

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)
Enviroplastics International,)
Respondent.)

DOCKET NO. 9358

**ORDER ON COMPLAINT COUNSEL'S MOTION
FOR A PROTECTIVE ORDER AND RESPONDENT'S
CROSS-MOTION TO REVISE PROTECTIVE ORDER**

On April 21, 2014, Federal Trade Commission ("FTC") Complaint Counsel filed an Emergency Motion for Protective Order ("Motion") requesting a ruling in advance of certain nonparty depositions scheduled to begin on April 28, 2014. On April 23, 2014, Respondent filed an Opposition to Complaint Counsel's Motion and a Cross-Motion to Revise the Protective Order ("Opposition and Cross-Motion"). On April 23, 2014, Complaint Counsel filed its Response to Respondent's Cross-Motion to Modify Protective Order ("Response"). As explained below, the Motion is GRANTED IN PART and DENIED IN PART. The Cross-Motion is DENIED, except as explained herein.

I. Positions of the Parties

Complaint Counsel has issued subpoenas requesting documents and deposition testimony from various nonparties and has scheduled depositions for Island Plastic Bags, Down to Earth, and FP International ("the nonparties"). Complaint Counsel states that these nonparties designated documents they produced in response to Complaint Counsel's subpoenas as "confidential." Motion at 2. Complaint Counsel further states that Respondent's counsel has advised Complaint Counsel that ECM's Chief Executive Officer, Robert Sinclair, will appear at the depositions of these nonparties. *Id.* at 1. Complaint Counsel asserts that, pursuant to the Protective Order Governing Confidential Material issued in this case on October 22, 2013 ("Protective Order"), nonparty information that has been designated as "confidential" cannot be disclosed to ECM itself (as opposed to ECM's outside counsel), or to any of ECM's officers and employees, including Mr. Sinclair. *Id.* at 1-2. Complaint Counsel seeks an order requiring that the depositions be divided into confidential and nonconfidential segments based on the designations that exist when the depositions begin, and allowing ECM's officers and employees to attend only the nonconfidential portions of the depositions.

Respondent asserts that, in an effort to limit the costs of attending depositions of nonparties, ECM has elected to appear *pro se* at the nonparty depositions, through Mr. Sinclair, with Respondent's counsel "supporting" Mr. Sinclair, by telephone, remotely from counsel's offices, "only when examination warrants exclusion of Mr. Sinclair to protect the deponents' trade secret or proprietary information for which competitive injury could reasonably result." Opposition and Cross-Motion at 3. Respondent requests that the Protective Order be revised to: (1) permit ECM to receive and examine deponents concerning documents and information authored by ECM or disclosed to ECM that a deponent has designated as "confidential"; (2) permit deponents to designate sensitive documents (such as trade secrets and information proprietary to them for which disclosure to ECM could cause competitive injury) as "Attorneys Eyes Only" ("AEO"), which will not be shared with ECM; and (3) having established a separate AEO designation, revise Paragraph 7 of the Protective Order to permit ECM's counsel to share "confidential" documents with ECM. *Id.* at 4.

Complaint Counsel, in its Response, asserts that ECM should not be allowed to appear in this matter both *pro se*, through Mr. Sinclair, and through counsel that have entered appearances in this case. Response at 1. Complaint Counsel further asserts that such dual representation implicates a number of troubling ethical issues, such as communication with a represented party and possible violation of lawyer-as-witness rule. *Id.*

II. Provisions of the Protective Order

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 was issued in this case on October 22, 2013.

Provisions of the Protective Order relevant to the instant dispute are:

1. As used in this Order, "confidential material" shall refer to any document or portion thereof that contains privileged information, competitively sensitive information, or sensitive personal information. . . .
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 other federal statute or regulation, or under any federal court or Commission precedent interpreting such statute or regulation, as well as any information that discloses the substance of the contents of any confidential materials derived from a document subject to this Order, shall be treated as confidential material for purposes of this Order. . . .
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. . . .

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. . . .

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.

III. Complaint Counsel’s Motion

Complaint Counsel states that “Down to Earth orally requested that its documents receive confidential treatment.” Motion, CX-A ¶ 2. Complaint Counsel also states that “many [nonparties] responded [to its subpoenas] without counsel (including Island Plastic Bags and FP International), and they may not have understood the precise process associated with designating material ‘confidential.’” Motion at 2 n.4. Complaint Counsel acknowledges that nonparties have over-designated materials as confidential. Motion at 7 n.16; *see also* Motion at 2 n.4 (characterizing requests for confidentiality as “arguably defective”).

The Protective Order sets forth the requirements for designating materials produced as “confidential.” Significantly, a nonparty cannot designate documents as “confidential” without good faith and a careful determination that (a) the material is not reasonably believed to be already in the public domain and that (b) counsel believes the material so designated actually constitutes confidential material as defined in Paragraph 1 of the Protective Order. Protective Order ¶ 5. According to Respondent, the nonparties have designated all of their documents confidential. Respondent notes, for example, that documents designated by FP International as “confidential” include marketing literature intended for public dissemination. Opposition and Cross-Motion at 6. Publicly disseminated marketing materials cannot be considered

“confidential.” Thus, the nonparties did not have a good faith basis for designating all of their material “confidential,” as confidential material is defined under the Protective Order.

The Protective Order also sets forth the mechanisms for designating materials produced as “confidential.” An oral request does not satisfy the requirements of Paragraph 6 of the Protective Order. *See* Protective Order ¶ 6 (mechanisms for designating material as confidential include “placing on or affixing to the document containing such material . . . 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 . . .”).

The Protective Order was issued to protect the rights of parties and nonparties from disclosure of their confidential information, by limiting disclosure to only the narrow set of persons listed in Paragraph 7 of that Order. It does not give parties or nonparties the right to assert that every document produced is “confidential.” If nonparties wish to avail themselves of the protections of the Protective Order, they must comply with the requirements of that Order. Complaint Counsel, as the party who served the subpoenas on the nonparties, shall, in consultation with Respondent’s counsel, work with the nonparties prior to their depositions to ensure that the nonparties have designated as “confidential” only those documents that actually are confidential, as defined in the Protective Order. Once this review of documents has been completed, such that the only documents designated as “confidential” are, in fact, confidential as defined under the Protective Order, as to such properly designated documents, the Protective Order will prohibit disclosure to ECM’s officers and employees, including Mr. Sinclair, except as explained below. Thus, Complaint Counsel’s Motion is GRANTED IN PART.

Even as to properly designated confidential documents, Paragraph 7(e) of the Protective Order allows disclosure to “any witness or deponent who may have authored or received the information in question.” Protective Order ¶ 7(e). Thus, Mr. Sinclair, as a named witness in this proceeding, may attend portions of the nonparty depositions relating to documents that ECM authored or previously received, regardless of the confidentiality of the documents.

In addition, Complaint Counsel’s request that the nonparty depositions be divided into confidential and nonconfidential segments “based on the designations that exist when the deposition begins” is DENIED. This request to micro-manage the parties’ depositions is rejected. However, as the party conducting the depositions, Complaint Counsel should organize deposition questions regarding confidential documents in a manner that minimizes disruptions in the depositions.

IV. Respondent’s Cross-Motion

In its Cross-Motion, Respondent seeks to have the Protective Order revised to create two categories of documents, Attorney Eyes Only documents, which would not be shared with ECM representatives, and “confidential” documents, which could be shared with ECM representatives. This request is DENIED.

The Protective Order allows access to and review of confidential materials by “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.*” Protective Order ¶ 7(c) (emphasis added). Thus, absent the revision requested by ECM, the Protective Order prohibits employees

of Respondent from having access to nonparties' confidential materials. In *In re McWane*, respondent sought to revise the protective order to enable its in-house counsel to review confidential materials and provided an affidavit averring that its in-house counsel was not involved in competitive decision-making. *In re McWane, Inc.*, 2012 FTC LEXIS 140 (Aug. 8, 2012). There, because the nonparties responding to subpoenas had a right to expect that the documents they designated as "confidential" would be treated as confidential under the terms of the protective order and because respondent failed to articulate any reason for failing to request access to confidential information for in-house counsel earlier in the case, prior to the production of confidential information by these nonparties, or to assert any special circumstances that might justify a deviation from the standard protective order language, respondent's motion was denied. *Id.* at *3-4. The reasoning for denying such request is even stronger in this case, where Mr. Sinclair has not claimed that he is not involved in competitive decision-making.

In addition, Respondent's request to revise the Protective Order to permit ECM to receive and examine deponents concerning documents and information authored by ECM or disclosed to ECM is DENIED. As noted above, Mr. Sinclair, as a named witness in this proceeding, may attend portions of the nonparty depositions relating to documents that ECM authored or previously received, regardless of the confidentiality of the documents. Accordingly, the requested revision is unnecessary.

Respondent's Cross-Motion includes two other requests for relief that have not been addressed above. First, Respondent asks that Complaint Counsel be ordered to produce a list of documents to be used at each deposition so that Respondent can evaluate the propriety of the confidentiality designations and seek judicial intervention if necessary. Opposition and Cross-Motion at 2. This request is DENIED as untimely and unworkable under the circumstances presented. As set forth above, the parties shall work with the nonparties so that the nonparties properly narrow the documents designated as confidential in advance of the depositions.

Second, Respondent seeks a ruling which would allow deponents to offer a limited waiver of confidential designations for purposes of allowing Mr. Sinclair to attend the depositions without effecting a general waiver of the confidential status of their documents. Opposition and Cross-Motion at 2. This request is DENIED. In the event that any of the "confidential documents" are offered as exhibits in the trial in this matter, the nonparties will have the opportunity to file motions for *in camera* treatment to have their confidential materials withheld from the public record. Those motions must show that the documents that the nonparties seek to have withheld from the public record meet the strict standards for *in camera* treatment. Scheduling Order Additional Provisions, ¶ 7; see 16 C.F.R. § 3.45. If such motions are filed, they will be evaluated using those standards. *Id.* Whether or not the nonparties waive their confidentiality designations for purposes of allowing Mr. Sinclair to attend the depositions has no effect on whether or not their *in camera* treatment motions, if filed, will be granted.

Except as explained above, Respondent's Cross-Motion is DENIED.

V. Representation by Mr. Sinclair

Respondent, in its Opposition and Cross-Motion, states that it intends for Mr. Sinclair to not only attend the depositions, but also to appear *pro se*, with outside counsel supporting him by telephone only when examination warrants exclusion of Mr. Sinclair to protect confidential

information. Opposition and Cross-Motion at 3. Respondent argues that excluding ECM's representative from the deposition room for extended periods of time or for entire depositions would "violat[e] ECM's right to appear *pro se* under Rule 4.1(a)(2)." *Id.* at 7.

Complaint Counsel objects to Mr. Sinclair being allowed to appear both *pro se* and by counsel and asserts that allowing Mr. Sinclair to conduct a deposition or represent ECM at the hearing when he already has counsel and when he is a primary witness would be disruptive and complicate the depositions and these proceedings generally. Response at 1.

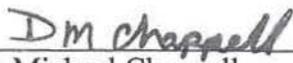
Commission Rule 4.1(a)(2) states: "[a] corporation or association may be represented by a bona fide officer thereof upon a showing of adequate authorization." 16 C.F.R. § 4.1(a)(2). In this regard, it should be noted that Mr. Sinclair has not filed an appearance in this matter, or made the required showing of authorization under Rule 4.1. In contrast, Jonathan Emord, Peter Arhangel'sky, and Lou Caputo have each filed a Notice of Appearance in this case. They are the only representatives of record at this time.

However, even if Mr. Sinclair was considered an authorized "*pro se*" representative of ECM, the Protective Order entered in this case would still prohibit Mr. Sinclair from accessing confidential materials. The Protective Order provides that only "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*" may view confidential information produced in this case. Protective Order ¶ 7(c); 16 C.F.R. § 3.31 Appendix A (emphasis added). As discussed above, even in-house counsel are not permitted access to confidential materials under the Protective Order. Mr. Sinclair cannot abrogate this clear prohibition of disclosing nonparties' confidential information directly to Respondent by simply asserting that he is representing himself pursuant to Commission Rule 4.1(a)(2). Moreover, because ECM is represented by outside counsel who can protect ECM's rights in the depositions of nonparties, there is no likelihood that ECM will suffer prejudice as a result of Mr. Sinclair's being excluded from the depositions at times when confidential information is discussed.

VI. Conclusion

For the reasons set forth above, Complaint Counsel's Motion is GRANTED IN PART and DENIED IN PART. Respondent's Cross-Motion is DENIED, except as explained above.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: April 24, 2014