

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



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

PUBLIC

DOCKET NO. 17-0173

ORIGINAL

**NON-PARTY MADISON CAPITAL FUNDING LLC'S
 UNOPPOSED MOTION FOR *IN CAMERA* TREATMENT**

Pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice, Non-party Madison Capital Funding LLC (“Madison Capital”) respectfully moves for an Order granting indefinite *in camera* treatment for the following documents:

Exhibit No.	Date	Beginning Rates No.	Ending Rates No.
PX03008	6/29/2016	MCF00013	MCF00021
PX03009	2/14/2017	MCF00022	MCF00027
PX03010	9/8/2017	MCF00035	MCF00038

These documents contain information about the proprietary models, analyses, and processes developed by Madison Capital to evaluate and manage credit risk. The public disclosure of this information would cause irreparable harm to Madison Capital.

The facts and authorities in support of this Motion are set forth in the supporting memorandum of law and the accompanying declaration of Joseph P. McDermott. Complaint Counsel and Respondent Counsel do not oppose this Motion.

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Dated: June 11, 2018

Respectfully submitted,

By: s/ Angelo M. Russo

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*Attorneys for Non-Party Madison
Capital Funding LLC*

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

In the Matter of)

PUBLIC

Otto Bock HealthCare North America, Inc.,)

DOCKET NO. 9378

Respondent)

**[PROPOSED] ORDER
NON-PARTY MADISON CAPITAL FUNDING LLC'S
UNOPPOSED MOTION FOR *IN CAMERA* TREATMENT**

Upon consideration of Non-Party Madison Capital Funding LLC's Unopposed Motion for *In Camera* Treatment, and finding good cause, it is HEREBY ORDERED that the following documents are to be provided indefinite *in camera* treatment from the date of this Order in their entirety.

Exhibit No.	Date	Beginning Bates No.	Ending Bates No.
PX03008	6/29/2016	MCF00013	MCF00021
PX03009	2/14/2017	MCF00022	MCF00027
PX03010	9/8/2017	MCF00035	MCF00038

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: _____, 2018

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

_____)	
In the Matter of)	PUBLIC
)	
Otto Bock HealthCare North America, Inc.,)	DOCKET NO. 9378
)	
Respondent)	

**MEMORANDUM IN SUPPORT OF
NON-PARTY MADISON CAPITAL FUNDING LLC’S
UNOPPOSED MOTION FOR *IN CAMERA* TREATMENT**

Non-Party Madison Capital Funding LLC (“Madison Capital”) respectfully submits this memorandum of law in support of its unopposed motion for an order directing indefinite full *in camera* treatment of three highly competitively-sensitive, confidential business documents under Rule 3.45(b) of the Federal Trade Commission Rules of Practice. 16 C.F.R. § 3.45(b)

BACKGROUND

On December 20, 2017, the Federal Trade Commission (“FTC”) issued an administrative complaint challenging the merger of two prosthetics manufacturers – Respondent Otto Bock HealthCare North America, Inc., and FIH Group Holdings, LLC (“Freedom Innovations”). Madison Capital, a third-party to these proceedings, operates as a finance company that provides products and services to support acquisition, recapitalization, and growth investment efforts of private equity firms focused on middle market companies. (*See* Exhibit A, Joseph P. McDermott Declaration ¶2.) Madison Capital provided financing to Freedom Innovations. (*Id.* ¶8.)

On November 15, 2017, the FTC served Madison Capital with a subpoena *duces tecum*.

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Madison Capital has cooperated with the FTC by producing documents in response to that subpoena. The documents produced by Madison Capital were designated as “Confidential” under the protective order in this proceeding without objection from the FTC or Respondent.

On May 25, 2018, the FTC notified Madison Capital that it intends to introduce three documents identified as PX03008, PX03009, and PX03010 (the “Designated Documents”) into evidence at the upcoming administrative trial. (See FTC Letter dated May 25, 2018 (attached as Exhibit B).) These documents contain competitively sensitive and proprietary information that is material to Madison Capital’s business.

Accordingly, Madison Capital respectfully requests an order directing *in camera* treatment of the three documents identified as PX03008, PX03009, and PX03010 for an indefinite period. (The Designated Documents are attached hereto as Exhibit C.)

LEGAL STANDARD

Rule 3.45(b) provides that *in camera* protection is appropriate where “public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting *in camera* treatment.” 16 C.F.R. § 3.45(b). Stated differently, *in camera* treatment is warranted where the information is “sufficiently secret and sufficiently material to the applicant’s business that disclosure would result in serious competitive injury.” *In re Gen. Foods Corp.*, 95 F.T.C. 352, 355 (1980).

In assessing whether information is sufficiently secret and material, the Commission may consider: (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

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information; and (6) the ease or difficulty with which the information could be acquired or duplicated by others. *In re Bristol-Myers Co.*, 90 F.T.C. 455, 456-457 (1977). Applying these factors, the Commission has held that the “likely loss of business advantages is a good example of a ‘clearly defined, serious injury.’” *In re Hoechst Marion Roussel, Inc.*, No. 9293, 2000 FTC LEXIS 138, at *6 (Sept. 19, 2000) (quoting *In re Gen. Foods Corp.*, 95 F.T.C. 352, 355 (1980)); *see also In re Dura Lube Corp.*, No. 9292, 1999 FTC LEXIS 255, at *7 (Dec. 23, 1999) (same). Non-party requests for *in camera* treatment should be given “special solicitude.” *See In re Kaiser Aluminum & Chemical 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.”).

Once information is afforded *in camera* treatment, a determination must also be made about the duration for which the information will be held *in camera*. *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 138, at *7. In making this determination, trade secrets (*i.e.*, secret formulas, processes, and other technical information) are granted more protection than ordinary business records. *Id.*

ARGUMENT

I. The Designated Documents Are Secret and Material Such that Disclosure Would Result in Serious Injury to Madison Capital

As the Commission has held, “confidential records of businesses involved in Commission proceedings should be protected insofar as possible.” *In re H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1185 (1961). Here, protection is warranted because the Designated Documents for which Madison Capital seeks *in camera* treatment are both secret and material to Madison Capital’s business and would seriously injure Madison Capital if disclosed to the public.

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First, as explained in Mr. McDermott's declaration, the Designated Documents contain information that is material to Madison Capital's business. The Designated Documents memorialize the approval of certain underwritten credit decisions to amend loan documents in response to a Freedom Innovations' performance trends, liquidity, and upcoming loan maturity date. (Ex. A ¶8.) As a result, they contain information about Madison Capital's internal approval authority thresholds, credit risk rating system, loan loss reserve process, and portfolio management process. (*Id.* ¶10.) They also contain proprietary methods, analyses, models, and formulas used in Madison Capital's underwriting and risk assessments that are critical to its business. (*Id.* ¶¶7-8.) Madison Capital has invested significant resources to develop the proprietary analyses and models underlying and reflected in the Designated Documents. (*Id.* ¶8.) Such methods, analyses, models, and formulas distinguish Madison Capital's business model from its competitors and are critical to its business development and competition strategies. (*Id.* ¶7.)

Second, given the competitive significance of this information, Madison Capital has taken great care to protect this information from public disclosure. As explained in Mr. McDermott's declaration, Madison Capital limits the distribution of this information to a set of Madison Capital employees, which generally includes a handful of employees and a few senior management. (*Id.* ¶9.) When Madison Capital shares documents like the Designated Documents with investors, it does so only after the investor executes a Non-Disclosure Agreement. (*Id.*) Here, the Designated Documents were never shared outside of Madison Capital. (*Id.*) Additionally, when producing the Designated Documents to the FTC, Madison Capital designated this information "Confidential" under the Protective Order in this proceeding. (*Id.*)

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Third, Madison Capital is likely to suffer severe financial harm and competitive disadvantage if the Designated Documents are made public. For example, the Designated Documents contain confidential information on how Madison Capital evaluates a borrower's application. (Ex. A ¶8.) If other borrowers gain insight into Madison Capital's internal approval authority thresholds, credit risk rating system, loan loss reserve process, and portfolio management process, then Madison Capital's bargaining position in ongoing and future negotiations with those borrowers will be undermined. (*Id.*) Moreover, the public disclosure of the Designated Documents will allow competitors to formulate business plans specifically calculated to undercut Madison Capital's lending efforts and business development. (*Id.*) Indeed, the disclosure of Madison Capital's models, analyses, and risk assessment methodology and criteria could be used by competitors to fraudulently reverse engineer Madison Capital's proprietary processes and methodologies. (*Id.*) Put simply, public disclosure of the Designated Documents will cause serious loss of business advantage to Madison Capital.

Finally, as a non-party to this proceeding, Madison Capital's request for *in camera* treatment deserves "special solicitude." See *In re POM Wonderful LLC*, No. 9344, 2011 WL 2160777, at *1 (May 9, 2011) (granting non-parties' motion for *in camera* treatment; "a request for *in camera* treatment by a non-party warrants 'special solicitude.'") (quoting *In re Crown Cork & Seal Co.*, 71 F.T.C. 1714, 1715 (1967)). Madison Capital complied with discovery requests made by the FTC understanding that this information would remain confidential. The serious competitive harm that Madison Capital would suffer substantially outweighs any interest in disclosing Madison Capital's proprietary and confidential information to the public. See *In re Kaiser Aluminum & Chemical Corp.*, 103 F.T.C. at 500 (granting an order extending *in camera*

treatment; “A public understanding of this proceeding does not depend on access to these data submitted by these third party firms”).

II. The Designated Documents Should Receive Indefinite *In Camera* Treatment Because They Contain Trade Secrets That Will Remain Sensitive Over Time

Where confidential information “is likely to remain sensitive or become more sensitive with the passage of time,” *in camera* treatment for more than five years is appropriate. Given the highly sensitive and technical nature of the information in the Designated Documents, Madison Capital requests that they be given *in camera* treatment indefinitely. The trade secret information in the Designated Documents “is likely to remain sensitive or become more sensitive with the passage of time” so the need for confidentiality is not likely to decrease over time. *In re Dura Lube Corp.*, 1999 FTC LEXIS at *7-8. “Trade secrets” – such as secret formulas and secret technical information – are granted more protection than ordinary business documents. *Id.* at *5.

Here, as described in Mr. McDermott’s Declaration, the Designated Documents contain business and trade secrets in the form of internal approval authority thresholds, credit risk rating system, loan loss reserve process, and portfolio management process. (Ex. A ¶¶8-10.) These materials also contain Madison Capital’s proprietary models and analyses that are used in Madison Capital’s underwriting and risk assessments. (*Id.*) The competitive significance of these models and analyses is unlikely to decrease over time and thus, indefinite protection from public disclosure is appropriate. (*Id.* ¶11.)¹

¹ If the Court decides against granting indefinite *in camera* treatment, Madison Capital respectfully asks that the period of *in camera* treatment granted be no less than 10 years from the date of the Court’s Order.

CONCLUSION

For the reasons set forth above and in the accompanying McDermott Declaration, Madison Capital respectfully requests that this Court grant indefinite *in camera* treatment for the Designated Documents in their entirety.

Dated: June 11, 2018

Respectfully submitted,

By: s/ Angelo M. Russo
Angelo M. Russo
McGuire Woods LLP
77 West Wacker Drive
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Chicago, Illinois 60601
(312) 849-8100
arusso@mcguirewoods.com

*Attorneys for Non-Party Madison
Capital Funding LLC*

STATEMENT REGARDING MEET AND CONFER

The undersigned certifies that counsel for Non-Party Madison Capital Funding LLC notified counsel for Complainant the Federal Trade Commission (“FTC”) and counsel for Respondent Otto Bock HealthCare North America, Inc. (“Otto Bock”), by telephone that it would be seeking *in camera* treatment of the Designated Documents. Both counsel for the FTC and counsel for Otto Bock stated they would not object to Madison Capital’s Motion.

Dated: June 11, 2018

Respectfully submitted,

By: s/ Angelo M. Russo
Angelo M. Russo
McGuireWoods LLP
77 West Wacker Drive
Suite 4100
Chicago, Illinois 60601
(312) 849-8100
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*Attorneys for Non-Party Madison Capital
Funding LLC*

CERTIFICATE OF SERVICE

I, Angelo M. Russo, declare under penalty of perjury under the laws of the State of Illinois that the following is true and correct. On June 11, 2018, I caused to be served the following documents on the parties listed below by the manner indicated:

- Non-Party Madison Capital Funding LLC's Unopposed Motion for *in Camera* Treatment, with accompanying Memorandum of Law and all Exhibits, and Statement Regarding Meet and Confer
- [Proposed] Order Granting Indefinite *In Camera* Treatment

**The Office of the Secretary
(via FTC E-Filing System)**

Donald S. Clark
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W., Room H-172
Washington, DC 20580

**The Office of the Administrative Law Judge
(via FTC E-Filing System and Email)**

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Avenue, N.W., Room H-106
Washington, DC 20580

**Complaint Counsel for Federal Trade Commission
(via FTC E-Filing System)**

Stephen Mohr, Esq.
Federal Trade Commission
400 7th Street, SW
Washington, DC 20024

**Counsel for Respondent Otto Bock HealthCare North America, Inc.
(via FTC E-Filing System)**

Christopher Casey, Esq.
Duane Morris LLP
30 South 17th Street
Philadelphia, PA 19103-4196

s/ Angelo M. Russo
Angelo M. Russo

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EXHIBIT A

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

In the Matter of)	PUBLIC
Otto Bock HealthCare North America, Inc.,)	DOCKET NO. 9378
Respondent)	

**DECLARATION OF JOSEPH P. MCDERMOTT IN SUPPORT
OF NON-PARTY MADISON CAPITAL FUNDING LLC'S
UNOPPOSED MOTION FOR *IN CAMERA* TREATMENT**

I, Joseph P. McDermott, hereby declare as follows:

1. I am the Assistant Vice President of Madison Capital Funding LLC ("Madison Capital").

I make this declaration in support of Non-Party Madison Capital Funding LLC's Motion for *In Camera* Treatment (the "Motion"). I have personal knowledge of the matters stated herein and, if called upon to do so, could competently testify about them.

2. Madison Capital was founded in 2001 and is based in Chicago, Illinois. Madison Capital operates as a finance company that provides cash flow based, leveraged capital products to private equity sponsors. Its products and services support acquisition, recapitalization, and growth investment efforts of private equity firms focused on middle market companies.

3. I joined Madison Capital in February 2014. In my current position, I am responsible for coordinating industry research and company diligence, preparing transaction memoranda and underwriting reports, and managing a portfolio of accounts. I am also involved in developing and evaluating financial models, supporting legal documentation negotiation, and managing deal closings.

4. I have reviewed the documents Madison Capital produced in response to a subpoena *duces tecum* issued by the Federal Trade Commission (“FTC”). I provided a certification of authenticity as to the three documents the FTC notified Madison Capital it may introduce during the administrative trial, which are identified as PX03008, PX03009, and PX03010 (collectively, the “Designated Documents”).

5. Given my position at Madison Capital, I am familiar with the type of information contained in the Designated Documents and its competitive significance to Madison Capital’s business. Based on my review of the documents, my knowledge of Madison Capital’s business, and my familiarity with the confidentiality protection afforded this type of information by Madison Capital, I submit that the disclosure of the Designated Documents to the public and to competitors of Madison Capital would cause serious competitive injury to Madison Capital.

6. As set forth in its Motion and accompanying Memorandum of Law, Madison Capital seeks permanent *in camera* protection of the Designated Documents because they contain competitively-sensitive and confidential business information and trade secrets.

7. Madison Capital finances deals across various industries, including manufacturing, distribution, consumer products, healthcare, insurance/financial services, aerospace and defense, and technology services. As a finance company that offers loans and underwrites senior credit facilities, Madison Capital depends on its ability to evaluate credit underwriting and risk management. To provide its products and services, Madison Capital applies its proprietary and confidential models and analyses to evaluate and make credit decisions based on the metrics and information presented by a particular borrower. Such methods, analyses, models, and formulas distinguish Madison Capital’s business model from its competitors and are critical to its business development and competition strategies.

8. The Designated Documents memorialize the approval of certain underwritten credit decisions to amend loan documents in response to Freedom Innovations' performance trends, liquidity, and upcoming loan maturity date. Public Disclosure of the Designated Documents would reveal the proprietary methods, analyses, models, and formulas used in connection with Madison Capital's underwriting and risk assessments that are critical to its business. Madison Capital has invested significant resources to develop the proprietary analyses and models underlying and reflected in the Designated Documents, which represent substantial competitive value to Madison Capital.

9. This proprietary information is not publicly available and Madison Capital has devoted its resources to protecting the confidentiality of the information in the Designated Documents. Madison Capital generally limits the distribution of this information to a set of Madison Capital employees, which includes a handful of employees and a small number of senior management. When Madison Capital shares documents like the Designated Documents with investors, it does so only after the investor executes a Non-Disclosure Agreement. Here, the Designated Documents were never shared outside of Madison Capital. Also, in producing the Designated Documents to the FTC, Madison Capital designated all of this information "Confidential" under the Protective Order in this proceeding.

10. Disclosure of the proprietary analyses and models through which Madison Capital evaluates, documents, and approves internal credit decisions will competitively disadvantage Madison Capital with borrowers and competitors. For example, the Designated Documents contain confidential information as to how Madison Capital evaluates a borrower's application. If other borrowers gain insight into Madison Capital's internal approval authority thresholds, credit risk rating system, loan loss reserve process, and portfolio management process, Madison Capital's

bargaining position in ongoing and future negotiations with those borrowers will be undermined. Moreover, the public disclosure of the Designated Documents will allow competitors to formulate business plans specifically calculated to undercut Madison Capital's lending efforts and business development. Indeed, the disclosure of Madison Capital's models, analyses, and risk assessment methodology and criteria could be used by competitors to fraudulently reverse engineer Madison Capital's proprietary processes and methodologies.

11. The Designated Documents contain business and trade secrets in the form of internal Madison Capital calculations, ratings, models, and analyses. Madison Capital uses this information in connection with its underwriting and risk assessments that are critical to its ability to offer its products and services. The competitive significance of the proprietary analyses, models, and confidential criteria in the Designated Documents is unlikely to decrease over time and thus, indefinite protection from public disclosure is appropriate.

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

Executed June 11, 2018 at Chicago, Illinois.


Joseph P. McDermott

PUBLIC-REDACTED

EXHIBIT B

**MARKED *IN-CAMERA*
PARTIAL REDACTION
REQUESTED**



Bureau of Competition
Mergers 1 Division

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

May 25, 2018

VIA EMAIL

Madison Capital Funding LLC
c/o Angelo M. Russo
77 West Wacker Drive, Suite 4100
Chicago, IL 60601-1818
arusso@mcguirewoods.com

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

Dear Mr. Russo,

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) 326-2850.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen Mohr". The signature is written in a cursive style with a large initial "S" and a long horizontal stroke.

Stephen Mohr
Counsel Supporting the Complaint

Attachment A

PUBLIC-REDACTED

Exhibit No.	Description	Date	BegBates	EndBates
PX03008	[REDACTED]	6/9/2016	MCF00013	MCF00021
PX03009	[REDACTED]	2/14/2017	MCF00022	MCF00027
PX03010	[REDACTED]	9/8/2017	MCF00035	MCF00038

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EXHIBIT C

Hearing Exhibits Nos.
PX03008, PX03009, and PX03010

IN-CAMERA TREATMENT IN
THEIR ENTIRETY REQUESTED

PUBLIC

PX03008

***IN-CAMERA* TREATMENT IN
THEIR ENTIRETY REQUESTED**

PUBLIC

PX03009

***IN-CAMERA* TREATMENT IN
THEIR ENTIRETY REQUESTED**

PUBLIC

PX03010

***IN-CAMERA* TREATMENT IN
THEIR ENTIRETY REQUESTED**