

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

**UNOPPOSED MOTION OF NON-PARTY SIGMA CORPORATION FOR *IN CAMERA*
TREATMENT OF CERTAIN ADDITIONAL DESIGNATED HEARING EXHIBITS**

Non-party SIGMA Corporation (“SIGMA”), through its undersigned counsel, hereby files this Unopposed Motion for *In Camera* Treatment of Certain Additional Designated Hearing Exhibits that Complaint counsel for the Federal Trade Commission (“FTC”) and counsel for Respondent McWane, Inc. (“McWane”) have designated for introduction into the record of the administrative trial of this matter. Both of these documents were treated by SIGMA as “Confidential” in accordance with the terms of the Protective Order Governing Discovery Material entered by D. Michael Chappell, Administrative Law Judge, on January 5, 2012. SIGMA respectfully requests that the Administrative Law Judge enter an Order pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.45(b), granting *in camera* treatment for a period of two (2) years to the portions of documents identified in this Motion. SIGMA has disclosed the contents of this Motion to the FTC’s Complaint counsel and Counsel for McWane. After meeting and conferring, neither objects to the relief requested for the documents that are subject to this Motion.

The documents subject to this Motion are secret and material to SIGMA’s ongoing business, the disclosure of which would harm SIGMA and create a loss of business

advantages for SIGMA in the marketplace. In support of this Motion, SIGMA relies upon the accompanying Declaration of James McGivern, and states as follows:

I. Introduction

On August 17, 2012, the Court granted SIGMA's initial Motion for *In Camera* Treatment of Certain Designated Hearing Exhibits. The purpose of the instant Motion is to seek *in camera* treatment for portions of only two additional documents—CX 1002 and CX 1745—both of which were produced in response to subpoenas issued upon SIGMA during the course of this proceeding. The documents are identified only by exhibit designation in this Motion and in the Declaration of James McGivern, but they are submitted for *in camera* review to the Office of Administrative Law Judges. Both of the subject documents were treated as “Confidential” under the Protective Order Governing Discovery Material entered by the Hon. D. Michael Chappell, Administrative Law Judge, on January 5, 2012 (“Protective Order”).

On November 5, 2012, counsel for SIGMA completed discussions with Complaint counsel and McWane's counsel concerning the instant Motion and identified the documents for which SIGMA would seek *in camera* treatment. Counsel for SIGMA explained the basis for the Motion and requested that Complaint counsel and McWane's counsel agree not to oppose SIGMA's Motion for *in camera* treatment. Complaint counsel and McWane's counsel have confirmed that they do not oppose the instant Motion for the identified documents.

The information contained in these documents is secret, commercially sensitive, and material to SIGMA's current and prospective business ventures. Accordingly, SIGMA respectfully requests that the Administrative Law Judge enter an Order pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.45(b), granting *in camera* treatment to the identified portions of these documents for a period of two (2) years.

II. Standard for In Camera Treatment

Materials merit *in camera* treatment when disclosure “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). An applicant for *in camera* treatment can establish such serious injury by showing that the information at issue 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 re Bristol-Myers Co.*, 90 F.T.C. 455, 456 (1977). The following factors should be weighed in considering both secrecy and materiality: (1) the extent to which the information is known outside of 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 Bristol-Myers Co.*, 90 F.T.C. at 456-57.

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). Administrative law judges have broad discretion in applying these factors to determine whether information warrants *in camera* treatment. *See In re General Foods Corp.*, 95 F.T.C. 352 (1980). Moreover, the Commission has stated that a request for *in camera* treatment by a non-party company to an FTC proceeding (such as SIGMA) should be given “special solicitude.” *In re Crown Cork & Seal Co.*, 71 F.T.C. 1714 (1967) (“[P]etitioner’s plea warrants special solicitude coming as it does from a third-party bystander in no way involved in the proceedings whose records, if *in camera* treatment is denied, will be open to the

scrutiny of its competitors”); accord *In re Kaiser Aluminum & Chemical Corp.*, 103 F.T.C. 500 (1984) (requests for *in camera* treatment by third parties should be given special solicitude because, as a policy matter, such treatment encourages the third party to cooperate with future adjudicative discovery requests).

Further, the Commission has recognized that it may be appropriate to provide *in camera* treatment for certain business records. *In re Champion Spark Plug Co.*, 1982 FTC LEXIS 85, at *2 (April 5, 1982); *Hood*, 58 F.T.C. at 1188-89; *In re Kaiser Aluminum*, 103 F.T.C. at 500. Where *in camera* treatment is granted for business records, such as business strategies, marketing plans, pricing policies, or sales documents, it is typically provided for two to five years. See, e.g., *In re Union Oil Co. of Cal.*, 2004 FTC LEXIS 223, at *2 (Nov. 22, 2004); *In re Int’l Ass’n of Conference Interpreters*, 1996 FTC LEXIS 298, at *13-*14 (June 26, 1996); *In re Champion Spark Plug Co.*, 1982 FTC LEXIS 85, at *2 and 1982 FTC LEXIS 92, at *2 (March 4, 1982).

III. The SIGMA Documents Meet the Standard for *In Camera* Treatment

The information contained in both of the documents is confidential and disclosure of such information would cause serious competitive injury to SIGMA, thereby meeting the standard set forth by the Commission for *in camera* treatment. *In re General Foods Corp.*, 95 F.T.C. at 355. As set forth in the accompanying Declaration of James McGivern, which is incorporated as part of this Motion, SIGMA expends a considerable amount of money and effort in creating the information contained in these documents and takes considerable measures to protect the secrecy of such information. McGivern Decl., ¶¶ 2, 8-9. Moreover, it would be extremely difficult for SIGMA’s competitors or customers to obtain the information contained in the subject documents. *Id.*

Both of the documents contain highly sensitive information related to SIGMA's financial information and SIGMA's strategic planning initiatives for the future of the company. *Id.* at ¶ 4. Documents containing information relevant to SIGMA's financial health and its strategic planning initiatives are important to SIGMA's business, competitiveness, and profitability. Were a competitor to know this sensitive information, such a competitor would gain a significant business advantage at the expense of SIGMA. Moreover, existing or potential customers armed with such sensitive information could use it to their advantage in future negotiations with SIGMA. The disclosure of this critically sensitive information would be highly detrimental to SIGMA as it would provide both the customers with whom SIGMA does or may contract and SIGMA's competitors with sensitive financial and strategic information, causing serious and irreparable harm to SIGMA resulting in significant loss of business advantage. *Id.* at ¶¶ 4, 10. Thus, SIGMA submitted the subject documents under the auspices of the Protective Order issued in this matter and fully expected that these documents would not be exposed to its customers or its competitors.

Further, these two documents contain confidential communications between high-level employees relating to pricing, as well as financial planning information solely meant for disclosure to SIGMA's Board of Directors and select members of management. SIGMA continues to use this data in analyzing its growth in various competitive sectors, in addition to seeking out competitive opportunities within the municipal waterworks industry. *Id.* at ¶ 7. The disclosure of such information would place SIGMA at a competitive disadvantage by exposing confidential communications and information regarding strategic growth with existing and potential customers. *Id.* at ¶ 10.

Finally, portions of these two documents contain sensitive financial information of SIGMA. The disclosure of this information would reveal to SIGMA's competitors, as well as to its existing and potential customers, an unfair "insider's" perspective of its financial strengths and weaknesses. *Id.* SIGMA continues to use this data in analyzing its growth in various competitive sectors within the municipal waterworks industry and, therefore, the data remains highly confidential. *Id.*

Based upon the above facts, and the support demonstrated by the Declaration of James McGivern, SIGMA has adequately demonstrated the secrecy and materiality set forth in *Bristol-Myers*, 90 F.T.C. at 456-57, and therefore should be afforded *in camera* status for the portions of documents identified in CX 1002 and CX 1745.

IV. In Camera Treatment of the Documents Should Extend for a Two Year Period

SIGMA seeks *in camera* treatment for portions of CX 1002 and CX 1745 for a period of two years. As a non-party seeking *in camera* treatment for its confidential business information, SIGMA's request should be treated with "special solicitude." *In re Kaiser Aluminum & Chemical Corp.*, 103 F.T.C. at 500 (order directing *in camera* treatment for non-party's sales statistics over five years old). Reasonable periods of *in camera* treatment encourage non-parties to cooperate with future discovery requests in adjudicative proceedings. *Id.* At great expense, SIGMA has cooperated with the discovery demands of both parties to this case, producing thousands of pages of documents and several witnesses for depositions in short order. The subject documents have been made available for use by Complaint counsel and McWane's counsel in accordance with the terms of the Protective Order. Further, neither Complaint counsel nor McWane's counsel object to this Motion. Disclosing documents containing SIGMA's highly confidential business information will not materially promote the resolution of this matter. Instead, the disclosure of these confidential documents will materially

harm SIGMA and create a loss of business advantage. Thus, the balance of interests favors *in camera* treatment for the subject documents. See *In re Bristol-Myers*, 90 F.T.C. at 456-57.

Further, SIGMA's request that *in camera* treatment for the subject documents be maintained for brief period is reasonable in light of the fact that the subject documents qualify as the types of business records for which the Commission regularly has granted *in camera* treatment. *In re Champion Spark Plug Co.*, 1982 FTC LEXIS 85, at *2; *Hood*, 58 F.T.C. at 1188-89; *In re Kaiser Aluminum*, 103 F.T.C. at 500. Moreover, the market is such that disclosure of this information creates an unreasonable and unnecessary risk of competitive harm to SIGMA such that *in camera* treatment is necessary for a period of at two (2) years, which is SIGMA's reasonable estimate of the minimum length of time for the information at issue to become outdated and irrelevant.

V. Conclusion

SIGMA, in endeavoring to remain competitive in the municipal waterworks industry and to provide superior service for its customers, has created certain highly sensitive documents, the disclosure of which would result in a clearly defined serious injury to SIGMA. Accordingly, for the reasons set forth above and in the Declaration of James McGivern submitted in support of this Motion, SIGMA respectfully requests that this Court grant its Motion directing *in camera* treatment for identified portions of the subject documents.

Respectfully submitted,

/s/ Matthew A. White
Matthew A. White

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Attorneys for SIGMA Corporation

Dated: November 7, 2012

**NON-PARTY SIGMA CORPORATION'S UNOPPOSED MOTION FOR *IN CAMERA*
TREATMENT OF CERTAIN ADDITIONAL DESIGNATED HEARING EXHIBITS**

(REDACTED FROM PUBLIC FILING)

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

In the Matter of

McWANE, INC.,
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PUBLIC

Docket No. 9351

DECLARATION OF JAMES MCGIVERN IN SUPPORT OF NON-PARTY SIGMA CORPORATION'S UNOPPOSED MOTION FOR *IN CAMERA* TREATMENT OF CERTAIN ADDITIONAL DESIGNATED HEARING EXHIBITS

I, James McGivern, declare as follows:

1. I am the Chairman and Chief Executive Officer of non-party SIGMA Corporation ("SIGMA"), in addition to a member of SIGMA's Board of Directors. I make this declaration based upon my personal knowledge and in support of SIGMA's Motion for *In Camera* Treatment of Certain Additional Designated Hearing Exhibits.

2. The information contained in the identified portions of CX 1002 and CX 1745 contains highly sensitive and confidential material. SIGMA has taken substantial measures to guard this information by limiting dissemination of such information and taking every reasonable step to protect its confidentiality. Such information is disclosed only to a few high-level SIGMA employees and its Board of Directors. This information is not known outside of SIGMA except to the extent necessary to engage in confidential contract negotiations or confidential discussions with potential or existing customers. The information contained in the identified portions of CX 1002 and CX 1745 would be extremely difficult for SIGMA's competitors or other outside persons to access or duplicate. Additionally, each such document has, upon production during

discovery in this proceeding, been designated “Confidential” pursuant to the Protective Order Governing Discovery Material entered on January 5, 2012.

3. I have reviewed CX 1002 and CX 1745. By virtue of my current position at SIGMA, I am familiar with the type of information contained in these documents. Based on my review of the documents, my knowledge of SIGMA’s business, and my familiarity with the confidentiality protection afforded this type of information by SIGMA, it is my belief that broad disclosure of these documents would cause serious competitive injury to SIGMA.

4. The identified portions of CX 1002 and CX 1745 contain highly sensitive information related to SIGMA’s financial information and SIGMA’s strategic planning initiatives for the future of the company. The disclosure of this critically sensitive information would be highly detrimental to SIGMA, as it would provide both the customers with whom SIGMA does or may contract and SIGMA’s competitors with sensitive financial and strategic information, causing serious and irreparable harm to SIGMA that would result in significant loss of business advantage within the marketplace.

5. Documents containing information relevant to SIGMA’s financial health and its strategic planning initiatives are important to SIGMA’s business, competitiveness, and profitability. Were a competitor to know this sensitive information, such a competitor would gain a significant business advantage at the expense of SIGMA. Moreover, existing or potential customers armed with such sensitive information could use it to their advantage in future negotiations with SIGMA.

6. The documents for which SIGMA seeks *in camera* treatment contain strategic planning and market share information. The information contained in these documents is highly

confidential and contains sensitive business information. Portions of CX 1745 contain financial covenants, profitability margins, plans to reduce expenses, and overall narratives on the state of the company. The disclosure of this information would reveal to SIGMA's competitors, as well as to its existing and potential customers, its future plans for strategic growth, as well as SIGMA's market share in various sectors within the municipal waterworks marketplace. Further, these documents contain confidential communications relating to pricing, as well as financial planning information, solely meant for disclosure to SIGMA's Board of Directors and high-level employees. SIGMA continues to use this data in analyzing its growth in various competitive sectors, in addition to seeking out competitive opportunities within the municipal waterworks industry. The disclosure of such information would place SIGMA at a competitive disadvantage by exposing such confidential communications and information regarding strategic growth within the marketplace.

7. Further, the documents for which SIGMA seeks *in camera* treatment contain sensitive financial information of SIGMA. The information contained in these documents is highly confidential and contains sensitive business information. Portions of CX 1745 and CX 1002 contain confidential pricing summaries and financial projections. The disclosure of this information would reveal to SIGMA's competitors, as well as to its existing and potential customers, its financial health. SIGMA continues to use this data in analyzing its growth in various competitive sectors within the municipal waterworks industry and, therefore, the data remains highly confidential.

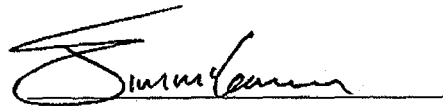
8. SIGMA has expended a significant amount of money and resources in preparing the documents for which it now seeks *in camera* treatment.

9. SIGMA takes considerable measures to protect the secrecy of the information contained in the documents for which it now seeks *in camera* treatment. Both the strategic planning documents and the financial information are disclosed only to a limited number of employees at SIGMA, in addition to its Board of Directors.

10. The information contained in the identified portions of CX 1002 and CX 1745 is material to SIGMA's business and competitive position in the marketplace. Disclosure of the information contained in the documents would result in a loss of business advantage and cause serious irreparable injury to SIGMA. The disclosure of this information would provide SIGMA's competitors, in addition to existing and potential customers, with information that is confidential and critical to SIGMA's business.

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

Executed this 6th day of November, 2012.

A handwritten signature in black ink, appearing to read "James McGivern", written over a horizontal line.

James McGivern, CEO

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**ORDER GRANTING NON-PARTY SIGMA CORPORATION'S UNOPPOSED MOTION
FOR *IN CAMERA* TREATMENT OF CERTAIN DESIGNATED HEARING EXHIBITS**

Upon consideration of Non-Party SIGMA Corporation's Unopposed Motion for *In Camera* Treatment of Certain Additional Designated Hearing Exhibits and the Declaration of James McGivern in support thereof, it is hereby ORDERED that SIGMA's Motion is GRANTED. It is FURTHER ORDERED that the identified portions of documents CX 1002 and CX 1745 are afforded *in camera* treatment for a period of two (2) years from the date of this Order.

It is FURTHER ORDERED that only authorized Federal Trade Commission ("Commission") personnel, and court personnel concerned with judicial review may have access to the documents identified in SIGMA Corporation's Motion for *In Camera* Treatment of Certain Additional Designated Hearing Exhibits, provided that I, the Commission, and reviewing courts may disclose such *in camera* information to the extent necessary for proper disposition of the proceeding.

ORDERED:

D. Michael Chappell

Chief Administrative Law Judge

Date: _____

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Certificate of Service and Regarding Electronic Submission

I certify that on November 7, 2012, I submitted the “Unopposed Motion for *In Camera* Treatment of Certain Additional Designated Hearing Exhibits” along with a proposed order and Declaration of James McGivern, electronically in PDF format using the FTC’s E-Filing System, and also served a copy of the foregoing document in on the following by the method indicated:

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I also certify that the electronic PDF copy of the foregoing document sent to the Secretary of the Commission via the FTC E-Filing System is a true and correct copy of the original in my possession, which is available for review by the parties and the adjudicator.

/s/ Matthew A. White
Matthew A. White