

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



In the Matter of:

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

Respondents.

Docket No. 9379

**RESPONDENT HENRY SCHEIN, INC.'S OPPOSITION TO COMPLAINT COUNSEL'S  
MOTION PURSUANT TO RULE 3.43(b) TO ADMIT PRIOR TESTIMONY FROM  
OTHER PROCEEDINGS<sup>1</sup>**

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").<sup>2</sup> 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

---

<sup>1</sup> Respondent Patterson Companies, Inc. joins this opposition.

<sup>2</sup> 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*.<sup>3</sup> Because the Association Transcripts do not meet these requirements of Rule 3.43(b), Complaint Counsel’s motion should be denied.

Under Rule 3.43(b), the Court “must make a finding ... that the prior testimony would not be duplicative ... and would aid in the determination of the matter,” in addition to being “relevant [and] material.” Rule 3.43(b). Complaint Counsel’s generic motion provides no basis on which this Court can make this finding. The failure to highlight any portion of any Association Transcripts that Complaint Counsel says is relevant is fatal to their motion. But even their generic *arguments* for relevance fail to pass muster.

First, Complaint Counsel argues the association testimony will be used to “provid[e] background information about the development of dental buying groups.” This will be entirely duplicative of testimony Complaint Counsel can elicit from the three dozen fact witnesses on its witness list, including third-party witnesses from some of the dental buying groups that were *actually involved* in the allegations. “Background information” from thirteen additional deposition transcripts of associations with no involvement in this case will not aid in the determination of the matter, and would be wholly duplicative.

The same is true of Complaint Counsel’s second purported use for the Transcripts: “the growing interest among dentists for buying groups.” Complaint Counsel does not argue – nor could it – that the witnesses it intends to call at trial will not or are incapable of testifying about dentists’ interest in buying groups. Complaint Counsel intends to call witnesses from actual buying groups. The Transcripts will at best be duplicative, and thus entirely unhelpful.

---

<sup>3</sup> Notably, Complaint Counsel seeks to introduce the transcript of Donovan Osio of the Texas Dental Association (CX 9065) taken by the Texas State Attorney General outside the presence of counsel for Respondents. Introduction of such evidence falls outside Rule 3.43(e), which is limited to FTC Investigations, and would raise serious due process issues.

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 *dealt* 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 proceedings in the same way that it applies to depositions in this case and live testimony at trial. Complaint Counsel has made no effort to show that each portion of the deposition it seeks to have admitted into evidence satisfies this requirement. Admitting these transcripts into evidence would be tantamount to overruling each of Respondents’ timely made, and well-preserved foundation objections without even considering the substance of the testimony or that nature of the objection. That would not be a “fair” use. See Rule 3.43(b) (limiting admission of hearsay to situations where its “use is fair.”).<sup>4</sup>

For these reasons, Respondent Henry Schein, Inc. respectfully requests that the Court deny Complaint Counsel’s motion to admit the Transcripts

Dated: October 11, 2018

Respectfully submitted,

/s/ John P. McDonald

John P. McDonald

[jpmcdonald@lockelord.com](mailto:jpmcdonald@lockelord.com)

LOCKE LORD LLP

2200 Ross Avenue, Suite 2800

Dallas, TX 75201

(214) 740-8000 (Telephone)

(214) 740-8800 (Facsimile)

Lauren M. Fincher

[lfincher@lockelord.com](mailto:lfincher@lockelord.com)

LOCKE LORD LLP

600 Congress Avenue, Suite 2200

Austin, Texas 78701

512-305-4700 (Telephone)

---

<sup>4</sup> Additionally, the Association Transcripts were taken in “other proceedings” that did not deal with the core issues in this case – whether the Respondents refused to supply or discount to buying groups. As such, Respondents did not have a fair opportunity to cross these witnesses on issues germane to this case.

512-305-4800 (Facsimile)

Colin R. Kass

[ckass@proskauer.com](mailto:ckass@proskauer.com)

Adrian Fontecilla

[afontecilla@proskauer.com](mailto: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](mailto: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

Thomas H. Brock  
Attorney  
Federal Trade Commission  
TBrock@ftc.gov  
Complaint

Jasmine Rosner  
Attorney  
Federal Trade Commission  
jrosner@ftc.gov  
Complaint

Howard Scher  
Attorney  
Buchanan Ingersoll & Rooney PC  
howard.scher@bipc.com  
Respondent

Kenneth Racowski  
Attorney  
Buchanan Ingersoll & Rooney PC  
kenneth.racowski@bipc.com  
Respondent

Carrie Amezcua  
Attorney  
Buchanan Ingersoll & Rooney PC  
carrie.amezcua@bipc.com  
Respondent

John McDonald  
Locke Lord LLP  
jpmcdonald@lockelord.com  
Respondent

Lauren Fincher  
Locke Lord LLP  
lfincher@lockelord.com  
Respondent

Colin Kass  
Proskauer Rose LLP  
ckass@proskauer.com  
Respondent

Adrian Fontecilla  
Associate  
Proskauer Rose LLP  
afontecilla@proskauer.com  
Respondent

Timothy Muris  
Sidley Austin LLP  
tmuris@sidley.com  
Respondent

Geoffrey D. Oliver  
Jones Day

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

David Heck  
Proskauer Rose LLP  
dheck@proskauer.com  
Respondent

Thomas Dillickrath  
Deputy Chief Trial Counsel  
Federal Trade Commission  
tdillickrath@ftc.gov  
Complaint

Josh Goodman  
Attorney  
Federal Trade Commission  
jgoodman@ftc.gov  
Complaint

Nair Diana Chang  
Federal Trade Commission  
nchang@ftc.gov  
Complaint

Adam Saltzman  
Buchanan Ingersoll & Rooney PC  
adam.saltzman@bipc.com  
Respondent

David Heck  
Attorney