBERT SINCLAIR IN SUPPORT OF RESPONDENT’S  
MOTION FOR *IN CAMERA* TREATMENT OF INFORMATION IN ECM’S  
APPLICATION FOR STAY**

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

1. I am over the age of eighteen years and I make this declaration on personal knowledge of its contents and in further support of Respondent’s Motion for *In Camera* Treatment of Information in ECM’s Application for Stay (the “Motion”).

2. I am the President and CEO of ECM BioFilms, Inc. As a result of my job responsibilities, I have extensive experience with the operations of ECM BioFilms, Inc.

3. ECM currently has six employees.

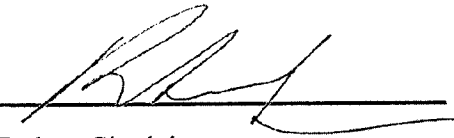
4. ECM faces substantial competition from other additive manufacturers selling competing technologies, each competing for a limited consumer market of plastics manufacturers. The market for plastic additive technologies, such as ECM’s, is particularly

competitive because the clients, who are all plastics manufacturers, generally open long-term accounts and infrequently change business partnerships once established.

5. The FTC proceedings {-----

6. The facts for which ECM requests *in camera* status, contained within Exhibit A to the Motion, are known only to ECM's officers and directors and not to other employees of ECM. Public disclosure of that information would be valuable to ECM's competitors because ECM's competitors could use that information to dissuade ECM customers from continuing to do business with ECM in favor of ECM's competitors.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 6<sup>th</sup> day of October, 2015.

  
Robert Sinclair

# **EXHIBIT C**



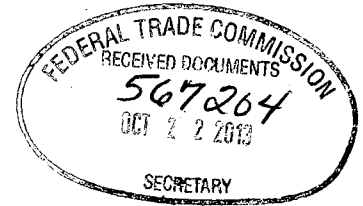
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# **EXHIBIT D**

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES

ORIGINAL



\_\_\_\_\_  
In the Matter of )  
)  
)


ECM BioFilms, Inc., )  
a corporation, also d/b/a )  
Envioplastics International, )  
Respondent. )  
\_\_\_\_\_ )

DOCKET NO. 9358

**PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL**

Commission Rule 3.31(d) states: "In order to protect the parties and third parties against improper use and disclosure of confidential information, the Administrative Law Judge shall issue a protective order as set forth in the appendix to this section." 16 C.F.R. § 3.31(d). Pursuant to Commission Rule 3.31(d), the protective order set forth in the appendix to that section is attached verbatim as Attachment A and is hereby issued.

ORDERED:

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

Date: October 22, 2013

## ATTACHMENT A

For the purpose of protecting the interests of the parties and third parties in the above-captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

**IT IS HEREBY ORDERED THAT** this Protective Order Governing Confidential Material ("Protective Order") shall govern the handling of all Discovery Material, as hereafter defined.

1. As used in this Order, "confidential material" shall refer to any document or portion thereof that contains privileged, competitively sensitive information, or sensitive personal information. "Sensitive personal information" shall refer to, but shall not be limited to, an individual's Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver's license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual's medical records. "Document" shall refer to any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the possession of a party or a third party. "Commission" shall refer to the Federal Trade Commission ("FTC"), or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding.
2. Any document or portion thereof submitted by a respondent or a third party during a Federal Trade Commission investigation or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as confidential material for purposes of this Order. The identity of a third party submitting such confidential material shall also be treated as confidential material for the purposes of this Order where the submitter has requested such confidential treatment.
3. The parties and any third parties, in complying with informal discovery requests, disclosure requirements, or discovery demands in this proceeding may designate any responsive document or portion thereof as confidential material, including documents obtained by them from third parties pursuant to discovery or as otherwise obtained.
4. The parties, in conducting discovery from third parties, shall provide to each third party a copy of this Order so as to inform each such third party of his, her, or its rights herein.
5. A designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph 1 of this Order.

6. Material may be designated as confidential by placing on or affixing to the document containing such material (in such manner as will not interfere with the legibility thereof), or if an entire folder or box of documents is confidential by placing or affixing to that folder or box, the designation "CONFIDENTIAL – FTC Docket No. 9358" or any other appropriate notice that identifies this proceeding, together with an indication of the portion or portions of the document considered to be confidential material. Confidential information contained in electronic documents may also be designated as confidential by placing the designation "CONFIDENTIAL – FTC Docket No. 9358" or any other appropriate notice that identifies this proceeding, on the face of the CD or DVD or other medium on which the document is produced. Masked or otherwise redacted copies of documents may be produced where the portions deleted contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been deleted and the reasons therefor.

7. Confidential material shall be disclosed only to: (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including consultants, provided they are not affiliated in any way with a respondent and have signed an agreement to abide by the terms of the protective order; and (e) any witness or deponent who may have authored or received the information in question.

8. Disclosure of confidential material to any person described in Paragraph 7 of this Order shall be only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever, provided, however, that the Commission may, subject to taking appropriate steps to preserve the confidentiality of such material, use or disclose confidential material as provided by its Rules of Practice; sections 6(f) and 21 of the Federal Trade Commission Act; or any other legal obligation imposed upon the Commission.

9. In the event that any confidential material is contained in any pleading, motion, exhibit or other paper filed or to be filed with the Secretary of the Commission, the Secretary shall be so informed by the Party filing such papers, and such papers shall be filed *in camera*. To the extent that such material was originally submitted by a third party, the party including the materials in its papers shall immediately notify the submitter of such inclusion. Confidential material contained in the papers shall continue to have *in camera* treatment until further order of the Administrative Law Judge, provided, however, that such papers may be furnished to persons or entities who may receive confidential material pursuant to Paragraphs 7 or 8. Upon or after filing any paper containing confidential material, the filing party shall file on the public record a duplicate copy of the paper that does not reveal confidential material. Further, if the protection for any such material expires, a party may file on the public record a duplicate copy which also contains the formerly protected material.

10. If counsel plans to introduce into evidence at the hearing any document or transcript containing confidential material produced by another party or by a third party, they shall provide advance notice to the other party or third party for purposes of allowing that party to seek an order that the document or transcript be granted *in camera* treatment. If that party wishes *in camera* treatment for the document or transcript, the party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives such notice. Except where such an order is granted, all documents and transcripts shall be part of the public record. Where *in camera* treatment is granted, a duplicate copy of such document or transcript with the confidential material deleted therefrom may be placed on the public record.

11. If any party receives a discovery request in any investigation or in any other proceeding or matter that may require the disclosure of confidential material submitted by another party or third party, the recipient of the discovery request shall promptly notify the submitter of receipt of such request. Unless a shorter time is mandated by an order of a court, such notification shall be in writing and be received by the submitter at least 10 business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the submitter of its rights hereunder. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Order to challenge or appeal any order requiring production of confidential material, to subject itself to any penalties for non-compliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission. The recipient shall not oppose the submitter's efforts to challenge the disclosure of confidential material. In addition, nothing herein shall limit the applicability of Rule 4.11(e) of the Commission's Rules of Practice, 16 CFR 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

12. At the time that any consultant or other person retained to assist counsel in the preparation of this action concludes participation in the action, such person shall return to counsel all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing confidential information. At the conclusion of this proceeding, including the exhaustion of judicial review, the parties shall return documents obtained in this action to their submitters, provided, however, that the Commission's obligation to return documents shall be governed by the provisions of Rule 4.12 of the Rules of Practice, 16 CFR 4.12.

13. The provisions of this Protective Order, insofar as they restrict the communication and use of confidential discovery material, shall, without written permission of the submitter or further order of the Commission, continue to be binding after the conclusion of this proceeding.