ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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 MOTION FOR LEAVE TO FILE A REPLY

For several reasons, Complaint Counsel respectfully asks the Court to deny Respondent ECM Biofilms, Inc.'s ("ECM's") Motion for leave to file a reply. First, the proposed reply does not satisfy Rule 3.22(d), because it does not identify "important developments that could not have been raised earlier in [ECM's] principal brief." To the extent ECM had reasons why it satisfied the meet and confer obligation, it could have explained those in its principal brief.

Second, the proposed reply does not address Scheduling Order ¶4, upon which Complaint Counsel's opposition relied. Rather, the proposed reply addresses Rule 3.22(g), which is irrelevant here (Rule 3.22(g) does not cover motions for *in camera* treatment, whereas Scheduling Order ¶4 does).

Third, ECM's *post hoc* rationalization is incomprehensible. ECM apparently claims to have conferred about the pending motion for *in camera* treatment on February 6: before ECM produced documents and before the parties exchanged exhibit lists. Suffice it to say, the letter ECM attaches to its proposed reply does not mention *in camera* treatment.

Finally, ECM calls us hypocrites for failing to confer regarding our McClaren/Hart motion *in limine*, but this is a red herring. As ECM admits, an attempt to persuade it to withdraw an important piece of its substantiation was "unlikely" to succeed (in fact, this is an understatement). *See* Proposed Reply at 3. Courts regularly excuse meet and confer requirements when they are obviously futile. *See, e.g., Gibbons v. Smith*, 01 Civ. 1224, 2010 WL 582354, *2 (S.D.N.Y. Feb. 11, 2010) ("relief from the meet-and-confer requirement" is warranted where "any attempt to resolve the dispute informally would have been futile").

Significantly, however, a conference with respect to the thirty-seven documents at issue would almost certainly have borne fruit—if not produced a complete agreement. Because the potential *in camera* treatment for thirty-seven documents is something the parties must at least **attempt** before burdening the Court, ECM's proposed reply changes nothing, and the Court should deny ECM's request to file it.

Dated: July 17, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 17, 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,** and one copy through the FTC's e-filing system (although Complaint Counsel received an error message when attempting to file):

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Room H-159
Washington, DC 20580
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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One electronic copy to **Counsel for the Respondent**:

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