

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
OFFICE OF THE 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

**COMPLAINT COUNSEL'S MOTION PURSUANT TO RULE 3.43(b) TO ADMIT  
PRIOR TESTIMONY FROM OTHER PROCEEDINGS**

Complaint Counsel respectfully moves the Court for an order admitting into evidence transcripts of depositions of twelve third-party witnesses taken in connection with two federal district court proceedings, *SourceOne Dental, Inc. v. Patterson Companies, Inc. and Benco Dental Supply Company*, 15-cv-5440 (BMC) (E.D.N.Y) and *In re Dental Supplies Antitrust Litigation*, 16:CV-00696-MBC (consolidated class action complaint). While Complaint Counsel did not participate in these depositions, all three Respondents were (or are) parties to those lawsuits. As such, they participated in each of these depositions, and had ample opportunity to cross-examine the witnesses. As described below, the testimony offered into the record by way of these transcripts will not be duplicative of other testimony, and meets all of the other requirements of Rule 3.43(b) for admissibility. This motion is necessary because Respondents Benco Dental Supply Co., Henry Schein, Inc., and Patterson Companies, Inc. have not consented to the admissibility of these transcripts.

## I. ARGUMENT

Rule 3.43(b) expressly contemplates that this Court may admit prior testimony from other proceedings with the consent of the parties. Absent the consent of the parties, testimony meeting certain criteria may be admitted based on certain findings by the Court. Specifically, the rule provides that

. . . absent the consent of the parties, before admitting prior testimony (including expert reports) from other proceedings where either the Commission or respondent did not participate, except for other proceedings where the Commission and at least one respondent did participate, the Administrative Law Judge must make a finding upon a motion of a party seeking the admission of such evidence that the prior testimony would not be duplicative, would not present unnecessary hardship to a party or delay the proceedings, and would aid in the determination of the matter.

16 C.F.R. §3.43(b).

The prior testimony at issue here is in the form of sworn depositions of twelve people representing nine state dental associations that created or planned to create, buying groups for their members.<sup>1</sup> Their depositions were taken in connection with the private actions referenced above, which concern allegations of collusion by the Respondents. The depositions took place between August 2016 and January 2017.

Counsel for each of the Respondents participated in every one of the depositions. At each deposition, Respondents' counsel had the opportunity to object to questions and examine the witness. A review of the transcripts shows that counsel for Respondents participated actively in these depositions, and either questioned the witnesses or stated on the record that they had no questions.

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<sup>1</sup> The transcripts involve dental associations for following states: Arizona, Colorado, Florida, Louisiana, Michigan, Nevada, Texas, Virginia, and Washington. The transcripts at issue have been marked as CX9024, CX9051, CX9052, CX9055, CX9056, CX9064, CX9065, CX9067, CX9068, CX9069, CX9070, CX9071, and CX9075. One of the witnesses was deposed twice, so there are thirteen transcripts containing the testimony of twelve witnesses.

These depositions meet all of the other requirements of Rule 3.43(b). First, the testimony will not be duplicative. The parties have not proposed calling representatives of these nine dental associations as witnesses in this case, so their testimony will not otherwise be in the record. Second, as the Respondents have already questioned these witnesses, presenting the sworn testimony in written form will not cause Respondents any hardship. By contrast, asking witnesses from around the country to attend a trial so that each can provide brief testimony would present a hardship for those witnesses and unnecessarily extend the time necessary for this trial. Finally, the deposition testimony will aid the Court in the determination of this matter by providing background information about the development of dental buying groups, the growing interest among dentists for buying groups, and the impact of Respondents' response to these state dental association buying groups.<sup>2</sup>

Because admitting the proposed testimony into the record meets all of the criteria set forth in Rule 3.43(b), Complaint Counsel respectfully requests that the Court grant this motion.

Respectfully submitted,

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*Counsel Supporting the Complaint*

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<sup>2</sup> MDA Insurance and Financial Group, a subsidiary of the Michigan Dental Association, has sought *in camera* treatment for designated portions of the transcript of Craig Start, its president, and for certain sensitive documents attached thereto.

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**[PROPOSED] ORDER**

After reviewing Complaint Counsel's Motion Pursuant to Rule 3.43(b) to Admit Prior Testimony from Other Proceedings, it is hereby ordered that the following exhibits be admitted: CX9024, CX9051, CX9052, CX9055, CX9056, CX9064, CX9065, CX9067, CX9068, CX9069, CX9070, CX9071, and CX9075.

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D. Michael Chappell  
Chief Administrative Law Judge

DATED this \_\_\_\_ day of October, 2018

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**COMPLAINT COUNSEL'S MEET AND CONFER STATEMENT**

Complaint Counsel represents to the Court that it met and conferred with counsel for Respondents Benco Dental Supply Co., Henry Schein, Inc., and Patterson Companies, Inc., on October 5 and October 8, 2018, in an effort in good faith to resolve by agreement the issues raised by Complaint Counsel's Motion Pursuant to Rule 3.43(b) to Admit Prior Testimony from Other Proceedings. The parties have been unable to reach such an agreement.

Dated: October 9, 2018

Respectfully submitted,

/s/ Erika Wodinsky

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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2018, I filed the foregoing documents electronically 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  
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I further certify that I delivered via electronic mail a copy of the foregoing documents to:

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October 9, 2018

By:         /s/ Lin W. 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.

October 9, 2018

By:     /s/ Lin W. Kahn      
Attorney