ORIGINAL

ORDER ON

A PROTECTIVE ORDER AND RESPONDENT'S

CROSS-M

ORDER

On April 21, 2014,

nsel filed an

Complaint Cou

2014,

er ("Opposition and Cross-Motion"). On A

Complain Counsel filed its

Response to Respondent's cross-Mot

Modify Protective Order ("Response"). As

explained below, the Motion is GR

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ents and depos ion testimony

from from various nonparties and has scheduled

Plastic Bags, Down to Earth

"Protective Order"), nonparty information th

ted as "confidential" cannot be

disclosed to EC

Leading Mis

ns that exist when the depositions begin, and ar

ng ECA's officers and employees

Respondent asserts that, in an effort to limit the costs of attending depositions of nonparties, ECM has elected to appear pro se at the nonparty depositions, through Mr. Sinclair, with Respondent's counsel "supporting" Mr. Sinclair, by telephone, remotely from counsel's offices, "only when examination warrants excusing Mr. Sinclair to protect the deponents' trade secret or proprietary information for which competitive injury could reasonably result." Opposition and Cross-Motion at 3. Respondent requests that the Protective Order be revised to: (1) permit ECM to receive and examine deponents concerning documents and information authored by ECM or disclosed to ECM that a

> 5. A designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph 1 of this Order.
>
> 6. Material may be designated as confidential by placing on or affixing to the document containing such material (in such manner as will not interfere with the legibility thereof), or if an entire folder or box of documents is confidential by placing or affixing to that folder or box, the designation "CONFIDENTIAL – FTC Docket No. 9358" or any other appropriate notice that identifies this proceeding, together with an indication of the portion or portions of the document considered to be confidential material. Confidential information contained in electronic documents may also be designated as confidential by placing the designation "CONFIDENTIAL – FTC Docket No. 9358" or any other appropriate notice that identifies this proceeding, on the face of the CD or DVD or other medium on which the document is produced. . . .
>
> 7. Confidential material shall be disclosed only to: (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including consultants, provided they are not affiliated in any way with a respondent and have signed an agreement to abide by the terms of the protective order; and (e) any witness or deponent who may have authored or received the information in question.

III. Complaint Counsel's Motion

Complaint Counsel states that "Down to Earth requested that its documents receive confidential treatment." Motion, CX-A ¶ 2. Complaint Counsel also states that "many [nonparties] responded [to its subpoena] without counsel (including Island Plastic Bags and FP International), and they may not have understood the precise process associated with designating material 'confidential.'" Motion at 2 n.4. Complaint Counsel acknowledges that nonparties have over-designated materials as confidential. Motion at 7 n.16; see also Motion at 2 n.4 (characterizing requests for confidentiality as "arguably defective").

The Protective Order sets forth the requirements for designating materials produced as "confidential." Significantly, a nonparty cannot designate documents as "confidential" without good faith and a careful determination that (a) the material is not reasonably believed to be already in the public domain and that (b) counsel believes the material so designated actually constitutes confidential material as defined in Paragraph 1 of the Protective Order. Protective Order ¶ 5. According to Respondent, the nonparties have designated all of their documents confidential. Respondent notes, for example, that documents designated by FP International as "confidential" include marketing literature intended for public dissemination. Opposition and Cross-Motion at 6. Publicly disseminated marketing materials cannot be considered

"confidential." Thus, the nonparties did not have a good faith basis for designating all of their material "confidential," as confidential material is defined under the Protective Order.

The Protective Order also sets forth the mechanisms for designating materials produced as "confidential." An oral request does not satisfy the requirements of Paragraph 6 of the Protective Order. *See* Protective Order ¶ 6 (mechanisms for designating material as confidential

of Respondent from having access to nonparties' confidential materials. In *In re McWane*, respondent sought to revise the protective order to enable its in-house counsel to review confidential materials and provide an affidavit averring that its in-house counsel was not involved in competitive decision-making. *In re McWane, Inc.*, 2012 FTC LEXIS 140 (Aug. 8, 2012). There, because the nonparties responding to subpoenas had a right to expect that the documents they designated as "confidential" would be treated as confidential under the terms of the protective order and because respondent failed to articulate any reason for failing to request access to confidential information for in-house counsel earlier in the case, prior to the production of confidential information by these nonparties, or to assert any special circumstances that might justify a deviation from the standard protective order language, respondent's motion was denied.

information." Opposition to Cross-Motion at 2. Respondent argues that exclud[illegible]

[illegible]

[illegible] made the required [illegible]

[illegible] limited access to confidential materials under the [illegible] pursuant to Commission rules 4.1(a)(2). Moreover, because ECM is represented by [illegible] counsel who can protect ECM's rights in the [illegible] [illegible] prejudice as a result of Mr. Smith's [illegible]

II. Conclusion

[illegible]