

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

10 11 2018
592557

In the Matter of:

Benco Dental Supply Co.,
Henry Schein, Inc., and
Patterson Companies, Inc.,

Respondents.

Docket No. 9379

ORIGINAL

**RESPONDENT HENRY SCHEIN, INC.'S OPPOSITION TO COMPLAINT COUNSEL'S
MOTION PURSUANT TO RULE 3.43(b) TO ADMIT PRIOR TESTIMONY FROM
OTHER PROCEEDINGS¹**

Complaint Counsel seeks to admit into evidence thirteen transcripts from twelve state dental associations that Complaint Counsel did not deem relevant or important enough to depose in this case (the "Association Transcripts").² Complaint Counsel, however, has not made any specific designations of such testimony, but rather seeks wholesale admission, regardless of the specific testimony's relevance, the witnesses' foundation or knowledge, or the general admissibility and reliability of such testimony. Nor does Complaint Counsel identify any portion of any transcript that would be non-duplicative, material, and sufficiently reliable such that its

¹ Respondent Patterson Companies, Inc. joins this opposition.

² Specifically, Complaint Counsel seeks wholesale admission of the following transcripts from *SourceOne Dental, Inc. v. Patterson Co. et al.*: CX9024 (Donovan Osio, Texas Dental Association); CX9051 (Ward Blackwell, Louisiana Dental Association); CX9052 (Pamela Brockhaus, Colorado Dental Association); CX9055 (Terry Dickinson, Virginia Dental Association); CX9056 (Kevin Earle, Arizona Dental Association); CX9067 (Elise Rupinski, Virginia Dental Association); CX9069 (Craig Start, Michigan Dental Association); and CX9075 (Terry Jon Xelowski, Arizona Dental Association); the following transcripts from *In re Dental Supplies Antitrust Litigation*: CX9064 (Robert Killpack, Washington State Dental Association); CX9068 (W. Scott Ruthstrom, Florida Dental Association); CX9070 (Dr. Robert Talley, Nevada Dental Association); and CX9071 (Antony Kainoa Trotter, Washington State Dental Association); and the following Texas AG EUO transcript: CX9065 (Donovan Osio, Texas Dental Association).

use would be fair *in this proceeding*.³ Because the Association Transcripts do not meet these requirements of Rule 3.43(b), Complaint Counsel's motion should be denied.

Finally, Complaint Counsel asserts that it will use these Transcripts to show “the impact of Respondents’ response to these state dental association buying groups.” As an initial matter, these associations did not actually operate buying groups, but rather, simply “endorsed,” or considered endorsing, an on-line distributor like SourceOne (a distributor Complaint Counsel excludes from its definition of the relevant market) as an approved vendor in exchange for a kickback, or so-called “marketing fee.” But even if these associations were somehow “buying groups,” there is no allegation that Respondents were asked, or refused, to supply or offer discounts to them. Thus, these depositions dealt with an entirely different situation than the issue here. More importantly, these association witnesses are not competent to testify about “Respondents’ response to these state dental associations.” Certainly, the associations cannot speculate about Respondents’ state of mind or motive. Indeed, most of the association witnesses never *d a* with the Respondents about their proposed endorsement program. With the sole exception of the Texas Dental Association, Complaint Counsel does not allege that Respondents boycotted these buying groups. *See* Schein’s Pretrial Brief at 77-130 (citing CC Second Amended Response and objections to Schein’s First Interrogatories (RX3087)).

The lack of relevance of these associations is also evidenced by Complaint Counsel’s own conduct in this case. They did not subpoena any of these associations, and did not depose any of them during the investigation or discovery phases of this case. If *any* of these witnesses were material, then Complaint Counsel would have deposed at least some of them. That Complaint Counsel deemed them so irrelevant as to not even be worthy of a deposition (or even a subpoena for documents) speaks volumes as to their irrelevance.

Finally, the Scheduling Order in this case makes clear that “[w]itnesses shall not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has

personal knowledge of the matter,” citing F.R.E. 602. This rule applies to transcripts from other

512-305-4800 (Facsimile)

Colin R. Kass

ckass@proskauer.com

Adrian Fontecilla

afontecilla@proskauer.com

PROSKAUER ROSE LLP

1001 Pennsylvania Ave., NW

Suite 600 South

Washington, DC 20004

Telephone: (202) 416-6800

Fax: (202) 416-6899

Tim Muris

tmuris@sidley.com

SIDLEY AUSTIN LLP

1501 K Street, N.W.

Washington, D.C. 20005

Telephone: (202) 736-8000

Facsimile: (202) 736-8711

*ATTORNEYS FOR RESPONDENT
HENRY SCHEIN, INC.*

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2018, I caused the foregoing document to be electronically filed using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm.H-113
Washington, DC 20580

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

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

Lin W. Kahn
lkahn@ftc.gov
Jeanine K. Balbach
jbalbach@ftc.gov
Thomas H. Brock
tbrock@ftc.gov
Emily Burton
eburton@ftc.gov
Diana Change
dchange@ftc.gov
Thomas Dahdouh
tdahdough@ftc.gov
Thomas Dillickrath
tdillickrath@ftc.gov
Karen Goff
kgoff@ftc.gov
Joseph Goodman
jgoodman@ftc.gov
Jessica Moy
jmoy@ftc.gov
Danica Noble
dnoble@ftc.gov
Jasmine Y. Rosner

jrosner@ftc.gov
Ronnie Solomon
rsolomon@ftc.gov
John Wiegand
jwiegand@ftc.gov
Erika Wodinsky
ewodinsky@ftc.gov
Federal Trade Commission
Western Region – San Francisco
901 Market Street, Suite 570
San Francisco, CA 94103
Telephone: (415) 848-5115

Counsel Supporting the Complaint

Howard Scher
howard.scher@bipc.com
Kenneth Racowski
kenneth.racowski@bipc.com
Carrie Amezcua
carrie.amezcua@bipc.com
Buchanan Ingersoll & Rooney PC
50 S. 16th Street Suite 3200
Philadelphia, PA 19102

Geoffrey D. Oliver
gdoliver@jonesday.com
Jones Day
51 Louisiana Avenue NW
Washington, DC 20001
Phone Number: 202-879-3939

Craig A. Waldman
cwaldman@jonesday.com
Benjamin M. Craven
bcraven@jonesday.com
Ausra O. Deluard
adeluard@jonesday.com
Jones Day
555 California Street
26th Floor
San Francisco, CA 94104
Phone Number: 415-626-3939

Counsel for Respondent Benco Dental Supply Company

James Long(Attorney)

jlong@briggs.com
Jay Schlosser(Attorney)
jschlosser@briggs.com
Scott Flaherty(Attorney)
sflaherty@briggs.com
Ruvn Jayasuriya(Attorney)
rjayasuriya@briggs.com
William Fitzsimmons(Attorney)
wfitzsimmons@briggs.com
Briggs and Morgan, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
Phone Number: 612-977-8400
Fax Number: 612-977-8650

Joseph Ostoyich
joseph.ostoyich@bakerbotts.com
William Lavery
william.lavery@bakerbotts.com
Andrew George
andrew.george@bakerbotts.com
Jana Seidl
jana.seidl@bakerbotts.com
Kristen Lloyd
kristen.lloyd@bakerbotts.com
Baker Botts L.L.P.
1299 Pennsylvania Ave NW
Washington, DC 20004
Phone Number: 202-639-7905

Counsel for Respondent Patterson Companies, Inc.

By: /s/ David W. Heck
Attorney

CERTIFICATE OF 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 documents that is available for review by the parties and the adjudicator.

October 11, 2018

By: /s/ David W. Heck
Attorney

Notice of Electronic Service

I hereby certify that on October 11, 2018, I filed an electronic copy of the foregoing Respondent Henry Schein, Inc's Opposition to Motion to Admit Prior Testimony, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

I hereby certify that on October 11, 2018, I served via E-Service an electronic copy of the foregoing Respondent Henry Schein, Inc's Opposition to Motion to Admit Prior Testimony, upon:

Lin Kahn
Attorney
Federal Trade Commission
lkahn@ftc.gov
Complaint

Ronnie Solomon
Attorney
Federal Trade Commission
rsolomon@ftc.gov
Complaint

Matthew D. Gold
Attorney
Federal Trade Commission
mgold@ftc.gov
Complaint

John Wiegand
Attorney
Federal Trade Commission
jwiegand@ftc.gov
Complaint

Erika Wodinsky
Attorney
Federal Trade Commission
Complaint

Boris Yankilovich
Attorney
Federal Trade Commission
byankilovich@ftc.gov
Complaint

Jeanine K. Balbach
Attorney
Federal Trade Commission
jbalbach@ftc.gov
Complaint

gdoliver@jonesday.com
Respondent

Craig A. Waldman
Partner
Jones Day
cwaldman@jonesday.com
Respondent

Benjamin M. Craven
Jones Day
bcraven@jonesday.com
Respondent

Ausra O. Deluard
Jones Day
adeluard@jonesday.com
Respondent

Joseph Ostoyich
Partner
Baker Botts L.L.P.
joseph.ostoyich@bakerbotts.com
Respondent

William Lavery
Senior Associate
Baker Botts L.L.P.
william.lavery@bakerbotts.com
Respondent

Andrew George
Baker Botts L.L.P.
andrew.george@bakerbotts.com
Respondent

Jana Seidl
Baker Botts L.L.P.
jana.seidl@bakerbotts.com
Respondent

Kristen Lloyd
Associate
Baker Botts L.L.P.
Kristen.Lloyd@bakerbotts.com
Respondent

James Long
Attorney
Briggs and Morgan, P.A.
jlong@briggs.com
Respondent

Jay Schlosser
Attorney
Briggs and Morgan, P.A.
jschlosser@briggs.com
Respondent

Scott Flaherty
Attorney
Briggs and Morgan, P.A.
sflaherty@briggs.com
Respondent

Ruvin Jayasuriya
Attorney
Briggs and Morgan, P.A.
rjayasuriya@briggs.com
Respondent

William Fitzsimmons
Attorney
Briggs and Morgan, P.A.
wfitzsimmons@briggs.com
Respondent

Hyun Yoon
Buchanan Ingersoll & Rooney PC
eric.yoon@bipc.com
Respondent

David Owyang
Attorney
Federal Trade Commission
dowyang@ftc.gov
Complaint

Karen Goff
Attorney
Federal Trade Commission
kgoff@ftc.gov
Complaint

Emily Burton
Attorney
Federal Trade Commission
eburton@ftc.gov
Complaint

Jessica Drake
Attorney
Federal Trade Commission
jdrake@ftc.gov
Complaint

Ashley Masters
Attorney
Federal Trade Commission
amasters@ftc.gov
Complaint

Terry Thomas
Attorney
Federal Trade Commission
tthomas1@ftc.gov
Complaint

Danica Nobel
Attorney
Federal Trade Commission
dnoble@ftc.gov
Complaint

Mary Casale
Attorney
Federal Trade Commission
mcasale@ftc.gov
Complaint

Thomas Manning
Buchanan Ingersoll & Rooney PC
Thomas.Manning@bipc.com
Respondent

Sarah Lancaster
Locke Lord LLP
slancaster@lockelord.com
Respondent

Owen Masters
Associate
Proskauer Rose LLP
omasters@proskauer.com
Respondent

Stephen Chuk
Proskauer Rose LLP
schuk@proskauer.com
Respondent

Rucha Desai
Associate
Proskauer Rose LLP
rdesai@proskauer.com
Respondent

Jessica Moy
Federal Trade Commission
jmoy@ftc.gov
Complaint

Thomas Dilickrath
Federal Trade Commission
tdilickrath@ftc.gov
Complaint

Caroline L. Jones
Associate
Baker Botts L.L.P.
caroline.jones@bakerbotts.com
Respondent

David Munkittrick
Proskauer Rose LLP
dmunkittrick@proskauer.com
Respondent

