



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

In the Matter of)
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)
Otto Bock Healthcare North) Docket No. D09378
America, Inc.,)
)
)
Respondents.)

NON-PARTY DAW INDUSTRIES, INC.’S UNOPPOSED RENEWED MOTION FOR

IN CAMERA TREATMENT

On July 6, 2018 this Court issued an order denying **without prejudice** Non-Party DAW Industries, Inc.’s (“**DAW**”) motion for *in camera* treatment for the deposition transcripts of Stuart Marquette (RX-1017-00001 to RX-1017-00039; PX05146-001-PX05146-039) and Hugues Belzidsky (RX-1018-00001 to RX-1018-00043; PX05147-001-PX05147-043). The Court invited DAW to file a renewed motion seeking *in camera* treatment narrowed to those pages and line numbers that contain information that meets the standard for *in camera* treatment.

DAW initially did not make a narrowed request because the parties to the action have not identified what, if any, specific testimony they intend to introduce as evidence and for DAW to review the entire transcripts constitutes a significant additional burden on non-party DAW.

Nonetheless, **DAW** hereby renews its motion for *in camera* treatment limited to the following specific testimony from the deposition transcripts of Stuart Marquette (25:4-6; 25:13;

25:20-22; 30:11-15; 33:15-20; 34:12-15; 34:21-23; 34:25-35:3; 38:7-20; 40:4-10; 41:6-23; 43:24-25; 61:24; 63:1-25; 69:4-12; 72:3-85:20) (**attached as Exhibit A**) and Hugues Belzidsky (14:4-16:18; 23:16-24; 28:6-24; 30:2-18; 34:22-35:3; 44:6-51:21; 53:10-23; 55:1-4; 55:20-64:21; 88:23-89:25; 91:24-92:22; 96:10-24; 98:6-22; 100:16-19) (**attached as Exhibit B**) (**Exhibits A & B** collectively “**Confidential Documents**”), pursuant to Rule 3.45 of the Federal Trade Commission’s Rules of Practice, 16 C.F.R. § 3.45(b).

DAW has been notified by the Federal Trade Commission (“**FTC**”) and Otto Bock HealthCare North America, Inc. (“**Otto Bock**”) that they intend to introduce **Exhibits A & B** at trial. *See* Letter from FTC dated May 25, 2018 (attached as **Exhibit C**) and letter from Otto Bock dated May 29, 2018 (attached as **Exhibit D**).

At the beginning of both depositions, it was stipulated by all parties that the transcripts would be treated as “Confidential” and subject to the Protective Order in this case. The documents and related testimony contain extremely sensitive and confidential business information that DAW testified about pursuant to third-party subpoenas served upon DAW initially by Otto Bock and then also by the FTC. DAW has advised both the FTC and Otto Bock of its intention to move for *in camera* treatment of these materials. Neither party opposes this motion.

Given the nature of the testimony, DAW would be significantly harmed in its ability to compete in the prosthetic industry if this information were publicly available. For the reasons set forth below, DAW requests that this Court afford DAW’s confidential information permanent *in camera* treatment. In support of this renewed motion, DAW relies on the Renewed Declaration of Hugues Belzidsky (“Decl. Belzidsky”), attached as **Exhibit E**.

I. Confidential Documents At Issue

DAW seeks *in camera* treatment of the following Confidential Documents:

<u>No.</u>	<u>Description</u>	<u>Date</u>	<u>Bates Ranges</u>
PX05146 RX-1017	Partial Deposition transcript of Stuart Marquette (25:4-6; 25:13; 25:20-22; 30:11-15; 33:15-20; 34:12-15; 34:21-23; 34:25-35:3; 38:7-20; 40:4-10; 41:6-23; 43:24-25; 61:24; 63:1-25; 69:4-12; 72:3-85:20)	04/03/2018	PX05146-008; RX-1017-008 PX05146-009; RX-1017-009 PX05146-010; RX-1017-010 PX05146-011; RX-1017-011 PX05146-012; RX-1017-012 PX05146-017; RX-1017-017 PX05146-019-PX05146-023; RX-1017-019-RX-1017-023
PX05147 RX-1018	Partial Deposition transcript of Hugues Belzidsky (14:4-16:18; 23:16-24; 28:6-24; 30:2-18; 34:22-35:3; 44:6-51:21; 53:10-23; 55:1-4; 55:20-64:21; 88:23-89:25; 91:24-92:22; 96:10-24; 98:6-22; 100:16-19)	04/03/2018	PX05147-005; RX-1018-005 PX05147-007; RX-1018-007 PX05147-008; RX-1018-008 PX05147-009; RX-1018-009 PX05147-010; RX-1018-010 PX05147-012-PX05147-014; RX-1018-012-RX-1018-014 PX05147-015-PX05147-017; RX1018-015-RX-1018-017 PX05147-023-PX05147-024; RX-1018-023-RX-1018-024 PX05147-025; RX-1018-025 PX05147-026; RX-1018-026

II. Legal Standard

In camera treatment of material is appropriate where, as here, its “public disclosure will likely result in a clearly defined, serious injury to the ... corporation requesting such treatment.” 16 C.F.R. § 3.45(b). A proponent seeking *in camera* treatment demonstrates 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). In this context, courts generally attempt “to protect confidential business information from unnecessary airing.” *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961).

The Court’s consideration of the secrecy and materiality of the documents and testimony at issue involves the following factors: (1) the extent to which the information is known outside of 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 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 ease or difficulty with which the information could be acquired or duplicated by others. *In re Bristol-Meyers Co.*, 90 F.T.C. 455, 456-457 (1977).

An additional factor—DAW’s non-party status—weighs in favor of *in camera* treatment of DAW’s information. 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.” *HP. Hood & Sons*, 58 F.T.C. at 1186. This is especially so in the case of a non-party, which deserves “special solicitude” in its request for *in camera* treatment for its confidential business information. *See In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500 (1984) (“As a

policy matter, extension of confidential or *in camera* treatment in appropriate cases involving third party bystanders encourages cooperation with future adjudicative discovery requests”).

III. The Testimony are Secret and Material and Disclosure Would Result in Serious Injury to DAW

DAW seeks *in camera* treatment for secret and competitively-sensitive sales data, cost data, annual sales revenue, pricing considerations, DAW’s internal structure and management, marketing strategy and practice, sales guidelines, data regarding the demand for DAW’s products, DAW’s investment strategies, the technology used in DAW’s products, customer service decisions, DAW’s expansion plans and strategies, internal training process and other secret and competitively-sensitive information contained in the Confidential Documents (“**Confidential and Sensitive Information**”)—that is exactly the type of information for which the FTC has traditionally afforded *in camera* treatment. (Decl. Belzidsky ¶¶ 4-6); *see, e.g., The Matter of Champion Spark Plug Company*, 1982 FTC LEXIS 85 at *2 (April 5, 1982) (finding that “there is ample support for granting *in camera* treatment for sales data of a type not normally disclosed”).

DAW’s Confidential and Sensitive Information is secret. DAW maintains the confidentiality of such information by narrowly disclosing such information to employees within DAW who have a specific “need to know” it to perform their duties and not disclosing such information outside of DAW. (Decl. Belzidsky ¶ 9.) Within DAW, the Confidential and Sensitive Information is contained within its computer system that restricts access to only those individuals that require the information for performing their job duties. (Decl. Belzidsky ¶ 9.) No person or entity outside of DAW has access to the Confidential and Sensitive Information and only required employees within DAW have access to it. (Decl. Belzidsky ¶ 9.)

DAW's efforts to maintain the secrecy of the Confidential and Sensitive Information extended to this matter. When DAW's employees were deposed in this matter, the parties entered into stipulations that the depositions in their entirety will be designated as confidential pursuant to the Protective Order in this case. (Decl. Belzidsky ¶ 8.) It will be extremely damaging to DAW if the Court were to make public the highly sensitive and confidential business information that are currently under the Protective Order. (*See* Decl. Belzidsky ¶¶ 11-12.)

Disclosure of the Confidential Documents will undermine DAW's ability to negotiate favorable terms in the future with its suppliers and customers; it would also give a business advantage to DAW's competitors, including Otto Bock, by allowing them to more effectively target DAW's customers and suppliers by undermining DAW's pricing and other business practices. (Decl. Belzidsky ¶ 11.) Thus, disclosing the Confidential and Sensitive Information will result in the loss of DAW's competitive business advantage in the prosthetic knee market place and will result in "serious injury" to the company. (Decl. Belzidsky ¶ 10); *see In re Dura Lube Corp.*, 1999 FTC LEXIS 255 at *7 (Dec. 23, 1999) ("the likely loss of business advantages is a good example of a 'clearly defined, serious injury'").

Additionally, DAW expends a significant amount of time and money to review and analyze the costs of its products, sale strategies, sales figures, and sales margins for use in its marketing and pricing decisions, which are highly-confidential business strategies. (Decl. Belzidsky ¶ 12.) DAW also spends a significant amount of time and resources in preparing its expansion plans and other internal decisions. (Decl. Belzidsky ¶ 12.) It would be highly prejudicial to DAW to allow its suppliers, customers and competitors to capitalize on these efforts and use DAW's data to its detriment. DAW's Confidential and Sensitive Information, as discussed above, is not publically available.

Moreover, if the Confidential and Sensitive Information is made public, DAW's competitors in the marketplace will be able to refine their pricing and business strategies based on DAW's sales and pricing data and will allow them to gain an unfair advantage over DAW. This will also be detrimental to the marketplace as a whole, since DAW's competitors will know exactly what to price their products to maintain an advantage over DAW, but at the same time will not have to price their products any more competitively. This result will be incongruous to the FTC's mission to maintain a competitive marketplace.

Because of the highly confidential nature of the Confidential and Sensitive Information and its materiality to DAW's business and survival, *in camera* treatment of DAW's Confidential and Sensitive Information is appropriate.

IV. The Confidential Documents Contain Trade Secrets, which will Remain Sensitive Over Time and Thus, Permanent *In Camera* Treatment is Justified.

Given the highly sensitive and technical nature of the information contained in the Confidential Documents, DAW requests that they be given *in camera* treatment indefinitely. The trade secret information contained in the Confidential Documents "is likely to remain sensitive or become more sensitive with the passage of time" such that the need for confidentiality is not likely to decrease over time. *In re Dura Lube Corp.*, 199 FTC LEXIS at **7-8. "Trade Secrets"—are granted much more protection than ordinary business documents. *Id.* at *5. Here, as described in the Belzidsky Declaration, the Confidential Documents contain business and trade secrets in the form of confidential competitively-sensitive sales data, sales guidelines, data regarding the demand for DAW's products, pricing considerations, cost data, marketing practice, sales revenue, DAW's market expansion plans and business strategies and other secret and competitively-sensitive information. The competitive significance of the

Confidential and Sensitive Information is unlikely to decrease over time and thus, indefinite protection from public disclosure is appropriate. (*See Decl. Belzidsky ¶¶ 6.*) For example, DAW's business strategies, marketing practice and pricing considerations took decades to develop and are unlikely to change in the coming years.

[CONTINUED ON NEXT PAGE]

V. **Conclusion**

For the reasons set forth above and in the Renewed Belzidsky Declaration, DAW respectfully requests that this Court grant permanent *in camera* treatment to the Confidential Documents in their entirety.

DATED: July 13, 2018

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Counsel for Non-Party DAW Industries, Inc.

STATEMENT REGARDING MEET AND CONFER

The undersigned certifies that counsel for non-party DAW Industries, Inc. (“DAW”) notified counsel for the parties via phone calls and emails on June 11, 2018, that it would be seeking *in camera* treatment of the Confidential Documents. Counsel for the Federal Trade Commission and Otto Bock Healthcare North America, Inc. indicated they would not object to DAW’s motion.

DATED: July 13, 2018

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EXHIBIT A – NON-PUBLIC
IN CAMERA

EXHIBIT B – NON-PUBLIC
IN CAMERA

EXHIBIT C – NON-PUBLIC
IN CAMERA

EXHIBIT D – NON-PUBLIC
IN CAMERA

EXHIBIT E – NON-PUBLIC
IN CAMERA

PUBLIC

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

In the Matter of)	
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Otto Bock Healthcare North America, Inc.,)	Docket No. D09378
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Respondents.)	

**[PROPOSED] ORDER RE NON-PARTY DAW INDUSTRIES, INC.’S UNOPPOSED
RENEWED MOTION FOR *IN CAMERA* TREATMENT**

Upon consideration of Non-Party DAW Industries, Inc.’s unopposed Renewed Motion for *In Camera* Treatment , it is hereby ordered that the following documents, listed below, is to be provided permanent *in in camera* treatment from the date of this Order, and it is further ORDERED that these documents may only be viewed by those permitted to view it under the Protective Order entered in this matter.

<u>No.</u>	<u>Description</u>	<u>Date</u>	<u>Bates Ranges</u>
PX05146 RX-1017	Partial Deposition transcript of Stuart Marquette (25:4-6; 25:13; 25:20-22; 30:11-15; 33:15-20; 34:12-15; 34:21-23; 34:25- 35:3; 38:7-20; 40:4-10; 41:6-23; 43:24-25; 61:24; 63:1-25; 69:4-12; 72:3-85:20)	04/03/2018	PX05146-008; RX-1017-008 PX05146-009; RX-1017-009 PX05146-010; RX-1017-010 PX05146-011; RX-1017-011 PX05146-012; RX-1017-012 PX05146-017; RX-1017-017 PX05146-019-PX05146-023;

<u>No.</u>	<u>Description</u>	<u>Date</u>	<u>Bates Ranges</u>
			RX-1017-019-RX-1017-023
PX05147 RX-1018	Partial Deposition transcript of Hugues Belzidsky (14:4-16:18; 23:16-24; 28:6-24; 30:2-18; 34:22-35:3; 44:6-51:21; 53:10-23; 55:1-4; 55:20-64:21; 88:23-89:25; 91:24-92:22; 96:10-24; 98:6-22; 100:16-19)	04/03/2018	PX05147-005; RX-1018-005 PX05147-007; RX-1018-007 PX05147-008; RX-1018-008 PX05147-009; RX-1018-009 PX05147-010; RX-1018-010 PX05147-012-PX05147-014; RX-1018-012-RX-1018-014 PX05147-015-PX05147-017; RX1018-015-RX-1018-017 PX05147-023-PX05147-024; RX-1018-023-RX-1018-024 PX05147-025; RX-1018-025 PX05147-026; RX-1018-026

IT IS SO ORDERED.

DATED:

By: _____

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UNITED STATES OF AMERICA

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BEFORE THE FEDERAL TRADE COMMISSION

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OFFICE OF ADMINISTRATIVE LAW JUDGES

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In the Matter of,

Case No. 9378

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Otto Bock HealthCare North America, Inc., a
corporation

PROOF OF SERVICE

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I, the undersigned, declare:

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I am employed in the County of San Diego, State of California. I am over the age of 18 years and not a party to this action. My business address is Solomon Ward Seidenwurm & Smith, LLP, 401 B Street, Suite 1200, San Diego, California 92101.

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On July 13, 2018, I will serve a copy, including all exhibits, if any, of the following document(s):

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UNOPPOSED RENEWED MOTION FOR IN CAMERA TREATMENT [PUBLIC]

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on the parties in this action listed in the attached Proof of Service List, which is incorporated herein by this reference, by the following means:

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BY ELECTRONIC TRANSMISSION THROUGH THE FTC WEBSITE: I hereby certify that I electronically filed the foregoing document and electronically served the foregoing document through the E-Filing System with the FTC.

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Executed on July 13, 2018, at San Diego, California.

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s/Jing Y. Li
JING Y. LI

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Notice of Electronic Service

I hereby certify that on July 13, 2018, I filed an electronic copy of the foregoing Non-Party DAW Industries, Inc.'s Unopposed Renewed Motion for In Camera Treatment, with:

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I hereby certify that on July 13, 2018, I served via E-Service an electronic copy of the foregoing Non-Party DAW Industries, Inc.'s Unopposed Renewed Motion for In Camera Treatment, upon:

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