

ORIGINAL

PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of)
)
McWANE, INC.,)
 a corporation, and)
)
STAR PIPE PRODUCTS, LTD.,)
 a limited partnership.)

PUBLIC

DOCKET NO. 9351

**MCWANE, INC.'S MOTION TO AMEND THE
PROTECTIVE ORDER GOVERNING DISCOVERY**

McWane, Inc. ("McWane") respectfully requests this Court to amend Paragraph 7 of its January 5, 2012 Protective Order Governing Discovery to include McWane's General Counsel James M. Proctor II as an individual to whom confidential material may be disclosed. As set forth in Mr. Proctor's attached Declaration, he is the senior legal officer at McWane and is charged with responsibility for managing the company's legal affairs, including protecting the company's interests in litigation. Declaration of James M. Proctor II, Paragraph 2 (hereinafter, "Proctor Decl. ¶ __"). With a rapidly approaching trial date and the company in the midst of its final pretrial preparations, it is crucial in order for Mr. Proctor to satisfy his corporate responsibilities that he be allowed to review and evaluate the pleadings and evidence in the case. Mr. Proctor plans to attend all or a significant portion of the trial and, to the extent that certain testimony and exhibits are afforded *in camera* treatment, he similarly needs to hear and evaluate such evidence as it is presented.¹

¹ Complaint Counsel has indicated that they take no position at this time.

Background

The Administrative Complaint in this matter was filed on January 4, 2012. Chief Administrative Law Judge Michael Chappell was designated to hear the case the following day and immediately entered the Protective Order Governing Discovery Material. The Standard Protective Order found at Appendix A to Commission Rule 3.31 was issued verbatim and has governed the handling of all Discovery Material throughout.

The Protective Order provides that the parties and any third parties complying with disclosure requirements or discovery requests may designate responsive documents or testimony or portions thereof as confidential material. Protective Order, ¶ 3. The Order strictly limits the disclosure of such material to narrow categories of individuals, including (a) the Court and its personnel, the Commission, its supporting personnel and retained experts; (b) future appellate judges and supporting personnel; (c) outside counsel and their supporting personnel; (d) individuals retained by outside counsel, including consultants and experts; and, (e) witnesses or deponents who authored or received the confidential material. Protective Order, ¶ 7. The obvious purpose of the Protective Order is to protect the parties and third parties' competitively sensitive information from disclosure and potential misuse.

As discovery has unfolded, McWane's outside lawyers have advised Mr. Proctor in broad terms consistent with the limits imposed by the Protective Order of the progress in the case and the merits and weaknesses of the claims and defenses. At this stage in the litigation, with cross-motions for summary judgment and expert motions pending, pretrial preparation in the final phases and trial roughly four weeks away, Mr. Proctor needs to be able to review unredacted pleadings, witness testimony and other potential evidence in order to fulfill his responsibilities to the company. As such, McWane seeks to include McWane's General Counsel, Mr. Proctor, as a

lawyer who is entitled to full access to confidential materials, with the same ability to review such materials as outside counsel. Mr. Proctor would of course also be subject to the Protective Order's limitations on disclosure that apply to outside counsel.

Argument

“A request to provide in-house counsel with a competitor's confidential information might properly be denied in a case where in-house counsel [is] involved in ‘competitive decision-making’, a term defined as shorthand for a counsel's activities, association, and relationship with a client that are such as to involve counsel's advice or participation in any or all of the client's decisions (pricing, product design, etc.) made in light of similar or corresponding information about a competitor.” *In the Matter of Schering-Plough Corporation, Upsher-Smith Laboratories, and American Home Products Corporation*, 2001 WL 1478371 (FTC), citing *Matsushita Elec. Indus. Co., Ltd. v. Int'l. Trade Comm'n*, 929 F.2d 1577, 1579 (Fed. Cir. 1991) (quoting *United States Steel Corp. v. Int'l. Trade Comm'n*, 730 F.2d 1465, 1468 (Fed. Cir. 1984)). It is well-settled, however, that an attorney's access to such confidential information should not be denied based solely on his or her status as inside counsel. *In the Matter of Schering Plough Corp., Id.* (citation omitted). As explained in the *U.S. Steel* decision, the leading authority on this issue:

Denial or grant of access [to confidential information], however, cannot rest on a general assumption that one group of lawyers are more likely or less likely inadvertently to breach their duty under a protective order Like retained counsel, . . . in-house counsel are officers of the court, are bound by the same Code of Professional Responsibility, and are subject to the same sanctions. In-house counsel provide the same services and are subject to the same types of pressures as retained counsel. The problem and importance of avoiding inadvertent disclosure is the same for both.

U. S. Steel, 730 F.2d at 1468.

The court's determination of counsel's access to confidential information is to be based "on the specific role of in-house counsel within the business: whether he or she has a part in the type of competitive decision-making that would involve the potential use of the confidential information." *In the Matter of Schering Plough Corp., Id.* (citations omitted). *See also ActiveVideo Networks, Inc. v. Verizon Communications, Inc.*, 274 F.R.D. 576 (E.D. Virg. 2010) (finding that General Counsel and 3 additional inside counsel were not involved in competitive decision-making and thus should not be denied access to confidential information); *Intervet, Inc. v. Merial Limited*, 241 F.R.D. 55 (D.D.C. 2007) (after balancing one party's right to try case as it sees fit against potential misuse of a confidential information, finding in-house counsel was not a competitive decision-maker and thus did not have to be precluded from access to information that other counsel and expert witnesses would see); *Matsushita Elec. Indus. Co., Ltd. v. U.S.* 929 F.2d 1577 (Fed. Circ. 1991) (reversing decision denying inside counsel access to business proprietary information in light of evidence that counsel was insulated from competitive decision-making).

In the case at hand, the inside lawyer in question is the company's General Counsel, James Proctor. Mr. Proctor is ultimately responsible for all of the company's myriad legal affairs involving the 23 plants it operates in multiple business lines across the United States, Canada, Australia and China. In his sworn Declaration, Mr. Proctor has testified that he is not involved in the day-to-day business or competitive decision-making at any of the individual businesses, including not being involved in the business affairs or competitive decision-making at the Tyler/Union utility fittings division that is the subject of the present action. Proctor Decl., ¶ 3. Specifically, Mr. Proctor states:

- he is not involved in formulating or implementing Tyler/Union's pricing strategies except to the extent that he might be called upon to provide legal advice;
- he does not participate in discussions about the price level the company sets for its products, including the published list price, multipliers (discounts off list), or job pricing; nor does he participate in the negotiation of freight terms, payment terms, cash discounts, or rebate structures except in his capacity as a lawyer providing legal advice;
- confidential information and how Tyler/Union's competitors make decisions regarding pricing, product offerings, marketing or similar competitive issues would not be relevant to his function as General Counsel.

Proctor Decl., ¶ 4.

In sum, while Mr. Proctor may offer legal advice to Tyler/Union, he is not involved in "competitive decision-making" as explained by the Court in *U.S. Steel* or by this court in *In the Matter of Schering-Plough*. Although no special need must be established, Mr. Proctor has testified that he needs to review all of the evidence and pleadings in this matter, including confidential matters, in order to fulfill his responsibilities to the corporation, specifically to ensure that the company's interests are appropriately protected, to evaluate the merits of the case for strategic purposes, and to report and make recommendations to senior management.

Because McWane has established that Mr. Proctor is not involved in competitive decision-making, McWane respectfully submits that its Motion is due to be granted and the Protective Order modified to allow Mr. Proctor access to confidential materials.

Dated: July 27, 2012

/s/ J. Alan Truitt

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Attorneys for Respondent McWane, Inc

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2012, 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 overnight delivery a copy of the foregoing document to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

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

Edward Hassi, Esq.
Geoffrey M. Green, Esq.
Linda Holleran, Esq.
Thomas H. Brock, Esq.
Michael L. Bloom, Esq.
Jeanine K. Balbach, Esq.
J. Alexander Ansaldo, Esq.
Andrew K. Mann, Esq.

By: /s/ William C. Lavery
William C. Lavery
Counsel for McWane, Inc.

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|---------------------------|---|-----------------|
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DECLARATION OF JAMES M. PROCTOR II

BEFORE ME, this day personally appeared James M. Proctor II, who, being first duly sworn, deposes and says as follows:

1. I am the General Counsel and a Senior Vice President of McWane, Inc. ("McWane"). McWane is a privately-held company with its headquarters in Birmingham, Alabama. McWane manufactures ductile iron pipe, valves and hydrants, and fittings for waterworks applications. McWane also manufactures pressure vessels for the containment of propane, compressed air, and chemicals; manufactures fire extinguishers and fire suppression systems through a subsidiary; and, is also engaged in operation of various technology companies. McWane operates 25 manufacturing plants, including 13 iron foundries, across the United States, Canada, Australia and China.

2. I am the senior legal officer at McWane and have overall responsibility for the management of all of the company's legal affairs. Among other duties, I am charged with assigning responsibility for the defense of the company in litigation, assuring that the company is ably represented and its interests are appropriately defended, and reporting to senior management and ownership the progress of such litigation and likely outcomes. I am also responsible for

evaluating the merits of cases and making recommendations to management regarding settlement strategies and alternatives.

3. Outside of my role in providing legal advice, I am generally not involved in the day-to-day operations or business affairs of any of the companies or businesses that make up McWane, including McWane's Tyler/Union utility fittings division that is the subject of the present action.

4. In particular, except when called upon to provide legal advice, I am not involved in formulating or implementing Tyler/Union's pricing strategies, competitive decision-making with respect to pricing levels, product offerings, production, marketing, or other decisions made in light of similar or corresponding information about a competitor. Except in my capacity as a lawyer providing legal advice, I am not involved in or consulted concerning the price level the company sets for its products, including the published list price, multipliers (discounts off list), or job pricing, and do not participate in the negotiation of freight terms, payment terms, cash discounts, or rebate structures. I am not involved in decisions concerning the range of products offered by Tyler/Union, the design of such products, the location or method of production, whether to offer new products, or similar competitive decisions. Similarly, as General Counsel, confidential information about how Tyler/Union's competitors make decisions regarding pricing, product offerings, marketing or similar competitive issues would not be relevant to the function that I serve.

5. As indicated above, I do on occasion provide legal advice to Tyler/Union (as well as other McWane companies) concerning competitive practices; however, it is in the context of assisting the company in understanding and complying with existing legal requirements. Similarly, I may also provide legal advice with respect to the negotiation of certain contracts that

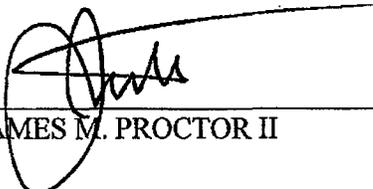
Tyler/Union (or other McWane companies) might consider. For example, I was involved in drafting the September 2009 Master Distributorship Agreement entered into by McWane and Sigma. I was not involved, however, in the underlying decisions with respect to whether the MDA was desirable from a business standpoint. Rather, my role in such instances is to provide legal advice and at times to help negotiate the contractual terms, but I do not determine the fundamental economic or other business terms of the agreement. All decisions about those issues are made by the operations executives involved in the transaction.

6. This matter is set for trial on September 4, 2012, and the parties are now actively engaged in final pretrial preparations. In order to fulfill my responsibilities to management, ownership and the company itself, including ensuring that the company's interests are being defended appropriately and evaluating strategic and tactical operations that could have a significant impact on the company's prospects, I must be able to review and evaluate the pretrial filings, expert reports and rulings of the Court. Unless I know and understand all the facts, I cannot advise senior management in a meaningful way. It is also my desire to attend all or a significant portion of the trial of this matter. For the same purposes, I need to participate fully, and, to the extent that certain testimony or exhibits are afforded *in camera* treatment, be able to hear and evaluate such evidence as it is presented. While any litigation against the company is considered important, the pending FTC matter is particularly so in light of the nature of the allegations and the potential impact to the company's reputation and financial condition.

7. I have read and understood the Protective Order entered in the above matter and agree to be bound by its terms. If granted access to confidential information, I will not use it, directly or indirectly, for any purpose other than the defense of this action. I acknowledge and agree that I am subject to the jurisdiction of this Court and to its contempt powers.

8. I have previously received and reviewed confidential or proprietary information in numerous cases that were the subject of protective orders entered by the respective courts adjudicating such cases. I have never revealed nor misused such confidential information in those cases, nor has it ever been suggested that I have done so.

FURTHER AFFIANT SAYETH NOT.



JAMES M. PROCTOR II

STATE OF ALABAMA)

Jefferson COUNTY)

I, the undersigned authority, a Notary Public in and for said County in said State, hereby certify that James M. Proctor, whose name as General Counsel and Senior Vice President of McWane, Inc., an Alabama corporation, is signed to the foregoing instrument, and who is known to me, acknowledged before me on this day that, being informed of the contents of said instrument, he, as such officer and with full authority, executed the same voluntarily for and as the act of said corporation.

Given under my hand and official seal this the 27th day of July, 2012.

Jennifer McDaniel

Notary Public

[NOTARIAL SEAL]

My Commission Expires: 2-23-2015

