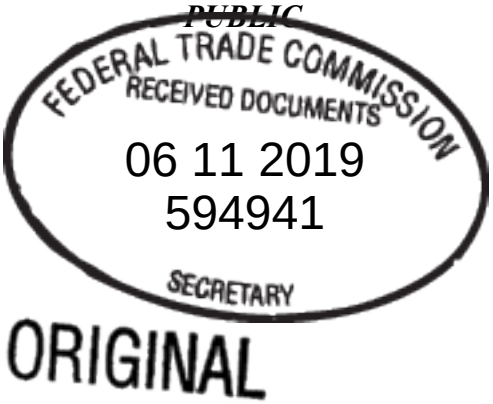
PUBLIC



ORIGINAL

The Federal Trade Commission
Office of the Administrative Law Judge

In the matter of:	)	
Benco Dental Supply Co., a corporation,	)	Docket No. 9379
	)	Judge Chappell
Henry Schein, Inc., a corporation, and	)	
Patterson Companies, Inc., a corporation,	)	
Respondents.	)	

HENRY SCHEIN'S POST-TRIAL REPLY BRIEF

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[1] Unless otherwise noted, all emphasis added and internal citations and quotation marks omitted. Schein's Reply Brief uses the following citing conventions: Complaint Counsel's Post-Trial Brief ("CC Br.") and Proposed Findings of Fact ("CCFF"); Schein's Post-Trial Brief ("S. Br.") and Proposed Findings of Fact ("SF"); Respondents' Joint Findings of Fact ("JF") and Conclusions of Law ("RCL"); Schein's Portion of Respondents' Reply Findings of Fact ("SRF"); Patterson's Post-Trial Brief (P.Br.); Benco's Post-Trial Brief ("B.Br."); Complaint Counsel's Exhibits ("CX") and Demonstratives ("CXD"); Respondents' Exhibits ("RX") and Demonstratives ("RXD").

OTHER AUTHORITIES

I. INTRODUCTION

Complaint Counsel's post-trial brief is an exercise in speculation, innuendo, and fabrication. It trots out facts as Complaint Counsel wishes they were, not as they are.

In Schein's post-trial brief and proposed findings of fact, we explained that Complaint Counsel's case against Schein is very different from their case against Patterson and Benco. It is different because Schein behaved differently. Like Burkhart, Schein did not engage with Benco's unsolicited communications about buying groups. And like Burkhart, Schein continued doing business with buying groups, just as it had done for well over a decade.

Of course, Schein was careful with its buying group relationships. It had good reason to be skeptical of the benefits buying groups purported to bring and concerned about the damage they could cause. So, Schein pursued a deliberate, rational, and unilateral strategy to embrace those buying groups that could "drive compliance" and avoid those that could not. This selective approach differed greatly from Benco's "No. Never. Ever. Amen" / "Not no. Hell no" buying group policy. It was also nothing like Patterson's consistent, immediate, almost knee-jerk rejection of buying group opportunities.

Complaint Counsel says their case "comes down to [the] communications between Chuck Cohen, Tim Sullivan, and Paul Guggenheim." (Kahn, Tr. 4759). But there too Schein is different. In the Benco-Patterson communications, Mr. Cohen relayed Benco's policy by email; Mr. Guggenheim said Patterson felt the same way; Mr. Guggenheim wrote a few months later to see if Benco's position was still the same; Mr. Cohen said yes. In contrast, when Mr. Cohen made an unsolicited call to Mr. Sullivan and started talking about whether ADC was a buying group, Mr. Sullivan shut the conversation down. And when Mr. Cohen sent an unsolicited text about the Dental Alliance – a buying group Schein did business with – Mr. Sullivan did not respond. Schein went right on with its buying group business. That is no group boycott.

But rather than grapple with this evidence, Complaint Counsel tries to lump all Respondents together, claiming that it has "clear evidence of direct competitor communications establishing the existence of a conspiracy" that was "perpetrated through documented emails, text messages, and phone calls between Respondents" who "explicitly discussed the parties' refusal to discount to buying groups." (CC Br. 1, 61). As to Patterson and Benco, Complaint Counsel cites to a February 8, 2013 two-way email exchange between the companies, which they say – rightly or wrongly – constitutes an agreement in the eyes of the law. But as to Schein, this bold assertion of "documented" and "explicit" discussions is just wishful thinking.

There is no evidence that Schein ever discussed its buying group policies, practices, or plans with Benco or Patterson. There are no emails or other documents reflecting or memorializing any agreement with Schein. Nor are there any recorded phone conversations, witness statements, or other evidence providing this so-called "clear evidence" of an "explicit" agreement. (CC Br. 1, 61). In short, Complaint Counsel does not have a direct evidence conspiracy claim. *E.g.*, *In re McWane, Inc. & Star Pipe Prods., Ltd.*, 155 F.T.C. 903, at *223 (2013). In fact, the ***only*** direct evidence presented at trial of what was said during the calls (or meetings) Complaint Counsel relies on are the sworn denials of the participants themselves.

In response, Complaint Counsel offers excuses. *First*, they say that accepting Respondents' denials is the same as "requiring admissions," which "would be tantamount to requiring direct evidence of a conspiracy, something that no court has required." (CC Br. 5). But no court has ever said that sworn denials of a conspiracy must be automatically ignored because plaintiffs have the option of relying on circumstantial evidence. To the contrary, as this Court has held, such testimony is entitled to weight. *In re McWane*, 155 F.T.C. at *267-68 ("sworn testimony

from [Respondents] that they … did not discuss and agree to [not compete] … is direct evidence contrary to the asserted agreement … and is entitled to weight.").

While it is certainly true that courts do not *require* direct evidence of a conspiracy, here, Complaint Counsel explicitly staked their case on such evidence:

> Judge Chappell: "Well, consider, if you will, something that might be called a lesser included offense. Let's say you can't prove anything directly. Let's say the fact finder doesn't buy it. Are you going to … prove that … the actions will show a conspiracy…. Or are you going to tell me that for your case to succeed you must prove ***direct contact and communication regarding this deal***?
>
> Ms. Kahn: "Our theory is that there were undisputed communications between respondents about buying groups. … [T]hat's what our case is based on. ***So we need not go to a world where we are only looking at parallel conduct and trying to infer a conspiracy from that***. ***We have direct evidence***."

(Kahn, Tr. 31-32).

The fact that Complaint Counsel now walks away from the burden they set for themselves is, at a minimum, telling. Telling, but not surprising. That is because Complaint Counsel not only fails to make out a direct evidence case, they also fail to make out a circumstantial evidence case.

Complaint Counsel tries to do circumstantially what they cannot do directly. They argue that the same communications that they admit do not constitute direct evidence of a conspiracy (at least as to Schein) nonetheless suffice to prove a circumstantial case against Schein. To fill in the gaps, Complaint Counsel offers nothing but speculation. They tell a story of "assurances" and "confrontations," but these characterizations assume the very fact they need to prove – the *existence* of a conspiracy. That is precisely why the Supreme Court has made clear that "antitrust law limits the range of permissible inferences from ambiguous evidence," lest unfettered speculation "chill the very conduct the antitrust laws are designed to protect." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 594 (1986).

Complaint Counsel does not cite to any communications initiated by Schein. They also do not point to any expressions of assent or agreement by Mr. Sullivan, or any disclosure of any information – confidential or otherwise – by Mr. Sullivan. Instead, they rest their case on unsolicited communications initiated by Benco, claiming that "Benco reached out to Schein to discuss buying groups on no fewer than six occasions." (CC Br. 25 & n.213).

But the first of those six supposed communications is a figment of Complaint Counsel's imagination. They do not cite any actual communication; they just speculate that it must have occurred in order for their elaborate tale to work. Specifically, they say that Schein "started dipping [its] toes" into the buying group world in September 2010, when Mr. Sullivan decided to "'test the model' of potential [buying group] profitability" and "*began* discounting to" Smile Source. (CC Br. 16). Not bothered by the fact that Schein had been discounting to Smile Source and other buying groups for numerous years prior, Complaint Counsel imagines that Schein's September 2010 decision to continue the status quo with Smile Source was a watershed event that must have reached Mr. Cohen's ears and scared him enough to "orchestrate" a conspiracy with Mr. Sullivan sometime in early 2011. Then, as their story goes, "[b]y July 2011, Sullivan's position had changed." (CC Br. 27).

How many holes are there in that story? At least four. *First*, there is the fact that Schein had been doing business with Smile Source since 2008 and with other buying groups for at least a decade prior. There was nothing new in September 2010 that provided an impetus to conspire. *Second*, there is no evidence that Benco learned anything about Smile Source or Schein's buying group activities in early 2011. *Third*, there is no evidence of any buying-group related communication – no text, no document, no internal notes memorializing any call – that would suggest that Mr. Cohen spoke with Mr. Sullivan about buying groups in early 2011. *Fourth*,

Complaint Counsel did not show that Mr. Sullivan had "changed his position" by July 2011. Their supposed evidence of this change is a single *internal* email from Mr. Sullivan to other (mostly non-dental) executives at Schein, commenting on an article about Synergy Dental, a buying group Schein had turned down ***over a year before*** the start of the alleged conspiracy and was now working with Schein's business-affiliate, Darby Dental. Reiterating a year-old decision is hardly a change in position.

The same flaw infects Complaint Counsel's other communications evidence. Where the documents and testimony do not give them what they want, Complaint Counsel imagines the content they need for their story to work. The second of the six communications, for example, was a January 13, 2012 phone call. But there is no record of what was discussed, and both Mr. Sullivan and Mr. Cohen denied that it related to buying groups. In fact, Mr. Cohen could say "with confidence" that the call related to employment matters, a fact corroborated by his calls to his employment lawyer immediately before and after the call with Mr. Sullivan, and the fact that that there were disputes over the hiring of a large California group of Schein employees at the time. While Complaint Counsel suggests that the call *may* have related to Unified Smiles, Unified Smiles had already been turned down by a separate division of Schein, and Mr. Sullivan had no involvement with or knowledge of Unified Smiles before or after the call.

The third communication was simply an attempt by Mr. Cohen to see if Mr. Sullivan knew anything about ADC, an entity with an unusual corporate structure. Mr. Sullivan's testimony about what occurred shows how innocuous it was and how appropriately Mr. Sullivan responded:

> He [Mr. Cohen] started talking about Atlantic Dental Care to me. He asked if I knew what they were, and I told him, I did not. Then he started to tell me more about them, and I immediately stopped him, and I said 'Chuck, this not a discussion that you and I should be having,' something like that. I don't know the exact words, but I cut off the discussion with him on that topic.

(SF 1492; Sullivan, Tr. 3946).

The fourth communication Complaint Counsel cites was another unsolicited text from Mr. Cohen relaying what he found out about ADC after some more research and "closing the loop" from his prior unsolicited call. Again, Mr. Sullivan did not engage and did not disclose Schein's policies, practices, or plans.

Now compare Mr. Sullivan's testimony to that of Jeff Reece, the Burkhart executive Complaint Counsel called at trial. Mr. Reece testified that Benco reached out to Burkhart not once, not twice, but three times to discuss buying groups. Mr. Reece listened each time, but did not agree with Benco's views on buying groups. But he did not report the conversation or admonish Mr. Cohen. This, coupled with evidence of Burkhart's continued business with buying groups, was enough for Complaint Counsel to concede that Burkhart did what it was supposed to. If that is true, then it is also true of Schein.

The fifth communication was also an unsolicited text from Mr. Cohen, this time relaying information about the buying group Dental Alliance. Mr. Sullivan testified that, at the time, he believed the text was just more information about ADC, and when he received the text, he tried to call Mr. Cohen to deliver "a much stronger message" that they should not be discussing customers, a message Mr. Sullivan delivered a few days later after a spate of phone tag. No one can fault Mr. Sullivan for that.

The final communication Complaint Counsel cites did not involve Mr. Sullivan or Mr. Cohen at all. It was a September 2013 unsolicited call from Benco's Pat Ryan to Schein's Randy Foley. So much for Complaint Counsel's assertion that "[t]he basis of our case comes down to the nature of the relationship and communications between Chuck Cohen, Tim Sullivan, and Paul Guggenheim." (Kahn, Tr. 4758). In any event, any concerns about that call are quickly laid to rest by Mr. Foley's contemporaneous report of the call to his superior, Hal Muller:

> Next time we talk remind me to tell you about my conversation with Pat Ryan at SM Benco. They're anti Buying Group and Smile Source recently reached out to them. I'm being careful not to cross any boundaries, like collusion.

(CX 0243). That is exactly what Mr. Foley should have done. It is the opposite of evidence of a conspiracy.

If that does not sufficiently "exclude the possibility of legitimate behavior," *In re Citric Acid Litig.*, 191 F.3d 1090, 1095 (9th Cir. 1999), Schein's treatment of Smile Source certainly did. When Smile Source reached out to Schein a few weeks later, Mr. Sullivan embraced the opportunity, telling Smile Source's President:

> ***Yes, we absolutely*** would like to discuss further… I am confident that there is something here for us to partner on together.

(SF 1160-61; RX 2328-001).

Unable to make a case on the communications evidence, Complaint Counsel looks for inferences in Schein's marketplace conduct. But a permissible inference of agreement requires evidence of both parallel conduct and plus factors, which taken together "tend[] to exclude the possibility" of unilateral conduct. *Matsushita*, 475 U.S. at 588, 601; *Cosmetic Gallery, Inc. v. Schoeneman Corp.*, 495 F.3d 46, 51-52 (3d Cir. 2007); *Mkt. Force, Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1170-71, 1173-74 (7th Cir. 1990) (same).

But before trial started, Complaint Counsel renounced a parallel conduct case, and they have abandoned any such case in their post-trial brief. For good reason. Unlike Patterson and Benco, Schein took a measured, deliberate approach to buying groups, saying yes to some, and no to others. As a result of those independent decisions, Schein did business with over 25 buying groups during the alleged conspiracy, totaling over $30 million per year in business. Schein devoted resources to evaluating buying groups, tasked managers to engage them, and developed protocols and templates to ensure fairness, consistency, and fit. At the end of 2014, for example,

Mr. Sullivan not only approved establishing a buying group template as a strategic priority for 2015, he approved a revised contract for Dental Gator and told his boss, Jimmy Breslawski, that he was "'in' on approving buying groups." (Sullivan, Tr. 4344; CX 2144).

Complaint Counsel tries to dismiss all this evidence, claiming some buying groups do not count or that $30 million in business can all be dismissed as mere cheating. But conduct contrary to the conspiracy cannot be so easily cast aside. *Valspar Corp. v. E.I. Du Pont De Nemours & Co.*, 873 F.3d 185, 196 n.7 (3d Cir. 2017) (it is "significant that the alleged conspirators behaved contrary to the existence of a conspiracy"). Without fail, every witness consistently testified that Schein did business with buying groups as Complaint Counsel defines them. And numerous contemporaneous documents attest to that fact. These buying group relationships were *not* exclusively from before or after the alleged conspiracy. Schein started contracting with numerous groups – including the Dental Alliance, MeritDent, the Schulman Group, Dental Gator, and Floss Dental – during the alleged conspiracy period, and negotiated in good faith with many more, including Smile Source, the Kois Buyers Group, and Klear Impakt.

Complaint Counsel attempts to sidestep this evidence arguing that "[e]vidence that [Schein] may have occasionally deviated from the agreement does not absolve them of liability." (CC Br. 99). But this puts the cart before the horse. Complaint Counsel must prove a conspiracy. They cannot just assume it and then assert that any evidence inconsistent with it is irrelevant cheating. *Valspar Corp.*, 873 F.3d at 198 ("[A] litigant may not proceed by first assuming a conspiracy and then explaining the evidence accordingly."). To do so would create an impossible "heads I win, tails you lose" framework in which any buying group rejection is evidence of conspiracy and any buying group partnership is an irrelevant deviation. In any event, the notion

of cheating simply does not work when it comes to buying group contracts, as buying group relationships are marketed to dentists and become well-known throughout the market.

Skipping the parallel conduct element of their case, Complaint Counsel employs the age-old logical fallacy of just assuming the fact it needs to prove. Specifically, they say their case "goes beyond parallel conduct," and skip right to plus factors. (CC Br. 64). But Complaint Counsel cannot proceed to step two of the analysis without first satisfying step one.

In any event, Complaint Counsel has not shown any plus factors. While they claim that Schein changed its conduct and acted contrary to its self-interest, the evidence does not establish either. In fact, in their post-trial submissions, Complaint Counsel abandons their poster child for both points: Smile Source.

In their opening and at trial, Complaint Counsel contended that the end of Schein's relationship with Smile Source in 2012 was a structural break because Schein terminated Smile Source or induced Smile Source to terminate Schein. Those contentions are now wholly absent from their post-trial brief and proposed findings because the evidence did not live up to Complaint Counsel's allegations. As Dr. Goldsmith wrote in 2012, explaining his decision to fire Schein,

[redacted]

(SF 1117-19; RX 2090-001-02). And as Mr. Sullivan wrote in response, [redacted] (SF 1354; RX 2090-001).

Complaint Counsel has also abandoned their contention that Schein's 2014 bid for Smile Source was an attempt to cheat on the conspiracy or was a fake bid that it did not want to win.

Instead, Complaint Counsel simply claims that discounts Schein offered were not as high as Smile Source wanted. But that is not evidence of a conspiracy or of irrational conduct.

To establish irrationality, Complaint Counsel boldly misrepresents the data. Pointing to Dr. Marshall's profitability analyses, they say Schein lost money by not supplying Smile Source. But Dr. Marshall corrected his 2017 Smile Source analysis at trial, admitting that he failed to include rebates and administrative fees. When properly included, Dr. Marshall's analysis shows that Schein actually lost [redacted]. (Marshall, Tr. 3122 ([redacted])). This correction is nowhere to be found in Complaint Counsel's brief or proposed findings.

Similarly, Dr. Marshall admitted that when analyzing Atlanta Dental's profitability with Smile Source in 2014, he replaced Schein's actual 2012 margin with its 2011 margin (thus mixing and matching 2011 and 2012 data and pretending that it all related to 2012). (CX 7100-172-73 n. 662; Marshall, Tr. 3112-13). Had he used the correct data, his results again would have flipped. (Marshall, Tr. 3114-15). Complaint Counsel also ignores the fact that in 2012, Schein earned more money from its existing Smile Source customers after Smile Source fired Schein, again indicating Smile Source was not a profitable proposition for Schein. (RX 3058; Marshall, Tr. 3073, 3076).

Like Smile Source, Complaint Counsel no longer touts the Kois Buyers Group as a poster child boycotted buying group. They abandoned their claim that Schein failed to engage in good faith discussions with Kois Buyers Group; they do not grapple with Mr. Qadeer Ahmed's refusal to provide Schein with the information it needed to evaluate the Kois Buyers Group's unusual business model and lofty claims; nor do they address the fact that Dr. Kois chose Burkhart before the negotiations with Schein had concluded. Nonetheless, Complaint Counsel says "Schein

forewent [redacted] in profits by not supplying the Kois Buyers Group," citing Dr. Marshall's analysis. (CC Br. 63). But Dr. Marshall conceded that he did not do a but-for analysis and thus did not study whether the Kois Buyers Group would have been profitable for Schein. Complaint Counsel is silent on that score.

Ultimately, Complaint Counsel has not shown that Schein ever acted irrationally or turned down a buying group opportunity that would have been profitable.

Instead, in a bizarre twist, Complaint Counsel claims that the fact that Schein did business with *some* buying groups demonstrates that *all* buying groups are profitable, and when Schein turned down other buying groups, it must have been irrational. But there is no evidence that all or even most buying groups are in fact profitable for Schein. The two instances that Dr. Marshall studied showed they were not, and in the two cases in which Schein reviewed particular buying groups after concerns were raised (Steadfast and the Dental Co-Op of Utah), Schein discovered that the buying groups not only failed to deliver incremental volume and cannibalized sales, but actually diverted sales away from Schein.

Even then, rather than immediately terminate those relationships, Schein sought to address the problem by offering to become their exclusive distributor, increasing the level of integration with the buying groups. So much for Complaint Counsel's theory that Schein conspired with Benco to slowly terminate legacy buying groups over time, a claim that featured prominently in their opening but has disappeared from their post-trial brief.

Other buying groups failed to deliver incremental volume. For example, Schein entered into a contract with MeritDent in early 2012, but three years later, MeritDent only had 35 customers who met the minimum volume commitments, and purchases for the entire group fell below pre-contract levels. (RX 2393-004). That is why, as Dr. Marshall admitted, [redacted]

[redacted] that [redacted] and [redacted] (Marshall, Tr. 3002-03).

The evidence shows that is exactly what Schein did. The record is replete with Schein's independent, unilateral business reasons for rejecting the buying groups that did not make sense and accepting those that did. Complaint Counsel dismisses this evidence as "nothing more than *ex post* rationalizations." (CC Br. 5). But Schein's buying group concerns feature prominently in its contemporaneous, ordinary course business documents. There is no basis to follow Complaint Counsel's "daisy chain" of speculation in which every witness at trial lied under oath in denying any agreement and every Schein employee made up issues and concerns about buying groups in emails discussing buying groups' inability to deliver incremental volume, their propensity to cannibalize existing customers, their siphoning of discounts away from their members and to their own coffers, and the conflicts they created with FSCs, non-members, manufacturers, and others. *See In re McWane, Inc.*, 155 F.T.C. at *238-39, 258.

In the end, Complaint Counsel's case against Schein depends on ignoring the mountain of uncontradicted evidence of Schein's deliberate, rational, and unilateral approach to buying groups; and relying on impermissible assumption and speculation. Judgment should be entered for Schein.[2]

II. COMPLAINT COUNSEL'S DISAPPEARING DIRECT EVIDENCE CASE.

As Schein noted in its opening brief, Complaint Counsel promised to prove their case through "direct evidence," foregoing the need to "go to a world where we are looking at parallel

[2] Complaint Counsel devotes a large portion of their post-trial brief to addressing the proper mode of analysis, whether per se, quick look, or rule of reason, and then addressing issues relevant to the latter, such as market definition and anticompetitive effects. Because Schein did not enter into any agreement, the debate over the proper mode of analysis is academic. That said, as Schein explains in its reply findings, Complaint Counsel has not shown anticompetitive effects, and its market definition arguments are also flawed. (SRF 1753-71).

Exhibit 1

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

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

[PROPOSED]

ORDER I.

IT IS ORDERED that the following definitions shall apply:

A. "Benco Dental Supply Co." means Benco Dental Supply Co., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Benco Dental Supply Co., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Henry Schein, Inc." means Henry Schein, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Henry Schein, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Patterson Companies, Inc." means Patterson Companies, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Patterson Companies, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Respondents" means Benco Dental Supply Co., Henry Schein, Inc., and Patterson Companies, Inc., individually and collectively.[1]

E. "Antitrust Laws" means the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 et seq., the Sherman Act, 15 U.S.C. § 1 et seq., and the Clayton Act, 15 U.S.C. §12 et seq.

F. "Association" means a dental trade association, state dental association, or other professional dental association.[2]

G. "Business Information" means, with respect to information regarding Buying Groups, confidential, non-public information regarding a Distributor's (including Respondents') manner of doing business with a Buying Group, including business and strategic plans, marketing, sales, pricing, pricing and sales strategy, costs, revenues, margins, marketing, and customer information.[3]

H. "Buying Group" means a buying club, buying cooperative, buying co-op, group purchasing organization (GPO) or other entity whose members are independent and separately owned and managed dental practices, that negotiates terms for the sale of Dental Products and Dental Services by Distributors or Manufacturers to its members, and which holds itself out as seeking to aggregate and leverage the collective purchasing power of separately owned and separately managed dental practices in exchange for lower prices on Dental Products and Dental Services.[4]

I. "Communicate" or "Communicating" means exchanging, transferring, or disseminating any information, without regard to the means by which it is accomplished.[5]

J. "Communication" means any information exchange, transfer, or dissemination, without regard to the means by which it is accomplished, including, without limitation, orally, telephonically, or by mail, e-mail, notice memorandum, text message, or other electronic transmission.[6]

K. "Dental Practice Customer" means any dental practice that does business in the United States and purchases Dental Products or Dental Services (regardless of size, ownership, or corporate structure).[7]

L. "Dental Products" means all products, supplies, materials, equipment, and other items used in the provision of dental services by a dentist, dental practice, or any Dental Services business or clinic in the United States.[8]

M. "Dental Services" means any repair, warranty support, business, technical, design or administrative services, or any other ancillary or incidental services used by a dentist, dental practice, or any Dental Services business or clinic in the United States.[9]

N. "Full Service Distributor" means any business holds itself out as a full service dental distributor, not including, for example and for the avoidance of doubt, ~~other than~~ (i) a Buying Group who purchases Dental Products and Dental Services for resale and distribution to Dental Practice Customers, and (ii) any business that holds itself out as a manufacturer of Dental Products. Respondents are included in the definition of Full Service Distributor.[10]

O. "Executive and Managerial Sales Staff" means Respondents' officers, directors, and managerial employees in the United States, each of whose job responsibilities include, in whole or in part, (i) the sale or pricing of Dental Products or Dental Services or (ii)

communications with Distributors ~~or Manufacturers~~. For avoidance of doubt, the term "Executive and Managerial Sales Staff" does not include field sales representatives.[11]

P. ~~"Manufacturer" means an entity that manufactures Dental Products for sale to Dental Practice Customers.~~[12]

II.

IT IS FURTHER ORDERED that Respondents, directly or indirectly, or through any corporate or other device, in connection with the sale of Dental Products and Dental Services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from and are prohibited from:[13]

A. Entering into or participating in an agreement or understanding, whether express or implied, with another Full Service Distributor relating to~~:~~.[14]

1. Any refusal to c~~C~~onducting business with a Buying Group, including any refusal to provid~~e~~~~ing~~ or offer~~ing~~ discounts or rebates, responding to solicitations~~, or refusing to do business~~;[15]

2. ~~Preventing or discouraging any Dental Practice Customer from joining or endorsing a Buying Group, including by refusing to provide certain Dental Products or Dental Services to a Dental Practice Customer, or withholding financial incentives, including discounts or rebates, to a Dental Practice Customer because of such Dental Practice Customer's participation in or affiliation with a Buying Group~~;[16]

3. ~~Preventing or discouraging an Association from doing business with, endorsing, creating, or partnering with a Buying Group or Distributor, including by withholding advertising or refusing to attend or sponsor the Association's seminars, meetings, or other events~~;[17] ~~or~~

4. ~~Preventing or discouraging a Manufacturer from doing business with a Buying Group, including by withholding or limiting business with the Manufacturer~~.[18]

B. Inducing, urging, encouraging, assisting, or attempting to induce another ~~y~~ Full Service Distributor to engage in the actions described in Paragraph II.A(1) ~~to (4)~~.[19]

C. ~~Preventing, discouraging, punishing, or threatening to punish any Association or Manufacturer that wants to join, sponsor, partner with, or conduct business with a Buying Group.~~[20]

D. Communicating Business Information regarding Buying Groups (including but not limited to, a Distributor's willingness to do business with a Buying Group) to another Full Service Distributor, or requesting, encouraging, or facilitating the Communication of Business Information regarding a Buying Group between or among Distributors.[21]

E. Provided, however, that ~~For avoidance of doubt,~~ nothing in this Order shall prevent Respondents from unilaterally deciding not to enter into any agreement or negotiate

with any Buying Group , ~~, Dental Practice Customer,~~ or Association~~, or Manufacturer so long as the conduct does not violate Paragraphs II.B, II.C, and II.D of this Order~~.[endnote 22]

~~E.~~F. Provided, further, that nothing in this Order shall prevent (or permit) a Respondent from communicating, coordinating, or reaching agreements with its majority or minority owned business affiliates. [endnote 23]

III.

IT IS FURTHER ORDERED that Benco Dental Supply Co., Henry Schein, Inc., and Patterson Companies, Inc. shall each maintain an antitrust compliance program that sets forth the policies and procedures each Respondent has implemented to comply with this Order and with the Antitrust Laws. In connection with this program, each Respondent, Benco Dental Supply Co., Henry Schein, Inc., and Patterson Companies, Inc., shall:[22]

A. Designate an antitrust compliance officer to supervise the design, maintenance, and operation of its program;[23]

B. Provide training regarding Respondent's obligations under this Order and the Antitrust Laws as follows:[24]

1. No later than 60 days after the Order becomes final, provide training regarding Respondent's obligations under the Order to Respondent's Executive and Managerial Sales Staff, or for an employee hired or promoted to Executive and Managerial Sales Staff, within 30 days of their employment start date; and

2. At least annually for the term of the Order.

C. Establish a procedure to enable Respondent's Executive and Sales Staff to ask questions about, and report violations of, this Order and the Antitrust Laws confidentially and without fear of retaliation of any kind;[25] and

D. Establish policies to discipline Respondent's Executive and Sales Staff who fail to comply with this Order and the Antitrust Laws.[26]

IV.

IT IS FURTHER ORDERED that Respondents shall file verified written reports ("compliance reports") in accordance with the following:[27]

A. Benco Dental Supply Co., Henry Schein, Inc., and Patterson Companies, Inc. shall separately and individually submit an interim compliance report 60 days[28] after the Order is issued, a compliance report one year after the date this Order is issued, and annual compliance reports[29] for the next 4 years[30] on the anniversary of that date~~; and additional compliance reports as the Commission or its staff may request~~;[31]

B. Each compliance report shall set forth in detail the manner and form in which submitting Respondent, Benco Dental Supply Co., Henry Schein, Inc., or Patterson Companies, Inc., intends to comply, is complying, and has complied with this Order.

~~Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether submitting Respondent, Benco Dental Supply Co., Henry Schein, Inc., or Patterson Companies, Inc., is in compliance with the Order. Conclusory statements that the submitting Respondent has complied with its obligations under the Order are insufficient.~~[32] ~~Benco Dental Supply Co., Henry Schein, Inc., and Patterson Companies, Inc. shall each include in its~~ The individual reports shall include the ~~,~~ following information~~among other information or documentation that may be necessary to demonstrate compliance~~:[33]

1. A full description of the substance and timing of all measures it has implemented or plans to implement to ensure that it has complied or will comply with each paragraph of the Order;

2. The name and title of its designated antitrust compliance officer, as required by Paragraph III.A above;

3. A description of all trainings it has conducted in compliance with Paragraph III.B above (excluding trainings described in a prior compliance report);

4. In each compliance report submitted by Benco Dental Supply Co., it shall provide documentation of:[34]

    a. Communications between or among:

        i. Any of Benco Dental Supply Co.'s officers, directors, or employees, including the following executives, or their successors: Charles Cohen (Managing Director) and Patrick Ryan (Director,
        Sales); and

        ii. Any officer, director, or employee of: (1) Henry Schein, Inc., including the following executives, or their successors: Timothy Sullivan (former President) and David Steck (Vice President and General Manager); and/or (2) Patterson Companies, Inc., including the following executives or their successors: Paul Guggenheim (former President), David Misiak (Vice President, Sales), and Timothy Rogan (Vice President, Marketing). Documentation of such Communication shall identify (name, employer, and job title) the persons involved, the method of communication, the subject matter of the Communication, and its duration; and

    b. Intra-firm Communications regarding each Communication identified in Paragraph IV.B(4)(a) above, including the name, employer, and job title of all persons involved in the Communication, a description of the subject matter of the Communication, and the duration of the Communication;

5. In each compliance report submitted by Henry Schein, Inc., it shall provide documentation of:[35]

    a. Communications between or among:

i. ~~Any officer, director, or employee of Henry Schein, Inc., including the following executives, or their successors:~~ Timothy Sullivan (former President), ~~and~~ David Steck (Vice President and General Manager), and their successors; and

ii. Any officer, director, or employee of: (1) Benco Dental Supply Co., including the following executives, or their successors: Charles Cohen (Managing Director) and Patrick Ryan (Director, Sales); and/or (2) Patterson Companies, Inc., including the following executives or their successors: Paul Guggenheim (former President), David Misiak (Vice President, Sales), and Timothy Rogan (Vice President, Marketing). Documentation of such Communication shall identify (name, employer, and job title) the persons involved, the method of communication, the subject matter of the communication, and its duration; and

b. Intra-firm Communications regarding each Communication identified in Paragraph IV.B(5)(a) above, including the name, employer, and job title of all persons involved in the Communication, a description of the subject matter of the Communication, and the duration of the Communication;

~~b.~~c. Notwithstanding the foregoing, the following communications may be excluded from the disclosure or documentation requirement: (i) Privileged communications, including, but not limited to, communications regarding litigation; (ii) Public communication, including but not limited to speaking engagements or publications sponsored by trade associations, public interest groups or charity groups; (iii) Purely administrative communications in furtherance of a trade association, public interest group, or charity group event made by an actual or potential participant in that trade association, public interest group, or charity group event or meeting; (iv) Communications regarding employment of individuals at or from HSD, including communications between in-house or outside counsel of HSD and in-house or outside counsel of another dental supply distributor or manufacturer relating to disputes or the resolution of disputes over the hiring of employees, unless those communications involve the establishment or modification of a policy or companywide agreement .among or between dental supply distributors or manufacturers about the hiring and employment of individuals in the dental supply distributor industry; (v) Communications related to the potential sale or acquisition of BSD or another dental supply distribution, or related businesses; (vi) Communications with an affiliate, subsidiary, joint venture partner or other entity in which Schein or an affiliate has an investment, or sub-distributor of Schein related to such business relationships; and (vii) Purely social and family related communications among or between former colleagues and business acquaintances. [Endnote 35A]

6. In each compliance report submitted by Patterson Companies, Inc., it shall provide documentation of:[36]

   a. Communications between and among:

      i. Any officer, director, or employee of Patterson Companies, Inc., including the following executives or their successors: Paul Guggenheim (former President), David Misiak (Vice President,
      Sales), and Timothy Rogan (Vice President, Marketing); and

      ii. Any officer, director, or employee of: (1) Benco Dental Supply Co., including the following executives, or their successors: Charles Cohen (Managing Director) and Patrick Ryan (Director, Sales); and/or (2) any officer, director, or employee of Henry Schein, Inc., including the following executives, or their successors: Timothy Sullivan (former President) and David Steck (Vice President and General Manager). Documentation of such Communications shall identify (name, employer, and job title) the persons involved, the method of communication, the subject matter of the Communication, and its duration; and

   b. Intra-firm Communications regarding each Communication identified in Paragraph IV.B(6)(a) above, including the name, employer, and job title of all persons involved in the Communication, a description of the subject matter of the Communication, and the duration of the Communication.

C. Respondents shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov.[37]

V.

IT IS FURTHER ORDERED that Respondent, Benco Dental Supply, Co., Henry Schein, Inc., or Patterson Companies, Inc., shall notify the Commission at least 30 days prior to:[38]

A. Its proposed dissolution;

B. Its proposed acquisition, merger, or consolidation to the extent such acquisition, merger, or consolidation may change the legal entity subject to or may affect compliance obligations arising out of, this Order; or

C. Any other change in the Respondent, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising

out of this Order.

VI.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and 5 days' notice to the relevant Respondent, Benco Dental Supply, Co., Henry Schein, Inc., or Patterson Companies, Inc., made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters office, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:[39]

A. Access, during business office hours of the respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at the request of the authorized representative of the Commission and at the expense of the Respondent;[40] and

B. To interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.[41]

VII.

IT IS FURTHER ORDERED that this Order shall terminate 10~~5~~ years from the date it is issued.[42]

By the Commission.

April J. Tabor
Acting
Secretary

SEAL

ISSUED:

[1] The defined term "Respondents" is modeled after the Final Order, *In re PolyGram Holding, Inc.*, Docket No. 9298, 2003 WL 25797195, at **31 (FTC July 24, 2003) (hereinafter "PolyGram Order"). This is the standard definition for "Respondents" used in Commission orders.

[2] The purpose of the defined term "Association" is to identify groups that may conduct business with, associate with, or create or form Buying Groups. This definition is necessary because the record evidence shows that Respondents exchanged Business Information regarding Texas Dental Association and Arizona Dental Association, examples of Associations, which created Buying Groups. CCFF ¶¶ 1109-1158.

[3] The purpose of the defined term "Business Information" is to identify the type and nature of non-public information shared by competitor Respondents sought to be prohibited in the Proposed Order. This definition is necessary because the record evidence shows that Respondents exchanged non-public, confidential, strategic information regarding Buying Groups. *See* CCFF ¶¶ 474-1100, 1109-1158. As Complaint Counsel noted, their concern is about "non-public, confidential, strategic information." Moreover, as phrased, chit-chat among low-level employees about historical, public events would be captured. As such, the definition of "Business Information" should be limited to confidential, non-public information.

[4] The purpose of the defined term "Buying Group" is to identify the customer segment that the record evidence shows was the subject of Respondents' unlawful agreement. *See* CCFF ¶¶ 17, 34, 67-71, 114-145, 474-1158. This defined term is not intended to alter the scope of type of Buying Group described in the Complaint.

[5] The defined terms "Communicate" or "Communicating" are modeled after the Final Order, *In re N.C. Bd. of Dental Exam'rs*, Docket No. 9343, 2011 WL 11798463, *39 (FTC Dec. 2, 2011) (hereinafter "NC Dental Order"). This is the standard definition for "Communicate" and "Communicating" used in Commission orders.

[6] The defined term "Communication" is modeled after NC Dental Order, at *39. This is the standard definition for "Communication" used in Commission Orders.

[7] The purpose of the defined term "Dental Practice Customer" is to identify customers in the Dental Products and Dental Services industry, which forms the basis of prohibitions in Paragraph II of the Proposed Order. This definition is necessary because the record evidence shows that Respondents agreed not to discount to or negotiate with certain Dental Practice Customers. *See* CCFF ¶¶ 10-11, 17, 20, 27, 29, 34, 38-39, 45, 57-113. The evidence does not show that Schein refused to provide discounts to independent dentists or any entity that actually purchases Dental Products or Dental Services. To the contrary, the evidence is undisputed that Respondents competed aggressively for, and did not reach any agreements or understandings with respect to, independent dentists. Even Complaint Counsel concedes that its case is only about an alleged refusal to sell to or provide discounts to a certain type of customer, Buying Groups.

[8] The purpose of the defined term "Dental Products" is to identify the product market and distribution channels relevant to Paragraph II of the Proposed Order. *See* CCFF ¶¶ 7, 12, 20, 24, 27, 39-40, 89-113, 125, 1522.

[9] The purpose of the defined term "Dental Services" is to identify the product market and

distribution channels relevant to Paragraph II of the Proposed Order. *See* CCFF ¶¶ 7, 15, 20, 33, 41, 67-69, 1446-1452, 1462, 1491, 1509, 1522.

[10] The purpose of the defined term "Distributor" is to identify entities that may compete with Respondents in selling, discounting, or doing business with Buying Groups. *See* CCFF ¶¶ 7, 20, 38, 1446, 1491, 1509, 1522. This definition is necessary because the record evidence shows that Benco Dental Supply Co. attempted to expand the conspiracy by recruiting other Distributors. *See* CCFF ¶¶ 1199-1251. There is no evidence that Schein attempted to reach out to any other distributor. As such, expanding the order to include other distributors, at least as to Schein, is unnecessary and unwarranted by the evidence. In that regard, Complaint Counsel has failed to assert an invitation to collude claim against Schein. To the extent the Order does extent beyond Respondents, Schein believes the definition of distributor should be restricted to full service distributors, since Complaint Counsel has defined the market as limited to full service distribution and has not introduced any evidence concerning any conduct directed to non-full service distribution. Finally, Schein further believes that the term "Distributor" should expressly exclude businesses that hold themselves out to be manufacturers (even if they outsource the production of certain of their products), as Schein is generally in a vertical relationship with such entities.

[11] The purpose of the defined term "Executive and Sales Staff" is to specify those individuals subject to the antitrust compliance program detailed in Paragraph III of the Proposed Order. This definition is necessary because the record evidence shows that Respondents' employees, at various levels ranging from sales representatives to the highest ranking executives, communicated about Buying Groups in furtherance of the conspiracy. *See* CCFF ¶¶ 474-1158. This definition is modeled after the PolyGram Order, at **31. The term "Executive and Sales Staff" is too broad in the context of this industry. Schein employs over 1,000 individuals that could fit this definition. Yet, complaint Counsel has stated "the basis of our case comes down to the nature of the relationship and communications between Chuck Cohen, Tim Sullivan, and Paul Guggenheim." ((Kahn, Tr. 4758). Nor has Complaint Counsel cited to any improper communications among rank-and-file sales staff. Complaint Counsel's assertion that they modeled the definition of Executive and Sales Staff after the PolyGram Order is ***false***. The Polygram order does not use this term. The closest it comes is the definition of "Officer, Director, or Employee," but that definition is ***expressly*** limited to "any officer or director or managerial employee … with responsibility for pricing, marketing or sale" of the relevant product. Accordingly, Schein believes that the scope of the Order be limited to Executive and Managerial Sales Staff, meaning individuals with direct managerial responsibility for the sale or pricing of Dental Products and Dental Services, or communications with other Full-Service distributors.

[12] The purpose of the defined term "Manufacturer" is to identify a distribution channel in the dental industry that may do business with Respondents, Buying Groups, or Dental Practice Customers that may participate in or affiliate with Buying Groups. *See* CCFF ¶¶ 1509. This definition is necessary because the record evidence shows that Respondents exchanged non-public information regarding their Buying Group strategies with Manufacturers and exchanged information regarding Manufacturer-related issues to coordinate or propose collective responses and solutions. *See* CCFF ¶¶ 284-295, 301-306, 788-789. Complaint Counsel misstates the record evidence. Complaint Counsel has not proven that any communications concerning any manufacturer issues are unlawful. Nor do any of the Complaint Counsel's proposed findings relate to buying groups. As such, there is no basis for including manufacturers within the scope of this Order. Moreover, including manufacturers within the scope of the order would prohibit perfectly legitimate and procompetitive conduct, including negotiations between manufacturer and distributor relating to charge-backs or special discounts for buying groups or others.

[13] Paragraph II is modeled after NC Dental Order, at *40-41 (¶ II). Paragraph II seeks to require Respondents to cease and desist from and prohibit Respondents from future recurrence of the unlawful conduct at issue. *See* Complaint Counsel's Post-Trial Brief, at Section II. "The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946); *see also FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952) ("Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past . . . it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity"); *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428-429 (1957) ("Commission is clothed with wide discretion in determining the type of order that is necessary to bring an end to the unfair practices found to exist."). Furthermore, even where the unlawful conduct has ceased, "voluntary cessation of an illegal practice is no bar to a Commission cease and desist order." *ITT Cont'l Baking Co. v. FTC*, 532 F.2d 207, 222 n.22 (2d Cir. 1976).

[14] Paragraph II.A(1)-(4) is modeled after the Final Order, *In re Toys "R" Us, Inc.*, Docket No. 9278, 1998 WL 34300619, **145 (FTC Oct. 13, 1998) (¶ II) (hereinafter "Toys "R" Us Order"), *aff'd*, *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 930, 939-40 (7th Cir. 2000). As here, where horizontal competitors agreed to refuse to do business with discounters, this Court issued an order—and the Seventh Circuit affirmed that order—prohibiting respondent from "entering into, and attempting to enter into any agreement or understanding . . . ." Toys "R" Us Order, **145 (¶ II); *Toys "R" Us*, 221 F.3d at 940; *see also* Complaint Counsel's Post-Trial Brief, at Section II. Schein believes that the Section II.A should make it clear that it only prohibits agreements with "another" Distributor, so as to expressly exclude any unilateral or non-horizontal conduct from its scope.

[15] Paragraph II.A(1) is modeled after the Toys "R" Us Order, which prohibited respondent from entering into any agreement with a supplier to refuse to sell products to a toy discounter. Toys "R" Us Order, at **145 (¶ II.A). The record evidence shows that Respondents reached an agreement to refuse to do business with Buying Groups, including refusing to provide or offer discounts or respond to requests to do business. *See* CCFF ¶¶ 474-1100; *see also* Complaint Counsel's Post-Trial Brief, at Section II.

[16] Paragraph II.A(2) is modeled after the Toys "R" Us Order, which prevented respondent from pressuring a supplier to limit or withhold products and business from a certain type of customer: toy discounters. Toys "R" Us Order, at **145 (¶ II.B). This paragraph is necessary because the record evidence shows that Respondents refused to sell to or provide discounts to a certain type of customer, Buying Groups. *See* CCFF ¶¶ 17, 34, 408-425, 503, 639, 641, 643-646, 648-649, 743-860, 925-954. The evidence does not show that Schein refused to provide discounts to independent dentists or any entity that actually purchases Dental Products or Dental Services. To the contrary, the evidence is undisputed that Respondents competed aggressively for, and did not reach any agreements or understandings with respect to, independent dentists. Even Complaint Counsel concedes that its case is only about an alleged refusal to sell to or provide discounts to a certain type of customer, Buying Groups. But to the extent any remedy with respect to buying groups is required, it is already fully captured by provision II.A.1. As such, provision II.A.2 should be deleted.

[17] Paragraph II.A(3) is necessary because the record evidence shows that Respondents withdrew

sponsorships and attendance at meetings of the Texas Dental Association and Arizona Dental Association after learning that both were creating statewide Buying Groups. *See* CCFF ¶¶ 1109-1158; *see also* Complaint Counsel's Post-Trial Brief, at Section I.I, II.H. Schein believes that Complaint Counsel has failed to prove any conspiracy to boycott the TDA or any state Dental Association. There was no evidence of any improper communication among Respondent concerning such Associations. Moreover, the decision not to attend a trade show has nothing to do with whether Respondents collectively agreed not to supply a buying group. As such, it is inappropriate to include any provisions relating to Respondents' dealings with Association, except to the extent that such Associations are seeking supply relationships from Respondents in their capacities as buying groups. To the extent that this occurs, it is already fully captured by provision II.A.1. As such, provision II.A.3 should be deleted.

[18] Paragraph II.A(4) is modeled after the Toys "R" Us Order, which prevented respondent from pressuring a supplier to limit or withhold products and business from a toy discounter. Toys "R" Us Order, at **145 (¶ II.B). The record evidence shows that Benco Dental Supply Co. attempted to expand the conspiracy by recruiting other industry participants. *See* CCFF ¶¶ 1199-1252. Paragraph II.A.4 focuses on communications with manufacturers. There is no evidence that Schein attempted to prevent or discount any manufacturer from doing business with a Buying Group. Moreover, communications between a single distributor and a manufacturer are vertical and nature and must be separately analyzed under the Rule of Reason. Complaint Counsel has not asserted such a claim, and has not established that any of Respondents' dealings with any Manufacturer would violate the Rule of Reason. Finally, the language is over broad as it would prevent normal buyer-seller negotiations or discussions between Schein and one or more of its suppliers. As such, provision II.A.4 should be deleted.

[19] Paragraph II.B is modeled after the NC Dental Order, which prohibited the respondents from urging, encouraging, assisting, or attempting to induce any person, other than the respondents, from engaging in any action that was prohibited by the order. NC Dental Order, at *41 (¶ II.G); *see also* Toys "R" Us Order, at **145 (¶ II.D). The record evidence shows that Benco Dental Supply Co. attempted to expand the conspiracy by recruiting other Distributors. *See* CCFF 1199-1252; *see also* Complaint Counsel's Post-Trial Brief, at Section V. As with Section II.A, Schein believes that this provision should make it clear that it only applies to horizontal interactions with another Full Service Distributor, so as to expressly exclude any unilateral or non-horizontal conduct from its scope.

[20] Paragraph II.C is necessary because the record evidence shows that Respondents withdrew sponsorships and attendance at meetings of the Texas Dental Association and Arizona Dental Association after learning that both were creating statewide Buying Groups. *See* CCFF ¶¶ 1138-1146, 1156-1158; *see also* Complaint Counsel's Post-Trial Brief, at Section I.I, Section II.H. Paragraph II.C is modeled after the Toys "R" Us Order, which prevented respondent from pressuring a supplier to limit or withhold products and business from a certain type of customer: toy discounters. Toys "R" Us Order, at **145 (¶ II.B). Complaint Counsel has not established any violation of law with respect to Schein's decision not to attend the TDA or Arizona trade shows. Moreover, as drafted, Section II.C would capture unilateral conduct, which is not the basis of Complaint Counsel's case. For example, under the proposed language perfectly legitimate discussions between Schein and its supplies about the pros and cons of supplying a buying group, including the buying group's reliability, would be prohibited.

[21] Paragraph II.D is necessary because the record evidence shows that Respondents engaged in repeated inter-firm communications and exchanged non-public, strategic information with their competitors to reach a prohibited agreement not to sell to or discount to Buying Groups. *See*

CCFF ¶¶ 474-1100, 1109-1158; *see also* Complaint Counsel's Post-Trial Brief, at Section I.F-I.I, Section II. The Court can prohibit the unlawful conduct it finds existed, as well as include in its order a remedy that "close[s] all roads to the prohibited goal." PolyGram Order, at **29 (quoting *FTC v. Ruberoid Co.*, 343 U.S. at 473). As with other provisions, Schein believes that Section II.D needs to make it clear that it only applies to horizontal interactions with another Full Service Distributor, so as to expressly exclude any unilateral or non-horizontal conduct from its scope.

[Endnote 21A] Complaint Counsel's attempt to include a proviso that excludes unilateral conduct is inssuficient and illusory. As an initial matter, the provision is rendered a nullity because it only applies to conduct that "does not violate" other provisions of the Order. As such, it does not exclude any unilateral conduct that may be captured by the other provisions. In addition, to the extent the court agrees with Schein that order should be limited to conduct focused on refusals to do business with or offer discounts to buying groups (and thus deleting the provisions relating to Dental Practice Customers, Associations, or Manufacturers), Section II.E should be likewise be conformed to the scope of the order.

[Endnote 21B] Schein believes an additional provision should be included to exclude from the scope of the Order any dealings between a Respondent and its own minority or majority owned business affiliates. Such conduct is either immune under *Copperweld*, or at a minimum, judged under the rule of reason. There is no evidence that Schein engaged in any improper conduct with respect to its own business affiliates, and thus, such dealings should be excluded from the Order.

[22] Paragraph III.A through D are modeled after previous FTC Part 3 orders that required distribution of the order to educate and inform relevant individuals of their responsibilities to comply with the order. *See* NC Dental Order, at *41-42 (¶ III); Final Order, *In re N. Tex. Specialty Physicians*, Docket No. 9312, 2005 WL 6241023, **37 (FTC Nov. 29, 2005) (hereinafter "North Texas Specialty Physicians Order"), *modified* 2008 WL 4235322 (FTC Sept. 12, 2008). *See also* Decision and Order, *In re Ferrellgas Partners, L.P.*, Docket No. 111-0195, 2015 WL 13021965, *14-15 (FTC Jan. 7, 2015) (requiring antitrust compliance program, specified in ¶ III) (hereinafter "Ferrellgas Partners Order"). This paragraph similarly seeks an effective and efficient manner by which to inform and educate those within the scope of the Proposed Order of their compliance responsibilities.

[23] Paragraph IV.A is modeled after the Ferrellgas Partners Order. Ferrellgas Partners Order, at *14 (¶ III.B(1)).

[24] Paragraph IV.B is modeled the Ferrellgas Partners Order. Ferrellgas Partners Order, at *14-15 (¶ III.B(2)).

[25] Paragraph IV.C is modeled the Ferrellgas Partners Order. Ferrellgas Partners Order, at *15 (¶ III.B(3)).

[26] Paragraph IV.D is modeled the Ferrellgas Partners Order. Ferrellgas Partners Order, at *15 (¶ III.B(4)).

[27] Paragraph IV is standard in FTC Part 3 orders. *See, e.g.*, NC Dental Order, at *42 (¶ IV); Toys "R" Us Order, at **146 (¶ IV); North Texas Specialty Physicians Order, at **38 (¶ IV.E).

[28] This time period is modeled after the NC Dental Order. NC Dental Order, at *42 (¶ IV); *see also* Toys "R" Us Order, at **146 (¶ IV); North Texas Specialty Physicians Order, at **38 (¶ IV.E).

[29] Requiring annual reports is standard in Part 3 orders. *See, e.g.*, NC Dental Order, at *42 (¶ IV); Toys "R" Us Order, at **146 (¶ IV); North Texas Specialty Physicians Order, at **38 (¶ IV.E).

[30] Compliance reporting serves to notify the Commission that a respondent is complying with its obligations. The period of such obligations should be long enough to cover all affirmative obligations and ensure that a respondent has and will continue to comply with the order's prohibitions. Since this Proposed Order is prohibitory, a total four-year reporting requirement is sufficient to ensure that Respondents understand and are complying with their obligations under the Proposed Order. *See* Toys "R" Us, at *146 (ordering 20-year term for annual reporting). *See also* NC Dental Order, at 42 (requiring annual reporting for 3 years); North Texas Specialty Physicians Order, at **38 (requiring annual reporting for 3 years).

[31] This is standard language in FTC Part 3 orders. *See, e.g.*, NC Dental Order, at *42 (¶ IV); Toys "R" Us Order, at *146 (¶ IV); North Texas Specialty Physicians Order, at 38 (¶ IV.E). To the extent an Order is required, Schein does not object an initial compliance report followed by annual reports thereafter for a period of four years. Schein, however, objects to the imposition of "additional compliance" reports, as there is no showing that such reports are necessary.

[32] This purpose of this language is to ensure and assist Respondents in writing acceptable and useful compliance reports that achieve the purpose of Paragraph IV. The language is modeled after the proposed order submitted by Complaint Counsel, *In re Otto Bock HealthCare N. America, Inc*., Docket No. 9378 (FTC Nov. 20, 2018) (hereinafter "Otto Bock Proposed Order"). Otto Bock Proposed Order, at ¶ VIII.2; *see also* Final Order in *In re Polypore Int'l, Inc.*, Docket No. 9327, 2010 WL 9549988 (FTC Nov. 5, 2010), at *63 (requiring descriptions and statements, set forth in ¶ XI.B., showing respondent's compliance with order); NC Dental Order, at *42 requiring "detailed description of the manner and form in which Respondent has complied, or is complying, with this Order."). Schein believes that the content of any compliance report should be clearly specified. The enumerated items identify the information Complaint Counsel believes is necessary, and thus, there is no need for a post-hoc subjective, or open-ended requirement that Schein would have no way of knowing was sufficient at the time it submits its report.

[33] Paragraph IV.B(1)-(3) is designed to ensure that the Commission can monitor the implementation of the Order by Respondents. Similar instructions have been included in previous Part 3 orders. *See, e.g.*, NC Dental Order, at ¶ IV.A-D (requiring detailed information to show manner and form of respondents' compliance with the order).

[34] Paragraph IV.B(4)(a)-(b) is necessary because the record evidence shows a high-level of inter-firm Communications between or among competitor Respondents exchanging non-public, strategic information regarding Buying Groups, which facilitated and formed the unlawful agreement, as well as intra-firm Communications discussing those exchanges between or among competitor Respondents. *See* CCFF ¶¶ 474-1158, 1178-1198; *see also* Complaint Counsel's Post-Trial Brief, at Section I.F-I.I, Section II. The language is modeled after the NC Dental Order, which required respondents to file copies of communications prohibited under the order. NC Dental Order, at *42 (¶ IV.B); *see also* Toys "R" Us Order, at **146 (¶ IV.B). Paragraph IV.B(4)(a)-(b) does not require filing copies of communications, and only requires inclusion of a narrative as part of compliance reports demonstrating compliance with the Order. The Office of the Texas Attorney General entered a similar final judgements against Benco that required it to maintain and furnish a detailed log of communications with its competitors to the State for a period of time. CCFF ¶¶ 1159-1161. That order, which stopped the conduct at issue, is no longer in effect. CCFF ¶¶ 1160-1161. Schein notes that that Final Judgment in Texas against Schein

was significantly more narrow than the Final Judgment against Benco. (CX 6023)

[35] Paragraph IV.B(5)(a)-(b) is necessary because the record evidence shows a high-level of inter-firm Communications between or among competitor Respondents exchanging non-public, strategic information regarding Buying Groups, which facilitated and formed the unlawful agreement, as well as intra-firm Communications discussing those exchanges between or among competitor Respondents. *See* CCFF ¶¶ 661-1100, 1123-1137, 1156-1158, 1179-1182, 1185; *see also* Complaint Counsel's Post-Trial Brief, at Section I.G-I, Section II. This language is modeled after the NC Dental Order, which required respondents to file copies of the communications prohibited under the order. NC Dental Order, at *42 (¶ IV.B); *see also* Toys "R" Us Order, at **146 (¶ IV.B). Paragraph IV.B(5)(a)-(b) does not require filing copies of communications, and only requires inclusion of a narrative as part of compliance reports demonstrating compliance with the Proposed Order. The Office of the Texas Attorney General entered a similar final judgement against Schein that required it to maintain and furnish a detailed log of communications with its competitors to the State for a period of time. CCFF ¶ 1163. That order, which stopped the conduct at issue, is reaching the end of its term in or around August 2019. CCFF ¶ 1163. There is no evidence that the Texas order "stopped the [alleged] conduct at issue." The Final Judgment was simply a settlement to resolve allegations, and under Complaint Counsel's own theory, the alleged conspiracy was over for a full two-and-a-half years before Schein settled the Texas case. Moreover, the reporting requirements were limited to just a handful of people. (CX 6023).

In that regard, Schein believes that the Order should be limited to specific enumerated individuals. It is impossible for Schein to conduct the necessary inquiry for all "employees" of Henry Schein, Inc. As Complaint Counsel as has stated, their case comes down to communications between Mr. Cohen, Mr. Sullivan, and Mr. Guggenheim. The reporting requirements should be limited to those individuals. At a minimum, the reporting requirements should be limited to the Executives and Managerial Sales Staff responsible for Dental Products and Supplies.

The Order should also exclude the categories of legitimate communications that have not been shown to be unlawful or related to buying groups. The proposed list of exclusions are those set forth in the Agreed Final Judgement and Stipulated Injunction between the State of Texas and Henry Schein. (CX 6023-006-8).

[36] Paragraph IV.B(6)(a)-(b) is necessary because the record evidence shows a high-level of inter-firm Communications between or among competitor Respondents exchanging non-public, strategic information regarding Buying Groups, which facilitated and formed the unlawful agreement, as well as intra-firm Communications discussing those exchanges between or among competitor Respondents. *See* CCFF ¶¶ 474-656, 1123-1146, 1156-1158, 1178-1182, 1184; *see also* Complaint Counsel's Post-Trial Brief, at Section I.G, Section I.I, Section II. This language is modeled after the NC Dental Order, which required respondents to file copies of the communications prohibited under the order. NC Dental Order, at *42 (¶ IV.B); *see also* Toys "R" Us Order, at **146 (¶ IV.B). Paragraph IV.B(6)(a)-(b) does not require filing copies of communications, and only requires inclusion of a narrative as part of compliance reports demonstrating compliance with the order. The Office of the Texas Attorney General entered a similar final judgement against Patterson that required it to maintain and furnish a detailed log of communications with its competitors to the State for a period of time. CCFF ¶ 1164. That order, which stopped the conduct at issue, is no longer in effect. CCFF ¶ 1164.

[37] This language describes the requirements for verification and is modeled after the Otto Bock Proposed Order. Otto Bock Proposed Order, at ¶ VIII.C.

[38] Paragraph V is modeled after the North Texas Specialty Physicians Order and provides the Commission with notice of changes in corporate structure that may alter or affect the entities within Respondents that are best able to comply with the order. *See* North Texas Specialty Physicians Order, at **38 (¶ IV.F). Schein believes that, as drafted, Section V.B is too broad, as it may require notification of transactions that do not either change the legal entity subject to the Order or affect compliance obligations required by the Order. Schein's proposed edits Section V.B add this clarification.

[39] This language is modeled after the Final Order, *In re of ProMedica Health System, Inc.*, Docket No. 9346, 2012 WL 2450574, at *18 (FTC Mar. 22, 2012) (hereinafter "ProMedica Order"). *See also* Polypore Order, at *63 (¶ XII); North Texas Specialty Physicians Order, at **38 (¶ VI); NC Dental Order, at *42-43 (¶ VI).

[40] This language is modeled after the ProMedica Order. ProMedica Order, at *18 (¶ X.A); *see also* Polypore Order, at *63 (¶ XII.A); North Texas Specialty Physicians Order, at **38 (¶ VI.A); NC Dental Order, at *42-43 (¶ VI.A).

[41] This language is modeled after the ProMedica Order. ProMedica Order, at *18 (¶ X.B); *see also* Polypore Order, at *63 (¶ XII.B); North Texas Specialty Physicians Order, at **38 (¶ VI.B); NC Dental Order, at *43 (¶ VI.B).

[42] Policy Statement Regarding Duration of Competition and Consumer Protection Orders, 60 Fed. Reg. 42,569 (August 16, 1995); *see also* NC Dental Order, at *43 (setting order term of 20 years).

conduct and trying to infer a conspiracy from that." (S. Br. 80; Kahn, Tr. 31-32). Complaint Counsel failed to live up to their promise.

Nowhere in Complaint Counsel's post-trial filings do they cite any direct evidence of the alleged agreement *involving Schein* – no written agreement, no document memorializing any agreement, no recorded phone calls, no communications that reflect an offer and acceptance or any other form of express or implied agreement, no eyewitness testimony to the alleged agreement, and no admissions of the parties. The absence of such evidence makes this a circumstantial case, not a direct evidence case. *In re McWane*, 155 F.T.C. at *223 (direct evidence is evidence that is "explicit and requires no inference to establish the proposition or conclusion being asserted"); *see also* RCL 16-17.

Lacking such evidence, Complaint Counsel pretends they have evidence they do not. They claim, for example, that they have "***clear evidence*** of ***direct*** competitor *communications* ***establishing*** the existence of a conspiracy," and that the "agreement was perpetrated through documented emails, text messages, and phone calls between Respondents[]" who "***explicitly discussed*** the parties' refusal to discount to buying groups." (CC Br. 1, 61). But as to Schein, this is nothing more than Complaint Counsel's *rhetoric*, *inference*, and *speculation*. It is not what the evidence actually says.

In that regard, the Court should note Complaint Counsel's artful drafting. Throughout their brief and proposed findings, Complaint Counsel lumps Schein, Patterson, and Benco together, making broad statements about what "Respondents" allegedly did. For example, Complaint Counsel claims that "Respondents were concerned about their competitors' buying group relationships," "monitored each other's buying group behavior," and "alerted each other when they saw the other was discounting to a buying group," and then they proceed to cite exclusively to

Patterson and Benco documents and conduct. (CC Br. 95 & n.726-28). The law does not allow such a group approach. *See United States v. U.S. Gypsum Co.*, 438 U.S. 422, 463 (1978) ("[L]iability [can] only be predicated on the knowing involvement of ***each defendant, considered individually***, in the conspiracy alleged."); *In re Zinc Antitrust Litig.*, 155 F. Supp. 3d 337, 384 (S.D.N.Y. 2016) (noting that plaintiffs should be "admonished" for "resorting to … group pleading.").

The evidence as to Schein is very different from the evidence as to Patterson and Benco. Complaint Counsel claims that the February 8, 2013 email exchange between Patterson and Benco – in which Benco relayed its no-buying-group policy and Patterson said it felt the same way – facially establishes an unlawful agreement as *a fait accompli*. But regardless of whether that *might* support their assertion of "clear evidence" that Patterson and Benco "explicitly discussed [their] refusal to discount to buying groups," there is no such evidence as to Schein.

The few interfirm communications involving Schein were Benco-initiated and do not indicate that Benco shared its no-buying-group policy or that Schein assented or reciprocated in any way. The emails and text messages speak for themselves. None show – contrary to Complaint Counsel's contention – that Benco and Schein "explicitly discussed [their] refusal to discount to buying groups." (CC Br. 1). Nor is there any email or text message in which Schein discussed its buying group policies, practices, or plans, shared competitively sensitive information (about buying groups or otherwise), or reached any agreement or understanding with Benco. In fact, Complaint Counsel cites only a single text from Mr. Sullivan, thanking Mr. Cohen in March 2013 for passing along a public article about ADC and commenting that it was "unusual." (CX 6027-028). The word "unusual," however, is not secret code for "I know we have been conspiring for two years, and though I've never reached out to you about buying groups before and did not do so

now, rest assured, you can assume by 'unusual,' I mean that Schein agrees with you not to bid for the business of ADC or any other buying group."

Unable to show conspiracy through written communication, Complaint Counsel points to phone calls. That is not "direct evidence" either. *E.g.*, *Cosmetic Gallery, Inc.*, 495 F.3d at 52-53 (evidence of competitor communications "lacked the clarity of the direct evidence proffered in other antitrust cases" and instead "required several inferences …"); *Mkt. Force, Inc.*, 906 F.2d at 1173 ("[I]t is well established that evidence of informal communications among several parties does not unambiguously support an inference of a conspiracy."); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1013 (1994) ("[c]ommunications alone … do not necessarily result in liability"); *Cosmetic Gallery, Inc.*, 495 F.3d at 53 (an "account" of a "communication between alleged conspirators" was "at best evidence of an opportunity to conspire, not of concerted action"); *see also In re Baby Food Antitrust Litig.*, 166 F.3d 112, 126 (3d Cir. 1999) ("communications between competitors do not permit an inference of an agreement to fix prices unless those communications rise to the level of an agreement, tacit or otherwise.").

There are no recordings or written memorialization of the phone calls. While Complaint Counsel tries to fill the void with speculation, Respondents introduced affirmative testimony about those calls from the actual participants, who each denied reaching any agreement, tacit or otherwise, to boycott buying groups or that Schein shared any information about its policies, practices, or plans. (JF 90, 104; SF 1486-93). These sworn denials are the ***only*** direct evidence concerning what happened on those phone calls.[3] *In re McWane*, 155 F.T.C. at *267-68 ("sworn testimony from [Respondents] that they … did not discuss and agree to [not compete] … is direct

[3] Denials – just like any other testimony by witnesses who participated in or witnessed the communications – are "direct evidence" of the *content* of those communications because they do not require the Court to make any *inferences*.

evidence contrary to the asserted agreement").

In response, Complaint Counsel offers generic excuses. Denials, they say, are not fatal to their case because "requiring admissions of agreement would be tantamount to requiring direct evidence of a conspiracy, something that no court has required." (CC Br. 5). That is an implicit admission that Complaint Counsel lacks direct evidence. The argument also misses the point. When pitting Complaint Counsel's speculation and unsupported inference about what happened on those calls against the testimony of the participants, the uncontradicted direct evidence wins. *City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 130 (D.D.C. 2006) ("Facing the sworn denial of the existence of conspiracy, it is up to plaintiff to produce significant probative evidence" of the conspiracy); *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1302 (11th Cir. 2003) (finding plaintiffs' evidence insufficient to overcome the defendants' sworn denials, and ignoring the denials would be to improperly "engage in speculation").[4] At a minimum, such testimony is entitled to weight. *In re McWane*, 155 F.T.C. at *267-68 (sworn denials are "entitled to weight").

Complaint Counsel next argues that the lack of direct evidence doesn't matter "[b]ecause conspiracies tend to form in secret, proof of conspiracies rarely consists of direct evidence." (CC Br. 39). That may or may not hold true in a world of email and text messages (for instance, Complaint Counsel claims that the alleged agreement between Patterson and Benco was communicated entirely by email), but it does not change the nature of direct evidence. As

[4] Complaint Counsel claims the Court can just ignore sworn denials (CC Br. 5), but the cases they cite say no such thing. Each involved evidence of conspiracy that Complaint Counsel has failed to adduce here. *Gainesville*, for instance, does not say sworn denials are to be ignored. It just says that the plaintiff there was able to overcome the sworn denials with evidence of parallel activity *and* a "continuous exchange of letters," the content of which indicated reciprocity. *Gainesville Utils. Dep't v. Fla. Power & Light Co.*, 573 F.2d 292, 301 (5th Cir. 1978). None of the remaining cases Complaint Counsel cites even discuss the impact of sworn denials.

Complaint Counsel has none, they must prove a circumstantial case. (RCL 27-32). They have not done so.

III. COMPLAINT COUNSEL'S FICTIONAL CIRCUMSTANTIAL CASE.

Complaint Counsel has taken the fact of Schein's business with buying groups and made up a story of conspiracy that has morphed with each telling of it. To do so, Complaint Counsel plays fast and loose with the facts, taking facts they like and ignoring ones they do not. To believe their story, this Court would have to first assume the existence of the alleged conspiracy, interpret the evidence through the lens of that assumption, and ignore the evidence and testimony that directly contradicts Complaint Counsel's theory. *See Blomkest Fertilizer, Inc. v. Potash Corp. of Sask.*, 203 F.3d 1023, 1033 (8th Cir. 2000) ("[A] litigant may not proceed by first assuming a conspiracy and then explaining the evidence accordingly.").

A. Complaint Counsel's "Dipping Their Toes" Fallacy.

Central to the Complaint Counsel's story is their contention that Schein "started dipping [its] toes into the buying group business" in 2010, and that, "[b]y July 2011, Sullivan's position had changed." (CC Br. 16, 27). It might sound like a nice story, but it's not true.

Complaint Counsel's entire conspiracy theory kicks off with a single internal email by Mr. Sullivan in September 2010 that, Complaint Counsel says, indicates Schein "***began*** discounting to a buying group" – Smile Source – "to 'test the model' of potential [buying group] profitability." (CC Br. 16). This claimed *change* in Schein's approach to buying groups is a lynchpin of Complaint Counsel's tale because, as their story goes, it instigated a series of events: Mr. Cohen learned of this so-called sudden change, felt threatened by it, and decided to "orchestrate" the alleged conspiracy. (CC Br. 2 (alleging that "Benco feared that its policy would be futile if … Schein … 'opened this door,'" and so "when" Mr. Cohen "saw … Schein starting to discount to buying groups, he acted.")).

But the story unravels at every turn. For it to be true, Complaint Counsel needed to prove the following four events:

1. Schein did not start doing business with buying groups until after September 2010.

2. Benco learned of Schein's newly changed approach to doing business with buying groups between September 2010 and July 2011.

3. Benco communicated and reached agreement with Schein to boycott buying groups sometime before July 2011.

4. Schein again drastically changed its behavior in July 2011 and ceased doing business with buying groups.

None of that happened.

As to the first event, Schein did not start "dipping its toes" into the buying group business in 2010. For decades, starting well before 2010, Schein has selectively partnered with buying groups, embracing some and rejecting others. (*E.g.*, SF 159-88). Schein did business with select buying groups during Mr. Sullivan's entire career at Schein, which started in 1997. (SF 6, 159; *see also* SF 395-98 (Alpha Omega in the early 2000s)). Complaint Counsel points to three buying groups that they say Schein was doing business with "[b]y 2011." (CC Br. 16). But each began with Schein *years* before: Long Island Dental Forum in 2006 (SF 940), the Dental Co-Op of Utah in 2007 (SF 583), and Smile Source in 2008 (SF 223). By 2009 – a year before Complaint Counsel claims Schein began "dipping its toes" into the buying group world – Schein counted as partners at least eleven buying groups, including Alpha Omega, Ciraden, Dental Associates of Virginia, the Dental Co-Op, Dentists for a Better Huntington, Long Island Dental Forum, OrthoSynetics, Smile Source, Comfort Dental, Advantage Dental, and Stark County. (SF 1627; CX 7101-140-41).

Even Smile Source – the subject of Mr. Sullivan's September 2010 email that Complaint Counsel puts so much stake in – does not fit Complaint Counsel's story. Schein did not *begin*

discounting to Smile Source in 2010, as Complaint Counsel claims. Schein, through its Special Markets division, had partnered with Smile Source since 2008. (SF 223). As explained in Schein's opening brief, the impetus for Mr. Sullivan's email in September 2010 was a conflict that had arisen between Special Markets' Smile Source business and HSD's FSCs. (S. Br. 24-26). Following discussions between Mr. Muller and Mr. Sullivan, Schein agreed to *maintain the status quo* with Smile Source, simply shifting *internal* responsibility for the account in January 2011. (SF 224-29, 1133, 1649).[5]

The second prong of Complaint Counsel's origin story fails as well. Because there was no *change* in Schein's behavior towards buying groups, there was nothing new for Benco to learn, and no sudden impetus for Mr. Cohen to implement the alleged conspiracy. Notably, Complaint Counsel does not cite any internal Benco email or any testimony about Schein's dealings with Smile Source or other buying groups between January and July 2011 that supposedly formed the impetus for the alleged conspiracy.

It is, therefore, not surprising that Complaint Counsel also fails to point to any evidence of a buying-group related communication that supposedly kicked off the conspiracy. Thus, Complaint Counsel also failed to establish the third prong of their origin story.

That leaves the fourth prong. Complaint Counsel says they can infer an agreement because Schein supposedly changed its "position" in July 2011. (CC Br. 27). But there was no change in position, let alone the kind of "radical or abrupt" change necessary to support an inference of conspiracy. *Valspar Corp.*, 873 F.3d at 196; *Kleen Prods. LLC v. Georgia-Pac. LLC*, 910 F.3d

[5] Complaint Counsel tries to make something of Mr. Sullivan's testimony that he was willing to "test" the Smile Source model in 2010. (CC Br. 16; *see also* SRF 438). But Mr. Sullivan was referring to transitioning Smile Source from Special Markets to HSD and testing the "theory" that Smile Source could deliver incremental volume; he was not referring to *Schein* for the first time testing either Smile Source or buying groups generally.

927, 937 (7th Cir. 2018) ("A continuation of a historic pattern … does not plausibly allow one to infer the existence of a cartel.").

For this part of their story, Complaint Counsel relies exclusively on a single *internal* Schein email from Mr. Sullivan. (CC Br. 27 & n.222 (quoting CX 0185)). The email – written to others at Henry Schein, Inc., most of whom do not work in Schein's dental business – said, "I don't think you will ever see a full service dealer get involved with GPOs." (SRF 705; CX 0185). Far from a 180-degree change in position, however, the email relates to Synergy Dental, which Schein turned downed over a year prior in March 2010. (SF 212-16; CX 2451 (March 2010 Sullivan email: "not interested," as the "risk is much greater if we do sign than if we don't")). Nor was this the first (or last) time Schein expressed skepticism of buying groups. (SF 30, 203, 1342; *see also, e.g.*, RX 2405 (2002 Muller email: "we have held a pretty firm line on saying NO to virtually all of them."); CX 2296 (2010 Sullivan email: "I do not support us opening Buying Clubs.")).

Complaint Counsel nonetheless claims that Mr. Sullivan's July 2011 email about Synergy Dental was inconsistent with his earlier email about Smile Source. But Mr. Sullivan's July 2011 email did not mark an end to Schein's case-by-case evaluation of buying groups that it had established in 2010; it was an application of it. The 2010 Guidance – developed after FSCs complained about Pugh Dental – expressed deep skepticism of most buying groups, and made clear that Schein would only focus on those that could "force compliance." (SF 210-11; CX 2111; CX 2153). Mr. Sullivan's July 2011 statement about Synergy Dental – a buying group that was nothing more than a random list of dentists – is fully consistent with that view.

Smile Source, in contrast to Synergy, is not a typical buying group. It is a franchisor, offering a number of management and marketing services, exclusive territories, and intellectual property rights in exchange for a portion of the members' gross patient revenue. Synergy Dental

did none of that. The difference in treatment between Synergy Dental and Smile Source thus follows the 2010 Guidance. (SF 210; RX 2529-002 (Mr. Muller noting that Smile Source fit the criteria); CX 2111-004-05 (same)).[6]

Because of Smile Source's attributes, Mr. Sullivan always expressed willingness to work with them.[7] Even after Smile Source fired Schein in 2012, Mr. Sullivan wrote, [redacted] (SF 1354; RX 2090). Each time that Smile Source approached Schein thereafter, Mr. Sullivan responded with enthusiasm: "I would enjoy catching up with you" (Oct. 2013); "Yes, we ***absolutely*** would like to discuss further" (Nov. 2013). (SF 1465; CX 2580; RX 2328).[8] Such consistency is antithetical to Complaint Counsel's claims. *White v. R.M. Packer Co.*, 635 F.3d 571, 581 (1st Cir. 2011) (conduct that is "stable over time, … undermines any inference that the … behavior represents a sudden shift marking the beginning of a price-fixing conspiracy").

The about-face Complaint Counsel posits is also inconsistent with Schein's buying group efforts after July 2011, including business with a number of new buying groups. For example, Schein (i) entered into a new buying group relationship with the Dental Alliance in July 2011; (ii) entered into a new buying group relationship with MeritDent in February 2012; (iii) approved a new buying group relationship with Sunrise Dental in March 2012; (iv) memorialized its buying

[6] Where, as here, policies and approaches are determined before any alleged conspiracy is even claimed to have started, the alleged conspiracy is rendered implausible. *In re Citric Acid*, 191 F.3d at 1101 (finding "the factual context renders [plaintiffs'] claim implausible" where defendant's decision to reduce expansion was six months *before* plaintiff alleged the defendant joined the conspiracy).

[7] Indeed, Complaint Counsel appears to have abandoned its theory that Schein somehow "induced" Smile Source to fire Schein in 2012, as the evidence did not bear it out. (*Compare* CC Pretrial Br. 20 *with* SF 1122-45).

[8] Complaint Counsel claims that Mr. Sullivan's tune about Smile Source had changed because in February 2012, he wanted to "KILL" their model. (CC Br. 27 (citing CX 0199)). But this was only *after* Smile Source terminated Schein. Mr. Sullivan was simply rallying his team to continue competing for the actual customer – the individual dentist offices that were Smile Source members. (SRF 729; SF 1352-54; Sullivan, Tr. 3932-33, 3935-37 ("I definitely wanted to … go after … Smile Source's model, and the customers that they were now attempting to switch to someone else.")).

group relationship with Dental Partners of Georgia in May 2012; (v) entered into a buying group partnership program with the Schulman Group in April 2013; (vi) submitted a bid in an attempt to win back the Smile Source business in 2014; (vii) created the Mid-Market Group in April 2014 to better serve buying group partners; (viii) attempted unsuccessfully to continue its partnership with the Dental Co-Op with an exclusivity offer in July 2014; (ix) attempted unsuccessfully to continue its partnership with Steadfast with an exclusivity offer in 2014; (x) attempted to negotiate with the Kois Buyers Group in 2014; (xi) saved its relationship with Dental Gator in late 2014 despite conflicts with FSCs; (xii) made developing a standardized buying group offering a strategic priority at the end of 2014; (xiii) entered into a buying group relationship with Floss Dental prior to January 29, 2015; and (xiv) negotiated a deal with Klear Impakt beginning in January 2015. (S. Br. 26-63; SF 269-95, 605-11, 653-57, 680, 757, 816-18, 895-913, 975, 1095-96, 1222-24, 1244, 1319).

The evidence shows there was no *change* in Schein's position – in September 2010 or in July 2011. Thus, there is no evidence that Complaint Counsel's alleged conspiracy ever started.

B. Complaint Counsel's Communications Fallacies.

Without direct evidence of an agreement or a cohesive origin story, Complaint Counsel is left to make the most of what communications evidence it has. Specifically, Complaint Counsel contends that "Benco reached out to Schein to discuss buying groups on no fewer than six occasions." (CC Br. 25 & n.213 (citing CCFF 679)). But the first and most critical of these – where the agreement was supposedly reached – never occurred. The others are innocuous.

1. The Six Supposed Communications.

a. Complaint Counsel's Made-Up "Kick-Off" Communication.

Complaint Counsel says that the first time "Benco reached out to Schein to discuss buying groups" was during an undated, unidentified "communication during which Cohen informed

Sullivan of Benco's no buying group policy." (CC Br. 25 n.213 (citing CCFF 662-64)). This is an imaginary communication with ***no evidentiary support***.

Again, Complaint Counsel attempts to fill the evidentiary void with artful drafting. Though they do not put a date on this supposed communication, they list it first, trying to support their origin story – discredited above – that the alleged agreement began prior to July 2011. (CC Br. 25 & n.213 (citing CCFF 662-64)). But they do not cite any specific communication. Instead, they cite only to their own proposed findings, which in turn refer to Mr. Cohen's testimony relating to ADC in March 2013. (SRF 662-64). At trial, Mr. Cohen was clear on the timing – he only talked to Mr. Sullivan about buying groups once – ***in 2013***. (Cohen, Tr. 844 ("Q. And aside from ADC [in 2013], you have never had any conversation with Mr. Sullivan about any buying group? A. That is correct.")). As such, Mr. Cohen's testimony cannot possibly support an inference that the conspiracy started in 2011 or that there was a *separate* communication where Benco disclosed its policy.[9]

b. Mr. Cohen's January 2012 Call About Employment Matters.

Complaint Counsel asserts that the second time "Benco reached out to Schein to discuss buying groups" was an "11 minute and 34 seconds call between Cohen and Sullivan on January 13, 2012." (CC Br. 25 & n.213 (citing CCFF 968)). But as Mr. Cohen testified, the call related to employment matters.[10] He could say that "with confidence" based on the surrounding telephone

[9] Elsewhere in their brief, Complaint Counsel cites to phone calls and text messages in February and March 2011 for their start-date fallacy. (CC Br. 26-27 & Att. A (citing CCFF 328-32, 349-50)). There is no evidence that any of those related to buying groups. Complaint Counsel did not introduce any evidence as to the content of those communications. And as such, they constitute nothing more than opportunity evidence. As discussed below, content-less opportunity evidence does not support an inference of a conspiracy.

[10] Complaint Counsel asserts these employment matters "raise[] [their] own anticompetitive concerns." (CC Br. 27 & n.221). But this case is not about any hiring agreement, it is about whether there was an agreement to boycott buying groups. If – as Mr. Cohen testified – the call related to employment matters, and not buying groups, it is irrelevant to this case.

records that indicated he made calls to his employment counsel immediately before and after the call with Mr. Sullivan. (SF 1436-39).

Complaint Counsel seeks a contrary inference that at least a portion of the call related to Unified Smiles, citing an earlier *internal* Benco email suggesting that Mr. Cohen planned to speak to Mr. Sullivan about Unified Smiles. (CC Br. 29-30, 48). But the only direct evidence of what was actually discussed – testimony from Mr. Sullivan and Mr. Cohen – is uniform. Neither Unified Smiles nor any buying group ever came up. (SF 1422, 1436-40; Cohen, Tr. 747; Sullivan, Tr. 4218-19).[11]

Nor do the circumstances around Unified Smiles support Complaint Counsel's speculation. Schein's Special Markets division – which does not report to Mr. Sullivan – had turned Unified Smiles down three weeks before the call. As Special Market's Mr. Foley testified, his decision to reject Unified Smiles was consistent with the guidance he had helped developed in 2010, and was made without consultation with Mr. Sullivan or anyone else. (SF 1297, 1300; Foley, Tr. 4657, 4690-91).

Mr. Sullivan, for his part, had never heard of Unified Smiles. (SF 1303; Sullivan, Tr. 4268-69). Nor does Complaint Counsel point to any actions by Schein or Benco following the January 13th call that might indicate Unified Smiles (or buying groups) was discussed. There is no record, for example, that Mr. Sullivan tried to investigate Unified Smiles before or after the January 13th call. In fact, Schein's conduct immediately following the call is antithetical to the

[11] Complaint Counsel also argues that an inference is warranted because Mr. Cohen "emailed Benco employees to reinforce Benco's no buying group policy" less than "thirty minutes before the scheduled call" with Mr. Sullivan. (CC Br. 30). But both the documents and Mr. Cohen's testimony demonstrate that those two events were entirely unconnected. Mr. Cohen was simply replying to an email that Benco's Pat Ryan had drafted in response to an inquiry from a different buying group, Nexus. Nexus had tried to shoehorn itself into exceptions to Benco's policy, so Mr. Ryan had drafted a formal policy to clarify what constituted a buying group. Mr. Cohen reviewed the draft, made revisions, and suggested that Mr. Ryan share the policy in advance of an upcoming regional meeting. (SF 1423-25). That document has nothing to do with Unified Smiles or Schein.

alleged conspiracy. Less than a month later, Schein signed up a new buying group, MeritDent, which Mr. Sullivan had personally helped evaluate. (SF 972-75).

Moreover, even if one gives in to speculation and assumes that Mr. Cohen had mentioned Unified Smiles on the call, there is no evidence that Schein reached any agreement or understanding with Mr. Cohen about Unified Smiles or buying groups generally. Nor is there any evidence that Schein disclosed its buying group policies, practices, or plans. (SF 1438).

At most, then, the January 13, 2012 call constitutes an *unsolicited* competitor communication that fails to rise to the level of an agreement, and cannot support an inference of an agreement. *In re Baby Food*, 166 F.3d at 126; *see also In re McWane*, 155 F.T.C. at *265 ("It remains the plaintiff's burden to prove that the [Respondent] succumbed to the temptation and conspired. It is not enough to point out the temptation and ask that the [Respondents] bear the onerous, if not impossible, burden of proving the negative – that no conspiracy occurred.").

c. The March 25, 2013 Call re ADC.

The next communication Complaint Counsel cites is an "8 minute and 35 seconds call between Cohen and Sullivan on March 25, 2013." (CC Br. 25 & n.213 (citing CCFF 1032)). But Complaint Counsel does not actually contend that any agreement was reached on the call. Rather, they latch on to the fact that ADC was *mentioned* to seek an inference that there must have been a prior pre-existing agreement. As a matter of either proof or logic, that does not work.

As Complaint Counsel concedes, this unsolicited call came about because Mr. Cohen was "uncertain" about whether ADC was a buying group, and he wanted to see if Mr. Sullivan knew anything about ADC. (CC Br. 33 (citing CCFF 1023, 1025-27)). That is indicative of Mr. Cohen's desire to get additional information about ADC. It is not indicative of a broad agreement to boycott buying groups. And it certainly does not "exclude" or "foreclose" the possibility of independent action. *Cosmetic Gallery, Inc.*, 495 F.3d at 53; *see also* RCL 29 (collecting cases). In any event,

Mr. Sullivan did not engage with Mr. Cohen on the topic. He did the opposite, and shut the conversation down. (SF 1492).

The undisputed facts surrounding the call are straight-forward. Earlier in the day on March 25, 2013, ADC submitted an RFP to Benco. After some internal lower-level discussions, Benco's Pat Ryan reached out to Mr. Cohen suggesting they "speak" because he could not "figure out if [ADC was] a buying group or not." (SRF 1024; CX 0020). Unable to resolve the issue, Mr. Cohen sent an unsolicited text message to Mr. Sullivan asking if he was available to talk, but did not identify the subject matter. (SRF 1029, 1031). The two spoke that afternoon. At trial, though Mr. Cohen could not recall the substance of the call, he surmised that his purpose was to gain "market intelligence" about ADC because he could not determine if it was a buying group. (SRF 1032; Cohen, Tr. 547).[12]

Based on these undisputed facts, Complaint Counsel speculates that, on this call, Mr. Cohen "told Sullivan that Benco was not planning to bid on ADC." (CC Br. 33-34 (citing CCFF 1038-40)). But Mr. Cohen did not testify to that. Rather, he testified that he had no recollection of the call. (SRF 1036). To fill the gap, Complaint Counsel relies solely on Mr. Sullivan's IHT. But Mr. Sullivan explained that, during his IHT, he confused that call with "the text [Mr. Cohen] sent me [two days] later." (SF 1328; Sullivan, Tr. 3946-47). He was thinking about the text in which Mr. Cohen indicated that Benco was going to bid. (Sullivan, Tr. 3946-47). Mr. Sullivan

[12] One can debate whether Mr. Cohen should have reached out to Mr. Sullivan to gain additional background information on ADC. But Complaint Counsel does not assert that any information exchanged on that call (if any) had an anticompetitive effect. They attempt to use the call as circumstantial evidence of a pre-existing agreement. But that requires inference upon inference. The Court would first have to assume the existence of a conspiracy, then infer that the purpose of the ADC call was not to gain additional information about ADC, but rather to coordinate a response. There is no evidence that was what occurred.

explained that at the time of his IHT, he had not had the benefit of reviewing the full chronology of documents, which refreshed his recollection. (SRF 1038; Sullivan, Tr. 3948-49).[13]

Preferring their version of the facts, Complaint Counsel says that Mr. Sullivan's confused IHT testimony is more credible because it is "independently corroborated by the fact that on that day, Benco believed ADC was a buying group and was planning to reject this customer." (CC Br. 34 & n.292 (citing CCFF 1024 (citing CX 0021))). Complaint Counsel is again incorrect. Complaint Counsel cites a 12:46 pm internal Benco email exchange from March 25, 2013 in which Mr. Ryan initially concluded that ADC was a buying group, and that Benco was "out." (CCFF 1024; CX 0021). But Mr. Ryan did not stop there. After subsequent internal discussions, Mr. Ryan had, by 2:45 pm, changed his mind and could "no longer figure out if [ADC] was a buying group." (SRF 1024-25; CX 0020). As such, when Mr. Cohen reached out to Mr. Sullivan at 4:15 pm, Benco did not know what ADC was and had not decided whether to bid. Thus, the internal Benco documents independently corroborate Mr. Sullivan's testimony that on March 25, 2013, Mr. Cohen was simply looking for information about ADC and did not communicate a decision not to bid for ADC.

Mr. Sullivan, for his part, had no information to share about ADC, and he quickly put an end to the conversation.

> [When Mr. Cohen] started talking about Atlantic Dental Care… He asked if I knew what they were, and I told him I did not. Then he started to tell me more about them, and I immediately stopped him, and I said, 'Chuck, this is not a discussion that you and I should be having' … [and] I cut off discussion with him on that topic.

[13] Complaint Counsel suggests that the IHT is more reliable than the trial testimony. But there is no reason why a witness would testify more truthfully in an IHT than at trial (or vice versa). To the contrary, there is every reason to believe that, after having a chance to review the documents in chronology, a witness's memory may be refreshed. That is precisely why the use of writings to refresh recollection is "settled doctrine." Fed. R. Evid. 612, Adv. Comm. Notes. Thus, there is no reason to discredit Mr. Sullivan's refreshed trial and deposition testimony, especially where the confusion relates to the order of events that occurred across two days over six years ago.

(Sullivan, Tr. 3946).[14]

Mr. Sullivan then transitioned the discussion to an upcoming meeting that Mr. Cohen had scheduled the following week with other senior executives from Henry Schein, Inc. The purpose of that meeting was to discuss potential M&A and joint venture opportunities. (SRF 1031). The call turned to joking about who would work for whom if a merger materialized. After the call, Mr. Sullivan followed up with a text message continuing the joke, noting that he would be happy to "join Team Benco" but would want his picture on the statue of the company's tooth logo. (SRF 1033; CX 6027; Cohen, Tr. 554-55, 897-98; Sullivan, Tr. 4189-90). Mr. Sullivan made no mention of ADC or buying groups, as he had put the kibosh on that topic.

After a few more texts continuing the who-will-work-for-whom joke, Mr. Cohen forwarded a public press release about ADC. (SRF 1045; CX 6027-028). Neither the text, nor the press release, contained any confidential information, or any indication of any plan or agreement on how to treat ADC. Mr. Sullivan's response was simply a polite, "thanks … unusual." (SRF 1047; CX 6027-028; Sullivan, Tr. 4194-96). He did not share any information with Mr. Cohen, and neither Mr. Cohen's nor Mr. Sullivan's text message suggests any prior understanding as to whether the companies were planning to bid for ADC. No "assurances" were made.

d. Mr. Cohen's March 27, 2013 Text re ADC.

Complaint Counsel next points to another unsolicited follow-up "text message between Cohen and Sullivan on March 27, 2013" about ADC, in which Mr. Cohen stated he "[d]id some additional research on the Atlantic [Dental] Care deal," determined that it was "not a buying

[14] Complaint Counsel incorrectly claims that Mr. Sullivan's "testimony is contradicted by Cohen's testimony." (CCFF 1054 (citing Cohen, Tr. 559)). Mr. Cohen testified that he could not recall "one way or the other" whether Mr. Sullivan told him that they should not be discussing specific customers. (SRF 1054-55; Cohen, Tr. 559, 891-92). A lack of recollection is a not a contradiction. *In re McWane*, 155 F.T.C. at *253 (where witnesses "denied having any recollection of the telephone calls and/or denied any recollection of what was discussed[,]" it "would be pure speculation … to simply assume" the content of the calls).

group," and had decided Benco was "going to bid." (CC Br. 25 & n.213 (citing 1069), 34 & n.287 (same)). Having earlier raised the question of what ADC was, and Mr. Sullivan not knowing, Mr. Cohen was simply closing the loop. While Complaint Counsel argues that Mr. Cohen should not have mentioned that Benco was going to bid, his message does not suggest any *prior* agreement *not* to bid for ADC or for buying groups.[15] Indeed, if an agreement or understanding had been reached, there would have been no reason for Mr. Cohen to have continued to research ADC's status.

In any event, this text message is entirely one-sided. It does not reflect any statement by Schein, any agreement by Schein, or any action by Schein consistent with any agreement.[16] One-sided communications do not a conspiracy make. (RCL 21-22 (citing *Reserve Supply Corp. v. Owens-Corning Fiberglass Corp.,* 971 F.2d 37, 50 n.9 (7th Cir. 1992); *In re McWane*, 155 F.T.C. at *265; *In re Citric Acid*, 191 F.3d at 1093, 1098; *El Cajon Cinemas, Inc. v. Am. Multi-Cinema, Inc.*, 832 F. Supp. 1395, 1398 (S.D. Cal. 1993)).[17]

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[15] Complaint Counsel calls Mr. Cohen's text message "the antithesis of free and open competition." (CC Br. 55). But Schein independently received an RFP from ADC (SF 1470, 1513), and if anything, competition *increased* with Benco's decision to bid. Competition certainly was not hindered, as Benco did not share any specifics of its bidding strategy or proposal.

[16] Attempting to create the impression that Mr. Sullivan reacted by trying to reach agreement with Mr. Cohen, Complaint Counsel asserts that, "[f]ollowing receipt of [the] March 27, 2013 text message, Sullivan and Cohen tried to reach each other on the telephone several times" and "finally connected and spoke for 5 minutes and 36 seconds" on April 3, 2013. (CC Br. 34, n.287 (citing CCFF 1080, 1088)). That is ***incorrect***. Mr. Sullivan called Mr. Cohen ***before*** he received the March 27th text. The call could *not* have been to discuss Benco's (later) decision to bid for ADC. (CX 6027-027). Rather, as Mr. Sullivan testified, he was concerned because before the call, Mr. Cohen had sent a text about Dental Alliance, and Mr. Sullivan wanted to re-iterate in "much stronger terms" that they should not be discussing specific customers, a message he delivered when the two spoke on April 3, 2013. (SF 1547; Sullivan, Tr. 3966, 4198-99).

[17] Complaint Counsel argues that *Esco Corp. v. United States*, 340 F.2d 1000 (9th Cir. 1965), upheld a conspiracy finding against a defendant that never expressly gave an assurance of commitment to the competitor. (CC Br. 4). That is not what the *Esco* court found. While "express" assurances – written or oral – "are unnecessary," they are only unnecessary where "a course of conduct … once suggested or outlined by a competitor in the presence of other competitors … ***is followed*** by all … and continuously for all practical purposes…." *Esco*, 340 F.2d at 1007-08. In other words, commitment can be expressed in words or conduct. Here, there is no evidence that Mr. Cohen even suggested or outlined a course of conduct. Even if he did, Schein certainly did not follow it. It continued to do business with new and existing buying groups. Complain Counsel's reliance on *Foley*, where defendants took steps

e. Mr. Cohen's March 26, 2013 Text re Dental Alliance.

Complaint Counsel, going out of chronological order, next points to an unsolicited text message Mr. Cohen sent to Mr. Sullivan on March 26, 2013 concerning Dental Alliance. (CC Br. 31-32). Contrary to Complaint Counsel's argument, this was not an attempt by Mr. Cohen to confront Schein about a deviation from a prior agreement, and Mr. Sullivan's response closes the door on any such inference.

Schein had been working with Dental Alliance since July 2011 (*after* the start of the alleged conspiracy), and continued to do so with Mr. Sullivan's express approval. (SF 1309-25; RX 2349; RX 2350). Almost two years later, Mr. Cohen sent an unsolicited text to Mr. Sullivan forwarding competitive intelligence Mr. Cohen had received about Schein's Dental Alliance discount program. (SRF 997; CX 6027-028). At trial, Mr. Cohen noted that he was just seeking "market intelligence." Indeed, the text itself suggests uncertainty, noting that it "[c]ould be a rumor…." (SF 1504, 1545; CX 6027; Cohen, Tr. 557).[18] It was not a confrontation. The text did not ask Mr. Sullivan to terminate the relationship or take any other action.[19]

When he received the text, Mr. Sullivan thought it related to ADC, the entity that Mr.

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to comply with the alleged agreement, fails for the same reason. (CC Br. 44 (citing *United States v. Foley*, 598 F.2d 1323 (4th Cir. 1979))).

[18] Ignoring Mr. Cohen's explanation, Complaint Counsel attempts to construct an inference of a prior agreement through a series of rhetorical questions, asking "Absent a prior assurance from Sullivan, why would Cohen tell Sullivan that he believed it might be a rumor …? And … why would Cohen end the message with 'Thanks,' showing gratitude for some anticipated action form Sullivan?" (CC Br. 50). But this just invites speculation. There are numerous reasons to say "thanks," and Mr. Cohen's text has all the markings of seeking intelligence ("could be a rumor"), not of agreement (no accusation or demand for action).

[19] Complaint Counsel may *argue* that Benco should not have tried to confirm its market intelligence by seeking confirmation directly from Schein. But the case against Schein is not about the wisdom of Mr. Cohen's unsolicited actions. It is about whether there was a pre-existing *agreement* to boycott buying groups. While information exchanges among competitors can be challenged under the rule of reason, that is not the case Complaint Counsel brings. Instead, it seeks to use *alleged* "confrontations" as circumstantial evidence of a prior agreement. But such an inference would require evidence that Schein responded in a suspicious manner that would not have occurred absent a conspiracy. *Valspar Corp.*, 873 F.3d at 193 (evidence must be "so unusual that in the absence of an advance agreement, no reasonable firm would have engaged in it"). There is no such evidence.

Cohen had texted about the prior day. (SRF 997; Sullivan, Tr. 3946-47). Mr. Sullivan's confusion is not surprising given the similarity of initials (ADC versus DA) and the fact that Mr. Cohen's text does not mention Schein or explain the reason for the text. As such, it was not unreasonable for Mr. Sullivan to (mistakenly) believe that Mr. Cohen was merely providing additional information about ADC, a group Mr. Cohen was researching.[20]

Regardless, Mr. Sullivan was concerned about Mr. Cohen's continued effort to engage in a discussion about specific customers despite Mr. Sullivan's prior warnings. So, Mr. Sullivan called Mr. Cohen to repeat his admonition and deliver "a much stronger message" that they should not discuss specific customers. (SRF 997-98; Sullivan, Tr. 4205-06).

Complaint Counsel ignores Mr. Sullivan's testimony. (CC Br. 31-32). Instead, they speculate that, on this call, Mr. Sullivan and Mr. Cohen discussed Dental Alliance, and presumably reached some understanding of which there is no evidence. Complaint Counsel's speculation that the call was a "confrontation" about Schein's supposed cheating, however, is inconsistent with the record. There was no internal follow-up by Mr. Sullivan about Dental Alliance, and Schein continued to do business with them throughout the relevant period. (SRF 997; SF 1319, 1543; Sullivan, Tr. 4241).

f. Mr. Ryan's October 2013 Call re Smile Source.

Complaint Counsel stated in open court that the "basis of our case comes down to the nature of the relationship and communications between Chuck Cohen, Tim Sullivan, and Paul Guggenheim" and other communications are "not the basis of our case." (Kahn, Tr. 4759). Yet, curiously, Complaint Counsel's sixth and last communication in which Benco allegedly "reached

[20] Testifying at his IHT four years later, Mr. Cohen was similarly confused about whether his text related to ADC or a different entity. (CX 0301 (Cohen, IHT at 284 ("Q. As you sit here today, what do you understand you meant there? A…. It could have to do with Atlantic Dental Care or not. I mean, they're both sort of in the same general area.")).

out to Schein to discuss buying groups" is an "18 minute call between Benco's Ryan and Schein's Foley on October 1, 2013." (CC Br. 25 & n.213 (citing CCFF 1010); *see also* CC Br. 32).

Complaint Counsel also dubs this call a "confrontation," but they do not contend that Mr. Foley reached any agreement with Benco or was even aware of any such agreement. (*See* SF 146-64; Foley, Tr. 4705, 4579). No such inference can be drawn; nor is there any indication of a "confrontation" on the call.

Just as Mr. Sullivan did with Mr. Cohen, Mr. Foley acted precisely as one should in response to an unsolicited call from a competitor. When Mr. Ryan raised Smile Source, Mr. Foley ended the discussion and reported it to his boss, Mr. Muller. As Mr. Foley wrote:

> Next time we talk remind me to tell you about my conversation with Pat Ryan at SM Benco. They are anti Buying Group and Smile Source recently reached out to them. ***I'm being careful not to cross any boundaries, like collusion.***

(SRF 1016-17; CX 0243). Mr. Muller described Mr. Foley's report as "a great sentence … telling me here that he didn't share information or have any collusion-type discussions." (SRF 1017; CX 0309 (Muller, IHT at 161)).

Mr. Foley did not share any information about Schein's policies, practices, or plans concerning buying groups generally or Smile Source specifically. (SRF 1016; Foley, Tr. 4579). Nor could he have. He did not have responsibility for Smile Source, as Special Markets lost the account to HSD three years prior, in 2010. (SF 1464). Smile Source fired Schein in 2012, but did not reach out to Schein again until later in October 2013, after Mr. Ryan's call to Mr. Foley. (SF 1157). Mr. Foley did not report on his conversation to Mr. Sullivan (CCFF 1018), who, when Smile Source did finally reach out later that month, enthusiastically embraced the opportunity to rekindle the relationship. (SRF 1020). Both words and deed demonstrate a lack of a conspiracy.

Moreover, Complaint Counsel's theory is illogical. They claim that Mr. Cohen and Mr. Sullivan hatched a conspiracy in early 2011, and that Mr. Sullivan implemented the agreement by

directing Schein employees to boycott buying groups. (CC Br. 27-28). For Mr. Ryan's unsolicited call to Mr. Foley to be relevant to these claims, this Court would need to find that Mr. Sullivan told Mr. Foley of the alleged agreement and that Mr. Foley lied in his report to Mr. Muller. There is no basis for such speculative inferences. That is why, as Complaint Counsel has already conceded, communications like these are "not the basis" of their case. (Kahn, Tr. 4759).

2. Complaint Counsel's Spin on the Six Communications.

The communications discussed above constitute the sum total of interfirm communications on which Complaint Counsel hang their case against Schein. As none establish any agreement, either alone or together, Complaint Counsel resorts to story-telling, imagining detailed and lengthy conversations about buying groups, exchanges of information about policies, "assurances" on how to deal with close calls, and "confrontations" when deviations are discovered. None of that happened.

a. Complaint Counsel's "Information Exchange" Fallacy.

Trying to draw parallels between the February 8, 2013 email exchange between Benco and Patterson, Complaint Counsel says that Benco disclosed its no-buying-group policy to Mr. Sullivan too, though there is no document containing or even indicating such a disclosure. Complaint Counsel continues that Mr. Sullivan reciprocated by disclosing that Schein too had a similar policy (even though it did not). The evidence is to the contrary.

(1) Complaint Counsel Has Not Shown that Benco Disclosed Its No-Buying-Group Policy to Schein.

There is no reliable evidence that Mr. Cohen informed Mr. Sullivan of Benco's no-buying-group policy. Unlike the email communications between Patterson and Benco, the text messages and emails between Mr. Sullivan and Mr. Cohen do not reveal Benco's policy. Complaint Counsel asserts that "contemporaneous documents … demonstrate that Cohen did inform Sullivan of

Benco's policy." (CC Br. 25 & n.212 (citing CCFF 662-64)). That is ***false***. Complaint Counsel does not cite any ***document***. And none of the interfirm communications involving Mr. Cohen and Mr. Sullivan disclose Benco's policy.

As Complaint Counsel admits, Mr. Sullivan consistently testified that Mr. Cohen did not inform him of Benco's policy on buying groups. (CC Br. 25 & n.212; SRF 661; CX 0311 (Sullivan, IHT at 269 ("Q. Has Mr. Cohen ever shared with you his general thoughts on buying groups? A. No.")); CX 8025 (Sullivan, Dep. at 344 ("[N]ever, to my knowledge, did [Mr. Cohen] call me to talk about buying groups in general and the strategy")); Sullivan, Tr. 3944 (Mr. Cohen "did not" share "that Benco had a no buying group policy")). In fact, Mr. Sullivan was not even aware that Benco had a no-buying-group policy. (SRF 662; Sullivan, Tr. 4259). That explains Mr. Sullivan's concern, which Complaint Counsel elicited at trial, that if Schein did not do business with a buying group, the group may turn to one of Schein's competitors. (SRF 239-40).

Mr. Cohen, for his part, testified that, while he "believed" he *might* have communicated Benco's policy to Mr. Sullivan, this "belief" was formed with no independent recollection or knowledge of the conversations whatsoever. (SRF 662-64; Cohen, Tr. 500-01; *see also* CX 0301 (Cohen, IHT at 195-200); CX 8015 (Cohen, Dep. at 230 ("I don't recall any specific conversations with Tim Sullivan about buying groups."))). Mr. Cohen's non-recollection is not reliable evidence of the supposed disclosure, particularly in light of Mr. Sullivan's testimony.[21]

[21] Complaint Counsel claims that Benco "reassured [its] competitors of Benco's compliance with [its no-buying group] policy," citing Mr. Cohen's March 26, 2013 text regarding Dental Alliance. (CC Br. 59-60 (citing CCFF 1182)). But this was not an effort to "reassure" Schein of anything, as Schein had not raised any questions or concerns. It was an unsolicited text. Moreover, Complaint Counsel ***misquotes*** the text. According to Complaint Counsel, "Cohen [wrote] to Sullivan: 'Dental Alliance buying group contacted me about a year ago…. Told him he was out of his tree.'" (CC Br. 59 (citing CCFF 997 (misquoting CX 6027-028))). In fact, Mr. Cohen simply copied an email he received from his regional manager. (SRF 994, 997; CX 0061; Cohen, Tr. 557-58). Thus, Dental Alliance did not approach Mr. Cohen, and the "out of his tree" comment was not Mr. Cohen's.

(2) The Uncontradicted Evidence Establishes that Schein Did Not Disclose Its Buying Group Policies, Practices, or Plans to Benco.

Mr. Sullivan affirmatively testified he did not disclose ***any*** information about any particular buying group, buying groups in general, or Schein's policies, practices, plans, or approaches to buying groups. This evidence is uncontradicted. There is no document making such a disclosure, and no document memorializing or reflecting any such disclosure by Schein or Mr. Sullivan. (*E.g.*, SRF 676, 680-81; *see also* CX 6027).

Mr. Cohen similarly testified that Mr. Sullivan never disclosed any information about buying groups. (SRF 662, 680-81; Cohen, Tr. 845). Mr. Cohen did not "know what Schein's policies or practices were with respect to buying groups." (SRF 662, 676-78, 680-81; Cohen, Tr. 525, 583; RX 1137 (Cohen, Dep. at 334-35); CX 0301 (Cohen, IHT at 216)).[22] Indeed, Mr. Cohen's trial testimony was clear:

> Q. … [A]side from ADC, you never had any conversation with Mr. Sullivan about buying group[s]?
>
> A. Correct.
>
> Q. And you don't recall any time Mr. Sullivan initiated a discussion with you about buying groups?
>
> A. Correct.
>
> Q. And Mr. Sullivan never asked you … whether Benco had a no-buying group policy?
>
> A. I don't believe so, no.
>
> Q. And Mr. Sullivan never told you what Schein's policy was with respect to buying groups?
>
> A. No.

[22] This evidence renders Complaint Counsel's reliance on *Gainesville* inapposite, as that case involved an "exchange of letters" of which the content was known. (CC Br. 43 (quoting *Gainesville*, 573 F.2d at 301)). Here, there was at most a one-way transfer of information on a phone call that was immediately cut off.

Q. In fact, you do not know what Schein's policy is with respect to doing business with buying groups; is that right?

A. I do not.

(Cohen, Tr. 844-45).

Complaint Counsel dances around this testimony in an effort to create a different impression, claiming that "[a]s a result of these communications, Benco gained the understanding that Schein, just like Benco and Patterson, would adopt a policy against recognizing buying groups." (CC Br. 25-26 (citing CCFF 680, 675-78)). But the evidence Complaint Counsel cites does not support their assertion.

Complaint Counsel cites only to Mr. Cohen's IHT. There, Mr. Cohen made clear that he did not have any "communications with Mr. Sullivan that gave [him] the impression that Schein does not sell to GPOs." (SRF 677-78; CX 0301 (Cohen, IHT at 225)). Mr. Cohen was also clear that he had no knowledge of Schein's policies or practices. (SRF 677-78; CX 0301 (Cohen, IHT at 216 (testifying that, it is "not fair to say" that he had an "understanding that Schein was not selling to GPOs" because "[a]s far as their overall policy, I don't know."))). Regarding Mr. Cohen's one call with Mr. Sullivan, Mr. Cohen testified repeatedly that he had no independent recollection of it. Specifically, he testified – over 20 pages of transcript – that he "can't recall" why he planned to call Mr. Sullivan," that he does not "remember the context around" the call, that he does not recall "in fact call[ing] Mr. Sullivan," that the records do "not refresh [his] memory as to what [he] and Mr. Sullivan discussed," and that "[t]he context and what was discussed in the call, [he] truly [does not] recall." (SRF 1036; CX 0301 (Cohen, IHT at 266-89)).

Complaint Counsel persisted and pressured Mr. Cohen to speculate about the call. After Ms. Kahn acknowledged that "I know you have no recollection," she insisted the he give his interpretation about "the way that you read these text messages." (CX 0301 (Cohen, IHT at 280)).

Mr. Cohen testified that he "didn't know," that all he could do was "try[] to reconstruct" an answer from the messages, and that he was "not testifying that I remember … the nature of the dialogue." (CX 0301 (Cohen, IHT at 280)). Another twenty pages of testimony later – which included testimony about Mr. Guggenheim's email to Mr. Cohen about ADC and an *internal* Benco document containing competitive intelligence incorrectly suggesting that Schein was not working with buying groups – Ms. Kahn again tried to press Mr. Cohen again about his "understand[ing]" of "Mr. Sullivan's position… on buying groups." (CX 0301 (Cohen, IHT at 310)). At that point, Mr. Cohen simply stated that he "think[s] that the policy that Henry Schein had was that they do not recognize GPOs," basing his speculation on the same text messages that he already said he could not recall.[23] (CX 0301 (Cohen, IHT at 310)).

This testimony ***does not*** establish, or even support an inference, that Mr. Sullivan disclosed Schein's buying group policies, practices, or plans, or that Schein had agreed that "Schein, just like Benco and Patterson, would adopt a policy against recognizing buying groups." (CC Br. 26).[24]

(3) Complaint Counsel's "Mirror Image" Characterization.

Lacking evidence that Mr. Sullivan shared any information with Mr. Cohen, Complaint Counsel resorts to characterization, claiming that the "communications between Benco and Schein about ADC perfectly mirror communications between Benco and Patterson." (CC Br. 35). The two sets of communications, however, are in no way alike.

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[23] Complaint Counsel does not contend that the text messages Mr. Cohen referred to actually disclosed Schein's policies or practices, or otherwise suggest that Schein had a no buying group policy. They do not.

[24] Complaint Counsel seeks an inference that Schein "exchanged assurances that" it "would [not] discount to buying groups," by first asking for an inference that Mr. Cohen *believed* that Schein *changed* its buying group policies. (CC Br. 25-26 ("The evidence [supposedly] shows that Benco knew that Schein was working with buying groups in 2011, but following communications between the companies, Benco executives understood Schein was no longer working with buying groups between 2012 and 2015.")). This again has no basis in the record. There is ***no evidence*** that Mr. Cohen or any Benco executive understood Schein to have changed its position. In fact, ***Complaint Counsel never even asked the question***. For Benco's ***pre-conspiracy*** understanding, Complaint Counsel relies exclusively on a single ***post-conspiracy*** email in which Smile Source informs Benco that it was working with Schein. (CCFF 665-69 (citing CX 1041)). This hardly establishes Benco's understanding before 2011 or whether it changed after 2011.

First, Mr. Cohen's June 8, 2013 email to Mr. Guggenheim was not unsolicited – it was in response to Mr. Guggenheim's question from two days before asking whether Mr. Cohen could "shed some light on your business agreement with Atlantic Dental Care?," as Mr. Guggenheim was "wondering if your position on buying groups is still as you articulated back in February?" (CX 0062-002). In contrast, Mr. Cohen's March 27, 2013 text message to Mr. Sullivan was entirely unsolicited, as Mr. Sullivan never reached out to Mr. Cohen regarding ADC or about buying groups generally, and in fact had previously admonished Mr. Cohen not to discuss ADC or other customers. (SF 1491; Sullivan, Tr. 3946; SRF 1071, 1088).

Second, in response to Mr. Guggenheim's question, Mr. Cohen noted "we don't recognize buying groups," and added four bullet points and a paragraph of explanation as to why ADC was a large group practice. (CX 0062). In contrast, Mr. Cohen's text to Mr. Sullivan did *not* reveal Benco's no-buying-group policy. (SRF 1071; CX 0196-010). Rather, Mr. Cohen only sent Mr. Sullivan a three-sentence text message that said ADC "merged ownership of all the practices … it's a big group." (SRF 1071; CX 0196-010).

Third, Mr. Guggenheim responded to Mr. Cohen; Mr. Sullivan did not. Mr. Guggenheim responded, "Sounds good Chuck. Just wanted to clarify where you guys stand," and then forwarded the email internally at Patterson. (CX 0097-001). Mr. Sullivan – again, in contrast – did not respond and did not take any internal action after Mr. Cohen's text message. Rather, he was already in the process of trying to reach Mr. Cohen by phone to again admonish him in "stronger terms" not to discuss specific customers. (SRF 1079; Sullivan, Tr. 3966, 4198-99).[25]

[25] It is telling that Complaint Counsel asked Mr. Cohen and Mr. Guggenheim if there were any business reasons for their communications, but did not ask Mr. Sullivan the question. (CC Br. 45-46).

(4) Complaint Counsel's "Competitive Intelligence" Fallacy.

Complaint Counsel next argues that the communications evidence supports an inference of conspiracy when it is coupled with internal commentary – sometimes correct, sometimes not – on competitors' buying group activities. But Patterson's and Benco's views on Schein's buying group activities came from information from the field and market observations, not communications with Schein. (SF 127, 129, 131, 133, 136, 138, 1474-75, 1582, 1587; SRF 250, 549-52, 555).[26] This is just normal competitive intelligence that any firm would have about its competitors in a concentrated industry. (CC Br. 46-47); *see also In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 875 (7th Cir. 2015) ("[c]ompetitors in concentrated markets watch each other like hawks").

Dealing with buying groups is open and notorious. Buying groups market their discounts to members and non-members alike. Dentists also discuss competitive offers with their FSCs. Indeed, the record is replete with instances in which a Respondent received competitive intelligence that Schein, Darby, or Burkhart was doing business with particular groups. (SF 127, 129, 131, 133, 136, 138, 1474-75, 1582; SRF 250, 408, 549-52, 555; RX 0387; CX 3091; CX 3236; CX 0106-002; CX 0163; CX 3176; CX 3134; CX 1039; CX 1047; CX 1048; CX 1074; CX 1116; CX 1144; CX 1158; CX 1104). It is, therefore, not surprising to see internal discussion in Respondents' files about other distributors' buying group activities.

Indeed, with the exception of the Patterson-Benco communications, each witness testified that their internal comments about competitors' practices were based on competitive intelligence. For example, when Mr. Cohen was asked about his understanding concerning Schein's practices during his IHT, he testified:

[26] Complaint Counsel's only response is Mr. Cohen's "wrath of text messages" testimony from his IHT. (CC Br. 47; SRF 676). As we explained, there is no basis, in the documents or Mr. Cohen's recollection, for that testimony.

> Q. Is it fair to say that in July 2012, … it was your understanding that Schein was not selling to GPOs?
>
> A. … ***I don't think that that's a fair thing to say***. It's a fair thing to say that at this moment in time …, I think that … Henry Schein was not really working with Smile Source. ***As far as their overall policy, I don't know***….
>
> Q. … And what made you think that Schein was not working with Smile Source?
>
> A. … If Henry Schein was working with Smile Source, we probably would have heard it from the individuals and customers…. ***[J]ust scuttlebutt. Word on the street***. You know, it's a small business….
>
> Q. And have there been other instances where GPOs aside, where customers have said, "Oh, we're getting a deal from Schein, but we want to get a better deal from you"?
>
> A. Oh, I think that happens all the time.

(SRF 674, 681, 993; CX 0301 (Cohen, IHT at 216-17); CX 0314 (Guggenheim, IHT at 136-37 ("[A]t times we hear about things from customers … We just at times learn of offerings that they're proposing.")); Misiak, Tr. 1362 ("Judge Chappell: Was part of your job to be aware of what your largest competitors were doing with customers you had in common? The Witness: Sure. Absolutely.")).[27]

As this testimony demonstrates, internal documents that merely make observations about what other competitors are *believed* to be doing in the market does not support an inference of a conspiracy or demonstrate that Schein and Benco exchanged information about their respective policies, practices, or plans.

[27] Even if one were to ignore Schein's buying group business and assume, counterfactually, the truth of Benco's and Patterson's internal speculation that Schein also said "no" to buying groups, there still could be no inference of conspiracy. *In re McWane*, 155 F.T.C. at *255 ("evidence of parallel behavior or even conscious parallelism alone, without more, is insufficient to establish a Section 1 violation….").

a. Complaint Counsel's "Phantom Communications" Fallacy.

Complaint Counsel seeks to bolster their meager communications evidence with communications that never occurred. There are at least four such phantom communications. The first, discussed above, is the non-existent, undated, unspecified communication that supposedly kicked-off the conspiracy in early 2011. No more needs to be said about that one.

The second phantom communication supposedly took place in July 2013 and related to Smile Source. Citing an internal Benco email, Complaint Counsel says that, at this time, "Benco began confronting Schein when it received market intelligence that indicated that Schein was deviating from their agreement." (CC Br. 29). But there is no evidence that any such communication occurred.

The *undisputed* facts are again straight-forward. On July 25, 2013, Benco's Pat Ryan received an email in which Smile Source's then-President, Dr. Goldsmith, wrote that, "in the past," Smile Source had used Schein, but was now looking for a new distribution partner. (CCFF 914; SRF 978). Misreading Dr. Goldsmith's email, and believing that Schein was currently working with Smile Source, Mr. Ryan forwarded the email to Mr. Cohen with a "flippant" remark to "tell your buddy Tim to knock this … off." (CX 0018; SRF 982). Mr. Cohen then asked Mr. Ryan to re-forward the message in a clean email, so he could "print & send to Tim with a note." (CX 0018). But Mr. Ryan ***did not do this***. (SRF 990). Instead, he followed up with a question, asking whether Smile Source was even a buying group. (SRF 990; CX 1251). Mr. Cohen said yes, making no further reference to any "note" to Mr. Sullivan. (SRF 990; CX 1251). The email thread ends there.

From these undisputed facts, Complaint Counsel speculates that Mr. Cohen must have sent the note, and that he did so pursuant to a pre-existing agreement with Mr. Sullivan.[28] But there is no evidence to support such an inference upon an inference. (SRF 991-92). Mr. Cohen testified that he has no recollection of receiving a clean email from Mr. Ryan, printing it out, writing a note to Mr. Sullivan, or sending any such note. (SRF 992; Cohen, Tr. 885-86). Mr. Sullivan similarly testified that he did not receive any note from Mr. Cohen about Smile Source or any buying group. (SRF 992; Sullivan, Tr. 4252-53). There is also no evidence of any response by Mr. Sullivan, or any follow-up communication between the two companies. If we actually follow the evidence, the phantom note appears to be nothing more than a fleeting thought in Mr. Cohen's mind that never went anywhere. Importantly, when Smile Source later approached Schein in 2013, Mr. Sullivan's conduct was the opposite of Benco's: he embraced the idea and subsequently submitted an offer. (SF 1156-86).

Thus, the phantom note provides no basis for Complaint Counsel's confrontation theory. But even if the phantom note is assumed into existence, there is still no evidence of any action by Schein – in words or deed – that shows its participation in the alleged conspiracy. *In re Baby Food*, 166 F.3d at 126; *In re McWane*, 155 F.T.C. at *265; *In re Citric Acid*, 191 F.3d at 1093, 1098. Benco could send all the notes it wanted, but if Schein never responded or changed its behavior, there could be no inference of agreement. There certainly can be no inference given that the next thing Schein did in relation to Smile Source was bid for its business. (SF 1156-86).

The third phantom communication supposedly occurred in the fall of 2013. Complaint Counsel claims that "Benco was concerned that the … agreement would collapse" because

[28] Complaint Counsel argues that Mr. Ryan's email is "simply illogical" absent a prior agreement. (CC Br. 49). Not so. Mr. Ryan testified he held strong opinions regarding buying groups. (SRF 430; Ryan, Tr. 1066). Mr. Ryan's emails are "logical" expressions of that opinion. A suggestion to tell someone to "knock it off" is not indicative of an agreement not to do the thing in the first place.

Burkhart was "discounting to buying groups," and so, Benco's Mr. Ryan suggested to Mr. Cohen that he "tell Tim [Sullivan] and Paul [Guggenheim] to hold their positions as we are." (CC Br. 35 (citing CCFF 1103 (quoting CX 0023-001))). But the evidence is unequivocal that no such communication occurred. Mr. Cohen never indicated that he would follow Mr. Ryan's suggestion; Mr. Cohen denied that any such call occurred; Mr. Ryan testified that he never learned of any such call; and the communications log prepared by Complaint Counsel shows no such communication. (SF 1555; Cohen, Tr. 901-02; Ryan, Tr. 1263; CX 6027).[29]

The fourth phantom communication also supposedly occurred in the fall of 2013 and related to the Texas Dental Association ("TDA"). Specifically, Complaint Counsel claims that "Cohen informed his manager that he (Cohen) would reach out to Schein's Sullivan about" whether to attend "TDA's annual meeting."[30] (CC Br. 36 (citing CX 0178)). Complaint Counsel does not contend that this communication ever occurred.

Again, the facts are straightforward and innocuous. On October 15, 2013, Schein's Regional Manager Glenn Showgren received an unsolicited call from Benco's Regional Manager Ron Fernandez, a former Schein employee. Mr. Fernandez told Mr. Showgren that "Chuck Cohen will be reaching out to, or has reached out to, Tim Sullivan," and asked Mr. Showgren to meet the "week after next" to "discuss concerns" about the TDA program. (SRF 1120; CX 0178). Mr.

[29] Complaint Counsel argues that the "opportunity" to follow up with Mr. Sullivan and Mr. Guggenheim arose at a trade show a month later. (CC Br. 36). But there is no evidence that they even met at the show, let alone discussed buying groups. The only evidence relating to that trade show concerned Mr. Cohen's discussion with Burkhart, not Schein.

[30] As Schein's opening brief explains, and as Complaint Counsel previously conceded, the TDA was not a buying group seeking a supply arrangement with Schein, Patterson, or Benco. (S. Br. 66 n.51, 97-98). It is uncontested that when TDA set up its TDA Perks program, it did not approach any of the Respondents for discounts. (SRF 1109-17). Rather, it selected SourceOne and prominently advertised SourceOne – Respondents' competitor – in the center of the trade show, which, as Complaint Counsel notes, Respondents were helping to fund. (CCFF 1117; SRF 1117). Following the TDA's decision, each Respondent considered whether to attend the trade show. Paying to promote a competitor is, of course, a problem, but it has nothing to do with whether Respondents conspired to refuse discounts to buying groups.

Showgren made it clear to Mr. Fernandez that he would "NOT discuss a pricing response and any action would have to be cleared by my Legal Team," and he reported the conversation to Mr. Sullivan and others. (SRF 1120; CX 0178). Mr. Sullivan reiterated in even stronger terms that "we should NOT be having these discussions [with] Benco" and that Mr. Cohen had "not contacted me nor would he on such a topic."[31] (SRF 998, 1088; CX 0178). Thus, this phantom communication not only fails to support an inference of a conspiracy, it affirmatively negates it, showing that Schein was cognizant of the antitrust laws and complied with them.

b. Complaint Counsel's "Opportunity Evidence" Fallacy.

Complaint Counsel tries to supplement the few communications there actually were with evidence that Mr. Cohen, Mr. Sullivan, and Mr. Guggenheim "regularly attended and saw each other at the same industry trade shows" or occasionally communicated by text or phone. (CC Br. 67). As to the text messages and phone calls, Complaint Counsel does not contend that any of them were about buying groups. Nor do they claim that Mr. Sullivan and Mr. Cohen spoke about buying groups at any particular trade show.

Courts have repeatedly rejected the notion that a conspiracy can be inferred from such opportunity evidence. Where – as here – Complaint Counsel makes no effort to tie any alleged parallel shift in behavior to a particular opportunity, the fact that there was a communication or meeting is not relevant. *See In re Baby Food Antitrust Litig.*, 166 F.3d at 133 ("evidence of opportunity" is not entitled to "much weight" and "evidence of social contacts and telephone calls … [is] insufficient to exclude the possibility that the defendants acted independently"); *Petruzzi's IGA Supermkts., Inc. v. Darling-Del. Co.*, 998 F.2d 1224, 1235, 1242 n.15 (3d Cir. 1993) (treating

[31] Complaint Counsel also cites the January 2014 unsolicited call from Patterson's Mr. Misiak to Mr. Steck after Patterson had already made its decision regarding the TDA show. The testimony was clear: no agreement was reached on the call as to whether to attend. (SF 1572-76).

evidence of social calls and telephone contacts as "[p]roof of opportunity to conspire [which], without more, will not sustain an inference that a conspiracy has taken place"); *Cosmetic Gallery*, 495 F.3d at 53 (an "account" of a "communication between alleged conspirators" was "at best evidence of an opportunity to conspire, not of concerted action"); *Venzie Corp. v. U.S. Mineral Prods. Co.*, 521 F.2d 1309, 1312 (3d Cir. 1975) (dismissing case because evidence that defendants had made "numerous telephone calls" to each other, at least one of which concerned allegedly boycotted plaintiffs, only proved an opportunity for an agreement).[32]

c. Complaint Counsel's "Other Bad Acts" Fallacies.

Finally, Complaint Counsel argues that their communications evidence is bolstered by claiming that Mr. Cohen generally sought to maintain an "open relationship" with Mr. Sullivan and Mr. Guggenheim and sometimes reached out to them to joke around or discuss sports, potential mergers, joint ventures, trade association matters, common manufacturer issues, or other matters. (CC Br. 7).[33] Complaint Counsel contends that, while some of those matters are obviously innocuous, others are more suspect, and as such, the Court can infer that Mr. Cohen had a

[32] Complaint Counsel cites a single 65-year-old case to argue that opportunity evidence is relevant. (CC Br. 67 & n.547 (citing *C-O-Two Fire Equip. Co. v. United States*, 197 F.2d 489, 493 (9th Cir. 1952)). But Courts have since rejected *C-O-Two* as authority to consider opportunity evidence. *See Weit v. Cont'l Ill. Nat'l Bank & Tr. Co.*, 467 F. Supp. 197, 214 (N.D. Ill. 1978) ("Plaintiffs mistake the significance of the meetings in the view of the court in *C-O-Two*; the finding of conspiracy was held to be warranted in light of the other factors: identical bids, unnecessary product standardization, illegal licensing contracts, dealer policing, and identical price increases at times of surplus, coupled with the fact that the defendants offered no evidence in rebuttal."). The law on opportunity evidence is settled: it is "insufficient to exclude the possibility that the defendants acted independently." *In re Baby Food Antitrust Litig.*, 166 F.3d at 133; *see also, e.g.*, *Petruzzi's IGA*, 998 F.2d at 1235, 1242 n.15 ("[p]roof of opportunity to conspire, without more, will not sustain an inference that a conspiracy has taken place").

[33] As for the specific communications, Complaint Counsel's Complaint does not allege that any such communications violated the antitrust laws. They cite three instances in which there were communications about manufacturer issues. There is no allegation, however, that any of those communications were unlawful. They also cite to various communications about the agreement between Schein and Benco to settle employee non-compete, misappropriation of trade secrets, and corporate raiding litigation. (CC Br. 27 & n.221; SRF 313-20). Again, Complaint Counsel has not alleged, or introduced any evidence to show, that the agreement violated the antitrust laws.

propensity to conspire, making it likely that an agreement was reached during one of the 2011 unrecorded phone calls with Mr. Sullivan. (CC Br. 27, Att. A).

This is all irrelevant and inadmissible. Mr. Cohen's cordiality towards industry participants and competitors has nothing to do with whether there was a conspiracy about buying groups. Nor do non-buying-group communications. This is character and "other acts" evidence, which is irrelevant and inadmissible to prove a conspiracy to boycott buying groups. Fed. R. Evid. 404(a) ("Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or character trait), 404(b) ("Evidence of a[n] … other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.").[34]

Even if the evidence were admissible, it is not probative or persuasive. Complaint Counsel sees nefarious intent behind Mr. Cohen's solitary "open relationship" comment in an email to his brother. (CC Br. 7). But there is nothing to indicate that Mr. Cohen's conception of an open relationship was the kind that might violate the antitrust laws. The email that Complaint Counsel cites discusses Mr. Guggenheim's planned site visit to Benco as part of the companies' exploratory M&A discussions. (SRF 277, 282, 357; CX 1045). Benco had similar M&A discussions with Schein leadership. (SRF 383). A desire to maintain an open and honest relationship with a potential merger partner is both important and permissible.[35] But it does not suggest that Benco

[34] To the extent Complaint Counsel argues that this is admissible as "habit" evidence, the argument fails. As the Committee Notes to Rule 406 make clear, "habit" is very specific. It requires a showing of "one's regular response to a repeated specific situation" such that it "become[s] semi-automatic." Fed. R. Evid. 406, Comm. Notes (providing the example of "going down a particular stairway two stairs at a time"). Complaint Counsel has made no showing of a "repeated specific situation." Rather, it argues that because Mr. Cohen behaved in a certain way in response to different situations (*e.g.*, manufacturer issues), he must have behaved in that way with regard to buying groups. Not only is that logically unsound, it does not meet the requirements of Rule 406.

[35] Complaint Counsel sees ill intent even in honesty. (CC Br. 57). The law, however, does not prevent honesty; it prevents anticompetitive agreements. Here, there is no evidence that Schein engaged in the latter.

crossed any lines during those discussions, let alone establish a pattern or propensity to conspire on any topic whenever the urge strikes. And it certainly does not establish that Schein similarly believed that it had an "open relationship" or behaved as such. (*See* Sullivan, Tr. 4083-84 ("We do not have an open relationship.")).

C. Complaint Counsel's "Marketplace Conduct" Fallacies.

Unable to prove either a direct or circumstantial case through communications evidence, Complaint Counsel tries to bolster their case by casting aspersions on Schein's buying group policies, practices, and plans. But Schein's dealings with buying groups and it employees' approach to them was perfectly rational and, importantly, very different from that of Benco or Patterson. Thus, Complaint Counsel's circumstantial conduct case fails because they cannot show parallel or other conduct that tends to exclude the possibility of unilateral conduct. *Matsushita*, 475 U.S. at 588, 597.

1. Complaint Counsel's Missing Parallel Conduct Case.

Complaint Counsel's brief and proposed findings make no effort to show parallel conduct. Nor do they deal with the affirmative evidence of Schein's nonparallel conduct.[36] Instead, Complaint Counsel advances three arguments, claiming that: (i) parallel conduct is not necessary to prove a circumstantial case; (ii) many of the buying groups Schein did business with do not meet Complaint Counsel's definitions; and (iii) for the buying groups that did, Schein's cheating on the assumed conspiracy does not disprove its existence. Complaint Counsel is thrice wrong.

[36] At most, Complaint Counsel states that the "parallel nature of the … Benco/Schein *communications* is evident from the competitors' exchange of information about the group ADC." (CC Br. 60). But this is communications evidence, not evidence of parallel conduct. Moreover, Complaint Counsel refers to an unsolicited text from Mr. Cohen. There is nothing "parallel" about it, as Schein did not respond, other than to tell Mr. Cohen that they should not be discussing specific customers. (SRF 1059, 1079-80, 1088, 1090).

a. Parallel Conduct Is a Necessary Element of Any Circumstantial Evidence Case.

Proof of parallel conduct is a necessary element of a circumstantial case. (S. Br. 86 (citing *In re Beef Indus. Antitrust Litig*., 907 F.2d 510, 514 (5th Cir. 1990) (a plaintiff must "first demonstrate that the defendants' actions were parallel"); *Anderson News, L.L.C. v. Am. Media, Inc.*, 899 F.3d, 87, 106-12 (2d Cir. 2018) ("Without 'parallel acts' … evidence supporting the presence of certain plus factors … can provide little support for a finding of unlawful conspiracy."))). Complaint Counsel does not claim otherwise.

Rather than prove this essential element, Complaint Counsel tries to skip it. *Assuming* the fact they need to prove, Complaint Counsel claims that their case "does not rest *merely* on parallel conduct" and "the evidence goes *beyond* parallel conduct." (CC Br. 62, 64). But a plaintiff cannot graduate to plus factor evidence until it has actually proven parallel conduct. The formula for a circumstantial case is parallel conduct + plus factors. (RCL 31); *Williamson Oil Co.*, 346 F.3d at 1301 (setting forth the three-step analysis). It is not just "plus factors."

b. Complaint Counsel Cannot Show Parallelism by Excluding Schein's Buying Group Partners.

Since the mid-1990s, Benco maintained a no-buying-group policy. (B. Br. 3, 11). Patterson likewise chose not do business with buying groups. (P. Br. 15-17). Schein was different.

Schein has been doing business with buying groups since at least the early 2000s. (*See* SF 188, 395-98, 384). In 2010, when its buying-group activities started causing friction with its FSCs, Schein leadership developed guidance to help differentiate between buying groups that presented worthwhile opportunities and those that did not. (SF 189-222). Rendering Complaint Counsel's claim that "Schein stopped pursuing new buying groups after … 2011" demonstrably false, Schein continued to add buying groups to its portfolio under the 2010 Guidance, including Dental Alliance in July 2011, MeritDent in 2012, the Schulman Group in 2013, Dental Gator in 2014, Floss Dental

in 2015, and Klear Impakt in 2015. (SF 1309-35, 969-81, 1093-104, 634-75, 802-38, 223-333). During the alleged conspiracy, Schein did business with over 25 buying groups representing more than $30 million in annual business. (S. Br. 1, 87-88; SF 375-1335; 1627-28).

Schein also continuously invested resources to better serve its buying group partners. In January 2011, it moved the Smile Source account from Special Markets to HSD to address its FSCs' concerns and assign an FSC to each Smile Source member, all while keeping the same discounts for Smile Source members. (SF 232; CX 2454; RX 2714). In 2013, Schein began an internal reorganization that moved primary responsibility for most buying groups from Special Markets to HSD. They were housed in a brand new group within HSD called Mid-Market, which launched in April 2014. (SF 238-264). The Mid-Market team began work on a more formalized buying group strategy (SF 272-73), and by the end of 2014, Schein made the need for a uniform buying group offering a "strategic priority." (SF 296-331). A task force was formed, and Schein's improved, standardized buying group offering was unveiled in September 2015. (SF 297, 318-24).

This evidence is inconsistent with the alleged conspiracy and affirmatively shows a lack of parallel conduct. *See In re McWane*, 155 F.T.C. at *259 (rejecting conspiracy claim, in part because one alleged conspirator's conduct was "inconsistent with the existence of an agreement...."). An alleged boycott simply cannot stand where a defendant did precisely what the plaintiff claimed the defendant had promised not to do. *E.g.*, *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1368 (3d Cir. 1996) (alleged refusal to grant first-run licenses to plaintiff failed where "the evidence is to the contrary; [plaintiff] received a first-run license from Miramax").

In response, Complaint Counsel tries to slice-and-dice Schein's buying group partnerships, claiming that many are "not buying groups." (CC Br. 97-98). But Schein confined its evidence

to those groups that satisfied Complaint Counsel's narrow buying group definition and supported each one with record cites. (SF 375-1335).[37]

In the end, Complaint Counsel quibbles about just three – Comfort Dental, Breakaway, and Corydon Palmer – claiming that the first two are DSOs or MSOs and the third received only a rebate paid to the entity and not additional discounts for members. (CC Br. 98). But Comfort Dental, just like Smile Source, is a franchisor whose members are independent dentists.[38] If Smile Source is a buying group for purposes of this case, then so is Comfort Dental.

Similarly, Breakaway is also a buying group, though – like a number of buying groups – it both owns a few of its locations and operates a buying group for unaffiliated independent dentists. (SF 402-45). As Mr. Foley testified, Breakaway was "completely anti-DSO," as their "whole premise" was to help young dentists "break-away" from DSOs and establish independent practices for "themselves." (SF 411; Foley, Tr. 4634-35).

As for Corydon Palmer, the evidence shows that Schein considered it a buying group – the standard Dr. Marshall used to determine if an entity is a buying group – and that Schein was willing to work with the group on any type of offer they wanted, including entity-level rebates and member-level discounts. (SF 533; Marshall, Tr. 3256). Corydon Palmer chose rebates. (SF 514).

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[37] Complaint Counsel appears to contend that Schein's list of buying groups is inflated because Dr. Carlton *separately* calculated sales to other types of buying groups, such as medical GPOs and buying groups of community health centers. Dr. Carlton's report, however, was prepared during discovery, and he expressly provided alternative calculations for different types of entities. If all buying groups are included, Dr. Carlton estimated annual sales of around $100 million. (RX 2832-022).

[38] Complaint Counsel claims that Comfort Dental was not a franchisor of independent dentists because Mr. Sullivan testified that Comfort Dental was an "elite DSO." But Mr. Sullivan was just reading from an email, where he made a passing reference that Comfort Dental was an elite DSO within Special Markets. There is no evidence that Mr. Sullivan had specific knowledge of Comfort Dental's operations. (*See* SF 504-07). Mr. Foley, who had responsibility for Comfort Dental, testified that Comfort Dental is a buying group, and the ordinary course business documents corroborate this. (SF 54-56, 493-511; Foley, Tr. 4632-34; RX 2877). As Comfort Dental's own marketing materials explain, Comfort Dental is a "true dental franchise," and "all of our locations are ***independently owned and operated.***" (RX 2877). Complaint Counsel has not identified anything distinguishing Comfort Dental, which they attempt to exclude, from Smile Source, their posterchild buying group.

Complaint Counsel next asserts that, even if Schein did business with buying groups, many still don't count because "Schein began discounting to [them] either before the conspiracy began in 2011 or after the conspiracy began to fall apart in April 2015." (CC Br. 97-98 (citing CCFF 441-44, 1751-823)). But Complaint Counsel does not allege a boycott of just new buying groups. Even if that was the alleged agreement, Complaint Counsel does not deny that Schein began doing business with a number of new buying groups *during* the alleged conspiracy period, including Universal Dental Alliance (July 2011); MeritDent (2012); Schulman Group (2013); Dental Gator (2014); and Floss Dental (2015). (SF 641-50, 815-32, 970-75, 1095-98). Complaint Counsel fails to explain how Schein's efforts to work with these buying groups could possibly be consistent with parallel conduct or their other allegations against Schein.

Complaint Counsel also fails to explain how Schein's efforts to *negotiate* with buying groups during the relevant period are somehow consistent with Patterson's and Benco's no-negotiation strategies. For example, Benco had a "not no, hell no" buying group policy, but Schein's practice was far different. As Ms. Titus explained in mid-2014, when offering to be a buying group's exclusive distribution partner, "we are not against having GPO partnerships. Quite the contrary, we have a number of them in which all parties are in a position to win." (SF 1223; RX 2201).

Similarly, on the same day that Patterson said no to Smile Source, Mr. Sullivan told Smile Source that Schein "absolutely would like to discuss further" and that he was "confident that there is something here for us to partner on together." (SF 1159-60; RX 2328). Schein then submitted what it considered a "compelling" and "aggressive" offer that was better than what most similarly-

situated independent dentists could receive. (SF 1163, 1175; CX 1163; CX 2130; CX 2683).[39] There is simply no way to infer a conspiracy from such facts. *See In re Baby Food*, 166 F.3d at 127 n.9 (dismissing claim that Heinz's decision not to enter the Chicago market was the result of an unlawful "truce," given Heinz's "formal, written proposal to … a large Chicago supermarket chain [which] rejected the proposal").

Nor can Complaint Counsel explain away Schein's efforts to negotiate a deal with Klear Impakt shortly after Schein instituted a "strategic priority" to develop a buying group offering. As Ms. Titus wrote to Klear Impakt in January 2015, during the alleged conspiracy, "[we] were very impressed by the clear-eyed visions you have for launching Klearimpakt [sic]…. oh, and cream just rises to the top!.... It's an understatement to say I really liked what I heard and feel very encouraged that our Senior Leadership will want to continue the discussion." (SF 820; CX 2208). While Complaint Counsel tries to exclude Klear Impakt because a deal was not signed until August 2015, the fact that Schein actively negotiated with Klear Impakt during the alleged conspiracy highlights the absence of parallel behavior. *Anderson News, L.L.C.*, 899 F.3d at 105 (no parallel conduct where defendants "undertook independent efforts to negotiate" with allegedly boycotted plaintiff).

c. Complaint Counsel Cannot Prove a Conspiracy by Calling All Evidence of Non-Parallel Conduct "Cheating."

Unable to show parallel conduct, Complaint Counsel says "[e]vidence that [Schein] may have occasionally deviated from the agreement does not absolve them of liability" or "erase

[39] Complaint Counsel relegates its discussion of Schein's 2014 Smile Source proposal to a single footnote on page 100, arguing that the proposal "does not resolve [Schein] of liability" because the discount offered in 2014 was "so low … that Smile Source could not accept it." (CC Br. 100 n.764). But Complaint Counsel does not allege a conspiracy to offer low discounts, and the evidence does not support Complaint Counsel's characterization. (SF 1163-66). Smile Source turned the offer down, not because the discounts were "so low" but because they were "similar" to what Smile Source was already receiving. (SF 1178). In any event, it is a clear instance of non-parallel conduct inconsistent with the alleged conspiracy.

Complaint Counsel's evidence of agreement." (CC Br. 99). This, of course, is an implicit admission that Schein did not engage in parallel behavior. As Complaint Counsel's own expert explained, evidence that Schein did business with buying groups is only considered cheating if one assumes the existence of an agreement; otherwise, it is non-parallel conduct that undermines an inference of a conspiracy. (SF 1634; Marshall, Tr. 2958-60).

It may be true that, if there is *direct evidence* sufficient to establish an agreement, evidence of non-parallel conduct might be treated as cheating. But where, as here, the plaintiff lacks direct evidence and is relying on inferences from *conduct* to prove the existence of the agreement, evidence of non-parallel conduct is not cheating, it is fatal to plaintiff's case. Any other rule would require assuming the existence of the conspiracy and reversing the burden of proof, alleviating Complaint Counsel of the need to prove a conspiracy and saddling Respondents with the obligation to disprove it. Moreover, under Complaint Counsel's view, the task of disproving an alleged conspiracy would be nearly insurmountable because any evidence of non-parallel conduct would be dismissed as cheating. This view of the law would put defendants in an impossible catch-22. Anytime competitors engaged in similar conduct, it would evince a conspiracy, but every time they did something different, it would be irrelevant. Thankfully, that is not the law. *Valspar Corp.*, 873 F.3d at 196 n.7 ("it is … significant that the alleged conspirators behaved contrary to the existence of a conspiracy").

Complaint Counsel's cases are not to the contrary. In *United States v. Beaver*, 515 F.3d 730, 733-39 (7th Cir. 2008), the "trial record [was] replete with details regarding the cartel's meetings," which alone established the existence of the agreement. That is, the plaintiff was not seeking to rely on *conduct* to infer the existence of the agreement. It was a direct evidence case, replete with a whistleblower, an FBI investigation, an amnesty applicant, and admissions by the

conspirators about the existence of the conspiracy and their role in it. *Id*. In such cases, evidence of cheating is irrelevant because the plaintiff is not relying on any marketplace conduct to prove the agreement.[40] In contrast, here, Complaint Counsel argues that a conspiracy should be inferred, at least in part, from alleged conduct – Schein supposedly boycotted buying groups, instructed its sales people to boycott buying groups, and acted irrationally in turning some buying groups down. The evidence that Schein did not do this and in fact did business with many buying groups, in stark contrast to Patterson and Benco, disproves Complaint Counsel's claims and precludes a finding of parallelism necessary to infer an agreement.

2. Complaint Counsel's "Internal Enforcement" Fallacy.

Complaint Counsel asserts that Schein's marketplace conduct is consistent with a conspiracy because Schein internally adhered to a "no buying group policy." (CC Br. 28). Not only is there no evidence of such a policy, there is no evidence that Mr. Sullivan suddenly started instructing Schein employees in July 2011 to avoid buying group business. (CC Br. 27). There is no document in the record containing such an instruction from Mr. Sullivan. Nor is there any testimony in the record that Mr. Sullivan issued such instructions. To the contrary, every Schein witness denied it. (SF 1359-62).[41]

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[40] Complaint Counsel's reliance on *In re Brand Name Prescription Drugs Antitrust Litig*., 123 F.3d 599, 615 (7th Cir. 1997), is similarly misplaced. There, plaintiffs introduced "smoking gun" evidence of an agreement. Likewise, *United States v. Foley*, 598 F.2d 1323 (4th Cir. 1979) was a pre-*Matsushita* case in which the government relied solely on evidence of cartel communications.

[41] Complaint Counsel tries to twist the evidence to their purposes, but to no avail. They cite a July 2012 email from Mr. Meadows with instructions that buying group negotiations were to go through Special Markets in the first instance, which had primary responsibility for them at the time. (SF 1376; Meadows, Tr. 2474-76, 2636-38). They cite a November 2015 email from Mr. Meadows – *after* the alleged conspiracy – discussing a note Mr. Meadows slid to Mr. Sullivan during a budget meeting noting Schein's contract with Klear Impakt. (*See* SF 811-14). They cite a July 2014 email from Mr. Upchurch about how the Dental Co-Op was turning into a medical-style GPO. (SF 624 n.8). And they cite a July 2014 email from Ms. Titus about PGMS, regarding which Mr. Sullivan did not speak to Ms. Titus or even make the final decision, allowing Mr. Cavaretta and his team to determine the best course of action. (SF 1068-73). None include an instruction from Mr. Sullivan regarding buying groups, and none indicate a change in behavior in July 2011.

Despite this, Complaint Counsel says it has nine examples of the alleged policy. (CC Br. 29). One is an example of Schein offering discounts to a buying group during the alleged conspiracy period; none make reference to Benco or Patterson; none evidence an agreement; and given that Schein continued to do business with existing and new buying groups, none evidence a no-buying-group policy.

1. Mr. Foley's December 21, 2011 rejection of Unified Smiles. That decision is explained in detail in Schein's opening brief and proposed findings. (S. Br. 27-29; SF 1286-308). In short, in keeping with Schein's 2010 Guidance regarding buying groups – developed well before the alleged conspiracy – Mr. Foley declined to extend DSO pricing to Unified Smiles, which did not have any members or any mechanism to enforce compliance or guarantee purchasing volume, the elements that make DSO pricing possible. (S. Br. 27-29; SF 1292-99). He was not operating on (nor did he receive) any instructions from his boss Mr. Muller or from Mr. Sullivan. (SF 1301-03).

2. Mr. Cavaretta's January 26, 2012 email regarding Intermountain Dental Associates ("IDA"). IDA had a buying group arm, and because it could ensure compliance, Mr. Foley ***approved offering it discounts*** in 2010. (SF 739-42). In his email, Mr. Cavaretta agreed, and Schein continued offering IDA's buying group discounts. (CX 0168).

3. Mr. Foley's February 20, 2012 email regarding Smile Source. Not only did Mr. Foley have no personal knowledge of the Smile Source relationship or decision-making at the time, his statement regarding a "corporate decision" was simply wrong. (SF 1145; Foley, Tr. 4556, 4725-29). In fact, just a couple weeks earlier, corporate had approved entering a purchasing agreement with MeritDent and would approve Sunrise Dental the next month. (SF 972-73, 1244-49).

4. Ms. Hight's June 8, 2012 email regarding Sunrise Dental. In March 2012, Mr. Steck approved moving forward with Sunrise Dental on behalf of HSD. (CX 2955; Steck, Tr. 3773-74). As Ms. Hight's email makes clear, Sunrise Dental was interested in being a Special Markets customer. Far from discussing some alleged no-buying-group policy, Ms. Hight explained that her email was "really more about trying to define what the home would be for this particular business model" and whether Sunrise Dental would be able to drive sufficient compliance to qualify for Special Markets pricing. She was investigating whether Sunrise Dental can "make commitments on the part of all of those offices, require compliance to all of those offices, and assure that the value-adds that we provide as a full-service distributor have the right business impact[.]" (SRF 771; CX 8022 (Hight, Dep. at 88-89, 97)).

5. Mr. Cavaretta's May 2013 email. In writing "we try to avoid buying groups," Mr. Cavaretta was responding to an email chain about a very specific type of buying

group that actually took title to the supplies, made one or two purchases a year, and presumably warehoused the supplies before reselling to members. (CX 2509-001-02; Cavaretta, Tr. 5655-56; *see also* SF 236). A year later, Mr. Cavaretta approved a set of "standard" questions for use in evaluating buying groups. (CX 2809). Again, far from a no-buying-group policy.

6. Mr. Foley's December 2013 email regarding Unified Smiles. As Mr. Foley explained at trial, the reference in his email was consistent with the 2010 Guidance in that Schein did not do business with "price only" buying groups like Unified Smiles. (SRF 788; Foley, Tr. 4723-26).

7. Mr. Baker's October 2014 email regarding Dental Gator. Ms. Titus – with whom Mr. Baker said he had a "conversation" – explained that Mr. Baker was simply wrong and did not have "knowledge or exposure to buying groups in general." (SRF 812; Titus, Tr. 5339). Indeed, Schein continued doing business with Dental Gator. (SF 285-90, 634-75; Titus, Tr. 5339-40).

8. Mr. Meadows' November 2014 email regarding Atlantic Dental Care. Mr. Meadows' email simply reflects a concern that manufacturers like 3M may start negotiating with buying groups and notes that Schein will "address these issues as they come up," reflecting Schein's unilateral, deliberate, and rational case-by-case approach to buying group issues, not a policy against buying groups, as Complaint Counsel contends. (SRF 828).

9. Mr. Sullivan's December 2014 email regarding Dental Gator. Mr. Sullivan testified that he was referring specifically to MB2's arbitrage of Schein's DSO pricing to Dental Gator members, not shutting down Dental Gator altogether. (SRF 838; Sullivan, Tr. 4255-56). In fact, Schein continued business with Dental Gator, and as Mr. Cavaretta's response makes clear, whatever Mr. Sullivan's goals were, Schein was able to continue with Dental Gator using the "HSD tools we already had in the bag." (SRF 838; CX 0246-001).

Complaint Counsel then says this supposed no-buying-group policy is evident in Schein's decision not to do business with certain buying groups.[42] (CC Br. 29 (citing CCFF 871-98, 925-

[42] Complaint Counsel also says the inclusion of provisions in DSO contracts that prohibit the DSO pricing from being used with a buying group is somehow indicative of a no-buying-group policy. (CC Br. at 29 (citing CCFF 861-69)). To the contrary, it is just good business practice. These provisions do not prohibit DSOs from forming buying groups, they just prohibit them from arbitraging Schein's DSO pricing to non-DSO customers. Schein's experience with Dental Gator is illustrative. When MB2 offered its DSO pricing through its buying group arm Dental Gator, Schein was confronted with conflicts and issues from its FSCs and manufacturers. (SF 285-88).

54)).[43] None, however, were boycotted, and each indicates Schein's legitimate unilateral concerns about a buying group's ability to drive compliance and add value.

- FDA: Schein ***made an offer*** to the Florida Dental Association ("FDA"), but FDA rejected it in favor of Darby. (SF 749-56).

- Kois Buyers Group: Schein ***tried to negotiate*** with the Kois Buyers Group, but Kois demanded a contract before providing the information Schein requested and decided to go with Burkhart before negotiations with Schein concluded. (SF 839-936).

- PGMS: Mr. Cavaretta decided not to move forward with PGMS because it would not commit to driving compliance. (SF 1061-72).

- Unified Smiles: Mr. Foley decided not to offer Unified Smiles a contract because it insisted on DSO pricing despite having no members and no compliance. (SF 1286-308).

- AGD: In 2014, Schein "presented an option to work with [the Academy of General Dentistry] offering several of [Schein's] Business Solutions products … at a discount." This was "approved by John, Tim [Sullivan] and AGD Executive Team." (SRF 938, 1750; CX 2439-002).

- PEARL: Consistent with Schein's concerns over cannibalization, Schein decided not to pursue the PEARL Network because, given Schein's market share, contracting with PEARL "could be a disaster." (SF 1078-81).

- Synergy: Schein declined to do business with Synergy Dental over a year before the start of the alleged conspiracy and did not change that position, because Synergy had no ability to drive compliance. (SF 87, 212-16).

- Dental Co-Op: Schein's relationship with the Dental Co-Op ended after it started promoting competing products and declined Schein's offer to enter an exclusive partnership. (SF 581-633).

- Steadfast: Schein's relationship with Steadfast ended after it started diverting business to Schein's customers and declined Schein's offer to enter an exclusive partnership. (SF 1199-242).

[43] Notably, Complaint Counsel appears to have abandoned its claim that Schein boycotted Smile Source, as well as its claims that Schein boycotted the Business Intelligence Group, California Dental Association, Dentistry Unchained, Integrity Dental Buyers Group, New Mexico Dental Cooperative, Potomac Valley Dental Group, TDAPerks, and the United Dental Alliance. (*Compare* RX 3087 (revised interrogatory responses)).

Finally, any notion that Schein had a no-buying-group policy is destroyed by Schein's decisions to do business with new buying groups and continue doing business with its existing buying group partners, including MeritDent, Sunrise, Dental Partners of Georgia, the Schulman Group, Smile Source, Dental Gator, Klear Impakt, Breakaway, Alpha Omega, Long Island Dental Forum, Orthosynetics, Comfort Dental, Advantage Dental, Stark County Dental, and the Universal Dental Alliance. The list goes on. (S. Br. 35-63; SF 1627; CX 7101-140-41).

3. Complaint Counsel's "Acts Against Self-Interest" Fallacy.

a. Complaint Counsel Ignores the Uncontradicted Evidence of Schein's Rational, Deliberate, and Unilateral Buying Group Decisions.

In its Opening Brief and Proposed Findings of Fact, Schein recounted the volumes of evidence detailing the difficulties and concerns Schein encountered with various buying groups, including their inability to deliver incremental volume or drive compliance, their propensity to cannibalize existing sales, the middleman tax they impose, the problems or conflicts they created between Schein's Special Markets and HSD divisions, as well as with FSCs, non-members, DSOs, and manufacturers. (S. Br. 16-19; *see* SF 35-374). Complaint Counsel does not deny that these are unilateral justifications that explain Schein's buying group partnering decisions.

Complaint Counsel just ignores this evidence. Without citation to the record, they assert that these justifications are "nothing more than *ex post* rationalizations." (CC Br. 5; *see also* CC Br. 95). But Schein's concerns about buying groups arise time and again in its contemporaneous documents. There is nothing *ex post* about it.

For example, in 2002 – nine years before the start of the alleged conspiracy – Mr. Muller explained to Senior Management that Schein "held a pretty firm line on saying NO to virtually all of them [because] there would be no increased volume." (SF 185; RX 2405). Likewise, HSD Vice President Dave Steck wrote two years before the start of the alleged conspiracy that HSD

"normally stay[s] away from buying group situations." (CX 2529-002; SF 188-89, 1082-89). As Brian Brady – who developed the buying group template Schein used during the alleged conspiracy period – explained in July 2014, cannibalization is a huge issue because "[d]octors already buying from us will want a more aggressive discount, and doctors who don't buy from us probably aren't going to switch." (SF 1062; CX 2250). Complaint Counsel's expert, Dr. Marshall, agreed that [redacted] and that it [redacted] that poses a substantial risk of it. (SF 94; Marshall, Tr. 2972).

Based on these concerns, Schein developed guidance in 2010 to evaluate buying groups on a case-by-case basis, partner with those that could drive compliance, and turn down those that could not. (S. Br. 19-23). Complaint Counsel does not dispute that this was a deliberate, rational, and unilateral approach. Nor does Complaint Counsel demonstrate that Schein ever departed from the 2010 Guidance.

Indeed, Complaint Counsel's Proposed Order would provide that "for avoidance of doubt, ***nothing*** in the Proposed Order prohibits Respondents from unilaterally deciding not to enter into any agreement or negotiate with any Buying Group …." (CC Br. 109). Nevertheless, Complaint Counsel argues that "claimed independent business justifications are no defense to an unlawful conspiracy." (CC Br. 95). This argument misses the point.

Evidence of independent justifications undermines any inference of a conspiracy. *See, e.g.*, *In re Baby Food*, 166 F.3d at 132 (evidence of "independent pricing determined by market conditions at the time, profit margins, and the effect of price increases or decreases on sales volume and distribution … negates the plaintiffs' inference of conscious parallelism."). That is, if there were *direct evidence of a conspiracy*, the fact that the conspirators were acting in their unilateral self-interest would not negate liability. But when the plaintiff seeks to prove the existence of the

conspiracy through *circumstantial* evidence, they must show that the evidence "tends to exclude the possibility of" unilateral conduct. *Matsushita*, 475 U.S. at 594; *In re McWane, Inc. & Star Pipe Prods., Ltd.*, 2012 WL 5375161, at *6 (F.T.C. 2012). Put simply, in the absence of a direct evidence of a conspiracy, Complaint Counsel must show that the conduct was "so unusual that, in the absence of an advance agreement, no reasonable firm would have engaged in it." *Valspar Corp.*, 873 F.3d at 193. Where the evidence shows that a Respondent's conduct was fully consistent with its unilateral interests, Complaint Counsel cannot satisfy this burden. Indeed, they make no effort to do so.

Complaint Counsel finds no solace in *United States v. General Motors Corp.*, 384 U.S. 127, 143 (1966) or *United States v. Apple, Inc.*, 791 F.3d 290, 316 (2d Cir. 2015). Not only was *General Motors* decided over twenty years before the Supreme Court announced the *Matsushita* "tends to exclude the possibility" of unilateral conduct standard, but the direct evidence in that case *unambiguously* proved an agreement. *Gen. Motors*, 384 U.S. at 142-43 ("[W]e regard as clearly erroneous and irreconcilable with its other findings the trial court's conclusory 'finding' that there had been no 'agreement' among the defendants and their alleged co-conspirators… Neither individual dealers nor the associations acted independently or separately.")). As such, the Court merely noted that, once an agreement is proven, the fact that each defendant acted in furtherance of its self-interest was no defense.

But *General Motors* "does not preclude the possibility that a defendant may rely upon circumstantial evidence of its own self-interest or actions taken inconsistent with the scope of the alleged conspiracy as a means to argue that it never engaged in an agreement in the first place." *In re Processed Egg Prods. Antitrust Litig.*, 2016 WL 3912843 (E.D. Pa. 2016). To hold otherwise would allow Complaint Counsel to present a circumstantial case with evidence of acts against self-

interest but preclude defendants from presenting the same type of evidence. The law is not so one-sided. *Id.* ("If circumstantial evidence is available to one litigant … there is no justification for rejecting the symmetry of permitting the other side use of circumstantial evidence as well.").

The same flaw infects Complaint Counsel's reliance on *Apple*. There, it was undisputed that publishers were "acting in concert" through Apple, but Apple argued it was an "unwitting" participant and acted consistent with its "independent business interests." *Apple*, 791 F.3d at 316. As such, the direct evidence proved an agreement in *Apple* to which independent self-interest was not a defense.

Here, in contrast to the evidence in *General Motors* and *Apple*, Complaint Counsel has not shown through direct evidence (or otherwise) that Schein has entered into an agreement. Rather, they seek to prove such an agreement by reference to Schein's decisions to turn down *certain* buying groups (though Complaint Counsel does not allege a selective boycott as to just a few buying groups). But Complaint Counsel does not show that Schein's decisions were contrary to its self-interest or were "so unusual" that no reasonable firm would have made them in absent an advance agreement. *Valspar Corp.*, 873 F.3d at 193; *Reserve Supply Corp.*, 971 F.2d at 49 ("[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.... 'The plaintiff must demonstrate ... that the defendant acted in a way that, ***but for a hypothesis of joint action***, would not be in its own interest.'") (quoting *Matsushita*, 475 U.S. at 588). They have done neither. (SF 159-1335, 1661-741).

Complaint Counsel then argues that "[t]he fact that Respondents' executives communicated with each other about buying groups is fatal to their claim of independent action" because "there would have been no need to discuss with a competitor whether to discount to buying

groups" if each firm "had been acting according to their own independent interests." (CC Br. 94). But the fact that *Benco* engaged in a few unsolicited communications with other distributors about buying groups does not mean that Schein lacked an independent basis for its buying group decisions. Complaint Counsel has not shown that Schein ever reached out to Benco to discuss buying groups or even engaged when Benco reached out (Schein shut the conversations down).[44] There is no evidence that Schein made any of its buying group decisions in consultation with, or even relation to, Benco. Nor does Complaint Counsel contend that Schein's actual policies and practices – including its 2010 Guidance under which buying groups were evaluated on a case-by-case basis to determine whether they could "force compliance" – were inconsistent with Schein's independent interests.

b. Complaint Counsel's "Fear of Competition" Fallacy.

Complaint Counsel argues that a conspiracy should be inferred because "Benco, Schein, and Patterson feared that unfettered competition for buying groups would lead to a price war." (CC Br. 12). The evidence, however, does not support Complaint Counsel's characterizations. This is so for two reasons. First, most of the documents Complaint Counsel cites do not express concerns about price wars or competition; they express concerns about cannibalization. Second, the few snippets that do reference competitors or competition simply reflect lawful interdependence, not conspiracy. *White*, 635 F.3d at 582 ("[m]otivation is ... synonymous with interdependence and therefore adds nothing....").

[44] For this reason, Complaint Counsel's citation to another pre-*Matsushita* case, *Gainesville*, is to no avail. *Gainesville* declined to credit defendants' explanation for declining to service certain customers because defendants were "communicating with a competitor about the refusal." 573 F.2d at 301. Here, in contrast, Complaint Counsel lists nine buying groups that they claim Schein declined to do business with (CCFF 925-54), but they identify *zero* communications with any competitor about them (SRF 925-1021). As *Gainesville* says, Schein had no reason to communicate with Benco or Patterson about its buying group decisions, and it did not.

Complaint Counsel ignores the evidence of Schein's legitimate and unilateral concerns about buying groups – from cannibalization to compliance to conflicts – and instead cites to a fragment of a single sentence in a September 2010 email in which Mr. Sullivan identified a number of reasons why neither he nor Mr. Muller "support[ed] buying groups," including "the risk to overall HSI (due to having 40% share in market) for margin erosion, image, *as well as* other competitors following suit and a huge price war breaks out." (CX 2113; *see also* CC Br. 12). While this email notes the possibility of a price war, the reference to Schein's high market share clearly relates to buying groups' propensity to cannibalize Schein's existing customers. (SRF 197; *see also* CX 7100-176). Moreover, even if competitor reactions were among the factors that Schein considered, it clearly did not stop Schein from doing business with buying groups. Indeed, Complaint Counsel paradoxically cites the very same email for the proposition that Schein was *willing* to do business with Smile Source. (CC Br. 26 & n.219).[45]

In any event, particularly in an oligopoly, a desire "to avoid precipitating a costly price war" is a natural and legitimate consideration and "is not evidence of collusion." *Holiday Wholesale v. Philip Morris*, 231 F. Supp. 2d 1253, 1279, 1316 (N.D. Ga. 2002); *In re Citric Acid*, 191 F.3d at 1101; *see also Valspar Corp.*, 873 F.3d at 191 ("any rational decision in an oligopoly must take into account the anticipated reaction of other firms"); *Kleen Prods. LLC*, 910 F.3d at 934 (plaintiffs' evidence must "rule out the hypothesis that the defendants were engaged in self-interested but lawful oligopolistic behavior during the relevant period").

Complaint Counsel also cites other documents describing buying groups as "threats" because they have the potential for margin erosion. (CC Br. 14 (citing CX 1083); *see also* CCFF

[45] Complaint Counsel also cites internal Benco or Patterson documents that note that buying groups may prompt a "race to the bottom." (CC Br. 1, 12-13, 35, 68, 101, 105). Schein addresses these in its Reply Findings. (SRF 198, 201, 259, 527). In short, a number of those documents refer to concerns about cannibalization, not price wars. And the ones that do imply concerns about a potential price war are fully consistent with oligopolistic interdependence.

225 (citing CX 2632)). But Schein identified buying groups as *both* opportunities *and* threats, often in the same document. (SRF 225; CX 2632). Moreover, there is no dispute that the risk of margin erosion is a legitimate business concern. *In re McWane*, 155 F.T.C. at *247 ("[T]his is still a free country and '[i]n a free capitalistic society, all entrepreneurs have a legitimate understandable motive to increase profits,'"). While a price war may precipitate margin erosion, it can also be caused by other factors that do not depend on competitors' reactions, such as cannibalization. Indeed, because cannibalization is inward looking (and depends on a firm's own market share), concerns about margin erosion provide *unilateral* explanations for Schein's skeptical approach to buying groups.

For the same reason, Complaint Counsel misplaces reliance on documents calling buying groups "a slippery slope." (CC Br. 13). Schein's documents using this term do so in the context of concern over *price discrimination* between members and non-members, not concern over price wars. As Mr. Sullivan wrote:

> I think that it is a very slippery slope. At the end of the day, we provide package discount 'deals' to those that control buying. Simply being a 'member' has historically provided little value or incentive to change purchasing loyalty at the local [dentist] level, yet causes all sorts of issues for those members and local area ***non-members*** who then expect the same.

(SRF 709; CX 2456). Thus, the term "slippery slope" does not connote a concern about a price war, but rather a concern about a buying group's pricing spreading to non-members and further cannibalizing Schein's existing customer base. (SRF 709).

Complaint Counsel also claims that Mr. Sullivan's testimony supports their assertion that Schein, Patterson, and Benco "knew that if one of them *did* discount to buying groups, the others would also need to lower prices to avoid losing business." (CC Br. 13 (citing CCFF 196-97, 200-01)). As to Schein, this contention makes no sense, as Schein *was* discounting to buying groups before, during, and after the alleged conspiracy. (SF 375-1335). In fact, in the testimony

Complaint Counsel cites, Mr. Sullivan expressed concern, not about doing business with buying groups, but about what might happen if Schein did not. (SRF 239-40). He testified that, if Schein declined to do business with a buying group, there was a potential risk of the buying group signing up with a competitor. (SRF 239-40). Mr. Sullivan's concern is completely at odds with the alleged conspiracy. If there was an agreement not to do business with buying groups, there would be no reason for Mr. Sullivan's concern.

Complaint Counsel next claims that Mr. Sullivan listed buying groups as one of "the 'Top 5 Keeps Me Up at Night' issues." (CC Br. 14). First, the top five issues were "The New Normal…, Customer Trends…, Supplier Relationships…, Sales Team Structure…, [and] Meetings-R-US." (SRF 224; CX 0183). "Buying Group mentality" was listed along with "Mid market and ultimately Elite DSO model" under "Customer Trends." (SRF 224; CX 0183). Mr. Sullivan explained that these were issues he had compiled coming in from the team for discussion at an off-site meeting. (Sullivan, Tr. 3909-10). He was thinking about the "positive" and "negative" impacts of buying groups and how Schein could structure itself to "meet the demands of our customers." (SRF 224; CX 0311 (Sullivan, IHT at 154-55)). Far from a fear of competition for buying groups, the discussion was designed to better position Schein for such competition. Indeed, over the next two months, Schein made it a "strategic priority" to develop a unified offering for buying groups. (SF 294-96).

Curiously, Complaint Counsel cites a 2016 Schein SWOT analysis from ***after*** the alleged conspiracy period listing buying groups as both an opportunity and a threat. (SRF 225; CX 2632-016). This shows the continuity in Schein's careful and deliberate approach to buying groups since at least the 2010 Guidance, recognizing there might be opportunities where a buying group could

drive compliance but risks where it could not. (*See* SRF 225). Mr. Sullivan answered a series of leading questions on these points:

> Q. If you think of a SWOT analysis, buying groups fall in both the opportunities category as well as the threats category. Is that fair?
>
> A. That's fair.
>
> Q. If Schein does not work with a buying group, turns a buying group down, there's a potential that the buying group could shift Schein's customers to a competitor, right?
>
> A. Correct….
>
> Q. Buying groups can lead to a decrease in margins for Schein.[46]
>
> A. They could….
>
> Q. And despite these risks, given that buying groups can be an opportunity for a distributor, Schein has done business with buying groups in the past and does business with buying groups today, right?
>
> A. That's correct.

(Sullivan, Tr. 3912).

This testimony hardly supports Complaint Counsel's contention that Schein "feared that unfettered competition for buying groups would lead to a price war." (CC Br. 12).[47] Nor does this testimony establish that Respondent's "buying group strategies were … interdependent" meaning that "if one of them discounted to buying groups, the others had to respond competitively." (CC Br. 14). Indeed, Schein did business with many buying groups, without sparking any competitive

[46] Complaint Counsel's leading questions mask a logical flaw. Even if buying groups could divert customers to a competing distributor, it does not follow that *margins* would decrease. Rather, total profits – not margin percentage – might decrease in that circumstance. Only if the distributor *wins* the contract would there be a decrease in margin percentage, arising not from a price war but from cannibalization.

[47] It should be noted that Ms. Kahn phrased all her questions in terms of hypothetical possibilities, asking whether a buying group "could" result in reduced margins. This basically asks a tautology. If a distributor offers a buying group a discount, then margins by definition decline. These hypotheticals, however, do not establish that buying groups actually receive bigger discounts than similarly-situated independent dentists. Nor do the hypotheticals establish that buying groups can divert or steer substantial incremental volume from one distributor to another.

response from Benco or Patterson, even in circumstances where they learned of Schein's buying group activity. (SF 126-40).

c. Complaint Counsel Has Not Shown that Schein Turned Down Any Profitable Buying Group Opportunity.

Schein's Opening Brief and Proposed Findings of Fact recount the substantial evidence showing the many times buying groups failed to deliver incremental volume. For example, Schein was forced to terminate Steadfast and the Dental Co-Op of Utah after internal analysis showed that the partnerships *reduced* sales, and the groups rebuffed Schein's attempts to address the problem by offering to become their exclusive distributor. (SF 590-624, 1209-36). Other buying groups, such as MeritDent, a group Schein opened in early 2012, also failed to deliver significant volume. (SF 975-78) Faced with this evidence, Complaint Counsel's own expert conceded that the [redacted] that not [redacted] and that each group [redacted] (SF 1694; Marshall, Tr. 3002-03).

Ignoring this, Complaint Counsel contends that Schein's concerns about cannibalization and compliance are "contradicted by the evidence" because "buying groups *can* be profitable." (CC Br. 91-94). But the fact that a hypothetical buying group *might* be profitable does not mean all buying groups are profitable, or even that most typically are. To the extent Complaint Counsel claims that all buying group opportunities are so profitable that Schein's approach – including its skepticism of them – was not economically rational, Complaint Counsel failed to present any evidence to support that contention. Schein entered into a number of buying group partnerships because it believed there was a reasonable prospect that they would turn out to be profitable. In *some* cases they were. But that does not mean that Schein's concerns about buying groups were

not real. Indeed, Complaint Counsel has not identified any buying group opportunity that Schein should have pursued that it did not.

To support their contention that buying groups are inherently profitable, Complaint Counsel relies on the fact that small distributors, like Burkhart and Atlanta Dental, gained incremental sales when they contracted with Smile Source or Kois Buyers Group. (CC Br. 92-93). But Burkhart has only a [redacted] market share, and Atlanta Dental's share is [redacted]. (CX 7101-143). The calculus for small firms is significantly different than for larger firms like Schein, for which the risk of cannibalization is greater and the likelihood of gaining incremental volume is lower. (SF 1749; SRF 1649, 1673; CX 7100-176).[48] Moreover, there is no evidence that Schein acted unreasonably either with respect to Smile Source or the Kois Buyers Group (or even in parallel with Benco or Patterson). Schein tried to negotiate with the Kois Buyers Group, and expressed interest in partnering with Smile Source each time Smile Source approached it. (SF 901-13, 1156-81). Those buying groups do not suggest that Schein failed to act in its independent business interests.

Complaint Counsel also claims that buying groups are inherently profitable because Schein worked with buying groups before and after the alleged conspiracy. (CC Br. 93). Of course, Schein also worked with buying groups during the alleged conspiracy, declined to work with certain buying groups before the alleged conspiracy, and declined to work with certain buying groups after the alleged conspiracy. (*E.g.*, SF 1342-55, 1392-1395). This refutes any notion of a "structural break" or "change in behavior," and confirms that Schein's conduct was perfectly

[48] Moreover, as explained in Schein's Opening Brief, Proposed Findings of Fact, and Reply Findings of Fact, Dr. Marshall's Burkhart and Atlanta Dental profitability studies are fundamentally flawed. They are infected by self-selection bias, do not study the but-for world, and do not shed any light on what Respondents' experience would be with a particular buying group. (S. Br. 78-79; SF 1715-21; SRF 1678-80).

consistent with Dr. Marshall's view that each group [redacted] (SF 1695; Marshall, Tr. 3002-03). Some buying groups are attractive and others are not.

Moreover, Complaint Counsel has not analyzed the profitability of any buying group opportunity presented to Schein before or after the alleged conspiracy, except for Smile Source. In both instances, Dr. Marshall's analysis shows that the relationship was actually *not* profitable. When Smile Source terminated Schein, Schein retained most of the customers, raised margins, and increased its profits by over [redacted]. (SF 1724; RX 3058; Marshall, Tr. 3073).[49] Likewise, although Complaint Counsel contends that Schein [redacted] when it contracted with Smile Source in 2017, Dr. Marshall admitted that he made a mistake in that analysis. He failed to include the rebates and administrative fees that Schein pays to Smile Source, and that once included, Schein's profits turned [redacted]. (*Compare* CC Br. 93 *with* SF 1732-33; Marshall, Tr. 3122 ([redacted])).

Similarly, though Complaint Counsel contends that Schein lost profits when Smile Source contracted with Atlanta Dental in 2013, that conclusion is based on Dr. Marshall's use of false data, namely his use of Schein's 2011 margins instead of 2012 margins when analyzing Schein's

[49] Complaint Counsel asserts that [redacted] (CC Br. 93 & n.712 (citing CCFF 1267)). That is false. Dr. Marshall analyzed Schein's sales to Smile Source members, and demonstrated that Schein earned [redacted] *more* from existing Smile Source member after Schein was terminated in 2012. (RX 3058; Marshall, Tr. 3073). Complaint Counsel's contrary proposed findings are based on Dr. Goldsmith's testimony [redacted] But Complaint Counsel did not lay any foundation for this testimony, and it is inconsistent with Dr. Marshall's analysis of the actual purchasing data showing that most members do ***not*** switch. (SF 1729; CX 7100-165). Complaint Counsel also relies on Dr. Marshall's estimates that, among Burkhart customers, [redacted] But as shown at trial, Dr. Marshall did not even attempt to analyze the but-for world, and his analysis failed to account for the cannibalization that Schein would have experienced had it continued to sell to Smile Source. (SRF 1678-80).

2012 profitability. (SF 1669, 1739). As such, Complaint Counsel's argument that buying groups are generally profitable is not supported by the evidence.

Finally, Complaint Counsel argues that "[i]f buying groups were bad business decisions, Respondents[] would not [be] concerned about competitors working with buying groups."[50] (CC Br. 95). But other than a few passing comments about Patterson or Benco, the overwhelming evidence shows that, when making buying group decisions, Schein was concerned primarily about cannibalization and incremental volume. In support of their argument, Complaint Counsel cites exclusively to internal Patterson and Benco commentary and conduct, not Schein's. (CC Br. 95). That other distributors may have reached the same conclusion about buying groups' ability to produce incremental volume and avoid cannibalization is hardly surprising. As in *Twombly*, it is expected that competitors would react similarly in response to "common economic stimuli," and executives recognizing as much is hardly evidence of a conspiracy. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 n.4 (2007) ("independent responses to common stimuli" provide no basis for a conspiracy inference). Such isolated snippets do not establish that Schein acted contrary to its self-interest, or demonstrate that its buying group decisions were the product of a conspiracy.

IV. COMPLAINT COUNSEL'S PROPOSED REMEDY IS UNWARRANTED AND OVERBROAD.

For reasons explained above, the appropriate remedy in this case is for judgment to be entered for Schein and Complaint Counsel's case against it dismissed. Complaint Counsel's draft order is in any event overbroad in many respects.

[50] This argument is circular and would require the Court to assume the existence of a conspiracy. If the communications evidence is insufficient to prove a conspiracy, then such evidence cannot be used to reject Respondents' evidence of unilateral conduct. Doing so would be tantamount to finding the communications evidence sufficient to prove a conspiracy even in cases where it is not capable of doing so.

A remedial order must be focused on preventing the recurrence of the unlawful conduct Complaint Counsel has proven at trial. While a certain amount of remedial fencing in may be appropriate if necessary to prevent evasion of the Order, such ancillary provisions do not give Complaint Counsel a free pass to bar conduct or address claims that have not been proven. *See ITT Cont'l Baking Co. v. F.T.C.*, 532 F.2d 207, 221 (2d Cir. 1976) (deleting Commission's remedies that "do not appear to be reasonably calculated to prevent future violations of the sort found to have been committed").

In this case, Complaint Counsel claimed only that "Benco, Schein, and Patterson agreed not to provide discounts to, or otherwise contract with, buying groups of independent dentists." (RXD 5). The Order must, therefore, focus on what is necessary to ensure that there would be no such agreement among the Respondents in the future. Complaint Counsel's Proposed Order goes far beyond that.

Attached as Exhibit 1 is a redlined version of Complaint Counsel's Proposed Order that, like Complaint Counsel, provides explanatory justifications in the corresponding footnotes. The main changes are as follows:

- ***Limiting Scope to Horizontal Conduct.*** Complaint Counsel has not alleged or proven that Schein's conduct with manufacturers or independent dentists was unlawful. Nor does Complaint Counsel claim that the antitrust laws prevent Schein from making its own unilateral determinations concerning which entities to do business with. The Proposed Order, however, contains a number of provisions that, on their face, encompass non-horizontal business activity. For example, Section II.A.C would prohibit Schein from unilaterally engaging with manufacturers or associations, even though Complaint Counsel has not established that any such conduct would violate the antitrust laws or that prohibiting such conduct is necessary to prevent the recurrence of the alleged horizontal conspiracy. Similarly, while Complaint Counsel appears to recognize that unilateral conduct is lawful, and proposed including a proviso in Section II.E to address such conduct, the proviso does not go far enough. In fact, through artful drafting, Complaint Counsel has rendered the proviso a nullity, since it only applies "so long as" the other provisions do not address the conduct. As such, it provides Schein with no protection whatsoever. To address these concerns, Schein proposes deleted Section II.A.C,

and clarifying in Section II.E (and elsewhere) that the order only prohibits horizontal conspiratorial conduct.

- ***Limiting Scope to Buying Group-Related Conduct.*** In their Complaint and at Trial, Complaint Counsel chose to limit their challenge to an alleged conspiracy to refuse to do business with or offer discounts to buying groups. They did not prove that any conduct directed to manufacturers, independent dentists, or Associations violated the antitrust laws. Accordingly, provisions such as Sections II.A.2-4 should be deleted.

- ***Limiting Scope to Respondents or at Least Full-Service Distributors.*** Complaint Counsel has alleged that the relevant market in this case consists of full-service distribution and that Schein conspired solely with Benco (and perhaps Patterson by proxy). The scope of the Order should therefore match those allegations, limiting its prohibitions to communications and agreements with other Respondents, or at most other full-service distributors. Complaint Counsel cannot justify extending the Order to reach other distributors (or other entities) on the grounds that "Benco Dental Supply Co. attempted to expand the conspiracy by recruiting other Distributors." (CC Br., Att. D. n.10). Complaint Counsel has not brought an invitation to collude claim against Schein, and thus, expanding the scope of the order to include other entities is unwarranted, at least as to Schein. To address this concern, the Order should limit the definition of distributor to "full-service distributors," and make clear that the prohibitions only apply to conspiracies with Respondents, or at most, other "full-service distributors."

- ***Limiting Scope to Executive and Managerial Sales Staff.*** The Proposed Order purports to extend, in a number of respects, to all employees of Henry Schein, Inc. In other instances, the Proposed Order purports to reach low level rank-and-file employees who had no involvement in the alleged conspiracy. Because Complaint Counsel has affirmatively stated that "the basis of [their] case comes down to the nature of the relationship and communications between Chuck Cohen, Tim Sullivan, and Paul Guggenheim" (Kahn, Tr. 4759), the scope of the Order should likewise be limited to high-level executives (and their successors) directly responsible for dental pricing and strategy, and who were involved in the conduct alleged. To extend the scope of the Proposed Order to rank-and-file employees would make the Proposed Order not only grossly overbroad but impossible to administer and implement. As such, the term, "Executive and Sales Staff" should be modified to clarify that it is limited to executives and management employees with responsibility for pricing or sales of Dental Products or Dental Services. It should specifically exclude FSCs and other employees in the field that have some pricing authority and were not alleged to have any participation in the alleged boycott. Notably, Complaint Counsel claims that its proposed definition – which is not so limited – is modeled after the Commission's order *In re PolyGram Holding, Inc.*, 2003 WL 25797195 at *386 (F.T.C. 2003). That is ***false***. The *PolyGram* order does not use the "Executive and Sales Staff definition," and its scope is expressly limited to "any officer or director or ***management*** employee … with

responsibility for the pricing, marketing, or sale" of the relevant product. *Id.* The same limitation should apply here.

- ***Excluding Coordination with Minority and Majority Owned Affiliates.*** Schein focuses on providing its dental customers with the products and services they need. Schein does so though a number of majority and minority owned business affiliates. Schein's dealings with such entities are either immune under *Copperweld* and its progeny, or at a minimum, evaluated under the rule of reason. Here, Complaint Counsel neither pled nor proved that Schein's dealings with any of its majority or minority owned business affiliates violate the antitrust laws. As such, any Order should expressly exclude such coordination.

- ***Delineating Communication Logging Obligations.*** Complaint Counsel's Proposed Order would require disclosure of all communications regardless of subject between any employee of Henry Schein, Inc. and any employee of either Benco Dental Supply Co. or the Patterson Companies, Inc. (*See* Proposed Order, Section IV.5.a-b). It would be impossible to certify compliance with such an order, as there is no way to monitor every single employee of the company for every communication that they may have to determine if one of those communications was with a competitor. Nor should such a logging requirement be necessary. First, competitor communications by themselves are not unlawful. Thus, there should be no need to log every time a Schein FSC runs into a Benco or Patterson FSC at a random trade show and says "hi." Second, according to Complaint Counsel, their case is "based on" communications involving just three people: Mr. Cohen, Mr. Sullivan, and Mr. Guggenheim. Even if the Order extended beyond these three individuals, there is no reason why it should go beyond the managerial control group at each firm. Moreover, to make it administratively feasible to implement, the logging obligation should be limited to clearly specified individuals (and their successors). Accordingly, Schein proposes limiting the disclosure obligation to Mr. Sullivan and Mr. Steck (and their successors) as the two Schein employees Complaint Counsel identifies by name in the Proposed Order.

- ***Specifying Compliance Report Content.*** Complaint Counsel's Proposed Order contains vague obligations concerning the information that must be included in periodic compliance reports. (*See* Section IV.A-B). This leaves Schein uncertain about what information must be included, and subjects it to potential claims of contempt if it guesses wrong. Because the enumerated items specify sufficient information to enable Complaint Counsel to evaluate Schein's compliance with the Proposed Order, Schein believe the compliance reports should be limited to those specifically identified items, without the inclusion of any vague catch-all disclosure obligations.

- ***Limiting Notification of M&A Activity to Relevant Transactions.*** Section V of the Proposed Order requires advance notification of "its proposed acquisition, merger, or consolidation." Schein understands that the purpose of this provision is to address changes in legal structure that would affect the legal entity responsible for complying with the order. The language, however, goes beyond that, and may

capture other M&A transactions. Accordingly, Schein proposes that Section V.B be modified to clarify that it only applies to such transactions to the extent such transactions either (i) change the legal entity subject to the Order, or (ii) affect compliance obligations arising out of the Order.

V. CONCLUSION

For the foregoing reasons, judgment should be entered for Schein.

Dated: June 6, 2019

Respectfully submitted,

/s/ Colin R. Kass

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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2019, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April J. Tabor
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Federal Trade Commission
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Washington, DC 20580

The Honorable D. Michael Chappell
Administrative Law Judge
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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.

/s/ Owen T. Masters

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.

June 6, 2019 By: /s/ *Owen T. Masters*

Exhibit 1

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

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

[PROPOSED]

ORDER I.

IT IS ORDERED that the following definitions shall apply:

A. "Benco Dental Supply Co." means Benco Dental Supply Co., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Benco Dental Supply Co., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Henry Schein, Inc." means Henry Schein, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Henry Schein, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Patterson Companies, Inc." means Patterson Companies, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Patterson Companies, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Respondents" means Benco Dental Supply Co., Henry Schein, Inc., and Patterson Companies, Inc., individually and collectively.[1]

E. "Antitrust Laws" means the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 et seq., the Sherman Act, 15 U.S.C. § 1 et seq., and the Clayton Act, 15 U.S.C. §12 et seq.

F. "Association" means a dental trade association, state dental association, or other professional dental association.[2]

G. "Business Information" means, with respect to information regarding Buying Groups, confidential, non-public information regarding a Distributor's (including Respondents') manner of doing business with a Buying Group, including business and strategic plans, marketing, sales, pricing, pricing and sales strategy, costs, revenues, margins, marketing, and customer information.[3]

H. "Buying Group" means a buying club, buying cooperative, buying co-op, group purchasing organization (GPO) or other entity whose members are independent and separately owned and managed dental practices, that negotiates terms for the sale of Dental Products and Dental Services by Distributors or Manufacturers to its members, and which holds itself out as seeking to aggregate and leverage the collective purchasing power of separately owned and separately managed dental practices in exchange for lower prices on Dental Products and Dental Services.[4]

I. "Communicate" or "Communicating" means exchanging, transferring, or disseminating any information, without regard to the means by which it is accomplished.[5]

J. "Communication" means any information exchange, transfer, or dissemination, without regard to the means by which it is accomplished, including, without limitation, orally, telephonically, or by mail, e-mail, notice memorandum, text message, or other electronic transmission.[6]

K. "Dental Practice Customer" means any dental practice that does business in the United States and purchases Dental Products or Dental Services (regardless of size, ownership, or corporate structure).[7]

L. "Dental Products" means all products, supplies, materials, equipment, and other items used in the provision of dental services by a dentist, dental practice, or any Dental Services business or clinic in the United States.[8]

M. "Dental Services" means any repair, warranty support, business, technical, design or administrative services, or any other ancillary or incidental services used by a dentist, dental practice, or any Dental Services business or clinic in the United States.[9]

N. "Full Service Distributor" means any business holds itself out as a full service dental distributor, not including, for example and for the avoidance of doubt, ~~other than~~ (i) a Buying Group who purchases Dental Products and Dental Services for resale and distribution to Dental Practice Customers, and (ii) any business that holds itself out as a manufacturer of Dental Products. Respondents are included in the definition of Full Service Distributor.[10]

O. "Executive and Managerial Sales Staff" means Respondents' officers, directors, and managerial employees in the United States, each of whose job responsibilities include, in whole or in part, (i) the sale or pricing of Dental Products or Dental Services or (ii)

communications with Distributors ~~or Manufacturers~~. For avoidance of doubt, the term "Executive and Managerial Sales Staff" does not include field sales representatives.[11]

P. ~~"Manufacturer" means an entity that manufactures Dental Products for sale to Dental Practice Customers.~~[12]

II.

IT IS FURTHER ORDERED that Respondents, directly or indirectly, or through any corporate or other device, in connection with the sale of Dental Products and Dental Services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from and are prohibited from:[13]

A. Entering into or participating in an agreement or understanding, whether express or implied, with another Full Service Distributor relating to~~:~~[14]

1. Any refusal to c~~C~~onducting business with a Buying Group, including any refusal to provid~~eing~~ or offer~~ing~~ discounts or rebates, responding to solicitations~~, or refusing to do business~~;[15]

2. ~~Preventing or discouraging any Dental Practice Customer from joining or endorsing a Buying Group, including by refusing to provide certain Dental Products or Dental Services to a Dental Practice Customer, or withholding financial incentives, including discounts or rebates, to a Dental Practice Customer because of such Dental Practice Customer's participation in or affiliation with a Buying Group~~;[16]

3. ~~Preventing or discouraging an Association from doing business with, endorsing, creating, or partnering with a Buying Group or Distributor, including by withholding advertising or refusing to attend or sponsor the Association's seminars, meetings, or other events~~;[17] ~~or~~

4. ~~Preventing or discouraging a Manufacturer from doing business with a Buying Group, including by withholding or limiting business with the Manufacturer~~.[18]

B. Inducing, urging, encouraging, assisting, or attempting to induce another ~~y~~ Full Service Distributor to engage in the actions described in Paragraph II.A(1) ~~to (4)~~.[19]

C. ~~Preventing, discouraging, punishing, or threatening to punish any Association or Manufacturer that wants to join, sponsor, partner with, or conduct business with a Buying Group.~~[20]

D. Communicating Business Information regarding Buying Groups (including but not limited to, a Distributor's willingness to do business with a Buying Group) to another Full Service Distributor, or requesting, encouraging, or facilitating the Communication of Business Information regarding a Buying Group between or among Distributors.[21]

E. Provided, however, that ~~For avoidance of doubt,~~ nothing in this Order shall prevent Respondents from unilaterally deciding not to enter into any agreement or negotiate

with any Buying Group , ~~Dental Practice Customer,~~ or Association~~, or Manufacturer so long as the conduct does not violate Paragraphs II.B, II.C, and II.D of this Order~~.[endnote 22]

~~E.~~F. Provided, further, that nothing in this Order shall prevent (or permit) a Respondent from communicating, coordinating, or reaching agreements with its majority or minority owned business affiliates. [endnote 23]

III.

IT IS FURTHER ORDERED that Benco Dental Supply Co., Henry Schein, Inc., and Patterson Companies, Inc. shall each maintain an antitrust compliance program that sets forth the policies and procedures each Respondent has implemented to comply with this Order and with the Antitrust Laws. In connection with this program, each Respondent, Benco Dental Supply Co., Henry Schein, Inc., and Patterson Companies, Inc., shall:[22]

A. Designate an antitrust compliance officer to supervise the design, maintenance, and operation of its program;[23]

B. Provide training regarding Respondent's obligations under this Order and the Antitrust Laws as follows:[24]

1. No later than 60 days after the Order becomes final, provide training regarding Respondent's obligations under the Order to Respondent's Executive and Managerial Sales Staff, or for an employee hired or promoted to Executive and Managerial Sales Staff, within 30 days of their employment start date; and

2. At least annually for the term of the Order.

C. Establish a procedure to enable Respondent's Executive and Sales Staff to ask questions about, and report violations of, this Order and the Antitrust Laws confidentially and without fear of retaliation of any kind;[25] and

D. Establish policies to discipline Respondent's Executive and Sales Staff who fail to comply with this Order and the Antitrust Laws.[26]

IV.

IT IS FURTHER ORDERED that Respondents shall file verified written reports ("compliance reports") in accordance with the following:[27]

A. Benco Dental Supply Co., Henry Schein, Inc., and Patterson Companies, Inc. shall separately and individually submit an interim compliance report 60 days[28] after the Order is issued, a compliance report one year after the date this Order is issued, and annual compliance reports[29] for the next 4 years[30] on the anniversary of that date~~; and additional compliance reports as the Commission or its staff may request~~;[31]

B. Each compliance report shall set forth in detail the manner and form in which submitting Respondent, Benco Dental Supply Co., Henry Schein, Inc., or Patterson Companies, Inc., intends to comply, is complying, and has complied with this Order.

~~Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether submitting Respondent, Benco Dental Supply Co., Henry Schein, Inc., or Patterson Companies, Inc., is in compliance with the Order. Conclusory statements that the submitting Respondent has complied with its obligations under the Order are insufficient.~~[32] ~~Benco Dental Supply Co., Henry Schein, Inc., and Patterson Companies, Inc. shall each include in its~~ The individual reports shall include the ~~,~~ following information~~among other information or documentation that may be necessary to demonstrate compliance~~:[33]

1. A full description of the substance and timing of all measures it has implemented or plans to implement to ensure that it has complied or will comply with each paragraph of the Order;

2. The name and title of its designated antitrust compliance officer, as required by Paragraph III.A above;

3. A description of all trainings it has conducted in compliance with Paragraph III.B above (excluding trainings described in a prior compliance report);

4. In each compliance report submitted by Benco Dental Supply Co., it shall provide documentation of:[34]

    a. Communications between or among:

        i. Any of Benco Dental Supply Co.'s officers, directors, or employees, including the following executives, or their successors: Charles Cohen (Managing Director) and Patrick Ryan (Director, Sales); and

        ii. Any officer, director, or employee of: (1) Henry Schein, Inc., including the following executives, or their successors: Timothy Sullivan (former President) and David Steck (Vice President and General Manager); and/or (2) Patterson Companies, Inc., including the following executives or their successors: Paul Guggenheim (former President), David Misiak (Vice President, Sales), and Timothy Rogan (Vice President, Marketing). Documentation of such Communication shall identify (name, employer, and job title) the persons involved, the method of communication, the subject matter of the Communication, and its duration; and

    b. Intra-firm Communications regarding each Communication identified in Paragraph IV.B(4)(a) above, including the name, employer, and job title of all persons involved in the Communication, a description of the subject matter of the Communication, and the duration of the Communication;

5. In each compliance report submitted by Henry Schein, Inc., it shall provide documentation of:[35]

    a. Communications between or among:

i. ~~Any officer, director, or employee of Henry Schein, Inc., including the following executives, or their successors:~~ Timothy Sullivan (former President), ~~and~~ David Steck (Vice President and General Manager), and their successors; and

ii. Any officer, director, or employee of: (1) Benco Dental Supply Co., including the following executives, or their successors: Charles Cohen (Managing Director) and Patrick Ryan (Director, Sales); and/or (2) Patterson Companies, Inc., including the following executives or their successors: Paul Guggenheim (former President), David Misiak (Vice President, Sales), and Timothy Rogan (Vice President, Marketing). Documentation of such Communication shall identify (name, employer, and job title) the persons involved, the method of communication, the subject matter of the communication, and its duration; and

b. Intra-firm Communications regarding each Communication identified in Paragraph IV.B(5)(a) above, including the name, employer, and job title of all persons involved in the Communication, a description of the subject matter of the Communication, and the duration of the Communication;

~~b.~~c. Notwithstanding the foregoing, the following communications may be excluded from the disclosure or documentation requirement: (i) Privileged communications, including, but not limited to, communications regarding litigation; (ii) Public communication, including but not limited to speaking engagements or publications sponsored by trade associations, public interest groups or charity groups; (iii) Purely administrative communications in furtherance of a trade association, public interest group, or charity group event made by an actual or potential participant in that trade association, public interest group, or charity group event or meeting; (iv) Communications regarding employment of individuals at or from HSD, including communications between in-house or outside counsel of HSD and in-house or outside counsel of another dental supply distributor or manufacturer relating to disputes or the resolution of disputes over the hiring of employees, unless those communications involve the establishment or modification of a policy or companywide agreement .among or between dental supply distributors or manufacturers about the hiring and employment of individuals in the dental supply distributor industry; (v) Communications related to the potential sale or acquisition of BSD or another dental supply distribution, or related businesses; (vi) Communications with an affiliate, subsidiary, joint venture partner or other entity in which Schein or an affiliate has an investment, or sub-distributor of Schein related to such business relationships; and (vii) Purely social and family related communications among or between former colleagues and business acquaintances. [Endnote 35A]

6. In each compliance report submitted by Patterson Companies, Inc., it shall provide documentation of:[36]

   a. Communications between and among:

      i. Any officer, director, or employee of Patterson Companies, Inc., including the following executives or their successors: Paul Guggenheim (former President), David Misiak (Vice President,
      Sales), and Timothy Rogan (Vice President, Marketing); and

      ii. Any officer, director, or employee of: (1) Benco Dental Supply Co., including the following executives, or their successors: Charles Cohen (Managing Director) and Patrick Ryan (Director, Sales); and/or (2) any officer, director, or employee of Henry Schein, Inc., including the following executives, or their successors: Timothy Sullivan (former President) and David Steck (Vice President and General Manager). Documentation of such Communications shall identify (name, employer, and job title) the persons involved, the method of communication, the subject matter of the Communication, and its duration; and

   b. Intra-firm Communications regarding each Communication identified in Paragraph IV.B(6)(a) above, including the name, employer, and job title of all persons involved in the Communication, a description of the subject matter of the Communication, and the duration of the Communication.

C. Respondents shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov.[37]

V.

IT IS FURTHER ORDERED that Respondent, Benco Dental Supply, Co., Henry Schein, Inc., or Patterson Companies, Inc., shall notify the Commission at least 30 days prior to:[38]

A. Its proposed dissolution;

B. Its proposed acquisition, merger, or consolidation to the extent such acquisition, merger, or consolidation may change the legal entity subject to or may affect compliance obligations arising out of, this Order; or

C. Any other change in the Respondent, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising

out of this Order.

VI.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and 5 days' notice to the relevant Respondent, Benco Dental Supply, Co., Henry Schein, Inc., or Patterson Companies, Inc., made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters office, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:[39]

A. Access, during business office hours of the respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at the request of the authorized representative of the Commission and at the expense of the Respondent;[40] and

B. To interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.[41]

VII.

IT IS FURTHER ORDERED that this Order shall terminate 10 ~~5~~ years from the date it is issued.[42]

By the Commission.

April J. Tabor
Acting
Secretary

SEAL

ISSUED:

[1] The defined term "Respondents" is modeled after the Final Order, *In re PolyGram Holding, Inc.*, Docket No. 9298, 2003 WL 25797195, at **31 (FTC July 24, 2003) (hereinafter "PolyGram Order"). This is the standard definition for "Respondents" used in Commission orders.

[2] The purpose of the defined term "Association" is to identify groups that may conduct business with, associate with, or create or form Buying Groups. This definition is necessary because the record evidence shows that Respondents exchanged Business Information regarding Texas Dental Association and Arizona Dental Association, examples of Associations, which created Buying Groups. CCFF ¶¶ 1109-1158.

[3] The purpose of the defined term "Business Information" is to identify the type and nature of non-public information shared by competitor Respondents sought to be prohibited in the Proposed Order. This definition is necessary because the record evidence shows that Respondents exchanged non-public, confidential, strategic information regarding Buying Groups. *See* CCFF ¶¶ 474-1100, 1109-1158. As Complaint Counsel noted, their concern is about "non-public, confidential, strategic information." Moreover, as phrased, chit-chat among low-level employees about historical, public events would be captured. As such, the definition of "Business Information" should be limited to confidential, non-public information.

[4] The purpose of the defined term "Buying Group" is to identify the customer segment that the record evidence shows was the subject of Respondents' unlawful agreement. *See* CCFF ¶¶ 17, 34, 67-71, 114-145, 474-1158. This defined term is not intended to alter the scope of type of Buying Group described in the Complaint.

[5] The defined terms "Communicate" or "Communicating" are modeled after the Final Order, *In re N.C. Bd. of Dental Exam'rs*, Docket No. 9343, 2011 WL 11798463, *39 (FTC Dec. 2, 2011) (hereinafter "NC Dental Order"). This is the standard definition for "Communicate" and "Communicating" used in Commission orders.

[6] The defined term "Communication" is modeled after NC Dental Order, at *39. This is the standard definition for "Communication" used in Commission Orders.

[7] The purpose of the defined term "Dental Practice Customer" is to identify customers in the Dental Products and Dental Services industry, which forms the basis of prohibitions in Paragraph II of the Proposed Order. This definition is necessary because the record evidence shows that Respondents agreed not to discount to or negotiate with certain Dental Practice Customers. *See* CCFF ¶¶ 10-11, 17, 20, 27, 29, 34, 38-39, 45, 57-113. The evidence does not show that Schein refused to provide discounts to independent dentists or any entity that actually purchases Dental Products or Dental Services. To the contrary, the evidence is undisputed that Respondents competed aggressively for, and did not reach any agreements or understandings with respect to, independent dentists. Even Complaint Counsel concedes that its case is only about an alleged refusal to sell to or provide discounts to a certain type of customer, Buying Groups.

[8] The purpose of the defined term "Dental Products" is to identify the product market and distribution channels relevant to Paragraph II of the Proposed Order. *See* CCFF ¶¶ 7, 12, 20, 24, 27, 39-40, 89-113, 125, 1522.

[9] The purpose of the defined term "Dental Services" is to identify the product market and

distribution channels relevant to Paragraph II of the Proposed Order. *See* CCFF ¶¶ 7, 15, 20, 33, 41, 67-69, 1446-1452, 1462, 1491, 1509, 1522.

[10] The purpose of the defined term "Distributor" is to identify entities that may compete with Respondents in selling, discounting, or doing business with Buying Groups. *See* CCFF ¶¶ 7, 20, 38, 1446, 1491, 1509, 1522. This definition is necessary because the record evidence shows that Benco Dental Supply Co. attempted to expand the conspiracy by recruiting other Distributors. *See* CCFF ¶¶ 1199-1251. There is no evidence that Schein attempted to reach out to any other distributor. As such, expanding the order to include other distributors, at least as to Schein, is unnecessary and unwarranted by the evidence. In that regard, Complaint Counsel has failed to assert an invitation to collude claim against Schein. To the extent the Order does extent beyond Respondents, Schein believes the definition of distributor should be restricted to full service distributors, since Complaint Counsel has defined the market as limited to full service distribution and has not introduced any evidence concerning any conduct directed to non-full service distribution. Finally, Schein further believes that the term "Distributor" should expressly exclude businesses that hold themselves out to be manufacturers (even if they outsource the production of certain of their products), as Schein is generally in a vertical relationship with such entities.

[11] The purpose of the defined term "Executive and Sales Staff" is to specify those individuals subject to the antitrust compliance program detailed in Paragraph III of the Proposed Order. This definition is necessary because the record evidence shows that Respondents' employees, at various levels ranging from sales representatives to the highest ranking executives, communicated about Buying Groups in furtherance of the conspiracy. *See* CCFF ¶¶ 474-1158. This definition is modeled after the PolyGram Order, at **31. The term "Executive and Sales Staff" is too broad in the context of this industry. Schein employs over 1,000 individuals that could fit this definition. Yet, complaint Counsel has stated "the basis of our case comes down to the nature of the relationship and communications between Chuck Cohen, Tim Sullivan, and Paul Guggenheim." ((Kahn, Tr. 4758). Nor has Complaint Counsel cited to any improper communications among rank-and-file sales staff. Complaint Counsel's assertion that they modeled the definition of Executive and Sales Staff after the PolyGram Order is ***false***. The Polygram order does not use this term. The closest it comes is the definition of "Officer, Director, or Employee," but that definition is ***expressly*** limited to "any officer or director or managerial employee … with responsibility for pricing, marketing or sale" of the relevant product. Accordingly, Schein believes that the scope of the Order be limited to Executive and Managerial Sales Staff, meaning individuals with direct managerial responsibility for the sale or pricing of Dental Products and Dental Services, or communications with other Full-Service distributors.

[12] The purpose of the defined term "Manufacturer" is to identify a distribution channel in the dental industry that may do business with Respondents, Buying Groups, or Dental Practice Customers that may participate in or affiliate with Buying Groups. *See* CCFF ¶¶ 1509. This definition is necessary because the record evidence shows that Respondents exchanged non-public information regarding their Buying Group strategies with Manufacturers and exchanged information regarding Manufacturer-related issues to coordinate or propose collective responses and solutions. *See* CCFF ¶¶ 284-295, 301-306, 788-789. Complaint Counsel misstates the record evidence. Complaint Counsel has not proven that any communications concerning any manufacturer issues are unlawful. Nor do any of the Complaint Counsel's proposed findings relate to buying groups. As such, there is no basis for including manufacturers within the scope of this Order. Moreover, including manufacturers within the scope of the order would prohibit perfectly legitimate and procompetitive conduct, including negotiations between manufacturer and distributor relating to charge-backs or special discounts for buying groups or others.

[13] Paragraph II is modeled after NC Dental Order, at *40-41 (¶ II). Paragraph II seeks to require Respondents to cease and desist from and prohibit Respondents from future recurrence of the unlawful conduct at issue. *See* Complaint Counsel's Post-Trial Brief, at Section II. "The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946); *see also FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952) ("Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past . . . it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity"); *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428-429 (1957) ("Commission is clothed with wide discretion in determining the type of order that is necessary to bring an end to the unfair practices found to exist."). Furthermore, even where the unlawful conduct has ceased, "voluntary cessation of an illegal practice is no bar to a Commission cease and desist order." *ITT Cont'l Baking Co. v. FTC*, 532 F.2d 207, 222 n.22 (2d Cir. 1976).

[14] Paragraph II.A(1)-(4) is modeled after the Final Order, *In re Toys "R" Us, Inc.*, Docket No. 9278, 1998 WL 34300619, **145 (FTC Oct. 13, 1998) (¶ II) (hereinafter "Toys "R" Us Order"), *aff'd*, *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 930, 939-40 (7th Cir. 2000). As here, where horizontal competitors agreed to refuse to do business with discounters, this Court issued an order—and the Seventh Circuit affirmed that order—prohibiting respondent from "entering into, and attempting to enter into any agreement or understanding . . . ." Toys "R" Us Order, **145 (¶ II); *Toys "R" Us*, 221 F.3d at 940; *see also* Complaint Counsel's Post-Trial Brief, at Section II. Schein believes that the Section II.A should make it clear that it only prohibits agreements with "another" Distributor, so as to expressly exclude any unilateral or non-horizontal conduct from its scope.

[15] Paragraph II.A(1) is modeled after the Toys "R" Us Order, which prohibited respondent from entering into any agreement with a supplier to refuse to sell products to a toy discounter. Toys "R" Us Order, at **145 (¶ II.A). The record evidence shows that Respondents reached an agreement to refuse to do business with Buying Groups, including refusing to provide or offer discounts or respond to requests to do business. *See* CCFF ¶¶ 474-1100; *see also* Complaint Counsel's Post-Trial Brief, at Section II.

[16] Paragraph II.A(2) is modeled after the Toys "R" Us Order, which prevented respondent from pressuring a supplier to limit or withhold products and business from a certain type of customer: toy discounters. Toys "R" Us Order, at **145 (¶ II.B). This paragraph is necessary because the record evidence shows that Respondents refused to sell to or provide discounts to a certain type of customer, Buying Groups. *See* CCFF ¶¶ 17, 34, 408-425, 503, 639, 641, 643-646, 648-649, 743-860, 925-954. The evidence does not show that Schein refused to provide discounts to independent dentists or any entity that actually purchases Dental Products or Dental Services. To the contrary, the evidence is undisputed that Respondents competed aggressively for, and did not reach any agreements or understandings with respect to, independent dentists. Even Complaint Counsel concedes that its case is only about an alleged refusal to sell to or provide discounts to a certain type of customer, Buying Groups. But to the extent any remedy with respect to buying groups is required, it is already fully captured by provision II.A.1. As such, provision II.A.2 should be deleted.

[17] Paragraph II.A(3) is necessary because the record evidence shows that Respondents withdrew

sponsorships and attendance at meetings of the Texas Dental Association and Arizona Dental Association after learning that both were creating statewide Buying Groups. *See* CCFF ¶¶ 1109-1158; *see also* Complaint Counsel's Post-Trial Brief, at Section I.I, II.H. Schein believes that Complaint Counsel has failed to prove any conspiracy to boycott the TDA or any state Dental Association. There was no evidence of any improper communication among Respondent concerning such Associations. Moreover, the decision not to attend a trade show has nothing to do with whether Respondents collectively agreed not to supply a buying group. As such, it is inappropriate to include any provisions relating to Respondents' dealings with Association, except to the extent that such Associations are seeking supply relationships from Respondents in their capacities as buying groups. To the extent that this occurs, it is already fully captured by provision II.A.1. As such, provision II.A.3 should be deleted.

[18] Paragraph II.A(4) is modeled after the Toys "R" Us Order, which prevented respondent from pressuring a supplier to limit or withhold products and business from a toy discounter. Toys "R" Us Order, at **145 (¶ II.B). The record evidence shows that Benco Dental Supply Co. attempted to expand the conspiracy by recruiting other industry participants. *See* CCFF ¶¶ 1199-1252. Paragraph II.A.4 focuses on communications with manufacturers. There is no evidence that Schein attempted to prevent or discount any manufacturer from doing business with a Buying Group. Moreover, communications between a single distributor and a manufacturer are vertical and nature and must be separately analyzed under the Rule of Reason. Complaint Counsel has not asserted such a claim, and has not established that any of Respondents' dealings with any Manufacturer would violate the Rule of Reason. Finally, the language is over broad as it would prevent normal buyer-seller negotiations or discussions between Schein and one or more of its suppliers. As such, provision II.A.4 should be deleted.

[19] Paragraph II.B is modeled after the NC Dental Order, which prohibited the respondents from urging, encouraging, assisting, or attempting to induce any person, other than the respondents, from engaging in any action that was prohibited by the order. NC Dental Order, at *41 (¶ II.G); *see also* Toys "R" Us Order, at **145 (¶ II.D). The record evidence shows that Benco Dental Supply Co. attempted to expand the conspiracy by recruiting other Distributors. *See* CCFF 1199-1252; *see also* Complaint Counsel's Post-Trial Brief, at Section V. As with Section II.A, Schein believes that this provision should make it clear that it only applies to horizontal interactions with another Full Service Distributor, so as to expressly exclude any unilateral or non-horizontal conduct from its scope.

[20] Paragraph II.C is necessary because the record evidence shows that Respondents withdrew sponsorships and attendance at meetings of the Texas Dental Association and Arizona Dental Association after learning that both were creating statewide Buying Groups. *See* CCFF ¶¶ 1138-1146, 1156-1158; *see also* Complaint Counsel's Post-Trial Brief, at Section I.I, Section II.H. Paragraph II.C is modeled after the Toys "R" Us Order, which prevented respondent from pressuring a supplier to limit or withhold products and business from a certain type of customer: toy discounters. Toys "R" Us Order, at **145 (¶ II.B). Complaint Counsel has not established any violation of law with respect to Schein's decision not to attend the TDA or Arizona trade shows. Moreover, as drafted, Section II.C would capture unilateral conduct, which is not the basis of Complaint Counsel's case. For example, under the proposed language perfectly legitimate discussions between Schein and its supplies about the pros and cons of supplying a buying group, including the buying group's reliability, would be prohibited.

[21] Paragraph II.D is necessary because the record evidence shows that Respondents engaged in repeated inter-firm communications and exchanged non-public, strategic information with their competitors to reach a prohibited agreement not to sell to or discount to Buying Groups. *See*

CCFF ¶¶ 474-1100, 1109-1158; *see also* Complaint Counsel's Post-Trial Brief, at Section I.F-I.I, Section II. The Court can prohibit the unlawful conduct it finds existed, as well as include in its order a remedy that "close[s] all roads to the prohibited goal." PolyGram Order, at **29 (quoting *FTC v. Ruberoid Co.*, 343 U.S. at 473). As with other provisions, Schein believes that Section II.D needs to make it clear that it only applies to horizontal interactions with another Full Service Distributor, so as to expressly exclude any unilateral or non-horizontal conduct from its scope.

[Endnote 21A] Complaint Counsel's attempt to include a proviso that excludes unilateral conduct is inssuficient and illusory. As an initial matter, the provision is rendered a nullity because it only applies to conduct that "does not violate" other provisions of the Order. As such, it does not exclude any unilateral conduct that may be captured by the other provisions. In addition, to the extent the court agrees with Schein that order should be limited to conduct focused on refusals to do business with or offer discounts to buying groups (and thus deleting the provisions relating to Dental Practice Customers, Associations, or Manufacturers), Section II.E should be likewise be conformed to the scope of the order.

[Endnote 21B] Schein believes an additional provision should be included to exclude from the scope of the Order any dealings between a Respondent and its own minority or majority owned business affiliates. Such conduct is either immune under *Copperweld*, or at a minimum, judged under the rule of reason. There is no evidence that Schein engaged in any improper conduct with respect to its own business affiliates, and thus, such dealings should be excluded from the Order.

[22] Paragraph III.A through D are modeled after previous FTC Part 3 orders that required distribution of the order to educate and inform relevant individuals of their responsibilities to comply with the order. *See* NC Dental Order, at *41-42 (¶ III); Final Order, *In re N. Tex. Specialty Physicians*, Docket No. 9312, 2005 WL 6241023, **37 (FTC Nov. 29, 2005) (hereinafter "North Texas Specialty Physicians Order"), *modified* 2008 WL 4235322 (FTC Sept. 12, 2008). *See also* Decision and Order, *In re Ferrellgas Partners, L.P.*, Docket No. 111-0195, 2015 WL 13021965, *14-15 (FTC Jan. 7, 2015) (requiring antitrust compliance program, specified in ¶ III) (hereinafter "Ferrellgas Partners Order"). This paragraph similarly seeks an effective and efficient manner by which to inform and educate those within the scope of the Proposed Order of their compliance responsibilities.

[23] Paragraph IV.A is modeled after the Ferrellgas Partners Order. Ferrellgas Partners Order, at *14 (¶ III.B(1)).

[24] Paragraph IV.B is modeled the Ferrellgas Partners Order. Ferrellgas Partners Order, at *14-15 (¶ III.B(2)).

[25] Paragraph IV.C is modeled the Ferrellgas Partners Order. Ferrellgas Partners Order, at *15 (¶ III.B(3)).

[26] Paragraph IV.D is modeled the Ferrellgas Partners Order. Ferrellgas Partners Order, at *15 (¶ III.B(4)).

[27] Paragraph IV is standard in FTC Part 3 orders. *See, e.g.*, NC Dental Order, at *42 (¶ IV); Toys "R" Us Order, at **146 (¶ IV); North Texas Specialty Physicians Order, at **38 (¶ IV.E).

[28] This time period is modeled after the NC Dental Order. NC Dental Order, at *42 (¶ IV); *see also* Toys "R" Us Order, at **146 (¶ IV); North Texas Specialty Physicians Order, at **38 (¶ IV.E).

[29] Requiring annual reports is standard in Part 3 orders. *See, e.g.*, NC Dental Order, at *42 (¶ IV); Toys "R" Us Order, at **146 (¶ IV); North Texas Specialty Physicians Order, at **38 (¶ IV.E).

[30] Compliance reporting serves to notify the Commission that a respondent is complying with its obligations. The period of such obligations should be long enough to cover all affirmative obligations and ensure that a respondent has and will continue to comply with the order's prohibitions. Since this Proposed Order is prohibitory, a total four-year reporting requirement is sufficient to ensure that Respondents understand and are complying with their obligations under the Proposed Order. *See* Toys "R" Us, at *146 (ordering 20-year term for annual reporting). *See also* NC Dental Order, at 42 (requiring annual reporting for 3 years); North Texas Specialty Physicians Order, at **38 (requiring annual reporting for 3 years).

[31] This is standard language in FTC Part 3 orders. *See, e.g.*, NC Dental Order, at *42 (¶ IV); Toys "R" Us Order, at *146 (¶ IV); North Texas Specialty Physicians Order, at 38 (¶ IV.E). To the extent an Order is required, Schein does not object an initial compliance report followed by annual reports thereafter for a period of four years. Schein, however, objects to the imposition of "additional compliance" reports, as there is no showing that such reports are necessary.

[32] This purpose of this language is to ensure and assist Respondents in writing acceptable and useful compliance reports that achieve the purpose of Paragraph IV. The language is modeled after the proposed order submitted by Complaint Counsel, *In re Otto Bock HealthCare N. America, Inc*., Docket No. 9378 (FTC Nov. 20, 2018) (hereinafter "Otto Bock Proposed Order"). Otto Bock Proposed Order, at ¶ VIII.2; *see also* Final Order in *In re Polypore Int'l, Inc.*, Docket No. 9327, 2010 WL 9549988 (FTC Nov. 5, 2010), at *63 (requiring descriptions and statements, set forth in ¶ XI.B., showing respondent's compliance with order); NC Dental Order, at *42 requiring "detailed description of the manner and form in which Respondent has complied, or is complying, with this Order."). Schein believes that the content of any compliance report should be clearly specified. The enumerated items identify the information Complaint Counsel believes is necessary, and thus, there is no need for a post-hoc subjective, or open-ended requirement that Schein would have no way of knowing was sufficient at the time it submits its report.

[33] Paragraph IV.B(1)-(3) is designed to ensure that the Commission can monitor the implementation of the Order by Respondents. Similar instructions have been included in previous Part 3 orders. *See, e.g.*, NC Dental Order, at ¶ IV.A-D (requiring detailed information to show manner and form of respondents' compliance with the order).

[34] Paragraph IV.B(4)(a)-(b) is necessary because the record evidence shows a high-level of inter-firm Communications between or among competitor Respondents exchanging non-public, strategic information regarding Buying Groups, which facilitated and formed the unlawful agreement, as well as intra-firm Communications discussing those exchanges between or among competitor Respondents. *See* CCFF ¶¶ 474-1158, 1178-1198; *see also* Complaint Counsel's Post-Trial Brief, at Section I.F-I.I, Section II. The language is modeled after the NC Dental Order, which required respondents to file copies of communications prohibited under the order. NC Dental Order, at *42 (¶ IV.B); *see also* Toys "R" Us Order, at **146 (¶ IV.B). Paragraph IV.B(4)(a)-(b) does not require filing copies of communications, and only requires inclusion of a narrative as part of compliance reports demonstrating compliance with the Order. The Office of the Texas Attorney General entered a similar final judgements against Benco that required it to maintain and furnish a detailed log of communications with its competitors to the State for a period of time. CCFF ¶¶ 1159-1161. That order, which stopped the conduct at issue, is no longer in effect. CCFF ¶¶ 1160-1161. Schein notes that that Final Judgment in Texas against Schein

was significantly more narrow than the Final Judgment against Benco. (CX 6023)

[35] Paragraph IV.B(5)(a)-(b) is necessary because the record evidence shows a high-level of inter-firm Communications between or among competitor Respondents exchanging non-public, strategic information regarding Buying Groups, which facilitated and formed the unlawful agreement, as well as intra-firm Communications discussing those exchanges between or among competitor Respondents. *See* CCFF ¶¶ 661-1100, 1123-1137, 1156-1158, 1179-1182, 1185; *see also* Complaint Counsel's Post-Trial Brief, at Section I.G-I, Section II. This language is modeled after the NC Dental Order, which required respondents to file copies of the communications prohibited under the order. NC Dental Order, at *42 (¶ IV.B); *see also* Toys "R" Us Order, at **146 (¶ IV.B). Paragraph IV.B(5)(a)-(b) does not require filing copies of communications, and only requires inclusion of a narrative as part of compliance reports demonstrating compliance with the Proposed Order. The Office of the Texas Attorney General entered a similar final judgement against Schein that required it to maintain and furnish a detailed log of communications with its competitors to the State for a period of time. CCFF ¶ 1163. That order, which stopped the conduct at issue, is reaching the end of its term in or around August 2019. CCFF ¶ 1163. There is no evidence that the Texas order "stopped the [alleged] conduct at issue." The Final Judgment was simply a settlement to resolve allegations, and under Complaint Counsel's own theory, the alleged conspiracy was over for a full two-and-a-half years before Schein settled the Texas case. Moreover, the reporting requirements were limited to just a handful of people. (CX 6023).

In that regard, Schein believes that the Order should be limited to specific enumerated individuals. It is impossible for Schein to conduct the necessary inquiry for all "employees" of Henry Schein, Inc. As Complaint Counsel as has stated, their case comes down to communications between Mr. Cohen, Mr. Sullivan, and Mr. Guggenheim. The reporting requirements should be limited to those individuals. At a minimum, the reporting requirements should be limited to the Executives and Managerial Sales Staff responsible for Dental Products and Supplies.

The Order should also exclude the categories of legitimate communications that have not been shown to be unlawful or related to buying groups. The proposed list of exclusions are those set forth in the Agreed Final Judgement and Stipulated Injunction between the State of Texas and Henry Schein. (CX 6023-006-8).

[36] Paragraph IV.B(6)(a)-(b) is necessary because the record evidence shows a high-level of inter-firm Communications between or among competitor Respondents exchanging non-public, strategic information regarding Buying Groups, which facilitated and formed the unlawful agreement, as well as intra-firm Communications discussing those exchanges between or among competitor Respondents. *See* CCFF ¶¶ 474-656, 1123-1146, 1156-1158, 1178-1182, 1184; *see also* Complaint Counsel's Post-Trial Brief, at Section I.G, Section I.I, Section II. This language is modeled after the NC Dental Order, which required respondents to file copies of the communications prohibited under the order. NC Dental Order, at *42 (¶ IV.B); *see also* Toys "R" Us Order, at **146 (¶ IV.B). Paragraph IV.B(6)(a)-(b) does not require filing copies of communications, and only requires inclusion of a narrative as part of compliance reports demonstrating compliance with the order. The Office of the Texas Attorney General entered a similar final judgement against Patterson that required it to maintain and furnish a detailed log of communications with its competitors to the State for a period of time. CCFF ¶ 1164. That order, which stopped the conduct at issue, is no longer in effect. CCFF ¶ 1164.

[37] This language describes the requirements for verification and is modeled after the Otto Bock Proposed Order. Otto Bock Proposed Order, at ¶ VIII.C.

[38] Paragraph V is modeled after the North Texas Specialty Physicians Order and provides the Commission with notice of changes in corporate structure that may alter or affect the entities within Respondents that are best able to comply with the order. *See* North Texas Specialty Physicians Order, at **38 (¶ IV.F). Schein believes that, as drafted, Section V.B is too broad, as it may require notification of transactions that do not either change the legal entity subject to the Order or affect compliance obligations required by the Order. Schein's proposed edits Section V.B add this clarification.

[39] This language is modeled after the Final Order, *In re of ProMedica Health System, Inc.*, Docket No. 9346, 2012 WL 2450574, at *18 (FTC Mar. 22, 2012) (hereinafter "ProMedica Order"). *See also* Polypore Order, at *63 (¶ XII); North Texas Specialty Physicians Order, at **38 (¶ VI); NC Dental Order, at *42-43 (¶ VI).

[40] This language is modeled after the ProMedica Order. ProMedica Order, at *18 (¶ X.A); *see also* Polypore Order, at *63 (¶ XII.A); North Texas Specialty Physicians Order, at **38 (¶ VI.A); NC Dental Order, at *42-43 (¶ VI.A).

[41] This language is modeled after the ProMedica Order. ProMedica Order, at *18 (¶ X.B); *see also* Polypore Order, at *63 (¶ XII.B); North Texas Specialty Physicians Order, at **38 (¶ VI.B); NC Dental Order, at *43 (¶ VI.B).

[42] Policy Statement Regarding Duration of Competition and Consumer Protection Orders, 60 Fed. Reg. 42,569 (August 16, 1995); *see also* NC Dental Order, at *43 (setting order term of 20 years).