

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES
Washington, D.C.

PUBLIC DOCUMENT



In the Matter of

ECM BioFilms, Inc.,
a corporation, also d/b/a
Enviroplastics International,

Respondent.

Docket No. 9358

ORIGINAL

PUBLIC DOCUMENT

**RESPONDENT'S MOTION FOR LEAVE TO FILE A REPLY TO COMPLAINT
COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR *IN CAMERA*
TREATMENT OF PROPOSED TRIAL EXHIBITS**

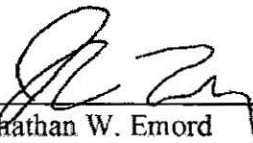
ECM BioFilms, Inc. ("ECM"), by counsel, hereby requests leave to file the attached Reply (Exh. A). A Reply is warranted in light of the following:

- Complaint Counsel raises new argument in the form of the charge that counsel to ECM failed to meet and confer prior to filing the Motion for *in Camera* Treatment of Proposed Trial Exhibits. See Opposition, at P. 3. ECM respectfully requests that this Court grant it leave to respond to the charge in the attached Reply, which concerns solely the aforementioned section of the Opposition.

Rule 3.22(d) permits Reply pleadings with leave of Court, where that pleading would draw the Administrative Law Judge's attention to recent important developments. For the foregoing reasons, explained more fully in ECM's accompanying Reply memorandum, good cause exists for grant of this motion in that it ensures a full record of argument, rather than a one-sided presentation, on the new argument raised by Complaint Counsel. ECM respectfully requests that the Court receive and file the attached Reply.

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Respectfully submitted,




Jonathan W. Emord
EMORD & ASSOCIATES, P.C.
11808 Wolf Run Lane
Clifton, VA 20124
Telephone: 202-466-6937

DATED: July 16, 2014

STATEMENT CONCERNING MEET AND CONFER

Pursuant to Rule 3.22(g), 21 C.F.R. § 3.22(g), the undersigned counsel certifies that, on July 15, 2014, Respondent's counsel conferred via telephone with Complaint Counsel in a good faith effort to resolve by agreement the issues raised in the foregoing Motion. Complaint Counsel represented to Respondent's counsel that they do not consent to this motion for leave.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2014, I caused a true and correct copy of the paper original of the foregoing document to be served as follows:

One electronic copy to the **Office of the Secretary** filed through the Federal Trade Commission's E-Filing System:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Room H-113
Washington, DC 20580
Email: secretary@ftc.gov

One electronic courtesy copy to the **Office of the Administrative Law Judge**:

The Honorable D. Michael Chappell
Administrative Law Judge
600 Pennsylvania Ave., NW, Room H-110
Washington, DC 20580

One electronic copy to **Counsel for Complainant**:

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I further certify that I retain a paper copy of the signed original of the foregoing document that is available for review by the parties and adjudicator consistent with the Commission's Rules.



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Exhibit A

UNITED STATES OF AMERICA
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OFFICE OF THE ADMINISTRATIVE LAW JUDGES
Washington, D.C.

In the Matter of

ECM BioFilms, Inc.,
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Envioplastics International,

Respondent.

Docket No. 9358

PUBLIC

**RESPONDENT ECM BIOFILM'S REPLY TO NEW ARGUMENT IN COMPLAINT
COUNSEL'S OPPOSITION TO MOTION FOR *IN CAMERA* TREATMENT OF
PROPOSED TRIAL EXHIBITS**

Respondent ECM BioFilms hereby submits this Reply to new argument contained in Complaint Counsel's Opposition to ECM's Motion for *In Camera* Treatment of Proposed Trial Exhibits. Consistent with Rule 3.22(d), ECM responds narrowly to Complaint Counsel's argument that ECM failed to meet and confer under Rule 3.22(g), first raised in its Opposition pleading.

The parties have conferred on these confidentiality issues earlier in this case. RX-A (Apr. 6, 2014 Letter). They agreed at that time, given Complaint Counsel's voluminous discovery demands, that ECM would be permitted to designate blocks of information "confidential" with the onus on ECM thereafter to reduce or "refine" the quantum of documents so designated. Complaint Counsel agreed to this approach, with the caveat that ECM would later refine its confidentiality designations. ECM has now done that, in the only manner possible through a motion for *in camera* treatment, reducing the universe of "confidential" material

substantially, down to just 37 possible exhibits out of some 1,500+ files that may be introduced in this case. That approach was consistent with the parties' prior conference and understanding.

Second, the motion for *in camera* treatment is not a motion listed in Rule 3.22(g) that requires a meeting of the parties before submission. *See* 16 C.F.R. § 3.22(g). Complaint Counsel thus errs in its application of the rule, even had no conference occurred. The reason for that exclusion is likely because the parties cannot agree to maintain *in camera* protection of exhibit files on their own; that decision is exclusively within the province of this Court, and a motion is not optional, it is *required*. *See* 16 C.F.R. § 3.45(b) (“A party or third party may obtain *in camera* treatment for material, or portions therefor, offered into evidence **only by motion to the Administrative Law Judge**”) (emphasis added). Accordingly, whether the parties agree on the confidential nature of ECM's documents is of no consequence to whether a motion will be filed, it must by rule. Because the parties cannot “agree” amongst themselves to maintain *in camera* status, a meeting under Rule 3.22(g) has no utility, unlike, e.g., a discovery motion under Rule 3.38 whereby the parties might resolve their differences without resort to motions practice. There is therefore no hint of prejudice to Complaint Counsel. If anything, ECM suffers because a further conference on the subset of documents previously agreed to be assigned confidentiality could only have benefitted ECM in that securing Complaint Counsel's endorsement may have bolstered its motion.

Third, the requirement that motions for *in camera* treatment be filed is prescribed by the Scheduling Order and Rule 3.45(c) and, so, ECM has no option but to file, regardless of the parties respective positions on the merits. Here, again, a Rule 3.22(g) meeting cannot alter the filing requirement.

It is passing strange for Complaint Counsel to posit the meet and confer argument in the face of a rule requirement to file when Complaint Counsel just submitted on July 14, 2014 a Motion to Exclude Documents in this case without satisfying Rule 3.22(g) or the Scheduling Order. *See* CC Mot. to Exclude 1999 McClaren/Hart Report for the Truth of the Matter Asserted (July 14, 2014). That motion contained no certificate or statement under Rule 3.22 or Paragraph 4 of the Scheduling Order. In the absence of a rule mandating filing of their motion, Complaint Counsel nevertheless failed to meet and confer, yet, hypocritically attacked ECM's submission for lack of a conference. If anything, the motion to exclude documents would be of the type envisioned within rule 3.22(g) because the parties could theoretically agree (albeit unlikely) not to introduce certain documents.

In conclusion, ECM has conferred with counsel over the course of this case concerning the confidential matters and, therein, defined the universe of documents that would be marked confidential. ECM's motion for *in camera* treatment substantially reduced the universe of information marked for *in camera* designation. Even were no conference to have occurred, Rule 3.22(g) renders a meeting superfluous because the motion is required to be filed.

For the foregoing reasons, and those included in ECM's opening motion for *in camera* treatment, ECM respectfully requests that this Court grant ECM's motion for *in camera* treatment as explained in ECM's opening motion.

Respectfully submitted,

/s/ Jonathan W. Emord
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DATED: July 16, 2014.

CERTIFICATE OF SERVICE

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Respectfully submitted,

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DATED: July 16, 2014

Exhibit RX-A



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February 6, 2014

VIA EMAIL:

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Peter A. Arhangelsky, Esq.
602.334.4416
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Re: No. 9358, In re ECM BioFilms; Document Production

Dear Counsel:

This letter follows our conversation of February 6, 2014 concerning Respondent ECM's discovery response. The production defined in this letter will render moot Complaint Counsel's pending Motion to Compel Production of Documents (filed January 23, 2014).

ECM shall produce the entirety of its customer correspondence files contained in its archived electronic storage for the period of January 1, 2009 through January 1, 2014. That production will include all files contained in ECM's electronic storage or database related to all ECM customers. That production will be limited in the following ways. First, ECM will redact or expurgate its customers' confidential business information to the extent that information is defined by mutual confidentiality agreements executed with certain ECM customers. Second, ECM will redact or expurgate all information subject to privilege, including, e.g., the attorney work product privilege, the attorney-client privilege, and trade secret privileges. Third, because ECM will be required to produce bulk documents under short deadlines, ECM shall designate all correspondence with customers (and associated files) as confidential under the standing protective order. Thereafter ECM will refine its designations.


ECM will timely respond to Complaint Counsel's second set of discovery requests, and provide all responsive documents under Complaint Counsel's first set of discovery requests, subject to the aforementioned limitations. ECM will produce all scientific and technical documents responsive to your discovery demand if those documents (1) are possessed by ECM and (2) were not already produced in prior productions.

ECM will produce its archived files on a rolling basis, meaning as it is retrieved and immediately after it is reviewed by counsel, on or before February 21, 2014. Thus, ECM agrees to complete the production by February 21, 2014, subject to its obligation and right to amend or supplement discovery under 16 C.F.R. § 3.31(e). ECM will produce the remainder of its Microsoft Access database summations (encompassing all emails, faxes, and phone calls from January 1, 2009 to the present) on or before February 12, 2014. ECM will not produce the MS Access notations in native format because the program produces records in PDF format, which have been supplied to Complaint Counsel in a “reasonably usable form.” See 16 C.F.R. § 3.37(c)(ii); see also 16 C.F.R. § 3.37(c)(iii) (“[a] party need not produce the same electronically stored information in more than one form”).

ECM provides this proposal in a good faith effort to resolve outstanding discovery disputes. The Court has imposed a 1pm Eastern deadline on February 7, 2014 to consider any surreply ECM may file in response to Complaint Counsel’s pending Motion to Compel. ECM intends to file a Motion for Leave to File a Surreply no later than 12:00pm Eastern, February 7, 2014, unless Complaint Counsel agrees to withdraw or moot the pending motion before that time.

Please do not hesitate to contact us with any questions.

Sincerely,



Jonathan W. Emord
Peter A. Arhangelsky
Counsel to Respondent ECM BioFilms, Inc.