PUBLIC

ORIGINAL

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

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

RESPONDENT PATTERSON'S REPLY TO
COMPLAINT COUNSEL'S POST-HEARING BRIEF

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INTRODUCTION

Complaint Counsel's brief and proposed findings lay bare the utter flimsiness of their case against Patterson. They completely ignore a mountain of trial evidence—dozens of exhibits and hundreds of pages of testimony—establishing that Patterson acted independently and pro-competitively before, during, and after the supposed February 2013-April 2015 conspiracy period.

There is, thus, no mention at all of evidence demonstrating that Patterson's 800-plus territory sales representatives competed "hardcore," "vigorously," and "fiercely" for the solo dentists and small practices, clinics and schools who constitute the vast majority of all customers. PF ¶¶ 40, 48. Each of those sales representatives had complete discretion to manually "override" the price in their system and lower their prices *down to cost* to clinch a specific sale, and they regularly used it. PF ¶ 12. In addition, they regularly requested, and obtained approval, to give *blanket discounts* every single day. PRF ¶ 1415. The amount of discounting Patterson provided was truly extraordinary, with "hundreds, probably thousands of overrides a day." PF ¶ 14. And the company provided hundreds and hundreds and hundreds of blanket Price Class Change discounts month in and month out (and, in some months, more than 1,400). Patterson provided those discounts to a large portion of its dentist-customers, including those who were members of "buying groups" or considering joining "buying groups."

Patterson's extensive discounting—along with the technological support Patterson provided with hundreds of additional, local service and equipment specialists and a state-of-the–art facility in Effingham, Illinois—were all designed to help Patterson "grind [its] way to gain market share," to "wrestle[]," "win," "switch," and "takeaway" business from Schein, to "battl[e]" and "kick . . . Benco in the mouth . . . finally kick them out the door." PF ¶¶ 33, 98. That is a lot

of evidence for Complaint Counsel to ignore. The composite exhibit of Price Class Change discounts alone was more than 8,000 pages and filled fifty-four boxes.

But there is more that Complaint Counsel ignored. The evidence at trial showed that Patterson *expanded* its competitive efforts and "widened its strike zone" by executing a confidential, expensive, and risky plan to transform its business to invade the fastest-growing segment of the market, corporate DSO customers, that had long been the stronghold of Schein (75-85% share) and Benco (10-15%). Patterson did so right smack in the middle of the supposed conspiracy period, and it worked. Patterson Special Markets was created from scratch in mid-2013 and by 2015-2016, it had won significant corporate DSO customers from Schein and Benco, including the single largest DSO in the country, Heartland Dental.

"Buying groups" were never part of Patterson's core strategic focus and, indeed, the very term is a "misnomer" because "buying groups" do not actually buy dental equipment or supplies. Instead, they are simply loose affiliations of dentists, sometimes organized by an outside person or entity, that demand lower prices. But they leave all purchasing decisions up to each individual dentist-member. The "buying group" cannot commit that its members will buy any particular volume, let alone increased volume. Instead, each member is free to buy from any of the dozens of national, regional, local, mail-order and Internet distributors it wants. And, because each member acts on its own, Patterson's costs to supply a buying group are the same as supplying each dentist: it has multiple bill-to and ship-to locations to fulfill, it has localized equipment and service support, and its territory sales representatives still have to visit each dentist regularly and try to convince them to buy from Patterson rather than from one of their many other options.

Patterson, thus, regularly concluded that "buying group" proposals offered no cost savings or additional volume, and made no business sense, particularly when it *already* sold to the member-

dentists, or when the "buying group" representatives' proposals were simply "incoherent," "outlandish," or out-and-out fraudulent about their number of members or their supposed vendor-relationships. Why would Patterson want to cannibalize its sales by simply giving its existing customers lower prices if they called themselves a "buying group" when they would not commit to buying more from Patterson? Why would Patterson seek endorsement from a "buying group" when its proposal made no business sense and sounded ridiculous on its face? Complaint Counsel's own expert, Dr. Marshall, conceded that it was an entirely legitimate, independent reason for Patterson to reject "buying groups" that were "incoherent" or that cannibalized existing sales, PF ¶¶ 696–97, 709, but Complaint Counsel ignores his concession in its post-trial filings. Patterson's skepticism over "buying groups" was heightened because many of their negotiators demanded a "kickback," a "vig," or a "taste," demands Patterson found not only costly, but unethical. PF ¶ 122–23. Again, this is all record evidence Complaint Counsel simply fails to address.

Patterson met with and evaluated numerous "buying groups" before, during, and after the alleged conspiracy period, and almost always decided not to pursue their endorsements. Its conduct was *the exact same* throughout this period: it rejected those who were unwilling to make a commitment or who would have simply cannibalized its existing sales or who demanded a kickback or a vig, whether in 2009 (MMCAP), 2011 (Synergy), 2012 (the Florida Dental Association), 2013 (Smile Source, Nexus), 2014 (Kois, NAICDS, the Dental Purchasing Group, Catapult), late 2015 (Dentistry Unchained), 2016 (Integrity Dental Buyers' Group). PF ¶¶ 119, 150, 167–168, 171, 350, 359, 556, 586; PRF ¶ 627. There was ***zero evidence*** at trial suggesting that Patterson discussed or communicated about any of those "buying groups" with anyone from Benco or Schein, and every witness involved flatly denied it. Occasionally, a "buying group"

offered something more because it had a deeper relationship with its members and provided accounting, management-consulting, or other back-office support. In those few circumstances, Patterson again acted independently and demonstrated its willingness to do business with them, whether before or during the alleged conspiracy, such as OrthoSynetics and Jackson Health Systems, or afterward, *e.g.*, Smile Source in 2016-17.

Complaint Counsel ignores all this evidence and, instead, offers the conclusory assertion over and over again—more than 50 times in its brief, alone—that Patterson traded "assurances" with Benco and Schein that they would not sell or discount to "buying groups." But, there was zero evidence at trial that anyone at Patterson ever communicated with anyone at Schein about whether to sell to or discount to buying groups. Not even a single communication regarding buying groups. A demonstrative exhibit presented at trial underscores that complete and total evidentiary failure with respect to any Schein-Patterson communications regarding buying groups. Its two pages (one for all the documentary evidence of Schein-Patterson communications and one for all the testimonial evidence) was "blank," the "complete absence of evidence." PF ¶ 331 (RXD0225). Every Patterson and Schein witness also flatly denied the accusation of any agreement. The remaining "conspiracy" evidence cited by Complaint Counsel under penalty of perjury was out and out "false," "a lie," "not true," and "shock[ing]." PF ¶¶ 184, 258. It was nothing more than innocuous emails and texts about Vikings-Packers and Badgers-Gophers football games, disaster relief efforts, and kids' lacrosse games.

There were only two inter-firm communications between Benco and Patterson about "buying groups," and neither came close to overcoming the mountain of evidence of Patterson's independent conduct that *disproved* any alleged conspiracy. After receiving Chuck Cohen's unsolicited February 8, 2013 email about "noise" regarding the New Mexico Dental Cooperative,

Guggenheim testified he did not know anything about the NMDC, did not investigate it, never got back to Cohen, and never talked to anyone at Patterson's Albuquerque branch about it. His "10-second" response with the throwaway phrase, "We feel the same way about these," was ***not*** a commitment to do anything—and Complaint Counsel's own expert, Dr. Marshall, conceded that a "feeling" was ***not*** a "commitment" or an "agreement." PF ¶¶ 272, 274, 276. "That's not the same word . . . The word 'feel' and the word 'commit' have different definitions." PF ¶ 681. He also conceded that Guggenheim's 10-second email was not credibly construed as a blueprint for a conspiracy; indeed, Dr. Marshall's own book concluded that "actual collusion requires planning, investments in coordination, clear thinking and hard work"—all of which require more time and effort than can be accomplished in "one hour of conversation over lunch," let alone a 10-second email. PF ¶ 690. The evidence at trial, thus, showed no commitment to do anything with respect to NMDC or any other "buying group."

The evidence at trial demonstrated that Patterson's local Albuquerque branch decided, for its own reasons, not to move forward with NMDC—and there was zero evidence they did so because of an agreement between Chuck Cohen and Paul Guggenheim, as Dr. Marshall conceded. "I don't have direct evidence of a transmission from Mr. Guggenheim to them." PF ¶¶ 682–84. "I don't have direct or indirect evidence that . . . that was directly communicated to people on the ground in New Mexico." PF ¶¶ 682–84. "I have nothing to point to that would say Mr. Guggenheim made a transmission directly to the managers in New Mexico, if that's what you're asking. I don't have that." PF ¶¶ 682–84. Instead, Dr. Marshall simply made it up: "I would presume" it occurred, despite a total lack of evidence in the record. PF ¶ 679. That is a "fatal" problem for Dr. Marshall's opinion and Complaint Counsel's case, as this Court explained when

reminding the parties "that when it comes to experts, if they are incorrect in the facts that they rely on, that can be a fatal problem." PF ¶ 680. Complaint Counsel ignores all of that, too.

The only remaining communication between Patterson and Benco, the June 2013 email exchange regarding Atlantic Dental Care, fails because—as Dr. Marshall conceded—the emails occurred months ***after*** Patterson had already decided on its own not to bid for ADC's endorsement, weeks ***after*** Benco decided to bid for ADC, weeks ***after*** Schein decided to bid, and weeks ***after*** ADC awarded its endorsement to Benco. Obviously, this communication did not affect either company's decision with regard to whether to bid for ADC or ADC's decision to award its endorsement to Benco. And, it shows the opposite of an agreement. As Dr. Marshall acknowledged on cross-examination, the facts show that Patterson ***acted differently*** than Benco and Schein (it did not bid for ADC; they did) and had a ***different*** view of ADC than Benco and Schein (Patterson considered it a "buying group"; they considered it a corporate DSO). And Complaint Counsel's argument that Guggenheim's June 2013 email was "enforcement" of an agreement is simply made up: the email literally said nothing at all about "enforce" or "enforcement," and the witnesses testified there was no secret "lemon juice" code communicating anything of the sort. PF ¶ 304. To consider it enforcement of an agreement "first requires an assumption that an agreement existed, which is contrary to the government's burden of proof." *In the Matter of Mcwane, Inc. & Star Pipe Prod., Ltd.*, 155 F.T.C. 903, 2013 WL 8364918, at *261 (May 1, 2013). "[A] litigant may not proceed by first assuming a conspiracy and then explaining the evidence accordingly." *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1033 (8th Cir. 2000). Complaint Counsel utterly failed to present evidence of an "agreement" or "commitment" by Patterson to do anything—and certainly not sufficient to overcome Patterson's mountain of evidence showing it always acted independently. *In re*

McWane, Inc., 2013 WL 8364918, at *223 (requiring an "agreement"—*i.e.*, a "unity of purpose or a common design and understanding, or a meeting of minds" or "'conscious commitment to a common scheme designed to achieve an unlawful objective'") (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) and *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)).

I. FACTUAL BACKGROUND

A. Communications About Things Other Than "Buying Groups" Show Patterson Acted Independently.

The evidence at trial was overwhelming that Patterson's executives and 800+ sales representatives considered Benco their bitter rival and regularly discounted pricing in an effort "to kick . . . Benco in the mouth and finally kick them out the door." PF ¶ 33(g); *see also* PF ¶ 33(g); PF ¶¶ 17–101 (record of competition). Complaint Counsel ignores that evidence and instead starts their fact statement by chronicling a small handful of communications that, they argue, shows Benco's Chuck Cohen believed he had an "open relationship" with Patterson, CC Br. 8, when the evidence shows nothing but fierce competition throughout. *See, e.g.*, PF ¶ 48 (Cohen wrote in an internal February 22, 2013 email, right after Complaint Counsel alleged Patterson joined the purported Benco-Schein conspiracy, "We need Patterson to have a LONG, SLOW DECLINE.") (caps in original). But not one of those few communications concerned buying groups (or customers at all, for that matter). CC Br. 8–9.

And, on the few occasions when Cohen raised a question about a *supplier's* actions—again, having nothing to do with buying groups—the evidence shows that Patterson consistently charted its own course, made an independent decision about its business, and did not agree with Benco to do anything. For example, when Cohen expressed concern to Guggenheim about a manufacturer (Proctor & Gamble) charging high wholesale prices, Guggenheim looked into it and decided *not*

to pursue the issue. "I looked into this briefly, and we determined that we were comfortable with [P&G's pricing]," Guggenheim testified. PRF ¶ 292. "I think I determined [Cohen] was right, but again, we didn't really care," so Patterson did nothing. PRF ¶ 292. Similarly, when Cohen urged Guggenheim in June 2013 to include a "poison pill" clause in Patterson's manufacturer contracts, to prevent manufacturers from using distributor sales data to compete with distributors, Guggenheim looked into it, learned that Patterson was already, independently, including such provisions in its contracts, and again did nothing. PRF ¶ 292.

B. There Is No Evidence That Buying Groups Netted Their Members Any Savings.

Complaint Counsel's claims of buying group members' "typical" savings do not consider *Patterson* pricing and rely primarily on a calculation *Burkhart* created for marketing purposes. CC Br. 11 n.74 (citing CCFF ¶ 138 (citing CX4219 at 2)). Ignored from the cited document are the portions where the author wrote that his savings number was based on calculations for *a single member*, or where the author wrote that [redacted] (CX4219 at 2) (emphasis added). Complaint Counsel cites this document as [redacted] even though the document specifically says not to do that very thing. CCFF ¶ 139.

Also, there is no evidence that Kois Buyers Group members *netted* any savings in this case over their membership fees during the alleged conspiracy period (*i.e.*, before the group changed management from Qadeer Ahmed to Johnny Kois in late 2015). Dr. Kois testified that Kois's fees of $199 to $499 a month were "way too expensive" during Qadeer Ahmed's administration of the

group (*i.e.*, the only time it had any contact with Patterson), making it hard to even recruit members. PF ¶¶ 615, 616, 619. Finally, other cited documents are from long after the alleged conspiracy and involve Smile Source, which is not a buying group, and groups that did not interact with Patterson. CCFF ¶¶ 107–09 (Smile Source views itself as a franchisor, not a buying group); 181 (citing CX4243 at 1, dated October 5, 2016).

None of Complaint Counsel's evidence that "The Big Three" recognized that buying groups would expand involves Patterson. CC Br. 10 nn.69–70 (citing CCFF ¶¶ 127–29, none of which relate to Patterson).

C. Patterson Was Already In A Daily "Price War" With Schein And Benco Before The Alleged Conspiracy.

Patterson *was* engaged in a price war with Schein and Benco, throughout their alleged conspiracy. Their daily "hand-to-hand combat," with "a thousand on our side and a thousand on their side going at it in the field," is documented in 50+ boxes of price class change forms showing Patterson cutting prices to compete with rivals like Schein and Benco, plus Patterson invading Schein and Benco's DSO stronghold in the middle of their alleged conspiracy. PF ¶¶ 23–37, 42, 80.

Complaint Counsel claims that "a senior Patterson executive informed his team that buying groups would lead to a 'a slippery slope,' meaning a "race to the bottom in terms of pricing." CC Br. 13. That senior Patterson executive was Neal McFadden, head of Patterson Special Markets, and he was responding to word from Patterson's local Boston branch manager—*not* on McFadden's team—that a *veterinarian* was interested in starting a dental buying group (for humans). PRF ¶ 201. McFadden told the manager, "If you want to call him and dig into some details and ask the hard questions that's fine," and McFadden testified, consistent with this response, that he "always told the local branch manager, if they wanted to pursue it, they could do

it." PRF ¶ 201. The record corroborates this testimony, showing Patterson consistently evaluating buying groups on their merits—a waste of time if it was bound by agreement to reject them. PF ¶¶ 118–20, 125–29, 171.

There is one more "slippery slope" reference in the record that Complaint Counsel omits from its proposed findings: an email from Patterson's Tim Rogan to a local branch manager from May 29, 2014, in the middle of the alleged conspiracy. PF ¶ 175. A local branch manager had written Rogan about Jackson Health, and Rogan responded, "This is a GPO. They are taking 2% off the top. This is a very slippery slope." PF ¶ 175. Such a statement, seemingly, ought to fit Complaint Counsel's observation that "Notably, executives from each of the Big Three used the same 'slippery slope' analogy in reference to buying groups." CC Br. 13. Yet Complaint Counsel does not cite this document, presumably because Patterson in fact worked with Jackson Health before and during its alleged participation in the alleged conspiracy. PF ¶ 175. Complaint Counsel thinks Jackson Health was not a buying group, but it is clear from Rogan's email that *Rogan* thought it was, and Patterson nevertheless worked with it in the middle of an alleged buying-group boycott. PF ¶ 175.

D. Patterson Never Had A No-Buying-Group Policy, Though It Was Always Skeptical.

Though Patterson did not have an explicit no-buying-group policy like Benco did, Patterson witnesses testified repeatedly that working with buying groups simply was not part of Patterson's culture, which focused on solo practices. *See, e.g.*, PF ¶ 118. Neal McFadden could not remember working with a buying group in 21 years at Patterson, and David Misiak said Patterson had not seen buying groups as attractive customers in his 22 years there. PF ¶¶ 121, 201. Consistent with this testimony, when Misiak chose not to bid on an entity in 2009, his expressed reason was: "it's a GPO." PF ¶ 119. And Misiak advised Neal McFadden in 2012, "Your response

is right," when McFadden wrote that he planned to say "thanks but no thanks" to a "buying group." PF ¶ 410. But, unlike Benco, Patterson did not bar buying groups as a matter of policy. It met with them and independently decided whether each opportunity made sense for Patterson. PF ¶¶ 130, 131, 134, 167, 171.

In 2013, Patterson met with Smile Source but decided not to bid on its business because of skepticism that Smile Source could add value at that time, as well as a negative impression of Smile Source's representative, Dr. Goldsmith, and out of concern that Patterson would be cannibalizing its existing business. PF ¶¶ 141-153. Patterson also considered Nexus Dentistry but turned the group down because it claimed to have a "vast client base" but, in reality, only had eight practices signed up. PF ¶¶ 167, 171. In 2014, Patterson evaluated a buying group started by an existing customer, Dr. Lennon, because the group mispresented itself as a community health center and wanted a "3 percent vig." PF ¶¶ 169-170. Patterson also evaluated United Orthodontic Buying Group (UOBG) in 2014 but turned down the group because of its "outlandish" ask—the group wanted to buy only *one* item, an x-ray machine. PF ¶ 171. Patterson also turned down the Dental Purchasing Group in 2014 because the doctor who reached out to Patterson was a veterinarian, not a dentist. PF ¶ 171. Patterson also turned down Catapult because it wanted a "vig," which Patterson considered unethical. PF ¶ 171. Also, in 2014, Patterson turned down Dr. Steven Sebastian because his offer did not "make any sense," he had no company and no clients, but wanted Patterson "to open him up." PF ¶ 171. Patterson also turned down an offer after realizing a group wanted to offer dental supplies for humans but was run by a *veterinarian*. PF ¶ 168. Finally, when Patterson evaluated Kois in 2014, Patterson engaged with the group, but ultimately turned them down after realizing its representative was making false claims about membership and manufacture support. PF ¶¶ 172-173.

E. The Record Refutes Complaint Counsel's NMDC Storyline.

The correct storyline for Patterson's interaction with the New Mexico Dental Cooperative ("NMDC") is as follows. An employee in Patterson's Albuquerque branch offered to host a meeting for three dentists seeking to create a dental co-op. CCFF ¶ 465. Patterson had no written or oral agreement with these dentists. PRF ¶ 643. Yet on February 4, 2013, one of them, Dr. Brenton Mason, sent an email blast to dental manufacturers stating, "we have partnered with Patterson Dental" and announcing that Patterson would be hosting a meeting for NMDC in Albuquerque. PRF ¶ 643. This email caused "quite a stir" and, in Mason's words, "confused the dental manufacturing world." PF ¶¶ 287–88. On February 7, 2013, Patterson's Albuquerque branch manager wrote Dr. Mason, "The email you sent out has greatly confused the dental community, and actually Patterson's role in the dental business community as well," and he said "[w]e need to cancel this meeting." PF ¶¶ 286–88 **(**CX4090 at 2). Dr. Mason interpreted this February 7 email as Patterson "pull[ing]" or "walking back" its arrangement with NMDC. PF ¶ 289. February 7 is a day ***before*** Cohen sent his February 8th email to Paul Guggenheim about NMDC. PF ¶ 267. Thus, to the extent Patterson Albuquerque branch was "dipping its toes" in the buying group waters with NMDC, it had already decided to pull its toes out of that water on the day ***before*** it allegedly joined a conspiracy.

Nor was NMDC Patterson's first dip into buying-group waters. Though Patterson was always mostly skeptical of buying groups, it did occasionally work with them long before 2013. For instance, Patterson worked with Jackson Health, which *Patterson* believed was a buying group, since around 2004. PF ¶ 175 ("This is a GPO."). Complaint Counsel also listed Steadfast Medical as a buying group that Patterson would have worked with but for the alleged conspiracy. PF ¶ 482. Yet the record shows that Patterson worked with Steadfast every year between 2004 and 2013 (the date of the spreadsheet in the record), except for 2011, and there is no evidence the

relationship changed after 2013. PF ¶ 637–38. Thus, Patterson's toes were already in the "buying group water" nearly a decade before its discussions with NMDC.

Finally, though Complaint Counsel calls the New Mexico Dental Cooperative "a buying group," *see, e.g.*, CC Br. 16, that is not what Dr. Brenton Mason, the head of NMDC, said it was. PF ¶¶ 279–81. Rather, Dr. Mason testified that NMDC was a co-op, and agreed it was "a very different animal from a buying group." PF ¶ 282. Nor is there any contemporaneous evidence that Patterson viewed NMDC as a buying group. Complaint Counsel does not provide a basis for overruling Dr. Mason's sworn testimony that NMDC was not a buying group.

F. Patterson Did Not Agree To Take Any Concerted Action With Benco Regarding Buying Groups.

1. A Feeling Is Not A Commitment and a 10-Second Response Is Not A Conspiracy.

The only Patterson witness who had any contact with Benco regarding buying groups, Paul Guggenheim, flatly denied that the 10-second email he "banged out," with its 7-word phrase "we feel the same way about these," constituted a commitment that Patterson would not sell or discount to them. PF ¶¶ 272, 274 (Guggenheim, Tr. 1707 ("Did you commit in any way to Mr. Cohen in this e-mail that Patterson was not going to discount to buying groups? A. Absolutely not. Q. Did you commit in any way to do anything going forward with regard to buying groups? A. Never.")). Nor did Chuck Cohen expect a commitment from Guggenheim. PF ¶ 270. Feelings and commitments, as Dr. Marshall acknowledged, are different things. PF ¶ 681. PF ¶ 681. There is thus zero evidence of any Patterson commitment to Benco.

Instead, Complaint Counsel shifts to a new word in their brief and bases their entire case on the argument that Guggenheim's quick email response somehow constitutes an "assurance" from that Patterson would not sell or discount to buying groups. Indeed, Complaint Counsel repeats the word "assurance" about 50 times in their brief, like a mantra. But, the word is nowhere

to be found as to Patterson in the actual trial record: "assurance" was never uttered at trial in any question to any Patterson witness and never uttered in any answer by any Patterson witness. It is a figment of Complaint Counsel's imagination and argumentation.

Complaint Counsel follows this recitation by repeating its assumption that, based on timing, Patterson's New Mexico branch must have ended its negotiations with the New Mexico Dental Cooperative because of Guggenheim's exchange with Cohen. CC Br. 19.[1] Left out from the narrative is Mason's testimony—elicited on direct—that by February 7, 2013, "there was some pullback by [Patterson's] Scott Belcheff after I sent the big [February 4] email to the manufacturers." PF ¶ 289. Dr. Mason further agreed on cross that Patterson's February 7 email to Mason cancelling the planned meeting with NMDC was "a walking back of what [he] had a feeling of what Patterson was willing to do." PF ¶ 289.[2] In short, Patterson's New Mexico branch was walking away from NMDC as of *the day before* Guggenheim and Cohen's email. PF ¶¶ 283, 287–89. Dr. Mason also testified that he had no reason to doubt that the cancellation decision was made by the Albuquerque team he was personally dealing with. PF ¶¶ 292, 293, 296. No witness contradicted Dr. Mason on this point.

Most fundamentally, there is no evidence that, over the *weekend* between the February 8 exchange and the February 11 NMDC cancellation, any communication occurred between Patterson's Minnesota headquarters (where Guggenheim was) and Patterson's New Mexixo branch (which cancelled the meeting). PF ¶ 296. Dr. Marshall testified that he "would presume that the senior manager of a company is managing his people," but he was "not right now able to

[1] Complaint Counsel repeatedly refers to "NMDC's discount arrangement with Patterson." CC Br. 17, 18. There is no evidence in the record that Patterson's "arrangement" with NMDC involved discounts. PRF ¶ 643.

[2] Dr. Mason may have felt to himself "that we had a deal that still was being worked out," but he could point to no conversation with Patterson that led him to that feeling. PRF ¶ 643.

put [his] finger on such a communication. PF ¶¶ 679, 682, 684. Because the record contains none. PF ¶¶ 682, 684. Patterson, a highly decentralized company in which local branches operated autonomously, PF ¶ 9, did not have a "hive mind" such that one executive's thoughts in Minnesota would have been automatically known to a local branch manager in Albuquerque.

2. There Is Zero Evidence That Patterson And Schein Ever Communicated At All About Whether to Sell Or Discount To "Buying Groups"

The trial record is entirely devoid of any communications between Patterson and Schein regarding any buying groups. Not a single communication. Indeed, it contains no evidence that Patterson was told that it was in a conspiracy with Schein at all, or that Patterson was told that Schein and Benco were in a conspiracy. PF ¶ 331 (testimony and blank-page demonstrative containing all questions Complaint Counsel asked Schein's Tim Sullivan about communications with Patterson about buying groups). It is unclear when exactly Complaint Counsel believes Patterson came to learn it was colluding with its archrival, if ever.

David Misiak believed as of February 27, 2013, that Schein and Benco were not working with buying groups, but there is no evidence that Misiak's beliefs about Schein came from anything other than his personal observations in the market. CC Br. 20 n.170 (citing CCFF ¶ 550). There is no communication about Schein and buying groups before Misiak's email that could disprove Misiak's testimony about the source of his beliefs. PRF ¶ 540. And his beliefs about Schein may well have been wrong given the extensive evidence that Schein in fact worked with buying groups. PF ¶ 762.

Misiak also did indeed send an email on February 27, 2013, advising a regional manager that his typical approach to buying group requests was to "politely" decline. PF ¶ 410. But he did so because he was asked for his advice by a Patterson regional manager, Anthony Fruehauf, who was fielding what he (Fruehauf) thought was a buying group request regarding a new group called

Atlantic Dental Care or "ADC." PF ¶¶ 406–09. Fruehauf is not alleged to have been a conspirator in this case, yet Fruehauf's request stated that he had already had "numerous discussions" with his subordinate, Devon Nease, about his own concerns "what it could mean if we set a precedent of offering lower prices to groups such as this." PF ¶ 406. Specifically, Fruehauf was worried about endangering Patterson's relationships with its other customers who were not members of the buying group by offering group members an additional discount. PF ¶ 407. Fruehauf wrote Misiak, "If you can think of any guidance I can offer it would be appreciated." PF ¶ 406. That request is what Misiak responded to on February 27, 2013. PF ¶¶ 406–09.

Misiak's response was perfectly consistent with advice he gave nearly a year earlier, *before* the alleged conspiracy, in a similar email exchange. Neal McFadden wrote Misiak about a buying group request in March 2012, "I get these more often than I like. This stuff scares me. I'm gonna tell him thanks but no thanks." CCFF ¶ 132 (citing CX0084 at 1). Misiak responded, "Your response is right." CCFF ¶ 132 (citing CX0084 at 1). March 2012 is a year before Patterson allegedly joined a conspiracy not to work with buying groups, yet once again this email is ignored in Complaint Counsel's brief while the February 2013 email is emphasized, CC Br. 20–21, even though they say the same thing.

3. The June 2013 Email About ADC Was An *After-The-Fact* Question About Past, Independent Decisions.

Patterson's only other interfirm communication relating to buying groups was a June 2013 email from Paul Guggenheim to Chuck Cohen regarding ADC. CC Br. 21. Guggenheim sent this email months ***after*** Patterson had already passed on Atlantic Dental Care ("ADC"), as reflected in the *February* 27, 2013 Fruehauf/Misiak correspondence described above (which was about ADC), and ***after*** Benco had already won ADC's business over Schein. PF ¶¶ 300, 311. Guggenheim, thinking that ADC was a buying group, had heard from Devon Nease that Benco had won ADC's

business and remembered Cohen's email about Benco's no-buying-group policy, so he followed up with Cohen wondering whether Benco still had that policy. PF ¶¶ 300–02. Cohen told Guggenheim that yes, Benco still had the same policy, but that ADC was a DSO, not a buying group. PF ¶¶ 300–02.

Complaint Counsel describes Guggenheim's purpose in writing the email differently between its proposed findings of fact and its brief. In its findings of fact, Complaint Counsel accurately writes, "Guggenheim viewed Benco's bidding on and doing business with ADC as a deviation from what Cohen previously told him about Benco's policy not to do business with buying groups in February 2013." CCFF ¶ 572. Yet in Complaint Counsel's brief, this becomes "Guggenheim believed Benco's agreement with ADC was a deviation from Cohen's *prior assurance* that Benco *would abide by* a no buying group policy." CC Br. 21 (emphasis added). The first recitation is accurate to Guggenheim's testimony, the second is embellished with attorney argument. PF ¶ 299–301; Guggenheim, Tr. 1629 ("[A]fter Devon [Nease] brought this up to me, I went back and looked at what he said in that e-mail, and I just was wondering if his -- it seemed inconsistent with what he told me at that time."). Guggenheim said nothing about having asked for or received any "assurance" that Benco would "abide by" the policy Cohen had brought up to Guggenheim out of the blue, nor are any such assurances to be found in the record.

4. Patterson Independently Decided To Focus Its New Special Markets Division On Stealing DSOs From Schein And Benco, And *Not* On Buying Groups.

Patterson directed its new Special Markets division in 2013 to focus only on winning the most promising DSOs away from Schein and Benco, and not on buying groups. PF ¶¶ 86–92. The point of Patterson's Special Markets was to catch up to Schein and Benco in the DSO market, which Patterson had largely ceded to them. PF ¶¶ 73, 79–82. With its historic focus on individual dental practices, Patterson lacked the business and IT infrastructure to service DSOs, which do

business through single points of contact and make centralized, high-volume orders. PF ¶¶ 65–69. Patterson therefore invested heavily to build a centralized ordering infrastructure that could service the DSO segment. PF ¶¶ 83–85. Patterson's head of Special Markets, Neal McFadden, explained that "Patterson Special Markets was created to give a central point of contact to a dental service organization." (CX8004 (McFadden, Dep. at 52–53)).

To protect its investment and meet commitments they had made to Patterson's board of directors, Patterson's senior management instructed McFadden to stay "laser focused" on large, corporate DSOs that owned at least 15 practices and purchased at least $600k annually. PF ¶ 86. When McFadden raised occasional questions about buying groups he was hearing from, he was directed not to be distracted with requests from these groups, which had no proven ability to yield profit and which do not purchase centrally and thus would be a poor fit for an infrastructure that was built to handle centralized purchasing. PF ¶ 113. McFadden testified that Paul Guggenheim was "open-minded about the future that maybe there might be something to [the idea of working with buying groups], but not at this particular time." PF ¶ 611.

Complaint Counsel chides that "Patterson's Special Markets division refused to discount to buying groups, even though the division was not profitable for more than a year." CC Br. 23. Yet McFadden testified that, for nearly this whole period, Patterson was building out its IT infrastructure so that it could accommodate the DSO business it was after. PF ¶ 83 (CX0315 (McFadden, IHT at 52 ("2013, we are new to special markets. We don't know what we don't know. And systematically our computer systems being able to do things out of the norm is not even feasible in 2013. *It took most of 2014* to build our IT infrastructure to be able to accommodate winning a DSO, so let alone going off on other tangents.") (emphasis added))). By 2015, Patterson's investment paid off, as it first won away Mortenson Dental, a $5 million Schein

account, and then won Heartland, a $30 million Schein account and the largest DSO in the country. PF ¶¶ 96–99.

Still, McFadden testified that, as Patterson Special Markets received requests from buying groups, "we didn't say no, as opposed to not now," and that "we would watch and see, and if it made good business sense at Patterson we would probably do something, but it didn't make any good business sense." PRF ¶ 611. McFadden explained, "we were always open to the local branches taking care of [buying groups] the way that they wanted to take care of those clients . . . . If there was business within those branch boundaries, the branch manager and local territory sales rep had the autonomy to deal with their local doctor -- their local client, you know, as they saw fit, you know, within -- within our culture." PRF ¶ 609.

Complaint Counsel cites seven emails in claiming that Patterson Dental's sales force, like its Special Markets division, refused to work with buying groups. CC Br. 23–24. Yet six of the emails are about Special Markets—five are to or from Neal McFadden while he was serving as head of Patterson Special Markets, and another forwards an email from McFadden. CC Br. 24. One of these six emails is noteworthy, though, because it is from Patterson's Shelley Beckler—never accused of participating in a conspiracy—and she wrote to McFadden on December 2, 2013, "In the past we have **not** done business with GPO's [sic] just because we don't have the resources or the systems to manage them properly." PF ¶¶ 119, 128 (bolding in original). Beckler's email about Patterson's past practice of not working with GPOs is not consistent with Patterson recently changing its policy to boycott buying groups, as alleged.

This leaves a late-night email response from Tim Rogan to a marketing manager fielding a request who was "unfamiliar with buying groups," in which Rogan wrote, "We don't sell to buying groups. Let's talk live." CCFF ¶ 607. Rogan testified that what he meant was, "we don't

sell to very many buying groups. We evaluate them all." PF ¶ 632 (CX8017 (Rogan, Dep. at 96). But because it was 10:35 p.m., Rogan explained, "At the time I didn't expound upon it and say, 'But we're evaluating them.'" PF ¶ 632 (CX8017 (Rogan, Dep. at 96). Likewise, Rogan wrote "Let's talk live" because it was 10:35 p.m., and he simply meant that they could talk more in the morning if necessary. PF ¶ 632 (CX8017 (Rogan, Dep. at 93). "We did not have a policy [not to sell to buying groups]," Rogan testified, "[i]t was true in 2013, it's true today. We evaluate any customer that buys dental stuff to see if it makes sense for Patterson to do business with it." PF ¶ 632 (Rogan, Tr. 96–97).

G. Section I(G) Concerns Only Evidence Related To Benco and Schein, Thus No Response From Patterson Is Required.

H. Section I(H) Concerns Only Evidence Related To Benco and Schein, Thus No Response From Patterson Is Required.

I. The TDA Meeting Did Not Concern Whether To Sell Or Discount To A "Buying Group," As Complaint Counsel and Its Expert Conceded.

This case is not about Patterson's decision not to attend the 2014 Texas Dental Association ("TDA") trade show. PF ¶ 316 (Kahn, Tr. 52 ("We do not allege a boycott of the trade show.")). It is about whether Patterson conspired with Schein and Benco to refuse to discount to dental buying groups. Neither Complaint Counsel nor Dr. Marshall even list TDAPerksSupplies, the TDA's discount program, as a buying group. CC Br. 74–75; PF ¶ 687. Nor is there any evidence in the record that Patterson communicated with Schein or Benco about selling or discounting to TDAPerks. Dr. Marshall conceded that interfirm communications about TDAPerks were about attending a trade show, not engaging with or selling to TDAPerks. PRF ¶ 1123. Dr. Marshall did not know that TDAPerks already had a distributor, SourceOne Dental. PRF ¶ 1110.

To the extent attendance at the Spring 2014 TDA Meeting is relevant to this case, the evidence showed Patterson independently decided not to attend in late 2013, months before Benco

and Schein made their decisions. PF ¶ 318. And Patterson's David Misiak informed Schein's David Steck two weeks ***after*** Patterson's Texas branches decided not to attend. PF ¶ 317 (Steck, Tr. 3822) ("[T]he only discussion you ever had with anyone at Patterson about the TDA meeting was that January 6th phone call with Mr. Misiak, correct? A. Correct. Q. And the sole topic of that call with Mr. Misiak was attendance at the TDA annual meeting. A. Yes. Q. Okay. And in that call, Mr. Misiak told you that Patterson had already told the TDA that Patterson would not be attending the 2014 annual meeting. A. He did.").

Schein had not yet decided if it would attend the meeting, and Misiak did not ask Steck to take any action. PF ¶ 319 (Steck, Tr. 3822–23 ("Q. And as you testified yesterday, as of the time of that call, Schein had not made the decision as to what it was going to do with respect to attendance. A. We had not.")); PF ¶ 321 (Steck, Tr. 3822–23 ("In that call, Mr. Misiak did not encourage you or Schein to take any action concerning the TDA or the meeting of the TDA. A. *He did not*.") (emphasis added)).

This was Steck and Misiak's last conversation about the TDA. PF ¶ 324 (Steck, Tr. 3828–29 ("Q. So you don't tell . . . Mr. Misiak what you had learned from Mr. Cavaretta about Schein planning to have a meeting with the TDA at the annual meeting. A. I did not. Q. And you don't tell Mr. Misiak that it was Schein's intention to attend the 2014 annual meeting to have that discussion with the TDA, but that if it didn't go well, that Schein would not attend in the future? A. I did not. . . . Q. And you never wrote to Mr. Misiak again concerning Schein's plans with the TDA, did you? A. No. Q. And you never had a conversation with Mr. Misiak again about Schein's plans with respect to the 2014 TDA annual meeting. A. I did not. Q. And you never had a discussion or any communication with anybody at Patterson -- A. No. Q. -- about -- sorry, I need to ask the whole question. You never had any discussion or conversation with anyone

at Patterson about Schein's plans for the 2014 TDA annual meeting. A. No, I did not.")); PF ¶ 325 (Misiak, Tr. 1509–10 ("Q. Did Mr. Steck ever follow up with you after you received this e-mail? A. Not to my recollection. Q. Then your e-mail exchange with Mr. Rogan, Mr. Rogan says, 'That sucks. You should call him. 'Thought I could trust you' type of conversation.' Do you see that? A. I do. Q. Did you ever call Mr. Steck and have a 'thought I could trust you' type of conversation? A. I did not.")).

And the evidence showed the TDA's competitor status, along with disparaging remarks it was making about dental distributors, were the reasons Patterson's Texas branches decided independently not to attend. PF ¶ 315 (Rogan, Tr. 3563–64 ("So we were supporting our competitor at that point, and that doesn't make any business sense, but there were several other reasons. They wrote some egregious articles about distribution that were grossly inaccurate to convince their members that we were charging more than appropriate for those services that we provide . . .")).

J. Patterson's Decisions About Smile Source Were Independently Made.

Smile Source was not a buying group, according to both of the Smile Source executives who testified at trial. PF ¶ 465. Complaint Counsel's argument to the contrary is simply counter to the evidence. Regardless, though, the record unequivocally showed that Patterson's decisions about Smile Soure were always independently made. The trial record did not contain any evidence—not a single exhibit—showing any communications between Patterson and Schein or Benco about Smile Source, the subject of inordinate attention in this case. And every witness flatly denied any such communications.

Patterson first evaluated Smile Source in November 2013, when Patterson executives including Neal McFadden and David Misiak hosted Smile Source's Dr. Andrew Goldsmith for a meeting at Patterson's headquarters. PF ¶ 141. McFadden came away with "not a very good

impression at all." PF ¶ 142. He had a poor view of Dr. Goldsmith. PF ¶ 152. Smile Source was already working with Burkhart and simply wanted Patterson as an *additional* distributor. PF ¶ 142. Smile Source also had few members and every member Patterson checked was already a Patterson customer. PF ¶¶ 153, 154. Dr. Marshall acknowledged that "cannibalization" can occur when a distributor sells to buying group members that are already its customers, that it is unprofitable, and that he had not reviewed or was not aware of the evidence that Patterson thought Smile Source "might just be cannibalizing its existing customers." PRF ¶ 1301, 1353. Patterson told Smile Source, while it was "currently not interested," it would "keep the strategy and Smile Source on the 'idea board.'" PF ¶ 150. Schein, meanwhile, bid on Smile Source and lost. PF ¶ 469.

By 2016 to 2017, Smile Source "finally admitted to [itself] that [it] needed a national partner." PF ¶¶ 157, 159. It had grown from 145 to more than 500 locations. PF ¶ 158. It had terminated Dr. Goldsmith for personal reasons. PF ¶ 155. It had its own office, a board room, a management team, and a hundred employees providing a suite of services for its membership. PF ¶¶ 161–62. Manufacturers were saying that "their ideas were well formulated," and that "this is more than just a bunch of dentists getting together for a deal." PF ¶¶ 163, 164. And Smile Source in turn took greater note of Patterson, which had just won Heartland (the nation's largest DSO), causing Smile Source to think Patterson might be interested in working together. PF ¶ 160. So Patterson submitted a bid, but lost to Schein. PF ¶¶ 165–66.

ARGUMENT

II. THE OVERWHELMING EVIDENCE AT TRIAL PROVES PATTERSON'S INDEPENDENT CONDUCT.

A. Complaint Counsel's Strict Burden Of Proof For Establishing A *Per Se* Conspiracy.

"The existence of an agreement is the very essence of a section 1 claim."[3] *In re McWane, Inc.*, 2013 WL 8364918, at *223; *In re Benco Dental Supply Co.*, FTC No. 9379, 2018 WL 6338485, at *4 (Nov. 26, 2018); *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 356 (3d Cir. 2004); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 117 (3d Cir. 1999). "Section 1 of the Sherman Act 'does not prohibit [all] unreasonable restraints of trade[;] . . . only restraints effected by a contract, combination, or conspiracy.'" *In re McWane, Inc.*, 2013 WL 8364918, at *223 (alterations in original) (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 775 (1984)). As such, Section 1 "does not reach independent decisions, even if they lead to the same anticompetitive result as an actual agreement among market actors." *Id*. Because "Section 1 'does not prohibit independent business actions and decisions[,]'" a "person still has the right to refuse to do business with another, provided he acts independently, and not pursuant to an unlawful understanding, tacit or expressed." *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1042 (2d Cir. 1976); *see also, e.g., Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 221 (3d Cir. 2011) ("Unilateral action, regardless of the motivation, is not a violation of Section 1."); *H.L. Moore Drug Exch. v. Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir.

[3] Proof of an illegal agreement under Section 5 of the FTC Act is identical to proof of an illegal agreement under Section 1 of the Sherman Act. *See, e.g., Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 762 & n.3 (1999) (explaining that Section 5 of the FTC Act "overlaps the scope of § 1 of the Sherman Act"); *FTC v. Cement Inst.*, 333 U.S. 683, 691-92 (1948) ("[S]oon after its creation the Commission began to interpret the prohibitions of § 5 as including those restraints of trade which also were outlawed by the Sherman Act, and . . . this Court has consistently approved that interpretation of the Act.").

1981) ("A unilateral refusal . . . to deal . . . , absent proof that it was pursuant to a conspiracy, does not violate § 1 of the Sherman Act."); *see also In re Citric Acid*, 191 F.3d 1090, 1101 (9th Cir. 1999) ("Courts have recognized that firms must have broad discretion to make decisions based on their judgments of what is best for them and that business judgments should not be second-guessed even where the evidence concerning the rationality of the challenged activities might be subject to reasonable dispute.").

The "crucial question" in this case is "whether the challenged anticompetitive conduct 'stem[s] from independent decision or from an agreement.'" *In re McWane, Inc.*, 2013 WL 8364918,at *223; *City of Moundridge v. Exxon Mobil Corp.*, 2009 WL 5385975, at *6 (D.D.C. 2009) ("[W]here there is an independent business justification for the defendants'[] behavior, no inference of conspiracy can be drawn."), *aff'd sub nom. City of Moundridge, KS v. Exxon Mobil Corp.*, 409 F. App'x 362 (D.C. Cir. 2011). "An 'agreement' is a 'unity of purpose or a common design and understanding, or a meeting of minds' as to the alleged unlawful arrangement at issue." *In re McWane, Inc.*, 2013 WL 8364918, at *223 (quoting *Am. Tobacco Co.*, 328 U.S. at 810 (1946)). "In other words, there must be a 'conscious commitment to a common scheme designed to achieve an unlawful objective.'" *In re McWane, Inc.*, 155 F.T.C. at *223 (quoting *Monsanto*, 465 U.S. at 764); *see also In re Benco Dental Supply Co.*, 2018 WL 6338485, at *5 ("there must be evidence 'that reasonably tends to prove . . . a conscious commitment to a common scheme designed to achieve an unlawful objective.'").

In a multi-party case, like here, Complaint Counsel must also show that ***each Respondent*** participated in the alleged agreement in order to find that particular Respondent liable. *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 charged.");

Anderson News, L.L.C. v. Am. Media, Inc., 899 F.3d 87, 106–11 (2d Cir. 2018) (assessing the evidence defendant-by-defendant), *cert. denied*, 139 S. Ct. 1375 (2019); *In re Citric Acid*, 191 F.3d at 1106 ("Considered as a whole, the evidence in the record, though it clearly shows that several citric acid producers conspired to fix prices and to allocate market shares, does not tend to exclude the possibility that Cargill acted independently—and thus does not support a reasonable inference that *Cargill* was involved in the citric acid price-fixing conspiracy."); *see also, e.g.*, *Mylan Labs., Inc. v. Akzo, N.V.*, 770 F. Supp. 1053, 1066–67 (D. Md. 1991) (plaintiff "must show that each alleged conspirator 'participated in the conspiracy with knowledge of the essential nature of the plan'").

Complaint Counsel bears the burden of proof. To meet its burden, Complaint Counsel must prove each element of its case by a preponderance of the evidence. *See In re Adventist Health Sys./W.*, 117 F.T.C. 224, at *297 (1994); *see also Cement Inst.*, 333 U.S. at 705; *Cal. Dental Ass'n* v. *FTC*, 224 F.3d 942, 957 (9th Cir. 2000); *Cinderella Career* & *Finishing Sch., Inc.* v. *FTC*, 425 F.2d 583, 592 n.2 (D.C. Cir. 1970); *Rayex Corp.* v. *FTC*, 317 F.2d 290, 292 (2d Cir. 1963). This "requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993). "Where the evidence points equally to two or more inferences, an objective fact finder would not decide the inference in favor of the party with the burden of proof," here, Complaint Counsel. *In re McWane, Inc.*, 2013 WL 8364918, at *268 (2013), *aff'd in part, rev'd in part*, FTC No. 9351, 2014 WL 556261 (Jan. 30, 2014), *aff'd sub nom. McWane, Inc. v. FTC*, 783 F.3d 814 (11th Cir. 2015); *see Venture Tech., Inc. v. Nat'l Fuel Gas Co.*, 685 F.2d 41, 48 (2d Cir. 1982) (reversing and remanding for judgment in favor of the defendants and holding that the evidence was insufficient

to support a finding of conspiracy when it "point[ed] with at least as much force toward unilateral actions by [the defendants] as toward conspiracy").

Complaint Counsel here attempts to prove its case through circumstantial evidence. Though an agreement can be proven through circumstantial evidence, "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). "[M]istaken inferences in [antitrust] cases . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Id*. at 594. For that reason, the "circumstantial evidence of a conspiracy, when considered as a whole, must tend to rule out the possibility of independent action." *In re McWane, Inc.*, FTC No. 9351, 2012 WL 5375161, at *6 (Aug. 9, 2012) (citing *Matsushita Elec. Indus. Co.*, 475 U.S. at 764); *Valspar Corp., v. E.I. Dupont de Nemours & Co.*, 873 F.3d 185, 192 (3d Cir. 2017). In weighing ambiguous or circumstantial evidence, a tie—evidence that is equally consistent with permissible competition as with illegal conspiracy—does not permit an inference of conspiracy. *Anderson News*, 899 F.3d at 98, 104–05 ("[I]f the evidence is in equipoise, then . . . judgment must be granted against the plaintiff. . . . A jury's choice between these two equally likely explanations for defendants' conduct, one legal and one illegal, would 'amount to mere speculation.'"); *see also, e.g., Richards v. Neilsen Freight Lines*, 810 F.2d 898, 903 (9th Cir. 1987) (affirming summary judgment for defendants despite testimony of a "gentlemen's agreement" because "[a]t least three interpretations of the deposition testimony are possible[,]" including that "it might refer to industrywide acceptance of the competitive reality").

Complaint Counsel's evidence must "exclude" or "foreclose" the possibility of independent action. *Cosmetic Gallery, Inc. v. Schoeneman Corp*., 495 F.3d 46, 53 (3d Cir. 2007) ("Evidence that does not exclude the possibility of independent action or that relies on a factual

context that is implausible is insufficient. . . ."); *Mkt. Force Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1173 (7th Cir. 1990) (affirming dismissal where the evidence did "not foreclose the conclusion that the competitors were not engaged in a conspiracy"); *see also, e.g.*, *Kleen Products LLC v. Georgia-Pac. LLC*, 910 F.3d 927, 934 (7th Cir. 2018) (plaintiff's evidence must "rule out the hypothesis that the defendants were engaged in self-interested but lawful oligopolistic behavior during the relevant period"); *In re Citric Acid*, 191 F.3d at 1095 (even testimony of "a gentlemen's agreement . . . was not necessarily inconsistent with lawful behavior . . . and thus did not tend to exclude the possibility of legitimate behavior"); *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 49 (7th Cir. 1992) ("[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 and *Ill. Corp. Travel Inc. v. Am. Airlines, Inc.*, 806 F.2d 722, 726 (7th Cir. 1986)); *In re K-Dur Antitrust Litig.*, No. 01-cv-1652, 2016 WL 755623, at *18 (D.N.J. Feb. 25, 2016) ("[I]f conduct can be explained in an equally plausible manner by an illegal conspiracy or by permissible competition, the finder of fact is not permitted to draw an inference of conspiracy.").

1. Complaint Counsel's Section II(A)(1) Requires No Response From Patterson.

2. Complaint Counsel's Section II(A)(2) Requires No Response From Patterson.

B. The Facts At Trial Proved Patterson Acted Independently At All Times And Disproved Any Agreement With Schein Or Benco To Refuse To Deal With Buying Groups.

The overwhelming record evidence at trial proved that Patterson always acted independently and pro-competitively—and affirmatively disproved Complaint Counsel's allegation that Patterson joined a purported agreement between Benco and Schein to boycott

buying groups. Indeed, this evidence included a massive wall of 53 boxes containing more than 8,000 "price class change" forms showing "fierce" "tooth-and-nail" competition "every day" with Benco and Schein to "steal" their customers; it included evidence documenting Patterson's "invasion" of Schein's stronghold in the market for DSOs; and it included evidence showing numerous interactions with the very buying groups Complaint Counsel claims were "boycotted," where Patterson evaluated them one-by-one, did business with them when it made sense, and did not when it did not.

Complaint Counsel does not dispute that there were zero communications between Patterson and Schein regarding buying groups. None. And the only *two* communications Patterson had with Benco regarding any purported "buying group"[4] consisted of (1) one "ten-second" email regarding the NMDC, where Patterson's Paul Guggenheim responded to Benco's Chuck Cohen and said "we feel the same way about these" but did not commit to do anything, and in fact did not do anything (indeed, the evidence at trial showed Patterson's decision regarding NMDC was made locally—*i.e.* not by Guggenheim—*before* the email exchange, and there was never a communication between Patterson's Guggenheim and the regional manager in Albuquerque that made the decision),[5] and (2) an after-the-fact email exchange between

[4] Notably, NMDC's Brenton Mason testified that NMDC was not even a buying group. PF ¶ 282 (Mason Tr., 2364–65 ("I take it that you have a view that a dental cooperative is a very different animal from a buying group, so am I correct? A. I do believe that. Q. Now, what you've been talking about is a dental cooperative, not a buying group. A. Correct.")). And while Patterson viewed ADC as a buying group, Benco saw it as a corporate DSO, not a buying group. *See* PF ¶¶ 302, 309, 311

[5] Complaint Counsel relies solely on its expert, Dr. Marshall, for its assertion that Guggenheim instructed the New Mexico branch manager to decline NMDC's business, but at trial Dr. Marshall acknowledged that his opinion on this issue was made up. Indeed, Dr. Marshall admitted under oath that he simply "assumed," without any evidence, that such communications existed. PF ¶ 682. There is no such evidence anywhere in the record, and all witnesses have denied any such communications. PF ¶ 278. Complaint Counsel cannot make its case through made up expert "evidence." Order on Post-Trial Briefs 3 (prohibiting "cit[ing] to expert testimony to support

Guggenheim and Cohen regarding ADC—where Benco had already been selling to ADC for two months and Patterson had decided not to sell to ADC months earlier—which showed that Patterson and Benco did not even agree regarding whether ADC was a buying group, and obviously did not come to an agreement *not* to sell to them. Simply put, there is zero evidence to support Complaint Counsel's contention that the "highest-level executives" at Patterson and either Benco or Schein "exchanged assurances of a refusal to deal with buying groups," CC Br. 41, or "confronted one another and reassured each other of compliance." CC Br. 42. This is simply made up.

To meet its burden, Complaint Counsel was required to prove by a preponderance of the evidence that Patterson reached a "preceding agreement" and "conscious commitment" with Benco and Schein to refuse to deal with or provide discounts to buying groups. *Twombly,* 550 U.S. at 557 ("[W]hen allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action."); *Monsanto,* 465 U.S. at 768 (Section 1 requires proof of a "conscious commitment to a common scheme designed to achieve an unlawful objective."); *see also Matsushita*, 475 U.S. at 588 ("[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy."). To prove such an agreement, Complaint Counsel must produce evidence that "tends to exclude" the possibility that Patterson acted independently. *Id.*

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factual propositions that should be established by fact witnesses or documents"); JUDGE CHAPPELL, Pre-Trial Tr. 25–26 ("Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that.") (emphasis added).

Complaint Counsel certainly did not produce any such "evidence" at trial, and its post-trial brief simply ignores the overwhelming record of competition that Patterson submitted at trial completely. Indeed, Complaint Counsel's brief does not address any of Patterson's trial evidence that affirmatively disproved Complaint Counsel's alleged agreement (or even parallel conduct), even after Patterson produced at trial a "Marianas Trench" full of contemporaneous documents—with thousands and thousands of discounts that Patterson provided to dentists (including dentists that were members of buying groups) with the specific intent of stealing those customers away from Schein and Benco—showing Patterson competing fiercely with Schein and Benco's throughout the *exact same period* when Complaint Counsel alleges it was colluding with them. PF ¶¶ 17–39. Complaint Counsel's post-trial brief likewise ignores Patterson's choice to invade Schein and Benco's stronghold in the DSO market, again right smack in the middle of the alleged conspiracy. PF ¶¶ 65–85. And Complaint Counsel ignores the indisputable record evidence, including both documents and testimony from numerous witnesses at trial, showing that Patterson met with and evaluated numerous buying groups and did business with them when it made sense to do so, and did not when it did not. PF ¶¶ 118–20, 125–29, 171. This was once again right in the middle of Complaint Counsel's alleged conspiracy period. PF ¶¶ 118–20, 125–29, 171. And Complaint Counsel presented zero evidence of any communications between Patterson and either Benco or Schein regarding any of these buying groups—because there is none. Indeed, the overwhelming evidence at trial showed Patterson's actual behavior was not even in "parallel" with Schein and Benco—it showed Patterson competed fiercely and made its own decisions regarding buying groups (which were often different than both Benco's and Schein's).

Complaint Counsel's strained interpretations of the *two* communications between Patterson and Benco regarding purported "buying groups" conflict with what the relevant

witnesses testified under oath the documents meant, and the witnesses' uniform denials of Complaint Counsel's allegations. PF ¶¶ 190–231. Moreover, Complaint Counsel relies entirely on testimony of its expert witness, Dr. Marshall, in its attempt to prove the "ten-second" communication regarding NMDC amounted to anything. Specifically, Complaint Counsel claims—as it must to prove an agreement—that Patterson chose to cancel its meeting with NMDC *after* Cohen's February 8, 2013 email to Guggenheim. But the evidence shows Patterson started pulling back from NMDC on February 4, and that the pullback was complete (with the decision made at the local level) by *February 7*—the day before the brief Cohen/Guggenheim email exchange. PF ¶¶ 283, 287–89. Complaint Counsel has zero evidence that Guggenheim or anyone else at Patterson's corporate office (in Minnesota) instructed Patterson's local sales team (in *Albuquerque*) to shut down discussions with NMDC—because it does not exist. PF ¶ 296, 684. Complaint Counsel therefore relies solely on Dr. Marshall to prove this instruction occurred; he testified that he "presume[d]" that an instruction was given, but he could not "put [his] finger" on evidence showing it was. PF ¶ 682.

Complaint Counsel's attempt to rely solely on its expert to prove this critical fact is a stark violation of the FTC's rules (and this Court's admonition not to do so). *See* Order on Post-Trial Briefs 3 (prohibiting "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents"); JUDGE CHAPPELL, Pre-Trial Tr. 25–26 ("Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs*. If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that.") (emphasis added). None of this is entitled to weight.

C. The Facts At Trial Showed Patterson Made Its Own Decisions And Did Not Exchange "Assurances" With Benco Or Schein Regarding NMDC, ADC, Or Any Other Buying Group.

There is nothing in the record showing any pledges or guarantees from any Patterson employee to any Schein or Benco employee about not working with buying groups. None exist. Not in lemon juice, and not on a printed page. As noted repeatedly herein, Patterson had *zero* communications with Schein regarding dealing with buying groups. And Patterson's two communications about buying groups with Benco, in February and June 2013, over the course of an alleged *two-year* conspiracy, said nothing about Patterson's intentions at all except "we feel the same way about these" and "I'll investigate," which Guggenheim did not do. PF ¶ 275. Indeed, Guggenheim (and Cohen) flatly denied Guggenheim made any commitment to Benco that Patterson would not sell or discount to buying groups—and Dr. Marshall himself conceded that a "feeling" (*i.e.*, the simple statement that "we feel the same way about these") does not amount to a "commitment." PF ¶ 681. Dr. Marshall also acknowledged that a conspiracy requires successful planning to implement that cannot be done over a one-hour lunch (let alone a 10-second email). Shockingly absent from Complaint Counsel's case is any evidence whatsoever showing "planning" or "implementation" of the alleged 2+ year conspiracy.

Complaint Counsel relies heavily on *Gainesville Utilities Department v. Florida Power & Light Co.*, 573 F.2d 292 (5th Cir. 1978), but a simple comparison of Patterson's *two* communications with Benco and *zero communications* with Schein about buying groups with the record of communications in *Gainesville*, show that *Gainesville* is completely inapplicable. *Gainesville* involved an alleged agreement by two electric utility companies—Florida Power and P&L—to a territorial division of the market. The *Gainesville* defendants had routinely blind-copied each other in their rejections of customers outside their territories and then in some cases sent messages of gratitude with literal assurances of reciprocation:

- After P&L "disclaim[ed] interest" in a customer "and sent a blind carbon" to Florida Power, Florida Power's president sent his thanks and promised, "Please be assured that if a similar situation should occur concerning your Company, we would be glad to reciprocate. *Id.* at 297.

- Florida Power's president passed a prospective customer's inquiry to a P&L executive, writing, "You may be assured our answer is that we have no power facilities within this area." P&L thanked Florida Power and expressed hope of reciprocating, "We sure do appreciate what you are doing for us on the matter covered in your February 7 letter. I hope this and the same kind of matter in the northern end of the state will not continue to take your time. Again, thanks a million for your help. I sure hope we have an opportunity to repay you." *Id.*

- When a city with an expiring P&L franchise reached out to Florida Power for service, it wrote back declining and sent a blind carbon to P&L with a handwritten note, '[t]his is about like I read to you over the phone.'" *Id*.

- When a customer in P&L's service area reached out to Florida Power, Florida Power drafted an internal memorandum stating, "I informed these gentlemen at the beginning that we were very sorry, but in no position whatsoever to make them a proposition as to supplying them with wholesale power service. I went into considerable detail as to why we could not make them a proposition, stressing particularly the point of service area." Florida Power then sent P&L a copy of the memo. *Id.* at 298.

- When a customer reached out to P&L about purchasing a municipally-owned electric system, P&L declined, writing "we are not rendering service in the Lake Helen area and do not have facilities to serve there" and, once again, blind copying Florida Power. *Id.* Two years later, P&L reminded Florida Power of this declination, writing "When we discussed the territorial question in Boston the other day, you mentioned that you were interested in buying the electric facilities in Lake Helen. Perhaps you have forgotten but back in 1956 we received an inquiry from Lake Helen and wrote them that they were not in our territory and we had no proposal to make. Alan B. Wright signed the letter and sent you a blind copy. I am enclosing reproductions of these letters for your information. Here's hoping you get Lake Helen." *Id.*

- When a city was considering switching from Florida Power to a municipally-owned system, P&L wrote a local citizens committee that the city was beyond its "economic service area," blind copying Florida Power. *Id*.

This record in *Gainesville*—and the level of communications there—is not even close to the situation here. Unlike the companies in *Gainesville*, who routinely blind-copied each other on their rejections of each other's customers and then thanked each other with literal assurances of reciprocation, never once did Patterson communicate with Schein or Benco about any buying

group decision it was making. In this case there were a grand total of ***two*** communications between Benco and Patterson regarding buying groups, and zero between Patterson and Schein. The first communication was an out-of-the-blue email from Benco's Chuck Cohen's to Patterson's Paul Guggenheim on February 8, 2013—after Cohen saw an email blast from an Albuquerque dentist about a meeting at Patterson's offices to discuss starting a buying group they called NMDC—in which Cohen disclosed that Benco had a pre-existing policy that it did not work with buying groups. PF ¶ 267–68. The email did not ask Guggenheim to do anything, let alone commit to anything, and Cohen testified he did not expect Guggenheim to respond. Guggenheim quickly responded in a "10-second email," "Thanks for the heads up. I'll investigate the situation. We feel the same about these." PF ¶ 273. Guggenheim did not investigate the situation, never talked to anyone at Patterson's Albuquerque branch about it, and never got back to Cohen. PF ¶ 275. That was it. And the only other inter-firm communication involving Patterson was an email Paul Guggenheim sent to Chuck Cohen in June 2013, months *after* Patterson had decided on its own not to bid for a newly-formed entity called ADC, weeks *after* Benco decided it would bid for ADC, weeks *after* Schein also decided to bid for ADC, and weeks *after* ADC awarded its endorsement to Benco. PF ¶ 685. Complaint Counsel's own expert conceded the email was chronologically after all relevant events, and obviously did not affect each company's decision. PF ¶ 685. Moreover, the companies' decisions with respect to ADC were not in "parallel" in any sense of the word. PF ¶ 685.

United States v. Foley is also not like this case. 598 F.2d 1323 (4th Cir. 1979). In *Foley*, one defendant realtor announced in advance to his competitor realtors at a dinner party that he intended to raise his commission from six to seven percent (which he did), but "he did not care what the others did." *Id.* at 1327, 1332. Each of the other defendants likewise "expressed an

intention or gave the impression that his firm would adopt a similar change" and then ultimately all the other defendants did raise their commissions to seven percent after the dinner party. *Id.* at 1332–34. The record in Foley also included evidence of "a number of instances in which members of the conspiracy sought after the September 5 dinner to hold their fellows to the 'agreement.'" *Id.* at 1332. This includes defendants confronting each other when they failed to keep commissions raised to the agreed-upon seven percent: "a guest at the September 5 dinner, testified that after [his firm] took some six percent listings, Foley called him and told him that was a "mistake" because if they all did not hold the line none of them could get seven percent." *Id.* at 1332. Another defendant called an agent (who accepted a six percent listing) and said "if we do not stay at seven percent, then it would be a slide back and . . . no one could get seven percent, because the competition would hurt us." *Id.* at 1333.

Here, by contrast, when Benco's Chuck Cohen informed Patterson's Paul Guggenheim of Benco's *pre-existing* policy against buying groups, Guggenheim responded with Patterson's *pre-existing* feelings, "we feel the same way about these." PF ¶ 273. Guggenheim did not state an intention to take any future action, let alone any concerted action, with respect to buying groups. Indeed, neither Guggenheim nor Cohen stated that they would take any action with respect to their business practices towards buying groups, let alone that they would change those practices. And after-the-fact statements about existing policies (or feelings) "cannot support a [price-fixing] conspiracy." *Blomkest*, 203 F.3d at 1033–34 ("*Subsequent* price verification evidence on particular sales cannot support a conspiracy.") (emphasis in original).

Similarly, *Esco Corp. v. United States* also involved competitor announcements of *planned actions*, not existing policies. 340 F.2d 1000 (9th Cir. 1965). *Esco* was a criminal case alleging a conspiracy between a group of larger competitors (known as stocking jobbers) to reduce discounts

to smaller competitors (known as non-stocking jobbers). *Id.* at 1002. The alleged conspiracy was conducted over a series of meetings, at which the dominant competitor announced its pricing plans and attending competitors attempted to define stocking jobbers, brought or developed lists of stocking jobbers, and discussed "a proposal to reduce the discount" to non-stocking jobbers. *Id.* at 1006. The court found this record sufficient to support the jury's verdict against Esco, one of the alleged conspirators.

Nothing like this is present in the case against Patterson. There were no meetings at which Patterson executives discussed buying groups with Benco or Schein executives. There were no communications in which Benco even announced its own *plans* (as opposed to existing policies) to Patterson with respect to buying groups, and there is certainly no evidence that Patterson said it would follow any Benco plans, as opposed to *already having* a more lenient version of Benco's already-existing policy—*i.e.*, a well-documented general skepticism towards buying groups. PF ¶¶ 119–120.

Complaint Counsel's suggestion that Guggenheim could not provide a reason for his response of "we feel the same way about these" to Cohen's unsolicited February 8, 2013 email stating Benco's no-buying-group policy is nonsense. CC Br. 46. Guggenheim testified under oath, repeatedly, and provided a perfectly legitimate rationale that was supported by the record evidence. PF ¶ 276 (Guggenheim testified that this was "just a cordial response in an eight-second email that [he] didn't really think that much about," to the effect of "yeah, I feel the same way."). Complaint Counsel also suggests that Patterson shared its "present and future plans" with its competitors, CC Br. 46, but it cites nothing from the trial record to support that. In Guggenheim's "ten-second" email to Cohen in February 2013, Patterson shared its *existing feelings* with Benco—"we feel the same way about these"—but did not commit to an agreement or share any information whatsoever

about "future plans." PF ¶ 274. Complaint Counsel's own expert conceded that a "ten-second" email does not amount to a commitment, and that emails dashed-off without much thought are not detailed conversations necessary to plan and implement a real cartel—as Dr. Marshall also conceded. PF ¶ 681.

Thus, Complaint Counsel's argument that "the Big Three exchanged assurances to reach a common understanding that they would all refuse to discount to buying groups"—based on *two* inter-firm communications that on their face did not contain an agreement and that the witnesses have denied amounted to a commitment to do anything—falls far short of meeting their burden of showing a "conscious commitment to a common scheme" to do anything illegal. CC Br. 46. Guggenheim never investigated NMDC, never responded to Cohen with the results of an investigation, and never contacted Patterson's Albuquerque branch over the weekend to make them back out of an arrangement with NMDC. PF ¶¶ 276–78. Thus, there is no agreement to take "concerted action," and no "conscious commitment to a common scheme designed to achieve an unlawful objective," that could "tend[] to exclude the possibility" of independent action. *Flat Glass*, 385 F.3d at 356–57; *Monsanto,* 465 U.S. at 768.

D. Patterson Made Its Own Decision Regarding ADC.

Guggenheim's June 2013 email exchange with Chuck Cohen contains no reference to any past agreement to take any concerted action, nor does it contain any commitment to take any future concerted action. PF ¶¶ 299–305. *See Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 999 (3d Cir. 1994). Thus, it is not evidence of Patterson's participation in an agreement not to discount to dental buying groups. The email was sent months *after* Patterson had decided on its own not to bid for ADC's business (and instead continue to go after its individual members), and weeks *after* ADC had already awarded its business to Benco (*after* Schein had also decided to bid on the business). PF ¶ 685. It is undisputed that this email could not have affected (and did not

affect) each company's decision with respect to ADC, and Complaint Counsel's characterization of this email as Guggenheim "confronting" Benco is contradicted by the evidence. PF ¶¶ 685, 300–302. After-the-fact discussions of decisions *already* made do not violate antitrust laws and *cannot* be used to prove a Section 1 claim.

Section 1 proscribes agreements to take concerted action, not communications about actions already taken. The Eighth Circuit made that clear in *Blomkest*, explaining that antitrust law proscribes communications that have an impact on pricing, not communications that occur after pricing. 203 F.3d at 1031. *Blomkest* involved an alleged conspiracy by potash producers to fix potash prices. *Id.* at 1031. The plaintiffs argued that summary judgment should be denied because there was a high level of interfirm communications including about three dozen "price verifications" between the producers, verifying prices they had charged on particular sales *after the sales were completed*, as well as "a sudden and dramatic increase in price" by one producer followed by the others. *Id.* at 1033–34. The court disagreed, noting that there was no evidence that the producers' "exchanges of information had an impact on pricing decisions." *Id.* at 1034. "There is no evidence here that price increases resulted from any price verification or any specific communication of any kind," the court said. *Id.* "*Subsequent* price verification evidence on particular sales cannot support a conspiracy for the setting of a broad market price." *Id.* (emphasis in original). The court ultimately affirmed summary judgment despite "roughly three dozen price verifications occurr[ing] between employees, including high-level sales employees, of different companies, over at least a seven-year period" because "[t]he fundamental difficulty with the class's argument regarding price verifications is that it assumes a conspiracy first, and then sets out to 'prove' it."). *Id.* at 1033–34.

Complaint Counsel nonetheless argues the email represents Guggenheim confronting Cohen over "a deviation from Cohen's past assurance of Benco's no buying group policy," "to ask for reassurance of a no buying group policy." CC Br. 51. But no such words are in the email—no reference to a past assurance, no request for a reassurance, and certainly no reference to any concerted plan of action. PF ¶ 306. Its strained attempt to use this after-the-fact email as proof of an agreement is contrary to the facts and the law.

Complaint Counsel's heavy reliance on *United States v. Beaver*, 515 F.3d 730 (7th Cir. 2008), is incorrect as a matter of law. As this Court already explained in its *McWane* decision, *Beaver* does not apply to a fact-pattern like this case. In *Beaver*, there was *direct evidence* of an agreement, including an in-person "meeting between appellant and other co-conspirators where they discussed ways to raise and stabilize prices on concrete and that attendees left the meeting with the 'firm understanding that an agreement to limit . . . discounts had been reached.'" *In re McWane*, 2013 WL 8364918, at *261. In *Beaver*, there was also "direct evidence that, after it appeared that some of the participants were not complying with the agreement, the alleged co-conspirators had more meetings where they 'reaffirmed' their agreement, and expressly agreed that if any member of the conspiracy detected discounting, they would confront that member about 'his cheating.'" *Id.*

This Court in *McWane* rejected the government's attempt at overreaching, responding to its citation of *Beaver* that the "probative value of Complaint Counsel's 'cheating complaints' first requires an *assumption* that an agreement existed," which was lacking. *Id*. (emphasis added). It is no different here—Complaint Counsel is overreaching and *assuming* an agreement existed. It is impermissible to assume that an agreement existed and then to read Guggenheim's email through the filter of that assumption. *Blomkest*, 203 F.3d at 1033–34. Complaint Counsel also

cannot meet its burden of proof by assuming Guggenheim and Cohen must have lied under oath when they denied that this email represented Guggenheim "enforcing" a boycott he had entered by responding to a single email the previous February. *In re McWane*, 2013 WL 8364918, at *267 (Initial Decision) (Complaint Counsel "cannot make [its] case just by asking the [fact finder] to disbelieve the defendant's witnesses.") (citing *High Fructose*, 295 F.3d at 655 (alteration in original)).

E. Guggenheim And Cohen's After-The-Fact Communication Regarding Benco *Already* Selling To ADC Is Not Evidence Of Anything Illegal.

The June 2013 "after-the-fact" email exchange between Chuck Cohen and Paul Guggenheim—which contains no reference to any past agreement to take any concerted action, and no commitment to take any concerted action—is not evidence of anything illegal. *Flat Glass*, 385 F.3d at 356–57 ("[C]ourts have interpreted [Section 1] to require 'some form of concerted action.'") (quoting *Alvord–Polk*, 37 F.3d at 999 & n.1). To prove its case against Patterson, Complaint Counsel must show that Patterson "consciously committed to a common scheme designed to achieve an unlawful objective." *Monsanto*, 465 U.S. at 764. But in the June 2013 email exchange, Guggenheim simply asked a question. He said nothing about Patterson and made no commitment (and as noted in detail herein, Patterson had already made its decision *not* to sell to ADC as a group, and instead go after its individual members as it always had, months before). PF ¶ 685. Cohen's response likewise was *after* Benco had made its own decision regarding ADC that was *different* than Patterson's. PF ¶ 685. Cohen's email response to Guggenheim does not say that Cohen was "reassuring" Patterson of anything—it did not say anything of the sort. PF ¶ 304. Complaint Counsel's *assumption* that Cohen's response to Guggenheim was "Cohen reassur[ing] his competitor that he was keeping his side of the agreement," CC Br. 51, despite the plain language of the email that contained no such "reassurance," is contrary to the evidence, and

Complaint Counsel's attempt to use this after-the-fact communication to prove its case—when on its face it does not contain or reference any agreement—fails as a matter of law. *Blomkest*, 203 F.3d at 1033–34.

F. Complaint Counsel Cannot Salvage Its Clam By Pointing To A Few Internal Patterson Documents That Witnesses Testified Had Nothing To Do With Any Conspiracy.

In the face of overwhelming evidence that Patterson competed fiercely, "tooth-and-nail," with Benco and Schein "every day" during the alleged conspiracy, and the indisputable record showing that the *two* inter-firm communications between Patterson and Benco buying groups (and zero communications with Schein) did not amount to an agreement to do anything, Complaint Counsel attempts to save its case by pointing to *internal* Patterson communications which on their face actually support Patterson's defense, and disprove Complaint Counsel's strained theory. To be clear, each document (which Complaint Counsel points to in conclusory fashion) is a purely internal Patterson document that shows that Patterson's position regarding buying groups *never* changed—before, during, or after the alleged conspiracy period. PF ¶¶ 333–463. None of the handful of internal communications that Complaint Counsel points to explicitly references an agreement with Benco or Schein to do anything. PF ¶¶ 333–463. Most fundamentally, no cited Patterson internal statement discusses future, concerted action to be taken by Patterson. They discuss pre-existing policies, and every relevant witness denies that they mean what Complaint Counsel thinks. PF ¶¶ 333–463. And all require numerous strained inferences to leap to the conclusion that Complaint Counsel reaches. PF ¶¶ 333–463. These emails simply do not come close to what is required to establish an agreement under the well-settled Section 1 case law. *Baby Food*, 166 F.3d at 118 (ruling that plaintiffs did not make out a case of direct evidence when evidence required the court to draw on inferences and showed only an exchange of information among defendants); *see also In re McWane Inc.*, 2013 WL8364918, at *223 ("Direct evidence in

a Section 1 conspiracy must be evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted.") (quoting *Baby Food*, 166 F.3d at 118).

Specifically, Complaint Counsel points to Neal McFadden's 2014 text message to a potential customer that states "we've signed an agreement that we won't work with GPOs." CC Br. 54. But Complaint Counsel acknowledges there was no signed agreement, both at trial and in its brief. PF ¶ 425, CC Br. 25 n.210 ("Complaint Counsel is not aware of a 'signed' agreement."). At trial, McFadden explained in detail that he made this statement, untruthfully, to avoid a former employee whom he had fired. PF ¶¶ 424, 426–28, 430. There was no "prior commitment that constrained Patterson's ability to work with buying groups," CC Br. 54—certainly not with Benco or Schein. McFadden testified that his only constraint regarding working with buying groups was the *internal* directive that Patterson Special Markets was to focus on DSOs, not GPOs. PF ¶ 429. But he nonetheless continued to evaluate buying groups one-by-one as they came along, and always had the ability to do business with them if he chose to. PF ¶ 421; CC Br. 25 n.210 ("Complaint Counsel is not aware of a 'signed' agreement.").

Complaint Counsel also points to an email Tim Rogan wrote to McFadden, saying "Schein, Benco, and Patterson have always said no." CC Br. 53–54. But Rogan testified he was simply writing based on his observations in the market. PF ¶¶ 397–98. This testimony rings true because there is no evidence of Patterson learning by this point that it was in an agreement with its archrival, Henry Schein. Still, Complaint Counsel strains to draw a causal connection between this email from Rogan and McFadden's text message almost *a year later* that "we've signed an agreement." CC Br. 54 ("After receiving this email, McFadden then informed a potential customer . . . .").

Similarly, David Misiak testified that when he wrote of a concern that Schein and Benco sneak into co-op bids and deny it, he was simply fishing for market intelligence. PF ¶ 462. He

strongly denied that he was referring to an agreement. PF ¶ 461 ("Q. Were you concerned that my client was violating some agreement that it had with Patterson to not work with buying groups? A. Absolutely not.")). And again, his testimony is corroborated by the total absence of evidence of communications in which Patterson is told of Schein's participation in a buying group boycott, let alone any instance where Schein "denied it," before Misiak's email. Absent such evidence, Complaint Counsel's position requires that the Court infer that Misiak somehow, through no documented communications, came to learn that Patterson had joined forces, through no documented communications, with its archrival, Schein. Such strained inferences are not sufficient to meet Complaint Counsel's burden. *In re McWane Inc.*, 2013 WL 8364918, at *275 ("The strained inferences required to accept this argument are rejected.").

The cases Complaint Counsel cites do not save its case. Complaint Counsel cites *B&R Supermarket, Inc. v. Visa, Inc.* for the proposition that internal emails can prove a conspiracy, but the difference between this case and *B&R Supermarket, Inc. v. Visa, Inc.*, is simple. In *B&R*, the alleged statement was made publicly, not internally, and it unambiguously referenced a future, concerted action—***an agreement to do something***—to be taken by all the defendants: "the card brands are not going to delay the liability shift date." No. C 16-01150, 2016 WL 5725010, at *6 (N.D. Cal. Sept. 30, 2016). This, the court held, was enough to state a well-pleaded complaint that could survive a motion to dismiss (when, of course, there is no countervailing evidence or evidentiary record at all). *Id.*

G. Section II(G) Does Not Involve Any Allegations Regarding Patterson, Thus It Requires No Response From Patterson.

H. Complaint Counsel's *Two* Emails Between Patterson and Benco (Zero With Schein) And A Handful of Internal Documents Fall Far Short Of Establishing Patterson Participated In An "Overarching Conspiracy."

In the face of overwhelming evidence demonstrating that Patterson acted independently and pro-competitively before, during, and after the 2013–15 period, Complaint Counsel once again points to the same *two* inter-firm communications between Benco and Patterson (and *zero* communications between Patterson and Schein), and a handful of internal documents that on their face do not reference an agreement to do anything (let alone an "overarching conspiracy" between Patterson and either Benco or Schein) and primarily discuss pre-existing internal policies.

Regarding the two emails, once again, in February 2013, Benco's CEO emailed Patterson's Guggenheim (in Minneapolis) out of the blue after hearing from a dentist in Albuquerque that the NMDC was starting a buying group and having a meeting at Patterson's office in New Mexico. PF ¶ 267. Cohen's email said Benco had a long-standing (and, indisputably, decided *before* it contacted Patterson) policy of not selling to "buying groups," but it did not ask Patterson to make a commitment to boycott "buying groups" and Guggenheim never made such a commitment—he merely responded "we feel the same way about these" in a "ten-second response" and did nothing else. PF ¶¶ 268–69. Both vehemently denied under oath that this represented a commitment to do anything, or it was understood that way. PF ¶¶ 274–76. In June 2013, Guggenheim and Cohen exchanged brief emails regarding ADC—a fledgling entity that was not even clear as to whether it was a "buying group" or a DSO—months after Patterson had made its decision *not* to do business with ADC and Benco had already *won* their business. PF ¶ ¶ 310–11. This after-the-fact communication obviously did not result in any kind of agreement to boycott "buying groups," or even a change in strategy regarding ADC. PF ¶ 306–07. Instead, the emails show they had *different*

views about whether a fledgling entity was a "buying group" or a DSO, and the undisputed facts show that each company behaved *differently*. Both denied that this exchange had anything to do with an agreement to do anything. PF ¶ 304.

Complaint Counsel's assertions that the few internal communications it identifies in its trial brief are evidence of an "overarching agreement" to boycott buying groups are plainly contrary to the fact record. First, Complaint Counsel's trial brief points to a February 27, 2013 internal Patterson email from Misiak to Rogan that simply states: "our 2 largest competitors stay out of these as well." CC Br. 57. This does not discuss any agreement with Benco or Schein to do anything.

Complaint Counsel next points to a situation in late 2013 where Patterson's Region Manager for Texas decided, on his own, not to pay to attend the Spring 2014 meeting of the Texas Dental Association ("TDA") because the TDA was creating its TDAPerksSupplies program and had taken out full-page advertisements bashing all distributors. After Patterson made its decision, Schein told Patterson it was still debating whether to attend—and it decided three months later, on its own, not to attend. PF ¶¶ 318, 321. Benco likewise decided, on its own, that it would not attend. PRF ¶ 1133.

These few emails do not raise an inference that Patterson agreed to boycott "buying groups" and they do not come close to being the "significant probative evidence" that is necessary to overcome the mountain of evidence of the company's independent and competitive decision-making and the many, many sworn denials of conspiracy that are in the record. *See 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.").

Merely labeling something an "overarching conspiracy" cannot relieve Complaint Counsel's heavy burden to actually prove an agreement as to each specific Respondent. *Gypsum Co.*, 438 U.S. at 463 ("Liability [can] only be predicated on the knowing involvement of each defendant, considered individually, in the conspiracy charged.").

I. Complaint Counsel's Failure To Prove Patterson Acted In Parallel With Benco and Schein Alone Dooms Its Claim.

To prove an antitrust conspiracy through circumstantial evidence, a plaintiff "must first demonstrate that the defendants' actions were parallel." *In re Beef Indus. Antitrust Litig.*, 907 F.2d 510, 514 (5th Cir. 1990). The Court only looks to "plus factors" *after* a plaintiff meets its burden of showing, at minimum, parallel conduct. *Williamson Oil Co. v. Philip Morris USA*, 346 F. 3d 1287, 1301 (11th Cir. 2003) ("First, the court must determine whether the plaintiff has established a pattern of parallel behavior."); *see In re McWane, Inc.*, 2013 WL 8364918 at *238–39, 258 ("Complaint Counsel's daisy chain of assumptions fail[ed] to support or justify an evidentiary inference of any unlawful agreement involving [Respondent], and the multilayered inference [was] rejected" where evidence did not show parallel conduct.); *Anderson News*, 899 F.3d at 106–12 ("Without 'parallel acts' to be reviewed 'in conjunction with' the circumstantial evidence, evidence supporting the presence of certain plus factors . . . can provide little support for a finding of unlawful conspiracy.").

Complaint Counsel's case fails at the outset because the record evidence at trial proved that Respondents did not act in parallel, as explained at great length in Patterson's Post-Hearing Brief, at 42–44. Each Respondent responded differently to Kois (Patterson caught Qadeer Ahmed lying and passed, Schein was interested but did not care for Ahmed's pressuring, and Ahmed rejected Benco). PF ¶¶ 592, 603, 614. Each Respondent also responded differently to Smile Source (Patterson met with Smile Source but did not bid, Schein did bid and lost, and Benco declined).

PF ¶ 475 (Goldsmith, Tr. 2177 ("Q. So three different respondents, three different responses; correct? A. Yes.")); PF ¶¶ 144–50, 469–71, 474, 475. The *absence* of parallel conduct logically undermines allegations of conspiracy to fix prices or engage in a group boycott, because the purpose of these types of conspiracies is to ensure that competitors will act in parallel (*i.e.*, take concerted action). *See, e.g.*, *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 321 (3d Cir. 2010) ("[I]n many cases where an agreement exists, parallel conduct—such as setting prices at the same level—is precisely the concerted action that is the conspiracy's object."); *Cosmetic Gallery*, 495 F.3d at 54 (group boycott claim could not survive summary judgment due to lack of parallel conduct). The lack of parallel conduct is inconsistent with Respondents having joined the type of agreement claimed. That disparity should be viewed as a significant "minus factor" in assessing Complaint Counsel's case.

Complaint Counsel directs much attention to decisions in contexts other than price fixing, in which consistently parallel conduct would be less logically necessary or harder to assess. In *Gainesville*, for example, the defendants agreed to abide by a territorial market division setting forth areas in which each could provide electrical service. To effectuate that agreement, the companies' parallel conduct would require them to act in ways *opposite* of one another, because each agreed to avoid competing in the other's territory. 573 F.2d at 299. The same logic explains *United States v. Champion*, in which the defendants sought to ensure each conspirator won its preferred auctions at a low price by having the other potential bidders stay out of the running. 557 F.2d 1270, 1273 (9th Cir. 1977). The conspirators' conduct did not need to be parallel because the intent was not to boycott all auctions but only to ensure the winner paid a low price. The decision never even uses the word "parallel."

Complaint Counsel points out that imperfect compliance is no bar to finding conspiracy, citing *Foley*. Though *Foley* was a price-fixing case, the facts there diverge significantly from those here. In that case, the leader of the conspiracy gathered his competitors to announce his intent to increase his realty firm's commission rate; the competitors discussed the issue; and within months, most had "substantially adopted" the higher commissions, though compliance rates varied. 598 F. 2d at 1327, 1333. Complaint Counsel argues that this last fact shows that "substantial deviation" from an agreement—"between 30% to 70% compliance" in the case of one defendant—does not preclude finding there was an agreement. *E.g.*, CC Br. 6, 100.[6] In *Foley*, however, the agreement was to make an affirmative change: Each broker would begin charging the higher commission, which the broker would have to apply (or fail to apply) anew to each property it listed. Here, however, the alleged agreement would have been to *abstain* from doing something: Each firm would refuse to discount its rates to buying groups, or to do business with them at all. If an agreement actually existed, then—at a minimum—there should be some evidence of parallel conduct.

Still, though they concede it unnecessary without a parallel conduct showing, Complaint Counsel include a cursory plus factor analysis. But every factor discussed remains a minus. Patterson's conduct towards buying groups was exceedingly justified. Patterson did not change its conduct. And Complaint Counsel's continued reliance on communications between lifelong

[6] *Esco Corp. v. United States*, another price-fixing case cited by Complaint Counsel, frames this issue even more narrowly, asking whether "a course of conduct . . . once suggested or outlined by a competitor in the presence of other competitors, is followed by all—generally and customarily—and *continuously for all practical purposes*, even though there be *slight variations*." 340 F.2d 1000, 1008 (9th Cir. 1965) (emphasis added). The evidence in this case does not support a finding that Patterson, Schein, and Benco ever followed the same "course of conduct," even when allowing for "slight variations."

friends regarding irrelevant things like sports and family to prove a conspiracy borders on frivolous.

1. Patterson's Decisions Not To Deal With Certain Buying Groups That Were Not In Its Self-Interest After Evaluating Them Individually Was Pro-Competitive.

Patterson did not share "strategic, non-public" information with Benco. CC Br. 62. To compare Paul Guggenheim's statement that "we feel the same way about these" in response to Chuck Cohen's email about Benco's no-buying-group policy with the disclosures in *Fleishman v. Albany Medical Center*, 728 F. Supp. 2d 130 (N.D.N.Y. 2010), is absurd.

Fleishman involved an alleged conspiracy to suppress nurses' wages. The hospitals at issue repeatedly exchanged information regarding their nurse pay structures including new hire and per diem rates, plans to move to a different pay model, and information "regarding merit and recruitment bonuses, tuition assistance, merit pay, health insurance co-payments, length of workweek, and loan forgiveness programs." *Id*. at 142. And the court rightly noted that (1) "no hospital, facing a shortage of nurses, would directly disclose its pay structure to a competitor absent an agreement among those hospitals that the recipient will not use the information as a genuine competitor would do—to bid away nurses;" (2) "it is equally contrary to a hospital's independent self interest to operate short of critical staff without using the information it obtains from rivals to try and fill its vacancies from lower paying hospitals in the area;" and (3) "it makes no sense to freely give valuable market intelligence gained from one rival to another rather that use it to one's own advantage." *Id.* at 160. This is not comparable to a ten-second empathetic reply of "we feel the same way" to an unsolicited email, and if it was, then virtually every human being who has written an expression of agreement in response to an email could find themselves on the wrong end of an antitrust plus factor. "Successful explicit collusion requires planning, investments in administration, clear thinking, and hard work," as Dr. Marshall wrote. PF ¶ 690.

Complaint Counsel cites the Kois Buyers Group as a golden missed opportunity only as to Schein, and not explicitly as to Patterson. CC Br. 63. This is no doubt because Patterson caught Qadeer Ahmed, who was running the group at the time it interacted with Patterson, in a series of exaggerations and blatant lies. PF ¶¶ 578–85. But Patterson had plenty of reasons for passing on this "opportunity." Both Dr. Kois and Johnny Kois testified to their view that Patterson turned down Kois because it did not actually exist at the time and had no members.[7] And there is zero evidence anyone from Patterson ever spoke with anyone from Benco or Schein about Kois, which Dr. Marshall also conceded. PF ¶ 715.

Complaint Counsel also cites Burkhart's favorable experience from working with Kois and Smile Source, suggesting that Patterson missed out on similar benefits by passing on those opportunities. CC Br. 64. But Burkhart is not Patterson. CCFF ¶¶ 1453–54. And it is far from clear that Burkhart, or any rational actor in Patterson's position, would have embraced the chance to do business with a discovered fraudster or with a buying group that appeared to consist entirely of its own customers, like Smile Source. Nor are such assumptions appropriate under antitrust law. *Baby Food*, 166 F.3d at 127 ("Furthermore, the explanation for the use of the term ["truce"] by an employee without price-fixing authority is more plausibly explained as an exercise of independent business judgment by Heinz not to enter a new market."); *Twombly*, 550 U.S. 568–69 ("Firms do not expand without limit and none of them enters every market that an outside

[7] PF ¶¶ 593 (CX8007 (Kois Sr., Dep. at 37–38 ("Q. Do you know why the -- all three, Benco, Schein and Patterson said they had no interest in the Kois Buyers Club or group? . . . A: It was my feeling, or my understanding, that it was because we were too small. And at the time the buyers club didn't even exist, so that many companies would not want to take a risk on engaging with something that isn't going to even turn out to be anything. So we didn't have the ability to negotiate with any of the companies."))); 594 (CC0321 (Kois Jr., IHT at 157 ("At the time there were no members, so there wasn't anything to offer them."))).

observer might regard as profitable, or even a small portion of such markets." (quoting Areeda & Hovenkamp ¶ 307d, at 155 (Supp. 2006) (alteration omitted)).

2. Patterson Independently Evaluated Each Buying Group Opportunity Before, During, and After the Alleged Conspiracy Period.

Patterson's opening brief explained at length why the change-in-conduct plus factor is a big minus in this case. Patterson's strategic planning before the alleged conspiracy was the same as after: it was never pursuing buying group business. PF ¶¶ 119–124 (Misiak, Tr. 1469 ("Q. Were you focused on buying groups or GPOs before 2012? A. We were not."); Misiak, Tr. 1493 ("Q. So back in 2012, the spring of 2012, group purchasing organizations, buying groups, were not part of your core strategy at Patterson Dental? A. They were not.")). There was no "number three" business segment for Patterson (besides private practice and DSOs), Misiak testified. PF ¶ 80 (Misiak, Tr. 1468–69); PF ¶¶ 121, 20 (McFadden and Misiak had never seen Patterson pursuing buying groups in their two-decade careers).

Indeed, Patterson was generally skeptical before, during, and after the alleged conspiracy period—the only difference is that the "during" documents are cited as critical evidence against Patterson while the before and after documents continue to go unacknowledged. But they exist. *See*, *e.g.*, PF ¶¶ 122 (David Misiak wrote in 2009 that GPO relationships "have not been a good fit or need for [Patterson's] dental business"), 126 (declining to bid on an entity in 2009 because "it's a GPO"), 528–30 (McFadden saying "thanks but no thanks" to a "buying group" in 2012 and Misiak saying "your response is right"), 351 (writing about Dentistry Unchained in July 2015 that a "GPO arrangement" can be a slippery slope and in January 2016 that it had explained that "we are not going to participate in a GPO-type program at this point").

Complaint Counsel argues, in the face of that evidence, that Patterson changed conduct because it "considered" the New Mexico Dental Cooperative and changed its mind after Cohen

sent his unsolicited email out of the blue to Guggenheim in February 2013. But that is simply not accurate. The record demonstrated very clearly, first, that Patterson and NMDC had no written—or even draft—contract. PRF ¶ 643. Instead, NMDC was a fledgling business that had simply asked Patterson to host a meeting with manufacturers of equipment and supplies. CCFF ¶ 465. Second, Patterson's Albuquerque branch decided—***before Cohen's email***—to cancel the NMDC-supplier meeting scheduled for its office. PF ¶¶ 286. Third, Patterson's Albuquerque branch—on its own and with no input at all from Guggenheim or anyone else at Patterson headquarters in Minnesota—made the decision not to move forward at all with NMDC. PF ¶¶ 289–90, 296. In fact, Complaint Counsel's own expert, Dr. Marshall, conceded he saw zero evidence the Cohen-Guggenheim email or Benco's policy on buying groups was ever known to Patterson's Albuquerque branch, zero evidence Paul Guggenheim investigated the situation, and zero evidence of any Minnesota headquarters involvement in the local branch decision. PF ¶¶ 682–84. Instead, he just made it up and ***presumed*** it! PF ¶¶ 679, 685–86. That inadmissible and fictitious non-evidence, obviously, cannot overcome the significant actual evidence in the trial record demonstrating that Patterson adhered to its typical practice of staying out of local branch decisions. PF ¶¶ 132–33, 293, 668–69.

The only other evidence CC points to as a "change" in Patterson conduct is equally weak. Patterson started looking more seriously at buying groups in late 2015 and bid on *a* buying group (that is not actually a buying group, PF ¶ 465) in 2017. CC Br. 65–66. But the Smile Source Patterson evaluated in 2016 and 2017 was not the Smile Source it evaluated in 2013. Whereas it appeared in 2013 to consist entirely of a small number of existing Patterson customers, by 2016 and 2017 it had more than 500 members, an office, a board room, a management team, and a hundred employees providing a suite of services for its membership. PF ¶¶ 153–54, 158, 161–62.

Whereas Dr. Andrew Goldsmith once made a poor impression and was later terminated from Smile Source for personal issues, in 2016 and 2017 it appeared professional and had references from manufacturers. PF ¶¶ 152, 155, 163–64. Neal McFadden denied under oath that Patterson's interest in 2016 and 2017 had anything to do with the end of a conspiracy. PRF ¶ 1717.

Even as alleged, these facts describe a glacial pace of change, not an "abrupt" or "radical" change of the sort properly raised under this plus factor, as Complaint Counsel's cited authorities recognize. *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 935 (7th Cir. 2000) (toy manufacturers' abrupt shift from dealing with warehouse clubs to refusing to work with them in conjunction with executive testimony about the refusal supported an inference of conspiracy); *In re Domestic Drywall Antitrust Litigation*, 163 F. Supp. 3d 175, 255–56 (E.D. Pa. 2016) (defendants' decision to eliminate job quotes when they were a common industry feature was a "radical" and "abrupt" change supporting an inference of conspiracy); CC Br. 66 n.544 (citing *Toys "R" Us* and *Domestic Drywall*)

3. Patterson Was Rightly Skeptical Of Buying Groups That Were "Incoherent" Or Provided No Value, But It Nonetheless Did Business With Buying Groups When It Made Sense.

Patterson was skeptical of some buying groups for a number of reasons that Patterson determined independently—including lack of ability to commit to volume, cannibalization, groups that asked for kickbacks or "vigs," and the general incoherence and outlandishness of some of their ideas—and it often decided (on its own) not to seek their business. *See supra* Section I(C). But, occasionally, Patterson did do business with buying groups when it made business sense to do so. *See supra* Section I(C).

Complaint Counsel's citation of *Apple* and *Toys "R" Us* fails to support its argument that Patterson's failure to do business with *some* buying groups qualifies is evidence of a "motive" to enter a conspiracy; both cases are completely inapplicable here. *Apple* involved a hub-and-spoke

conspiracy to raise e-book prices, and included extensive horizontal communications among the publishers and Apple; each of them expressly discussed that each would agree with Apple's proposal if Apple got the other publishers on board. *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 691 (S.D.N.Y. 2013). Indeed, the *Apple* court found that "the Publisher Defendants conferred about their need to act collectively if they were to have any impact on Amazon's pricing" and "roughly once a quarter, the CEOs of the Publishers held dinners in the private dining rooms of New York restaurants, without counsel or assistants present, in order to discuss" the agreement. *Id.* at 650–51. Apple served as a conduit and source of competitor information, and ultimately informed the Publishers it would move forward as long as it got four of the six Publishers to agree. *Id.* at 673–74. Defendants' efforts ultimately culminated in meetings with Apple at which the Publishers voiced "their unanimous condemnation of the $9.99 price point and desire to raise e-book prices"—a desire they put into practice in coordination with the iPad's launch by raising e-book prices "overnight and substantially." *Id.* at 691. The facts in *Apple* are simply nothing like the facts here.

Toys "R" Us is likewise inapplicable, as in *Toys "R" Us* there were likewise express communications between the "hub" and the various spokes that forged an agreement. *Toys "R" Us*, 221 F.3d at 931. Seeing warehouse clubs as an immediate threat to its image and profits, Toys "R" Us created a new policy imposing numerous terms on manufacturers limiting their dealings with warehouse clubs, and then met with the manufacturers to convince them to abide by the policy, which they agreed to do. *Id.* at 931–32. The *Toys "R" Us* agreement involved numerous express communications that directly confirmed the shared boycott policy, which were made through a central hub that ensured all parties held to the agreement. *Id.* at 932–33. The vast communications in *Toys "R" Us* stand in stark contrast to the *two* emails Complaint Counsel relies

on here, where Paul Guggenheim responded to an email with a simple statement that he shared Chuck Cohen's *feeling* about buying groups, but did not commit to do anything and vehemently denied doing anything differently afterwards. PF ¶ 273.

Complaint Counsel's remaining allegations regarding a handful of social communications—many involving football, their kids' lacrosse games, or charitable ventures—between individuals at Patterson and either Benco or Schein were proven to be meaningless at trial. *See, e.g.*, PF ¶ 257. And the argument that the Respondents attended the same "industry trade association" meetings at times fails as a matter of law to support a conspiracy—indeed Complaint Counsel has zero evidence of any improper communications at any industry association event. PRF ¶ 391. Complaint Counsel's arguments are nothing more than a "straw man" designed to confuse the issues, and get beyond the indisputable reality that to prove its case it has *two inter-firm communications* that on their face do not show an agreement to do anything, and have been credibly explained by the witnesses at trial. *See* Part II(F)(I), *supra*. As the Third Circuit has explained with respect to "evidence of social contacts and telephone calls among representatives of defendants," "such evidence of 'opportunity' should be accorded little, if any weight. Company personnel do not often operate in a vacuum or 'plastic bubble'; they sometimes engage in the longstanding tradition of social discourse." *Baby Food*, 166 F.3d at 133 (alteration and citations omitted). If Patterson had the "open relationship" with Schein and Benco that Complaint Counsel claims, and if Patterson was in a multi-year conspiracy with them not to work with buying groups, then there should be more than two interfirm emails involving Patterson and buying groups in this whole case.

Finally, courts "have been cautious in accepting inferences from circumstantial evidence in cases involving allegations of horizontal price-fixing among oligopolists." *Flat Glass*, 385 F.3d

at 358–59 (collecting cases). The reason for this caution is interdependence—the fact that firms in a highly concentrated market tend to watch each other's moves and react to them, often coalescing around the same positions without making any agreement. *Id.* at 359. This is true even where there is parallel conduct, particularly parallel *in*action. *See* Brief for the United States as Amicus Curiae, Department of Justice at 21, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (No. 05-1126), 2006 WL 2482696 at *21 ("Parallel *inaction* is even less suggestive of illicit agreement. In particular, 'parallel decisions by business firms not to enter new markets create no such inference.' Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 307d, at 155 (Supp. 2006). Thus, drawing inferences from what a business fails to do is a problematic exercise; one can analyze the harms and benefit of an action as a discrete matter, but the number of territories a business does not enter or products it does not offer is virtually infinite. Even the most vigorous rivals will end up not competing in some respects."); *Reserve Supply*, 971 F.2d at 50 ("It is well-established, however, that '[t]he mere existence of an oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the antitrust laws.'") (quoting *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 139 (2d Cir. 1984)). But of course, no parallel conduct is argued here.

J. The Record Evidence Proved Patterson Acted Independently And Disproved Complaint Counsel's Allegation That Patterson Entered An Agreement to Refuse To Sell To Or Discount To Buying Groups .

Complaint Counsel failed to meet its burden of proving an agreement, regardless of whether it is judged under the *per se* or rule of reason standard. *See supra* Sections II.A-H.

III. The Evidence Demonstrates That Patterson's Conduct Was Independent And Pro-Competitive At All Times, Whether Evaluated Under The Rule Of Reason Or *Per Se* Standard.

Patterson's defense in this case that there was no agreement.

A. Complaint Counsel Did Not Prove Patterson Entered An Agreement.

Complaint Counsel failed to meet its burden of proving an agreement, regardless of whether it is judged under the *per se* or rule of reason standard. *See supra* Sections II.A-H.

B. Patterson's Independent Decisions, Including Individually Evaluating Each Buying Group And Dealing With Them When It Made Sense, Was Pro-Competitive.

Complaint Counsel failed to meet its burden of proving an agreement, regardless of whether it is judged under the *per se* or rule of reason standard. *See supra* Sections II.A-H.

C. Complaint Counsel Introduced Zero Evidence Of An Agreement Between Patterson And Either Benco Or Schein Regarding Any Of The 29 Buying Groups It Identifies In Its Brief.

Complaint Counsel introduced zero evidence of any communications between Patterson and Schein regarding *any* of the 29 buying groups listed in its brief, and zero evidence of any communications between Patterson and Benco regarding 28 of the 29 buying groups. The only exception is NMDC, where, once again, Patterson and Benco had one interfirm email, which did not contain a commitment to do anything. *See supra* Sections II(A)-(F). For 8 of the 29 buying groups, Complaint Counsel presented no evidence at trial at all (American Academy of General Dentistry Buying Group, Business Intelligence Group, Dental Visits LLC, Dr. David Carter, Erie Family Dental Equipment, Insight Sourcing Group, Pearl Network Buying Group, and Save Dentists, Inc.). 5 of the 29 supposed buying groups did not even exist during Complaint Counsel's alleged conspiracy period (Dentistry Unchained, Florida Dental Association, New Mexico Dental Cooperative, Dr. Stephen Sebastian, and Synergy Dental Partners), and another 5 of the 29 were not listed in Dr. Marshall's expert report (¶ 491), which purported to identify all allegedly affected "buying groups" (IDA, Dr. Narducci Buying Group, Pearl Network Buying Group, UOBG, and Tralongo). PRF ¶ 1255.

Indeed, of the 29 "buying groups" Complaint Counsel identified as ones "Respondents refused to discount to" during the entire alleged multi-year conspiracy, Patterson interacted with only 4 of them.[8] CC Br. 74–75. Of the four that Patterson did interact with during Complaint Counsel's alleged "conspiracy" period, one (Catapult) wanted a kickback or "vig" to work with Patterson, so Patterson declined for ethical reasons. PF ¶¶ 485–91. One (Kois) had zero members, its representative (Qadeer Ahmed) had no experience in the industry and no coherent plan, and Patterson also caught him lying about what manufacturers he signed up and how many members Kois actually had; Patterson therefore declined. PF ¶¶ 578–85. One (NMDC), Patterson was already pulling back from *before* the alleged conspiracy started and *before* the two communications Complaint Counsel claims constituted an agreement. *See supra* Sections II(A)-(F). Moreover, NMDC says it is not a buying group. PF ¶¶ 282, 289–93. And one (Smile Source) appeared to be made up of all Patterson customers and likewise says it is not a buying group. Patterson nonetheless met with them, in person at Patterson's headquarters in Minnesota, individually considered them, but ultimately declined for business reasons. PF ¶¶ 146, 153, 465. That is it.

Patterson did not "refuse" to deal with any of the other 25—the purported groups did not reach out to Patterson, and Patterson did not turn them down. Any suggestion by Complaint Counsel (or Complaint Counsel's expert, Dr. Marshall) to the contrary is simply made up.

[8] Complaint Counsel's list cites no corresponding proposed finding of fact and appears completely unmoored from the record. This violates this Court's Order on Post-Trial Briefs, which stated: "All factual assertions made in a party's brief shall cite to a corresponding proposed finding of fact. Citations to individual documents or items of testimony that do not also reference a corresponding proposed finding of fact may be disregarded." The Court should enforce this clear directive. Additionally, the list barely resembles Complaint Counsel's sworn discovery responses listing "buying groups" that "may have bought dental equipment or supplies from Patterson but for the alleged conspiracy." PF ¶ 482.

The 29 "buying groups" Complaint Counsel identifies in its brief should also be disregarded for the reasons provided below.

Listed Group	Response
1. Academy of General Dentistry Buying Group	• No evidence of interaction with Patterson. PRF ¶ 1255. • No Patterson document cited in reference to this entity in Dr. Marshall's ¶ 491 (allegedly affected "buying groups"). • Complaint Counsel did not ask Dr. Marshall about this entity at trial. • Not on list of buying groups from discovery. PF ¶ 482. • Not called as a witness at trial.
2. American Academy of Cosmetic Dentistry	• Never mentioned at trial. PRF ¶ 1255. • No evidence of interaction with Patterson. PRF ¶ 1255. • No Patterson document cited in reference to this entity in Dr. Marshall's ¶ 491 (allegedly affected "buying groups"). PRF ¶ 1255. • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.
3. Business Intelligence Group	• Never mentioned at trial. PRF ¶ 1255. • No evidence of interaction with Patterson. PRF ¶ 1255. • No Patterson document cited in reference to this entity in Dr. Marshall's ¶ 491 (allegedly affected "buying groups"). PRF ¶ 1255. • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.
4. Catapult Group	• David Misiak met with Lou Graham, who was planning to launch the Catapult Group, over dinner, evaluated his proposal and concluded it made no business sense to Patterson because it was uninformed, had little to no members or purchasing history, and was overall not a good opportunity for Patterson. PRF ¶ 1255. • Patterson concluded it was "not at all" a good opportunity because it wanted a "vig" or "kickback," which Patterson considered "unethical" and costly. PF ¶¶ 485–91. • Complaint Counsel did not ask Dr. Marshall about this entity at trial. On cross, Dr. Marshall conceded he did not know whether it made a coherent proposal to Patterson. PF ¶¶ 493, 710.

	• Dr. Marshall conceded that it was rational for Patterson to turn down "incoherent" proposals from buying groups. PF ¶ 709 (Marshall, Tr. 3259) ("If there was, however, some kind of incoherent management at one of these firms, I could understand them turning away that business, that that would not be irrational to me."). There is no evidence Patterson ever communicated with Schein or Benco about Catapult. PRF ¶ 1255. • Not called as a witness at trial.
5. Dental Purchasing Group	• Patterson evaluated the group, saw it was run by a *veterinarian*, and ultimately decided to pass. PF ¶¶ 168, 171. • Dr. Marshall did not review the group's proposal to Patterson and did not know it was run by a veterinarian. PF ¶ 710-712. • Complaint Counsel did not ask Dr. Marshall about this entity at trial. On cross, Dr. Marshall conceded that it was rational for Patterson to turn down "incoherent" proposals from buying groups. PF ¶ 709 (Marshall, Tr. 3259) ("If there was, however, some kind of incoherent management at one of these firms, I could understand them turning away that business, that that would not be irrational to me."). • No evidence Patterson communicated with Schein or Benco about the group. PRF ¶ 1255. • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.
6. Dental Visits LLC	• Never mentioned at trial. PRF ¶ 1255. • No evidence of interaction with Patterson. PRF ¶ 1255. • No Patterson document cited in reference to this entity in Dr. Marshall's ¶ 491 (allegedly affected "buying groups"). PRF ¶ 1255. • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.
7. Dentistry Unchained	• Did not exist during the alleged conspiracy. PF ¶ 338. • Patterson rejected *after* the alleged conspiracy. PF ¶ 352. • Complaint Counsel did not ask Dr. Marshall about this entity at trial. On cross, Dr. Marshall conceded he did not know it did not exist during the alleged conspiracy and that Patterson rejected it after the alleged conspiracy. PF ¶ 338, 346–51. • Not on list provided in discovery. PF ¶ 482.

	• Not called as a witness at trial.
8. DDS Group	• No evidence of interaction with Patterson. PRF ¶ 1255. • No Patterson document cited in reference to this entity in Dr. Marshall's ¶ 491 (allegedly affected "buying groups"). PRF ¶ 1255. • Complaint Counsel did not ask Dr. Marshall about this entity at trial. • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.
9. Dr. David Carter	• Never mentioned at trial. PRF ¶ 1255. • No evidence of interaction with Patterson. PRF ¶ 1255. • No Patterson document cited in reference to this entity in Dr. Marshall's ¶ 491 (allegedly affected "buying groups"). PRF ¶ 1255. • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.
10. Erie Family Dental Equipment	• Never mentioned at trial. PRF ¶ 1255. • No evidence of interaction with Patterson. PRF ¶ 1255. • No Patterson document cited in reference to this entity in Dr. Marshall's ¶ 491 (allegedly affected "buying groups"). PRF ¶ 1255. • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.
11. Florida Dental Association	• Patterson declined to work with this group for a second time in *March 2012*, nearly a year *before* allegedly joining a conspiracy. PF ¶ 119. • Patterson was already doing business with likely 30 to 35% of dentists in Florida and buying groups were not part of Patterson's core strategy. PF ¶ 119; PRF ¶ 237. • No evidence of interaction with Patterson in Complaint Counsel's proposed findings of fact. PRF ¶ 1255. • No evidence Patterson communicated with Schein or Benco about the group. PRF ¶ 1255. • Complaint Counsel did not ask Dr. Marshall about this entity at trial. • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.

12. IDA	• No evidence of interaction with Patterson. PRF ¶ 1255. • Not listed in Dr. Marshall's ¶ 491 (allegedly affected "buying groups"). PRF ¶ 1255. • Complaint Counsel did not ask Dr. Marshall about this entity at trial. • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.
13. Insight Sourcing Group	• Never mentioned at trial. PRF ¶ 1255. • No evidence of interaction with Patterson. PRF ¶ 1255. • No Patterson document cited in reference to this entity in Dr. Marshall's ¶ 491 (allegedly affected "buying groups"). PRF ¶ 1255. • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.
14. Kois Buyers Group	• Patterson evaluated and decided not to move forward with the group because it presented an incoherent, outlandish proposal. • Its representative, Qadeer Ahmed, was caught lying to Patterson about its number of members and claimed manufacturer relationships. PF ¶¶ 578–85. • In reality, Kois did not yet exist and had zero members. PF ¶ 591. • Dr. Marshall conceded it made sense for Patterson to walk away from such a proposal. PF ¶ 729. • No evidence Patterson communicated with Schein or Benco about the group. PRF ¶ 1255.
15. Dr. Narducci Buying Group	• Dr. Narducci, who was a "very good Patterson client," started "his own dental distributor company" during the alleged conspiracy, reportedly supplied by Schein, and stole away Patterson customers. PRF ¶ 1284. • No evidence Patterson communicated with Schein or Benco about the group. PRF ¶ 1255. • Not listed in Dr. Marshall's ¶ 491 (allegedly affected "buying groups"). PRF ¶ 1255. • Complaint Counsel did not ask Dr. Marshall about this entity at trial. • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.
16. New Mexico Dental Cooperative	• Did not exist at the time it approached Patterson. PF ¶ 281. • Patterson was "pull[ing] back" from NMDC as of the day before it allegedly joined a conspiracy. PF ¶ ¶289.

	• Dr. Mason had no reason to doubt Patterson's decision came from its local branch. PF ¶ 293. • Does not consider itself a buying group. PF ¶¶ 282, 289–93.
17. Nexus Dental	• Neal McFadden spoke with Nexus's representative, Kianor Shah, who was an unknown to Patterson at the time he reached out through a "contact the CEO" form. PRF ¶ 1255. • The group was looking for a vig and Patterson found the group's proposal "offensive." PRF ¶ 1255. • No evidence Patterson communicated with Schein or Benco about the group. PRF ¶ 1255. • No Patterson document cited in reference to this entity in Dr. Marshall's ¶ 491 (allegedly affected "buying groups"). PRF ¶ 1255. • Complaint Counsel did not ask Dr. Marshall about this entity at trial. • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.
18. Pacific Group Management Services	• No evidence of interaction with Patterson. PRF ¶ 1255. • No Patterson document cited in reference to this entity in Dr. Marshall's ¶ 491 (allegedly affected "buying groups"). PRF ¶ 1255. • Complaint Counsel did not ask Dr. Marshall about this entity at trial. • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.
19. Pearl Network Buying Group	• Never mentioned at trial. PRF ¶ 1255. • No evidence of interaction with Patterson. PRF ¶ 1255. • Not listed in Dr. Marshall's ¶ 491 (allegedly affected "buying groups"). PRF ¶ 1255. • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.
20. Unified Smiles	• No evidence of interaction with Patterson. PRF ¶ 1255. • No Patterson document cited in reference to this entity in Dr. Marshall's ¶ 491 (allegedly affected "buying groups"). PRF ¶ 1255. • Not called as a witness at trial.

21. UOBG	• A doctor claiming to be a part of UOBG asked Patterson about getting a discount on an X-ray machine in 2014, and another doctor made a similar request in May 2015, after the alleged conspiracy. PF ¶¶ 661–69.[9] • Patterson responded to the *post*-conspiracy inquiry, "*We currently have little appetite to deal with the buying groups* as we feel they compete directly with the branches and reps." PF ¶ 668. • No evidence Patterson communicated with Benco or Schein about the group. PRF ¶ 1255. • Not listed in Dr. Marshall's ¶ 491 (allegedly affected "buying groups"). PRF ¶ 1255. • Complaint Counsel did not ask Dr. Marshall about this entity at trial. • Not called as a witness at trial.
22. Smile Source	• Patterson met with and evaluated Smile Source in 2013, and its impression was poor. PF ¶¶ 141–42. • Smile Source was looking for a second distributor in addition to Burkhart. PF ¶ 142. • All Smile Source members appeared to already be Patterson customers. PF ¶¶ 153, 154. • Patterson decided to keep Smile Source on the "idea board," and in 2015 bid for its business when it had quadrupled its membership, terminated its representative, been vouched for by manufacturers, and developed a suite of services it was offering its members. PF ¶¶ 155, 158, 161–64. • Smile Source insists it is not a buying group. PF ¶ 465. • There is no evidence that Patterson communicated with Benco or Schein about Smile Source. PRF ¶ 1255.
23. Dr. Stephen Sebastian	• Dr. Stephen Sebastian reached out to Patterson wanting to "talk to someone about the possibility of starting" a buying group and explained he was "looking to recruit a group of individually owned offices." PRF ¶ 644. • There "was no upside to Patterson" since Dr. Sebastian had no company and no clients, just an idea that was not a coherent business plan, so Patterson independently decided not to move forward with this proposal. PRF ¶ 1633.

[9] Patterson's proposed finding of fact 661 mistakenly reported that there was no trial testimony about UOBG. Patterson is not aware of any additional trial references to UOBG aside from the one cited above.

	• Complaint Counsel did not ask Dr. Marshall about this entity at trial. On cross, Dr. Marshall conceded that it was rational for Patterson to turn down "incoherent" proposals from buying groups. PF ¶ 709 (Marshall, Tr. 3259) ("If there was, however, some kind of incoherent management at one of these firms, I could understand them turning away that business, that that would not be irrational to me."). • There is no evidence that Patterson communicated with Benco or Schein about Dr. Stephen Sebastian. PRF ¶ 1255. • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.
24. Save Dentists, Inc.	• Never mentioned at trial. PRF ¶ 1255. • No evidence of interaction with Patterson. PRF ¶ 1255. • Does not appear in Complaint Counsel's proposed findings of fact. PRF ¶ 1255. • No Patterson document cited in reference to this entity in Dr. Marshall's ¶ 491 (allegedly affected "buying groups"). PRF ¶ 1255. • Complaint Counsel did not ask Dr. Marshall about this entity at trial. • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.
25. Schulman Group	• No evidence of interaction with Patterson. PRF ¶ 1255. • No Patterson document cited in reference to this entity in Dr. Marshall's ¶ 491 (allegedly affected "buying groups"). PRF ¶ 1255. • Complaint Counsel did not ask Dr. Marshall about this entity at trial. • Not called as a witness at trial.
26. Synergy Dental Partners	• Patterson rejected Synergy in 2011, long before it allegedly joined a conspiracy in February 2013. PF ¶¶ 641–45. • No Patterson document cited in reference to this entity in Dr. Marshall's ¶ 491 (allegedly affected "buying groups"). PRF ¶ 1255. • Complaint Counsel did not ask Dr. Marshall about this entity at trial. • Not called as a witness at trial.

27. Tralongo	• Neal McFadden evaluated Tralongo and determined it to be an "outlandish buying group request" looking for money. PF ¶ 132. • Mr. McFadden decided not to move forward with this entity as part of Patterson Special Markets but let the branch know that they could pursue this opportunity if they chose to do so. PF ¶ 132. • There is no evidence that Patterson communicated with Schein and/or Benco about Tralongo; in fact, Mr. Rogan testified he never contacted Benco when he was made aware that Benco might have been selling to Tralongo. PRF ¶ 588. • No evidence of interaction with Patterson in Complaint Counsel's proposed findings of fact. • Not listed in Dr. Marshall's ¶ 491 (allegedly affected "buying groups"). PRF ¶ 1255. • Complaint Counsel did not ask Dr. Marshall about this entity at trial. • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.
28. WheelSpoke LLC	• No evidence of interaction with Patterson. PRF ¶ 1255. • No Patterson document cited in reference to this entity in Dr. Marshall's ¶ 491 (allegedly affected "buying groups"). PRF ¶ 1255. • Complaint Counsel did not ask Dr. Marshall about this entity at trial. • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.
29. XYZ Dental	• No evidence of interaction with Patterson. PRF ¶ 1255. • No Patterson document cited in reference to this entity in Dr. Marshall's ¶ 491 (allegedly affected "buying groups"). PRF ¶ 1255. • Complaint Counsel did not ask Dr. Marshall about this entity at trial. • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.

IV. COMPLAINT COUNSEL FAILED TO OVERCOME THE OVERWHELMING RECORD EVIDENCE DISPROVING AN AGREEMENT.

A. Universal, Vehement Witness Denials Under Oath Deserve Significant Weight.

Every current or former Patterson employee called as a witness in this case came before this Court, swore to tell the truth, and vehemently denied Complaint Counsel's allegations: Paul Guggenheim ("I have never committed that to anybody." "No." "I do not." "No." "No." "No." "Absolutely not." "Nope." "Absolutely not." "No." "Absolutely not." "No.")[10]; David Misiak ("Absolutely not." "I do not." "No." "No." "I have not." "Absolutely not.")[11]; Neal McFadden ("We do not have a signed agreement." "There was never a signed agreement." "We never had any agreement, any signed agreement, that we would not work with GPOs." "I did not." "No." "No.")[12]; Tim Rogan ("No." "No." "No." "No." "Absolutely not." "No." "No.").[13] So did Benco and Schein's witnesses. PF ¶¶ 192, 193, 194, 200, 203, 204, 206, 208, 210.

Complaint Counsel would have the Court simply ignore every one of these denials as a lie. But this Court explained in *McWane* why that is inappropriate. While of course witness denials were not dispositive, this Court properly considered them significant:

> Further weighing against a finding of an agreement to curtail Project Pricing is sworn testimony from the Suppliers that they made pricing decisions independently and did not discuss and agree to stop or curtail Project Pricing. This is direct evidence contrary to the asserted agreement to curtail Project Pricing and is entitled to weight. Complaint Counsel urges that these denials be dismissed as "self-serving"; however, "[a] plaintiff cannot make his case just by asking the [fact finder] to disbelieve the defendant's witnesses . . . ." *High Fructose Corn Syrup*, 293 F.3d at 655. "[M]ere disbelief [does] not rise to the level of positive proof of agreement" sufficient to meet Complaint Counsel's burden of proof. *Venzie*, 521 F.2d at 1313; *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879, 894 (3d Cir. 1981); accord *Alvord-*

[10] PF ¶¶ 195 (Guggenheim, Tr. 1707; 1853; 1862; 1870; 1872, *respectively*).

[11] PF ¶¶ 194 (Misiak, Tr. 1502; 1505; 1508-09, *respectively*).

[12] PF ¶¶ 201 (McFadden, Tr. 2737-2738; 2740; 2742; 2781, *respectively*).

[13] PF ¶¶ 202 (Rogan, Tr. 3571-3572; 3575; 3651-3652, *respectively*).

> *Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1014 (3d Cir. 1994) (noting that mere disbelief of contrary testimony does not prove agreement).

In re McWane Inc., 2013 WL 8364918, at 267 (record citations omitted); *see also City of Moundridge*, 429 F. Supp. 2d at 130 ("Facing the sworn denial of the existence of conspiracy, it [is] up to plaintiff to produce significant probative evidence"); *Williamson Oil*, 346 F.3d at 1305 (11 parallel price increases were insufficient to overcome sworn denials and avoid summary judgment); *Lamb's Patio Theatre, Inc. v. Universal Film Exchanges, Inc.*, 582 F.2d 1068, 1070 (7th Cir. 1978) (affirming summary judgment because plaintiff had only "its bald allegation of conspiracy to refute the sworn affidavit denying a conspiracy"); *American Key Corp. v. Cumberland Associates*, 579 F. Supp. 1245, 1259 (N.D. Ga. 1983) (affirming summary judgment because each of the defendants submitted "sworn affidavits denying the existence of any contract, combination or conspiracy" and plaintiff failed to "come forward with significant probative evidence supporting its allegations of a conspiracy").

The Court should apply the same analysis here as in *McWane*. It should consider significant the fact that *every witness* alleged to have knowledge of the alleged conspiracy came before this Court, swore an oath to tell the truth under penalty of perjury, and said that the conspiracy did not happen. PF ¶¶ 192, 193, 194, 195, 200, 201, 202 203, 204, 206, 208, 210. It is a serious thing to assume that all these people probably committed federal crimes by lying under oath. If we are to disregard what every witness said, then trial was a pointless exercise.

B. Patterson Assessed For Itself That Most Buying Groups Made Unattractive Customers.

No one is arguing that independent business justifications are a defense to an unlawful conspiracy; but they are certainly evidence suggesting there *was no* unlawful conspiracy. Indeed, as Complaint Counsel's brief notes, where a party takes an action against its unilateral self-interest, that is considered plus-factor evidence suggesting the existence of a conspiracy. CC Br. Part

II(I)(1). Thus, as a matter of logic, where a party takes an action consistent with its unilateral self-interest, that is "minus factor" evidence suggesting the *absence* of a conspiracy. *Blomkest*, 203 F.3d at 1037 ("[N]o inference of conspiracy can be drawn" when there is an "independent business justification for the defendant's behavior.").

Complaint Counsel's cited authorities for the point that independent justifications are no defense are inapposite—all involve cases where the courts found agreements to exist and then refused to then waver from that finding based on the defendants' evidence that their actions had justified business purposes.

In *General Motors*, the automotive giant learned that some franchisee-dealers had been selling cars through third-party "discount houses," frustrating other local dealers who rejected the practice. *United States v. Gen. Motors Corp.*, 384 U.S. 127, 133–34 (1966). The Supreme Court held that the trial court's findings "include[d] the essentials of a conspiracy within [Section] 1 of the Sherman Act." *Id*. at 140, 143. The evidence showed that, after dealers complained, GM demanded agreements from all dealers in the city to refuse to sell cars through the discount houses, and it worked with other dealers and dealer associations to police the agreements. *Id*. at 140–41, 144. As the Court explained, there was clearly an agreement; even if was not explicit, "joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan." *Id*. at 142–43. Under these facts, even if GM and the dealers were acting in their own self-interest to restrict the discount sales, that fact could not negate the evidence of conspiracy. *Id*. at 142.

The *Apple* case, too, involved ample evidence of conspiracy—evidence the trial judge called "overwhelming." *United States v. Apple*, 791 F.3d 290, 319 (2d Cir. 2015). Apple worked with the major book publishing companies to deliberately raise the standard retail price for e-books, insisting that it would be able to accomplish this shared goal only if a sufficient number of

the publishers agreed to sign virtually identical contracts with Apple and then used those contracts as leverage against Apple's competitor Amazon. *Id*. at 318–19. Apple facilitated communications among the publishers and assured each of them that they would not be alone in challenging Amazon. *Id*. at 319. While Apple and the publishers may have had different, self-interested reasons for joining the conspiracy, the economic rationales could not defeat the clear picture of an agreement that was painted by the rest of the evidence. *Id*. at 318.

Finally, in *Gainesville*, executives of competing power companies shared a "continuous exchange of letters" about each other's refusal to serve certain cities, out of respect for a territorial division. 573 F.2d at 301. The letters expressed "hopeful, if not expected, reciprocity," *id.*, with comments like "thanks a million for your help. I sure hope we have an opportunity to repay you," *id*. at 297. Again, the anticompetitive nature of the conduct was apparent enough that little inference was required; the defendants all but admitted that they were acting in concert. *Id*. at 301 ("In fact, the letters and internal memoranda border on a blatant agreement to divide the market."). Consequently, any legitimate business interests simply were not a significant part of the equation in finding an agreement.

Complaint Counsel may believe *in hindsight* that "buying groups can be profitable for distributors, even without contractual volume guarantees," CC Br. 92, but that was not at all Patterson's assessment at the time. Buying groups do not buy anything or commit to buy anything. PF ¶¶ 113–14. Their members can buy from whomever they like. PF ¶ 113–14. And there is no centralized ordering—buying group members continue to make their own purchases, just at a lower price. PF ¶ 114. Some buying groups also demand that distributors pay a "vig," or "kickback," which Patterson considers unethical. PF ¶¶ 122–23. All of this means that there is little way for a distributor to know that, by discounting to a buying group's membership (which

may include a number of existing customers), it will recoup its losses through increased purchasing volume. PF ¶ 114. Still, where Patterson's local branches have believed it in their interest, they have worked with buying groups. PF ¶¶ 174–75. But where a buying group lied to Patterson, or where it appeared to consist entirely of Patterson customers, or where it was run by a veterinarian, Patterson had ample reason to be skeptical that the group represented a winning business proposition. PF ¶¶ 153, 465, 578–85.

And the basis for Complaint Counsel's opinion that groups like Kois and Smile Source were great opportunities is, again, Dr. Marshall's case studies based on studying a tiny fraction of dentists, purporting to show that Patterson would have made a relatively tiny fraction of profit had it overlooked Qadeer Ahmed's lies and Smile Source's obvious cannibalization risk and worked with the groups anyway. PF ¶¶ 736, 738, 740.

1. Patterson Made Its Buying Group Decisions Independently.

a. What's Good For Burkhart Is Not Necessarily Good For Patterson.

The hindsight bias continues with claims of Burkhart's positive experience working with buying groups. CC Br. 92. Again, absent evidence that Patterson knew *at the time* that particular buying groups could drive new sales in a way that would be profitable for Patterson, what allegedly turned out to be good for Burkhart is irrelevant. Nor is there any basis to say that Patterson would have experienced the same gains as Burkhart (let alone that Patterson would have had that expectation at the time). Burkhart is a very different company from Patterson. CCFF ¶¶ 1453–54. And Smile Source appeared, from Patterson's perspective, to be made up entirely of existing Patterson customers in 2013. PF ¶ 153. Patterson knew, similarly, that Kois's representative was exaggerating and blatantly lying. PF ¶¶ 578–85. It is doubtful that, had it been in Patterson's position with respect to either Smile Source or Kois, Burkhart or any other distributor would have gone forward with either.

Again, the government has in other scenarios explained that making assumptions from such instances of *inaction* is a dangerous enterprise. See Brief for the United States as Amicus Curiae, Department of Justice at 21, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (No. 05-1126), 2006 WL 2482696 at *21 ("Parallel *inaction* is even less suggestive of illicit agreement. In particular, 'parallel decisions by business firms not to enter new markets create no such inference.' Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 307d, at 155 (Supp. 2006). Thus, drawing inferences from what a business fails to do is a problematic exercise; one can analyze the harms and benefit of an action as a discrete matter, but the number of territories a business does not enter or products it does not offer is virtually infinite. Even the most vigorous rivals will end up not competing in some respects."). Complaint Counsel cites no antitrust case suggesting that passing on what hindsight later suggested could have been an infinitesimally small potential profit is enough to infer an action against self-interest, and none exists.

b. Patterson's Bidding On One Alleged Buying Group Two Years After A Conspiracy Is Not Circumstantial Evidence Of A Conspiracy.

As to Patterson, Complaint Counsel's basis for the claim that "Respondents Profited from Buying Groups Before and After the Conspiracy," CC Br. 93, is apparently limited to the single example of Patterson bidding against Schein for Smile Source's business in *2017*—nearly two years after the alleged conspiracy. That single anecdote, involving a group that was dramatically different than it had been in 2013 and that insists it is not a buying group, cannot possibly support the proposition for which it is cited. PF ¶ 161, 174–75, 465.

2. Patterson's Keeping Track Of What Its Competitors Were Doing Was Not Unusual.

Complaint Counsel cites no case supporting the notion that a mountain of evidence of Patterson's independent and pro-competitive conduct during the period of alleged collusion, plus

hundreds of sworn denials, can be overcome by a few expressions of concern about what its competitors were doing. Patterson's alleged concern with what its competitors were doing with respect to buying groups is consistent with predictable behavior in a concentrated market of closely following one another's activity. *See, e.g.*, *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 879 (7th Cir. 2015) ("We can, moreover, without suspecting illegal collusion, expect competing firms to keep close track of each other's pricing and other market behavior and often to find it in their self-interest to imitate that behavior rather than try to undermine it . . . ."); *In re McWane Inc.*, 2013 WL 8364918, at *226 ("Because of their mutual awareness, oligopolists' decisions may be interdependent although arrived at independently.") (quoting Areeda & Hovenkamp, ¶ 1429 at 221); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 484 (1st Cir. 1988) ("[I]t is close to impossible to devise a remedy for 'interdependent' pricing. How does one order a firm to set its prices without regard to likely reactions of its competitors?"); *In re McWane Inc.*, 2013 WL 8364918, at *226 (citing *Clamp-All*, 851 F.2d at 484 and emphasizing "without regard to").

3. Patterson's Valid Justifications For Its Buying Group Decisions Are A Minus Factor.

Patterson is not claiming as a legal defense that it was justified in entering an agreement not to work with buying groups. Its defense is that it entered no such agreement. And the fact that it had valid justifications for its decisions corroborates that defense by refuting Complaint Counsel's circumstantial case. *See* Part IV(B), *supra*. For example, the fact that Patterson rejected the Kois Buyers Group after discovering Qadeer Ahmed's lies refutes Complaint Counsel's persistent reliance on Patterson's decision to pass on Kois as circumstantial evidence that Patterson must have been in an agreement. PF ¶¶ 578–85.

C. Sections IV(C) and (D) Do Not Involve Any Allegations Regarding Patterson, Thus They Require No Response From Patterson.

V. Section V Does Not Involve Any Allegations Regarding Patterson, Thus It Requires No Response From Patterson.

VI. Because There Is No Evidence Showing A Risk Of Recurrence, There Is No Basis For Injunctive Relief.

Complaint Counsel claims the alleged conspiracy ended in April 2015, when Benco settled with the Attorney General of Texas and was required to log all communications. CC Br. 37–38. Complaint Counsel introduced zero evidence of any Patterson communication with Schein or Benco after that (and, in fact, none about buying groups with Schein at any point, and none with Benco after June 2013).

Complaint Counsel makes no effort to justify its request for injunctive relief but rather assumes that its appropriateness is a foregone conclusion. This fails to meet the legal requirements for injunctive relief and disregards this Court's directive: "I want to call everyone's attention to the issue of remedy. . . . I want to see legal support for and against any proposed remedy. This includes the government providing a proposed order for relief together with, and *I emphasize, supporting law and argument for all sections and parts of a proposed order* and respondents specifically replying thereto." (Judge Chappell, Tr. 5667) (emphasis added).

Injunctive relief under Section 5 of the FTC Act is appropriate only where there is a cognizable danger (as opposed to a "mere possibility") of recurrent violation. *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953) ("The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility. . ."); *see also TRW, Inc. v. FTC*, 647 F.2d 942, 954 (9th Cir. 1981); *Borg-Warner Corp. v. FTC*, 746 F.2d 108, 110 (2d Cir. 1984). Complaint Counsel bears the burden to show such a cognizable danger. *Borg-Warner*, 746 F.2d at 110. Plaintiffs who fail to meet this showing are not entitled to injunctive

relief. *TRW*, 647 F.2d at 954 (setting aside Commission order when the company was no longer infringing at the time of the Commission's order and complaint counsel failed to prove a "cognizable danger of recurrent violation"); *Borg-Warner*, 746 F.2d at 110 (reversing Commission order when the alleged infringing conduct had terminated before the order was issued and nothing in the record suggested a possibility of recurrence); *see also City of L.A. v. Lyons*, 461 U.S. 95, 105 (1983) (past injury at hands of police did not entitle plaintiff to enjoin future police practices).

Complaint Counsel has not shown a "cognizable danger" or even a "mere possibility" of recurrent violation. *W. T. Grant*, 345 U.S. at 633. The standard for receiving injunctive relief—"cognizable danger of recurrent violation"—does not even appear once in Complaint Counsel's post-trial brief. *Id*. Nor does Complaint Counsel identify a single piece of evidence supporting the assertion that the alleged agreement not to work with buying groups could recur. Instead, Complaint Counsel makes sweeping, conclusory assertions that its requested relief is necessary due to Respondent's *past* and *no longer occurring* alleged conduct. *See, e.g.*, CC Post Trial Brief, Attachment D, Paragraph II.D. n. 21 ("Paragraph II.D. is necessary because the record evidence shows that Respondents engaged in repeated interfirm communications . . . to reach a prohibited agreement not to sell to or discount to Buying Groups."); Paragraph IV.B(6) n. 35 ("Paragraph IV.B(6)(a)-(b) is necessary because the record evidence shows a high-level of interfirm Communications between or among competitor Respondents . . . which facilitated and formed the unlawful agreement").

Complaint Counsel itself acknowledges that Patterson's alleged unlawful conduct ended *four years ago* in April 2015, (Kahn, Tr. 19), and that all three Respondents—including Patterson—are now working with buying groups. (CCFF ¶ 1709; CC's Pretrial Brief at 50 ("[A]ll three Respondents began competing for buying groups after the conspiracy ended.")). And despite

Complaint Counsel's claims of "repeated" and "high-level" interfirm communications that facilitated the alleged agreement, Patterson had only *two* interfirm communications discussing buying groups, and they were *six years ago*. PF ¶¶ 267–314. The record likewise shows that Patterson, Schein, and Benco each work with buying groups today. PF ¶¶ 760–63. Patterson and Schein competed for the business of Smile Source almost *two* years ago in 2017. PF ¶ 759. Such a record does not support a finding of a "cognizable danger" that the challenged conduct could reoccur. *W. T. Grant*, 345 U.S. at 633. It shows this case is simply a historical debate. As such, because the alleged infringing conduct has ceased, and because Complaint Counsel has presented zero evidence of a cognizable danger of recurrence, this Court should deny Complaint Counsel's proposed remedy.

CONCLUSION

For reasons stated above, Complaint Counsel has failed to meet its burden to show that Patterson participated in an unlawful agreement or that injunctive relief is warranted to prevent future recurrence. Thus, the Court should find in favor of Patterson.

Dated: June 11, 2019

/s/ Joseph A. Ostoyich

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CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2019, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

Dated: June 11, 2019

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