

ORIGINAL

PUBLIC

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 RESPONDENT'S MOTION FOR *IN CAMERA* TREATMENT

I.

Pursuant to Rule 3.45(b) of the Federal Trade Commission's ("FTC") Rules of Practice and the Scheduling Order entered in this matter, on July 9, 2014, Respondent ECM BioFilms, Inc. ("Respondent" or "ECM") filed a motion for *in camera* treatment for materials that the parties have listed on their exhibit lists as materials that might be introduced at trial in this matter. FTC Complaint Counsel filed an Opposition on July 15, 2014. On July 16, 2014, Respondent filed a Motion for Leave to File a Reply to Complaint Counsel's Opposition to Respondent's Motion for *In Camera* Treatment of Proposed Trial Exhibits and its Proposed Reply. Complaint Counsel filed an opposition to the motion for leave on July 17, 2014.

Respondent's Motion for Leave to File a Reply is GRANTED. For the reasons set forth below, Respondent's Motion for *In Camera* Treatment is DENIED WITHOUT PREJUDICE.

II.

Under Rule 3.45(b) of the Rules of Practice, the Administrative Law Judge may order that material offered into evidence "be placed *in camera* only after finding that its public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting *in camera* treatment or after finding that the material constitutes sensitive personal information." 16 C.F.R. § 3.45(b). Applicants for *in camera* treatment must "make a clear showing that the information concerned is sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury." *In re General Foods Corp.*, 95 F.T.C. 352, 1980 FTC LEXIS 99, at *10 (Mar. 10, 1980). In *In re Bristol-Myers Co.*, the Commission outlined six factors to be weighed when determining materiality and secrecy: (1) the extent to which the information is known outside of the applicant's business; (2) the extent to which the information is known by employees and others involved in the applicant's

business; (3) the extent of measures taken by the applicant to guard the secrecy of the information; (4) the value of the information to the applicant and its competitors; (5) the amount of effort or money expended by the applicant in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *In re Bristol-Myers Co.*, 90 F.T.C. 455, 1977 FTC LEXIS 25, at *5 (Nov. 11, 1977). *Accord In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 138 (Sept. 19, 2000).

The Federal Trade Commission recognizes the “substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons.” *In re H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1961 FTC LEXIS 368, at *5-6 (March 4, 1961). A full and open record of the adjudicative proceedings promotes public understanding of decisions at the Commission. *In re Bristol-Myers Co.*, 1977 FTC LEXIS 25, at *6. A full and open record also provides guidance to persons affected by its actions and helps to deter potential violators of the laws the Commission enforces. *In re Hood*, 1961 FTC LEXIS 368, at *6-7. The burden of showing good cause for withholding documents from the public record rests with the party requesting that documents be placed *in camera*. *Id.* at *10-11.

Nevertheless, the Commission has recognized that it may be appropriate to provide *in camera* treatment for certain business records. *In re Champion Spark Plug Co.*, 1982 FTC LEXIS 85, at *2 (April 5, 1982); *see Hood*, 1961 FTC LEXIS 368, at *4-5; *In re Kaiser Aluminum & Chemical Corp.*, 103 F.T.C. 500, 500, 1984 FTC LEXIS 60 (May 25, 1984). Where *in camera* treatment is granted for business records, such as business strategies, marketing plans, pricing policies, or sales documents, it is typically provided for two to five years. *E.g., In re Union Oil Co. of Cal.*, 2004 FTC LEXIS 223, at *2 (Nov. 22, 2004); *In re Int’l Assoc. of Conference Interpreters*, 1996 FTC LEXIS 298, at *13-14 (June 26, 1996); *Champion Spark Plug*, 1982 FTC LEXIS 85 at *2 and 1982 FTC LEXIS 92, at *2 (March 4, 1982).

In order to sustain the burden for withholding documents from the public record, an affidavit or declaration is required, demonstrating that a document is sufficiently secret and sufficiently material to the applicant’s business that disclosure would result in serious competitive injury. *See In re North Texas Specialty Physicians*, 2004 FTC LEXIS 109, at *3-4 (Apr. 23, 2004). To overcome the presumption that *in camera* treatment will not be granted for information that is more than three years old, applicants seeking *in camera* treatment for such documents must also demonstrate, by affidavit or declaration, that such material remains competitively sensitive. In addition, to properly evaluate requests for *in camera* treatment, applicants for *in camera* treatment must provide a copy of the documents for which they seek *in camera* treatment to the Administrative Law Judge for review.

III.

Respondent seeks *in camera* treatment for a narrow set of documents that the parties intend to introduce at trial. Of the over 1,200 potential exhibits identified by the parties, Respondent seeks *in camera* treatment for 37 documents that ECM asserts contain truly confidential information, such as customer lists, financial information, personal information, and business strategy. In support of its Motion, Respondent provides an Affidavit of Robert Sinclair,

President and CEO of ECM BioFilms, Inc. (“Sinclair Affidavit”).

Complaint Counsel opposes Respondent’s Motion on grounds that Respondent: failed to meet and confer prior to filing the Motion; improperly attempted to assert the alleged confidentiality interests of third parties; failed to adequately support its requests; and improperly sought *in camera* treatment for entire documents, rather than selected portions.

In order to encourage discussion between the parties and minimize unnecessary motion practice, Additional Provision 4 of the Scheduling Order issued in this case requires that “[e]ach motion (other than a motion to dismiss or a motion for summary decision) shall be accompanied by a separate signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement.” Although Respondent failed to include the required “meet and confer” statement, under the circumstances presented, Respondent’s Motion will not be denied on that ground.

Although Respondent’s Motion shows a diligent effort to narrow the scope of documents for which it seeks *in camera* treatment, Respondent has not adequately supported its requests. The Sinclair Affidavit asserts that disclosure of the 37 documents at issue will likely result in a serious and clearly defined injury to ECM, but it does not explain how or why, or provide sufficient information to evaluate the materiality or secrecy of the documents using any of the factors set forth in *Bristol-Myers*. Furthermore, a review of some of the documents shows that not all of the documents for which *in camera* treatment is sought meet the Commission’s strict standard. For example, RX-84 is an email from 3M Company to ECM that reveals 3M’s response to ECM’s position regarding trade secrets. It does not reveal any actual trade secrets.

In addition, “requests for *in camera* treatment must show ‘that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved.’” *In re Kaiser Aluminum*, 103 F.T.C. at 500 (quoting *In re Hood*, 58 F.T.C. at 1188) (emphasis added). Complaint Counsel’s exhibit CCX-568 is an email from FP International to ECM that contains the names of FP International’s competitors and some of the accounts that FP International has gained with its biodegradable products. Nothing on the face of the document indicates that CCX-568 contains information that is “sufficiently secret and sufficiently material” to ECM’s business that disclosure would result in “serious competitive injury” to ECM, and the Sinclair Affidavit provides no such explanation to support such a finding.


Five of the exhibits for which Respondent seeks *in camera* treatment are entire transcripts of the depositions of ECM employees and executives. Respondent asserts that these transcripts contain confidential information related to sales, customers, and other sensitive and personal information. With respect to deposition transcripts for which *in camera* protection is sought, Respondent must narrow its request to specific excerpts reflecting confidential information. *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 44, at *5 (Apr. 1, 2004).

¹ In addition, Complaint Counsel states that FP International, upon receiving notice from Complaint Counsel that it intended to introduce CCX-568 at the hearing in this matter, indicated that it would not seek *in camera* treatment for this document. Opposition at 2 n.3.

IV.

Because Respondent has not adequately demonstrated that the documents for which it seeks *in camera* treatment meet the Commission's strict standards, Respondent's motion is DENIED WITHOUT PREJUDICE. Respondent may file a renewed motion for *in camera* treatment, by July 30, 2014. With respect to the exhibits for which Respondent continues to seek *in camera* treatment, Respondent shall support its motion with an affidavit or declaration showing that the documents it seeks to withhold from the public record meet the Commission's standards as detailed above. 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 entire exhibits are of reasonable length. With respect to the deposition transcripts, Respondent shall designate specific excerpts reflecting confidential information. Complaint Counsel may file any opposition thereto by 1:00 p.m. on August 1, 2014.

ORDERED:


D. Michael Chappell
Chief Administrative Law Judge

Date: July 23, 2014