

ORIGINAL



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

In the Matter of _____
POLYPORE INTERNATIONAL, INC., _____
Respondent. _____

Docket No. 9327

ORDER ON RESPONDENT’S MOTION FOR *IN CAMERA* TREATMENT

I.

Pursuant to Rule 3.45(b) of the Commission’s Rules of Practice and the October 22, 2008 Scheduling Order entered in this matter, Respondent Polypore International, Inc. submitted its motion for *in camera* treatment for materials (“Motion”), on April 9, 2009. Complaint Counsel submitted its Opposition to Respondent’s Motion on April 16, 2009. On April 23, 2009, Respondent submitted a motion for leave to file a reply brief and its proposed reply brief. Respondent’s motion for leave to file a reply brief is GRANTED. For the reasons set forth below, Respondent’s motion for *in camera* treatment is DENIED WITHOUT PREJUDICE.

II.

Respondent states that Complaint Counsel’s Final Proposed Exhibit List identifies approximately 1,364 exhibits and that Respondent’s Final Proposed Exhibit List identifies approximately 1,500 potential trial exhibits. Respondent further states that it carefully reviewed each document identified on either party’s exhibit list to determine whether the confidential material warranted *in camera* treatment. Respondent identified several categories of documents and listed and described the documents within them and argues that disclosure of these documents is likely to cause direct, serious harm to Respondent’s competitive position.

Complaint Counsel states that Respondent’s motion seeks *in camera* treatment for over 1,600 documents and argues that Respondent has failed to justify its broad request for what should be a narrow application of *in camera* treatment. Complaint Counsel contends that Respondent seeks *in camera* treatment for: business plans and strategies containing the type of information considered by the Commission in *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184 (1961); documents that are three or more years old; and documents containing information that is already in the public domain.

In its Reply, Respondent charges that, in suggesting that the public be allowed unfettered access to Respondent’s confidential and sensitive documents, Complaint Counsel will inevitably

create a less competitive marketplace and harm competition. Respondent asserts that Complaint Counsel objects to Respondent's motion simply to further harm and waste Respondent's limited resources.

III.

In Commission proceedings, requests for *in camera* treatment must show that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved. *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500 (1984); *In re H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). That showing can be made by establishing that the documentary evidence is "sufficiently secret and sufficiently material to the applicant's business that disclosure would result in serious competitive injury," and then balancing that factor against the importance of the information in explaining the rationale of Commission decisions. *Kaiser*, 103 F.T.C. at 500; *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980); *In re Bristol Myers Co.*, 90 F.T.C. 455, 456 (1977).

The Federal Trade Commission strongly favors making available to the public the full record of its adjudicative proceedings to permit public evaluation of the fairness of the Commission's work and to provide guidance to persons affected by its actions. *In re Crown Cork & Seal Co., Inc.*, 71 F.T.C. 1714, 1714-15 (1967); *Hood*, 58 F.T.C. at 1186 ("[T]here is a substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons."). A heavy burden of showing good cause for withholding documents from the public record rests with the party requesting that documents be placed *in camera*. *Hood*, 58 F.T.C. at 1188.

A review of the documents submitted with the motion reveals that many of the documents do not meet the strict standards for *in camera* treatment. A motion for *in camera* treatment must be narrowly tailored to request *in camera* treatment for only that information that is sufficiently secret and material. In *General Foods*, the Commission upheld the ALJ's denial of *in camera* treatment to a number of charts prepared by an expert witness which showed profits, breakdowns of various costs, sales, and assets relating to several brands of respondent's products. 95 F.T.C. at 353-54. The Commission rejected the respondent's argument that the data was compiled at great expense and would give competitors significant insights into respondent's strengths and weaknesses. *Id.* "[D]ocuments should not be sealed simply because an applicant asserts that its competitors would like to possess the information the documents contain." *Bristol Myers Co.*, 90 F.T.C. at 455.

A number of the documents for which Respondent seeks *in camera* treatment are many years old. "There is a presumption that *in camera* treatment will not be provided to information that is three or more years old." *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157, at *5 (Nov. 22, 2000). The Commission places "a greater burden on a respondent when the information is old" and "has usually denied *in camera* treatment for data [more than three years old]." *In re General Foods Corp.*, 95 F.T.C. at 353-54 (citing *Crown Cork & Seal Co.*, 71 F.T.C. 1714, 1715 (1967) (two and a half to six year old sales data denied *in camera* treatment));

Columbia Broadcasting Sys., Inc., 72 F.T.C. 27, 177-80, 334-35 (1967) (*in camera* treatment for sales data, especially five year old data, criticized by the Commission).

IV.

The overwhelming problem with Respondent's motion is the sheer breadth of documents for which Respondent seeks *in camera* treatment. Upon a cursory review, it appears that Respondent is seeking *in camera* treatment for documents that do not qualify for *in camera* treatment either because the information may have been widely disseminated throughout the company or to investors or does not contain sufficiently secret material. Respondent's designation of Complaint Counsel's proposed final exhibit list is one example of a document that does not readily appear to meet the Commission's strict *in camera* standards.

In addition, the overwhelming number of documents for which *in camera* treatment is sought stems from an apparent overdesignation of documents to be used at trial. According to Respondent, Complaint Counsel's Final Proposed Exhibit List identifies approximately 1,364 exhibits and Respondent's Final Proposed Exhibit List identifies approximately 1,500 potential trial exhibits. Pursuant to Additional Provision 15 of the Scheduling Order entered in this case, "The final exhibit lists shall represent counsels' good faith designation of all trial exhibits other than demonstrative, illustrative, or summary exhibits." A designation of close to 1,500 trial exhibits by each side does not appear reasonable or in good faith.

Rule 3.43 of the Commission's Rules of Practice sets forth: "Irrelevant, immaterial, and unreliable evidence shall be excluded. Evidence, even if relevant, may be excluded . . . by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." 16 C.F.R. § 3.43(b). Both Complaint Counsel and Respondent shall significantly narrow their lists of documents they intend to introduce at trial in order to comply with Rule 3.43(b) or provide sufficient justification for all listed exhibits.

V.

The parties shall submit revised Exhibit Lists by May 1, 2009. The parties shall also include a list of documents that have been removed from their Exhibit Lists. Several non-parties have filed motions for *in camera* treatment for documents that may be offered by the parties at trial. Each party shall review the lists of documents for which *in camera* treatment has been sought by non-parties and indicate which of those documents remain on the party's exhibit list or have been removed from the party's exhibit list.

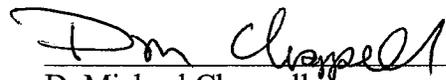
Respondent shall file a renewed motion for *in camera* treatment by May 5, 2009. Respondent must significantly reduce the number of documents for which it seeks *in camera* treatment to only those documents which are sufficiently secret and material to their business that disclosure would result in serious competitive injury. *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500, 500 (1984); *In re H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961).

Complaint Counsel shall file its opposition to Respondent's motion for *in camera* treatment, that notes with specificity the documents to which it objects to the *in camera* request, by May 8, 2009.

VI.

For reasons set forth above, Respondent's motion for *in camera* treatment is **DENIED WITHOUT PREJUDICE.**

ORDERED:



D. Michael Chappell
Administrative Law Judge

Date: April 27, 2009