

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
MOTION TO PLACE DISCOVERY MOTIONS ON THE PUBLIC RECORD**

Respondent ECM BioFilms, Inc. ("ECM") hereby opposes Complaint Counsel's Motion to Place Discovery Motions on the Public Record. Complaint Counsel has filed its motion in derogation of Rule 3.22(g) and paragraph 5 of this Court's Scheduling Order, having done so without first satisfying the obligation to confer with ECM (omitting, therefore, the Rule 3.22(g) statement required for its motion). On December 30, 2013, Complaint Counsel filed a public version of its motion which revealed information ECM deemed protected under his Honor's Protective Order. ECM therefore requests that his Honor order that Complaint Counsel's December 30th "public" document be stricken from the record, and censure Complaint Counsel for unilaterally breaching this Court's Protective Order without affording ECM due process.¹

¹ The proper procedure for withdrawing a "confidential" designation is through a motion filed with the Office of the ALJ, and then disclosing only upon an order permitting same. By filing its motion public on December 30 before any such order, Complaint Counsel essentially granted itself the relief it requested, violating this Court's Protective Order and the Rule 3.22(g) meet and confer requirements. That disclosure was a deliberate violation of 16 C.F.R. § 4.10, 16 C.F.R. § 4.2, 15 U.S.C. § 57b-2(c). *See In the Matter of Basic Research, L.L.C., et al.*, Docket No. 9318, 2005 WL 1541546, *4-5 (F.T.C. June 17, 2005) (holding that disclosure of

On December 13, 2013, ECM filed a motion for a protective order seeking a reasonable limit on the quantum of Complaint Counsel discovery against ECM customers. In its motion,

ECM explained [REDACTED]

[REDACTED] The discovery motions should therefore be protected from disclosure consistent with Rules 3.45(e), 3.22(c), and 4.10, and with paragraph 9 of this Court’s Protective Order.

Without conferring on this point, Complaint Counsel filed a motion on Monday, December 23, 2013, seeking a complete public release of the content that ECM designated “confidential” in its motions. Complaint Counsel’s motion was filed in haste without the

confidential files by Complaint Counsel in violation of Protective Order was subject to remedies). ECM shall pursue those remedies.

requisite statement under Rule 3.22(g). Under the Scheduling Order, the motion is subject to summary denial on that ground alone. *See* Scheduling Order, ¶ 5 (Nov. 21, 2013).

The entirety of ECM’s motion should be given *in camera* protection because (a) the entire subject matter of the document is highly sensitive, disclosure of which is likely to cause injury; (b) the document is replete with confidential facts; and (c) Complaint Counsel has advanced no countervailing public interest in the information which outweighs the foreseeable risks of injury to ECM.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED], the subject matter of the motion for a protective order is highly sensitive and in need of protection. [REDACTED]

[REDACTED]

[REDACTED] This Court’s existing Protective Order protects “confidential material,” which is defined as “any document ... that contains ... competitively sensitive information.” *See* Protective Order at ¶ 1. “Competitively sensitive information” has been defined as “information that has economic value from not being generally known, and that has been the subject of reasonable efforts aimed at secrecy, and the disclosure of which is likely to result in a clearly defined and very serious injury to the designating party by providing a competitor with information that would give it a competitive advantage in ongoing or reasonably foreseeable competitions.” *Lockheed Martin Corp. v. Boeing Co.*, 6:03CV796

ORL28KRS, 2005 WL 5278461 at *4 (M.D. Fla. Jan. 26, 2005). [REDACTED] been deemed “competitively sensitive information.” *See, e.g., F.T.C. v. Foster*, CIV 07-352 JBACT, 2007 WL 2219410 at *7 (D.N.M. Apr. 26, 2007).

Here ECM’s President, Robert Sinclair, provided a sworn statement revealing that [REDACTED]

[REDACTED]

[REDACTED] ECM Mot. for Prot. Order, Exh. B (Sinclair Decl.), at ¶¶ 13-18.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Its motion for a protective order relied heavily on statements from Mr.

Sinclair that explained the [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at ¶ 18.

Moreover, ECM filed a public version of its motion for protective order that redacts only that content which is likely to cause competitive injury, leaving the fact of the motion’s filing and the overall nature of the objection unobscured. The redacted portions present discussion of Complaint Counsel’s request for information concerning ECM’s [REDACTED]. ECM redacted that content because Complaint Counsel’s very request for information creates a risk of competitive injury and customer loss. Notwithstanding, ECM was entitled under the Protective Order to redact information concerning its business losses and business practices, including the information discussed in Mr. Sinclair’s declaration. His declaration included statements about efforts he undertakes to maintain customer goodwill, and [REDACTED]

[REDACTED]. Moreover, Exhibit C to ECM's motion included a private contract (non-disclosure agreement) between ECM and its customers, the substance of which was developed at cost to ECM and is private. Revelation of that contract, a critical component in ECM business and business development, would redound to the advantage of ECM competitors in obtaining business from companies that would otherwise choose to employ ECM.

The sections in ECM's motion that reveal the nature and extent of ECM's business injuries are thus "competitively sensitive information" entitled to protection from disclosure, and ECM should be permitted to redact that information from its pleading. To comply with Rule 3.45(e) ECM submitted a redacted public version of that document on December 23, 2013, having served same on Complaint Counsel before Complaint Counsel filed its instant motion. Put simply, if ECM's competitors that have a keen interest in watching these proceedings are granted public access to the discovery motions and responses which reveal [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].² That would constitute a malicious abuse of discovery because it will plainly lead to the destruction of ECM's entire business, including the very real prospect of ultimate ECM insolvency.

Finally, Complaint Counsel pleads incompetently in their Supplemental Memorandum, advancing conclusory and speculative argument, bereft of supporting fact and justification, that "the FTC's rules and the public interest in open proceedings trump Respondent's desire to keep

² [REDACTED]

its position secret.” Conclusory and speculative assertions of that kind fail to tip the balance in favor of public release against the specific facts and sound reasoning revealing economic injury that Respondent has presented. The law requires a careful balancing of the public right to information against the risk of harm. *See, e.g., Republic Servs., Inc. v. Liberty Mut. Ins. Companies*, CIV.A. 03-494-KSF, 2006 WL 1635655 at *6 (E.D. Ky. June 9, 2006); *Wiggins v. Burge*, 173 F.R.D. 226, 228 (N.D.Ill.1997) (court must balance “the harm to the party seeking the protective order and the importance of disclosure to the public.”). The public’s right to judicial records is not absolute. *See Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597-98 (1978). Here, ECM has documented at least two instances where Complaint Counsel’s investigation resulted [REDACTED]

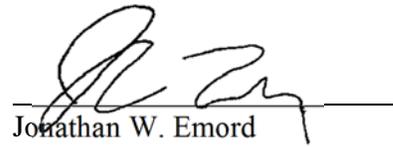
ECM has offered a sworn statement revealing that [REDACTED]

[REDACTED] unless ECM is afforded the relief requested in its motion for protective order. Assuming that the public has at least some right to judicial records, ECM’s limited request for confidentiality does not impair that right at all. ECM limits its request for confidentiality to a narrow group of discovery pleadings concerning Complaint Counsel’s request for all ECM customer information. It is not this narrow discovery dispute but the contest over what if anything cited by FTC constitutes deceptive advertising that defines the substance of public interest in this case. ECM’s submission of a limited public document is sufficient to put the public on notice that discovery is underway, involves certain ECM customers, and involves requests for a certain category of information. Moreover, his Honor’s ultimate Order concerning ECM’s motion for a protective order will be a public document. Complaint Counsel has not, therefore, explained why a general conclusory assertion of public interest in judicial records, shorn of supportive fact and justification and which leaves ECM’s claim of injury substantively

uncontroverted, should outweigh a specific and palpable showing of prospective economic injury by ECM associated with a very narrow category of information which, in and of itself, has no public interest value.

For the foregoing reasons, ECM respectfully requests that his Honor deny Complaint Counsel's Motion to Place Discovery Motions on the Public Record, and accept as sufficient the redacted motion for protective order that ECM has placed on the public docket, thereby sparing ECM from the very likely prospect of severe economic injury.

Respectfully submitted,

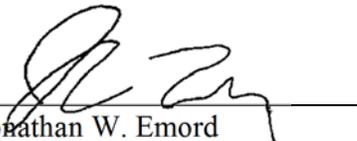


Jonathan W. Emord
EMORD & ASSOCIATES, P.C.
11808 Wolf Run Lane
Clifton, VA 20124
Telephone: 202-466-6937
Facsimile: 202-466-6938
Email: jemord@emord.com

DATED: January 6, 2014

STATEMENT CONCERNING CONFIDENTIALITY

The undersigned Respondent's Counsel hereby states that the subject matter of this instant Opposition is confidential and contains 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 MOTION TO PLACE DISCOVERY MOTIONS ON THE PUBLIC RECORD** 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**:

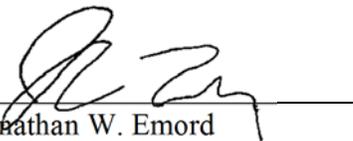
The Honorable D. Michael Chappell
Administrative Law Judge
600 Pennsylvania Ave., NW, Room H-110
Washington, DC 20580

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