

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 ALTRIA GROUP, 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 Altria Group Inc. (“Altria”) 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, Altria’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 and JUUL Labs, Inc. (“JLI”) announced that they had executed a purchase agreement and a number of related agreements (together, “the Transaction”). Complaint ¶ 6; Altria Answer ¶ 6. Through this proceeding, the FTC is seeking to unwind the Transaction.

Altria’s motion seeks *in camera* treatment for 515 potential trial exhibits that it states fall into at least one of the following categories: (1) highly detailed and sensitive financial and volume data, projections, and strategy; (2) sensitive information and analysis concerning potential mergers, acquisitions and/or investments; (3) sensitive information concerning ongoing contractual or other relationships; (4) sensitive information and analysis concerning regulatory compliance and communications; and (5) sensitive personal information. Altria supports its motion with a declaration from a senior director of strategy and business development. 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

Nearly 100 of the documents for which Altria seeks *in camera* treatment 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. Altria’s supporting declaration fails to provide the necessary justification for granting *in camera* treatment to these documents. Instead, it makes a blanket, conclusory statement that the confidential information in the documents has remained highly sensitive despite the passage of time. The declaration does not identify which documents are sufficiently detailed as to Altria’s strategy that they remain competitively sensitive. Further, the declaration has not demonstrated how projections that were made three years ago remain competitively sensitive. From a review of some of these documents, it is not apparent that they contain information that remains competitively sensitive. For example, PX1216 is a February 2018 email that appears to relate to Altria’s consideration of potential transactions with JLI. Since the transaction with JLI was completed in December 2018, it is not readily apparent that such information remains competitively sensitive.

Unless otherwise granted in another section of this Order, Altria’s request for *in camera* treatment for documents that are over three years old and fall under Categories 1, 2, and 3, is DENIED WITHOUT PREJUDICE.

¹ Altria 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.

B. Categories 1, 2, and 3

Altria states that documents in Category 1 include analysis of all of Altria's businesses, not just those e-vapor products at issue in this proceeding. Altria further states that documents in Category 1 describe financial and volume data and forecasts as well as strategy.

Altria states that documents in Category 2 include information on and analysis of potential transactions contemplated by Altria, other than the one it ultimately entered into with JLI. Altria further states that documents in Category 2 may reflect discussions among or presentations to Altria's board of directors or top executives about what opportunities to pursue and how such decisions are made.

Altria states that documents in Category 3 include not only information relating to the ongoing relationship between Altria and JLI, but also Altria's relationships with retailers and wholesalers. Altria further states that documents in Category 3 include information about the ways in which Altria markets and prices products as part of those relationships.

Complaint Counsel asserts that many of the documents for which Altria seeks *in camera* treatment relate to the consideration of a transaction with JLI and argues that Altria has failed to show why public disclosure of information relating to its consummated acquisition remains competitively sensitive. Complaint Counsel notes that Altria has not explained how documents dated before the Transaction that discuss then potential transactions that are now precluded because of the Transaction are still competitively sensitive.

Complaint Counsel also asserts that Altria seeks *in camera* treatment for documents related to discontinued e-cigarette products and future products that Altria stopped developing after the Transaction. Complaint Counsel argues that because Altria is no longer competing in the closed system e-cigarette market, Altria has not shown that it would suffer serious competitive injury if such documents were disclosed.

For documents in Categories 1, 2, and 3, Altria's request for *in camera* treatment is GRANTED for the documents to which Complaint Counsel has no objection and for those documents that Altria attests include in-depth analyses of Altria's businesses other than the e-vapor products at issue in this proceeding. *In camera* treatment, for a period of five years, to expire June 1, 2026 is GRANTED for these documents.

For all other documents in Categories 1, 2, and 3, Altria's request for *in camera* treatment is DENIED WITHOUT PREJUDICE. Altria is instructed to review its requests in compliance with the directives of this Order. If Altria determines that any of these documents do in fact meet the strict standards for *in camera* treatment, Altria 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.

C. Category 4

Altria states that before and after the Transaction and up to today Altria and its operating companies were manufacturing and marketing highly regulated products, and its compliance with regulation and relations with regulators is crucial. Altria further states that following the Transaction with JLI, Altria provided substantial regulatory services and advice to JLI, which Altria argues should be protected from public disclosure.

Altria states that documents in Category 4 reflect Altria's regulatory analyses and strategy and may reflect Altria's communications with its regulator or include information from the development of regulatory strategy. Altria asserts that public disclosure of such discussions could undermine Altria's relations with regulators and also give its competitors a strategic advantage by providing them insight in Altria's regulatory strategy. Altria argues that disclosure of documents in this category would cause serious competitive injury.

Complaint Counsel argues that many of the documents discussing regulatory issues are several years old and may no longer contain competitively sensitive information.

Altria's justifications for documents in Category 4 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 4.

D. Category 5

Altria states that documents in Category 5 provide details regarding named individuals' personal phone numbers, personal email addresses, and/or home addresses. To the extent that documents contain sensitive personal information 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, the documents need not be withheld from the public record since that information can be redacted. Altria is instructed to redact the sensitive personal information from documents in Category 5.

E. 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). Altria 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 Altria'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 Altria's motion that have been denied without prejudice, Altria may, by May 25, 2021, refile its motion for *in camera* treatment, supported with a sworn statement. Prior to filing such motion, Altria 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, Altria'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