

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

ORIGINAL

In the Matter of )

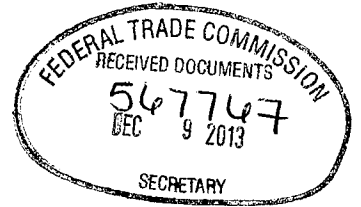
Ardagh Group S.A., )  
a public limited liability company, and )

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

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

Docket No. 9356

PUBLIC



**NON-PARTY CONSTELLATION BRANDS, INC.'S MOTION  
FOR *IN CAMERA* TREATMENT OF PROPOSED OF TRIAL EXHIBITS**

Non-party Constellation Brands, Inc. hereby moves for *in camera* treatment of certain proposed trial exhibits, pursuant to 16 C.F.R. §3.45.

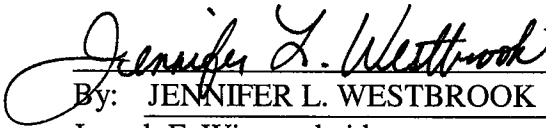
In support of this motion, Constellation Brands, Inc. provides its accompanying memorandum and Declaration of Peter Lijewski.

On December 3, 2013, Counsel for Constellation Brands, Inc. conferred with Complaint Counsel and Respondents' counsel regarding the proposed exhibits for which Constellation Brands, Inc. is seeking *in camera* treatment. Complaint Counsel and Respondents do not oppose this motion.

WHEREFORE, Non-party Constellation Brands, Inc. respectfully requests that this court grant *in camera* treatment to the documents designated in the attached memorandum.

Dated: December 9, 2013

Respectfully submitted,

  
By: JENNIFER L. WESTBROOK

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*Counsel for Constellation Brands, Inc.*

**CERTIFICATE OF SERVICE**

I, Jennifer Westbrook, hereby certify that I served a true and correct copy of the foregoing Non-Party Constellation Brands, Inc.'s Motion for *In Camera* Treatment of Proposed Trial Exhibits, Public Version, upon the following individuals by hand on December 9, 2013.

Hon. D. Michael Chappell  
Chief Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Room H110  
Washington, DC 20580

Donald S. Clark  
Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Room 172  
Washington, DC 20580

I, Jennifer Westbrook, hereby certify that I served a true and correct copy of the foregoing Non-Party Constellation Brands, Inc.'s Motion for *In Camera* Treatment of Proposed Trial Exhibits, Public Version, upon the following individuals by electronic mail on December 9, 2013.

Sebastian Lorigo  
Edward Hassi  
Michael Franchak  
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*Counsel for Defendant Compagnie de Saint-Gobain, and  
Saint-Gobain Containers, Inc.*

  
Jennifer L. Westbrook

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

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In the Matter of )

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

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Saint-Gobain Containers, Inc., a )  
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\_\_\_\_\_

Docket No. 9356

**PUBLIC**

**NON-PARTY CONSTELLATION BRANDS, INC.'S MEMORANDUM  
IN SUPPORT OF ITS MOTION FOR *IN CAMERA*  
TREATMENT OF PROPOSED TRIAL EXHIBITS**

Pursuant to Rule 3.45 of the Federal Trade Commission's Rules of Adjudicative Practice, Non-party Constellation Brands, Inc. ("Constellation ") submits this Memorandum in Support of its Motion for *In Camera* Treatment of Proposed Trial Exhibits.

**I. Introduction**

Constellation, which is not a party to the above-captioned matter, produced over three thousand documents to Complaint Counsel and Respondents in response to their requests for documents as part of discovery in this administrative proceeding. In response to Complaint Counsel's and Respondents' requests for various documents, including competitively sensitive presentations and reports, financial information, contracts, and internal correspondence, Constellation produced these documents to the respective parties on August 12-14, 2013. Constellation designated all of its documents as "Confidential" at the time they were produced. By letters from Complaint Counsel and Respondents dated November 19, 2013, the parties

notified Constellation that they intend to introduce certain Constellation documents into evidence at the administrative hearing in this matter.

Constellation seeks *in camera* treatment of these proposed exhibits because they are confidential, competitively sensitive documents that relate to Constellation's business strategy and present and future operations. Public disclosure would result in a serious competitive injury to Constellation. Counsel for Constellation have carefully reviewed each document and deposition excerpt identified in Table 1 and have determined that they qualify under the standards as set forth in 16 C.F.R. §3.45 for *in camera* treatment.

Accordingly, and pursuant to 16 C.F.R. §3.45, Constellation respectfully submits its motion and moves for an order granting *in camera* treatment for certain proposed trial exhibits designated by Complaint Counsel and Respondents. These documents and deposition testimony are listed in Table 1 and described in the accompanying declaration of Peter Lijewski.<sup>1</sup> The confidential information contained in these proposed exhibits, if disclosed, would result in a clearly defined, serious competitive injury to Constellation.

## II. The Clearly Defined, Serious Injury Standard

An applicant seeking *in camera* protection for material offered into evidence may receive *in camera* treatment when "its public disclosure will likely result in a clearly defined, serious injury." 16 C.F.R. § 3.45(b). An applicant can meet that standard by establishing that the evidence is "sufficiently secret and sufficiently material to the applicant's business that disclosure would result in serious competitive injury." *See In the Matter of Evanston Northwestern Healthcare Corp.*, 2005 FTC LEXIS 27, at \*1 (Feb. 9, 2005) (internal citations

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<sup>1</sup> Table 1 provides a complete list of proposed trial exhibits for which Constellation seeks *in camera* treatment. Table 1 and the declaration accompanying this motion explain the basis for *in camera* treatment for each proposed exhibit.

omitted). In making this determination, administrative courts review six factors to determine 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 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; (5) the amount of effort or money expended by him in developing the information; (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.*, 1977 FTC LEXIS 25, at \*5-6 (Nov. 11, 1997).

### III. Constellation's Documents Meet The Clearly Defined, Serious Injury Standard

All six factors support granting Constellation's motion for *in camera* treatment. First, Constellation treats as confidential every document for which it seeks *in camera* treatment. (*See* Lijewski Decl. ¶¶ 2-3.) The information in these materials is not known to the public or generally outside Constellation (or the party with whom Constellation was negotiating or contracting). These documents are not a matter of public record and have not been fully disclosed in any public context. *Id.*

Second, the internal materials reflect the strategic decision-making of senior executives from Constellation. The confidential information in these documents is not generally known to all employees within Constellation. The internal reports and presentations contain carefully guarded business planning, forecasting, and strategy information. (*See, e.g.*, Lijewski Decl ¶¶ 5-18.) Likewise, documents reflecting Constellation's supplier contracts and negotiations with third parties represent the business goals and competitive strategy of Constellation's senior executives. The contracting terms and conditions are not generally known throughout the organization.

Third, Constellation has carefully guarded the secrecy of these materials. (*See, e.g.,* Lijewski Decl ¶¶ 2-3.) Constellation was compelled to produce the materials pursuant to the discovery process, but otherwise has not publically disclosed the information found within the confidential documents or discussed during Mr. Lijewski's deposition.

Fourth, competitor companies would benefit significantly from gaining access to these materials. The materials reflect Constellation's business strategy, financial plans, budgeting scenarios, competitive goals, and contracting initiatives, all of which are competitively sensitive. For example, the materials include correspondence revealing negotiations with glass suppliers. These materials are competitively sensitive to Constellation, as well as to the parties with which they contract. These documents represent a complex process and are unique to the relevant parties. Competitors would benefit significantly and unfairly from gaining access to these materials.

Fifth, Constellation has spent significant effort and resources in developing some of the materials, particularly financial budgets, strategic plans, and presentations. Constellation has spent considerable time and expended considerable resources to analyze its production activities, financial performance, and potential strategies for future production activities. The public disclosure of this information would harm Constellation's business operations.

Finally, it would be difficult for another party to replicate the information found in these materials because they reflect the work product of senior executives with years of experience at Constellation. The materials are unique and tailored to Constellation and are not known to the general public.

Constellation would suffer irreparable injury if the information contained in these documents and testimony was disclosed to the public. Disclosure of planning, strategy, and



financial documents would give competitors an improper glimpse into the Constellation's day-to-day operations and strategic decision-making, and give them a competitive advantage for future planning and budgeting. (*See, e.g.*, Lijewski Decl ¶¶ 5-18.)

The tribunal may infer, "without a specific showing of how a competitor would use it, that disclosure of allegedly sensitive information would seriously affect the firm's commercial position. Underlying this analysis is a general concern for the seriousness of injury to a firm's commercial or competitive position." *In the Matter of E.I. Dupont de Nemours & Co.*, 1981 FTC LEXIS 91, at \*3 (Jan. 21, 1981). The materials at issue here pose a strong likelihood of harming Constellation's competitive position if disclosed to the public.

The information for which Constellation seeks *in camera* treatment remains relevant and significant today. Constellation seeks *in camera* treatment for information that is generally within three years old. Nevertheless, even aged data is sensitive and remains worthy of protection because they reflect Constellation's business strategies and can impact future negotiations between Constellation and its suppliers. Disclosure of these materials would cause competitive harm to Constellation and its suppliers in future contract negotiations. *See In re Kaiser Aluminum & Chemical Corp.*, 1984 FTC LEXIS 60, at \*2 (May 25, 1984) (holding that material that was over five years old was still sensitive and deserving of *in camera* treatment where "a serious injury would be done by release of this information, which they have never made available to the public").

**IV. The Public Interest in Disclosure of the Proposed Exhibits is Outweighed by the Likelihood of Serious Competitive Harm to Constellation**

As a non-party to this matter, Constellation should receive "special solicitude" in its request for *in camera* treatment of the proposed exhibits. *See In re Kaiser Aluminum & Chemical Corp.*, 1984 FTC LEXIS 60, at \*2-3 (May 25, 1984) (granting *in camera* treatment for

non-parties' sales information that was five years old). Extending *in camera* treatment in appropriate cases and for reasonable periods of time encourages non-parties to cooperate with future discovery requests. *Id.* Although Constellation has complied with the discovery requests in this administrative proceeding, "public understanding of this proceeding does not depend on access" to Constellation's confidential information. *Id.* Therefore, the balance of interests weighs in favor of *in camera* protection for Constellation's documents.

#### V. Expiration Date

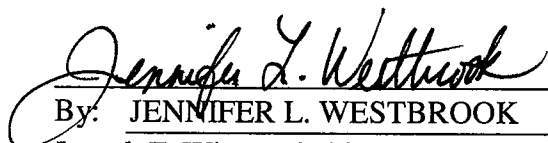
Constellation seeks temporary *in camera* treatment of these confidential documents and deposition testimony identified in Table 1. Specifically, Constellation seeks temporary *in camera* treatment for each category of documents for a period of five years. Where *in camera* treatment is granted for business records, it is typically extended for a period of two to five years. *See In re Kaiser Aluminum & Chemical Corp.*, 1984 FTC LEXIS 60 (May 25, 1984) (granting sales data *in camera* treatment for five years); *Evanston Northwestern Healthcare Corp.*, 2005 FTC LEXIS 27, at \*2 (Feb. 9, 2005); *In re Union Oil Co. of Cal.*, 2004 FTC LEXIS 223, at \*2 (Nov. 22, 2004); *In the Matter of E.I. Dupont de Nemours & Co.*, 1981 FTC LEXIS 91 (Jan. 21, 1981) (granting financial data *in camera* treatment for three years); *In re Int'l Ass. Of Conf. Interpreters*, 1996 FTC. LEXIS 298 (June 26, 1996) (granting contracts *in camera* treatment for three years). Five years is necessary to protect documents related to Constellation's agreements with suppliers because those contracts often last several years. Five years is also necessary to protect business records with competitively sensitive information that contain projections or forecasts impacting future plans and initiatives. Therefore, documents that are three to five years old remain relevant, material, and confidential, and warrant *in camera* treatment.

VI. Conclusion

Pursuant to 16 C.F.R. §3.45, Constellation respectfully moves for *in camera* treatment of the proposed exhibits identified in Table 1.

Dated: December 9, 2013

Respectfully submitted,

  
By: JENNIFER L. WESTBROOK

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*Counsel for Constellation Brands, Inc.*

**CERTIFICATE OF SERVICE**

I, Jennifer Westbrook, hereby certify that I served a true and correct copy of the foregoing Non-party Constellation Brands, Inc.'s Memorandum in Support of Its Motion for *In Camera* Treatment of Proposed Trial Exhibits, Public Version, upon the following individuals by hand on December 9, 2013.

Hon. D. Michael Chappell  
Chief Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Room H110  
Washington, DC 20580

Donald S. Clark  
Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Room 172  
Washington, DC 20580

I, Jennifer Westbrook, hereby certify that I served a true and correct copy of the foregoing Non-party Constellation Brands, Inc.'s Memorandum in Support of Its Motion for *In Camera* Treatment of Proposed Trial Exhibits, Public Version, upon the following individuals by electronic mail on December 9, 2013.

Sebastian Lorigo  
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Michael Franchak  
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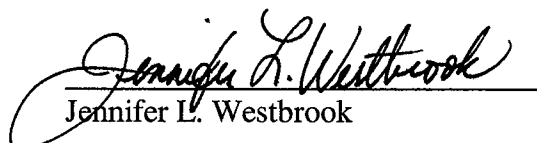
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*Counsel for Defendant Compagnie de Saint-Gobain, and  
Saint-Gobain Containers, Inc.*

  
Jennifer L. Westbrook

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

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In the Matter of )

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

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) Docket No. 9356

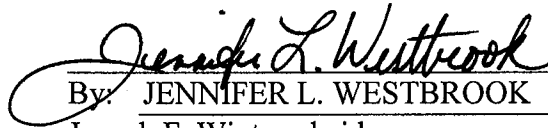
**STATEMENT REGARDING MEET AND CONFER**

On December 3, 2013, at approximately 2:40 p.m., Non-party Constellation Brands, Inc.'s ("Constellation") Counsel, Jennifer Westbrook, conferred telephonically with Respondents' Counsel, Mark Lanpher, regarding Constellation's Motion for *In Camera* Treatment of Proposed Trial Exhibits. Respondents' Counsel indicated that they do not intend to oppose Constellation's motion.

On December 3, 2013, at approximately 3:00 p.m., Non-party Constellation Brands, Inc.'s ("Constellation") Counsel, Jennifer Westbrook, conferred telephonically with Complaint Counsel, Michael Franchak, regarding Constellation's Motion for *In Camera* Treatment of Proposed Trial Exhibits. Complaint Counsel indicated that they do not intend to oppose Constellation's motion.

Respectfully submitted,

Dated: December 9, 2013

  
By: JENNIFER L. WESTBROOK

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*Counsel for Constellation Brands, Inc.*

DM\_US 47289846-1.025309.0011

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

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In the Matter of )

Ardagh Group S.A., )  
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corporation. )

Docket No. 9356

**[PROPOSED] ORDER GRANTING NON-PARTY  
CONSTELLATION BRANDS, INC.'S MOTION  
FOR *IN CAMERA* TREATMENT OF PROPOSED TRIAL EXHIBITS**

Upon consideration of Non-Party, Constellation Brands, Inc.'s Motion for *In Camera* treatment of Proposed Trial Exhibits, it is hereby ordered that *in camera* treatment will be given to the exhibits listed in the Table below for the period of time indicated.

Dated December \_\_\_\_, 2013

\_\_\_\_\_  
The Honorable D. Michael Chappell  
Chief Administrative Law Judge

<b>PX Number</b>	<b>DX Number</b>	<b>Length of <i>In Camera</i> Treatment</b>	<b>Expiration of <i>In Camera</i> Treatment</b>
	DX643	Five Years	December 9, 2018
	DX649	Five Years	December 9, 2018



<b>PX Number</b>	<b>DX Number</b>	<b>Length of <i>In Camera</i> Treatment</b>	<b>Expiration of <i>In Camera</i> Treatment</b>
	DX757	Five Years	December 9, 2018
PX4346	DX648	Five Years	December 9, 2018
PX4347		Five Years	December 9, 2018
PX4348		Five Years	December 9, 2018
PX4351		Five Years	December 9, 2018
PX4354		Five Years	December 9, 2018
PX4370		Five Years	December 9, 2018
PX4371		Five Years	December 9, 2018
PX4378		Five Years	December 9, 2018
PX5031		Five Years	December 9, 2018
PX6042		Five Years	December 9, 2018

**DECLARATION OF PETER LIJEWSKI**

**REDACTED IN ITS ENTIRETY**

**TABLE 1 TO NON-PARTY CONSTELLATION BRANDS, INC.'S MOTION  
FOR *IN CAMERA* TREATMENT OF PROPOSED TRIAL EXHIBITS**

**REDACTED IN ITS ENTIRETY**

**PROPOSED TRIAL EXHIBITS**

**REDACTED IN ITS ENTIRETY**