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 DENYING RESPONDENT'S MOTION FOR PROTECTIVE ORDER AND GRANTING COMPLAINT COUNSEL CROSS-MOTION TO COMPEL

On December 16, 2013, Respondent ECM BioFilms, Inc. ("Respondent" or "ECM") filed a Motion for a Protective Order ("Motion for Protective Order"). On December 24, 2013, Complaint Counsel filed an opposition to Respondent's Motion for Protective Order, combined with a Cross-Motion to Compel Respondent to Disclose Customer and Distributor Names. ("Cross-Motion to Compel"). Respondent filed an opposition to Complaint Counsel's Cross-Motion to Compel on January 2, 2014.

Further, on January 7, 2014, Complaint Counsel filed a Motion for Leave to File a Reply in Support of its Opposition to the Motion for Protective Order and Cross-Motion to Compel ("Motion for Leave"), along with a conditionally filed Reply Brief, pursuant to Commission Rule 3.22(d) ("Reply"). As of the date of this Order, ECM has not responded to the Motion for Leave. The Motion for Leave to file the Reply is GRANTED.

Having fully considered all the submissions of the parties, and all the contentions and arguments therein, and as more fully explained below, the Motion for Protective Order is DENIED and Complaint Counsel's Cross-Motion to Compel is GRANTED.

I. Introduction

The Complaint in this case charges that ECM engaged in deceptive trade practices in violation of Section 5 of the FTC Act by making false or unsubstantiated representations regarding the biodegradability of plastics treated with an additive manufactured by ECM ("ECM Additive"). The Complaint alleges, among other things, that Respondent distributes ECM Additives to its customers -- independent distributors and plastic products manufacturers (collectively, "customers") -- located throughout the United States who, in turn, treat plastics with ECM Additives and thereafter advertise and sell the treated plastic products to end-users as biodegradable. Complaint ¶ 2. The Complaint further alleges that ECM's representations to its customers were passed on to plastics end-users, and therefore, ECM provided its customers with

the "means and instrumentalities" to deceive the end-users. Complaint ¶¶ 4, 14, 15.

At issue in Respondent's Motion for a Protective Order are Complaint Counsel's Interrogatories 1, 2, and 6, and Complaint Counsel's Document Request 13, set forth verbatim below:

> Interrogatory 1: Identify, by business name, individual contact, address, and telephone number, all customers who have purchased any ECM Additive, including customers who purchased any ECM Additive from distributors, in which case, also provide the name, address, and telephone number of the distributor from whom the customer purchased the ECM Additive.
>
> Interrogatory 2: For each customer or distributor identified in Interrogatory 1, list ECM's revenue per customer or distributor per year.
>
> Interrogatory 6: Identify, by name, title, and business name, . . . the customers, distributors, or potential customers involved in any communications described in Interrogatory 5 (requesting verbal communications regarding the rate and extent of the Biodegradability of the ECM Additive or ECM Plastics, or regarding the ability of ECM Additives to initiate, cause, enable, promote, or enhance the Biodegradation of ECM Plastics).
>
> Document Request 13: Provide all communications with customers, distributors, potential customers, or potential distributors regarding ECM Additives.

Respondent objects to the foregoing discovery and seeks an order limiting Complaint Counsel to the following: (1) ECM will produce the names, addresses, and contact information for fifty (50) of its customers who do not have orders pending (exclusive of its top 10 revenue generating companies) to Complaint Counsel; (2) Complaint Counsel may not contact more than ten (10) of ECM's customers, through informal or formal process; and (3) discovery requests concerning ECM's customers, including requests for revenue per customer, shall be limited to the ten (10) customers chosen by Complaint Counsel, presumably from the list of 50 customers ECM would provide.

Complaint Counsel argues that Respondent's proposed limitations are unsupported and insufficient under the discovery rules. Complaint Counsel's Cross-Motion to Compel seeks an order compelling Respondent to produce a complete list of ECM's customers and distributors, and to supplement ECM's mandatory initial disclosures under Rule 3.31(b)(1).[1] Complaint Counsel's Cross-Motion to Compel does not seek any relief beyond obtaining Respondent's complete customer list, as encompassed by Interrogatory 1, above. Thus, it does not appear that Complaint Counsel's Cross-Motion to Compel is directed at Interrogatories 2 or 6, or Document Request 13.

[1] Mandatory initial disclosures under Rule 3.31(b) include "(1) The name, and, if known, the address and telephone number of each individual likely to have discoverable information relevant to the allegations of the Commission's complaint, to the proposed relief, or to the defenses of the respondent . . . ." 16 C.F.R. § 3.31(b).

II. Applicable Law

Pursuant to Commission Rule 3.31(c)(1), "[u]nless otherwise limited by order of the Administrative Law Judge, . . . [p]arties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." 16 C.F.R. § 3.31(c)(1). However, even if proposed discovery meets the foregoing relevance test:

> [t]he frequency or extent of use of the discovery methods . . . shall be limited by the Administrative Law Judge if he or she determines that:
>
> (i) The discovery sought from a party or third party is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
>
> (iii) The burden and expense of the proposed discovery on a party or third party outweigh its likely benefit.

16 C.F.R. § 3.31(c)(2).

Even if requested discovery is otherwise permissible under the rules, Commission Rule 3.31(d) permits the Administrative Law Judge "to deny discovery or make any other order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding." 16 C.F.R. § 3.31(d). The burden of demonstrating that the challenged discovery should not proceed is on Respondent, as the proponent of the requested protective order. *In re Polypore Int'l*, 2008 FTC LEXIS 155, at *14-16 (Nov. 14, 2008); *In re Schering-Plough Corp.*, 2001 FTC LEXIS 105, at *5 (July 6, 2001). *In re Phoebe Putney Health Sys.*, 2013 FTC LEXIS 84, at *13 (May 28, 2013) (quoting *In re Polypore*, 2008 FTC LEXIS 155, at *16).

If a party fails to comply with any discovery obligation under the rules, Rule 3.38 authorizes the opposing party to seek an order compelling such compliance. "Unless the Administrative Law Judge determines that the objection is justified, the Administrative Law Judge shall order that an initial disclosure or . . . documents, depositions, or [answers to] interrogatories be served or disclosure otherwise be made." 16 C.F.R. § 3.38(a).

III. Overview of Arguments of the Parties

Respondent argues that Complaint Counsel's requested customer related discovery should be rejected in favor of Respondent's proposed limited production. According to Respondent, the benefit to Complaint Counsel of its requested discovery is outweighed by economic harm that ECM claims would result from lost customer business, which, Respondent argues, would surely

occur if Complaint Counsel contacts and/or issues subpoenas to ECM's customers. In addition, Respondent asserts that the customer communications requested by Complaint Counsel are available from ECM, which ECM asserts is less burdensome and less expensive than seeking such information from Respondent's customers. Moreover, Respondent contends that Complaint Counsel's requested discovery is cumulative and/or duplicative because the sales representations made by Respondent, which are at issue in this proceeding, do not vary by customer, and that therefore production of information regarding a sampling of Respondent's customers, should be sufficient. Respondent further asserts that Complaint Counsel's discovery requests are overbroad, and ECM's customer lists are privileged trade secrets protected from discovery.

In response, Complaint Counsel argues that Respondent was required to provide a complete customer list as part of Respondent's mandatory initial disclosures under Commission Rule 3.31(b)(1), but that Respondent failed to do so, and that now, Respondent is required to disclose its complete customer list in response to Complaint Counsel's Interrogatories. Complaint Counsel asserts that: a complete customer list is relevant to Complaint Counsel's allegations and Respondent's defenses; ECM has failed to demonstrate that it will lose business from those customers contacted by Complaint Counsel; and that the Protective Order Governing Discovery Material, issued in this case on October 22, 2013, is sufficient to protect Respondent's customer information.[2] Although Complaint Counsel rejects the limitations outlined in Respondent's proposed protective order, Complaint Counsel nevertheless offers that "if ECM produces its customer list, Complaint Counsel will limit its contacts to a subset of customers; give Respondent advance notice of such contacts; and negotiate search terms to reduce the number of customer communications responsive to discovery requests." Cross-Motion at 7.

Respondent's opposition to Complaint Counsel's Cross-Motion to Compel largely reiterates the arguments in support of Respondent's Motion for Protective Order, and further asserts that Complaint Counsel has failed to demonstrate that a complete customer list, or contacting every customer of Respondent, is necessary for Complaint Counsel's case, in light of the economic harm to ECM that Respondent claims will result.

In its Reply, Complaint Counsel states that Respondent has changed its position since Respondent filed its Opposition to the Cross-Motion to Compel concerning the number of customers it was willing to identify, and that documents recently produced by Respondent indicate that Respondent's customer communications do vary, contrary to Respondent's assertions, and therefore a complete customer list will not lead to redundant or duplicative discovery.

Additional details of the parties' arguments are addressed in the context of the legal analysis, below.

IV. Analysis

A. Confidentiality of customer information as a basis for limiting discovery

[2] Rule 3.31(d) 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."

Respondent asserts that its customer information, including customer names, communications with customers, and ECM's revenues by customer, constitutes "confidential information." Respondent maintains that such information is competitively sensitive and should be protected from discovery. "The fact that discovery might result in the disclosure of sensitive competitive information is not a basis for denying such discovery." *In re Lab. Corp. of Am.*, 2011 FTC LEXIS 22, at *5 (Feb. 17, 2011) (citing *LeBaron v. Rohm and Hass Co.*, 441 F.2d 575, 577 (9th Cir. 1971); *In re North Tex. Specialty Physicians*, 2004 FTC LEXIS 20, at *4 (Feb. 5, 2004). In addition, courts interpreting discovery sought under the Federal Rules of Civil Procedure have held that there is no immunity protecting the disclosure of trade secrets. *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 155, at *29 (Oct. 17, 2000) (citing *FTC v. J.E. Lonning*, 539 F.2d 202, 209-10 (D.C. Cir. 1976) (other citations omitted)). Even if ECM's customer information is considered confidential information, Respondent's contention that such information is therefore protected from discovery is without merit.

Respondent also states that ECM's customer information is protected against disclosure under Respondent's standard confidentiality agreement with its customers. That agreement, attached as Exhibit C to Respondent's Motion for Protective Order, clearly permits a party to disclose confidential information, when disclosure is required in judicial proceedings. Paragraph 3 of the Confidentiality Agreement, which Respondent cites, states in pertinent part:

> The obligation of nondisclosure in this Agreement shall not be breached by disclosure required in a judicial proceeding or governmental investigation, provided Recipient gives Discloser prior notice of such requirement and affords Discloser an opportunity to oppose such disclosure or seek a protective order.

The plain language of ECM's confidentiality agreement, set forth above, clearly contemplates, and does not bar, either party to the agreement from producing confidential information in litigation.[3]

The Protective Order Governing Discovery issued in this case on October 22, 2013 ("Protective Order") is designed to protect against competitive harm resulting from disclosure of confidential business information produced in the course of discovery. For example, Paragraph 7 of the Protective Order strictly limits the disclosure of confidential information to outside counsel and adjudicative personnel, and their assistants and consultants, and to witnesses or deponents who authored or received such confidential information previously. Because adequate safeguards are in place to ensure sensitive information will not be misused, Respondent may not withhold the requested discovery even if such information is confidential and/or represents trade

[3] Respondent maintains that paragraph 3 of its standard confidentiality agreement will still require ECM to notify its customers that it is disclosing their information and that, once so notified, the customers will cease doing business with ECM. This argument fails. The term "Recipient" is defined by the confidentiality agreement as the "receiver of the confidential information," and the "Discloser" is the disclosing party. Motion for Protective Order Exh. C at ¶ 1. As applied to paragraph 3 of the confidentiality agreement, the "Recipient" of the asserted confidential customer information would be Complaint Counsel, and the "Discloser" would be Respondent. There does not appear to be any requirement that the "Discloser" provide any notifications, as claimed by Respondent. In addition, as addressed further *infra*, Respondent fails to demonstrate that customers will cease doing business with Respondent upon learning that ECM's customer information has been produced in this litigation.

secrets, as argued by Respondent. Respondent claims that the Protective Order is not sufficient to protect ECM's competitive interest because it does not protect ECM from the economic harm of lost business that, according to Respondent, will result as soon as such customers learn that their information is being disclosed in this litigation. Respondent's assertions that customers will cease doing business with ECM once customers learn that their information has been disclosed, resulting in serious economic harm to ECM, are unsupported and rejected, as more fully explained below.

B. Customer list

Respondent does not, and cannot reasonably, argue that its customer list is not relevant under the discovery rules. The nature of Respondent's representations to its customers and distributors is a key issue in the case, and identification of ECM's customers and distributors would seem to be a gateway to developing evidence on that issue. Thus, discovery of a complete customer list is clearly calculated to "yield information relevant to" this case. 16 C.F.R. § 3.31(c)(1). Respondent argues, however, that it should not be required to produce a complete customer list because the economic harm likely to result from that disclosure outweighs the discovery benefit of a complete customer list.

Respondent asserts that if a complete customer list is provided, Complaint Counsel will proceed to seek discovery from at least 50, or even all, of ECM's customers, and that "every customer contacted by Complaint Counsel will cease doing business with ECM." Memorandum in Support of Motion for Protective Order at 2. According to the Declaration of ECM's Chief Executive Officer, Robert Sinclair, attached to the Motion for Protective Order, a loss of "more than 10 of [ECM's] existing customers" or the loss of even "one of its top 10 revenue generating companies," would place ECM in "imminent financial peril, either suffering severe financial losses for which recovery would be very difficult, if not impossible, or into financial insolvency." Sinclair Decl. ¶ 22. Thus, through a protective order, ECM seeks to produce a limited list of 50 customers, selected by Respondent and exclusive of its top revenue generating customers, and to further limit to 10 the number of customers from such list that Complaint Counsel may contact directly for formal or informal discovery. Complaint Counsel responds that Respondent should not be permitted to dictate Complaint Counsel's discovery plan by providing a "cherry-picked," and potentially unrepresentative, universe of customers and that Respondent has failed to demonstrate that ECM will suffer the devastating economic harm claimed, if ECM is required to produce a complete customer list.

Respondent's assertion that disclosure of ECM's customer list will inevitably result in a devastating loss of business is not sufficiently supported by the facts presented. The Sinclair Declaration, upon which Respondent relies, states: "Customer fear of associational liability could create a mass flight if the FTC seeks information from any number of ECM customers. ECM believes that [the] FTC contacted at least three ECM customers during its pre-complaint investigation. None of the three have ordered ECM additives since July, 2012." Sinclair Decl. ¶ 15. The Declaration does not explain the basis for ECM's "belief" regarding the customers previously contacted; but more important, ECM provides no factual basis for concluding that there is any causal connection between the asserted pre-Complaint customer contact and such customers' failure to order ECM additives since July 2012, or that ECM's other customers would

withdraw their business if contacted by Complaint Counsel.[4] To assume that the FTC's pre-Complaint contact with these previous customers caused these customers to "cease doing business" with Respondent, and to further assume that any and all other customers that are contacted will have the same response, resulting in "mass flight," would be speculation at best.

In addition, Mr. Sinclair's statement that Complaint Counsel's contacting more than 10 customers will result in "severe financial losses" or "financial insolvency," *Id.* at ¶ 22, does not cite financial records, or set forth any particular factual basis, and amounts to nothing more than unsupported opinion. *See In re Lab. Corp. of Am.*, 2011 FTC LEXIS 31 (Feb. 28, 2011) (denying motion to quash subpoena where movant's assertion of burden and expense was bare allegation without supporting facts). In any event, Complaint Counsel states that if ECM produces a complete customer list, it will choose a subset of those customers and limit its contacts to this subset. Thus, it cannot be assumed that producing a complete customer list will result in every customer becoming the target of further discovery from Complaint Counsel, as predicted by Respondent. Moreover, Complaint Counsel asserts, a complete customer list will enable Complaint Counsel to make a reasoned determination of which customers merit further discovery, and to thereby "limit [the discovery] in a manner that conserves both parties' resources." Reply at 4.

For all the foregoing reasons, Respondent has failed to demonstrate that producing a complete customer list will cause ECM undue economic harm that outweighs the relevance of the discovery, or that Complaint Counsel's discovery of the customer list should be limited as requested in the Motion for Protective Order.

C. ECM's revenues per customer

Respondent contends that ECM's revenues per customer are not relevant because, according to Respondent, there is no association between the amount paid by a customer to ECM and the nature or extent of biodegradability representations made by ECM. This argument is unpersuasive. First, Respondent's proposed protective order appears to acknowledge the relevance of customer revenues for discovery, since its proposed order would provide the requested information, albeit for only 10 customers. In addition, even if ECM's sales representations do not vary by size of the customer, it does not follow that customer generated revenues have no bearing on any of the allegations, or defenses, or the potential remedy, in this case. At a minimum, revenues generated by an alleged deceptive practice may be relevant to the nature and extent of the permissible remedy in this case, should a violation be found. Thus, Respondent has failed to meet its burden of demonstrating that the requested discovery should be barred as not relevant.

Respondent further asserts that revenues by customer are also protected from discovery by Respondent's confidentiality agreements with its customers. As noted above, the confidentiality agreement is no bar to disclosing customer information in the course of a judicial

[4] In this regard, Complaint Counsel states that the ECM customers that were contacted prior to the issuance of the Complaint in this case are distinguishable because these customers were themselves the subject of investigation regarding suspected biodegradability misrepresentations, and entered into consent orders with the FTC.

proceeding, such as this. Accordingly, for all the foregoing reasons, Respondent has failed to demonstrate that ECM's revenues by customer should not be disclosed in discovery.

D. Communications with customers

Respondent acknowledges that ECM's communications with its customers regarding ECM Additives are discoverable, stating that it "accepts the need for a reasonable opportunity to probe" such communications with its customers. Respondent contends that there is no need to probe or produce such communications for every customer because, according to the Sinclair Declaration, "ECM does not alter its sales presentations or advertising claims based on the size of [its] clients, or the amount of revenue obtained per client." Sinclair Decl. ¶ 12. Thus, Respondent argues, any effort by Complaint Counsel to probe communications with a large number of customers will yield only cumulative and duplicative information, and such effort must, therefore, be limited. Complaint Counsel argues it is entitled to test ECM's assertion that sales presentations do not vary. Moreover, in its Reply, Complaint Counsel points to documents tending to dispute the notion that Respondent's sales presentations do not vary among customers. It cannot be concluded, based on the present record, that permitting discovery of ECM's communications with customers will result in cumulative or duplicative discovery.

Respondent further argues that Complaint Counsel can obtain ECM's communications with its customers from ECM itself, which Respondent asserts is a cheaper and less burdensome source for such information than ECM's customers. Therefore, Respondent argues, Complaint Counsel should be limited to obtaining such materials from ECM, and should not be permitted to contact ECM customers for the purpose of obtaining customers' communications with ECM. This argument is curious, given that ECM is presently opposing producing its records of customer communications. Moreover, it would be premature to determine whether obtaining discovery of communications directly from ECM's customers is more burdensome or more expensive than obtaining such communications from ECM. The parties do not state that any such discovery has been issued to ECM's customers, and there is no pending motion to quash from any customer resisting discovery of ECM communications on the ground of burden or expense. In addition, Complaint Counsel states that it will seek discovery from only a subset of ECM customers, drawn from a complete ECM customer list, so it cannot be assumed that each customer will be the subject of further discovery.

Finally, Respondent contends that the request for "all communications" with customers "regarding" ECM Additives is overbroad, and will result in production of "hundreds of thousands" of emails and documents that may not pertain to the case. Moreover, Respondent claims, such a large production would require 50-70 hours of counsel review, at an estimated cost of $25,000. Sinclair Decl. ¶ 21. It is noteworthy that Respondent has provided no documentation to support the foregoing opinions of Mr. Sinclair. Complaint Counsel responds that it is prepared to negotiate appropriate search terms to reduce the number of responsive materials, provided that it first receives a complete customer list. Based on the foregoing, overbreadth is an insufficient basis for limiting Complaint Counsel's requested discovery.

V. Conclusion

For all the foregoing reasons, Respondent's Motion for Protective Order is DENIED, and Complaint Counsel Cross-Motion to Compel is GRANTED. It is further ORDERED that Respondent shall provide a complete customer list as requested by Complaint Counsel's Interrogatory 1 and required by the mandatory initial disclosures provided under Rule 3.31(b)(1) no later than January 16, 2014.

ORDERED:

D M Chappell

D. Michael Chappell
Chief Administrative Law Judge

Date: January 10, 2014