

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

ORIGINAL

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

PUBLIC

DOCKET NO. 9351



**MOTION FOR *IN CAMERA* TREATMENT**

Pursuant to Rule 3.45 of the Federal Trade Commission’s Rules of Practice, 16 C.F.R. § 3.45(b), non-party Ferguson Enterprises, Inc. (“Ferguson”) respectfully submits this motion for *in camera* treatment of certain competitively-sensitive, confidential business documents. These documents were produced in response to a third-party subpoena in this matter, and the Federal Trade Commission and McWane, Inc. have now notified Ferguson that they intend to introduce the documents that are the subject of this motion into evidence at the administrative trial in this matter. *See* Letter from the Federal Trade Commission dated July 17, 2012 (attached as Exhibit A); Letter from Counsel for McWane, Inc. dated July 17, 2012 (attached as Exhibit B).

All of the materials for which Ferguson is seeking *in camera* treatment are confidential business documents, such that if they were to become part of the public record, Ferguson would be seriously harmed in its ability to compete in the distribution of ductile iron pipe fittings. For the reasons discussed in this motion, Ferguson requests that this Court afford its confidential business documents *in camera* treatment for a period of five years. In support of this motion, Ferguson relies on the Affidavit of William T. Thees, Jr., attached as Exhibit C, which provides additional details on the documents for which Ferguson is seeking *in camera* treatment.

**I. The Documents for which Protection is Sought**

Ferguson seeks *in camera* treatment for the following documents, copies of which are attached as Exhibit D.

Exhibit No.	Document Title	Date	Beginning Bates	End Bates
CX 0500	Email from Bill Thees to Ruffner Page Re: follow up	6/15/2010	FEI-00002429	FEI-00002430
CX 0502	Spreadsheet: Blended/Import \$	2010	FEI-00002424	FEI-00002424
CX 0504	Spreadsheet: 2010 MJ Ftg Programs	2010	FEI-00002421	FEI-00002421
CX 0509	McWane Corporate Rebate Program for Ferguson	2009	FEI-00002420	FEI-00002420
CX 0510	2010 McWane Corporate Rebate Program for Ferguson	2010	FEI-00000575	FEI-00000576
CX 2276	Email from Andrea Gayle to Mike Vore re: 2012 Wolseley North America Corporate Sourcing Agreement(s) - McWane, Inc. w/ Attach: 2012 McWane, Inc. - Admin. Agreement.pdf; 2012 McWane, Inc. - Rebate Agreement.pdf	5/8/2012	FEI-00003150	FEI-00003158
CX 2277	Email from Andrea Gayle to Rick Tatman re: 2012 Wolseley North America Corporate Sourcing Agreement(s) - Tyler Union w/ Attach: 2012 Tyler Union. - Admin. Agreement.pdf; 2012 Tyler Union - Rebate Agreement.pdf	2/13/2012	FEI-00003159	FEI-00003169

**II. Ferguson's Documents are Secret and Material Such That Disclosure Would Result in Serious Injury**

Material may be given *in camera* treatment when its "public disclosure will likely result in a clearly defined, serious injury to the person, partnership, or corporation requesting" such treatment. 16 C.F.R. § 3.45(b). The proponent of *in camera* treatment demonstrates serious injury by showing that the documents are secret and that they are material to the business. *In re*

*General Foods Corp.*, 95 F.T.C. 352, Dkt. No. 9085, 1980 WL 338997, at \*3 (Mar. 10, 1980); *In re Bristol-Myers Co.*, 90 F.T.C. 455, Dkt. Nos. 8917, 8918, & 8919, 1977 WL 189054, at \*2 (Nov. 11, 1977). In considering both secrecy and materiality the following factors should be weighed: (1) the extent to which the information is known outside of the 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 business 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 acquired or duplicated by others. *In re Bristol-Myers Co.*, 1977 WL 189054, at \*2 (citing Restatement of Torts § 757, Comment b at 6 (1939)). Such a showing may be “inferred from the nature of the documents themselves.” *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, Dkt. No. 7709, 1961 WL 65882, at \*4 (Mar. 14, 1961).

The documents at issue are both secret and material to Ferguson’s business.<sup>1</sup> The materials at issue contain information of competitive significance to Ferguson, such as rebate terms with its suppliers and the share of each supplier’s product sold by Ferguson. Such information is not widely known outside of the business. Further, when they were produced, Ferguson took steps to maintain confidentiality by designating the documents “Confidential.” Moreover, the information contained in the documents is material to Ferguson’s business because it is directly related to Ferguson’s distribution of ductile iron pipe fitting. As a distributor, Ferguson relies on its relationships with its suppliers and its negotiations with them to remain competitive. Because of the confidential nature of the information and its materiality to Ferguson’s business, *in camera* treatment is appropriate.

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<sup>1</sup> For a discussion of each document, see Affidavit of William T. Thees, Jr., attached hereto as Exhibit C.

Further, disclosure of the materials will likely result in the loss of a business advantage. See *In re Dura Lube Corp.*, Dkt. No. 9292, 1999 FTC LEXIS 255, at \*7 (Dec. 23, 1999) (“The likely loss of business advantages is a good example of a ‘clearly defined, serious injury.’”) (citing *In re General Foods Corp.*, 1980 WL 338997, at \*3). The documents at issue are material to Ferguson’s negotiations with its suppliers. Making such documents public will likely result in a loss of any business advantage Ferguson has with those suppliers.

Finally, Ferguson’s status as a third-party is relevant to the treatment of its documents. The Commission has held that “[t]here can be no question that the confidential records of businesses involved in Commission proceedings should be protected insofar as possible.” *H.P. Hood & Sons*, 1961 WL 65882, at \*2. This is especially so in the case of a third-party, which deserves “special solicitude” in its request for *in camera* treatment for its confidential business information. See *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500, 500 (1984) (“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.”). Ferguson’s third-party status therefore weighs in favor of granting *in camera* status to its documents.

### **III. Conclusion**

For the reasons set forth above and in the Affidavit of William T. Thees, Jr., Ferguson respectfully requests that this Court grant *in camera* treatment for a period of five years for the documents identified herein.

Dated: September 21, 2012

Respectfully Submitted,

*Kristina Van Horn/ccs*

Kristina Van Horn  
Hunton & Williams LLP  
1751 Pinnacle Drive  
Suite 1700  
McLean, VA 22102  
Phone: (703) 714-7525  
kvanhorn@hunton.com

Counsel for Non-Party Ferguson  
Enterprises, Inc.



CX 2277	Email from Andrea Gayle to Rick Tatman re: 2012 Wolseley North America Corporate Sourcing Agreement(s) - Tyler Union w/ Attach: 2012 Tyler Union. - Admin. Agreement.pdf; 2012 Tyler Union - Rebate Agreement.pdf	2/13/2012	FEI-00003159	FEI-00003169
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ORDERED:

\_\_\_\_\_  
D. Michael Chappell  
Chief Administrative Law Judge

\_\_\_\_\_, 2012

**CERTIFICATE OF SERVICE**

I hereby certify that on September 21, 2012, I caused the foregoing MOTION FOR *IN CAMERA* TREATMENT and [PROPOSED] ORDER to be filed by hand on the following:

Office of the Secretary  
Federal Trade Commission  
600 Pennsylvania Ave., N.W.  
Room H-135  
Washington, D.C. 20580


I also certify that I delivered via electronic mail and overnight delivery a copy of the foregoing document to:

The Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Ave. N.W.  
Room H-106  
Washington, D.C. 20580

Thomas W. Thagard III, Esq.  
Maynard, Cooper & Gale PC  
1901 Sixth Avenue North  
2400 Regions/Harbert Tower  
Birmingham, AL 35203

Edward Hassi, Esq.  
Federal Trade Commission  
600 Pennsylvania Ave., N.W.  
Room H-380  
Washington, DC 20580

By:

  
Kristina Van Horn  
Counsel for Non-Party Ferguson  
Enterprises, Inc.



**EXHIBIT A**



United States of America  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

Andrew Mann, Esq.  
Bureau of Competition  
Federal Trade Commission  
601 New Jersey Ave., N.W.  
Washington, D.C. 20580  
(202) 326-2481  
amann@FTC.gov

July 17, 2012

**Via Federal Express**

David Meeker  
Ferguson Enterprises, Inc.  
12500 Jefferson Avenue  
Newport News, VA 23602

RE: *In the Matter of McWane, Inc. and Star Pipe  
Products, Ltd.*, Federal Trade Commission Docket No.  
9351

Dear Mr. Meeker:

By this letter we are providing formal notice, pursuant to Rule 3.45(b) of the Commission's Rules of Practice, 16 C.F.R. §3.45(b), that Complaint Counsel intend to offer the documents and testimony referenced in the enclosed Attachments A and B into evidence in the administrative trial in the above-captioned matter. Please note that the list of deposition designations in Exhibit B does not include any of Respondent's designations or Complaint Counsel's counter-designations, if any, which are not due until July 24, 2012.

The administrative trial is scheduled to begin on September 4, 2012. All exhibits admitted into evidence become part of the public record unless *in camera* status is granted by Administrative Law Judge D. Michael Chappell.

For documents or testimony that include sensitive or confidential information that you do not want on the public record, you must file a motion seeking *in camera* status or other confidentiality protections pursuant to 16 C.F.R §§ 3.45, 4.10(g). Judge Chappell may order that materials, whether admitted or rejected as evidence, be placed *in camera* only after finding that

their public disclosure will likely result in a clearly defined, serious injury to the person, partnership, or corporation requesting *in camera* treatment.

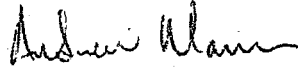
Motions for *in camera* treatment for evidence to be introduced at trial must meet the strict standards set forth in 16 C.F.R. § 3.45 and explained in *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157 (Nov. 22, 2000); *In re Basic Research, Inc.*, 2006 FTC LEXIS 14 (Jan. 25, 2006). Motions also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the material. *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (April 23, 2004).

Please be aware that under the current Scheduling Order of February 15, 2012, the deadline for filing motions seeking *in camera* status is July 27, 2012.

Additionally, in lieu of a deposition on the admissibility of the documents listed in Exhibit A, we ask that you sign and return the attached declaration regarding the admissibility of these documents. Please return the signed declaration to my attention by July 29, 2012.

If you have any questions, please feel free to contact me at (202) 326-2481.

Sincerely,



Andrew Mann, Esq.  
Counsel Supporting the Complaint

Attachments

FERGUSON ENTERPRISES, INC.

Attachment A

Exhibit No.	Document Title	Date	BegBates	EndBates
CX 0500	E-mail from Bill Thees to Ruffner Page re: follow up	6/15/2010	FEI-00002429	FEI-00002430
CX 0502	Spreadsheet: Blended/Import \$	00/00/0000	FEI-00002424	FEI-00002424
CX 0504	Spreadsheet: 2010 MJ Ftg Programs	00/00/2010	FEI-00002421	FEI-00002421
CX 0506	E-mail from Butch J. Doane to Bill Thees re: Tyler Union Announcement w/Attach: McWane Announcement Sept 22nd 2009.pdf	9/22/2009	FEI-00002410	FEI-00002411
CX 0508	Handwritten notes: AWWA	6/21/2010	FEI-00002514	FEI-00002516
CX 0509	McWane Corporate Rebate Program for Ferguson	00/00/2009	FEI-00002420	FEI-00002420
CX 0510	2010 McWane Corporate Rebate Program for Ferguson	00/00/2010	FEI-00000575	FEI-00000576
CX 0511	Handwritten notes: Sigma	6/4/2009	FEI-00002532	FEI-00002534
CX 2276	E-mail from Andrea Gayle to Mike Vore re: 2012 Wolseley North America Corporate Sourcing Agreement(s) - McWane, Inc. w/Attach: 2012 McWane, Inc. - Admin. Agreement.pdf, 2012 McWane, Inc. - Rebate Agreement.pdf	5/8/2012	FEI-00003150	FEI-00003158
CX 2277	E-mail from Andrea Gayle to Rick Tatman re: 2012 Wolseley North America Corporate Sourcing Agreement(s) - Tyler Union w/Attach: 2012 Tyler Union - Admin. Agreement.pdf, 2012 Tyler Union - Rebate Agreement.pdf	2/13/2012	FEI-00003159	FEI-00003169
CX 2503	RESERVED FOR Designated Investigational Hearing Transcript of Bill Thees	11/16/2010	CX 2503-001	CX 2503-001
CX 2504	RESERVED FOR Designated Deposition Transcript of Bill Thees	6/1/2012	CX 2504-001	CX 2504-001

**FERGUSON ENTERPRISES, INC.**  
**Attachment B**

**CX 2503 - Thees, Bill 11/16/2010 Investigational Hearing**

6:1 - 3  
8:4 - 13:9  
14:20 - 19:25  
21:5 - 24:2  
24:16 - 26:19  
26:24 - 28:24  
29:6 - 9  
29:14 - 30:10  
31:20 - 33:5  
34:24 - 37:9  
38:2 - 16  
39:1 - 21  
41:18 - 42:17  
44:8 - 45:4  
46:20 - 47:6  
47:11 - 20  
48:12 - 20  
49:14 - 23  
57:8 - 9  
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59:16 - 25  
66:13 - 20  
68:19 - 69:10  
69:23 - 70:18  
70:23 - 75:14  
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78:15 - 82:25  
87:9 - 89:24  
91:14 - 94:11  
99:25 - 103:7  
104:1 - 9  
105:14 - 106:12  
106:23 - 107:17  
107:22 - 110:8  
110:22 - 111:11  
111:19 - 113:11  
114:9 - 15  
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120:21 - 123:20  
127:15 - 129:19  
130:10 - 131:7  
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**FERGUSON ENTERPRISES, INC.**  
**Attachment B**

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149:22 - 151:14  
156:3 - 158:4  
158:20 - 160:10  
162:5 - 163:25  
164:15 - 165:3  
173:22 - 175:11  
176:10 - 177:13  
177:24 - 179:11  
184:17 - 185:8  
208:23 - 210:5  
210:10 - 211:1  
211:14 - 21  
212:6 - 16  
213:2 - 18

**CX 2504 - Thees, William 06/01/2012 Deposition**

5:1 - 3  
5:6 - 8  
6:25 - 8:20  
8:23 - 10:1  
10:5 - 12:25  
13:8 - 15:14  
15:17  
15:25 - 17:15  
18:20 - 19:19  
20:6 - 23  
21:18 - 22:9  
50:10 - 51:7  
63:13 - 64:14  
67:9 - 69:13  
71:11 - 19  
73:6 - 74:15  
75:7 - 14  
75:16 - 17  
77:5 - 14  
78:15 - 79:22  
79:25 - 80:5  
81:20 - 82:18  
83:9 - 18  
84:4 - 86:2  
86:5 - 87:21  
87:24 - 88:21  
88:24 - 89:4

**FERGUSON ENTERPRISES, INC.**  
**Attachment B**

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89:19 - 90:23  
91:21 - 92:24  
93:12 - 94:9  
94:11 - 18  
95:20 - 96:7  
96:11 - 20  
96:23  
97:10 - 12  
97:14 - 98:1  
98:5 - 13  
98:16 - 17  
98:19 - 21  
98:23 - 99:5  
99:7 - 12  
99:14 - 25  
100:15 - 16  
100:19 - 20  
100:22 - 101:9  
101:19 - 22  
101:24 - 102:22  
102:25 - 103:19  
105:14 - 22  
105:25 - 106:1  
106:3 - 14  
107:5 - 24  
108:1 - 9  
109:20 - 111:4  
113:12 - 116:18  
116:21 - 117:22  
118:5 - 120:8  
120:14 - 121:12  
124:2 - 125:12  
125:25 - 126:7  
126:20 - 128:15  
129:8 - 130:10  
130:15 - 133:4  
133:8 - 16  
134:3 - 135:4  
135:19 - 136:7  
137:5 - 9  
138:25 - 141:2  
141:6 - 143:6  
143:14 - 144:7  
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144:15 - 146:9

**FERGUSON ENTERPRISES, INC.**  
**Attachment B**

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148:24 - 149:1  
149:3 - 12  
149:25 - 150:6  
150:8 - 151:7  
151:9 - 152:6  
160:12 - 161:17



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

In the Matter of )

McWANE, INC., )  
Respondent )

**PUBLIC**

DOCKET NO. 9351

**DECLARATION**

I, \_\_\_\_\_, pursuant to 28 U.S.C. § 1746, make the following statement:

1. I am an employee of Ferguson Enterprises, Inc. I have personal knowledge of the facts set forth in this declaration, and if called as a witness I could and would testify competently under oath to such facts.
  
2. I have reviewed the documents referenced in Attachment A to this Declaration, which have been identified by Complaint Counsel with CX numbers for use as exhibits in the above-captioned matter.
  
3. I hereby certify that each document referenced in Attachment A herein: (a) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; (b) was kept in the course of regularly conducted activity; and (c) was made by the regularly conducted activity as a regular practice.

Pursuant to 28 U.S.C. § 1746, I declare, under the penalty of perjury, that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on: \_\_\_\_\_

\_\_\_\_\_  
Name:  
Title:

**EXHIBIT B**

July 17, 2012

**VIA FEDERAL EXPRESS**

Ferguson Enterprises, Inc.  
c/o Kristina Van Horn  
Hunton & Williams  
1751 Pinnacle Drive, Suite 1700  
McLean, Virginia 22102

Re: *In the Matter of McWane, Inc. and Star Pipe Products Ltd., Docket No. 9351*

Dear Ms. Van Horn:

By this letter, we are providing formal notice, pursuant to § 3.45(b) of the Commission's Rules of Practice, 16 C.F.R. § 3.45(b), that counsel for Respondent McWane, Inc. (McWane) has placed the documents referenced in Attachment A on its exhibit list and intends to offer these documents into evidence at the administrative trial in this Matter, which is scheduled to begin on September 4, 2012. Attachment B includes transcripts of depositions taken during this and related litigations that Respondent McWane also intends to offer into evidence. All exhibits and depositions admitted into evidence become part of the public record unless *in camera* status is granted by the Administrative Law Judge.

Under § 4.10(g) of the Commission's Rules of Practice, 16 C.F.R. § 4.10(g), you have "an opportunity to seek an appropriate protective or *in camera* order." Pursuant to the Commission's Rules, the Administrative Law Judge may order that material, whether admitted or rejected as evidence, be placed *in camera* only after a finding that its public disclosure will likely result in a clearly defined, serious injury to the person or company requesting *in camera* treatment. For the standards applicable to the granting of *in camera* treatment, please see 16 C.F.R. § 3.45(b) as well as the decisions of the Commission in *H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961); *Bristol-Myers Co.*, 90 F.T.C. 455, 456 (1977); *General Foods Corp.*, 95 F.T.C. 352, 355 (1980).

Motions for *in camera* treatment for evidence to be introduced at trial must meet the strict standards set forth in 16 C.F.R. § 3.45 and explained *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157 (Nov. 22, 2000) and 2000 FTC LEXIS 138 (Sept. 19, 2000); *In re Basic Research, Inc.*, 2006 FTC LEXIS 14 (Jan. 25, 2006). Motions also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (April 23, 2004). Each party or non-party that files a motion for *in camera* treatment shall provide one copy of the documents for which *in camera* treatment

July 17, 2012

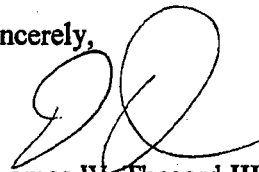
Page 2

is sought to Judge Chappell. Finally, examples of motions requesting *in camera* treatment can be found by searching the FTC website (*i.e.*, [www.ftc.gov](http://www.ftc.gov)).

Please be aware that under the current Scheduling Order, the deadline for filing motions seeking *in camera* status is **July 27, 2012**. By that date, an original and two copies of your motion should be filed with the Office of the Secretary, Room H-135, 600 Pennsylvania Avenue, N.W., Washington D.C. 20580. Also, serve copies of your motions as follows: (1) Send two copies overnight/hand-delivery and e-mail a copy to Honorable D. Michael Chappell, Administrative Law Judge, Federal Trade Commission, 600 Pennsylvania Avenue, NW, H-106, Washington, DC 20580 ([oadj@ftc.gov](mailto:oadj@ftc.gov)); (2) Send copies overnight/hand-delivery and e-mail a copy to counsel for Respondent McWane: Thomas W. Thagard III, Maynard, Cooper & Gale, P.C., 1901 Sixth Avenue North, 2400 Regions/Harbert Tower, Birmingham, AL 35203, [tthagard@maynardcooper.com](mailto:tthagard@maynardcooper.com); and (3) Send copies overnight/hand-delivery and e-mail a copy to Complaint Counsel: Edward Hassi, Federal Trade Commission, 600 Pennsylvania Ave., NW, Washington DC 20580 ([ehassi@ftc.gov](mailto:ehassi@ftc.gov)).

If you have any questions, please call me at (205) 254-1000.

Sincerely,



Thomas W. Thagard III

TWTIII/shl

Attachment

**MAYNARD COOPER**  
**& GALE PC**  
ATTORNEYS AT LAW

**ATTACHMENT A**  
**FERGUSON ENTERPRISES, INC.**

<b>Document</b>
FEI-00002442
FEI-00002443 - 2445

**ATTACHMENT B**

**FERGUSON ENTERPRISES, INC.**

**The following deposition is attached hereto as Attachment B:**

<b>Date</b>	<b>Deposition</b>
June 1, 2012	Bill Thees

**EXHIBIT C**

(REDACTED – CONFIDENTIAL INFORMATION)



**EXHIBIT D**

(REDACTED – CONFIDENTIAL INFORMATION)