

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



In the Matter of

BENCO DENTAL SUPPLY CO.,
a corporation,

HENRY SCHEIN, INC.,
a corporation, and

PATTERSON COMPANIES, INC.,
a corporation.

Docket No. 9379

HENRY SCHEIN INC.'S SECOND 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), the March 14, 2018 Scheduling Order (the "Scheduling Order"), and in response to Administrative Law Judge Chappell's October 11, 2018 Order on Schein's First Motion for *In Camera* Treatment (the "October 11th Order"), Respondent Henry Schein, Inc. ("Schein") has substantially narrowed the exhibits for which it seeks *in camera* treatment and files its renewed Second Motion for *In Camera* Treatment (the "Motion"). Schein has conducted a complete and thorough review of every exhibit identified in Schein's original motion for *in camera* treatment, pursuant to the Court's October 11th Order. In Schein's original motion, it requested *in camera* treatment for 678 exhibits. Through its comprehensive review, Schein reduced the total number of exhibits requested for *in camera* treatment to 126 (a majority of which are proprietary customer contracts), which is less than 20% of its original request. Pursuant to the October 11th

Order, Schein has removed deposition transcripts from its list and removed its current request for *in camera* treatment of the expert reports.¹

Schein seeks *in camera* treatment for 126 exhibits that contain highly sensitive and proprietary information. Schein and its counsel have determined that public disclosure of the documents listed in Section III (below) will cause such a clearly defined, serious injury to Schein by harming its ability to compete in the marketplace. Accordingly, for the reasons set forth below and in the Declaration of Marjorie Han (“Han Declaration”), Schein respectfully moves this Court for *in camera* treatment of these certain confidential, competitively sensitive documents designated as trial exhibits by the parties to this case.

I. Legal Standard

In camera treatment is appropriate for materials of which public disclosure will result in serious injury to the party requesting *in camera* treatment. See 16 C.F.R. 3.45; see also *In re 1-800-Contacts, Inc.*, 2017 FTC LEXIS 55 (April 4, 2017) (*in camera* treatment appropriate for information that “is sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury.”). A proponent of *in camera* treatment may demonstrate the requisite competitive injury by showing that the information is secret and that it is material to the business. *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980).

In making *in camera* determinations, factors that the Court may consider include: (1) the extent to which the information is known outside the business; (2) the extent to which it 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

¹ The expert reports, including CX7100 and RX2832, contain confidential material that is the subject of this Motion and also information subject to the Protective Order entered in this case that is not the subject of this Motion. Pursuant to the October 11th Order, Schein will prepare *in camera* versions of the expert reports once the orders on pending *in camera* motions are issued and will also designate the specific portions of the deposition transcripts of the experts that contain *in camera* information.

competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be acquired or duplicated. *In re Bristol-Myers Co.*, 90 FTC LEXIS 455, at *5-6 (Nov. 11, 1977). In general, courts endeavor to “protect confidential business information from unnecessary airing.” *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961).

The Commission has previously “recognized that it may be appropriate to provide in camera treatment for business records to be introduced as evidence . . . , such as business strategies, marketing plans, pricing policies, or sales documents.” *In re OSF Healthcare Sys.*, 2012 WL 1355598, at *3 (F.T.C. Mar. 29, 2012) (holding that such business records are typically afforded two to five years of *in camera* treatment). The Commission has previously held that 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 (F.T.C. Sept. 19, 2000).

II. Schein’s Materials Meet the Standard for *In Camera* Treatment

Schein seeks *in camera* treatment of documents listed in Section III (below), all of which contain information that are both secret and material to Schein’s business, making *in camera* treatment of such documents proper. This information falls into four categories: (1) customer contracts; (2) customer-specific information; (3) proprietary pricing proposals; and (4) highly sensitive financial information such as sales, costs, profits, margins, and internal Schein business plans and strategic documents (“Confidential Information”).

The Confidential Information is confidential and propriety, less than three years old, and is not known to individuals outside of Schein, with the limited exception of contract terms which are known only to the contracting parties and frequently subject to contractual confidentiality clauses. For this reason, Schein noted the confidential nature of its documents when they were produced by designating the documents “Confidential” pursuant to the Protective Order in this

matter. It has also established internal policies and practices to prohibit disclosure of this information. Han Decl. ¶ 3. In many cases, Schein is contractually bound to maintain the confidentiality of such information. RX2266 (at p. 5-6, § 7); RX2353 at 2 (at p. 4-5, § 7); CX2274 (at p. 7, § 10).

As described in more detail below, disclosure of the Confidential Information would result in a decisive loss of business advantage to Schein, especially considering Schein's substantial investments and years spent refining its own business model. *See In re Dura Lube Corp.*, 1999 FTC LEXIS 255 at *7 (1999) ("The likely loss of business advantages is a good example of a 'clearly defined, serious injury.'"). If disclosed, both competitors and customers would be able to take unfair advantage of this information. It would provide valuable insight into Schein's competitive strategies, negotiation positions, confidential structuring of its business arrangements, proprietary pricing, and amount of business done with customers. Competitors cannot obtain this Confidential Information absent disclosure in this matter because the materials come from Schein's private business records that are not publicly disseminated. Without insight into Schein's confidential practices and operations, this information could not be replicated by an outside party. The risk of such disclosure would severely undermine Schein's ability to compete for future business opportunities.

III. Proposed Exhibits that Contain Confidential Information

Schein seeks to have the below proposed exhibits granted *in camera* treatment. The chart below separates the Confidential Information for which Schein seeks *in camera* treatment into four categories (Contracts; Pricing Proposals; Customer-Specific Information; Confidential Strategic and Business Plans and Financial Information). The vast majority of these documents, are contracts between Schein and its customers that are either currently operative or contain proprietary terms that were in effect in the past three years. Schein is agreeable to redacting the

Confidential Information from a majority of its documents. The chart below indicates whether Schein can redact the Confidential Information or if the document needs to be withheld in full. Upon order by the Administrative Law Judge, Schein will submit proposed redactions for the Confidential Information for the documents identified for “redaction” in the chart below.

Exhibit Number	Category	Time Period Requested	Protection Requested	Total Number of Exhibits
CX2165 ; CX2187 ; CX2288; CX2404; CX2428; CX2481; CX2610; CX2700; CX2724; CX2736; CX2737; CX2920; CX2938; CX4001; CX4091; CX4092; CX4099; CX4128; CX4140; CX4142; CX6598; CX6599; CX6600; CX6602; CX6603; CX6606; RX0489; RX0602; RX2033; RX2079; RX2162; RX2196; RX2221; RX2250; RX2261; RX2262; RX2263; RX2265; RX2266; RX2267; RX2269; RX2274; RX2275; RX2276; RX2282; RX2287; RX2295; RX2341; RX2348; RX2352; RX2353; RX2354; RX2356; RX2359; RX2452; RX2468; RX2469; RX2470; RX2471; RX2503; RX2504; RX2527; RX2628; RX2644; RX2654; RX2655; RX2656; RX2657; RX2659; RX2662; RX2675; RX2681; RX2682; RX2683; RX2684; RX2695; RX2697; RX2698; RX2699; RX2700; RX2723; RX2724; RX2736 ² ; RX2737; RX2769	Customer Contracts	5 years	Redaction (<i>see</i> exception for RX2736)	85
CX2204; CX2626; RX2136; RX2151; RX2234; RX2448; CX2319; RX2249	Pricing Proposals	5 years	Redaction	8
RX2324; RX2358; RX2479; RX2480; RX2481; RX2622; RX2670; RX2671; RX2672; RX2680; RX2685; RX2687;	Customer Specific Information	5 years	Withheld in entirety	24

² Schein seeks to withhold RX2736 in its entirety. This exhibit contains recent contractual terms entered into in February 2018 with strict confidentiality provisions that require Schein to undertake to retain in confidence the terms of the agreement. *See* RX2736 § 10 & Attachment C § 27.

RX2692; RX2693; RX2694; RX2696; RX2721; RX2722; RX2735; RX2745; RX2746; RX2748; RX2750; RX2730				
CX2632; RX2180; RX2474; RX2627; CX2651; RX3062; RX3061; RX3066; RX3069	Confidential Strategic and Business Plans & Financial Information	10 years	Withheld in entirety	9

A. Contracts

Schein's Confidential Information includes current contracts and contracts with proprietary terms in effect in the past three years, including prime vendor agreements between Schein and various buying groups at issue in this case. *See e.g.*, CX2288; CX2428; CX4099; CX6602; RX2709; RX2352; RX2470; RX2471. These contracts are confidential agreements between private parties, and most contain strict confidentiality clauses. *See e.g.*, RX2266 (at p. 5-6, § 7); RX2353 at 2 (at p. 4-5, § 7); CX2274 (at p. 7, § 10). Schein carefully negotiates these contracts individually with each of its customers, including highly confidential and individualized pricing, discounts, rebates, administrative fees and other key contractual terms. Schein has developed custom pricing based on detailed, customer-specific analyses, for which it has spent significant resources and time negotiating. If this confidential information were disclosed, then competitors could attempt to undercut the terms of such agreements to take away Schein customers, while new customers would have an unfair advantage in negotiations with Schein. Despite the importance of this information, Schein has nonetheless been careful to narrowly tailor its request for *in camera* treatment, as it seeks only protection for those contracts that are either currently operative or had terms in effect within the last three years. Similar contracts involving Schein

and its buying group customers have already been granted *in camera* treatment. See Oct. 18th Order Regarding Non-Parties Motions For In Camera Treatment, granting *in camera* treatment for CX0294, CX4107; RX2057; RX2059. Schein requests that this information remain *in camera* for at least five years, by which time the terms of currently active contracts would have lapsed. See *In re Otto Bock Healthcare N. Am., Inc.*, 2018 FTC LEXIS 111, *11 (F.T.C. July 6, 2018) (granting five years of *in camera* treatment for distribution agreements); *In re Tronox Ltd.*, 2018 FTC LEXIS 77, *2 (F.T.C. May 15, 2018) (granting 10 years of *in camera* treatment for customer-specific information).

B. Pricing Proposals

The Confidential Information also includes negotiations and pricing proposals to certain buying groups within the last three years, which includes proprietary discounts, rebates, and other services offered to specific customers on a confidential basis. See *e.g.*, CX2204; CX2626; RX2136; RX2151; RX2234; RX2448; CX2319; RX2249. As noted above, release of information about prices, discounts, or contractual terms would materially harm Schein's ability to compete in the marketplace and fairly negotiate. Schein's price information is customer-specific and non-public, meaning disclosure would provide competitors with the advantage of asymmetrical information. Schein requests that this information remain *in camera* for at least 5 years. See *In re Otto Bock Healthcare N. Am., Inc.*, 2018 FTC LEXIS 111, *11 (F.T.C. July 6, 2018) (granting five years of *in camera* treatment for contract and pricing information); see *Tronox*, 2018 FTC LEXIS 77, *2 (granting 10 years of *in camera* treatment for customer-specific prices).

C. Customer-Specific Information

The parties exhibit lists also contain documents setting forth customer-specific information, including customer lists and sales to certain customers, which has also been held by the Commission to be deserving of *in camera* treatment. *See FTC v. Foster*, 2007 WL 2219410 at *7 (D.N.M. Apr. 26, 2007) (holding that customer lists are “competitive sensitive information”); *see also Polymore Int’l, Inc.*, 2009 WL 1499350, at *4 (F.T.C. May 13, 2009) (granting *in camera* treatment to “customer-specific documents”). Schein has developed relationships with many different customers over the years. Schein’s Confidential Information contains certain customer lists from the last three years that disclose who Schein’s customers are and how much business these customers have done with Schein. *See e.g.*, RX2324; RX2358; RX2479; RX2480; RX2481; RX2622; RX2670; RX2671; RX2672; RX2680; RX2685; RX2687; RX2692; RX2693; RX2694; RX2696; RX2721; RX2722; RX2735; RX2745; RX2746; RX2748; RX2750; RX2730. Disclosure of this information would allow Schein’s competitors to identify and selectively target Schein’s customers, including its larger customers, and gain competitive sales intelligence to undermine Schein. Accordingly, Schein requests that this highly sensitive information remain *in camera* for five years. *See Otto Bock*, 2018 FTC LEXIS 111, *11 (F.T.C. July 6, 2018) (providing five years of *in camera* treatment for sales and financial data); *See Tronox*, 2018 FTC LEXIS 77, at *2 (granting *in camera* treatment for a period of ten years for “customer-specific price and volume information”).

D. Confidential Strategic and Business Plans and Financial Information

The parties’ exhibits lists also include Confidential Information relating to sensitive business plans and financial and sales information, including long-term strategic plans and information relating to Schein’s market share and margins. *See e.g.*, CX2632; CX2651;

RX2180. These documents implicate Schein's plans to compete in the marketplace, including Schein's strategic plan on how to compete in the market through 2020, as well as financial information relating to customer segments and/or certain sales representatives. This Confidential Information could give competitors a roadmap to unfairly undermine Schein in various competitive areas. Disclosure of this information would allow competitors to obtain valuable insight into Schein's business and would allow them to see Schein's future plans in the market and possibly make decisions based on Schein's plans, thereby undermining Schein's plan for growth. Moreover, Schein's sales data and financial information are commercially valuable to Schein's competitors and are inherently material to its business. For example, some of Schein's financial information segments its sales by division, which would allow competitors to see which segment Schein was having the most or least success with. As such, these documents should be granted *in camera* treatment for at least 10 years. *See Tronox*, 2018 FTC LEXIS 77, at *2 (granting 10 years of *in camera* treatment for confidential business plans); *In the Matter of Impax Labs., Inc., A Corp.*, 9373, 2017 WL 4948988, at *1 (F.T.C. Oct. 23, 2017) (granting ten years of *in camera* treatment for "financial and sales projections for future years and pipeline products").

IV. Pursuant to the October 11th Order, Schein Will Prepare an In Camera Version of its Expert Report Based on the Outcome of the Pending Motions for *In Camera* Treatment

In the October 11th Order, Administrative Law Judge Chappell held that "once the orders on pending *in camera* treatment motions are issued, the parties shall prepare two version of their expert reports." The expert reports, including CX7100 and RX2832, contain confidential material that is the subject of this Motion and also information subject to the Protective Order entered in this case that is not the subject of this Motion. Pursuant to the October 11th Order, Schein will prepare *in camera* versions of the expert reports once the orders on pending *in*

camera motions are issued and will also designate the specific portions of the deposition transcripts of the experts that contain *in camera* information.

V. Conclusion

For the foregoing reasons, Schein respectfully moves that its motion for *in camera* treatment be granted.

Dated: October 19, 2018

Respectfully submitted,

/s/ Lauren M. Fincher

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2018 I delivered a true and correct copy Henry Schein Inc.'s Motion for *In Camera* Treatment via electronic mail to:

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/s/ Lauren M. Fincher

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

In the Matter of

**BENCO DENTAL SUPPLY CO.,
a corporation,**

**HENRY SCHEIN, INC.,
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a corporation.**

Docket No. 9379

**DECLARATION OF MARJORIE HAN IN SUPPORT OF SCHEIN'S SECOND
MOTION FOR *IN CAMERA* TREATMENT**

1. I am Marjorie Han of Henry Schein, Inc. ("Schein"). I make this declaration in support of Schein's Second Motion for *In Camera* Treatment of certain confidential documents and information (the "Confidential Information").

2. I am Vice President and Senior Counsel for Litigation. I am responsible for overseeing Schein's antitrust and other litigation matters, including the protection of Schein's confidential and proprietary information used in litigation. I have been employed by Schein since 2003.

3. I and outside counsel have reviewed the Confidential Information, and I am familiar with these materials. I am familiar with the confidential and proprietary nature of this information from my work in connection with related litigation where such information has remained under seal. Given my position at Schein, I am familiar with Schein's policies and procedures regarding the protection of such confidential and proprietary information. Based on

my review of the documents and my knowledge of Schein's business, I believe disclosure of the Confidential Information would cause serious competitive injury to Schein.

4. I understand that parties to this litigation have included on their final proposed exhibit lists hundreds of documents produced by Schein, many of which include confidential and propriety information. In the ordinary course of business, Schein generates and maintains highly confidential information. Schein is agreeable to redacting the Confidential Information from a majority of its documents. Upon order by the Administrative Law Judge, Schein will submit proposed redactions for the Confidential Information for the documents identified for "redaction" in the chart in Section III of Schein's Motion. Below, I explain why and how Schein would be harmed if any such category of Confidential Information is publicly disclosed. Documents containing the below categories of Confidential Information are listed in the Motion, Section III.

5. Customer Contracts: Schein negotiates contracts with many of its customers, which include pricing and other competitively sensitive terms that are specific to individual agreements. As such, these contracts are generally subject to confidentiality provisions. *See e.g.*, RX2266 (at p. 5-6, § 7); RX2353 at 2 (at p. 4-5, § 7); CX2274 (at p. 7, § 10). Schein does not publicly disclose information related to specific prices, discounts, rebates, and volume purchasing information offered to individual customers. If the terms of these current contracts were disclosed, Schein's business operations would be harmed on multiple fronts. First, competitors would gain insight into Schein's offerings and could attempt to unfairly compete for Schein's current and prospective customers, thus harming its current and future business. Furthermore, prospective customers would obtain an upper hand in negotiations, while current customer relations could be imperiled if certain customers discovered contract terms that they

interpret, without context, to be more favorable to other parties. Specifically, these documents contain Schein's rebate offerings, discount levels, and pricing for certain buying groups that are at issue in this proceeding. These contracts include pricing and discounts to customers that were in effect in the last three years and competitors could use this proprietary information to undermine Schein's ability to negotiate in the future. Therefore, this information should remain confidential.

6. Pricing Proposals: Schein individually negotiates prices with many of its customers and potential customers. In the course of those negotiations, Schein submits individualized pricing proposals and bids to prospective customers, which contain proprietary information related to specific prices, discounts, rebates, and volume purchasing information. Schein does not publicly disclose information related to specific prices, discounts, rebates, and volume purchasing information related to individual customers and groups. Given that the Confidential Information contains heavily negotiated and customer-specific pricing structures, Schein would be harmed by public disclosure for the same reasons given in the previous paragraph. Allowing a competitor to duplicate Schein's strategic business opportunities and thereby gain access to such a decisive competitive advantage, would significantly harm Schein. As such, this information should remain confidential.

7. Customer-Specific Information: Some documents on the parties' exhibit lists contain confidential information about Schein's customers, including customer lists and the amount of sales Schein has done with certain customers. Schein has developed relationships with many different customers over the years. The Confidential Information contains certain customer lists that Schein has done business with in the last three years and includes information relating to the amount of sales Schein has done with specific customers. If produced publicly,

this information could allow Schein's competitors to identify and selectively target Schein's customers, including its larger customers, and gain competitive sales intelligence to undermine Schein. Accordingly, this information should be afforded a high degree of protection.


8. Confidential Strategic and Business Plans and Financial Information: In the course of its business, Schein creates various strategic plans, budgets, projections, and other forward-looking documents, as well as various documents containing Schein's financial information. These documents directly relate to Schein's plans in the near term and long term to improve its business operations, grow sales and compete in the marketplace. These exhibits include highly sensitive information including Schein's unique business offering and strategic plans to improve its business operations. For example, one of the exhibits contains information on Schein's long-term plan on how to compete in the marketplace through 2020. The exhibits also contain confidential financial information relating to Schein's sales, costs, margins, commission structure, and financial performance in the last three years. If disclosed, Schein's competitors could use this information to duplicate or supplement their own business plans and attempt to take business opportunities away from Schein, thereby undermining Schein's competitive position in the marketplace. These materials should therefore remain confidential.

9. Though many documents could plausibly be grouped into multiple categories, each document has been designated with the category that is most appropriate.

10. I reserve the right to modify or supplement this Declaration if I discover new facts that render it inaccurate or incomplete.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: October 19, 2018


Marjorie Han
Senior VP and Senior Counsel, Litigation
Henry Schein, Inc.

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

In the Matter of

**BENCO DENTAL SUPPLY CO.,
a corporation,**

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a corporation, and**

**PATTERSON COMPANIES, INC.,
a corporation.**

Docket No. 9379

**[PROPOSED] ORDER GRANTING HENRY SCHEIN INC.'S
SECOND MOTION FOR *IN CAMERA* TREATMENT**

Upon consideration of Respondent Henry Schein, Inc.'s ("Schein") Second Motion for *In Camera* Treatment, it is HEREBY ORDERED that the following documents are to be provided *in camera* treatment for the amount of time specified below.

Exhibit Number	Category	<i>In Camera</i> Time Period
CX2165; CX2187; CX2288; CX2404; CX2428; CX2481; CX2610; CX2700; CX2724; CX2736; CX2737; CX2920; CX2938; CX4001; CX4091; CX4092; CX4099; CX4128; CX4140; CX4142; CX6598; CX6599; CX6600; CX6602; CX6603; CX6606; RX0489; RX0602; RX2033; RX2079; RX2162; RX2196; RX2221; RX2250; RX2261; RX2262; RX2263; RX2265; RX2266; RX2267; RX2269; RX2274; RX2275; RX2276; RX2282; RX2287; RX2295; RX2341; RX2348; RX2352; RX2353; RX2354; RX2356; RX2359; RX2452; RX2468; RX2469; RX2470; RX2471; RX2503; RX2504; RX2527; RX2628; RX2644; RX2654; RX2655; RX2656; RX2657; RX2659; RX2662; RX2675; RX2681; RX2682; RX2683; RX2684; RX2695; RX2697; RX2698; RX2699; RX2700; RX2723; RX2724; RX2736; RX2737; RX2769	Customer Contracts	5 years

CX2204; CX2626; RX2136; RX2151; RX2234; RX2448; CX2319; RX2249	Pricing Proposals	5 years
RX2324; RX2358; RX2479; RX2480; RX2481; RX2622; RX2670; RX2671; RX2672; RX2680; RX2685; RX2687; RX2692; RX2693; RX2694; RX2696; RX2721; RX2722; RX2735; RX2745; RX2746; RX2748; RX2750; RX2730	Customer Specific Information	5 years
CX2632; RX2180; RX2474; RX2627; CX2651; RX3062; RX3061; RX3066; RX3069	Confidential Strategic and Business Plans & Financial Information	10 years

Date: _____

D. Michael Chappell
Administrative Law Judge

Notice of Electronic Service

I hereby certify that on October 19, 2018, I filed an electronic copy of the foregoing Henry Schein, Inc.'s Second Motion for In Camera Treatment, with:

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I hereby certify that on October 19, 2018, I served via E-Service an electronic copy of the foregoing Henry Schein, Inc.'s Second Motion for In Camera Treatment, upon:

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