

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



In the Matter of )  
)  
Ardagh Group S.A., )  
a public limited liability company, and )  
)  
Compagnie de Saint-Gobain, )  
a corporation, and )  
)  
Saint-Gobain Containers, Inc., )  
a corporation. )  
)  
)

*PUBLIC VERSION*

DOCKET NO. 9356

**RESPONDENTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR  
UNOPPOSED MOTION FOR *IN CAMERA* TREATMENT  
OF PROPOSED TRIAL EXHIBITS**

Respondents Ardagh Group S.A., Compagnie de Saint-Gobain, and Saint-Gobain Containers, Inc. respectfully submit this memorandum of law in support of their unopposed motion for *in camera* treatment of certain proposed trial exhibits.

**I. Introduction**

Respondents have produced over two million documents in response to Complaint Counsel's request for documents during its investigation of the proposed merger between Ardagh and Saint-Gobain Containers, as well as during discovery in this action and the related federal action (*FTC v. Ardagh Group S.A., et al.*, 13-CV-1021 (BJR) (D.D.C.)). A subset of these documents contains highly sensitive, confidential information about Respondents' customer contracts and negotiations, core business practices, financial performance, and internal production capabilities. Accordingly, Respondents now move for an order granting *in camera* treatment to 548 proposed trial exhibits and related testimony that, if made public, would result

in a clearly defined, serious competitive injury to Respondents.<sup>1</sup> These exhibits and testimony are listed in Appendix A and Appendix B to Respondents' motion and are grouped into three categories.<sup>2</sup>

Category 1 ("Contracts and Related Negotiations") includes proposed trial exhibits and deposition testimony related to Respondents' contracts, bids, and negotiations with customers and suppliers. The customer-related information is highly confidential because it contains competitively sensitive terms (*e.g.*, price, volume, rebates, price adjustment formulas, payment schedules) that are submitted confidentially to prospective customers and ultimately memorialized in confidential supply contracts. Declaration of Jim Warner ("Warner Decl.") ¶ 4; Declaration of David W. Knight ("Knight Decl.") ¶ 4. Respondents' supplier-related information is confidential because it directly relates to Respondents' production costs and their efforts to improve the procurement process, which gives Respondents a competitive advantage in the industry. Warner Decl. ¶ 12; Knight Decl. ¶ 11.

Category 2 ("Plant Capabilities and Operations") includes proposed trial exhibits and deposition testimony related to individual plant capabilities (*e.g.*, plant configuration, plant capacity, furnace lines, furnace rebuild schedules, and color change schedules) and operational know-how. On a plant by plant level, this information is competitively sensitive because it would provide competitors with a roadmap of Respondent's ability to compete for specific business from specific plants. Warner Decl. ¶ 19; Knight Decl. ¶ 18. In addition, this category

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<sup>1</sup> To the extent that the Court grants *in camera* treatment to any confidential party or third party information contained in the expert reports of Dr. Chetan Sanghvi, Rob Wallace, Mike Kallenberger, or Dr. Ray Bourque, Respondents will submit two versions of the expert reports in accordance with Paragraph 8 of the Court's Scheduling Order.

<sup>2</sup> Respondent Saint-Gobain has also identified a fourth category of documents that include proprietary bottle designs that Saint-Gobain has developed for specific customers. Knight Decl. ¶ 19.

of materials contains highly sensitive information about Ardagh's internal process for reducing soda ash, which is an ongoing process and the result of over three years of invested time.

Declaration of Eamon King ("King Decl.") ¶ 8.

Category 3 ("Financial Terms and Current/Future Business Strategy") includes proposed trial exhibits and deposition testimony containing Respondents' sensitive financial data and current and future business strategy. Like Category 2, some of this information is broken down on a plant-by-plant level, which would provide competitors with an understanding of the performance of Respondents' specific plants and their ability to compete for business. Warner Decl. ¶ 26; Knight Decl. ¶ 23. The information also includes specific business opportunities that Respondents are intending to target in the near-future, as well as long-range plans for improving Respondents' businesses on a micro and macro level. King Decl. ¶ 13; Knight Decl. ¶ 24.

## II. Applicable Legal Standard

Under 16 C.F.R. § 3.45(b), a party may obtain *in camera* treatment of materials to be offered into evidence by showing that "the public disclosure [of the documentary evidence] will result in a clearly defined, serious injury" to the corporation requesting *in camera* treatment. That showing can be made by establishing that the proposed evidence is "sufficiently secret and sufficiently material to [the applicant's] business that disclosure would result in serious competitive injury." *In the Matter of General Foods Corp.*, 1980 F.T.C. LEXIS 99, at \*3 (Mar. 10, 1980); *In the Matter of Union Oil Company of California*, 2004 WL 3142853, at \*1 (F.T.C. Nov. 22, 2004). "The likely loss of a business advantages is a good example of a clearly defined, serious injury." *In re Dura Lube*, 1999 F.T.C. LEXIS 255, at \*7 (Dec. 23, 1999). In determining whether an applicant has made a sufficient showing of secrecy and materiality, this Court has considered six factors: (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 the Matter of Bristol-Myers Co.*, 90 F.T.C. 455, at \*5-6 (Nov. 11, 1977). The Commission has recognized that it may be appropriate to provide *in camera* treatment for business records to be introduced as evidence. *In re Champion Spark Plug Co.*, 1982 F.T.C. LEXIS 85, at \*2 (April 5, 1982); *see Hood*, 58 F.T.C. at 1188-89; *In the Matter of Kaiser Aluminum & Chemical Corporation*, 103 F.T.C. 500, 500 (1984).<sup>3</sup>

### **III. The Proposed Trial Exhibits and Testimony Meet the Clearly Defined, Serious Injury Standard**

The information contained in the proposed trial exhibits and testimony is both secret and material to Respondents' business. As detailed more thoroughly in the accompany declarations of Eamon King, Jim Warner, and David W. Knight, the six *Bristol-Myers* factors all support granting *in camera* treatment for the proposed trial exhibits and testimony identified in Appendix A and Appendix B.

*First*, the information is not known outside of the Respondents' respective business. Respondents' contracts with their customers and suppliers contain confidentiality clauses and this information is not disclosed to the public. Warner Decl. ¶ 4; Knight Decl. ¶ 4. Information about the production capabilities and financial performance of Respondents' specific plants is

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<sup>3</sup> The Court may grant *in camera* treatment for documents more than three years old if the material is sufficiently secret and sufficiently material to the party's business that disclosure would cause serious competitive injury. *In re North Texas Specialty Physicians*, 2004 F.T.C. LEXIS 109, at \*2-3 (Apr. 23, 2004).

not shared publicly or disclosed in public filings. Warner Decl. ¶¶ 19, 25, 28; Knight Decl. ¶¶ 18, 23. Further, Respondents do not share – and indeed, closely guard – highly sensitive manufacturing processes that improve plant performance and efficiency. Warner Decl. ¶ 25; Knight Decl. ¶ .

*Second*, Respondents limit access to this information internally. Much of the information is restricted to senior level executives and shared only with employees who require the information to perform their job responsibilities. Warner Decl. ¶¶ 8, 13, 18, 27; Knight Decl. ¶¶ 7, 12, 17, 22.

*Third*, Respondents have guarded the secrecy of this information and have disclosed it only in response to requests from Complaint Counsel. They have requested confidential treatment of all documents produced during the Complaint Counsel's investigation, and have taken precautions to keep any of this confidential information from being publicly disclosed throughout this litigation and the related federal proceeding.

*Fourth*, the information is of significant value to Respondents, and their competitors would benefit greatly were they to acquire the information. Contractual information reflects internal pricing decisions made by Respondents, and if publicly disclosed, would give competitors a competitive advantage in bidding for customer business. Warner Decl. ¶ 11; Knight Decl. ¶ 10. Competitors would also gain a competitive advantage over Respondents were they privy to plant-specific operational information and financial data that would reveal Respondents' plant capabilities and ability to compete for business. Warner Decl. ¶¶ 19, 28; Knight Decl. ¶ 23. Likewise, Respondents' manufacturing know-how would be highly valuable to any competitor because it would allow competitors to implement more efficient manufacturing processes without investing the time and effort to develop them internally. Warner Decl. ¶ 25;

King Decl. ¶¶ 10, 12. Another example of highly sensitive information is Respondents' current and future business plans, which would allow a competitor to identify Respondents' business opportunities and understand the companies' plant-level performance. King Decl. ¶¶ 13, 14; Knight Decl. ¶¶ 24, 25. If any of this secret and highly sensitive information is disclosed, it would cause serious competitive injury to Respondents. Warner Decl. ¶¶ 11, 14, 19, 25, 28; King Decl. ¶¶ 6, 10, 12, 14; Knight Decl. ¶ 25.

*Fifth*, Respondents have spent significant time and effort to develop their sensitive business information. For example, Ardagh's soda ash reduction process has taken over three years and remains an ongoing project for the company. Warner Decl. ¶ 22; King Decl. ¶ 8. This information is not easily acquirable, and would cause serious competitive injury to Ardagh if publicly disclosed. Warner Decl. ¶ 25; King Decl. ¶10. In addition, Ardagh's management teams has invested significant time and effort into developing manufacturing processes that allow each specific plant to run as efficiently as possible. Warner Decl. ¶ 24.

*Sixth*, for much of the reasons discussed above, the information contained in these documents is difficult to acquire by industry participants. Respondents' contracts have confidentiality clauses and contractual terms are submitted confidentially during the bidding process. Warner Decl. ¶¶ 4-5; Knight Decl. ¶ 4. Respondents do not publicly disclose their plant-specific operational and financial information, nor do they publicly disclose their performance metrics. Warner Decl. ¶¶ 16, 21, 26; King Decl. ¶ 11; Knight Decl. ¶ 18. Therefore, industry participants are unable to acquire this information.

Finally, Complaint Counsel and Respondents have designated portions of deposition testimony from a number of party and third-party witnesses that cover the same confidential and highly sensitive information discussed above. Further, Respondents expect that several

witnesses will testify at the hearing about the same sensitive information. Respondents respectfully request that the designated testimony and any live testimony at the hearing related thereto be given the same *in camera* treatment afforded to the proposed trial exhibits.

#### **IV. Expiration Date**

Respondents seek *in camera* treatment of differing lengths for the highly sensitive information identified in Appendix A and Appendix B.

##### **A. Twenty Year In Camera Treatment**

Respondents respectfully request *in camera* treatment of twenty years for proposed trial exhibits and deposition testimony related to Contracts and Related Negotiations. Respondents' customer contracts are multi-year contracts, and the sensitive nature of the information will not diminish during the life of the contract. Warner Decl. ¶ 10; Knight Decl. ¶ 9.

[Redacted - In Camera Treatment Requested]

Respondents'

supplier contracts are also multi-year contracts, and the terms of these agreements remain sensitive throughout because they are indicative of Respondents' production input costs during the life of the contract. Warner Decl. ¶ 12. As this Court has recognized, extended *in camera* treatment, even for an indefinite period of time, may be warranted where the competitive sensitivity of the information will not diminish with the passage of time. *In the Matter of Union Oil Co. of Cal.*, 2004 WL 2458849, at \*1 (F.T.C. Oct. 7, 2004); *see also* 16 C.F.R. § 3.45(b)(3) (order granting indefinite *in camera* treatment for material other than sensitive personal

information shall state “why the need for confidentiality of the material, or portion thereof at issue is not likely to decrease over time”).

**B. Five Year *In Camera* Treatment**

For materials relating to Plant Capabilities and Operations, Respondents request that *in camera* treatment be extended for a period of five years. *In the Matter of Union Oil Co. of Cal.*, 2004 WL 2458853, at \*2 (F.T.C. Oct. 12, 2004) (granting *in camera* treatment for period of ten years to proprietary information regarding non-party’s “supply needs and production capabilities”). Five year *in camera* treatment is necessary to protect the confidential information contained in these documents. Respondents do not regularly reconfigure their glass plants, and so a plant’s product-specific capabilities are consistent over a several-year period. Warner Decl. ¶ 17; Knight Decl. ¶ 16. Moreover, Ardagh’s manufacturing know-how, such as its soda ash reduction process, provides the company with a competitive advantage by reducing production costs. King Decl. ¶ 8. Because the process to-date has taken over three years to achieve (and is an ongoing process), releasing this information within the next five years would allow competitors to replicate Ardagh’s internal manufacturing work product without investing any of the time required. King Decl. ¶ 10.

**C. Three Year *In Camera* Treatment**

For information related to Respondents’ Financial Terms and Current/Future Business Strategy, Respondents request that *in camera* treatment extend for a period of three years. As this Court has repeatedly noted, *in camera* treatment for business records, such as business strategies, marketing plans, pricing policies, or sales documents, is typically extended for two to five years. *E.g., In re Union Oil Co. of Cal.*, 2004 F.T.C. LEXIS 223, at \*2 (Nov. 22, 2004); *In re Int’l Ass’n of Conference Interpreters*, 1996 F.T.C. LEXIS 298, at \*13-14 (June 26, 1996);

*Champion Spark Plug*, 1982 F.T.C. LEXIS 85 at \*2 and 1982 F.T.C. LEXIS 92, at \*2 (March 4, 1982). The information in these documents includes identifying future business opportunities and financial performance projections that remains relevant, material, and confidential for the entire three year period.

#### V. Conclusion

For the foregoing reasons, Respondents respectfully request that the Court grant their motion for *in camera* treatment of the proposed trial exhibits identified in Appendix A and Appendix B to the Motion.

Dated: December 9, 2013

Respectfully submitted,

SHEARMAN & STERLING LLP

By: /s/ Richard F. Schwed

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**CERTIFICATE OF SERVICE**

I, Jason M. Swergold, an associate at Shearman & Sterling LLP, hereby certify that on December 9, 2013, I caused the foregoing document to be filed using the FTC's E-Filing System, which will send notifications 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 electronic mail and hand 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:

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*Complaint Counsel*

December 9, 2013

By: /s/ Jason M. Swergold  
Jason M. Swergold

**CERTIFICATE FOR ELECTRONIC FILING**

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

December 9, 2013

By: /s/ Jason M. Swergold  
Jason M. Swergold

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
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In the Matter of	)	
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Ardagh Group S.A.,	)	
a public limited liability company, and	)	
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Compagnie de Saint-Gobain,	)	
a corporation, and	)	<i>PUBLIC</i>
	)	
Saint-Gobain Containers, Inc.,	)	<b>DOCKET NO. 9356</b>
a corporation.	)	
	)	
	)	

**STATEMENT REGARDING MEET AND CONFER**

On December 8, 2013, Respondents' counsel, Jason M. Swergold, conferred with Complaint Counsel, Amanda Hamilton, regarding Respondents' Unopposed Motion for *In Camera* Treatment of Proposed Trial Exhibits. Complaint Counsel has indicated that they do not oppose Respondents' motion.

Dated: December 9, 2013

Respectfully submitted,

SHEARMAN & STERLING LLP

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**UNITED STATES OF AMERICA  
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	)	
	)	
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**[PROPOSED] ORDER GRANTING RESPONDENTS' UNOPPOSED MOTION  
FOR *IN CAMERA* TREATMENT OF PROPOSED TRIAL EXHIBITS**

Upon consideration of Respondents' Unopposed Motion For *In Camera* Treatment of Proposed Trial Exhibits, it is hereby ordered that the Motion is **GRANTED** and *in camera* treatment will be given to the exhibits and testimony listed in Appendix A and Appendix B to Respondents' Motion for the time period indicated therein.

Dated: December \_\_, 2013

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Honorable D. Michael Chappell  
Chief Administrative Law Judge

UNITED STATES OF AMERICA  
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Saint-Gobain Containers, Inc., )  
a corporation. ) *DOCKET NO. 9356*  
)  
)  
\_\_\_\_\_ )

DECLARATION OF DAVID W. KNIGHT

I, David W. Knight, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, as follows:

[REDACTED - IN CAMERA TREATMENT  
REQUESTED]

**UNITED STATES OF AMERICA  
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	)	
Saint-Gobain Containers, Inc.,	)	
a corporation.	)	DOCKET NO. 9356
	)	
	)	

**DECLARATION OF DAVID W. KNIGHT**

I, David W. Knight, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, as follows:

**[REDACTED - IN CAMERA TREATMENT  
REQUESTED]**

**UNITED STATES OF AMERICA  
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	)	
Saint-Gobain Containers, Inc.,	)	
a corporation.	)	<b>DOCKET NO. 9356</b>
	)	
	)	

**DECLARATION OF PATRICK EAMON KING**

I, Patrick Eamon King, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, as follows:

**[REDACTED - IN CAMERA TREATMENT  
REQUESTED]**

**UNITED STATES OF AMERICA  
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	)	
Saint-Gobain Containers, Inc.,	)	
a corporation.	)	DOCKET NO. 9356
	)	
	)	

**DECLARATION OF JIM WARNER**

I, Jim Warner, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, as follows:

**[REDACTED - IN CAMERA TREATMENT  
REQUESTED]**