

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



ORIGINAL

In the Matter of)	
)	PUBLIC
Otto Bock HealthCare North)	
America, Inc.)	Docket No.: 9378
)	
Respondent)	

NON-PARTY ABILITY PROSTHETICS & ORTHOTICS'
MOTION FOR INDEFINITE *IN CAMERA* TREATMENT

To the Honorable D. Michael Chappell
Chief Administrative Law Judge

Counsel for non-party Ability Prosthetics & Orthotics (“Ability”), pursuant to Rule 3.45(b) of the Federal Trade Commission’s Rules of Practice, 16 C.F.R. §3.45(b), respectfully moves this Court for indefinite *in camera* treatment of commercially-sensitive and confidential portions of the transcript of the April 4, 2018 deposition of Ability’s Chief Executive Officer Jeffrey M. Brandt, and for indefinite *in camera* treatment of the entirety of one competitively-sensitive, confidential business document designated as an exhibit to Mr. Brandt’s deposition.

Respectfully submitted,

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DATED: June 8, 2018

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

In the Matter of)	
Otto Bock HealthCare North America, Inc.)	PUBLIC
Respondent)	Docket No.: 9378

**NON-PARTY ABILITY PROSTHETICS & ORTHOTICS'
MEMORANDUM OF LAW IN SUPPORT OF ITS
MOTION FOR INDEFINITE *IN CAMERA* TREATMENT**

Pursuant to Rule 3.45(b) of the Federal Trade Commission's Rules of Practice, 16 C.F.R. §3.45(b), Counsel for non-party Ability Prosthetics & Orthotics ("Ability") submits this Memorandum of Law in support of Ability's Motion, filed this date, for indefinite *in camera* treatment of commercially-sensitive and confidential portions of the transcript of the April 4, 2018 deposition of Ability's Chief Executive Officer Jeffrey M. Brandt (the "Confidential Testimony"), and for indefinite *in camera* treatment of the entirety of one competitively-sensitive, confidential business document (the "Confidential Document") designated as an exhibit to Mr. Brandt's deposition (collectively, the "Confidential Information").

Counsel for FTC and counsel for Respondent Otto Bock HealthCare North America, Inc. have stated that they do not oppose Ability's Motion. A corresponding Statement Regarding Meet and Confer is appended to this Memorandum.

Mr. Brandt's deposition testimony was given in response to Subpoenas ad Testificandum in this matter. *See* Exh. A to this Memorandum (Dep. Exh. Brandt 2). Ability produced the Confidential Document at issue in response to Subpoenas Duces Tecum from the Parties. *See* Exh. B to this Memorandum (Dep. Exh. Brandt 3). In fact, the Confidential Document is a

spreadsheet that Ability created *de novo* from its internal corporate data expressly to respond to certain requests for information in the subpoenas that Complaint Counsel and Counsel for Otto Bock served on Ability.

This Court signed a Protective Order Governing Confidential Material in this matter on December 20, 2017 (the Order was entered on December 28, 2017). That Order governs only the handling of Discovery Material, however, and if a Party or non-party wishes to prevent public disclosure of Confidential Material at the hearing, it must seek an order for *in camera* treatment of any document or transcript that a Party plans to introduce into evidence at the administrative trial of this matter. Protective Order ¶ 10.

Complaint Counsel have notified Ability that they intend to offer the Confidential Testimony (Trial Exh. No. PX05149, Bates No. PX05149-001 -- 106) and the Confidential Document (Trial Exh. No. PX03282, Bates No. APO000017) into evidence in the administrative trial of this matter, currently scheduled to begin on July 10, 2018. *See* Exh. C to this Memorandum (Letter from Amy S. Posner, Esq. to Jeffrey Brandt c/o David Creagan, Esq. dated May 23, 2018 & Attachment A). A copy of the Confidential Testimony is Exhibit D to this Memorandum, and a copy of the Confidential Document is Exhibit E.

The Confidential Testimony and the Confidential Document warrant indefinite *in camera* treatment because they contain sensitive and confidential information about Ability's internal business structure, finances, practices, strategies, and contracts that, were it made public or divulged to Ability's suppliers or competitors, would injure Ability's capacity to compete in the market for prosthetic services. In addition, the Confidential Document also contains personal

identifying information and consumer information that require indefinite *in camera* treatment.¹

Therefore, Ability requests indefinite *in camera* treatment of portions of the Confidential Testimony and indefinite *in camera* treatment of the Confidential Document in its entirety.

In support of its Motion, Ability relies on the Declaration of Jeffrey M. Brandt (“Brandt Declaration”), attached as Exhibit F to this Memorandum. The Brandt Declaration provides additional details about the Confidential Testimony (Exh. D) and the Confidential Document (Exh. E) for which Ability seeks *in camera* treatment.

I. Public disclosure of the Confidential Information would seriously injure Ability’s competitiveness in the market for prosthetic services by revealing proprietary, commercially sensitive, and confidential information about Ability’s business to its suppliers, competitors, and payors.

In camera treatment of information 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). Here, serious competitive injury would result from public disclosure because the Confidential Information is proprietary and material to Ability’s business. *See In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980); *In re Dura Lube Corp.*, 1999 F.T.C. LEXIS 255, *5 (1999). Where that is the case, courts generally attempt “to protect confidential business information from unnecessary airing.” *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). Indeed, it is unquestionable that “the confidential records of businesses involved in Commission proceedings should be protected insofar as possible.” *Id.* at 1186.

Moreover, Ability is a non-party to this proceeding and is thus entitled to “special solicitude” in the consideration of its request for *in camera* treatment of its Confidential Information. *See In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500, 500 (1984). Among

¹ The personal identifying and personally sensitive information in the spreadsheet was redacted prior to production of the document to FTC and Otto Bock, but Trial Exhibit PX03282 still contains competitively-sensitive, confidential business information of Ability that should be granted indefinite *in camera* treatment.

the reasons for the “special solicitude” shown non-parties is the realization that “[a]s a policy matter, extensions of confidential or *in camera* treatment in appropriate cases involving third party bystanders encourages cooperation with future adjudicative discovery requests.” *Id.* That has certainly been the case here where Ability -- a customer of the Parties, not just a “bystander” -- has cooperated with FTC Complaint Counsel and counsel for the Respondent and voluntarily produced documents and provided deposition testimony in this proceeding. All of these factors should further tip the scales toward granting indefinite *in camera* treatment to Ability’s Confidential Information.

The Confidential Information for which Ability seeks indefinite *in camera* treatment is non-public and material to Ability’s competitiveness in the market for prosthetic services. As required, the Brandt Declaration (Exh. F) demonstrates the non-public nature of the Confidential Information and its materiality to Ability’s capacity to compete. *See In re North Texas Specialty Physicians*, 2004 FTC LEXIS 109, at *2-3 (Apr. 23, 2004). According to the Brandt Declaration, disclosure of the Confidential Information to the public, which would include Ability’s competitors and suppliers and the payors that reimburse Ability for the prosthetic services provided to patients, would cause serious competitive injury to Ability. *See* Exh. F, Brandt Decl. ¶ 5.

The Confidential Document, by itself, shows the cost of goods (“COG”) to Ability (i.e., how much Ability pays various manufacturers and suppliers for prostheses, which includes any negotiated discounts), the allowable claim (i.e., how much Medicare or private health insurers will pay Ability for the prosthetic services provided to patients), the cost to Ability of various microprocessor knees (“MPKs”) including any negotiated discounts, and Ability’s gross margin (“GM”) on each patient. Ability keeps all of that commercially-sensitive information

confidential because it is material to the core of Ability's business and capacity to compete in the marketplace. Ability's competitors, suppliers, and payors would derive competitive advantages from knowing Ability's Confidential Information that would injure Ability's capacity to negotiate costs and prices, shrink its revenue and profit margins, and weaken Ability's overall competitiveness. *See* Exh. F, Brandt Decl. ¶ 6. The Court should thus grant indefinite *in camera* treatment to the Confidential Document in its entirety.

In addition, in his deposition, in answer to questions from counsel for FTC and Otto Bock, Mr. Brandt testified about the data and information in the Confidential Document. All of that testimony should likewise be granted indefinite *in camera* treatment. *See* Exh. F, Brandt Decl. ¶ 9.

Mr. Brandt's deposition transcript also contains his testimony about Ability's internal business affairs, past, present and future, and reveals confidential information about Ability's management, its Board of Directors, its corporate debt and finances, Mr. Brandt's personal thought processes in deciding whether to seek licensure or to open offices in Pennsylvania or other states, and similar non-public matters that have no relevance to the dispute before this Court but that if publicly disclosed would cause injury to Ability's business or reputation and weaken its competitiveness. *See* Exh. F, Brandt Decl. ¶ 10. For these reasons, those portions of the Confidential Testimony should also be granted indefinite *in camera* treatment.

Mr. Brandt also testified at his deposition about Ability's relationships with the various payors (principally, Medicare and private health insurers) that reimburse Ability for the care provided to patients. Those payors are often identified by name and compared with one another as to the approaches they take or might take to different scenarios and treatment options. Public disclosure of those comparisons could damage Ability's relationships with the payors and

consequently injure its ability to compete with other prosthetic service providers. *See* Exh. F, Brandt Decl. ¶ 11. Those portions of the Confidential Testimony should, therefore, be granted indefinite *in camera* treatment.

II. The Confidential Information will remain competitively-sensitive in the future; therefore, indefinite *in camera* treatment is justified.

Because the Confidential Information at issue “is likely to remain sensitive or become more sensitive with the passage of time,” *In re Dura Lube Corp.*, 1999 FTC LEXIS *7-8, such that the need for confidentiality is not likely to decrease over time, Ability requests that it be given *in camera* treatment indefinitely. The Brandt Declaration (Exh. F) states why the competitive significance of the Confidential Information is unlikely to decrease over time.

The information in the Confidential Document was drawn from Ability’s records for the period January 1, 2016 to December 31, 2017. Ability compiled the information in a spreadsheet that it created expressly in response to the subpoenas Ability received from FTC and Otto Bock. Although the data in the spreadsheet are from the two most recent calendar years, the relationships, ratios, and percentages expressed by the data are unlikely to change for the foreseeable future. *See* Exh. F, Brandt Decl. ¶ 7. Hence, the Court should grant indefinite *in camera* treatment to the Confidential Document and the designated portions of the Confidential Testimony.²

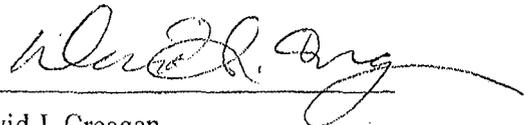
III. Conclusion.

For all of the reasons stated in this Memorandum and in the Brandt Declaration, disclosure of the Confidential Information to the public -- and consequently to Ability’s competitors, suppliers, and payors -- would cause serious competitive injury to Ability.

² Should the Court decide against granting indefinite *in camera* treatment, Ability respectfully asks that the period of *in camera* treatment granted be no less than 10 years from the date of the Court’s Order.

Therefore, Ability respectfully requests this Court to grant indefinite *in camera* treatment for the Confidential Information.

Respectfully submitted,



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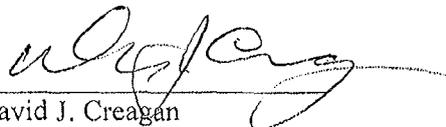
Counsel for Non-Party Ability Prosthetics &
Orthotics

DATED: June 8, 2018

STATEMENT REGARDING MEET AND CONFER

The undersigned certifies that counsel for Non-Party Ability Prosthetics & Orthotics notified counsel for Complainant the Federal Trade Commission and counsel for Respondent Otto Bock HealthCare North America, Inc. by email on June 6, 2018 that it would be seeking *in camera* treatment of the Confidential Information. Both counsel for FTC and counsel for Otto Bock stated by reply email that they would not object to Ability's Motion.

Respectfully submitted,



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DATED: June 8, 2018

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ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: _____

CERTIFICATE OF SERVICE

I, David J. Creagan, declare under penalty of perjury under the laws of the State of Pennsylvania that the following is true and correct. On June 8, 2018, I caused to be served the following documents on the parties listed below by the manner indicated:

- Non-Party Ability Prosthetics & Orthotics' Motion for *In Camera* Treatment, with accompanying Memorandum of Law and all Exhibits, and Statement Regarding Meet and Confer
- [Proposed] Order Granting Indefinite *In Camera* Treatment

The Office of the Secretary: (via FTC E-Filing System)

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David J. Creagan

Notice of Electronic Service

I hereby certify that on June 12, 2018, I filed an electronic copy of the foregoing Non-Party Ability Prosthetics & Orthotics' Motion for Indefinite In Camera Treatment, Exhibits to Non-Party Ability Prosthetics & Orthotics' Motion for Indefinite In Camera Treatment, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
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I hereby certify that on June 12, 2018, I served via E-Service an electronic copy of the foregoing Non-Party Ability Prosthetics & Orthotics' Motion for Indefinite In Camera Treatment, Exhibits to Non-Party Ability Prosthetics & Orthotics' Motion for Indefinite In Camera Treatment, upon:

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