

ORIGINAL



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: William E. Kovacic, Chairman
Pamela Jones Harbour
Jon Leibowitz
J. Thomas Rosch

In the Matter of _____)
Polypore International, Inc., _____)
A corporation. _____)
_____)

Docket No. 9327
Public

**THE MOORE COMPANY'S MOTION FOR *IN CAMERA* TREATMENT OF
DOCUMENTS DESIGNATED BY
COMPLAINT COUNSEL**

Non-Party The Moore Company moves, pursuant to Federal Trade Commission ("FTC") Rule 3.45(b) of the FTC's Rules of Practice, 16 C.F.R. § 3.45(b), for an order allowing *in camera* treatment of certain documents designated by Complaint Counsel as proposed trial exhibits (the "Designated Documents"). A table setting forth the Designated Documents is attached hereto as Exhibit A. In support of this motion, The Moore Company refers to the accompanying Declaration of Guy Dauwe ("Dauwe Decl.").

I. Procedural Background

Complaint Counsel and Respondent Polypore International, Inc. ("Polypore") have made numerous discovery requests of The Moore Company relating to The Moore Company's subsidiary Amer-Sil, S.A.'s ("Amer-Sil") battery separator business. The Moore Company designated those non-public, commercially-sensitive materials it produced in response to the discovery requests as "Confidential" in accordance with 15 U.S.C. § 46(f) and 16 C.F.R. §

4.10(a)(2). The Moore Company also produced materials pursuant to the Protective Order Governing Discovery Material that was entered by the Court on October 23, 2008.

By letter dated April 24, 2009, Complaint Counsel informed The Moore Company that it intended to introduce into evidence four documents containing “Confidential Material” as that term is defined in the Protective Order. See Letter from Linda D. Cunningham dated April 24, 2009, attached hereto as Exhibit B.

II. Legal Standard

16 C.F.R. § 3.45(b) provides that a document shall be placed *in camera* “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.” An applicant for *in camera* treatment bears the burden of demonstrating that public disclosure will result in a clearly defined, serious injury. See H.P. Hood & Sons, Inc., 58 F.T.C. 1184, 1188, 1961 FTC LEXIS 368, *10-11 (1961).

Demonstrating serious injury requires the applicant to show “that the documents are secret, that they are material to the applicant’s business and that public disclosure will plausibly discourage the future production of such information.” In the Matter of Bristol-Myers Company, 90 F.T.C. 455, 456, 1977 FTC LEXIS 25, *4-5 (1977). “The likely loss of business advantages is a good example of a ‘clearly defined, serious injury.’” In re Hoechst Marion Roussel, Inc., 2000 FTC LEXIS 138, *6 (Sept. 19, 2000) (quoting In the Matter of General Foods Corp., 95 F.T.C. 352, 355 (1980)). In order to sustain this burden of proof, an application for *in camera* treatment must be supported by proper evidence, such as affidavits, to support all factual issues or assertions. See id. *4.

The following factors are weighed in considering both secrecy and materiality: (1) the extent to which the information is known outside of the applicant's business; (2) the extent to which the information 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 the applicant and to the applicant's competitors; (5) the amount of effort or money expended by the applicant 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 Company, 90 F.T.C. at 456, 1977 FTC LEXIS 25, *5 (citing Restatement of Torts § 757, Comment b at 6 (1939)).

An application for *in camera* treatment that is submitted by a third-party should be given "special solicitude," because such treatment encourages third-party cooperation in future proceedings. See In the Matter of Kaiser Aluminum & Chemical Corporation, 103 F.T.C. 500, 1984 FTC LEXIS 60, at *2-3 (1984) ("Moreover, as third parties, the requests of these companies deserve special solicitude. As a policy matter, extensions of confidential or *in camera* treatment in appropriate cases involving third party bystanders encourages cooperation with future adjudicative discovery requests."); see also The Crown Cork & Seal Company, Inc., 71 F.T.C. 1714; 1967 FTC LEXIS 128, at *2 (1967) ("Here, on the other hand, petitioner's plea warrants special solicitude coming as it does from a third party bystander in no way involved in the proceedings whose records, if *in camera* treatment is denied, will be open to the scrutiny of its competitors including respondent herein.").

III. Argument

The Designated Documents should be afforded *in camera* treatment because The Moore Company, a nonparty, will suffer a clearly defined, serious injury if the documents are publicly

disclosed. Specifically, the Designated Documents contain information that is both secret and material to the business of Amer-Sil, The Moore Company's wholly-owned subsidiary. Public disclosure therefore would cause great competitive harm to The Moore Company, and this risk of harm is not outweighed by the significance of the information to the present proceeding.

The Designated Documents contain information that is highly confidential and not disclosed outside of Amer-Sil, except insofar as it may be shared confidentially with Amer-Sil's business partners, usually in the context of non-disclosure agreements. Dauwe Decl. ¶ 6. It is distributed within the company only to those who have a specific need for the information. Id. Amer-Sil maintains all of its records in a locked facility. Id. It does not permit tours of the facility or permit access to any part of the facility where confidential business records are stored, or confidential manufacturing processes take place. Id. Those employees who receive the information typically do so only upon entering into confidentiality agreements that prohibit them from disclosing the information to others. Id. Amer-Sil guards the confidentiality of this information because of its value to the Company's ongoing business, as well as to its competitors. Id. The information is the product of a significant investment of time and resources, and could not be acquired or duplicated by others in the absence of a similar expenditure of time and resources, if it could be duplicated at all. Id. Additionally, Amer-Sil, and by extension The Moore Company, has sought legal advice and incurred substantial cost to protect the confidentiality of the Designated Documents. Id. Each of the Designated Documents is therefore secret and material to Amer-Sil's business. See In the Matter of Bristol-Myers Company, 1977 FTC LEXIS at *5.

As discussed more fully in the Declaration of Guy Dauwe, The Moore Company seeks *in camera* treatment for the following four documents:

1. Exhibit PX2267: This is an internal document produced after a battery conference in the United States in 2007. Dauwe Decl. ¶ 8. It contains highly confidential information regarding product development ideas, including ideas for products unrelated to this litigation, as well as customer information including extremely sensitive information about a potential dispute between Amer-Sil and one of its customers. Id. This information should be protected for five years, and any shorter period of time would risk substantial commercial and competitive harm to Amer-Sil and its customers. Id.

2. Exhibit PX2268: This document is an updated version of another document which was designated as a trial exhibit (Exhibit RX1613) by Polypore and for which The Moore Company also sought in camera treatment. Dauwe Decl. ¶ 9; see also Declaration of Guy Dauwe in Support of Motion for *In Camera* Treatment of Documents Designated by Respondent Polypore International, Inc., filed on May 1, 2009. As does Exhibit RX1613, this document includes highly confidential information regarding Amer-Sil's strategic marketing and sales plans. Dauwe Decl. ¶ 9. For example, it includes information about the profitability of a new project. Id. If Amer-Sil's customers or competitors were to learn this information, it would unfairly compromise Amer-Sil's pricing strategy. Id.; see In re Hoechst Marion Roussel, Inc., 2000 FTC LEXIS at *6 ("The likely loss of business advantages is a good example of a 'clearly defined, serious injury.'"). The document also contains information about strategic investment and prospective customer targets. Dauwe Decl. ¶ 9. Only the most senior people within Amer-Sil have seen this document. Id. This information should be protected for ten years, and any shorter period of time would risk substantial commercial and competitive harm to Amer-Sil. Id.; see In the Matter of Evanston Northwestern Healthcare Corp., 2005 FTC LEXIS 38, at *19-21

(2005) (granting *in camera* treatment for ten years for non-party's business development and strategy documents).

3. Exhibit PX2269: This document contains minutes from a confidential 2007 meeting. Dauwe Decl. ¶ 10. The information discussed at that meeting is confidential because it pertains to Amer-Sil's customer development initiatives in the Asian market. Id. Amer-Sil has invested and continues to invest significant amounts of time and money in its ongoing efforts to cultivate new customers, including in the Asian market. Id. It has also invested substantial amounts of time and money in developing its knowledge of its customers' unique needs, including the needs of customers and prospective customers in the Asian market. Id. Public disclosure would undermine Amer-Sil's competitiveness in Asia, and perhaps elsewhere, because it would give Amer-Sil's competitors inside information about Amer-Sil's customer development and marketing strategy. Id.; see In re Hoechst Marion Roussel, Inc., 2000 FTC LEXIS at *6 ("The likely loss of business advantages is a good example of a 'clearly defined, serious injury.'"). Moreover, this document includes sensitive product development information about products unrelated to this litigation. Dauwe Decl. ¶ 10. This information should be protected for five years, and any shorter period of time would risk substantial commercial and competitive harm to Amer-Sil. Id.; see In the Matter of Evanston Northwestern Healthcare Corp., 2005 FTC LEXIS at *19-21 (granting *in camera* treatment for ten years for non-party's business development and strategy documents).

4. Exhibit PX2273: This is an internal email that includes highly sensitive information about one of Amer-Sil's customer relationships. Dauwe Decl. ¶ 11. As described in detail by Mr. Dauwe in his Declaration, public disclosure of this information could cause substantial harm to Amer-Sil's other customer relationships and sales. Id.; see In re Hoechst

Marion Roussel, Inc., 2000 FTC LEXIS at *6 (“The likely loss of business advantages is a good example of a ‘clearly defined, serious injury.’”). This information should be protected for five years, and any shorter period of time would risk substantial commercial and competitive harm to Amer-Sil. Dauwe Decl. ¶ 11.

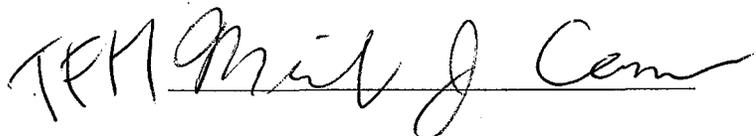
As detailed in his Declaration, Mr. Dauwe personally reviewed all of the Designated Documents and determined the length of time for which *in camera* treatment is appropriate based on his assessment of the harm that Amer-Sil and, by extension, The Moore Company would suffer if the Designated Documents were publicly disclosed. Id. ¶ 12. Based on that review, The Moore Company has indicated the minimum lengths of time for which the documents should be afforded *in camera* treatment. Id.

Because it discusses the above listed documents in great detail and specifically as to why they are deserving of *in camera* treatment, the Declaration of Guy Dauwe should also be afforded *in camera* treatment for a period of ten years, which is the longest period of time for which *in camera* treatment is sought for any document discussed therein.

WHEREFORE, The Moore Company respectfully requests that (1) *in camera* status be granted for the time frames above for those documents identified in Exhibit A, and (2) *in camera* status be granted for a period of ten years to the Declaration of Guy Dauwe and its accompanying exhibits.

Respectfully submitted,

THE MOORE COMPANY
By its attorneys,

A handwritten signature in black ink, appearing to read "TFM Mil J Cem", written over a horizontal line.

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Dated: May 5, 2009

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2009, I caused a copy of this document to be served upon the following persons via first class mail, postage pre-paid:

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TFM Michael J. Connolly

Exhibit A

Nonpublic
Exhibits
Redacted