

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

In the Matter of)
)
OSF Healthcare System,) DOCKET NO. 9349
a corporation, and) PUBLIC
)
Rockford Health System,)
a corporation,)
)

Respondents.



**NON-PARTY CATERPILLAR INC.'S MOTION
FOR *IN CAMERA* TREATMENT OF PROPOSED TRIAL EXHIBIT**

Caterpillar Inc. ("Caterpillar"), which is not a party to the above captioned matter, respectfully requests this Court to grant its Motion for *in camera* treatment of a proposed trial exhibit which Respondent OSF Healthcare System ("OSF") has designated for introduction into evidence in the administrative trial of this matter. The document, designated in OSF's March 13, 2012, letter, was produced by Caterpillar in response to a subpoena *duces tecum* issued by Complaint Counsel in this matter. The document OSF proposes to introduce as a trial exhibit has been marked and identified by OSF as CAT0000306. Caterpillar has communicated with OSF, and OSF has no objection to this motion.

Caterpillar designated this document as confidential when it was produced to Complaint Counsel. The information contained in CAT0000306 is competitively sensitive and held in strict confidence by Caterpillar. Public disclosure of this document is likely to cause direct, serious harm to Caterpillar's competitive position. Thus, under 16 CFR §3.45(b), Caterpillar respectfully moves for *in camera* treatment of CAT0000306 identified in the declaration of Todd Bisping in support of this motion. (See Declaration of Todd Bisping In Support of Non-Party

Caterpillar Inc.’s Motion for *In Camera* Treatment of Proposed Trial Exhibit, attached as Exhibit 1).

I. CATERPILLAR’S CONFIDENTIAL DOCUMENT QUALIFIES FOR *IN CAMERA* TREATMENT UNDER THE FEDERAL TRADE COMMISSION’S RULES OF PRACTICE.

Caterpillar’s designated document in this motion warrants *in camera* treatment under 16 CFR §3.45(b) which provides for *in camera* treatment of business information where disclosure “will likely result in a clearly defined, serious injury to the person or corporation whose records are involved.” *H.P. Hood and Sons, Inc.*, 58 FTC 1184, 1188 (1961). This showing can be made by establishing the document in question is “sufficiently secret and sufficiently material to the applicant’s business that disclosure would result in serious competitive injury.” *In re Dura Lube Corp.*, 1999 FTC LEXIS 255, at *6 (Dec. 23, 1999) (*quoting General Foods Corp.*, 95 FTC 352, 355 (1980)). Under these circumstances “courts generally attempt to protect confidential business information from unnecessary erring.” *H.P. Hood and Sons, Inc.*, 58 FTC at 1188.

The six factors to be weighed in determining whether the documents in question are sufficiently material and secret that disclosure would result in serious competitive injury are:

- (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 applicants 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.

Dura Lube Corp., 1999 FTC LEXIS 255, at *6-*7 (*quoting Bristol Meyers Co.*, 90 FTC 455, 456-57 (1977)).

A nonparty requesting *in camera* treatment deserves “special solicitude” for its confidential business information. *In the matter of Kaiser Aluminum and Chemical Corporation*, 103 FTC 500, at *1 (1984) (directing *in camera* treatment for sales statistics over five years old). *In camera* treatment for long time periods and even indefinitely is granted under certain circumstances where the competitive sensitivity or the proprietary value of the information will not diminish with the passage of time. *See e.g., In re Coca Cola Company*, 1990 FTC LEXIS 364, at *3-*4 (Oct. 17, 1990) (granting *in camera* treatment for “market research, strategy planning data”).

II. CATERPILLAR’S CONFIDENTIAL DOCUMENT WARRANTS IN CAMERA TREATMENT BECAUSE PUBLIC DISCLOSURE WOULD RESULT IN SERIOUS COMPETITIVE INJURY TO CATERPILLAR.

A. CAT0000306 CONTAINS HIGHLY CONFIDENTIAL AND COMMERCIALLY SENSITIVE BUSINESS INFORMATION.

CAT0000360 contains highly confidential and commercially sensitive business information regarding negotiated terms obtained from one of Caterpillar’s hospital and physician network providers in the Peoria area. (Exhibit 1 at ¶ 4). This document contains information regarding rates, coverage and innovations. *Id.* The document reveals highly confidential and commercially sensitive information regarding how Caterpillar negotiates contracts and rates with hospital and physician network providers. *Id.* Disclosure of this document would reveal valuable information regarding the way Caterpillar defines relationships with its providers and how rates are determined. *Id.* Caterpillar has expended numerous hours and many years to

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develop these processes. *Id.* Caterpillar's negotiation efforts have allowed it to gain a competitive advantage in the marketplace and to better service its employees. *Id.* Disclosure of this information could result in serious damage to Caterpillar's competitive advantage in the marketplace. *Id.*

Caterpillar's prospective pecuniary loss from disclosure of CAT0000306 qualifies as the "clearly defined, serious injury" required to demonstrate a need for *in camera* treatment. "The likely loss of business advantages is a good example of a clearly defined serious injury." *In re Dura Lube Corp.*, 1999 FTC 255, at *7. Materials that "represent[] a significant work product, compiled at great expense, [and the] disclosure of which would give other companies the benefit of [the applicant's] labors" are good candidates for *in camera* treatment. *In re General Foods*, 1980 FTC LEXIS 99, at *3 (March 10, 1980).

B. CATERPILLAR HAS GUARDED THE SECRECY AND CONFIDENTIALITY OF CAT0000306.

Caterpillar has taken substantial measures to guard the secrecy of the information contained in CAT0000306, limiting dissemination of such information and taking every reasonable step to protect its confidentiality. (Exhibit 1, ¶3). Such information is disclosed only to particular Caterpillar employees, and is not known outside of Caterpillar except to the extent necessary to engage in confidential contract negotiations. *Id.* The information contained in CAT0000306 would be extremely difficult for Caterpillar's competitors or other outside persons to access or duplicate. *Id.* These efforts demonstrate that Caterpillar has gone to great lengths to preserve the confidentiality of the information contained in CAT0000306.

Caterpillar is also contractually obligated to maintain the confidentiality of the commercially sensitive business information contained in CAT0000306 regarding Caterpillar's contractual arrangements with its health care providers. (Exhibit 1, ¶3). The health care

providers have a similar interest as Caterpillar in maintaining the confidentiality of the terms of its health care contracts, disclosure of which would disadvantage them competitively.

C. THE PUBLIC INTEREST IN DISCLOSURE OF THE DOCUMENT IN QUESTION IS OUTWEIGHED BY THE LIKELIHOOD OF SERIOUS COMPETITIVE HARM TO CATERPILLAR.

As a non-party to this matter, Caterpillar deserves “special solicitude” requesting *in camera* treatment for its confidential business information. *In the matter of Kaiser*, 103 FTC 500, at *1. *In camera* treatment of information for reasonable periods of times encourages nonparties to cooperate with future discovery requests in adjudicative proceedings. *Id.* Caterpillar has cooperated with discovery demands in this case, and “public understanding of this proceeding does not depend on access to” Caterpillar’s highly confidential information. *Id.* The balance of interests clearly favors *in camera* treatment for document CAT0000306. *See Bristol*, 90 FTC at 456 (describing six factor test for determining secrecy and materiality).

D. IN CAMERA PROTECTION FOR DOCUMENT CAT0000306 SHOULD BE EXTENDED FOR SIX YEARS.

The nature of the highly confidential information contained in CAT0000306 warrants *in camera* treatment for six years. This is because the competitive sensitivity or the proprietary value of the information will not diminish in a shorter passage of time. *In re Coca Cola*, 1990 FTC LEXIS 364, at *4 (*in camera* treatment granted for papers more than three years old). Unlike ordinary business records such as business plans, marketing plans, or sales documents, which often receive *in camera* treatment for shortened periods of time, the benefit rates, coverage and innovations Caterpillar negotiated with its health care providers, as set forth in the document, are extremely sensitive and of such enduring significant proprietary value to Caterpillar’s competitive position and business strategy that their value will not diminish with a

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short passage of time. Caterpillar respectfully requests document CAT0000306 be afforded *in camera* protection for six years.

III. CONCLUSION

The Federal Trade Commission's Rules of Practice and precedent warrant *in camera* treatment for six years for document CAT0000306. This document is both secret and material to Caterpillar's business.

Respectfully submitted,

CATERPILLAR INC.



One of Its Attorneys

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

In the Matter of)
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 a corporation, and)
)
Rockford Health System)
 a corporation,)
 Respondents.)
)
DOCKET NO. 9349

PROPOSED ORDER

On March 29, 2012, Non-Party Caterpillar Inc. (“Caterpillar”) filed a Motion for *In Camera* Treatment of Proposed Trial Exhibit containing confidential business information that Respondent OSF Healthcare System (“OSF”) has identified as a potential trial exhibit.

IT IS HEREBY ORDERED that Caterpillar’s Motion is GRANTED. The document designated by OSF as CAT0000306 will be subject to *in camera* treatment under 16 CFR § 3.45 and kept confidential and not placed in the public record of this proceeding for a period of six years.

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

ORDERED: _____

D. Michael Chappell
Administrative Law Judge

DATED: _____

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EXHIBIT 1

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
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DECLARATION OF TODD BISPING IN SUPPORT OF NON-PARTY CATERPILLAR INC.'S MOTION FOR *IN CAMERA* TREATMENT OF PROPOSED TRIAL EXHIBIT

1. I am the Provider Relations Manager for Caterpillar Inc. ("Caterpillar"), and submit this declaration in support of Caterpillar's Motion for *In Camera* Treatment of Proposed Trial Exhibit which was produced in response to a subpoena *duces tecum* issued by Complaint Counsel in this matter (*see* CAT0000306, attached hereto as Exhibit A).

2. In my capacity as Provider Relations Manager for Caterpillar, I manage Caterpillar's hospital and physician provider networks in Illinois, which includes overseeing the group of professionals at Caterpillar who negotiate contracts with these hospitals and physicians, and my personal involvement in those contract negotiations. Consequently, I am familiar with the highly confidential information that Caterpillar maintains in the course of negotiating hospital and physician provider network contracts. If called upon to testify, I would testify competently to the facts set forth in this declaration.

3. Caterpillar has taken substantial measures to guard the information contained in Exhibit A by limiting dissemination of such information and taking every reasonable step to protect its confidentiality. Such information is disclosed only to particular Caterpillar employees, and is not known outside of Caterpillar except to the extent necessary to engage in confidential contract negotiations or plan administration. The information contained in Exhibit

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A would be extremely difficult for Caterpillar's competitors or other outside persons to access or duplicate. Caterpillar also is contractually obligated to maintain the confidentiality of the commercially sensitive business information contained Exhibit A.

4. Exhibit A contains negotiated terms obtained from one of Caterpillar's hospital and physician network providers in the Peoria area. The document contains information regarding rates, coverage and innovations. These documents reveal highly confidential and commercially sensitive information regarding how Caterpillar negotiates contracts and rates with hospital and physician network providers in Illinois. Disclosure of these documents would reveal valuable information regarding the way Caterpillar defines relationships with its providers and how rates are determined. Caterpillar has expended numerous hours and many years to develop these processes. Caterpillar's negotiation efforts have allowed it to gain a competitive advantage in the marketplace and to better service its employees. Disclosure of this information could result in serious damage to Caterpillar's competitive advantage in the marketplace. A six year period of *in camera* treatment of Exhibit A will protect Caterpillar's legitimate business interests.

Pursuant to 28 U.S.C. Section 1746, I declare under the penalties of perjury that the foregoing is true and correct.

Dated this 26 day of March, 2012.



Todd Bisping

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EXHIBIT A

(REDACTED FROM PUBLIC FILING)

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CERTIFICATE OF VERIFICATION OF WORD COUNT

I HEREBY CERTIFY that Non-Party Caterpillar Inc.'s Motion for *In Camera* Treatment of Proposed Trial Exhibit does not exceed the 10,000 word count pursuant to 16 CFR § 3.22(c).



Erin Bolan Hines

CERTIFICATE OF SERVICE

I, Erin Bolan Hines, certify that on March 28, 2012, I caused an original and one (1) copy of Non-Party Caterpillar Inc.'s Motion for *In Camera* Treatment Of Proposed Trial Exhibits (public, *in camera* and *in camera* disc versions) to be filed by overnight courier upon:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-159
Washington, DC 20580
secretary@ftc.gov

I also certify that on March 28, 2012, I caused two (2) copies of the Motion (both public and *in camera* versions) to be served by overnight courier upon:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

I also certify that on March 28, 2012, I caused one copy of the Motion (both public and *in camera* versions) to be served by overnight courier upon:

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