

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,**

Respondents.

Docket No. 9379

PUBLIC

**PATTERSON'S SECOND MOTION FOR *IN CAMERA*
PROTECTION OF CERTAIN TRIAL EXHIBITS**

Pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice and in response to Administrative Law Judge Chappell's October 11, 2018 Order as to Patterson's Motion for *In Camera* Protection of Certain Documents Containing Sensitive Business Information ("October 11 Order"), Respondent Patterson Companies, Inc. ("Patterson") submits this Second Motion for *In Camera* Protection of Certain Trial Exhibits. Full copies of the documents for which *in camera* protection is being sought will be placed on a disk and will be concurrently submitted to the Administrative Law Judge.

In light of the Court's October 11 Order, the undersigned counsel and Patterson's Senior Litigation Counsel reviewed every document for which *in camera* protection is sought and has reduced the number of trial exhibits for which it seeks *in camera* treatment to 122. What Patterson seeks to do through this Second Motion is prevent sensitive competitive information from being placed in the public record which its competitors, including the two Respondents

with whom it is being accused of colluding, may use to unfairly compete against it. Patterson has submitted with this Second Motion a Declaration from [REDACTED] which provides detailed support for Patterson's request and specifies the serious competitive injury to Patterson if *in camera* protection is not granted for the trial exhibits on Exhibit A.

[REDACTED] The trial exhibits for which Patterson seeks *in camera* protection all contain highly sensitive and proprietary information regarding Patterson's pricing, customer relationships, territory representatives, sales and financial data, overall market strategy, market and competitive assessments and strategic business plans, [REDACTED] – as well as methods and strategies used regarding same – which are currently applicable which if placed in the hands of a competitor or other third parties would cause serious competitive injury to Patterson. (*Id.*)

The October 11 Order identified that almost half of the documents that were the subject of Patterson's prior motion were over three years old. (October 11 Order, p. 6.) With limited exception, Patterson has removed virtually all of those trial exhibits. [REDACTED] There are only seven documents that remain on the list that are dated prior to 2015.¹ (*Id.*) Providing *in camera* protection to these trial exhibits will result in minimal disruption at the trial, given Complaint Counsel's opening statement which asserted that the alleged conspiracy ended in April 2015, more than three years ago. As a result of Complaint Counsel's temporal limitation,

¹ These seven documents pertain to highly confidential employee compensation and commission information (RX0082) and six business plans which contain highly confidential and proprietary information regarding the future marketing and business plans of Patterson (CX0086; RX0074; RX0175; RX0182; RX0217; and RX0222). [REDACTED] (*See infra* at 13-14.) The information and detail in these plans still apply to the current and future years of Patterson's business operations and if they were given to a competitor would cause serious and severe competitive injury to Patterson. [REDACTED]

very few of these “older” trial exhibits subject to *in camera* protection will be needed to be used in open court at trial because they fall outside the alleged conspiracy period.

Patterson also has revised its requests for *in camera* protection in a number of other ways to comply with the ALJ’s order:

1. Patterson has withdrawn its request for *in camera* protection of entire deposition transcripts and identified and designated a limited number specific pages and line numbers from 18 deposition transcripts for which it seeks *in camera* protection;
2. Patterson has reduced the period for which it seeks *in camera* protection to five years for all exhibits but one. The only document for which it seeks indefinite/permanent *in camera* protection is a document containing sensitive personal information which is being redacted. (CX0102.) The rules expressly allow for permanent *in camera* treatment of such sensitive personal information. 16 C.F.R. §3.45(b)(3);
3. Patterson no longer seeks *in camera* protection of any emails that it has exchanged with any other Respondent in this matter; and
4. Pursuant to the direction provided in the October 11 Order that it is not proper to seek *in camera* protection for the entire report of an expert, (October 11 Order, p. 7), Patterson has removed the expert report of Lawrence Wu from Exhibit A and will prepare a second, redacted version of that report once the orders on pending *in camera* treatment motions are issued.

The documents identified by Patterson and set forth in Exhibit A satisfy the stringent requirements for *in camera* treatment as set forth in Rule 3.45(b) and the relevant decisions of the FTC. Patterson respectfully requests *in camera* treatment for the trial exhibits identified in Exhibit A attached to the [REDACTED].

I. LEGAL STANDARD

Commission Rule 3.45(b) provides that the “Administrative Law Judge shall order that such material [set forth in a motion to obtain *in camera* treatment] be placed *in camera* [a] 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 [b] after finding that the material constitutes sensitive personal information.” 16 C.F.R. § 3.45(b). A party seeking such

protection must establish that the information is “sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury.” *In re Impax Labs., Inc.*, No. 9373, 2017 WL 4810534, at *1 (F.T.C. Oct. 16, 2017) (quoting *In re General Foods Corp.*, 95 F.T.C. 352, 1980 FTC LEXIS 99 at *10 (Mar. 10, 1980)). A showing of injury may be inferred from the nature of the materials at issue. *In re E.I. Dupont De Nemours & Co.*, No. 9108, 1981 WL 389447 (F.T.C. Jan. 21, 1981).

The party requesting *in camera* treatment has the burden of establishing good cause for withholding the documents from the public record. *In re H.P. Hood & Sons, Inc.*, 58 F.T.C 1184 (1961). The moving party must provide a declaration or affidavit to demonstrate that the documents are sufficiently secret and material to its business such that disclosure would result in serious competitive injury. *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 109, at *2-3 (Apr. 23, 2004). If protection is sought as to deposition testimony, the party must identify specific pages and line numbers of the deposition transcript for which *in camera* protection is sought. *In re Unocal*, 2004 FTC LEXIS 197, at *4-5 (Oct. 7, 2004).

The FTC has set forth six factors to weigh in considering whether information is sufficiently secret and material:

- (1) the extent to which the information is known outside of his business;
- (2) the extent to which it is known by employees and others involved in his business;
- (3) the extent of measures taken by him to guard the secrecy of the information;
- (4) the value of the information to him and to his competitors;
- (5) the amount of effort or money expended by him in developing the information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

In re Bristol-Myers Co., 90 F.T.C. 455, 458 (1977) (citing Restatement of Torts § 757, Comment b at 6 (1939)). “Underlying this analysis is a general concern for the seriousness of public disclosure in determining the scope of *in camera* review.” *In re E.I. DuPont de*

Nemours & Co., 1981 WL 389447 at *1 (Jan. 21, 1981); *see also General Foods Corp.*, 95 F.T.C. 352, 355 (1980). The FTC has previously "recognized that it may be appropriate to provide *in camera* treatment for business records to be introduced as evidence . . . , such as business strategies, marketing plans, pricing policies, or sales documents." *In re OSF Healthcare Sys.*, No. 9349, 2012 WL 1355598, at *3 (Mar. 29, 2012). The FTC has specifically found that "the likely loss of a business advantage is a good example of a clearly defined, serious injury." *Dura Lube Corp.*, No. 9292, 1999 FTC LEXIS 255, (Dec. 23, 1999) at *7 (punctuation omitted) (citing *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 138, at *6 (Sept. 19, 2000)).

II. ARGUMENT

A. The Types of Information At Issue Require *In Camera* Protection

Patterson has divided the documents into discrete and limited categories to simplify and target its discussion and motion for *in camera* protection:

1. Territory Representative Performance Assessment (RX0703);
2. Sales Scorecards (CX3259, RX0600, RX0603, RX0631, RX0718, RX0491, RX0622, RX0627, RX0639, RX0670, RX0679, RX0680, RX0681);
3. Special Markets Strategy and Pricing (CX3142, CX3138, RX0538, RX0559, RX0542, RX0676, RX0687, RX0704, RX0713, RX0645, RX0688, RX0691, RX0693, RX0695, RX0696, RX0697, RX0698, RX0700, RX0701, RX0706, RX0724, RX0725);
4. McKinsey Reports (CX3105, CX3285, RX1097, RX0640, RX0572, RX0544);
5. Sensitive Employee Compensation and Commission Information (CX3058, RX0455, RX0082);
6. Price Class Change Forms (CX3261, CX3135, CX0152, CX3376, CX3136, CX0153, CX0154, CX3137, CX3262, CX3104, RX0528, RX0540, RX0576, RX0607, RX0608, RX0633, RX0635, RX0636, RX0666, RX0669, RX0672, RX0674, RX0737, RX0685);

7. Sensitive Personal Information (CX0102);
8. Recent Customer Sales Information (RX0710, RX0726, RX0728, RX0733, RX0734);
9. Business and Strategic Plans (CX3180, CX3292, CX3140, CX0086, CX3280; RX0222, RX0420, RX0445, RX0450, RX0488, RX0604, RX0613, RX0175, RX0074, RX0182, RX0217);
10. Current Pricing CX0083, CX3289, CX3239, CX3258, RX0407, RX0408, RX0468, RX0568, RX0614, RX0661, RX0662, RX0717, RX0677, RX0719, RX0730, RX0731);
11. Deposition and Investigational Hearing Transcripts Trial Exhibits Selected Testimony (by line and page); and
12. Expert Report of Lawrence Wu (RX2833).

Each category is discussed separately below. For ease in reference the documents as set forth in Exhibit A are divided into these categories.

1. Territory Representative Performance Assessment

This first category contains a single document – RX0703, [REDACTED] a PowerPoint slide presentation prepared and presented approximately one year ago (October 24, 2017). (*Id.*) RX0703 contains detailed and highly confidential information regarding the performance and retention of Patterson’s territory representatives. (*Id.*) Patterson’s sales representatives (“Territory Representatives”) are critical to how Patterson goes to market. (*Id.*) Patterson’s overall business success is directly tied to the sales performance and success of its Territory Representatives. (*Id.*) Territory Representatives have the direct contact, communications and relationships with the customers who are purchasing products on a daily basis from Patterson. (*Id.*)

The market for the employment of productive territory representatives in the dental distribution market is fierce and extremely competitive, (*Id.*), as confirmed by the testimony of

Chuck Cohen on Thursday, October 18. There is constant recruiting of Patterson's territory representatives by competitors. The information in this document, if publicly disclosed, would give Patterson's competitors direct access to how Patterson perceives and values its territory representatives and identifies those who are top performers. (*Id.*) Disclosure would provide confidential information to competitors and allow them to directly recruit and target Patterson's best performing and most valued territory representatives. (*Id.*) Patterson and Schein are routinely engaged in litigation concerning the hiring and recruitment of territory representatives and other sales employees, some of which is active. (*Id.*) If this document were disclosed it would cause serious competitive injury to Patterson. (*Id.*)

2. Patterson "Sales Scorecards"

This category consists of trial exhibits that set forth detailed and highly confidential information regarding Patterson's sales, including gross margin and pricing trends, commissions based on sales and quarterly performance information. [REDACTED] The majority of these trial exhibits are monthly "scorecards" showing gross margin and pricing trends for sundries (otherwise known as dental supplies/merchandise). (*Id.*) Sales of sundries represent the largest portion of Patterson's business and information regarding the sales, pricing trends and gross margins is critical to its success. (*Id.*) Information pertaining to sales, pricing and gross margin trends can provide a competitor with a roadmap for attacking Patterson's business and future approach to building sales. (*Id.*) Similarly, information and data on Patterson's commission structure would allow competitors to target and recruit employees. (*Id.*) If a competitor were to receive such information, it would cause serious competitive injury to Patterson. (*Id.*)

The FTC has previously recognized that documents that include financial and sales information are entitled to *in camera* treatment. *In re Impax Labs., Inc.*, No. 9373, 2017 WL

4948988, at *1 (F.T.C. Oct. 23, 2017) (documents with sales and financial projections entitled to 10 years *in camera* protection); *Champion Spark Plug Co.*, 1982 FTC LEXIS 85 (Apr. 5, 1982) (*in camera* treatment was appropriate for documents containing sales data); *In re ECM Biofilms, Inc.*, 2014 WL 3974607, at *1 (F.T.C. Aug. 4, 2014) (documents disclosing financial information of the company are entitled to *in camera* protection).

3. Special Markets Strategy and Pricing

These trial exhibits contain pricing and sales information pertaining to Patterson's Special Markets division (now renamed "Strategic Accounts"), along with market assessments of DSO customers and potential DSO customers. [REDACTED] Special Market customers are those that would be considered "corporate dentistry", consisting of large groups of dentists that join together to make group type purchases, such as DSOs. (*Id.*) This is the market segment that Patterson "expanded its strike zone" to during the alleged conspiracy period, to attack Schein's stronghold of the DSO segment. (*Id.*) Many of the documents in this category are pipeline reports, quarterly summaries and tracking scorecards. (*Id.*) The pipeline reports and tracking scorecards show how Patterson competes, conducts competitive research and evaluates customers – all of which are relevant to current day strategies. (*Id.*) They contain detailed and sensitive assessments of customers in the market by Patterson employees, Patterson's proposals to such customers, analyses of the market, and pricing/marketing strategies to attract and capture business from these customers. (*Id.*) They include intelligence gathering information on customers that help Patterson in planning its proposals and pitches for sales to customers. (*Id.*)

These trial exhibits provide a roadmap or blueprint of how Patterson intends to attack the market and increase its business and would provide competitors with insight into Patterson's current and future product marketing strategies. [REDACTED] If the sources from whom

Patterson gathers its competitive intelligence are made public, it could cause issues for the source (usually dental customers), which may erode the trust placed in Patterson that is critical for its customer relationships. (*Id.*) Disclosure of these documents to a competitor would give them a tremendous advantage and would cause serious competitive injury to Patterson. (*Id.*)

Like business/strategic plans, these types of documents containing market assessments and analysis have regularly been granted *in camera* protection by the FTC. *Polypore Int'l, Inc.*, No. 9327, 2009 WL 1499350, at *4 (F.T.C. May 13, 2009) (market analysis documents were entitled to *in camera* protection); *Evanston Nw. Healthcare Corp.*, No. 9315, 2005 WL 1541539, at *2 (F.T.C. June 1, 2005) (same).

4. McKinsey Report

There are six documents on the Exhibit Lists that include a copy of the McKinsey Report – CX3105; CX3285; RX0544; RX0572; RX0640; and RX1097. [REDACTED] In 2015, Patterson retained McKinsey & Company to develop and produce, on a confidential and proprietary basis, a detailed study of the dental supplies market with a specific intent of identifying potential short and long-range business opportunities for Patterson. (*Id.*) That report was delivered to Patterson in December 2015 and has been one of the key and most important aspects of Patterson's business and marketing strategies over the past three years as it continues to assist with Patterson's development and implementation of current business and market strategies. (*Id.*)

The October 11 Order specifically questioned whether the trial exhibits containing the McKinsey Report are entitled to *in camera* protection. (October 11 Order, p. 6.) While some of the raw data and information in the report may be publicly available in other forums, the analysis and formatting of that data/information along with the conclusions, methodologies, proposals

and opportunities set forth by McKinsey as they relate to Patterson specifically, are highly confidential and proprietary and not publicly available. ██████████ Patterson has redacted the information and data from the report that is highly confidential and proprietary and has left for public disclosure the information and data that is purely public in nature and available in other public forums. (*Id.*) The versions of this report provided on the disk will show the material which is being proposed for redaction. Disclosure of the redacted information and data would cause serious competitive injury to Patterson.² (*Id.*)

5. Sensitive Employee Compensation and Commission Information

There are three trial exhibits in this category (CX3058, RX0082 and RX0455) which contain detailed information pertaining to the compensation paid to Patterson's territory representatives and the commission structure used by Patterson in connection with those territory representatives. ██████████ As discussed in connection with RX0703, the territory representatives are critical to Patterson's overall business success and retaining the most productive territory representatives is essential to Patterson's business. (*Id.*) The competition for, and recruiting of, territory representatives is intense and constant (and the subject of litigation). (*Id.*) Any piece of confidential information, including paid compensation and commission structure for these representatives, gives a competitor a significant advantage in the on-going recruitment of those territory representatives. (*Id.*) It is critical that this information and these documents remain confidential. Disclosure of this information would cause serious competitive injury to Patterson. (*Id.*)

6. Price Class Change Forms

² Patterson has also redacted from these reports and a few other documents information and data pertaining to the non-dental segments of Patterson's business (animal health/vet) which are not at issue in this matter.

The documents in this category are referred to internally at Patterson as price class change forms [REDACTED]. These documents were used by Patterson in its opening statement at slides 12-15 and show the extremely competitive nature of this industry. These forms are used by Patterson territory representatives to request a decrease in price or an additional discount for a customer in order to secure the business and avoid losing it to a competitor or to capture new business from a customer who was buying from a competitor. (*Id.*)

Patterson competes fiercely on price every day, at every branch. [REDACTED]. The market for the distribution of dental products is an extremely competitive market. (*Id.*) Small differences in pricing of dental supplies and products can mean the difference in winning, retaining or losing a customer. (*Id.*) If a competitor were to learn the pricing offered and/or given to a particular customer, or the details relating to the pricing such as costs, margins, or purchase volumes, it would give that competitor a distinct advantage in competing for that customer. (*Id.*) These price class change forms provide detailed information not only as to the specific pricing being offered to a customer but the reasons for the requested price change and the prospects for future business from the customer. (*Id.*) These forms also contain sensitive and confidential information as to the source the pricing information. (*Id.*)

In addition to the trial exhibits which are single price class change forms, Patterson seeks protection of one other exhibit in this category: RX0737. RX0737 is the compilation of thousands of price class change forms that have been joined together to form one single exhibit. While most of the price class change forms in this single exhibit are more than three years old, there are some price class change forms within this exhibit that fall within the last three years. Patterson only seeks *in camera* protection for those price class change forms in RX0737 which fall within the last three years.

The FTC has repeatedly recognized the importance of protecting pricing information through *in camera* protection. *In re Tronox Ltd.*, No. 9377, 2018 WL 2336017, at *1 (F.T.C. May 15, 2018) (five years period of *in camera* treatment was appropriate for documents containing aggregated price and volume information); *In re McWane, Inc.*, No. 9351, 2012 WL 3862131, at *3 (F.T.C. Aug. 17, 2012) (*in camera* treatment was proper for documents that contained pricing and cost information); *In re E.I. Dupont De Nemours & Co.*, 97 F.T.C. 116 (1981) (recognizing that releasing pricing information would assist competitors and justifies the *in camera* treatment of documents containing such information).

7. Sensitive Personal Information

There is one document in this category – CX0102. It contains confidential and personal information, mainly personal telephone numbers for witnesses in this matter. The FTC has previously recognized that under certain circumstances witnesses’ names, addresses and telephone numbers can be found to be sensitive personal information and entitled to *in camera* protection. *In re Lab MD, Inc.*, 2014 FTC LEXIS 127 (May 6, 2014); *In re McWane, Inc.*, 2012 FTC LEXIS 156 (Sept. 17, 2012); *In re Basic Research, LLC*, 2006 FTC LEXIS 14, at *5-6 (Jan. 25, 2006) (permitting redaction of sensitive personal information). Patterson will redact the personal information and provide a copy of the proposed redactions on the disk provided to the ALJ. The rules expressly allow for permanent *in camera* treatment of such sensitive personal information. 16 C.F.R. §3.45(b)(3).

8. Recent Customer Sales Information

This category consists of five trial exhibits – RX0710; RX0726; RX0728; RX0733; and RX0734 [REDACTED]. These are detailed spreadsheets that contain the details of each and every sale made by Patterson to members of Atlantic Dental, Smile Source, Kois Buying

group, Georgia Dental Association, and the Dental Cooperative for the period 2009 to 2017. (*Id.*) The customer specific sales information contained in these documents is highly confidential and proprietary. (*Id.*) Sales are the lifeblood of the organization and details regarding the sales made to customers is considered some of the most highly confidential and proprietary information in the company. (*Id.*) If such customer specific sales detail is disclosed to competitors, it could wreak havoc on Patterson's business. (*Id.*) It provides competitors with precise and detailed information on these customers to use to target and steal business from Patterson. (*Id.*) Disclosure of these documents would cause serious competitive injury to Patterson. (*Id.*) The FTC has previously recognized that such information is deserving of *in camera* protection under the standards set forth in Rule 3.45(b). *In re Tronox Ltd.*, No. 9377, 2018 WL 2336017, at *1 (F.T.C. May 15, 2018) (customer specific price and volume information entitled to *in camera* protection).

9. Business and Strategic Plans

The documents in this category consist of business/strategic plans, which include budgets, presentations, market opportunities, and other forward-looking business strategy. [REDACTED] Patterson's business/strategic plans are the very essence and heart of its current and future business operations. (*Id.*) These strategic plans contain Patterson's methodology and components looked at by the company, including "stretch goals" which help formulate Patterson's future direction for its business. (*Id.*) Such documentation provides a clear and unedited blueprint of Patterson's future business operations and how it has, and intends to, compete in the market for the years to come. (*Id.*) The plans detail the strengths and weaknesses of Patterson as well the perceived strengths and weaknesses of Patterson's competitors which

Patterson intends to try and exploit in the competitive market. (*Id.*) A competitor who has access to such information would have a tremendous advantage in competing with Patterson. (*Id.*)

These trial exhibits contain strategy and plans covering the current year and future years and would give any competitor insight into not only what Patterson plans are for the future, but also how Patterson intends to implement those plans and the basis for its decisions as to business opportunities and marketing. [REDACTED] Access to this information would allow competitors to steal Patterson's ideas for sales pitches, marketing strategies, and future product placement. (*Id.*) Disclosure of these business/strategic plans to competitors would cause serious competitive injury to Patterson. (*Id.*)

The FTC has consistently recognized the need for, and appropriateness of, *in camera* treatment for such business/strategic plans. *In re Union Oil Company of California*, No. 9305, 2004 WL 2458848, at *3 (F.T.C. Oct. 7, 2004) (granting motion for *in camera* treatment of business planning information); *In re Tronox*, No. 9377, 2018 WL 2336017, at *1 (F.T.C. May 15, 2018) (granting *in camera* treatment for a period of ten years for business plan documents); *In re Champion Spark Plug Co.*, 1982 FTC LEXIS 85 (F.T.C. Apr. 5, 1982) (granting *in camera* treatment for documents showing overall business plans and strategies).

10. Current Customer Pricing

The trial exhibits in this category disclose or show Patterson's current pricing to customers. [REDACTED] These documents contain highly confidential information regarding Patterson's margins, pricing and costs, as well as customer commitment levels and purchase history. (*Id.*) The market for the distribution of dental products is an extremely competitive market. (*Id.*) Small differences in pricing of dental supplies and products can mean the difference in winning or losing a potential customer. (*Id.*) If a competitor were to learn the

pricing offered and/or given to a particular customer, or the details relating to the pricing such as costs, margins, or purchase volumes, it would give that competitor a distinct advantage in competing for that customer. (*Id.*) In addition, disclosure of such pricing information, and the details relating to that pricing, to other customers could cause customer dissatisfaction and discontent. (*Id.*) Patterson's relationship with its customers could be seriously harmed if they learn that Patterson has entered into a relationship with another customer with different terms. (*Id.*) The disclosure of such pricing information to a competitor or to a customer would put Patterson at a decided disadvantage in the market and cause serious competitive injury to Patterson. (*Id.*)

CX3289 is a report similar to the McKinsey Report that was paid for by Patterson and prepared by Evergreen Consulting in 2015. [REDACTED] It provides detailed information, data and strategic plans regarding Patterson's pricing strategy on a going forward basis. (*Id.*) Patterson still uses and implements many of the plans and designs contained in that report in its current pricing strategy. (*Id.*) Again the disclosure of this report with confidential pricing strategy would cause serious competitive injury to Patterson. (*Id.*)

The FTC has repeatedly recognized the importance of protecting pricing information through *in camera* protection. *In re Tronox*, No. 9377, 2018 WL 2336017, at *1 (F.T.C. May 15, 2018) (five years period of *in camera* treatment was appropriate for documents containing aggregated price and volume information); *In re McWane, Inc.*, No. 9351, 2012 WL 3862131, at *3 (F.T.C. Aug. 17, 2012) (*in camera* treatment was proper for documents that contained pricing and cost information); *In re E.I. Dupont De Nemours & Co.*, 97 F.T.C. 116 (1981) (recognizing that releasing pricing information would assist competitors and justifies the *in camera* treatment of documents containing such information).

11. Deposition Transcripts

Patterson has identified, by page and line, the testimony in each trial exhibit transcript which falls within one of the categories of protected information set forth above. Patterson has redacted the deposition trial exhibits for these page and lines only, and seeks to have the redacted transcripts in the public record. The redactions to the deposition transcript of Joe Lepley, Patterson's Director of Strategic Pricing, are illustrative of this process. CX 8028. For example, Mr. Lepley testified concerning specific current pricing at specific current Patterson customers, (*see e.g.*, 38:20-23, 39:13-24, 40:12- 41:2) and current pricing strategies. (*See e.g.*, 51:19-54:13) Clearly, this is not the type of information that should be in the public record as it would cause serious competitive injury to Patterson, and therefore, was redacted by Patterson.

12. Expert Reports

In the October 11 Order, Judge Chappell stated that "once the orders on pending *in camera* treatment motions are issued, the parties shall prepare two versions of their expert reports." In light of this provision in the October 11 Order, Patterson has not included its expert report as part of its requests in this Motion but reserves the right to prepare an *in camera* version of its expert report once the orders on pending *in camera* motions are issued.

B. All Six Bristol Myers Factors are Satisfied

All six *Bristol Myers* factors (*see supra* at 4) support Patterson's motion for *in camera* treatment. First, Patterson has carefully reviewed the trial exhibits so as to limit its list to those that are internal only or which were communicated in confidence to customers or third parties and which are not otherwise publicly available. [REDACTED] Second, the information contained in these trial exhibits is only disclosed to those within Patterson who are actively involved in the subject matter of the document and have a "need to know" basis for the information. (*Id.*) Third, Patterson keeps this information secured and private through use of

confidentiality and/or non-compete agreements, or other forms of encrypted security protection. (Id.) Fourth, the information at issue is highly secretive and proprietary, such that disclosure would result in serious injury to Patterson and would offer a distinct business advantage to Patterson's competitors. (Id.) Fifth, Patterson believes its success is directly tied to its business and marketing strategies. (Id.) Patterson expends a great deal of time and energy in developing its business and marketing strategies. (Id.) Sixth, given the steps and measures taken by Patterson to protect this information it would be extremely difficult for a competitor to properly acquire and/or duplicate this information. (Id.) While Patterson is a public company, none of the documentation or information for which *in camera* protection is sought is in the public domain and it cannot be obtained through other means. (Id.)

III. CONCLUSION

Based on the foregoing, Patterson requests that its Second Motion for *In Camera* Protection of Certain Trial Exhibits be granted and the documents set forth on Exhibit A to the [REDACTED] be granted *in camera* protection.

Dated: October 26, 2018

/s/ James J. Long

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***ATTORNEYS FOR
PATTERSON COMPANIES, INC.***

**UNITED STATES OF AMERICA
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Respondents.

PUBLIC

Docket No. 9379

PROPOSED ORDER

On October 19, 2018, Patterson Companies, Inc. filed its Second Motion for *In Camera* Protection of Certain Trial Exhibits appearing on the Exhibit Lists of the parties to this action. Upon consideration of the submissions of counsel, Patterson's Second Motion is Granted with respect to the documents identified in Exhibit A attached to the [REDACTED]

ORDERED:

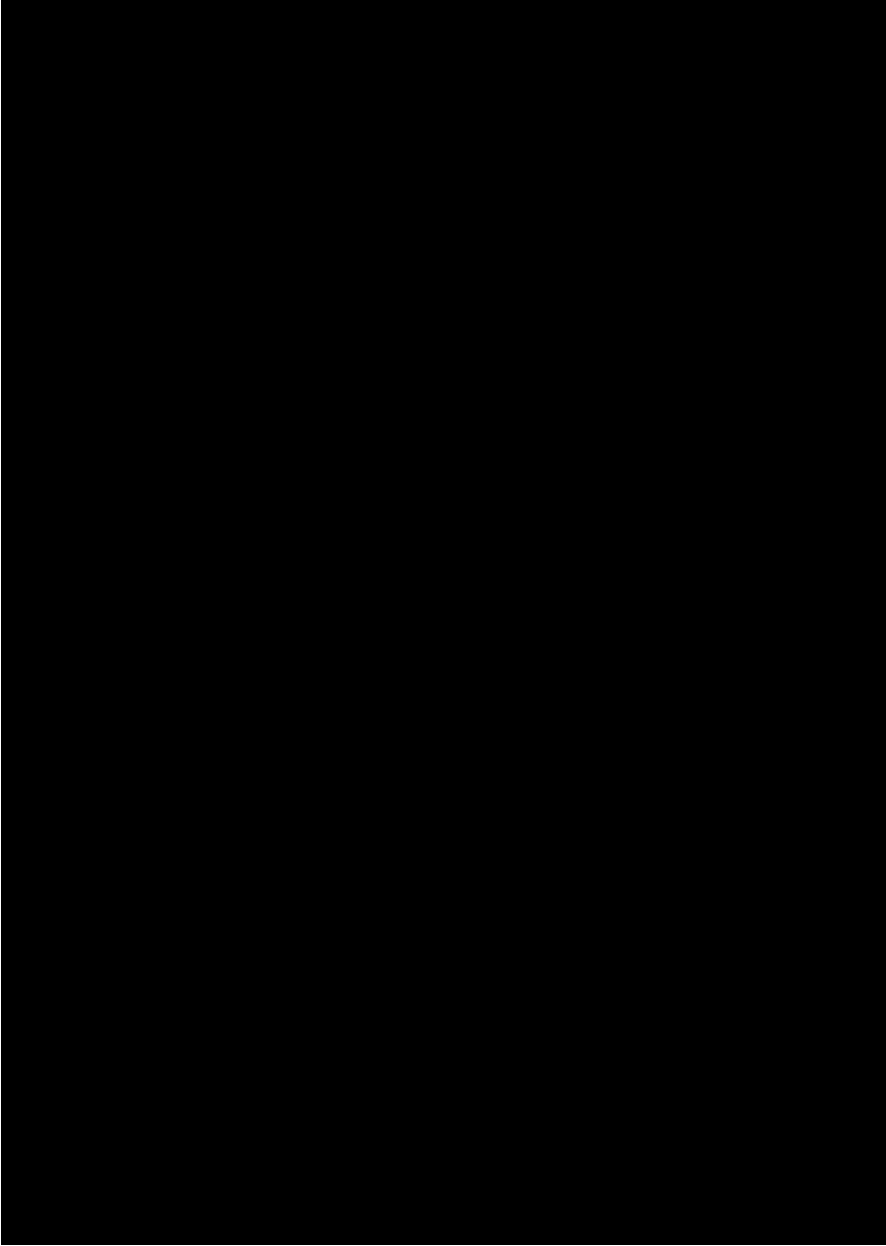
_____, 2018

D. Michael Chappell
Administrative Law Judge

Exhibit A

RX/CX	Description	Date	Confidentiality Category	Duration of <i>In Camera</i> Treatment Requested
A. Territory Representative Performance Assessment				
RX0703	[REDACTED]	[REDACTED]	Territory Representative Performance Assessment	5 years
B. Sales Scorecards				
RX0600	[REDACTED]	[REDACTED]	Sales Scorecards	5 years
RX0603	[REDACTED]	[REDACTED]	Sales Scorecards	5 years
CX3259	[REDACTED]	[REDACTED]	Sales Scorecards	5 years
RX0631	[REDACTED]	[REDACTED]	Sales Scorecards	5 years
RX0718	[REDACTED]	[REDACTED]	Sales Scorecards	5 years
RX0491	[REDACTED]	[REDACTED]	Sales Scorecards	5 years
RX0622	[REDACTED]	[REDACTED]	Sales Scorecards	5 years
RX0627	[REDACTED]	[REDACTED]	Sales Scorecards	5 years
RX0639	[REDACTED]	[REDACTED]	Sales Scorecards	5 years
RX0670	[REDACTED]	[REDACTED]	Sales Scorecards	5 years
RX0679	[REDACTED]	[REDACTED]	Sales Scorecards	5 years
RX0680	[REDACTED]	[REDACTED]	Sales Scorecards	5 years
RX0681	[REDACTED]	[REDACTED]	Sales Scorecards	5 years
C. Special Markets Strategy and Pricing				


EXHIBIT A

RX/CX	Description	Date	Confidentiality Category	Duration of <i>In Camera</i> Treatment Requested
RX0538			Special Markets Strategy and Pricing	5 years
CX3142			Special Markets Strategy and Pricing	5 years
RX0559			Special Markets Strategy and Pricing	5 years
RX0542			Special Markets Strategy and Pricing	5 years
RX0676			Special Markets Strategy and Pricing	5 years
RX0687			Special Markets Strategy and Pricing	5 years
RX0704			Special Markets Strategy and Pricing	5 years
RX0713			Special Markets Strategy and Pricing	5 years
RX0645			Special Markets Strategy and Pricing	5 years
CX3138			Special Markets Strategy and Pricing	5 years
RX0688			Special Markets Strategy and Pricing	5 years
RX0691			Special Markets Strategy and Pricing	5 years
RX0693			Special Markets Strategy and Pricing	5 years

RX/CX	Confidentiality Category	Duration of <i>In Camera</i> Treatment Requested
RX0695	Special Markets Strategy and Pricing	5 years
RX0696	Special Markets Strategy and Pricing	5 years
RX0697	Special Markets Strategy and Pricing	5 years
RX0698	Special Markets Strategy and Pricing	5 years
RX0700	Special Markets Strategy and Pricing	5 years
RX0701	Special Markets Strategy and Pricing	5 years
RX0706	Special Markets Strategy and Pricing	5 years
RX0724	Special Markets Strategy and Pricing	5 years
RX0725	Special Markets Strategy and Pricing	5 years
D. McKi		
RX1097	McKinsey Report	5 years
RX0640	McKinsey Report	5 years
RX0572	McKinsey Report	5 years
RX0544	McKinsey Report	5 years
CX3105	McKinsey Report	5 years
CX3285	McKinsey Report	5 years
E. Sensitive Employee Compensation and Commission Information		

RX/CX		Confidentiality Category	Duration of <i>In Camera</i> Treatment Requested
CX3058		Sensitive Employee Compensation and Commission Information	5 years
RX0455		Sensitive Employee Compensation and Commission Information	5 years
RX0082		Sensitive Employee Compensation and Commission Information	5 years
F. Price Class Change Forms			
RX0528		Price Class Change Forms	5 years
RX0540		Price Class Change Forms	5 years
CX3261		Price Class Change Forms	5 years
CX3135		Price Class Change Forms	5 years
CX0152		Price Class Change Forms	5 years
CX3376		Price Class Change Forms	5 years
CX3136		Price Class Change Forms	5 years

EXHIBIT A

RX/CX	Description	Date	Confidentiality Category	Duration of <i>In Camera</i> Treatment Requested
CX0153			Price Class Change Forms	5 years
CX0154			Price Class Change Forms	5 years
RX0576			Price Class Change Forms	5 years
RX0607			Price Class Change Forms	5 years
RX0608			Price Class Change Forms	5 years
CX3137			Price Class Change Forms	5 years
RX0633			Price Class Change Forms	5 years
RX0635			Price Class Change Forms	5 years
RX0636			Price Class Change Forms	5 years
CX3262			Price Class Change Forms	5 years
RX0666			Price Class Change Forms	5 years

RX/CX			Confidentiality Category	Duration of <i>In Camera</i> Treatment Requested
RX0669			Price Class Change Forms	5 years
CX3104			Price Class Change Forms	5 years
RX0672			Price Class Change Forms	5 years
RX0674			Price Class Change Forms	5 years
RX0737			Customer Pricing	5 years
RX0685			Price Class Change Forms	5 years
G. Sensitive Personal Information				
CX0102			Sensitive Personal Information	Indefinite
H. Recent Customer Sale Information				
RX0710			Recent Customer Sale Information	5 years
RX0726			Recent Customer Sale Information	5 years
RX0728			Recent Customer Sale Information	5 years
RX0733			Recent Customer Sale Information	5 years
RX0734			Recent Customer Sale Information	5 years
I. Business and Strategy Plans				
RX0222			Business and Strategy Plans	5 years
RX0420			Business and Strategy Plans	5 years

RX/CX	Description	Date	Confidentiality Category	Duration of <i>In Camera</i> Treatment Requested	
CX3180			Business and Strategy Plans	5 years	
CX3292		Business and Strategy Plans	5 years		
CX3140		Business and Strategy Plans	5 years		
RX0445		Business and Strategy Plans	5 years		
RX0450		Business and Strategy Plans	5 years		
RX0488		Business and Strategy Plans	5 years		
RX0604		Business and Strategy Plans	5 years		
RX0613		Business and Strategy Plans	5 years		
RX0175		Business and Strategy Plans	5 years		
RX0074		Business and Strategy Plans	5 years		
RX0182		Business and Strategy Plans	5 years		
CX0086		Business and Strategy Plans	5 years		
RX0217		Business and Strategy Plans	5 years		
CX3280		Business and Strategy Plans	5 years		
J. Pricing					
RX0407				Pricing	5 years
RX0408				Pricing	5 years
CX0083				Pricing	5 years

RX/CX	Confidentiality Category	Duration of <i>In Camera</i> Treatment Requested
RX0468	Pricing	5 years
CX3289	Pricing	5 years
CX3239	Pricing	5 years
CX3258	Pricing	5 years
RX0568	Pricing	5 years
RX0614	Pricing	5 years
RX0661	Pricing	5 years
RX0662	Pricing	5 years
RX0717	Pricing	5 years
RX0677	Pricing	5 years
RX0719	Pricing	5 years
RX0730	Pricing	5 years
RX0731	Pricing	5 years
K. Deposition and Investigational Hearing Transcripts		
CX0312	Employee Compensation and Commission Information; Business and Strategy Plans	5 years
CX0314	Special Markets Strategy and Pricing	5 years

EXHIBIT A

RX/CX	Description	Date	Confidentiality Category	Duration of <i>In Camera</i> Treatment Requested
CX0315			Pricing; Employee Compensation and Commission Information; Business and Strategy Plans	5 years
CX0316			Business and Strategy Plans; Price Class Change Forms; Pricing	5 years
CX0317			Pricing; Employee Compensation and Commission Information; Business and Strategy Plans	5 years
CX0318			Employee Compensation and Commission Information; Business and Strategy Plans	5 years
CX8002			Employee Compensation and Commission Information	5 years
CX8004			Pricing; Business and Strategy Plans	5 years
CX8013			Employee Compensation and Commission Information; Business and Strategy Plans; Pricing	5 years
CX8017			Employee Compensation and Commission Information; Pricing	5 years
CX8023			McKinsey Report; Sensitive Personal Information; Pricing	5 years

RX/CX		Confidentiality Category	Duration of <i>In Camera</i> Treatment Requested
CX8027		Employee Compensation and Commission Information; McKinsey Report; Business and Strategy Plans	5 years
CX8028		Pricing; Business and Strategy Plans; Price Class Change Forms; Sales Scorecards	5 years
CX8038		Business and Strategy Plans; Price Class Change Forms; Pricing; Territory Representative Performance Assessment	5 years
L. Expert Witness Transcripts			
RX2967		McKinsey Report; Business and Strategy Plans; Third Party <i>In Camera</i> Information	5 years

Notice of Electronic Service

I hereby certify that on October 26, 2018, I filed an electronic copy of the foregoing 2018-10-26 Patterson Second Motion for In Camera Protection [PUBLIC], with:

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Washington, DC, 20580

Donald Clark
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I hereby certify that on October 26, 2018, I served via E-Service an electronic copy of the foregoing 2018-10-26 Patterson Second Motion for In Camera Protection [PUBLIC], upon:

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