

ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of)

PUBLIC DOCUMENT

Ardagh Group S.A.,)
a public limited liability company, and)

DOCKET NO. 9356

Compagnie de Saint-Gobain,)
a corporation, and)

Saint-Gobain Containers, Inc.,)
a corporation.)

MOTION OF NON-PARTY MILLERCOORS LLC
FOR *IN CAMERA* TREATMENT OF PROPOSED EVIDENCE

MillerCoors LLC (“MillerCoors”) respectfully requests, pursuant to 16 C.F.R. § 3.45(b), an order granting *in camera* treatment of certain documents and testimony that Complaint Counsel and Respondents Ardagh Group S.A., Compagnie de Saint-Gobain, and Saint-Gobain Containers (“Respondents”) have designated for possible introduction in the administrative trial in this matter. MillerCoors, which is not a party to the above-captioned matter, produced the documents at issue in response to subpoenas served on it by Complaint Counsel and Respondents. The deposition testimony introduced was subpoenaed by Respondents.

By letter dated November 19, 2013, Complaint Counsel notified MillerCoors that it intends to introduce into evidence certain documents produced by MillerCoors in response to the subpoena; the declaration of Jim Sheehy, MillerCoors’ Vice President of Procurement; and portions of the deposition testimony transcripts given by MillerCoors employees Jim Sheehy and David Kroll (the “Sheehy deposition” and the “Kroll deposition”). By letter dated November 19, 2013, counsel for Respondents likewise advised MillerCoors that Respondents intend to

introduce into evidence certain documents and portions of the Sheehy and Kroll deposition transcripts.

The documents identified by the parties and the deposition transcripts have been designated as confidential by MillerCoors. With this motion, MillerCoors requests *in camera* treatment of certain of these materials. As demonstrated below, the materials that are the subject of this motion meet the standard required to justify *in camera* treatment in this proceeding. Information contained in these documents and in the Sheehy deposition transcript is competitively sensitive and is held in confidence by MillerCoors. Public disclosure of this evidence is likely to cause direct, serious harm to MillerCoors' competitive position. Therefore, pursuant to 16 C.F.R. § 3.45(b), MillerCoors respectfully moves for *in camera* treatment of the documents and testimony in question. MillerCoors submits the Declaration of Jim Sheehy, its Vice President of Procurement, attached as **Exhibit A**, in further support of this motion.

A description of each document identified by Complaint Counsel and counsel for Respondents as potential trial exhibits for which MillerCoors seeks *in camera* treatment is attached **Exhibit B**. The documents are submitted for *in camera* review only to the Office of Administrative Law Judges, and are identified by exhibit designation both in this motion and in the Declaration of Jim Sheehy. Each of the subject documents was treated as "Confidential" under the terms of the Protective Order Governing Discovery Material entered in this matter on July 1, 2013 ("Protective Order"). Copies of all of the documents, as well as the Sheehy deposition transcript, are attached as **Exhibit D**.

I. STANDARD FOR *IN CAMERA* TREATMENT

The evidence described in this motion warrants *in camera* treatment as provided by 16 C.F.R. § 3.45(b). Under 16 C.F.R. § 3.45(b), requests for *in camera* treatment must show that public disclosure of the document in question "will result in a clearly defined, serious injury to

the person or corporation whose records are involved.” *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). That showing of a clearly defined, serious injury can be made by establishing that the document in question is “sufficiently secret and sufficiently material to the applicant’s business that disclosure would result in serious competitive injury.” *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980).

The following factors should be weighed in considering both secrecy and materiality: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors (a greater burden is placed on applicant when the information is old); (5) the amount of effort or money expended by him in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *See In re Bristol-Myers Co.*, 90 F.T.C. 455, 456-57 (1977). In this context, “the courts have generally attempted to protect confidential business information from unnecessary airing.” *Hood*, 58 F.T.C. at 1188.

A showing of injury may consist of extrinsic evidence or, in certain instances, may be inferred from the nature of the documents themselves. *In re E.I. DuPont de Nemours & Co.*, 97 F.T.C. 116 (1981). Administrative law judges have broad discretion in applying these factors to determine whether information warrants *in camera* treatment. *See In re General Foods Corp.*, 95 F.T.C. at 352. Moreover, the Commission has stated that a request for *in camera* treatment by a non-party company to an FTC proceeding (such as MillerCoors) should be given “special solicitude.” *In re Crown Cork & Seal Co.*, 71 F.T.C. 1714 (1967) (“Petitioner’s plea warrants special solicitude coming as it does from a third-party bystander in no way involved in the proceedings whose records, if *in camera* treatment is denied, will be open to the scrutiny of its competitors.”); *see also In re Kaiser Aluminum & Chemical Corp.*, 103 F.T.C. 500 (1984)

(requests for *in camera* treatment by third parties should be given special solicitude because, as a policy matter, such treatment encourages the third party to cooperate with future adjudicative discovery requests).

The Commission has also 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); *Hood*, 58 F.T.C. at 1188-89; *In re Kaiser Aluminum*, 103 F.T.C. at 500. 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. See, e.g., *In re Union Oil Col. of Cal.*, 2004 FTC LEXIS 223, at *2 (Nov. 22, 2004); *In re Int'l Ass'n of Conference Interpreters*, 1996 FTC LEXIS 298, at *13-14 (June 26, 1996). Indefinite *in camera* treatment may be granted where the competitive sensitivity or other proprietary value of the information will not diminish with the passage of time. *In re Coca Cola Co.*, 1900 F.T.C. LEXIS 364 (Oct. 17, 1990).

II. THE MILLERCOORS DOCUMENTS AND EXCERPTS OF JIM SHEEHY'S DEPOSITION MEET THE STANDARD FOR *IN CAMERA* TREATMENT

A. The MillerCoors Documents Identified in Exhibit B Meet the Standard for *In Camera* Treatment.

The information contained in each of the documents described in Exhibit B is confidential, and disclosure of such information would cause serious competitive injury to MillerCoors, thereby meeting the standard set forth by the Commission for *in camera* treatment. *In re General Foods Corp.*, 95 F.T.C. at 355. As detailed in the accompanying Declaration of Jim Sheehy, attached as Exhibit A, MillerCoors takes substantial measures to protect the secrecy of the information contained in these documents and expends a considerable amount of money and effort in creating the information contained in many of these documents. Sheehy Decl., ¶¶ 2,

9. Additionally, it would be extremely difficult for MillerCoors' competitors or customers to obtain the information contained in the subject documents. *Id.* at ¶ 2.

Each of the documents identified in Exhibit B contains highly sensitive information related either to MillerCoors' strategic planning or MillerCoors' source supply contracts for packaging materials. *Id.* at ¶ 4. Documents containing information relevant to MillerCoors' strategic planning initiatives and consumer insights ascertained through research are important to MillerCoors' business, competitiveness, and profitability. Were a competitor to know this sensitive information, this competitor would gain a significant business advantage at the expense of MillerCoors. Moreover, existing or potential packaging suppliers armed with such sensitive information regarding MillerCoors' current costs and strategy could use it to their advantage in future negotiations with MillerCoors. The disclosure of this critically sensitive information would be highly detrimental to MillerCoors as it would provide both the suppliers with whom MillerCoors does or may contract and MillerCoors' competitors with sensitive financial and strategic information, causing serious and irreparable harm to MillerCoors. *Id.* at ¶¶ 3, 4, 11.

MillerCoors has taken significant steps to protect the confidential nature of the subject documents, all of which were produced under a compulsory subpoena process. MillerCoors submitted the subject documents under the protection of the Protective Order issued in this matter, designating all such documents as "confidential" either by stamping confidential on all such documents or by designating the documents as "confidential" in accompanying correspondence, and fully expected that these documents would not be exposed to its customers, competitors, or suppliers. *Id.* at ¶ 2. Furthermore, MillerCoors keeps the information contained in the subject documents confidential, and the information is not publicly available. *Id.* at ¶ 2, 10. It also has taken reasonable measures to protect the confidentiality of the information contained in the documents. *Id.*

The documents for which MillerCoors seeks *in camera* treatment can be separated into two categories: (a) strategic planning and consumer insights documents; and (b) documents relating to MillerCoors' costs and strategy regarding source supply contracts for packaging materials. *Id.* at ¶ 4.

Strategic Planning and Consumer Insights Documents

The first category of documents includes DX080, DX159, DX331, DX454, DX496, DX522, PX4041, PX4088, PX4096, PX4097, PX4105, PX4106, PX4107, PX4112, PX4114, PX4115, and PX4157. *Id.* at ¶ 6. The information contained in these documents is highly confidential and contains sensitive business analyses. The disclosure of this information would reveal to MillerCoors' competitors, as well as to its existing and potential suppliers, its future plans for strategic growth and new products, as well MillerCoors' perception of the market. *Id.*

Further, not all of the products discussed in the strategic planning and consumer insights documents have not been launched yet. For example, the ongoing initiative to move from glass to PET bottles in singles for certain brands – discussed at length in DX080, DX454, DX496, DX522, and PX4041 – will not launch until 2014. *Id.* at ¶ 6. These materials contain competitive information that shows MillerCoors' thinking for moving forward with the PET bottle initiative. While it is public knowledge that MillerCoors is launching the PET bottle in 2014, the reasons for and strategy behind the launch should not be public. *Id.*

Additionally, the consumer insight reports¹ ascertained through proprietary and confidential research projects are important to MillerCoors' business and competitive position. Ongoing projects, such as work with packaging certain brands in aluminum pints, continue to represent a true market advantage for MillerCoors over competing packages. *Id.* MillerCoors has spent a considerable amount of money and effort developing this information, and its

¹ DX159, DX331, PX4088, PX4096, PX4097, PX4105, PX4106, PX4107, PX4112, PX4114, PX4115, and PX4157.

competitors should not be provided insight into MillerCoors' business strategies and consumer research, which are highly confidential and unavailable to the public. *See In re Bristol-Meyers Co.*, 90 F.T.C. at 456.

Documents Relating to MillerCoors' Costs and Strategy Regarding Source Supply Contracts for Packaging Materials

The second category of documents includes DX319, DX327, DX336, DX570, DX660, DX722, DX723, DX724, PX4037, PX4057, PX4063, PX4065, PX4614, PX4648, and PX5028. Sheehy Decl., ¶ 7. The information contained in these documents is highly confidential and sensitive to MillerCoors. The materials include details regarding MillerCoors' current contracts with O-I for glass bottles and Ball Corporation for metal containers, along with MillerCoors' negotiating strategies and views of the market. *Id.* at ¶ 7. MillerCoors will negotiate new contracts with suppliers in the near future, and disclosure of these materials would put it at a severe competitive disadvantage during negotiations. Disclosure would give existing and potential suppliers an unfair "insider's" perspective of MillerCoors' financial strengths and weaknesses, views of the market for packaging materials and its participants, and its short and long term strategy for purchasing packaging materials. *Id.*

This category also includes a number of documents MillerCoors created specifically in response to this litigation and the preceding FTC investigation. For example, PX5028 is the declaration Jim Sheehy provided on June 21, 2013, and reflects MillerCoors' negotiating strategy during the most recent bidding process for a glass source supply contract. *Id.* at ¶ 7. Additionally, DX570 is MillerCoors' response to Specification 1 of the Subpoena it received from the Federal Trade Commission. This report was specially prepared in response to the Subpoena, and contains proprietary cost information for almost all of MillerCoors' products. *Id.* Packaging costs are a substantial input cost and are extremely sensitive to MillerCoors. *Id.* Disclosure of this

information to competitors would be highly detrimental to MillerCoors' operations and result in a significant loss of business advantage for MillerCoors. *Id.*

Based on the above facts, and the support demonstrated in Exhibit A by the Declaration of Jim Sheehy, MillerCoors has adequately demonstrated the secrecy and materiality set forth in *Bristol-Myers*, 90 F.T.C. at 456-57, and the documents listed and described in Exhibit B should be afforded *in camera* status.

B. Portions of Jim Sheehy's Deposition Should Be Afforded *In Camera* Treatment.

Complaint Counsel and counsel for Respondents have proposed to introduce into evidence specific excerpts from Jim Sheehy's August 29, 2013 deposition during the administrative law trial. MillerCoors seeks to have certain portions of Mr. Sheehy's deposition, itemized in **Exhibit C**, afforded *in camera* treatment. The excerpts listed in Exhibit C detail the same kinds of information as the documents described above, including MillerCoors' negotiating strategies and views of the source supply markets. Sheehy Decl., at ¶ 8.

Much of the testimony Mr. Sheehy provided concerns PX5028, the declaration he provided on June 21, 2013, and details MillerCoors' negotiating strategy during the most recent bidding process for a glass source supply contract. *Id.* As discussed above, MillerCoors will negotiate new contracts with suppliers in the near future, and disclosure of this testimony would put it at a severe competitive disadvantage during these negotiations. *Id.*

Based on the above facts, and the support demonstrated in Exhibit A by the Declaration of Jim Sheehy, MillerCoors has adequately demonstrated the secrecy and materiality set forth in *Bristol-Myers*, 90 F.T.C. at 456-57, and the excerpts listed Exhibit C should be afforded *in camera* status.

III. *IN CAMERA* TREATMENT SHOULD EXTEND FOR A FIVE YEAR PERIOD

MillerCoors seeks *in camera* treatment for the documents identified in Exhibit B and for the testimony identified in Exhibit C for a period of five (5) years. As a non-party seeking *in camera* treatment for its confidential business information, MillerCoors' request should be treated with "special solicitude." *In re Kaiser Aluminum & Chemical Corp.*, 103 F.T.C. at 500. Additionally, reasonable periods of *in camera* treatment encourage non-parties to cooperate with future discovery requests in adjudicative proceedings. *Id.* At great expense, MillerCoors has cooperated with the discovery demands of both parties to this matter, producing two witnesses for depositions and thousands of pages of documents over the course of three separate productions.

The documents and testimony for which MillerCoors seeks *in camera* treatment have been made available for use by Complaint Counsel and counsel for Respondents in accordance with the terms of the Protective Order. Disclosing documents or testimony containing MillerCoors' highly confidential business information will not materially promote the resolution of this matter. Instead, disclosure will materially harm MillerCoors and create a loss of business advantage. Thus, the balance of interests weighs in favor of *in camera* treatment for the documents and testimony. *See In re Bristol-Myers*, 90 F.T.C. at 456-57.

Further, MillerCoors' request that *in camera* treatment for the documents be maintained for five years is reasonable in light of the fact that the documents qualify as the types of business records – business strategies, marketing plans, financial information and costs – for which the Commission regularly has granted *in camera* treatment. *Hood*, 58 F.T.C. at 1188-89; *In re Kaiser Aluminum*, 103 F.T.C. at 500. Moreover, five years is MillerCoors' reasonable estimate of the minimum length of time for the information at issue to potentially become outdated and irrelevant, considering that many of the innovations discussed in the documents have not been

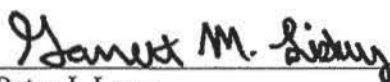
commercially released, and that the contract terms included are still in effect and up for renegotiation soon. Disclosure of this information will create an unreasonable and unnecessary risk of competitive harm to MillerCoors such that *in camera* treatment is necessary for a period of five (5) years.

IV. CONCLUSION

Accordingly, for the reasons set forth above and in the Declaration of Jim Sheehy submitted in support of this motion, MillerCoors respectfully requests that this Court grant its motion directing *in camera* treatment for the documents listed in and described in Exhibit B and for the excerpts from the deposition of Jim Sheehy listed in Exhibit C.

Dated: December 9, 2013

Respectfully submitted,



Peter J. Love
Garrett M. Liskey
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Tel: 202-879-3939
Fax: 202-626-1700
E-mail: pjlove@jonesday.com
gmliskey@jonesday.com

Attorneys for MillerCoors LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December, 2013, the foregoing motion was served

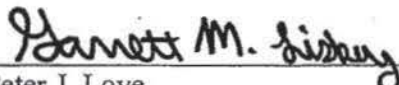
on the following:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580
(via FTC E-Filing System and hand delivery)

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580
(via hand delivery)

Edward Hassi
James Abell
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580
ehassi@ftc.gov
jabell@ftc.gov
(via electronic mail)

Mark Lanpher
Jason Swergold
Shearman & Sterling LLP
599 Lexington Avenue
New York, NY 10022
mark.lanpher@shearman.com
jason.swergold@shearman.com
(via electronic mail)


Peter J. Love
Garrett M. Liskey
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Tel: 202-879-3939
Fax: 202-626-1700
E-mail: pjlove@jonesday.com
gmliskey@jonesday.com

Attorneys for MillerCoors LLC

EXHIBIT A

REDACTED

EXHIBIT B

Documents For Which MillerCoors LLC Seeks *In Camera* Treatment

REDACTED

EXHIBIT C

Excerpts From Jim Sheehy's Deposition For Which
MillerCoors LLC Seeks *In Camera* Treatment

REDACTED

EXHIBIT D

REDACTED