PUBLIC

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

In the Matter of H&R Block Inc., a corporation, HRB Digital LLC, a limited liability company, and HRB Tax Group, Inc., a corporation, Respondents.	)	Docket No. 9427

ORDER ON:
(1) MOTION TO REMOVE REDACTIONS FROM PARAGRAPHS 29 THROUGH 32 OF THE PUBLIC COMPLAINT, AND
(2) UNOPPOSED MOTION TO REMOVE CERTAIN REDACTIONS FROM THE PUBLIC COMPLAINT

I.

Complaint Counsel filed a motion on April 22, 2024 to remove all redactions from paragraphs 29 through 32 of the public version of the Complaint ("Contested Motion"). Respondents oppose removing all such redactions, but agree to remove certain specified redactions from these and other paragraphs in the public version of the Complaint, in accordance with the parties' previous unopposed motion to remove certain redactions ("Unopposed Motion").

As explained below, this Contested Motion is DENIED. The Unopposed Motion is GRANTED.

II.

On April 2, 2024, Complaint Counsel filed the Unopposed Motion to remove certain redactions from the public version of the Complaint. Specifically, Complaint Counsel's proposed order would remove (1) all redactions in paragraphs 8, 17, 19, 20, 24, 25, 26, 27, 28, 33, 40, 53, and 54; and (2) designated redactions in paragraphs 29, 30, 31, and 32. In my April 5, 2024

Order on the Unopposed Motion, I stated that I found it "questionable that much, if any, of the remaining material redacted in paragraphs 29, 30, 31, and 32 from the public version of the Complaint rises to the level of competitively sensitive information." *In re H&R Block Inc.*, No. 9427, 2024 WL 1598400, *1 (F.T.C. Apr. 5, 2024). Accordingly, my Order directed the parties to confer further to determine if additional redactions in paragraphs 29 through 32 could be removed, and that Order held a ruling on the Unopposed Motion in abeyance pending receipt of a joint status report from the parties.

The parties' subsequent joint status report stated that they were unable to agree to remove any additional redactions and that Complaint Counsel intended to file a motion to remove all redactions from paragraphs 29 through 32, which Respondents would oppose. I issued an Order continuing to hold the Unopposed Motion in abeyance pending resolution of Complaint Counsel's forthcoming Contested Motion. *See In re H&R Block Inc.*, No. 9427, 2024 WL 1929299 (F.T.C. Apr. 25, 2024).

Complaint Counsel now argues that to justify maintaining the disputed redactions in paragraphs 29 through 32, Respondents must demonstrate, via affidavit, that the redacted material is competitively sensitive and that "public disclosure will likely result in a clearly defined, serious injury." Contested Motion at 3 (quoting 16 C.F.R. § 3.45(b) and citing *In re Jerk, LLC*, No. 9361, 2015 WL 926508, at *2 (Feb. 23, 2015) (discussing the requirements for *in camera* treatment under Rule 3.45(b)). Complaint Counsel maintains, in substance, that, taking into account the age of information in the disputed redactions, Respondents cannot show sufficient competitive harm from disclosure.

As noted above, while Respondents agree to remove certain redactions in paragraphs 29 through 32, they oppose the relief sought in the Contested Motion insofar as Complaint Counsel seeks to remove all other redactions. Respondents assert that disclosure of this disputed redacted material "would provide competitors with insight into Respondents' current business strategies, allowing competitors to capitalize on the details of [matters] Respondents have sought to keep confidential over many years." Respondents' Opposition at 4.[1]

III.

Complaint Counsel's argument on the Contested Motion is unpersuasive. Complaint Counsel's characterization of Respondents' burden of proof relies on standards governing the granting of *in camera* treatment for material that is to be offered into evidence, typically, at the hearing on the merits. This characterization is inapplicable as the Contested Motion does not involve *in camera* treatment of evidentiary material. *In re LabMD, Inc.*, No. 9357, 2013 WL 5232774, at *2 (F.T.C. Sept. 10, 2013) (holding that "the parties' request . . . for provisional *in*

[1] Respondents' opposition to the Motion designated as "confidential material" some of their descriptions of the information they seek to protect from public disclosure. Rule 3.45(d) "does not preclude references in briefs to 'confidential information or general statements based on the content of such information.' 16 C.F.R. § 3.45(d)." *In re ECM BioFilms, Inc*., 2014 FTC LEXIS 16, *6 (Jan. 14, 2014). This Order thus reveals general statements based on the content of information that has been designated as confidential. *See In re Bristol-Myers Co.*, 90 F.T.C. 455, 1977 FTC LEXIS 25, at *6 (Nov. 11, 1977) (An Administrative Law Judge may reveal information if "public disclosure is required in the interests of facilitating public understanding" of decisions.).

camera treatment of material contained in the Nonpublic Complaint is procedurally improper" because no material was being offered into evidence). Rather, the standard for addressing confidentiality of parts of the public version of a complaint was provided in the applicable protective order in the case. *Id.* at *3 (citing 16 C.F.R. § 3.31(d) and directing redaction of "competitively sensitive revenue information . . . in the public version of the Complaint").

Under the Protective Order here, "confidential material" that is entitled to protection includes "competitively sensitive information." Protective Order ¶ 1. The issue is whether Respondents have sufficiently demonstrated that the disputed material in paragraphs 29 through 32 satisfies this prerequisite.

Respondents have submitted a declaration from Heather Watts, the President for Respondent HRB Digital and affiliated entities. Among other things, Ms. Watts asserts that the redactions at issue "concern[] pricing and marketing strategies and related financial data that Respondents continue to build upon and assess presently," the public disclosure of which "would result in a serious competitive injury to Respondents . . . ." Declaration of Heather Watts ("Watts Decl.") ¶¶ 6 & 7. Ms. Watts further states that disclosure of the redacted material would "provide insight" to Respondents' competitors regarding "pricing of various product offerings, product structure and consumer preference," as well as "actual knowledge" of matters Respondents took account of "in considering potential changes to its product design, structure and pricing"—information that "is not yet available in the marketplace." Watts Decl. ¶ 5. Moreover, Ms. Watts explains that the redacted material at issue "remains competitively sensitive," notwithstanding the passage of time. Watts Decl. ¶ 6.

To be sure, some of Ms. Watts' assertions border on the conclusory, and the declaration does not provide overwhelming or incontrovertible proof that each individual, challenged redaction is, in fact, competitively sensitive information. However, I am satisfied that Respondents have demonstrated the competitively sensitive nature of the disputed redacted material, particularly at this early juncture in the case.

While denying the Contested Motion, I remind the parties that "[t]he Protective Order does not give parties or non-parties the unfettered ability or option to designate every document produced as 'confidential.'" *In re Axon Enterprise, Inc*., 2020 WL 1875539, at *1 n.1 (F.T.C. Feb. 14, 2020). Overly broad designations risk defeating the "substantial public interest in holding all aspects of adjudicative proceedings . . . open to all interested persons." *In re H.P. Hood & Sons*, 1961 FTC LEXIS 368, at *5-6 (Mar. 14, 1961) (quoted with approval in *In re Altria Grp*., *Inc.*, No. 9393, 2021 WL 2379509, at *2 (F.T.C. May 26, 2021).

Although paragraph 5 of the Protective Order provides that a designation of confidentiality is a representation "that counsel believes the material so designated constitutes confidential material," counsel's subjective belief is only a precondition to a proper confidentiality designation. It does not itself establish confidentiality. Furthermore, when potential over-designation is brought to the attention of the Administrative Law Judge by appropriate motion, it is well within the ALJ's discretion in overseeing the conduct of litigation to require sufficient proof of confidentiality, and where such proof is lacking, to remove improper redactions. *See* Protective Order ¶ 9 (providing that "[c]onfidential material contained

in papers shall continue" to be treated as such "until further order of the Administrative Law Judge"). While in some circumstances, it may be appropriate to overrule a confidentiality designation for failure to meet the Protective Order's requirements, this is not that case.

IV.

Accordingly, Complaint Counsel's Contested Motion is DENIED.

Complaint Counsel's Unopposed Motion, previously held in abeyance, is GRANTED. Complaint Counsel shall file a revised public version of the Complaint that removes the redactions identified in the Unopposed Motion by May 10, 2024.

ORDERED:

Jay L. Himes

Jay L. Himes
Administrative Law Judge

Date: May 8, 2024