



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

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In the Matter of )  
)  
Otto Bock HealthCare North America, Inc., ) Docket No. 9378  
)  
a corporation, )  
)  
Respondent. )  
\_\_\_\_\_)

**ORDER ON RENEWED MOTIONS AND SUPPLEMENTAL MOTION FOR  
IN CAMERA TREATMENT FILED BY OTTOBOCK AND BY FREEDOM**

**I.**

Pursuant to Rule 3.45(b) of the Commission’s Rules of Practice and the Scheduling Order entered in this matter, Respondent Otto Bock HealthCare North America, Inc. (“OttoBock”) and FIH Group Holdings, Inc. (“Freedom”), which was acquired by OttoBock on September 22, 2017, filed renewed motions for *in camera* treatment on July 16, 2018 (“July 16 Motions”). OttoBock’s and Freedom’s original motions for *in camera* treatment were denied without prejudice by Order dated July 2, 2018 (“July 2 Order”). On July 20, 2018, Federal Trade Commission (“FTC” or “Commission”) Complaint Counsel filed a single, consolidated opposition to the July 16 Motions. On July 24, 2018 OttoBock and Freedom also filed a Supplemental Motion for *In Camera* Treatment for a Newly-Produced Trial Exhibit (“July 24 Motion”).<sup>1</sup>

For the reasons set forth below, the July 16 Motions are GRANTED in part and DENIED in part and the July 24 Motion is GRANTED.

<sup>1</sup> Complaint Counsel has not yet filed an opposition to the July 24 Motion and the deadline for so doing has not yet passed. The July 24 Motion seeks *in camera* treatment for the revised version of one exhibit, PX3113. Complaint Counsel’s Opposition to the July 16 Motions addressed PX3113. Those arguments are equally applicable to the revised version of PX3113 and have been considered in ruling on the July 24 Motion.

## II.

The July 2 Order sets forth the standards for *in camera* treatment by which the renewed motions are evaluated. The July 2 Order stated that Ottobock and Freedom had sought *in camera* treatment for 1,699 documents, which constitute more than half of the documents listed on the parties' exhibit lists, and that the declarations submitted in support of the July 2 Motions failed to provide sufficient information about the documents to determine whether they meet the Commission's strict standards for *in camera* treatment. Ottobock and Freedom were ordered to review the documents for which they seek *in camera* treatment and narrow their requests to only those documents that they can demonstrate comply with the Commission's strict standards for *in camera* treatment.

In their renewed motions, Ottobock and Freedom have reduced their requests for *in camera* treatment to 726 documents. In addition, with one exception explained below, they have each designated the specific page and line numbers of deposition transcripts, lowered the requested amount of time for which *in camera* treatment is sought, and removed the request for *in camera* treatment of the expert reports.<sup>2</sup> Ottobock has supported its motion with a declaration from its Vice President of Medical Affairs, Government Affairs, and Future Development ("Ottobock Declaration") and Freedom has supported its motion with a declaration from its Chairman ("Freedom Declaration").

The declarations describe in detail the confidential nature of the information contained in the documents, the competitive harm that Ottobock or Freedom would suffer if this information were made publicly available, and the measures that Ottobock and Freedom take to ensure that the information contained in these documents remains confidential. The declarations explain that the documents contain competitively sensitive information falling into eight categories: Business Plans and Strategies; Contract Negotiations and Customer Contracts; Intellectual Property, Proprietary Information and Trade Secrets; Customer-Specific Documents; Pricing and Cost Information; Market Analysis Documents; Sales and Financial Information; and Multiple Category Documents.

Complaint Counsel opposes Respondent's request to treat as *in camera*: (1) the entire deposition transcripts of [REDACTED]; (2) trial testimony of Respondent's employees; and (3) certain exhibits that Complaint Counsel asserts are not confidential or competitively sensitive. These are addressed in turn.

## III.

### A. Entire Deposition Transcripts of [REDACTED]

Respondent asserts that, due to the agreed-upon divestiture between Ottobock and

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<sup>2</sup> The July 2 Order instructed: "[O]nce the orders on pending *in camera* treatment motions are issued, the parties shall prepare two versions of their expert reports." Pursuant to that Order, Ottobock and Freedom state that they do not include the expert reports in their motions, but reserve the right to prepare *in camera* versions of the expert reports after the order on these motions is issued.

██████████, the entire deposition transcripts of ██████████, as opposed to partial designations, deserve *in camera* treatment. Respondent argues that the agreed-upon divestiture is highly confidential and could be jeopardized by its disclosure and that competitors, customers, and Freedom employees would be able to conclude that an agreed-upon divestiture exists between Ottobock and ██████████, given the number of ██████████ deposed.

*In camera* treatment will not be given to entire deposition transcripts. Where *in camera* treatment is sought for transcripts of investigational hearings or depositions, the requests shall be made only for those specific pages and line numbers of transcripts that contain information that meets the *in camera* standard. *In re Unocal*, 2004 FTC LEXIS 197, \*4-5 (Oct. 7, 2004). Respondent seeks *in camera* treatment for entire deposition transcripts of a non-party. That non-party has already sought and received *in camera* treatment for the portions of the deposition transcripts of its employees that contain information that meets the standards for *in camera* treatment. Respondent's request to shield the fact that ██████████ were deposed, by seeking to have the entirety of their depositions treated as *in camera*, is inconsistent with the Commission's *in camera* treatment rules and is DENIED.

#### B. Trial Testimony of Ottobock's and Freedom's employees

Ottobock and Freedom assert that it is likely that their employees will be questioned about the topics covered in the documents that are the subject of its motion and requests that any trial testimony on any of these topics, either upon direct examination or cross-examination, be subject to *in camera* treatment.

It is not appropriate to designate all trial testimony as *in camera* before any of it has taken place. *In re Polypore International, Inc.*, 2009 WL 4086831, at \*2 (Nov. 10, 2009). As instructed during the Final Prehearing Conference, except as described below, if counsel wish to elicit testimony on information that has been granted *in camera* treatment, questions pertaining to *in camera* information shall be segregated into a separate portion of the examination of the witness. Trial will go into an *in camera* session when testimony on *in camera* information is elicited. Respondent's preemptive request that the trial testimony of its employees be designated as *in camera* is premature and is DENIED.

#### C. Specific Exhibits

Complaint Counsel objects to a small subset of the documents for which *in camera* treatment is sought.

First, Complaint Counsel objects to Respondent's request that certain exhibits relating to the November 7 and 8, 2017 meetings ("November Meetings") between high ranking Ottobock and Freedom executives be designated as *in camera* in their entirety. According to Complaint Counsel, during the November Meetings, Ottobock executives discussed plans to raise the price of Freedom's Plie 3 MPK in the United States, or to discontinue it, and plans to reposition Freedom's next-generation MPK to avoid cannibalizing sales of Ottobock's MPK business. At trial, on the public record, Respondent described the November Meetings as "a draft

brainstorming meeting in which draft documents were prepared,” and ideas were “floated” around. July 10, 2018 Tr. Trans. at 122-23.

If applicants for *in camera* treatment show that information is sufficiently secret and material to their business that disclosure would result in serious competitive injury, that showing is balanced against the importance of the information in explaining the rationale of FTC decisions. *In re General Foods Corp.*, 95 F.T.C. 352, 1980 FTC LEXIS 99, at \*10 (Mar. 10, 1980) (stating that the importance of the information in explaining the rationale of FTC decisions is “the principal countervailing consideration weighing in favor of disclosure.”).

Upon review of the documents, PX01266 does not meet the standards for *in camera* treatment and thus Respondent’s request is DENIED as to this document. With respect to the remaining documents in this subset, PX1302/RX0636, PX1303, and PX1304, the documents contain specific, competitively sensitive information. However, due to the importance of the information in explaining the rationale of FTC decisions, Respondent’s request is GRANTED in part and DENIED in part. *In camera* treatment, for a period of 5 years, to expire on July 1, 2023, is GRANTED for PX1302/RX0636, PX1303, and PX1304. Although the documents will be shielded from disclosure, the parties are permitted to elicit testimony regarding these documents in a public session. Counsel shall not display the documents when using them with a witness.

Second, Complaint Counsel objects to Respondent’s request for indefinite *in camera* treatment for exhibits relating to Ottobock’s 2015 launch of its C-Leg 4.

It has been three years since the launch of the C-Leg 4 and the exhibits at issue appear to have been generated over three years ago. A review of these documents shows that they do not meet the Commission’s standards for *in camera* treatment. *In camera* treatment is DENIED as to: PX1297 and PX1703.<sup>3</sup>

Third, Complaint Counsel objects that Respondent seeks *in camera* treatment for documents produced by non-parties. Respondent does not allege that it controls these non-parties or that these non-parties owe a contractual duty to Respondent not to disclose this information. Although many non-parties have filed motions for *in camera* treatment, Center for Orthotic & Prosthetic Care (“CO&P”) did not. Respondent seeks *in camera* treatment for documents produced by CO&P that reveal costs of MPKs produced by Respondent.

Because Respondent seeks to protect the competitively sensitive information that it provided to CO&P, the request is GRANTED. *In camera* treatment for a period of five years to expire on July 1, 2023 is granted for documents falling in this category, including: PX3111, PX3113, revised PX3113<sup>4</sup>, PX3114, PX3116, and PX3118.

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<sup>3</sup> Complaint Counsel also objects to *in camera* treatment for PX1518 and PX1526. It appears that Respondent’s July 16 motion did not seek *in camera* treatment for PX1518 or PX1526. In the event Respondent did seek *in camera* treatment for these two documents, the request is denied for the reasons above.

<sup>4</sup> This exhibit is the subject of the July 24 Motion.

Fourth, Complaint Counsel asserts that Respondent's designations of deposition transcripts are overbroad, seeking *in camera* protection for non-competitively sensitive information such as basic descriptions of potential witnesses' roles and responsibilities. Complaint Counsel also asserts that, in some instances, Respondent has designated portions of deposition transcripts that, rather than disclosing sensitive information, reveal instead that the witness has no knowledge of such topics.

Such information does not qualify for *in camera* treatment and granting *in camera* treatment to broad portions of depositions will impede conducting trial on the public record if the depositions are needed to refresh witnesses' recollection. With respect to the deposition transcripts, Respondent's request is DENIED WITHOUT PREJUDICE in part and GRANTED in part.

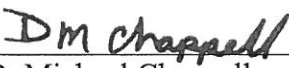
For each individual who is also on either party's witness list, Respondent is instructed to work with Complaint Counsel to prepare a revised list of deposition designations limited to only portions that actually disclose competitively sensitive information. The parties shall confer on Respondent's revised request for *in camera* treatment prior to each potential witnesses' testimony at trial.

With respect to the deposition transcripts of individuals who are not listed on either party's witness list, Respondent's request for *in camera* treatment for the designated portions of those depositions is GRANTED. Respondent shall prepare a proposed order that lists (a) the revised request for *in camera* treatment of portions of deposition transcripts, in consultation with Complaint Counsel for those individuals who are potential witnesses; and (b) the request for portions of deposition testimony as listed in the July 16, 2018 Motions. These portions of deposition testimony shall be granted *in camera* treatment for a period of five years, to expire July 1, 2023.

#### IV.

In all other aspects, the July 16, 2018 Motions are GRANTED. Ottobock and Freedom shall prepare a proposed order listing the documents that have been granted *in camera* treatment by expiration date and exhibit number.

ORDERED:

  
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D. Michael Chappell  
Chief Administrative Law Judge

Date: July 30, 2018