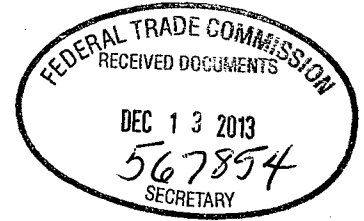


UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES



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.

Docket No. 9356

**COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION FOR IN CAMERA TREATMENT OF PROPOSED TRIAL EXHIBITS AND REQUEST FOR LEAVE TO FILE ITS PUBLIC VERSION OF ITS PRE-TRIAL BRIEF TO FIVE DAYS AFTER THIS COURT RULES ON ITS PENDING IN CAMERA MOTIONS**

Respondents moved for *in camera* treatment of more than 500 proposed trial exhibits and related testimony, claiming that public disclosure would result in serious competitive injury. The scope of Respondents' motion far exceeds the protections contemplated by Rule 3.45 of the Federal Trade Commission's Rules of Practice. The burden of showing good cause for withholding documents from the public record rests with the party requesting that documents be placed *in camera*. *H.P. Hood & Sons, Inc.*, 58 FTC 1184, 1188 (1961). Respondents have failed to meet their burden of demonstrating a "clearly defined, serious injury," as contemplated by Rule 3.45(b), and their motion should be denied.<sup>1</sup> In addition, Complaint Counsel respectfully

<sup>1</sup> Respondents' indicate that their motion is unopposed, which is misleading and incorrect. Complaint Counsel agreed to not oppose the motion provided that the Respondents' requests were reasonable and within the scope of FTC Rule 3.45(b). However, for the reasons stated in this motion, Respondents' requests far exceed the protections contemplated by Rule 3.45, and, therefore, Complaint Counsel opposes the motion.

requests leave to file its public version of its Pre-Trial Brief, to five days after this Court rules on the pending *in camera* motions in this matter.

### ARGUMENT

Rule 3.45(b) of the Commission's Rules of Practice provides that a party may request *in camera* treatment for material offered into evidence by submitting a motion to the Administrative Law Judge. The Rule provides that, "[t]he Administrative Law Judge shall order that such material . . . be placed in camera only after finding that its public disclosure will likely result in a clearly defined, serious injury to the person, partnership, or corporation requesting in camera treatment." 16 C.F.R. § 3.45(b). Rule 3.45(b) further provides that, "a finding that public disclosure will likely result in a clearly defined, serious injury shall be based on the standard articulated in *H.P. Hood & Sons, Inc.*, 58 FTC 1184 (1961)." In *H.P. Hood*, the Commission recognized a strong presumption in favor of open access to Commission adjudicative proceedings. *H.P. Hood*, 58 FTC 1184, at 1186 ("The desirability and in fact the necessity for public hearings is . . . an engrained and accepted part of our judicial system . . . . However, with respect to [FTC] hearings in particular, there are peculiarly pressing reasons for holding all aspects of adjudicative hearings open to public gaze . . . . To foreclose [FTC] hearings and the evidence adduced therein from the scrutiny of . . . interested persons would serve in a large measure to defeat the very reason for our existence."). Respondents have the burden of demonstrating that they will suffer a "clearly defined, serious injury," as a result of public disclosure. 16 C.F.R. § 3.45(b); *H.P. Hood*, 58 FTC 1184, 1188. Further, Respondents' motion must be "narrowly tailored . . . for only that information that is sufficiently secret and material." *Polypre Int'l, Inc.*, 2009 FTC LEXIS 256, at \*2.

**I. Respondents Have Not Met Their Burden Of Showing A Clearly Defined, Serious Injury.**

Respondents seek *in camera* treatment for 548 of the approximately 1,500 proposed trial exhibits submitted by the parties for use at the hearing. Respondents thus seek protection for approximately one-third of the total exhibits that the parties propose to use at the hearing. Yet Respondents do not offer a “clearly defined, serious injury,” that would occur as a result of public disclosure. Rather, Respondents broadly group their documents into three separate categories, and offer a general, cursory explanation of the harm that would result from public disclosure, using the six-part test set forth in *Bristol-Meyers Co.*, 90 FTC 455 (1977).

Further, for the vast majority of the 548 documents for which Respondents are seeking *in camera* treatment, Respondents are seeking *in camera* treatment for the entire document, without specifying the pages or portions that contain confidential information. In several instances, these documents marked for *in camera* treatment are significantly comprised of non-confidential or publicly available information. *See, infra*, Section II.

As this Court has stated, “[a] motion for *in camera* treatment must be narrowly tailored to request *in camera* treatment for only that information which is secret and material.” *Polypre Int’l, Inc.*, 2009 FTC LEXIS 256, at \*2. Based on the above, Respondents’ motion is not “narrowly tailored,” nor does it clearly define serious injury, as required by FTC Rule 3.45(b) and related caselaw.

**II. Respondents’ List Of Documents Contains Many Examples Of Documents And Information That Do Not Warrant *In Camera* Treatment.**

Many of the documents identified in Respondents’ motion simply do not warrant *in camera* treatment, based on prior precedent of this Court. This Court has stated that, “there is a strong presumption that *in camera* treatment will not be accorded to information that is more

than three years old.” *Promedica Heath System, Inc.*, 2011 FTC LEXIS 70, at \*2 (quoting *Conference Interpreters*, 1996 FTC LEXIS 298, at \*15). A non-exhaustive review of Respondents’ motion reveals the following documents that are more than three years old: PX 1053 (2007), PX 1082 (2009), PX 1087 (2009), PX 1110 (2007), PX 1142 (2008), PX 1182 (2009), PX 1185 (2009), PX 2244 (2009).

In addition, this Court has stated that, “[a]ny material that has previously been made public will not be afforded in camera treatment.” *Promedica Heath System, Inc.*, 2011 FTC LEXIS 70, at \*2. As noted above, a non-exhaustive review of Respondents’ motion reveals the following documents that contain publicly available or non-confidential information which Respondents claim require *in camera* treatment: PX 1033 (marketing presentation including Census data and widely-available industry history), PX 1067 (same), PX 1199 (Ardagh presentation containing numerous slides available online). Other documents, while not public have been widely shared with potential investors: PX 1610 (Bond Offering Prospectus), PX1393 (same).

This Court has also looked skeptically upon motions for *in camera* treatment that include documents that “contain little if any information of current competitive significance.” *Promedica Heath System, Inc.*, 2011 FTC LEXIS 70, at \*2. A non-exhaustive review of Respondents’ motion reveals the following documents that lack specific information of current competitive significance: PX 1131 (2009 email containing no meaningful competitive information), PX 1121 (2011 Anchor email speculating on customer’s interaction with a competitor), PX 1148 (2010 Anchor document exploring possibility of purchasing a glass container plant).

Finally, Respondents' motion seeks *in camera* treatment for Complaint Counsel's Efficiencies Expert Report of Mr. Gabe Dagen, including his entire deposition transcript. Respondent offers no explanation for why Mr. Dagen's report and deposition transcript should be deemed *in camera* in their entirety.

As this Court has noted, "[t]he burden rests on Respondent to demonstrate that the evidence sought to be withheld from the public record is sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury." *Promedica Heath System, Inc.*, 2011 FTC LEXIS 70, at \*2. Respondents' motion and accompanying declarations fail to make this showing.

### **III. Complaint Counsel Respectfully Requests Leave To File The Redacted Public Version Of Its Pre-Trial Brief.**

Complaint Counsel respectfully moves for leave to file the redacted public version of Complaint Counsel's Pre-Trial Brief ("Public Brief") to five days after this Court rules on the pending *in camera* motions in this matter. In addition to Respondents, several third parties have also filed motions pursuant to FTC Rule 3.45, seeking *in camera* treatment of their documents and deposition and investigational hearing testimony that Complaint Counsel intends to introduce at trial. Prior to this Court ruling on those motions, Complaint Counsel filed its Pre-Trial Brief which includes information that the Respondents and several third parties respectfully ask this Court to keep *in camera*. Under the current schedule, Complaint Counsel must file the Public Brief by December 19, 2013, which is likely before the Court will have the opportunity to rule on the *in camera* motions. In recognizing this Court's strict standard for granting *in camera* motions, Complaint Counsel seeks this extension in order to redact its Pre-Trial Brief in a manner consistent with this Court's ruling. Respondents do not object to this brief extension.

This Court has the authority to grant this request. FTC Rule 3.45 states that the Public Brief “shall be filed with the Secretary within 5 days after the filing of the complete version, unless the Administrative Law Judge . . . directs otherwise . . . .” 16 C.F.R. § 3.45(e). Thus, we respectfully ask the Court to use its discretion under FTC Rule 3.45 to allow Complaint Counsel to file its Public Brief five days after this Court has ruled on the *in camera* motions so that Complaint Counsel’s redactions are consistent with the Court’s rulings.

### CONCLUSION

Complaint Counsel respectfully requests that the Court deny Respondents’ motion for *in camera* treatment of proposed trial exhibits, and grant its request for leave to file its Pre-Trial Public Brief to five days after this Court rules on Respondents’ and third parties’ *in camera* motions.

Dated: December 13, 2013

Respectfully submitted,

s/ Edward D. Hassi

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*Counsel Supporting the Complaint*

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Compagnie de Saint-Gobain, a corporation.

Docket No. 9356

**[PROPOSED] ORDER**

Upon consideration of Complaint Counsel's Opposition to Respondents' Motion for In Camera Treatment Of Proposed Trial Exhibits, it is hereby ORDERED that Respondents' Motion be DENIED.

Upon consideration of Complaint Counsel's Request For Leave To File Its Redacted, Public Version Of Its Pre-Trial Brief To Five Days After The Court Rules On Its Pending *In Camera* Motions, its request is hereby GRANTED.

ORDERED:

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

Dated:

**CERTIFICATE OF SERVICE**

I hereby certify that on December 13, 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 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  
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Washington, DC 20580

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

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*Counsel for Respondent Saint-Gobain Containers, Inc.*

**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 13, 2013

By: s/ Edward D. Hassi  
Attorney