

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

**03 05 2018
589871**

In the Matter of

**BENCO DENTAL SUPPLY CO.,
a corporation,**

**HENRY SCHEIN, INC.,
a corporation, and**

**PATTERSON COMPANIES, INC.,
a corporation,**

Respondents.

ORIGINAL

Docket No. 9379

**COMPLAINT COUNSEL'S MOTION TO PLACE THE UNREDACTED COMPLAINT
ON THE PUBLIC RECORD**

Lin W. Kahn
Ronnie Solomon
Attorneys

Federal Trade Commission
Western Region – San Francisco
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Please take notice that Complaint Counsel respectfully moves for an order placing an unredacted version of the Complaint on the public record. The current public version of the Complaint redacts two categories of information:

- (1) Names and titles of Respondents' executives alleged in paragraphs 33-35, 37, 39, 41, 43, 45-51, 54-60, 63-64, and 71 of the Complaint; and
- (2) Names of third party entities alleged in paragraphs 35, 41-50, 57, 58, 60 of the Complaint.

By this Motion, Complaint Counsel seeks the removal of all redactions in the Complaint because the redacted information is not confidential, the public's interest is best served by having open access to the unredacted Complaint, and Respondents would not be harmed by the disclosure of publicly available information. Respondents object to the disclosure of their executives' names and titles, but they do not object to the removal of third party redactions.

Dated: March 5, 2018

Respectfully submitted,

/s/ Lin W. Kahn

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Docket No. 9379

PUBLIC

**MEMORANDUM OF LAW IN SUPPORT OF COMPLAINT COUNSEL'S
MOTION TO PLACE THE UNREDACTED COMPLAINT ON THE PUBLIC RECORD**

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Counsel Supporting the Complaint

Dated: March 5, 2018

I. INTRODUCTION

The Complaint in this matter alleges a conspiracy between Benco, Schein, and Patterson (“Respondents”) to prevent the decline of prices threatened by the rise of buying groups. The Complaint quotes communications between Respondents’ executives regarding the alleged conspiracy. Respondents concede that the contents of these communications are not confidential or sealable, and permitted Complaint Counsel to disclose these communications in the current public version of the Complaint. Respondents claim, however, that the names and titles of the executives involved in the communications should be sealed because they constitute confidential “competitively sensitive information” or “sensi

hide their identities from their competitors in the course of carrying out the alleged conspiracy. Thus, preserving Respondents' redactions leads to the absurd result of preventing the public from accessing information already in the hands of Respondents' competitors. Rather than protecting

example, Respondents seek to seal the names/titles of the executives involved in the following exchange:

Benco: “Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups . . . and our team understands that policy.” Compl. ¶ 37.

Patterson: “Thanks for the heads up. I’ll investigate the situation. We feel the same way about these.” Compl. ¶ 39.

The names and titles of the executives who engaged in this communication are already in the public filings of a federal court litigation.¹ Similarly, Respondents seek to seal the executives involved in the following exchange:

Benco to Schein: “Did some additional research [I]t’s not a buying group We’re going to bid.” Compl. ¶ 45.

In addition, Respondents object to the disclosure of the names and titles of executives who sent internal company communications relevant to the conspiracy, such as:

Patterson: “We don’t need GPO’s in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry.” Compl. ¶ 51.

The executive who made this statement has also been identified in public filings.²

Not only do Respondents seek to seal the identities referenced in their own documents, but they also seek to seal names mentioned in their *competitors’* internal documents. For example, paragraphs 35 and 56 of the complaint contain quotes of internal Benco documents that reference the executives of Schein and Patterson. Benco does not object to the disclosure of the quoted statements, yet Schein and Patterson take the position that their executives’ names should be redacted. Compl. ¶ 35 (“Better tell your buddy [REDACTED] to knock this shit off.”);

¹ *SourceOne Dental, Inc. v. Patterson Co., Inc.*, No. 2:15-cv-05440-BMC-GRB, Doc. 216, at 4 (E.D.N.Y. Dec. 1, 2017) (Plaintiff’s Opposition to Defendants’ Motion for Summary Judgment).

² *Id.* at 6.

goal of holding publicly open adjudicative proceedings. The names and titles of the executives involved in the alleged conspiracy are pertinent to the allegations in the Complaint. Redacting this information obscures the misconduct at the core of this case. Moreover, preserving the redactions interferes with the day-to-day aspects of litigating this case. Sealing the names and titles makes it logistically cumbersome to discuss the individuals at the center of the alleged conspiracy at hearings. It also disrupts Complaint Counsel's dealings with potential third party witnesses, as it would bar Complaint Counsel from revealing the identities of the relevant executives. Moreover, sealing this information would force the parties to take extra steps to hide the identities of key executives in every subsequent filing.

operation today and Complaint Counsel has been unable to reach anyone involved. *Id.* at ¶ 5. Because the Complaint does not allege any confidential information, the redactions should be removed. Respondents do not oppose the motion to remove the third party redactions. *Id.* at ¶ 6.

IV. Conclusion

For the foregoing reasons, a fully unredacted version of the Complaint should be placed on the public record.

March 5, 2018

Respectfully submitted,
s/ Lin W. Kahn

COMPLAINT COUNSEL'S CERTIFICATION CONCERNING MEET AND CONFER

The undersigned counsel certifies that Complaint Counsel conferred with Respondents' counsel in a good faith effort to resolve by agreement the issues raised by Complaint Counsel's Motion to Place the Unredacted Complaint on the Public Record by telephone on February 26 and 27, 2018. Complaint Counsel met and conferred again with counsel for Patterson on March 2 and 5, 2018. Respondents' indicated they would not oppose Complaint Counsel's request to remove third party redactions, but the parties have been unable to reach an agreement on the redactions as of the names and titles of Respondents' executives.

Dated: March 5, 2018

Respectfully submitted,

s/ Lin W. Kahn

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PUBLIC

DECLARATION OF LIN W. KAHN

1. I am an attorney for the Federal Trade Commission and Complaint Counsel in this proceeding. I have personal knowledge of the facts set forth in this declaration, and if called as a witness I could and would testify competently under oath to such facts.
2. The public version of the Complaint in the above-captioned matter contains references to multiple third parties. The Complaint does not allege any confidential information received from any of the third parties. Out of an abundance of caution, however, we provisionally redacted the names of four entities referenced in the Complaint to allow us time to give notice to these parties.
3. On February 21, 2018, I contacted the entity identified in paragraphs 42-45, 47-50 of the Complaint and the entity identified in paragraph 41 of the Complaint to give them notice and an opportunity to object to the disclosure of their names. These two entities gave their

consent to the disclosure of their names.

4. On February 22, 2018, my colleague contacted the entity named in paragraphs 35, 57, 58, 60, of the Complaint, which also gave its consent to the disclosure of its name.
5. I have not been able to locate the contact information for the entity identified in paragraph 46 of the Complaint, and it does not appear that the entity is still in operation today. On February 23, 2018, I contacted an individual that was likely associ

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 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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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:

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Counsel For Respondent Patterson Companies, Inc.

March 5, 2018

By: s/ Lin Kahn
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.

March 5, 2018

By: s/ Lin Kahn
Attorney