

PUBLIC

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.)	
_____)	

**ORDER ON: (1) RESPONDENTS’ MOTION FOR CONFIDENTIAL OR
IN CAMERA TREATMENT OF PORTIONS OF THE ANSWER AND (2) COMPLAINT
COUNSEL’S MOTION TO UNREDACT THE PUBLIC COMPLAINT**

I.

On September 3, 2024, concurrent with their Answer to the Commission’s August 16, 2024 Complaint, Respondents filed a Motion for Confidential or In Camera Treatment (“Respondents’ Motion on the Answer”) seeking confidential or in camera treatment of portions of Respondents’ Answer. Complaint Counsel filed its response (“Complaint Counsel’s Opposition to the Motion on the Answer”) on September 16, 2024.¹

¹ Respondents assert that Complaint Counsel’s Opposition to the Motion on the Answer was due on September 13, 2024 and that because Complaint Counsel did not file its response until September 16, 2024, Complaint Counsel

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In the same September 16, 2024 filing, Complaint Counsel filed a Motion to Unredact the Complaint (“Complaint Counsel’s Motion on the Complaint”), seeking to remove redactions from the public version of the Complaint with the exception of the redactions in Paragraph 33.² On September 26, 2024, Respondents filed their response to Complaint Counsel’s Motion on the Complaint. (“Respondents’ Response”).³

For the reasons set forth below, Respondents’ Motion on the Answer is **DENIED**. Complaint Counsel’s Motion on the Complaint is **GRANTED**.

II.

Prior to its issuance of the Complaint, the Commission issued a Civil Investigative Demand (“CID”) to the corporate Respondents. In response to the CID, the corporate Respondents produced over 10,000 documents and marked all the documents and information produced as confidential.

On August 16, 2024, consistent with FTC Rule 3.45(e), the Commission issued two versions of the Complaint: (1) a public version, with certain information redacted for having been designated confidential; and (2) a confidential version, with information that had been designated confidential marked in bold and bracketed. 16 C.F.R. § 3.45(e) (“If a party includes specific information that . . . is subject to confidentiality protections pursuant to a protective order in any document filed in a proceeding under this part, the party shall file 2 versions of the document. . . . The expurgated version shall indicate any omissions with brackets or ellipses, and its pagination and depiction of text on each page shall be identical to that of the in camera [or confidential] version.”).⁴

should be deemed to have consented to the relief requested in Respondents’ motion. Rule 3.22(d) of the Commission’s Rules of Practice (“FTC Rules”) requires that the opposing party answer a written motion within ten days after service of the motion or “be deemed to have consented to the granting of the relief asked for in the motion.” FTC Rule 4.3(c) provides that “[w]henver a party in an adjudicative proceeding under part 3 is required or permitted to do an act within a prescribed period after service of a document upon it and the document is served by electronic delivery pursuant to § 4.4(e), 1 day shall be added to the prescribed period.” Therefore, under these rules, Complaint Counsel’s Opposition to the Motion on the Answer was due on September 16, 2024 and was timely filed.

² Attached to its September 16, 2024 filing, Complaint Counsel included a document captioned Motion for Confidential or In Camera Treatment, seeking confidential or in camera treatment of the September 16, 2024 filing. This document is not a properly filed motion and will not be treated as such. If it were to be considered a motion, it would be denied on procedural grounds for the reasons explained in Section III below.

³ By Order issued September 30, 2024, the ruling on Respondents’ Motion on the Answer was held in abeyance to allow Respondents’ Motion on the Answer and Complaint Counsel’s Motion on the Complaint to be considered together.

⁴ Although the August 21, 2024 Protective Order Governing Confidential Material (“Protective Order”) was not issued until after the Complaint, Appendix A to FTC Rule 3.31 governs all filings in Part 3 cases and provides the standard protective order with confidentiality protections.

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On September 3, 2024, also consistent with FTC Rule 3.45(e), Respondents filed two versions of their Answer: (1) a public version, with redactions of information the same or substantially equivalent to the information the Commission redacted in the Complaint; and (2) a confidential version, with information that had been designated confidential marked in bold font and bracketed.

Through the instant motions, Respondents seek to maintain the confidentiality of certain information in the Answer and Complaint Counsel seeks to publicly disclose certain information in the Complaint. Each motion is considered in turn below.

III.

Respondents' Motion on the Answer seeks in camera or confidential treatment of portions of the Answer. The term "in camera" in Commission practice "means that documents made subject to such orders are not made a part of the public record but are kept secret and only respondents, their counsel and authorized [persons] are permitted access thereto." *In re H.P. Hood & Sons*, No. 7709, 1961 FTC LEXIS 368, at *1 (Mar. 14, 1961). A motion for in camera treatment is appropriate only for materials to be "offered into evidence." 16 C.F.R. § 3.45(b); *see also FTC v. Sysco Corp.*, 83 F. Supp. 3d 271, 276 (D.D.C. 2015) (stating that FTC Rule 3.45(b) applies only to materials actually submitted into evidence at the hearing). The material for which Respondents seek in camera treatment is not being offered into evidence, but rather is contained in a brief or other submission and governed by FTC Rule 3.45(e). Accordingly, a motion for in camera treatment under such circumstances is procedurally improper. *In re LabMD, Inc.*, No. 9357, 2013 FTC LEXIS 153, at *4 (Sept. 10, 2013) (holding that "the parties' request . . . for provisional *in camera* treatment of material contained in the Nonpublic Complaint is procedurally improper" because no material was being offered into evidence).

The FTC Rules do not require a motion in order to file a confidential version of any pleading. Instead, FTC Rule 3.45(e) provides a mechanism for parties to file both confidential and public, expurgated versions of any brief or other submission without seeking leave of the Administrative Law Judge.

For the reasons stated above, Respondents' Motion on the Answer seeking in camera or confidential treatment of portions of the Answer is **DENIED** as procedurally improper. Nevertheless, given Respondents' compliance with FTC Rule 3.45(e), the redactions in the Answer filed on September 3, 2024 remain confidential.

IV.

A.

Complaint Counsel's Motion on the Complaint seeks an order removing all redactions from the public version of the Complaint, with the exception of the redactions in Paragraph 33. Complaint Counsel argues that, except as to Paragraph 33, none of the information that Respondents designated as confidential is, in fact, confidential under the Protective Order and the redacted information should not be withheld from the public record.

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Respondents assert that the information in the Complaint that Complaint Counsel seeks to place on the public record was derived from documents that Respondents designated as confidential when they produced them in response to the CID and that such materials must remain confidential pursuant to 15 U.S.C. § 57b-2(b)(3)(C). Respondents further assert that revealing information that has been marked as confidential in response to a CID in a public complaint would violate 15 U.S.C. § 57b-2(b)(1)(3)(C).⁵

B.

Section 21(b) of the FTC Act governs confidentiality of information received by the Commission pursuant to CIDs. Relevant provisions are set forth below:

Except as otherwise provided in this section, . . . no documentary material . . . shall be available for examination by any individual other than a duly authorized officer or employee of the Commission without the consent of the person who produced the material

15 U.S.C. § 57b-2(b)(3)(C) (emphasis added).

All information reported to or otherwise obtained by the Commission . . . shall be considered confidential when so marked by the person supplying the information and shall not be disclosed, except in accordance with the procedures established in [§ 57b-2(c)(2) and (3)].

Id. § 57b-2(c)(1).⁶

The provisions of [§ 57b-2(c)] shall not be construed to prohibit . . . the disclosure of relevant and material information in Commission adjudicative proceedings or in judicial proceedings to which the Commission is a party. . . .

Id. § 57b-2(d)(1)(C).

Any disclosure of relevant and material information in Commission adjudicative proceedings or in judicial proceedings to which the Commission is a party *shall be governed by the rules of the Commission for adjudicative proceedings* or by court rules or orders, except that the rules of the Commission shall not be amended in a manner inconsistent with the purposes of [§ 57b-2].

Id. § 57b-2(d)(2) (emphasis added).

⁵ Although cited by Respondents, there is no subsection 15 U.S.C. § 57b-2(b)(1)(3)(C). Respondents' arguments are interpreted to relate to 15 U.S.C. § 57b-2(b)(3)(C), excerpted below.

⁶ The procedures established in 15 U.S.C. § 57b-2(c)(2) and (3) are not applicable because the information is covered by 15 U.S.C. § 57b-2(d)(1)(C). Therefore, Respondents' argument that Complaint Counsel has not adhered to the procedures outlined in 15 U.S.C. § 57b-2(c) because it failed to provide at least ten-days' advance written notice of its intent to disclose information marked confidential is meritless.

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The plain language of the FTC Act makes clear that information designated confidential during an investigation, if relevant and material, may be disclosed in an adjudicative proceeding. *Id.*; see *FTC v. Match Grp., Inc.*, No. 1:22-mc-54, 2023 U.S. Dist. LEXIS 75470, at *36 (D.D.C. May 1, 2023) (“Section 57b-2(d)(1)(C) *overrides* the mandated confidentiality of material collected in an FTC investigation where court action is pursued.”); *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 411 (1st Cir. 1987) (The FTC Act plainly exempts judicial proceedings in which the Commission is a party “from the confidentiality requirements of the statute. The only precondition is that the information be ‘relevant and material.’”). The information that Respondents seek to shield from public disclosure is contained in allegations of the Complaint and thus is relevant and material information.

The plain language of the statute also makes clear that public disclosure in an adjudicative proceeding is governed by the rules of the Commission, which allow for disclosure of information received in an investigation unless subject to a protective or in camera order. See 16 C.F.R. § 4.10(g). The information produced in response to the CID is therefore subject to the Protective Order, which states that any document submitted by a respondent during an FTC investigation “*that is entitled to confidentiality*” as well as any information taken from such a document shall be treated as confidential material for purposes of the Protective Order. Protective Order ¶ 2 (emphasis added). To be entitled to confidentiality under the Protective Order, the information must contain “privileged, competitively sensitive information, or sensitive personal information.” *Id.* ¶ 1.

Respondents do not assert that any of the challenged information is privileged or sensitive personal information.⁷ Instead, Respondents assert that the redacted portions of the Complaint contain competitively sensitive, confidential, commercial information about Respondents’ sales, employment pay plans, business policies and practices, and internal audits. Respondents’ Motion on the Answer at 2.

Under the FTC Rules, “competitively sensitive information” includes “costs or various types of sales statistics and inventories . . . [and] trade secrets in the nature of formulas, patterns, devices, and processes of manufacture, as well as names of customers in which there is a proprietary or highly competitive interest.” 16 C.F.R. § 4.10(a)(2). Examples of information that has been found to be competitively sensitive include financial data, methodology for setting fees, marketing strategies, details on business operations, development and marketing strategies, pricing plans, sales projections, and performance reviews. *In re Altria Grp., Inc.*, No. 9393, 2021 FTC LEXIS 66 (May 26, 2021); see also *In re Illumina, Inc.*, No. 9401, 2021 WL 3808883, at *4 (F.T.C. Aug. 19, 2021) (holding that information developed at significant expense that is “highly valuable” to competitors may be “competitively sensitive”); *In re Impax Labs., Inc.*, No. 9373, 2017 FTC LEXIS 122, *7 (Oct. 20, 2017) (holding that competitively sensitive information includes information on sales and marketing initiatives, discounting tactics, goals for negotiations, and internal training and compliance information).

⁷ “‘Sensitive personal information’ . . . [refers to] an individual’s Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver’s license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual’s medical records.” Protective Order ¶ 1.

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Documents that are over three years old are presumed to not be competitively sensitive. *In re General Foods Corp.*, No. 9085, 1980 FTC LEXIS 99, at *4-5 (Mar. 10, 1980); *In re Altria Grp., Inc.*, No. 9393, 2021 WL 2258803, at *4 (F.T.C. May 19, 2021). Furthermore, “the mere embarrassment of the movant should not foreclose public disclosure.” *Hood*, 1961 FTC LEXIS 368, at *14.

The Commission recognizes the “substantial public interest in holding all aspects of adjudicative proceedings . . . open to all interested persons.” *Id.* at *5-6. A full and open record of the adjudicative proceedings promotes public understanding of decisions at the Commission, provides guidance to persons affected by its actions, and helps to deter potential violators of the laws that the Commission enforces. *Id.* at *6-8; *In re Bristol-Myers Co.*, No. C-8917-919, 1977 FTC LEXIS 25, at *3-6 (Nov. 11, 1977). Therefore, the burden of demonstrating good cause to justify withholding information from the public record rests with the party seeking to withhold it. *Hood*, 1961 FTC LEXIS 368, at *10-11; *In re H&R Block, Inc.*, No. 9427, 2024 FTC LEXIS 46, at *4-5 (May 8, 2024).

“[W]hen potential over-designation [of confidentiality] is brought to the attention of the Administrative Law Judge [(“ALJ”)] by appropriate motion, it is well within the ALJ’s discretion in overseeing the conduct of litigation to require sufficient proof of confidentiality, and where such proof is lacking, to remove improper redactions.” *H&R Block*, 2024 FTC LEXIS 46, at *7; Protective Order ¶ 9 (ordering that “[c]onfidential material contained in the papers shall continue” to be treated as such “until further order of the [ALJ]”).

C.

Applying the foregoing legal standards, the information in the allegations of the Complaint that Complaint Counsel seeks to reveal and Respondents seek to shield from public disclosure is evaluated below.

Consumer complaints (Complaint Paragraphs 14, 15, 18, 19, 21). Complaint Counsel asserts that these paragraphs contain direct quotes from consumer complaints produced by the corporate Respondents in response to the CID. Examples of the information in these allegations of the Complaint that Respondents seek to shield from public disclosure are⁸:

¶ 15: Other consumers reported that they specifically declined add-on items only to discover that Respondents charged them anyway. For example, a consumer reported that after she and her husband agreed to purchase a vehicle at McDavid Ford Ft. Worth, the couple “specifically said we did not want an extended warranty and a key fob replacement warranty” but that “both of those were snuck into our paper work.” Another

⁸ Complaint Counsel’s Motion on the Complaint designated as “confidential material” the allegations of the Complaint they now seek to reveal. FTC Rule 3.45(a) allows the ALJ to disclose confidential material to the extent necessary for the proper disposition of the proceeding. 16 C.F.R. § 3.45(a); *In re Bristol-Myers Co.*, 1977 FTC LEXIS 25, at *6 (ALJ may reveal information if “public disclosure is required in the interests of facilitating public understanding” of decisions). Therefore, representative allegations are revealed in this order.

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consumer similarly reported that, in the “huge pile of papers” she received, she was charged for add-ons she declined “many times”; after inquiring about the charges, the finance manager “lied to” her and told her the products were free. Mr. Benli received the complaint.

¶ 18: Asbury has received directly many complaints from consumers reporting that they were charged for add-on products without consent. For example, in 2021, a McDavid Honda Frisco consumer complained that “he did not want ANY products at all, but after he signed there was HondaCare, Resistall, Key and Windshield.” Asbury’s Regional Finance and Insurance Director called the complaint “pretty concerning.”

Results of internal investigations (Complaint Paragraphs 6, 25, 26, 28-31). Complaint Counsel asserts that these paragraphs describe the findings of audits from 2019 and 2020 and other internal investigations conducted by the corporate Respondents. Examples of the information in these allegations of the Complaint that Respondents seek to shield from public disclosure are:

¶ 25: Despite their limited nature, audits at each Respondent dealership have uncovered substantial evidence that consumers are charged for add-ons without consent: the dealerships have each failed multiple audits due to payment packing and other “Deceptive Practice[s],” as Respondents label them. For example, 2019 audits of McDavid Honda Frisco (managed by Mr. Benli) and McDavid Ford Ft. Worth found evidence of payment packing in 28% and 34% of deals, respectively. In total, the audits found “Deceptive Practice[s]” in over 50% of deals. Asbury’s Investigations Manager called the audits – the second consecutive failed audits for each dealership – “the worse” (Ft. Worth) and “the ugly” (Frisco).

¶ 30: Also in 2019, Asbury’s Investigations Manager found that Asbury employees were selling service plans for amounts that exceeded Asbury’s policies, thereby “enhanc[ing] their pay at the expense of our customers.” Of the 14 “most frequent offenders,” six were employees at one of the three Respondent dealerships.

Respondents assert that the foregoing information (and similar information in the other allegations of the Complaint at issue) includes “certain sensitive, non-public, proprietary, commercial, financial, and other information regarding the business operations of the Corporate Respondents and their internal audits and investigations” as well as “detailed information about the Corporate Respondents’ business model, pricing practices, proprietary data, and internal policies and procedures, including internal audits and investigations, which if disclosed could put the Respondents at a competitive disadvantage in the marketplace.” Respondents’ Motion on the Answer at 4-5. A careful review of the allegations of the Complaint reveals that some of the information is more than three years old and none of the information (with the exception of the redacted material in paragraph 33) constitutes competitively sensitive information.

Respondents further assert, without factual support, that disclosure of the information would cause them serious injury. However, the Respondents’ “unsupported statement . . . that their public disclosure might result in injury” is insufficient to meet Respondents’ burden of

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showing good cause to withhold information from the public record. *Hood*, 1961 FTC LEXIS 368, at *10-11. Although the information Respondents seek to shield might be embarrassing for them if made public, the law is clear that “mere embarrassment of the movant should not foreclose public disclosure.” *Id.* at *14.

D.

For the reasons stated above, Respondents have failed to demonstrate that the information they seek to withhold from the public record is competitively sensitive information. Accordingly, Complaint Counsel’s Motion on the Complaint is **GRANTED**.

By October 8, 2024, Complaint Counsel shall file a revised public version of the Complaint that removes all redactions in the Complaint, except for those redactions in Paragraph 33.

ORDERED:

Dania L. Ayoubi

Dania L. Ayoubi
Administrative Law Judge

Date: October 4, 2024