

Interlocutory Order

103 F.T.C.

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,

the certified order is inconsistent with certain requirements of the FTC Act, the FTC's rules and the Federal Records Act regarding return of materials submitted in FTC investigations. And last, the certified order requires destruction of documents in a manner that is unnecessary. The Commission has determined at this time not to issue an order modified to conform to what the Commission believes are the applicable statutes and rules, or to direct the parties to show cause why the certified order should not be modified. Instead, the Commission has determined to order the parties to establish a depository arrangement, on terms to be negotiated, whereby complaint counsel may examine the documents and information in question without the Commission's taking custody of the material. This procedure would enable staff to proceed expeditiously with the discovery portion of this case without the immediate need for issuance of an advance *in camera* order. After complaint counsel have examined the documents and determined which, if any, they plan to use in connection with their case or to introduce as evidence, the parties should reassess the need for *in camera* treatment and seek an appropriate *in camera* order from the ALJ, if warranted. The Commission's action here should not be considered a bar to renewal of the instant motion, whether or not in modified form, after completion of efforts in compliance with this order.

The Commission has carefully considered some of the issues this motion raises. The following discussion is intended to provide an explanation of the Commission's view of these issues that will guide the parties in the negotiations directed by this order. Any further motion for *in camera* protection, whether addressed to the ALJ or the Commission, should address the issues discussed below to the extent that they are relevant to the treatment sought.

A. Advance In Camera Treatment

At the outset, the Commission is troubled that the present motion seeks *in camera* treatment in advance of production of any documents, making virtually impossible adherence to the usual standard in Commission Rule 3.45. Rule 3.45 provides for *in camera* treatment of materials offered in evidence in adjudicative proceedings in "unusual and exceptional circumstances upon a showing of good cause." The rule provides in relevant part:

Administrative law judges shall have authority but only in those unusual and exceptional circumstances where good cause is found on the record [*citing H.P. Hood & Sons*, 58 F.T.C. 1154 (1953)] to order documents or oral testimony offered in evidence, whether admitted or rejected, to be placed *in camera*.¹

¹ The rule further provides that the *in camera* order shall include: "(1) a description of the documents and (footnote cont'd)

Rule 3.45 has been construed to protect confidential documents which, if released, would cause a submitter clearly defined serious injury. *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). In decisions following *Hood*, the Commission has held that an applicant for *in camera* treatment must make a clear showing that "the information concerned is sufficiently secret and sufficiently material to [its] business that disclosure would result in serious competitive injury." *General Foods Corp.*, 95 F.T.C. 352, 355 (1980). It has also construed the *in camera* standard strictly, taking into account the countervailing public interest favoring the disclosure of all information relevant to Commission decisions to permit both improved evaluation of the fairness and wisdom of a given decision and to provide clearer guidance to affected parties. *Tenneco, Inc.*, D. 9097 (September 10, 1981); *RSR Corp.*, 88 F.T.C. 206 (1976).

The first issue presented here was whether an *in camera* order should be issued under Rule 3.45 for reasons other than a showing of "clearly defined serious business injury": namely, to comply with the legal standards of a foreign government which that government has imposed as conditions for its transmitting through diplomatic channels documents responsive to discovery. In certain limited circumstances, good cause to issue an *in camera* order may be found under Rule 3.45 for reasons other than "clearly defined serious business injury" (see e.g. *Koscot Interplanetary*, D. 8888). We believe, however, that *in camera* treatment must be predicated on a finding that the submitter is likely to suffer harm from the absence of the protection. Moreover, if the projected harm does not meet the commercial injury standard reflected in the Commission's decisions in *H.P. Hood* and its progeny, it becomes doubly incumbent upon the parties to justify the need for the protection. Second, issuance of an *in camera* order before identifying the materials subject to the order would also be inconsistent with Rule 3.45(b)(1), which requires that an *in camera* order include a description of the documents and testimony to be excluded from the public record.

B. Permanent In Camera Status

The motion also seeks an order, in effect, making the *in camera* protection permanent. Specifically, paragraph 9 of the order attached to Complaint Counsel's motion provides that the *in camera* order may be modified, but only if the Government of Germany approves less restrictive treatment. This provision does not recognize that, at some point, materials placed *in camera* may no longer be sensitive and should be made available to the public if they form part of the basis

testimony; (2) * * * the reasons for granting in camera treatment and (3) * * * the reasons for the date on which in camera treatment expires." See Commission Rule 3.45(b).

for agency action. Finally, issuance of a permanent *in camera* order would also be inconsistent with Rule 3.45(b)(3), which requires the *in camera* order to include a full statement of the reasons for the date on which the *in camera* treatment will expire.

*C. The Certified Order is Inconsistent With the FTC Act
and Other Provisions of the Commission's Rules*

As already suggested, in addition to the legal problems posed under Rule 3.45 by an advance *in camera* procedure, the Commission believes that the certified order presents several other difficulties.

(1) Requirements of the FTC Act Regarding
Disclosure of Information to Congress

The motion seeks an order specifying that VWAG documents be kept *in camera* throughout the entire proceeding and any related proceeding including an action brought to obtain consumer redress under Section 19 of the FTC Act. The Commission has no authority, however, to refuse to respond to official requests from Congress for access to information or documents. *See, e.g. Ashland Oil, Inc. v. FTC*, 409 F.Supp. 297 (D.D.C. 1976), *aff'd*, 548 F.2d 977 (D.C. Cir. 1976). Its duties with respect to such requests are not altered by the confidentiality provisions of Section 21 of the FTC Act. *See* (15 U.S.C. 57b-2(b)(3)(C) and 57b-2(d)(1)(A)) or the Freedom of Information Act (5 U.S.C. 552(c)). Section 21(b)(3)(C), provides:

Nothing in [Section 21] is intended to prevent disclosure to either House of the Congress or to any committee or subcommittee of the Congress * * *.

Further, Section 21(d)(1)(A) provides that the provisions of Section 21(c) (regarding protecting the confidentiality of submitted materials) shall not be construed to prohibit

the disclosure of information to either House of the Congress or to any committee or subcommittee * * *.

These statutory provisions are reflected in Section 4.11(b) of the Commission's rules.

Paragraph two of complaint counsel's proposed order, which specifies the limited circumstances in which VWAG's *in camera* materials may be disclosed, fails to take account of the Commission's legal obligation to disclose information upon official request of Congress. Thus, even if the Commission were to issue an *in camera* order to protect VWAG's materials, that order could not legally prohibit the Commission from disclosing *in camera* materials to Congress upon

receipt of an official request. Under both the statute and the rules, the Commission must notify a submitter of its receipt of such a request.

(2) Disclosure of Information to Federal and
State Law Enforcement Agencies

The certified order also does not take account of the Commission's authority, at its discretion and under strict conditions of confidentiality, to share company-submitted materials with state and federal law enforcement agencies for official law enforcement purposes. Specifically, under Sections 6(f) and 21(b)(6) of the FTC Act, 57 U.S.C. 46(f) and 57b-2(b)(6), the Commission has discretion to respond to requests from state and federal agencies and to provide them access to confidential, company-submitted information

upon the prior certification * * * that such information will be maintained in confidence and will be used only for official law enforcement purposes.

The Commission's procedures for responding to official requests from state and federal agencies are contained in Section 4.11(c) of the Commission's rules. The certified order does not address the issue whether *in camera* materials may be shared with federal and state agencies under the authority of Sections 6(f) and 21, and, therefore, it must be construed to preclude such action. Although the statute does not require the Commission to provide information to state and federal agencies as it does with respect to Congress, the Commission has engaged in such information-sharing routinely, and Section 4.6 of the Rules declares the practice to be a matter of Commission policy.

While the Commission may waive its discretion to share information with state and federal law enforcement agencies in particular instances, it is reluctant to issue a general waiver. A general waiver could place the Commission in the position of having to deny, without exception, all requests from such agencies as, for example, the Internal Revenue Service and the Department of Justice, or to deny state attorneys general access to information not readily obtainable in this country but not having any peculiarly sensitive financial or commercial significance. In addition, issuance of a general waiver based on factors such as the interest of a foreign government could create precedent from which departure could become increasingly difficult.²

² There might also be pressure to extend the precedent as domestic firms seek a level of protection comparable to that enjoyed by companies with foreign connections. Two decisions following the 1980 amendments to the FTC Act resulted from company efforts to curb the Commission's information-sharing activities with state attorneys general: *Jaymar-Ruby Inc. v. FTC*, 496 F.Supp. 838 (N.D. Ind. 1980), *aff'd*, 651 F.2d 506 (7th Cir. 1981); *Flemming v. FTC*, CCH 1980-1 Trade Cas. ¶ 63642 (D.D.C. 1980), *aff'd*, 670 F.2d 311 (D.C. Cir. 1982), (also its companion case, *Milton Bradley, Inc. v. FTC*). These cases were preceded by *Interco, Inc. v. FTC*, 490 F.Supp. 39 (D.D.C. 1979), and *Martin Marietta Corp. v. FTC*, 475 F.Supp. 338 (D.D.C. 1979), *aff'd*, No. 79-1781 (D.C. Cir. May 27, 1980).

(3) Requirements Of The FTC Act Regarding Return of Originals and Copies Of Submitted Material

a. *Originals*

The motion also seeks an order providing that *in camera* documents, presumably originals, be returned at the end of the proceedings.³ Two statutory provisions govern the Commission's authority to return documents obtained and used in connection with a law enforcement proceeding: First, Section 21(b)(5) of the FTC Act, 15 U.S.C. 57-2(b)(5), provides in relevant part:

If any documentary material * * * [has] been produced in the course of any investigation * * * and

(A) any proceeding arising out of the investigation has been completed

* * * * *
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).⁴ Second, the Federal Records Act requires federal agencies to "make and preserve records [which reflect] the organization, functions, policies, *decisions*, procedures and essential transactions of the agency * * *." 44 U.S.C. 3301 (emphasis added). Accordingly, when a proceeding is complete, the FTC Act requires the Commission, upon receipt of a written request, to return all original documents produced in the course of the investigation *except* for materials placed in evidence and received into the record of the proceeding. Such materials provide the bases for Commission decisions and may not be returned to submitting parties pursuant to the Federal Records Act. See 44 U.S.C. 3101. Material placed *in camera* will be retained *in camera* pursuant to Rule 3.45(b).

The certified order provides for return of VWAG's documents stating that materials will be returned "to the degree permitted by the laws of the United States * * *." As will be discussed below, the order is too broad because it appears to cover copies of *in camera* documents generated by or on behalf of complaint counsel and it might also be read as extending to internal Commission documents generated by or on behalf of complaint counsel containing *in camera* information.

³ The motion does not distinguish between the return of originals and copies, but because the legal standards are somewhat different, we make that distinction here.

⁴ Commission Rule 4.12(a) states in part:

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 * * *.

b. *Return Of Copies Of In Camera Materials*

Several provisions of the FTC Act and the Rules of Practice authorize the Commission to copy and retain copies of materials submitted in the course of its investigations. Under Section 21(b)(3)(B) of the FTC Act, 15 U.S.C. 57b-2(b)(3)(B), the custodian of submitted materials "may prepare such copies of the documentary material * * * as may be required for official use." Similarly, under Section 21(b)(5), 15 U.S.C. 57b-2(b)(5), the Commission is required to return materials not received into the record of a proceeding "other than *copies* of such materials made by the custodian * * *." (Emphasis added.) In addition to these provisions of the FTC Act, certain copies of documents must be maintained under the Federal Records Act if, as explained above, they are considered "appropriate for preservation." 44 U.S.C. 3301.

The requirements of the Federal Records Act are reflected in Commission Rule 4.12(c), which states that after a Commission proceeding is complete, Commission staff will

examine all submitted documents and Commission-made copies * * * and will determine pursuant to the Federal Records Act, 44 U.S.C. § 3301, which documents are appropriate for preservation as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Commission because of the information value of data in them.

Thus, the Commission has no authority under the Federal Records Act to return all copies of documents which reflect certain decisions, procedures or transactions of the FTC.

As already explained, original documents that are made part of the administrative record may not be returned because of the Federal Records Act. If copies of the documents are introduced into evidence, perhaps to avoid permanent Commission custody of original documents such as contracts and the like, these copies must be retained. Finally, if copies of the materials or portions of information derived from them are incorporated into or attached to internal Commission documents such as memoranda recommending issuance of complaints in related matters or subsequent actions against VWAG for consumer redress, these copies too would have to be retained. Beyond these circumstances, however, the Federal Records Act and Rule 4.12(c) do not restrict the Commission's authority to return documents.

As already noted, the FTC Act provisions permit the Commission to make and retain copies. They do not, however, require that it do so. Nevertheless, the Commission has declared in Rule 4.12(b) that it

will not return to the submitter copies of documents made by the Commission *unless, upon a showing of extraordinary circumstances, the Commission determines that return would be required in the public interest.* (Emphasis added.)

The certified order does not address the issue of return of copies of VWAG's *in camera* materials. Copies are mentioned in the certified order only in Paragraph 5 which requires staff to "destroy personal copies of *in camera* documents and information * * *."⁵ Presumably, this clause may be construed as prohibiting the Commission from retaining copies of VWAG's materials. The present case may yet present "extraordinary circumstances" within the meaning of Rule 4.12(b) under which the Commission may determine that it is in the public interest to return all copies of *in camera* documents except those which must be maintained under the Federal Records Act. The Commission, however, has long guarded its prerogative to retain copies of documents for use in future activities associated with its missions and not necessarily connected with the investigation or proceeding in which the documents were obtained. See *United States v. Morton Salt, Co.*, 338 U.S. 632 (1950).⁶

(4) Requirement for Destruction of Copies of Documents

The certified order requires complaint counsel to destroy all personal copies of *in camera* documents and information and mandates destruction of all notes, memoranda or other papers containing information derived from *in camera* materials. This provision is unnecessary. Assuming the Commission did issue an *in camera* order, any personal copies of *in camera* materials would be examined by staff after this proceeding is over and any related administrative or judicial actions and appeals are complete. Materials would be retained as required by the Federal Records Act pursuant to Commission Rule 4.12(c) or returned to VWAG under Commission Rule 4.12(b). Any *in camera* materials contained in notes or memoranda would be protected against disclosure under Exemption 3 of the FOIA, pursuant to Exemption 21(f) of the FTC Act and Rule 4.10(d), as explained above.⁷

⁵ See discussion *infra* at 15 regarding destruction of copies of documents.

⁶ The certified order does not mention the protections of the Freedom of Information Act, 5 U.S.C. 552. The parties should note that under applicable laws and the Commission's rules, any originals or copies of *in camera* documents received into the record of a proceeding and any other copies required to be preserved in the Commission's custody under the Federal Records Act will be kept confidential and protected from disclosure under the FOIA. Specifically materials would be exempt from mandatory public disclosure under the Exemption 3 of the Freedom of Information Act, 5 U.S.C. 552(b)(3)(B), and Section 21(f) of the FTC Act, which states that materials received in an FTC investigation in response to compulsory process, or voluntarily in lieu thereof, shall be exempt under the FOIA. Although under the FOIA and Section 21(f), the Commission has discretion to make public materials that are simply exempt from mandatory disclosure, under Rule 4.10(d) of its rules, the Commission has waived this discretion for materials received in a law enforcement investigation that have been marked confidential by their submitter.

⁷ Exemption 5 of FOIA also protects from disclosure staff's analysis of company submitted materials contained in notes and memoranda, but only to the extent the analysis does not reveal company-submitted information. Although it is Commission policy to favor discretionary release of such portions of internal memoranda after a file has been closed for three years, this policy is based on a rebuttable presumption that these materials are no longer sensitive, a presumption that might be inapplicable in the instant case.

D. *Modified Order*

As discussed above, the Commission believes that complaint counsel's motion and proposed order as certified present a number of problems. The Commission considered modifying the certified order so as to avoid inconsistencies with applicable laws and Commission rules, but it could not determine what objections might be raised to the modifications without affording the parties an opportunity to show cause why the order should not be modified. Following that procedure would further delay the proceedings in this case. Moreover, any advance *in camera* order would require the Commission to waive the requirements of Rule 3.45. Accordingly, the Commission determined to order the parties to enter a depository arrangement, on terms to be negotiated between them, whereby complaint counsel may examine the documents and information without the Commission's taking custody of VWAG's materials. The principal advantage to this procedure is that it will allow discovery to proceed, at least through an initial phase, without further delay.

Accordingly, *it is hereby ordered*, that:

1. Complaint counsel and counsel for VWAG enter a depository arrangement, on terms to be negotiated, whereby complaint counsel may view VWAG documents in possession of the German Foreign Office which are responsive to discovery in D. 9154 without prejudice to either party's right to petition for an *in camera* order for specific documents to be copied and taken into Commission custody and/or introduced into evidence;
2. In viewing the relevant documents, complaint counsel be permitted to take whatever notes are necessary to participate fully in the viewing of such materials and that such notes be withheld from public disclosure under Exemptions 3 and 5 of the FOIA, and not otherwise provided to persons outside the Commission except as required by the laws of the United States;
3. Except as provided herein or by order of the ALJ or the Commission, VWAG documents will not be photocopied or at any time taken into the custody and possession of the Commission;
4. Following the depository stage of discovery, complaint counsel and respondent shall designate whatever documents are to be copied, placed in the custody of the Commission and/or introduced into evidence; and
5. The documents designated pursuant to paragraph 4, or copies thereof, shall be delivered promptly to complaint counsel, but nothing in this order shall be read to preclude either party from seeking from the ALJ an appropriate *in camera* order for these documents that is consistent with United States law. Similarly, the ALJ is not precluded

from certifying further requests for extraordinary *in camera* protection to the Commission but is directed before doing so to require full briefing on issues discussed herein that are presented in such future requests.

Complaint

103 F.T.C.

IN THE MATTER OF
CHAMPION SPARK PLUG COMPANY

DISMISSAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SEC. 7 OF THE CLAYTON ACT

Docket 9141. Complaint, July 29, 1980—Final Order, June 20, 1984

In this Final Order, the Commission denied appeals of respondent and complaint counsel, accepted the ALJ's Initial Decision and Order as its own, and dismissed the complaint charging a spark plug manufacturer with antitrust violations through its acquisition of The Anderson Company, the nation's largest manufacturer of replacement windshield wiper products.

Appearances

For the Commission: *Robert C. Jones*

For the respondent: *Alan Malasky, Arent, Fox, Kintner, Plotkin and Kahn*, Wash., D.C. and *Richard Kerger, Marshall, Melhorn, Cole, Hummer and Spitzer*, Toledo, Ohio.

COMPLAINT

The Federal Trade Commission, having reason to believe that Champion Spark Plug Company ("Champion"), a corporation subject to the jurisdiction of the Commission, has violated Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45(a)(1)), through the acquisition of the stock of The Anderson Company ("Anco"), and that a proceeding by it in respect thereof is in the public interest, hereby issues its Complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. DEFINITIONS

1. For the purposes of this Complaint, the following definitions shall apply:

(a) *Windshield wiper products* include all windshield wiper arms, blades and refills for application on automobiles, trucks and buses.

(b) The *replacement market* consists of all sales by manufacturers of motor vehicle parts for use in replacement of original equipment parts or previously replaced parts.