



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

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In the Matter of)	
)	
McWANE, INC.,)	
a corporation, and)	DOCKET NO. 9351
)	
STAR PIPE PRODUCTS, LTD.,)	
a limited partnership.)	
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**RESPONDENT MCWANE, INC.’S MOTION FOR IN CAMERA PROTECTION
OF CERTAIN DOCUMENTS CONTAINING SENSITIVE BUSINESS INFORMATION**

COMES NOW, Respondent McWane, Inc. (“McWane”), and moves for *in camera* protection of a very limited set of documents, containing McWane’s sensitive and proprietary business information, designated by the parties as potential exhibits in the trial of this matter and identified in Exhibits A and B attached hereto (hereinafter the “Subject Documents”).¹ Full copies of the twenty-six (26) Subject Documents have been submitted to the Administrative Law Judge concurrently herewith by hand delivery.

Federal law provides that information in evidence is worthy of *in camera* treatment where “its public disclosure will likely result in a clearly defined, serious injury” to the person or corporation whose records are at issue. *See* 16 C.F.R. § 3.45(b); *see also* FTC Rule of Practice 3.45(b); *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500, 1984 FTC LEXIS 60, at *1 (1984), quoting *In re H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). A party seeking *in*

¹ Counsel for McWane has conferred with Complaint Counsel regarding the issues raised in this motion, and has been authorized to state that Complaint Counsel takes no position with respect to this motion and does not intend to file an opposition.

camera protection must establish that the information is “sufficiently secret and sufficiently material to the applicant's business that disclosure would result in serious competitive injury.” *In the Matter of Evanston Northwestern Healthcare Corp.*, 2005 F.T.C. LEXIS 27, at * 1 (Feb. 9, 2005) (internal citations omitted); *see also In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980). A showing of injury may be supported by extrinsic evidence, such as an affidavit, or inferred from the nature of the documents themselves. *See In the Matter of E.I. Dupont de Nemours & Co.*, 97 F.T.C. 116 (1981).

The Commission considers six factors in evaluating secrecy and materiality: (1) the extent to which the information is known outside of the applicant's business; (2) the extent to which it is known by employees and others involved in the 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. *See In re Bristol-Myers Co.*, 90 F.T.C. 455, 458 (1977). The Commission weighs any likely competitive injury associated with disclosure against the importance of publicly disclosing the information to help explain the rationale of the Commission's decision. *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980).

Applying the standard set forth above, “the courts have generally attempted to protect confidential business information from unnecessary airing.” *H.P. Hood & Sons, Inc.*, 58 F.T.C. at 1188-89; *see also In re Champion Spark Plug Co.*, 1982 FTC LEXIS 85, at *2 (April 5, 1982); *Kaiser Aluminum*, 103 F.T.C. at 500. For example, the FTC has found that “the likely loss of business advantages is a good example of a clearly defined, serious injury.” *In re Dura Lube Corp.*, 1999 FTC LEXIS 255, at *7 (1999) (punctuation omitted). *In camera* treatment of

sensitive business records such as strategic plans, marketing plans, pricing policies, or sales documents is typically extended for a limited time period. *E.g.*, *In re Union Oil Co. 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); *Champion Spark Plug*, 1982 FTC LEXIS 85 at *2 and 1982 FTC LEXIS 92, at *2 (March 4, 1982).

As Exhibits A and B, and the Affidavit of Rick Tatman demonstrate, the Subject Documents meet the standard set forth in 16 C.F.R. §3.45(b). *See* Exhibits A - C, attached hereto. Twenty-one of the 26 Subject Documents are Tyler/Union's Blue Books, which contain both detailed financial statements and the General Manager's Report, which discusses pending and potential litigation and other liabilities.² Tatman Aff., ¶ 2. The remaining Subject Documents are consist of monthly financial statements during the year 2011;³ Tyler/Union's current non-public job pricing information;⁴ and two of Tyler/Union's 2012 customer-specific rebate programs.⁵ *Id.* Because McWane is a privately held corporation which does not disclose sensitive business information to the public, the Subject Documents are considered seriously proprietary information, are kept confidential and remain competitively sensitive in the marketplace. *Id.* The disclosure of the Subject Documents will create an unfair disadvantage to McWane in the marketplace and result in serious competitive injury. *Id.* at ¶¶ 3-4.

The Subject Documents – almost all of which were created within the past three years - are a small fraction of the 2,612 exhibits identified by the parties. *See* Exhs. A and B. The Blue Books, each of which contain not only a General Manager's Report – in which pending and

² Exh. A, CX-2394 – 2406; 2415 – 2419; Exh. B, 630 – 632.

³ Exh. A, CX-2135 and 2138.

⁴ Exh. B, RX-396.

⁵ Exh. B, RX-319 and 361.

potential lawsuits and other liabilities are discussed – but also highly detailed proprietary information pertaining to every aspect of Tyler/Union’s financial status, are kept confidential within McWane and not disclosed to the public. *See* Exh. A, CX-2394-2400, 2415-2419; Exh. B, RX-630-632; Tatman Aff. Public disclosure of the Blue Books would substantially harm McWane, by providing its competitors a wide open look into its innermost financial strengths and weaknesses, that the competitors could use to unfair advantage over McWane. *See Id.* Disclosure of the current customer-specific price and rebate plans would enable McWane’s competitors to leverage more favorable prices and plans for themselves, or even poach McWane’s customers.

McWane has attempted in good faith to limit, to the greatest extent possible, the amount of information for which it is seeking *in camera* treatment. This good faith limitation weighs in favor of granting this motion. *See, e.g., In re Union Oil Co. of Calif.*, 2005 LEXIS 9, at *1 (Jan. 19, 2005) (granting *in camera* treatment where parties sought it only for “narrowly tailored” portions of deposition testimony). Only seven of the Subject Documents contain information over three years old. *See* Exhs A and B. One of those documents is Tyler/Union’s ongoing price protection log; however, McWane’s request for *in camera* protection of the log extends only to the items with prices set to expire in or after 2012. *See* Exh. B, RX-396 (these items appear under the 2012 Tab, 2011 Tab, and one appears under the 2010 Tab). Such current customer-specific pricing information should be protected from McWane’s competitors because it relates to ongoing jobs, and would provide competitors with the identities of customers, locations of specific jobs and sensitive pricing information not otherwise available to the public, which the competitors could then use to analyze and undermine both McWane’s internal pricing and business strategy, and its relationships with customers. *See Id.*

With regard to the other six Subject Documents containing information over three years old, all are Blue Books, and McWane seeks *in camera* protection of only the discrete portion of those Blue Books - the General Manager's Report - which discusses pending and potential litigation and other liabilities wholly unrelated to this action. *See* Exh. A, CX-2394, 2395, 2397, 2398, 2416 and Exh. B, RX-630. Disclosure of this information could expose McWane to liability, undermine McWane's reputation, and otherwise arm McWane's competitors with private information they could use to undermine McWane's relationships with its customers. *See Id.*

Because McWane has demonstrated that the Subject Documents fall within the well-established standard for *in camera* protection, this Motion is due to be granted.

/s/ Joseph A. Ostoyich _____
Joseph A. Ostoyich
One of the Attorneys for McWane, Inc.

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2012, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

I also certify that I delivered via overnight delivery a copy of the foregoing document to:

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

I further certify that I delivered via electronic mail a copy of the foregoing document to:

Edward Hassi, Esq.
Geoffrey M. Green, Esq.
Linda Holleran, Esq.
Thomas H. Brock, Esq.
Michael L. Bloom, Esq.
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J. Alexander Ansaldo, Esq.
Andrew K. Mann, Esq.

By: /s/ William C. Lavery
William C. Lavery
Counsel for McWane, Inc.

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PROPOSED ORDER

On July 31, 2012, McWane, Inc. filed its Motion for In Camera Protection of certain documents appearing on the Exhibit Lists of the parties to this action. Upon consideration of this motion, McWane’s Motion is hereby GRANTED with respect to the twenty-six (26) documents identified in Exhibits A and B to its Motion.

ORDERED:

_____, 2012

D. Michael Chappell
Administrative Law Judge

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STATEMENT REGARDING MEET AND CONFER

Pursuant to Paragraph 4 of the Scheduling Order, one of the attorneys for McWane met and conferred in good faith with Complaint Counsel regarding the issues raised in this motion. Counsel for McWane has been authorized to state that Complaint Counsel takes no position with respect to this motion and does not intend to file an opposition.

By: /s/ William C. Lavery
Counsel for McWane, Inc.

EXHIBIT A

**This exhibit has been
marked Confidential
and redacted in its
entirety**

EXHIBIT B

**This exhibit has been
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EXHIBIT C

**This exhibit has been
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