

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  
Saint-Gobain Containers, Inc.,  
a corporation, and  
Compagnie de Saint-Gobain, a corporation.

PUBLIC

Docket No. 9356

**MOTION OF NON-PARTY**  
**FEVISA INDUSTRIAL, S.A. de C.V.**  
**FOR IN CAMERA TREATMENT OF PROPOSED EVIDENCE**

**I. Introduction**

Non-party Fevisa Industrial, S.A. de C.V. ("Fevisa"), through its undersigned counsel, respectfully submits this motion pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.45(b), and requests that this Court grant *in camera* treatment to the two documents, PX4018 and PX4046, which Complaint Counsel has designated for possible introduction into evidence.

Fevisa is not a party to the above-captioned action. Fevisa produced the documents at issue in response to Complaint Counsel's request during Complaint Counsel's non-public investigative phase and long before Complaint Counsel filed its Complaint. Complaint Counsel sent Fevisa the original request on March 13, 2013 and stated the information Fevisa provided would be afforded confidential treatment. Fevisa then disclosed the two documents at issue, which detail highly sensitive and confidential information regarding Fevisa's exports to the

United States, production capacities, and prices. On July 18, 2013, Fevisa reiterated by letter emailed to Complaint Counsel that confidential treatment of the information was requested.

By letter dated November 19, 2013, Complaint Counsel notified Fevisa that it intends to introduce into evidence PX4018 and PX4046. Accordingly, Fevisa now moves for *in camera* treatment under Rule 3.45(b). Fevisa requests *in camera* treatment be extended indefinitely to the portions of these documents relating to Fevisa's production capacity, and for five (5) years to those portions addressing Fevisa's annual United States exports, its volume/gross, its gross/price, and its percentage of exports to United States customers.

## **II. Legal Standard for *In Camera* Treatment**

Materials merit *in camera* treatment when their disclosure would "result in a clearly defined, serious injury to the person or corporation whose records are involved." *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961); *see also* 16 C.F.R. § 3.45(b). An applicant for *in camera* treatment can demonstrate serious injury by showing that the information at issue is "sufficiently secret and sufficiently material to the applicant's business that disclosure would result in serious competitive injury." *In re General Foods Corp.*, No. 9085 95 F.T.C. 352, 355, 1980 WL 338997, at \*4 (1980); *In re Bristol-Myers Co.*, 90 F.T.C. 455, 456 (1977).

In considering whether to grant *in camera* treatment, the following factors are weighed: (1) the extent to which the information is known outside the applicant's business; (2) the extent to which it 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 him and to his competitors; (5) the amount of effort or money expended by him in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Bristol-Myers*, 90 F.T.C. at 456-57.

Administrative law judges have broad discretion in applying these factors to determine whether information warrants *in camera* treatment. *General Foods Corp.*, 1980 WL 338997, at \*2. Moreover, a non-party requesting *in camera* treatment deserves “special solicitude” for its confidential business information. *See In re Kaiser Aluminum & Chemical Co.*, 103 F.T.C. 500 (1984); *In re Crown Cork & Seal Co.*, 71 F.T.C. 1714 (1967) (“[P]etitioner’s plea warrants special solicitude coming as it does from a third-party bystander in no way involved in the proceedings[.]”).

The Commission has recognized that it may be appropriate to provide *in camera* treatment for certain business records. *See, e.g., In re McWane, Inc.*, No. 9351, 2012 WL 3862131, at \*2 (F.T.C. Aug. 17, 2012); *In re Champion Spark Plug Co.*, 1982 F.T.C. LEXIS 85, at \*2 (Apr. 5, 1982); *Hood*, 58 F.T.C. at 1188-89; *Kaiser Aluminum*, 103 F.T.C. at 500. “Where *in camera* treatment is granted for business records, such as business strategies, marketing plans, pricing policies, or sales documents, it is typically provided for two to five years.” *McWane, Inc.*, No. 9351, 2012 WL 3862131, at \*2. Indefinite *in camera* treatment may be granted, however, when the competitive sensitivity or the proprietary value of the information will not necessarily diminish over time. *In re Coca Cola Co.*, No. 9207, 1990 WL 10081418, at \*3 (F.T.C. Oct. 17, 1990) (quoting 54 Fed. Reg. 49,278-79 (Nov. 30, 1989)).

### **III. The Fevisa Documents Satisfy the Standard for *In Camera* Treatment**

The standard for *in camera* treatment has been satisfied with respect to PX4018 and PX4046, because the information contained in each of these documents is confidential and its disclosure would cause serious competitive harm to Fevisa. *See General Foods Corp.*, 95 F.T.C. at 355. As the accompanying Declaration of Juan R. Silva G., Executive Vice-President of Fevisa, explains, Fevisa expends considerable resources ensuring the information contained in

these two documents remains secret. Furthermore, it would be very difficult for Fevisa's competitors or customers to obtain this information independently.

Each of these documents contains highly sensitive information detailing Fevisa's annual exports to the United States, its production capacity, and its percentage of exports to United States customers, broken down by market sector (beer, wine, and wine coolers). PX4046 additionally contains detailed information regarding Fevisa's volume/gross and price/gross.

This information by its nature could subject Fevisa to serious competitive harm if disclosed. See *McWane, Inc.*, 2012 WL 3862131, at \*3-4 (finding documents containing "customer data, pricing and cost information" warranted *in camera* treatment); *General Foods Corp.*, 96 F.T.C. at 169 n.4 (noting "[r]ecent sales and profit data generally suggest themselves as being both secret and material to the firm concerned"). Fevisa's competitors would gain a significant business advantage – at Fevisa's expense – if this information were disclosed, as they would be unfairly equipped to compete with Fevisa, and could exploit knowledge regarding Fevisa's production capacity in their own negotiations with customers. Similarly, existing or potential customers to whom this information were disclosed would gain significant leverage in future negotiations with Fevisa.

Moreover, Fevisa takes great pains to ensure the confidentiality of its contracts with customers. Were the information in PX4018 and PX4046 to be disclosed, Fevisa would face irreparable damage to its customer relationships. Disclosure of this critical information would thus be highly detrimental to Fevisa.

Furthermore, the public's "understanding of this proceeding does not depend on access to these data." *Kaiser Aluminum*, 103 F.T.C. at 500. Fevisa does not have a business relationship with any of the named parties involved in this litigation. Indeed, Fevisa has no direct presence in

the United States at all, as its products are exported to the U.S. Thus, sensitive information regarding the details of its prices, production, and United States exports will not further illuminate the case against the named parties.

Fevisa submitted this information to the Commission with the understanding that this information would be treated confidentially. And, “[a]s a policy matter, extensions of confidential or *in camera* treatment in appropriate cases involving third party bystanders encourages cooperation with future adjudicative discovery requests.” *Kaiser Aluminum*, 103 F.T.C. at 500.

These facts and the Declaration of Juan R. Silva G. make clear that the information contained in PX4018 and PX4046 is highly confidential and competitively sensitive. Accordingly, these documents should be afforded *in camera* treatment.

#### **IV. *In Camera* Treatment Should Extend to Information Regarding Fevisa’s Production Capacity Indefinitely and to All Other Sensitive Information for Five (5) Years**

While *in camera* treatment generally extends to ordinary business records for five years, *see, e.g., McWane, Inc.*, 2012 WL 3862131, *in camera* treatment may be extended indefinitely when the competitive sensitivity of the information is unlikely to diminish over time, *see, e.g., id.; Coca Cola Co.*, 1990 WL 10081418, at \*3. Specifically, Fevisa respectfully requests that paragraph 6 of PX4018, as well as the columns in both PX4018 and PX4046 named “Percentage of Usage Capacity,” be afforded indefinite *in camera* treatment. Fevisa’s production capacity is unlikely substantially to change over the next several years, and, accordingly, disclosure of this information would impose serious competitive harm upon Fevisa into the foreseeable future. This information should therefore receive indefinite *in camera* treatment. *See Kaiser Aluminum*, 103 F.T.C. at 500 (extending *in camera* treatment to statistics more than five years old, due to the “serious injury [that] would be done [the applicant] by release of this information”).

Fevisa requests that the remaining information contained in PX4018 and PX4046 be given *in camera* treatment for five years, as this is the typical length afforded to such confidential and sensitive information. *See McWane, Inc.*, 2012 WL 3862131.

## V. Conclusion

For the forgoing reasons, Fevisa respectfully requests that PX4018 and PX4046 be afforded *in camera* treatment pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.45(b). Fevisa requests *in camera* treatment be extended indefinitely to the portions of these documents relating to Fevisa's production capacity as identified in Section IV above, and for five (5) years to those portions addressing Fevisa's annual United States exports, its volume/gross, its gross/price, and its percentage of exports to United States customers.

Respectfully submitted,



Andrea Agathoklis Murino  
Elyse Dorsey

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December 9, 2013

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
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In the Matter of

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

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**PUBLIC**

Docket No. 9356

**DECLARATION OF JUAN R. SILVA G.  
IN SUPPORT OF NON-PARTY FEVISA INDUSTRIAL, S.A. de C.V.'S  
MOTION FOR *IN CAMERA* TREATMENT OF PROPOSED EVIDENCE**

I, Juan R. Silva G., declare as follows:

1. I am Executive Vice President of non-party Fevisa Industrial, S.A. de C.V. ("Fevisa"). I make this Declaration based upon my personal knowledge and in support of Fevisa's Motion for *In Camera* Treatment of Proposed Evidence in the above captioned matter.
2. The information contained in PX4018 and PX4046 contains highly sensitive and confidential material. Fevisa has taken substantial measures to guard this information by limiting dissemination of this information and by taking every reasonable step to protect its confidentiality. This information is disclosed only to employees and officers of Fevisa or members of the Fevisa Board of Directors with a need to know the information. This information is not known outside of Fevisa, except to the extent necessary to engage in confidential contract negotiations or confidential discussions with potential or existing customers. The information contained in PX4018 and PX4046 would be extremely difficult for Fevisa's competitors or other outside persons to access or duplicate. Additionally, each document was submitted to the Federal Trade Commission with the understanding that it would be treated confidentially. Fevisa sent a letter to Complaint Counsel on July 18, 2013, reiterating that it desired these documents to be treated confidentially.
3. I have reviewed PX4018 and PX4046. I am familiar with the type of information these documents contain by virtue of my position with Fevisa. It is my belief that broad disclosure of these documents would inflict serious competitive injury upon Fevisa. This belief is based upon my review of the documents, as well as my knowledge of Fevisa's business and the confidentiality protection Fevisa typically affords this type of information.



4. Documents containing information regarding Fevisa's prices, production capacity, and exports are critical to Fevisa's business, its customer relations, its competitiveness, and its profitability. Competitors with access to this information would gain a significant business advantage at Fevisa's expense. And, customers with this information could unfairly leverage their knowledge in future negotiations with Fevisa.
5. PX4018 and PX4046 detail highly sensitive information regarding Fevisa's prices, production capacity, and exports to the United States. Disclosure of this sensitive information would be highly detrimental to Fevisa, as it would provide both customers and competitors with competitively significant information, thereby causing serious and irreparable harm to Fevisa. As a result, Fevisa would lose a business advantage in the marketplace. Fevisa's competitors would be able to compete unfairly on price with Fevisa and to exploit their knowledge of Fevisa's production capacity in their own negotiations with customers; and customers similarly would be able to utilize this information for their own gain in future negotiations with Fevisa.
6. Furthermore, Fevisa places significant value upon maintaining the secrecy and confidentiality of its customer contracts. Disclosure of the sensitive information contained in PX4018 and PX4046 would seriously undermine Fevisa's efforts to keep these contracts confidential and would, accordingly, cause irreparable harm to Fevisa's relationships with its customers.
7. Fevisa takes considerable measures to protect the secrecy of the information contained in PX4018 and PX4046. The detailed information regarding Fevisa's annual exports to the United States, its production capacity, and its pricing are disclosed only to employees and officers of Fevisa or members of the Fevisa Board of Directors with a need to know the information.
8. The information PX4018 and PX4046 contain is material to Fevisa's business and to its competitive position in the marketplace. Fevisa would experience a significant loss in its business advantage and irreparable injury to its customer relationships if this information were to be disclosed. Such a disclosure would provide Fevisa's competitors and customers with information that is confidential and critical to Fevisa's business.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the forgoing is true and correct.



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Juan R. Silva G.  
Executive Vice President  
Fevisa Industrial, S.A. de C.V.

Executed this 9th day of December, 2013.



## CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2013, 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 Avenue, NW, Room H-113  
Washington, DC 20580

I also certify that on December 9, 2013 a copy of the foregoing document was delivered via electronic mail, and will be sent by overnight courier (Federal Express) to:

The Honorable D. Michael Chappell (oalj@ftc.gov)  
Administrative Law Judge  
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I further certify that on December 9, 2013, a copy of the foregoing document was delivered via electronic mail to:

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## CERTIFICATE OF 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

  
Andrea Agathoklis Murino

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