

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

PUBLIC
Docket No. 9327

COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENT’S MOTION FOR *IN CAMERA* TREATMENT OF CERTAIN TRIAL EXHIBITS

Respondent does not even approach satisfying its burden of showing that disclosure of the material for which it seeks *in camera* treatment will result in a clearly defined and serious injury - - as required by Rule 3.45 governing the *in camera* treatment of materials. 16 C.F.R. § 3.45(b). Respondent claims that it carefully limited the number of documents in which it claims merits *in camera* treatment.¹ This “carefully” culled list results in a request for *in camera* treatment for more than 1,600 documents. Respondent categorizes each document into one or more of nine broad categories with very little analysis of how the information, if made public, would seriously injure the company. Respondent’s Motion, Exhibit B. This is a complete failure to justify its broad request for what should be a narrow application of *in camera* treatment, and even a cursory review of the materials for which respondent seeks *in camera* treatment reveals documents that should be put on the public record. Respondent’s application should therefore be denied.

The Commission has always operated under the presumption that its proceedings -

¹ See Respondent’s Motion For *In Camera* Treatment of Certain Trial Exhibits [hereafter “Respondent’s Motion”] at 3.

including the evidence presented in those proceedings - should be open to the public. *See Crown Cork & Seal Co., Inc.*, 71 F.T.C. 1714, 1714-15 (1967); *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1186 (1961). To help applicants determine what should be accorded confidential treatment, the Commission established six factors to consider in determining whether *in camera* treatment is appropriate: (1) the extent to which the information is known outside of the party's business; (2) the extent to which the information is known by employees and others involved in the business; (3) the extent of measures taken by the party to guard the secrecy of the information; (4) the value of the information to the party and to its competitors - if the information is old, a greater burden is placed on the party to demonstrate its value; (5) the amount of effort or money expended by the party in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Bristol-Meyers Co.*, 90 F.T.C. 455, 456 (1977). Taking these factors into account, applicants for *in camera* treatment must make a "clear showing that the information concerned is sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury." *General Foods Corp.*, 95 F.T.C. 352, 355 (1980). This standard best serves the balance between "the need for a public understanding of the Commission's adjudicative actions and the interest of business in avoiding competitive injury from public disclosure of information." *Id.* To carry its burden, respondents must show "that the public disclosure . . . will result in a clearly defined, serious injury." *Hood*, 58 F.T.C. at 1188.

Instead of satisfying its burden, respondent paints with the broadest brush possible. First, the sheer volume of documents for which *in camera* treatment is requested is suspect.

Complaint counsel and respondent previously submitted exhibits lists with approximately 1,355 and 1,546 exhibits, respectively, for a total of 2,901 potential trial exhibits. Of the 2,901

exhibits, respondent seeks *in camera* treatment for all or portions of approximately 1,663 documents, well over half of the total potential trial exhibits. For approximately 1,350 out of the 1,663 exhibits, respondent seeks *in camera* treatment for the entire document.

Second, while respondent attempts to justify why each document should be accorded *in camera* protection, they fail to analyze each document with any specificity, preferring to lump each document into one or more of nine broad categories. Within each category, respondent includes a brief justification for its *in camera* request consisting of a short description of the document usually followed by a sentence explaining that “[s]hould this information be disclosed to the public, competitors could use this information to their advantage and Polypore’s detriment,” or similar language. Respondent’s Motion, Exhibit B. This approach fails to meet the burden of justifying keeping material from the public eye. Respondent’s motion should therefore be rejected on these grounds alone.

To the extent complaint counsel can glean any relevant information from respondent’s motion, even a cursory examination of the documents for which respondent seeks *in camera* treatment reveals the flaws in their approach. For example, respondent seeks to seal the following documents:

- Business plans and strategies containing the very type of information considered by the Commission in *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184 (1961). Information on pricing, the costs of doing business, and profits is “of a type which most businesses would prefer to keep confidential,” however, the Commission nonetheless held that “requests to seal relevant evidence of this type should be looked upon with disfavor and only granted in exceptional circumstances,” *Id.* at 1189 (emphasis added). Respondent’s justifications outlined in Exhibit B of Respondent’s Motion show no “exceptional circumstances” that place all of their information above that at issue in *H.P. Hood*, and thus they have failed to satisfy their burden.
- Documents that are three or more years old. Such documents are presumed to belong on the public record. *General Foods Corp.*, 95 F.T.C. at 353; *Crown Cork & Seal*, 71 F.T.C. at 1751.

- Documents containing information that is already in the public domain For example, there is a letter to a customer announcing that a price increase is imminent. This letter does not contain the details of the price increase, nor does it mention any details relating to the terms or conditions of any pricing or service agreement. The fact that Polypore implemented a price increase in the past is no secret. In fact complaint counsel states as much in its complaint that was publicly filed by the Commission on September 10, 2008.

These examples are merely illustrative of the many problems caused by respondent's broad approach.

For the reasons discussed above, respondent's application for *in camera* treatment of certain confidential materials should be denied in its entirety.

Respectfully Submitted,

J. Robert Robertson
Chief Trial Counsel
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Ave, NW (H-374)
Washington, DC 20580
Telephone: (202) 326-2813
Facsimile: (202) 326-2214

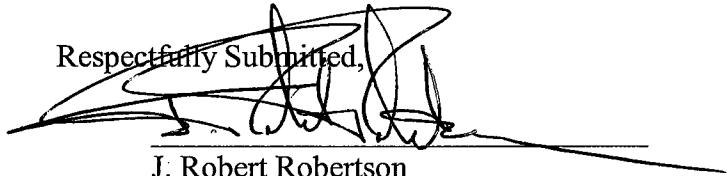
Dated: April 16, 2009

- Documents containing information that is already in the public domain. For example, there is a letter to a customer announcing that a price increase is imminent. This letter does not contain the details of the price increase, nor does it mention any details relating to the terms or conditions of any pricing or service agreement. The fact that Polypore implemented a price increase in the past is no secret. In fact complaint counsel states as much in its complaint that was publicly filed by the Commission on September 10, 2008.

These examples are merely illustrative of the many problems caused by respondent's broad approach.

For the reasons discussed above, respondent's application for *in camera* treatment of certain confidential materials should be denied in its entirety.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'J. Robert Robertson', is written over the text 'Respectfully Submitted,'. The signature is stylized and somewhat illegible.

J. Robert Robertson
Chief Trial Counsel
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Ave, NW (H-374)
Washington, DC 20580
Telephone: (202) 326-2813
Facsimile: (202) 326-2214

Dated: April 16, 2009

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2009 I filed *via* hand and electronic mail delivery an original and two copies of the foregoing COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR *IN CAMERA* TREATMENT OF CERTAIN TRIAL EXHIBITS with:

Donald S. Clark, Secretary
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, Rm. H-135
Washington, DC 20580

I hereby certify that on April 16, 2009, I served *via* electronic mail and hand delivery a copy of the foregoing COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR *IN CAMERA* TREATMENT OF CERTAIN TRIAL EXHIBITS with:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW, H-106
Washington, DC 20580
oyalj@ftc.gov

I hereby certify that on April 16, 2009, I served *via* electronic mail delivery a copy of the foregoing COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR *IN CAMERA* TREATMENT OF CERTAIN TRIAL EXHIBITS with:

William L. Rikard, Jr., Esq.
Eric D. Welsh, Esq.
Parker, Poe, Adams & Bernstein, LLP
401 South Tryon Street, Suite 3000
Charlotte, NC 28202
williamrikard@parkerpoe.com
ericwelsh@parkerpoe.com

By: 
Terri Martin
Federal Trade Commission
601 New Jersey Avenue, NW
Washington, DC 20001
Telephone: (202) 326-3488
tmartin@ftc.gov