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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. FACTUAL BACKGROUND.....2

III. ARGUMENT.....3

A. THE SAME ISSUE IS CURRENTLY PENDING BEFORE THE DISTRICT COURT, AND THIS COURT SHOULD REFRAIN FROM DECIDING COMPLAINT COUNSEL'S M

## TABLE OF AUTHORITIES

CASES	PAGE(S)
<i>ACT, Inc. v. Sylvan Learning Sys.</i> , No. CIV. A. 9963, 1999 WL 305300 (E.D. Pa. May 14, 1999).....	8
<i>Awuah v. Coverall North America, Inc.</i> , 585 F.3d 479 (1st Cir. 2009).....	7
<i>Bradburn Parent/Teacher Store, Inc. v. 3M</i> , No. Civ. A. 027676, 2004 WL 1146665 (E.D. Pa. May 19, 2004).....	9
<i>Bristol-Myers Co.</i> , 90 F.T.C. 455 (1977).....	6, 8
<i>California Dental Ass 'n</i> , Dkt. No. 9259, 1996 FTC LEXIS 277, *8-2 (May 22, 1996).....	3
<i>Dynamic Health of Florida, LLC</i> , Dkt. No. 9317, 2005 FTC LEXIS 6 (Jan. 12, 2005).....	3



inferences about the implications of these documents. The misuse of these confidential documents threatens to harm Graco's business reputation and good will.

## II. FACTUAL BACKGROUND

The redacted portions of the public complaint include the following confidential information from Graco:

- x Communications by Graco's CEO to its Board of Directors discussing the proposed acquisition and assessment of the industry [Sealed Complaint, ¶ 1];

x

On the same day it filed its administrative complaint before this Court, the FTC filed a nearly identical complaint in the District Court, seeking a temporary restraining order and preliminary injunction

disparate rulings, this Court should exercise its discretion and refrain from ruling on Complaint Counsel's motion pending the District Court's ruling.

B. The Disclosure Of Confidential Information Contained In The Unredacted Complaint Is Prohibited By The Protective Order

Graco's cooperation with the FTC's mammoth information requests was, in part, predicated on the FTC's continued assurances that Graco's confidential business information would not be disclosed to its competitors. In its response to the second request, Graco invoked and relied on the FTC's statutory and regulatory provisions governing the confidentiality of competitively sensitive business information. *See* 15 U.S.C. § 57b and the FTC Rules of Practice §§ 4.10 – .11 (1987). These investigation stage confidentiality protections do not vanish upon the initiation of a judicial proceeding. In fact, Commission Rule (3.31) expressly requires that the parties enter into a protective order “[i]n order to protect the parties and third parties against improper use and disclosure of confidential information . . . .” 16 C.F.R. § 3.31(d). The issuance of a protective order ensures that the confidential materials disclosed during the FTC's pre-complaint investigation are not summarily disclosed to the public upon the FTC's decision to issue a complaint before the Commission. The present case is no exception—as required by Rule 3.31(d), this Court issued a protective order on December 16, 2017, Protective Order Governing Discovery Material (“Protective Order”).

The Protective Order governing discovery materials in this proceeding expressly prohibits the disclosure of the confidential materials redacted from the public complaint. The Order extends to “any document or portion thereof submitted by a respondent and party during a Federal Trade Commission investigation . . . .” Protective Order, ¶ 2. The information redacted from the public complaint was not and is not publicly available, but was disclosed by Graco to the FTC during its investigation. Any “confidential material,” which the Protective

Order defines to include “competitively sensitive information” (



352, 355 (1980).” Complaint Counsel wishes to collapse the ~~partial~~ analysis contained in these three precedents into the blanket statement that there is a strong presumption in favor of open access.

While *H.P. Hood* provides that a strong presumption in favor of open access should be the starting point for the analysis of requests for *in camera* review, it recognizes that the full balancing of interests is more nuanced:

[T]he Commission should protect the confidential records of persons or corporations involved in proceedings before it insofar as protection is practicable. Is this duty in conflict with our duty to hold public hearings? We think not. The answer lies somewhere between the Scylla of indiscriminate *in camera* rulings and the Charybdis of complete and unnecessary disclosure.

*H.P. Hood*, 58 F.T.C. 1184, 1961 FTC LEXIS 368, at \*9 (Mar. 14, 1961). The Commission continues on to hold that public disclosure of “trade secrets” should be presumptively prohibited, while an applicant seeking *in camera* review of business information must make a “good cause” showing that disclosure would cause serious injury. Rule § 3.45 ~~the~~ *Bristol Meyers* because it is here that the Commission clarified how an applicant demonstrates serious injury:

[W]e believe demonstrating serious injury requires the applicant to show [1] that the documents are secret, [2] that they are material to the applicant's ~~business~~ *business* that [3] public disclosure will plausibly discourage the future production of such information.

*Bristol Meyers Co.*, 90 F.T.C. 455, 1977 FTC LEXIS 25, at \*4–\*5 (Nov. 11, 1977). Finally, *General Foods Corp* modifies *Bristol Meyers Co.* by removing the third prong.

Thus, Complaint Counsel states only half the test when asserting that Graco must demonstrate that it will suffer “a clearly defined, serious injury” as the result of disclosure. Rather, to demonstrate serious injury, such that public disclosure is ~~material~~ *material*, Graco must show that (1) the documents are secret and (2) that they are material to the Graco’s business. It

is abundantly clear that the information redacted from the public complaint meets both prongs of this test.

1. The Redacted Portions Of The Public Complaint Represent Secret Business Information

The public has not had access to Graco's competitively sensitive information. Indeed, Graco has not allowed this information to be circulated beyond its Board of Directors and the highest levels of management. In order that Graco's CEO may speak openly and frankly to its Board of Directors, Graco takes care to ensure the complete privacy of a CEO's communications. In fact, the CEO's presentations to the Board are not circulated at all and only presented once to the Board alone. The testimony given by Graco's CEO covered subjects that are not discussed beyond Graco's highest levels of management. Furthermore, this testimony was proffered in express reliance on the FTC's rules granting confidentiality to the subject documents and testimony.

Courts recognize that documents and communications of this nature are highly confidential and regularly allow them to be submitted under seal. See *United States v. Hubbard*, 650 F.2d 293, 318 (D.C. Cir. 1980) (reversing the district court's order placing church business documents on the record); *Avourlareas v. Washington Post Co.*, 724 F.2d 1010, 1022 (D.C. Cir. 1984) (holding that the district court erred in lifting the seal on confidential business information), *vacated in part on other grounds*, 763 F.2d 1472 (D.C. Cir. 1985) (en banc); *LEAP Systems, Inc. v. MoneyTrax, Inc.*, 638 F.3d 216 (3rd Cir. 2011).

corporations have in closely guarded business information. *See, e.g., Vesta Corset Co. v. Carmen Founds., Inc.*, No. 97 CIV. 5139 (WHP), 1999 WL 13257 at \*2 (S.D.N.Y. Jan. 13, 1999) (granting a protective order limiting the disclosure of confidential pricing and marketing information); *ACT, Inc. v. Sylvan Learning Sys.*, No. CIV. A. 9963, 1999 WL 305300 at \*2 (E.D. Pa. May 14, 1999) (denying motion to compel on the basis that disclosure of the company's proprietary market analysis could cause it serious commercial harm).

Complaint Counsel's quotations derive from materials submitted confidentially by Graco as part of HarScottRodino ("HSR") antitrust review process. Such material is protected from public disclosure during precomplaint discovery. *See* 15 U.S.C. § 18a(b); *Deberman v. Federal Trade Commission*, 771 F.2d 32, 38 (2nd Cir. 1985) ("Congress wanted premerger information kept confidential."). At every step of the way, Graco sought confidential protection for the documents and information it disclosed. As the Commission has noted, "the extent of measures taken by the part to guard the secrecy of the information" is germane to a consideration of the protection which should be afforded to the information. *See Brimley Co.*, 90 F.T.C. at \*5. None of the confidential statements and information at issue is public today. Complaint Counsel should not be allowed to make it public at the expense of Graco.

## 2. The Redacted Portions Of The Public Complaint Are Material To Graco's Business

The redacted information is material to Graco's business such that it would face harm to both its legal and business interests if the information is disclosure publicly. First, Graco faces harm to its business interests by publication of the redacted information. For example, the strategic planning information redacted from the complaint is not known by Graco's competitors, some of whom have submitted declarations to the FTC in support of its investigation. Graco's internal business communications should not be laid bare to its competitors. Moreover, Graco



the selected excerpts in context, while simultaneously protecting the confidentiality of these materials. Complaint Counsel should not be allowed to use Graco's confidential materials for public relations gain.

#### IV. CONCLUSION

For the foregoing reasons, Graco respectfully requests that Complaint Counsel's motion to unseal the unredacted complaint be denied.

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Respectfully submitted,

*s/ Richard A. Duncan*

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