

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



_____)
In the Matter of)
)
Benco Dental Supply Co.,)
a corporation,)
)
Henry Schein, Inc.,)
a corporation, and)
)
Patterson Companies, Inc.,)
a corporation.)
)
Respondents.)
_____)

Docket No. 9379

ORDER DENYING RESPONDENT'S MOTION TO COMPEL

On August 31, 2018, Respondent Henry Schein, Inc. ("Schein" or "Respondent") filed a Motion to Compel certain expert disclosures by Federal Trade Commission ("FTC") Complaint Counsel ("Motion"). Specifically, Schein contends that Complaint Counsel failed to disclose the materials considered and relied on by Complaint Counsel's proposed expert, Dr. Robert Marshall, as required under FTC Rule 3.31A and Additional Provision 19 of the Scheduling Order issued in this case.

Complaint Counsel filed an opposition to the Motion on September 10, 2018, ("Opposition") arguing that Complaint Counsel did in fact disclose the materials considered and relied on by Dr. Marshall, in compliance with the FTC Rules and the Scheduling Order, and that Schein's request for further disclosure is without merit.¹

¹ Complaint Counsel argues that Schein failed to fulfill its meet and confer obligations under Rule 3.22(g) and Additional Provision 4 of the Scheduling Order, and urges that the Motion should be denied on this basis. Even if Respondent's meet and confer statement and related counsel correspondence failed to strictly comply with all meet and confer requirements, in the instant case, based on the record presented and the upcoming expert deposition, consideration of the merits of the Motion is warranted as a matter of discretion. *Compare In re Lab Corp.*, 2011 FTC LEXIS 26, at *5-6 (Feb. 8, 2011) (denying motion to compel based on failure to comply with meet and confer requirements, where party sent a single e-mail on a Sunday, one calendar day before filing a motion to compel, and filed motion without awaiting a response).

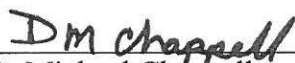
Rule 3.31A(c) requires that each expert report shall “contain a complete statement of . . . the data, materials, or other information considered by the witness in forming the opinions.” 16 C.F.R. § 3.31A(c). Additional Provision 19 of the Scheduling Order further requires that, at the time an expert report is produced, the producing party shall provide to the other party all documents and other written materials “relied upon” by the expert in formulating the expert’s opinion, subject to the provisions of 19(g).² Scheduling Order Additional Provision 19(b).

Based on the Motion, the Opposition, and the exhibits attached thereto, the record shows that on August 10, 2018, Complaint Counsel provided Schein with Dr. Marshall’s expert report (“Marshall Expert Report”). The text and footnotes of the Marshall Expert Report referenced various supporting materials. Appendix B of the Marshall Expert Report listed various materials considered by Dr. Marshall in reaching his conclusions.

In response to Schein’s email inquiry to Complaint Counsel as to which materials were “relied on” by Dr. Marshall and which materials were “considered” by Dr. Marshall, Complaint Counsel confirmed that the materials cited in the text and footnotes of the Marshall Expert Report are the materials relied upon by Dr. Marshall and that the materials listed in Appendix B were the materials considered by Dr. Marshall. Motion Exhibit A (August 29, 2018 email from J. Moy to A. Fontecilla). Furthermore, Appendix B is specifically prefaced with Dr. Marshall’s statement: “I considered the following materials in reaching my conclusions.” Opposition Exhibit 1. To the extent there is ambiguity as to which materials were personally considered by Dr. Marshall, as opposed to considered solely by his staff, as asserted by Schein, Schein may seek to clarify the matter through questioning Dr. Marshall at his deposition or at trial.

For the foregoing reasons, the Motion is DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: September 13, 2018

² Additional Provision 19(g) provides that experts need not disclose certain items, including “(ii) any form of communication or work product shared between an expert(s) and persons assisting the expert(s).”