



UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGE

\_\_\_\_\_  
In the Matter of )  
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 )  
Otto Bock Healthcare North ) Docket No. D09378  
America, Inc., )  
 )  
 )  
Respondents. )  
\_\_\_\_\_

**NON-PARTY DAW INDUSTRIES, INC.’S UNOPPOSED MOTION FOR**

**IN CAMERA TREATMENT**

Non-Party DAW Industries, Inc. (“**DAW**”) 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 documents produced by DAW (DAW0000001-DAW0000004; DAW0000147-DAW0000149; DAW0000150-DAW0000152; DAW0000153-DAW0000155; DAW0000156-DAW0000158; DAW0000166-DAW0000178; DAW0000180) (these documents are attached as **Exhibit A**), Declaration of Stuart Marquette (FTC-DAWI-000002 to FTC-DAWI-000004; PX04002-001 to PX04002-003) (attached as **Exhibit B**), the Deposition Transcript of Stuart Marquette (RX-1017-00001 to RX-1017-00039; PX05146-001-PX05146-039) (attached as **Exhibit C**) and the Deposition Transcript of Hughes Belzidsky (RX-1018-00001 to RX-1018-00043; PX05147-001-PX05147-043) (**attached as Exhibit D**) (**exhibits A-D** collectively “Confidential Documents”). DAW has been notified by the Federal Trade Commission (“**FTC**”)

and Otto Bock HealthCare North America, Inc. (“**Otto Bock**”) that they intend to introduce **Exhibits A-D** at trial. *See* Letter from FTC dated May 25, 2018 (attached as **Exhibit E**) and letter from Otto Bock dated May 29, 2018 (attached as **Exhibit F**).

The documents were marked at the time of production as “Confidential” and subject to the Protective Order in this case. Similarly, at the beginning of both depositions, it was stipulated by all parties that the transcripts would be treated as “Confidential” and subject to the Protective Order in this case. The documents and related testimony contain extremely sensitive and confidential business information that DAW produced pursuant to third-party subpoenas served upon DAW initially by Otto Bock and then subsequently also by the FTC. DAW 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, DAW would be significantly harmed in its ability to compete in the prosthetic industry if this information were publicly available. For the reasons set forth below, DAW requests that this Court afford DAW’s confidential information permanent *in camera* treatment. In support of this motion, DAW relies on the Declaration of Hughes Belzidsky (“Decl. Belzidsky”), attached as **Exhibit G**.

**I. Confidential Documents At Issue**

DAW seeks *in camera* treatment of the following Confidential Documents:

| <u>No.</u>         | <u>Description</u>                        | <u>Date</u> | <u>Beginning Bates</u>      | <u>Ending Bates</u>          |
|--------------------|---|-------------|-----------------------------|------------------------------|
| RX-1017<br>PX05146 | Deposition transcript of Stuart Marquette | 04/03/2018  | RX-1017-0001<br>PX05146-001 | RX-1017-00039<br>PX05146-039 |
| RX-1018            | Deposition transcript of Hughes Belzidsky | 04/03/2018  | RX-1018-0001                | RX-1018-00043                |

| <u>No.</u>                                  | <u>Description</u>                                | <u>Date</u> | <u>Beginning Bates</u>             | <u>Ending Bates</u>                |
|---|---|-------------|------------------------------------|------------------------------------|
| PX05147                                     |   |             | PX05147-001                        | PX05147-043                        |
| RX-0734<br>(FTC-DAWI-000002)<br><br>PX04002 | Declaration of Stuart Marquette                   | 12/15/2017  | FTC-DAWI-000002<br><br>PX04002-001 | FTC-DAWI-000004<br><br>PX04002-003 |
| PX03158                                     | Prosthetic; Price List                            | 06/30/2017  | DAW0000001                         | DAW0000004                         |
| PX03160                                     | Sales, Unit, Profits, GM% and Description of item | 3/21/2018   | DAW0000147                         | DAW0000149                         |
| PX03161<br><br>RX-0856<br>(DAW0000150)      | Sales, Unit, Profits, GM% and Description of item | 3/21/2018   | DAW0000150                         | DAW0000152                         |
| PX03162<br><br>RX-0859<br>(DAW0000153)      | Sales, Unit, Profits, GM% and Description of Item | 3/21/2018   | DAW0000153                         | DAW0000155                         |
| RX-0091<br>(DAW0000156)                     | DAW Call Sheet                                    | 09/20/2015  | DAW0000156                         | DAW0000158                         |
| PX03165<br><br>RX-0781<br>(DAW0000166)      | 5-Bar Adult Knee Selection Guide                  | 02/1/2018   | DAW0000166                         | DAW0000178                         |
| PX03167                                     | DAW Answers to Subpoena                           | 00/00/0000  | DAW0000180                         | DAW0000180                         |

## II. Legal Standard

*In camera* treatment of material is appropriate where, as here, its “public disclosure will likely result in a clearly defined, serious injury to the ... corporation requesting such treatment.” 16 C.F.R. § 3.45(b). A proponent seeking *in camera* treatment demonstrates serious competitive injury by showing that the documents 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). In this context, courts generally attempt “to protect confidential business information from unnecessary airing.” *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961).

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 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 or difficulty with which the information could be acquired or duplicated by others. *In re Bristol-Meyers Co.*, 90 F.T.C. 455, 456-457 (1977).

An additional factor—DAW’s non-party status—weighs in favor of *in camera* treatment of DAW’s information. The FTC has held that “[t]here can be no question that the confidential records of businesses involved in Commission proceedings should be protected insofar as possible.” *HP. Hood & Sons*, 58 F.T.C. at 1186. This is especially so in the case of a non-party, which deserves “special solicitude” in its request for *in camera* treatment for its confidential business information. See *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500 (1984) (“As a policy matter, extension of confidential or *in camera* treatment in appropriate cases involving third party bystanders encourages cooperation with future adjudicative discovery requests”).

### **III. The Documents and Testimony are Secret and Material and Disclosure Would Result in Serious Injury to DAW**

DAW seeks *in camera* treatment for secret and competitively-sensitive sales data, pricing information, cost data, marketing practice, pricing decisions, information regarding contracts with distributors, profit/gross margins and other secret and competitively-sensitive information

contained in the Confidential Documents (“Confidential and Sensitive Information”)—that is exactly the type of information for which the FTC has traditionally afforded *in camera* treatment. (Decl. Belzidsky ¶¶ 4-7 ); *see, e.g., The Matter of Champion Spark Plug Company*, 1982 FTC LEXIS 85 at \*2 (April 5, 1982) (finding that “there is ample support for granting *in camera* treatment for sales data of a type not normally disclosed”).

DAW’s Confidential and Sensitive Information is secret. DAW maintains the confidentiality of such information by narrowly disclosing such information to employees within DAW who have a specific “need to know” it to perform their duties and not disclosing such information outside of DAW. (Decl. Belzidsky ¶ 11.) Within DAW, the Confidential and Sensitive Information is contained within its computer system that restricts access to only those individuals that require the information for performing their job duties. (Decl. Belzidsky ¶ 11.) No person or entity outside of DAW has access to the Confidential and Sensitive Information and only required employees within DAW have access to it. (Decl. Belzidsky ¶ 11.)

DAW’s efforts to maintain the secrecy of the Confidential and Sensitive Information extended to this matter. When DAW produced the Confidential Documents, it took steps to maintain their confidentiality by requesting confidential and attorney eyes only treatment under the Protective Order in this case. (Decl. Belzidsky ¶ 10.) It will be extremely damaging to DAW if the Court were to make public the highly sensitive and confidential business documents that are currently under the Protective Order. (Decl. Belzidsky ¶ 13.)

Disclosure of the Confidential Documents will undermine DAW’s ability to negotiate favorable terms in the future with its suppliers and customers; it would also give a business advantage to DAW’s competitors, including Otto Bock, by allowing them to more effectively target DAW’s customers and suppliers by undermining DAW’s pricing and other business

practices. (Decl. Belzidsky ¶ 13.) Thus, disclosing the Confidential and Sensitive Information will result in the loss of DAW's competitive business advantage in the prosthetic knee market place and will result in "serious injury" to the company. (Decl. Belzidsky ¶ 12); *see In re Dura Lube Corp.*, 1999 FTC LEXIS 255 at \*7 (Dec. 23, 1999) ("the likely loss of business advantages is a good example of a 'clearly defined, serious injury'").

Additionally, DAW expends a significant amount of time and money to review and analyze the costs of its products, product specifications, sale strategies, sales figures, and sales margins for use in its marketing and pricing decisions, which are highly-confidential business strategies. (Decl. Belzidsky ¶ 15.) It would be highly prejudicial to DAW to allow its suppliers, customers and competitors to capitalize on these efforts and use DAW's data to its detriment. DAW's Confidential and Sensitive Information, as discussed above, is not publically available.

Moreover, if the Confidential and Sensitive Information is made public, DAW's competitors in the marketplace will be able to refine their pricing and business strategies based on DAW's sales and pricing data and will allow them to gain an unfair advantage over DAW. This will also be detrimental to the marketplace as a whole, since DAW's competitors will know exactly what to price their products to maintain an advantage over DAW, but at the same time will not have to price their products any more competitively. This result will be incongruous to the FTC's mission to maintain a competitive marketplace.

Because of the highly confidential nature of the Confidential and Sensitive Information and its materiality to DAW's business and survival, *in camera* treatment of DAW's Confidential and Sensitive Information is appropriate.

**IV. The Confidential Documents Contain Trade Secrets, which will Remain Sensitive Over Time and Thus, Permanent *In Camera* Treatment is Justified.**

Given the highly sensitive and technical nature of the information contained in the Confidential Documents, DAW requests that they be given *in camera* treatment indefinitely. The trade secret information contained in the Confidential Documents “is likely to remain sensitive or become more sensitive with the passage of time” such that the need for confidentiality is not likely to decrease over time. *In re Dura Lube Corp.*, 199 FTC LEXIS at \*\*7-8. “Trade Secrets”—are granted much more protection than ordinary business documents. *Id.* at \*5. Here, as described in the Belzidsky Declaration, the Confidential Documents contain business and trade secrets in the form of confidential competitively-sensitive sales data, pricing data, financial data, cost data, marketing practice, pricing decisions, information regarding contracts with distributors, profit/gross margins, DAW’s market analyses and business strategies and other secret and competitively-sensitive information. The competitive significance of the Confidential and Sensitive Information is unlikely to decrease over time and thus, indefinite protection from public disclosure is appropriate. (*See Decl. Belzidsky ¶ 15.*)

**[CONTINUED ON NEXT PAGE]**

V. **Conclusion**

For the reasons set forth above and in the Belzidsky Declaration, DAW respectfully requests that this Court grant permanent *in camera* treatment to the Confidential Documents in their entirety.

DATED: June 22, 2018

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*Counsel for Non-Party DAW Industries, Inc.*



**STATEMENT REGARDING MEET AND CONFER**

The undersigned certifies that counsel for non-party DAW Industries, Inc. (“DAW”) notified counsel for the parties via phone calls and emails on June 11, 2018, that it would be seeking *in camera* treatment of the Confidential Documents. Counsel for the Federal Trade Commission and Otto Bock Healthcare North America, Inc. indicated they would not object to DAW’s motion.

DATED: June 22, 2018

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*Counsel for Non-Party DAW Industries, Inc.*

**EXHIBIT A**  
**[NON-PUBLIC / REDACTED]**

**EXHIBIT B**  
**[NON-PUBLIC / REDACTED]**

**EXHIBIT C**  
**[NON-PUBLIC / REDACTED]**

**EXHIBIT D**  
**[NON-PUBLIC / REDACTED]**

**EXHIBIT E**  
**[NON-PUBLIC / REDACTED]**

**EXHIBIT F**  
**[NON-PUBLIC / REDACTED]**

**EXHIBIT G**  
**[NON-PUBLIC / REDACTED]**



# PUBLIC

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGE**

|                            |   |                   |
|----------------------------|---|-------------------|
| _____                      | ) |                   |
| In the Matter of           | ) |                   |
|                            | ) |                   |
| Otto Bock Healthcare North | ) | Docket No. D09378 |
| America, Inc.,             | ) |                   |
|                            | ) |                   |
| Respondents.               | ) |                   |
| _____                      | ) |                   |

**[PROPOSED] ORDER RE NON-PARTY DAW INDUSTRIES, INC.’S UNOPPOSED  
MOTION FOR *IN CAMERA* TREATMENT**

Upon consideration of Non-Party DAW Industries, Inc.’s unopposed Motion for *In Camera* Treatment , it is hereby ordered that the following documents, listed below, is to be provided permanent *in in camera* treatment from the date of this Order, and it is further ORDERED that these documents may only be viewed by those permitted to view it under the Protective Order entered in this matter.

| <b><u>No.</u></b>     | <b><u>Description</u></b>                 | <b><u>Date</u></b> | <b><u>Beginning<br/>Bates</u></b> | <b><u>Ending Bates</u></b>   |
|-----------------------|---|--------------------|-----------------------------------|------------------------------|
| RX-1017<br>PX05146    | Deposition transcript of Stuart Marquette | 04/03/2018         | RX-1017-0001<br>PX05146-001       | RX-1017-00039<br>PX05146-039 |
| RX-1018<br>PX05147    | Deposition transcript of Hughes Belzidsky | 04/03/2018         | RX-1018-0001<br>PX05147-001       | RX-1018-00043<br>PX05147-043 |
| RX-0734<br>(FTC-DAWI- | Declaration of Stuart Marquette           | 12/15/2017         | FTC-DAWI-                         | FTC-DAWI-                    |

| <u>No.</u>                         | <u>Description</u>                                | <u>Date</u> | <u>Beginning Bates</u> | <u>Ending Bates</u>   |
|------------------------------------|---|-------------|------------------------|-----------------------|
| 000002)<br>PX04002                 |   |             | 000002<br>PX04002-001  | 000004<br>PX04002-003 |
| PX03158                            | Prosthetic; Price List                            | 06/30/2017  | DAW0000001             | DAW0000004            |
| PX03160                            | Sales, Unit, Profits, GM% and Description of item | 3/21/2018   | DAW0000147             | DAW0000149            |
| PX03161<br>RX-0856<br>(DAW0000150) | Sales, Unit, Profits, GM% and Description of item | 3/21/2018   | DAW0000150             | DAW0000152            |
| PX03162<br>RX-0859<br>(DAW0000153) | Sales, Unit, Profits, GM% and Description of Item | 3/21/2018   | DAW0000153             | DAW0000155            |
| RX-0091<br>(DAW0000156)            | DAW Call Sheet                                    | 09/20/2015  | DAW0000156             | DAW0000158            |
| PX03165<br>RX-0781<br>(DAW0000166) | 5-Bar Adult Knee Selection Guide                  | 02/1/2018   | DAW0000166             | DAW0000178            |
| PX03167                            | DAW Answers to Subpoena                           | 00/00/0000  | DAW0000180             | DAW0000180            |

**IT IS SO ORDERED.**

DATED:

By: \_\_\_\_\_

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**UNITED STATES OF AMERICA**

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**BEFORE THE FEDERAL TRADE COMMISSION**

10

**OFFICE OF ADMINISTRATIVE LAW JUDGES**

11

In the Matter of,

Case No. 9378

12

Otto Bock HealthCare North America, Inc., a  
corporation

**PROOF OF SERVICE**

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I, the undersigned, declare:

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I am employed in the County of San Diego, State of California. I am over the age of 18 years and not a party to this action. My business address is Solomon Ward Seidenwurm & Smith, LLP, 401 B Street, Suite 1200, San Diego, California 92101.

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On June 22, 2018, I will serve a copy, including all exhibits, if any, of the following document(s):

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**UNOPPOSED MOTION FOR IN CAMERA TREATMENT [PUBLIC]**

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on the parties in this action listed in the attached Proof of Service List, which is incorporated herein by this reference, by the following means:

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**BY ELECTRONIC TRANSMISSION THROUGH THE FTC WEBSITE:** I hereby certify that I electronically filed the foregoing document and electronically served the foregoing document through the E-Filing System with the FTC.

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Executed on June 22, 2018, at San Diego, California.

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s/Jing Y. Li  
JING Y. LI

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**Attorney**

Notice of Electronic Service

**I hereby certify that on June 22, 2018, I filed an electronic copy of the foregoing Non-Party DAW Industries, Inc.'s Unopposed Motion for In Camera Treatment, with:**

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**I hereby certify that on June 22, 2018, I served via E-Service an electronic copy of the foregoing Non-Party DAW Industries, Inc.'s Unopposed Motion for In Camera Treatment, upon:**

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