

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



In the Matter of)
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)

Benco Dental Supply Co.,)
a corporation,)
)

Henry Schein, Inc.,)
a corporation, and)
)

Patterson Companies, Inc.,)
a corporation.)
)

Respondents.)
_____)

Docket No. 9379

**ORDER ON RESPONDENTS' RENEWED
MOTIONS FOR *IN CAMERA* TREATMENT**

I.

By Order dated October 11, 2018, the motions for *in camera* treatment filed by Respondents Benco Dental Supply Co. ("Benco"), Henry Schein, Inc. ("Schein"), and Patterson Companies, Inc. ("Patterson") were each denied without prejudice ("October 11 Order"). Each Respondent was directed to review the standards for *in camera* treatment and allowed to file a renewed motion for *in camera* treatment in compliance with those standards. Each Respondent filed a renewed motion for *in camera* treatment on October 19, 2018. On October 26, 2018, Complaint Counsel filed oppositions to the motions filed by Benco and by Schein and filed a statement that it does not oppose the motion filed by Patterson. Each motion is addressed separately, applying the standards for *in camera* treatment set forth in the October 11 Order.

II.

Benco's renewed motion seeks *in camera* treatment for 20 documents in their entirety and for portions of 105 documents. Benco states that the documents fall into at least one of the following categories: (1) customer-specific price and volume information; (2) pricing strategy information; (3) information regarding price-setting

processes; (4) business plans; and (5) sensitive personal information. Benco supported its motion with a declaration from its interim general counsel.

Benco explains that it has reduced the volume of exhibits requested for *in camera* treatment by over 33%; has provided more specific information in its declaration; reviewed the documents for information that is already on the public record; reduced the duration of time for which *in camera* treatment is sought; identified specific page and line numbers of deposition transcripts for which *in camera* treatment is sought; and redacted sections of expert reports.

Complaint Counsel opposes certain redactions of investigational hearing and deposition transcripts, which, according to Complaint Counsel, contain information that is already part of the public record in this matter. Complaint Counsel also opposes the proposed redaction of expert reports as premature. Complaint Counsel states that it does not oppose full or partial *in camera* treatment of other exhibits, or portions thereof, identified by Benco.¹

The October 11 Order required Benco to narrowly tailor its requests for *in camera* treatment of transcripts of investigational hearings and depositions to those specific pages and line numbers of transcripts that contain information that meets the *in camera* standard. Information that is already on the public record is not secret, has been disclosed, and does not warrant *in camera* treatment. (October 11 Order.) The following portions of transcripts relate to information that is on the public record and therefore shall not be accorded *in camera* treatment: CX0301 at 26:18; 33:11-22; 73:9-10, 13; 76:8-25; 77:1-18, 20-25; 78:2-5, 7-13, 21-24; 92:11-22; 117:8,14-22; 121:11-18; 313:16-18, 20-25; 314:1-14; CX0304 at 43:7-8, 16-20; 78:21-25; and CX8015 at 77:6-12, 16-25; 126:7, 10-12, 20-22; 128:16, 21-22; 129:5-8; 157:3-5, 18-20; 191:11-14, 192:6-7; 339:15-18; 341:22-24; 342:8-12; 344:22-25; 345:2-3; 388:12-15; 389:19-21; 390:4-5, 12-13; 391:4-5, 15-20.

The October 11 Order also directed the parties to prepare two versions of their expert reports after the orders on pending *in camera* treatment motions are issued. Benco has proposed redactions to the expert reports of Robert C. Marshall, PhD (CX7100) and John H. Johnson, IV (RX2834). If the proposed redactions are only to portions of documents that have been granted *in camera* treatment by this Order or by other orders previously issued in this case, Benco's proposed redactions are accepted. If Benco's proposed redactions are to information that has not been granted *in camera* treatment, the proposed redactions are not accepted.

Except as explained herein, Benco has demonstrated that the documents and portions of documents for which it seeks *in camera* treatment meet the standards set forth in the October 11 Order. Benco's Renewed Motion is DENIED in part and GRANTED in part. Benco's Renewed Motion is DENIED as to all exhibits or portions of exhibits

¹ Complaint Counsel states that in an email on October 23, 2018, 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. Based on the email, *in camera* treatment is not provided for CX1100 and these portions of CX8037.

identified in this Order as rejected. *In camera* treatment for a period of five years to expire on October 1, 2023 is GRANTED for the remaining documents or portions thereof identified by Benco on Exhibits B and C of its Renewed Motion. Permanent *in camera* treatment is GRANTED for the sensitive personal information contained in the documents or portions thereof identified by Benco on Exhibits B and C of its Renewed Motion. Benco shall review its proposed redactions to the expert reports to ensure compliance with this Order.

Benco shall prepare a proposed order listing the documents by exhibit number that have been granted *in camera* treatment by this Order. The proposed order shall list only the exhibit numbers and portions of exhibits that have been granted *in camera* treatment and the length of time for which *in camera* treatment has been granted and need not include a description of the documents or the category under which a document falls.

III.

Schein's renewed motion seeks *in camera* treatment for 126 potential trial exhibits that it states fall into one of the following categories: (1) customer contracts; (2) customer-specific information; (3) proprietary pricing proposals; and (4) highly sensitive financial information such as sales, costs, profits, margins, and internal business plans and strategic documents. Schein supported its motion with a declaration from its vice president and senior counsel for litigation. Schein seeks *in camera* treatment for 34 documents in their entirety and for portions of 92 documents.

Schein explains that it has significantly curtailed its requests and is seeking *in camera* treatment only for confidential and proprietary information that is less than three years old and is not known to individuals outside of Schein, with the exception of contract terms, which are known only to the contracting parties and are frequently subject to contractual confidentiality clauses. Schein states that it has withdrawn its request for *in camera* treatment of the expert reports and will prepare a redacted version of the reports once the orders on pending *in camera* treatment are issued.

Schein seeks *in camera* treatment for a period of five years for all of its documents, except those containing sensitive business plans and financial and sales information, including long-term strategic plans. For documents in this category, Schein has adequately explained why an extended duration of *in camera* treatment is appropriate.

Complaint Counsel does not oppose Schein's request for *in camera* treatment for the entirety of 34 documents. Complaint Counsel does oppose Schein's request for *in camera* treatment for portions of the remaining 92 documents, stating that the renewed request fails to identify the information that Schein seeks to withhold from the public record.

Except as explained herein, Schein has demonstrated that the 34 documents for which it seeks full *in camera* treatment meet the standards set forth in the October 11 Order. Accordingly, Schein's Renewed Motion is GRANTED in part. *In camera* treatment for a period of five years to expire on October 1, 2023 is GRANTED for: RX2324; RX2358; RX2479; RX2480; RX2481; RX2622; RX2670; RX2671; RX2672; RX2680; RX2685; RX2687; RX2692; RX2693; RX2694; RX2696; RX2721; RX2722; RX2735; RX2736; RX2745; RX2746; RX2748; RX2750; and RX2730. *In camera* treatment for a period of ten years to expire on October 1, 2028 is GRANTED for CX2632; RX2180; RX2474; RX2627; CX2651; RX3062; RX3061; RX3066; and RX3069.

With respect to the 92 documents for which Schein seeks partial *in camera* treatment, Schein states that it is willing to redact the confidential information from these documents. Because Schein has not yet identified the confidential information it seeks to withhold from the public record, it is not possible to rule on Schein's requested redactions. In this respect, Schein's motion is DENIED IN PART WITHOUT PREJUDICE. Schein may submit a set of these 92 documents, with the proposed redactions, as a supplement to the pending motion no later than November 2, 2018. Schein need not file another motion or declaration in support of its request. Complaint Counsel may file any opposition to Schein's supplement no later than November 5, 2018.

IV.

Patterson's renewed motion seeks *in camera* treatment for 122 trial exhibits that it states fall into at least one of the following categories: (1) territory representative performance assessment; (2) sales scorecards; (3) special markets strategy and pricing; (4) McKinsey reports; (5) sensitive employee compensation and commission information; (6) price class change forms; (7) sensitive personal information; (8) recent customer sales information; (9) business and strategic plans; (10) current pricing; and (11) selected portions of deposition and investigational hearing transcripts. Patterson supported its motion with a declaration from its senior litigation counsel.

Patterson explains that it has significantly reduced the volume of exhibits requested for *in camera* treatment; has limited its requests for *in camera* treatment of investigational hearing and deposition transcripts to only those portions of the testimony that reveal competitively sensitive information; has removed its request for *in camera* treatment of emails between the Respondents; and has reduced the period of time for which it seeks *in camera* treatment for all exhibits except one, which contains sensitive personal information.

Patterson further explains that it has removed its request for *in camera* treatment for documents that are over three years old, except as to seven documents. With respect to these seven documents, Patterson has demonstrated that the information contained therein remains commercially sensitive and that the disclosure of the information would cause Patterson competitive injury. Patterson states that it has removed its request for *in*

camera treatment of the expert report of Lawrence Wu and will prepare a redacted version of that report once the orders on pending *in camera* treatment motions are issued.

Complaint Counsel does not oppose Patterson's renewed motion.

Patterson has demonstrated that the documents and portions of documents for which it seeks *in camera* treatment meet the standards set forth in the October 11 Order. Patterson's Renewed Motion is GRANTED. *In camera* treatment for a period of five years to expire on October 1, 2023 is GRANTED for the documents or portions of documents listed on Exhibit A to Patterson's renewed motion. Permanent *in camera* treatment is GRANTED for the sensitive personal information contained in CX0102. Patterson shall prepare a redacted version of CX0102 for the record in this matter. Patterson shall also prepare a redacted version of the expert report of Lawrence Wu in accordance with this Order.

Patterson shall prepare a proposed order listing the documents by exhibit number that have been granted *in camera* treatment by this Order. The proposed order shall list only the exhibit numbers and portions of exhibits that have been granted *in camera* treatment and the length of time for which *in camera* treatment has been granted and need not include a description of the documents or the category under which a document falls.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: October 30, 2018

Notice of Electronic Service

I hereby certify that on October 30, 2018, I filed an electronic copy of the foregoing Order on Respondents Renewed Motions for In Camera Treatment, with:

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I hereby certify that on October 30, 2018, I served via E-Service an electronic copy of the foregoing Order on Respondents Renewed Motions for In Camera Treatment, upon:

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