

IN THE MATTER OF

E.I. DUPONT DE NEMOURS & COMPANY

*Docket 9108. Interlocutory Order, June 12, 1984*ORDER EXTENDING *IN CAMERA* TREATMENT

By Order of the Commission, dated January 21, 1981, certain exhibits in the record of Docket No. 9108 were accorded *in camera* status for a three year period. The Order has now expired and respondent, E.I. DuPont de Nemours and Company ("DuPont") has moved the Commission, pursuant to a January 20, 1984 motion, for return of all *in camera* exhibits in Docket No. 9108 which are part of the record in that proceeding. In the alternative, respondent has asked the Commission for an extension of *in camera* treatment for certain exhibits indefinitely, or at least for three additional years with a provision for further *in camera* treatment upon a showing of good cause therefor.

After consideration of DuPont's motion, the Commission denies respondent's request for return of all *in camera* exhibits in the record of the *DuPont* proceeding. The Federal Trade Commission Act ("FTC Act") and the Commission's Rules of Practice allow for return of documentary materials submitted to the Commission *except* those materials offered and received in evidence in a Commission proceeding.¹ The Commission's Rules reflect its desire to maintain a full and accurate record of Commission deliberative considerations, as well as to preserve records of Commission activities which have legitimate informational value to its law enforcement functions.²

The Commission also denies respondent's request for indefinite *in camera* treatment for certain specified exhibits. That request, seeking *in camera* protection in perpetuity, fails to meet the Commission standard for *in camera* treatment, *i.e.*, disclosure of documents must result in "clearly defined serious injury to the person or corporation

¹ Specifically, under Section 21(b)(5) of the FTC Act, when materials are produced in the course of an investigation and any proceeding arising out of the investigation is complete,

then the custodian shall, upon written request of the person who produced the material, return to the person any such material *which has not been received into the record* of any such proceeding.

(emphasis added). See also Commission rule 4.12(a) which states:

Any person who has submitted documentary material to the Commission . . . may obtain, on request, the return of material submitted to the Commission *which has not been received into evidence*. . . .

Because the FTC Act and the Commission's Rules do not provide for the return of the "originals" of the documents in question it is unnecessary to determine whether Dupont has met the "extraordinary circumstances" showing required by Rule 4.12(b) for the return of copies of documents made by the Commission.

² The Commission is required by Federal law to preserve records received by the agency in connection with the transaction of public business "as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them." Federal Records Act, 44 U.S.C. 3301; see also Commission's Rules of Practice, Rule 4.12(c).

whose records are involved." *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1958); Commission Rule 3.45. At some point in the future, DuPont's confidential information may well lose its competitive sensitivity and have little value to its competitors. Given the importance of keeping the Commission's activities open to public review and scrutiny, it is appropriate to make the record in the *DuPont* matter publicly available at some point in time, provided sensitive and confidential business information is not disclosed.

Finally, the Commission finds sufficient grounds for extending *in camera* protection for certain DuPont exhibits based upon the standard reflected by Commission Rule 3.45(b) and explained in *H.P. Hood & Sons, Inc.*, *supra*. An applicant for *in camera* status is required to show that the information in the documents is "sufficiently secret" and "sufficiently material" to its business that disclosure would result in serious competitive injury. *General Foods Corporation*, 95 F.T.C. 352, 355 (1980). The Commission places a greater burden on a respondent to demonstrate that disclosure would result in competitive injury for information over three years old. *General Foods, supra*, 95 F.T.C. 353.

Although respondent's confidential data is over three years old, respondent has made a convincing showing that it remains possible, through sophisticated extrapolation techniques, that DuPont's current cost information could be computed by its competitors from the data presently in the record. Given the limited number of documents involved in respondent's request, the finite time period of continued protection requested, and the clear possibility that disclosure will result in "clearly defined serious injury" if such information is disclosed, it is not unreasonable to extend *in camera* treatment for an additional three years. At the conclusion of another three year period, both DuPont and the Commission will be better situated to evaluate the necessity of further *in camera* treatment for the documents in question.³ Therefore,

It is ordered, That the following 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:

CX 21N	CX 173D	CX 211Z(40)
CX 29M	CX 178T	CX 219A-N
CX 32I	CX 182G-H	CX 241A-O
CX 50N	CX 182J	CX 255A-E
CX 54H	CX 183D	CX 255H-L
CX 64D-I	CX 196D	CX 264A-B

³ As the underlying data become older, any extrapolation techniques will likely become less accurate, and will pose less risk of competitive harm.

CX 68X	CX 196F	RX 1S
CX 68Z(1)	CX 196I	RX 6E
CX 81A-F	CX 196K-M	RX 17B-C
CX 82A	CX 196Y-Z(1)	RX 18A
CX 83A	CX 198H	RX 19A
CX 117A-F	CX 200C	RX 32A-W
CX 129C	CX 208A-D	RX 34A-C
CX 132G-H	CX 209K-Z	RX 35A-B
CX 146C	CX 209LL	RX 35D-O
CX 146E	CX 210C-E	RX 36A-N
CX 149D	CX 210G-H	RX 37A-B
CX 149F	CX 211F-J	RX 37H-Q
CX 149H-J	CX 211L-P	RX 38A-B
CX 149T	CX 211R-V	RX 38E-P
CX 149V	CX 211X-Z(2)	RX 38S
CX 133R	CX 211Z(4)-Z(8)	RX 39A-B
CX 158M-N	CX 211Z(11)-Z(15)	RX 39H-O
CX 158Z(32)-Z(33)	CX 211Z(17)-Z(21)	RX 40A-B
CX 169A	CX 211Z(23)-Z(27)	RX 40I-P
CX 170I	CX 211Z(29)-Z(33)	RX 40S
CX 173B	CX 211Z(35)-Z(38A)	

Interlocutory Order

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IN THE MATTER OF

VOLKSWAGEN OF AMERICA, INC., ET AL.

Docket 9154. Interlocutory Order, June 19, 1984

This order requires respondents to establish a depository arrangement, on terms to be negotiated, whereby Complaint Counsel may examine relevant documents and information without the Commission taking custody of the material.

ORDER

Administrative Law Judge John J. Mathias has certified to the Commission complaint counsel's motion requesting *in camera* treatment for all documents and information to be submitted by Volkswagenwerk AG ("VWAG") for purposes of discovery in Volkswagen of America, Inc., D. 9154. The relevant materials are located in Germany and in the possession of the German government because the ALJ ordered the parties to transmit the documents through diplomatic channels as an alternative to ruling on VWAG's motion to quash the discovery subpoena. Although a protective order was issued to maintain the confidentiality of materials submitted during the pretrial stage of the proceedings and to allow VWAG to move for *in camera* treatment of materials introduced into evidence, the German government has refused to transmit the documents until an *in camera* order is issued covering all of the documents regardless of their sensitivity. The German government has requested assurances that VWAG's materials will be afforded the same protections they would have in a German administrative proceeding: namely, that they will be kept confidential throughout the proceeding and returned to VWAG when the proceedings are complete.

The Commission has considered the certified motion and order, complaint counsel's arguments in favor of its motion and order, and the ALJ's recommendations for granting it, and it has determined that issuance of the certified order would be inconsistent with the Commission's rules in several important ways: First, it would not be based on the legal standard for issuance of *in camera* orders established in Commission decisions and reflected in its rules. Second, it seeks permanent and total protection, which is inconsistent with the public interest in making available as much as may be disclosed of the factual bases for Commission action. Third, certain provisions in the certified order are inconsistent with the Commission's obligation to disclose information to Congress. Fourth, the certified order includes no provision for discretionary information-sharing with state and other federal law enforcement agencies authorized by statute. Fifth,