

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



ORIGINAL

DOCKET NO. 9379

In the Matter of

BENCO DENTAL SUPPLY CO.,
a corporation,

HENRY SCHEIN, INC.,
a corporation, and

PATTERSON COMPANIES, INC.,
a corporation.

Respondents.

**NON-PARTY BURKHART DENTAL SUPPLY COMPANY, INC.'S
UNOPPOSED MOTION FOR *IN CAMERA* TREATMENT**

Pursuant to Rule 3.45 of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.45(b) (2018), non-party The Burkhart Dental Supply Company, Inc. ("Burkhart") respectfully moves this Court for *in camera* treatment of 32 documents and excerpts of four deposition transcripts, all of which contain competitively-sensitive, confidential business information (the "Confidential Exhibits").

I. FACTUAL BACKGROUND

Burkhart is a full-service dental supplier based in Tacoma, Washington, that has been serving dentists since 1888. Declaration of Jeff Reece in Support of Non-Party Burkhart Dental Supply Company, Inc.'s Motion for *In Camera* Treatment, dated September 26, 2018, attached hereto as **Exhibit A** ("Reece Decl.") ¶ 1. Burkhart provides equipment, repair, supplies, consulting, continuing education, and other services to dentists. Burkhart is a direct competitor of respondents Benco Dental Supply Co., Henry Schein, Inc., and Patterson Companies, Inc. (collectively, "Respondents"). *Id.* ¶ 2.

Burkhart produced certain documents and data in this proceeding in response to a subpoena and civil investigative demand from the Federal Trade Commission (the “Commission”). Some of those documents and that data already had been produced in the federal litigation titled *In re Dental Supplies Antitrust Litigation*, No. 16-cv-696-BMC-GRB (E.D.N.Y.) (the “Federal Action”). Burkhart was a defendant in the Federal Action, but was dismissed on September 20, 2017, prior to the settlement of the Federal Action. *Id.* ¶ 3. Through one of its officers, Jeff Reece, Burkhart also provided testimony in this proceeding during an investigational hearing held on June 19, 2017, and through a deposition conducted on July 16, 2018. Mr. Reece also provided testimony in the Federal Action as Burkhart’s corporate representative, and in his individual capacity, both on August 30, 2017. *Id.* ¶ 4.

On September 17, 2018, Burkhart received formal notices pursuant to Rule 3.45(b) of the Commission’s Rules of Practice, 16 C.F.R. § 3.45(b). In those notices, Complaint Counsel and Respondents stated their intention to offer certain documents, data and testimony in the upcoming administrative trial (collectively, the “Exhibits”), and identified those Exhibits. *See* 9/17/18 Notices, attached as **Exhibit B**. Specifically, Complaint Counsel identified 98 Exhibits, and Respondents identified 13 Exhibits. The Exhibits include all four of the transcripts containing over 600 pages of Reece’s testimony, although the notices do not identify which portions of that testimony are to be offered at the administrative trial. *Id.* ¶ 5. When the information contained in the Exhibits was disclosed to the parties herein, all of the Exhibits were designated by Burkhart as “Confidential” under the Protective Order in this proceeding, or as “Confidential” or “Attorneys’ Eyes Only” under the Amended Protective Order in the Federal Action. *Id.* ¶ 6.

Upon careful review, Burkhart has determined that—out of the 111 Exhibits identified by the parties—the public disclosure of 32 Exhibits in addition to specific excerpts of the four

transcripts of Mr. Reece's testimony (*i.e.*, the Confidential Exhibits) would cause serious competitive injury to Burkhart. *See id.* ¶ 7. Burkhart therefore seeks *in camera* treatment for a period of five years for the Confidential Exhibits.¹ The reasons that Burkhart seeks protection for the Confidential Exhibits are discussed in further detail below, as well as in the Reece Declaration.

II. ARGUMENT

In camera treatment of material is appropriate when its "public disclosure will likely result in a clearly defined, serious injury to the person, partnership, or corporation requesting" such treatment. 16 C.F.R. § 3.45(b). The proponent demonstrates serious competitive injury by showing that the documents are secret and that they are material to the business. *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980); *In re Dura Lube Corp.*, 1999 F.T.C. LEXIS 255, at *5 (Dec. 23, 1999). In this context, courts generally attempt "to protect confidential business information from unnecessary airing." *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961).

A. Public Disclosure of the Confidential Exhibits Will Cause Serious Competitive Injury to Burkhart

The Confidential Exhibits are both secret and material to Burkhart's business as discussed in detail in the Reece Declaration. In sum, the materials at issue contain information of competitive significance to Burkhart, including: raw sales data; agreements and other documents containing the terms and structure of Burkhart's relationship with group purchasing organizations ("GPOs"); other generally sensitive and confidential commercial information, including pricing, sales strategies and internal guidelines; training and compensation information; and legal matters. *See generally*, Reece Decl. ¶¶ 9-22. Such information and processes are proprietary to Burkhart and

¹ A complete list of the Confidential Exhibits is attached as Exhibit 1 to the Reece Decl. With the exception of the transcripts, copies of the Confidential Exhibits are attached as composite **Exhibit C**. However, CX4443 contains very large Microsoft Excel files that cannot be submitted electronically. Burkhart will provide copies of these files directly to the Court on a DVD. Copies of the transcripts are attached as **Exhibit D**. The portions of the transcripts for which Burkhart seeks *in camera* treatment are highlighted for the Court's convenience.

not shared with Burkhart’s competitors or the public. *Id.* ¶ 6. Indeed, when Burkhart produced the Confidential Exhibits, it took steps to maintain confidentiality by designating the documents as “Confidential” or “Attorneys’ Eyes Only” in accordance with the protective orders governing their disclosure. *See id.* Disclosure of the Confidential Exhibits will cause Burkhart competitive injury because that information could be used by Burkhart’s competitors (including the Respondents in this proceeding) or its customers to gain a competitive advantage over Burkhart. Reece Decl. ¶¶ 10, 13, 16, 19, 22. Accordingly, *in camera* treatment is appropriate. *See In re Dura Lube*, 1999 F.T.C. LEXIS 255, *7 (“The likely loss of business advantages is a good example of a ‘clearly defined, serious injury.’”).

Additionally, Burkhart’s status as a third party is relevant to the treatment of the Confidential Exhibits. The Commission has held that “[t]here can be no question that the confidential records of businesses involved in Commission proceedings should be protected insofar as possible.” *H.P. Hood & Sons*, 58 F.T.C. at 1186. This is especially so in the case of a third-party, which deserves “special solicitude” in its request for *in camera* treatment for its confidential business information. *See In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500, 500 (1984) (“As a policy matter, extensions of confidential or *in camera* treatment in appropriate cases involving third party bystanders encourages cooperation with future adjudicative discovery requests.”). Burkhart’s third-party status therefore weighs in favor of granting *in camera* treatment.

B. The Confidential Exhibits are of the Type for which In Camera Treatment is Routinely Granted

The Confidential Exhibits are categorized in the Reece Declaration based on their type and subject matter. Reece Decl. ¶8. As discussed in detail below, they fall into categories that are routinely granted *in camera* treatment by the Commission.

1. Exhibit Containing Raw Sales Data

Burkhart produced its raw sales data, which contains the individual purchases of dental supplies and equipment, the price, any sales amount, the customer, the associated sales representatives and account managers, the cost to Burkhart and other information. This data also could be used to calculate margins on a purchase-by-purchase basis. *Id.* ¶ 9. Such raw sales data is routinely granted *in camera* protection. See *In the Matter of Otto Bock HealthCare North America, Inc.*, 2018 FTC LEXIS 111, at *11 (July 6, 2018) (granting *in camera* treatment for 5 years for financial data revealing product-level sales, monthly sales reports by product line and distribution channel, sales targets, margins, and pricing information); *In re Tronox Ltd.*, 2018 FTC LEXIS 78, at *23-24 (May 15, 2018) (granting *in camera* treatment for 10 years for commercially sensitive information regarding market share entry, sales data, product grades, capital costs, and projected plant costs); *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55, at *27-28 (April 4, 2017) (granting *in camera* treatment for “sales data”).

In camera treatment should be granted to this data (CX4443) because it is extremely sensitive, and is not shared with Burkhart’s competitors or customers. Its public disclosure would seriously harm Burkhart because its competitors would have detailed, granular information about every sale by Burkhart, which could be used to target Burkhart’s customers. Also, if the individual customer data were made publicly available, it would harm Burkhart’s reputation with those customers and could dissuade potential customers from using Burkhart. Reece Decl. ¶ 10. Also, the competitive injury to Burkhart from the public disclosure of this sales data is not diminished for the data that is more than three years old, because that data could be used to harm Burkhart in the same manner as the more recent data. *Id.*

2. ***Exhibits Regarding Burkhart's Relationship with Group Purchasing Organizations***

Burkhart maintains or has maintained relationships with multiple group purchasing organizations (“GPOs”). On behalf of their member dentists, GPOs negotiate volume discounts and other savings directly with suppliers of dental supplies and equipment like Burkhart. Kois Tribal Management, Inc. (“Kois”), and SmileSource, LLC (“SmileSource”) are the two largest GPOs with which Burkhart has business relationships. Burkhart’s sales to members of Kois and SmileSource constitute a material portion of its overall sales. *Id.* ¶ 11.

There are multiple Exhibits about Burkhart’s relationships with GPOs, including the terms of those relationships, financial or otherwise. Those Exhibits are detailed in the table found in paragraph 12 of the Reece Declaration, and include the agreements between Burkhart and Kois and SmileSource, documents pertaining to the negotiations that led to those agreements, communications or discussions of sales strategies that reveal some the confidential terms of those agreements, sales reports or other financial information or analyses pertaining to those agreements, and testimony about the agreements and Burkhart’s relationships with GPOs. *Id.* ¶ 12. The details of similarly sensitive business relationships have been granted *in camera* treatment by the Commission. *See In re Otto Bock HealthCare*, 2018 FTC LEXIS 111, at *11 (granting *in camera* treatment for 5 years for information revealing distribution channel, sales targets, margins, distributor contracts and pricing information); *In re Tronox*, 2018 FTC LEXIS 83, at *25 (granting *in camera* treatment for 10 years for documents disclosing supplier identities, contract terms, and detailed purchasing data).

The same result should obtain here. If the Exhibits in this category were disclosed to Burkhart’s competitors, it would cause serious competitive injury to Burkhart in multiple ways. *First*, its competitors would learn the terms on which Burkhart does business with GPOs. That

information could be used by competitors to target Burkhart's GPO relationships, to Burkhart's detriment. *Second*, Burkhart's negotiating position with other GPOs could be negatively impacted. *Third*, some of these Exhibits contain detailed information about individual customer purchases, the disclosure of which could harm Burkhart's reputation with its customers. *Fourth*, some of these Exhibits reflect contract negotiations, and their disclosure would disadvantage Burkhart by revealing its negotiating positions and strategy. *Fifth*, some of the Exhibits reveal Burkhart's internal methods for evaluating its business relationships, the public disclosure of which would harm Burkhart if known by its competitors or customers, because that information could be used in future negotiations. Reece Decl. ¶ 13.

Furthermore, that many of the Exhibits in this category are more than three years old does not lessen the competitive harm to Burkhart from their public disclosure. The Burkhart and Kois relationship was governed by the terms of the Letter of Intent (CX1032) until they entered a new agreement on January 4, 2016 (CX4223), which contains similar terms and structure to the Letter of Intent. And, although the 2014 SmileSource agreement (CX4103 & CX4240) was replaced by a new agreement (CX4245), its public disclosure would still harm Burkhart because it reflects the nature of the relationship between Burkhart and SmileSource, and contains some of the same terms as the new agreement. The financial analyses of Burkhart's relationship with SmileSource (CX0219 and CX4239) and Kois (CX0220 and CX4222) reveal some of the financial terms of those agreements, in addition to certain evaluative methods and customer purchasing data. The communications related to negotiating the Kois agreement and the strategy for making sales under that agreement (CX4126, CX4288, CX4218, CX4219) reveal negotiating positions, sales strategy, and certain terms governing the Kois relationship. The SmileSource and Kois relationships are

ongoing, so the details about those relationships—including information that is greater than three years old—is still confidential and sensitive. *Id.* ¶ 14.

3. Exhibits Containing Other Generally Sensitive Commercial Information, Including Pricing, Sales Strategies, and Internal Guidelines

There are multiple Exhibits containing Burkhart’s generally sensitive commercial information. As detailed in the table found in paragraph 15 of the Reece Declaration, these Exhibits contain commercially sensitive information such as sales breakdowns, sales strategies, discussions of specific customer accounts, internal pricing arrangements, market impressions, and other analyses of Burkhart’s business. *Id.* ¶ 15. Documents containing the same types of sensitive commercial information has been granted *in camera* treatment in previous Commission cases. *See In re Otto Bock HealthCare*, 2018 FTC LEXIS 111, at *12 (granting *in camera* treatment for 5 years for strategic plans, marketing insights, internal competitive analysis, and market conditions, and testimony relating to the same information); *In re Tronox*, 2018 FTC LEXIS 78, at *32 (granting *in camera* treatment for 10 years for business plans, analyses of prices, capacity, supply and demand, and market forecasts).

For the same reasons, the Exhibits in this category should be granted *in camera* treatment here. The public disclosure of these Exhibits would cause Burkhart serious competitive harm because it would reveal to competitors and customers alike Burkhart’s internal business strategies, specific customer account information, forecasts, methods for targeting customers, revenue breakdowns, and terms of internal discount and pricing programs. This information could negatively affect Burkhart in future negotiations with customers, and could provide an unfair advantage to Burkhart’s competitors. Burkhart’s discount programs and internal processes and procedures for setting pricing for its larger clients are utilized to gain a competitive advantage. That advantage could be harmed if Burkhart’s competitors learn the inner-workings of these

programs. Also, Burkhart could be harmed if its customers learned the strategies and guidelines governing the pricing arrangements with other customers. Reece Decl. ¶ 16.

That several of these Exhibits are more than three years old does not diminish the potential for serious competitive injury to Burkhart from their public disclosure. One document (CX4119 & RX1012) describes the terms governing the SPA program, which is still in effect today. Another discusses a specific customer account (CX4248), and includes margin and sales information that remains relevant and sensitive. The third document (CX4130) contains a detailed and thorough appraisal of Burkhart's business, including a valuation, strategy discussions, and sensitive financial information. *Id.* ¶ 17.

4. Exhibits Regarding Employee Training and Compensation

Several Exhibits pertain to internal training methods and materials, and discuss employee compensation, as set forth in the table in paragraph 18 of the Reese Declaration. These Exhibits also contain specific information about Burkhart's business relationships, including details about sales and pricing, as well as information about the compensation of specific employees. *Id.* ¶ 18. These types of materials have been granted *in camera* treatment numerous times by the Commission. *See, e.g., See In re Otto Bock HealthCare*, 2018 FTC LEXIS 111, at *12 (2018) (granting *in camera* treatment for 5 years for confidential sales support and training materials and testimony relating to the same information); *In the Matter of Impax Laboratories, Inc.*, 2017 FTC LEXIS 122, at *7 (Oct. 20, 2017) (granting *in camera* treatment for 10 years for marketing initiatives, discounting tactics, training plans, goals for negotiations, and internal training and compliance information).

Disclosure of the compensation and training documents would cause serious competitive injury to Burkhart because its competitors would learn how Burkhart trains and compensates its sales staff. And some of the information discusses compensation of particular employees by name,

the disclosure of which would not only be harmful to Burkhart, but implicates the privacy interests of those employees. Reece Decl. ¶ 19. The one training document that is more than three years old (CX4268) contains information that remains pertinent to Burkhart's business. The public disclosure of this document would subject Burkhart to the same competitive harms as the other, more recent, training and compensation documents. *Id.* ¶ 20.

5. *Testimony Regarding Legal Matters*

During the depositions in the Federal Action, Jeff Reece testified about certain legal matters, including a confidential settlement and certain training initiatives. All of this testimony was designated as "Attorneys' Eyes Only." Reece Decl. ¶ 21. There is no conceivable reason why this testimony would be used at the upcoming hearing. However, out of an abundance of caution, Burkhart is seeking *in camera* treatment for this testimony because its public disclosure would significantly harm Burkhart. The settlement terms are confidential, and issues pertaining to legal training are inherently sensitive. *Id.* ¶ 22. Testimony discussing confidential settlement information and training materials have been granted *in camera* treatment. *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55, at * [] (2017) (granting *in camera* treatment indefinitely for transcripts of deposition of employees which included confidential and competitively sensitive information); *In re Impax Labs.*, 2017 FTC LEXIS 122 at *6 (granting *in camera* treatment to confidential settlement agreements and drafts thereof). Just as in those decisions, Burkhart's testimony regarding legal matters should be granted *in camera* treatment here.

III. CONCLUSION

For the reasons set forth above and in the Reece Declaration, Burkhart respectfully requests that this Court grant permanent *in camera* treatment for the Confidential Exhibits in their entirety.

Dated: September 26, 2018

Respectfully submitted,

/s/Jonathan Montcalm

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STATEMENT REGARDING MEET AND CONFER

The undersigned certifies that counsel for non-party Burkhart notified counsel for the parties via email on September 26, 2018 that it would be seeking *in camera* treatment of the Confidential Documents. Both Complaint Counsel and Respondents' counsel indicated that they would not object to Burkhart's motion.

Dated: September 26, 2018

/s/Jonathan Montcalm

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EXHIBIT A

[NON-PUBLIC]

EXHIBIT B

[NON-PUBLIC]

EXHIBIT C

[NON-PUBLIC]

EXHIBIT D

[NON-PUBLIC]

Notice of Electronic Service

I hereby certify that on September 26, 2018, I filed an electronic copy of the foregoing Non-Party Burkhart Dental Supply Co.'s Unopposed Motion for In Camera Treatment, with:

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I hereby certify that on September 26, 2018, I served via E-Service an electronic copy of the foregoing Non-Party Burkhart Dental Supply Co.'s Unopposed Motion for In Camera Treatment, upon:

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