

ORIGINAL



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

\_\_\_\_\_)  
In the Matter of \_\_\_\_\_)  
POLYPORE INTERNATIONAL, INC., \_\_\_\_\_)  
Respondent. \_\_\_\_\_)  
\_\_\_\_\_)

Docket No. 9327

**ORDER ON NON-PARTIES' MOTIONS FOR *IN CAMERA* TREATMENT**

**I.**

Pursuant to Rule 3.45(b) of the Commission's Rules of Practice and the October 22, 2008 Scheduling Order entered in this matter, several non-parties filed motions for *in camera* treatment for materials that the parties have listed on their exhibit lists as materials that might be introduced at trial in this matter. Neither Complaint Counsel nor Respondent have filed an opposition to any of the motions addressed below filed by the non-parties.

**II.**

Under Rule 3.45(b) of the Federal Trade Commission's Rules of Practice, the Administrative Law Judge may order that 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). Accordingly, in proceedings at the Federal Trade Commission, "requests for *in camera* treatment must show 'that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved.'" *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500, 500 (1984), quoting *In re H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). Applicants for *in camera* treatment must "make a clear showing that the information concerned is sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury." *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980). If the applicants for *in camera* treatment make this showing, the importance of the information in explaining the rationale of decisions at the Commission is "the principal countervailing consideration weighing in favor of disclosure." *Id.*

The Federal Trade Commission recognizes the "substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons." *Hood*, 58 F.T.C. at 1186. A full and open record of the adjudicative proceedings promotes public understanding of decisions at the Commission. *In re Bristol-Myers Co.*, 90 F.T.C. 455, 458 (1977). A full and open record also provides guidance to persons

affected by its actions and helps to deter potential violators of the laws the Commission enforces. *Hood*, 58 F.T.C. at 1186. The burden of showing good cause for withholding documents from the public record rests with the party requesting that documents be placed *in camera*. *Id.* at 1188. However, a request for *in camera* treatment by a non-party warrants “special solicitude.” *In re Crown Cork & Seal Co.*, 71 F.T.C. 1714, 1715 (1967).

Under Commission Rule 3.45(b)(3), indefinite *in camera* treatment is warranted only “in unusual circumstances,” including circumstances in which “the need for confidentiality of the material . . . is not likely to decrease over time.” 16 C.F.R. § 3.45(b)(3). The Commission has nonetheless recognized that “in some unusual cases ‘the competitive sensitivity or the proprietary value of the information for which *in camera* treatment is requested will not necessarily diminish, and may actually increase, with the passage of time.’” *In re Coca-Cola Co.*, 1990 FTC LEXIS 364, at \*7 (Oct. 17, 1990) (quoting Commission comments on amendments to the Rule).

The Commission has recognized that it may be appropriate to provide *in camera* treatment to business records to be introduced as evidence. *In re Champion Spark Plug Co.*, 1982 FTC LEXIS 85, at \*2 (April 5, 1982); *see 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 extended for two to five years. *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). In addition, there is a presumption that *in camera* treatment will not be accorded to information that is more than three years old. *Conference Interpreters*, 1996 FTC LEXIS 298, at \*15 (citing *General Foods*, 95 F.T.C. at 353; *Crown Cork*, 71 F.T.C. at 1715).

In order to sustain the burden for withholding documents from the public record and to overcome the presumption that *in camera* treatment may be withheld for information that is three or more years old, an affidavit or declaration demonstrating that a document is sufficiently secret and sufficiently material to the applicant’s business that disclosure would result in serious competitive injury is required. *See In re North Texas Specialty Physicians*, 2004 FTC LEXIS 109, at \*2-3 (Apr. 23, 2004).

### III.

As set forth below, each of the non-parties filed separate motions for *in camera* treatment that complied with the standards for granting *in camera* treatment. Each motion was supported by an affidavit or declaration of an individual within the company who had reviewed the documents. These affidavits or declarations supported the applicants’ claims that the documents are sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury. That showing was then balanced against the importance of the information in explaining the rationale of decisions at the Commission. Each motion attached the documents or deposition testimony for which *in camera* treatment was sought. Where *in camera* treatment for deposition testimony was sought, the non-party narrowed its requests to

specific page and line numbers. The specific motions of each of the non-parties are addressed below.

**A.**

Non-party EnerSys submitted a motion for *in camera* treatment on April 9, 2009. EnerSys supports its request with a Declaration from Larry Axt, who states that he is the Vice President, Global Procurement, of EnerSys (“Axt Declaration”). Axt declares that the information contained in the documents for which EnerSys seeks *in camera* treatment is secret, commercially sensitive, and material to EnerSys’ current and prospective business. According to the Axt Declaration, the documents contain commercially proprietary and confidential information regarding EnerSys’ prices, costs, procurement spending, supply of raw materials or inputs, purchasing outlook, planning and strategy, and product technical detail. Axt further declares: that each of these documents has been maintained internally by EnerSys in a confidential manner, shared only with those individuals requiring knowledge of the information the document contained; that the information in these documents was not made available to EnerSys’ competitors or other outside persons; that all of the information in the documents is held in strict confidence by EnerSys; and that if such information were publicly disclosed, EnerSys would suffer serious competitive injury.

EnerSys requests *in camera* treatment for each of its documents for a period of at least ten years.

A review of the Axt Declaration in support of EnerSys’ Motion and of the documents reveals that all but one of the documents for which protection is sought meet the standards for *in camera* treatment. *In camera* treatment is DENIED for a July 2004 EnerSys “Investor Roadshow” document, bearing Bates stamps EN18267 through EN18300, for two reasons: The documentary evidence does not appear sufficiently secret and material to EnerSys’ business that disclosure would result in serious competitive injury, and the document is over three years old and EnerSys has not provided sufficient justification for extending *in camera* treatment to it. For all other documents, EnerSys has not demonstrated circumstances necessitating an extension of *in camera* treatment beyond the five-year period typically given to business records. Accordingly, EnerSys’ motion is GRANTED in part.

*In camera* treatment, for a period of five years, to expire on June 1, 2014, will be extended to the documents listed by the parties in accordance with Section IV of this Order.

**B.**

Non-party Entek International LLC (“Entek”) submitted a motion for *in camera* treatment on April 9, 2009. Entek supports its motion with a Declaration from Dan Weerts, Vice President of Sales & Marketing at Entek (“Weerts Declaration”). Weerts states that all of the documents for which Entek seeks *in camera* treatment contain confidential business information, the disclosure of which would seriously injure Entek’s ability to compete. Weerts further states that the documents are material to Entek’s business as core company information and/or important business records. The documents are, according to his Declaration, grouped into six

subject matter categories: (1) customer contracts, (2) confidential communications with customers and/or confidential customer information, including Entek's strategy for keeping and/or securing additional business, (3) Entek's price lists, individual customer pricing, and product costs, (4) Entek's sales and/or capacity, (5) Entek's products and the testing thereof; and (6) Entek's global business plans and strategy. Weerts declares, for the documents in each of these subject matter categories, that the "[d]etails are disclosed only to a select group" of Entek employees, and that all Entek employees are required to sign a non-disclosure agreement covering all of the kinds of documents included in these categories.

Entek requests *in camera* treatment for each of these documents for a specified period of either one, three, or five years.

A review of the Weerts Declaration in support of Entek's motion and of the documents reveals that all of the documents sought to be protected meet the standards for *in camera* treatment. Accordingly, Entek's motion is GRANTED.

*In camera* treatment for a period of five years, expiring on June 1, 2014, will be extended to the documents for which Entek requests *in camera* treatment of such duration, in accordance with Section IV of this Order.

*In camera* treatment for a period of three years, expiring on June 1, 2012, will be extended to the documents for which Entek requests *in camera* treatment of such duration, in accordance with Section IV of this Order.

*In camera* treatment for a period of one year, expiring on June 1, 2010, will be extended to the documents for which Entek requests *in camera* treatment of such duration, in accordance with Section IV of this Order.

### C.

On April 9, 2009, non-party Exide Technologies ("Exide") submitted a motion seeking *in camera* treatment for documents relating to three categories: (1) Exide's ongoing contract negotiations with potential suppliers, including information about the price, volume, and other terms of the offers Exide received from potential suppliers, Exide's internal evaluations of those offers, and Exide's negotiating strategies and objectives; (2) specific and detailed information about costs, prices, volumes, and contract terms, including information about Exide's current contract with Daramic; and (3) strategic planning documents that disclose sales opportunities, product plans, strategies for dealing with particular customers, price and volume data, evaluations of specific suppliers, potential business partners and opportunities. Exide seeks *in camera* treatment for a period of three years for the documents in category (1), one year for the documents in category (2), and two years for the documents in category (3).

Exide's motion provides a declaration of Pradeep Menon, who states that he is Vice President of Commodities and Strategic Supplier Development at Exide ("Menon Declaration"). According to the Menon Declaration, the documents regarding ongoing contract negotiations for

which *in camera* treatment is sought contain material that Exide regards as highly confidential, the disclosure of which could, the Declaration states, severely compromise Exide's negotiating position with potential suppliers. The Menon Declaration also states that the public release of documents that reveal detailed information about prices, costs, volumes, and specific contract terms, and the public release of the three strategic planning documents, would cause Exide serious commercial and competitive harm.

A review of the Menon Declaration in support of the motion and of the documents reveals that the information Exide seeks to protect meets the standards for *in camera* treatment, except with respect to the following documents: (1) documents bearing Bates stamps EX002390 through EX002451 (i.e., all of the documents that Exide provides under "Tab 16"), and (2) documents bearing Bates stamps that are, for the first and many subsequent pages, cut off, but that conclude with Bates stamp ETIHC\_0001758 (i.e., all of the documents that Exide provides under "Tab 37"). These specified documents, under Exide Tabs 16 and 37, are over three years old and the Menon Declaration does not provide a sufficient justification for extending *in camera* treatment to them.

Accordingly, Exide's motion is GRANTED with respect to all documents except for the documents specified above under Exide Tabs 16 and 37. With respect to those documents, Exide's motion is DENIED WITHOUT PREJUDICE, to allow the company an opportunity to demonstrate, if it can, that *in camera* treatment would be warranted.

*In camera* treatment, for a period of three years, expiring on June 1, 2012, will be granted to Exide's documents concerning its ongoing contract negotiations with potential suppliers in accordance with Section IV of this Order.

*In camera* treatment, for a period of one year, expiring on June 1, 2010, will be granted to Exide's specific and detailed information about costs, prices, volumes, and contract terms in accordance with Section IV of this Order.

*In camera* treatment, for a period of two years, expiring on June 1, 2011, will be granted to the three Exide strategic planning documents in accordance with Section IV of this Order.

#### D.

Non-party Hollingsworth & Vose Company ("H&V") submitted a motion for *in camera* treatment on April 9, 2009. H&V supports its motion with an affidavit of Thomas White, Vice President and General Manager of the Battery Products Business Unit at H&V ("White Affidavit"). White avers that the documents for which *in camera* treatment is requested include high-level strategic planning and product development documents, pricing information, sales and revenue information, and customer information. White further states that the documents for which it seeks *in camera* treatment are maintained in strict confidence and that disclosure could harm H&V's business.

H&V has narrowly tailored its request for *in camera* treatment. In addition, H&V has requested *in camera* treatment for specific portions of deposition designations that relate to confidential information meeting the *in camera* standards. H&V has requested *in camera* treatment for a period of ten years for some categories of its documents and a period of five years for other categories.

A review of the White Affidavit in support of the motion, the documents, and the excerpted designated deposition testimony reveals that all of the information sought to be protected meets the standards for *in camera* treatment. However, H&V has not demonstrated circumstances necessitating an extension of *in camera* treatment beyond the five-year period typically given to business records. Accordingly, H&V's motion is GRANTED in part.

*In camera* treatment, for a period of five years, to expire on June 1, 2014, will be extended to the documents listed by the parties, including the designated deposition testimony, in accordance with Section IV of this Order.

#### E.

Non-party Johnson Controls, Inc. ("JCI") submitted a motion for *in camera* treatment on April 9, 2009. Johnson Controls supports its request with a Declaration from Flavio Almeida, Director of Procurement, Americas in JCI's Power Solutions Group ("Almeida Declaration"). Almeida declares that the documents for which it seeks *in camera* treatment are highly confidential and contain proprietary information regarding JCI's global separator supply strategy, joint venture with BFR, and relationship with Entek. The documents contain technically sensitive parameters, analysis of capacity and production, contract negotiations, strategy and pricing information, and internal testing results. Almeida further declares that the documents for which it seeks *in camera* treatment are disclosed to only a limited group within JCI and that disclosure of this information would cause real and serious damage to the competitive position of JCI.

In addition, Almeida states that although some of the documents are more than three years old, JCI considers them highly confidential because the separator strategy is a multi-year strategy that remains in effect today. JCI requests *in camera* treatment for each of its documents indefinitely, or, at a minimum, for a period of seven years.

A review of the Almeida Declaration in support of the motion and of the documents reveals that all of the documents sought to be protected meet the standards for *in camera* treatment. In addition, JCI has provided a sufficient justification to overcome the presumption that documents over three years old may not warrant *in camera* treatment. However, JCI has not demonstrated circumstances necessitating indefinite *in camera* treatment or an extension of *in camera* treatment beyond the five-year period typically given to business records. Accordingly, JCI's motion is GRANTED in part.

*In camera* treatment, for a period of five years, to expire on June 1, 2014, will be extended to the documents listed by the parties in accordance with Section IV of this Order.

## F.

Non-party Trojan Battery Co. (“Trojan Battery”) submitted a motion for *in camera* treatment on April 9, 2009. Trojan Battery supports its request with a Declaration from Rick Godber, President and Chief Executive Officer of Trojan Battery (“Godber Declaration”). Godber avers that public disclosure of the documents for which *in camera* treatment is sought would cause serious competitive injury to Trojan Battery. Godber further states that Trojan Battery has taken and continues to take measures to guard the secrecy of the information; that the documents are not widely disseminated; and that public disclosure of commercially sensitive information would be very detrimental to Trojan Battery and would expose Trojan Battery to a serious competitive disadvantage.

Trojan Battery narrowly tailored its request to 22 documents. For each of these documents, Trojan Battery requests *in camera* treatment for a period of five years.

A review of the Godber Declaration in support of the motion and of the documents reveals that all of the documents sought to be protected meet the standards for *in camera* treatment. Accordingly, Trojan Battery’s motion is GRANTED.

*In camera* treatment, for a period of five years, to expire on June 1, 2014, will be extended to the documents listed by the parties in accordance with Section IV of this Order.

## G.

Non-party Warburg Pincus LLC (“Warburg Pincus”) submitted a motion for *in camera* treatment on April 9, 2009. Warburg Pincus supports its request with the Declaration of Michael Graff, Managing Director of Warburg Pincus and Chairman of the Board of Polypore International, Inc. (“Graff Declaration”). Graff avers that the documents for which *in camera* treatment is sought contain proprietary methodology for valuing its investments that is not available to the public and highly confidential and extremely sensitive business information about Polypore, including information about its strategic growth plans, revenue sources, competitive intelligence, and customer relations. Graff further avers that the documents for which it seeks *in camera* treatment are not widely disseminated.

Warburg Pincus narrowly tailored its request to excerpts of 13 documents. For each of these documents, Warburg Pincus requests *in camera* treatment for a period of three years.

A review of the Graff Declaration in support of the motion and of the documents reveals that all of the documents sought to be protected meet the standards for *in camera* treatment. Accordingly, Warburg Pincus’ motion is GRANTED. *In camera* treatment, for a period of three years, to expire on June 1, 2012, will be extended to the documents listed by the parties in accordance with Section IV of this Order.

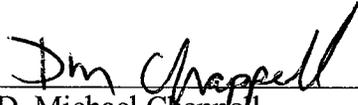
#### IV.

Complaint Counsel's Final Proposed Exhibit List identified approximately 1,364 exhibits and Respondent's Final Proposed Exhibit List identified approximately 1,500 potential trial exhibits. By Order dated April 27, 2009, the parties were directed to significantly narrow their lists of documents that they intend to introduce at trial in order to comply with Rule 3.43(b) or provide sufficient justification for all listed exhibits. On May 1, 2009, Complaint Counsel and Respondent each submitted revised final exhibit lists. These non-parties' motions for *in camera* treatment were filed prior to these revised exhibit lists and thus the non-parties may have sought *in camera* treatment for documents that, as a result of these modifications to the parties' exhibit lists, will not be offered into evidence.

Because *in camera* treatment is appropriate only for information that is offered into evidence, the parties are required to prepare a joint proposed order, with a signature line for the Administrative Law Judge, that lists by exhibit number the documents that, by this Order, have been granted *in camera* treatment and that sets forth the expiration date of *in camera* treatment for each exhibit.

Each non-party that has documents or information that has been granted *in camera* treatment by this Order shall inform its testifying current or former employees that *in camera* treatment has been extended to the material described in this Order. At the time that any documents that have been granted *in camera* treatment are offered into evidence or before any of the information contained therein is referred to in court, the parties shall identify such documents and the subject matter therein as *in camera*, inform the court reporter of the trial exhibit number(s) of such documents, and request that the hearing go into an *in camera* session.

ORDERED:

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

Date: May 6, 2009