

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



In the Matter of

**Otto Bock HealthCare North
America, Inc.,**

a corporation,

Respondent.

Docket No. 9378

**COMPLAINT COUNSEL'S CONSOLIDATED RESPONSE TO RESPONDENT'S
MOTIONS FOR *IN CAMERA* TREATMENT OF CERTAIN TRIAL EXHIBITS**

Complaint Counsel supports an open and public trial subject to the narrow exception contemplated in Commission Rule 3.45(b). That Rule provides a strict standard and process for seeking *in camera* treatment that is not satisfied here. Specifically, Respondent¹ overreaches by seeking to withhold from the public record over a thousand documents, including entire deposition transcripts and the entire reports of both parties' experts. In addition, Respondent seeks either ten year or indefinite protection for all but a tiny fraction of these materials without the showing of exceptional circumstances necessary to warrant such extended protection. By seeking protection for such a vast number of documents, supported only by the conclusory testimony of one of its outside counsel, Respondent fails to fulfill its obligations under Rule

¹ Respondent submitted two separate motions for (1) Otto Bock HealthCare North America, Inc. ("Otto Bock") and (2) FIH Group Holdings, LLC ("Freedom"). Respondent's Mot. for *In Camera* Treatment of Certain Trial Exhibits, June 11, 2018 ("Otto Bock Mot.") and Freedom's Mot. for *In Camera* Treatment of Certain Trial Exhibits, June 11, 2018 ("Freedom Mot."). Although Freedom is being held separate pursuant to a voluntary agreement, Freedom has been wholly owned by Otto Bock since its acquisition on September 22, 2017. Complaint Counsel is submitting this consolidated motion in response to both motions because both Otto Bock and Freedom are a part of Respondent and because the two motions raise identical issues.

3.45(b) to explain why, and what portions of, each document are sufficiently secret and material to Respondent's business that its disclosure would cause a clearly defined, serious competitive injury. Moreover, many of the documents do not appear to be competitively sensitive on their face. This is improper: the burden of showing good cause for *in camera* treatment rests with the party seeking it. If Respondent's motions are granted, the public would be deprived access to virtually the entire trial record in this matter. Therefore, Complaint Counsel respectfully requests that the Court deny Respondent's motions for *in camera* treatment without prejudice until it fully satisfies the requirements of Rule 3.45(b). *See* Commission Rule 3.42(c)(11), 16 C.F.R. § 3.42(c)(11) (enumerating the powers of Administrative Law Judges, including, *inter alia*, to "deny *in camera* status without prejudice until a party complies with all relevant rules").

I. Statement of Facts

On June 11, 2018, Respondent filed motions for *in camera* treatment of more than a thousand potential trial exhibits that allegedly contain confidential information. Respondent seeks *in camera* treatment for 638 Otto Bock documents and 1016 Freedom documents, which it grouped into eight categories: (1) Business Plans & Strategies; (2) Contract Negotiations and Customer Contracts; (3) Intellectual Property, Proprietary Information and Trade Secrets; (4) Customer-Specific Documents; (5) Pricing and Cost Information; (6) Market Analysis Documents; (7) Sales and Financial Information; and (8) Multiple Category Documents. Otto Bock Mot. at 4-7; Freedom Mot. at 4-7. Respondent requests "complete" *in camera* treatment for the vast majority of these documents, rather than "partial" *in camera* treatment for those portions of the documents containing allegedly competitively sensitive information. Respondent also requests *in camera* treatment for five years for forty (40) documents that it categorized as "Pricing and Cost Information" documents and either ten year or indefinite protection for the remaining 1613 documents (over 97 percent of the documents it identifies). Otto Bock Mot.,

“Exhibit A”; Freedom Mot., “Exhibit A.” In addition, Respondent “requests that any trial testimony, either upon direct examination or cross examination by either party on any of these topics, be subject to *in camera* treatment” Otto Bock Mot. at 12; Freedom Mot. at 12. Respondent submitted declarations of its outside counsel, Sean S. Zabaneh, in support of its motions.

II. Argument

Respondent’s requests for *in camera* treatment are overbroad in both scope and duration and are not supported with specific information about each document sufficient to determine whether it meets the Commission’s strict standard for *in camera* treatment.

A. Legal Standard

Under Commission Rule 3.45(b), the Court may grant a request for *in camera* treatment for material “only 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 after finding that the material constitutes sensitive personal information.” 16 C.F.R. § 3.45(b). The applicant 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 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55, at *2 (April 4, 2017) (quoting *In re General Foods Corp.*, 95 F.T.C. 352, 1980 FTC LEXIS 99, at *10 (Mar. 10, 1980)). If the applicant makes this showing, the Court should then consider “the importance of the information in explaining the rationale of FTC decisions,” which is “the principal countervailing consideration weighing in favor of disclosure.” *Id.* As this Court recently explained, there is a “substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons.” *Id.* at *2 (quoting *In re H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1961 FTC LEXIS 368, at *5-6 (Mar. 14, 1961)). A full and open trial record not

only “promotes public understanding of decisions at the Commission,” but also “provides guidance to persons affected by its actions and helps to deter potential violators of the laws the Commission enforces.” *Id.* at *2-3 (internal citations omitted).

Respondent bears the burden of showing that good cause exists for withholding the materials from the public record. *1-800 Contacts*, 2017 FTC LEXIS 55, at *3. In order to sustain that burden, “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.” *Id.* In addition, there is a presumption that *in camera* treatment should not be granted for information that is more than three years old. *Id.* To overcome the presumption, applicants must “demonstrate, by affidavit or declaration, that such material remains competitively sensitive.” *Id.*

The length of time materials may be maintained *in camera* depends on whether the material in question consists of ordinary business records or trade secrets. *1-800 Contacts*, 2017 FTC LEXIS 55, at *5. Ordinary business records, including “information such as customer names, pricing to customers, business costs and profits, as well as business plans, marketing plans, or sales documents” typically receive *in camera* treatment for only two to five years. *Id.* at *5-6. In contrast, trade secrets such as “secret formulas, processes, other secret technical information, or information that is privileged,” may merit indefinite *in camera* treatment, *id.* at *5, though indefinite treatment is warranted only “in unusual circumstances.” 16 C.F.R. § 3.45(b)(3). Applicants seeking indefinite *in camera* treatment must demonstrate that the need for confidentiality is not likely to decrease over time and “that the circumstances which presently give rise to this injury are likely to be forever present.” *Id.* at *4 (quoting *In re E. I. DuPont de Nemours & Co.*, 1990 FTC LEXIS 134, at *2-3 (April 25, 1990)).

B. Respondent's Requests For *In Camera* Treatment Do Not Meet The Relevant Standard Under Rule 3.45(b)

1. Respondent Fails to Satisfy Its Burden of Clearly Showing Disclosure Would Result in Serious Injury

Respondent's motions and attached declarations do not explain specifically why *in camera* treatment is warranted for each exhibit. *See 1-800 Contacts*, 2017 FTC LEXIS 55, at *23 (explaining that a declaration supporting *in camera* review provided insufficient justification). Given the substantial public interest in ensuring adjudicative proceedings are open to the public, "[a] heavy burden of showing good cause for withholding documents from the public record rests with the party requesting that documents be placed in camera." *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 109, at *3 (April 23, 2004).

Respondent seeks *in camera* treatment for more than a thousand documents based on conclusory justifications. A review of many of those documents indicates that disclosure would not likely result in serious competitive injury. For example, Respondent seeks *in camera* treatment for PX00820 and PX00797 on the basis that they are "Market Analysis Documents."² Otto Bock Mot., "Exhibit A" at 1; Freedom Mot., "Exhibit A" at 3. However, [REDACTED]

[REDACTED] Disclosure of such information seems incapable of resulting in serious competitive injury, though it is impossible to tell what specific justification Respondent has to deem documents of this kind as requiring *in camera* treatment based on the declaration of Mr.

² Copies of PX00820 and PX00797 are attached to this motion as Exhibits "A" and "B". All of the other documents referenced in this motion are available on the disk submitted as Exhibit "B" with the Otto Bock Mot. and the Freedom Mot.

Zabaneh. Complaint Counsel has identified documents in each of Respondent's eight categories that similarly appear not to contain competitively sensitive information, suggesting Respondent's process for determining which types of documents, and the specific parts of those documents, should properly receive *in camera* treatment has systematic flaws.³

2. Respondent Fails to Justify its Request for *In Camera* Protection For Information More Than Three Years Old

Respondent's motions include many documents that are more than three years old.⁴ Under the Commission's Rules and this Court's decisions, there is a presumption that *in camera* treatment should not be granted for information that is more than three years old. *I-800 Contacts*, 2017 FTC LEXIS 55, at *3. Respondent provides no justification for why the Court should depart dramatically from this presumption and precedent and grant *in camera* treatment to information that is more than three years old.

3. *In Camera* Treatment for Entire Transcripts and Expert Reports is Inappropriate

Respondent improperly seeks *in camera* treatment for entire transcripts of several investigational hearings and depositions.⁵ Prior rulings by this Court make clear that "*in camera*

³ See e.g., PX00807; PX01309; PX01424; PX01425; PX00868; PX01055; PX01468; PX01478; PX00768; PX01553; PX00805; PX00849; PX00856; PX00769; PX00841; PX01265; PX001274. This list is not exhaustive.

⁴ Otto Bock Mot., Exhibit A: PX00869; PX01058; PX01067; PX01327-29; PX01331; PX01356-57; PX01377-78; PX01381-83; PX01481; PX01494; PX01499; PX01508; PX01516-17; PX01519; PX01529-30; PX01567; PX01568; PX01569-73; PX01581; PX01591-92; PX01595; PX01604; PX01704; PX01707-08; PX01712; PX01758; PX01856; PX01856 OB0029526; PX01861; PX01863-64; PX01871; PX01899; PX01937; PX03111; PX03154; PX03170; PX03203; RX-0008; RX-0018; RX-0022; RX-0033; RX-0034-37; RX-0039-40; RX-0044; RX-0046-51; RX-0055; RX-0058; RX-0062; RX-0237; Freedom Mot., Exhibit A: PX00771; PX00837; PX00864; PX01246-48; PX01549-50; PX01683; PX01848; PX01958; PX01989-90; PX01993; PX02110; PX03111; PX03154; PX03170; PX03203; RX-0005; RX-0009; RX-0012; RX-0014; RX-0019; RX-0029-30; RX-0038; RX-0041; RX-0410; RX-0454; RX-0467; RX-0815-16; RX-0824; RX-0826; RX-0829; RX-0831-32; RX-0834-35.

⁵ PX05005-7; PX05010; PX05101-104; PX05106; PX05109-115; PX05118; PX05122-123; PX05125-127; PX05130-131; PX05133, PX05137-139; PX05143; PX05148; PX05150; PX05152; PX05154-157; PX05159; PX05162-163.

treatment will not be granted to entire depositions.” *Basic Research, Inc.*, 2006 FTC LEXIS 14, at *4. Instead, a party requesting *in camera* treatment must designate the specific portions of the testimony that it seeks to protect from public disclosure. *Id.* (citing *In re Aspen Tech., Inc.*, 2004 FTC LEXIS 56, at *5-6 (May 5, 2004)). Respondent’s designations, moreover, must be “narrowly tailored” to cover only those portions of the transcript that contain the allegedly competitively sensitive information. *Id.* at *4-5 (quoting *In re Union Oil Co. of Calif.*, 2005 FTC LEXIS 9, at *1 (Jan. 19, 2005)).

Similarly, Respondent inappropriately requests *in camera* treatment for entire reports of both sides’ experts.⁶ *Basic Research, Inc.*, 2006 FTC LEXIS 14, at *5 (citing *Aspen Tech.*, 2004 FTC LEXIS 56, at *5-6 (“In camera treatment shall be sought only for those portions of the reports that meet the Commission’s standard”)). Indeed, this Court’s Scheduling Order clearly contemplates that expert reports should be placed on the public record, by instructing parties to prepare public and non-public versions of each report. Fourth Revised Scheduling Order, dated April, 26, 2018 (incorporating Additional Provision 8 to the January 18, 2018 Scheduling Order). Blanket designations of deposition transcripts and expert reports are improper, not only because they are evasions of Respondent’s responsibility to make particularized showings of good cause for withholding documents from the public record, but because it would render a public adjudicative proceeding unmanageable. In practice, it would mean that all cross-examination of party witnesses, as well as direct and cross-examination of expert witnesses would have to take place *in camera*.⁷ Conducting a trial in such a manner would fundamentally frustrate the

⁶ PX06001-2; RX-1048-49.

⁷ Indeed, Respondent requests “that any trial testimony, either upon direct examination or cross examination by either party on any [confidential] topics, be subject to *in camera* treatment” Otto Bock Mot. at 12; Freedom Mot. at 12. This request should be denied.

“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.

4. Respondent Fails to Show Exceptional Circumstances Warrant Indefinite or Even Ten Year *In Camera* Treatment for its Materials

Even for materials that may qualify for *in camera* treatment, Respondent’s motion overreaches in terms of the time it seeks to have these materials withheld from the public record. Respondent seeks ten year or indefinite *in camera* treatment for over 97 percent of the documents identified in its motions. *Otto Bock Mot.*, “Exhibit A”; *Freedom Mot.*, “Exhibit A.” However, only one of the eight categories of documents it identifies – “Intellectual Property, Proprietary Information and Trade Secrets” – arguably merits indefinite *in camera* treatment. The other seven categories comprise ordinary business records for which *in camera* treatment is “typically provided for two to five years.” *I-800 Contacts*, 2017 FTC LEXIS 55, at *5-6. Because Respondent did not provide an adequate basis to justify its request for ten year *in camera* treatment of its ordinary business records, Respondent’s request should be denied.

[REDACTED]

III. CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that the Court deny Respondent's motions for *in camera* treatment without prejudice until it fully satisfies the requirements of Rule 3.45(b).

Dated: June 28, 2018

Respectfully submitted,

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EXHIBIT A

**CONFIDENTIAL – REDACTED IN
ENTIRETY**

EXHIBIT B

**CONFIDENTIAL – REDACTED IN
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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2018, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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I also certify that I delivered via electronic mail a copy of the foregoing document to:

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Dated: June 28, 2018

By: /s/ Daniel Zach
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CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

June 28, 2018

By: /s/ Daniel Zach