

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK**

In re DENTAL SUPPLIES ANTITRUST LITIGATION	No. 1:16-CV-00696-BMC-GRB  ALL CASES
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**DECLARATION OF ERIC L. CRAMER, ESQ. IN SUPPORT OF PLAINTIFFS’  
MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT,  
FOR CERTIFICATION OF A CLASS FOR SETTLEMENT PURPOSES, FOR  
APPOINTMENT OF CLASS COUNSEL, AND TO ISSUE APPROPRIATE NOTICE TO  
THE CLASS**

I, Eric L. Cramer, declare as follows:

1. I am a managing shareholder of the law firm of Berger Montague PC. The Court has appointed my firm as one of four Interim Co-Lead Class Counsel (“Class Counsel”) in this case. I submit this declaration in support of Plaintiffs’ Motion for Preliminary Approval of Class Settlement, for Certification of Class for Settlement Purposes, for Appointment of Class Counsel, and to Issue Appropriate Notice to the Class. I have personal knowledge of the information set forth in this declaration.

2. Attached as Exhibit A is a true and correct copy of the proposed Stipulation and Agreement of Settlement (the “Settlement” or “Agreement”) between Plaintiffs Arnell Prato, D.D.S., P.L.L.C., d/b/a/ Down to Earth Dental, Evolution Dental Sciences, LLC, Howard M. May, DDS, P.C., Casey Nelson, D.D.S., Jim Peck, D.D.S., Bernard W. Kurek, D.M.D. and Larchmont Dental Associates, P.C., and Keith Schwartz, D.M.D., P.A. (together, “Plaintiffs”), on behalf of a proposed class of similarly situated direct purchasers of Dental Supplies and

dental equipment<sup>1</sup> (the “Settlement Class” or “Class”),<sup>2</sup> on the one hand, and Defendants Henry Schein, Inc., Patterson Companies, Inc., and Benco Dental Supply Company (together, “Defendants”) (together with Plaintiffs, “the Parties”), on the other.

3. Attached as Exhibit B is a true and correct copy of the long-form Notice that Plaintiffs propose to disseminate to the Class.

4. Attached as Exhibit C is a true and correct copy of the short-form Notice that Plaintiffs propose to disseminate to the Class.

5. Attached as Exhibit D is a true and correct copy of the Declaration of Jeanne C. Finegan, Apr, Concerning Ability to Provide Adequate Notice to Settlement Class Members Through Direct Notice Methods and Proposed Multi-Media Notice Program.

6. Attached as Exhibit E is a true and correct copy of the Declaration of James T. McClave, Ph.D. Concerning Proposed Dental Litigation Settlement Allocation Plan.

7. Attached as Exhibit F is a true and correct copy of the escrow agreement between Class Counsel and the proposed Escrow Agent, The Huntington National Bank.

### **Litigation Background**

8. In drafting the complaints at the outset of this litigation, Class Counsel extensively investigated the alleged Conspiracy (the “Conspiracy”) and its effects, including, *inter alia*, reviewing materials from related litigation, researching the applicable law with respect

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<sup>1</sup> Dental Supplies and dental equipment are collectively referred to herein, and in the Settlement, as “Dental Products.” *See* Ex. A (Settlement) at Sec. II ¶ 10. Dental Supplies are defined as consumable Dental Products used by dentists and dental laboratories, sometimes referred to as sundries or merchandise, and include items such as gloves, hand instruments, face masks, toothbrushes, anesthetic solutions, and the like. *Id.* at ¶ 11. Dental equipment includes non-consumable Dental Products used by dentists and dental laboratories that include imaging devices, dental chairs, and CAD/CAM systems. *See* Second Consolidated Class Action Complaint (“SCCAC”), ECF No. 114, at ¶ 36.

<sup>2</sup> The proposed Class is defined in the Settlement (Ex. A) at Sec. 3 ¶ 1.

to the claims asserted in the Action and the potential defenses, and consulting with industry experts.

9. Plaintiffs filed their first Consolidated Class Action Complaint (“CCAC”) on February 26, 2016, alleging that since at least August 31, 2008, Defendants and co-conspirator Burkhart Dental Supply Co. (“Burkhart”) engaged in a long-running Conspiracy in the market for the distribution of Dental Supplies and equipment which encompassed an alleged overarching agreement to suppress price competition, by coordinating, among other ways: (a) directly, through interfirm communications, and indirectly, through dental manufacturers and a third-party data collection company, to impose artificially inflated gross margin levels and monitor and enforce those levels; (b) directly and indirectly to prevent and restrain competition by boycotting, refusing to deal with, and jointly pressuring manufacturers not to deal with entities that threatened margin erosion such as group purchasing organizations, Amazon.com, and low-cost distributors; and (c) directly to restrict the movement of customers from one Defendant to another by limiting the hiring of each other’s sales representatives and restricting new hires from soliciting prior clients.

10. The discovery process in this case included the production of more than 600,000 documents by Defendants, and the productions of hundreds of thousands of additional documents by third parties. Defendants deposed all seven of the named Plaintiffs in the case, and Plaintiffs conducted nearly 100 depositions of Defendant and third-party witnesses.

11. Discovery issues related to Defendants’ productions of transactional data were also substantial. Defendants’ final combined data productions included more than 900 million transactional records and more than 1 terabyte of data.

12. Fact discovery spanned eighteen months, beginning on February 9, 2016, just before Plaintiffs filed the CCAC, and continuing until August 10, 2017. *See* ECF No. 209.

13. Expert discovery was similarly extensive. Plaintiffs served four expert reports from their two expert witnesses (Dr. James McClave (an econometrician) and Prof. John Solow (an economist)). Defendants served expert reports from four separate experts. Plaintiffs deposed all four of Defendants' experts and defended depositions of Plaintiffs' experts.

14. Plaintiffs filed their Motion for Class Certification on February 22, 2018. ECF No. 263. Defendants filed memoranda in opposition to the Motion for Class Certification as well as *Daubert* motions to exclude the opinions of both of Plaintiffs' expert witnesses, Dr. McClave and Dr. Solow. ECF Nos. 272, 274. Defendants' motions argued, among other things, that: (1) the evidence does not support Plaintiffs' allegations that Defendants had conspired to restrain trade, and that Plaintiffs' evidence could not show a single overarching conspiracy; (2) Plaintiffs cannot demonstrate common impact and classwide damages because prices and margins for dental supplies were supposedly highly variable; (3) individualized inquiries are purportedly required to determine whether each Class member was overcharged; and (4) Dr. McClave's models used invalid benchmarks and had certain other statistical flaws, rendering them unreliable for purposes of demonstrating common impact and classwide damages. *Id.*

15. From the outset of the litigation, Co-Lead Counsel coordinated with counsel for the plaintiff in the related action *SourceOne Dental, Inc. v. Patterson Companies, Inc., et al.*, No. 15-cv-5440. Co-Lead Counsel also coordinated with counsel for Archer and White Sales, Inc. ("Archer & White") (a low-cost distributor alleging that Defendants' conduct impaired its ability to compete, *see Archer and White Sales, Inc. v. Henry Schein, Inc., et al.*, No. 12-cv-00572-JRG (E.D. Tex.)); and the Federal Trade Commission ("FTC") in its investigation of Defendants'

allegedly anticompetitive conduct and subsequent administrative action. Defendants have denied the allegations in all of these cases. Co-Lead Counsel obtained all discovery materials that were produced in the *SourceOne* action and coordinated with SourceOne's counsel throughout the discovery process to avoid duplicative document requests and depositions. Co-Lead Counsel similarly coordinated on discovery issues with counsel for Archer & White. Plaintiffs obtained numerous discovery materials from Archer & White. Co-Lead Counsel also consulted with the FTC regarding discovery in the FTC's related investigation into Defendants' conduct, including regarding issues relating to Defendants' document and data productions. The FTC action, in which trial before an administrative law judge began on October 16, 2018, alleges some of the same conduct alleged by Plaintiffs here.

### **Settlement Discussions**

16. The Parties discussed the possibility of settlement intermittently throughout the course of this litigation.

17. On February 23, 2018, the Parties attended a mediation before the Honorable Diane Welsh, a highly respected mediator and former United States Magistrate Judge for the Eastern District of Pennsylvania. The Parties prepared extensive mediation statements in advance of the mediation. Both sides vigorously negotiated their respective positions. Although no agreement was reached at the mediation, the Parties continued their settlement discussions in the following months.

18. On August 16, 2018, just before the scheduled hearing on Defendants' motion to exclude the opinions of Dr. McClave, the Parties reached an agreement in concept for a proposed classwide settlement. The Parties informed the Court of that agreement in the Court's chambers.

19. After the Parties preliminarily agreed on the dollar amount of the Settlement, they continued to negotiate the specifics of the Settlement for an additional six weeks.

20. At all times when the Settlement was being negotiated, Class Counsel had extensive knowledge of the case record and the Dental Products industry, resulting from nearly three years of litigating the case. The settlement negotiations were accompanied by frank discussions of the relative strengths and weaknesses of the Parties' claims and defenses.

21. Plaintiffs' and Class Counsel's negotiations were informed by the assistance of their expert econometrician, Dr. McClave, and his consulting firm, Info Tech, Inc.

22. The Parties executed the Settlement Agreement on September 28, 2018. The Parties informed the Court of the Settlement in writing on the same day.

23. Plaintiffs Arnell Prato, D.D.S., P.L.L.C., d/b/a/ Down to Earth Dental, Evolution Dental Sciences, LLC, Howard M. May, DDS, P.C., Casey Nelson, D.D.S., Jim Peck, D.D.S., Bernard W. Kurek, D.M.D., Larchmont Dental Associates, P.C., and Keith Schwartz, D.M.D., P.A have all indicated to Class Counsel they support the Settlement and that they believe it is an excellent result for the Class.

### **The Proposed Settlement Class**

24. Based on the data produced by Defendants and Burkhart, Dr. McClave estimates that there are approximately 200,000 members in the Settlement Class, including approximately 155,000 non-corporate purchasers of Dental Supplies, 35,000 corporate purchasers of Dental Supplies, and 10,000 Class members that only purchased dental equipment and did not purchase Dental Supplies. *See* Ex. E. at ¶ 2. However, because it is difficult to identify duplicate entries (including, *e.g.*, Class members who may have purchased from multiple Defendants under slightly different names), Dr. McClave believes that these estimates are likely inflated, and that

the total number of Class members in each of the above categories, while still substantial, are somewhat lower. *Id.*

### **The Allocation Plan**

25. The Plan of Allocation allocates 99.25% of the Net Settlement Fund to Group 1; and 0.75% to Group 2. *Id.* at ¶ 4. These percentages are due to the relatively small fraction of revenue associated with Dental Equipment-only purchasers (approximately 1.8%), and the lower overcharge estimate for equipment (approximately 40% of the estimated overcharge on Dental Supplies). *Id.*

26. Both the Plan of Allocation and the Notice Plan were prepared by Class Counsel with the aid of an experienced Settlement Administrator, Heffler Claims Group. Plaintiffs' expert econometrician, Dr. McClave, also assisted Class Counsel in the preparation of the Plan of Allocation. *See id.*

27. The proposed Settlement Administrator, Heffler Claims Group, is a highly respected claims administration group with more than 50 years of experience administering class action settlements. *See* <https://www.hefflerclaims.com/about/differentiators/>. Heffler Claims Group was recently recognized as a top service provider in *The Legal Intelligencer's* 2018 "Best of" survey in the category of Claims Administration. *See* <https://www.hefflerclaims.com/heffler-claims-group-named-a-top-claims-administrator-by-the-legal-intelligencer/>. Further, the same team of notice and administration experts that handled these functions in the *Air Cargo* matter are now with Heffler Claims Group and are working with Class Counsel on this case.

28. The Plan of Allocation proposes the distribution the Settlement Fund, net of Court-approved attorneys' fees, reimbursed costs, incentive awards to the named Plaintiffs, and appropriate taxes and costs of administration (the "Net Settlement Fund") on a *pro rata* basis

based on the purchases, in dollars, made by Class members making claims (“Claimants”) during the Class Period. The Claimants will be broken into two main groups: “Group 1,” consisting of Claimants who have some Dental Supplies purchases; and “Group 2,” consisting of Claimants who only have Dental Equipment purchases. Ex. E at ¶ 3. Within each Group, the Claimants will be divided into two segments: private practices and labs (“Private Dental Practices”), on the one hand, and corporate practices (“Corporate Dental Practices”), which are also commonly referred to as DSOs, on the other. *Id.* According to Dr. McClave’s analysis, Corporate Dental Practices were relatively insulated from the challenged conduct, and thus the harm each incurred from each purchase is less than that incurred for each private purchase.<sup>3</sup> The Plan proposes, therefore, to weight private purchases substantially more than corporate in computing *pro rata* shares. The proposed Settlement Class includes direct purchasers of dental equipment as well as Dental Supplies.

29. According to Dr. McClave’s analysis, the purchases of the Class Members in Group 2 (Class members that purchased Dental Equipment but not Dental Supplies) account for approximately 1.8% of the total revenue associated with all Class Member purchases. Ex. E at ¶ 4.

30. According to Dr. McClave’s analysis, the revenue-weighted estimate for Dental Equipment damages to Private Dental Practice purchasers during the Class Period is approximately 7.6%, and the revenue-weighted damage estimate for Corporate Dental Practice purchasers is approximately 0.24%. *Id.* at ¶ 6.

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<sup>3</sup> See Expert Report of Dr. James T. McClave, September 19, 2017, at 2 n.1 (“My statistical analysis suggests that DSOs may have escaped some or all of the impact of the anticompetitive conduct alleged herein, as pricing to DSOs appears to have been more competitive, other factors being equal, than pricing to private dental practices and laboratories.”).

**The Notice Plan**

31. The Notice Plan provides for widespread direct mailed notice and published notice, robust media coverage, and a comprehensive settlement website. *See* Ex. D at ¶ 13. Plaintiffs already have the names and contact information for all or nearly all of the Class members from the data produced by Defendants and Burkhart, which will enable the Settlement Administrator to efficiently and accurately mail short-form notice to all Class members in those databases. For purposes of efficiency and to limit expenses associated with administering the Notice Plan, Plaintiffs propose to mail a short-form notice form to all Class members in those databases, and that such forms will reference the long-form notice, direct recipients to the settlement website, and include a toll-free phone number for Class members to call with any questions. *Id.* Long-form notices will be mailed upon request, and Class members can request mailed materials through the settlement website as well as the toll-free number. *Id.*

32. I, as one of the Co-Lead Counsel, support the Settlement and see it as an excellent result for the Class.

33. I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 12, 2018, in Philadelphia, PA.

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