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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE 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

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT BENCO DENTAL SUPPLY CO.'S RENEWED MOTION FOR *IN CAMERA* TREATMENT OF TRIAL EXHIBITS

Complaint Counsel seeks an open and public trial, subject to the narrow exception in Commission Rule 3.45(b). That Rule sets a strict standard and high burden for Respondents seeking to withhold documents from the public record. As explained in this Court's October 11, 2018 Order on Respondents' Motions for *In Camera* Treatment ("Order"), Respondent Benco Dental Supply Co. ("Benco" or "Respondent") must demonstrate why disclosure of identified documents, or portions thereof, would result in clearly defined, serious injury to meet this strict standard and avoid denial of its motion. As to expert reports, the Order required Respondent to prepare any *in camera* versions after the Court issued an order on these pending motions. Complaint Counsel opposes certain redactions of investigational hearing and deposition transcripts containing information that is already part of the public record in this matter. Complaint Counsel also opposes premature redaction of expert reports. Complaint Counsel does

not oppose full or partial *in camera* treatment of other exhibits, or portions thereof, identified by Respondent.[1] Therefore, Complaint Counsel respectfully requests that the Court deny Respondent's Renewed Motion for *In Camera* Treatment of Trial Exhibits as to certain portions of the exhibits and expert reports identified below.

I. STATEMENT OF FACTS

On October 11, 2018, the Court denied Respondent's motion for *in camera* treatment of over 200 potential trial exhibits without prejudice and allowed Respondent to file a renewed motion no later than October 19, 2018. Order at 8. Respondent filed its Renewed Motion for *In Camera* Treatment ("Second Mot.") on October 19, 2018. Respondent groups the documents into five categories: (1) Customer-Specific Price and Volume Information; (2) Pricing Strategy Information; (3) Information Regarding Price-Setting Process; (4) Business Plans; and (5) Sensitive Personal Information. Respondent submitted a declaration of its interim General Counsel, Rebecca Warren, in support of its motion. Second Mot., Exhibit A.

II. LEGAL STANDARD

Under Commission Rule 3.45(b), the Court may grant a request for *in camera* treatment "only 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 after finding that the material constitutes sensitive personal information." 16 C.F.R. § 3.45(b) (emphasis added). The applicant 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." Order at 2 (quoting *In re General Foods Corp.*, 95 F.T.C. 352, 1980 FTC LEXIS 99, at *10

[1] In an email on October 23, 2018, attached hereto as Exhibit A, Benco's counsel withdrew its claim for *in camera* treatment of CX1100 and CX8037 at 183:23-25, 184:11-16, and 209:6-7.

(Mar. 10, 1980)). If the applicant makes this showing, the Court weighs it against the primary reason favoring disclosure – the importance of the information in explaining the rationale of FTC decisions. Order at 2. As this Court recently explained, there is a "substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons." *Id*. (quoting *In re H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1961 FTC LEXIS 368, at *5-6 (Mar. 14, 1961)). A full and open trial record "promotes public understanding" of the Commission's decisions, "provides guidance to those affected by its actions," and "helps to deter potential violators of the laws the Commission enforces." *Id.*

Respondent bears the burden of showing good cause to withhold materials from the public record. *Id*. (citing *Hood*, 58 F.T.C. at 1188). An affidavit or declaration "is always required" to explain sufficiently why the information is secret and material and why disclosure would cause serious harm. *Id*.; *see also In the Matter of Otto Bock Healthcare N. Am.*, 2018 WL 3491602, at *3 (July 2, 2018). For information more than three years old, there is a presumption against *in camera* treatment, defeated only by affidavit or declaration that such material remains competitively sensitive. Order at 2 (internal citations omitted).

If Respondent meets the burden, the length of time granted for *in camera* treatment depends on whether the material consists of ordinary business records or trade secrets. Order at 3 (citing *Hood,* 58 F.T.C. at 1189). Trade secrets, like secret formulas, technical information, processes, or privileged information, may merit indefinite *in camera* treatment "in unusual circumstances." *Id*. (quoting 16 C.F.R. § 3.45(b)(3)). To receive indefinite protection, applicants must show that the need for confidentiality is "not likely to decrease over time" and that the circumstances giving rise to a serious injury "are likely to be forever present." *Id*. (quoting *In re E. I. DuPont de Nemours & Co.*, 1990 FTC LEXIS 134, at *2-3 (April 25, 1990)). In contrast,

ordinary business records, like pricing information, customer names, financial information, business plans, marketing plans, and sales documents, typically receive two- to five-year protection from disclosure. *Id*. (citing *In re McWane, Inc.*, 2012 FTC LEXIS 143 (Aug. 17, 2012); *In re ProMedica Health Sys.*, 2011 FTC LEXIS 101 (May 25, 2011)).

III. ARGUMENT

A. Respondent Fails to Show Disclosure of Certain Documents Containing Information on the Public Docket Will Result in Serious Competitive Injury

This Court required *in camera* treatment requests for transcripts of investigational hearings and depositions specify pages and line numbers, which must be "narrowly tailored to cover only those portions of the transcripts that contain competitively sensitive information." *Id.*; *see also In re Unocal*, 2004 FTC LEXIS 197, *4-5 (Oct. 7, 2004). Respondent has now identified portions of 18 transcripts and states that it has "precisely redact[ed] only those particular clauses or portions of exhibits containing competitively sensitive information." Second Mot. at 6. A review of those redactions shows that Respondent seeks *in camera* protection for portions containing information already on the public docket, including through testimony of Benco's executive Charles Cohen elicited by Benco's counsel. "Documents that are already on the public record are not secret" nor is public testimony in open court. Order at 6. Complaint Counsel opposes the following redactions of transcripts,[2] which contain public information:

[2] Second Mot., Exhibit C.

Exhibit No.	Page(s):Line(s) Redacted	Information on Public Docket
CX0301	26:18	Oct. 18, 2018 Trial Transcript ("Oct. 18 Tr.") at 410:12-14
CX0301	33:11-22	Oct. 18 Tr. at 672:6-19
CX0301	73:9-10, 13	Oct. 18 Tr. at 410:19-21, 411:2-5
CX0301	76:8-25; 77:1-18, 20-25; 78:2-5, 7-13, 21-24	Oct. 18 Tr. at 418:6-419:2; 652:14-653:16, 656:1-23
CX0301	92:11-22	Oct. 18 Tr. at 671:1-7; 673:16-25
CX0301	117:8,14-22	Oct. 18 Tr. at 673:16-25
CX0301	121:11-18	Oct. 24, 2018 Rough Trial Transcript ("Oct. 24 Tr.") at 112:8-11
CX0301	313:16-18, 20-25; 314:1-14	Oct. 24 Tr. at 130:13-20
CX0304	43:7-8, 16-20	Oct. 18 Tr. at 410:15-23; 411:2-5
CX0304	78:21-25	Oct. 18 Tr. at 689:24-690:1
CX8015	77:6-12, 16-25	Oct. 18 Tr. at 410:15-23; 411:2-5
CX8015	126:7, 10-12, 20-22; 128:16, 21-22; 129:5-8	Oct. 24 Tr. at 131:8-132:2; CX1051
CX8015	157:3-5, 18-20	Oct. 24 Tr. at 145:7-18; 146:5-11; CX1039
CX8015	191:11-14, 192:6-7	CX3200
CX8015	339:15-18; 341:22-24; 342:8-12; 344:22-25; 345:2-3	CX1078[3]
CX8015	388:12-15; 389:19-21; 390:4-5, 12-13; 391:4-5, 15-20	CX1079

[3] Respondent has redacted certain portions of CX1078 for *in camera* treatment, but it has not redacted the portions of CX1078 included in the redacted testimony.

B. Respondent's Redactions for *In Camera* Treatment of Expert Reports Is Premature and Improper

This Court ordered Respondent to prepare any public and *in camera* versions of expert reports "once the orders on pending in camera treatment motions are issued." Order at 7. Benco's premature redactions requesting *in camera* treatment of reports of both side's experts disregards this Court's order and is improper.[4]

IV. CONCLUSION

For the foregoing reasons, as to redaction of transcripts and expert reports identified above, Complaint Counsel respectfully requests that the Court deny Respondent's Renewed Motion for *In Camera* Treatment of Trial Exhibits.

Respectfully submitted,

/s/ Lin W. Kahn
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Erika Wodinsky
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(415) 848-5100/(415) 848-5184 (Facsimile)
lkahn@ftc.gov

Counsel Supporting the Complaint

[4] CX7100, RX2834.

EXHIBIT A

From:	Oliver, Geoffrey D.
To:	Kahn, Lin; Saltzman, Adam M.; Racowski, Kenneth
Cc:	Chang, Nair Diana; Scher, Howard
Subject:	RE: Benco"s In Camera Motion
Date:	Tuesday, October 23, 2018 6:09:39 PM

Lin,

Thanks very much for the discussion earlier this afternoon and for your message.

CX1084: Thank you for agreeing to use our redacted version of CX1084 in court tomorrow. We maintain our motion for in camera treatment of the portions of CX1084 that we have designated. Your use of our redacted version of CX1084 will permit us to complete Mr. Cohen's testimony on schedule tomorrow, and we can revisit this issue subsequently.

CX1100: Because this document was only a draft and is now four or more years old, we withdraw our claim for in camera treatment of this exhibit. (Please note that this does not alter our claim for in camera treatment of any final document, or any more recent draft, containing similar subject matter.)

CX8037 (deposition transcript of Patrick Ryan): We withdraw our claim for in camera treatment of the three designations you raised with us:

- Page 183: lines 23-25
- Page 184: lines 11-16
- Page 209: lines 6-7

Thank you for raising these issues before the testimony of Mr. Cohen and Mr. Ryan over the next two days. Please let us know if you anticipate any other issues regarding documents or testimony designated for in camera treatment.

Best regards,

Geoff

Geoffrey D. Oliver
Partner
JONES DAY® - One Firm Worldwide℠
51 Louisiana Avenue NW
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Office +1.202.879.5447

From: Kahn, Lin <lkahn@ftc.gov>
Sent: Tuesday, October 23, 2018 3:39 PM
To: Saltzman, Adam M. <adam.saltzman@bipc.com>; Oliver, Geoffrey D. <gdoliver@jonesday.com>; Racowski, Kenneth <kenneth.racowski@bipc.com>
Cc: Chang, Nair Diana <nchang@ftc.gov>; Scher, Howard <howard.scher@bipc.com>

Subject: RE: Benco's In Camera Motion

Adam and Geoff,

For the limited purpose of tomorrow, we are willing to use your redacted version of CX1084. Please get back to us on CX1100 and the testimony I raised on the call.

Thank you.

Lin

From: Saltzman, Adam M. <adam.saltzman@bipc.com>
Sent: Tuesday, October 23, 2018 12:13 PM
To: Kahn, Lin <lkahn@ftc.gov>; Oliver, Geoffrey D. <gdoliver@jonesday.com>; Racowski, Kenneth <kenneth.racowski@bipc.com>
Cc: Chang, Nair Diana <nchang@ftc.gov>; Scher, Howard <howard.scher@bipc.com>
Subject: RE: Benco's In Camera Motion

Lin,

Can you please send us your version of CX1084?

Thanks,
Adam

Adam M. Saltzman
Counsel
* *Admitted in NY and NJ, Pending in PA*

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Buchanan Ingersoll & Rooney PC

From: Kahn, Lin [mailto:lkahn@ftc.gov]
Sent: Tuesday, October 23, 2018 10:53 AM
To: Oliver, Geoffrey D.; Racowski, Kenneth
Cc: Chang, Nair Diana; Scher, Howard; Saltzman, Adam M.
Subject: RE: Benco's In Camera Motion

We can use this dial in:

USA Toll-Free: (877)336-1839; Access Code: 6851327

Thanks, Geoff.

Lin

From: Oliver, Geoffrey D. <gdoliver@jonesday.com>
Sent: Tuesday, October 23, 2018 7:35 AM
To: Racowski, Kenneth <kenneth.racowski@bipc.com>; Kahn, Lin <lkahn@ftc.gov>
Cc: Chang, Nair Diana <nchang@ftc.gov>; Scher, Howard <howard.scher@bipc.com>; Saltzman, Adam M. <adam.saltzman@bipc.com>
Subject: RE: Benco's In Camera Motion

Lin,

Adam and I are available at 2:30 this afternoon. At what number can we reach you?

Geoff

Geoffrey D. Oliver
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From: Racowski, Kenneth <kenneth.racowski@bipc.com>
Sent: Tuesday, October 23, 2018 10:27 AM
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Cc: Chang, Nair Diana <nchang@ftc.gov>; Oliver, Geoffrey D. <gdoliver@jonesday.com>; Scher, Howard <howard.scher@bipc.com>; Saltzman, Adam M. <adam.saltzman@bipc.com>
Subject: RE: Benco's In Camera Motion

Lin:

Geoff and Adam will reach out to you to discuss.

Regards,
Ken

Kenneth L. Racowski
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From: Kahn, Lin [mailto:lkahn@ftc.gov]
Sent: Tuesday, October 23, 2018 10:17 AM
To: Racowski, Kenneth
Cc: Chang, Nair Diana; Oliver, Geoffrey D.; Scher, Howard
Subject: RE: Benco's In Camera Motion

Ken,

I have not received a response from you. Are you free at 2:00 or 2:30 for a call today on the issue I raised below?

Lin

From: Kahn, Lin
Sent: Monday, October 22, 2018 5:04 PM
To: Racowski, Kenneth <kenneth.racowski@bipc.com>
Cc: Chang, Nair Diana <nchang@ftc.gov>; 'Oliver, Geoffrey D.' <gdoliver@jonesday.com>
Subject: Benco's In Camera Motion

Ken,

It appears that Benco is seeking in camera treatment for documents which have already been used in open court, as well as general testimony relating to subjects discussed in open court. These documents and testimony are already in the public domain and are no longer confidential. Benco has waived any argument that these materials require in camera treatment.

Because this impacts our examination of Patrick Ryan and redirect of Chuck Cohen, we need to meet and confer about this tomorrow. If we are not able to resolve this, we plan to raise this with Judge Chappell Wednesday morning.

Please let me know what time you're available tomorrow.

Lin

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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2018, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
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600 Pennsylvania Ave., NW, Rm. H-113
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The Honorable D. Michael Chappell
Administrative Law Judge
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Washington, DC 20580

I further certify that I delivered via electronic mail a copy of the foregoing document to:

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October 31, 2018

By: */s/ Lin W. Kahn*
Attorney

PUBLIC

CERTIFICATE OF ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed documents that is available for review by the parties and the adjudicator.

October 31, 2018

By: */s/ Lin W. Kahn*
Attorney

Notice of Electronic Service

I hereby certify that on October 31, 2018, I filed an electronic copy of the foregoing Complaint Counsel's Response to Respondent Benco Dental Supply Co.'s Renewed Motion for In Camera Treatment of Trial Exhibits, with:

D. Michael Chappell
Chief Administrative Law Judge
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Donald Clark
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I hereby certify that on October 31, 2018, I served via E-Service an electronic copy of the foregoing Complaint Counsel's Response to Respondent Benco Dental Supply Co.'s Renewed Motion for In Camera Treatment of Trial Exhibits, upon:

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