PUBLIC

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 MOTION TO PLACE THE UNREDACTED COMPLAINT ON THE PUBLIC RECORD

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Counsel Supporting the Complaint

Dated: March 5, 2018

Please take notice that Complaint Counsel respectfully moves for an order placing an unredacted version of the Complaint on the public record. The current public version of the Complaint redacts two categories of information:

(1) Names and titles of Respondents' executives alleged in paragraphs 33-35, 37, 39, 41, 43, 45-51, 54-60, 63-64, and 71 of the Complaint; and

(2) Names of third party entities alleged in paragraphs 35, 41-50, 57, 58, 60 of the Complaint.

By this Motion, Complaint Counsel seeks the removal of all redactions in the Complaint because the redacted information is not confidential, the public's interest is best served by having open access to the unredacted Complaint, and Respondents would not be harmed by the disclosure of publicly available information. Respondents object to the disclosure of their executives' names and titles, but they do not object to the removal of third party redactions.

Dated: March 5, 2018

Respectfully submitted,

/s/ Lin W. Kahn

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MEMORANDUM OF LAW IN SUPPORT OF COMPLAINT COUNSEL'S MOTION TO PLACE THE UNREDACTED COMPLAINT ON THE PUBLIC RECORD

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I. INTRODUCTION

The Complaint in this matter alleges a conspiracy between Benco, Schein, and Patterson ("Respondents") to prevent the decline of prices threatened by the rise of buying groups. The Complaint quotes communications between Respondents' executives regarding the alleged conspiracy. Respondents concede that the contents of these communications are not confidential or sealable, and permitted Complaint Counsel to disclose these communications in the current public version of the Complaint. Respondents claim, however, that the names and titles of the executives involved in the communications should be sealed because they constitute confidential "competitively sensitive information" or "sensitive personal information" under the Protective Order. Respondents further claim that this information should remain redacted to avoid embarrassment and disruption to their businesses.

Contrary to Respondents' position, the names and titles alleged in the Complaint are not confidential, sealable information. The identities of these top executives are publicly available and well known. Most of the executives at issue have already been identified in the public filings of various federal court antitrust lawsuits against Respondents. The public filings not only disclose the executives' names and titles, but also disclose that these executives engaged in many of the communications alleged in the Complaint. It is no surprise that this information was not sealed in the federal court cases. The fact that Respondents' executives are alleged to have communicated with their competitors to coordinate a response to an industry threat can neither be construed as "competitively sensitive" nor "sensitive personal" information.

Moreover, given that Respondents concede the underlying communications are not confidential, there can be no claim of confidentiality over the identities of the executives involved. Further undermining any claim of confidentiality, the executives themselves did not

hide their identities from their competitors in the course of carrying out the alleged conspiracy. Thus, preserving Respondents' redactions leads to the absurd result of preventing the public from accessing information already in the hands of Respondents' competitors. Rather than protecting confidential business or personal information, sealing the executives' identities only serves to further the secrecy of the alleged conspiracy, conceal pertinent facts from the public, and interfere with Complaint Counsel's day-to-day litigation of this case.

Complaint Counsel also respectfully requests removal of the redactions of third parties' names in the Complaint, which Respondents do not oppose. Thus, the Court should place a fully unredacted version of the Complaint in the public record.

II. FACTUAL BACKGROUND

As alleged in the Complaint, Respondents Benco, Schein, and Patterson are dental products distributors, collectively controlling more than 85% of the market. Compl. ¶¶ 2, 30. The Complaint alleges that Respondents conspired to refuse to offer discounted prices to entities known as buying groups, or group purchasing organizations ("GPOs"), that seek to obtain supply agreements on behalf of independent dentists. Compl. ¶¶ 1, 3. The Complaint quotes inter-firm communications between Respondents' executives regarding buying groups, as well as internal company emails evidencing coordinated action between the three distributors. Respondents have raised no confidentiality concerns regarding the substance of these communications, which they allowed to be placed in the public record. These communications are at the heart of this conspiracy case, and the executives involved will be called as witnesses at trial.

Despite Respondents' position on the contents of the communications, they object to the disclosure of the names and titles of the executives involved in those communications. For

example, Respondents seek to seal the names/titles of the executives involved in the following exchange:

- **Benco**: "Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups . . . and our team understands that policy." Compl. ¶ 37.
- **Patterson**: "Thanks for the heads up. I'll investigate the situation. We feel the same way about these." Compl. ¶ 39.

The names and titles of the executives who engaged in this communication are already in the public filings of a federal court litigation.[1] Similarly, Respondents seek to seal the executives involved in the following exchange:

- **Benco to Schein**: "Did some additional research . . . . [I]t's not a buying group . . . . We're going to bid." Compl. ¶ 45.

In addition, Respondents object to the disclosure of the names and titles of executives who sent internal company communications relevant to the conspiracy, such as:

- **Patterson**: "We don't need GPO's in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry." Compl. ¶ 51.

The executive who made this statement has also been identified in public filings.[2]

Not only do Respondents seek to seal the identities referenced in their own documents, but they also seek to seal names mentioned in their ***competitors'*** internal documents. For example, paragraphs 35 and 56 of the complaint contain quotes of internal Benco documents that reference the executives of Schein and Patterson. Benco does not object to the disclosure of the quoted statements, yet Schein and Patterson take the position that their executives' names should be redacted. Compl. ¶ 35 ("Better tell your buddy [REDACTED] to knock this shit off.");

[1] *SourceOne Dental, Inc. v. Patterson Co., Inc.*, No. 2:15-cv-05440-BMC-GRB, Doc. 216, at 4 (E.D.N.Y. Dec. 1, 2017) (Plaintiff's Opposition to Defendants' Motion for Summary Judgment).
[2] *Id.* at 6.

Compl. ¶ 56 ("[M]aybe what you should do is make sure you tell [REDACTED] and [REDACTED] to hold their positions as we are.").

III. ARGUMENT

A. The Complaint Can Only Be Redacted to Protect Confidential Material, As Defined by the Protective Order.

There is a strong presumption in favor of open access to all aspects of Commission proceedings, including "any document filed in the record of an adjudicative proceeding." *In re Detroit Auto Dealers Ass'n, Inc.*, No. 9189, 1985 FTC LEXIS 90, at *3 (June 7, 1985); *see also In re H. P. Hood & Sons, Inc.*, No. 7709, 1961 FTC LEXIS 368, at *5-8 (Mar. 14, 1961). The Protective Order permits pleadings to be filed *in camera* if they contain confidential material. Protective Order ¶ 9. The Order provides that the designation of confidentiality shall constitute counsel's good faith representation that the information is not already in the public domain and that the material constitutes confidential material as defined in Paragraph 1 of the Order. *Id.* at ¶ 5. Paragraph 1 defines confidential material as documents that contain privileged, competitively sensitive information, or sensitive personal information. *Id.* at ¶ 1. Pursuant to the Protective Order, this Court has permitted the redaction of confidential information, such as revenue information and customer lists, but has rejected attempts to redact non-confidential information. *See, e.g., In re LabMD, Inc.*, No. 9357, 2013 WL 5232774, at *3 (Sept. 10, 2013); *In re ECM BioFilms, Inc.*, No. 9358, 2014 FTC LEXIS 16, at *8-9 (Jan. 14, 2014). Given that the complaint is the "foundation of a lawsuit," courts have routinely established a high bar for sealing pleadings. *E.g., In re Google Inc. Gmail Litig.*, 2013 U.S. Dist. LEXIS 138910, at *10-11 (N.D. Cal. Sept. 25, 2013).

B. The Names and Titles of Respondents' Executives Are Not Confidential.

Here, the names and titles of Respondents' executives are publicly available and easily

accessible, including through Respondents' websites, LinkedIn profiles, and industry publications. Respondents do not claim that this information alone is confidential or sealable. Rather, their claim arises solely from the association of the names and titles with the communications quoted in the Complaint. But because Respondents do not claim that the underlying communications are confidential, it follows that the names and titles of the executives involved should not be treated as confidential. The names and titles cannot become confidential merely by being associated with non-confidential, publicly available communications. Moreover, the public filings in the federal court antitrust litigations have already disclosed the executives who engaged in many of the communications alleged in the Complaint.[3]

C. The Executive Names and Titles Are Not "Competitively Sensitive Information."

Respondents argue that the names and titles are "competitively sensitive" under the Protective Order because disclosure would interfere with the executives' ability to do their jobs. Respondents' interpretation of the term "competitively sensitive" would eviscerate the Commission's ability to make public any records of any adjudicative proceeding. This is not the appropriate definition.

"Competitively sensitive information" has been defined as "information that has economic value from not being generally known, and that has been the subject of reasonable efforts aimed at secrecy, and the disclosure of which is likely to result in a clearly defined and very serious injury to the designating party by providing a competitor with information that would give it a competitive advantage in ongoing or reasonably foreseeable competitions." *Lockheed Martin Corp. v. Boeing Co.*, No. 6:03-cv-796-Orl-28KRS, 2005 U.S. Dist. LEXIS

[3] *See, e.g.*, *SourceOne Dental, Inc. v. Patterson Co., Inc.*, No. 2:15-cv-05440-BMC-GRB, Doc. 216 (E.D.N.Y. Dec. 1, 2017) (Plaintiff's Opposition to Defendants' Motion for Summary Judgment); *In re Dental Supplies Antitrust Litig.*, No. 1:15-cv-00696-BMC-GRB, Doc. 116 (E.D.N.Y. Oct. 22, 2016) (Second Consolidated Class Action Complaint).

44820, at *13-14 (M.D. Fla. Jan. 26, 2005); *see also FTC v. Advocate Health Care Network*, 162 F. Supp. 3d 666, 671 (N.D. Ill. 2016).

As these cases illustrate, the purpose of sealing competitively sensitive information is to prevent a party's ***competitors*** from gaining confidential information, not to prevent the public's access to information that a party's competitors already possess. Here, the executives communicated with their competitors and made no efforts to hide their identities in the course of those communications. The executives' names and titles are thus the antithesis of competitively sensitive information.

D. The Executive Names and Titles Are Not "Sensitive Personal Information."

The Protective Order defines "sensitive personal information" to include Social Security number, taxpayer identification, financial account information, and sensitive health information. Protective Order ¶ 1. While not exhaustive, the Protective Order's definition relates solely to non-public personal information, the disclosure of which would cause tangible personal harm in any context. Publicly available executive names and titles are not the types of personal, private information meant to be protected by the Order. *See, e.g., The North Carolina Bd. of Dental Exam'r*, No. 9343, 2011 WL 2160773, at *4 (May 16, 2011) (an individual's name and business address do not constitute sensitive personal information); *Lytle v. JPMorgan Chase*, 810 F. Supp. 2d 616, 630 (S.D.N.Y. 2011) (refusing to seal individuals' names because the disclosure of names does not implicate privacy interests sufficient to overcome the presumption of public access); *Skky, LLC v. Facebook, Inc.*, 191 F. Supp. 3d 977, 980-81 (D. Minn. 2016) (refusing to seal employee names because they do not constitute sensitive information).

E. The Public's Interest is Best Served by Disclosure of The Names and Titles of Respondents' Executives.

Sealing patently non-confidential information from a complaint runs counter to the FTC's

goal of holding publicly open adjudicative proceedings. The names and titles of the executives involved in the alleged conspiracy are pertinent to the allegations in the Complaint. Redacting this information obscures the misconduct at the core of this case. Moreover, preserving the redactions interferes with the day-to-day aspects of litigating this case. Sealing the names and titles makes it logistically cumbersome to discuss the individuals at the center of the alleged conspiracy at hearings. It also disrupts Complaint Counsel's dealings with potential third party witnesses, as it would bar Complaint Counsel from revealing the identities of the relevant executives. Moreover, sealing this information would force the parties to take extra steps to hide the identities of key executives in every subsequent filing.[4]

F. Disclosure Would Not Harm Respondents.

Because the executive names and titles as alleged in the Complaint are neither confidential, competitively sensitive, nor personally sensitive, disclosure of this information would not harm Respondents. Harm is particularly unlikely because many of the executives' names and titles have already been identified in federal court filings. Any harm to Respondents would have resulted from the totality of the allegations in the Complaint, not from the disclosure of specific names and titles.

More importantly, Commission precedent and federal court cases have held that embarrassment, harm to reputation, and disruption to business are insufficient grounds for withholding information from the public. *Hood*, 1961 FTC LEXIS 368, at *14 ("Quite clearly the mere embarrassment of the movant should not foreclose public disclosure."); *Lytle*, 810 F. Supp. 2d at 628-29 (rejecting request to seal names where movant claimed disclosure would

[4] For all of the above reasons, the need for disclosure is important even though the executives are not personally named as respondents in the Complaint.

cause individuals embarrassment and stress, and would cause an adverse impact on their employment); *Jewitt v. IDT Corp.*, 2004 U.S. Dist. LEXIS 32639, at *14-15 (D.N.J. Aug. 6, 2004) (refusing to seal names identified in the complaint where movant claimed disclosure would be detrimental to movant's business); *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) ("[T]he mere fact that the production of documents may embarrass, incriminate or create further litigation for a party is not enough to compel a court to seal the documents.). Consistent with this, the Protective Order does not contemplate redactions to pleadings based on embarrassment or disruption to business. Protective Order ¶ 9.

G. Rule 4.10 Does Not Support Sealing the Executives' Names and Titles.

During the meet and confer, Respondents' counsel argued that Rule 4.10(a) allows for the sealing of the executive names. But Rule 4.10(a) sets forth the records that the Commission may withhold pursuant to the FOIA statute, not the standard for redacting information from a complaint in adjudicative proceedings. The FTC Act "provides inherent authority for disclosure of information in the course of adjudicative proceedings." *In re General Foods Corp.*, No. 9085, 1980 FTC LEXIS 99, at *4 (Mar. 10, 1980). Nor does 4.10(g), which requires notice to Respondents and an opportunity to seek a protective order prior to disclosure of materials obtained by the Commission through compulsory process, support sealing the names/titles. Complaint Counsel provided Respondents such an opportunity, but Respondents failed to seek such an order.

H. Third Party Redactions Should Be Removed.

The Complaint does not contain any confidential information regarding third parties, but Complaint Counsel provisionally redacted the names of third parties to allow time to give notice. Complaint Counsel has now done so and received no objections from three of the four entities. Declaration of Lin W. Kahn ("Kahn Decl."), ¶¶ 3-4. The fourth entity does not appear to be in

operation today and Complaint Counsel has been unable to reach anyone involved. *Id.* at ¶ 5. Because the Complaint does not allege any confidential information, the redactions should be removed. Respondents do not oppose the motion to remove the third party redactions. *Id.* at ¶ 6.

IV. Conclusion

For the foregoing reasons, a fully unredacted version of the Complaint should be placed on the public record.

March 5, 2018

Respectfully submitted,
s/ Lin W. Kahn

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COMPLAINT COUNSEL'S CERTIFICATION CONCERNING MEET AND CONFER

The undersigned counsel certifies that Complaint Counsel conferred with Respondents' counsel in a good faith effort to resolve by agreement the issues raised by Complaint Counsel's Motion to Place the Unredacted Complaint on the Public Record by telephone on February 26 and 27, 2018. Complaint Counsel met and conferred again with counsel for Patterson on March 2 and 5, 2018. Respondents' indicated they would not oppose Complaint Counsel's request to remove third party redactions, but the parties have been unable to reach an agreement on the redactions as of the names and titles of Respondents' executives.

Dated: March 5, 2018

Respectfully submitted,

s/ Lin W. Kahn

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In the Matter of	
BENCO DENTAL SUPPLY CO., **a corporation,**	**DOCKET NO. 9379**
HENRY SCHEIN, INC., **a corporation, and**	**PUBLIC**
PATTERSON COMPANIES, INC., **a corporation.**	

[PROPOSED] ORDER GRANTING COMPLAINT COUNSEL'S MOTION TO PLACE THE UNREDACTED COMPLAINT ON THE PUBLIC RECORD

On March 5, 2018, Complaint Counsel submitted a Motion to Place the Unredacted Complaint on the Public Record. Having carefully considered Complaint Counsel's Motion to Place an Unredacted Complaint on the Public Record, Respondents' Opposition thereto, and all supporting and opposing materials, and the applicable law, it is hereby

ORDERED that Complaint Counsel's Motion to Place an Unredacted Complaint on the Public Record is GRANTED, and it is hereby

ORDERED that a fully unredacted Complaint shall be placed on the public record.

ORDERED:

Dated: _____

_____

D. Michael Chappell

Chief Administrative Law Judge

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,	**Docket No. 9379**
HENRY SCHEIN, INC., a corporation, and	**PUBLIC**
PATTERSON COMPANIES, INC., a corporation,	
Respondents.	

DECLARATION OF LIN W. KAHN

1. I am an attorney for the Federal Trade Commission and Complaint Counsel in this proceeding. I have personal knowledge of the facts set forth in this declaration, and if called as a witness I could and would testify competently under oath to such facts.
2. The public version of the Complaint in the above-captioned matter contains references to multiple third parties. The Complaint does not allege any confidential information received from any of the third parties. Out of an abundance of caution, however, we provisionally redacted the names of four entities referenced in the Complaint to allow us time to give notice to these parties.
3. On February 21, 2018, I contacted the entity identified in paragraphs 42-45, 47-50 of the Complaint and the entity identified in paragraph 41 of the Complaint to give them notice and an opportunity to object to the disclosure of their names. These two entities gave their

consent to the disclosure of their names.

4. On February 22, 2018, my colleague contacted the entity named in paragraphs 35, 57, 58, 60, of the Complaint, which also gave its consent to the disclosure of its name.
5. I have not been able to locate the contact information for the entity identified in paragraph 46 of the Complaint, and it does not appear that the entity is still in operation today. On February 23, 2018, I contacted an individual that was likely associated with the entity, but he has not responded to my repeated inquiries.
6. Respondents' counsels informed me on February 27, 2018 that they will not object to the removal of the third party redactions.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 5th day of March, 2018, in San Francisco, California.

Respectfully submitted,

s/ Lin W. Kahn

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2018, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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The Honorable D. Michael Chappell
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I further certify that I delivered via electronic mail a copy of the foregoing document to:

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Counsel For Respondent Patterson Companies, Inc.

March 5, 2018

By: *s/* Lin 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.

March 5, 2018

By: *s/* Lin Kahn
Attorney