

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 PATTERSON'S MOTION TO DISMISS

I.

This case involves an alleged illegal agreement concerning the sale of dental supply products to dental practices in the United States. The Federal Trade Commission ("FTC") Complaint alleges that Respondent Patterson Companies, Inc. ("Patterson"), together with Respondents Benco Dental Supply Co. ("Benco") and Henry Schein, Inc. ("Schein"), agreed not to sell to dental buying groups, and that this agreement constitutes an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45. Complaint ¶¶ 80-88. Patterson and the other Respondents deny the substantive allegations of the Complaint.

Trial commenced on October 16, 2018. On December 19, 2018, FTC Complaint Counsel rested. On December 19, 2018, in open court, after Complaint Counsel concluded its presentation of evidence and rested its case, Respondent Patterson moved to dismiss the case against Patterson in its entirety, asserting that Complaint Counsel's evidence failed to establish a prima facie case of the alleged agreement involving Patterson. Thereafter, on December 20, 2018, Respondent submitted its motion to dismiss in writing ("Motion"). Complaint Counsel filed an opposition to the Motion on

February 6, 2019 (“Opposition”).¹ Respondent filed a Reply in support of its Motion on February 14, 2019.²

Respondents rested their case and the evidentiary hearing was concluded on February 15, 2019. Pursuant to Rule 3.44(c), the record was closed on February 21, 2019. Accordingly, pursuant to Rule 3.22(a), the Motion is ripe for decision.

Rule 3.22(a) of the Commission’s Rules of Practice states in pertinent part:

When a motion to dismiss is made at the close of the evidence offered in support of the complaint based upon an alleged failure to establish a *prima facie* case, the Administrative Law Judge shall defer ruling thereon until immediately after all evidence has been received and the hearing record is closed.

16 C.F.R. § 3.22(a). In evaluating a respondent’s motion to dismiss at the close of the evidence, “the evidence and all inferences reasonably to be drawn therefrom must be viewed in the light most favorable to the complaint.” *In re Uarco, Inc.*, 64 F.T.C. 924, 1964 FTC LEXIS 19, at *26-27 (Feb. 24, 1964).

II.

Patterson first argues that Complaint Counsel failed to make its *prima facie* case because there is no direct evidence of Patterson participating in the alleged agreement not to work with buying groups. Specifically, Patterson asserts that the three interfirm communications in evidence involving Patterson contain no explicit reference to any action to be taken or any reference to any agreement to take any concerted action with respect to buying groups. In addition, Patterson argues that internal Patterson communications do not constitute direct evidence of an alleged agreement because none of the communications expressly references an agreement with Schein and Benco, and each communication requires one or more inferences to conclude that Patterson was a party to an agreement with Schein and Benco. Second, Patterson argues that Complaint Counsel has failed to present circumstantial evidence of the alleged agreement, in the form of parallel conduct, supplemented by plus factors indicating an agreement. Third,

¹ By Order dated December 27, 2018, Complaint Counsel was granted an extension of time to respond to the Motion until January 9, 2019. By Order dated February 1, 2019, in accordance with the December 28, 2018 Commission Order fully staying this matter for the duration of the partial shutdown of the federal government and for an additional five business days thereafter, Complaint Counsel was granted a further extension of time to respond to the Motion by February 6, 2019.

² Rule 3.22(d) allows the filing of a reply, without advance leave of court, when filed in connection with a dispositive motion, such as the instant Motion to Dismiss. *See* 16 C.F.R. § 3.22(d) (“The moving party shall have no right to reply, except for dispositive motions or as otherwise permitted by the Administrative Law Judge or the Commission.”).

Patterson argues the Complaint should be dismissed as moot because Complaint Counsel did not put on any evidence of a need for the relief requested in the Complaint. Specifically, Patterson argues that, by Complaint Counsel's admission, the alleged agreement terminated years ago, and that Complaint Counsel has failed to demonstrate that there is a danger the alleged unlawful conduct will reoccur.

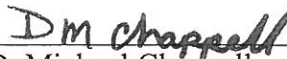
Complaint Counsel argues that it has met its prima facie burden of proving an alleged agreement involving Patterson. Complaint Counsel points to evidence that, according to Complaint Counsel, constitutes direct evidence of Patterson's entering into the alleged agreement. Complaint Counsel also cites evidence that it contends shows both parallel conduct among Patterson, Benco and Schein with respect to buying groups and the existence of various plus factors indicating Patterson's agreement. Complaint Counsel further argues that Patterson's mootness argument fails as contrary to precedent holding that voluntary termination of alleged illegal conduct does not render a complaint moot, and is not a basis for dismissal.

In its Reply, Patterson disputes inferences to be drawn from the evidence presented.

III.

Having considered the positions of the parties, Patterson has failed to demonstrate that the evidence presented is insufficient as a matter of law, and that the Complaint must therefore be dismissed at this time. Accordingly, the Motion is DENIED. The issues raised by the Motion, to the extent they are material to the "issues of fact, law, or discretion presented on the record" (16 C.F.R. § 3.51(c)), and are properly briefed by the parties in their post-hearing briefs, will be addressed in the initial decision. *See, e.g., In re LabMD, Inc.*, 2015 FTC LEXIS 182, at *3, 5 (July 21, 2015); *In re McWane, Inc.*, 2012 FTC LEXIS 174, at *4-5 (Nov. 7, 2012); *In re North Carolina Board of Dental Examiners*, 2011 FTC LEXIS 52, at *7 (March 30, 2011).

ORDERED:


D. Michael Chappell
Chief Administrative Law Judge

Date: February 22, 2019