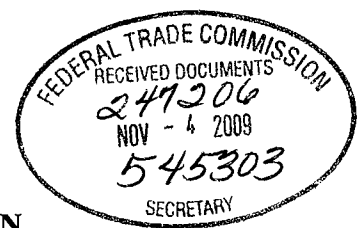


ORIGINAL



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)
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)
Polypore International, Inc.)
a corporation)

Docket No. 9327

PUBLIC DOCUMENT¹

**RESPONDENT'S FIFTH MOTION FOR *IN CAMERA* TREATMENT
OF CERTAIN TRIAL EXHIBITS**

On October 15, 2009, the Honorable D. Michael Chappell entered an Order Granting Respondent's Second Motion to Reopen the Hearing Record and Setting Hearing Schedule ("Order"). Pursuant to the Order, the hearing record was reopened for the reception of evidence limited to four factual propositions as set forth in the Order.

In Respondent's Fifth Motion for *In Camera* Treatment of Certain Trial Exhibits ("Fifth Motion"), and pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.45(b), and the Order, Respondent Polypore International, Inc. ("Polypore"), by and through counsel, seeks *in camera* treatment for certain proposed trial exhibits containing confidential information. These proposed trial exhibits are highly sensitive and proprietary in nature. Public disclosure of the information contained in such exhibits would divulge Polypore's most sensitive and confidential information to competitors and/or customers, and would cause irreparable harm and serious injury to Polypore. Accordingly, Polypore respectfully requests an order requiring that these materials be used at the hearing only *in camera* and that they be maintained under seal.

¹ This Motion refers to and contains information subject to Respondent's Fifth Motion for *In Camera* Treatment of Certain Trial Exhibits pursuant to Rule 3.45(b) of the FTC's Rules of Practice. Such information has been redacted and labeled "{ }" in the public version of this Motion.

The specific pages and documents which have been identified by Polypore, after a thorough review of the proposed exhibit lists submitted by Complaint Counsel and Polypore in relation to the hearing for the reopened Record, fall within the Commission's strict standards for *in camera* treatment as set forth in Judge Chappell's April 27, 2009 Order on Respondent's Motion for *In Camera* Treatment and the opinions of this Commission.² Each exhibit identified by Polypore contains sensitive information that is "sufficiently secret and sufficiently material to [Polypore's] business that disclosure would result in serious competitive injury" and, even when balanced against the "importance of the information in explaining the rationale of Commission decisions" warrants *in camera* treatment. *General Foods Corp.*, 95 FTC 352 (1980). The exhibits at issue in this Fifth Motion are listed in the index attached hereto as Exhibit A. For ease of reference, Polypore has grouped the exhibits identified in Exhibit A into the following categories:

1. Category 1 – Business Plans & Strategies
2. Category 2 – Contract Negotiations & Customer Contracts
3. Category 3 – Customer-Specific Documents
4. Category 4 – Costing Data
5. Category 5 – Sales & Financial Information

The grounds for this Fifth Motion are set forth herein, and this Fifth Motion is fully supported by the sworn Fifth Declaration of Michael Shor ("Shor Decl.") attached hereto as Exhibit B and which individually analyzes each proposed trial exhibit listed on Exhibit A. The documents themselves are being provided in electronic form as Exhibit C to Polypore's Fifth Motion for *In Camera* Treatment of Certain Trial Exhibits.

² See *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); and *In re Basic Research, Inc.*, 2006 FTC LEXIS 14 (Jan. 25, 2006).

Introduction

As Respondent will demonstrate herein and in the supporting Fifth Declaration of Michael Shor, the public disclosure of the exhibits identified in Exhibit A hereto, will likely result in a clearly defined, serious injury to Respondent, thus justifying *in camera* treatment under the standard articulated by the Commission 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) and 2000 FTC LEXIS 138 (Sept. 19, 2000); and *In re Basic Research, Inc.*, 2006 FTC LEXIS 14 (Jan. 25, 2006).

The exhibits identified in Exhibit A contain confidential information that is paramount to Polypore's business, competitiveness, and profitability. Indeed, revealing such information would, among other things: (1) allow Polypore's competitors to gain a commercial advantage through knowledge of Polypore's pricing strategies, production capacities, and contract negotiations; and (2) give Polypore's customers a tactical advantage in current and future negotiations with Polypore. At the very least, disclosure of the information Polypore seeks to protect would deprive Polypore of its current bargaining position with customers; at worst, competitors would be allowed unfettered access to Respondent's confidential and sensitive documents which will inevitably create a less competitive marketplace and harm competition. Continued confidentiality of these documents is key to maintaining Polypore's ability to develop, market, and sell its products in this competitive market dominated by powerful buyers.

Argument

Pursuant to Commission Rule 3.45(b), the Administrative Law Judge may order material, or portions thereof, offered into evidence . . . to be placed *in camera* on a finding that their public disclosure will likely result "in a clearly defined, serious injury to the . . . corporation requesting

in camera treatment.” 16 C.F.R. § 3.45(b)(emphasis added). Establishing that a “serious injury” would ensue with disclosure requires a demonstration that serious and irreparable harm will result from the Court’s publication of the confidential documents. Meeting such a standard requires Respondent to make a clear showing that the information concerned is “sufficiently secret and sufficiently material to [Respondent’s] business that disclosure would result in serious competitive injury.” See *Bristol-Myers Co.*, 90 FTC 455 (1977); *General Foods Corp.*, 95 FTC 352 (1980).

In *Bristol-Myers*, 90 FTC 455 (1977), the Commission outlined six factors to be weighed when determining materiality and secrecy: (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. Additionally, the Commission has expounded on the definition of “serious injury,” stating “[t]he likely loss of business advantages is a good example of a clearly defined, serious injury.” *Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 138 (Sept. 19, 2000).

As set forth below and in the Fifth Declaration of Michael Shor, the proposed trial exhibits listed in Exhibit A, and grouped by the previously identified five categories, contain information sufficiently secret, and sufficiently material to Polypore’s business, that disclosure would constitute a serious competitive injury under the *Bristol-Myers* factors and prevailing Commission law.

I. IN CAMERA TREATMENT IS WARRANTED FOR THE FOLLOWING PROPOSED TRIAL EXHIBITS

A. Category One – Business Plans & Strategies

Because of the competitive sensitivity of Polypore's strategic planning, Polypore asks this Court to grant *in camera* treatment for the Category 1 documents. (*Shor Decl.*, ¶ 11). Each of these documents contains information about Polypore's current and future business. Access to this information would enable Polypore's competitors to understand Polypore's strategies, strengths and weaknesses in the market, its future plans {
}. (*Shor Decl.*, ¶ 11). Their publication would put Polypore at a competitive disadvantage and cause injury to Polypore. (*Shor Decl.*, ¶¶ 6, 9, 11, 17, 18).

Polypore keeps this information strictly confidential, and it is not available from any other source outside the company. (*Shor Decl.*, ¶¶ 7, 11, 16). Circulation of these documents within Polypore is very limited. (*Shor Decl.*, ¶¶ 7, 11, 16). Much time and money is devoted to compiling this information. Given the importance of this information to Polypore's current operations and competitive positions, Polypore requests that these documents be afforded *in camera* protection for a period of three (3) years from the date of this motion.

B. Category Two – Contract Negotiations & Customer Contracts

The contracts between Polypore and its customers are often the result of intense negotiations in which internal costing, production capacity and pricing are key components. These negotiations are conducted in secret, often over a period of several months. The documents in Category 2 contain {
}. (*Shor Decl.*, ¶ 6, 9, 12, 17, 18). Disclosing this information could cause serious injury to Polypore both

immediately and in future negotiations. (*Shor Decl.*, ¶¶ 12). Indeed, it is possible that {

}

Similarly, {

}

Additionally, Polypore’s competitors would have the potential to gain access to this information, which they could use in their own negotiations. (*Shor Decl.*, ¶¶ 12).

Because of the sensitivity of pricing and other relevant terms contained in supply agreements, only the parties involved (i.e., Polypore and that particular customer) are privy to the information. (*Shor Decl.*, ¶¶ 7, 12, 16). Polypore does not disclose this information to other customers. *Id.* Moreover, the general public would not be able to obtain this information elsewhere. *Id.* Even access to such information within Polypore is limited. *Id.* Therefore, Polypore requests that these documents be afforded *in camera* protection for a period of five (5) years from the date of this motion.

Additionally, Respondent’s Counsel has determined that several exhibits identified by Complaint Counsel on its Proposed Exhibit List, which were produced by Exide Technologies (“Exide”) directly to Complaint Counsel, are duplicates of exhibits produced by Respondent and included on Respondent’s Proposed Exhibit List (“Exide Duplicates”). The Exide Duplicates are set forth below:

Respondent’s Proposed Exhibit	Duplicate Exide-Produced Exhibit Included on Complaint Counsel’s Proposed Exhibit List
RX01679	PX5033
RX01683	PX5025
RX01685	PX5026
RX01693	PX5035

RX01705	PX5036
RX01713	PX5007
RX01714	PX5028
RX01718	PX5027
RX01720	PX2050

The Exide Duplicates are exhibits containing {

} The Exide Duplicates

contain competitively sensitive business information {

} Should Polypore's

competitors and/or customers gain access to this information, they could use it to their advantage in their own negotiations. Polypore anticipates that Exide will include the Exide Duplicates in its own motion for *in camera* treatment, and such exhibits have not been reviewed by Michael Shor or individually analyzed and summarized in the supporting declaration of Michael Shor attached hereto as Exhibit B. However, to the extent that Exide does not move for *in camera* treatment on all of the Exide Duplicates, Polypore respectfully requests that any such duplicate exhibit which was produced by Exide and included on Complaint Counsel's Proposed Exhibit List, be granted *in camera* treatment for the reasons stated herein and for the individual reasons set forth in the supporting declaration of Michael Shor, which individually analyzes Respondent's version of each of the Exide Duplicate exhibits.³ Polypore requests that the Exide Duplicates be afforded *in camera* protection for a period of five (5) years from the date of this motion.

³ Additionally, Complaint Counsel's Proposed Exhibit List includes five (5) exhibits, which were produced by Exide, but are not included on Respondent's Proposed Exhibit List. These exhibits - PX5001, PX5003, PX5017, PX5020, and PX5021 - are also exhibits containing {

C. Category Three – Customer-Specific Documents

Given Polypore's presence in a market dominated by large, sophisticated customers, it is not surprising that Polypore possesses a large number of customer-specific documents. The documents in Category 3 contain, among other things, customer contract terms, customer requests, customer proposals, and other customer analysis. (*Shor Decl.*, ¶ 13). Part of Polypore's success is attributable to its decades of work aimed at building solid customer and strategic relationships. (*Shor Decl.*, ¶ 13). Many of the documents in Category 3 were created in order to service customers and are highly confidential to Polypore's ongoing business. (*Shor Decl.*, ¶ 13). If competitors were privy to the inner workings of these long-established relationships, it would give them an unfair advantage in trying to attract new (i.e., Polypore's) customers. (*Shor Decl.*, ¶ 13). To reveal the strengths and weaknesses of Polypore's relationship with specific customers to all of Polypore's competitors would allow Polypore's competitors to know exactly where to attack Polypore – a most unfair advantage. (*Shor Decl.*, ¶ 6, 9, 13, 17, 18).

Polypore keeps customer-specific information strictly confidential, and it is not available from any other source outside the company. Circulation of these documents within Polypore is very limited. (*Shor Decl.*, ¶¶ 7, 13, 16).

The protection of these documents is essential to Polypore's success. Because of the fundamental importance of such documents to the competitiveness of Polypore, Polypore requests that these documents be granted *in camera* treatment for a period of three (3) years from the date of this motion.

}, and

therefore warrant *in camera* treatment. Pursuant to Commission Rule 3.45(b) and the Protective Order Governing Discovery Material entered in this proceeding on October 23, 2008, however, Exide has the burden of seeking *in camera* treatment of the documents it produced directly to Complaint Counsel and which are included on Complaint Counsel's Proposed Exhibit List. Polypore anticipates that Exide will include PX5001, PX5003, PX5017, PX5020, and PX5021 in its own motion for *in camera* treatment. To the extent that Exide does not include PX5001, PX5003, PX5017, PX5020, or PX5021 in its own motion for *in camera* treatment, Respondent respectfully requests that the Administrative Law Judge make a provisional grant of *in camera* status to PX5001, PX5003, PX5017, PX5020, or PX5021 pursuant to Commission Rule 3.45(g) in order to allow Respondent to move for *in camera* treatment of such exhibits.

D. Category Four – Costing Data

This category of documents pertains specifically to the cost structure of Polypore's products, which is a critical aspect of Polypore's business. The documents in Category 4 are highly valued and protected. (*Shor Decl.*, ¶ 14). Disclosure of such documents would expose Polypore's costs and margins, which competitors have no way of independently knowing. (*Shor Decl.*, ¶14). The information contained in these documents is invaluable to a competitor and would provide a roadmap as to the needs and buying patterns of customers. (*Shor Decl.*, ¶ 6, 9, 14, 17, 18).

The cost-structure documents, which are kept strictly confidential by Polypore, represent considerable work product and it would be unfair for it to be released to those who could use it to their advantage against Polypore. (*Shor Decl.*, ¶¶ 7, 14, 16). For these reasons, Polypore requests that these documents be granted *in camera* treatment for a period of three (3) years from the date of this motion.

E. Category Five – Sales and Financial Information

This category of documents pertains specifically to sales data and analyses which have been accumulated over time through substantial efforts by Polypore, and to financial information about Polypore's assets and liabilities, both of which are critical aspects of Polypore's business. (*Shor Decl.*, ¶ 15). The documents in Category 5 are highly valued and protected. (*Shor Decl.*, ¶ 15). Disclosure of such documents would expose Polypore's sales policies and strategies and/or enable competitors to construct an accurate financial model of Polypore's business. (*Shor Decl.*, ¶ 15). The publication of these documents would put Polypore at a competitive disadvantage and cause injury to Polypore. (*Shor Decl.*, ¶¶ 6, 9, 15, 17, 18). Many of these documents reflect sales strategies, discounts, income/expense data, financial review, budgets and forecasts. (*Shor Decl.*, ¶ 15).

These documents, which are kept strictly confidential by Polypore, represent considerable work product and it would be unfair for it to be released to those who could use it to their advantage against Polypore. (*Shor Decl.*, ¶¶ 7, 15, 18). For these reasons, Polypore requests that these documents be granted *in camera* treatment for a period of five (5) years from the date of this motion.

II. *IN CAMERA* TREATMENT IS ALSO WARRANTED FOR POSSIBLE TRIAL TESTIMONY BY POLYPORE'S WITNESSES

Both Respondent and Complaint Counsel have designated Polypore employees as potential trial witnesses. Polypore's employees will likely be questioned about the topics covered by this motion. Testimony on all of these topics could result in the disclosure of the same information contained in the documents described above and in the supporting declaration of Michael Shor. Thus, Polypore also requests that any trial testimony, either upon direct examination or cross examination by either party on any of these topics, be subject to *in camera* treatment for a period of three (3) to five (5) years from the date of this motion.

Conclusion

Polypore has for several decades driven itself to set the standard and meet the competition in the battery separator market. In doing so, Polypore has amassed many competitively sensitive and confidential documents, which, if disclosed, would result in a "clearly defined, serious injury." Polypore has taken care to maintain the confidential nature of these documents. Polypore has also spent significant time and resources developing its product line and developing relationships with its customers. This effort would be sacrificed should Polypore's confidential and proprietary information be disclosed during the course of this hearing. For the foregoing reasons and those articulated in the Fifth Declaration of Michael

Shor, Polypore respectfully requests that this Court grant *in camera* protection to all the proposed trial exhibits identified on Exhibit A and any trial testimony related to the topics covered by the proposed trial exhibits in Exhibit A.

Dated: November 4, 2009

Respectfully submitted,

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