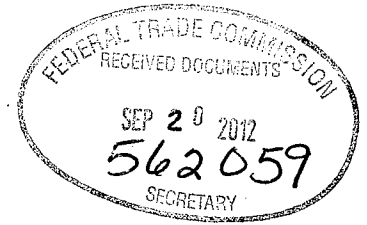


ORIGINAL



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

In the Matter of)	PUBLIC
McWane, Inc.,)	DOCKET NO. 9351
Respondent)	

MOTION OF NON-PARTY AMERICAN CAST IRON PIPE COMPANY FOR *IN CAMERA* TREATMENT OF PROPOSED EVIDENCE

American Cast Iron Pipe Company (“ACIPCO”), a non-party to the above styled action, respectfully moves, pursuant to 16 C.F.R. § 3.45(b), for an order granting *in camera* treatment of certain documents that it produced in response to third party subpoenas issued by Complaint Counsel and respondent McWane, Inc. (“McWane”) that have been designated for possible introduction in the administrative trial in this matter.

By letter dated July 17, 2012, Complaint Counsel notified ACIPCO that it intends to introduce into evidence certain documents produced by ACIPCO in response to its subpoena, and certain excerpts from the May 17, 2012 depositions of ACIPCO employees Jerry Burns and Michael Hays. Counsel for McWane has also notified ACIPCO that McWane intends to introduce into evidence certain excerpts from the transcripts of Messrs. Burns and Hays’s depositions.

The ACIPCO documents designated by the Complaint Counsel for possible introduction into evidence include, among others, the following documents (the “Confidential Documents”):

- Exhibit CX 1894 (ACIP000001-000002)
- Exhibit CX 1895 (ACIP000003-000007)
- Exhibit CX 1902 (ACIP002676-002679)

- Exhibit CX 1907 (ACIP000068-000069)
- Exhibit CX 1924 (ACIP002601-002603)
- Exhibit CX 2295 (ACIP000018-000018)
- Exhibit CX 2296 (ACIP000019-000019)

Each of the Confidential Documents are attached as exhibits to the Affidavit of J. Michael O'Brien in support of this Motion¹ (the "O'Brien Aff."), which is attached to this Motion as Exhibit "A." Each of the Confidential Documents, including those produced in native format (Exhibits CX 2295 and CX 2296), were produced as "confidential material" subject to the Protective Order entered in this matter on January 5, 2012.

The Confidential Documents contain information that is competitively sensitive for ACIPCO, and which ACIPCO holds in strict confidence. Public disclosure of these materials is likely to cause direct, serious harm to ACIPCO's competitive position. Therefore, pursuant to 16 C.F.R. § 3.45(b), ACIPCO respectfully moves for *in camera* treatment of the Confidential Documents identified in the O'Brien Affidavit.

I. DESCRIPTION OF CONFIDENTIAL DOCUMENTS.

Exhibit CX 1894 is a summary of ACIPCO's sales of its domestically manufactured fittings for the year 2009 and the year 2010 (through August 18, 2010). The summary includes substantial confidential information of ACIPCO, including the types of customers to whom ACIPCO made sales, the total sales figures for the relevant time period, and the total tonnage

¹ Two of the documents, Exhibits CX 2295 and CX 2296, are excel spreadsheets that were produced in native format (which is why each are labeled with only one Bates number), and are quite voluminous. The first several pages of both Exhibits CX 2295 and CX 2296 are attached to the O'Brien Aff. as exemplars of the complete spreadsheets. All succeeding pages of each exhibit contain the same type of information contained on the first several pages. ACIPCO has not attached the full spreadsheets due to their bulk, but will provide them should the Court desire.

sold. Furthermore, certain other confidential information, including the price per ton as sold to certain types of customers, could be derived from Exhibit CX 1894 even though such information is not disclosed on the document. (O'Brien Aff., ¶ 5).

Exhibit CX 1895 is a quarterly summary of ACIPCO's sales of its domestically manufactured fittings for the year 2008 through the first quarter of 2011. The sales figures are broken down by the size of the fittings sold by ACIPCO. This exhibit contains not only ACIPCO's sales figures for each quarter between 2008 and the first quarter of 2011 for the different size fittings sold by ACIPCO, but also the total amount of tons sold during the same time period and for each of the different sizes of fittings. As with Exhibit CX 1894, per ton pricing information can be derived from the data in Exhibit CX 1895. Disclosure of the information contained in Exhibits CX 1894 and 1895 would severely harm ACIPCO because ACIPCO's competitors would gain access to internal, confidential sales data which would not otherwise be available to such competitors. (O'Brien Aff., ¶¶ 6, 7).

Exhibit CX 1902 is a February 22, 2011 email and attachment. The email and the attachment are an internal discussion regarding ACIPCO's business plan and strategy with regard to fittings, and are thus highly confidential. Disclosure of this plan would severely harm ACIPCO because its competitors would have direct insight into its future business plan and strategy with regard to an entire segment of its business -- fittings. Such a disclosure would put ACIPCO at a severe competitive disadvantage. (O'Brien Aff., ¶¶ 8, 11).

Exhibit CX 1907 is an internal March 2011 email string between ACIPCO personnel regarding its fittings negotiations, including those related to pricing, with another major fittings supplier. ACIPCO purchases fittings from this company for resale to ACIPCO customers, and this company is the supplier of the overwhelming majority of the fittings sold by ACIPCO, with

the exception being a few large diameter fittings that ACIPCO manufactures. ACIPCO invests significant time and resources in conducting negotiations with its customers and suppliers. Disclosure of this exhibit would allow ACIPCO's competitors, including the manufacturer referenced in the email string, to view and analyze ACIPCO's internal pricing and business strategy, and would substantially affect and harm ACIPCO's future dealings with its customers and suppliers. (O'Brien Aff., ¶¶ 9, 11).

Exhibit CX 1924 is a September 2009 email string and a related attachment. The attachment contains data regarding ACIPCO's average costs to purchase fittings and ACIPCO's average costs to manufacture fittings. The email discusses the data contained in the attachment and discusses ACIPCO's strategy for the purchase and manufacture of fittings based on the data. As with the previous exhibits, this exhibit contains highly confidential internal business strategy, as well as confidential internal cost data. ACIPCO would be at a severe competitive disadvantage if its competitors were permitted to review the data contained in the attachment and the internal strategy discussion contained in the email. The candor contained in both Exhibits CX 1907 and CX 1924 demonstrate the expectation that the strategy discussions and data would remain confidential. (O'Brien Aff., ¶¶ 10, 11).

Exhibits CX 2295 and CX 2296 are voluminous spreadsheets containing information relating to ACIPCO's fittings sales by its two divisions: American Ductile Iron Pipe and American Flow Control. Together, these two divisions account for all fittings sales by ACIPCO. The spreadsheets contain customer names, dates of sales, a description of the products sold, the quantities of the products sold, the total tonnage sold, and the total price paid by each customer, for the time period January 2003 - March 2012. Thus these spreadsheets contain a complete and detailed sales history of every fittings sale by ACIPCO during the time period covered in the

spreadsheets. ACIPCO considers all of the information contained on these spreadsheets, particularly the identity of its customers, the products such customers buy, and the prices paid by such customers, to be trade secrets, vital to the company, and highly confidential. (O'Brien Aff., ¶¶ 12, 13).

Disclosure of the information contained in Exhibits CX 2295 and CX 2296 would make public the lists of customer names, the products purchased and the prices paid by those customers, all of which ACIPCO and its divisions consider to be trade secrets, vital to the company, and highly confidential information. As these exhibits also include a description of the type and quantity of particular fittings bought by each customer, the date of the sale, and the prices paid by each customer, public disclosure of this information would provide ACIPCO's customers and competitors with information that might be used (i) by ACIPCO's competitors to poach ACIPCO customers, and (ii) by ACIPCO's customers in future pricing negotiations, all of which would be substantially detrimental to ACIPCO's business. (O'Brien Aff., ¶ 13).

II. ACIPCO'S CONFIDENTIAL DOCUMENTS DESERVE IN CAMERA TREATMENT.

The documents that are described in this motion warrant *in camera* treatment as provided by 16 C.F.R. § 3.45(b). Under 16 C.F.R. § 3.45(b), requests for *in camera* treatment must show that public disclosure of the document in question "will result in a clearly defined, serious injury to the person or corporation whose records are involved." H.P. Hood & Sons, Inc., 58 F.T.C. 1184, 1188 (1961). That showing of a clearly defined, serious injury can be made by establishing that the document in question is "sufficiently secret and sufficiently material to the applicant's business that disclosure would result in serious competitive injury." In re General Foods Corp., 95 F.T.C. 352, 355 (1980). In this context, "the courts have generally attempted to protect confidential business information from unnecessary airing." Hood, 58 F.T.C. at 1188.

In this instance, the public disclosure of the Confidential Documents would be unnecessary because they are not essential to explain the rationale of the Commission's decision in the above styled matter. In addition, several factors warrant *in camera* treatment of the Confidential Documents.

A. ACIPCO has preserved the confidentiality of the Confidential Documents.

ACIPCO has taken significant steps to protect the confidential nature of the Confidential Documents, all of which were produced under a compulsory subpoena process. ACIPCO produced all the Confidential Documents subject to the Protective Order entered in this matter, and designated all such documents as "confidential," either by stamping confidential on all such documents, or by designating the documents as "confidential" in an accompanying correspondence. (O'Brien Aff., ¶ 14).

Furthermore, ACIPCO keeps the information contained in the Confidential Documents confidential, and the information is not publicly available. (O'Brien Aff., ¶ 15). ACIPCO has taken reasonable measures to protect the confidentiality of the Confidential Documents. (O'Brien Aff., ¶ 15). Only a limited number of ACIPCO employees have knowledge of or access to the information contained in the Confidential Documents, and it would be extremely difficult, if not impossible, for ACIPCO's competitors or other outside persons to access or re-create the information contained therein. (O'Brien Aff., ¶ 16). These efforts demonstrate that ACIPCO has gone to great lengths to preserve the confidentiality of the information contained in the Confidential Documents.

B. Disclosure of the information in the Confidential Documents would result in serious competitive injury to ACIPCO.

Each of the Confidential Documents contain information that is central to ACIPCO's business, and its disclosure would have a serious and direct impact on its competitive position in

the fittings business. The information contained in the Confidential Documents would be extremely valuable to ACIPCO's business partners and competitors as it would provide behind-the-scenes insight into ACIPCO's sales, pricing, customers, business strategies, and negotiation strategies, all of which are highly confidential and unavailable to the public.

For example, if ACIPCO's competitors and business partners are able to view internal discussions regarding business strategy, negotiations and pricing, such competitors could use that information to their advantage, and ACIPCO's disadvantage, in future negotiations. Furthermore, if ACIPCO's customers are able to view the prices and rates that all of ACIPCO's other customers pay, they could use that information to leverage different prices and rates for themselves. Similarly, if ACIPCO's competitors are able to view ACIPCO's customer lists and sales information, those competitors would be free to approach ACIPCO's customers armed with valuable information and possibly poach ACIPCO's customers.

Taken together, the information contained in the Confidential Documents is central to ACIPCO's business. Preserving the confidentiality of this commercially sensitive information is critical for ACIPCO to maintain its market position and competitive advantage, which are the result of substantial investment over many years. (O'Brien Aff., ¶ 18). If accorded access to this confidential information, ACIPCO's competitors and business partners could unfairly exploit the information to their advantage. Disclosure would allow ACIPCO's competitors to pinpoint ACIPCO's prices and use this non-public information to target ACIPCO's customers for their own competitive gain. Access to this information would also enable ACIPCO's competitors to gain an understanding of ACIPCO's business and negotiating strategies, all of which would have an immediate and lasting detrimental effect on ACIPCO's ability to compete in the fittings market.

The Confidential Documents, which are non-public documents of a non-party, are the types of protected materials the public -- and by extension competitors -- should not be permitted to access. If disclosed, their confidentiality is destroyed completely, and ACIPCO will suffer significant harm.

C. **The likelihood of serious competitive harm to ACIPCO outweighs any public interest in disclosure of the Confidential Documents.**

As a non-party requesting *in camera* treatment of confidential, competitively sensitive business information, ACIPCO deserves “special solicitude” for its Confidential Documents. In the Matter of Kaiser Aluminum & Chemical Corporation, 103 F.T.C. 500 (1984) (order directing *in camera* treatment for sales statistics over five years old). Granting *in camera* treatment of confidential, competitively sensitive information for a reasonable period encourages non-parties to cooperate with future discovery requests in adjudicative proceedings. Id. Indeed, ACIPCO has cooperated with the discovery demands made upon it by the Complaint Counsel and McWane in this case.

On the other hand, publicly disclosing ACIPCO’s sensitive information will not materially promote the resolution of this matter, nor will it be necessary to understand the Court’s decision-making process. In re Bristol-Myers Co., 90 F.T.C. 455, 456 (1977). Thus, the balance of the interests clearly favors *in camera* treatment for the Confidential Documents in this matter.

D. **Protection for the Confidential Documents warrants lasting protection.**

The information contained in Confidential Documents warrants lasting protection because it is “sufficiently secret and sufficiently material to [ACIPCO’s] business that disclosure would result in competitive injury.” General Foods, 95 F.T.C. at 355; see also 16 C.F.R. § 3.45(b); Hood, 58 F.T.C. at 1188 (“courts have generally attempted to protect confidential

business information from unnecessary airing”). Indefinite *in camera* treatment is granted under certain circumstances, including where the competitive sensitivity or the proprietary value of the information will not diminish with the passage of time. In re Coca Cola Co., 1990 FTC LEXIS 364 (Oct. 17, 1990). Examples of this information include trade secrets, secret formulas, processes, and other secret technical information, and information that is privileged. In re Hoechst Marion Roussel, Inc., 2000 FTC LEXIS 157 (Nov. 22, 2000).

Exhibits CX 2295 and 2296, in particular, warrant indefinite *in camera* treatment, because such exhibits contain lists of ACIPCO’s customers, which are trade secrets under Alabama law under certain circumstances that are present in this instance. See Public Systems, Inc. v. Towry, 587 So. 2d 969, 973 (Ala. 1991) (customers lists may be treated as trade secrets, especially when the lists contain “specific information about customers, for example, their buying habits”).

The remaining Confidential Documents contain core business information, customer data, pricing and cost information, business strategies, and negotiating strategies that are vital to ACIPCO’s competitive position and overall business strategy. (O’Brien Aff., ¶ 17). Accordingly, ACIPCO respectfully requests that Exhibits CX 1894, CX 1895, CX 1902, CX 1907, and CX 1924 be afforded *in camera* treatment for a period of five years.

Respectfully submitted this the 19th day of September, 2012.

/s/ Brent W. Dorner

Gary M. London (LON001)

John C. Morrow (MOR054)

Brent W. Dorner (DOR026)

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document by Federal Express or by U.S. First Class Mail, and by email on this the 19th day of September, 2012:

The Office of the Secretary
Federal Trade Commission
600 Pennsylvania Ave NW
Room H-113
Washington, D.C. 20580

Honorable D. Michael Chappell, Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave NW
Room H-106
Washington, D.C. 20580
ojl@ftc.gov

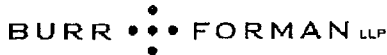
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/s/ Brent W. Dorner
OF COUNSEL

EXHIBIT 1 (CX 1894)



results matter

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BURR.COM

September 9, 2010

Christopher Renner
Federal Trade Commission, Bureau of Competition
601 New Jersey Avenue, NW
Washington, DC 20580

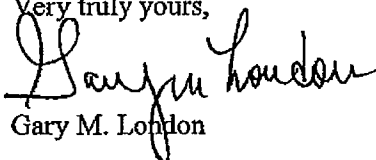
Re: 2009 and 2010 Fittings Sales Summary

Dear Mr. Renner:

Enclosed is a summary of American Cast Iron Pipe Company's ("American") domestically manufactured fittings sales for the year 2009 and the year 2010 to date. The fittings size range is 30" through 64". American did not domestically manufacture fittings in sizes 24" and smaller. As you can see the company has broken its annual fittings sales down by customer category, dollars and tonnage.

American treats these numbers as highly confidential, and requests that the Federal Trade Commission treats them in the same manner. If you have further questions please contact me at your convenience.

Very truly yours,



Gary M. London

GML/tlm
Enclosure

REDACTED

EXHIBIT 2 (CX 1895)

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April 7, 2011

Christopher Renner
Federal Trade Commission, Bureau of Competition
601 New Jersey Avenue, NW
Washington, DC 20580

Re: 2008 through 1st quarter 2011 Fittings Sales Summary

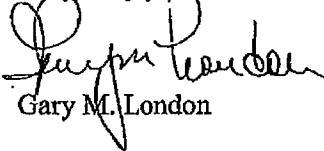
Dear Mr. Renner:

Recently, on behalf of the Federal Trade Commission, you requested that American Cast Iron Pipe Company ("American") produce certain information relating to the sale of domestically manufactured fittings.

Enclosed is a summary of American's domestically manufactured fittings sales for the year 2008 through the 1st quarter of 2011. As you requested American has broken the information out by quarter for each year. The information is organized by size range in both dollars and tons. This information is for all domestically manufactured fittings sold for use in the United States. The fittings size range is 30" through 64". American did not domestically manufacture fittings in sizes 24" and smaller.

American treats these numbers as highly confidential, and requests that the Federal Trade Commission treats them in the same manner. If you have further questions please contact me at your convenience.

Very truly yours,



Gary M. London

GML/tlm
Enclosure

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CONFIDENTIAL

EXHIBIT 3 (CX 1902)

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EXHIBIT 4 (CX 1907)

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EXHIBIT 5 (CX 1924)

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EXHIBIT 6 (CX 2295)

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EXHIBIT 7 (CX 2296)

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