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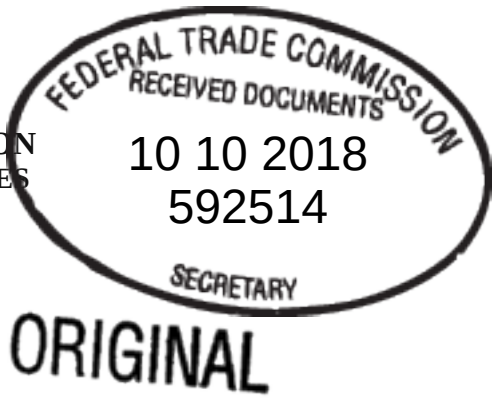

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES

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 BENCO DENTAL SUPPLY CO.'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. Benco Dental Supply Co. ("Respondent" or "Benco") fails to meet that standard. Benco overreaches by seeking to withhold from the public record over two hundred documents, including communications with its competitors Patterson and Schein, widely disseminated public information, entire deposition transcripts, and entire expert reports and documents. In addition, Respondent inexplicably seeks either ten-year or indefinite protection for all these documents without showing the exceptional circumstances to warrant extended protection. Most fatally, Respondent fails to provide sufficient justification for its request aside from bare conclusions in a cursory 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 204 potential trial exhibits allegedly containing confidential information. These exhibits fall into at least one of the following categories: (1) Customer-Specific Price and Volume Information; (2) Pricing Strategy Information; (3) Information Regarding Price-Setting Processes; (4) Business Plans; and (5) Sensitive Personal Information. Mot., at 5. Respondent seeks full *in camera* treatment for all documents, rather than specifically identifying portions containing sensitive information for partial *in camera* treatment. Mot., Exhibit B. Respondent also seeks *in camera* treatment for either ten years or an indefinite period for all documents. *Id.* Respondent submitted a declaration of its Interim General Counsel, Rebecca Warren, 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 a declaration's broad justifications covering hundreds of documents was insufficient). 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).

Respondent seeks in camera treatment of 203 documents, which fall into at least one of five identified categories. The declaration attached by Respondent provides nothing more than general and conclusory justifications for each category of documents. For example, Respondent's declaration provides the following justification for 99 documents, or nearly half of all documents at issue, in the category "Business Plans": "The public release of these materials would harm Benco because they reveal Benco's current and future plans to improve its business and compete in the market; Benco's competitors could use them to plan their own competitive

activities or unfairly undermine Benco's plans for growth. I believe this information should remain confidential." Mot., Exhibit A, at ¶ 9. However, this category improperly contains documents depicting co-conspirator communications, which are by nature not secret and already known outside Respondent's business. For example, **{** **}** contains a message from **{** **}**, which was already placed on the public record in this matter: **{** **}**[1] *See* Public Complaint, dated February 12, 2018, at . **{** **}** also contains communications **{** **}**, which were already placed on the public record: **{** **}** *See id.* at . To the extent the documents contain sensitive personal information (like telephone numbers or personal addresses), that information can be redacted without requiring 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 request for such documents); *see also infra* Section III.A.4.

It is difficult to see how documents containing already public information are sufficiently secret and material to warrant wholesale *in camera* treatment. Moreover, asserting that public disclosure "*would* harm Benco" or that "competitors *could* use" such materials does not rise to the standard requiring a showing that disclosure "will likely" result in serious competitive harm. Mot., Exhibit B, at ¶ 9; 16 C.F.R. § 3.45(b). This Court recently found a declaration with nearly

[1] Exhibits referenced in this motion are available on the disk submitted by Respondent as Exhibit B.

identical language explaining why "Business Plan and Strategies" documents should be confidential were "broad justifications" that did not "provide sufficient information about the documents . . . 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 **{** **}**, categorizing it as "Business Plans" and "Pricing Strategy Information." Mot., Exhibit B, at 1. The exhibit, however, **{** **}** Respondent argues that this exhibit contains competitively sensitive information. Mot., Exhibit B, at 1; Mot., at 6-7. But Respondent does not even attempt to explain how information ***already*** shared with third parties is sufficiently secret, material to Respondent's business, and would likely now result in serious competitive harm if disclosed. **{** **}** also suffers the same problem. Respondent claims this document contains "Information Regarding Price-Setting Processes" and "Pricing Strategy Information." Mot., Exhibit B, at 5. The document is **{** **}** Here, again, Respondent fails to explain how **{** **}** could possibly be sufficiently secret, material to Respondent's business, and reveal competitively sensitive information. 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

Many of the documents that are the subject of Respondent's motion are more than three years old, some dating as far back as November 2011.[2] There is a presumption against *in camera* treatment for such information unless Respondent's declaration shows that such material remains competitively sensitive. *Otto Bock*, at *1*; 1-800 Contacts,* at *3. Respondent provides no justification for the vast majority of these documents. Respondent provides only a one-sentence conclusion for the "Information Regarding Price-Setting Process" category, claiming that "information that is years old is sensitive" and should remain confidential because it "could reveal current (and future) approach[es] to price negotiations." Mot., Exhibit A, at ¶ 8. But Respondent provides little justification for how and why such information still remains competitively sensitive. Respondent fails to explain 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 and Expert Reports Is Inappropriate

Respondent improperly seeks *in camera* treatment for entire transcripts of 28 investigational hearings and depositions (including transcripts of depositions that have not yet

[2] Mot., Exhibit B: [redacted]}

occurred).[3] Prior rulings by this Court make clear that "[i]n camera treatment will not be granted to entire depositions." *Basic Research,* at *4. Instead, a party requesting *in camera* treatment must designate the 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.[4] *Basic Research,* at *5* ("In camera treatment shall be sought only for those portions of the reports that meet the Commission's standard.") (internal citations omitted). This Court's Scheduling Order also instructs parties to prepare public and non-public versions of each 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.

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[3] Mot., Exhibit B: [redacted]

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

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

Respondent seeks ten-year or indefinite *in camera* treatment for all documents identified in its motion. Even if some materials warrant *in camera* treatment, unless such documents rise to the level of trade secret (which they do not) or contain sensitive personal information, this overreaching 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). Respondent also seeks indefinite *in camera* treatment for materials containing non-private co-conspirator communications, arguing that portions of such communications contain sensitive personal information.[5] Mot., Exhibit A, at ¶ 10; Mot., Exhibit B. In such cases, sensitive personal information can be redacted without seeking full *in camera* treatment. *Basic Research*, at *5-6 (permitting redaction of customer names without requiring in camera request for such documents).

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).

[5] Mot., Exhibit B: {[redacted]} As to potential exhibits offered by Complaint Counsel, Complaint Counsel is willing to reach agreement on such redactions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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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