

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

In the Matter of

**Meta Platforms, Inc.,
a corporation,**

**Mark Zuckerberg,
a natural person,**

and

**Within Unlimited, Inc.,
a corporation.**

DOCKET NO. 9411

**NON-PARTY HTC AMERICA, INC.’S MOTION FOR *IN CAMERA* TREATMENT OF
TRIAL EXHIBIT**

I. INTRODUCTION

Non-Party HTC America, Inc. (“HTCA”) moves pursuant to 16 C.F.R. 3.45(b) for *in camera* treatment of one proposed trial exhibit containing highly confidential and competitively sensitive information, attached as Exhibit A, to be submitted by Respondents Meta Platforms, Inc. (“Meta”), Mark Zuckerberg and Within Unlimited, Inc. (collectively, “Respondents”) in this Part 3 administrative proceeding.

Exhibit A was produced in response to Respondents’ third-party subpoena in the related preliminary injunction matter filed in the District Court for the Northern District of California (“Preliminary Injunction Matter”). *See FTC v. Meta Platforms, Inc.*, No. 5:22-cv-04325-EJD (N.D. Cal.). Exhibit A is designated “Highly Confidential” per the Protective Order in that matter. *See Protective Order, Meta*, No. 5:22-cv-04325-EJD (N.D. Cal. Aug. 24, 2022), ECF No. 80. Further, on November 1, 2022, Meta agreed to keep HTCA’s document production, and the information contained therein, on an outside-counsel only basis, which prohibited any disclosure of HTCA’s

document production to in-house counsel. *See* Declaration of Shylah R. Alfonso In Support Of Non-Party HTCA’s Administrative Motion To Seal and Request *In Camera* Treatment of Highly Confidential Business Material, *Meta*, No. 5:22-cv-04325-EJD (N.D. Cal. Nov. 30, 2022), ECF No. 379-1. That same day, the Federal Trade Commission also agreed to this expanded protection concerning HTCA’s documents. *Id.* As a result, Exhibit A is additionally designated as “Outside Counsel Only” pursuant to HTCA’s agreement with the parties in the Preliminary Injunction Matter.

Further, Exhibit A was previously listed as DX1285 in Meta’s exhibit list in the Preliminary Injunction Matter. *See* Defendants’ Fourth Amended Exhibit List, *Meta*, No. 5:22-cv-04325-EJD (N.D. Cal. Dec. 11, 2022), ECF No. 455. HTCA filed a motion to request *in camera* treatment and sealing of Exhibit A by the court, which was granted on December 5, 2022. *See* Order Granting Non-Party HTC America, Inc.’s Second Administrative Motion To Seal and Request *In Camera* Treatment of Highly Confidential Business Materials, *Meta*, No. 5:22-cv-04325-EJD (N.D. Cal. Dec. 05, 2022), ECF No. 424.

Accordingly, HTCA requests *in camera* treatment for Exhibit A in this Part 3 administrative proceeding, the public disclosure of which would harm HTCA’s competitive standing. HTCA further designates Exhibit A as “CONFIDENTIAL & IN CAMERA” per the Protective Order in this Part 3 administrative proceeding (Document No. 605346, ¶ 7), and Rule 3.45(e):

Document	Preliminary Injunction Matter Exhibit No.	Preliminary Injunction Matter Bates No.	Portion(s) To Maintain <i>In Camera</i>	Time Period for <i>In Camera</i> Treatment	Basis for <i>In Camera</i> Treatment
Exhibit A	DX1285	HTCA-META-00000001	Entire Document	Three Years	Declaration of Vincent S. Lam In Support of Non-Party HTC America,

					Inc.’s Motion For <i>In Camera</i> Treatment of Trial Exhibit (“Lam Decl.”) ¶¶ 5-6 ¹
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II. LEGAL STANDARD

“[C]onfidential records of businesses involved in Commission proceedings should be protected insofar as possible.” *In re H.P Hood & Sons, Inc.*, No. 7709, 1961 WL 65882, at *2 (F.T.C. Mar. 14, 1961). *In camera* treatment applies to information when “public disclosure will likely result in a clearly defined, serious injury.” 16 C.F.R. 3.45(b). Serious injury occurs when documents that are “sufficiently secret and sufficiently material to [applicant’s] business” are disclosed to the public. *In re Otto Bock Healthcare N. Am., Inc.*, No. 9378, 2018 WL 3491602, at *1 (F.T.C. July 2, 2018) (quoting *In re Gen. Foods Corp.*, No. 9085, 1980 WL 338997, at *4 (F.T.C. Mar. 10, 1980)).

In considering whether to grant *in camera* treatment, the Administrative Law Judge (“ALJ”) may consider (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others within the business; (3) the extent of measures taken to protect the information’s secrecy; (4) the value of the information to the business and its competitors; (5) the effort or investment made in developing the information; and (6) the ease or difficulty with which the information could be acquired or duplicated by others. *In re Bristol Meyers Co.*, Nos. 8917, 8918, 8919, 1977 WL 189054, at *2 (F.T.C. Nov. 11, 1977).

Once a party shows that disclosure of confidential information will cause serious injury “the principal countervailing consideration weighing in favor of disclosure” becomes the “importance of the information in explaining the rationale of decisions at the Commission.” *In re*

¹ Attached as Exhibit B.

ProMedica Health Sys., No. 9346, 2011 WL 2258040, at *1 (F.T.C. May 25, 2011) (quoting *Gen. Foods Corp.*, 1980 WL 338997, at *3). *In camera* review is appropriate for ordinary-course business records such as “business plans, marketing plans, or sales documents.” *In re 1-800 Contacts, Inc.*, No. 9372, 2017 WL 1345290, at *3 (F.T.C. Apr. 4, 2017) (quoting *Hood*, 1961 WL 65882, at *13). Where *in camera* treatment “is granted for ordinary business records, it is typically provided for two to five years.” *Id.* *In camera* treatment is particularly appropriate for information less than three years old. *In re Impax Labs, Inc.*, No. 9373, 2017 WL 4810534, at *1 (F.T.C. Oct. 16, 2017). The ALJ has broad discretion to grant *in camera* status. *In re Gen. Foods Corp.*, No. 9085, 1980 WL 339035, at *2 (F.T.C. Aug. 19, 1980).

III. ARGUMENT

The information that HTCA seeks to protect from public disclosure here clearly meets the “sufficiently secret and sufficiently material” standard. Exhibit A, Respondents’ proposed exhibit, is a slide deck reflecting HTCA’s business and marketing practices and product details related to upcoming product releases, all brand-new information that is less than three years old. Lam Decl. ¶ 5. It includes highly confidential information related to product release dates, possible marketing strategies and product descriptions. Public disclosure of this sensitive business information would harm HTCA’s competitive and strategic standing in the virtual reality industry, causing devastating and irreparable harm. *Id.* ¶ 6. Being “first” (i.e., the first to launch a new product line or feature set) gives companies a competitive advantage in the virtual reality industry. *Id.* If such information were publicly disclosed, a competitor would be able to copy the innovative features, capabilities, and development plans of HTCA’s new product and circumvent the time and resources necessary in developing their own practices and strategies. *Id.*

HTCA has made diligent efforts to maintain the confidentiality of the information reflected in Exhibit A from public disclosure. *Id.* ¶ 5. This information is internal to HTCA only, and even then, HTCA maintains this information as highly confidential within the company and takes extensive steps to limit employee access to this non-public information. *Id.* For instance, only certain top-level employees are informed of the details of new products that have not yet been released. *Id.* Employees who receive this information must often sign non-disclosure agreements which prohibit discussing or disseminating the information to anyone who is not on a need-to-know basis. *Id.* There is a physical separation of teams working on products under development from the rest of the company (e.g., separate office buildings, separate floors within a building, partitions within offices). *Id.* HTCA also restricts access to servers that store this information, with only very few HTCA employees given access. *Id.* When an employee is provided access, HTCA takes the further precaution of prohibiting this information from being downloaded onto the employee's computer or printed from his computer. *Id.*

HTCA's request for sealing and *in camera* treatment of Exhibit A is the result of its good faith effort to seek sealing protection only for information that is confidential, competitively-sensitive, and cannot be protected from public disclosure through less restrictive means. The request is minimal in scope, comprising only one document. There is little legitimate public interest in the disclosure of the small amount of highly sensitive information that HTCA seeks to protect for the reasonable time period of three years — particularly given that the information relates only to HTCA, a non-party to this proceeding. *In re Kaiser Aluminum & Chem. Co.*, No. 9080, 1984 WL 565325, at *1 (F.T.C. May 25, 1984) (holding that “[a] public understanding of this proceeding does not depend on access to these data submitted by these third party firms.”). Additionally, *in camera* treatment “involving third-party bystanders encourages cooperation with

future adjudicative discovery requests.” *Id.* Any public interest in disclosure of the limited information that HTCA seeks to protect is outweighed by the prejudice that will result to HTCA if no protection is granted.

IV. CONCLUSION

Given the serious risk that public disclosure of HTCA’s Exhibit A would cause material injury to HTCA’s business, HTCA respectfully requests an *in camera* order to protect Exhibit A from public disclosure.

Dated: December 21, 2022

Respectfully submitted,

/s/Caroline G. Tunca

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*Counsel for Non-Party, HTC
America, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2022, I filed the foregoing document via the FTC email below. Pending the acceptance of Non-Party HTC America, Inc.'s appearance in the matter, the foregoing document will also be filed electronically using the FTC's E-Filing system, which will send notification to:

April Tabor
Secretary
Federal Trade Commission
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Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I also certify that I caused the foregoing document to be served via email to:

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/s/ Caroline G. Tunca

EXHIBIT A

FILED *IN CAMERA*

EXHIBIT B

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

In the Matter of

**Meta Platforms, Inc.,
a corporation,**

**Mark Zuckerberg,
a natural person,**

and

**Within Unlimited, Inc.,
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DOCKET NO. 9411

DECLARATION OF VINCENT S. LAM IN SUPPORT OF NON-PARTY HTC AMERICA, INC.’S MOTION FOR *IN CAMERA* TREATMENT OF TRIAL EXHIBIT

I, Vincent S. Lam, declare as follows:

1. I am an Assistant Vice President and the Chief IP Litigation Counsel at HTC America, Inc. (“HTCA”), which is not a party to the above-captioned case. I have been employed by HTCA since 2010 and practiced law at DLA Piper US LLP prior to joining HTCA. I am a member in good standing of the State Bar of California. During my time at HTCA, the company has launched dozens of new products. The facts stated in this declaration are based on my own personal knowledge and, if called as a witness, I could and would testify to those facts.

2. I make this declaration in support of HTCA’s Motion for *In Camera* Treatment of Trial Exhibit (“Motion”), which is attached to HTCA’s Motion as Exhibit A. I understand that Respondents Meta Platforms, Inc., Mark Zuckerberg, and Within Unlimited, Inc. (collectively “Respondents”) have noticed HTCA regarding the use of Exhibit A as a potential trial exhibit in the above Part 3 administrative hearing.

3. I also understand that Exhibit A was previously designated as “Highly Confidential Outside Counsel Only” by HTCA in a related matter concerning a preliminary injunction hearing because it contains highly confidential and competitively sensitive information, and the court in that case granted the sealing and *in camera* treatment of this document. Further, I understand that HTCA has also designated Exhibit A as “Confidential & In Camera” pursuant to the Protective Order in this proceeding.

4. I understand HTCA’s Motion seeks to protect only one highly confidential document from public disclosure for three years:

Document	Portion(s) To Maintain <i>In Camera</i>	Time Period for <i>In Camera</i> Treatment
Exhibit A	Entire Document	Three Years


5. Exhibit A reflects highly confidential and competitively sensitive information about HTCA’s business and marketing practices and product details related to upcoming product releases, which is information that is less than three years old. That information is internal to HTCA only, and even then, HTCA maintains this information as highly confidential within the company and takes extensive steps to limit employee access to this non-public information. For instance, only certain top-level employees are informed of the details of new products that have not yet been released. Employees who receive this information must often sign non-disclosure agreements which prohibit discussing or disseminating the information to anyone who is not on a need-to-know basis. There is a physical separation of teams working on products under development from the rest of the company (e.g., separate office buildings, separate floors within a building, partitions within offices). HTCA also restricts access to servers that store this information, with only very few HTCA employees given access. When an employee is provided

access, HTCA takes the further precaution of prohibiting this information from being downloaded onto the employee’s computer or printed from his computer.

6. These extensive steps to limit access to the information, even within the company, are taken in order to protect against any prospect of this extremely sensitive information becoming public. Being “first” (i.e., the first to launch a new product line or feature set) gives companies a competitive advantage in the virtual reality industry. Thus, public disclosure of the information would lead to substantial competitive harm to HTCA. If such information were publicly disclosed, a competitor would be able to copy the innovative features, capabilities, and development plans of HTCA’s new product. The competitor could beat HTCA to the market on the new product line or feature set without having to put in all the time, resources and money that HTCA has. As a result, this would undermine HTCA’s strategic position in the virtual reality industry and cause devastating and irreparable harm, and the unsealing of the information would result in injury to HTCA that could not be avoided through any less restrictive alternative to sealing.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 21st day of December 2022, in San Diego, California.

By: 

Vincent S. Lam

EXHIBIT C

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

In the Matter of

Meta Platforms, Inc.,
a corporation,

Mark Zuckerberg,
a natural person,

and

Within Unlimited, Inc.,
a corporation.

DOCKET NO. 9411

[PROPOSED] ORDER FOR NON-PARTY HTC AMERICA, INC.’S MOTION FOR *IN*
CAMERA TREATMENT OF TRIAL EXHIBIT

Upon consideration of Non-Party HTC America, Inc.’s (“HTCA”) Motion for *In Camera* Review of Trial Exhibit, it is hereby

ORDERED, that HTCA’s motion is GRANTED, and it is further

ORDERED, that pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.45(b), Exhibit A to the Motion and the information contained therein, and any related trial testimony, shall be subject to *in camera* treatment and will be kept confidential and not placed on the public record of this proceeding.

Date: _____

D. Michael Chappell
Chief Administrative Law Judge