~~PUBLIC~~

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES
Washington, D.C.

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

RESPONDENT ECM BIOFILMS, INC.'S OPPOSITION TO COMPLAINT COUNSEL'S CROSS-MOTION TO COMPEL RESPONDENT TO DISCLOSE [redacted]

Pursuant to 16 C.F.R. § 3.22(d), Respondent ECM hereby opposes Complaint Counsel's Cross-Motion to Compel Respondent to Disclose [redacted]. Complaint Counsel has not established why the ECM proposed list [redacted] will not suffice to satisfy Complaint Counsel's discovery needs, particularly in light of the unrebutted declaration (corroborated by documentary proof already supplied to Complaint Counsel) that ECM advertising presentations on biodegradation of plastics do not vary in any material respect from one customer to another. Complaint counsel's insistence on taking discovery from [redacted] will yield redundant evidence on every material point and will very likely destroy ECM's business. As explained more fully in ECM's motion for a protective order, ECM's [redacted] (*see* also Exhibit C to ECM's Motion for Protective Order, non-disclosure agreement between ECM and its customers). Contrary to Complaint Counsel's speculative assertions, general knowledge of FTC

proceedings against ECM (an occurrence that followed in the first instance FTC's publication of its action against ECM) is a far cry from specific knowledge that Complaint Counsel [redacted]. The harms caused by the former have been incurred and pale by comparison with those to be caused by the latter. One would not logically assume that a case brought by FTC for alleged deceptive advertising would be used as a pretext for federal agents [redacted]. Finally, Complaint Counsel does not address essential points in ECM's objections to Complaint Counsel's overbroad, cumulative, duplicative, and burdensome discovery requests. As ECM stated in its motion for a protective order, the issue is not about whether [redacted] but the unreasonableness of Complaint Counsel's insistence that all [redacted] be provided. ECM has offered to [redacted] that will enable Complaint Counsel to test its case theory and discover indirectly what is discoverable from ECM directly: that ECM's advertising claims concerning the biodegradation of plastics do not vary materially from one customer to another.

BACKGROUND:

ECM does not materially alter its advertising claims concerning the biodegradation of plastics from one customer to another. *See* Decl. of R. Sinclair, ECM Mot. for Prot. Order (Exh. B), at ¶12. A sampling of discovery [redacted] presentations. *Id.*

ECM's [redacted] are among the most confidential information ECM possesses, a point appreciated by ECM and each of its customers; indeed, ECM enters into confidentiality

agreements with its customers [redacted]. *Id.* at ¶¶ 10, 14. If ECM provides [redacted]. [redacted].

Complaint Counsel originally demanded ECM's sensitive information through Rule 3.31(b)(1) disclosures. ECM then informed Complaint Counsel that the information was highly sensitive and that ECM intended to object. On November 26th and 27th respectfully, Complaint Counsel served interrogatories and document requests that targeted all [redacted]. *See* ECM Mot. for Prot. Order, Exh. A (filed Dec. 13, 2013). ECM sought a compromise that would provide Complaint Counsel responsive information from [redacted], while protecting ECM's remaining business from economic injury. Complaint Counsel rejected the compromise, insisting that [redacted]. *See* Compl. Counsel's Mot. to Compel, Exh. 3 at 4. Moreover, Complaint Counsel has refused to limit the scope of its discovery requests, literally seeking every document in ECM's computer database.

Because ECM is imperiled by compliance with Complaint Counsel's demands and because Complaint Counsel is unwilling to compromise, ECM sought a protective order from His Honor on December 13, 2013, nearly two weeks before its response to Complaint Counsel's

first set of interrogatories came due on December 26, 2013. ECM also requested that this dispute remain confidential.[1]

ARGUMENT

I. Complaint Counsel Has Not Shown that Requested Discovery Is Needed for its Case

Complaint Counsel misconstrues ECM's position. ECM maintains that Complaint Counsel's extant discovery is overbroad, cumulative, and would cause undue burden and, so, ECM is entitled to protection under Rule 3.31(c)(2) that reasonably reduces the scope of Complaint Counsel's discovery. All of the concerns stated by Complaint Counsel in its cross-motion can be satisfied with reasonable limitations on discovery that will not impose the enormous financial burdens that gave rise to ECM's motion for a protective order. Consequently, Complaint Counsel's cross-motion should be denied.

First, Complaint Counsel need not have access to [redacted] to test the content of ECM's advertising claims on biodegradation of plastics or to discern, more particularly, if ECM's logos and certificates appear at retail. There are obvious, less burdensome and efficient means to obtain that same information. Because ECM's advertising claims concerning biodegradation of plastics do not vary materially from one customer to another, [redacted] would suffice to permit a thorough exploration. ECM markets to trade customers; it does not market directly to end-consumers. If Complaint Counsel's theory is that ECM's logos and certificates migrate from its actual trade customers to the retail market, it has the present wherewithal to search publicly available advertising and labeling to see whether,

[1] In a companion motion, Complaint Counsel now seeks to remove confidential status and place ECM's sensitive information on the public docket. ECM responds to that motion separately, and requests that his Honor permit ECM to keep confidential the discovery motion content that reveals Complaint Counsel's intent to make all ECM customers discovery targets.

and where, ECM logos and certificates publicly appear. It may efficiently request from ECM itself whether [redacted] it provided the logos and certificates. Indeed, during the investigatory phase, Complaint Counsel already obtained from ECM its logos and certificates and correspondence related thereto.

Second, access [redacted] is unnecessary to evaluate whether ECM's verbal communications altered customers' net impression. Complaint Counsel will receive discovery from ECM directly. For instance, in response to Complaint Counsel's Document Production Requests, ECM has provided Complaint Counsel 1,200 pages of verbal and email correspondence [redacted] from 2006 through 2011.[2] Surely that enormous production provides Complaint Counsel ample grist for the mill. That correspondence identifies [redacted], who received ECM advertising and verbal claims. ECM has no objection to disclosure of that information, which does not implicate existing accounts or conflict with contractual terms. That sales correspondence provides considerable information concerning ECM's customer market, the type of customers ECM serves, and the claims made in commerce. That information reveals that claims and representations to trade customers do not differ materially from one to the next. It shows that ECM's customers are provided ECM's scientific testing in support of biodegradable claims. Combined with [redacted], Complaint Counsel can readily determine if ECM's business practices somehow diverge from those used [redacted]. Thus, most significantly, ECM's production reveals that Complaint Counsel's request for discovery [redacted] is so lacking in probative

[2] *See* ECM Resp. to Complaint Counsel's First Set of Document Production Requests (DATE), at ECM-FTC-000648-001859 (excerpted section included here as Exhibit A).

value and yet so enormously burdensome [redacted] that it is destined to produce cumulative and duplicative information yet [redacted]. ECM has no objection if Complaint Counsel contacts any of the [redacted], realizing that Complaint Counsel may need alternatives for accessing information that involve less immediate and profound harm to ECM.

ECM has also disclosed to Complaint Counsel the names of all current and former employees who spoke to customers. Complaint Counsel can therefore explore correspondence through ECM's own documents and employee testimony, and assess that information [redacted].

The information sought from [redacted] is available from a more convenient and direct source under Rule 3.31(c)(2)(i), to wit, ECM itself. Seeking confirmatory information from [redacted] is also sure to result in cumulative and duplicative responses. *See* 16 C.F.R. § 3.31(c)(2)(i). ECM's President stated that he uses the same claims and discussions with all of his customers, and ECM's substantial document production (including FTC's own non-public investigation document retrieval from ECM) confirms that point. *See* Sinclair Decl. at ¶ 12.

Third, Complaint Counsel does not need access to [redacted] The scientific evidence adduced from ECM directly, [redacted] will plainly show that ECM's customers (which include no end-use consumer) are in the technical business of plastics manufacture and, thus, have a sophisticated knowledge of plastics, plastic uses and plastics disposal. ECM's additive is unusable by end-use consumers because it is usable only when combined with plastic polymer

during the manufacturing of plastic. *See id.* at ¶ 16. Accordingly, no company that manufactures plastics with ECM's additive may be said to be unsophisticated or possessed of a lay understanding of the characteristics of plastics. *Id.* Complaint Counsel has not explained why it must [redacted] would not suffice to yield all answers anyone could reasonably expect from this group

II. Disclosing [redacted] Will Cause Irreparable Harm

Complaint Counsel either misunderstands or chooses to misrepresent the injury ECM suffers from giving Complaint Counsel [redacted]. ECM's burden is not based on the notion that Complaint Counsel's receipt of that information, if kept non-public, would in and of itself result in competitive injury. Rather, ECM's burden arises from the discovery Complaint Counsel says it will pursue from [redacted]. *See* ECM Mot. for Prot. Order, at Exhibit C (Conf. Agmt), Exhibit B, at ¶¶ 11-18 (Sinclair Decl.).

Moreover, although Mr. Sinclair has admitted the existence of FTC's suit against the company (a fact known well to the industry because of FTC's own press releases to that effect, *see, e.g.*, ECM Mot. for Prot. Order, at 3 n.1), neither Mr. Sinclair nor anyone else outside of this case has been informed of Complaint Counsel's effort to [redacted] In addition, the Protective Order cannot protect ECM from injury when Complaint Counsel expressly intends to use discovery in this case as a pretext to [redacted]. As ECM more fully explains in its motion for a protective order, Complaint Counsel's discovery requests are in no way reasonably tailored to lead to the adduction of

relevant evidence; they are overbroad, imposing a tremendous burden on ECM without any responsible effort by Complaint Counsel to limit the burden. Indeed, ECM counsel has explained in detail the economic injuries that will flow from the unrestricted requests and Complaint Counsel has rejected every effort at reasonable compromise to permit adduction of relevant evidence but avoid undue burden and redundancy in production.

A. ECM Will Suffer Economic Harm:

Complaint Counsel leaves entirely unrebutted each of ECM's substantive claims of economic injury stemming from its proposed discovery. Complaint Counsel does not rebut the fact that [redacted]

Indeed, Complaint Counsel leaves substantively unrebutted the sworn testimony of ECM's President Robert Sinclair that [redacted]

The fear of government entanglement [redacted]. *Id.* at ¶ 18. In fact, Complaint Counsel concedes that they [redacted] *See* Compl. Counsel's Mot. to Compel, at 6. [redacted]

[redacted].[3] [redacted], but a fact of history likely to repeat itself.

Contrary to Complaint Counsel's argument, ECM's instant concerns are unlike those considered by the Court in *Tiffany & Co. v. Costco Wholesale Corp.*, Slip Copy, No. 13 Civ. 1041, 2013 WL 5677020 (S.D.N.Y. Oct. 18, 2013). *See id.* at *2. Here, ECM claims different business injuries, including a loss of the [redacted]. In *Tiffany*, Costco's members had no reason to fear liability for unfair competition or trademark infringement, etc. *Id.* at *1-2. Costco's claim of injury was entirely speculative; there was no proof or record showing the harm. By contrast, undeniably [redacted]. .For instance, other courts have held that the [redacted] is indeed competitively sensitive. *See Wagner v. Mastiffs*, No. 2:08-cv-431, 2012 WL 5948325, *4 (S.D. Ohio 2012). In *Wagner*, the Court rejected the plaintiff's motion request for confidential treatment, but did so because, *inter alia*, the plaintiffs did "not produce any evidence that they have a contractual obligation to keep

[3] *See* Sinclair Decl. at ¶ 15 ([redacted]; *compare Proposed Consent Agreement In re American Plastic Manuf., Inc.*; File No. 122-3291 (filed Nov. 14, 2013, [redacted]; *MacNeil Eng'g Co., Inc.*, No. 1223292 (filed Oct. 29, 2013, [redacted]).

th[e] information private" (contrary to the non-disclosure agreements here in place) and that they did not show [redacted] *See id.* (explaining, also, that the parties had disclosed the information in litigation earlier without a protective order in place). Here, ECM has [redacted], ECM has in fact held the information in strict confidence as a trade secret, and ECM has demonstrated that disclosure of the information [redacted].

B. <u>The Protective Order Does Not Protect ECM's Trade Secrets</u>

When discovery requests seek disclosure of trade secret information, the analysis concerns whether the disclosure will cause injury that outweighs the need for production. *See M-I LLC v. Stelly*, 733 F.Supp. 2d 759, 801-802 (S.D. Tex. 2010) ("If the party seeking protection established that the information sought is both confidential and that disclosure would cause harm, then the burden falls on the opposing party to 'establish that the information is sufficiently relevant and necessary' to its case to outweigh the harm that disclosure may cause.") (quoting 8 Wright & Miller, Fed. Prac. & Proc. § 2043 (2d ed. 1994)). The question is not whether disclosure *to a competitor* will cause harm. ECM has established that [redacted] are trade secrets based on, *inter alia*, its holding them in strict confidence; its acts to limit internal access to only essential company employees; and the great economic and competitive worth [redacted]. *See* Sinclair Decl., at ¶¶ 5-14; *See Ashland Oil, Inc. v. F.T.C.*, 409 F. Supp. 297, 303 (D.D.C. 1976) *aff'd,* 548 F.2d 977 (D.C. Cir. 1976). ECM suffers business injury immediately upon [redacted] Complaint

Counsel refuses any reasonable accommodation to limit the palpable injury caused by its excessive demands.

C. Complaint Counsel's Discovery Request Are Overly Burdensome

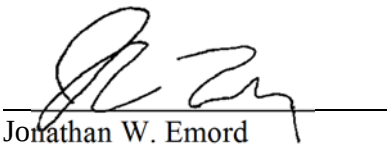
Complaint Counsel has requested in Document Request No. 13 "all communications [redacted] regarding ECM Additives." *See* ECM Mot. for Prot. Order, Exh. A, Doc. Requests at 7. ECM is in the additive business and, so, literally every document it possesses is related to "ECM Additives." Mr. Sinclair testified that a suitable response to that request (and similar requests) would require a search of hundreds of thousands of documents, including ones having no relationship with the advertising here in issue, which must then be examined by counsel at substantial cost. *See* Sinclair Decl., at ¶¶ 19-21. The requests are without temporal and relevance limits. Complaint Counsel has refused to reduce the scope of the requests in any way and has offered no justification for them, let alone a reasonable one, in Complaint Counsel's cross-motion.

That discovery abuse underscores the need for judicial limits on Complaint Counsel's overzealous discovery. ECM has proposed reasonable limitations out of court to no avail.

CONCLUSION

For the foregoing reasons, ECM respectfully requests that Complaint Counsel's cross-motion to compel production be denied and that ECM's Motion for Protective Order be granted.

Respectfully submitted,



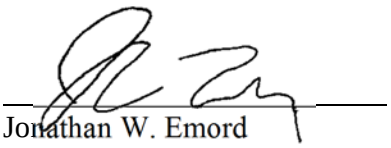
Jonathan W. Emord
EMORD & ASSOCIATES, P.C.
11808 Wolf Run Lane
Clifton, VA 20124

Telephone: 202-466-6937
Facsimile: 202-466-6938
Email: jemord@emord.com

DATED: January 6, 2014

STATEMENT CONCERNING CONFIDENTIALITY

The undersigned Respondent's Counsel hereby states, consistent with its accompanying Opposition to Complaint Counsel's Motion to Place Discovery Documents on the Public Record, and that the subject matter of this instant Opposition and supporting documents are confidential and contain competitively sensitive information, the disclosure of which is likely to result in substantial economic injury to Respondent ECM Biofilms. ECM hereby files this present Opposition confidential, but will submit an expurgated version consistent with Rule 3.45(e) with redactions suitable to protect ECM from competitive injury.



Jonathan W. Emord
EMORD & ASSOCIATES, P.C.
11808 Wolf Run Lane
Clifton, VA 20124
Telephone: 202-466-6937

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2014, I caused a true and correct copy of the foregoing **(PUBLIC) OPPOSITION TO COMPLAINT COUNSEL'S CROSS-MOTION TO COMPEL** to be filed and served as follows:

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

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

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

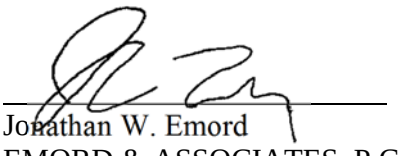
The Honorable D. Michael Chappell
Administrative Law Judge
600 Pennsylvania Ave., NW, Room H-110
Washington, DC 20580

One electronic copy to **Counsel for Complainant**:

Katherine Johnson
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Mail stop M-8102B
Washington, D.C. 20580
Email: kjohnson3@ftc.gov

Elisa Jillson
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Mail stop M-8102B
Washington, D.C. 20580
Email: ejillson@ftc.gov

I further certify that I retain a paper copy of the signed original of the foregoing document that is available for review by the parties and adjudicator consistent with the Commission's Rules.



Jonathan W. Emord
EMORD & ASSOCIATES, P.C.
11808 Wolf Run Lane
Clifton, VA 20124
Telephone: 202-466-6937

EXHIBIT A

COMPETITIVELY SENSITIVE CONFIDENTIAL INFORMATION SUBJECT TO PROTECTIVE ORDER

REDACTED