

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. )  
\_\_\_\_\_

PUBLIC

Docket No. 9379

**NON-PARTY DARBY’S MOTION FOR RECONSIDERATION AND MODIFICATION**  
**OF THE ORDER DATED OCTOBER 11, 2018 IN CONNECTION WITH THE**  
**AMOUNT OF TIME THAT *IN CAMERA* TREATMENT**  
**IS AFFORDED CONFIDENTIAL DOCUMENTS**

Non-party Darby Dental Supply, LLC (“Darby”) respectfully moves this Court for reconsideration and modification of the Order on Non-Parties’ Motions for *In Camera* Treatment dated October 11, 2018 (the “Order”) to provide for indefinite *in camera* treatment of the Confidential Documents (as defined below), or, if not indefinite, a minimum of ten (10) years in which the Confidential Documents are afforded *in camera* treatment. The Order is attached hereto as Exhibit A.

The Order granted Darby’s two (2) motions (the “Motions”) for *in camera* treatment of seventeen (17) competitively-sensitive, confidential business documents (the “Confidential

Documents”).<sup>1</sup> The First Motion is attached hereto as Exhibit B and the Second Motion is attached here as Exhibit C. As this Court recognized in issuing the Order, the Confidential Documents are entitled to in camera treatment, and the sensitive business information and confidential agreements contained in the Confidential Documents deserve protection from public disclosure. The Order, however, limits the *in camera* treatment to only a period of five (5) years.

As described below, a five (5) year time period is inadequate to protect Darby from the substantial competitive harm which will result from disclosure after that short protective period. The competitive significance of the information contained in the Confidential Documents will still be relevant to the market in five (5) years and disclosure of such highly sensitive business information would result in serious injury to Darby. For the reasons set forth in this motion for reconsideration (this “Motion”), Darby respectfully requests that this Court reconsider and modify the Order to afford the Confidential Documents *in camera* treatment indefinitely, or, if not indefinite, a minimum of ten (10) years. In support of this Motion, Darby relies on the Declaration of Michael Caputo, President and Chief Executive Officer of Darby (the “Caputo Declaration”), attached hereto as Exhibit D, which provides additional details on the need for permanent *in camera* treatment and the significant harm disclosure in five (5) years would cause, as well as the First Motion and the Second Motion and accompanying declarations.

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<sup>1</sup> The first motion was submitted on September 26, 2018 (the “First Motion”), and requested permanent in camera treatment of nine (9) confidential documents, which were identified in attachment A to the letter sent by John Weigand of the Federal Trade Commission dated September 17, 2018 (the “FTC Letter”), specifically CX4127; CX4444; CX4452; CX4453; CX4454; CX4455; CX4456; CX4457; and CX4458. The second motion was submitted on October 10, 2018 (the “Second Motion”), and requested permanent in camera treatment of eight (8) confidential documents which were identified in attachment A to the letter sent by Colin R. Kass of Proskauer Rose LLP dated October 6, 2018 (the “Proskauer Letter”), specifically RX3078; RX3079; RX3080; RX3081; RX3082; RX3083; RX3084; and RX3085. The documents identified in the Proskauer Letter are the same documents identified in the FTC Letter, excluding CX4444.

## **1. Maturity and Stability of the Dental Supply Industry**

Darby is a private company and is a dental supply distributor upon which thousands of dentists rely nationwide. The dental supply industry is a mature industry, and, for major players in the industry such as Darby, there is relative stability in its customer base, product sales, pricing, marketing, as well as the terms of strategic and contractual relationships and agreements with customers and/or strategic partners. Accordingly, it is a reasonable expectation that the information in the Confidential Documents (especially CX4444, which contains millions of lines of highly detailed data and analysis, including every customer and every sale from 2010 to the present) will continue to be of high value to competitors in five (5) years. In fact, the Confidential Documents contain the information that is the very basis of competitive advantage.

## **2. Data From 2009, Almost Ten (10) Years Ago, Is Still Relevant Today**

As indicated in the First Motion, based on the demand and information produced in response to the third party subpoenae duces tecum served on Darby by the Federal Trade Commission (the “FTC”) and Benco Dental Supply Company, Henry Schein, Inc. and Patterson Companies, Inc. (collectively, the “Respondents”), all parties consider information as far back as 2009 to be relevant to the matter at hand. CX4444 is the most detailed item of the Confidential Documents, and is 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 from 2010 to the present. If the FTC and the Respondents consider strategic relationships, sales data and business analysis from as far back as 2009 to be relevant today in 2018, almost a decade later, the information contained in the Confidential Documents will certainly still be relevant when the Order for *in camera* treatment

expires in 2023, just five (5) years later. In this mature and stable industry, five (5) years is an inadequate period of time to afford protection to the sensitive competitive business information that Darby produced. The disclosure of such information within such a short time period would result in a serious injury to Darby. Because of the length of time that Darby's highly confidential and propriety information is relevant to the industry, indefinite *in camera* treatment of the Confidential Documents is appropriate, or, if not indefinite, a minimum of ten (10) years of *in camera* treatment.

### **3. Data Would Not Have Otherwise Been Disclosed**

Darby is not a party to this proceeding. Had this enforcement action not been taken by the FTC, there would have been no chance that the information contained in the Confidential Documents would have been disclosed to Darby's competitors or have been made available to the public. The Confidential Documents contain information that essentially lays out the plan and strategy as to how Darby accomplishes its competitive success. 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 in just a five (5) year time period would result in serious competitive harm to Darby, including loss of Darby's competitive advantage, business and ability to compete. Indefinite *in camera* treatment of the Confidential Documents is appropriate, or, if not indefinite, a minimum of ten (10) years of *in camera* treatment.



#### **4. Respondents Should Not Be Rewarded For Failure to Settle**

If the Respondents had settled this proceeding, all of Darby's documents and information that was produced in connection with this proceeding would have been returned to Darby, and never would have been subject to potential public disclosure. Since the Respondents did not settle this proceeding, the Respondents should not be rewarded by being able to avail themselves of non-parties' competitive and sensitive business data that would otherwise have been returned to Darby and never accessible to the Respondents. As mentioned in the First Motion, Darby, a non-party, was thoroughly responsive to the FTC's and the Respondents' requests, but did so with a good faith expectation that confidential treatment would be accorded this highly sensitive material, and that the confidential treatment would be for an appropriate period of time that would not result in any competitive harm to Darby. Certainly, it would be entirely wrong for non-party Darby to be prejudiced by its very responsiveness to the FTC and the Respondents (its competitors) especially when no salutary purpose would be achieved by public disclosure. As such, indefinite *in camera* treatment of the Confidential Documents is appropriate, or, if not indefinite, a minimum of ten (10) years of *in camera* treatment.

#### **5. Conclusion**

For the reasons set forth in this Motion, and the accompanying Affidavit of Michael Caputo, President and Chief Executive Officer of Darby, Darby respectfully requests that this Court reconsider and modify the Order to grant Darby indefinite *in camera* treatment for the Confidential Documents in their entirety, or, if not indefinite, a minimum of ten (10) years of *in camera* treatment.

Dated: October 22, 2018

Respectfully submitted,

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

By JOHN PAUL FULCO, P.C.

A handwritten signature in blue ink, consisting of a large, stylized 'J' followed by a series of loops and a long horizontal stroke.

By: \_\_\_\_\_

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# **Exhibit A**

PUBLIC

UNITED STATES OF AMERICA  
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.

Respondents.

Docket No. 9379

ORDER ON NON-PARTIES' MOTIONS  
FOR *IN CAMERA* TREATMENT

I.

Pursuant to Rule 3.45(b) of the Commission's Rules of Practice and the Scheduling Order entered in this matter, certain non-parties, identified below, filed motions for *in camera* treatment for designated materials that Federal Trade Commission ("FTC") Complaint Counsel and/or Respondents Benco Dental Supply Co., Henry Schein, Inc. and Patterson Companies, Inc. ("Respondents") have listed on their exhibit lists as materials that might be introduced at trial. Neither Complaint Counsel nor Respondents have filed oppositions to any of these motions.

II.

Under Rule 3.45(b), the Administrative Law Judge may order that material offered into evidence "be placed *in camera* only [a] 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 [b] 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 FTC decisions 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. Moreover, there is a presumption that *in camera* treatment will not be accorded to information that is more than three years old. *In re Int’l Ass’n of Conference Interpreters*, 1996 FTC LEXIS 298, at \*15 (June 26, 1996) (citing *General Foods*, 95 F.T.C. at 353; *Crown Cork*, 71 F.T.C. at 1715).

In order to sustain the burden for withholding documents from the public record, an affidavit or declaration is always 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. 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).

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). “Applicants seeking indefinite *in camera* treatment must further demonstrate ‘at the outset that the need for confidentiality of the material is not likely to decrease over time’ 54 Fed. Reg. 49,279 (1989) . . . [and] that the circumstances which presently give rise to this injury are likely to be forever present so as to warrant the issuance of an indefinite *in camera* order rather than one of more limited duration.” *In re E. I. DuPont de Nemours & Co.*, 1990 FTC LEXIS 134, at \*2-3 (April 25, 1990). In *DuPont*, the Commission rejected the respondent’s request for indefinite *in camera* treatment. However, based on “the highly unusual level of detailed cost data contained in these specific trial exhibit pages, the existence of extrapolation techniques of known precision in an environment of relative economic stability, and the limited amount of technological innovation occurring in the . . . industry,” the Commission extended the duration of the *in camera* treatment for a period of ten years. *Id.* at \*5-6.

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. *Hood*, 58 F.T.C. at 1189. Examples of trade secrets meriting indefinite *in camera* treatment include secret formulas, processes, other secret technical information, or information that is privileged. *Hood*, 58 F.T.C. at 1189; *General Foods*, 95 F.T.C. at 352; *In re Textron, Inc.*, 1991 FTC LEXIS 135, at \*1 (Apr. 26, 1991).

In contrast to trade secrets, ordinary business records include information such as customer names, pricing to customers, business costs and profits, as well as business plans, marketing plans, or sales documents. *See Hood*, 1961 FTC LEXIS 368, at \*13; *In re McWane, Inc.*, 2012 FTC LEXIS 143 (Aug. 17, 2012); *In re Int’l Ass’n of Conference Interpreters*, 1996 FTC LEXIS 298, at \*13-14. When *in camera* treatment is granted for ordinary business records, it is typically provided for two to five years. *E.g., McWane, Inc.*, 2012 FTC LEXIS 143; *In re ProMedica Health Sys.*, 2011 FTC LEXIS 101 (May 25, 2011).

## **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 (Sept. 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

when 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.

The non-parties listed below filed separate motions for *in camera* treatment. Each motion included the documents for which *in camera* treatment is sought and was properly supported by a declaration of an individual within the company who had reviewed the documents at issue. These declarations supported the applicants’ claims that the documents are sufficiently secret and sufficiently material to their businesses that disclosure would result in serious competitive injury. That showing was then balanced against the importance of the information in explaining the rationale of FTC decisions. In evaluating the specific motions of each of the non-parties under the standards set forth above, requests for *in camera* treatment by non-parties warrant “special solicitude.” *In re Crown Cork & Seal Co.*, 71 F.T.C. 1714, 1715 (1967); *In re ProMedica Health Sys.*, 2011 FTC LEXIS 101, \*4 (May 25, 2011).

#### **The Atlanta Dental Supply Company (“ADS”)**

Non-party ADS seeks permanent *in camera* treatment for two exhibits. ADS supports its motion with a declaration from its president. The declaration describes in detail the confidential nature of the documents and the competitive harm that ADS would suffer if these documents were made publicly available and the measures that ADS takes to ensure that they remain confidential. The declaration explains that the documents contain competitively sensitive, confidential business documents and sales data relating to dental supplies, products and dental equipment.

ADS has met its burden of demonstrating that these documents are entitled to *in camera* treatment. However, the documents for which ADS seeks *in camera* treatment consist of ordinary business records, and not trade secrets, and are not entitled to indefinite *in camera* treatment. *In camera* treatment for a period of five years, to expire on October 1, 2023, is GRANTED for the documents identified as CX4129 and CX4442.

#### **Brasseler USA (“Brasseler”)**

Non-party Brasseler seeks *in camera* treatment for 36 documents, including one deposition transcript, for varying lengths of time. Brasseler supports its motion with declarations from its Senior Director, Business Operations and from its President, Strategic Business Units and Asia Pacific Dental, for Schein. The declarations describe in detail the confidential nature of the documents, the competitive harm that Brasseler would suffer if these documents were made publicly available, and the measures that Brasseler takes to ensure that the information contained in these documents remains confidential.

The declarations explain that the documents fall into four categories. The first category consists of current contracts, including purchasing agreements with many of Brasseler's current or prospective customers, which include pricing and other competitively sensitive terms that are specific to individual agreements and heavily negotiated. Brasseler has met its burden of demonstrating that documents in this category are entitled to *in camera* treatment, but not for an extended period of ten years. *In camera* treatment for a period of five years, to expire on October 1, 2023, is GRANTED for CX4146, CX4147, CX4149, CX4181, RX2020, RX2022, RX2023 and RX2032.

The second category contains documents relating to Brasseler's non-public pricing information including proprietary price lists, discount schedules, and rebates offered to specific customers and buying groups. Brasseler has met its burden of demonstrating that documents in this category are entitled to *in camera* treatment, but not for an extended period of ten years. *In camera* treatment for a period of five years, to expire on October 1, 2023, is GRANTED for CX4148, CX4156, CX4161, CX4163, CX4174, CX4180, RX2021, RX2029 and RX2031.

The third category contains documents concerning Brasseler's sales, costs, margins, financial performance, and customers. Brasseler has met its burden of demonstrating that documents in this category are entitled to *in camera* treatment for a period of five years. *In camera* treatment for a period of five years, to expire on October 1, 2023, is GRANTED for CX4160, CX4163, CX4165, CX4177 and CX4188.

The fourth category consists of private information related to mergers and acquisition activity, and other forward-looking strategic documents produced by Brasseler. Brasseler has met its burden of demonstrating that documents in this category are entitled to *in camera* treatment, but not for an extended period of ten years. *In camera* treatment for a period of five years, to expire on October 1, 2023, is GRANTED for CX4150, CX4151, CX4154, CX4162, CX4164, CX4182, CX4183, CX4187, CX4334, RX2025, RX2026, RX2027, RX2028 and RX2030.

In addition, some of the documents in the fourth category contain sensitive personal information such as personal addresses and personal financial information. Indefinite *in camera* treatment is GRANTED for CX4150, CX4151, CX4182, CX4187, RX2025, RX2026, RX2027, and RX2028<sup>1</sup>.

Brasseler's motion is DENIED WITHOUT PREJUDICE for the deposition transcript identified as RX2955 because Brasseler did not narrow its request to only the portions of testimony containing confidential information. Brasseler may, by October 19, 2018, file a renewed motion seeking *in camera* treatment for only those pages and line numbers that contain information that meets the standard for *in camera* treatment.

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<sup>1</sup> Although the sensitive personal information can be redacted and should not be a basis for withholding the documents from the public record, because these documents are covered by the *in camera* treatment ruling for documents in Brasseler's fourth category, documents are being withheld from the public record and the sensitive personal information contained therein merely extends the time for which the documents are withheld.



### **Burkhart Dental (“Burkhart”)**

Non-party Burkhart seeks permanent *in camera* treatment of 32 documents and excerpts from 4 deposition transcripts. Burkhart supports its motion with a declaration from its officer. The declaration describes in detail the confidential nature of the documents and the competitive harm that Burkhart would suffer if these documents were made publicly available and the measures that Burkhart takes to ensure that the information contained in these documents remains confidential. The declaration explains that the documents contain information of competitive significance to Burkhart, including: raw sales data; agreements and other documents containing the terms and structure of Burkhart’s relationship with group purchasing organizations (“GPOs”); other generally sensitive and confidential commercial information, including pricing, sales strategies and internal guidelines; training and compensation information; and information regarding legal matters.

Burkhart has met its burden of demonstrating that these documents are entitled to *in camera* treatment. These documents are ordinary business records, and not trade secrets, and are not entitled to indefinite *in camera* treatment or to *in camera* treatment for an extended period. *In camera* treatment for a period of five years, to expire on October 1, 2023, is GRANTED for the documents identified as CX0219, CX0220, CX1032/RX1051, CX4103/CX4240, CX4114, CX4117, CX4119/RX1012, CX4120, CX4124, CX4126, CX4130, CX4218, CX4219, CX4222, CX4223, CX4224, CX4227, CX4228, CX4229, CX4239, CX4241, CX4242, CX4243/CX4451, CX4245, CX4248, CX4268, CX4288, CX4443 and for the following excerpts of CX0319/RX2986: 18:25-21:13; 21:14-26:24; 29:7-31:25; 34:2-36:8; 37:25-45:15; 49:5-66:2; 73:19-76:3; 78:23-80:15; 81:3-93:14; 96:2-103:24; 104:23-106:7; 118:5-123:20; 125:16-137:19; 138:1-139:21; 141:18-146:10; CX8021/RX3036: 19:5-19:17; 23:6-24:5; 28:15-31:3; 31:4-41:20; 45:6-46:15; 46:16-55:3; 57:19-58:7; 68:6-70:17; 82:20-83:7; 88:13-97:25; 122:10-123:24; 126:22-127:14; RX1135: 24:1-29:16; 33:3-36:4 and RX1136: 29:23-46:15; 47:12-60:23; 63:8-76:21; 82:19-83:8; 95:19-98:12; 99:5-108:17; 111:8-130:16; 138:24-225:7; 231:14-234:23; 242:2-257:7; 262:19-263:20.

### **Darby Dental Supply Company, LLC (“Darby”)**

Non-party Darby seeks permanent *in camera* treatment for 17<sup>2</sup> documents. Darby supports its motion with a declaration from its president and chief executive officer. The declaration describes in detail the confidential nature of the documents and the competitive harm that Darby would suffer if these documents were made publicly available and the measures that Darby takes to ensure that they remain confidential. The declaration explains that the documents contain servicing/purchasing agreements with strategic partners/servicing organizations and group purchasing organizations, including sales and pricing history.

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<sup>2</sup> Darby filed two motions. The first sought *in camera* treatment for nine documents; the second motion sought *in camera* treatment for eight additional documents. Both motions are addressed as one filing.

Darby has met its burden of demonstrating that these documents are entitled to *in camera* treatment. These documents are ordinary business records, and not trade secrets, and are not entitled to indefinite *in camera* treatment or to *in camera* treatment for an extended period. *In camera* treatment for a period of five years, to expire on October 1, 2023, is GRANTED for the documents identified as CX4127, CX4444, CX4452, CX4453, CX4454, CX4455, CX4456, CX4457, CX4458, RX3078, RX3079, RX3080, RX3081, RX3082, RX3083, RX3084, and RX3085.

### **The Denali Group (“Denali”)**

Non-party Denali seeks permanent *in camera* treatment for 14 documents. Denali supports its motion with a declaration from its president and chief executive officer. The declaration describes in detail the confidential nature of the documents and the competitive harm that Denali would suffer if these documents were made publicly available and the measures that Denali takes to ensure that they remain confidential. The declaration explains that the documents contain confidential sensitive business information detailing Denali’s business model and operations, personal customer information, and pricing information.

Denali has met its burden of demonstrating that these documents are entitled to *in camera* treatment. These documents are ordinary business records, and not trade secrets, and are not entitled to indefinite *in camera* treatment or to *in camera* treatment for an extended period. *In camera* treatment for a period of five years, to expire on October 1, 2023, is GRANTED for the documents identified as CX4191/RX2040, CX4193/RX2041, CX4320, CX4321, CX4322, CX4323, CX4324, CX4325, CX4326, CX4331, CX4332, and CX4333.

### **Georgia Dental Association, Inc. (“GDA”)**

Non-party GDA seeks permanent *in camera* treatment for ten documents and for certain portions of two deposition transcripts. GDA supports its motion with a declaration from its general counsel and corporate secretary. The declaration describes in detail the confidential nature of the documents and the competitive harm that GDA would suffer if these documents were made publicly available and the measures that GDA takes to ensure that they remain confidential. The declaration explains that the documents and deposition transcripts contain competitively sensitive information regarding contractual agreements, strategic business plans, sales data, and confidential customer feedback.

GDA has met its burden of demonstrating that these documents are entitled to *in camera* treatment. These documents are ordinary business records, and not trade secrets, and are not entitled to indefinite *in camera* treatment or to *in camera* treatment for an extended period. *In camera* treatment for a period of five years, to expire on October 1, 2023, is GRANTED for the documents identified as CX0300, CX4078, CX4295,

CX4296, CX4297, CX4298, CX4299, CX4449/RX0736 and for the following portions of CX8011/RX3026: 14:15-25; 15:2; 15:13-18; 23:11-14; 31:23-25; 32:2-16; 43:23-5 and 44:2-10; and for the following portions of CX0320/RX2987: 36:16-17, 23; 37:3-6, 41:22-25; 42:1; 44:24-25; 45:1-22; 47:1-9; 57:14-24; 62:3-24; 63:2-25; 64:1-23; 65:18-25; 66:1-3; 100:3-13; 100:24-25; 101:1-10; 105:12-20; 106:1-16; 106:24-25; 107:1-3; 107:7-14; 113:1-25; 114:1-11; 115:19-25; 116:1-24; 117:4-14; 117:22-25; 118:1-13; 120:4-20 and 125:12-16.

### **Klear Impakt, LLC (“Klear Impakt”)**

Non-party Klear Impakt seeks permanent *in camera* treatment for four documents. Klear Impakt supports its motion with a declaration from its vice president of finance. The declaration describes in detail the confidential nature of the documents and the competitive harm that Klear Impakt would suffer if these documents were made publicly available and the measures that Klear Impakt takes to ensure that they remain confidential. The declaration explains that the documents contain highly sensitive details relating to vendor agreements and financial terms.

Klear Impakt has met its burden of demonstrating that these documents are entitled to *in camera* treatment. These documents are ordinary business records, and not trade secrets, and are not entitled to indefinite *in camera* treatment or to *in camera* treatment for an extended period. *In camera* treatment for a period of five years, to expire on October 1, 2023, is GRANTED for the documents identified as CX4107, RX2057, RX2058 and RX2059.

### **Michigan Dental Association (“MDA”)**

Non-party MDA seeks permanent *in camera* treatment for excerpts of a deposition transcript, along with corresponding exhibits. MDA supports its motion with a declaration from its president. The declaration describes in detail the confidential nature of the information contained in the deposition and documents, the competitive harm that MDA would suffer if this information was made publicly available, and the measures that MDA takes to ensure that it remains confidential. The declaration explains that the excerpts from the deposition and its corresponding exhibits contain sensitive and confidential proprietary business information relating to endorsement relationships and contracts, pricing and marketing strategies, sales and profit plans, and future sales outlook.

MDA has met its burden of demonstrating that the selected portions of the deposition transcript and its corresponding exhibits are entitled to *in camera* treatment. The information and the documents are ordinary business records, and not trade secrets, and are not entitled to indefinite *in camera* treatment or to *in camera* treatment for an extended period. *In camera* treatment for a period of five years, to expire on October 1,

2023, is GRANTED for the deposition page/line numbers and deposition exhibits identified below:

Deposition Page/Line Numbers	FTC Exhibit Pages	Deposition Exhibit	FTC Exhibit Pages
103:20 - 110:1	CX9069-027 - CX9069-029	Exhibit 952	CX9069-101
149:14 - 154:22	CX 9069-038 - CX9069-040	Exhibit 957	CX9069-110 - CX9069-114
161:19 - 167:11	CX 9069-041 - CX9069-043	Exhibit 960	CX9069-118 - CX9069-126
		Exhibit 961	CX9069-127
177:1 - 184:21	CX 9069-045 - CX9069-047	Exhibit 963	CX9069-129 - CX9069-193

#### **Mid-Atlantic Dental Partners (“Mid-Atlantic”)**

Non-party Mid-Atlantic seeks permanent *in camera* treatment for nine documents and for a deposition transcript. Mid-Atlantic supports its motion with a declaration from its chief executive officer. The declaration describes in detail the confidential nature of the documents and the competitive harm that Mid-Atlantic would suffer if these documents were made publicly available and the measures that Mid-Atlantic takes to ensure that they remain confidential. The declaration explains that the documents contain sensitive and confidential business information about its corporate structure, business operations, and business relationships/affiliations.

Mid-Atlantic has met its burden of demonstrating that these documents are entitled to *in camera* treatment. These documents are ordinary business records, and not trade secrets, and are not entitled to indefinite *in camera* treatment or to *in camera* treatment for an extended period. *In camera* treatment for a period of five years, to expire on October 1, 2023, is GRANTED for the documents identified as CX4131, CX4132, CX4135, CX4136, CX4138, CX4140/RX2769, CX4141, CX4142, and CX4143.

Mid-Atlantic’s motion is DENIED WITHOUT PREJUDICE for the deposition transcript because Mid-Atlantic did not narrow its request to only the portions of testimony containing confidential information. Mid-Atlantic may, by October 19, 2018, file a renewed motion seeking *in camera* treatment for only those pages and line numbers that contain information that meets the standard for *in camera* treatment.

### **Pearson Dental Supplies (“Pearson”)**

Non-party Pearson seeks permanent *in camera* treatment for one document. Pearson supports its motion with a declaration from its president. The declaration describes in detail the confidential nature of the document and the competitive harm that Pearson would suffer if this document were made publicly available and the measures that Pearson takes to ensure that the information contained therein remains confidential. The declaration explains that the document contains confidential business data, retrieved from its database, that includes highly sensitive financial information on its sales and customers. The declaration also states its sales and customer database is used to develop pricing decisions and marketing strategies and that Pearson is a privately held company and does not make any public filings.

Pearson has met its burden of demonstrating that this document is entitled to *in camera* treatment. This document is an ordinary business record, and not a trade secret, and is not entitled to indefinite *in camera* treatment or to *in camera* treatment for an extended period. *In camera* treatment for a period of five years, to expire on October 1, 2023, is GRANTED for the document identified as CX4441.

### **Smile Source, LP (“Smile Source”)**

Non-party Smile Source seeks *in camera* treatment, for varying lengths of time, for 32 documents and portions of deposition transcripts containing three categories of information: (1) sales, pricing, rebates/discounts, and member feedback; (2) vendor bidding processes, negotiations, and terms; and (3) strategic business plans. Smile Source supports its motion with a declaration from its in-house counsel. The declaration describes in detail the confidential nature of the documents and the competitive harm that Smile Source would suffer if these documents were made publicly available and the measures that Smile Source takes to ensure that they remain confidential.

Smile Source has met its burden of demonstrating that these documents are entitled to *in camera* treatment. These documents are ordinary business records, and not trade secrets, and are not entitled to indefinite *in camera* treatment or to *in camera* treatment for an extended period. *In camera* treatment for a period of five years, to expire on October 1, 2023, is GRANTED for the documents identified as CX0294/CX4128, CX4099, CX4098, CX4203/CX4206/RX2087, CX4205, CX4125, CX4207, CX4209, CX4450, CX0295, CX4097, CX4100, CX4101, RX2084, CX0296, CX4204, RX2085, RX2086, RX2088, CX0291, CX4208, RX2082, CX4200, CX4202, RX2083 RX2090, RX2091, and RX2092.

With respect to the deposition transcripts, Smile Source has narrowed its request to only the portions of testimony containing confidential information by providing redacted versions of the transcripts. *In camera* treatment for a period of five years, to expire on October 1, 2023, is GRANTED for the redacted portions of CX8019/RX3034, RX2952, CX0322/RX2989 and CX8039/RX3051. Complaint Counsel is hereby



ORDERED to provide, by October 19, 2018, a proposed order that indicates pages and line numbers of the Smile Source depositions that have been granted *in camera* treatment by this Order.

### **Strategic Data Marketing, LLC (“SDM”)**

Non-party SDM seeks permanent *in camera* treatment for a number of competitively sensitive business documents. SDM supports its motion with a declaration from its managing director. The declaration describes in detail the confidential nature of the documents and the competitive harm that SDM would suffer if these documents were made publicly available and the measures that SDM takes to ensure that the information contained therein remains confidential. The declaration explains that the documents contain confidential business data relating to financial sales, sales performance and marketing strategies collected on various companies. The declaration also states that SDM entered data collection agreements with various manufacturers and distributors and that SDM agreed to keep the information confidential.

SDM has met its burden of demonstrating that the documents are entitled to *in camera* treatment. The documents are ordinary business records, and not trade secrets, and are not entitled to indefinite *in camera* treatment or to *in camera* treatment for an extended period. *In camera* treatment for a period of five years, to expire on October 1, 2023, is GRANTED for the documents identified in SDM’s motion. Complaint Counsel is hereby ORDERED to provide, by October 19, 2018, a proposed order that indicates the exhibit number(s) of the SDM documents that have been granted *in camera* treatment by this Order.

### **IV.**

Several of the non-parties requested that disclosure of their *in camera* documents be limited to only those persons enumerated in Paragraph 7 of the Protective Order issued in this case. That request is granted. All of the documents for which *in camera* treatment has been granted shall also be treated as confidential under the Protective Order and may only be disclosed to those entities covered by the Protective Order.<sup>3</sup> In addition, pursuant to Rule 3.45(a), “material made subject to an *in camera* order will be kept confidential and not placed on the public record of the proceeding in which it was submitted. Only respondents, their counsel, authorized Commission personnel, and court personnel concerned with judicial review may have access thereto, provided that the Administrative

---

<sup>3</sup> Confidential material shall be disclosed only to: (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including consultants, provided they are not affiliated in any way with a respondent and have signed an agreement to abide by the terms of the protective order; and (e) any witness or deponent who may have authored or received the information in question. Protective Order ¶ 7.

Law Judge, the Commission and reviewing courts may disclose such *in camera* material to the extent necessary for the proper disposition of the proceeding.” 16 C.F.R. §3.45(a).

Each non-party whose documents or information 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. The parties are permitted to elicit testimony that includes references to, or general statements derived from, the content of information that has been granted *in camera* treatment. 16 C.F.R. § 3.45. However, any testimony revealing the confidential information from documents that have been granted *in camera* treatment shall be provided in an *in camera* session. Counsel shall segregate their questions of witnesses in such a manner that all questions on *in camera* materials will, to the extent practicable, be grouped together and elicited in an *in camera* session.

ORDERED:

Dm Chappell

D. Michael Chappell

Chief Administrative Law Judge

Date: October 11, 2018

## **Exhibit B**



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

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

**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:

<b>Exhibit No.</b>	<b>Document Name</b>	<b>Date</b>	<b>Beginning Bates No.</b>	<b>Ending Bates No.</b>
CX4127	Agreement between Darby and Smile Source	7/21/2014	Darby 00015	Darby 00035
CX4444 <sup>1</sup>	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

<sup>1</sup> 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: 

John Paul Fulco  
292 Madison Avenue 6<sup>th</sup> floor  
New York, New York 10017  
Tel: 212-661-7100  
Fax: 212-661-3339

**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 blue ink that reads "John Wiegand". The signature is fluid and cursive, with the first name "John" and last name "Wiegand" clearly distinguishable.

John Wiegand  
Counsel Supporting the Complaint

Attachment

# Attachment A

Exhibit No.	Full Name	Date	BegBates	EndBates
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
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
CX4459	Letter from John Paul Fulco to Devon Allen Re: FTC-Matter of Benco et al Docket #9379	5/22/2018	FTC-DDS-0000001	FTC-DDS-0000001

**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,** )

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

**PATTERSON COMPANIES, INC.,** )  
**a corporation.** )  
\_\_\_\_\_

**Docket No. 9379**

**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) documents<sup>1</sup> 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.<sup>2</sup> 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

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<sup>1</sup> As shown below, one of the Confidential Documents, CX4444, is actually a multi-thousand page spreadsheet containing millions of lines of data.

<sup>2</sup> 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:

<b>Exhibit No.</b>	<b>Document Name</b>	<b>Date</b>	<b>Beginning Bates No.</b>	<b>Ending Bates No.</b>
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
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

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



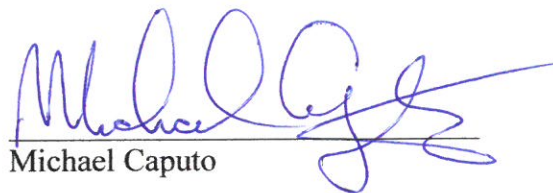
CX4127, CX4452, CX4453, CX4454, CX4455, CX4456, CX4457 and CX4458 would significantly harm Darby's ability to compete by making its confidential information, strategies and competitive processes available to the public and its competitors.

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

**Exhibit C**

**[Filed *In Camera*]**

## **Exhibit C**

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

The Proskauer 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. Darby previously submitted a motion requesting permanent *in camera* treatment of the Confidential Documents in their entirety on September 26, 2018 (the “Prior Motion”), a copy of which is attached hereto as Exhibit B. Due to the fact that an *in camera* version of the Prior Motion, together with copies of the Confidential Documents, has already been e-filed on the electronic docket of this matter, we do not plan to file an *in camera* version of this motion in order to avoid multiple filings.

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 set forth in the Prior Motion and the accompanying Affidavit of Michael Caputo, President and Chief Executive Officer of Darby, sworn to on September 24, 2018 and annexed as part of Exhibit B, Darby respectfully requests that this Court grant permanent *in camera* treatment for the Confidential Documents in their entirety.

In addition, we note that by Scheduling Order dated March 14, 2018, Administrative Law Judge D. Michael Cappell required that all applications for *in camera* treatment be submitted on or before September 26, 2018. However, the Proskauer Letter, dated October 6, 2018, is the first notification Darby received of the intention of the Respondents to introduce the Confidential Documents. Accordingly, Darby respectfully requests that the Court modify the Scheduling Order nunc pro tunc to deem the filing of the instant motion timely.

Dated: October 10, 2018

Respectfully submitted,

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

By JOHN PAUL FULCO, P.C.

By: 

John Paul Fulco  
292 Madison Avenue 6<sup>th</sup> floor  
New York, New York 10017  
Tel: 212-661-7100  
Fax: 212-661-3339  
JFulco@salonmarrow.com

**Exhibit A**



Proskauer Rose LLP 1001 Pennsylvania Avenue, NW Suite 600 South Washington, DC 20004-2533

October 6, 2018

**VIA EMAIL**

Darby Dental Supply, LLC  
c/o John Paul Fulco, Esq.  
Salon Marrow Dyckman Newman & Broudy LLC  
292 Madison Avenue  
New York, NY 10017

Colin Kass  
Attorney at Law  
d 202.416.6890  
f 202.416.6899  
ckass@proskauer.com  
www.proskauer.com

Re: *In the Matter of Benco Dental Supply Co, Henry Schein, Inc. and Patterson Companies, Inc.* (FTC Docket No. 9379)

Dear Mr. Fulco,

By this letter, we are providing formal notice, pursuant to Rule 3.45(b) of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.45(b), that Benco Dental Supply Company, Henry Schein, Inc., and Patterson Companies, Inc. intend to offer the documents referenced in the enclosed Attachment A into evidence in the administrative trial in the above-captioned matter. The administrative trial is scheduled to begin on October 16, 2018. All exhibits admitted into evidence become part of the public record unless *in camera* status is granted by Administrative Law Judge D. Michael Chappell.

For documents which 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, 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 (Feb. 23, 2015); *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 documents. *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (April 4, 2017); *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (April 23, 2004). Each party or non-party that files a motion for *in camera* treatment shall provide one copy of the documents for which *in camera* treatment is sought to the Administrative Law Judge. For your convenience, a copy of the documents will be provided to you via secure file share.



If you have any questions, please feel free to contact me at (202) 416-6890.

Sincerely,

/s/ Colin R. Kass

Colin R. Kass

**Darby Dental Supply  
Attachment A**

<b>RX Number</b>	<b>Description</b>	<b>Date</b>	<b>Beg Bates</b>	<b>End Bates</b>
RX3078	Agreement between Darby and New Orleans Dental Association	1/1/2014	Darby 00001	Darby 00014
RX3079	Agreement between Darby and Smile Source	7/21/2014	Darby 00015	Darby 00035
RX3080	Agreement between Darby and Unified Smiles	5/14/2013	Darby 00036	Darby 00049
RX3081	Agreement between Darby and Dental Purchasing Group of New England (DPG)	11/1/2013	Darby 00050	Darby 00064
RX3082	Agreement between Darby and Dental Partner Connection	10/1/2016	Darby 00065	Darby 00077
RX3083	Agreement between Darby and Synergy Linx	10/1/2016	Darby 00078	Darby 00091
RX3084	Agreement between Darby, David and Richard Madow, and Creative Management Resources	4/28/2011	Darby 00092	Darby 00108
RX3085	Agreement between Darby and Minnesota Multistate Contracting Alliance for Pharmacy (MMCAP)	9/1/2014	Darby 00109	Darby 00131

**Exhibit B**

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

In the Matter of	)	
	)	
BENCO DENTAL SUPPLY CO.,	)	PUBLIC
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 <sup>1</sup>	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

<sup>1</sup> 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: 

John Paul Fulco  
292 Madison Avenue 6<sup>th</sup> floor  
New York, New York 10017  
Tel: 212-661-7100  
Fax: 212-661-3339

**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,



John Wiegand  
Counsel Supporting the Complaint

Attachment

# Attachment A

Exhibit No.	Full Name	Date	BegBates	EndBates
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
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
CX4459	Letter from John Paul Fulco to Devon Allen Re: FTC-Matter of Benco et al Docket #9379	5/22/2018	FTC-DDS-0000001	FTC-DDS-0000001

**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) documents<sup>1</sup> 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.<sup>2</sup> 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

---

<sup>1</sup> As shown below, one of the Confidential Documents, CX4444, is actually a multi-thousand page spreadsheet containing millions of lines of data.

<sup>2</sup> 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:

<b>Exhibit No.</b>	<b>Document Name</b>	<b>Date</b>	<b>Beginning Bates No.</b>	<b>Ending Bates No.</b>
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
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 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

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

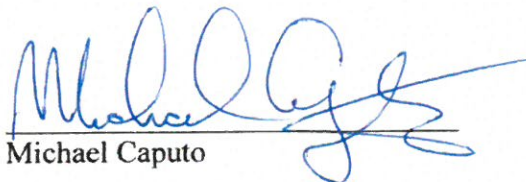
CX4127, CX4452, CX4453, CX4454, CX4455, CX4456, CX4457 and CX4458 would significantly harm Darby's ability to compete by making its confidential information, strategies and competitive processes available to the public and its competitors.

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

**Exhibit C**

**[Filed *In Camera*]**

## **Exhibit D**

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

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

**DECLARATION OF MICHAEL CAPUTO IN SUPPORT OF NON-PARTY DARBY  
DENTAL SUPPLY, LLC'S MOTION FOR RECONSIDERATION AND  
MODIFICATION OF THE ORDER DATED OCTOBER 11, 2018 IN CONNECTION  
WITH THE AMOUNT OF TIME THAT *IN CAMERA* TREATMENT  
IS AFFORDED CONFIDENTIAL DOCUMENTS**

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 reconsideration and modification of the Order on Non-Parties' Motions for *In Camera* Treatment dated October 11, 2018 (the "Order") to provide for indefinite *in camera* treatment of certain documents produced by Darby in response to a subpoena duces tecum (the "Motion"), or, if not indefinite, a minimum of ten (10) years of *in camera* treatment. I have personal knowledge of the matters stated herein and, if called upon to do so, could competently testify about them.
2. The Order granted Darby's two (2) motions (the "Prior Motions") for *in camera* treatment of seventeen (17) competitively-sensitive, confidential business documents (the

“Confidential Documents”).<sup>1</sup> The Order, however, limits the *in camera* treatment to only a period of five (5) years. For the reasons set forth below, Darby seeks indefinite *in camera* treatment of the Confidential Documents, or, if not indefinite, a minimum of ten (10) years of *in camera* treatment.

3. 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, and the maturity and stability of the dental supply market as explained below, I submit that disclosure of these documents to Darby’s competitors and/or the public in five (5) years would cause disastrous competitive injury to Darby. In order to avoid such competitive injury, the Confidential Documents therefore require *in camera* treatment indefinitely, or for a minimum of ten (10) years.

4. As described in my prior affidavit, submitted as Exhibit B to the First Motion and sworn to on September 24, 2018 (the “Prior Affidavit”), Darby is a private company and is a dental supply distributor upon which thousands of dentists rely nationwide. Due to the services Darby provides to its customer, 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 and marketing strategies and processes, including pricing and discount structures and records. Darby also applies proprietary and confidential information, strategies and processes in order to service its customers. Additionally, Darby maintains contracts with

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<sup>1</sup> The first motion was submitted on September 26, 2018 (the “First Motion”), and requested permanent *in camera* treatment of nine (9) confidential documents, which were identified in attachment A to the letter sent by John Weigand of the Federal Trade Commission dated September 17, 2018 (the “FTC Letter”), specifically CX4127; CX4444; CX4452; CX4453; CX4454; CX4455; CX4456; CX4457; and CX4458. The second motion was submitted on October 10, 2018 (the “Second Motion”), and requested permanent *in camera* treatment of eight (8) confidential documents which were identified in attachment A to the letter sent by Colin R. Kass of Proskauer Rose LLP dated October 6, 2018 (the “Proskauer Letter”), specifically RX3078; RX3079; RX3080; RX3081; RX3082; RX3083; RX3084; and RX3085. The documents identified in the Proskauer Letter are the same documents identified in the FTC Letter, excluding CX4444.



strategic partners/servicing organizations and group purchasing organizations, the terms of which are expressly confidential. The counterparties 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. It is this information which is contained in the Confidential Documents. As described in the Prior Affidavit, one of the Confidential Documents, CX4444, 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 from 2010 through the present. The document contains detailed customer contact information, specific products purchased, confidential discount pricing information, locations where products were purchased, and many more specific records covering all activity over a nearly decade-long period.

5. As this Court recognized in issuing the Order, the Confidential Documents are entitled to *in camera* treatment, and the sensitive business information and confidential agreements contained in the Confidential Documents deserve protection from public disclosure. The Order, however, limited the *in camera* treatment to a five (5) year time period, expiring October 1, 2023 which as explained herein is inadequate to protect Darby from the substantial competitive harm which will result from disclosure after that short protective period.

6. The dental supply market is a mature and relatively stable market. Given that maturity and stability, it is reasonable to expect that sales, marketing, pricing, product and customer data, as well as the terms of strategic and contractual relationships and agreements with customers and/or strategic partners, and marketing strategies and data analysis processes will retain substantial competitive value over a very long period of time. As explained in the Prior

Motions, this information, among other things, is exactly what is contained in the Confidential Documents. In the dental supply market, this kind of information, and the knowledge it represents, is the very basis of competitive advantage.

7. As pointed out in the accompanying Motion, it is not only Darby which views the kind of information contained in the Confidential Documents as having very long-term competitive value. Indeed, based upon the demands contained in the subpoenae duces tecum served upon Darby by the Federal Trade Commission and the Respondents, confidential information of this kind going back to 2009 is regarded as competitively very important and highly relevant today. Thus, those with the closest and deepest knowledge of the dental supply marketplace acknowledge that even information which is nearly a decade old remains competitively important and valuable. It follows, as Darby has maintained, that disclosure of that information would result in serious and substantial, potentially catastrophic, competitive harm.


8. Finally, Darby is not a party to this proceeding. It was called upon to make available records and information of a highly confidential nature by both the FTC and the Respondents. It did not object. It complied fully and completely, with alacrity and at great effort with the reasonable expectation that the highly confidential information sought by counsel for its competitors as well as the FTC would be safeguarded from disclosure to those very competitors, and that it would not suffer harm as a result of that compliance.

9. The Confidential Documents and the information contained in them are not publicly available and Darby has devoted substantial resources to protecting the confidentiality thereof. Disclosure of this information in just five (5) years 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. 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 in five (5) years and thus, indefinite and permanent protection from public disclosure is appropriate, but if not indefinite, a minimum of ten (10) years of *in camera* treatment.

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

Dated: Oct 22, 2018

  
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 October 22, 2018 that it would be seeking reconsideration and modification of the Order on Non-Parties’ Motions for *In Camera* Treatment dated October 11, 2018 to provide for permanent *in camera* treatment of the Confidential Documents, or, in the alternative, *in camera* treatment for a period of at least ten (10) years. We have received no objection to Darby’s motion.

Dated: October 22, 2018

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

Upon consideration of Non-Party Darby Dental Supply, LLC's Motion reconsideration and modification of the Order on Non-Parties' Motions for *In Camera* Treatment dated October 11, 2018 (the "Order") to provide for indefinite *in camera* treatment of the Confidential Documents, or, if not indefinite, a minimum of ten (10) years in which the Confidential Documents are afforded *in camera* treatment, it is HEREBY ORDERED that the following documents are to be provided [indefinite *in camera* treatment] [*in camera* treatment for a period of at least ten (10) years] from the date of this Order in their entirety.

294736

CX4457/ RX3084	Agreement between Darby, the Madow Brothers, and CMR	4/28/2011	Darby 00092	Darby 00108
CX4458/ RX3085	Contract between the State of Minnesota and Darby	9/9/2014	Darby 00109	Darby 00131

**ORDERED:**

\_\_\_\_\_  
D. Michael Chappell  
Chief Administrative Law Judge

Date: \_\_\_\_\_

## **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 RECONSIDERATION AND MODIFICATION OF THE ORDER DATED OCTOBER 11, 2018 (PUBLIC VERSION ONLY)**
- **[PROPOSED] ORDER**

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Federal Trade Commission  
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Washington, D.C. 20580

*The Office of the Administrative Law Judge (Public Version Only):*

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Dated: October 22, 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