

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION

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In the Matter of )  
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DURA LUBE CORPORATION, )  
AMERICAN DIRECT MARKETING, INC., )  
HOWE LABORATORIES, INC., )  
CRESCENT MANUFACTURING, INC., )  
NATIONAL COMMUNICATIONS CORPORATION ) Docket No. 9292  
THE MEDIA GROUP, INC., )  
corporations, and )  
HERMAN S. HOWARD, and )  
SCOTT HOWARD, )  
individually and as officers )  
of the corporations. )

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ORDER ON REQUESTS FOR *IN CAMERA* TREATMENT

I.

Before the Court is Respondents' Application for *In Camera* Treatment, filed December 17, 1999. In this motion, Respondents request *in camera* treatment of: (1) the "*in camera*" version of Complaint Counsel's Motion for Partial Summary Decision, Memorandum in Support thereof, and supporting exhibits, filed December 7, 1999; and (2) portions of Respondents' Opposition to the Motion for Partial Summary Decision and supporting exhibits, filed December 23, 1999. In an earlier pleading, Respondents' Request to Reply, Reply in Support of Motion to Exclude Witnesses and Request for In Camera Treatment of Complaint Counsel's Opposition, filed December 6, 1999, Respondents requested *in camera* treatment of materials contained in Complaint Counsel's Opposition to Respondent's Motion to Exclude Witnesses, filed December 3, 1999.

In the pretrial conferences in the instant case, the parties have been advised to comply with the procedures for requesting *in camera* treatment of materials to be submitted in pleadings. In addition, the parties have previously been instructed in the Order on Respondents' Motion to Exclude Witnesses, December 8, 1999:

Under the Commission's Rules of Practice, confidential material does not become "*in camera*" material until the Administrative Law Judge has granted it *in camera* status.

Commission Rule 3.45. The Pretrial Scheduling Order sets forth procedures which counsel must follow for confidential material to be granted *in camera* status.

According to Respondents, Complaint Counsel failed to provide Respondents with notice that Complaint Counsel intended to file or introduce Respondents' confidential materials prior to filing Complaint Counsel's Opposition to Respondents' Motion to Exclude Witnesses and its Motion for Partial Summary Decision. Despite Complaint Counsel's failure to follow the procedures contained in the Pretrial Scheduling Order, Respondents have attempted to comply with the Pretrial Scheduling Order by filing the pending Respondents' Application for *In Camera* Treatment. However, in order for Respondents' Application for *In Camera* Treatment to be considered, Respondents must strictly comply with the Commission's rules on *in camera* treatment.

Because Respondents' pending requests do not comply with the Commission's express rules on *in camera* treatment, they are DENIED WITHOUT PREJUDICE, as described herein.

## II.

Pursuant to Commission Rule 3.45(b):

[t]he Administrative Law Judge may order material, or portions thereof, offered into evidence . . . to be placed *in camera* on a finding that their public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting their *in camera* treatment. . . . No material . . . may be withheld from the public record unless it falls within the scope of an order issued in accordance with this section, stating the date on which *in camera* treatment will expire, and including: (1) A description of the material; (2) A statement of the reasons for granting *in camera* treatment; and (3) A statement of the reasons for the date on which *in camera* treatment will expire.

16 C.F.R. § 3.45(b). Though the language of Rule 3.45(b) literally applies to information "offered into evidence," Rule 3.45(d) requires that "[p]arties shall not disclose information that has been granted *in camera* status pursuant to § 3.45(b) in the public version of proposed findings, briefs, or other documents." 16 C.F.R. § 3.45(d).

Respondents' Application for *In Camera* Treatment fails to specifically identify or describe the material for which they seek *in camera* treatment, fails to provide evidence to support reasons for granting materials *in camera* treatment, and fails to distinguish between material for which indeterminate *in camera* treatment is sought versus material for which *in camera* treatment for a specific time frame should be sought. A blanket *in camera* order for an entire pleading will not be granted. An application for *in camera* treatment should describe the materials for which *in camera* treatment is sought, provide reasons for granting such materials *in*

*camera* status, specify the time period for which *in camera* treatment is sought for each document, and attach as exhibits to the application the specific documents for which *in camera* treatment is sought. In addition, to sustain the burden of proof, an application must be supported by proper evidence, such as affidavits, to support all factual issues.” See 16 C.F.R. § 3.43.

### III.

The Federal Trade Commission strongly favors making available to the public the full record of its adjudicative proceedings to permit public evaluation of the fairness of the Commission’s work, and to provide guidance to persons affected by its actions. *Crown Cork & Seal Co., Inc.*, 71 F.T.C. 1714, 1714-15 (1967); *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1186 (1961)(“[T]here is a substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons.”). See also *RSR Corp.*, 88 F.T.C. 734 (1976), in which the Commission explained:

One reason for the requirement that proceedings of this sort be decided “on the record” is to permit the public to evaluate the fairness and wisdom with which the decisions of public agencies have been made, and to permit affected parties to draw guidance from those decisions in determining their future conduct. . . . [I]n *camera* treatment of certain relevant information may be appropriate where the prospective injury from disclosure outweighs the public interest in full knowledge.

*Id.* at 734-35.

To clarify, all applications for *in camera* treatment will be evaluated by the standards set forth in Rule 3.45(b) and described in this Order. “The party seeking *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.’” *Volkswagen of America, Inc.*, 103 F.T.C. 536, 538 (1984) (quoting *General Foods Corp.*, 95 F.T.C. 352, 355 (1980)); *Hood*, 58 F.T.C. at 1188 (applicant has burden of showing “that the public disclosure . . . will result in a clearly defined, serious injury to the person or corporation whose records are involved”). Whenever an applicant seeks *in camera* treatment, it should demonstrate the necessity thereof by “using the most specific information available.” *Bristol-Myers Co.*, 90 F.T.C. 455, 457 (1977).

In *Bristol-Myers*, the Commission outlined six factors to be weighed when determining materiality and secrecy: (1) the extent to which the information is known outside of the applicant’s business; (2) the extent to which the information is known by employees and others involved in the applicant’s business; (3) the extent of measures taken by the applicant to guard the secrecy of the information; (4) the value of the information to the applicant and its competitors; (5) the amount of effort or money expended by the applicant in developing the information; and (6) the ease or difficulty with which the information could be properly acquired

or duplicated by others. *Bristol-Myers*, 90 F.T.C. at 456-57. The likely loss of business advantages is a good example of a "clearly defined, serious injury." *General Foods*, 95 F.T.C. at 355. To warrant *in camera* treatment, an application must include a complete analysis and evidence in support of these factors.

A determination that information should be accorded *in camera* treatment does not end the inquiry. The next step is to determine the duration for which material will be held *in camera*. Again, the applicant has the burden of proof on this issue. In making this determination, the distinction between trade secrets and ordinary business records is important since ordinary business records are granted less protection than trade secrets. *See Hood*, 58 F.T.C. at 1189. "Trade secrets" are primarily limited to secret formulas, processes, and other secret technical information. *Hood*, 58 F.T.C. at 1189; *General Foods*, 95 F.T.C. at 352. "Ordinary business records" includes names of customers, prices to certain customers, and costs of doing business and profits. *Hood*, 58 F.T.C. at 1189. (Although Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. § 46(f), prohibits the Commission from publishing "trade secrets and names of customers," this provision does not apply to adjudicative proceedings. *Hood*, 58 F.T.C. at 1185, 1186 n.1).

Applicants seeking indefinite *in camera* treatment must demonstrate "at the outset that the need for confidentiality of the material is not likely to decrease over time." *E.I. DuPont de Nemours & Co.*, 1990 FTC LEXIS 134, \*2 (April 25, 1990)(quoting 54 Fed. Reg. 49,279 (1989)). Commission Rule 3.45(b)(3) requires:

[An] expiration date [for an *in camera* order] may not be omitted except in unusual circumstances, in which event the order shall state with specificity the reasons why the need for confidentiality of the material, or portion thereof at issue is not likely to decrease over time, and any other reasons why such material is entitled to *in camera* treatment for an indeterminate period.

16 C.F.R. § 3.45(b)(3). The applicant has the burden of proof to demonstrate these "unusual circumstances." Accordingly, requests for indefinite *in camera* treatment must include evidence to provide justification as to why the document should be withheld from the public's purview in perpetuity and why the requestor believes the information is likely to remain sensitive or become more sensitive with the passage of time. *See DuPont*, 1990 FTC LEXIS 134 at \*2.

In addition, there is a presumption that *in camera* treatment will not be provided to information that is three or more years old. *See, e.g., General Foods*, 95 F.T.C. at 353; *Crown Cork & Seal*, 71 F.T.C. at 1715.

IV.


IT IS HEREBY ORDERED that Respondents shall refile their application for *in camera* treatment in accordance with the standards set forth in Rule 3.45(b) and this Order by January 14, 2000, or expressly withdraw their request by way of pleading.

IT IS FURTHER ORDERED that the deadline set forth in the Second Revised Scheduling Order for filing motions for *in camera* treatment of proposed trial exhibits is extended to January 14, 2000. Such motions shall comply with the standards set forth in Rule 3.45(b) and this Order.

Should Respondents choose to refile their Application for *In Camera* Treatment, the Court will issue an appropriate order to grant or deny *in camera* treatment of confidential information contained in (1) Complaint Counsel's Opposition to Respondent's Motion to Exclude Witnesses, (2) Complaint Counsel's Motion for Summary Judgment, and (3) Respondents' Opposition to Complaint Counsel's Motion for Summary Judgment. The parties will then be instructed to refile public versions and *in camera* versions in accordance with Commission Rule 3.45(e). The Secretary of the Commission is hereby requested to withhold from public disclosure all documents previously filed as *in camera* versions until a final order is issued.

Because the Commission's rules do not contemplate the filing of an *in camera* version of a pleading until the Administrative Law Judge has granted *in camera* treatment to confidential materials, when filing applications for *in camera* treatment or responses thereto which include or specifically describe information for which a party is seeking *in camera* treatment, the parties are instructed to serve the Office of Administrative Law Judges, and to serve each other, copies of such pleadings, but not to file such pleadings with the Office of the Secretary. Once the Court has granted or denied *in camera* treatment of the information for which *in camera* treatment is sought, the parties shall then file with the Secretary an *in camera* version and a public version of the application for *in camera* treatment or any response thereto.

It is SO ORDERED.

  
D. Michael Chappell  
Administrative Law Judge

Dated: December 23, 1999