

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.)
_____)

DOCKET NO. 9379

**RESPONDENT BENCO DENTAL SUPPLY CO.’S MOTION TO ADMIT PRIOR
TESTIMONY FROM OTHER PROCEEDINGS**

In accordance with FTC Rule 3.43(b), Respondent Benco Dental Supply Co. respectfully moves to admit a series of prior deposition transcripts from *SourceOne Dental, Inc. v. Patterson Companies, Inc.*, 15-cv-5440 (E.D.N.Y.) and *In Re: Dental Supplies Antitrust Litigation*, 1:16-cv-00696 (E.D.N.Y.): RX1121-38 (prior depositions¹).

Complaint Counsel has also moved to admit deposition transcripts from these matters and stated in its motion that the Respondents “have not consented to the admissibility of these

¹ The prior depositions include Brian Evans – Director of Sales for the West, Benco (11-21-2016) (RX1121), Mike Wade – former Regional Manager in Arizona, Benco; current Western Regional Manager, Southern Dental Industries (11-22-2016) (RX1122), Steven Desautel – Vice Presidents of Sales and Marketing, Dental Health Products, Inc. (1-26-2017) (RX1123), Mark Rowe – Director of Sales, Benco (1-31-2017 (RX1124) and 8-1-2017 (RX1132)), Rick Dunn – Regional Manager for Dallas, Benco (2-1-2017 (RX1125) and 8-1-2017 (RX1133)), Ron Fernandez – former Regional Manager for San Antonio, Austin, and Houston, Benco; current Salesman, Gideon Services (2-3-2017 (RX1126) and 8-17-2017 (RX1134)), Chuck Cohen – Managing Director, Benco (6-16-2017 (RX1130) and 10-27-2017 (RX1137)), Mike McElaney – current Vice President of Sales and Branch Operations, Benco; former Acting Director of the Northeast District, Benco (RX1128), Pat Ryan – Director of Sales for Strategic Markets, Benco (RX1129), John Johnson – Benco Expert Witness (6-27-2017 (RX1131) and 1-10-2018 (RX1138)), and Jeffrey Reece – Vice President of Sales and Marketing, Burkhart (individual (RX1135) and as corporate designee (RX1136)).

transcripts.”² That is not Benco Dental’s position. We do not contest the admissibility of Complaint Counsel’s desired depositions. We believe, though, that the Court should treat all deposition transcripts from these litigations equally and also admit our requested deposition transcripts from the same cases. Because Complaint Counsel has not consented to the admission of these deposition transcripts, we ask that the Court grant this motion and admit both parties’ requested deposition transcripts from these two prior cases.

Where one party did not participate in the prior proceeding and does not consent to admission, Rule 3.43(b) nevertheless permits the admission of prior deposition testimony on a motion showing that (1) the prior testimony would not be duplicative, (2) it would not present unnecessary hardship to a party or delay to the proceedings, and (3) it would aid in the determination of the matter. The requested deposition transcripts meet these requirements.

First, the requested prior testimony would not be duplicative of other testimony in this case; the majority of the deponents have not testified and will not testify in this case.

Second, the requested prior testimony will not present unnecessary hardship to Complaint Counsel, which has had access to all of it from early in this case, and which had the opportunity to seek additional discovery from any of the deponents if it so chose. This is especially true for Chuck Cohen, Pat Ryan, Jeff Reece, and Dr. John Johnson, all of whom Complaint Counsel later deposed in this case; Complaint Counsel had full opportunity to question them, including about their prior testimony, and in a number of instances did so.

Third, the requested prior testimony would aid in the determination of this matter, as it pertains to Complaint Counsel’s allegations surrounding Patterson’s, Schein’s, and Benco’s decisions not to attend a 2014 trade show hosted by the Texas Dental Association. Complaint

² See October 9, 2018 Complaint Counsel Motion to Admit Prior Testimony from Other Proceedings at 1.

Counsel apparently considers Respondents' decisions relating to the Texas Dental Association to be an important prong of its case and has included numerous documents on its exhibit list containing statements from or references to these witnesses.³ The Court would benefit from hearing what these witnesses have said under oath, especially about these documents.

For all these reasons, we respectfully ask that the Court admit the prior case materials.

Dated: October 11, 2018

Respectfully submitted,

By: /s/ Kenneth L. Racowski
Howard D. Scher (howard.scher@bipc.com)
Kenneth Racowski (kenneth.racowski@bipc.com)
Thomas P. Manning (thomas.manning@bipc.com)
Adam M. Saltzman (adam.saltzman@bipc.com)
Carrie Amezcua (carrie.amezcua@bipc.com)
Buchanan Ingersoll & Rooney PC
50 S. 16th St., Suite 3200
Philadelphia, PA 19102
Phone: 215-665-8700
Fax: 215-665-8760

Geoffrey Oliver (gdoliver@jonesday.com)
Jones Day
51 Louisiana Ave., NW
Washington, D.C. 20001
Phone: 202-879-3939

Craig A. Waldman (cwaldman@jonesday.com)
Benjamin M. Craven (bcraven@jonesday.com)
Aura O. Deluard (adeluard@jonesday.com)

³ Complaint Counsel has included hundreds of documents as exhibits in this case that contain statements from or references to these witnesses. *See also* October 10, 2018 Complaint Counsel Pre-Trial Brief at 32 (referencing emails with statements made by Ron Fernandez (citing CX1278 and CX1289) as well as an email discussing Ron Fernandez (citing CX0178)); 34 (referencing an email with statements made by Mike Wade (citing CX1378)); 46 (referencing an email with statements made by Ron Fernandez and Mark Rowe (citing CX1332); October 2, 2018 Complaint Counsel's Opposition to Patterson Motion for Summary Decision at 22 (referencing an email with statements made by Ron Fernandez (citing CX1289)).

PUBLIC

Jones Day
555 California Street
26th Floor
San Francisco, CA 94104
Phone: 415-626-3939

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2018, I filed the foregoing document 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
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
Jeanine K. Balbach
Thomas H. Brock
Emily Burton
Diana Change
Thomas Dahdough
Thomas Dillickrath
Karen Goff
Joseph Goodman
Jessica Moy
Danica Noble
Jasmine Y. Rosner
Ronnie Solomon
John Wiegand
Erika Wodinsky
Federal Trade Commission
Western Region – San Francisco
901 Market Street, Suite 570
San Francisco, CA 94103
Telephone: (415) 848-5115
lkahn@ftc.gov
jbalbach@ftc.gov
tbrock@ftc.gov
eburton@ftc.gov
dchange@ftc.gov
tdahdough@ftc.gov

tdillickrath@ftc.gov
kgoff@ftc.gov
jgoodman@ftc.gov
jmoy@ftc.gov
dnoble@ftc.gov
jrosner@ftc.gov
rsolomon@ftc.gov
jwiegand@ftc.gov
ewodinsky@ftc.gov

Counsel for Federal Trade Commission

Timothy J. Muris
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
T: 202 736 8000
F: 202 736 8711
tmuris@sidley.com

Rucha Desai
David Munkittrick
David Heck
Proskauer Rose LLP
Eleven Times Square
New York, NY 10036
T: 212-969-3628
rdesai@proskauer.com
dmunkittrick@proskauer.com
dheck@proskauer.com

John P. McDonald
Locke Lord LLP
2200 Ross Avenue
Suite 2800
Dallas, TX 75201
T: 214.740.8000
F: 214.740.8800
jpmcdonald@lockelord.com

Colin Kass
Adrian Fontecilla
Owen Masters
Stephen Chuck
Proskauer Rose LLP
1001 Pennsylvania Ave, N.W.
Suite 600 South
Washington, DC 20004-2533
T: 202.416.6800
F: 202.416.6899
ckass@proskauer.com;
afontecilla@proskauer.com
omasters@proskauer.com
schuck@proskauer.com

Lauren Fincher
Sara Lancaster
Locke Lord LLP
600 Congress Ave.
Ste. 2200
Austin, TX 78701
T: 512.305.4700
F: 512.305.4800
lfincher@lockelord.com
slancaster@lockelord.com

Counsel For Respondent Henry Schein Inc.

Joseph Ostoyich
William Lavery
Andrew George
Jana Seidl
Kristen Lloyd
Baker Botts L.L.P.
1299 Pennsylvania Ave NW
Washington, DC 20004
T: 202.639.7905
joseph.ostoyich@bakerbotts.com
william.lavery@bakerbotts.com
andrew.george@bakerbotts.com
jana.seidl@bakerbotts.com
kristen.lloyd@bakerbotts.com

James J. Long
Jay Schlosser
Scott Flaherty
Ruvim Jayasuriya
William Fitzsimmons
Briggs and Morgan
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
T: 612.977.8400
F: 612.977.8650
jlong@briggs.com
jschlosser@briggs.com
sflaherty@briggs.com
rjayasuriya@briggs.com
wfitzsimmons@briggs.com

Counsel For Respondent Patterson Companies, Inc.

October 11, 2018

By: s/ Kenneth L. Racowski
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/ Kenneth L. Racowski
Attorney

Notice of Electronic Service

I hereby certify that on October 12, 2018, I filed an electronic copy of the foregoing RESPONDENT BENCO DENTAL SUPPLY CO.'S MOTION TO ADMIT PRIOR TESTIMONY FROM OTHER PROCEEDINGS, 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 12, 2018, I served via E-Service an electronic copy of the foregoing RESPONDENT BENCO DENTAL SUPPLY CO.'S MOTION TO ADMIT PRIOR TESTIMONY FROM OTHER PROCEEDINGS, 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

Kenneth Racowski
Attorney