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

_____)	
In the Matter of)	
)	
Asbury Automotive Group, Inc.,)	
a corporation,)	
)	
Asbury Ft. Worth Ford, LLC, a limited liability)	
company, also d/b/a David McDavid Ford)	
Ft. Worth,)	
)	
McDavid Frisco – Hon, LLC, a limited liability)	
company, also d/b/a David McDavid Honda of)	DOCKET NO. 9436
Frisco,)	
)	
McDavid Irving – Hon, LLC, a limited liability)	
company, also d/b/a David McDavid Honda of)	
Irving, and)	
)	
Ali Benli, individually and as an officer of)	
Asbury Ft. Worth Ford, LLC,)	
McDavid Frisco – Hon, LLC, and)	
McDavid Irving – Hon, LLC,)	
)	
Respondents.)	
_____)	

**COMPLAINT COUNSEL’S (1) MOTION TO UNREDACT THE COMPLAINT AND
(2) OPPOSITION TO RESPONDENTS’ MOTION FOR CONFIDENTIAL OR *IN
CAMERA* TREATMENT OF RESPONDENTS’ ANSWER**

Complaint Counsel respectfully moves for an order removing all redactions from the Complaint except one (Paragraph 33). The public has a strong interest in access to these proceeding, and the information Respondents seek to redact—complaints from consumers that they were wrongfully charged for add-on products and internal documents that corroborate those complaints—is not competitively sensitive or otherwise entitled to protection under the

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Protective Order. Respondents’ Motion for Confidential or *In Camera Treatment*—again, except insofar as it seeks to redact Paragraph 33—fails for similar reasons. Respondents’ blunderbuss motion simply asserts blanket confidentiality over all information marked “confidential” (*i.e.*, everything Respondents produced during the Commission’s investigation), and all statements it deems “substantially equivalent.” Mot at 2. But they have not, and cannot, satisfy the requisite standard—*i.e.*, showing with particularity that the material qualifies as “confidential” under the Protective Order.

BACKGROUND

Respondents are three auto dealerships, their parent company, and one of their general managers. In connection with auto sales, Respondents charge consumers for an array of add-on products—for example, extended warranties, chemical coatings, and dent protection. *See* Complaint ¶ 12. The Complaint alleges, *inter alia*, that Respondents, in violation of the FTC Act, have charged significant numbers of consumers for add-on products without their consent, allegations based in part on consumer complaints. Specifically, consumers have complained (1) that Respondents slipped add-ons into their paperwork without mentioning the add-ons at all; (2) that they specifically declined add-ons but were charged for them anyway; and that (3) they were falsely told that add-ons were required. Many of these consumer complaints are quoted directly in the Complaint. *See, e.g., id.* ¶¶ 14, 15, 18, 19, 21.

These consumer complaints are corroborated by many of Asbury’s own internal documents, which are described in the Complaint. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹

Prior to filing the Complaint, Complaint Counsel informed Respondents that the pleading might include information produced in response to the CID. In response, Respondents requested that Complaint Counsel file under seal any such information. Complaint counsel complied with Respondents' request to provide them the opportunity to establish the confidentiality of each purportedly confidential allegation. In their motion, however, Respondents simply assert without justification that *all* of the information, and any part of their Answer they deem sufficiently related (Mot. at 2), should remain shielded from public view.

ARGUMENT

I. The Redacted Material Is Not Confidential under the Protective Order.

Whether Complaint allegations should remain under seal is governed by the Protective Order. *See In re H&R Block*, No. 9427, 2024 WL 2181863, at *2 (May 8, 2024).² As the party seeking redactions from the public record, Respondents bear the burden of establishing that the material is confidential. *See id.* at *2-3.

¹ The Complaint also alleges that Respondents have violated the Equal Credit Opportunity Act by charging Black and Latino consumers more than non-Latino White consumers for the same products. *See, e.g., id.* ¶¶ 32-34. Complaint Counsel agrees to maintain the redactions that appear in this portion of the Complaint and Answer. *See id.* ¶ 33.

² To the extent Respondents seek an order granting *in camera* treatment, the motion must be denied as “procedurally improper.” *See In re LabMD, Inc.*, No. 9357, 2013 WL 5232774, at *2 (Sept. 10, 2013). Where, as here, no material has yet been offered into evidence, a motion for *in camera* treatment is premature; the only pertinent question vis-à-vis an ordinary filing like a Complaint or Answer is whether the information sought to be filed under seal qualifies as confidential under the protective order. *See id.* at *2-3.

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The Protective Order allows the filing under seal of “privileged, competitively sensitive information, or sensitive personal information.” The information is not “privileged” or “sensitive personal information”; thus the only question is whether it is “competitively sensitive,” a category that may include, for example, a “methodology for setting fees,” “client names,” or a “detailed geographic scope of operations,” *see In re: Louisiana Real Est. Appraisers Bd.*, No. 9374, 2021 WL 1223991, at *7 (Mar. 29, 2021), as well as information on consumer preferences and potential changes to product design, structure, and pricing, *see In re H&R Block*, 2024 WL 2181863, at *2 (May 8, 2024); *see also In re: Illumina, Inc.*, No. 9401, 2021 WL 3808883, at *4 (Aug. 19, 2021) (information developed at significant expense that is “highly valuable” to competitors may be “competitively sensitive”).

Here, none of the information comes close to satisfying this standard:

- **Consumer complaints: Complaint Paragraphs 14, 15, 18, 19, 21.** These paragraphs contain direct quotes from consumer complaints produced by Asbury in response to the CID. Although this information might be embarrassing for Asbury if made public, the law is clear that “mere embarrassment of the movant should not foreclose public disclosure.” *See In re: Boc Int’l, Ltd.*, 106 F.T.C. 337, at *2 (1985) (citation omitted).
- **High-level results of internal investigations: Complaint Paragraphs 6, 25-26, 28-31.** These paragraphs describe the high-level findings of Asbury audits [REDACTED]
[REDACTED]
[REDACTED] Again, though potentially embarrassing, there is no argument that Asbury’s own high-level findings of misconduct constitute the type of highly sensitive competitive information that can justify withholding the information from the public.
- **Quoting non-confidential Complaint allegations: Answer Paragraphs 6, 25, 26, 29, 30, 31.** In several cases, Respondents’ Answer quotes or paraphrases a portion of the Complaint’s allegations that were provisionally filed under seal. These provisions are not confidential for the reasons stated above.
- **Boilerplate disagreements with Complaint allegations: Answer Paragraphs 18, 19, 21.** Respondents seek to redact in three Answer paragraphs the following sentence:
[REDACTED]
[REDACTED]
[REDACTED] Needless to say, there is nothing “competitively sensitive” about these boilerplate assertions.

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- **Adding purported explanatory facts: Answer Paragraphs 26 and 31.** In two paragraphs, Respondents assert confidentiality over purported facts it offers in attempted rebuttal of the Complaint’s allegations. Neither contains any confidential information. In Paragraph 26, Respondents seek redaction of [REDACTED]
[REDACTED]
[REDACTED] Again, Respondents do not even attempt to explain how public disclosure of this material could confer an advantage on any competitor.

The recent *H&R Block* case confirms the conclusion that none of the material warrants protection. In that action, Complaint counsel originally redacted certain materials that were produced during the investigation and marked confidential. *See In re H&R Block*, No. 9427, Complaint Counsel’s Unopposed Motion to Remove Certain Redactions from the Public Complaint, at 3 (Apr. 2, 2024). Specifically, Complaint Counsel redacted (1) consumer complaints (*see In re H&R Block*, No. 9427, Complaint ¶¶ 20, 25, 26, 40, 53, 54 (May 9, 2024)); and (2) internal H&R Block documents, including internal emails, reviews, assessments, reports, and presentations (*see id.* ¶¶ 17, 19, 24, 27, 33). The redactions were removed from the public Complaint following H&R Block’s apparent recognition that the materials, though arguably “sensitive” in some colloquial sense, were not “*competitively sensitive*” under the protective order (identical in relevant part to the Protective Order in this case).

Here, in arguing for confidentiality, Respondents fail to submit any affidavit explaining the purported competitive sensitivity of the materials. *Cf. H&R Block*, 2024 WL 2181863, at *2 (affidavit from company president). Nor do they even attempt to explain, item by item, the purported confidentiality of the material. Instead, they take the position that any document marked “confidential” qualifies for protection, exactly the position that both the Honorable Jay L. Himes and the Honorable D. Michael Chappell have warned against. *See id.* at *3 (“[t]he Protective Order does not give parties or non-parties the unfettered ability or option to designate

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every document produced as ‘confidential.’” (Himes, J.) (quoting *In re Axon Enterprise, Inc.*, 2020 WL 1875539, at *1 n.1 (F.T.C. Feb. 14, 2020) (Chappell, J.)).

Respondents’ remaining arguments are equally meritless. They claim—without citation—that the Commission “has already determined” that the material is confidential (Mot. at 3), but that is emphatically false. As noted above (*see supra* p. 3), Complaint Counsel filed the Complaint with provisional redactions at Respondents’ request, only to provide them the opportunity to make a particularized showing of confidentiality, which they have failed even to attempt.

Respondents also argue that the Protective Order grants confidentiality to any document marked “confidential” that was produced in response to a CID. Mot. at 4. That is, of course, not the law. *See In re H&R Block*, 2024 WL 2181863, at *2 (appropriateness of redactions turned on whether respondents carried their burden that information was “competitively sensitive”); *In re LabMD, Inc.*, No. 9357, 2013 WL 5232774, at *3 (same). To hold otherwise would nullify the “substantial public interest in holding all aspects of adjudicative proceedings open to all interested persons.” *See In re H&R Block*, 2024 WL 2181863, at *3 (quoting *In re H.P. Hood & Sons*, 1961 FTC LEXIS 368, at *5-6 (Mar. 14, 1961); *see also In re Altria Grp., Inc.*, No. 9393, 2021 WL 2379509, at *2 (F.T.C. May 26, 2021)).

Respondents’ final argument rests on ignoring the relevant standard. They claim the material is, for example, “sensitive,” “non-public,” “commercial,” and “financial” (Mot. at 4), but, again, make no specific argument that the information is “competitively sensitive” under the Protective Order. The cases they cite only underscore the chasm between the specific articulations of competitive sensitivity required to justify sealing and Respondents’ vague, blanket assertions of confidentiality. *See In re Dura Lube*, No. 9292, 1999 FTC LEXIS 255, at

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*1 (F.T.C. Dec. 23, 1999) (“A blanket *in camera* order for an entire pleading will not be granted.”); *In re 1-800 Contacts*, No. 9372, 2017 WL 1345290, at *1 (Apr. 4, 2017) (“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.”) (quotation marks omitted); *100Reporters LLC v. U.S. Dep’t of Justice*, 248 F. Supp. 3d 115, 143 (D.D.C. 2017) (moving party satisfied its burden by submitting declaration explaining that information would provide “competitors with a roadmap of [its] system and allow those competitors to make affirmative use of the program . . . without incurring the substantial investment cost that [the party] has incurred.”).

CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that the Court, with the exception of Paragraph 33 (*see supra* n.1), order the removal of the Complaint redactions and deny Respondents’ Motion for Confidential or *In Camera* Treatment.

Dated: September 16, 2024

/s/ James Doty

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on all counsel of record—Ed Burbach, Michael Lockerby, Robert Johnson, John Sepehri, and Megan Chester—by email on this 16th day of September, 2024.

/s/ James Doty

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