

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



_____)
In the Matter of)
)
CHICAGO BRIDGE & IRON COMPANY N.V.)
a foreign corporation,)
)
CHICAGO BRIDGE & IRON COMPANY,)
a corporation, and)
)
PITT-DES MOINES, INC.,)
a corporation.)
_____)

DOCKET NO. 9300

**ORDER ON NON-PARTIES' MOTIONS FOR *IN CAMERA* TREATMENT
OF DOCUMENTS LISTED ON PARTIES' EXHIBIT LISTS**

I.

Pursuant to Commission Rule 3.45(b) and the Scheduling Order entered in this litigation, several non-parties have filed motions 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.

In Commission proceedings, requests 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 (1984); *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). That showing can be made by establishing that the documentary evidence is "sufficiently secret and sufficiently material to the applicant's business that disclosure would result in serious competitive injury," and then balancing that factor against the importance of the information in explaining the rationale of Commission decisions. *Kaiser*, 103 F.T.C. at 500; *General Foods Corp.*, 95 F.T.C. 352, 355 (1980); *Bristol Myers Co.*, 90 F.T.C. 455, 456 (1977).

Indefinite *in camera* treatment is granted only in those "unusual" cases where the competitive sensitivity or the proprietary value of the information will not diminish with the passage of time. *In re Coca Cola Co.*, 1990 FTC LEXIS 364 (Oct. 17, 1990). Examples of documents meriting indefinite *in camera* treatment are trade secrets, such as secret formulas, processes, and other secret technical information, and information that is privileged. *See Hood*, 58 F.T.C. at 1189; *In re R.R. Donnelley & Sons Co.*, 1993 FTC LEXIS 32 (Feb. 18, 1993); *In re Textron, Inc.*, 1991 FTC LEXIS 135 (April 26, 1991). Where *in camera* treatment is granted for

ordinary business records, such as business plans, marketing plans, or sales documents, it is typically extended for two to five years. *E.g.*, *In re E.I. Dupont de Nemours & Co.*, 97 F.T.C. 116 (Jan. 21, 1981); *In re International Ass. of Conf. Interpreters*, 1996 FTC LEXIS 298 (June 26, 1996).

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); *Hood*, 58 F.T.C. at 1186 (“[T]here is a substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons.”). Thus, a heavy burden of showing good cause for withholding documents from the public record rests with the party requesting that documents be placed *in camera*. *Hood*, 58 F.T.C. at 1188. Further, 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. Thus, in order to sustain the heavy burden for withholding documents from the public record, an affidavit or declaration demonstrating that a document is sufficiently secret and material to the applicant's business that disclosure would result in serious competitive injury is generally required.

II.

Non-party Societe Nouvelle Technigaz (“TGZ”), on September 24, 2002, filed a motion seeking *in camera* treatment for two declarations made by Jean-Pierre Jolly, Vice President of Marketing of TGZ, one on June 4, 2002, and the second on August 22, 2002 (“Jolly Declarations”). TGZ seeks *in camera* treatment for a period of three years. No oppositions to this motion have been filed.

As described by outside counsel for TGZ, the Jolly declarations contain competitively sensitive and confidential information regarding business and pricing strategies of TGZ, the disclosure of which would cause the loss of business advantage and serious and irreparable injury to TGZ. In order to meet its heavy burden of demonstrating that public disclosure of the documents will result in clearly defined, serious injury, TGZ must provide an affidavit or declaration in support of its motion. TGZ's request for *in camera* treatment is DENIED WITHOUT PREJUDICE.

TGZ has until November 12, 2002 to file a renewed motion for *in camera* treatment which includes a declaration or affidavit in support of its motion. In the event that one of the parties offers into evidence the Jolly declarations, provisional *in camera* status may be granted pursuant to 16 C.F.R. § 3.45(g).

III.

Complaint Counsel, Respondents' counsel, and counsel for Pat Outtrim, President of Project Technical Liaison Associates, Inc. ("PTLA"), on October 15, 2002, filed a joint motion seeking *in camera* treatment for certain portions of the deposition testimony of Outtrim, taken June 4, 2002. The motion states that Outtrim is prevented from disclosing many items of her testimony due to the confidentiality agreements she signed as president of PTLA with several clients and potential clients.

The motion does not attach the deposition transcript, or excerpts thereof, for which *in camera* treatment is sought. The motion does not provide a declaration or affidavit of Outtrim to demonstrate that the deposition testimony is sufficiently secret and material to the applicant's business that disclosure would result in serious competitive injury. The motion does not specify a time period for which *in camera* treatment is sought. All of this information must be provided to support an order granting *in camera* treatment. Accordingly, the motion is DENIED WITHOUT PREJUDICE.

PTLA has until November 12, 2002 to file a renewed motion for *in camera* treatment which includes the deposition transcript and a declaration or affidavit in support of its motion. In the event that one of the parties offers into evidence the deposition transcript, CX-508, provisional *in camera* status may be granted pursuant to 16 C.F.R. § 3.45(g).

IV.

Non-party American Tank and Vessel, Inc. ("AT&V") on October 11, 2002, filed a motion seeking *in camera* treatment for three documents, an in house financial statement, a confidential bid history report form and a confidential contract history report form. AT&V requests that these documents be treated as *in camera* for an indefinite period of time, or in the alternative, for six years. No party has opposed AT&V's motion.

The affidavit by William T. Cutts, attached to the motion, states that these three documents contain highly confidential and proprietary information, the disclosure of which would cause the loss of business advantage and serious and irreparable injury to AT&V. However, a review of the documents submitted with the motion reveals that some of the documents do not meet the standards for *in camera* treatment. For example, one of the documents titled "A World of Products Serving the World," appears to be a publicly disseminated document. Further, AT&V has not met the heavy burden of establishing the unusual circumstances that may warrant indefinite *in camera* treatment for its confidential materials. Accordingly, AT&V's motion is DENIED WITHOUT PREJUDICE.

AT&V has until November 12, 2002 to file a renewed motion for *in camera* treatment that is more narrowly tailored to request *in camera* treatment for only that information that is sufficiently secret and material. In the event that one of the parties offers into evidence the

AT&V documents for which *in camera* treatment was sought, provisional *in camera* status may be granted pursuant to 16 C.F.R. § 3.45(g).

V.

Non-party Zachary Construction Corp. (“ZCC”), on September 18, 2002, filed a motion seeking *in camera* treatment. ZCC filed a Supplemental Motion on October 22, 2002. The September 18, 2002 motion will be treated as withdrawn. ZCC seeks *in camera* treatment for specific sections of the deposition transcript of Moon Fahel and for documents identified with bates numbers ZCC 000014-020 and ZCC000030-059. ZCC seeks *in camera* treatment for a period of three years. No oppositions to ZCC’s motion have been filed.

As described by the motion filed by ZCC, the deposition of Fahel and the identified exhibits thereto contain competitively sensitive and confidential information, the disclosure of which would cause the loss of business advantage and serious and irreparable injury to ZCC. To allow a determination on whether the documents sought qualify for *in camera* treatment, ZCC must provide the Administrative Law Judge with a copy of such documents. Further, in order to meet its heavy burden of demonstrating that public disclosure of the documents will result in clearly defined, serious injury, ZCC must provide an affidavit or declaration. ZCC’s request for *in camera* treatment is DENIED WITHOUT PREJUDICE.

ZCC has until November 12, 2002 to file a renewed motion for *in camera* treatment which includes a declaration or affidavit in support of its motion. In the event that one of the parties offers into evidence the deposition of Fahel or the ZCC documents for which *in camera* treatment was sought, provisional *in camera* status may be granted pursuant to 16 C.F.R. § 3.45(g).

VI.

Non-party Yankee Gas Services Co. (“Yankee”), on October 22, 2002, filed a motion seeking *in camera* treatment for sections of the deposition transcript of Marc N. Andrukiewicz, P.E., Director, Gas Supply Management for Yankee. Yankee seeks *in camera* treatment for a limited period. No oppositions to Yankee’s motion have been filed.

As described in the motion filed by Yankee, the deposition of Andrukiewicz contains competitively sensitive and confidential information, the disclosure of which would cause the loss of business advantage and serious and irreparable injury to Yankee. Yankee seeks *in camera* treatment for all portions of this deposition which either Complaint Counsel or Respondents’ counsel have indicated that they intend to introduce at trial. A review of some of the designated deposition testimony reveals that some of the information that Yankee seeks to have protected does not meet the standards for *in camera* treatment. A motion for *in camera* treatment must be narrowly tailored to request *in camera* treatment for only that information that is sufficiently secret and material. Further, in order to meet its heavy burden of demonstrating that public

disclosure of the documents will result in clearly defined, serious injury, Yankee must provide an affidavit or declaration in support of its motion. Yankee's request for *in camera* treatment is DENIED WITHOUT PREJUDICE.

Yankee has until November 12, 2002 to file a renewed motion for *in camera* treatment that is more narrowly tailored to request *in camera* treatment for only that information that is sufficiently secret and material and that includes a declaration or affidavit in support of its motion. In the event that one of the parties offers into evidence the Andrukiewicz deposition, provisional *in camera* status may be granted pursuant to 16 C.F.R. § 3.45(g).

VII.

Non-parties Panhandle Eastern Pipe Line Company ("Panhandle") and CMS Trunkline LNG Company, LLC ("Trunkline"), on October 22, 2002, filed an unopposed motion seeking *in camera* treatment for specific sections of the deposition transcript of John Charles Kelly. Panhandle and Trunkline request that the information be treated as *in camera* for an indefinite period of time.

As supported by the declaration of Kelly, attached to the motion, the deposition transcript of Kelly contains competitively sensitive and confidential information, the disclosure of which would cause the loss of business advantage and serious and irreparable injury to Panhandle and Trunkline. A review of the declaration in support of the motion and the designated deposition testimony reveals that the information sought to be protected meets the standards for *in camera* treatment. However, Panhandle and Trunkline have not met the heavy burden of establishing the unusual circumstances that may warrant indefinite *in camera* treatment for such information. Accordingly, Panhandle and Trunkline's motion is GRANTED in part and DENIED in part.

In camera treatment for a period of five years, to expire on November 1, 2007, is granted to the following portions of John Kelley's deposition (designated as exhibits CX 347 and RX 789): 10:4-9; 11:21-19:7; 23:16-23; 24:7-21; 29:7-21; 30:14-32:14; 37:9-24; 39:10-21; 42:22-45:21; 47:4-15; 51:9-22; 53:5-55:24; 59:1-60:19; 64:2-65:24; 67:9-23.

VIII.

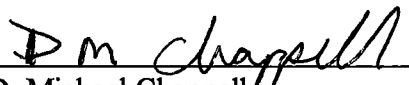
Non-party Boeing Satellite Systems, Inc. ("Boeing") on October 22, 2002, filed an unopposed motion seeking *in camera* treatment for specific portions of the April 23, 2002 declaration of Greg Proulx and of the June 20, 2002 deposition transcript of Greg Proulx. Boeing requests that the information be treated as *in camera* for an indefinite period of time.

As supported by the declaration by Marjorie Waltrip, attached to the motion, the declaration and deposition transcript of Proulx contain competitively sensitive and confidential information, the disclosure of which would cause the loss of business advantage and serious and irreparable injury to Boeing. A review of the declaration in support of the motion and the

documents for which *in camera* treatment is sought reveals that the information meets the standards for *in camera* treatment. However, Boeing has not met the heavy burden of establishing the unusual circumstances that may warrant indefinite *in camera* treatment for such information. Accordingly, Boeing's motion is GRANTED in part and DENIED in part.

In camera treatment for a period of five years, to expire on November 1, 2007, is granted to paragraphs 7 and 13-18 of the Proulx Declaration (designated as exhibit CX 10) and to the following portions of the Proulx deposition (designated as exhibit CX 513): 12:25-18:7; 25:25-28:6; 29:3-38:10.

ORDERED:


D. Michael Chappell
Administrative Law Judge

Date: November 1, 2002

