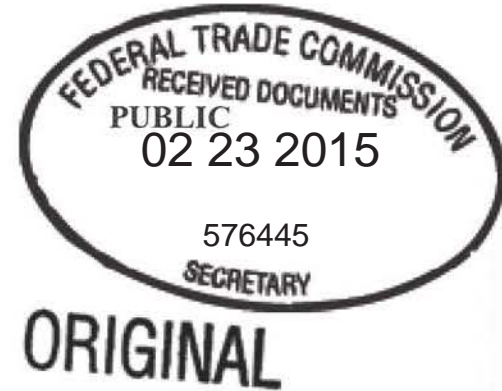


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



_____)
In the Matter of)
)
Jerk, LLC, a limited liability company,)
also d/b/a JERK.COM, and)
)
John Fanning, individually and as a member of)
Jerk, LLC,)
Respondents.)
_____)

DOCKET NO. 9361

ORDER ON MOTIONS FOR *IN CAMERA* TREATMENT

I. PROCEDURAL BACKGROUND

Pursuant to Rule 3.45(b) of the Rules of Practice of the Federal Trade Commission (“FTC”), the Scheduling Order entered in this matter on May 28, 2014, and the First Revised Scheduling Order entered in this matter on January 7, 2015, which reset the deadline for filing motions for *in camera* treatment to February 17, 2015, FTC Complaint Counsel and two non-parties have filed motions for *in camera* treatment. Neither Jerk, LLC, nor John Fanning (“Respondents”) have filed any oppositions to these motions.

As set forth below, the motion filed by Complaint Counsel is GRANTED; the motion filed by Non-party Larry D. Cox is GRANTED IN PART and DENIED IN PART; and the motion filed by Non-party Stripe, Inc. is GRANTED.

II. LEGAL STANDARDS

Under Rule 3.45(b), the Administrative Law Judge may order that material offered into evidence “be placed *in camera* 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).

A. Clearly defined, serious injury

“[R]equests 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, 500 (1984), quoting *In re H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1961 FTC LEXIS 368 (Mar. 14, 1961). Applicants must “make a clear showing that the information concerned is sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury.” *In re General Foods Corp.*, 95 F.T.C. 352, 1980 FTC LEXIS 99, at *10 (Mar. 10, 1980). If the applicants for *in camera* treatment make this showing, the importance of the information in explaining the rationale of decisions at the Commission is “the principal countervailing consideration weighing in favor of disclosure.” *Id.*

The Federal Trade Commission recognizes the “substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons.” *Hood*, 1961 FTC LEXIS 368, at *5-6. A full and open record of the adjudicative proceedings promotes public understanding of decisions at the Commission. *In re Bristol-Myers Co.*, 90 F.T.C. 455, 458 (1977). A full and open record also provides guidance to persons affected by its actions and helps to deter potential violators of the laws the Commission enforces. *Hood*, 58 F.T.C. at 1186. The burden of showing good cause for withholding documents from the public record rests with the party requesting that documents be placed *in camera*. *Id.* at 1188.

In order to sustain the burden for withholding documents from the public record, an affidavit or declaration is required, demonstrating that a document is sufficiently secret and sufficiently material to the applicant’s business that disclosure would result in serious competitive injury. *See In re North Texas Specialty Physicians*, 2004 FTC LEXIS 109, at *2-3 (Apr. 23, 2004). To overcome the presumption that *in camera* treatment will not be granted for information that is more than three years old, applicants seeking *in camera* treatment for such documents must also demonstrate, by affidavit or declaration, that such material remains competitively sensitive. In addition, to properly evaluate requests for *in camera* treatment, applicants for *in camera* treatment must provide a copy of the documents for which they seek *in camera* treatment to the Administrative Law Judge for review.

Under Commission Rule 3.45(b)(3), indefinite *in camera* treatment is warranted only “in unusual circumstances,” including circumstances in which “the need for confidentiality of the material . . . is not likely to decrease over time. . . .” 16 C.F.R. § 3.45(b)(3). The Commission has nonetheless recognized that “in some unusual cases ‘the competitive sensitivity or the proprietary value of the information for which *in camera* treatment is requested will not necessarily diminish, and may actually increase, with the passage of time.’” *In re Coca-Cola Co.*, 1990 FTC LEXIS 364, at *7 (Oct. 17, 1990) (quoting Commission comments on amendments to Rule 3.45). In determining the length of time for which *in camera* treatment is appropriate, the distinction between trade secrets and ordinary business records is important because ordinary business records are granted less protection than trade secrets. *See Hood*, 58 F.T.C. at 1189. “Trade secrets” are primarily limited to secret formulas, processes, and other secret technical information. *Id.*; *General Foods*, 95 F.T.C. at 352. “Ordinary business records” includes names of customers, prices to certain customers, and costs of doing business and profits. *Hood*, 58 F.T.C. at 1189.

The Commission has recognized that it may be appropriate to provide *in camera*

treatment for certain business records. *In re Champion Spark Plug Co.*, 1982 FTC LEXIS 85, at *2 (April 5, 1982); *see Hood*, 58 F.T.C. at 1188-89; *Kaiser Alum.*, 103 F.T.C. at 500. Where *in camera* treatment is granted for business records, such as business strategies, marketing plans, pricing policies, or sales documents, it is typically provided for two to five years. *E.g.*, *In re Union Oil Co. of Cal.*, 2004 FTC LEXIS 223, at *2 (Nov. 22, 2004); *Conference Interpreters*, 1996 FTC LEXIS 298, at *13-14 (June 26, 1996); *Champion Spark Plug*, 1982 FTC LEXIS 85 at *2 and 1982 FTC LEXIS 92, at *2 (March 4, 1982).

B. Sensitive personal information

Under Rule 3.45(b) of the Rules of Practice, after finding that material constitutes “sensitive personal information,” the Administrative Law Judge shall order that such material be placed *in camera*. 16 C.F.R. § 3.45(b). “Sensitive personal information” is defined as including, but not limited to, “an individual’s Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver’s license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual’s medical records.” 16 C.F.R. § 3.45(b).

In addition to these listed categories of information, in some circumstances, individuals’ names and addresses, and witness telephone numbers have been found to be “sensitive personal information” and accorded *in camera* treatment. *In re LabMD, Inc.*, 2014 FTC LEXIS 127 (May 6, 2014); *In re McWane, Inc.*, 2012 FTC LEXIS 156 (September 17, 2012). *See also In re Basic Research, LLC*, 2006 FTC LEXIS 14, at *5-6 (Jan. 25, 2006) (permitting the redaction of information concerning particular consumers’ names or other personal data where it was not relevant).

“[S]ensitive personal information . . . shall be accorded permanent *in camera* treatment unless disclosure or an expiration date is required or provided by law.” 16 C.F.R. § 3.45(b)(3).

III. COMPLAINT COUNSEL’S MOTION

A. Sensitive Personal Information

Complaint Counsel seeks permanent *in camera* treatment for the following categories of sensitive personal information of consumers who have complained about Jerk.com, the business allegedly owned and/or controlled by Respondents, or whose profiles on the Jerk.com website were captured by FTC staff as part of this investigation: (1) names, (2) photographs, (3) telephone numbers, (4) addresses, (5) e-mail addresses, and (6) online user names. Although Respondents have not filed any opposition to Complaint Counsel’s motion, Complaint Counsel represents that Respondents do not oppose permanent *in camera* treatment for “identification numbers, photographs, children’s names/identification, emails, and usernames,” but that Respondents do oppose permanent *in camera* treatment for “names and addresses of witnesses.” Complaint Counsel maintains that the names and addresses of the consumers in this case constitute sensitive personal information.

The first set of trial exhibits for which Complaint Counsel seeks permanent *in camera* treatment consists of consumers' complaints about Jerk.com, including requests to have profiles removed from Jerk.com. Complaint Counsel proposes to redact the sensitive personal information of consumers falling in the six categories listed above from this first set of documents. Complaint Counsel asserts that consumer complainants would face abuse, harassment, and embarrassment if these individuals were identified through their personal information.

The second set of trial exhibits for which Complaint Counsel seeks permanent *in camera* treatment consists of screen and video captures of consumer profiles displayed on Jerk.com and documented by FTC staff between May 2012 and March 2013. Complaint Counsel asserts that the consumers recorded in these captures did not know that their profiles, and the sensitive personal information contained therein, were being documented as part of a law enforcement investigation and that they did not give their consent to these captures.¹

In this case, in light of the substantial privacy interest of protecting consumers from abuse, harassment, and embarrassment, consumer complainants' personally identifiable information, including consumers' personally identifiable Jerk.com profiles, should be shielded from disclosure. It does not appear that these individuals' personally identifying information has any bearing on either the allegations of the Complaint or the defenses of the Respondents. Thus, protection of this personally identifiable information would neither prejudice Respondents nor impede the public's ability to understand the arguments or evidence presented.

B. Sensitive Personal Financial Information

Complaint Counsel seeks permanent *in camera* treatment for the following categories of sensitive personal financial information: (1) financial account numbers, (2) credit card or debit card numbers, (3) financial transaction numbers, (4) tax identification numbers, (5) dates of birth, and (6) personal signatures. Complaint Counsel represents that Respondents do not oppose permanent *in camera* treatment for "financial information" and "identification numbers."

Rule 3.45(b) identifies "sensitive personal information" as including, but not limited to, Social Security numbers, taxpayer identification numbers, financial account numbers, credit card or debit card numbers, and dates of birth. 16 C.F.R. § 3.45(b). Financial transaction numbers and personal signatures, while not explicitly listed, are encompassed by the rule, as they also are individually identifiable pieces of information, the disclosure of which would expose the associated individuals to increased risk of harm.

C. Limited Set of Sensitive Personal Information

In addition to the requests for *in camera* treatment for the documents described above, Complaint Counsel requests permanent *in camera* treatment for the following categories of sensitive personal information contained in any other part of this action's evidentiary record:

¹ Complaint Counsel asserts that since the current online version of Jerk.com no longer displays these profiles and Respondents have not provided Jerk.com profile screenshots or code for the site in response to discovery requests, these captures remain the most reliable means of presenting evidence of what was displayed on Jerk.com.

(1) personal phone numbers, (2) home addresses, (3) personal e-mail addresses, and (4) personal online usernames. Complaint Counsel states that this sensitive information is contained in numerous places throughout the record, including deposition testimony and other documents. Complaint Counsel asks that *in camera* treatment be granted to the requested categories of personal sensitive information for any material to be introduced into the evidentiary record in this matter.

D. Summary

Complaint Counsel has demonstrated that the information for which it seeks *in camera* treatment constitutes “sensitive personal information” under the Commission’s Rules of Practice and therefore the information shall be accorded permanent *in camera* treatment, as set forth in Section VI below.

IV. MOTION FILED BY NON-PARTY LARRY D. COX

Non-party Larry D. Cox (“Cox”) filed a motion for *in camera* treatment seeking permanent *in camera* treatment for three documents, which Cox describes as containing personally identifiable information. Cox asserts that Respondent Jerk, LLC and Complaint Counsel do not oppose Cox’s motion.

The three documents that are the subject of Cox’s motion are: CX0089, CX0090, and CX0091. CX0089 is a one-page declaration executed by Cox, in which Cox describes his business or financial interactions with Respondent John Fanning and Jerk.com as an investor. CX0090 is a two-page certification of compliance and records, in which Cox certifies the authenticity of the documents he produced in response to the subpoena issued to Cox by Complaint Counsel. CX0091 is described by Cox as “investor related paperwork with personal notes,” and is titled “Standard Non-Disclosure Agreement.”

These three exhibits are “ordinary” business documents. Cox has not demonstrated that the public disclosure of these exhibits “will result in a clearly defined, serious injury to the person or corporation whose records are involved.” *Hood*, 58 F.T.C. 1184. With the exception of one line in CX0089, in which Cox explains the reason for receiving mail from Respondents at Cox’s business address, these documents do not contain “sensitive personal information,” as defined by the Commission’s Rules of Practice.

V. MOTION FILED BY NON-PARTY STRIPE, INC.

Non-party Stripe, Inc. (“Stripe”) filed a motion for *in camera* treatment seeking permanent *in camera* treatment for two competitively-sensitive, confidential business documents.² Stripe asserts that Respondent Jerk, LLC and Complaint Counsel both indicated to Stripe that they do not oppose Stripe’s motion and that Respondent Fanning did not respond to Stripe’s inquiry.

² Stripe states that Complaint Counsel’s Motion for *In Camera* Treatment includes a request for *in camera* treatment for the sensitive personal information contained in five documents produced by Stripe, CX0421-CX0425, and that Stripe joins in that request.

The two documents that are the subject of Stripe's motion are: CX0421 and CX0422. Stripe has supported its motion with the declaration of Mr. Jon Zieger, Stripe's general counsel and corporate secretary ("Zieger Declaration"). According to the Zieger Declaration: (1) CX0421 is a snapshot of Stripe's internal underwriting "dashboard," which reflects the underwriting and risk analysis of merchants who apply to do business with Stripe, and which contains confidential information about Stripe's personnel and how they evaluate customer applications; and (2) CX0422 is a printout of Stripe's account dashboard, which contains information about consumer transactions for a particular merchant account, the disclosure of which would reveal what systems Stripe uses to process the accounts and charges, as well as how underwriters at Stripe review risk and make assessments. According to the Zieger Declaration, Stripe keeps this information in strict confidence, Stripe has devoted significant resources in developing its proprietary processes and technical systems or formulas, and public disclosure of this information would result in serious competitive harm to Stripe. In addition, according to the Zieger Declaration, both CX0421 and CX0422 contain business and trade secrets in the form of internal Stripe dashboards, which apply Stripe's secret formulas and technical information, and the competitive significance of the technical formula and confidential criteria in CX0421 and CX0422 is unlikely to decrease over time.

Non-party Stripe has met its burden of demonstrating that CX0421 and CX0422 are entitled to indefinite *in camera* treatment.

VI. ORDER

As set forth above, Complaint Counsel's Motion is GRANTED. Complaint Counsel shall redact its exhibits in accordance with its proposed redactions listed in Attachment A to Complaint Counsel's Motion. Permanent *in camera* treatment is GRANTED for the following:

1. CX0044, CX0049-CX0050, CX0053, CX0064-CX0070, CX0260-CX0263, CX0265-CX0270, CX0422, CX0425, CX0428, and CX0507, in their entirety;
2. All consumer (1) names, (2) photographs, (3) telephone numbers, (4) addresses, (5) email addresses, and (6) online usernames in any material to be introduced into the evidentiary record for this matter, including any such information in CX0001-CX0040, CX0042, CX0047-CX0048, CX0259, CX0271, CX0403, CX0447-CX0449, CX0450, CX0529-CX0545, CX0550-CX0563, CX0565-CX0608, CX0610-CX0620, CX0622-CX0624, CX0626-CX0627, CX0745-CX0762, CX0764-CX0765, CX0775-CX0776, CX0810, and Complaint Counsel's Final Proposed Exhibit List and Final Witness List;
3. All (1) financial account numbers, (2) credit card numbers, (3) financial transaction numbers, (4) tax identification numbers, (5) dates of birth, and (6) personal signatures in any material to be introduced into the evidentiary record for this matter, including any such information in CX0051, CX0054, CX0091, CX0119, CX0237, CX0238, CX0240-CX0247, CX0264, CX0402, CX0411-CX0419, CX0421, CX0423-CX0424, CX0427, CX0481, CX0494, CX0735, CX0738, CX0770-CX0773; and

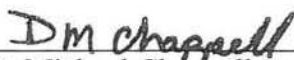
4. All (1) personal phone numbers, (2) home addresses, (3) personal e-mail addresses, and (4) personal online usernames in any material to be introduced into the evidentiary record for this matter.

As set forth above, Non-party Cox's Motion is GRANTED IN PART and DENIED IN PART. As to CX0089, Complaint Counsel is directed to prepare a redacted version of CX0089, which re-labels the exhibit as CX0089-A, and which redacts the sentence that begins with the words, "I was" and ends with the word, "address." As to all other information contained in CX0089, and as to CX0090 and CX0091, Cox's motion is DENIED.

As set forth above, Non-party Stripe's Motion is GRANTED. Indefinite *in camera* treatment is GRANTED for CX0421 and CX0422.

Each non-party that has documents or information that has been granted *in camera* treatment by this Order shall inform its testifying current or former employees that *in camera* treatment has been provided for the material described in this Order. At the time that any documents that have been granted *in camera* treatment are offered into evidence or before any of the information contained therein is referred to in court, the parties shall identify such documents and the subject matter therein as *in camera*, inform the court reporter of the trial exhibit number(s) of such documents, and request that the hearing go into an *in camera* session.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: February 23, 2015