ORIGINAL

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

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 MEMORANDUM OF LAW IN OPPOSITION TO RESONDENT HENRY SCHEIN, INC.'S MOTION TO COMPEL EXPERT DISCLOSURES

The Court should deny Respondent Henry Schein, Inc.'s Motion to Compel Expert Disclosures ("Motion"). First, Respondent failed to satisfy the meet and confer requirements in Scheduling Order Additional Provision ¶ 4 and Rule 3.22(g) before filing its Motion. This failure alone is reason to deny Respondent's Motion in its entirety. Second, Complaint Counsel's expert, Dr. Robert Marshall, complied with his obligation under both the Part 3 Rules and the Court's Scheduling Order by disclosing both the materials that he considered and relied upon in his expert report. Specifically, Appendix B of Dr. Marshall's expert report identifies the materials that he considered, and as previously relayed to Respondent Schein's counsel, Dr. Marshall relied upon those materials cited in the body and footnotes of his expert report. Dr. Marshall disclosed the required information in his expert report, and Respondent does not dispute this.

Instead, Respondent is moving to compel the discovery of information routinely sought at an expert's deposition. This Motion is particularly inappropriate here because Respondent here has even more time (11 hours) than the Court usually allots for expert depositions to ask Dr. Marshall the questions that they want Complaint Counsel to answer through this backdoor discovery. Indeed, the Expert Report of Dennis W. Carlton, submitted on behalf of Respondent Schein, does not include the very disclosures that Respondent Schein demands from Complaint Counsel in its Motion.

For these reasons, if the Court considers Respondent's Motion on the merits, Respondent's Motion should be denied.

ARGUMENT

I. Respondent Failed To Comply With Its Meet And Confer Requirements Before Filing Its Motion

The Court should deny the Motion because Respondent failed to comply with its meet and confer obligations under Scheduling Order Additional Provision ¶ 4: Respondent unilaterally declared an impasse without responding to questions and concerns that Complaint Counsel raised in the parties' email exchanges. Respondent also did not satisfy the requirements necessary for its Rule 3.22(g) separate signed statement regarding meet and confer requirements. Scheduling Order Additional Provision ¶ 4 requires that "[e]ach motion…be accompanied by a separate signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement." Under Rule 3.22(g), "the required signed statement must also "recite the date, time, and place of each…conference between counsel, and the names of all parties participating in each such conference." Scheduling Order

Additional Provision ¶ 4 makes clear that ***"Motions that fail to include such separate statement may be denied on that ground."***

Here, Respondent's purported Rule 3.22(g) Statement is deficient in two respects. First, Respondent's Rule 3.22(g) Statement does not "recite the date, time, and place of each…conference between counsel, and the names of all parties participating in each such conference" as required by the Rules. Second, Respondent's blanket assertion that it "met and conferred in good faith" fails to acknowledge the fact that the "conferring" entailed nothing more than a few email exchanges.

It is little wonder Respondent did not comply with the meet and confer disclosures requirements: Respondent did not meet and confer. As described in more detail in Section II below, Respondent unilaterally declared an "impasse" after declining Complaint Counsel's invitation to confer telephonically (J. Moy Aug. 29, 2018 3:09 p.m. Email) and ignoring concerns and potential solutions that Complaint Counsel raised (J. Moy Aug. 31, 2018 12:31a.m. Email).[1] Additionally, Respondent filed the Motion even though Complaint Counsel expressed interest in continuing the dialogue (J. Moy Aug, 31, 2018 4:07p.m. Email). Such conduct does not qualify as meeting and conferring in good faith. *See Aponte-Navedo v. Nalco Chem. Co.*, 268 F.R.D. 31, 40-41 (D.P.R. 2010) (finding the moving parties' meet-and-confer certification statement deficient because "only two of the emails were sent by [the moving party], which instead of showing a good faith effort to reach an agreement, only showed [the moving party's] point of view over the objections made.").

Moreover, the Court has previously found that a moving party fails to satisfy its meet and confer obligations by conferring only by email or letter correspondence. *See Laboratory Corporation of America*, Order Denying Complaint Counsel's Motion To Compel Document

[1] Unless otherwise noted, all references to correspondence are to those identified in Exhibit A of the Motion.

Production, Dkt. No. 9345 (Feb. 8, 2011) (J. Chappell) (citing, *inter alia*, *Hozel v. First Select Corp.*, 214 F.R.D. 634, 636 (D. Colo. 2003)); *accord Goodman v. Shalimar Investments, LLC*, No. 414CV00079SEBTAB, 2016 WL 3936048, at *1 (S.D. Ind. Jul. 21, 2016) (finding that an exchange of only four emails without a suggested date, time, or place to resolve the matter does not qualify as a "good faith attempt" to resolve discovery disputes before filing a discovery motion). In these instances, the Court and others identified the moving party's failure to satisfy its meet-and-confer obligations as the sole basis for denying the motions to compel.

Similarly, here, Respondent failed to satisfy the good faith meet-and-confer requirement under Scheduling Order Additional Provision ¶ 4 and did not submit a separate statement complying with Rule 3.22(g). The Court should deny the Motion on these grounds alone.

II. The Court Should Deny Respondent's Motion Because Dr. Marshall Has Complied With His Obligation To Disclose Materials That He Considered And Relied Upon

Even if the Court considers the merits of the Motion, it should be denied. Dr. Marshall and Complaint Counsel have, in fact, complied with the expert report disclosure obligations and identified the materials that Dr. Marshall considered and relied upon in his report. Rule 3.31A(c) sets forth that each expert report shall contain "data, materials, or other information considered by the witness in forming the opinions." Scheduling Order Additional Provision ¶ 19(d) states that the expert report shall include "data or other information relied upon by the expert in forming the opinions."[2]

Here, Appendix B of the Expert Report of Robert C. Marshall, PhD ("Appendix B") provides the list of materials that Dr. Marshall considered in formulating the opinions of his report. Appendix B thus satisfies the disclosure requirements, as Complaint Counsel has

[2] Respondents have failed to identify any requirement in the Rules or Scheduling Order that requires counsel to furnish two separate lists of materials considered and relied upon because this requirement does not exist.

indicated to Respondent's counsel. *See* Aug. 29, 2018 3:09 p.m. Email from J. Moy to A. Fontecilla. Respondent's counsel incorrectly asserts that Appendix B "does not disclose what the *witness* considered." Motion, at 2. To the contrary, Appendix B is clearly titled "Materials Considered," and is prefaced with the statement: **{** [redacted] **}** Declaration of Jessica Moy In Support of Opposition to Motion ("Moy Decl."), Ex. 1 (emphasis added).

Complaint Counsel also satisfied any requirement to identify materials Dr. Marshall *relied upon* (as opposed to *considered*): Complaint Counsel informed Respondents that "Dr. Marshall relied upon the materials cited in the body and footnotes of his report." *See* Aug. 29, 2018 12:47 p.m. Email from J. Moy to A. Fontecilla. Complaint Counsel further explained that "Dr. Marshall provided citations to materials in the body and footnotes of his report to support his opinion. In this sense, he is relying on these materials to support his opinion." *See* Aug. 29, 2018 3:09 p.m. Email from J. Moy to A. Fontecilla. Complaint Counsel invited Respondent's counsel to discuss any concerns, questions, or clarifications about this explanation. *Id.* Respondent declined to call Complaint Counsel to confer about any disagreement or clarification. *See generally*, Motion Exhibit A; *see also* Moy Decl., ¶ 5. But the record is clear: Complaint Counsel explicitly identified the materials Dr. Marshall *relied upon* in preparing his expert report.

Despite this clear and unequivocal record, Respondent's counsel responded with an email posing four convoluted multi-part questions asking Complaint Counsel to identify and distinguish between materials that Dr. Marshall "*himself*" considered or relied upon and those that his staff considered. *See* Aug. 29, 2018 2:30 p.m. Email from A. Fontecilla to J. Moy. Complaint Counsel expressed concern that these questions raised issues related to

"communication and work product shared between expert(s) and persons assisting the expert(s)," which are explicitly protected from disclosure under Scheduling Order ¶19(g)(ii). *See* Aug. 31, 2018 12:31 a.m. Email from J. Moy to A. Fontecilla. Complaint Counsel also suggested that the questions related to work conducted and materials considered by Dr. Marshall and his staff could be a potential topic for Respondent to explore during Dr. Marshall's deposition if the questions do not delve into otherwise privileged materials. *Id.* Complaint Counsel concluded by asking Respondent to identify legal authority indicating a requirement to separate materials that the expert and his staff considered so that we could better understand the basis for Respondent's position. *Id.* Complaint Counsel is unaware of any such authority, nor has Respondent's counsel identified any such authority. Indeed, it bears noting that the Expert Report of Dennis W. Carlton, submitted on behalf of Respondent Schein, identifies materials that Dr. Carlton and his staff *collectively* considered. *See* Moy Decl., Ex. 2, ¶ 6.

Without responding to Complaint Counsel's expressed concerns or any further explanation, Respondent's counsel unilaterally declared an impasse on the issue. *See* Aug. 31, 2018 12:49 p.m. Email from A. Fontecilla to J. Moy. Respondent's counsel filed the Motion despite a response from Complaint Counsel indicating openness to continuing to dialogue about the issue. *See generally* Aug. 31, 2018 Emails Between A. Fontecilla and J. Moy. To date, Respondent's counsel has not identified or provided any legal authority supporting a requirement to separate materials that the expert and his staff considered.[3] *See generally*, Motion and Motion Exhibit A. Nor has Respondent's counsel offered an explanation as to why it is not more appropriate and efficient to ask Dr. Marshall *himself* about the materials that he considered or relied upon in formulating his opinions during Dr. Marshall's deposition. *Id.* Dr. Marshall's

[3] Indeed, courts have declined to draw distinctions between materials considered by expert and staff for purposes of expert report disclosure obligations. *See, e.g., U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, No. 97 CIV. 6124JGKTHK, 2002 WL 15652, at *7-8 (S.D.N.Y. Jan. 7, 2002).

deposition will take place in advance of trial, and Respondent will be able to ask Dr. Marshall himself about the materials that form the basis of his opinions.

As explained above, Complaint Counsel identified the materials that Dr. Marshall considered and relied upon in his expert report in compliance with its obligations under both the Rules and Scheduling Order. Respondent's Motion is an inappropriate attempt to obtain expert discovery through informal email exchanges between the parties' attorneys. The various questions that Respondent's counsel posed in his August 29, 2018 2:30 p.m. email regarding distinguishing materials that expert and staff considered also implicate expert and staff communications and work product protected from disclosure under Scheduling Order 19(g)(ii). The Court should deny this Motion.[4]

III. Conclusion

For the reasons set forth above, the Court should deny the Motion. Respondent failed to satisfy its meet and confer obligations under Scheduling Order Additional Provision ¶ 4 and Rule 3.22(g). In the alternative, the Court should deny the Motion because Dr. Marshall and Complaint Counsel complied with their obligation under both the Rules and Scheduling Order to disclose materials that the expert considered and relied upon in his expert report.

Dated: September 13, 2018

Respectfully submitted,

/s/ Jessica Moy

Jessica Moy
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Attorneys

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[4] Respondent does not claim that it was prejudiced in any way from the information it seeks in its Motion, and it has waived this claim by not raising it in the Motion.

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Counsel Supporting the Complaint

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

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**

DECLARATION OF JESSICA MOY IN SUPPORT OF COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT HENRY SCHEIN, INC.'S MOTION TO COMPEL EXPERT DISCLOSURES

I, Jessica Moy, declare as follows:

1. I am an attorney at the Federal Trade Commission, Complaint Counsel in this matter, and I have entered an appearance as Complaint Counsel in this matter.
2. I submit this Declaration in Support of Complaint Counsel's Opposition to Respondent Henry Schein Inc.'s Motion to Compel Expert Disclosures. I have personal knowledge of the facts stated in this declaration and, if called as a witness, could competently testify to them.
3. Attached hereto as Exhibit 1 is a true and correct copy of page 1 of Appendix B (Materials Considered) to the Expert Report of Robert C. Marshall, PhD that was submitted to Respondents' counsel on August 10, 2018.

4. Attached hereto as Exhibit 2 is a true and correct copy of page 3 of Respondent Schein's Expert Report of Dennis W. Carlton submitted to Complaint Counsel on September 5, 2018.
5. On August 29, 2018, I invited Respondent's counsel to call me if he wanted to discuss questions about the topic of his Motion to Compel Expert Disclosures. I did not receive any subsequent phone calls from Respondent's counsel to meet and confer about the topic of this Motion.
6. Attached hereto as Exhibit 3 is a true and correct copy of *Laboratory Corporation of America*, Order Denying Complaint Counsel's Motion To Compel Document Production, Dkt. No. 9345 (Feb. 8, 2011) (J. Chappell).

Executed on September 10, 2018 in San Francisco, California.

Respectfully submitted,

/s/ Jessica Moy

Jessica Moy

EXHIBIT 1

CONFIDENTIAL – REDACTED IN ENTIRETY

EXHIBIT 2

CONFIDENTIAL – REDACTED IN ENTIRETY

EXHIBIT 3

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

In the Matter of LABORATORY CORPORATION OF AMERICA and LABORATORY CORPORATION OF AMERICA HOLDINGS, Respondents.	DOCKET NO. 9345

ORDER DENYING COMPLAINT COUNSEL'S MOTION TO COMPEL DOCUMENT PRODUCTION

I.

On January 31, 2011, Complaint Counsel filed a Motion to Compel Document Production ("Motion"). Respondents filed an Opposition to the Motion on February 7, 2011 ("Opposition"). For the reasons set forth below, Complaint Counsel's Motion is DENIED.

II.

Complaint Counsel filed its Motion to Compel pursuant to Commission Rules 3.37(b) and 3.38(a), and Additional Provision 4 of the Scheduling Order entered in this case on December 20, 2010. Commission Rule 3.37(b) governs the deadline for responses or objections to requests for documents and Commission Rule 3.38(a) allows a party to apply by motion to the Administrative Law Judge for an order compelling disclosure or discovery. 16 C.F.R. §§ 3.37(b), 3.38(a). Complaint Counsel's Motion to Compel is also subject to the Commission rule governing motions, Rule 3.22, which states in pertinent part:

> [E]ach motion to compel or determine sufficiency pursuant to § 3.38(a) . . . shall be accompanied by a signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. . . . The statement shall recite the date, time, and place of each such conference between counsel, and the

> names of all parties participating in each such conference. Unless otherwise ordered by the Administrative Law Judge, the statement required by this rule must be filed only with the first motion concerning compliance with the discovery demand at issue.

16 C.F.R. § 3.22(g). In addition, Additional Provision 4 of the Scheduling Order requires:

> Each motion (other than a motion to dismiss or a motion for summary decision) shall be accompanied by a signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. Motions that fail to include such statement may be denied on that ground.

Scheduling Order, December 20, 2010, p. 5.

III.

Complaint Counsel states that, on December 28, 2010, it served ten document requests on Respondents which requested Respondents to produce responsive documents by Friday, January 28, 2011. Complaint Counsel further states that on January 28, 2011, Respondents served their Answers and Objections to Complaint Counsel's document requests, but did not serve responsive documents. Complaint Counsel next states that it "tried to meet and confer with counsel for LabCorp before filing this motion by sending an electronic mail stating [its] concerns on the morning of [Sunday,] January 30, 2011." Motion at 2. The e-mail, attached to the Motion, states in pertinent part:

> While we did receive your Answers and Objections . . . , it appears that no documents were produced . . . . Instead, you state that you will be producing documents on a "rolling basis." At the very least, you should be able to produce immediately the primary documents responsive to Request No. 5, as revised . . . . We are available to talk to you about your production at any point this weekend so that we can understand your plans, in particular what production schedule you have in mind. But given the fact that party depositions are set to commence in little more than a week, we will have no choice but to move to compel . . . .

Motion Exhibit D.

Because Respondents had not responded to the January 30, 2011 e-mail, Complaint Counsel says it felt "compelled" to file its motion the following day, Monday, January 31, 2011. Complaint Counsel attaches to its motion what it titled a "Certificate of Conference," asserting that Complaint Counsel "attempted to confer with Respondents' Counsel in an effort in good faith to resolve by agreement the issues raised

by Complaint Counsel's Motion . . . but Respondents' Counsel has not responded to the email sent on January 30, 2011 as of the filing of this motion which we are forced to bring immediately because of the time frames involved in the requested relief."

Respondents argue that Complaint Counsel's Motion is defective because Complaint Counsel failed to confer with Respondents' Counsel as required. Respondents further state that, had Complaint Counsel actually conferred with LabCorp, Complaint Counsel would have known that LabCorp planned to begin its production the week of January 31, 2011 and is committed to prioritizing its production to provide Complaint Counsel with materials for individuals noticed for deposition at least three days prior to those depositions. Moreover, Respondents state, LabCorp has already begun producing documents and is working diligently to respond completely and quickly to the document requests.

Respondents note that although Complaint Counsel advised that it was "available to talk" about Respondents' production schedule "at any point this weekend," Complaint Counsel did not indicate that it needed a response by the next morning, January 31, 2011, or inquire about Respondents' counsel's availability on that day. In fact, Respondents argue, Complaint Counsel did not allow LabCorp even one full day to respond to that e-mail prior to filing its Motion.

IV.

Counsel for parties moving to compel discovery have a duty to make reasonable efforts to confer with opposing counsel before filing a motion to compel. 16 C.F.R. § 3.22(g). One single e-mail to counsel, sent on a Sunday, two calendar days after timely receiving Answers and Objections to the document request, and one calendar day before filing a motion to compel, without awaiting a response to that e-mail, does not constitute a good faith effort to resolve by agreement the issues raised by the motion. Courts have found similar "attempts to confer" insufficient to satisfy conference requirements. *E.g.*, *Hoelzel v. First Select Corp.*, 214 F.R.D. 634, 636 (D. Colo. 2003) ("The rule is not satisfied by one party sending a single e-mail to another party, and particularly not where, as here, the e-mail indicates an intention to file a motion to compel and does not suggest any negotiation or compromise."); *Marsch v. Rensselaer County*, 218 F.R.D. 367, 372 (N.D.N.Y. 2003) ("Where . . . the moving party has sent a single letter to opposing counsel and taken no further steps to confer on the issue, the moving party has not satisfied its duty to make a good faith effort to resolve the dispute before seeking court intervention."); *Williams v. Bd. of County Comm'rs of Unified Gov't of Wyandotte County*, 192 F.R.D. 698, 700 (D. Kan. 2000) (single letter does not satisfy the duty to confer); *Cannon v. Cherry Hill Toyota*, 190 F.R.D. 147, 153 (D.N.J. 1999) (demanding a response to a facsimile the next business day and threatening to move to compel constituted a "token effort" to resolve the dispute without intervention of the court and thus did not meet the good faith meet and confer requirement).

Because Complaint Counsel did not, as required, confer with opposing counsel in an effort in good faith to resolve by agreement the issues raised by its motion, Complaint Counsel has not complied with Rule 3.22(g) and Additional Provision 4 of the Scheduling Order in this case.

V.

Complaint Counsel failed to comply with Rule 3.22(g) and Additional Provision 4 of the Scheduling Order. Accordingly, Complaint Counsel's Motion is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: February 8, 2011

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

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**

[PROPOSED] ORDER DENYING RESONDENT HENRY SCHEIN, INC.'S MOTION TO COMPEL EXPERT DISCLOSURES

Having considered Respondent Henry Schein Inc.'s Motion to Compel Expert Disclosures ("Motion"), Complaint Counsel's Opposition thereto, and all supporting and opposing materials, and the applicable law,

IT IS HEREBY ORDERED that the Motion is **DENIED** in its entirety (1) due to Respondent's failure to satisfy its meet and confer obligations under Scheduling Order Additional Provision ¶ 4 and Rule 3.22(g), or, in the alternative, (2) because Dr. Marshall and Complaint Counsel complied with their obligation under both the Rules and Scheduling Order to disclose materials that Dr. Marshall considered and relied upon in his expert report.

ORDERED:

Dated: _____ _____

D. Michael Chappell,
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 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
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Washington, DC 20580

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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I further certify that I delivered via electronic mail a copy of the foregoing document to:

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CERTIFICATE FOR 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 document that is available for review by the parties and the adjudicator.

September 13, 2018

By: *s/* Jessica Moy
Attorney