

Interlocutory Order

96 F.T.C.

IN THE MATTER OF

E. I. DUPONT DE NEMOURS & COMPANY

*Docket 9108. Interlocutory Order, Oct. 20, 1980*ORDER INVITING ADDITIONAL BRIEFS ON RESPONDENT'S MOTION
FOR CONTINUED *IN CAMERA* TREATMENT

By motion filed January 16, 1980, respondent E. I. DuPont de Nemours and Company ("DuPont") requested a three year extension of *in camera* protection for certain documents in the record in this case. Administrative Law Judge Miles J. Brown previously ordered that these materials be given *in camera* treatment until the date of the Commission's final order or as otherwise ordered by the Commission. As indicated in DuPont's motion and confirmed in a subsequent pleading, complaint counsel have no objection to a three year extension of *in camera* treatment except to the extent that the Commission finds it necessary to refer to *in camera* evidence in its opinion. In a supplemental memorandum, DuPont raised additional issues concerning the effect of the Federal Trade Commission Improvement Act of 1980, Pub. Law 96-252, on our adjudicative *in camera* standards. Complaint counsel did not address respondent's contention that the legislation modified the criteria for *in camera* treatment because they do not oppose the requested extension.

We reject respondent's supplemental arguments at the outset and state our view that the provisions of the Improvement Act governing treatment of confidential information do not apply to or affect the Commission's standards for *in camera* protection of exhibits in adjudicative proceedings. Those standards are clearly expressed in *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184 (1961); *Bristol-Myers Company*, 90 F.T.C. 455 (1977); and *General Foods Corporation*, Dkt. 9085, Order of March 10, 1980.

In applying the standards set forth in these cases to the instant motion for extended *in camera* treatment, we have found that certain issues raised by the respondent require clarification before a final determination can be made. While some of the documents appear to warrant extended *in camera* protection, the appropriate treatment for other data is less clear. Accordingly, we invite respondent, and complaint counsel should they so desire, to submit additional briefs on the following matters:

(1) Respondent has argued that certain earnings data should be given *in camera* treatment not only because of their commercial sensitivity, but also because a ruling by the Internal Revenue

Service that "disclosure of non-LIFO basis financial information in this proceeding does not constitute a violation of the LIFO conformity requirements of the Code" was apparently conditioned on such data remaining *in camera*. We are unconvinced, as yet, that the respondent's argument concerning the IRS ruling affords a satisfactory basis to grant continued *in camera* protection. While increased tax liability following the release of the earnings data might well be something that DuPont legitimately desires to avoid, the *in camera* standards enunciated in *H.P. Hood* and its progeny require us to focus on the likelihood of injury to a company's *commercial* or *competitive* position. In addition to addressing the issue of the continued commercial importance of these data, DuPont should also address further the effect of removing *in camera* protection on the IRS' ruling and the applicability of the *Hood* standard to the kind of injury asserted here.

(2) Exhibits CX 129C, 173B, 173D, 178T, 182G, 182H, 182I, and 182J are entitled to *in camera* treatment, according to DuPont, because they contain recent and highly sensitive business information. The data contained in these documents—generally profits, earnings, unit costs, and sales volumes for titanium dioxide—do appear to comprise information that, if recent, would normally be viewed as highly sensitive. However, the data here concern the years 1973 through 1976, with estimates covering years no more recent than 1977. DuPont should explain more fully how the release of this information would result in serious injury to its competitive or commercial position today.

We also note that some of this information already may have been publicly released. For example, CX 133N reveals DuPont's actual return on investment in titanium dioxide as of 1976, and CX 26I projects sales volumes, investment volumes, earnings, and returns on investment for titanium dioxide for 1972–1984. In *Bristol-Myers Company, supra*, the Commission stated that "demonstrating serious injury requires the applicant to show that the documents [to be protected] are secret" 90 F.T.C. 455, 456. DuPont has not satisfactorily addressed the impact that prior disclosures have had on the likelihood that serious competitive injury would result from the release of exhibits CX 129C, 173B, 173D, 178T, 182G, 182H, 182I, and 182J.

(3) Information contained in exhibits CX 81E, 81F, 82, 83, and 98C similarly appears to have been disclosed or so closely resembles information previously disclosed in the record that it may no longer be commercially sensitive or secret. Specifically, CX 28E, apparently prepared in 1972, shows the unit costs of titanium dioxide production

by plant for both DuPont and its competitors, as well as sales prices and operative earnings. CX 26M, also prepared in 1972, reveals costs, operative earnings, return on investment and total investment for DuPont's plants. Exhibits CX 81E, 81F, 82, 83, and 98C evidently contain the same types of information for the years 1973 and 1975. In its additional briefs, DuPont should discuss any material differences between the information in these five exhibits and data that have already been disclosed.

(4) DuPont further asserts that another group of documents contains sensitive financial information from its departmental quarterly reports, the release of which would give its competitors an injurious insight into its strengths and weaknesses. However, among these documents we notice several bare listings of selling prices of titanium dioxide by month for 1976 and 1977, indexed to a base year. These are exhibits RX 35K, RX 36J, RX 37L, RX 38L, RX 39L, and RX 40M. The age and apparent public nature of this information suggest that the exhibits need not be given extended *in camera* protection. We therefore request that DuPont explain why the release of these data would be likely to result in serious injury to its competitive or commercial position. Accordingly,

It is ordered, That the respondent and complaint counsel be given thirty days from the date of issuance of this order in which to submit briefs discussing the issues noted above. *In camera* protection of the exhibits that are the subject of respondent's motion shall be extended until the Commission issues an order disposing of that motion.

IN THE MATTER OF

E. I. DUPONT DE NEMOURS & COMPANY

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED
VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9108. Complaint, April 5, 1978—Order, Oct. 20, 1980*

This order sustains the initial decision of the administrative law judge and dismisses the complaint issued April 5, 1978 charging a Wilmington, Del. chemical manufacturer with attempting to monopolize the domestic titanium dioxide market. The Commission holds that since the conduct of the company was "consistent with its own technological capacity and market opportunities," it was "reasonable" and not a violation of law.

Appearances

For the Commission: *James C. Egan, Jr.* and *Robert W. Doyle, Jr.*

For the respondent: *William E. Kirk, Jr.* and *Howard J. Rudge*,
Wilmington, Del. and *Daniel M. Gribbon*, *Covington & Burling*,¹
Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that E. I. DuPont de Nemours & Company has violated and is now violating Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding by it in respect thereof is in the public interest, hereby issues its complaint, charging as follows:

E. I. DUPONT DE NEMOURS & COMPANY

1. Respondent E.I. DuPont de Nemours & Company (hereinafter "DuPont") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal offices and place of business located at 1007 Market St., Wilmington, Delaware.

2. DuPont is engaged principally in manufacturing and selling diversified lines of chemical products and other products related thereto. In 1976, the company's sales were in excess of \$8.3 billion, its net income was in excess of \$459 million, its assets at year end were valued in excess of \$7 billion, and it ranked 16th on the Fortune 500 list.

¹ Mark I. Levy, Esq., was on the briefs for respondent. He is now Assistant to the Solicitor General, Office of the Solicitor General of the United States, Department of Justice, Washington, D. C. 20530.