

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

_____)	
In the Matter of)	
Altria Group, Inc.,)	
a corporation,)	Docket No. 9393
and)	
JUUL Labs, Inc.)	
a corporation,)	
Respondents.)	
_____)	

**ORDER ON RESPONDENT JUUL LABS, INC.’S
MOTION FOR *IN CAMERA* TREATMENT**

I.

Pursuant to Rule 3.45(b) of the Commission’s Rules of Practice and the Scheduling Order entered in this matter, Respondent JUUL Labs, Inc. (“JLI”) filed a motion for *in camera* treatment for materials that the parties have listed on their exhibit lists as materials that might be introduced at trial in this matter. Federal Trade Commission (“FTC” or “Commission”) Complaint Counsel filed an opposition. For the reasons set forth below, JLI’s motion is GRANTED in part and DENIED WITHOUT PREJUDICE in part.

II.

Under Rule 3.45(b), the Administrative Law Judge may order that material offered into evidence “be placed *in camera* only [a] after finding that its public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting *in camera* treatment or [b] after finding that the material constitutes sensitive personal information.” 16 C.F.R. § 3.45(b).

A. Clearly defined, serious competitive injury

“[R]equests for *in camera* treatment must show ‘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.’” *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500, 500

(1984), quoting *In re H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1961 FTC LEXIS 368 (Mar. 14, 1961). Applicants must “make a clear showing that the information concerned is sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury.” *In re General Foods Corp.*, 95 F.T.C. 352, 1980 FTC LEXIS 99, at *10 (Mar. 10, 1980). If the applicants for *in camera* treatment make this showing, the importance of the information in explaining the rationale of FTC decisions is “the principal countervailing consideration weighing in favor of disclosure.” *Id.*

The Federal Trade Commission recognizes the “substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons.” *Hood*, 1961 FTC LEXIS 368, at *5-6. A full and open record of the adjudicative proceedings promotes public understanding of decisions at the Commission. *In re Bristol-Myers Co.*, 90 F.T.C. 455, 458 (1977). A full and open record also provides guidance to persons affected by its actions and helps to deter potential violators of the laws the Commission enforces. *Hood*, 58 F.T.C. at 1186. The burden of showing good cause for withholding documents from the public record rests with the party requesting that documents be placed *in camera*. *Id.* at 1188. Moreover, there is a presumption that *in camera* treatment will not be accorded to information that is more than three years old. *In re Int’l Ass’n of Conference Interpreters*, 1996 FTC LEXIS 298, at *15 (June 26, 1996) (citing *General Foods*, 95 F.T.C. at 353; *Crown Cork*, 71 F.T.C. at 1715).

In order to sustain the burden for withholding documents from the public record, a sworn statement is always required, demonstrating that a document is sufficiently secret and sufficiently material to the applicant’s business that disclosure would result in serious competitive injury. *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 109, at *2-3 (Apr. 23, 2004). To overcome the presumption that *in camera* treatment will not be granted for information that is more than three years old, applicants seeking *in camera* treatment for such documents must also demonstrate, by a sworn statement, that such material remains competitively sensitive. In addition, to properly evaluate requests for *in camera* treatment, applicants must provide a copy of the documents at issue to the Administrative Law Judge for review. Where *in camera* treatment is sought for transcripts of investigational hearings or depositions, the requests shall be made only for those specific pages and line numbers of transcripts that contain information that meets the *in camera* standard. *In re Unocal*, 2004 FTC LEXIS 197, *4-5 (Oct. 7, 2004).

Under Commission Rule 3.45(b)(3), indefinite *in camera* treatment is warranted only “in unusual circumstances,” including circumstances in which “the need for confidentiality of the material . . . is not likely to decrease over time. . . .” 16 C.F.R. § 3.45(b)(3). “Applicants seeking indefinite *in camera* treatment must further demonstrate ‘at the outset that the need for confidentiality of the material is not likely to decrease over time’ 54 Fed. Reg. 49,279 (1989) . . . [and] that the circumstances which presently give rise to this injury are likely to be forever present so as to warrant the issuance of an indefinite *in camera* order rather than one of more limited duration.” *In re E. I. DuPont de Nemours & Co.*, 1990 FTC LEXIS 134, at *2-3 (Apr. 25, 1990). In *DuPont*, the Commission rejected the respondent’s request for indefinite *in camera* treatment. However, based on “the highly unusual level of detailed cost data contained in these specific trial exhibit pages, the existence of extrapolation techniques of known precision in an

environment of relative economic stability, and the limited amount of technological innovation occurring in the . . . industry,” the Commission extended the duration of the *in camera* treatment for a period of ten years. *Id.* at *5-6.

In determining the length of time for which *in camera* treatment is appropriate, the distinction between trade secrets and ordinary business records is important because ordinary business records are granted less protection than trade secrets. *Hood*, 58 F.T.C. at 1189. Examples of trade secrets meriting indefinite *in camera* treatment include secret formulas, processes, other secret technical information, or information that is privileged. *Hood*, 58 F.T.C. at 1189; *General Foods*, 95 F.T.C. at 352; *In re Textron, Inc.*, 1991 FTC LEXIS 135, at *1 (Apr. 26, 1991).

In contrast to trade secrets, ordinary business records include information such as customer names, pricing to customers, business costs and profits, as well as business plans, marketing plans, or sales documents. *See Hood*, 1961 FTC LEXIS 368, at *13; *In re McWane, Inc.*, 2012 FTC LEXIS 143 (Aug. 17, 2012); *In re Int’l Ass’n of Conference Interpreters*, 1996 FTC LEXIS 298, at *13-14. When *in camera* treatment is granted for ordinary business records, it is typically provided for two to five years. *E.g.*, *McWane, Inc.*, 2012 FTC LEXIS 143; *In re ProMedica Health Sys.*, 2011 FTC LEXIS 101 (May 25, 2011).

B. Sensitive personal information

Under Rule 3.45(b) of the Rules of Practice, after finding that material constitutes “sensitive personal information,” (“SPI”) the Administrative Law Judge shall order that such material be placed *in camera*. 16 C.F.R. § 3.45(b). “Sensitive personal information” is defined as including, but not limited to, “an individual’s Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver’s license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual’s medical records.” 16 C.F.R. § 3.45(b). In addition to these listed categories of information, in some circumstances, individuals’ names and addresses, and witness telephone numbers have been found to be “sensitive personal information” and accorded *in camera* treatment. *In re LabMD, Inc.*, 2014 FTC LEXIS 127 (May 6, 2014); *In re McWane, Inc.*, 2012 FTC LEXIS 156 (Sept. 17, 2012). *See also In re Basic Research, LLC*, 2006 FTC LEXIS 14, at *5-6 (Jan. 25, 2006) (permitting the redaction of information concerning particular consumers’ names or other personal data when it was not relevant). “[S]ensitive personal information . . . shall be accorded permanent *in camera* treatment unless disclosure or an expiration date is required or provided by law.” 16 C.F.R. § 3.45(b)(3).

III.

On December 20, 2018, Respondents Altria Group Inc. (“Altria”) and JLI announced that they had executed a purchase agreement and a number of related agreements (together, “the Transaction”). Complaint ¶ 6; JLI Answer ¶ 6. Through this proceeding, the FTC is seeking to unwind the Transaction.

JLI's motion seeks *in camera* treatment for 217 potential trial exhibits that it states fall into at least one of the following categories: (1) trade secrets and product development; (2) financial data; (3) pricing and pricing strategy; (4) sales and marketing strategy; (5) regulatory strategy; (6) strategic initiatives; (7) Altria services; and (8) sensitive personal information. JLI supports its motion with a declaration from a chief growth officer. The declaration provides a general description of the documents in each category and asserts that disclosure of the documents in each category would cause serious competitive injury.

A. Documents that are over three years old

JLI included 10 documents in its motion for *in camera* treatment that are over three years old.¹ There is a presumption that *in camera* treatment will not be accorded to information that is more than three years old unless the movant's supporting declaration shows that such material remains competitively sensitive. JLI's supporting declaration fails to provide any justification for granting *in camera* treatment to documents that are over three years old. Unless otherwise granted in another section of this Order, JLI's request for *in camera* treatment for documents that are over three years old is DENIED WITHOUT PREJUDICE.

B. Category 1

JLI states that documents in Category 1 include information on trade secrets, such as the formulation of JLI's e-liquid or the technical specifications of its current and future products and product development plans. JLI further states that it would experience a clearly defined, serious competitive injury if its trade secrets were publicly disclosed. For this category of documents, JLI seeks *in camera* treatment for a period of ten years.

Trade secrets, including specifications and detailed product development plans, merit *in camera* treatment. JLI's justifications for documents in Category 1 are sufficient to sustain its burden. *In camera* treatment, for a period of ten years, to expire June 1, 2031 is GRANTED for the documents in Category 1.²

C. Categories 2, 3, 4, 6, and 7

JLI states that documents in Category 2 include detailed sales, costs and margin data dated from May 1, 2018. JLI further states that this financial data is fundamental to JLI's operations.

JLI states that documents in Category 3 include detailed information, dated from May 1, 2018, on prices to customers, how those prices are determined, and whether, when and how

¹ JLI seeks *in camera* treatment for several undated documents. Without knowing when these documents were created, it cannot be determined whether they are competitively sensitive. Accordingly, the motion is DENIED WITHOUT PREJUDICE as to these documents.

² For the reasons explained in subsections E and F below, any portions of deposition or investigational hearing transcripts under Category 1 are granted *in camera* treatment, for a period of five years, to expire June 1, 2026.

much to change prices. JLI further states that disclosure of this pricing information could harm JLI's relationships with its customers and undermine JLI's negotiating positions.

JLI states that documents in Category 4 include detailed information, dated from May 1, 2018, regarding JLI's strategy and considerations related to sales and marketing. JLI further states that disclosure of this information could harm JLI's relationships with its customers and undermine JLI's negotiating positions.

JLI states that documents in Category 6 contain information on strategic initiatives under consideration by JLI since May 1, 2018. JLI further states that disclosure of this information could undermine JLI's position in future corporate transactions or financing efforts.

JLI states that documents in Category 7 contain detailed pricing and cost information related to commercial services provided to JLI by Altria. JLI further states that disclosure of this information would be harmful to JLI's negotiations with other service providers.

Complaint Counsel asserts that many of the documents for which JLI seeks *in camera* treatment relate to the Transaction, which was consummated in December 2018, and a services agreement that was part of the Transaction that has been almost entirely abandoned. Complaint Counsel argues that JLI has not shown how public disclosure of documents containing historical information or related events that already transpired are still competitively sensitive today.

Complaint Counsel further argues that JLI has not demonstrated that the disclosure of documents relating to the timeline of negotiations for the Transaction, which happened over two years ago, and conversations about why JLI considered entering into the Transaction, are likely to cause significant competitive injury to JLI.

In addition, Complaint Counsel states that JLI seeks *in camera* treatment for 37 documents relating to commercial services provided to JLI by Altria, and asserts that all of JLI's services agreements were terminated in January 2020, with the exception of regulatory services. Complaint Counsel argues that JLI has not shown that it would suffer serious competitive injury from the disclosure of expired agreements.

Complaint Counsel also asserts that JLI seeks *in camera* treatment for documents related to discontinued e-cigarette products and argues that JLI provides no explanation why documents relating to products that are no longer on the market are competitively sensitive.

With respect to documents JLI has categorized as strategy documents, Complaint Counsel asserts that the documents do not appear to strategize beyond 2019 and thus JLI has not shown that this information is currently competitively sensitive.

For documents in Categories 2, 3, 4, 6, and 7, JLI's request for *in camera* treatment is GRANTED for the documents to which Complaint Counsel has no objection and for the designated portions of deposition and investigational hearing transcripts.³ For these documents, *in camera* treatment, for a period of five years, to expire June 1, 2026, is GRANTED.

³ See section F, below.

For all other documents in Categories 2, 3, 4, 6, and 7, JLI's request for *in camera* treatment is DENIED WITHOUT PREJUDICE. JLI is instructed to review its requests in compliance with the directives of this Order. If JLI determines that any of these documents do in fact meet the strict standards for *in camera* treatment, JLI must sustain its burden of demonstrating that the documents sought to be withheld from the public record are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury.

D. Category 5

JLI states that documents in Category 5 reflect JLI's efforts and analyses relating to its premarket tobacco application ("PMTA") filings with the Food and Drug Administration ("FDA") and its interactions with that agency related to PMTA filings. JLI further states that the documents contain details regarding clinical or other studies conducted in connection with PMTA filings. JLI asserts that this information is sensitive because it provides direct insight into JLI's regulatory strategy and deliberative process relating to its PMTA filing and its interactions with the FDA. JLI argues that disclosure of this information could impact JLI's pending PMTA before the FDA and that providing this information to competitors would result in competitive and commercial harm to JLI.

Complaint Counsel's opposition does not assert any objection to this category of documents.

JLI's justifications for documents in Category 5 are sufficient to sustain its burden. *In camera* treatment, for a period of five years, to expire June 1, 2026 is GRANTED for the documents in Category 5.

E. Category 8

JLI states that documents in Category 8 provide details regarding named individuals' compensation, their job performance, or their personal phone numbers and thus constitute Sensitive Personal Information ("SPI"). JLI further states that information regarding compensation and job performance is particularly sensitive and its disclosure within JLI is limited to the named individual and those who need it to perform their job.

Complaint Counsel asserts that JLI seeks permanent *in camera* treatment for 65 documents in their entirety, purportedly for containing SPI, but upon review, the inclusion of telephone numbers in a document appears to be the basis for many of JLI's request to have the documents withheld from the public record.

To the extent that documents contain SPI such as telephone numbers or personal addresses, that information can be redacted without requiring *in camera* treatment and shall not serve as a basis for withholding documents from the public record. *Basic Research*, 2006 FTC LEXIS 14, at *5-6 (permitting redaction of customer names without requiring *in camera* request for such documents).

Permanent *in camera* treatment is GRANTED for the sensitive personal information contained in the documents in Category 5. However, where the sole basis for a claim of *in camera* treatment based on SPI is an individual's telephone number or home or personal e-mail address, the documents need not be withheld from the public record since that information can be redacted. JLI is instructed to redact this sensitive personal information.

With respect to information regarding compensation and job performance of named individuals, this information is sensitive personal information and may be withheld from the public record. Permanent *in camera* treatment is GRANTED for such documents.

Complaint Counsel also asserts that JLI broadly claims deposition transcripts contain SPI without identifying which quotes contain SPI and that many of the quotes identified do not contain SPI. As an example, Complaint Counsel points to RX0116 73:22 and 79:6-11. According to JLI's chart of exhibits for which it seeks *in camera* treatment, portions of the deposition transcript designated as RX0016 fall under one of three categories: sensitive personal information, Altria services, or regulatory strategy. It appears that where certain portions of a deposition contain SPI, JLI has sought indefinite *in camera* treatment for all of the portions of the deposition. This is not appropriate. JLI may redact the SPI from the transcripts. As explained in subsection F below, testimony falling under the other categories for which JLI seeks *in camera* treatment is granted *in camera* treatment for a period of five years, to expire June 1, 2026.

F. Deposition and Investigational Hearing Transcripts

With respect to transcripts of investigational hearings and deposition testimony, requests for *in camera* treatment shall be made only for those specific pages and line numbers of transcripts that contain information that meets the *in camera* standard. *In re Unocal*, 2004 FTC LEXIS 197, *4-5 (Oct. 7, 2004). JLI has properly tailored its request to cover only those portions of the transcripts that it asserts contain competitively sensitive information, the disclosure of which would cause it serious competitive injury.

In camera treatment, for a period of five years, to expire June 1, 2026 is GRANTED for the portions of depositions and investigational hearing transcripts listed in Exhibit 1 to JLI's motion.

IV.

The burden rests on the movant to demonstrate that the evidence sought to be withheld from the public record is sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury.

As to those portions of JLI's motion that have been denied without prejudice, JLI may, by May 25, 2021 refile its motion for *in camera* treatment, supported with a sworn statement. Prior to filing such motion, JLI shall carefully and thoroughly review all documents for which it seeks *in camera* treatment, and strictly narrow its requests to only those documents that comply

with the Commission's strict standards for *in camera* treatment. Furthermore, JLI's refiled motion shall include a sworn statement containing sufficient detail regarding the documents to identify the bases for the request for *in camera* treatment and demonstrate that such documents are entitled to *in camera* treatment. Complaint Counsel may file an opposition to any such motion no later than noon on May 27, 2021.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: May 19, 2021