



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

In the Matter of)	
)	PUBLIC
BENCO DENTAL SUPPLY CO.,)	
a corporation,)	Docket No. 9379
)	
HENRY SCHEIN, INC.,)	
a corporation, and)	
)	
PATTERSON COMPANIES, INC.,)	
a corporation.)	

NON-PARTY DARBY'S 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), non-party Darby Dental Supply, LLC ("Darby") respectfully moves this Court for permanent *in camera* treatment of nine (9) competitively-sensitive, confidential business documents (the "Confidential Documents"). Darby produced these documents in response to a third party subpoena duces tecum served on Darby. The Federal Trade Commission (the "FTC") has now notified Darby that it intends to introduce the Confidential Documents into evidence at the administrative trial in this matter. See Letter from John Wiegand dated September 17, 2018, attached hereto as Exhibit A.

The FTC letter indicated that all exhibits admitted into evidence become part of the public record unless the Administrative Law Judge grants *in camera* status. The Confidential Documents warrant protection from public disclosure given the sensitive business information and trade secrets they contain. Thus, Darby submits this Motion requesting permanent *in camera* treatment of the Confidential Documents in their entirety.

All of the materials for which Darby is seeking permanent *in camera* treatment are confidential agreements and business documents, such that if they were to become part of the public record, Darby's competitive position would be significantly harmed. For the reasons discussed in this Motion, Darby requests that this Court afford its Confidential Documents *in camera* treatment indefinitely. In support of this Motion, Darby relies on the Affidavit of Michael Caputo, President and Chief Executive Officer of Darby (the "Caputo Declaration"), attached hereto as Exhibit B, which provides additional details on the documents for which Darby is seeking permanent *in camera* treatment and the significant harm disclosure would cause.

I. The Documents for Which Protection is Sought

Darby seeks permanent *in camera* treatment for the following Confidential Documents, copies of which are attached hereto as Exhibit C:

Exhibit No.	Document Name	Date	Beginning Bates No.	Ending Bates No.
CX4127	Agreement between Darby and Smile Source	7/21/2014	Darby 00015	Darby 00035
CX4444 ¹	FTC-DDS-0000002 - CONFIDENTIAL - FTC Dkt. No. 9379		CX4444-001	CX4444-003
CX4452	Agreement between Darby and NODA	1/1/2014	Darby 00001	Darby 00014
CX4453	Agreement between Darby and Unified Smiles	5/14/2013	Darby 00036	Darby 00049
CX4454	Agreement between Darby and DPG	11/1/2013	Darby 00050	Darby 00064
CX4455	Agreement between Darby and DPC	10/1/2016	Darby 00065	Darby 00077
CX4456	Agreement between Darby and Linx	10/1/2016	Darby 00078	Darby 00091
CX4457	Agreement between Darby, the Madow Brothers, and CMR	4/28/2011	Darby 00092	Darby 00108
CX4458	Contract between the State of Minnesota and Darby	9/9/2014	Darby 00109	Darby 00131

¹ As shown in the Caputo Declaration, CX4444 is not a single document but rather a multi-thousand page series of spreadsheets containing detailed sales, customer, pricing and marketing information on a customer by customer and item by item basis for every sale of every product made by Darby over the last seven (7) years

II. Darby Documents are Secret and Material Such that Disclosure Would Result in Serious Injury to Darby

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 applicant must demonstrate 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, *5 (1999). Courts generally attempt “to protect confidential business information from unnecessary airing.” *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). Trade secrets, which are primarily secret formulas, processes and other secret technical information, are granted more, and longer, protection than ordinary business documents. *In re Dura Lube Corp.*, supra at *5

Demonstrating serious injury requires the applicant to show “that the documents are secret, that they are material to the applicant's business and that public disclosure will plausibly discourage the future production of such information.” *In the Matter of Bristol-Myers Company*, 90 F.T.C. 455, 456, 1977 FTC LEXIS 25, *4-5 (1977). “The likely loss of business advantages is a good example of a ‘clearly defined, serious injury.’” *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 138, *6 (Sept. 19, 2000) (quoting *In the Matter of General Foods Corp.*, supra).

The following factors are weighed in considering both secrecy and materiality: (1) the extent to which the information is known outside of the business; (2) the extent to which the information is known by employees and others involved in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended in developing the

information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *In the Matter of Bristol-Myers Company*, supra.

The Confidential Documents are both secret and material to Darby's business discussed in detail in the Caputo Declaration. In sum, the materials at issue contain trade secrets and information of competitive significance to Darby, such as agreements with strategic partners/servicing organizations and group purchasing organizations, the terms of which are expressly confidential, as well as spreadsheets containing millions of lines of highly detailed data and analysis, including every customer and every sale on an item by item basis over the last seven (7) years. As a dental supply distributor, Darby relies on its strategic relationships and data and analysis of sales history to engage its customers and promote its products. The Confidential Documents contain information that essentially lays out the plan and strategy as to how Darby accomplishes its success. Darby has spent many years and significant resources to establish such information, processes, strategies and relationships, and the Confidential Documents are proprietary to Darby and are not publicly known outside of the company. All of the Confidential Documents contain competitively-sensitive and confidential business information, and maintaining the confidentiality of the Confidential Documents is critical to Darby's continued competitive success. Disclosure of the Confidential Documents would serve no salutary purpose.

Darby sought to be thoroughly responsive to the FTC's requests but did so with an expectation that confidential treatment would be accorded this highly sensitive material. Thus, when Darby produced the Confidential Documents, Darby took steps to maintain confidentiality by designating the documents "Confidential", "Attorneys Eyes Only" and "In Camera Filing Only." Because of the highly confidential and proprietary nature of the information and its materiality to Darby's business, permanent *in camera* treatment is appropriate.

Furthermore, disclosure of the Confidential Documents will result in the serious competitive harm to Darby, including loss of Darby's competitive advantage, business and ability to compete. The disclosure would reveal highly sensitive and proprietary information, as well as processes and technical strategies that Darby implements. "The likely loss of business advantages is a good example of a 'clearly defined, serious injury.'" *In re Dura Lube Corp.*, 1999 FTC LEXIS 225 at *7 (Dec. 23, 1999). Making the Confidential Documents, which contain Darby's trade secrets, public would result in a loss of business advantage that Darby has built as the result of its own substantial investments in the development of its processes and technical strategies. The information contained in the Confidential Documents is sufficiently secret and sufficiently material to Darby's business that disclosure would result in serious competitive injury. *In re North Texas Specialty Physicians*, 2004 FTC Lexis 109, at *2-3 (Apr. 23, 2004). The competitive sensitivity or the proprietary value of the information contained in the Confidential Documents will not decrease over time. *In re Coca Cola Co.* 1990 FTC LEXIS 364 (Oct. 17, 1990). Therefore, permanent *in camera* treatment is appropriate.

Finally, Darby's status as a third party should be considered in the treatment of the Confidential Documents. The FTC 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*, *supra*. "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." *In re Kaiser Aluminum & Chem. Corp.*, 103 FTC 500, 500 (1984). Therefore, Darby's third party status weighs in favor of granting permanent *in camera* status to the Confidential Documents. In addition, it is Darby's understanding that the

FTC will only make reference to limited portions of CX4444 but seeks to submit it in its entirety for ease of reference. In such circumstances, there is even more reason to grant such status.

III. Conclusion

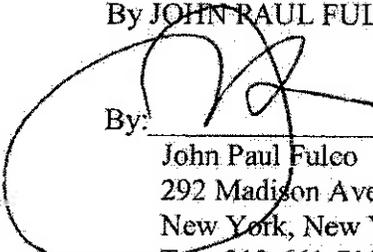
For the reasons set forth above and in the accompanying Caputo Declaration, Darby respectfully requests that this Court grant permanent *in camera* treatment for the Confidential Documents in their entirety.

Dated: September 25, 2018

Respectfully submitted,

SALON MARROW DYCKMAN
NEWMAN & BROUDY LLC
*Attorneys for Non Party, Darby Dental
Supply, LLC*

By JOHN PAUL FULCO, P.C.

By: 

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Exhibit A



Western Regional Office

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

WASHINGTON, D.C. 20580

September 17, 2018

VIA EMAIL TRANSMISSION

Darby Dental Supply, LLC
c/o John Paul Fulco, P.C.
Salon Marrow Dyckman Newman & Boudy LLC
292 Madison Avenue
New York, NY 10017
JFulco@salonmarrow.com

RE: *In the Matter of Benco Dental Inc., et al., Docket No. 9379*

Dear Mr. Fulco:

By this letter we are providing formal notice, pursuant to Rule 3.45(b) of the Commission's Rules of Practice, 16 C.F.R. § 3.45(b), that Complaint Counsel intends to offer the documents referenced in the enclosed Attachment A into evidence in the administrative trial in the above-captioned matter. For your convenience, a copy of the documents will be sent to you in a separate email with an FTP link.

The administrative trial is scheduled to begin on October 16, 2018. All exhibits admitted into evidence become part of the public record unless Administrative Law Judge D. Michael Chappell grants *in camera* (i.e., non-public/confidential) status.

For documents that include sensitive or confidential information that you do not want on the public record, you must file a motion seeking *in camera* status or other confidentiality protections pursuant to 16 C.F.R §§ 3.45 and 4.10(g). Judge Chappell may order that materials, whether admitted or rejected as evidence, be placed *in camera* only after finding that their public disclosure will likely result in a clearly-defined, serious injury to the person, partnership, or corporation requesting *in camera* treatment.

Motions for *in camera* treatment for evidence to be introduced at trial must meet the strict standards set forth in 16 C.F.R. § 3.45 and explained in *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (April 4, 2017); *In re Jerk, LLC*, 2015 FTC LEXIS 39 (Feb. 23, 2015) and *In re Basic Research, Inc.*, 2006 FTC LEXIS 14 (Jan. 25, 2006). Motions also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the material. *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (April 4, 2017); *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (Apr. 23, 2004). For your convenience, we included, as links in the cover email, an example of a third-party motion (and the accompanying declaration or affidavit) for *in camera* treatment that was filed and granted in an FTC administrative proceeding. If you choose to move for *in camera* treatment, you must provide a copy of the

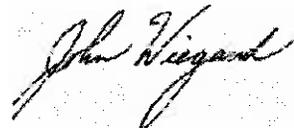
document(s) for which you seek such treatment to the Administrative Law Judge. Also, you or your representative will need to file a Notice of Appearance in the administrative proceeding. For more information regarding filing documents in adjudicative proceedings, please see <https://www.ftc.gov/faq/ftc-info/file-documents-adjudicative-proceedings>.

Please be aware that under the current Scheduling Order **the deadline for filing motions seeking *in camera* treatment is September 26, 2018**. A copy of the March 14, 2018 Scheduling Order can be found at <https://www.ftc.gov/enforcement/cases-proceedings/151-0190/bencoscheinpatterson-matter>.

Additionally, in lieu of a deposition on the admissibility of the documents listed in Attachment A, we ask that you sign and return the attached declaration regarding the admissibility of these documents. Please return the signed declaration to my attention by September 28, 2018.

If you have any questions, please feel free to contact me at 415-848-5174.

Sincerely,

A handwritten signature in black ink that reads "John Wiegand". The signature is written in a cursive style and is positioned above the printed name.

John Wiegand
Counsel Supporting the Complaint

Attachment

Attachment A

Exhibit No.	Full Name	Date	Beg Bates	End Bates
CX4127	Agreement between Darby and Smile Source	7/21/2014	Darby 00015	Darby 00035
CX4444	FTC-DDS-0000002 - CONFIDENTIAL - FTC Dkt. No. 9379		CX4444-001	CX4444-003
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CX4453	Agreement between Darby and Unified Smiles	5/14/2013	Darby 00036	Darby 00049
CX4454	Agreement between Darby and DPG	11/1/2013	Darby 00050	Darby 00064
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CX4457	Agreement between Darby, the Meadow Brothers, and CMR	4/28/2011	Darby 00092	Darby 00108
CX4458	Contract between the State of Minnesota and Darby	9/9/2014	Darby 00109	Darby 00131
CX4459	Letter from John Paul Fulco to Devon Allen Re: FTC-Matter of Benco et. al Docket #9379	5/22/2018	FTC-DDS-00000001	FTC-DDS-00000001

Exhibit B

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

In the Matter of)	
)	
BENCO DENTAL SUPPLY CO.,)	
a corporation,)	Docket No. 9379
)	
HENRY SCHEIN, INC.,)	
a corporation, and)	
)	
PATTERSON COMPANIES, INC.,)	
a corporation.)	
)	

**DECLARATION OF MICHAEL CAPUTO IN SUPPORT OF NON-PARTY DARBY
DENTAL SUPPLY, LLC'S MOTION FOR PERMANENT *IN CAMERA* TREATMENT**

I, Michael Caputo, hereby declare as follows:

1. I am the President and Chief Executive Officer of Darby Dental Supply, LLC ("Darby"). I make this declaration in support of Non-Party Darby's motion for permanent *in camera* treatment of certain documents produced by Darby in response to a subpoena duces tecum from the Federal Trade Commission (the "FTC") and respondent Patterson Companies, Inc. (the "Motion"). I have personal knowledge of the matters stated herein and, if called upon to do so, could competently testify about them.

2. I have reviewed and am familiar with the documents and records Darby produced in the above-captioned matter.

3. In a letter dated September 17, 2018, the FTC informed Darby that it intends to introduce (10) documents¹ produced by Darby into evidence at the administrative trial in this matter. For the reasons set forth below, Darby seeks permanent *in camera* treatment for nine (9) of those items (the “Confidential Documents”).

4. At the time of production, the Confidential Documents were expressly designated for outside attorneys eyes only and for *in camera* filing only.² I am fully familiar with the type of information contained in the documents at issue and its competitive significance to Darby. Based on my review of the documents, my knowledge of Darby’s business, and my familiarity with the confidentiality afforded this type of information by Darby, I submit that disclosure of these documents to Darby’s competitors and/or the public would cause disastrous competitive injury to Darby.

5. Darby is a private company and is a dental supply distributor upon which thousands of dentists rely nationwide. Darby is one of the leading national distributors of dental supplies. Darby stocks more than 40,000 different products in several strategically located warehouse and distribution centers across the country to ensure product availability and reduce inventory costs for its customers. Further, Darby is a leader in the use of information technology and has developed some of the most innovative and successful Internet systems for online supply purchasing and inventory management to better serve its customers. In order to provide these services, Darby collects and maintains very detailed item by item and customer by customer records of its sales activity, detailed customer pricing and order history information. Darby also applies proprietary and confidential information, strategies and processes in order to service its

¹As shown below, one of the Confidential Documents, CX 4444, is actually a multi-thousand page spreadsheet containing millions of lines of data.

² I recognize that it is the Court’s prerogative to order such treatment but I point this out so that the Court is aware that the FTC and Patterson Companies, Inc. were advised of Darby’s concerns prior to production.

customers. Darby also maintains contracts with strategic partners/servicing organizations and group purchasing organizations, the terms of which are expressly confidential. The parties counter to those contracts, as well as Darby, agreed in those contracts to maintain the terms thereof as confidential. Such information, analyses strategies and processes are critical to its business development and competitive strategies, and are proprietary and highly confidential.

6. All of the Confidential Documents contain competitively-sensitive and confidential business information. As described in the Motion, Darby seeks permanent *in camera* treatment for the following Confidential Documents:

Exhibit No.	Document Name	Date	Beginning Bates No.	Ending Bates No.
CX4127	Agreement between Darby and Smile Source	7/21/2014	Darby 00015	Darby 00035
CX4444	FTC-DDS-0000002 - CONFIDENTIAL - FTC Dkt. No. 9379		CX4444-001	CX4444-003
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CX4458	Contract between the State of Minnesota and Darby	9/9/2014	Darby 00109	Darby 00131

7. CX4444 (which the FTC intends to introduce in its entirety) is not a single document, but rather thousands of pages of spreadsheets containing millions of lines of highly detailed data and analysis, including every customer and every sale of every one of the approximately 40,000 products Darby sales for the last seven (7) years. It contains detailed customer contact information, specific products purchased, confidential discount pricing information, locations where products were purchased, and many more specific sales records

covering all sales activity over the last seven (7) years. Disclosure of CX4444 would reveal the processes and analysis Darby uses to analyze its sales information, as well as detailed non-public financial information of the company. In sum, it contains a detailed analysis of every customer transaction for the last seven (7) years. Darby has devoted significant resources to developing its proprietary processes and technical systems and underlying formulas that are reflected in CX4444, which represent substantial competitive value to Darby. This information is not publicly available and Darby has devoted substantial resources to protect the confidentiality of the information found in CX4444. Disclosure of this information would essentially provide a roadmap to a competitor to severely damage Darby's competitive advantages, business and ability to compete and would serve no salutary purpose.

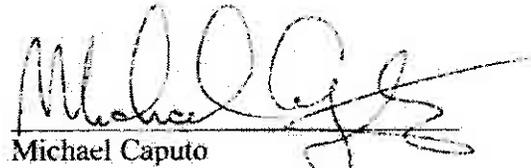
8. CX4127, CX4452, CX4453, CX4454, CX4455, CX4456, CX4457 and CX4458 are all servicing or purchasing agreements, which are by their terms confidential. These documents are agreements that contemplate transactions relating to, among others, distribution processes, partnership and promotional relationships, marketing efforts, sales strategies, vendor and other strategic relationships, consulting services, equipment servicing and pharmacy relationships. Darby keeps these agreements in strict confidence due to the potential loss of any business advantage if the information were to be publicly disclosed. Additionally, each of the agreements has a confidentiality provision expressly prohibiting or limiting the disclosure of the information contained in the contract. Darby has spent many years and significant resources to establish such information, processes, strategies and relationships. As a dental supply distributor, Darby relies on its reputation with its customers and the strategies, processes and technology it has developed and implemented, which are in part reflected in the documents, and which have resulted in Darby becoming one of the leading distributors of dental supplies. Thus, disclosure of

CX4127, CX4452, CX4453, CX4454, CX4455, CX4456, CX4457 and CX4458 would significantly harm Darby's ability to compete by making its confidential information, strategies and competitive processes available to the public and its competitors.

9. The Confidential Documents contain business and trade secrets in the form of agreements, processes, strategies and strategic relationships, as well as Darby's entire sales and pricing history, customer relationships and strategies, for the last seven (7) years. Maintaining confidentiality of the information contained in these documents is critical to Darby's business. The competitive significance of the Confidential Documents is unlikely to decrease over time and thus, indefinite and permanent protection from public disclosure is appropriate.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: 9/24/18


Michael Caputo

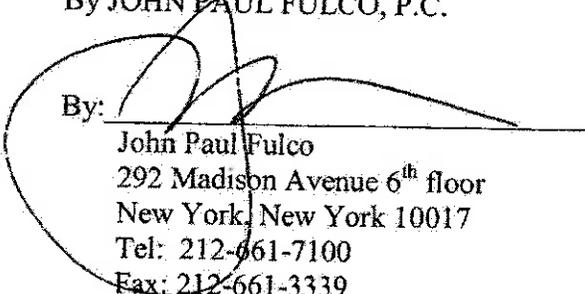
STATEMENT REGARDING MEET AND CONFER

The undersigned certifies that counsel for Non-party Darby Dental Supply, LLC ("Darby") notified counsel for the parties via email on or about September 24, 2018 that it would be seeking permanent *in camera* treatment of the Confidential Documents. We have received no objection to Darby's motion.

Dated: September 25, 2018

SALON MARROW DYCKMAN
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*Attorneys for Non Party, Darby Dental
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By JOHN PAUL FULCO, P.C.

By: 

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Exhibit C

[Filed *In Camera*]

CERTIFICATE OF SERVICE

I hereby certify that I delivered via electronic mail a copy of the following documents on the parties listed below:

- **NON-PARTY DARBY DENTAL SUPPLY, LLC'S MOTION FOR *IN CAMERA* TREATMENT (PUBLIC VERSION AND NON-PUBLIC IN CAMERA VERSION)**
- **NOTICE OF APPEARANCE**
- **[PROPOSED] ORDER**

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The Office of the Administrative Law Judge:

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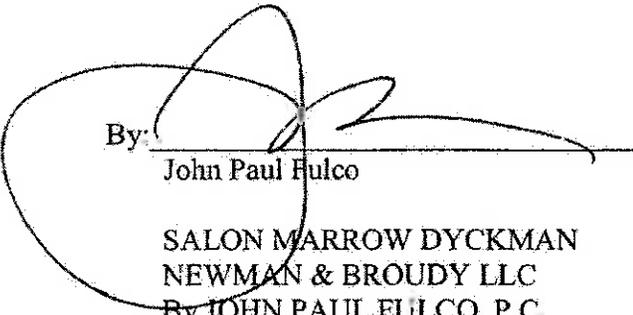
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San Francisco, CA 94103
415-848-5115

Dated: September 25, 2018

By: 

John Paul Fulco

SALON MARROW DYCKMAN
NEWMAN & BROUDY LLC
By JOHN PAUL FULCO, P.C.

Counsel for Non-Party,
Darby Dental Supply, LLC