

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



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

Docket No. 9378

**ORDER ON MOTIONS FOR *IN CAMERA* TREATMENT
FILED BY OTTOBOCK AND BY FREEDOM**

I.

Pursuant to Rule 3.45(b) of the Commission’s Rules of Practice and the Scheduling Order entered in this matter, Respondent Otto Bock HealthCare North America, Inc. (“Ottobock”), on June 11, 2018, filed a motion for *in camera* treatment for certain materials that the parties have listed on their exhibit lists as materials that might be introduced at trial in this matter (“Ottobock Motion”). In addition, FIH Group Holdings, Inc. (“Freedom”), which was acquired by Ottobock on September 22, 2017, filed a motion for *in camera* treatment on June 11, 2018 (“Freedom Motion”). Because both the Ottobock Motion and the Freedom Motion raise identical issues and are supported by a declaration from the same individual, Federal Trade Commission (“FTC” or “Commission”) Complaint Counsel filed a single, consolidated opposition to both Motions.

For the reasons set forth below, both Motions are DENIED WITHOUT PREJUDICE.

II.

Under Rule 3.45(b), the Administrative Law Judge may order that material offered into evidence “be placed *in camera* only [a] after finding that its public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting *in camera* treatment or [b] after finding that the material constitutes sensitive personal information.” 16 C.F.R. § 3.45(b).

A. Clearly defined, serious injury

“[R]equests for *in camera* treatment must show ‘that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved.’” *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500, 500 (1984), quoting *In re H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1961 FTC LEXIS 368 (Mar. 14, 1961). 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.” *In re General Foods Corp.*, 95 F.T.C. 352, 1980 FTC LEXIS 99, at *10 (Mar. 10, 1980). If the applicants for *in camera* treatment make this showing, the importance of the information in explaining the rationale of FTC decisions is “the principal countervailing consideration weighing in favor of disclosure.” *Id.*

The Federal Trade Commission recognizes the “substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons.” *Hood*, 1961 FTC LEXIS 368, at *5-6. A full and open record of the adjudicative proceedings promotes public understanding of decisions at the Commission. *In re Bristol-Myers Co.*, 90 F.T.C. 455, 458 (1977). A full and open record also provides guidance to persons affected by the Commission’s actions and helps to deter potential violators of the laws that the Commission enforces. *Hood*, 58 F.T.C. at 1186. The burden of showing good cause for withholding documents from the public record rests with the party requesting that documents be placed *in camera*. *Id.* at 1188. Moreover, there is a presumption that *in camera* treatment will not be accorded to information that is more than three years old. *In re Conference Interpreters*, 1996 FTC LEXIS 298, at *15 (June 26, 1996) (citing *General Foods*, 95 F.T.C. at 353; *Crown Cork*, 71 F.T.C. at 1715).

In order to sustain the burden for withholding documents from the public record, an affidavit or declaration is always required, demonstrating that a document is sufficiently secret and sufficiently material to the applicant’s business that disclosure would result in serious competitive injury. See *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 109, at *2-3 (Apr. 23, 2004). To overcome the presumption that *in camera* treatment will not be granted for information that is more than three years old, applicants seeking *in camera* treatment for such documents must also demonstrate, by affidavit or declaration, that such material remains competitively sensitive. In addition, to properly evaluate requests for *in camera* treatment, applicants for *in camera* treatment must provide a copy of the documents for which they seek *in camera* treatment to the Administrative Law Judge for review. Where *in camera* treatment is sought for transcripts of investigational hearings or depositions, the requests shall be made only for those specific pages and line numbers of transcripts that contain information that meets the *in camera* standard. *In re Unocal*, 2004 FTC LEXIS 197, *4-5 (Oct. 7, 2004).

Under Commission Rule 3.45(b)(3), indefinite *in camera* treatment is warranted only “in unusual circumstances,” including circumstances in which “the need for

confidentiality of the material . . . is not likely to decrease over time . . .” 16 C.F.R. § 3.45(b)(3). “Applicants seeking indefinite *in camera* treatment must further demonstrate ‘at the outset that the need for confidentiality of the material is not likely to decrease over time’ 54 Fed. Reg. 49,279 (1989) . . . [and] that the circumstances which presently give rise to this injury are likely to be forever present so as to warrant the issuance of an indefinite *in camera* order rather than one of more limited duration.” *In re E. I. DuPont de Nemours & Co.*, 1990 FTC LEXIS 134, at *2-3 (April 25, 1990). In *DuPont*, the Commission rejected the respondent’s request for indefinite *in camera* treatment. However, based on “the highly unusual level of detailed cost data contained in these specific trial exhibit pages, the existence of extrapolation techniques of known precision in an environment of relative economic stability, and the limited amount of technological innovation occurring in the . . . industry,” the Commission extended the duration of the *in camera* treatment for a period of ten years. *Id.* at *5-6.

In determining the length of time for which *in camera* treatment is appropriate, the distinction between trade secrets and ordinary business records is important because ordinary business records are granted less protection than trade secrets. *Hood*, 58 F.T.C. at 1189. Examples of trade secrets meriting indefinite *in camera* treatment include secret formulas, processes, other secret technical information, or information that is privileged. *Hood*, 58 F.T.C. at 1189; *General Foods*, 95 F.T.C. at 352; *In re Textron, Inc.*, 1991 FTC LEXIS 135, at *1 (Apr. 26, 1991).

In contrast to trade secrets, ordinary business records include information such as customer names, pricing to customers, business costs and profits, as well as business plans, marketing plans, or sales documents. *See Hood*, 1961 FTC LEXIS 368, at *13; *In re McWane, Inc.*, 2012 FTC LEXIS 143 (Aug. 17, 2012); *In re Int’l Ass’n of Conference Interpreters*, 1996 FTC LEXIS 298, at *13-14. When *in camera* treatment is granted for ordinary business records, it is typically provided for two to five years. *E.g., McWane, Inc.*, 2012 FTC LEXIS 143; *In re ProMedica Health Sys.*, 2011 FTC LEXIS 101 (May 25, 2011).

B. Sensitive personal information

Under Rule 3.45(b) of the Rules of Practice, after finding that material constitutes “sensitive personal information,” the Administrative Law Judge shall order that such material be placed *in camera*. 16 C.F.R. § 3.45(b). “Sensitive personal information” is defined as including, but not limited 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.” 16 C.F.R. § 3.45(b). In addition to these listed categories of information, in some circumstances, individuals’ names and addresses and witness telephone numbers have been found to be “sensitive personal information” and accorded *in camera* treatment. *In re LabMD, Inc.*, 2014 FTC LEXIS 127 (May 6, 2014); *In re McWane, Inc.*, 2012 FTC LEXIS 156 (Sept. 17, 2012). *See also In re Basic Research, LLC*, 2006 FTC LEXIS 14, at *5-6 (Jan. 25, 2006) (permitting the

redaction of information concerning particular consumers' names or other personal data when it was not relevant). "[S]ensitive personal information . . . shall be accorded permanent *in camera* treatment unless disclosure or an expiration date is required or provided by law." 16 C.F.R. § 3.45(b)(3).

III.

Of the nearly 3,000 documents the parties listed on their exhibit lists, Ottobock seeks *in camera* treatment for 683 documents and Freedom seeks *in camera* treatment for 1,016 documents. Ottobock and Freedom each supported its motion with a declaration from outside counsel for Ottobock, Sean S. Zabaneh. The declaration submitted in support of Ottobock's motion is nearly identical to the declaration submitted in support of Freedom's motion. Ordinarily, motions for *in camera* treatment must be supported by a declaration or affidavit by a person within the company who has reviewed the documents at issue and is qualified to explain the confidential nature of the documents. January 18, 2018 Scheduling Order Additional Provision 7 (citing *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)). Ottobock explains that many of the documents for which Ottobock seeks *in camera* treatment contain highly confidential information belonging to both Ottobock and Freedom, and that, due to the Hold Separate Agreement, because Ottobock and Freedom have been held separate and apart, Ottobock employees have not had access to documents originating from Freedom custodians. Freedom makes the identical argument. In this narrow circumstance, it is acceptable for counsel for Ottobock and Freedom to have reviewed these documents for confidentiality. However, as explained herein, a stronger case would be made by an employee with the requisite knowledge from each company.

Each declaration explains that the documents fall into one of eight categories: Business Plans and Strategies; Contract Negotiations and Customer Contracts; Intellectual Property, Proprietary Information and Trade Secrets; Customer-Specific Documents; Pricing and Cost Information; Market Analysis Documents; Sales and Financial Information; and Multiple Category Documents. However, each declaration provides only broad justifications for each category of documents. For example, with respect to all documents falling in the category designated as Business Plans and Strategies, Ottobock's declaration explains only: "The disclosure of these documents would harm Ottobock by revealing Ottobock's current and future business plans to competitors. This would allow competitors to take advantage of any weaknesses identified by Ottobock and to enact their own defensive plans to combat Ottobock's plans. I believe this information should remain confidential." This general statement covering hundreds of documents does not provide sufficient information about the documents for which Ottobock seeks *in camera* treatment to determine whether the documents meet the Commission's strict standard for *in camera* treatment.

A review of many of the documents for which *in camera* treatment is sought indicates that disclosure would not likely result in serious competitive injury. For example, Respondent seeks *in camera* treatment for PX0820 and PX0797, which are

listed under the category of Market Analysis Documents. PX0820 appears to be an internal email among Ottobock employees relaying information received from an unnamed customer relating to a Freedom promotional offer. PX0797 appears to be an internal email among Freedom employees discussing an Ottobock promotional offer. Ottobock and Freedom have failed to articulate how discussions about promotional offers are confidential or to demonstrate that such information meets the *in camera* standards.

In addition, many of the documents for which Ottobock and Freedom seek *in camera* treatment are more than three years old. As explained above, there is a presumption that *in camera* treatment should not be granted for information that is more than three years old. *1-800 Contacts, Inc.*, 2017 FTC LEXIS 55, at *3. Ottobock and Freedom fail to provide the necessary justification for granting *in camera* treatment to these documents.

Ottobock and Freedom also seek *in camera* treatment for entire transcripts of investigational hearings and depositions. Requests for *in camera* treatment shall be made only for those specific pages and line numbers of transcripts that contain information that meets the *in camera* standard. *In re Unocal*, 2004 FTC LEXIS 197, *4-5 (Oct. 7, 2004). Ottobock's and Freedom's motions are not narrowly tailored to cover only those portions of the transcripts that contain competitively sensitive information.

Similarly, Ottobock seeks *in camera* treatment for entire expert reports of both sides' experts. Additional Provision 8 of the Scheduling Order issued in this case requires:

If the expert reports prepared for either party contain confidential information that has been granted *in camera* treatment, the party shall prepare two versions of its expert report(s) in accordance with Additional Provision 6 of this Scheduling Order and 16 C.F.R. § 3.45(e).

When *in camera* treatment is given to an entire expert report, examination of that expert would have to take place *in camera*. To avoid this result, once the orders on pending *in camera* treatment motions are issued, the parties shall prepare two versions of their expert reports.

Finally, Ottobock and Freedom have failed to justify the length of time for which they seek *in camera* treatment. According to Complaint Counsel, Ottobock and Freedom seek ten year or indefinite *in camera* treatment for over 97 percent of the documents identified in the motions. Under Commission Rule 3.45(b)(3), indefinite *in camera* treatment is warranted only "in unusual circumstances," including circumstances in which "the need for confidentiality of the material . . . is not likely to decrease over time . . ." 16 C.F.R. § 3.45(b)(3). While documents falling in the category of Intellectual Property, Proprietary Information and Trade Secrets likely merit indefinite *in camera* treatment, documents in other categories, such as Pricing and Cost Information; Market Analysis Documents; and Sales and Financial Information, are ordinary business records for which an order of more limited duration is appropriate. *E. I. DuPont de*

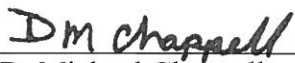
Nemours & Co., 1990 FTC LEXIS 134, at *2-3. When *in camera* treatment is granted for ordinary business records, it is typically provided for two to five years. *E.g.*, *McWane, Inc.*, 2012 FTC LEXIS 143; *In re ProMedica Health Sys.*, 2011 FTC LEXIS 101.

IV.

The burden rests on the movant to demonstrate that the evidence sought to be withheld from the public record is sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. The Motions and the declarations provided by Ottobock and Freedom fail to make this showing. Furthermore, the sheer number of documents for which these Motions seek *in camera* treatment (over 1,500 exhibits) far exceeds the number of documents that would reasonably be expected to be entitled to the protection contemplated by Rule 3.45 in a case of this type, which casts further doubt on the assertions that all the documents are entitled to such protection.

Because Ottobock and Freedom have not adequately demonstrated that the documents for which they seek *in camera* treatment meet the Commission's strict standards, the motions are DENIED WITHOUT PREJUDICE. Ottobock and Freedom are hereby ORDERED to review the documents for which they seek *in camera* treatment and narrow their requests to only those documents that they can demonstrate comply with the Commission's strict standards for *in camera* treatment. Each may file a renewed motion for *in camera* treatment, supported with an affidavit or declaration, by July 16, 2018. Complaint Counsel may file an opposition to any such renewed motions no later than July 20, 2018.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: July 2, 2018