

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

**NON-PARTY BRASSELER USA'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 Brasseler USA ("Brasseler") respectfully moves this Court for *in camera* treatment of certain confidential, competitively sensitive documents designated as trial exhibits by the parties to this case.

Brasseler produced these documents, among others, in response to a third-party subpoena in this matter. The Federal Trade Commission (the "FTC") and Respondents have submitted their final proposed exhibit lists and have notified Brasseler that they intend to introduce certain documents produced by Brasseler and testimony given by Brasseler in this proceeding into evidence at the administrative trial in this matter. *See* Exhibit A (Letters from the FTC and Respondents). Many of the documents that appear on the FTC or Respondents' exhibit lists contain confidential, competitively sensitive information, disclosure of which would harm Brasseler's business operations. Under Rule 3.45(b), a party may obtain *in camera* treatment for materials offered into evidence if "public disclosure will likely result in a clearly defined, serious

injury.” After conducting a careful review of all of the documents produced by Brasseler that appear on the parties’ exhibit lists, Brasseler and its counsel have determined that public disclosure of the documents listed in Section III (below) will cause a clearly defined, serious injury to Brasseler by harming its ability to compete in the marketplace. As such, and for the reasons set forth below and in the Declarations of Ryan Dew (“Dew Declaration”) and David Brous (“Brous Declaration”) (attached as Exhibits B & C), Brasseler seeks *in camera* treatment for these confidential and proprietary materials.

I. Legal Standard

In camera treatment is appropriate for materials (1) that constitute sensitive personal information, such as social security or other ID numbers, tax info, bank account info, and sensitive health info, or (2) public disclosure of which will result in serious injury to the party requesting *in camera* treatment. See 16 C.F.R. 3.45; see also *In re 1-800-Contacts, Inc.*, 2017 FTC LEXIS 55 (April 4, 2017) (*in camera* treatment appropriate for information that “is sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury.”). A proponent of *in camera* treatment may demonstrate the requisite competitive injury by showing that the information is secret and that it is material to the business. *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980).

In making *in camera* determinations, factors that the Court may consider include: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended in developing the information; and (6) the easy or difficulty with which the information could be acquired or duplicated. *In re Bristol-*

Myers Co., 90 FTC LEXIS 455, at *5-6 (Nov. 11, 1977). In general, courts endeavor to “protect confidential business information from unnecessary airing.” *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961).

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

Non-party Brasseler seeks *in camera* treatment of documents listed in Section III (below), all of which contain information that are both secret and material to Brasseler’s business, making *in camera* treatment of such documents proper. This information includes current, operative customer contracts; proprietary customer-specific pricing, confidential purchasing plans, discounts, rebates and service arrangements; highly sensitive performance information such as sales, costs, profits, margins; and internal Brasseler business plans, strategic initiatives and forward-looking metrics and documents reflecting merger and acquisition activity (“Confidential Information”).

The Confidential Information is confidential and propriety, and is not known to individuals outside of Brasseler, with the limited exception of customer-specific pricing, which is highly confidential and frequently subject to contractual confidentiality clauses. For this reason, Brasseler noted the confidential nature of its documents when they were produced by designating the documents “Confidential” pursuant to the Protective Order in this matter. It has also established internal policies and practices to prohibit disclosure of this information. Ryan Dew Decl. ¶ 3. In many cases, Brasseler is contractually bound to maintain the confidentiality of such information. *E.g.*, RX2022 (at 4-5); RX2023 at 2; CX4147 at 2; CX4181 at 4-5.

As described in more detail below, disclosure of the Confidential Information would result in a decisive loss of business advantage to Brasseler, especially considering Brasseler’s substantial investments and years spent refining its own business model. *See In re Dura Lube Corp.*, 1999 FTC LEXIS 255 at *7 (1999) (“The likely loss of business advantages is a good

example of a ‘clearly defined, serious injury.’”). If disclosed, both competitors and customers would be able to take unfair advantage of this information. It would provide insight into Brasseler’s competitive strategies, negotiation positions, confidential structuring of its business arrangements, and proprietary pricing. Such asymmetrical information vis-à-vis competitors and customers would disadvantage Brasseler and cause substantial injury in the marketplace.

Competitors cannot obtain this Confidential Information absent disclosure in this matter, because the materials come from Brasseler’s confidential business records that are not publicly disseminated. Without insight into Brasseler’s confidential practices and operations, this information could not be replicated by an outside party. The risk of such disclosure would severely undermine Brasseler’s ability to compete for future business opportunities.

III. Proposed Exhibits that Contain Confidential Information

Brasseler seeks to have the below proposed exhibits granted *in camera* treatment, a majority of which it only seeks to redact the Confidential Information contained in the document, instead of withholding the document in full. The chart below separates the Confidential Information for which Brasseler seeks *in camera* treatment into four categories (Current Contracts; Non-Public Pricing Information; Confidential Performance Metrics; and Confidential Strategic and Business Plans). Of the over fifty Brasseler documents listed as proposed exhibits on the FTC and Respondents’ exhibit lists, Brasseler seeks *in camera* treatment for thirty-six documents. The vast majority of these documents, which includes Brasseler’s deposition testimony, contain highly sensitive confidential information, including current contract terms, customer-specific pricing, and customer information. Brasseler is agreeable to redacting the Confidential Information from a majority of its documents. The chart below indicates whether Brasseler can redact the Confidential Information or if the document needs to be withheld in full.

Upon order by the Administrative Law Judge, Brasseler will submit proposed redactions for the Confidential Information for the documents identified for “redaction” in the chart below.

Exhibit Number	Category	Protection Requested
CX4148	Non-public pricing information	Redaction
CX4146	Current Contract	Redaction
CX4147	Current Contract	Redaction
CX4149	Current Contract	Redaction
CX4150	Confidential Strategic and Business Plans	Withheld in entirety
CX4151	Confidential Strategic and Business Plans	Withheld in entirety
CX4154	Confidential Strategic and Business Plans	Withheld in entirety
CX4156	Non-public pricing information	Redaction
CX4160	Confidential Performance Metrics	Redaction
CX4161	Non-public pricing information	Redaction
CX4162	Confidential Strategic and Business Plans	Redaction
CX4163	Non-public pricing information; Confidential Performance Metrics	Redaction
CX4164	Non-public pricing information; Confidential Strategic and Business Plans	Withheld in entirety
CX4165	Confidential Performance Metrics	Redaction
CX4174	Non-public pricing information	Redaction
CX4177	Confidential Performance Metrics	Redaction
CX4180	Non-public pricing information	Redaction
CX4181	Current Contract	Redaction
CX4182	Confidential Strategic and Business Plans	Withheld in entirety

CX4183	Confidential Strategic and Business Plans	Redaction
CX4187	Confidential Strategic and Business Plans	Withheld in entirety
CX4188	Confidential Performance Metrics	Redaction
CX4334	Confidential Strategic and Business Plans	Redaction
RX2020	Current Contract	Redaction
RX2021	Non-public pricing information	Redaction
RX2022	Current Contract	Redaction
RX2023	Current Contract	Redaction
RX2025	Confidential Strategic and Business Plans	Withheld in entirety
RX2026	Confidential Strategic and Business Plans	Withheld in entirety
RX2027	Confidential Strategic and Business Plans	Withheld in entirety
RX2028	Confidential Strategic and Business Plans	Withheld in entirety
RX2029	Non-public pricing information	Redaction
RX2030	Confidential Strategic and Business Plans	Withheld in entirety
RX2031	Non-public pricing information	Redaction
RX2032	Current Contract	Redaction
RX2955	Current Contract; Non-public pricing information; Confidential Performance Metrics; Confidential Strategic and Business Plans	Withheld in entirety

A. Current Contracts

Brasseler's Confidential Information includes current contracts it has produced in this matter, including purchase agreements between Brasseler and various buying groups. *See e.g.*, CX4146; CX4147; CX4149; CX4181; RX2020; RX2022; RX2023; RX2032; RX2955. These contracts

are confidential agreements between private parties, and most contain strict confidentiality clauses. RX2022 (at 4-5); RX2023 at 2; CX4147 at 2; CX4181 at 4-5. Brasseler carefully negotiates these contracts individually with each of its customers, including highly confidential and individualized pricing, discounts, and other key contractual terms. Brasseler has developed custom pricing based on detailed, customer-specific analyses, for which it has spent significant resources and time negotiating. If this confidential information were disclosed, then competitors could attempt to undercut the terms of such agreements to take away Brasseler customers, while new customers would have an unfair advantage in negotiations with Brasseler. Despite the importance of this information, Brasseler has nonetheless been careful to narrowly tailor its request for *in camera* treatment, as it seeks only protection for those contracts that are currently operative. Brasseler requests that this information remain *in camera* for at least ten years, by which time the terms of currently active contracts would have lapsed. *See In re Otto Bock Healthcare N. Am., Inc.*, 2018 FTC LEXIS 111, *11 (F.T.C. July 6, 2018) (granting five years of *in camera* treatment for distribution agreements); *In re Tronox Ltd.*, 2018 FTC LEXIS 77, *2 (F.T.C. May 15, 2018) (granting 10 years of *in camera* treatment for customer-specific information).

B. Non-Public Pricing Information

The Confidential Information also includes proprietary price lists, discount schedules, and rebates offered to specific customers on a confidential basis. *See e.g.*, CX4156 (pricing and discount information); CX4161 (pricing and discount information); CX4174 (pricing and discount information); CX4180 (rebate information); RX2021 (rebate information); RX2029 (pricing and discount information); RX2031 (pricing information); RX2955. As noted above, release of information about prices, discounts, or contractual terms would materially harm

Brasseler's ability to compete in the marketplace and fairly negotiate. Brasseler's price information is customer-specific and non-public, meaning disclosure would provide competitors with the advantage of asymmetrical information. Brasseler requests that this information remain *in camera* for at least 10 years. *See Tronox*, 2018 FTC LEXIS 77, *2 (granting 10 years of *in camera* treatment for customer-specific prices).

C. Confidential Performance Metrics

The Confidential Information also includes highly sensitive information about Brasseler's sales, costs, margins, financials, and customers. These documents describe Brasseler's business operations and Brasseler's analysis of them. *See e.g.*, CX4160 (margins); CX4165 (sales figures); CX4177 (customer information); CX4188 (customer information); RX2955. If disclosed, they could be used by competitors to gain an unfair advantage with information about whether and when Brasseler decides to implement business changes, or how Brasseler is impacted by different competitive forces. Confidential, non-public details about business margins and strategic pricing to customers—present an increased risk. Such information would enable competitors to unfairly compete against Brasseler. As such, Brasseler requests that these documents remain protected for at least five years. *See Otto Bock*, 2018 FTC LEXIS 111, *11 (F.T.C. July 6, 2018) (providing five years of *in camera* treatment for sales and financial data).

D. Confidential Strategic and Business Plans

The parties' exhibits lists include Confidential Information relating to sensitive business plans, private information related to mergers and acquisition activity, and other forward-looking documents strategic documents produced by Brasseler. *See e.g.*, CX4150 (merger and acquisition activity); CX4151 (merger and acquisition activity); CX4154 (group strategy presentation that details, among other things, pricing); CX4162 (group strategy planning

meeting, including strategic priorities); CX4164 (customer engagement rules); CX4182 (merger and acquisition activity); CX4183 (2018 Senior Management Report); CX4187 (merger and acquisition activity); CX4334 (CEO Council Summary discussing Brasseler’s approach to certain customers); RX2025 (merger and acquisition activity); RX2026 (merger and acquisition activity); RX2027 (merger and acquisition activity); RX2028 (merger and acquisition activity); RX2030 (group strategy presentation that details, among other things, pricing); RX2955. These documents implicate Brasseler’s plans to compete in the marketplace, including strategy on setting proprietary pricing, business programs to evaluate and respond to market trends, and how to address competitive threats and could be used by competitors to unfairly undermine Brasseler in certain competitive areas. As such, these documents should be granted *in camera* treatment for at least 10 years. *See Tronx*, 2018 FTC LEXIS 77, at *2 (granting 10 years of *in camera* treatment for confidential business plans); *In the Matter of Impax Labs., Inc., A Corp.*, 9373, 2017 WL 4948988, at *1 (MSNET Oct. 23, 2017) (granting ten years of *in camera* treatment for “financial and sales projections for future years and pipeline products”). Moreover, some of the documents in this category contain sensitive personal information such as personal addresses and personal financial information. *See e.g.*, RX2025; RX2026; RX2027; RX2028; CX4150; CX4151; CX4182; CX4187. Brasseler requests that sensitive personal information be kept *in camera* indefinitely because such information “shall be accorded permanent *in camera* treatment unless disclosure or an expiration date is required or provided by the law.” 16 C.F.R. § 3.45(b)(3).

E. Brasseler is a Third Party

Brasseler’s status as a third party is also relevant to the treatment of its documents. The FTC has held that “[t]here can be no questions that the confidential records of businesses involved in

Commission proceedings should be protected insofar as possible.” *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1186 (1961). As a nonparty, Brasseler deserves “special solicitude” in its request for *in camera* treatment for its confidential business information. See *In re Kaiser Aluminum & Chem. Corp.*, 103 FTC 500 (1984) (“As a policy matter, extensions of confidential information or *in camera* treatment in appropriate cases involving third party bystanders encourages cooperation with future adjudicative discovery requests.”). Brasseler’s status as a third party further supports granting *in camera* treatment to the Confidential Information.

IV. Conclusion

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

Dated: September 26, 2018

Respectfully submitted,

/s/ Lauren M. Fincher

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STATEMENT REGARDING MEET AND CONFER

The undersigned certifies that counsel for Non-Party Brasseler USA notified counsel for the Federal Trade Commission and Respondents via email on or about September 25, 2018 that it would seek in camera treatment of the Confidential Documents. Counsel for both the FTC and Respondents informed the undersigned that they would not object to Brasseler's motion.

/s/ Lauren M. Fincher

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2018 I delivered a true and correct copy Brasseler USA's Motion for *In Camera* Treatment via electronic mail to:

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Exhibit A

Exhibit B

Exhibit C

Notice of Electronic Service

I hereby certify that on September 26, 2018, I filed an electronic copy of the foregoing Non-Party Brasseler USA's Motion for In Camera Treatment (Public), with:

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I hereby certify that on September 26, 2018, I served via E-Service an electronic copy of the foregoing Non-Party Brasseler USA's Motion for In Camera Treatment (Public), upon:

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