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



In the Matter of

Otto Bock Healthcare North America, Inc.,

A corporation,

Respondent.

DOCKET NO. 9578
ORIGINAL

**NON-PARTY UNITED HEALTHCARE SERVICES, INC.'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 United HealthCare Services, Inc. ("United") respectfully moves for *in camera* treatment of (i) the confidential business document labeled Exhibit Number PX03154 (Bates UHC-FTC-00036) and (ii) the deposition transcript of its witness in this matter labeled as Exhibit Number PX05165 (collectively, the "Confidential Documents"). United produced the document, with others, in response to a Subpoena *Duces Tecum* served by Respondent Otto Bock Healthcare North America, Inc. ("Otto Bock") and submitted to the deposition in response to Subpoenas *Ad Testificandum* served by both Otto Bock and the FTC. United previously designated both the document and deposition transcript as "Confidential" pursuant to the Protective Order Governing Confidential Material (Dec. 20, 2017). Counsel for the FTC and for Otto Bock have notified United's counsel that they intend to offer into evidence at the administrative trial of this matter five of United's documents, including the two Confidential Documents. Letter from Attorney for Federal Trade Commission (May 22, 2018) and Letter from Attorney for Otto Bock (May 29, 2018) (Exhibit 1).

The materials for which United is seeking *in camera* treatment are confidential business documents, reflecting (i) in the case of the document, United’s confidential reimbursement data for the prosthetic knee products at issue in this proceeding, and (ii) in the case of the transcript, United’s confidential internal methods and practices for setting reimbursement rates, assessing claims, contracting with clinics and working with vendors. If these documents were to become part of the public record and its confidences were revealed, United would be significantly harmed in its ability to compete against other payers with health plans covering these products, as well as in its ability to negotiate with clinics and vendors. This is demonstrated by the Declaration of Jack Sanders (the “Sanders Declaration”), attached as Exhibit 2. United’s Confidential Documents, which contain highly sensitive business information and trade secrets, therefore warrant protection from public disclosure and the severe competitive injury that would result from it.

For the reasons discussed in this motion, United requests that this Court afford its Confidential Documents *in camera* treatment indefinitely.

I. The Confidential Documents for Which Protection is Sought

United seeks *in camera* treatment for the following Confidential Documents, copies of which are attached as Exhibit 3-A and Exhibit 3-B:¹

Exhibit	Description	BegBates	EndBates
PX03154 RX-0890	United Reimbursement Data Spreadsheet	UHC-FTC-00036	UHC-FTC-00036
PX05165 RX-1033	Deposition Transcript of Jack Sanders	PX05165-001 RX-1033-0001	PX05165-069 RX-1033-0069

¹ United seeks *in camera* treatment only for those Confidential Documents that meet the legal standard. It does not seek *in camera* protection for the other documents it produced: PX03151 (UHC-FTC-00001-6), PX03152 (UHC-FTC-00007-13), and PX03153 (UHC-FTC-00014-35).

To the extent United is required to designate specific deposition transcript pages warranting *in camera* treatment, United designates the excerpts indicated with redactions at Exhibit 3-C. But the burden of doing so should not fall in the first instance upon United, a non-party to this proceeding, especially given the fact that the Order Granting Joint Motion To Modify the Scheduling Order and Issuing Fourth Revised Scheduling Order (Apr. 26, 2018) (“Fourth Revised Scheduling Order”) required the parties to disclose witness testimony summaries to each other by May 18 and May 29, respectively. *Id.* at 2. United has not been advised of any specific portions of the testimony that the parties intend to use.

II. Disclosure of United’s Secret and Material Confidential Documents Would Result in Serious Injury to United

Courts generally attempt “to protect confidential business information from unnecessary airing.” *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). “There can be no question that the confidential records of businesses involved in Commission proceedings should be protected insofar as possible.” *Id.* at 1184.

United’s status as a third party is relevant to the treatment of its 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*, 58 F.T.C. at 1186. This is especially so in the case of a third 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, extensions of confidential or *in camera* treatment in appropriate cases involving third party bystanders encourages cooperation with future adjudicative discovery requests.”). United’s third-party status therefore weighs in favor of granting *in camera* status to the Confidential Documents.

In camera treatment of material is appropriate when “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). 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 the Matter of Jerk, LLC, et. al.*, Order on Motion for *In Camera* Treatment (F.T.C. Docket No. 9361) (Feb. 23, 2015), (quoting *In re General Foods Corp.*, 95 F.T.C. 352, 355 (Mar. 10, 1980)).

In evaluating both secrecy and materiality, the Court may consider 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 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 ease or difficulty with which the information could be acquired or duplicated by others. *In re Bristol-Myers Co.*, 90 F.T.C. 455, 456-57 (1977). These factors, taken together, warrant *in camera* treatment of United’s Confidential Documents.

First, United safeguards the confidentiality of the Confidential Documents, satisfying the first part of the *Jerk* test and the first three factors of the *Bristol-Myers* test outlined above. As noted above, the Confidential Documents reflect (i) in the case of the document, United’s confidential reimbursement data for the prosthetic knee products at issue in this proceeding, and (ii) in the case of the transcript, United’s confidential internal methods and practices for setting reimbursement rates, assessing claims, contracting with clinics and working with vendors. This information is not shared with United’s competitors or customers due to its competitive sensitivity. United took care to protect the confidentiality of the materials by expressly designating them

“Confidential” under the Protective Order Governing Confidential Material (Dec. 20, 2017); *see* 16 C.F.R. § 3.31(d) (authorizing the entry of a protective order to protect the parties and third parties from the improper use and disclosure of confidential information).

Second, the information contained in the Confidential Documents is highly material to United’s business, which invests substantial resources in determining appropriate reimbursement rates and procedures and in developing and working with networks of vendors and clinics capable of providing quality and efficient health care services and products for its members. This information is confidential and is essential to United’s business and disclosure of this information to United’s competitors or others in the industry would result in the loss of a business advantage to United. *See In re Dura Lube Corp.*, 1999 FTC LEXIS 255, at *7 (“The likely loss of business advantages is a good example of a ‘clearly defined, serious injury.’”). This satisfies the second part of the *Jerk* test and the final three factors of *Bristol-Myers*.

Third, under many circumstances, antitrust law scrutinizes sharing of the kind of pricing, cost and other competitively sensitive information reflected in United’s documents. *See United States v. Container Corp. of America*, 393 U.S. 333, 335 (1969) (carefully reviewing exchanges of recent price information among sellers); *see also id.* at 337 (communication of price information “had an anticompetitive effect in the industry, chilling the vigor of price competition”). The notion that the FTC would require this kind of information to be disclosed to suppliers, competitors and to the public would undermine the very purpose of the laws that the FTC enforces in the first place.

Because of the highly confidential and proprietary nature of the information and its materiality to United’s business, *in camera* treatment is appropriate and necessary.

III. Permanent *In Camera* Treatment Is Justified Because the Confidential Documents Contain Trade Secrets that Will Remain Sensitive Over Time

Given the highly sensitive nature of the information contained in the Confidential Documents, United requests that they be given *in camera* treatment indefinitely.² The strategic analyses and trade secrets contained in the Confidential Documents are “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.*, 1999 FTC LEXIS, at *8-9. “Trade secrets” – including secret technical information – are granted greater protection than ordinary business documents. *Id.* at *7-8.

Here, as described in the Sanders Declaration, the Confidential Documents contain business and trade secrets in the form of the company’s internal methods and practices for setting reimbursement rates, assessing claims, contracting with clinics and working with vendors. Sanders Declaration ¶¶ 5-9. Although prices may change over time, the competitive significance of the strategies themselves does not. As a result, indefinite protection from public disclosure is appropriate and necessary to protect United’s material interests. *Id.* at ¶ 10.

IV. Conclusion

For the reasons set forth above and in the Sanders Declaration (Exhibit 2), United respectfully requests that this Court grant permanent *in camera* treatment for the Confidential Documents in their entirety.

Dated: June 11, 2018

Respectfully submitted,

² To the extent such permanent treatment is not given, United requests that the period of *in camera* treatment of the Confidential Documents be no fewer than 10 years.

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/s/ Iain R. McPhie

Mark J. Botti

Iain R. McPhie

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Fax: 202.457.6315

Mark.Botti@squirepb.com

Iain.Mcphie@squirepb.com

Counsel for non-party, UNITED
HEALTHCARE SERVICES, INC.

STATEMENT REGARDING MEET AND CONFER

The undersigned certifies that counsel for United notified counsel for the parties that it would be seeking *in camera* treatment of the Confidential Documents. Both counsel for the FTC and Otto Bock indicated they would not object to United's motion.

Dated: June 11, 2018

/s/ Iain R. McPhie

Mark J. Botti

Iain R. McPhie

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Washington, DC 20037

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Mark.Botti@squirepb.com

Iain.Mcphie@squirepb.com

Counsel for non-party, UNITED
HEALTHCARE SERVICES, INC.

CERTIFICATE OF SERVICE

I hereby certify on June 11, 2018, I filed the foregoing Non-Party United HealthCare Services, Inc.'s Motion for *In Camera* Treatment and related documents electronically using the FTC's E-Filing System, which will send notification of such filings to:

Office of the Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Room H-113
Washington, D.C. 20580
Secretary@ftc.gov

I hereby also certify that on June 11, 2018, I caused to be served a true and correct copy of the foregoing documents on the following via electronic email:

The Honorable D. Michael Chappell
Chief Administrative Law Judge -
Federal Trade Commission
600 Pennsylvania Ave.
Room H-110
Washington, D.C. 20580
oalj@ftc.gov

<p>Ms. Meghan E. Iorianni Federal Trade Commission 400 Seventh Street, SW Washington, DC 20024 miorianni@ftc.gov</p> <p><i>Counsel Supporting the Complaint</i></p>	<p>Mr. Sean P. McConnell Duane Morris LLP 30 S. 17th St. Philadelphia, PA 19203 SPMcConnell@duanemorris.com</p> <p><i>Counsel for Otto Bock</i></p>
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/s/ Iain R. McPhie

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

In the Matter of

Otto Bock Healthcare North America, Inc.,

DOCKET NO. 9378

A corporation,

Respondent.

[PROPOSED] ORDER

Upon consideration of Non-Party United HealthCare Services, Inc.'s Motion for *In Camera* Treatment, it is HEREBY ORDERED that the following documents are to be provided permanent *in camera* treatment from the date of this Order in their entirety:

Exhibit	Description	BegBates	EndBates
PX03154 RX-0890	United Reimbursement Data Spreadsheet	UHC-FTC-00036	UHC-FTC-00036
PX05165 RX-1033	Deposition Transcript of Jack Sanders	PX05165-001	PX05165-069

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

EXHIBIT 1



Bureau of Competition
Mergers I Division

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D. C. 20580

May 22, 2018

VIA EMAIL

Jack Sanders
United Healthcare Services, Inc.
c/o Iain McPhie, Esq.
Squire Patton Boggs LLP
2550 M Street NW
Washington, DC 20037

RE: *In the Matter of Otto Bock HealthCare North America, Inc.*, Federal Trade
Commission Dkt. No. 9378

Dear Iain McPhie,

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 intend to offer the documents and testimony 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 July 10, 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 or testimony 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 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 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). You must also provide one copy of the documents for which *in camera* treatment is sought to the Administrative Law Judge.

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Please be aware that under the current Scheduling Order dated April 26, 2018, the deadline for filing motions seeking *in camera* status is June 11, 2018.

If you have any questions, please feel free to contact me at (202) 326-2295.

Sincerely,

A handwritten signature in black ink that reads "Meghan E. Iorianni". The signature is written in a cursive style with a large, sweeping flourish at the end.

Meghan E. Iorianni
Counsel Supporting the Complaint

Attachment A

Exhibit No.	Description	Date	BegBates	EndBates
PX03151	United HealthCare Document: UHC Prosthetic Devices, Specialized, Microprocessor or Myoelectric Limbs	1/1/2018	UHC-FTC-00001	UHC-FTC-00006
PX03152	United HealthCare Document: UHC Prosthetic Devices, Wigs, Specialized, Microprocessor or Myoelectric Limbs	1/1/2018	UHC-FTC-00007	UHC-FTC-00013
PX03153	United HealthCare Document: Local Coverage Determination (LCD): Lower Limb Prosthesis (L33787)	00/00/0000	UHC-FTC-00014	UHC-FTC-00035
PX03154	United HealthCare Spreadsheet: Procedure Code and Description, Provider to Tax ID and Name, Service Unit Count, and Reimbursement Amount	00/00/2015	UHC-FTC-00036	UHC-FTC-00036
PX05165	Deposition Transcript of Jack Sanders (United HealthCare)	4/12/2018	PX05165-001	PX05165-069

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A GCC REPRESENTATIVE OFFICE
OF DUANE MORRIS

ALLIANCES IN MEXICO
AND SRI LANKA

May 29, 2018

VIA EMAIL AND OVERNIGHT COURIER

United Healthcare
c/o Iain R. McPhie
Squire Patton Boggs (US) LLP
2550 M Street, NW
Washington, DC 20037
iain.mcphie@squirepb.com

Re: In the Matter of Otto Bock HealthCare North America, Inc., Federal Trade Commission Dkt. No. 9378

Dear Mr. McPhie,

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 Respondent Counsel intend to offer the documents and testimony 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 July 10, 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 or testimony 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 39 (Feb. 23, 2015); and *In re Basic Research, Inc.*, 2006 FTC LEXIS 14 (Jan. 25, 2006). Motions also must be supported by a

DUANE MORRIS LLP

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Duane Morris

May 29, 2018

Page 2

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). You must also provide one copy of the documents for which *in camera* treatment is sought to the Administrative Law Judge.

Please be aware that under the current Scheduling Order dated April 26, 2018, the deadline for filing motions seeking *in camera* status is June 11, 2018.

If you have any questions, please feel free to contact me at 215-979-1947.

Very truly yours,

/s/ Sean P. McConnell

Sean P. McConnell

TAL

Enclosures

cc: Sean S. Zabaneh
Sarah O'Laughlin Kulik

Exhibit No.	Description	Date	BegBates	EndBates
RX-1033	Deposition Transcript of Jack Sanders (United Healthcare)	4/12/2018	RX-1033-00001	RX-1033-00069
RX-0744 (UHC-FTC-00001)	United Healthcare Community Plan - Coverage Determination Guide - Prosthetic Devices, Specialized, Microprocessor or Myoelectric Limbs (Guideline Number: CS104.H)	01/01/2018	UHC-FTC-00001	UHC-FTC-00001
RX-0745 (UHC-FTC-00007)	United Healthcare Commercial Coverage Determination Guideline - Prosthetic Devices, Wigs, Specialized, Microprocessor or Myoelectric Limbs (Guideline Number: CDG.018.07)	01/01/2018	UHC-FTC-00007	UHC-FTC-00007
RX-0889 (UHC-FTC-00014)	Local Coverage Determination (LCD): Lower Limb Prostheses Contractor Information		UHC-FTC-00014	UHC-FTC-00014
RX-0890 (UHC-FTC-00036)	UHC-FTC-00036 - CONFIDENTIAL - FTC Docket No. 9378.xlsx		UHC-FTC-00036	FTC-00036

EXHIBIT 2

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

In the Matter of

Otto Bock Healthcare North America, Inc.,

DOCKET NO. 9378

A corporation,

Respondent.

DECLARATION OF JACK SANDERS IN SUPPORT OF
NON-PARTY UNITED HEALTHCARE SERVICES, INC.'S
MOTION FOR *IN CAMERA* TREATMENT

I, Jack Sanders, hereby declare as follows:

1. I am a Senior Clinical Program Consultant for United Healthcare Services, Inc. ("United"). I make this Declaration in support of Non-Party United's Motion for *in Camera* Treatment (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 personally familiar with the highly confidential business document and the deposition transcript (the "Confidential Documents") that counsel for the Federal Trade Commission ("FTC") and for Respondent Otto Bock Healthcare North America, Inc. ("Otto Bock") have requested be admitted into evidence at trial. I also am personally familiar with the type of information contained in the Confidential Documents and its competitive significance to United. Based on my review of the Confidential Documents, my knowledge of United's business, and my familiarity with the

confidentiality United affords this type of information, I submit that the disclosure of these documents to the public and to suppliers and competitors would cause serious competitive injury to United.

3. United provides health benefit programs for individuals and families, employers, and others. It is a subsidiary of UnitedHealth Group Incorporated, a diversified managed healthcare company offering health care products and insurance services in the United States and abroad.

4. United's mission to meet the health and wellness needs of its members by delivering high quality and affordable care depends, among many other things, upon its ability to set appropriate reimbursement rates, accurately assess claims, contract favorable terms with clinics and work productively with vendors. United invests substantial resources into the development and use of confidential information to accomplish these goals and to improve its performance to compete more effectively against other health insurance providers.

5. Our reimbursement rates, and the methods we use to set such rates and to assess claims by members are highly confidential. We do not share them with our competitors.

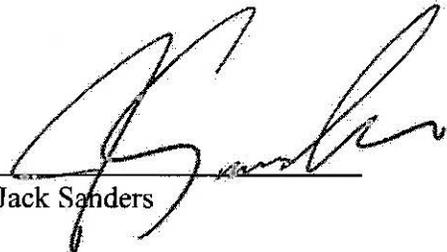
6. The FTC has informed United that they intend to offer into evidence four documents United produced in response to a Subpoena served upon United in this matter, along with the transcript of my deposition. Of those, one document — as well as the deposition transcript — are especially sensitive and contain especially confidential business information, strategic analyses and trade secrets. As described in the Motion,

these Confidential Documents should be granted *in camera* protection for the following reasons;

7. Exhibit PX03154: United Reimbursement Data Spreadsheet. This confidential report was created and produced in response to a subpoena issued in this proceeding. It reports United's reimbursement data for the past three years for the prosthetic knee products at issue in this proceeding, including the names of each provider of the product, the number of units provided by each and the amounts reimbursed by United. This information, if publicly disclosed, would reveal competitively sensitive information to United's competitors, including the amounts reimbursed by United to each provider.
8. Exhibit PX05165: Deposition Transcript of Jack Sanders. This transcript includes extensive discussion of United's confidential internal methods and practices for setting reimbursement rates, assessing claims, contracting with clinics and working with vendors. It also includes discussion of confidential information reported in Exhibit PX03154. This information, if publicly disclosed, would reveal competitively sensitive information to United's competitors, including United's confidential internal business practices.
9. The information contained in these Confidential Documents is maintained confidentially within United. United invests its resources in maintaining the confidentiality of the information contained in them.
10. The analyses contained in the Confidential Documents provide substantial insights into United's confidential strategies and business practices. Their value is not limited to a specific point-in-time, but instead would provide suppliers and competitors with materially important information about the way in which United sets reimbursement

rates, assesses claims contracts with providers and works with vendors. The competitive significance of this highly confidential information is unlikely to decrease over time and thus, indefinite protection from public disclosure is appropriate.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 7, 2018.



Jack Sanders

EXHIBIT 3

**DOCUMENTS MARKED CONFIDENTIAL
REDACTION IN THEIR ENTIRETY
REQUESTED**

Notice of Electronic Service

I hereby certify that on June 11, 2018, I filed an electronic copy of the foregoing Motion for In Camera Treatment, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

I hereby certify that on June 11, 2018, I served via E-Service an electronic copy of the foregoing Motion for In Camera Treatment, upon:

Steven Lavender
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Federal Trade Commission
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Complaint

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Iain McPhie
Attorney