

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

PUBLIC

In the Matter of)
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UNION OIL COMPANY OF CALIFORNIA, INC.)
a corporation)
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)
_____)

DOCKET NO: 9305

**NON-PARTY VALERO ENERGY CORPORATION INC.'S MOTION FOR
IN CAMERA TREATMENT OF FOURTEEN CONFIDENTIAL DOCUMENTS**

I. Introduction

Non-Party Valero Energy Corporation Inc. (“Valero”), by and through undersigned counsel, moves pursuant to Section 3.45 of the Commission’s Rules of Practice, 16 C.F.R. § 3.45(b), for an order directing *in camera* treatment for highly confidential documents from among the documents which Complaint Counsel or Respondent Union Oil Company of California (“Unocal”) have identified as trial exhibits. As described more fully below and in the accompanying Declaration of Martin E. Loeber (“Loeber Decl.”), each exhibit contains current, highly-sensitive, non-public information that would cause Valero serious competitive injury if published in this proceeding.

Both Complaint Counsel and Unocal have stipulated to the *in camera* treatment of these documents and do not oppose Valero’s Motion for *In Camera* Treatment of these Confidential Documents. The fourteen Confidential Documents that are the subject of this Motion are the following:

Trial Exh. Number	Description	Bates Numbers
CX0820	Clean Fuels Project Wilmington Refinery Process Data Book and Operating Instructions	VALFTC-0010750-0011041
CX0821	Wilmington Refinery CARB RFG III Project Process Design Specification for Utilities	VALFTC-0011132-0011164
CX0822	Wilmington Refinery CARB RFG III Project Overview	VALFTC-0011043-0011120
CX0823	Valero Wilmington Refinery Clean Fuels Projects Steps I, II & III	VALFTC-0017604-0017635
CX0824	Detailed Process Step III	VALFTC-0017484-0017603
CX0825	Detailed Process Description Step I/II	VALFTC-0017386-0017483
CX0826	CARB Phase 3 Revised Specs and Operation	VALFTC-0016548-0016659
CX0827	Fluor Daniel Clean Fuels FCC Modifications Turnaround Project Book	VALFTC-0011369-0011625
CX0828	Wilmington Refinery CARB RFG III Project Process Design Spec. for HF Alkylation Unit	VALFTC-0011240-0011367
CX0829	Wilmington Refinery CARB RFG III Project Process Design Specification for Butamer Unit	VALFTC-0011175-0011239

Trial Exh. Number	Description	Bates Numbers
CX2211	Benecia Refinery Batch data from 2000-2003	CX2211-080
CX2212	Wilmington Refinery Batch data from 1996-2003	CX2212-113
RX278	CARB III Gasoline Strategy West Coast Refineries	VALFTC-0048773-0048780
RX279	Benecia Refinery CARB RFG3 Meeting	VALFTC-0048746-0048754

(collectively, the “Confidential Documents”).

II. Legal Standard for *In Camera* Treatment

The documents that are described in this motion warrant *in camera* treatment as provided by Commission Rule 3.45(b), 16 C.F.R. § 3.45(b).

“There is no question that the confidential records of businesses involved in Commission proceedings should be protected insofar as possible.” H.P. Hood & Sons, Inc., 58 F.T.C. 1184, 1186 (1961). As set forth in General Foods, Commission Rule 3.45(b) properly affords *in camera* treatment on a clear showing “that the information concerned is sufficiently secret and sufficiently material” to Valero’s business “that disclosure would result in serious competitive injury.” In re General Foods Corp., 95 F.T.C. 352 (1980), 1980 FTC LEXIS 99, at *10.

The Commission weighs six factors in determining the secrecy and materiality of documents under Rule 3.45(b):

- 1) the extent to which the information is known outside of respondent's business;
- 2) the extent to which it is known by employees and other involved in respondent's business;
- 3) the extent of measures taken by respondent to guard the secrecy of the information;
- 4) the value of the information to respondent and his competitors;
- 5) the amount of effort or money expended by respondent in developing the information; and
- 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

In re Bristol-Myers Company, 90 F.T.C. 455, 456-57 (1977).

In addition, “a showing that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved” is also required. Hood, 58 F.T.C. at 1188. Within the context of this legal backdrop, “the courts have generally attempted to protect confidential business information from unnecessary airing.” Id. Moreover, in the event of uncertainty as to whether the documents are entitled to *in camera* treatment, there is precedent that such designation may preliminarily be made, subject to change at a later time. As explained in Bristol-Myers,

the general and fundamental policy favoring government decisions based on publicly available facts may warrant different treatment for similar information depending upon the importance of the information to an understanding of the Commission's decision making processes. Taking this into consideration, it may be reasonable in some cases, as Commission Rule 3.45(a) allows, for the law judge to grant *in camera* treatment for information at the time it is offered into evidence subject to a later determination by the law judge or the Commission that public disclosure is required in the interests of facilitating public understanding of their subsequent decisions.

Bristol-Myers Company, 90 F.T.C. at 457. Using these criteria, the Court should afford *in camera* treatment to the documents in question so that Valero does not needlessly suffer serious competitive injury from their disclosure in this proceeding.

III. The Documents in Question Should be Afforded *In Camera* Treatment

The documents that require *in camera* treatment fall into three general categories: 1) CARB II Compliance; 2) CARB III Compliance; and 3) Production and Process Records. The documents that are the subject of this motion contain highly sensitive information that Valero needs to maintain in confidence. For each document at issue, the factors set forth above compel the conclusion that the documents are secret and material within the meaning of the Commission's Rule 3.45(b) analysis.

A. Confidential Nature of the Documents

The Confidential Documents for which Valero seeks *in camera* treatment consist of process design documents and procedures describing in detail the manner in which Valero's Wilmington, California refinery made investments to comply with California's CARB II standards. The information sought to be protected is very detailed and lays out the specific process unit configurations now utilized by Valero in California and process unit configurations planned for the future. With this information, a competitor could understand in detail the strengths and weaknesses, capabilities, limitations, and planned improvements of the Wilmington refinery's operations. See Declaration of Martin E. Loeber ("Loeber Decl.") ¶ 4". Other documents relate to specific plans for Valero's compliance with California's CARB III regulations. Such documents detail exactly what constraints Valero faces at its Benicia, California and Wilmington, California refineries in its effort to comply with California's CARB III regulations. The information shows specific compliance options based on particular refinery gasoline pool constraints, and includes information regarding the competitive abilities of Valero's other refineries outside of California. Access to this information would enable a competitor to precisely understand Valero's strengths and weaknesses in the marketplace and put Valero at a severe competitive disadvantage. (Loeber Decl. ¶ 4) Another category of confidential information is specific blend data for production from the California refineries. Disclosure of

this information would be highly damaging because it would inform competitors of exactly what blends Valero's refineries are capable of making. Such categories of information are so sensitive that the FTC almost certainly would not permit sharing of this type of information at this level of detail between competitors as evidenced by the need to create "clean teams" who were strictly isolated from their respective companies when Valero announced its merger with Ultramar Diamond Shamrock in May 2001.

These documents and the information contained therein are highly sensitive and confidential. For Valero to successfully compete in this market it needs to maintain the confidentiality of its business plans, refinery operations, and plans for CARB compliance. (Loeber Decl. ¶ 5)

The documents in question are the essence of the competitive information Valero seeks to shield from public disclosure. The disclosure of Valero's competitive information, both to the public and to Valero's competitors, will negatively impact Valero's ability to compete and cause it serious economic injury in the marketplace. Moreover, there is no countervailing public interest that militates against maintaining Valero's' confidences. Valero is not a party to this proceeding. Valero is a third-party witness whose documents may be called upon to assist the fact finder's understanding of the marketplace the government believes was subjected to anti-competitive behavior by Unocal. No public purpose will be advanced by disclosing Valero's confidential information to other companies in the market. Such disclosure will only serve to impede Valero's ability to compete and impair its flexibility to meet the challenges of the marketplace and comply with CARB regulations in a competitive manner. (Loeber Decl. ¶ 6)

B. CARB II Compliance Documents

Public disclosure of the information contained in the Confidential Documents will unfairly reveal competitive production, processing, technological and regulatory compliance information. Documents CX 0820, CX 0823, CX 0824, CX 0825, and CX 0827 all consist of

process design documents and procedures describing in detail the manner in which Valero's Wilmington, California refinery made investments to comply with California's CARB II standards. The information sought to be protected is very detailed and lays out the specific process unit configurations now utilized by Valero in California and process unit configurations planned for the future. With this information, a competitor could understand in detail the strengths and weaknesses, capabilities, limitations, and planned improvements of the Wilmington refinery's operations. (Loeber Decl. ¶ 7).

C. CARB III Compliance Documents and Blend Data

Documents CX 0821, CX 0822, CX 0826, CX 0828, CX 0829, CX 2211, CX 2212, RX 278, and RX 279 all relate to specific plans for Valero's compliance with California's CARB III regulations. The documents detail exactly what constraints Valero faces at its Benicia, California and Wilmington, California refineries in its effort to comply with California's CARB III regulations. The information shows specific compliance options based on particular refinery gasoline pool constraints, and includes information regarding the competitive abilities of Valero's other refineries outside of California. Access to this information would enable a competitor to precisely understand Valero's strengths and weaknesses in the marketplace and put Valero at a severe competitive disadvantage. Specifically, CX 2211 and CX 2212 contain confidential information showing specific blend data for production from the California refineries. Disclosure of this information would be highly damaging because it would inform competitors of exactly what blends Valero's refineries are capable of making. (Loeber Decl. ¶ 8).

The information detailed in these documents is known only by Valero and, to the best of Valero's knowledge, those parties to whom such documents have been disclosed pursuant to the terms of the confidentiality order in this FTC proceeding. (Loeber Decl. ¶ 11).

Within Valero's own corporate structure, this information is circulated to only a small number of its employees, specifically only those who are involved in structuring, planning implementing or evaluating the procedures and processes outlined in the Confidential Documents. (Loeber Decl. ¶ 12).

Valero enforces a strict confidentiality policy and aggressively attempts to prevent the dissemination of any of the information contained in these documents to external sources. In pursuing these efforts, Valero takes great steps in protecting its confidential information. (Loeber Decl. ¶ 13).

Disclosure of any of the Confidential Documents would allow Valero's competitors to analyze and study Valero's processes, plans and production procedures and identify Valero's future business planning and production strategies, all to Valero's severe detriment. As such, the Confidential Documents contain secret information that is material to Valero's business, competitiveness and profitability. Release of this information will cause the loss of business advantage and serious and irreparable injury to Valero. (Loeber Decl. ¶ 14).

Disclosure of any of the fourteen Confidential Documents would result in serious and irreparable competitive injury to Valero without serving any countervailing public purpose. The Confidential Documents have been designated "confidential" and treated by all the relevant parties as confidential during the entirety of this proceeding. (Loeber Decl. ¶ 9). Both Complaint Counsel and Unocal have confirmed they do not oppose *in camera* treatment of these fourteen Confidential Documents. (See Declaration of William E. Stoner ¶¶ 3 and 4).

IV. Valero Satisfies the Bristol Myers/Hood Test and Warrants *In Camera* Treatment of Its Confidential Documents

Great measures have been taken to guard the secrecy of every document for which Valero seeks *in camera* treatment. See Bristol-Myers Company, 90 F.T.C. at 456-57. They are not

already a matter of public record. To the extent any of them have been disclosed to third parties, Valero has done so only upon first procuring assurances of confidentiality. (Loeber Decl. ¶ 11). These documents have limited circulation within Valero. Bristol-Myers Company, 90 F.T.C. at 456-57. Only designated individuals with a “need to know” basis have access to these documents. (Loeber Decl. at ¶ 12).

The information is not stale and is still significant today. To the extent that certain information concerning Valero’s processes may be older, they are still used to extrapolate current business operations, strategies and/or decision-making rationale. Similarly, to the extent such documents relate to production and blending strategies, such information is still sensitive and worthy of protection today. Kaiser Aluminum & Chemical, 103 F.T.C. at 500 (holding that material that is over five years old is still extremely sensitive and deserving of *in camera* protections because “a serious injury would be done by release of this information, which they have never made available to the public”).

Much of the information consists of significant work product that has cost Valero a tremendous amount of money to develop. Bristol-Myers Company, 90 F.T.C. at 456-57. In addition to financial cost, the time and effort expended to create the information contained in these documents has been significant. The value of the information in each of these documents is extremely high to Valero, as the documents reflect Valero’s business judgments and strategies on many levels. (Loeber Decl. ¶ 14).

It would be extremely difficult and probably even impossible for Valero outsiders to replicate or develop this information on their own. It is not available from other sources either, since Valero has never released this information to a third party without obtaining assurances of confidentiality. Bristol-Myers Company, 90 F.T.C. at 456-57.

The public interest would not be served by making these confidential documents a matter of public record. Particularly, the documents fail to bear any relationship to consumers or other members of the public at large. The information would, however, be highly valuable to Valero's competitors in the marketplace and as a business matter, would significantly prejudice Valero's legitimate commercial interests. (Loeber Decl. ¶ 14); see Kaiser Aluminum, 103 F.T.C. at 500 (holding that certain documents warranted *in camera* treatment reasoning that a public understanding of the proceeding does not depend upon access to such data.) Certainly, a public understanding does not depend upon knowledge of Valero's secret production and processing information. Nor does it depend in any way upon Valero's strategies or plans for CARB III compliance.

Finally, irreparable injury to Valero would ensue if the information contained in these documents were disclosed to the public. See Hood, 58 F.T.C. at 1188. As demonstrated above, much of the information would be invaluable to Valero's competitors and provide them with an improper business advantage. The benefits of Valero's investment, research and business expertise would be unfairly reaped. (Loeber Decl. ¶ 14). Public disclosure of these documents would result in injury to Valero without serving any countervailing public purpose.

V. Duration of *In Camera* Treatment

The Confidential Documents require *in camera* treatment for at least 15 years. 16 C.F.R. § 3.45(b)(3); General Foods, 95 F.T.C. at 352 n.4 (1980) (noting that *in camera* treatment may be granted indefinitely or for a period of years). Since Valero intends to comply with CARB II and CARB III requirements indefinitely into the future, information pertaining to its production processes and strategies will remain sensitive for quite some time. A period of 15 years is an

appropriate length of time for *in camera* protection for the documents containing this type of confidential information.

Despite the fact “there is a presumption that *in camera* treatment will not be provided to information that is three or more years old,” In re Dura Lube Corp., 1999 FTC LEXIS 255 (1999) (citing General Foods, 95 F.T.C. at 353), the FTC has recognized that this presumption is rebuttable and, on numerous occasions, granted *in camera* protection to older documents depending on their contents. See In re Coca-Cola Company, 1990 FTC LEXIS 364 (1990) (noting that a three-year standard is sometimes used, but holding that the age of a particular document offers “little guidance” as to whether *in camera* treatment is warranted; instead it is the actual justification for the treatment that matters); Kaiser Aluminum, 103 F.T.C. at 500 (extending protection to information over five years of age related to “sales of specific lines of refractories and related products”); In re E.I. duPont de Nemours & Co., 97 F.T.C. 116 (1981) (protecting 6-year-old “investment, earnings, profit, operative return and cost information” related to the sales).

Fifteen years for each of the fourteen Confidential Documents is the most reasonable solution. See Coca-Cola Company, 1990 FTC LEXIS at 364 (noting that while the sensitivity of various documents may decrease over time at different rates, it is “sensible to treat all documents consistently” for purposes of *in camera* treatment). Non-disclosure of this information over the next fifteen years will prevent Valero outsiders from learning about and taking advantage of Valero’s secret and vital business plans and strategies, as well as some of its most sensitive and important production data. Certainly, the general public can have little, if any, legitimate interest over the next fifteen years in this information. Moreover, even if there were any public interest here, it would be heavily outweighed by the serious injury Valero would suffer from disclosure.

To the extent that any of the parties intend to introduce any testimony evidence from Valero employees Victor H. Ibergs, Robert J. Simonson or Diane Sinclair, or any other Valero

employee, relating to such Confidential Documents or the information contained in the documents, Valero likewise seeks *in camera* treatment for such testimony to the extent any such evidence similarly reveals confidential and proprietary information belonging to Valero.

CONCLUSION

For the foregoing reasons, Valero respectfully requests that the information in the fourteen documents listed above be given *in camera* treatment, kept confidential, and not placed on the public record of this proceeding. This information meets the criteria set forth in FTC precedent as qualifying for *in camera* treatment, and therefore, should be accorded such protection.

DATED: October 17, 2003

Respectfully submitted,

HENNIGAN, BENNETT & DORMAN LLP

By: _____

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Attorneys for Third Party

Valero Energy Corporation, Inc.

CERTIFICATE OF SERVICE

I declare as follows:

I certify that on October 17, 2003, I caused an original and two copies of the **NON-PARTY VALERO ENERGY CORPORATION INC.'S MOTION FOR *IN CAMERA* TREATMENT OF FOURTEEN CONFIDENTIAL DOCUMENTS** to be served (including one electronic copy of that motion filed by electronic mail) with:

Donald S. Clark
Secretary
Federal Trade Commissions
600 Pennsylvania Ave., NW Rm. H-159
Washington, DC 20580

I also certify that on October 17, 2003, I caused one copy of the foregoing motion to be served by U.S. Mail and Federal Express upon:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

I also certify that on October 17, 2003, I caused one copy of the foregoing motion to be served by U.S. Mail and Federal Express upon each person listed below:

J. Robert Robertson, Esq.
Senior Litigation Counsel
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

Richard B. Dagen
(through service upon)
Chong S. Park, Esq.
Bureau of Competition
Federal Trade Commission
601 New Jersey Ave., NW Rm. NJ-6213

I also certify that on October 17, 2003, I caused one copy of the foregoing motion to be served by U.S. Mail and Federal Express upon:

David W. Beehler, Esq.
Diane Simerson, Esq.
Robins, Kaplan, Miller & Ciresi, LLP
2800 LaSalle Plaza
800 LaSalle Ave.
Minneapolis, MN 55402-2015

William E. Stoner

IT IS FURTHER ORDERED that only authorized Federal Trade Commission (“Commission”) personnel, and court personnel concerned with judicial review may have access to the above-referenced information, provided that I, the Commission, and reviewing courts may disclose such *in camera* information to the extent necessary for the proper disposition of the proceeding.

ORDERED:

Date: _____

D. Michael Chappell
Administrative Law Judge

CERTIFICATE OF SERVICE

I declare as follows:

I certify that on October 17, 2003, I caused an original and two copies of the **PROPOSED ORDER IN SUPPORT OF NON-PARTY VALERO ENERGY CORPORATION INC.'S MOTION FOR *IN CAMERA* TREATMENT OF FOURTEEN CONFIDENTIAL DOCUMENTS** to be served (one electronic copy of that motion to be filed by electronic mail) with:

Donald S. Clark
Secretary
Federal Trade Commissions
600 Pennsylvania Ave., NW Rm. H-159
Washington, DC 20580

I also certify that on October 17, 2003, I caused one copy of the foregoing motion to be served by U.S. Mail and Federal Express upon:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

I also certify that on October 17, 2003, I caused one copy of the foregoing motion to be served by U.S. Mail and Federal Express upon each person listed below:

J. Robert Robertson, Esq.
Senior Litigation Counsel
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600 Pennsylvania Ave., NW\
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Richard B. Dagen
(through service upon)
Chong S. Park, Esq.
Bureau of Competition
Federal Trade Commission
601 New Jersey Ave., NW Rm. NJ-6213

I also certify that on October 17, 2003, I caused one copy of the foregoing motion to be served by U.S. Mail and Federal Express upon:

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William E. Stoner