

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

In the Matter of

**Altria Group, Inc.
a corporation;**

and

**JUUL Labs, Inc.
a corporation.**

DOCKET NO. 9393

**COMPLAINT COUNSEL’S OPPOSITION TO ALTRIA GROUP, INC.’S SECOND
MOTION FOR *IN CAMERA* TREATMENT OF CERTAIN TRIAL EXHIBITS**

Complaint Counsel opposes Respondent Altria Group, Inc.’s (“Altria”) request to treat as *in camera* certain exhibits identified in Altria’s Second Motion for *In Camera* Treatment.

Commission rules and precedents strongly favor 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. *In re Crown Cork & Seal Co., Inc.*, 71 F.T.C. 1714-15 (1967); *In re H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1186 (1961).

While Altria did reduce the number of documents in which it is seeking *in camera* treatment, Altria still has not met the burden of demonstrating that it would suffer clearly defined, serious injury from public disclosure of its information for many of the 76 documents for which it renews its request for *in camera* treatment. Because Altria has not shown good cause for withholding these documents from the public record, Complaint Counsel respectfully requests that the Court deny Altria’s Second Motion for *In Camera* Treatment as to the exhibits identified

in this Opposition, and any other exhibits that this Court believes do not meet the requirements specified in this Court's Order On Respondent Altria's Motion for *In Camera* Treatment.

Exhibit A.

LEGAL STANDARD

There is a strong presumption in favor of open access to Commission adjudicative proceedings. Exhibit B, *In re Axon Enterprise, Inc.*, D-9389 at 2 (Oct. 2, 2020); *In re Polypore Int'l, Inc.*, D-9327, 2009 FTC LEXIS 256, at *3 (April 27, 2009); *see also In re H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1186 (1961) (“To foreclose [FTC] hearings and the evidence adduced therein from the scrutiny of . . . interested persons would serve in large measure to defeat the very reason for our existence.”); *In re Impax Labs, Inc.*, D-9373, 2017 FTC LEXIS 121, at *2 (Oct. 16, 2017). Open proceedings permit the public to evaluate the “fairness of the Commission’s work,” and “provide guidance to persons affected by [the Commission’s] actions.” *In re Intel Corp.*, D-9288, 1999 FTC LEXIS 227, at *1 (Feb. 23, 1999) (citing *The Crown Cork & Seal Co.*, 71 F.T.C. 1714, 1714-15 (1961) and *H.P. Hood*, 58 F.T.C. at 1196).

Under Rule 3.45, Altria must demonstrate that it will likely suffer “a clearly defined, serious injury” as a result of disclosure. 16 C.F.R. § 3.45(b). The standard for determining “a clearly defined, serious injury” is “based on the standard articulated in *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961).” 16 C.F.R. § 3.45(b) (also citing *Bristol-Myers Co.*, 90 F.T.C. 455, 456 (1977) and *General Foods Corp.*, 95 F.T.C. 352, 355 (1980)). *H.P. Hood* explained that *in camera* requests for ordinary business documents “should be looked upon with disfavor and only granted in exceptional circumstances upon a clear showing that an irreparable injury will result from disclosure.” *H.P. Hood*, 58 F.T.C. 1184, at *14. The Commission found that “the mere fact that respondent prefers to keep them confidential” is not evidence of injury. *H.P.*

Hood, 58 F.T.C. 1184, at *13. The potential for embarrassment or the desire to protect business information that competitors may be “desirous to possess” are not sufficient bases for obscuring material from the public. *H.P. Hood*, 58 F.T.C. 1184, at *14. The motion must also be “narrowly tailored to request *in camera* treatment for only that information that is sufficiently secret and material.” *Polypore*, D-9327, 2009 FTC LEXIS 256, at *4.

ARGUMENT

Following this Court’s Order on Altria’s Motion for *In Camera* Treatment, Altria renewed its request for *in camera* treatment for 76 exhibits. While Complaint Counsel appreciates the fact that Altria narrowed its request for *in camera* protection, Altria has once again included many documents without justifying why it would suffer serious competitive injury, including documents related to Altria’s acquisition of 35% of JUUL Labs, Inc. (“JLI”), which closed in 2018 (the “Transaction”); documents discussing e-cigarette products that were discontinued in 2018 because of the Transaction; and documents greater than 3 years old.

“The burden rests on Respondent 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.” *In re ProMedica Health Sys.*, D-9346, 2011 FTC Lexis 70, at *5-6 (May 13, 2011). Complaint Counsel requests that this Court deny Altria’s request for *in camera* protection for the exhibits described below, and any other exhibits that do not meet the requirements of this Court’s Order on Altria’s Motion for *In Camera* Treatment. Exhibit A.

I. CLAIMS RELATED TO LONG-DISCONTINUED E-CIGARETTE PRODUCTS SHOULD BE DENIED

Altria once again seeks *in camera* treatment for documents related to e-cigarette products that Altria pulled from the market in 2018, and future innovative products that Altria stopped

developing when it entered into a non-compete agreement with JLI. Given the length of time that has passed since Altria was allowed to compete in the closed system e-cigarette market, Altria has not shown and cannot show why it would suffer “serious injury” if such documents were disclosed.

- **Exhibit C – RX0886, RX0887, RX0888, RX0889:** These four documents discuss [REDACTED] [REDACTED] } Altria has not shown why *in camera* protection is justified for stale documents relating to these long-discontinued products. While Altria cites communications with [REDACTED] } in its justification for *in camera* protection for these documents, these four documents make no mention of [REDACTED] }.
- **Exhibit D – RX0871, RX0872, RX0873:** These agreements between [REDACTED] } to research, develop, and distribute e-cigarette products have been terminated because of Altria’s transaction with JLI and the associated non-compete agreement.¹ If it is true that these agreements are no longer in effect and cannot be renewed, then Altria has not justified why *in camera* protection is warranted.
- **Exhibit E – PX1618, PX4073, PX4527, PX4528:** These exhibits contain old information and projections for Altria’s e-cigarette products that have been discontinued and can no longer be sold. PX1618 and PX4073 do not appear to contain any projections. PX4073 is a document from 2017 that provides information on Altria’s e-

¹ [REDACTED] }

cigarette business from 2016-2017. PX4527 and PX4528 contain projections from 2017-2019 and 2018-2020, which can no longer be considered competitively sensitive.

Altria has not explained why it would suffer serious injury from disclosure of long-discontinued e-cigarette products, and its request for *in camera* treatment for such documents should be denied.

II. BLANKET CLAIMS RELATED TO THE TRANSACTION, WHICH CLOSED YEARS AGO, SHOULD BE DENIED

Altria again fails to show why public disclosure of stale information relating to the Transaction, which was consummated years ago, would result in serious competitive injury. Altria has the burden to show that documents containing historical information and events that already transpired are still competitively sensitive today. Exhibit B, *In re Axon*, D-9389 at 2 (Oct. 2, 2020). Altria has not justified why *in camera* treatment is warranted for the following documents related to the Transaction.

- **Exhibit F – PX1701:** This exhibit from 2018 contains a single slide that discusses { [REDACTED] } Given the stale information and the fact that the Transaction precluded all of { [REDACTED] }, Altria has not shown why it would suffer serious injury from its disclosure.
- **Exhibit G – PX1470:** This exhibit from 2019 is an admission from Altria that { [REDACTED] }
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] } The mere mention of a { [REDACTED] }

█ } does not warrant *in camera* treatment, particularly when it was public knowledge that Altria was in discussions with █ } See, e.g., <https://www.nytimes.com/2019/08/27/health/philip-morris-altria-merger-tobacco.html>.

III. BLANKET CLAIMS FOR HISTORICAL DOCUMENTS SHOULD BE DENIED

Altria once again included at least 20 documents that are older than three years. As the Court stated in its Order on Altria’s Motion for *In Camera* Treatment, “[T]here is a presumption that *in camera* treatment will not be accorded to information that is more than three years old,” and to overcome that presumption, Altria must “demonstrate, by affidavit or declaration, that such material remains competitively sensitive.” Exhibit A at 2. See also Exhibit B, *In re Axon*, D-9389 at 2 (Oct. 2, 2020).

In a declaration, Altria provides a blanket statement that it requested *in camera* treatment for 17 documents older than 3 years because they contain sensitive confidential information of third-parties, or projections from 2022 and beyond. First, Complaint Counsel counts at least 21 documents older than 3 years in Altria’s Attachment A to their Second Motion for *In Camera* Treatment. Moreover, a cursory review of documents older than 3 years reveals that Altria’s blanket explanation is pretext to withhold public information since most such documents do not contain the types of information claimed in Altria’s declaration, or they only contain such information on a small number of pages. See **Exhibit H**.

- **PX1065:** Altria claims *in camera* protection for a number of slides, but only two slides (014-015) have projections into 2022, and the projections are for a hypothetical transaction that never took place that assumed a scenario with 50% ownership of JLI.

- **PX1179:** Slide 13 discusses a hypothetical transaction with { [REDACTED] } from early 2018 that never took place.
- **PX1229:** Altria requests protection for a large number of slides, but only pages -039-042 contain any projections beyond 2021.
- **PX1685:** April 2018 minutes from a conference call with { [REDACTED] } that discusses Altria's and { [REDACTED] } efforts to jointly commercialize e-cigarette products. Altria discussed an e-cigarette product under development and now released elsewhere in the world: { [REDACTED] }.
While this document is clearly relevant to this case since it shows another avenue for Altria to compete in the closed-system e-cigarette market, Altria has not justified why this document with stale information and about a partnership that has been terminated should receive *in camera* treatment.
- **PX3166:** Presentation about a hypothetical transaction with { [REDACTED] } from early 2018 that never took place, and that does not appear to contain any forward-looking projections.
- **PX3221:** Minutes from a 2017 meeting with { [REDACTED] } about a number of e-cigarette products under development, all of which have since been discontinued following Altria's non-compete agreement with JLI or { [REDACTED] }
{ [REDACTED] }
- **PX4020:** Altria requests protection for a large number of slides, but only pages -040-042 contain any projections beyond 2020 or 2021.

- **PX4073**: Altria claims that this document from 2017 contains { [REDACTED] }, but it appears to contain only historical information from 2016 and 2017.
- **PX4188**: Altria claims that this document from 2017 contains { [REDACTED] }, but it appears to only contain potential considerations about an old transaction that never occurred.
- **PX4500**: Supply agreement from early 2018. Altria has not explained whether this agreement is even in effect anymore or why Altria would suffer serious injury from public disclosure.
- **RX0713**: Altria requests *in camera* protection for the entire 2017 document, but only pages -024-027 appear to contain any projections into 2022.
- **RX0871, RX0872, RX0873**: 2015 agreements that were previously discussed.

In addition, Altria once again includes an undated document, PX1421, with a date of “00/00/0000”. **Exhibit I**. In its original Order on Altria’s Motion for *In Camera* Treatment, this Court stated that “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.” Because Altria has still not provided a date for this document, *in camera* treatment should be denied.

Altria’s arguments do not overcome the presumption that documents older than three years should not be afforded *in camera* treatment.

CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that the Court deny Respondent's Second Motion for *In Camera* Treatment for the documents identified in this Opposition and that do not follow the instructions specified in this Court's initial Order on Altria's Motion for *In Camera* Treatment.

Dated: May 27, 2021

Respectfully Submitted,

s/ Michael Lovinger

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EXHIBIT A

**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

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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

EXHIBIT B

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

In the Matter of)	
)	
Axon Enterprise, Inc.)	
a corporation,)	Docket No. 9389
)	
and)	
)	
Safariland, LLC,)	
a partnership,)	
)	
Respondents.)	

**ORDER ON RESPONDENT’S
MOTION FOR *IN CAMERA* TREATMENT**

I.

Pursuant to Rule 3.45(b) of the Rules of Practice of the Federal Trade Commission (“FTC” or “Commission”) and the Scheduling Order entered in this matter, Respondent Axon Enterprise, Inc. (“Respondent” or “Axon”) 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 (“Motion”). Complaint Counsel filed an opposition to the motion (“Opposition”). For the reasons set forth below, Respondent’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 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, an affidavit or declaration 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 affidavit or declaration, 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).

In addition, Respondent’s motion is evaluated by the standards applied in *In re Otto Bock Healthcare N. Am.*, 2018 WL 3491602, at *1 (July 2, 2018).

B. Sensitive personal information

Under Rule 3.45(b) of the Rules of Practice, after finding that material constitutes “sensitive personal information,” 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.

Respondent’s motion seeks *in camera* treatment for 659 identified trial exhibits, which include documents and testimony that, according to Respondent, fall into five categories: (1) internal pricing information, (2) internal financial and business planning, (3) business strategy information, (4) product security information, and (5) personal information. The large number of documents that Respondent seeks to protect exceeds that which would reasonably be expected to be entitled to the protection contemplated by Rule 3.45. This casts doubt on the claim that all the documents are in fact entitled to such protection. Furthermore, the declaration from Axon’s general counsel offered by Respondent to support its claim provides only general and conclusory justifications.

A review of a sampling of documents reveals that, for many documents, Respondent’s assertion that it would suffer serious competitive harm if the documents were publicly disclosed is unsupported and unpersuasive. For example, Respondent seeks *in camera* treatment for exhibits consisting of board meetings and updates from 2016 that detail plans for 2016 and into 2017, but do not appear to involve plans beyond 2017. Respondent fails to explain why this information is still competitively sensitive. Several pages of one of these exhibits involve details about Axon’s name change, which has already taken place. Some of the information contained therein is already public, such as lists of police departments that are using body worn camera systems. As another example, Respondent seeks *in camera* treatment for a chat transcript from 2015 that discusses an acquisition made by Axon in 2015. It is unclear why this information remains competitively sensitive.

Furthermore, many of the documents for which Respondent seeks *in camera* treatment are over three years old. 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. Respondent’s supporting declaration fails to provide the necessary justification for granting *in camera* treatment to these documents.

In addition, Respondent seeks *in camera* treatment for a period of ten years for all of the documents at issue. Respondent has made no representations that the documents reveal trade secrets or highly detailed cost data, and are thus the types of documents that warrant ten-year protection, nor otherwise justified its request for an extended duration of *in camera* treatment for all of the documents. Documents reflecting business plans and strategies, contracts and negotiations with customers, customer specific information, market and competitive analyses, and sales and financial information are ordinary business records and generally are not entitled to an extended period of *in camera* treatment.

The following documents are less than one year old and appear to be competitively sensitive. Therefore, *in camera* treatment, for a period of five years, to expire October 1, 2025, is GRANTED for the documents identified as: RX000290, RX000291, RX000300, RX000305,

RX000432, RX000444, RX000464/PX11457, PX10141, PX10402, PX10404, PX10450, PX10459, PX10492, PX10502, PX10511, PX10617, PX10638, PX10642, PX10652, PX10654, PX10666, PX10667, PX10668, PX10670, PX10687, PX10690, PX10823, PX10825, PX10841, PX10847, PX10855, PX10858, PX10889, PX10900, PX10905, PX10908, PX10909, PX10910, PX10926, PX10939, PX10979, PX10981, PX11138, PX11181, PX11354, PX11389, RX000464/PX11457, PX11458, PX11524, PX11533, PX11682, PX11720, PX11721, PX11722, PX11723, PX11724, PX11745, PX11779, PX11791, PX11792, PX11796, PX11797, PX11798, and PX20311.

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). Respondent has properly tailored its request to cover only those portions of the transcripts that contain competitively sensitive information. *In camera* treatment, for a period of five years, to expire October 1, 2025, is GRANTED for the following:

RX000433: 67:6-21; 69:18-70:12; 88:23-93:8; 96:6-19; 104:8-22; 109:3-110:7; 111:9-20; 129:20-130:9; 132:11-133:24; 136:2-141:6; 184:3-186:7;
 RX000434: 46:14-48:14; 72:10-22; 87:19-94:6; 94:21-97:20; 112:9-12; 123:16-124:4; 129:1-23; 140:7-141:14; 151:5-153:15; 162:8-163:2; 173:13-14; 181:13-184:13; 188:4-191:12;
 RX000849/PX80001: 34:5-35:4; 42:20-23; 142:15-143:16; 144:2-146:7; 151:20-158:12;
 RX000850/PX80002: 37:2-5; 68:13-74:13; 79:4-7; 79:25; 154:2-156:19; 158:2-12;
 RX000851/PX80003: 67:6-21; 69:18-70:12; 88:23-93:8; 96:6-19; 104:8-22; 109:3-110:7; 111:9-111:20; 129:20-130:9; 132:11-133:24; 136:2-141:6; 184:3-186:7;
 RX000852/PX80004: 46:14-48:14; 72:10-72:22; 87:19-94:6; 94:21-97:20; 112:9-12; 123:16-124:4; 129:1-23; 140:7-141:14; 151:5-153:15; 162:8-163:2; 173:13-14; 181:13-184:13; 188:4-191:12;
 RX000862/PX81007: 30:2-31:19; 94:22-95:19; 140:9-143:11; 148:13-149:7; 193:7-195:22; 197:3-198:12; 222:20-226:5;
 RX000863/PX81008: 13:13-14:19; 48:18-51:3; 23:16-24:15; 29:17-31:21; 51:12-52:11;
 RX000866/PX81011: 180:7-184:17; 205:5; 207:1;
 RX000879/PX81024: 26:15-29:11;
 RX000883/PX81028: 23:20-27:4; 224:20-238:19;
 RX000888/PX81033: 52:10-54:14;
 RX000890/PX81035: 120:12-16; 137:5-138:9; 140:5-25; 141:15-25; 142:1-4; 143:22-25; 144:1-25; 158:2; 179:3-6, 19; 180:9; 187:19-25; 188:9-12; 189:5-15; 190:1-191:10; 196:9-14; 197:16-199:18;
 RX000891/PX81036: 35:1-36:8; 39:15-42:18;
 RX000895/PX81040: 104:24-25; 199:24-200:9; 216:10-231:2; 231:19-240:23; 247:3-8;
 RX000899/PX81044: 114:20-23; 115:19-25; 116:1-9; 160:16-25; 168:1-21; 214:16-18;
 RX000903/PX81048: 155:9-159:12; 162:12-164:9; 245:24-251:24; 257:6-262:4;
 RX000906/PX81051: 16:24-17:21; 27:1-29:2; 73:11-75:9; 81:11-84:21; 184:22-185:13;
 RX000910/PX81060: 82:22-83:8; 87:5-90:3; 100:10-16; 153:7-13; 154:14-163:11; 164:13-169:6; 177:17-178:24; 190:17-191:5.

One of the categories for which Respondent seeks *in camera* treatment is “personal information.” In support of Respondent’s request for *in camera* treatment for documents in this category, the declaration states: “certain documents reflect compensation, including bonus metrics, salaries, and stock options Other documents in this category include personal performance evaluations” Sensitive personal information includes personal financial information and employment arrangements. *In re Otto Bock Healthcare N. Am., Inc.*, 2018 FTC LEXIS 111, *16-17 (F.T.C. July 6, 2018). “[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).

Therefore, permanent *in camera* treatment is GRANTED for the following documents containing sensitive personal information: PX10052, PX10084, PX10128, PX10140, PX10187, PX10196, PX10730, PX10915, PX11125, PX11172, PX11229, PX11385, PX11444, PX11466, PX11506, PX11518, PX11529, PX11733, PX11744, and PX20167.

IV.

For all other documents, Respondent’s Motion is DENIED WITHOUT PREJUDICE, and it is hereby ORDERED that Respondent shall have until October 9, 2020 to refile a motion for *in camera* treatment. In advance of filing any such motion, Respondent shall carefully and thoroughly review all documents for which it seeks *in camera* treatment and narrow its requests to only those documents that comply with the Commission’s strict standards for *in camera* treatment and provide a declaration or affidavit that provides sufficient support for any requests. Complaint Counsel shall have until October 14, 2020 to file any opposition. In the event that either party wishes to introduce any document at trial that is the subject of a then-pending motion for *in camera* treatment, provisional *in camera* treatment may be granted until such time as a subsequent order is issued. *See* 16 C.F.R. § 3.45(g).

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: October 2, 2020

EXHIBIT C

CONFIDENTIAL – REDACTED IN ENTIRETY

EXHIBIT D

CONFIDENTIAL – REDACTED IN ENTIRETY

EXHIBIT E

CONFIDENTIAL – REDACTED IN ENTIRETY

EXHIBIT F

CONFIDENTIAL – REDACTED IN ENTIRETY

EXHIBIT G

CONFIDENTIAL – REDACTED IN ENTIRETY

EXHIBIT H

CONFIDENTIAL – REDACTED IN ENTIRETY

EXHIBIT I

CONFIDENTIAL – REDACTED IN ENTIRETY

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2021, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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I also certify that I delivered via electronic mail a copy of the foregoing document to:

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CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

May 27, 2021

By: s/ Michael Lovinger
Michael Lovinger, Attorney