

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



In the Matter of

McWANE, INC.,
a corporation.

PUBLIC

Docket No. 9351

Star Pipe Products, Ltd.'s Motion for In Camera Treatment of Proposed Evidence

Star Pipe Products, Ltd. ("Star") requests that the Administrative Law Judge enter an order pursuant to Rule 3.45(b) of the FTC Rules of Practice, 16 C.F.R. § 3.45, granting *in camera* treatment for no less than five years to the documents and deposition testimony listed in Attachment A submitted with motion and also listed in the proposed order. These materials, which have been designated by either Complaint Counsel or Respondent McWane, Inc. for possible introduction into evidence at the evidentiary hearing in this matter, contain secret, competitively sensitive information of Star, the disclosure of which could cause serious competitive injury. Accordingly, Star files this motion for *in camera* treatment, and also respectfully refers the Administrative Law Judge to the accompanying Declaration of Rishi Bhutada (Star's Vice President, Finance), which is submitted in support of the request for *in camera* treatment.

I. Background

Star, a non-party to this proceeding, has produced documents in response to subpoenas *duces tecum* served on it by Complaint Counsel and McWane, and has also made available a number of its officers and employees for deposition pursuant to subpoenas *ad testificandum*. Star also previously produced documents to the FTC pursuant to subpoenas served during the

FTC's pre-complaint investigation, which documents were later produced to McWane after this adjudicative proceeding began, and certain Star personnel were questioned at investigative hearings during the pre-complaint investigation.

Star recently received notice of Complaint Counsel's and McWane's intent to offer into evidence at the evidentiary hearing certain documents and deposition testimony reflecting Star's highly confidential and business-sensitive information. These materials had previously been designated by Star as "Confidential" under the FTC's Rules of Practice and the terms of the Protective Order entered in this matter. Complaint Counsel and McWane's counsel collectively identified over 500 documents or excerpts of deposition testimony¹ containing Star confidential information that Complaint Counsel or McWane state that they plan to offer into evidence at the evidentiary hearing. After reviewing these materials, Star has identified a narrow subset of these documents that are the subject of this motion, because of the sensitive nature of the materials and because Star believes their disclosure would cause it serious competitive harm. Accordingly, Star now moves for *in camera* treatment of these materials.

II. Standards for In Camera Treatment

Under FTC Rule 3.45(b), a party or third party to an adjudicative proceeding may obtain *in camera* treatment of materials offered into evidence. *See* 16 C.F.R. § 3.45(b). Materials merit *in camera* treatment when their public disclosure will result in a clearly defined, serious injury to the person or corporation whose records are involved. *See In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500 (1984); *In re H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). This showing can be made by establishing that the evidence is "sufficiently serious and material to the

¹ McWane's July 17, 2012 notice to Star did not identify specific deposition testimony by page and line designation, but instead simply designated a number of deposition transcripts in their entirety. Star objects to this blanket method of designating evidence and reserves its rights to more specifically request *in camera* treatment for any specific portions of this deposition testimony that McWane may seek to introduce as evidence at trial.

applicant's business that disclosure would result in serious competitive injury."² *Kaiser*, 103 F.T.C. at 500; *In re Gen. Foods Corp.*, 95 F.T.C. 352, 355 (1980); *In re BristolMeyers Co.*, 90 F.T.C. 455, 456 (1977).

The following factors are relevant in determining secrecy and materiality: (1) the extent to which the information is known outside 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 its competitors; (5) the amount of effort or money expended by the applicant in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *In re BristolMeyers Co.*, 90 F.T.C. at 456. A showing of injury may consist of extrinsic evidence or, in certain instances, may be inferred from the nature of the documents themselves. *In re E.I. Dupont de Nemours & Co.*, 97 F.T.C. 116 (1981). Third party requests for *in camera* treatment deserve special solicitude. *Kaiser*, 103 F.T.C. at 500.

III. Argument and Authorities

A. In camera treatment is warranted for the materials listed on Attachment A.

The documents and deposition testimony identified in Attachment A submitted with this motion contain highly sensitive competitive information of Star falling into roughly two categories: (1) internal communications, analyses, and data relating to Star's margins and other sensitive internal financial profitability and sales information, including specific customer information and information about Star's rebating practices; and (2) internal correspondence and analyses, as well as agreements and costing documents, relating to Star's efforts to develop and

² This factor can also be balanced against the importance of the information in explaining the rationale of Commission decisions. *Kaiser*, 103 F.T.C. at 500.

establish a presence in the market for domestic DIPF³ (DIPF made in the United States), which efforts are still ongoing. (Bhutada Decl., ¶ 4.) As explained herein and in the accompany declaration, each category of information warrants *in camera* treatment under the standards of 16 C.F.R. § 3.45.

The documents listed on section A.1 of Attachment A reveal information about Star's internal margin analyses for the products it sells; its pricing, rebating, and other discounting practices and policies; certain sensitive, specific information about customers; and Star's internal market and profitability analyses and overall strategies. (Bhutada Decl., ¶ 5; *see also* Attachment A.) This information was obtained and developed by Star through its own internal business analysis and strategic planning, which efforts Star undertook to gain a competitive advantage and to enhance its ability to compete in the market for DIPF and related products. (Bhutada Decl., ¶ 2.) If these categories of Star's competitive information were revealed, Star's ability to compete in the marketplace could be severely damaged and Star's competitors would gain a competitive advantage through their access to Star's internal business analyses and strategies. (*Id.*, ¶ 5.) For example, Star's competitors would be privy to Star's "break even" points and margins on different products; they would be able determine how Star analyzes and values business opportunities; and they and would be in a position to exploit this information in the marketplace against Star.

This information has been developed by Star over the course of many years and only by expending thousands of hours of time and at substantial cost. (*Id.*, ¶ 2.) It could not easily be accessed or recreated by any of Star's competitors. (*Id.*, ¶ 7.) And its disclosure to Star's competitors could be extremely damaging to Star, because among other things it could allow

³ Ductile iron pipe fittings, a product used in the waterworks industry and of which Star is a supplier.

those competitors compete against Star—using the unique knowledge and information that Star has developed—for the competitors’ own competitive gain and to the detriment of Star after it has expended its time and resources over many years to develop its business. (*Id.*, ¶¶ 2–3, 5.)

The documents listed in section A.2 of Attachment A contain information about Star’s business planning and strategies in the domestic DIPF market, including Star’s costs and the terms Star has negotiated for its domestic DIPF production with domestic foundries. (*Id.*, ¶ 6.) This information is closely guarded by Star and of extreme competitive sensitivity. If a competitor of Star in the market for supplying domestic DIPF were to gain access to Star’s plans and projections for competing in the domestic DIPF market, including Star’s profitability analyses and the details of Star’s consideration of contracting with or acquiring one or more domestic foundries, or to the content of Star’s negotiations and pricing arrangements with the domestic foundries Star has contracted with or is attempting to contract with to serve as a source for domestic DIPF, the competitor would gain an advantage over Star and could use that information to the detriment of Star. (*Id.*) In fact, part of this proceeding involves a complaint by the FTC that one of Star’s competitors engaged in exclusionary conduct in the domestic DIPF market, including by using exclusive dealing practices and making threats in an attempt to exclude Star from this market. (*See* Complaint ¶¶ 56–63.) In light of these matters, Star continues to be very concerned about the public release of its plans and arrangements in the domestic DIPF market.

The documents and deposition testimony listed on Attachment A also reveal generally the details of Star’s business strategy and its internal business strategies and principles and policies for dealing with customers and competing in the marketplace. Allowing Star’s competitors to obtain unfettered access to this information will enable them to understand Star’s strengths and

weaknesses in a manner that will put Star at a disadvantage in the marketplace, including because Star possesses no comparable information about its competitors.

Star has taken measures to protect the confidentiality of the information in the documents listed in Attachment A. It has limited the dissemination of such information within Star to select employees and officers on a “need to know” basis, and has taken every reasonable step to protect its confidentiality. (Bhutada Decl., ¶¶ 7, 8.) It would be difficult if not impossible for other entities, including competitors of Star, to access or recreate this information. (*Id.*, ¶¶ 2, 7.) Accordingly, it is clear that Star has gone to great lengths to preserve the confidentiality of the information in question.

In sum, the information in the documents and deposition testimony described above and in the declaration and on Attachment A thereto is competitively sensitive, and its disclosure could result in substantial harm to Star’s business. It is also information that is held in strict confidence by Star. If this information were disclosed and Star’s competitors given access to it, these competitors could potentially gain a competitive advantage in the marketplace by using this information against Star, to its detriment. The information therefore qualifies for *in camera* treatment under the FTC’s applicable standards.

B. Any public interest in disclosure is outweighed by the risk of competitive harm.

A non-party requesting *in camera* treatment for its confidential business information is deserving of “special solicitude.” *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500, 500 (1984). Reasonable periods of *in camera* treatment encourage cooperation with future discovery requests in adjudicative proceedings, just as Star has cooperated with the discovery demands in this case. Conversely, disclosing documents containing Star’s highly confidential information will not materially promote the resolution of this matter, nor will these documents lend

measurable public understanding of these proceedings. Thus, the balance of interests favors *in camera* protection for the materials listed on Attachment A. See *In re Bristol-Myers*, 90 F.T.C. 455, 456 (1977) (describing six-factor test for determining secrecy and materiality).

C. Star requests in camera protection for any hearing testimony regarding the information contained in the materials listed in Attachment A.

Star anticipates that certain of its own officers, employees, or former employees may be called to testify at the evidentiary hearing. To the extent testimony is elicited from these individuals concerning the documents and testimony listed on Attachment A, or information of the type contained therein, Star respectfully requests that it be permitted to designate such testimony as confidential and *in camera* and subject to the same protections afforded the underlying documents and testimony listed on Attachment A.

D. In camera protection should extend for five years.

The nature of the confidential and sensitive information contained in the documents and testimony listed on Attachment A warrants lasting protection. As discussed above and in the Declaration of Rishi Bhutada and shown by the documents themselves, the documents contain information about Star's plans and strategies that are still in effect, and they also contain information about Star's practices and financial analyses that would allow a Star competitor to derive knowledge about Star's current competitive position that would give the competitor an advantage against Star. Accordingly, Star respectfully requests that the materials listed on Attachment A be afforded *in camera* protection for a period of five years from the date of any order granting this motion.

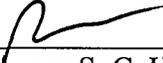
IV. Conclusion

For these reasons, Star requests that the Administrative Law Judge enter an order granting the documents and deposition testimony listed on Attachment A and in the proposed

order *in camera* treatment for a period of not less than five years. Star further requests general relief.

Dated: July 30, 2012

Respectfully submitted,



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Certificate of Service and Regarding Electronic Submission

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