

ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of)

Docket No. 9327

Polypore International, Inc.)
a corporation)

PUBLIC¹

**RESPONDENT'S MOTION FOR *IN CAMERA* TREATMENT
OF CERTAIN TRIAL EXHIBITS**

In response to Administrative Law Judge Chappell's ("Judge Chappell") April 27, 2009 Order on Respondent's Motion for *In Camera* Treatment ("April 27th Order"), Respondent removed 482 exhibits from its Final Proposed Exhibit List which resulted in 332 exhibits being removed from *in camera* consideration. Similarly, Complaint Counsel's revisions to its Final Proposed Exhibit List allowed Respondent to remove an additional 142 exhibits from *in camera* consideration.² Additionally, Respondent has conducted a complete and thorough review of every exhibit identified in Respondent's original motion for *in camera* treatment in order to reduce the total number of exhibits for which Respondent seeks *in camera* protection. In total, Respondent has removed over 915 exhibits from *in camera* consideration, approximately 60% of the exhibits for which Respondent originally sought *in camera* protection.

¹ This Motion refers to and contains information subject to Respondent's Second Motion for *In Camera* Treatment of Certain Trial Exhibits pursuant to Rule 3.45(b) of the FTC's Rules of Practice. Such information has been redacted and labeled "[Redacted - Subject to Pending Motion for *In Camera* Treatment]" in the public version of this Motion.

² In addition to removing specific exhibits as implied by Judge Chappell's April 27th Order, Complaint Counsel's May 1, 2009 Final Proposed Exhibit List added several exhibits which had not previously been identified to Respondent's Counsel. The actual exhibits were not provided to Respondent's Counsel until May 4, 2009. Respondent's Counsel objects to the inclusion of these improperly added exhibits and will file a motion seeking their exclusion if Complaint Counsel does not immediately withdraw such exhibits. To the extent any such exhibits are ultimately admitted into evidence, Respondent's Counsel reserves the right to seek *in camera* protection for any such exhibit. See Letter of Adam C. Shearer dated May 4, 2009, attached hereto as Exhibit C.

Respondent Polypore International, Inc. (“Polypore”) seeks *in camera* treatment for the remaining exhibits included in its original motion. These documents are highly sensitive and proprietary in nature. Public disclosure of such information would divulge Polypore’s most sensitive and confidential information to competitors and/or customers, and would cause irreparable harm and serious injury to Polypore. Accordingly, Polypore respectfully requests an order requiring these materials to be used at the hearing only *in camera* and maintained under seal.

The specific pages and documents which have been identified by Polypore, after multiple reviews of Complaint Counsel’s and Polypore’s revised Final Proposed Exhibit Lists, fall within the Commission’s strict standards for *in camera* treatment as set forth in the April 27th Order and the opinions of this Commission.³ Each exhibit identified by Polypore contains sensitive information that is “sufficiently secret and sufficiently material to [Polypore’s] business that disclosure would result in serious competitive injury” and, even when balanced against the “importance of the information in explaining the rationale of Commission decisions” warrants *in camera* treatment. *General Foods Corp.*, 95 FTC 352 (1980). The exhibits at issue in this Second Motion are listed in the index attached hereto as Exhibit A. For ease of reference, Polypore has grouped the exhibits identified in Exhibit A into the following categories:

1. Category 1 – Business Plans & Strategies
2. Category 2 – Contract Negotiations & Customer Contracts
3. Category 3 – Intellectual Property & Proprietary Information
4. Category 4 – Market Analysis Documents
5. Category 5 – Pricing Strategy Documents

³ See *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23 1999); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157 (Nov. 22, 2000) and 2000 FTC LEXIS 138 (Sept. 19, 2000); and *In re Basic Research, Inc.*, 2006 FTC LEXIS 14 (Jan. 25, 2006)

6. Category 6 – Customer-Specific Documents
7. Category 7 – Costing Data
8. Category 8 – Sales & Financial Information
9. Category 9 – Multiple Category Documents

The grounds for this Second Motion are set forth herein, and this Second Motion is fully supported by the sworn Second Declaration of Michael Shor (“Shor Decl.”) attached hereto as Exhibit B and which individually analyzes each item listed on Exhibit A. The documents themselves were previously provided as a DVD exhibit to Respondent’s original motion.

Introduction

In response Judge Chappell’s April 27th Order, Respondent conduct a careful re-examination of each exhibit identified in Respondent’s original motion to determine whether the confidential material met the strict standards warranting *in camera* treatment. As a result of this additional review, Respondent has carefully limited the number and nature of documents for which it requests *in camera* protection. Of the approximately 1,600 exhibits for which Respondent originally sought *in camera* treatment, over 915 exhibits have been removed. As Respondent will demonstrate herein and in the supporting Second Declaration of Michael Shor, the public disclosure of the remaining exhibits, identified in Exhibit A hereto, will likely result in a clearly defined, serious injury to Respondent, thus justifying *in camera* treatment under the standard articulated by the Commission in *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23 1999); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157 (Nov. 22, 2000) and 2000 FTC LEXIS 138 (Sept. 19, 2000); and *In re Basic Research, Inc.*, 2006 FTC LEXIS 14 (Jan. 25, 2006).

The exhibits identified in Exhibit A contain confidential information that is paramount to Polypore’s business, competitiveness, and profitability. Indeed, revealing such information

would, among other things: (1) allow Polypore's competitors to gain a commercial advantage through knowledge of Polypore's pricing strategies, production capacities, technical know-how, and manufacturing processes; (2) give Polypore's customers a tactical advantage in future negotiations with Polypore; and (3) enable suppliers to peg the prices they charge Polypore. At the very least, disclosure of the information Polypore seeks to protect would deprive Polypore of its current bargaining position with customers and suppliers; at worst, competitors would be allowed unfettered access to Respondent's confidential and sensitive documents which will inevitably create a less competitive marketplace and harm competition. Continued confidentiality of these documents is key to maintaining Polypore's ability to develop, market, and sell its products in this competitive market dominated by powerful buyers.

Argument

Pursuant to Commission Rule 3.45(b), the Administrative Law Judge may order material, or portions thereof, offered into evidence . . . to be placed *in camera* on a finding that their public disclosure will likely result "in a clearly defined, serious injury to the . . . corporation requesting *in camera* treatment." 16 C.F.R. § 3.45(b)(emphasis added). Establishing that a "serious injury" would ensue with disclosure requires a demonstration that serious and irreparable harm will result from the Court's publication of the confidential documents. Meeting such a standard requires Respondent to make a clear showing that the information concerned is "sufficiently secret and sufficiently material to [Respondent's] business that disclosure would result in serious competitive injury." See *Bristol-Myers Co.*, 90 FTC 455 (1977), *General Foods Corp.*, 95 FTC 352 (1980).

In *Bristol-Myers*, 90 FTC 455 (1977), the Commission outlined six factors to be weighed when determining materiality and secrecy: (1) the extent to which the information is known outside of the applicant's business; (2) the extent to which the information is known by

employees and others involved in the applicant's business; (3) the extent of measures taken by the applicant to guard the secrecy of the information; (4) the value of the information to the applicant and its competitors; (5) the amount of effort or money expended by the applicant in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. Additionally, the Commission has expounded on the definition of "serious injury," stating "[t]he likely loss of business advantages is a good example of a clearly defined, serious injury." *Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 138 (Sept. 19, 2000).

As set forth below and in the Second Declaration of Michael Shor, the documents list in Exhibit A, and grouped by the previously identified nine categories, contain information sufficiently secret, and sufficiently material to Polypore's business, that disclosure constitutes a serious competitive injury under the *Bristol-Myers* factors and prevailing Commission law.

I. IN CAMERA TREATMENT IS WARRANTED FOR THE FOLLOWING POLYPORE DOCUMENTS

A. Category One – Business Plans & Strategies

[Redacted – Subject to Pending Motion for *In Camera* Treatment]

B. Category Two – Contract Negotiations & Customer Contracts

[Redacted – Subject to Pending Motion for *In Camera* Treatment]

C. Category Three – Intellectual Property & Proprietary Information

[Redacted – Subject to Pending Motion for *In Camera* Treatment]

D. Category Four – Market Analysis Documents

[Redacted – Subject to Pending Motion for *In Camera* Treatment]

E. Category Five – Pricing Strategy Documents

[Redacted – Subject to Pending Motion for *In Camera* Treatment]

F. Category Six – Customer-Specific Documents

[Redacted – Subject to Pending Motion for *In Camera* Treatment]

G. Category Seven – Costing Data

[Redacted – Subject to Pending Motion for *In Camera* Treatment]

H. Category Eight – Sales and Financial Information

[Redacted – Subject to Pending Motion for *In Camera* Treatment]

I. Category Nine – Multiple-Category Documents

[Redacted – Subject to Pending Motion for *In Camera* Treatment]

II. *IN CAMERA* TREATMENT IS ALSO WARRANTED FOR POSSIBLE TRIAL TESTIMONY BY POLYPORE’S WITNESSES

Both Respondent and Complaint Counsel have designated several Polypore employees as potential trial witnesses. Polypore’s employees will likely be questioned about the topics covered by this motion. Testimony on all of these topics could result in the disclosure of the same information contained in the documents described above. Thus, Polypore also requests that any trial testimony, either upon direct examination or cross examination by either party on any of these topics, be subject to *in camera* treatment for a period of three (3) to five (5) years from the date of this motion.

Conclusion

[Redacted – Subject to Pending Motion for *In Camera* Treatment]. For the foregoing reasons and those articulated in the Second Declaration of Michael Shor, Polypore respectfully requests that this Court grant *in camera* protection to all the documents identified on Exhibit A and any trial testimony related to the topics covered by the documents in Exhibit A.

Dated: May 5, 2009

Respectfully submitted,



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**UNITED STATES OF AMERICA
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PUBLIC DOCUMENT

PROPOSED ORDER

Upon consideration of Respondent's Second Motion for *In Camera* Treatment of Certain Trial Exhibits, any opposition thereto, any hearing thereon, and the entire record in this proceeding,

IT IS HEREBY ORDERED, that Respondent's Motion is GRANTED.

IT IS FURTHER ORDERED, that pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice, *16 C.F.R. § 3.45(b)*, the documents identified in the index attached as Exhibit A to the Motion, and any related trial testimony, shall be subject to the requested *in camera* treatment and will be kept confidential and not placed on the public record of this proceeding.

D. Michael Chappell
Administrative Law Judge

Date: _____

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2009, I caused to be filed via hand delivery and electronic mail delivery an original and two copies of the foregoing ***Respondent's Second Motion for In Camera Treatment of Certain Trial Exhibits [PUBLIC]***, and that the electronic copy is a true and correct copy of the paper original and that a paper copy with an original signature is being filed with:

Donald S. Clark, Secretary
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, Rm. H-135
Washington, DC 20580
secretary@ftc.gov

I hereby certify that on May 5, 2009, I caused to be served one copy via electronic mail delivery and two copies via overnight mail delivery of the foregoing ***Respondent's Second Motion for In Camera Treatment of Certain Trial Exhibits [PUBLIC]*** upon:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
oalj@ftc.gov

I hereby certify that on May 5, 2009, I caused to be served via first-class mail delivery and electronic mail delivery a copy of the foregoing ***Respondent's Second Motion for In Camera Treatment of Certain Trial Exhibits [PUBLIC]*** upon:

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Exhibits A-C
Redacted