

ORIGINAL

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



In the Matter of )

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

DOCKET NO. 9358

**ORDER ON COMPLAINT COUNSEL'S MOTION  
TO PLACE DISCOVERY MOTIONS ON THE PUBLIC RECORD**

**I.**

On December 23, 2013, Complaint Counsel filed a Motion to Place Discovery Motions on the Public Record. Complaint Counsel additionally filed a Supplemental Memorandum in Support of its Motion to Place Discovery Motions on the Public Record on December 26, 2013 (collectively, "Motion"). Respondent ECM BioFilms, Inc. ("Respondent") filed its Opposition to the Motion on January 2, 2014.

On January 7, 2014, Complaint Counsel filed a Motion for Leave to File a Reply in Support of its Motion to Place Discovery Motions on the Public Record. On January 10, 2014, Respondent filed an opposition to Complaint Counsel's Motion for Leave to File a Reply in Support of its Motion to Place Discovery Motions on the Public Record. Respondent states that Complaint Counsel's Reply does not address new "important developments" or "controlling authority" that could not have been raised in Complaint Counsel's opening brief. Complaint Counsel's Motion for Leave to File a Reply is DENIED.

For the reasons set forth below, Complaint Counsel's Motion to Place Discovery Motions on the Public Record is GRANTED, as limited by this Order.

**II.**

The Motion to Place Discovery Motions on the Public Record relates to the following five filings (hereafter, collectively, the "Discovery Motions"):

- (1) Respondent's Motion for a Protective Order ("Motion for Protective Order"), filed December 16, 2013, which Respondent designated as "Confidential Subject to Protective Order." In the Motion for Protective Order, Respondent's counsel certified that the subject matter of the Motion for Protective Order includes confidential and

trade secret information, the disclosure of which is likely to cause Respondent irreparable business injury, and that the non-public content could not reasonably be expurgated from Respondent's motion, memorandum, and exhibits. Respondent filed a public version of this motion on December 23, 2013.

- (2) Complaint Counsel's opposition to Respondent's Motion for Protective Order, combined with a Cross-Motion to Compel Respondent to Disclose Customer and Distributor Names, filed December 24, 2013 ("Cross-Motion to Compel"). Complaint Counsel states that it filed its Cross-Motion to Compel as "Confidential," "out of an abundance of caution," but that its Cross-Motion to Compel did not contain any nonpublic information.
- (3) Respondent's opposition to Complaint Counsel's Cross-Motion to Compel, filed January 2, 2014, which Respondent designated as "Confidential Subject to Protective Order." In its opposition, Respondent's counsel certified that the subject matter of Respondent's opposition and supporting documents are confidential and contain competitively sensitive information, the disclosure of which is likely to cause Respondent irreparable business injury. Respondent's counsel further stated that it filed Respondent's opposition as "Confidential," but that it would file an expurgated version consistent with Rule 3.45(e), with redactions suitable to protect ECM from competitive injury. Respondent filed a public version of this opposition on January 6, 2014.
- (4) Complaint Counsel's Motion for Leave to File Reply in Support of its Opposition to the Motion for Protective Order and Cross-Motion to Compel and its conditionally filed Reply, filed January 7, 2014. Complaint Counsel labeled these filings "Confidential," but stated that the documents were not confidential and that Complaint Counsel was constrained from preparing an improperly redacted version.
- (5) Respondent's Opposition to Complaint Counsel's Motion for Leave to File a Reply, filed January 10, 2014.<sup>1</sup> In this opposition, Respondent's counsel states that the subject matter of Respondent's opposition is confidential and contains competitively sensitive information and further states that ECM stands to suffer considerable injury if customers learn that Complaint Counsel intends to investigate ECM's customers in depth.

At issue in the Discovery Motions was whether the identity of Respondent's customers, as well as related customer information, was protected from discovery. The Discovery Motions were resolved by Order issued January 10, 2014 ("January 10 Order"). Specifically, the January 10 Order denied Respondent's request for a protective order to limit discovery of the identities of Respondent's customers, and related customer information, and further, as requested in Complaint Counsel's Cross-Motion to Compel, required Respondent to provide a complete customer list.

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<sup>1</sup> Respondent did not contemporaneously serve a courtesy copy of this opposition on the Office of Administrative Law Judges, as required under Additional Provision 1 of the Scheduling Order in this case, and the Office of Administrative Law Judges did not receive the official filing of this opposition from the Office of the Secretary until after the issuance of the January 10 Order.

### III.

Before summarizing the parties' respective positions, relevant authority is set forth below.

Rule 3.31(d) of the Commission's Rules of Practice provides in part: "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." The required Protective Order Governing Discovery Material was issued in this case on October 22, 2013. Paragraph 1 of the Protective Order Governing Discovery Material defines "confidential material" as "any document or portion thereof that contains privileged, competitively sensitive information, or sensitive personal information." 16 C.F.R. § 3.31(d) Appendix A. Paragraph 6 of the Protective Order Governing Discovery Material provides the manner in which a party or nonparty may designate material as "confidential." *Id.*

Rule 3.45(d) of the Commission's Rules of Practice provides in part: "Parties shall not disclose information that . . . is subject to confidentiality protections pursuant to a protective order in the public version of proposed findings, briefs, or other documents. This provision does not preclude references in such proposed findings, briefs, or other documents to . . . confidential information or general statements based on the content of such information." 16 C.F.R. § 3.45(d).

Rule 3.45(e) of the Commission's Rules of Practice provides in part: "If a party includes specific information that . . . is subject to confidentiality protections pursuant to a protective order in any document filed in a proceeding under this part, the party shall file 2 versions of the document. A complete version shall be marked . . . 'Subject to Protective Order,' . . . on every page and shall be filed with the Secretary and served by the party on the other parties in accordance with the rules in this part. Submitters of . . . confidential material should mark any such material in the complete versions of their submissions in a conspicuous matter, such as with highlighting or bracketing. . . . An expurgated version of the document, marked 'Public Record' on every page and omitting the . . . confidential information and attachment that appear in the complete version, shall be filed with the Secretary within 5 days after the filing of the complete version, unless the Administrative Law Judge or the Commission directs otherwise . . . . The expurgated version shall indicate any omissions with brackets or ellipses, and its pagination and depiction of text on each page shall be identical to that of the *in camera* [or confidential] version." 16 C.F.R. § 3.45(e).

### IV.

Complaint Counsel argues in support of its Motion to Place Discovery Motions on the Public Record that the Discovery Motions do not contain any "confidential material" within the meaning of the Protective Order Governing Confidential Material, and that because the Discovery Motions do not contain "confidential information," they should be placed on the public record, or, in the alternative, Respondent should be ordered to comply with Commission Rule 3.45(e).

In opposing placing the Discovery Motions on the public record, Respondent argues that the fact that Complaint Counsel is seeking to determine Respondent's customer list and the fact that Complaint Counsel may serve subpoena requests on Respondent's customers are not public

knowledge and disclosure of these facts “will likely cause a mass exodus from ECM to its competitors.” Opposition at 2. Thus, Respondent seeks to keep confidential the fact that Complaint Counsel is seeking Respondent’s customer list and the fact that Complaint Counsel may serve discovery on Respondent’s customers.

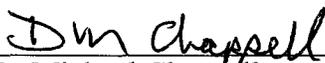
V.

Customer lists have been deemed “competitive sensitive information.” *FTC v. Foster*, 2007 WL 2219410 at \*7 (D.N.M. Apr. 26, 2007). The names of Respondent’s customers may be treated as confidential information provided that Respondent complies with the requirements of the Protective Order Governing Discovery Material. Thus, the names of Respondent’s customers may properly be redacted from the public versions of the Discovery Motions.

However, Respondent seeks to shield from disclosure the very fact that Complaint Counsel has asked for Respondent’s customer list and the fact that Respondent had refused to provide the names of its customers. These facts do not constitute “confidential information.” Furthermore, although Commission Rule 3.45(d) provides that parties shall not disclose confidential information, it specifically provides that the Rule does not preclude references in briefs to “confidential information or general statements based on the content of such information.” 16 C.F.R. § 3.45(d).

If Respondent complies with the requirements of the Protective Order Governing Discovery Material, Respondent may redact the names of its customers from the Discovery Motions filed by Respondent,<sup>2</sup> and if the Discovery Motions filed by Complaint Counsel contain customer names, Complaint Counsel shall redact such customer names from those Discovery Motions filed by Complaint Counsel. In all other respects, Complaint Counsel’s Motion to Place Discovery Motions on the Public Record is GRANTED. Respondent and Complaint Counsel shall each advise the Office of Administrative Law Judges whether any of their respective motions referenced in either the above Part I or Part II of this Order contain customer names or other confidential information. Each motion referenced in Part I and Part II that does not contain customer names or other confidential information protected from disclosure, will be placed on the public record.

ORDERED:

  
D. Michael Chappell  
Chief Administrative Law Judge

Date: January 14, 2014

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<sup>2</sup> Although Respondent filed a public version of its Motion for a Protective Order on December 23, 2013, and a public version of its opposition to Complaint Counsel’s Cross-Motion to Compel on January 6, 2014, these public versions redacted much more information than is allowable under the Commission’s Rules of Practice and this Order.