

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



In the Matter of)
Otto Bock HealthCare North America, Inc.)
Respondent)

Docket No. 9378

ORIGINAL

NON-PARTY JONESBORO P&O LABS'
MOTION FOR *IN CAMERA* TREATMENT

Non-Party Jonesboro P&O Labs (“JPO”) hereby moves this Court pursuant to Rule 3.45 of the Federal Trade Commission’s Rules of Practice, 16 C.F.R. § 3.45(b) for *in camera* treatment of two documents produced by JPO (JPO0105 - JPO0125 and JPO 0126 - JPO0130)¹ and portions of the Investigational Hearing Transcript of Rob Yates and the Deposition Transcript of Rob Yates.² JPO has been notified by the Federal Trade Commission (“FTC”) that it intends to introduce Exhibit 1 and both transcripts at trial. See Letter from FTC dated May 24, 2018 (attached as Exhibit 5). JPO has been notified by Otto Bock HealthCare North America, Inc. (“Otto Bock”) that it intends to introduce Exhibit 2 and the Deposition Transcript. See Letter from Otto Bock dated May 29, 2018 (attached as Exhibit 6).

The documents were marked at the time of production as “Confidential” and “Subject to Protective Order.” Similarly, at the beginning of both the investigational testimony and the deposition testimony, it was agreed that the transcripts would be treated as confidential. The documents and related testimony contain extremely sensitive and confidential business information provided pursuant to third-party subpoenas served upon JPO by the FTC and

¹ The documents are attached hereto as Exhibit 1 and Exhibit 2.

² The Investigational Hearing Transcript is attached hereto as Exhibit 3 and the Deposition Transcript is attached as Exhibit 4.

Respondent Otto Bock. JPO has advised both the FTC and Otto Bock of its intention to move for *in camera* treatment of these materials at trial. Neither party opposes this motion.

Given the nature of the documents and related testimony, JPO would be significantly harmed in its ability to compete in the prosthetic and orthotic industry if this information were publicly available. For the reasons set forth below, JPO requests that this Court afford its confidential information permanent *in camera* treatment. In support of this motion, JPO relies on the affidavit of Rob Yates, attached as Exhibit 7.

I. The Documents at Issue

JPO seeks *in camera* treatment of the following Confidential documents:

Exhibit No.	Description	Date	BegBates	EndBates
RX-0995	Deposition Transcript of Robert Yates (Jonesboro O&P)	03/08/2018	RX-0995-00001	RX-0995-00097
RX-0905	Jonesboro - L. Code / Fee Schedule / Price Chart	Unknown	JPO126	JPO130

Exhibit No.	Description	Date	BegBates	EndBates
PX03036	Jonesboro P&O Document: Arkansas BlueCross BlueShield Fee Schedule	00/00/0000	JPO105	JPO125
PX05003	Investigational Hearing Transcript of Rob Yates (Jonesboro P&O)	11/29/2017	FTC-PROD-005019	FTC-PROD-005051
PX05108	Deposition Transcript of Rob Yates (Jonesboro P&O Labs)	3/8/2018	PX05108-001	PX05108-097

Attached hereto as Exhibit 8 is a listing of the excerpts of the transcripts for which *in camera* treatment is being sought with a brief description of the nature of the testimony.

II. The Documents and Testimony are Secret and Material and Disclosure Would Result in Serious Injury to JPO.

The Court should grant *in camera* treatment to documents and testimony 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). Serious competitive injury may be demonstrated by showing that the documents or testimony 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). Significantly, courts generally attempt “to protect confidential business information from unnecessary airing.” *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961).

In assessing the nature of the injury to JPO should the information be made public and the need to protect confidential business, the Court must keep in mind that JPO is not a party to this litigation. It was initially subpoenaed by the F.T.C. for investigative testimony and then subpoenaed by both the F.T.C. and Otto Bock for a deposition and to produce documents. Thus, JPO has already been inconvenienced and forced to incur substantial expenses simply because it does business with Otto Bock and its competitors. JPO’s status as a third-party is relevant to the Court’s ruling on the present motion. The F.T.C. has held that a third-party deserves “special solicitude” in its request for *in camera* treatment of its confidential business information. *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.”).

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 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 of difficulty with which the information could be acquired or duplicated by others.

In re Bristol-Myers Co., 90 F.T.C. 455, 456-57.

There can be no doubt but that the documents at issue are secret and material. Exhibit 1 is the Jonesboro fee schedule with Arkansas BlueCross BlueShield (“ABCBS”). It represents the agreement between JPO and ABCBS for the amounts that ABCBS will reimburse JPO for various components of prosthetic devices. Both JPO and ABCBS clearly consider this document to be confidential as the contract between them contains a confidentiality clause:

L. Confidentiality

ABCBS and Provider agree to maintain the confidentiality of the following data and documents: **the Allowance or any Fee Schedule of ABCBS**, any other compensation set forth in this Agreement, the Provider Manual, utilization review program outlines or guidelines of ABCBS, or any other written policies or procedures of ABCBS or of Payers furnished to Provider. The terms of this Agreement are confidential and the parties agree not to disclose such terms to third parties except as necessary to perform under this Agreement or as required by law or regulation.

See Exhibit 9 (emphasis added).

It is not difficult to understand why it is in the interest of both JPO and ABCBS to keep their fee schedule confidential. Imagine the potential harm to JPO should competitors, other payers, and suppliers learn of its pricing terms with other suppliers and payers. For example, if another payer is paying more than ABCBS and that other payer learns that it is paying more than ABCBS, that payer would use that information to negotiate a lower reimbursement rate for JPO. Similarly, if a competitor of JPO learns that JPO has better pricing than it does on certain knees, it could use that information to negotiate the same terms, eliminating JPO’s competitive advantage.

Exhibit 2 is even more sensitive than Exhibit 1 as it includes the reimbursement rate for multiple payers for a variety of prosthetic components. Thus, it includes not only information about ABCBS, but compares the reimbursement paid by ABCBS to the other payers with which

JPO has contracts. The agreements with these payers contain confidentiality provisions similar to the one cited above with ABCBS. For example, the UHC agreement provides:

9.9 Confidentiality. Neither party will disclose to a Customer, other health care providers, or other third parties any of the following information (except as required by an agency of the government):

- a) any proprietary business information, not available to the general public, obtained by the party from the other party; or
- b) **the specific reimbursement amounts provided for under this Agreement**, except for purposes of administration of benefits.

See Exhibit 10 (emphasis added).

The transcript excerpts listed in Exhibit 8 demonstrate that the testimony listed relates to this confidential pricing information and related subjects. Therefore, it is as sensitive as the information contained on the documents.

The foregoing establishes that JPO has satisfied most of the factors upon which this Court is to base its decision regarding *in camera* treatment. JPO's pricing information with various payers is not known outside of the business. JPO and the payers have taken measures to guard the secrecy of their contractual arrangements. The information about reimbursement rates between JPO and various payers would be extremely valuable to other payers and to JPO's competitors and the information cannot easily be acquired by those other payers or competitors. Therefore, JPO has satisfied its burden to obtain confidential treatment of its information.

Given the highly sensitive nature of the information contained in the documents and the testimony and the contractual obligation of JPO to keep this information confidential, JPO requests that Exhibits 1, 2, 3, and 4 be given *in camera* treatment permanently. The confidential nature of the information "is likely to remain sensitive or become more sensitive with the passage of time." *In re Dura Lube Corp.*, 1999 F.T.C. Lexis 255, *7-9.

III. Conclusion

For the reasons set forth above and in the Affidavit of Rob A. Yates, JPO respectfully requests that this Court grant permanent *in camera* treatment to the Confidential Documents in their entirety.

Respectfully submitted,

/s/Larry S. Gondelman
Larry S. Gondelman
Powers Pyles Sutter & Verville, PC
1501 M Street, NW, Suite 700
Washington, DC 20005
202.872.6712
larry.gondelman@powerslaw.com

Counsel for Non-Party JPO

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2018 the foregoing Motion and exhibits have been served via electronic mail on:

William Cooke
Federal Trade Commission
wcooke@ftc.gov

Sean Zabaneh
Duane Morris
sszabaneh@duanemorris.com

/s/Larry S. Gondelman
Larry S. Gondelman

STATEMENT REGARDING MEET AND CONFER

The undersigned certifies that counsel for Non-Party Jonesboro P&O Labs notified counsel for the parties via e-mail on May 25, 2018 that it would be filing a motion for *in camera* treatment of the documents produced and testimony provided by JPO that the parties intend to utilize at trial in this matter. Both counsel for the Federal Trade Commission and Otto Bock advised that they do not object to JPO's motion.

/s/Larry S. Gondelman
Larry S. Gondelman
Powers Pyles Sutter & Verville, PC
1501 M Street, NW, Suite 700
Washington, DC 20005
202.872.6712
larry.gondelman@powerslaw.com

Counsel for Non-Party JPO

REDACTED

CONFIDENTIAL- FTC DOCKET 9378
SUBJECT TO PROTECTIVE ORDER

JPO105

PX03036-001

EXHIBIT 1 IN CAMERA

REDACTED

CONFIDENTIAL- FTC DOCKET 9378
SUBJECT TO PROTECTIVE ORDER

JPD108

PX03036-002

EXHIBIT 1 IN CAMERA

REDACTED

CONFIDENTIAL- FTC DOCKET 8378
SUBJECT TO PROTECTIVE ORDER

JPO107
PX03036-003

EXHIBIT 1 IN CAMERA

REDACTED

CONFIDENTIAL- FTC DOCKET #378
SUBJECT TO PROTECTIVE ORDER

JPO108
PX03036-004

EXHIBIT 1 IN CAMERA

REDACTED

CONFIDENTIAL- FTC DOCKET 9378
SUBJECT TO PROTECTIVE ORDER

JPO108

PX03036-005

EXHIBIT 1 IN CAMERA

REDACTED

CONFIDENTIAL- FTC DOCKET 9378
SUBJECT TO PROTECTIVE ORDER

JPO110

PX03036-006

EXHIBIT 1 IN CAMERA

REDACTED

CONFIDENTIAL- FTC DOCKET 9378
SUBJECT TO PROTECTIVE ORDER

JPO111

PX03036-007

EXHIBIT 1 IN CAMERA

REDACTED

CONFIDENTIAL- FTC DOCKET 8378
SUBJECT TO PROTECTIVE ORDER

JPO112

PX03036-008

EXHIBIT 1 IN CAMERA

REDACTED

CONFIDENTIAL- FTC DOCKET 8378
SUBJECT TO PROTECTIVE ORDER

JPO113

PX03036-009

EXHIBIT 1 IN CAMERA

REDACTED

CONFIDENTIAL- FTC DOCKET 9379
SUBJECT TO PROTECTIVE ORDER

JPO114

PX03036-010

EXHIBIT 1 IN CAMERA

REDACTED

CONFIDENTIAL- FTC DOCKET 8378
SUBJECT TO PROTECTIVE ORDER

JPO115

EXHIBIT 1 IN CAMERA

PX03036-011

REDACTED

CONFIDENTIAL- FTC DOCKET #378
SUBJECT TO PROTECTIVE ORDER

JPO116

PX03036-012

EXHIBIT 1 IN CAMERA

REDACTED

CONFIDENTIAL- FTC DOCKET 9378
SUBJECT TO PROTECTIVE ORDER

JPO117

PX03036-013

EXHIBIT 1 IN CAMERA

REDACTED

CONFIDENTIAL- FTC DOCKET 9378
SUBJECT TO PROTECTIVE ORDER

JPO118

PX03036-014

EXHIBIT 1 IN CAMERA

REDACTED

CONFIDENTIAL- FTC DOCKET 8378
SUBJECT TO PROTECTIVE ORDER

JPO119

PX03036-015

EXHIBIT 1 IN CAMERA

REDACTED

CONFIDENTIAL- FTC DOCKET 9378
SUBJECT TO PROTECTIVE ORDER

JPO120

EXHIBIT 1 IN CAMERA

PX03036-016

REDACTED

CONFIDENTIAL- FTC DOCKET 9378
SUBJECT TO PROTECTIVE ORDER

JPO121

PX03036-017

EXHIBIT 1 IN CAMERA

REDACTED

CONFIDENTIAL- FTC DOCKET 8378
SUBJECT TO PROTECTIVE ORDER

EXHIBIT 1 IN CAMERA

JP0122
PX03036-018

REDACTED

CONFIDENTIAL- FTC DOCKET 9378
SUBJECT TO PROTECTIVE ORDER

JPO123

EXHIBIT 1 IN CAMERA

PX03036-019

REDACTED

CONFIDENTIAL- FTC DOCKET 9378
SUBJECT TO PROTECTIVE ORDER

JPO124

PX03036-020

EXHIBIT 1 IN CAMERA

REDACTED

CONFIDENTIAL- FTC DOCKET 8378
SUBJECT TO PROTECTIVE ORDER

JPO125

PX03036-021

EXHIBIT 1 IN CAMERA

REDACTED

EXHIBIT 2 IN CAMERA

CONFIDENTIAL- FTC DOCKET 9378
SUBJECT TO PROTECTIVE ORDER

JPO126

REDACTED

EXHIBIT 2 IN CAMERA

CONFIDENTIAL- FTC DOCKET 9378
SUBJECT TO PROTECTIVE ORDER

JPO127

REDACTED

EXHIBIT 2 IN CAMERA

CONFIDENTIAL - FTC DOCKET 9378
SUBJECT TO PROTECTIVE ORDER

JPO128

REDACTED

EXHIBIT 2 IN CAMERA

CONFIDENTIAL- FTC DOCKET 9378
SUBJECT TO PROTECTIVE ORDER

JPO129

REDACTED

EXHIBIT 2 IN CAMERA

CONFIDENTIAL- FTC DOCKET 9378
SUBJECT TO PROTECTIVE ORDER

JPO130

REDACTED

REDACTED

1 (Pages 1 to 4)

REDACTED

2 (Pages 5 to 8)

REDACTED

3 (Pages 9 to 12)

REDACTED

4 (Pages 13 to 16)

REDACTED

5 (Pages 17 to 20)

CONFIDENTIAL - FTC Docket No.
9378

EXHIBIT 3 IN CAMERA

FTC-JNBR-000013

REDACTED

6 (Pages 21 to 24)

CONFIDENTIAL - FTC Docket No.
9378

EXHIBIT 3 IN CAMERA

FTC-JNBR-000014

REDACTED

7 (Pages 25 to 28)

REDACTED

8 (Pages 29 to 32)

CONFIDENTIAL - FTC Docket No.
9378

EXHIBIT 3 IN CAMERA

FTC-JNBR-000016

REDACTED

9 (Pages 33 to 36)

REDACTED

10 (Pages 37 to 40)

REDACTED

11 (Pages 41 to 44)

REDACTED

12 (Pages 45 to 48)

CONFIDENTIAL - FTC Docket No.
9378

EXHIBIT 3 IN CAMERA

FTC-JNBR-000020

REDACTED

13 (Pages 49 to 52)

CONFIDENTIAL - FTC Docket No.
9378

EXHIBIT 3 IN CAMERA

FTC-JNBR-000021

REDACTED

14 (Pages 53 to 56)

REDACTED

15 (Pages 57 to 60)

REDACTED

16 (Pages 61 to 64)

REDACTED

17 (Pages 65 to 68)

REDACTED

18 (Pages 69 to 72)

CONFIDENTIAL - FTC Docket No.
9378

EXHIBIT 3 IN CAMERA

FTC-JNBR-000026

REDACTED

19 (Pages 73 to 76)

CONFIDENTIAL - FTC Docket No.
9378

EXHIBIT 3 IN CAMERA

FTC-JNBR-000027

REDACTED

20 (Pages 77 to 78)

CONFIDENTIAL - FTC Docket No.
9378

EXHIBIT 3 IN CAMERA

FTC-JNBR-000028

REDACTED

1 (Pages 1 to 4)

EXHIBIT 4 IN CAMERA

REDACTED

2 (Pages 5 to 8)

EXHIBIT 4 IN CAMERA

REDACTED

3 (Pages 9 to 12)

EXHIBIT 4 IN CAMERA

REDACTED

4 (Pages 13 to 16)

EXHIBIT 4 IN CAMERA

REDACTED

5 (Pages 17 to 20)

EXHIBIT 4 IN CAMERA

REDACTED

6 (Pages 21 to 24)

EXHIBIT 4 IN CAMERA

REDACTED

7 (Pages 25 to 28)

EXHIBIT 4 IN CAMERA

REDACTED

REDACTED

9 (Pages 33 to 36)

EXHIBIT 4 IN CAMERA

REDACTED

10 (Pages 37 to 40)

EXHIBIT 4 IN CAMERA

REDACTED

11 (Pages 41 to 44)

EXHIBIT 4 IN CAMERA

REDACTED

12 (Pages 45 to 48)

EXHIBIT 4 IN CAMERA

REDACTED

13 (Pages 49 to 52)

EXHIBIT 4 IN CAMERA

REDACTED

14 (Pages 53 to 56)

EXHIBIT 4 IN CAMERA

REDACTED

15 (Pages 57 to 60)

EXHIBIT 4 IN CAMERA

REDACTED

16 (Pages 61 to 64)

EXHIBIT 4 IN CAMERA

REDACTED

17 (Pages 65 to 68)

EXHIBIT 4 IN CAMERA

REDACTED

REDACTED

19 (Pages 73 to 76)

EXHIBIT 4 IN CAMERA

REDACTED

20 (Pages 77 to 80)

EXHIBIT 4 IN CAMERA

REDACTED

21 (Pages 81 to 84)

EXHIBIT 4 IN CAMERA

REDACTED

22 (Pages 85 to 88)

EXHIBIT 4 IN CAMERA

REDACTED

23 (Pages 89 to 92)

EXHIBIT 4 IN CAMERA

REDACTED

24 (Pages 93 to 96)

EXHIBIT 4 IN CAMERA

REDACTED

25 (Pages 97 to 100)

EXHIBIT 4 IN CAMERA

REDACTED

26 (Pages 101 to 104)

EXHIBIT 4 IN CAMERA

REDACTED

27 (Pages 105 to 108)

EXHIBIT 4 IN CAMERA

REDACTED

28 (Pages 109 to 112)

EXHIBIT 4 IN CAMERA

REDACTED

REDACTED

30 (Pages 117 to 120)

EXHIBIT 4 IN CAMERA

REDACTED

31 (Pages 121 to 124)

EXHIBIT 4 IN CAMERA

REDACTED

32 (Pages 125 to 128)

EXHIBIT 4 IN CAMERA

REDACTED

33 (Pages 129 to 132)

EXHIBIT 4 IN CAMERA

REDACTED

34 (Pages 133 to 136)

EXHIBIT 4 IN CAMERA

REDACTED

35 (Pages 137 to 140)

EXHIBIT 4 IN CAMERA

REDACTED

36 (Pages 141 to 144)

EXHIBIT 4 IN CAMERA

REDACTED

37 (Pages 145 to 148)

EXHIBIT 4 IN CAMERA

REDACTED

38 (Pages 149 to 152)

EXHIBIT 4 IN CAMERA

REDACTED

39 (Pages 153 to 156)

EXHIBIT 4 IN CAMERA

REDACTED

40 (Pages 157 to 160)

EXHIBIT 4 IN CAMERA

REDACTED

41 (Pages 161 to 164)

EXHIBIT 4 IN CAMERA

REDACTED

42 (Pages 165 to 168)

EXHIBIT 4 IN CAMERA

REDACTED

43 (Pages 169 to 172)

EXHIBIT 4 IN CAMERA

REDACTED

44 (Pages 173 to 176)

EXHIBIT 4. IN CAMERA

REDACTED

45 (Pages 177 to 180)

EXHIBIT 4 IN CAMERA

REDACTED

46 (Pages 181 to 184)

EXHIBIT 4 IN CAMERA

REDACTED

47 (Pages 185 to 188)

EXHIBIT 4 IN CAMERA

REDACTED

48 (Pages 189 to 192)

EXHIBIT 4 IN CAMERA

REDACTED

49 (Pages 193 to 196)

EXHIBIT 4 IN CAMERA

REDACTED

50 (Pages 197 to 200)

EXHIBIT 4 IN CAMERA

REDACTED

REDACTED

52 (Pages 205 to 208)

EXHIBIT 4 IN CAMERA

REDACTED

53 (Pages 209 to 212)

EXHIBIT 4 IN CAMERA

REDACTED

54 (Pages 213 to 216)

EXHIBIT 4 IN CAMERA

REDACTED

55 (Pages 217 to 220)

EXHIBIT 4 IN CAMERA

REDACTED

56 (Pages 221 to 224)

EXHIBIT 4 IN CAMERA

REDACTED

.57 (Pages 225 to 228)

EXHIBIT 4. IN CAMERA

REDACTED

58 (Pages 229 to 232)

EXHIBIT 4 IN CAMERA

REDACTED

59 (Pages 233 to 234)

EXHIBIT 4 IN CAMERA

REDACTED

EXHIBIT 4 - IN CAMERA

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED



Bureau of Competition
Mergers I Division

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

May 24, 2018

VIA EMAIL

Robert A. Yates, Jonesboro P&O Labs
c/o Larry S. Gondelman
Powers Pyles Sutter & Verville, PC
1501 M. Street, NW 7th Floor
Washington, DC 20005

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

Dear Mr. Gondelman,

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.

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) 326-2331.

Sincerely,

A handwritten signature in black ink, appearing to read 'W. Cooke', with a long horizontal flourish extending to the right.

William Cooke
Counsel Supporting the Complaint

Attachment A

Exhibit No.	Description	Date	BegBates	EndBates
PX03036	Jonesboro P&O Document: Arkansas BlueCross BlueShield Fee Schedule	00/00/0000	JPO105	JPO125
PX05003	Investigational Hearing Transcript of Rob Yates (Jonesboro P&O)	11/29/2017	FTC-PROD-005019	FTC-PROD-005051
PX05108	Deposition Transcript of Rob Yates (Jonesboro P&O Labs)	3/8/2018	PX05108-001	PX05108-097

NEW YORK
LONDON
SINGAPORE
PHILADELPHIA
CHICAGO
WASHINGTON, DC
SAN FRANCISCO
SILICON VALLEY
SAN DIEGO
LOS ANGELES
TAIWAN
BOSTON
HOUSTON
AUSTIN
HANOI
HO CHI MINH CITY

Duane Morris®

FIRM and AFFILIATE OFFICES

SEAN S. ZABANEH
DIRECT DIAL: +1 215 979 1149
PERSONAL FAX: +1 215 689 4964
E-MAIL: SSZabaneh@duanemorris.com

www.duanemorris.com

SHANGHAI
ATLANTA
BALTIMORE
WILMINGTON
MIAMI
BOCA RATON
PITTSBURGH
NEWARK
LAS VEGAS
CHERRY HILL
LAKE TAHOE
MYANMAR
OMAN
U.S. RESPONSE CENTER
OF DUANE MORRIS
ALLIANCES IN MEXICO
AND SRI LANKA

May 29, 2018

VIA EMAIL AND FEDEX

Robert A. Yates, Jonesboro P&O Labs
c/o Larry S. Gondeiman
Powers Pyles Sutter & Verville, PC
1501 M. Street, NW 7th Floor
Washington, DC 20005

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

Dear Mr. Gondeiman:

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 declaration or affidavit by a person qualified to explain the confidential nature of the documents.

DUANE MORRIS LLP

30 SOUTH 17TH STREET PHILADELPHIA, PA 19103-4196

PHONE +1 215 979 1000 FAX +1 215 979 1020

EXHIBIT 6 PUBLIC

Robert A. Yates, Jonesboro P&O Labs
May 29, 2018
Page 2

Duane Morris

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 215-979-1149.

Very truly yours,

/s/ Sean S. Zabaneh

Sean S. Zabaneh

SSZ
Enclosures

cc: Sean P. McConnell
Sarah O'Laughlin Kulik

Attachment A

Exhibit No.	Description	Date	BegBates	EndBates
RX-0995	Deposition Transcript of Robert Yates (Jonesboro O&P)	03/08/2018	RX-0995-00001	RX-0995-00097
RX-0905	Jonesboro - L. Code / Fee Schedule / Price Chart	Unknown	JPO126	JPO130

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

In the Matter of)	
Otto Bock HealthCare North America, Inc.)	
Respondent)	Docket No. 9378

DECLARATION OF ROB A. YATES

I, Rob A. Yates, pursuant to 28 U.S.C. § 1746, state and declare as follows:

1. I am the president and CEO of David A. Yates and Associates, doing business as JP&O Prosthetic & Orthotic Laboratory and Jonesboro Prosthetic & Orthotic Laboratory ("JPO"). I have served in these positions since September 2007.
2. JPO provides prosthetic and orthotic services to patients.
3. JPO received several subpoenas in connection with the above-captioned matter. Pursuant to these subpoenas, JPO produced several documents. Those documents include two documents that have been identified by the parties as documents that they intend to use at the trial in this matter.
4. One document is a listing of the fee schedule between JPO and Arkansas BlueCross BlueShield ("ABCBS"). That document, labeled JPO0105 – JPO0125, is Exhibit 1 to the Non-Party Jonesboro P&O Labs' Motion for *In Camera* Treatment. When JPO produced this document, it marked it as "confidential" and as "subject to protective order." The document was so labeled because it contained highly sensitive business information. In fact, the information contained in this document is governed by an agreement between JPO and ABCBS that includes a confidentiality clause, obligating the parties to the agreement to maintain the confidentiality of,

among other things, the fee schedule. A copy of the page of the agreement with the confidentiality clause is Exhibit 9 to the Motion.

5. The other document that the parties intend to use at trial is a fee schedule that contains the reimbursement amount that ten different payers have agreed to pay to JPO for various prosthetic components. This document, labeled JPO0126– JPO0130, is Exhibit 2 to the Non-Party Jonesboro P&O Labs’ Motion for In Camera Treatment. When JPO produced this document, it marked it as “confidential” and as “subject to protective order.” The document was so labeled because it contained highly sensitive business information. The information contained in this document is governed by agreements between JPO and the various payers that include confidentiality clauses, obligating the parties to the agreements to maintain the confidentiality of, among other things, the fee schedule.

6. Had these documents not been subject to the Protective Order in this case I would have refused to produce them.

7. The parties to this matter have also notified JPO that they intend to introduce at trial portions of my investigative testimony transcript and my deposition transcript. They have not identified the particular portions of the testimony that they intend to use.

8. I have reviewed both transcripts and have designated those portions of my testimony that either directly relate to Exhibits 1 and 2 or discuss business strategy or practices relating to the costs of parts purchased by JPO or the reimbursement by payers for prosthetic devices made by JPO. My testimony on these subjects is highly confidential as it relates to the private financial information of JPO. A listing of the excerpts for which JPO is seeking *in camera* treatment is Exhibit 8 to the Motion.

9. Both JPO and ABCBS have strong interests in keeping their fee schedule confidential. JPO would suffer irreparable harm should competitors, other payers, and suppliers learn of its pricing terms with other suppliers and payers. For example, if another payer is paying JPO more than ABCBS for a particular component and that other payer learns that it is paying more than ABCBS, that payer would use that information to negotiate a lower reimbursement rate for JPO. Similarly, if a competitor of JPO learns that JPO has better pricing than it does on certain knees, it could use that information to negotiate the same terms, eliminating JPO's competitive advantage.

10. The information in Exhibit 2 is even more sensitive than Exhibit 1 as Exhibit 2 includes the reimbursement rate for multiple payers for a variety of prosthetic components. Thus, it includes not only information about ABCBS, but compares the reimbursement paid by ABCBS to the other payers with which JPO has contracts. As noted previously, the agreements with these payers contain confidentiality provisions similar to the one cited above with ABCBS. For example, the UHC agreement provides:

9.9 Confidentiality. Neither party will disclose to a Customer, other health care providers, or other third parties any of the following information (except as required by an agency of the government):

- a) any proprietary business information, not available to the general public, obtained by the party from the other party; or
- b) the specific reimbursement amounts provided for under this Agreement, except for purposes of administration of benefits.

See Exhibit 10.

11. The transcript excerpts listed in Exhibit 8 demonstrate that the testimony listed relates to this confidential pricing information and related subjects. Therefore, it is as sensitive as the information contained on the documents.

12. JPO's pricing information with various payers is not known outside of the business.

13. JPO and the payers have taken measures to guard the secrecy of their contractual arrangements.

14. The information about reimbursement rates between JPO and various payers would be extremely valuable to other payers and to JPO's competitors and the information cannot easily be acquired by those other payers or competitors.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on this 7 day of June 2018.



Name: Rob Yates

Title: President / CEO

**EXCERPTS OF TESTIMONY FOR WHICH
IN CAMERA TREATMENT IS SOUGHT**

Excerpts of Deposition Testimony of March 8, 2018

<u>Page/Line</u>	<u>Subject Matter of Testimony</u>
17.8-18.9	property owned by family
20.5-20.19	number of prosthetics fit by Rob Yates in 2017
23.11-24.17	number of prosthetic knees by JPO
28.5-29.2	length of time pricing terms last
29.3-30.2	price paid for Plié and C-Leg
36.3-37.24	allowed charge for MP knees
51.3-52.6	range of prices offered for MP knees
55.6-55.10	price paid by JPO
56.10-57.16	prices and effect of price increase
57.18-60.7	numbers of Pliés and C-Legs
60.8-61.4	reimbursement for Plié and C-Leg is the same
61.5-64.1	purchasing decisions and pricing, including numbers purchased
68.13-72.13	Quattro
73.14-74.7	Plié and C-Leg compete on price
75.24-77.17	higher margins enable JPO to offer certain patient services
91.5-91.12	percentage of revenue from upper body devices
91.16-91.24	percentage of revenue from lower body devices
92.10-96.4	numbers of different MP knees; percentage of units including knees
98.21-99.1	amount of money spent on MP knees
99.23-103.3	numbers of knees and feet, cost of Plié

111.16-117.10	pricing discounts
118.14-121.19	pricing of non-MP knees and discounts
132.2-132.20	reimbursement amount from Medicare
134.22-137.7	reimbursement rates
140.2-141.6	UHC rates
144.23-145.14	reimbursement rates
159.1-160.8	number of patients
171.9-172.15	discounts
173.1-173.21	discounts
197.25-204.4	effect of price increases
205.16-209.3	effect of price increases
214.25-221.20	Quattro
229.2-230.1	Exhibit 2 reimbursement rates

Excerpts of Investigative Testimony of November 29, 2017

<u>Page/Line</u>	<u>Subject Matter</u>
17.12-17.18	number of patients; percentage with MK knee
18.21-19.18	amount spent on MK knees
29.8—33.1	CMS reimbursement rate
50.11-53.18	range of costs
56.19-58.20	cost and numbers purchased from each manufacturer
60.24-67.24	C-Leg v. Plié
62.20-67.24	Quattro
68.12-69.16	pricing structure by Otto Bock and Freedom
74.8-75.24	higher margins benefit patients

E. Confidentiality

ABCBS and Provider agree to maintain the confidentiality of the following data and documents: the Allowance or any Fee Schedule of ABCBS, any other compensation set forth in this Agreement, the Provider Manual, utilization review program outlines or guidelines of ABCBS, or any other written policies or procedures of ABCBS or of Payers furnished to Provider. The terms of this Agreement are confidential and the parties agree not to disclose such terms to third parties except as necessary to perform under this Agreement or as required by law or regulation.

9.9 Confidentiality. Neither party will disclose to a Customer, other health care providers, or other third parties any of the following information (except as required by an agency of the government):

- a) any proprietary business information, not available to the general public, obtained by the party from the other party; or
- b) the specific reimbursement amounts provided for under this Agreement, except for purposes of administration of benefits.

Notice of Electronic Service

I hereby certify that on June 08, 2018, I filed an electronic copy of the foregoing NON-PARTY JONESBORO P&O LABS' 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 08, 2018, I served via E-Service an electronic copy of the foregoing NON-PARTY JONESBORO P&O LABS' MOTION FOR IN CAMERA TREATMENT, upon:

Steven Lavender
Attorney
Federal Trade Commission
slavender@ftc.gov
Complaint

William Cooke
Attorney
Federal Trade Commission
wcooke@ftc.gov
Complaint

Yan Gao
Attorney
Federal Trade Commission
ygao@ftc.gov
Complaint

Lynda Lao
Attorney
Federal Trade Commission
llao1@ftc.gov
Complaint

Stephen Mohr
Attorney
Federal Trade Commission
smohr@ftc.gov
Complaint

Michael Moiseyev
Attorney
Federal Trade Commission
mmoiseyev@ftc.gov
Complaint

James Weiss
Attorney
Federal Trade Commission
jweiss@ftc.gov

Complaint

Daniel Zach
Attorney
Federal Trade Commission
dzach@ftc.gov
Complaint

Amy Posner
Attorney
Federal Trade Commission
aposner@ftc.gov
Complaint

Meghan Iorianni
Attorney
Federal Trade Commission
miorianni@ftc.gov
Complaint

Jonathan Ripa
Attorney
Federal Trade Commission
jripa@ftc.gov
Complaint

Wayne A. Mack
Duane Morris LLP
wamack@duanemorris.com
Respondent

Edward G. Biester III
Duane Morris LLP
egbiester@duanemorris.com
Respondent

Sean P. McConnell
Duane Morris LLP
spmconnell@duanemorris.com
Respondent

Sarah Kulik
Duane Morris LLP
sckulik@duanemorris.com
Respondent

William Shotzbarger
Duane Morris LLP
wshotzbarger@duanemorris.com
Respondent

Lisa De Marchi Sleigh
Attorney
Federal Trade Commission
ldemarchisleigh@ftc.gov
Complaint

Catherine Sanchez
Attorney

Federal Trade Commission
csanchez@ftc.gov
Complaint

Sarah Wohl
Attorney
Federal Trade Commission
swohl@ftc.gov
Complaint

Joseph Neely
Attorney
Federal Trade Commission
jneely@ftc.gov
Complaint

Sean Zabaneh
Duane Morris LLP
SSZabaneh@duanemorris.com
Respondent

Dylan Brown
Attorney
Federal Trade Commission
dbrown4@ftc.gov
Complaint

Betty McNeil
Attorney
Federal Trade Commission
bmneil@ftc.gov
Complaint

Stephen Rodger
Attorney
Federal Trade Commission
srodger@ftc.gov
Complaint

Christopher H. Casey
Partner
Duane Morris LLP
chcasey@duanemorris.com
Respondent

Simeon Poles
Duane Morris LLP
sipoles@duanemorris.com
Respondent

Andrew Rudowitz
Duane Morris LLP
ajrudowitz@duanemorris.com
Respondent

J. Manly Parks
Attorney
Duane Morris LLP
JMParks@duanemorris.com

Respondent

Jordan Andrew
Attorney
Federal Trade Commission
jandrew@ftc.gov
Complaint

Kelly Eckel
Duane Morris LLP
KDEckel@duanemorris.com
Respondent

Theresa A. Langschultz
Duane Morris LLP
TLangschultz@duanemorris.com
Respondent

Larry Gondelman
Attorney