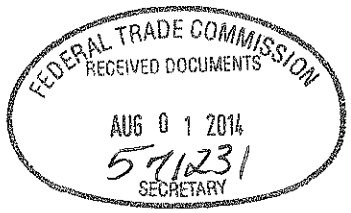
ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

**COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S RENEWED MOTION FOR *IN CAMERA* TREATMENT OF PROPOSED TRIAL EXHIBITS**

Complaint Counsel and Respondent ECM Biofilms, Inc. ("ECM") agree regarding certain points; however, we file this Opposition to emphasize three important respects in which ECM still substantially overreaches. First, ECM's conclusory declaration offers no reason why documents often dozens of pages long must be concealed from public view when rarely more than a few words (such as prices) are even arguably confidential.[1] Second, Complaint Counsel objects to any *in camera* treatment for CX-676[2]—which is a crucial document in this case and damaging to ECM—but not confidential. Third, ECM fails to establish the requisite "clearly defined, serious injury" from the public treatment of deposition excerpts that, at very most, contain a few lines of confidential material irrelevant to this case.

**LEGAL STANDARD**

As this Court explained last week, ECM must "'make a showing that the information concerned is sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury.'" Order (July 23, 2014) (*quoting In re General Foods Corp.*, 95 F.T.C. 352, 180 FTC LEXIS 99, *10 (Mar. 10, 1980)); *see also In re Bristol-Myers Co.*, 90 F.T.C. 455, 1977 FTC LEXIS 25, *5 (Nov. 11, 1977) (outlining six factors relevant to whether the movant has established materiality and necessity). The Court also noted that,

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[1] *See* Rule 3.43(b) (affording the Court the power to give *in camera* treatment to "portions" of documents).

[2] *See* Motion at 6 and n.12 (noting that "Complaint Counsel does not consent to *in camera* treatment of this document," but providing no analysis as to why "a discussion between ECM and one its distributors on how to obtain specific types of customers" would cause a "clearly defined, serious injury" to ECM).

although certain business records may receive public treatment, there is a "'substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons.'" *Id.* at 2 (*quoting In re Hood & Sons, Inc.*, 58 F.T.C. 1184, 1961 FTC LEXIS 368, *5-*6 (Mar. 4, 1961)). Such sunshine "provides guidance to persons affected by Commission actions," "promotes public understanding of decisions at the Commission," and helps "deter[] potential violators." *See id.* For these sound reasons, ECM has the "heavy burden"[3] to establish that disclosure would cause "clearly defined, serious injury." *See* Rule 3.45(b). Significantly, the Court cautioned ECM that, although the declaration attached to its prior motion asserted generally that disclosure would cause injury, it "**does not explain how or why, or provide sufficient information to evaluate the materiality or secrecy using any of the factors set forth in *Bristol-Myers***." Order (July 23, 2014) at 3 (emphasis added).

## ARGUMENT

### I. ECM's New Conclusory Declaration Is No More Adequate Than Its First One.

Although ECM's new declaration requests confidential treatment for fewer documents than its last one, there is still no explanation of "how or why" disclosure will cause clearly-defined, serious injury, nor does the new declaration provide "sufficient information to evaluate the materiality or secrecy" in accordance with Commission law. In fact, most operative paragraphs of the new declaration merely contain a few extra words. For instance, the old declaration paragraph supporting the alleged confidentiality of CCX-395 and the new declaration paragraph referencing the same document are identical save the addition of one conclusory

[3] It is Respondent's "heavy" burden to prove that the information is a trade secret or otherwise confidential—the public interest in open proceedings is presumed. *Miller v. Indiana Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994) (characterizing the burden as "heavy" and emphasizing that the "strong presumption of openness does not permit the routine closing of judicial records to the public"); *see also United States v. Pickard*, 733 F.3d 1297, 1302 (10th Cir. 2013) (assigning the burden to "[t]he party seeking to overcome the presumption of public access"). Respondent must "make a clear showing that the information concerned is sufficiently secret and sufficiently material to their business that disclosure would result in serious completive injury." *In re General Foods Corp.*, 95 F.T.C. 352, 1980 FTC LEXIS 99, at *10 (Mar. 10, 1980).

sentence: "ECM's competitors could use such information to get an unfair advantage."[4] Other declaration paragraphs are boilerplate apparently pasted from one paragraph to the next.[5]

Additionally, the Court's Order denying ECM's initial *in camera* motion made clear that confidentiality was only appropriate for documents "of reasonable length":

> Respondent will not be required to redact confidential information from individual exhibits and may seek *in camera* treatment for entire exhibits, other than for deposition transcripts, **provided such exhibits are of reasonable length.**

Order (July 23, 2014) at 4 (emphasis added). However, the majority of exhibits ECM's motion addresses are call lengthy log excerpts (in on case, more than 100 pages), or compilations of vaguely related emails to different parties.[6] In many cases, the exhibits already contain redactions removing ECM's prices or customer's order volume, neither of which is relevant to this case. ECM's conclusory declaration utterly fails to establish why dozens of pages of information is allegedly confidential when redacting a few irrelevant characters (price or order volume) solves the problem.[7] *See, e.g., In re Union Oil Co. of Cal.*, 2004 FTC LEXIS 223, *4 (Nov. 22, 2004) ("Requests for *in camera* treatment shall be made **only** for those pages of documents or of deposition transcripts that contain information that meets the in camera standard.") (emphasis added).

## II. CCX-676 Is Both Critical and Non-Confidential.

This document contains a conversation between ECM and an international distributor in which ECM advises the distributor to focus on a certain class of companies that "should be easier

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[4] *Compare* R. Sinclair Dec. (July 8, 2014) ¶ 9(h), *with* R. Sinclair Dec. (July 30, 2014) ¶ 9(e).

[5] *See, e.g.*, R. Sinclair Dec. (July 30, 2014) ¶ 10(a)-(n) (fourteen nearly identical short paragraphs purporting to justify the nondisclosure of fourteen documents). Although ECM provides marginally more information for RX-132, RX-330, RX-331, and CCX-234, Complaint Counsel has consented to *in camera* treatment of those documents.

[6] *See, e.g.*, CCX-422 (86 pages); CCX-410 (40 pages); CCX-419 (32 pages); CCX-420 (118 pages); RX-130 (34 pages of separate emails); RX-132 (21 pages of separate emails).

[7] Complaint Counsel consents to such redactions. During the parties' meet and confer, ECM's counsel indicated that ECM would make such redactions; however, ECM moved to have the entire documents placed *in camera* anyway.

to sell [to]."[8] ECM uses a common metaphor to characterize this class of businesses in contrast to those outside the class.[9] Significantly with respect to the merits, ECM states that it "currently employs" this approach.[10] Most important here, however, in the correspondence itself—which is four years old— ECM does not identify any particular company or set of companies as potential clients. ECM's distributor focuses on one international firm, but ECM counsels against selling to that firm because it falls outside of the general class of potential customers that ECM recommends pursuing—and still pursues. Regardless, the class of companies that ECM suggests are "easier to sell [to]" includes tens of thousands of businesses, making the suggestion much too general to constitute a legally cognizable "trade secret."

Furthermore, although ECM characterizes the approach CCX-672 articulates as a business strategy, ECM's perfunctory declaration provides no information at all regarding "how or why" disclosing this approach would produce a "clearly defined, serious injury," nor is there any information (let alone sufficient information) to enable the Court "to evaluate the materiality or secrecy" of this approach. *See* Order (July 23, 2014) at 3 (emphasis added). As such, ECM's request to keep this probative document confidential should be denied.

## III. ECM Has Not Established That Disclosing Deposition Excerpts Would Cause "Clearly Defined, Serious Injury."

ECM's declaration addresses deposition transcripts with a sweeping generality: they allegedly contain information "related to sales, customers, and other sensitive and personal information."[11] However, the declaration again provides no detail at all regarding how disclosing the unidentified "sensitive . . . information" would seriously injure ECM in some "clearly defined" way. The only example given is that customers could use the information "to

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[8] CCX-676 at 1.

[9] *See id.*

[10] R. Sinclair Dec. (July 30, 2014) ¶ 10(a).

[11] R. Sinclair Dec. (July 30, 2014) ¶ 10(o). Complaint Counsel consents to the redaction of employees' personal information, the number of customers ECM has, ECM's financial information, and ECM's product formula (to the extent not already disclosed). *See, e.g.*, Joint Stipulation ¶ 8 (stipulating that the ECM additive is biodegradable).

take business away from ECM."[12] Parroting back the standard along with a general business harm assertion is clearly insufficient to satisfy ECM's "heavy burden" to establish "clearly defined, serious injury." Rule 3.43(b); *see also Wall Indus., Inc. v. United States*, 5 Cl. Ct. 485, 487 (1984) ("[I]t is axiomatic that nebulous and conclusory allegations of confidentiality and business harm are insufficient to carry the movant's burden.") (citations omitted); *Beastie Boys v. Monster Energy Co.*, 983 F. Supp.2d 354, 368 (S.D.N.Y. 2014) ("The Court will not accept conclusory claims of the need for confidentiality[.]").

Additionally, the deposition excerpts identified include subjects that are obviously not trade secrets (for instance, what "each ECM employee does"), statements about marketing or sales processes too vague or general to constitute a trade secret, and general—but important and already public—characterizations of ECM's customer base. As the Court is well aware, ECM has repeatedly and publicly trumpeted the supposed fact that its customers are sophisticated businesses that construe its claims to mean something more nebulous than the words expressly mean. *See, e.g.*, ECM's (Public) Trial Brief (July 30, 2014) at 83 (making arguments under a subheading that reads, "**The ECM Customer: A Sophisticated Corporation**, Not an End-Use Consumer.") (emphasis added). Accordingly, ECM's characterizations of its customers are clearly not confidential.

Finally, the proposed redactions affect meaningful portions of each of the deposition transcripts of the employees ECM represents it will call live. Thus, if the deposition transcripts potentially necessary for impeachment receive *in camera* treatment, then at least some portion of the cross-examination of ECM's witnesses may have to occur *in camera* as well. This creates a distorted proceeding in which ECM's carefully controlled direct examinations of its employees will take place publically, but relevant portions of the cross-examination of those same witnesses will be hidden.

[12] R. Sinclair Dec. (July 30, 2014) ¶ 10(o).

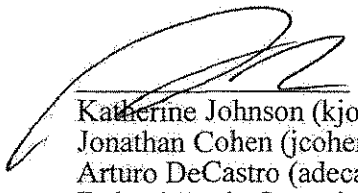
Overall, this is a false advertising case that does not involve genuine trade secrets or sensitive personal information like some other FTC actions do. We respectfully request that the public's right to access this Court's proceedings continue as unencumbered as the law will permit.

## CONCLUSION

For the foregoing reasons, the Court should deny those portions of ECM's motion to which Complaint Counsel has not consented.

Dated: August 1, 2014

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2014, I caused a true and correct copy of the foregoing to be served as follows:

One electronic copy to the **Office of the Secretary**, one hard copy, and one copy through the FTC's e-filing system:

Donald S. Clark, Secretary
Federal Trade Commission
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Email: secretary@ftc.gov

One electronic copy and one hard copy to the **Office of the Administrative Law Judge:**

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