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2022. In Response to the CID, Respondents provided over 10,000 documents, materials, and information (the “CID-materials”). In the Complaint filed by the Commission more than two years later, 13 allegations were redacted because the underlying material consisted of CID-materials. Pursuant to 15 U.S.C. § 57b-2(b)(3)(C), these allegations must remain redacted—as must the references to these allegations in Respondents’ Answer. The statute is clear that no materials submitted to the Commission through the CID process can be made available for public examination. The pending motion seeks to do just that. Even if 15 U.S.C. § 57b-2(b)(3)(C) permitted the relief sought by Complaint Counsel, it is procedurally improper because Complaint Counsel previously waived their right to oppose and object to confidential treatment.

**A. Complaint Counsel Waived the Right to Oppose and Object to Respondents’ Request for Confidential or *In Camera* Treatment of Their Answer.**

On September 16, 2024, Complaint Counsel filed their Motion and titled it “Complaint Counsel’s (1) Motion to Unredact the Complaint and (2) Opposition to Respondents’ Motion for Confidential or In Camera Treatment of Respondents’ Answer.” The second half of the caption and significant portions of the pleading do not constitute a separate motion but rather serve as a direct Response to Respondents’ September 3, 2024 Motion for Confidential or *In Camera* Treatment.

Complaint Counsel may not circumvent 16 C.F.R. § 3.22(d) by incorporating their Response into their separate Motion to Unseal the Complaint. According to § 3.22(d), an opposing party must file a Response “[w]ithin 10 days after service of any written motion...or shall be deemed to have consented to the granting of the relief asked for in the motion.”

Complaint Counsel’s Response to Respondents’ motion was due September 13, 2024. No such Response was filed. Since Complaint Counsel’s Response, framed as a Motion, was filed on

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September 16, 2024, it is late. Complaint Counsel is therefore “deemed to have consented to the granting of the relief” sought by Respondents regarding their Answer.

**B. By Statute, All Materials Obtained Through the Commission’s Compulsory Process Remain Confidential, Even in an Adjudicative Proceeding.**

Pursuant to 15 U.S.C. § 57b-2(b)(3)(C) materials obtained through a compulsory process (*i.e.*, a CID), may not be made available for inspection by the public—regardless of the initiation of adjudicative proceeding. Thus, the only question at issue is whether Complaint Counsel seeks to make material within the meaning of 15 U.S.C. § 57b-2(b)(1)(3)(C) public.

Respondents are unable to fully ascertain—nor will the Commission fully disclose—the source of the redacted information in the Complaint. Filing a public complaint with portions of CID-materials would violate 15 U.S.C. § 57b-2(b)(1)(3)(C), which prohibits public examination of such materials.

At 2:27 pm ET on August 16, 2024, Complaint Counsel emailed Respondents’ Counsel and advised that it would be filing a Complaint with redactions of “non-public information” and requested that Respondents’ Counsel “*reply with any additional redactions* by 6:15pm [ET].” Ex. A (emphasis added). Respondents’ Counsel provided no further redactions. Complaint Counsel confirmed they redacted information received in response to the CID. However, at the September 12, 2024 scheduling conference, Complaint Counsel erroneously indicated that “[w]e’ve filed portions of the Complaint under seal *at the request of Respondents* to give them the opportunity to articulate a lot of material that was confidential *under the protective order...*” Tr. 20:3-6. Of course, this could not be possible because Complaint Counsel proposed the redactions and the Protective Order was issued on August 21, 2024—five days *after* the Complaint was filed on August 16, 2024.

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**1. Complaint Counsel concedes that Complaint paragraphs 25, 26, 28, 29, 30, and 31 are from non-public CID-materials.**

Complaint Counsel concedes that Complaint paragraphs 25, 26, 28, 29, 30, and 31 are derived from CID-materials concerning Corporate Respondents' internal compliance checks related to business policies, sales methodologies, and other audits. Therefore, this material is clearly not subject to public disclosure under § 57b-2(b)(1)(3)(C).

**2. Complaint paragraphs 14, 15, 18, and 19 reference “customer complaints” that are likely also derived from CID-materials.**

Complaint Counsel’s motion refers to Complaint paragraphs 14, 15, 18, and 19 as “customer complaints.” It is unclear whether Complaint Counsel obtained these alleged complaints from CID-materials or publicly available online resources. Paragraphs 14 and 15 specify that a particular Respondent, Ali Benli, personally received the complaints, while paragraphs 18 and 19 contain direct quotes from Asbury employees, including an employee not party to this lawsuit, suggesting the material is from internal documents produced through the CID process.

**3. Complaint paragraphs 6 and 21 lack sufficient context to be identified as CID-material or not.**

The redactions in paragraphs 6 and 21 lack context and Respondents are unable to identify the source material. Given the subject matter, this material could originate from either CID-materials or from nonparties through the Commission's own fact-gathering efforts. But again, Complaint Counsel previously noted that the Complaint redacts confidential CID-materials.

**4. Respondents’ redactions in their Answer are protected from public disclosure by 15 U.S.C. § 57b-2(b).**

As set forth above, the Answer should not be considered because Complaint Counsel is “deemed to have consented to the granting of the relief” sought by Respondents regarding their

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Answer. Further, Respondent's Answer simply restates portions of the Complaint that have been redacted, those portions are protected from public inspection for the reasons outlined *supra*.

Answer paragraphs 25, 26, 27, and 31, specifically address internal audits, policies, business methodologies, and other sensitive practices drawn directly from CID-materials.

**C. Complaint Counsel and the Commission Must Follow the Notice Procedures in 15 U.S.C. § 57b-2(c)(1)-(3) to Use Material Submitted to Them as “Confidential.”**

Even if certain allegations in the Complaint and corresponding portions of the Answer were not derived from the CID process and therefore protected by § 57b-2(b), they remain confidential because Respondent Asbury Automotive Group, Inc. designated them as such when they were submitted to the Commission. *See* § 57b-2(c)(1)-(3).

The Commission is required to provide written notice of its intent to disclose information it receives that has been marked confidential at least 10 days before doing so, as set forth in 15 U.S.C. § 57b-2(c), which provides: “All information reported to or otherwise obtained by the Commission which is not subject [to its Compulsory Process] shall be considered confidential when so marked by the person supplying the information and shall not be disclosed, except in accordance with the procedures established in [§ 57b-2(c)(1)-(3)].” Importantly, § 57b-2(c)(3) does not apply to CID-materials, as no notice or response period is needed for materials already prohibited from disclosure, as discussed above. *See* § 57b-2(c)(1) (expressly excluding materials “subject to the requirements of subsection (b),” which includes CID-materials).

The redacted sections of the Complaint and Answer are taken from over 10,000 documents marked confidential and submitted to the Commission under the CID. Complaint Counsel has not adhered to the procedures outlined in § 57b-2(c)(1)-(3) as it has failed to provide written notice.

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Dated: September 26, 2024

Respectfully Submitted,

FOLEY & LARDNER LLP

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COUNSEL FOR RESPONDENTS

# EXHIBIT A

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**Livengood, Brandon M.**

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**From:** Benway, Kathleen <Kathleen.Benway@alston.com>  
**Sent:** Friday, August 16, 2024 4:34 PM  
**To:** Winker, Erik; Burbach, Ed; Sepehri, John; Martin-Patterson, Ryan  
**Cc:** Brooks, Jamie; Doty, James; Dwyer, Daniel; Abutaleb, Sarah; Tabor, April; OALJ  
**Subject:** RE: Asbury Automotive: Part 3 Complaint Proposed Redactions  
**Attachments:** Asbury P3 Complaint Proposed Redactions.pdf

**\*\* EXTERNAL EMAIL MESSAGE \*\***

Hello Erik,

We agree with the Commission's proposed redactions (designated in bold) and don't have any additional.

Best,

Kathleen

**Kathleen Benway**

Partner

Alston & Bird LLP

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**From:** Winker, Erik <ewinker@ftc.gov>  
**Sent:** Friday, August 16, 2024 11:14 AM  
**To:** eburbach@foley.com; Benway, Kathleen <Kathleen.Benway@alston.com>; jsepehri@foley.com; Martin-Patterson, Ryan <Ryan.Martin-Patterson@alston.com>  
**Cc:** Brooks, Jamie <jbrooks4@ftc.gov>; Doty, James <jdoty@ftc.gov>; Dwyer, Daniel <ddwyer@ftc.gov>; Abutaleb, Sarah <sabutaleb@ftc.gov>; Tabor, April <atabor@ftc.gov>; OALJ <OALJ@ftc.gov>  
**Subject:** Asbury Automotive: Part 3 Complaint Proposed Redactions

**EXTERNAL SENDER – Proceed with caution**

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Dear Respondents' Counsel,

Please see the proposed redactions in the attached document. Please reply with any additional redactions by 6:15pm. If we do not receive any additional redactions by this deadline, we will proceed with the redactions reflected in the attached version. As this complaint contains non-public information, please allow this complaint to be viewed by outside counsel only. Once we receive your input, we will provide the public and non-public versions of the complaint.

Best regards,

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**Erik Winker**

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Federal Trade Commission  
Office of the Secretary  
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**CERTIFICATE OF SERVICE**

I hereby certify that on September 26, 2024, a correct and true copy of the foregoing document was served via email on all counsel of record: Jamie D. Brooks, Daniel Dwyer, James Doty, and Sarah Abutaleb.

I further certify that on September 26, 2024, a correct and true courtesy copy of the foregoing document was sent via email to:

Office of the Administrative Law Judges  
600 Pennsylvania Avenue, N.W., Rm. H-110  
Washington, D.C. 20580

/s/ Megan Chester  
Megan Chester

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