

Interlocutory Order

97 F.T.C.

IN THE MATTER OF

E.I. DUPONT de NEMOURS & CO.

Docket 9108. Interlocutory Order, Jan. 21, 1981

ORDER EXTENDING IN CAMERA TREATMENT

On January 16, 1980, E.I. DuPont de Nemours and Company ("DuPont") requested a three year extension of *in camera* treatment for certain documents in the record of this proceeding. By order of October 20, 1980, the Commission ordered that *in camera* protection of all documents so designated should continue until certain questions on which the Commission requested additional information are resolved. Respondent has submitted its response to that order and the Commission is now prepared to rule on the requested extension.

The Commission's standards for *in camera* protection of exhibits in adjudicative proceedings 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*, Docket No. 9085, Order of March 10, 1980. Despite respondent's arguments to the contrary, the provisions of the F.T.C. Improvements Act of 1980 (Pub Law 96-252) governing treatment of confidential information do not alter the long-established fact that Section 6(f) of the Federal Trade Commission Act does not absolutely bar disclosure of business data as evidence in our adjudicatory proceedings.¹

The standard for *in camera* treatment is one of "clearly defined, serious injury." *H.P. Hood & Sons, Inc.*, 58 F.T.C. at 1188. We pointed out in *Bristol-Myers Co.*, 90 F.T.C. at 457 and in our March 10 Order in *General Foods* that the secrecy and materiality of the business information sought to be protected comprise the two elements of the serious injury analysis. As aids in the determination of secrecy and materiality, the Commission in *Bristol-Myers* cited six factors mentioned in the Restatement of Torts. 90 F.T.C. at 457. Furthermore, we have acknowledged that the showing of serious injury does not necessarily require a specific demonstration of the manner in which other firms would use material to the disadvantage of the firm

¹ New Section 21(d)(2) of the FTC Act provides that

[a]ny disclosure of relevant and material information in adjudicative proceedings to which the Commission is a party shall be governed by the rules of the Commission for adjudicative proceedings . . . except that the rules of the Commission shall not be amended in a manner inconsistent with the purposes of this section.

Discussing what ultimately was enacted as Section 21(d)(2), the Senate Report on S.1991 stated specifically that the Commission should maintain the procedures in Rules 1.18(b) and 3.45 for granting *in camera* treatment. Senate Report No. 96-500 at pp. 27-28 (1979).

whose information is at issue. Rather, we have said that it is proper to infer, without a specific showing of how a competitor would use it, that disclosure of allegedly sensitive information would seriously affect the firm's commercial position.² Underlying this analysis is a general concern for the seriousness of injury to a firm's commercial or competitive position. Of course, the injury contemplated in *Hood* and its successors is not limited to "commercial" injury in any strict or exclusive sense, nor is such injury confined to the precise type under consideration in *Hood*, but our precedents appear to distinguish it from the kind of injury arising from potential tax liability envisioned by respondent.

In essence, respondent argues that certain earnings data should be given extended *in camera* treatment because of the possibility that disclosure would result in increased tax liability for the firm. In *Hood*, the Commission weighed the possibility that disclosed data might give rise to and be used in private treble-damage actions, and it concluded that such an eventuality was not the kind of injury that should govern its determination of whether to disclose the information. As such, it appears that respondent's potential tax liability is more like the potential private damage liability in *Hood* and less like the type of direct business injury contemplated by our *in camera* standards. Nevertheless, it is unnecessary for us to make a definitive determination on this point inasmuch as respondent advances an independent, and we think valid, ground for continued *in camera* treatment of the same information to which its tax argument applies.

The exhibits in question contain valuable, secret and material investment, earnings, profit, operative return and cost information about respondent's titanium dioxide and pigments business, the release of which might enable DuPont's competitors to construct an accurate financial model of DuPont's business, to its detriment. While it appeared to the Commission that certain information in question had been previously disclosed in public exhibits, respondent points out that the *in camera* data in question are *actual* while the previously disclosed data were only projections and forecasts. DuPont asserts, and we are persuaded, that the actual data were expensive to compile, are more sensitive and secret than the projections and are more likely to result in injury to respondent's business if released.

The Commission also asked DuPont for clarification of the status of certain *in camera* information that appeared to be too old to be of

² General Foods Corporation, Docket No. 9085, Order of August 1, 1980, pp. 1-2.

competitive concern. Respondent has persuaded us that, despite its age (1975), the actual data in question—trends of profits, earnings, unit costs and sales volumes of titanium dioxide—might enable competitors to extrapolate an accurate model of its current business. We also asked for further argument concerning certain comparisons of costs of production by plant. DuPont asserts that this information is more recent, more detailed and more accurate than similar information apparently disclosed in other exhibits and that this information is highly proprietary and sensitive, having been developed at substantial expense to DuPont. The Commission finds this a sufficient ground for extending *in camera* protection for the plant data. Finally, the Commission inquired about certain lists of prices for 1976, 1977 and 1978. Respondent contends that these exhibits contain indexed averages of actual discounted prices which are secret and which would assist its competitors if released. We are persuaded that this group of documents should also be given continued *in camera* treatment.

Having disposed of the specific groups of documents discussed in our October 20 Order, we now move to the whole *in camera* record of this proceeding. We have found it unnecessary to disclose any of the *in camera* information in writing our opinion in this case, which is a primary consideration in determining whether to grant *in camera* treatment to adjudicative information or to disclose it, 58 F.T.C. at 1187. Moreover, we have carefully reviewed each of the documents for which respondent seeks extended *in camera* treatment and are satisfied that all of them meet the criteria set out in the holdings cited above. Therefore,

It is ordered, That all exhibits presently in the *in camera* record of Docket No. 9108 shall remain *in camera* for three years from the date of this order, at which time respondent may show cause why those documents should not be made public.

IN THE MATTER OF
THE CENTRAL FLORIDA ELECTRICAL BID DEPOSITORY,
INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9132. Complaint, Nov. 28, 1979—Decision, Jan. 22, 1981

This consent order requires, among other things, a Winter Park, Fla. corporation operating a non-profit electrical bid depository service, and nine individuals to cease engaging in any course of action, conspiracy or agreement which has the purpose or effect of fixing, maintaining, stabilizing, or tampering with the price of electrical contracting services, including: encouraging or requiring members or signatories to exchange relevant bid information prior to bid opening time; barring them from negotiating or submitting bids after the bid filing deadline; requiring them to function exclusively through the bid depository; and penalizing those who fail to do so. Further previously suspended recalcitrants must be reinstated, and the corporation is required to promptly amend its rules and regulations so as to conform with the terms of the order.

Appearances

For the Commission: *Truett M. Honeycutt and David R. Flowerree.*

For the respondent: *William A. Harmening, Stanley, Harmening, Lovett & Cohen, Orlando, Fla.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The Central Florida Electrical Bid Depository, Inc., a corporation, and David Perry, Robert Behe, Larry Poirier, and Fred Newton, individually and as officers and directors of said corporation, and Charles Mayo, Helmuth Eidel, Donald Burchnell, Patrick Kelly, and Lynn Harden, individually and as directors of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows: