

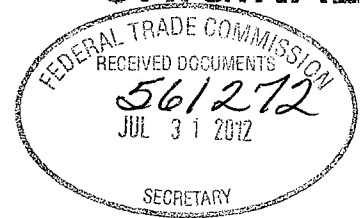
UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

ORIGINAL

In the Matter of
McWANE, INC.,
a corporation.

PUBLIC

DOCKET NO. 9351



**NON-PARTY UNITED STATES PIPE AND FOUNDRY COMPANY, LLC'S MOTION
FOR *IN CAMERA* TREATMENT OF COMPLAINT COUNSEL
PROPOSED TRIAL EXHIBITS**

United States Pipe and Foundry Company, LLC ("U.S. Pipe"), a non-party to this matter, respectfully moves, pursuant to 16 C.F.R. § 3.45(b), for *in camera* treatment of two documents that Complaint Counsel have designated for introduction into evidence in the administrative trial in this matter. Specifically, U.S. Pipe requests *in camera* treatment for a period of two years of two spreadsheets that contain highly confidential and competitively sensitive U.S. Pipe purchase and sales data.

I. INTRODUCTION

By letters dated July 17, 2012, Complaint Counsel and McWane, Inc. ("McWane") notified U.S. Pipe and Mueller Water Products, Inc. ("Mueller") that they intend to introduce into evidence certain documents and deposition testimony that U.S. Pipe produced pursuant to compulsory process issued in this matter. Complaint Counsel and McWane together designated thirty U.S. Pipe documents as well as extensive U.S. Pipe deposition testimony.¹ U.S. Pipe

¹ Certain deposition content that the parties have designated contains or describes communications to and from attorneys for the Ductile Iron Fittings Research Association for which U.S. Pipe and Mueller have maintained a claim of attorney-client privilege. McWane's counsel read those communications into the record from privileged documents that were not produced by U.S. Pipe or Mueller and therefore could not be clawed back by either company. U.S. Pipe and Mueller continue to maintain their privilege claim for the communications.

marked all of the designated documents as confidential when it produced them.

Two of the documents that Complaint Counsel designated, CX 1944 and CX 1945, contain recent, detailed U.S. Pipe purchase and sales data that is competitively sensitive and is held in strict confidence by U.S. Pipe. Exhibit A to this Motion contains the Declaration of Tom Morton, U.S. Pipe's Vice President, Purchasing, who is qualified to explain the highly sensitive and confidential nature of the data in these documents. Public disclosure of these documents will cause direct, serious harm to U.S. Pipe's business and competitive position. U.S. Pipe is therefore entitled to *in camera* treatment of CX 1944 and CX 1945 for a period of two years.

II. THE STANDARD FOR *IN CAMERA* TREATMENT

Applicants seeking protection for material offered into evidence are entitled to *in camera* treatment when the material's "public disclosure will likely result in a clearly defined, serious injury." 16 C.F.R. § 3.45(b). Applicants may meet this standard by establishing that the evidence 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). Administrative courts consider six factors to determine secrecy and materiality: (1) the extent to which the information is known outside of the applicant's business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the company and its competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *In re Bristol-Myers Co.*, 90 F.T.C. 455, 456 (1977). When considering these factors, "the courts have generally attempted to protect confidential business information from unnecessary airing." *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). Moreover, a non-party requesting *in camera* treatment deserves "special solicitude" for its confidential business

information. *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500 (1984) (order directing *in camera* treatment for sales statistics over five years old).

III. TWO YEARS OF *IN CAMERA* TREATMENT FOR CX 1944 AND CX 1945 IS WARRANTED

The information contained in CX 1944 and CX 1945 is sufficiently secret and material to U.S. Pipe's business that its public disclosure would result in serious business and competitive injury to U.S. Pipe. Two years of *in camera* treatment for these documents is necessary to avoid this serious injury.

A. U.S. Pipe Has Preserved The Confidentiality Of The Information In CX 1944 And CX 1945

U.S. Pipe has taken substantial measures to guard the information contained in CX 1944 and CX 1945 by limiting dissemination of such information and taking every reasonable step to protect its confidentiality. (Morton Decl., Ex. A at ¶ 5.) The information is disclosed only to those U.S. Pipe employees who have a need to know the information in order to perform their job functions. (*Id.*) Detailed purchase and sales data compilations like those contained in CX 1944 and CX 1945 are not disseminated outside of U.S. Pipe. (*Id.*) It would be virtually impossible for U.S. Pipe's competitors or others outside U.S. Pipe to access or recreate the information in CX 1944 and CX 1945. (*Id.*) These factors demonstrate that U.S. Pipe has gone to great lengths to preserve the confidentiality of the information contained in CX 1944 and CX 1945.

B. The Information In CX 1944 And CX 1945 Is Sufficiently Material Such That Its Public Disclosure Would Result In Serious Competitive Injury To U.S. Pipe

CX 1944 and CX 1945 contain recent, detailed information about U.S. Pipe's purchases and sales of fittings. (*Id.* ¶¶ 3, 6-9.) Their public disclosure would reveal very competitively valuable and sensitive information about U.S. Pipe's supply relationships, customer list, prices, costs and purchasing and sales strategies. (*Id.* ¶¶ 3-4, 6-9.) This disclosure would result in

serious injury to U.S. Pipe's competitive position in the marketplace and would threaten the company's relationships with its suppliers and customers. (*Id.*)

CX 1944 is a spreadsheet that contains U.S. Pipe fittings purchase data for 2010. (*Id.* ¶ 6.) The document consists of detailed information about each U.S. Pipe fittings purchase, including supplier name, price, quantity and product description. (*Id.*) CX 1944 reveals highly confidential and competitively sensitive business information about U.S. Pipe's fittings supply relationships and negotiated fittings purchase prices. (*Id.*) Disclosure of this purchase data to U.S. Pipe's competitors would result in serious and significant competitive injury and potential irreparable harm. (*Id.*) Such disclosure would provide U.S. Pipe's competitors with extensive information about the pricing terms of U.S. Pipe's highly confidential contractual supply relationships and would erode U.S. Pipe's competitiveness in the marketplace. (*Id.*) Competitors could use the data to interfere with U.S. Pipe's contractual relationships with its fittings suppliers. (*Id.*) Competitors might also use the data to negotiate fittings supply agreements with U.S. Pipe's suppliers that disadvantage U.S. Pipe. (*Id.*) Competitors could further use this data, which describes an important component of U.S. Pipe's input costs, against U.S. Pipe when competing for sales opportunities. (*Id.*)

CX 1945 is a spreadsheet that contains U.S. Pipe fittings sales data for 2003 through 2010. (*Id.* ¶ 8.) The document consists of detailed information about each U.S. Pipe fittings sale, including customer name, price, quantity and product description. (*Id.*) CX 1945 reveals highly confidential and competitively sensitive business information of U.S. Pipe including the identity of U.S. Pipe's customers, the products that each customer purchased, and the prices that U.S. Pipe charged each customer for each product. (*Id.*) Disclosure of this sales data to U.S. Pipe's competitors and customers would result in serious and significant competitive injury and potential irreparable harm. (*Id.*) Such disclosure would provide U.S. Pipe's competitors with

extensive information about U.S. Pipe's prices, customer relationships and sales strategy and would erode U.S. Pipe's competitiveness in the marketplace. (*Id.*) Competitors could use the customer list and pricing information to attempt to take business from U.S. Pipe. (*Id.*) Customers could take advantage of this information about the prices that their competitors are paying for fittings in future negotiations with U.S. Pipe, to U.S. Pipe's detriment. (*Id.*)

The public disclosure of CX 1944 and CX 1945, therefore, would result in serious competitive injury to U.S. Pipe.

C. The Public Interest In Disclosure Of CX 1944 And CX 1945 Is Outweighed By The Likelihood Of Serious Competitive Harm To U.S. Pipe

As a non-party to this matter, U.S. Pipe deserves "special solicitude" in requesting *in camera* treatment for its confidential business information. *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500 (1984) (order directing *in camera* treatment for sales statistics over five years old). *In camera* treatment of information for reasonable time periods encourages non-parties to cooperate with future discovery requests in adjudicative proceedings. *Id.* U.S. Pipe has cooperated extensively with the discovery demands in this matter. Conversely, "public understanding of this proceeding does not depend on access to" U.S. Pipe's highly confidential and competitively sensitive purchase and sales data, nor will the disclosure of these documents materially promote the resolution of this matter. *Id.* The balance of interests clearly favors *in camera* protection for CX 1944 and CX 1945. *See In re Bristol-Myers Co.*, 90 F.T.C. at 456.

D. Two Years Of *In Camera* Treatment Is Necessary To Avoid Serious Competitive Injury To U.S. Pipe

The current competitive sensitivity of the recent U.S. Pipe purchase and sales information contained in CX 1944 and CX 1945 warrants delaying the public release of the documents for a time period that allows sufficient aging so as to avoid serious competitive injury to U.S. Pipe.


(Morton Decl., Ex. A at ¶¶ 7, 9.) Accordingly, U.S. Pipe requests that the Court grant CX 1944 and CX 1945 *in camera* treatment for the limited period of two years.

IV. CONCLUSION

Public disclosure of CX 1944 and CX 1945 would result in a serious injury to U.S. Pipe's business and competitive position. The Court should grant U.S. Pipe's motion for *in camera* treatment of these documents for a period of two years.²

Dated: July 31, 2012

Respectfully submitted,

By 
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Michael L. Hitsky
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*Attorneys for Mueller Water Products, Inc.
and United States Pipe and Foundry
Company, LLC*

² Pursuant to 16 C.F.R. § 3.45(b), in the event that the Commission intends to disclose *in camera* information of U.S. Pipe in a final decision, the undersigned counsel at Latham & Watkins LLP should be notified.

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

**In the Matter of
McWANE, INC.,
a corporation.**

DOCKET NO. 9351

[PROPOSED] ORDER

On July 31, 2012, Non-Party United States Pipe and Foundry Company, LLC (“U.S. Pipe”) filed a motion for *in camera* treatment of two documents that Complaint Counsel have designated for introduction into evidence in the administrative trial in this matter. The two documents contain recent, detailed fittings purchase and sales data of U.S. Pipe.

IT IS HEREBY ORDERED that U.S. Pipe’s motion is GRANTED. CX 1944 and CX 1945 shall be subject to *in camera* treatment pursuant to 16 C.F.R. § 3.45 and shall be kept confidential and not placed on the public record of this proceeding for a period of two years.

IT IS FURTHER ORDERED that only authorized Federal Trade Commission personnel and court personnel concerned with judicial review may have access to the above-referenced materials, provided that I, the Commission and reviewing courts may disclose such *in camera* materials to the extent necessary for the proper disposition of the proceeding.

ORDERED this ____ day of _____, 2012.

D. Michael Chappell
Administrative Law Judge

Exhibit A

**UNITED STATES OF AMERICA
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DECLARATION OF TOM MORTON IN SUPPORT OF NON-PARTY UNITED STATES PIPE AND FOUNDRY COMPANY, LLC'S MOTION FOR *IN CAMERA* TREATMENT OF COMPLAINT COUNSEL PROPOSED TRIAL EXHIBITS

I, Tom Morton, declare as follows:

1. I am Vice President, Purchasing of United States Pipe and Foundry Company, LLC ("U.S. Pipe"). I have held this position since May 2005. In my position, I am responsible for the management of all purchasing and logistics activities for U.S. Pipe. My responsibilities include the management of U.S. Pipe's fittings purchases.

2. I make this declaration in support of Non-Party United States Pipe and Foundry Company, LLC's Motion For *In Camera* Treatment Of Complaint Counsel Proposed Trial Exhibits. I have personal knowledge of the matters stated herein and, if called upon to do so, could competently testify about them.

3. I have reviewed the U.S. Pipe documents that Federal Trade Commission complaint counsel have marked as CX 1944 (USP-FTC_00000025) and CX 1945 (USP-FTC_00000026), which are attached to this declaration as Exhibit 1 and Exhibit 2, respectively. These documents consist of detailed fittings purchase and sales data of U.S. Pipe.

4. By virtue of my management position at U.S. Pipe and my familiarity with the confidentiality protections that U.S. Pipe affords to the type of information contained in CX 1944 and CX 1945, I believe that the disclosure of these documents to the public, including U.S. Pipe's competitors, would cause serious business and competitive injury to U.S. Pipe.

5. U.S. Pipe has taken substantial measures to guard the information contained in CX 1944 and CX 1945 by limiting dissemination of such information and taking every reasonable step to protect its confidentiality. The information is disclosed only to those U.S. Pipe employees who have a need to know the information in order to perform their job functions. Detailed purchase and sales data compilations like those contained in CX 1944 and CX 1945 are not disseminated outside of U.S. Pipe. It would be virtually impossible for U.S. Pipe's competitors or others outside U.S. Pipe to access or recreate the information in CX 1944 and CX 1945.

6. CX 1944 is a spreadsheet that contains U.S. Pipe fittings purchase data for 2010. The document consists of detailed information about each U.S. Pipe fittings purchase, including supplier name, price, quantity and product description. CX 1944 reveals highly confidential and competitively sensitive business information about U.S. Pipe's fittings supply relationships and negotiated fittings purchase prices. Disclosure of this purchase data to U.S. Pipe's competitors would result in serious and significant competitive injury and potential irreparable harm. Such disclosure would provide U.S. Pipe's competitors with extensive information about the pricing terms of U.S. Pipe's highly confidential contractual supply relationships and would erode U.S. Pipe's competitiveness in the marketplace. Competitors could use the data to interfere with U.S. Pipe's contractual relationships with its fittings suppliers. Competitors might also use the data to negotiate fittings supply agreements with U.S. Pipe's suppliers that disadvantage U.S. Pipe.

Competitors could further use this data, which describes an important component of U.S. Pipe's costs, against U.S. Pipe when competing for sales opportunities.

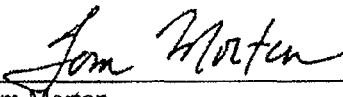
7. CX 1944 contains recent data from 2010. *In camera* treatment of the document for two years is necessary to avoid serious injury to U.S. Pipe's business and competitive position.

8. CX 1945 is a spreadsheet that contains U.S. Pipe fittings sales data for 2003 through 2010. The document consists of detailed information about each U.S. Pipe fittings sale, including customer name, price, quantity and product description. CX 1945 reveals highly confidential and competitively sensitive business information of U.S. Pipe including the identity of U.S. Pipe's customers, the products that those customers purchased, and the prices that U.S. Pipe charged those customers. Disclosure of this sales data to U.S. Pipe's competitors and customers would result in serious and significant competitive injury and potential irreparable harm. Such disclosure would provide U.S. Pipe's competitors with extensive information about U.S. Pipe's customer relationships and sales strategy and would erode U.S. Pipe's competitiveness in the marketplace. Competitors could use the customer list and pricing information to attempt to take business from U.S. Pipe. Customers could take advantage of this information about the prices that their competitors are paying for fittings in future negotiations with U.S. Pipe.

9. CX 1945 contains recent data from 2010. *In camera* treatment of the document for two years is necessary to avoid serious injury to U.S. Pipe's business and competitive position.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 30TH day of July, 2012.



Tom Morton

Exhibit 1

[Redacted from Public Version]

Exhibit 2

[Redacted from Public Version]

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**McWANE, INC.,
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PROOF OF SERVICE OF PUBLIC FILING AND CERTIFICATION

I, Michael L. Hitsky, hereby certify that on this 31st day of July, 2012, I caused a copy of the documents listed below to be served *by hand* on each of the following: The Office of the Secretary of the Federal Trade Commission (original and two copies) and the Honorable D. Michael Chappell (two copies),

and by *electronic mail* to the Honorable D. Michael Chappell (oyalj@ftc.gov); Thomas H. Brock (tbrock@ftc.gov); Edward Hassi (ehassi@ftc.gov); Linda Holleran (lholleran@ftc.gov); J. Alexander Ansaldo (jansaldo@ftc.gov); Andrew K. Mann (amann@ftc.gov); Jeanine Balbach (jbalbach@ftc.gov); Michael J. Bloom (mjbloom@ftc.gov); Geoffrey Green (ggreen@ftc.gov); Joseph A. Ostoyich (joseph.ostoyich@bakerbotts.com); Andreas Stargard (andreas.stargard@bakerbotts.com); William Lavery (william.lavery@bakerbotts.com); Alan Truitt (atruitt@maynardcooper.com); Thomas Thagard III (tthagard@maynardcooper.com); Gregory Huffman (Gregory.Huffman@tklaw.com); William Katz (William.Katz@tklaw.com); Nicole Williams (Nicole.Williams@tklaw.com); and Brian Stoltz (Brian.Stoltz@tklaw.com):

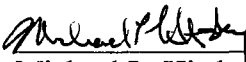
- (1) Non-Party U.S. Pipe & Foundry Company, LLC's Motion for *In Camera* Treatment of Complaint Counsel Proposed Trial Exhibits;
- (2) [Proposed] Order;
- (3) Exhibit A – Declaration of Tom Morton In Support of Non-Party U.S. Pipe & Foundry Company, LLC's Motion for *In Camera* Treatment of Complaint Counsel Proposed Trial Exhibits;
- (4) Exhibit 1 – CX 1944 (USP-FTC_00000025) [Redacted from Public Version];
- (5) Exhibit 2 – CX 1945 (USP-FTC_00000026) [Redacted from Public Version]; and
- (6) This Proof of Service.

I also certify that on this 31st day of July, 2012, I caused to be served one copy via Federal Express of the foregoing documents upon:

Edward Hassi
U.S. Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

Thomas W. Thagard III
Maynard Cooper & Gale, P.C.
1901 Sixth Avenue North
2400 Regions/Harbert Tower
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July 31, 2012

By: 
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