

Before the
FEDERAL MARITIME COMMISSION

Washington, D.C. 20573

Docket No. 23-10

BED BATH & BEYOND INC. v. YANG MING MARINE TRANSPORT CORP.

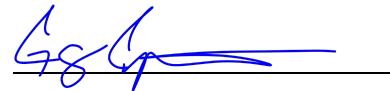
CONSENT MOTION FOR ENTRY OF PROTECTIVE ORDER

Complainant 20230930-DK-Butterfly-1, Inc., formerly known as Bed Bath & Beyond Inc. (“BBBY” or “Complainant”), with the consent of Respondent Yang Ming Marine Transportation Corp. (“Yang Ming” or “Respondent”), hereby moves pursuant to Rule 201(i) of the Commission’s Rules of Practice and Procedure, 46 C.F.R. § 502.141(j), for entry of a protective order in connection with the above-captioned proceeding. Issuance of a protective order is necessary and required to enable the parties to fully respond to discovery requests, which may cover information and documents that are confidential, proprietary, and/or commercially sensitive. A proposed protective order is attached for consideration by the Presiding Officer (“ALJ”). The parties have agreed to the terms of the Protective Order.

Dated: December 29, 2023

Respectfully submitted,

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PROTECTIVE ORDER

Upon stipulation of Complainant 20230930-DK-Butterfly-1, Inc., formerly known as Bed Bath & Beyond Inc. (“BBBY” or “Complainant”) and Respondent Yang Ming Marine Transportation Corp. (“Yang Ming” or “Respondent”), the Parties, through their respective attorneys, and in order to expedite the exchange of certain confidential information, hereby submit the following proposed Protective Order (the “Order”) to the ALJ for due consideration and issuance:

IT IS HEREBY ORDERED THAT:

1. Except as otherwise ordered by the ALJ, this Order shall apply to all documents, answers to interrogatories, answers to requests for admissions, responses to requests for production of documents, responses to subpoenas, deposition transcripts and exhibits, expert materials, or other writings produced, given or filed in this action, and all information derived from any of the foregoing, that are designated as “Confidential” or “Attorneys Eyes Only” in accordance with the terms of this Order.
2. A party (or producing non-party) may designate as “Confidential” any information that is commercially sensitive and is not publicly known, including information provided by third parties to the producing party or non-party with the expectation that the information remain confidential (“Confidential Information”). Confidential Information subject to this Order shall be used solely for purposes of this litigation in accordance with provisions of this Order. Except with the prior written consent of the producing party or non-party or with prior order of the ALJ, Confidential Information and any information derived therefrom may only be disclosed to:

- a. counsel for the parties, including in-house counsel, and their legal, paralegal and clerical staff and printing, copying, and electronic discovery vendors;
 - b. any officers before whom any deposition in this action is taken, including stenographic reporters, videographers, and any necessary secretarial, clerical, or other personnel of such officers engaged for the preparation of verbatim transcripts and/or recordings in this proceeding;
 - c. any person(s) who created or previously received the Confidential Information;
 - d. employees of the Federal Maritime Commission (the “Commission”);
 - e. experts retained by a party and their respective personnel; and
 - f. any other person the parties have agreed to in advance in writing.
3. A party (or producing non-party) may designate as Attorneys Eyes Only (“AEO”) any information or material whose disclosure to anyone other than outside counsel has a substantial probability of jeopardizing the producing party or non-party’s competitive business interests or the competitive or privacy interests of the producing party or non-party’s suppliers, service providers, customers or clients, or of an individual party in this proceeding. AEO material subject to this Order shall be used solely for purposes of this litigation in accordance with provisions of this Order. Except with the prior written consent of the producing party or non-party or with prior order of the ALJ, AEO material and any information derived therefrom may only be disclosed to:
 - a. outside counsel and in-house counsel for the parties and their legal, paralegal and clerical staff and printing, copying, and electronic discovery vendors;
 - b. any officers before whom any deposition in this action is taken, including stenographic reporters, videographers, and any necessary secretarial, clerical, or

other personnel of such officers engaged for the preparation of verbatim transcripts and/or recordings in this proceeding;

- c. any person(s) who created or previously received the AEO material;
- d. employees of the Federal Maritime Commission (the “Commission”); and
- e. any other person the parties have agreed to in advance in writing or, if the parties are unable to agree after meeting and conferring in good faith on the issue, upon an Order from the Presiding Officer in the above-captioned matter. The process for resolving such a dispute shall be as follows:

- i. Counsel for the parties shall confer in a good faith effort to resolve any differences.
- ii. Failing agreement of the parties, the party objecting to the disclosure of the AEO information to the proposed person may file an appropriate motion with the ALJ and shall (1) certify that s/he has sought in good faith to confer with opposing counsel and has been unable to resolve the dispute by agreement; and (2) identify by specific reasons why disclosure of the particular information to the proposed person should be denied.
- iii. Within five business days of receiving such a motion, the opposing party shall respond to the motion by showing with particularity the reasons why the AEO information should be disclosed to the proposed person.
- iv. The burden of establishing that the AEO information should not be shared with the proposed person shall be on the party seeking to prevent such disclosure. AEO material shall be presumptively permissible to be shared with a party’s retained experts related to the above-captioned matter.

- v. If a response is timely made as provided in subparagraph (iii) above, until the motion is ruled upon by the ALJ, the designation of confidentiality shall remain in full force and effect and the information shall continue to be accorded the treatment required by this Order.
4. Information shall be designated by the producing party or non-party as Confidential Information or AEO in the following manner:
- a. in the case of information contained in a document, answer to interrogatory, answer to request for admission, response to request for production of documents, response to subpoena, expert report, or other writing, by stamping or otherwise marking, in such a manner as not to interfere with the legibility of the documents, the label “Confidential” or “Attorneys Eyes Only” / “AEO” on the face thereof at the time of production or copying;
 - b. in the case of information contained or revealed in a deposition, whether in a question, answer or exhibit, by noting the designation on the record at the time of the deposition, or within ten business days after receipt of the deposition transcript. The transcript pages and any associated documents containing confidential information shall be bound separately and shall contain on each page, including the cover page, an appropriate notation identifying it as “Confidential” or “Attorneys Eyes Only” / “AEO”.
 - c. In the case of information contained or referenced in legal documents filed with the Commission, including, but not limited to, motions and legal memoranda in support, the parties shall seek to reach agreement regarding the release of information, failing such an agreement by stamping or otherwise marking, in such a manner as not to interfere with the legibility of the documents, the words

“Confidential” or “Attorneys Eyes Only” / “AEO” on every page containing or referencing the Confidential Information or AEO material. Such documents shall be filed with the Commission under seal. A party that files a pleading in accordance with this paragraph shall promptly serve on the other party (or non-party whose Confidential Information or AEO material is implicated) a proposed redacted copy of the pleading with the claimed protected information deleted and clearly marked “Proposed Redacted Copy” in the upper right-hand corner of the first page. Within five business days after their receipt of the proposed redacted copy, the receiving party or non-party shall advise the party originating the pleading of any additional redactions it requires. The originating party shall promptly provide the other party or non-party with a copy of the pleading from which all information that any party or non-party has requested be redacted has been redacted and clearly marked “Agreed-Upon Redacted Copy – May be Made Public” in the upper right-hand corner of the page. During the five-day period, the proposed redacted copy shall be treated as protected. At the expiration of the five-day period, or when agreement is reached, the agreed-upon redacted copy shall be filed with the Commission by the originating party; and

- d. in the case of information exchanged prior to the entry of this Order, by procedures adopted by counsel for the parties, which procedures shall be consistent with those specified in subparts (a) – (c) of this paragraph 4.
5. It is the responsibility of all persons receiving materials containing Confidential Information or AEO material that is properly marked to maintain such materials in a secure and appropriately identified manner.

6. It is the responsibility of counsel for each party to this action to ensure that those receiving Confidential Information or AEO material properly marked pursuant to this Order have knowledge of the terms of this Order and agree to be bound by them. Prior to any such disclosure, recipients who are approved pursuant to paragraphs 2 (e) or (f) above must read and agree in writing to abide by the terms of this Order in the form of Exhibit A hereto. A copy of each recipient's written acknowledgment shall be kept by the party divulging the Confidential Information or AEO material.
7. When serving any discovery request or subpoena upon a non-party, it shall be the obligation of the party requesting such discovery from a non-party to include a copy of this Order when said discovery request or subpoena is served upon the non-party.
8. Any producing party or non-party may designate any discovery material containing Confidential Information or AEO material that it inadvertently produced without the appropriate confidentiality designation by providing written notice to counsel for all parties identifying the particular discovery material that should have been designated as "Confidential" or "Attorneys Eyes Only" / "AEO". Such notice must be provided within a reasonable time following the producing party or non-party's discovery that it produced the discovery material subject to such notice without the appropriate confidentiality designation(s).
9. The designation of information as Confidential or AEO by the producing party or non-party shall not waive or affect in any way the right of the receiving party to contest the designation of confidentiality. The designation of confidentiality may be contested as follows:

- a. Counsel for the parties shall confer in a good faith effort to resolve any differences.
 - b. Failing agreement of the parties, the party objecting to the designation of information as Confidential or AEO may file an appropriate motion with the ALJ and shall (1) certify that s/he has sought in good faith to confer with opposing counsel and has been unable to resolve the dispute by agreement; and (2) identify by specific category or document number the information for which relief is sought.
 - c. Within ten business days of receiving such a motion, the opposing party or non-party shall respond to the motion by showing with particularity with respect to each challenged item of Confidential or AEO information, the reasons why such information has been properly designated as Confidential or AEO.
 - d. The burden of establishing that information is Confidential or AEO shall be on the party or non-party designating it as such.
 - e. If a response is timely made as provided in subparagraph (c) above, until the motion is ruled upon by the ALJ, the designation of confidentiality shall remain in full force and effect and the information shall continue to be accorded the treatment required by this Order.
10. The production or disclosure of Confidential Information or AEO material shall in no way constitute a waiver of any sort, including of: (a) any producing party or non-party's right to object to the production or disclosure of other information in this proceeding or in any other proceeding; (b) any objections to discovery or admissibility that any producing party or non-party or receiving party may assert; or (c) the parties' ability to use their own documents, communications, information, or testimony.
11. Nothing herein shall be deemed to waive any attorney-client privilege, attorney work product protection, or similar protection recognized by applicable law, or be deemed

an admission as to the admissibility in evidence of any facts, documents, communications, information, or testimony revealed in the course of discovery in this proceeding. In particular, any production of attorney-client privileged, attorney work product, or similarly protected discovery material does not constitute a waiver of any claim of privilege, work product, or other similar protection. A receiving party shall not argue that such a production constitutes a waiver of privilege, work product, or other similar protection and shall promptly return any such inadvertently produced privileged, work product, or similarly protected discovery material upon notification or discovery of the inadvertent production and shall not use the privileged, work product, or other similarly protected information contained therein for any purpose other than to challenge whether such material is protected by the attorney-client privilege, the attorney work product doctrine, or other similar protection, in which case the discovery material being challenged shall be treated as if designated “Attorneys Eyes Only” / “AEO” until such time as the ALJ rules on the privilege protection.

12. If Confidential Information or AEO material in the possession of the receiving party is subpoenaed by any court, administrative or legislative body, or any other person purporting to have authority to subpoena such information, the party to whom the subpoena is directed shall give written notice of the subpoena (including the delivery of a copy thereof) to counsel for the party or non-party that produced the information or documents promptly after the receipt of the subpoena. In the event that the subpoena purports to require production of such Confidential or AEO information on less than 7 days’ notice, the party to whom the subpoena is directed shall give immediate email notice of the receipt of such subpoena, and forthwith deliver a copy thereof, to the attorney for the producing party or non-party.
13. Within thirty days after the conclusion of this proceeding, including any appellate proceedings, all Confidential and AEO information (including copies and documents containing information derived therefrom) shall be destroyed or returned to the

producing party or non-party, at the election of the receiving party, provided that documents previously filed with the Commission containing such information may either be destroyed or retained under seal and preserved as confidential in accordance with the terms of this Order.

14. The provisions of this Order shall survive and remain in full force and effect after the conclusion of this proceeding, including any appellate proceedings.

SO ORDERED,

Dated:

EXHIBIT A

AGREEMENT TO ABIDE BY THE TERMS OF PROTECTIVE ORDER

I acknowledge that I have read the foregoing Protective Order and understand its contents, and I hereby agree to abide by its terms and conditions.

NAME:

DATE: _____