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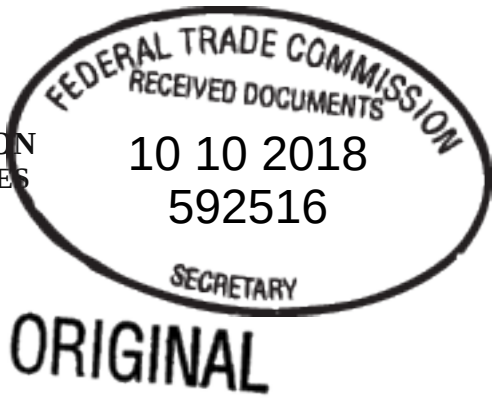

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES

In the Matter of **BENCO DENTAL SUPPLY CO.,** **a corporation,** **HENRY SCHEIN, INC.,** **a corporation, and** **PATTERSON COMPANIES, INC.** **a corporation,** **Respondents.**	Docket No. 9379

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT HENRY SCHEIN, INC.'S MOTION FOR *IN CAMERA* TREATMENT OF TRIAL EXHIBITS

Complaint Counsel supports an open and public trial subject to the narrow exception in Commission Rule 3.45(b), which sets a strict standard for applicants seeking to withhold documents from the public record. Henry Schein, Inc. ("Respondent" or "Schein") fails to meet that standard. Schein overreaches by seeking to withhold from the public record 678 documents, including communications with its competitors Benco and Patterson, widely-disseminated public information, and entire deposition transcripts, expert reports, and interrogatory responses. In addition, Respondent inexplicably seeks either ten year or indefinite protection for most of these documents without showing the exceptional circumstances to warrant extended protection. Respondent also fails to provide sufficient justification for its request aside from conclusory statements in a declaration. To meet its burden of showing good cause for *in camera* treatment, Respondent must explain why each document, by specifying specific portions thereof, is sufficiently secret and material to Respondent's business that disclosure will likely result in

clearly defined, serious injury. Respondent has failed to meet this burden. Granting Respondent's request will deprive the public of a record that explains the Commission's reasoning and provides further guidance to those affected by the Commission's actions – an interest that outweighs any of Respondent's assertions. Therefore, Complaint Counsel respectfully requests that this Court deny Respondent's motion without prejudice until it fully satisfies the requirements of Rule 3.45(b).

I. STATEMENT OF FACTS

On September 26, 2018, Respondent filed a motion for *in camera* treatment of 678 potential trial exhibits allegedly containing confidential information. Mot., Exhibit B. Respondent groups the documents into one of five categories: (1) Customer Contracts; (2) Non-Public Price & Service Information; (3) Confidential Performance Metrics; (4) Confidential Strategic and Business Plans; and (5) Sensitive Personal Information. Mot., at 4. Respondent seeks full *in camera* treatment for the majority of documents, and for the remainder identifies portions for partial *in camera* treatment. Mot., Exhibit B. Respondent also seeks *in camera* treatment for five years, ten years, or an indefinite period for all documents. *Id.* Respondent submitted a declaration of its Vice President and Senior Counsel for Litigation, Marjorie Han, in support of its motion. Mot., Exhibit A.

II. LEGAL STANDARD

Under Commission Rule 3.45(b), the Court may grant a request for *in camera* treatment "only 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 after finding that the material constitutes sensitive personal information." 16 C.F.R. § 3.45(b) (emphasis added). The applicant "must make a clear showing that the information concerned is sufficiently secret and

sufficiently material to their business that disclosure would result serious competitive injury." *In the Matter of Otto Bock Healthcare N. Am.*, 2018 WL 3491602, at *1 (July 2, 2018) (quoting *In re General Foods Corp.*, 1980 FTC LEXIS 99, at *10 (Mar. 10, 1980)). If the applicant makes this showing, the Court weighs it against the primary reason favoring disclosure – the importance of the information in explaining the rationale of FTC decisions. *Otto Bock*, at *1. As this Court recently explained, there is a "substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons." *Id.* (quoting *In re H.P. Hood & Sons, Inc.*,1961 FTC LEXIS 368, at *5-6 (Mar. 14, 1961)). A full and open trial record provides the public with the Commission's rationale and the guidance to deter potential future violations. *Id*.

Respondent bears the burden of showing good cause to withhold materials from the public record. *Id.*; *1-800 Contacts*, 2017 FTC LEXIS 55, at *3 (April 4, 2017). The motion must be supported by "a declaration or affidavit by a person within the company who has reviewed the documents at issue and is qualified to explain the confidential nature of the documents." *Otto Bock*, at *3. For information more than three years old, there is a presumption against *in camera* treatment, defeated only by affidavit or declaration that such material remains competitively sensitive. *Otto Bock*, at *1-2.

If Respondent meets the burden, the length of time granted for *in camera* treatment depends on whether the material consists of ordinary business records or trade secrets. *Id.* at *2-3. Trade secrets, like secret formulas, technical information or processes, or privileged information, may merit indefinite *in camera* treatment "in unusual circumstances." *Id.* at *2; 16 C.F.R. § 3.45(b)(3). To receive indefinite protection, applicants must show that the need for confidentiality is "not likely to decrease over time" and that the circumstances giving rise to a

serious injury "are likely to be forever present." *Id.* at *2 (quoting *In re E. I. DuPont de Nemours & Co.*, 1990 FTC LEXIS 134, at *2-3 (April 25, 1990)). In contrast, ordinary business records, like pricing information, customer names, financial information, business plans, marketing plans, and sales documents, typically receive two to five year protection from disclosure. *Id.* at *3.

III. ARGUMENT

A. Respondent's Request for *In Camera* Treatment Does Not Meet the Strict Rule 3.45(b) Standard

1. Respondent Fails to Clearly Show Disclosure Will Likely Result in Serious Competitive Injury

Respondent's motion and attached declaration fail to provide specific explanations for why *in camera* treatment is warranted for each exhibit. *Otto Bock*, at *4 (explaining that declaration's broad justifications covering hundreds of documents insufficient to support *in camera* treatment). The "heavy burden of showing good cause for withholding documents from the public record rests with the party requesting that documents be placed *in camera*." *In the Matter of N. Texas Specialty Physicians*, 2004 FTC LEXIS 109, at *3 (April 23, 2004).

The majority of the documents in Respondent's request are communications between or among co-conspirators, which Respondent has categorized as "Sensitive Personal Information" because they may contain personal telephone numbers or addresses.[1] It is axiomatic that Respondent's communications with co-conspirators are not secret or sufficiently material to its

[1] Mot., at 7 ("The document in this category are more numerous than any other."); *See, e.g.*, Mot., Exhibit B: {[redacted]} This is not an exhaustive list. Documents referenced in this motion are available on the disk submitted by Respondent as Exhibit B.

business to now cause competitive injury if disclosed. For example, **{** **}** contains a message to **{** **}**, which was already placed on the public record in this matter: **{** **}** *See* Public Complaint ("Complaint"), dated February 12, 2018, at . **{** **}** also contains communications **{** **}**, which were already placed on the public record: **{** **}** *See id.* at It is difficult to see how documents containing already public information can be sufficiently secret and material to warrant wholesale *in camera* treatment. Similarly, requesting wholesale *in camera* treatment of documents in various categories that do not contain competitively sensitive information is an overreach. For example, granting wholesale *in camera* treatment of **{** **}** would have a perverse effect – it would deprive the public record of evidence necessary to understand the claims at issue, which is the primary countervailing consideration favoring disclosure. To the extent these materials may contain sensitive personal information (such as telephone numbers or personal addresses) or other specific, competitively sensitive information, that information can be redacted without requiring full and permanent *in camera* treatment. *In the Matter of Basic Research, LLC*, 2006 FTC LEXIS 14, at *5-6 (Jan. 25, 2006) (permitting redaction of customer names without requiring *in camera* treatment for such documents).[2]

[2] For any potential exhibits offered by Complaint Counsel, Complaint Counsel is willing to reach agreement on such redactions.

The remaining documents subject to Respondent's *in camera* request are supported by a declaration containing general justifications for each category of documents. For example, Respondent claims that the documents categorized as "Confidential Performance Metrics" "should be afforded a high degree of protection" because if publicly disclosed, they "could give competitors extensive and unwarranted insight into Schein's business operations." Mot., Exhibit A, at ¶ 7. Respondent, a publicly traded company, inexplicably includes **{** [redacted] **}**[3] This broad justification does not apply to all documents in this category, and generalizations fall short of meeting the heavy burden to show good cause. This Court recently explained that "broad justifications" that "cover[] hundreds of documents does not provide sufficient information . . . to determine whether the documents meet the Commission's strict standard for in camera treatment." *Otto Bock*, at *4.

A further review of the documents indicates that serious competitive injury would not result from disclosure of these documents. For example, Respondent seeks *in camera* treatment of portions of **{** [redacted] **}** in the "Customer Contracts" category, but these portions of the exhibit contain publicly available information that is already on the public docket: **{** [redacted] **}** *See* Complaint, at [redacted]. **{** [redacted] **}** is similar. Though categorized as "Non-Public Price and Service Information," **{** [redacted]

[3] Mot., Exhibit B: **{** [redacted] **}**

[redacted]**}** These examples suggest that Respondent's process for determining which types of documents should receive *in camera* status is systematically flawed.

2. Respondent Fails to Overcome Presumption Denying *In Camera* Treatment for Information More Than Three Years Old

Respondent seeks *in camera* treatment for over 200 documents that are more than three years old. Morever, over 110 of these documents are over five years old.[4] There is a presumption against *in camera* treatment for such documents unless Respondent's declaration shows that such material remains competitively sensitive. *Otto Bock*, at *1; *1-800 Contacts*, at *3. Respondent states it could suffer competitive harm from the disclosure of contracts that are several years old or no longer operative, and speculates that "competitors or customers could use past contracts to infer information about Schein's current or future contracts or customer relationships." Mot., Exhibit A, at ¶ 5. Granting protection based on a mere possibility that information about a company might be inferred from older, non-operative documents would engulf the presumption favoring disclosure. Respondent offers only weak justification for why the Court should depart dramatically from this presumption and precedent and grant *in camera* treatment to information that is more than three years old.

3. Respondent's Request for *In Camera* Treatment of Entire Transcripts, Experts Reports, and Interrogatories is Inappropriate

Respondent seeks *in camera* treatment for entire transcripts of depositions.[5] Prior rulings by this Court make clear that "*in camera* treatment will not be granted to entire depositions." *Basic Research*, at *4. Instead, a party requesting *in camera* treatment must designate the

[4] *See, e.g.*, Mot., Exhibit B: {[redacted]**}**

[5] Mot., Exhibit B: {[redacted]**}**

specific portions of the testimony that it seeks to protect from public disclosure. *Id.* (citing *In re Aspen Tech., Inc.*, 2004 FTC LEXIS 56, at *5-6 (May 5, 2004)). Respondent's designations, moreover, must be "narrowly tailored" to cover only those portions of the transcript that contain the allegedly competitively sensitive information. *Id.* at *4-5; *see also In re Union Oil Co. of Calif.*, 2005 FTC LEXIS 9, at *1 (Jan. 19, 2005).

Respondent also improperly seeks *in camera* treatment for entire reports of both sides' experts[6] and entire sets of responses to interrogatories.[7] *Basic Research*, at *5 (requiring applicant to seek *in camera* treatment only for portions of reports or interrogatory responses "that meet the Commission's standard.") (internal citations omitted). In addition, this Court's Scheduling Order also instructs parties to prepare public and non-public versions of each expert report, which contemplates that expert reports should be placed on the public record. Scheduling Order, dated March 14, 2018. Blanket designations of expert reports fail to make the required, particularized showing of good cause for protection from disclosure. Such designations also render an adjudicative proceeding unmanageable by essentially requiring experts to be examined entirely *in camera* and render the public nature of a trial meaningless. Indeed, this Court has rejected such requests for those very reasons. *Otto Bock*, at *5.

4. Respondent Fails to Show Exceptional Circumstances Warrant Indefinite or Even Ten-Year *In Camera* Treatment

Even for records that may qualify for *in camera* treatment, Schein's motion overreaches by seeking to have materials withheld from the public record for an excessive period of time. For example, it seeks ten-year protection for all "Customer Contracts," "Non-Public Price and Service Information," and "Confidential Strategic and Business Plans" categories. As noted

[6] Mot., Exhibit B: {[redacted]}

[7] Mot., Exhibit B: {[redacted]}

above, Schein seeks this protection for contracts even when they are expired or no longer operative. It similarly seeks ten-year protection for the "Confidential Strategic and Business Plans" category, claiming these involve "near-term and long-term plans to compete" with no explanation of why or how that document would disclose its current plans. Unless these documents rise to the level of trade secrets (Respondent does not allege they do), this request should be denied. *In camera* treatment for ordinary business records is "typically provided for two to five years. *Otto Bock*, at *3; *In the Matter of McWane, Inc.*, 2012 FTC LEXIS 143, at *5 (Aug. 17, 2012).

IV. CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that the Court deny Respondent's motion for *in camera* treatment without prejudice until it fully satisfies the requirements of Rule 3.45(b).

Respectfully submitted,

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I hereby certify that on October 10, 2018, 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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CERTIFICATE OF 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 documents that is available for review by the parties and the adjudicator.

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