

PUBLIC

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



In the Matter of)
)
)

BENCO DENTAL SUPPLY CO.,)
a corporation,)
)

HENRY SCHEIN, INC.,)
a corporation, and)
)

PATTERSON COMPANIES, INC.)
a corporation.)
)
)
)

DOCKET NO. 9379

COMPLAINT COUNSEL'S POST-TRIAL REPLY TO RESPONDENT
PATTERSON'S PROPOSED FINDINGS OF FACT

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RECORD REFERENCES

References to the record are made using the following citation forms and abbreviations:

CCFF ¶ — Complaint Counsel’s Proposed Findings of Fact

CX# — Complaint Counsel Exhibit

RX# — Respondent Exhibit

CXD# — Complaint Counsel Demonstrative Exhibit

RXD# — Respondent Demonstrative Exhibit

Name of Witness, Tr. xx — Trial Testimony

CX/RX# (Name of Witness, Dep. at xx) — Deposition Testimony

CX/RX # (Name of Witness, IHT at xx) — Investigational Hearing Testimony

JSLF ¶ x — Joint Stipulations of Law and Fact

Compl. ¶ x — Complaint Counsel’s Complaint filed February 14, 2018

CC Opp. to MTD at x — Complaint Counsel’s Opposition to Patterson’s Motion to Dismiss

CC’s Pre-Trial Br. at x or Complaint Counsel’s Pre-Tr. Br. at x — Complaint Counsel’s
Pre-Trial Brief

Complaint Counsel’s Post-Tr. Br. at x — Complaint Counsel’s Post-Trial Brief

{ **bold** } - *In Camera* Material

COMPLAINT COUNSEL’S RESPONSE TO PATTERSON’S**PROPOSED FINDINGS OF FACT****I. Responses to Proposed Findings Regarding “The Parties and The Dental Distribution Industry”**

1. Patterson Dental (“Patterson”) has been in the dental business for more than 140 years. (CX5035 at 2). It is a distributor of dental supplies and equipment, a developer and manufacturer of software, and a provider of technical services and training. (Misiak, Tr. 1444; CX0314 (Guggenheim, IHT at 10); [REDACTED]).

Response to Proposed Finding No. 1

Complaint Counsel has no specific response.

2. Patterson’s parent company, Patterson Companies, trades on the NASDAQ under the symbol PDCO. (CX5033 at 10). It had gross profits of about \$1.19 billion on about \$3.6 billion in revenue in FY2013, \$1.2 billion gross profit on about \$4.06 billion in revenue in FY 2014, and about \$1.24 billion gross profit out of \$4.4 billion in revenue in FY2015. (CX5033 at 47). Patterson Dental’s sales were about \$2.4 billion in FY2013. (CX5031 at 4).

Response to Proposed Finding No. 2

Complaint Counsel has no specific response.

3. The U.S. dental products distribution industry is “highly competitive” and “extremely fragmented,” with at least 15 full-service distributors (including Respondents) operating on a regional level, hundreds of local distributors, mail-order and online companies, and some manufacturers sell directly to end users. (CX5033 at 18). Patterson’s largest, full-service competitor is Henry Schein. (CX5033 at 18). Benco is a smaller full-service competitor. (Cohen, Tr. 430).

Response to Proposed Finding No. 3

The Proposed Finding regarding competition in the dental distribution industry is vague and misleading, and is contrary to the weight of the evidence. Respondent Patterson provides no basis for this Proposed Finding with regard to competition in the dental products industry other than a single statement in Patterson’s 2015 10-K. Patterson has cited no testimony or other documentary evidence with any specific information to support its assertion about the

competitiveness of the industry. Its assertion that the industry is “extremely fragmented” is contrary to substantial evidence -- including the testimony of company executives -- that Patterson, Schein and Benco’s collective national market share is approximately 78-84%. CCFF ¶ 1458; *see also* CX2742 at 032 (Henry Schein 2011-2013 Strategic Plan: “Competition is concentrated in certain markets like the U.S. where top 3 distributors have a combined market share of over 80% in the dental supplies and equipment market.”). In addition, the record evidence demonstrates that Schein, Patterson and Benco are the only full-service distributors with a national footprint. CCFF ¶ 1449. The assertion that the industry is “highly fragmented” is also contrary to Respondent Patterson’s Proposed Finding No. 5 (“The dental supply industry is characterized by oligopoly”), as oligopoly, by definition, connotes a small number of market participants and limited competition.

With respect to Patterson’s Proposed Findings that “Patterson’s largest, full-service competitor is Henry Schein” and that “Benco is a smaller full-service competitor,” Complaint Counsel has no specific response.

4. Patterson Dental carries more than 100,000 individual SKUs for dental products, selling consumable products like x-ray film, impression materials, and gloves, along with dental equipment like x-ray machines, dental chairs, and diagnostic equipment. (CX5033 at 11, 14–15). Patterson Dental also offers a full range of related services, such as equipment installation, maintenance and repair, dental office design, and equipment financing. (CX5033 at 11).

Response to Proposed Finding No. 4

Complaint Counsel has no specific response.

5. The dental supply distribution industry is characterized by oligopoly. (RX2832 at 49; *see also* CX7101 at 12, 26).

Response to Proposed Finding No. 5

Complaint Counsel has no specific response.

II. Responses to Proposed Findings Regarding “Patterson Competed Tooth-And-Nail With Schein And Benco Before, During, And After The Alleged Conspiracy.”

a. Responses to Proposed Findings Regarding “Patterson’s Decentralized Salesforce Of Autonomous Reps Used Its Nearly Unfettered Pricing And Sales Discretion To Compete Every Day.”

6. Patterson’s value proposition is that it offers a full-service suite of products, services, and equipment at a competitive price point. (CX0316 (Misiak, IHT at 56–57 (“Q. . . . Why would you say Patterson customers choose Patterson over Schein or Benco? A. Because we’re best. Q. And why are you best? A. So I think some of it is dependent on the -- the rep and their ability to build a relationship and talk about the programs and the value of working with Patterson, and the -- yes, it’s somewhat about products, but they need products to run their dental practice. It’s about technical support and our ability to deliver technical support, keep the practice up and running. It’s our ability to install and service equipment and technology at a really high level and train staff. We do that really well. It is about our technology advisors and helping keep the staff efficient and running when they have staff turnover, and training and helping new folks. And it’s about helping them with their business and helping them grow. I think the -- the technology center and our support that we can do remotely and with our service techs is a big differentiator. And then it’s about being competitive with the reps and making sure that the reps are in front of the customers, delivering that value proposition to the customers. And with that, I think we have a good story.”)); CX8013 (Fruehauf, Dep. at 107 (“[T]he value-add strategy is you’re going to choose to partner with Patterson because we offer more value to the customer for the -- for a similar price point than our major competitors do. So, you know, could it be service, could it be technology implementation, could it be training, could it be business growth, marketing, what can we do in conjunction with a fair price to maintain you as a customer.”))).

Response to Proposed Finding No. 6

Complaint Counsel has no specific response.

7. Patterson has more than 70 local branches, which serve tens of thousands of dentists across the country in a purposefully decentralized structure. (CX5033 at 11; Misiak, Tr. 1300). Patterson employs more than 1,300 salespeople, service representatives, and equipment specialists, organized in geographic regions. (CX5033 at 11; Misiak, Tr. 1300

[REDACTED]

Misiak, Tr. 1395 (“A. As I said earlier, Patterson is very decentralized, and lots of branches have a great sense of entrepreneurial spirit and autonomy and will do business and make agreements with different customers, . . .”); Misiak, Tr. 1426–27 (“A. So in the branches there are -- were approximately 1200 salespeople in 2012, a thousand territory reps. The other 200 were specialists. These folks were calling on

the private practice day to day, building relationships, introducing loyalty, and helping private practice grow.”); Misiak, Tr. 1446 (“[W]hen you think about private practice in a community, a private dental practice, being decentralized shows up as a strength. You’ve got localized relationships. You’ve got local reps, a manager who understands the local market and can really connect with that private practice.”); Guggenheim, Tr. 1726 (“I think the philosophy of the organization going back to the early days was we always wanted to place all the resources and decisions as close as possible to the customer, so that meant that each branch -- the thinking is every market is a little different. Customers in San Diego aren’t the same as the customers in Fargo, and it’s important to have local relationships, which include management relationships and decision-making as best possible in each local market. So we encouraged that sort of entrepreneurial-ship in the branches, so allowed them to focus on, you know, serving customers, within a framework. I mean, they’re obviously, you know, expected to adhere to the ethics and the policies and procedures, operating responsibilities, but, you know, we certainly give them a lot of independent decision-making.”)).

Response to Proposed Finding No. 7

This Proposed Finding is misleading and contrary to evidence in the record. Indeed, the cited evidence contradicts Patterson having a “decentralized” structure, referring to central “policies and procedures [and] operating responsibilities” that the local branches must follow.

(Guggenheim, Tr. 1726). The evidence in the record moreover shows that, by mid-2013, Patterson was building out its Special Markets Division to service large, multi-office DSO, government and Community Health Center accounts so that many of its customers would be served by a single, *centralized* division rather than decentralized branches. (CCFF ¶¶ 589-592, 616-620; *see also* CX0158 (Patterson Special Markets announcement, explaining that high volume single-source contracts will “flow directly through” the Special Markets division); CCFF ¶ 595 (Patterson had the resources and infrastructure to work with buying groups both before it established its Special Markets division and after Special Markets was formed in 2013)).

8. Patterson’s business is “extremely high-touch,” and it has “personal relationship[s] with most all of [its] clients.” (Guggenheim, Tr. 1728).

Response to Proposed Finding No. 8

Complaint Counsel has no specific response.

9. Patterson’s territory representatives have broad discretion over which dentists they supply and what prices and discounts they offer. Patterson’s management did not dictate the prices that Patterson’s territory representatives offered to customers. (Guggenheim, Tr. 1543 (“[O]ur branches, which are our local offices, operate pretty independently and decentralized, and if there’s an opportunity to, you know, approach a market, they can make that choice independently.”); Misiak, Tr. 1450 (“Q. Did you, Mr. Misiak, did you dictate the prices that all your region managers and branch managers and territory reps sold your products at? A. No. We -- the organization has an incredible amount of autonomy at the rep level. The reps are changing prices each and every day to compete at the individual SKU level.”)).

Response to Proposed Finding No. 9

The Proposed Finding is irrelevant, incomplete, misleading and contrary to the weight of the evidence to the extent that it implies that, during the period of the conspiracy, Patterson territory representatives had discretion to offer discounts to buying groups. The overwhelming evidence shows that, within weeks of Guggenheim’s February 8, 2013 email communications with Cohen regarding not doing business with buying groups, Patterson began instructing sales representatives to “stay out” of buying groups. *See, e.g.*, CX0093 at 001 (Statement of Misiak: “stay out” of buying group); CX0106 at 001 (Statement of Rogan: “We don’t need GPO’s in the dental business”); CX3116 at 001 (Statement of Misiak: “My guidance has been to politely say no [to buying groups] and whether [sic] the storm with these.”); CX3168 at 001 (Statement of Rogan: “We don’t sell to buying groups. Let’s talk live.”); CX3010 at 001 (Statement of McFadden: “[A]s of now we are not working with GPO’s.”); CX3016 at 001 (Statement of McFadden: “I am sure we should pass on these [buying] groups....”); CX3004 at 001 (Statement of McFadden: “For now – I am electing to not participate with [buying groups] – we have said no to several already”); CX3045 at 001 (Statement of McFadden: “[D]oes he own all these offices—if not then he is a GPO—we don’t deal with GPOs.”). *See also* CCF ¶¶ 630-660. Because the territory representatives (sometimes also called sales representatives) were directed not to work with buying groups, the ability of these representatives to offer discounts to non-buying group customers is irrelevant.

10. One pricing tool Patterson used to compete in the marketplace and “gain market share from [its] competitors” during Complaint Counsel’s alleged conspiracy period was manual “overrides,” where territory reps changed the price of the products for their customers in Patterson’s computer system. (Misiak, Tr. 1471). Patterson territory reps could go in and change the price of items for their customers at the point of sale “with complete autonomy.” (Misiak, Tr. 1471). Patterson’s former President, David Misiak, estimated that territory reps changed the price of items for customers via manual “overrides” “many times in the day” and “thousands of times in a week.” (Misiak, Tr. 1471).

Response to Proposed Finding No. 10

The Proposed Finding is irrelevant, incomplete, and misleading to the extent that it implies that the Patterson territory representatives had discretion to compete for the business of buying groups by using “overrides” to change the prices of products. See Complaint Counsel’s Response to Patterson’s Proposed Finding No. 9 for a summary of the evidence showing that, during the conspiracy, Patterson directed its sales force not to do business with buying groups. Because the territory representatives were directed not to work with buying groups, the ability of these representatives to use manual price overrides with non-buying group customers is irrelevant to the question of whether Patterson rejected buying groups during the conspiracy period.

11. Patterson territory representatives could manually set “any price that they want” for any given item for a specific sale. [REDACTED]
[REDACTED]. Territory reps “have complete discretion to override any price at point of sale.” (Guggenheim, Tr. 1731); (Misiak, Tr. 1471–72) (“Q. So they can lower price anytime they want in a specific sale? A. Correct.”).

Response to Proposed Finding No. 11

The Proposed Finding is irrelevant, incomplete, and misleading to the extent that it implies that the Patterson territory representatives had discretion to compete for the business of buying groups by using “overrides” to change the prices of products. See Complaint Counsel’s Response to Patterson’s Proposed Finding No. 9 for a summary of the evidence showing that,

during the conspiracy, Patterson directed its sales force not to do business with buying groups. Because the territory representatives were directed not to work with buying groups, the ability of these representatives to use manual price overrides with non-buying group customers is irrelevant to the question of whether Patterson rejected buying groups during the conspiracy period.

12. All of Patterson's 750 sales representatives had "no limits" to their pricing autonomy—they could price "all the way down to cost" on any given sale. (Rogan, Tr. 3618}; *see also* (Rogan, Tr. 3617 ("Q. Among your 750 sales reps, who has the authority to do the price overrides? A. They all do. Q. How low can they go? A. They can go all the way down to cost."); (Misiak, Tr. 1451–52) (The reps have an amazing amount of autonomy to be aggressive and entrepreneurial and compete on price. Q. When you say "an amazing amount of autonomy," what sort of autonomy? Were there any limits? A. There were no limits. Q. So on a given sale, they could price at cost. A. They could."); (Guggenheim, Tr. 1729) (territory reps "can override any price in our system any day for any order so long as they stay above the wholesale cost of the product"))).

Response to Proposed Finding No. 12

The Proposed Finding is irrelevant, incomplete, and misleading to the extent that it implies that the Patterson territory representatives had discretion to compete for the business of buying groups. See Complaint Counsel's Response to Patterson's Proposed Finding No. 9 for a summary of the evidence showing that, during the conspiracy, Patterson directed its sales force not to do business with buying groups. Because the territory representatives were directed not to work with buying groups, the ability of these representatives to use manual price overrides with non-buying group customers is irrelevant to the question of whether Patterson rejected buying groups during the conspiracy period.

13. Patterson representatives did not need to ask for permission to override a price down to cost. (Guggenheim, Tr. 1729 ("So on a given sale like that they could change any price to anything as long as it's above the cost of the product. We give them full discretion all the way down to whatever the product costs. They can't go below the product cost, but they can override any price in our system any day for any order so long as they stay above the wholesale cost of

the product. Q. Do they have to ask your permission? A. Nope. Q. Do they have to ask Mr. Misiak's permission? A. No.”)).

Response to Proposed Finding No. 13

The Proposed Finding is irrelevant, incomplete, and misleading to the extent that it implies that the Patterson territory representatives had discretion to compete for the business of buying groups. See Complaint Counsel's Response to Patterson's Proposed Finding No. 9 for a summary of the evidence showing that, during the conspiracy, Patterson directed its sales force not to do business with buying groups. Because the territory representatives were directed not to work with buying groups, the ability of these representatives to use manual price overrides with non-buying group customers is irrelevant to the question of whether Patterson rejected buying groups during the conspiracy period.

14. There were thousands of price overrides per week. (Misiak, Tr. 1471). [REDACTED]

[REDACTED] There are “hundreds, probably thousands of overrides a day,” “lowering prices.” (Guggenheim, Tr. 1730).

Response to Proposed Finding No. 14

The Proposed Finding is irrelevant, incomplete, and misleading to the extent that it implies, in authorizing price overrides, the Patterson territory representatives had discretion to compete for the business of buying groups. See Complaint Counsel's Response to Patterson's Proposed Finding No. 9 for a summary of the evidence showing that, during the conspiracy, Patterson directed its sales force not to do business with buying groups. Because the territory representatives were directed not to work with buying groups, the ability of these representatives to use manual price overrides with non-buying group customers is irrelevant to the question of whether Patterson rejected buying groups during the conspiracy period.

15. During Complaint Counsel's alleged conspiracy period, Patterson's discounts increased both on an overall percentage basis and as a percentage of sales. (CX3241 at 2). Patterson's margins on merchandise also declined during Complaint Counsel's alleged conspiracy period. (CX3241 at 2).

Response to Proposed Finding No. 15

The Proposed Finding is irrelevant, lacks foundation, is misleading and is not supported by the document cited. First, the Proposed Finding is irrelevant as there is no indication whether the claimed discounts were for buying groups. Second, the Proposed Finding is misleading and not supported by the evidence, as CX3241 at 002 shows that the percentage of sundries sold at a discount increased over the period shown, but the document does not show the *amount* of the discount for the goods sold. If a greater percentage of goods are sold at a discount, but the discount is smaller, the prices paid by customers would not necessarily decrease – especially if Patterson's list prices had increased over time. Indeed, Rogan specifically testified that this was the case. (Rogan, Tr. 3668 (“Q. And the blue line on this chart indicates the customers or the percentage of customers paying catalog price, right? A. Correct, the percentage of customers paying catalog price, yes. Q. And that percentage, it appears from this document, decreased over time? A. That's correct. Q. But this chart doesn't show the actual prices paid by customers. A. No, it doesn't. Q. And Patterson's catalog prices have gone up over time. A. That's correct.”)). Citation to this document without the witness's testimony that contradicts the implication of the Proposed Finding is both incomplete and misleading. The Proposed Finding regarding Patterson's margins on merchandise is also unsupported by the evidence. Although CX3241 at 002 references margins in a heading, the chart itself does not provide any information whatsoever about margins or offer any basis for the statement asserted, and the witness who testified about this document did not mention margins at all. The witness, moreover, did not even prepare this document and provided no testimony regarding the source of the underlying

data. (Rogan, Tr. 3625-3627). Because there is no foundation in the document for the Proposed Finding, it should be disregarded.

16. Patterson representatives were also able to discount technical service, offer free support for software, and give clients additional loyalty program points, which were all decisions “made each and every day to compete.” [REDACTED]

Response to Proposed Finding No. 16

The Proposed Finding is irrelevant, incomplete, and misleading to the extent that it implies that the Patterson representatives had discretion to compete for the business of buying groups using any tools, including discounts on technical services, offers for free support for software, or additional loyalty points. On the contrary, Patterson sales representatives were instructed to stay out of doing business with buying groups. See Complaint Counsel’s Response to Patterson’s Proposed Finding No. 9 for a summary of the evidence showing that, during the conspiracy, Patterson directed its sales force not to do business with buying groups.

b. Responses to Proposed Findings Regarding “Price Class Change forms are used extensively to support Patterson’s daily competition with Benco and Schein.”

17. Patterson customers were classified in one of four price classes—91, 92, 93, and 94—corresponding to the purchasing volume committed to by the customer as well as the customer’s volume potential. (Misiak, Tr. 1450).

Response to Proposed Finding No. 17

The Proposed Finding is vague, misleading, and contrary to the weight of the evidence, in that Respondent Patterson’s documents show that customers were regularly placed into a price class with greater discounts regardless of “purchasing volume committed by the customer” or evidence of the customer’s “volume potential.” *See, e.g.,* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

18. Changes in these price classes were another tool available to Patterson territory representatives to “win business away” from competitors. (Guggenheim, Tr. 1734–35 (“Q. Is this a tool that you and others in the organization used, these lower prices in the price class change requests, to go win business away from your competitors? A. Absolutely.”)).

Response to Proposed Finding No. 18

The Proposed Finding is irrelevant, incomplete, and misleading to the extent that it implies that, during the conspiracy, Patterson territory representatives were allowed to use price class changes to compete for the business of buying groups. Indeed, Patterson’s former President admitted that price class change forms had nothing to do with buying groups. (Misiak, Tr. 1516 (“Q. Mr. Misiak, I just showed you all of the class price form change – change forms that you counsel showed you. Did any of them have anything to do with a buying group? A. Not to my knowledge.”)). Similarly, Patterson’s current VP and General Manager for North America testified that the price class changes requests he testified about had nothing to do with buying groups. (Rogan, Tr. 3669 (“Q. And none of those price class change request forms that your counsel showed you had anything to do with buying groups, right? A. No, I don’t believe so.”)).

Although Respondent Patterson has not pointed to a single price class change form in the record that indicates that this tool was ever used to compete for buying groups, there appears to be one price class change request involving competition for a buying group, but this one is from 2010 – long before Patterson entered into the agreement not to do business with buying groups. *See* RX0010 at 00001 (March 31, 2010 email from Patterson Sacramento Branch manager to Guggenheim: “Hi Paul, This is for a group of dentists who have gathered together to boost purchasing power.” (Attachment shows that the group consisted of five separate dental offices.))

The overwhelming evidence further shows that, Patterson instructed its sales representatives to “stay out” of buying groups, and that these instructions began within weeks of Guggenheim’s February 8, 2013 email communications with Cohen regarding not doing business with buying groups. *See, e.g.*, CX0093 at 001 (Misiak email: “stay out” of buying group); CX0106 at 001 (Rogan email: “We don’t need GPO’s in the dental business”); CX3116 at 001 (Misiak email: “My guidance has been to politely say no [to buying groups] and whether [sic] the storm with these.”); CX3168 at 001 (Rogan email: “We don’t sell to buying groups. Let’s talk live.”); CX3010 at 001 (McFadden email: “[A]s of now we are not working with GPO’s.”); CX3016 at 001 (McFadden email: “I am sure we should pass on these [buying] groups....”); CX3004 at 001 (McFadden email: “For now – I am electing to not participate with [buying groups] – we have said no to several already”); CX3045 at 001 (McFadden email: “[D]oes he own all these offices—if not then he is a GPO—we don’t deal with GPOs.”). *See also* CCFF ¶¶ 630-660.

19. If a Patterson territory representative wants to provide a customer with a blanket discount on all future purchases, he can fill out a short “price class change form” explaining why and how much of a blanket discount is necessary and requesting branch and regional management approval. (Misiak, Tr. 1452–53 (“The other form of discount is a price class change, which you’ve referenced. And that’s where the rep would submit a form or send an e-mail to get a standard percent off of everything the customer bought from them, so to say Dr. Jones gets 10 percent off of everything, not 10 percent off of the item, because the rep made a manual adjustment in their software. Q. So it’s beyond just the specific purchase order. A. Correct. Q. And it’s just going forward that dentists will get a discount on all their purchases. A. Going forward.”); Misiak, Tr. 1589–90 (“A. Yeah. We’ve -- so our market is very price-competitive, and we get thousands of price class change forms that come in. Essentially what happens is a sales rep, which we have today a hundred or so, goes into a dental office, works with a customer. Oftentimes we have a competitor that comes in there, and so they’ll want to make a modification to pricing to be competitive. It might be to win business. Oftentimes it’s to defend business. And these price class change forms come in where reps generally say, I want to offer additional discount to this customer. And they’ll define what price class they want to have the customer on and then how much additional discount they want to do off that price class. Sometimes it’s individual product discounts. Discounts can vary quite a bit on how they want to discount to the office. We get tens of thousands of these over time.”)).

Response to Proposed Finding No. 19

The Proposed Finding is irrelevant, incomplete, and misleading to the extent that it implies that, during the conspiracy, Patterson territory representatives were allowed to use price class changes to compete for the business of buying groups. See Complaint Counsel's Response to Patterson's Proposed Finding No. 18 for a summary of the evidence that Patterson directed its sales force not to do business with buying groups during the conspiracy. In addition, the Proposed Finding is misleading because the citation to Misiak Tr. 1589-90 is, in fact, to Guggenheim's testimony at 1589-90, and Guggenheim was responding to a different, question about the use of price class change forms.

20. These blanket discounts "happen automatically," allowing the customer to "place the order" instead of the sales rep manually going in and changing the price. (Guggenheim, Tr. 1731-32 ("So the reps, you know, while they have complete discretion to override any price at point of sale, the -- today, more and more customers want to do their own ordering, and so a price class change is a function where we go in and we set the pricing within our system so that change in price will happen automatically, and therefore a customer could place an order.")).

Response to Proposed Finding No. 20

Complaint Counsel has no specific response.

21. Once a price class change request is approved and implemented, the discounted pricing stays in place "at least for the next year." (Guggenheim, Tr. 1732).

Response to Proposed Finding No. 21

The Proposed Finding is irrelevant, incomplete, and misleading to the extent that it implies that, during the conspiracy, Patterson territory representatives were allowed to use price class changes to compete for the business of buying groups. See Complaint Counsel's Response to Patterson's Proposed Finding No. 18 for a summary of the evidence that Patterson directed its sales force not to do business with buying groups during the conspiracy.

22. Price class changes are typically *on top of* the manual overrides that sales representatives can do for individual products. (Guggenheim, Tr. 1747, 1750).

Response to Proposed Finding No. 22

The Proposed Finding is vague and misleading, and is not supported by the testimony cited. The witness's testimony (Guggenheim, Tr. 1750) – which is ambiguous at best – states that the *number* of price class changes in a year is “in addition to” the number of overrides, not that customers receive dual discounts, first in the form of a price class change and then in the form of an override. There is no testimony to support the statement as framed in this Proposed Finding. Patterson's other citation (Guggenheim, Tr. 1747) is about the frequency with which managers saw price class change forms, and makes no mention of manual overrides. It provides no support whatsoever for the Proposed Finding. The Proposed Finding is also irrelevant to the extent that it implies that, during the conspiracy, Patterson territory representatives were allowed to use price class changes to compete for the business of buying groups. See Complaint Counsel's Response to Patterson's Proposed Finding No. 18 for a summary of the evidence that Patterson directed its sales force not to do business with buying groups during the conspiracy.

23. Patterson territory representatives frequently requested and received blanket discounts for their customers. (Rogan, Tr. 3621 (“how common, in your experience, were these blanket requests by your 750 sales folks to lower prices for a given customer? Was that a rare event or a common event? A. It's a constant event.”); *see also* Guggenheim, Tr. 1747 (“Now, Mr. Guggenheim, how often did you and your region managers see these price class change requests by your territory reps to lower prices? A. Oh, very often. Hundreds of times. These come up all the time. Constantly. Q. More than once a day? A. What's that? Q. More than once a day? A. Oh, yeah. A lot more than once a day.”))).

Response to Proposed Finding No. 23

The Proposed Finding is irrelevant, incomplete, and misleading to the extent that it implies that, during the conspiracy, Patterson territory representatives were allowed to use price class changes or other “blanket discounts” to compete for the business of buying groups. See Complaint Counsel's Response to Patterson's Proposed Finding No. 18 for a summary of the evidence that Patterson directed its sales force not to do business with buying groups.

24. For instance, on April 28, 2014, Patterson’s Tim Rogan received an email from his assistant, Jenny McNamara, asking for help reviewing [REDACTED]. [REDACTED].

Response to Proposed Finding No. 24

The Proposed Finding is misleading, irrelevant, and incomplete to the extent that it implies that, during the conspiracy, Patterson territory representatives were allowed to use price class changes to compete for the business of buying groups. The Proposed Finding is also misleading and incomplete to the extent that it suggests that receiving 500 requests in one day was a normal or typical event. RX0568 shows that April 2014 was an aberrational month (with a total of 1,480 “price class change and discount exceptions” received in the whole month). By contrast, in the previous and subsequent months, only 594 and 554 requests, respectively, were received for the *whole month* – not a single day. Similarly, February 2014 shows a total of 372 requests for the whole month – not for a single day. Accordingly, the implication of the Proposed Finding that Patterson regularly processed a high volume of requests each day is typical is misleading. The Proposed Finding is also irrelevant to the extent that it implies that, during the conspiracy, Patterson territory representatives were allowed to use price class changes to compete for the business of buying groups. See Complaint Counsel’s Response to Patterson’s Proposed Finding No. 18 for a summary of the evidence that Patterson directed its sales force not to do business with buying groups during the conspiracy.

25. In April 2014—the middle of the alleged conspiracy period (Compl. ¶ 36 (alleging Patterson joined the conspiracy in February 2013); Kahn, Tr. 19 (alleging the conspiracy ended in April 2015; *see also* RXD0204 at 1 (“Patterson Joined The Alleged Conspiracy in February 2013”); RXD0205 at 1 (“The Alleged Conspiracy Ended in April 2015”))—Patterson representatives submitted 1,480 price class change requests. (RX0568 at 2).

Response to Proposed Finding No. 25

The Proposed Finding is irrelevant, misleading, incomplete, and relies on improper evidence. It is irrelevant, misleading and incomplete to the extent that it implies that, during the conspiracy, Patterson territory representatives were allowed to use price class changes to compete for the business of buying groups. See Complaint Counsel's Response to Patterson's Proposed Finding No. 18 for a summary of the evidence that Patterson directed its sales force not to do business with buying groups.

The Proposed Finding is further irrelevant, misleading and incomplete to the extent that it suggests that the number of price class change requests submitted in April 2014 was typical. As explained in the response to Patterson's Proposed Finding No. 24, substantial record evidence shows that April 2014 was not typical of the number of forms submitted in other months, or throughout the year.

In addition, the Proposed Finding misstates the record regarding the time of the end of the conspiracy. The record shows that Complaint Counsel has stated that the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015, because the conspiracy became difficult to maintain once Benco was required to log all communications with its competitors. Complaint Counsel has never taken the position that Benco's entry into a settlement with the Texas Attorney General created a precise "end" date. (Tr., 19 (Complaint Counsel's Opening Statement); *see also* Complaint Counsel's Post-Tr. Br. at 37-38).

Finally, to the extent that the Proposed Finding relies on demonstratives RXD0204 and RXD0205 as support for the finding, that reliance contravenes the Court's February 21, 2019

Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence.

26. During the 2014 calendar year, Patterson representatives submitted roughly 8,000 price class change requests. (Guggenheim, Tr. 1749–50 (“Q. And then it says “Number of Requests. And is this Mr. Lepley’s tally -- A. It is. Q. -- that he sent you of all the requests to lower prices that your sales reps sent up through the chain of command? A. It is. Q. Hundreds every month? A. Correct. Q. A couple months here, April of 2014, it’s almost 1,500 across the country; is that right? A. That’s correct. Q. So if we just do a little back-of-the-envelope math, so January and February of 2014, it looks like roughly a thousand in those two months, add in March, 1,500, does that look about right? A. Yeah. Q. And then if we add in April, we’re up to 3,000 in the first four months of 2014, these lower price requests? A. Right. Q. And we add, May, June, July, August, looks like roughly 8,000 requests by your sales team to lower prices in this formal price class change request approval process; is that right? A. It is. 8,000 in what period of time? Q. 2014.”); *see also* RX0568 at 2).

Response to Proposed Finding No. 26

The Proposed Finding is irrelevant, misleading, and incomplete to the extent that it implies that, during the conspiracy, Patterson territory representatives were allowed to use price class changes to compete for the business of buying groups. See Complaint Counsel’s Response to Patterson’s Proposed Finding No. 18 for a summary of the evidence that Patterson repeatedly directed its sales force not to do business with buying groups.

The Proposed Finding is also misleading to the extent that Respondent Patterson’s statements about the number of price class change request in 2014 is intended to suggest that this is a significant number of requests. By its own admission, Patterson is a very large company. See Patterson’s Proposed Finding of Fact No. 2 (Patterson Dental’s FY2013 sales were about \$2.4 billion.) Patterson’s former president and CEO, Paul Guggenheim testified that, at the time he was president, Patterson had over 800 sales (territory) representatives (Guggenheim, Tr. 1536-1537 (testifying that Patterson had 1,000 sales representatives, with approximately 120-140 of those in Canada)). If 8,000 requests were submitted by 800 sales representatives annually, the

average number of requests for each sales representative is 10 per year – or less than one per month. It is misleading to suggest that this is a significant number. Moreover, because sales representatives could not compete for the business of buying groups by submitting a price class change request, even a larger number of requests per sales representative has no relevance.

27. During the 2015 calendar year, Patterson representatives again submitted “a little more than 8,000” requests. (Guggenheim, Tr. 1750 (“Q. And then if we look at 2015, you got 1,500 in January roughly, 1,200 in March, 1,200 in April. It’s about another 8,000 requests and approvals in 2015 to lower prices, too. A. Yeah. It looks a little more than 8,000, but yeah. Q. Okay. And this is on top of these overrides or individual purchase order lower prices; is that right? A. Correct.”); *see also* RX0568 at 2).

Response to Proposed Finding No. 27

The Proposed Finding is irrelevant, misleading, and incomplete to the extent that it implies that, during the conspiracy, Patterson territory representatives were allowed to use price class changes to compete for the business of buying groups. See Complaint Counsel’s Response to Patterson’s Proposed Finding No. 18 for a summary of the evidence that Patterson directed its sales force not to do business with buying groups. It is further misleading because the number of requests relies on counsel testimony about the number of requests. The fact that the witness agreed to an incorrect calculation does not make that calculation correct. When the addition suggested by counsel is performed accurately, the total number of requests for 2015 is 7830, or about nine requests per sales representative each year. See Complaint Counsel’s Response to Patterson’s Proposed Finding No. 26 regarding number of Patterson sales representatives. Proposed Finding No. 27 is misleading to the extent that Respondent Patterson’s statements about the number of price class change requests in 2015 is intended to suggest that this is a significant number of requests. Moreover, because sales representatives could not compete for the business of buying groups by submitting a price class change request, even a larger number of requests per sales representative has no relevance.

28. In January 2015—almost two years after Patterson allegedly joined the conspiracy (Compl. ¶ 36 (alleging Patterson joined the conspiracy in February 2013)—Patterson representatives submitted 1,482 price class change requests. (RX0568 at 2).

Response to Proposed Finding No. 28

The Proposed Finding is irrelevant, misleading, and incomplete to the extent that it implies that, during the conspiracy, Patterson territory representatives were allowed to use price class changes to compete for the business of buying groups. See Complaint Counsel’s Response to Patterson’s Proposed Finding No. 18 for a summary of the evidence that Patterson directed its sales force not to do business with buying groups during the conspiracy. The Proposed Finding is further irrelevant, misleading and incomplete to the extent that it suggests that the number of price class change requests submitted in January 2015 was typical. According to Respondent Patterson’s source, RX0568 at 002, the numbers of requests varied from a low of 145 in December 2015, to a high of 1,482 in January 2015. Respondents have offered no documentary evidence or testimonial explanation for the monthly variance, and selecting months with higher volume to suggest they are typical (and therefore have some significance) is misleading.

29. Likewise, in April 2015—the month the alleged conspiracy supposedly ended (Kahn, Tr. 19; *see also* RXD0205 at 1 (“The Alleged Conspiracy Ended in April 2015”))—Patterson representatives submitted 1,213 price class change requests. (RX0568 at 2).

Response to Proposed Finding No. 29

The Proposed Finding is irrelevant, misleading, incomplete, and relies on inadmissible evidence, and misstates evidence in the record. It is irrelevant, misleading and incomplete to the extent it implies that, during the conspiracy, Patterson territory representatives were allowed to use price class changes to compete for the business of buying groups. See Complaint Counsel’s Response to Patterson’s Proposed Finding No. 18 for a summary of the evidence that Patterson directed its sales force not to do business with buying groups during the conspiracy. The Proposed Finding

is further irrelevant, misleading and incomplete to the extent that it suggests that the number of price class change requests submitted in one particular month that is significantly higher than many other months in 2015 was typical. As described in the responses to Complaint Counsel's Responses to Proposed Findings Nos. 25 and 28, Respondent Patterson has offered no documentary or testimonial explanation for the monthly variance. Rather, the fact that it has selected months with higher volumes is misleading.

The Proposed Finding also misstates the record regarding the time of the end of the conspiracy. The record shows that Complaint Counsel has stated that the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015, because the conspiracy became difficult to maintain once Benco was required to log all communications with its competitors. Complaint Counsel has never taken the position that Benco's entry into a settlement with the Texas Attorney General created a precise "end" date. (Tr., 19 (Complaint Counsel's Opening Statement); *see also* Complaint Counsel's Post-Tr. Br. at 37-38).

In addition, to the extent that the Proposed Finding relies on a demonstrative (RXD0205) as support for the finding, that reliance contravenes the Court's February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence.

30. There are 54 or so boxes of price class change forms "full of thousands of forms of price class changes" admitted into evidence in this case. (Misiak, Tr. 1475; 1484; [REDACTED]; *see also* Misiak Tr. 1473 ("JUDGE CHAPPELL: "That would fill would you say the Marianas Trench?"); RXD0202 at 1-3 (picture of David Misiak with the 54 boxes of price class change forms)).

Response to Proposed Finding No. 30

The Proposed Finding is irrelevant and misleading, and relies upon evidence that is unreliable or improper. It is irrelevant and misleading to the extent that it implies that, during the conspiracy,

Patterson territory representatives were allowed to use price class changes to compete for the business of buying groups. See Complaint Counsel’s Response to Patterson’s Proposed Finding No. 18 for a summary of the evidence that Patterson directed its sales force not to do business with buying groups. Indeed, the witness who provided the testimony on which Patterson relies in support of this Proposed Finding testified repeatedly that the price class change forms did not show a discount from Patterson to a buying group. (Misiak, Tr. 1512 [REDACTED]; Misiak, Tr. 1512 [REDACTED]; Misiak, Tr. 1513 [REDACTED]; Misiak, Tr. 1514 [REDACTED]; Misiak, Tr. 1514 [REDACTED]; Misiak, Tr. 1514 [REDACTED]; Misiak, Tr. 1515 (re: RX0434); Misiak, Tr. 1515 (re: RX0231); Misiak, Tr. 1515 (re: RX0219); Misiak, Tr. 1516 (re: RX0061); Misiak, Tr. 1516 (“Q. Mr. Misiak, I just showed you all of the [price class change] forms that your counsel showed you. Did any of them have anything to do with a buying group? A. Not to my knowledge.”)).

In addition, to the extent that the Proposed Finding relies on a demonstrative (RXD0202) as evidence of the number of pages contained in [REDACTED] or as other substantive support for the finding, that reliance contravenes the Court’s February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence. The use of this demonstrative is particularly egregious because the witness specifically admitted that he was testifying about what was contained in the pictured boxes although he had not seen all of the documents about which he was testifying. (Misiak, Tr. 1475 (“I have not seen them all, but I’ve seen many of them.”) The witness was only able to provide vague testimony that the boxes contained “binders.”

Finally, Patterson’s suggestion that the underlying composite document (which was purportedly printed and placed in the binders and boxes) contained separate or unique “price class change forms” is not only misleading, but is demonstrably false. [REDACTED] is replete with blank pages and duplicates. *See, e.g.,* [REDACTED]
[REDACTED]
[REDACTED]. Indeed, over 11,000 pages of the document are cover sheets that contain only the words “Native File Placeholder.” Although [REDACTED] – a composite document made up of over 11,000 separate documents -- has been admitted into evidence, this Proposed Finding, asks the Court to accept Patterson’s characterization of the document. It should be disregarded.

31. Patterson’s branches and regional management almost always approve the blanket discounts sought in the price class change forms. (Misiak, Tr. 1489–90 (“Did you ever -- in your time as vice president of sales, do you remember ever disapproving one of these thousands and thousands of requests for discounts? A. I do not recall not approving a discount request. Q. Why did you -- why did you approve all these discount requests? A. Because we wanted to compete and we wanted to win the business. Price is an element of competing.”); (Guggenheim, Tr. 1747 (“I don’t recall ever disapproving them. . . . We want to get after the business, so I’m not aware of anyone disapproving these.”); (McFadden, Tr. 2759 (“JUDGE CHAPPELL: Before you get there, did you get those requests and did you ever deny one? THE WITNESS: I approved probably 99.5 percent of them. Very rarely would I question one, but I would question them. But most of the time, we were in such a competitive situation that the explanation would come up, I need to do this because of XYZ, because Benco or Atlanta Dental are doing this and I need to compete, so I allowed them to do it. JUDGE CHAPPELL: So you deferred or trusted your people in the field. THE WITNESS: I did.”)). McFadden thought, when he approved [REDACTED], “it didn’t take long to scan that and say, wow, this makes business sense, this is all incremental business. And every dollar that, you know, we could take from our competitor was a good dollar, so that’s why I approved it so quickly.” (McFadden, Tr. 2768).

Response to Proposed Finding No. 31

The Proposed Finding is irrelevant, incomplete, and misleading to the extent that it implies that, during the conspiracy, Patterson territory representatives were allowed to use price class changes to compete for the business of buying groups. *See* Complaint Counsel’s Response to Patterson’s

Proposed Finding No. 18 for a summary of the evidence that Patterson directed its sales force not to do business with buying groups. Moreover, the testimony of McFadden cited in support of this Proposed Finding that Patterson had an interest in securing incremental business from its competitors supports Complaint Counsel's position that Respondents acted against their own self-interest in refusing to deal with buying groups made up of customers. (McFadden, Tr. 2768 ("[I]t didn't take long to scan that and say, wow, this makes business sense, this is all incremental business. And every dollar that, you know, we could take from our competitor was a good dollar . . ."). *See* CCFF ¶¶ 1255-1296.

32. These discount requests were often approved within minutes. *See, e.g.,*

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

Response to Proposed Finding No. 32

The Proposed Finding is irrelevant, incomplete, and misleading to the extent that it implies that, during the conspiracy, Patterson territory representatives were allowed to use price class changes to compete for the business of buying groups. *See* Complaint Counsel's Response to Patterson's Proposed Finding No. 18 for a summary of the evidence that Patterson directed its sales force not to do business with buying groups during the conspiracy. This Proposed Finding is also misleading to the extent that it implies there is any significance whatsoever to the speed at which these requests are approved (or denied). Finally, this Proposed Finding is not supported by the evidence in that, even in the documents Patterson cites, many of the requests were *not* approved within minutes. *See, e.g.,* [REDACTED]

[REDACTED]; [REDACTED]

[REDACTED]

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- a. On February 15, 2013, Mark Webb, Patterson’s Southwest Region Manager, approved a price class change request for an account that Patterson “wrestled back from Schein.” (RX0060 at 1).
- b. On February 18, 2013, Dan Reinhardt, Patterson’s Mountain West Region Manager, approved a price class change request for an account Patterson was “competing with Schein to win.” (RX0061 at 1).
- c. On February 27, 2013, Reinhardt approved a request for an account “switch[ing] all her business” from Benco. (RX0219 at 1).
- d. On April 24, 2013, Neal McFadden approved a request for an account that was “currently using Schein exclusively” but Patterson “match[ed] Schein’s discount to gain a share of the business.” (RX0081 at 1).
- e. On May 28, 2013, McFadden approved a request asking for “an aggressive discount in an attempt to get their business” from Schein and Benco. (RX0089 at 1).
- f. On June 5, 2013, Clint Edens, Patterson’s South Central Region Manager, approved a request for an account that was “a new win from Schein.” (RX0091 at 1).
- g. On June 19, 2013, Anthony Fruehauf, Patterson’s then-Regional Manager for the Southeastern United States, approved a request for an account it was competing with Benco over. The representative wrote, “*I just want to kick . . . Benco in the mouth with and finally kick them out the door.*” (RX0094 at 1 (emphasis added)).
- h. On September 17, 2013, Dick Ruder, Patterson’s Ohio Valley Region Manager, approved a request for a sales representative who “flipped [a] 30-year Schein customer.” (RX0121 at 1).
- i. On October 16, 2013, Anthony Fruehauf approved a request for a territory representative who was “battling Benco” over an account. (RX0134 at 1).
- j. On January 16, 2014, Dan Reinhardt approved a request for an account who was “going to switch 100% to Schein, but we won.” (RX0204 at 1).
- k. On February 12, 2014, Anthony Fruehauf approved a request where the territory representative had won over a Schein customer. (RX0214 at 1). The representative wrote, “Schein Takeaway.” (RX0214 at 1).
- l. On February 28, 2014, Dick Ruder approved a “price class change to take [an account] from Schein.” (RX0220 at 1).
- m. On April 7, 2014, Clint Edens approved a request for a “former Schein customer, converted to 100% Patterson.” (RX0231 at 1).
- n. On April 16, 2014, Dan Reinhardt approved a request for an “\$80,000-a-year Schein customer that converted to Patterson.” (Misiak, Tr. 1487; *see also* (RX0246 at 1)).

- o. On April 24, 2014, Clint Edens approved a request to “prevent Dr. Roddy from switching to Benco and to grow his Patterson business.” (RX0251 at 1).
- p. On April 30, 2014, Rick Cacciatore, Patterson’s North Central Region Manager, approved a request “to price compete with Benco and gain more of [the account’s] business.” (RX0254 at 1).
- q. On June 2, 2014, Dave Misiak approved a request for two new accounts that [REDACTED]; *see also* (Misiak, Tr. 1480)).
- r. Given the sheer volume of price class change requests, Misiak’s assistant, Bobbi Galloway, had Misiak’s authorization to approve price class change forms herself. (Misiak, Tr. 1482).
- s. For instance, on June 13, 2014, Galloway approved an “aggressive” discount for an account with four locations “ALL take from Schein.” (RX0279 at 1).
- t. On August 26, 2014, Misiak approved a price class change request for an account Patterson wanted back from Schein. [REDACTED]
[REDACTED]; Misiak, Tr. 1481 (“So this is the Sacramento branch manager sending a price class change for business that we had, but Schein had taken it, and we were going to get it back if we could offer this discount, so it was approved.”)).
- u. Price class change requests were even approved in the middle of the night. For example, one approval was time-stamped 1:06 a.m. (RX0737-02824). Misiak granted this late-night approval because he “wanted to keep the business moving.” (Misiak, Tr. 1481–82).
- v. On August 28, 2014, Patterson’s Clint Edens approved a request for a “customer switching business from Schein to Patterson.” (RX0335 at 1).
- w. On October 8, 2014, Edens approved a request for a “multi-location practice won from Schein.” (RX0362 at 1).
- x. On December 5, 2014, Edens approved a request for a “merchandise clinic converted from Schein.” (RX0386 at 1).
- y. On December 18, 2014, Fruehauf approved a price class change and discount request that stated, “Gunna try and steal this one from my friend Greg Jones at Benco!” (RX0399 at 1).
- z. On February 3, 2015, Edens approved a request for “a new Advantage account pickup from Schein.” (RX0414 at 1).
- aa. On March 2, 2015, Reinhardt approved a request for a Benco account where the sales representative had written, “trying to move this quickly (as usual) as not to give Benco the chance to rebut[] if they get wind of the change.” (RX0421 at 1).

Response to Proposed Finding No. 33

The Proposed Finding (including its 27 subparts) is irrelevant, incomplete, and misleading to the extent that it implies that, during the conspiracy, Patterson used price class changes to compete for the business of buying groups. Testimony in the record is directly to the contrary.

Patterson's former President admitted that price class change forms had nothing to do with buying groups. (Misiak, Tr. 1516 ("Q. Mr. Misiak, I just showed you all of the class price form change – change forms that you counsel showed you. Did any of them have anything to do with a buying group? A. Not to my knowledge.")). Similarly, Patterson's current VP and General Manager for North America testified that none of the price class changes requests he was shown had anything to do with buying groups. (Rogan, Tr. 3669 ("Q. And none of those price class change request forms that your counsel showed you had anything to do with buying groups, right? A. No, I don't believe so.")). *See also* Complaint Counsel's Response to Patterson's Proposed Finding No. 18 for a summary of evidence that Patterson directed its sales force not to do business with buying groups during the conspiracy. Not a single example offered by Patterson in support of this Finding offers any evidence about its actions with respect to working with buying groups. Patterson Proposed Finding No. 33(r), moreover, is not even an example of a price class change, but merely addresses an internal staffing issue regarding who is permitted to authorize price class changes. It provides no support whatsoever for the Proposed Finding.

34. All the above price class change requests referencing competition with Schein and Benco were made and approved during the period from February 2013 to April 2015 in which Patterson is alleged to have participated in a conspiracy with Schein and Benco. (Compl. ¶ 36; Kahn, Tr. 19; *see also* RXD0204 at 1 ("Patterson Joined The Alleged Conspiracy in February 2013"); RXD0205 at 1 ("The Alleged Conspiracy Ended in April 2015")).

Response to Proposed Finding No. 34

The Proposed Finding misstates the record regarding the time of the end of the conspiracy. The record shows that Complaint Counsel's has stated that the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015, because the

conspiracy became difficult to maintain once Benco was required to log all communications with its competitors. Complaint Counsel has never taken the position that the entry by Benco into a settlement with the Texas Attorney General created a precise “end” date. (Tr., 19 (Complaint Counsel’s Opening Statement); *see also* Complaint Counsel’s Post-Tr. Br. at 37-38).

In addition, to the extent that the Proposed Finding relies on demonstratives RXD0204 and RXD0205 as support for the finding, that reliance contravenes the Court’s February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence. Complaint Counsel has no specific response with respect to the accuracy of the dates of the price class change forms as described in this Proposed Finding.

35. Complaint Counsel has argued there are no price class change forms showing Patterson competing with Schein and Benco over buying groups. (CC Opp. to MTD at 20).

Response to Proposed Finding No. 35

Complaint Counsel has no specific response.

36. Dental buying groups do not actually “buy” dental supplies (or anything at all); the customers are the buying group’s members. (Cohen, Tr. 684 (“Q. So in the Kois buyers club, who’s the customer? A. The customer is the individual dentists. The members of the Tribe.”); Sullivan, Tr. 4105 (“A. We partner with buying groups. Our customer is the dentist. Our customer is their member. I don’t view the group as our customer.”); Sullivan, Tr. 4330–31 (“Q. None of your customers are actually buying groups, right? A. Correct. As stated earlier, that we view the groups as partners. The customer is the dentist.”); Sullivan, Tr. 4328–29 (“[B]uying groups don’t actually buy dental supplies, do they? A. They do not. Q. It’s kind of a misnomer to call them buying groups, right? A. I hadn’t thought of it that way. It’s a -- that’s correct. Q. They kind of negotiate, but the member dentists are all independently owned, right? A. That’s correct. Q. So they’re the ones who actually buy, the private practice dentists. Is that fair? A. That’s fair.”)).

Response to Proposed Finding No. 36

Complaint Counsel has no specific response.

37. Patterson competed fiercely for individual members of buying groups. Examples include:

- a. August 29, 2013: [REDACTED]
- b. December 1, 2014: [REDACTED]
- c. August 1, 2015: [REDACTED]
- d. January 14, 2016: [REDACTED]
- e. January 22, 2016: [REDACTED]
- f. March 4, 2106: [REDACTED]
- g. March 15, 2016: [REDACTED]
- h. May 4, 2016: [REDACTED]
- i. May 11, 2016: [REDACTED]

Response to Proposed Finding No. 37

The Proposed Finding is irrelevant, incomplete and misleading to the extent that it implies that Patterson competed to do business with buying groups at any time during the conspiracy period. On the contrary, each of these Proposed Findings show that Patterson's actions in refusing to work with buying groups was contrary to its self-interest because Patterson lost customers to buying groups. Most of the support for the Proposed Finding is also misleading because they are citations to post-conspiracy documents (*e.g.*, Proposed Findings 37 (c)-(i), which are from August 2015 through May 2016) to suggest that they are relevant to Patterson's actions during the conspiracy. Rather than support that claim, these documents suggest that buying groups operating successfully after the conspiracy were able to infuse greater competition into the dental

supply industry leading to competitive pricing responses. *See, e.g.,* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; *see also* CCFF

¶¶ 1359-1363 (describing Patterson losses due to customers switching to buying groups).

38. From July 2008 to May 2015, Patterson’s sales at list price fell from 77% to 54%. (CX3241 at 2; Rogan, Tr. 3628).

Response to Proposed Finding No. 38

The Proposed Finding is irrelevant, lacks foundation, is misleading and is not supported by the document cited. To the extent that this Proposed Finding implies that sales at list prices have any significance to Patterson’s willingness to work with buying groups, the Proposed Finding is misleading. The Proposed Finding is also misleading to the extent that it implies that the number of sales at “list price” has any relevance to the prices paid by customers or to competitive pricing at all. As discussed in Complaint Counsel’s Response to Patterson’s Proposed Finding No. 15 (which also relies on CX3241), the percentage of sales at list price is meaningless if the list price itself was increasing over time. Indeed, Rogan specifically testified that this was the case. (Rogan, Tr. 3668 (“Q. And the blue line on this chart indicates the customers or the percentage of customers paying catalog price, right? A. Correct, the percentage of customers paying catalog price, yes. Q. And that percentage, it appears from this document, decreased over time? A. That’s correct. Q. But this chart doesn’t show the actual prices paid by customers. A. No, it doesn’t. Q. And Patterson’s catalog prices have gone up over time. A. That’s correct.”)). Citation to this document without the witness’s full testimony, including testimony that contradicts the implication of the Proposed Finding, is misleading. The document

itself also lacks foundation, as the witness admitted that he did not prepare this document. (Rogan, Tr. 3625-3627). The witness who prepared the document did not testify at trial.

39. From July 2008 to May 2015, Patterson's sales that were discounted rose from 8% to 28%. (CX3241 at 2; Rogan, Tr. 3626-27).

Response to Proposed Finding No. 39

This Proposed Finding essentially restates Patterson's Proposed Finding No. 15, but provides more specific numbers regarding the percentage of sales that were discounted. It is irrelevant, lacks foundation, is misleading and not supported by the document on which it relies for the reasons set forth in Complaint Counsel's Response to Patterson's Proposed Finding No. 15. It is further misleading because it fails to include the fact that list prices increased over this time period, so says nothing about actual prices. (CX3241 at 002; Rogan, Tr. 3668 ("Q. And that percentage, it appears from this document, decreased over time? A. That's correct. Q. But this chart doesn't show the actual prices paid by customers. A. No, it doesn't. Q. And Patterson's catalog prices have gone up over time. A. That's correct."))

c. Responses to Proposed Findings Regarding "The Record Contains Voluminous, Unrebutted Testimony of Fierce, Brutal, Day-In And Day-Out Competition Between Patterson, Schein And Benco."

40. There was extensive testimony that the dental industry is very competitive. (*See, e.g.*, McFadden, Tr. 2781 ("You could place every dentist in the United States in our largest stadium, and then you could surround it with 2,000-plus sales reps all fighting for a limited amount of dollars. It's a very competitive industry. And these reps start every day with no money, they eat what they kill, so as their leader, I wanted to support them and keep them in a good frame. And I loved the fact that they were aggressive and going after incremental business.")); [REDACTED]

[REDACTED]; Misiak, Tr. 1396 ("And it's a highly competitive market in which they're, you know, doing this business and trying to take accounts back and forth and competing on price each and every day to the tune of changing price at the SKU level probably thousands of times a day, tens of thousands of times over the whole course of the portfolio over the career with dentists."); CX8017 (Rogan, Dep. at 26 ("I mean, this is a very -- very tough market to compete in, and so we're always trying to grind our way to gain market share")); [REDACTED]

Response to Proposed Finding No. 40

The Proposed Finding is irrelevant, incomplete and contrary to the weight of the evidence to the extent that it implies that Schein, Patterson and Benco competed for the buying group customer segment during the conspiracy period. The weight of the evidence shows that Schein, Patterson and Benco did not compete for buying groups and rejected buying groups during the conspiracy. The weight of the evidence further establishes that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, the Big Three rejected buying groups. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198). The record is replete with examples of buying groups that Schein categorically rejected because it had a policy not to do business with buying groups during the conspiracy period. (CCFF ¶¶ 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Tr. Br. at Attachment C). The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 630-653, 657). Benco had a long-standing no buying group policy, and followed that throughout the conspiracy period. CCFF ¶¶ 394-396; Ryan, Tr. 1029 (Q. And it is fair to say that once you found out a group was a buying group, the answer was no from Benco, meaning no, Benco wouldn’t work with them? A. Correct. We would tell them what our policy is and move on.”)) In sum, the evidence shows that the Big Three did not compete for buying groups during the conspiracy

period, although, after the conspiracy began to fall apart, the Big Three began to compete for buying groups. (CCFF ¶¶ 1159-1166). The broad statement that the dental industry is “very competitive” is not supported by the record with respect to buying groups during the conspiracy period.

1. Response to Proposed Findings Regarding “Every Patterson witness testified to Patterson’s persistent competition.”

41. Paul Guggenheim described competition with Schein and Benco as a “battle.” (Guggenheim Tr. 1757 (“Q. The next couple paragraphs here talk about Schein and Benco. Maybe you can just tell us in your own words, what are you communicating as a management team with these paragraphs about Schein and Benco? A. That the business is extremely competitive. It’s a battle.”); *see also* Guggenheim, Tr. 2748 (“[W]e competed hardcore against Henry Schein and Benco on a daily basis); Guggenheim, Tr. 1751–52 (“A. Yeah, it’s an extremely aggressive business. There’s a lot of competition, and we’re trying to win customers out there, and this is -- obviously, for every customer price is a concern, so we’re trying to adjust to it. Q. Trying to win business from your many competitors? A. Correct. Q. Schein? A. Correct. Q. Benco? A. Correct.”); Guggenheim Tr., 1863 (“Q. So if Henry Schein is the successful partner with these buying groups, they don’t just have free and clear about now working with this independent dentist; is that right? A. Absolutely right. Q. You’re still going to fight for those individual dentists’ business? A. Aggressively.”)).

Response to Proposed Finding No. 41

The Proposed Finding is misleading to the extent that it implies that the cited testimony from Guggenheim is about competition between Patterson, Schein and Benco for the business of buying groups. The Proposed Finding is also unsupported by much of the evidence cited, or the cited evidence does not pertain to the existence of competition during the conspiracy period. The first citation (the only one that uses the word “battle”) is to Guggenheim, Tr. 1757, but is a response to a question about what Guggenheim was communicating in a pre-conspiracy February 2012 Patterson business review document. (Guggenheim, Tr. 1753-57, regarding CX3068). The suggestion that this response necessarily applies to any other time period is misleading, and no testimony is cited to support that proposition. The second citation (to the trial transcript at 2748) is to testimony of another witness, Neal McFadden, and does not pertain to

Guggenheim. The next citation to Guggenheim’s testimony (Guggenheim, Tr. 1863) is about competition for *individual* dentists to keep them from moving to buying groups, but is not about competition with Schein and Benco for buying groups. Finally, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies Patterson was competing with Schein and Benco for buying groups during the conspiracy. Rather, the evidence establishes that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, the Big Three rejected buying groups. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198).

42. Dave Misiak viewed Patterson’s competition with Benco and Schein as “hand-to-hand combat.” (CX8038 (Misiak, Dep. at 133 (“It’s hand-to-hand combat. You want to understand what your largest competitors are doing so you can formulate competitive ideas to go compete and get the business.”); *see also* Misiak, Tr. 1499–1500 (“Q. Mr. Misiak, as the vice president of sales in that position from 2010 to 2015 or ‘16, did you and your organization compete to win private dentist business all the time? A. Each and every day.”); CX8038 (Misiak, Dep. at 215 (“But that being said, hand-to-hand combat, the reps would compete on the street and adjust pricing.”))).

Response to Proposed Finding No. 42

The Proposed Finding is misleading to the extent that it implies that the witness testified regarding competition between Patterson, Schein and Benco for buying groups. In fact, the weight of the record evidence establishes that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, the Big Three rejected buying groups during the conspiracy. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198). Complaint Counsel has no specific response as to whether Misiak’s views are stated correctly.

43. Neal McFadden saw Schein as Patterson’s “fiercest competitor.” (McFadden, Tr. 2689 (“In 2008, after the recession, the vast majority of Patterson’s business is solo practitioners or small partnerships, and that business was flat or slightly down. And being a publicly traded company, we needed to find growth opportunities. And our fiercest competitor, Henry Schein,

was growing double digits in the special markets space, and we felt it would be an opportunity for us to go and compete against them in this space and try to take some of their business.”); CX8004 (McFadden Dep. at 189 (“Q. Do you compete for business against Henry Schein? A. Yes. Q. And by compete I mean when you were working at Patterson. A. Yes. Q. When you were working at Patterson, when given the opportunity, would you try to take business away from Schein? A. Yes.”)).

Response to Proposed Finding No. 43

The Proposed Finding is misleading to the extent that it implies that the witness testified regarding competition between Patterson and Schein for buying groups. The testimony cited does not support a finding that Patterson and Schein competed for buying groups. In fact, the weight of the record evidence establishes that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, the Big Three rejected buying groups during the conspiracy. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198). Complaint Counsel has no specific response as to whether McFadden’s views are stated correctly.

44. Tim Rogan also described Schein and Benco as Patterson’s “fiercest competitors.” (CX0317 (Rogan, IHT at 123 (“Q. Would you say Henry Schein is one of Patterson’s competitors? A. Yeah, they’re our biggest competitor. Q. In what sense are they your biggest competitor? A. Well, they’re the largest . . . and we compete head-to-head with them everyday. Q. How about Benco Dental? A. . . . But they’re the number two, but much smaller than Henry Schein or Patterson. But, again, we’re fierce competitors of them.”)); *see also* Rogan, Tr. 3601 (“Q. Mr. Rogan, it was a core part of your strategy in the fall of 2012 for the upcoming year, 2013, was to go out and beat your competitors in the marketplace for private practice customers? A. Without a doubt. That’s the share gain, taking it directly from our competitors. Q. And that would include Schein? A. Yes. Q. Benco? A. Yes.”); CX8017 (Rogan, Dep. at 72 (“Look, we -- every single day we have a thousand people out there going head to head with these two companies and all the other ones we referenced earlier, every single day.”)); [REDACTED]; CX0317 (Rogan, IHT at 221 (“All of our competitors are constantly going in and undercutting, you know, or trying to talk to our customers to compete with us; right?”))).

Response to Proposed Finding No. 44

The Proposed Finding is misleading to the extent that it implies that the witness testified regarding competition between Patterson, Schein and Benco for buying groups. The testimony cited does not support a finding that Patterson and Schein competed for buying groups. In fact, the weight of the record evidence establishes that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, the Big Three rejected buying groups during the conspiracy. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198). Complaint Counsel has no specific response as to whether Rogan's views are stated correctly.

45. Scott Anderson described competition with Schein as “a thousand on our side and a thousand on their side going at it in the field.” (CX8027 (Anderson, Dep. at 135 (“Obviously, every day we have, you know, a thousand on our side and a thousand on their side going at it in the field.”))); *see also* (CX8027 (Anderson, Dep. at 159)) (“I’ve competed personally as a sales rep in San Francisco against both Henry Schein at the time as a catalog company and Sullivan Dental before they merged together. I’ve competed with them as a branch manager in both San Francisco and -- San Francisco and Minnesota for sales in those marketplaces every day. I’ve also competed for sales rep and sales reps and hired sales people from Henry Schein while I was a manager. And then as I moved into upper management, helped drive the strategy to create what we felt would be winning solutions for customers to win business from Henry Schein in the marketplace.”).

Response to Proposed Finding No. 45

The Proposed Finding is misleading to the extent that it implies that the witness testified regarding competition between Patterson and Schein for buying groups. In fact, the weight of the record evidence establishes that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, the Big Three rejected buying groups during the conspiracy. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198). The Proposed Finding is also vague as to the significance, relevance or meaning of the phrase “a thousand on our side and a thousand on their side” as a measure of

competition. Complaint Counsel has no specific response as to whether Anderson's views are stated correctly.

46. Anthony Fruehauf heard of Patterson customers considering shifting business to a competitor "almost daily." (CX8013 (Fruehauf, Dep. at 27 ("Q. When you were a -- or in any of your roles with Patterson, would you hear of -- ever hear of a situation where a Patterson dentist was considering shifting his or her primary business to one of your competitors? A. Probably almost daily. It's a very competitive market. Q. Do you take any steps in an attempt to retain such a customer? A. Absolutely.")); (CX8013 (Fruehauf, Dep. at 193 ("Q. And do you compete for business against Schein? A. Every day. Q. And when given the opportunity, do you try to take business away from Schein? A. Absolutely."))).

Response to Proposed Finding No. 46

The Proposed Finding is misleading to the extent that it implies that the witness testified regarding competition between Patterson, Schein and Benco for buying groups. On the contrary, the witness's testimony was about competition for individual dentists. Complaint Counsel has no specific response as to whether what Fruehauf heard is stated correctly.

47. Devon Nease tried to take Schein's business while employed at Patterson. (CX8002 (Nease, Dep. at 128 ("Q. While you were at Patterson, did you compete for the business against Schein? A. Absolutely. Q. When given the opportunity, did you try to take business away from Schein? A. Yes. Q. Did you ever not try to take business away from Schein? A. No."))).

Response to Proposed Finding No. 47

The Proposed Finding is misleading to the extent that it implies that the witness testified regarding competition between Patterson and Schein for buying groups. The testimony cited does not support a finding that Patterson and Schein competed for buying groups. In fact, the weight of the record evidence establishes that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, the Big Three rejected buying groups during the conspiracy. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198).

The record, moreover, shows that, when Nease was concerned that he might lose business by not bidding on what he thought was a buying group, his managers still instructed him not to work with the entity. *See* CX0092 at 001 (February 27, 2013 email from Fruehauf to Misiak: “[Nease’s] concern was more how he would be judged if we lost a big chunk of business.”); CX0093 at 001 (February 27, 2013 email from Misiak to Fruehauf: “When I get these calls directly I politely say that I appreciate the opportunity, but currently we do not participate with group purchasing organizationsContinue to help Devon stay out of this with grace.”); CCFF ¶¶ 534-543, 566. Complaint Counsel has no specific response as to whether Nease’s description of his actions is stated correctly.

2. Response to Proposed Findings Regarding “All Benco Witnesses Testified To Patterson’s Sustained Competition.”

48. Chuck Cohen described competition with Patterson and Schein as “aggressive,” “vigorous,” and “fierce.” (Cohen, Tr. 662 (“Q. And is it fair to say that Benco has always aggressively competed on price with Schein and Patterson? A. We always aggressively compete on everything. Price is one element of that. Yes. Q. And value is another; correct? A. Value is another.”)); [REDACTED]; *see also* Cohen, Tr. 937 (“I believe that we compete every day in the streets in every office trying to win customers from large competitors and small competitors”); Cohen, Tr. 939 (“Q. All right. And you get -- periodically, internally at Benco, you get reports or contacted by people in that 400-salesperson team, and they say, I’m fighting with Patterson over dentist X or dentist Y. That happens; right? A. Yes. Q. In fact, it happens pretty regularly; right? A. Yes. Q. In fact, it happened throughout 2013 and 2014 and 2015; right? A. Yes.”); CX8015 (Cohen, Dep. at 287)) (“Q. Benco wins customers from Schein and Patterson, correct? A. Every day, we hope.”). Contemporaneous documents also show Mr. Cohen’s desire to compete with Patterson. (*See, e.g.*, RX0064 at 1 (Cohen wrote in a February 22, 2013 email, “We need Patterson to have a LONG, SLOW DECLINE.”) (caps in original)).

Response to Proposed Finding No. 48

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that the witness’s testimony was about competition between Patterson and Benco for buying groups. Starting in the mid-1990s, Benco had a policy of not recognizing or selling to buying groups (Cohen, Tr. 444-445; Ryan, Tr. 1027-1028; *see also* CX8015 (Cohen, Dep. at

138); CCFF ¶¶ 394-431), so any suggestion that Benco was competing for the buying group segment is contrary to the record evidence and misleading.

Moreover, Respondents' vigorous competition for independent dentists and DSOs highlights, by contrast, their lack of competition for buying groups during the conspiracy period, suggesting that the lack of competition for buying groups is driven by something other than non-competitive oligopoly behavior. (CX7100 at 203 (¶ 475) (Marshall Report) ("I describe how Respondents behaved toward customers other than buying groups and how Benco entered Southern California. The behavior underlying both these episodes contrasts with Respondents' non-competitive behavior toward dental buying groups. This contrast suggests that the Respondents' non-competitive behavior toward buying groups is not the result of the Respondents acting as they typically do. In other words, this contrast in conduct is an indicator that Respondents' parallel conduct with respect to buying groups is driven by something other than non-competitive oligopoly behavior.")

49. Patrick Ryan described competition with Patterson as "constant" and "robust." (Ryan, Tr. 1267 ("Q. How would you describe the nature of competition between Benco and Patterson? A. Robust. Constant."); *see also* CX8037 (Ryan, Dep. at 388) ("So is it fair to say from your understanding that Patterson and Benco competed vigorously over the years during your time at Benco? A. Yes."); Ryan, Tr. 1266 ("Q. So you compete with Patterson for customers? A. Yes. Q. Has that been the case for throughout your 25-year tenure at Benco? A. Yes. Q. You -- Benco takes customers away from Patterson; right? A. Yes. Q. Patterson takes customers away from you? A. Yes."); Ryan, Tr. 1267 ("The only time I didn't compete with Patterson is the five years [1980-1985] I worked for them."); CX8037 (Ryan, Dep. at 390) ("Q. Competition between Patterson and Benco has not waned in any way during your time at Benco. Is that right? A. No.").

Response to Proposed Finding No. 49

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that the witness's testimony was about competition between Patterson and Benco for buying groups. Starting in the mid-1990s, Benco had a policy of not recognizing or selling to

buying groups (Cohen, Tr. 444-445; Ryan, Tr. 1027-1028; *see also* CX8015 (Cohen, Dep. at 138); CCFF ¶¶ 394-431), so any suggestion that it was competing for the buying group segment is contrary to the evidence and misleading.

Moreover, Respondents' vigorous competition for independent dentists and DSOs highlights, by contrast, their lack of competition for buying groups during the conspiracy period, suggesting that the lack of competition for buying groups is driven by something other than non-competitive oligopoly behavior. (CX7100 at 203 (¶ 475) (Marshall Report) ("I describe how Respondents behaved toward customers other than buying groups and how Benco entered Southern California. The behavior underlying both these episodes contrasts with Respondents' non-competitive behavior toward dental buying groups. This contrast suggests that the Respondents' non-competitive behavior toward buying groups is not the result of the Respondents acting as they typically do. In other words, this contrast in conduct is an indicator that Respondents' parallel conduct with respect to buying groups is driven by something other than non-competitive oligopoly behavior."))

50. In fact, in February 2014, in the middle of their alleged price fixing conspiracy (Compl. ¶ 36. (alleging Patterson joined a conspiracy in February 2013); Kahn, Tr. 19 (alleging the conspiracy ended in April 2015); *see also* RXD0204 at 1 ("Patterson Joined The Alleged Conspiracy in February 2013"); RXD0205 at 1 ("The Alleged Conspiracy Ended in April 2015")), Benco considered *suing* Patterson for *restraint of trade* in a dispute over an exclusive arrangement for CEREC technology. [REDACTED]

[REDACTED]; Cohen, Tr. 952-53 ("Q. And the last sentence there, you say that you were so upset internally that you were considering filing a lawsuit against my client, which you considered the best opportunity to deliver a blow to Patterson. Do I have that right? A. Yes.")).

Response to Proposed Finding No. 50

The Proposed Finding is irrelevant and misleading to the extent that it implies that Cohen's consideration of bringing a legal action against a Patterson – an action that was never filed –

ended or negated the agreement between Cohen and Guggenheim that their companies would not do business with buying groups. In fact, approximately two months *after* the February 2014 internal Benco note cited in the Proposed Finding, Cohen contacted Sullivan and Guggenheim in the same email, forwarding an article about TDA Perks, the Texas Dental Association's buying group. CCF ¶¶ 1133-1137.

The Proposed Finding also misstates the record regarding the time of the end of the conspiracy. Complaint Counsel has asserted that the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015, because the conspiracy became difficult to maintain once Benco was required to log all communications with its competitors. Complaint Counsel has never taken the position that the entry by Benco into a settlement with the Texas Attorney General created a precise "end" date. (Tr., 19 (Complaint Counsel's Opening Statement); *see also* Complaint Counsel's Post-Tr. Br. at 37-38). In addition, to the extent that the Proposed Finding relies on demonstratives RXD0204 and RXD0205 as support for the finding, that reliance contravenes the Court's February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence.

3. Response to Proposed Findings Regarding "All Schein Witnesses Testified To Fierce Competition With Patterson."

51. Tim Sullivan saw competition between Patterson and Schein as "fierce." (Sullivan, Tr. 4027) ("Q. A lot of competition between you and Patterson over the years? A. Fierce competition between the two, yes."); Sullivan, Tr. 4065 ("First, let's talk about Patterson. Does Henry Schein compete with Patterson? A. Yes. Q. Has that ever not been the case? A. No. Q. How would you describe the level of competition between Henry Schein and Patterson? A. As fierce as can be."); RX2941 (Sullivan, Dep. at 528) ("Q. Could you give me an intensity rating as to the intensity of your competition with Patterson? A. I've stated in the past we are fierce competitors with Patterson."); *see also* RX2941 (Sullivan, Dep. at 527) ("So we meet with customers often to try to win the business, whether it's Patterson, Benco, Burkhardt, Darby, online, whatever. We are competing every day in every segment of the customer segmentation on our overall value."); RX2941 (Sullivan, Dep. at 522) ("I'm not sure what Patterson does, but we know that they're going to compete hard for the business, whether we sign a group or not,

just as we compete hard for the business with those customers who are members of the group if we decide to sign up or not.”).

Response to Proposed Finding No. 51

The Proposed Finding is misleading to the extent that it implies that Sullivan’s testimony was about competition between Schein and Patterson for buying groups. None of the cited testimony references buying groups. Indeed, in February 2012, Sullivan instructed his team to “KILL the buying group model” – contradicting the implication that Sullivan saw Schein competing with Patterson for buying groups. (CX0199 at 001 (email from Sullivan: “Let’s really take this serious and get after it. I’m really less concerned about the actual revenues, although very important too, rather more about what we can do to KILL the buying group model!!”) (emphasis in original); CCFF ¶ 729). Complaint Counsel has no specific response as to whether what Sullivan’s position is stated correctly.

52. Dave Steck described Schein, Patterson, and Benco’s price competition as “all day every day.” CX0310 (Steck, IHT at 56) (“Q. Would you say that Schein, Patterson, and Benco ever try to outbid each other on price in order to gain business? A. All day every day.”).

Response to Proposed Finding No. 52

The Proposed Finding is misleading to the extent that it implies that the witness’s testimony was about price competition among Schein, Benco, and Patterson for buying group business during the conspiracy period. There is no indication that Mr. Steck’s testimony applied to price competition for buying groups. Indeed, in December of 2013, Steck expressly suggested acting together with other distributors to forestall competition from a buying group. (CX0179 at 001 (email from Steck to Sullivan proposing that Schein “should get together with a group of other dealers and manufacturers and send them [Texas Dental Association] a petition.”); *see also* CCFF ¶ 1141).

53. Randy Foley testified that Schein competes with Patterson “every day” and that each company takes customers away from the other. (Foley, Tr. 4733–34 (“Q. I believe you testified during your deposition that you competed with Patterson every day. Correct? A. That is correct. Q. And Schein competed for and took away customers from Patterson; correct, sir? A. That is correct.”); *see also* CX8003 (Foley, Dep. at 419 (“Q. How frequently did you compete against Benco and Patterson for business? A. All the time. Every day.”)); CX8003 (Foley, Dep. at 384–85 (“Q. And while you were at Schein, you competed with Patterson for customers? A. Yes. Q. And was competition for customers between Schein and Patterson intense? A. Yes. . . . Q. When given the opportunity, Schein took customers away from Patterson? Right? A. Yes. Q. That was your job, correct? A. Yes. Q. Was there ever a point that Schein did not compete against Patterson for customers? A. No.”))).

Response to Proposed Finding No. 53

The Proposed Finding is misleading to the extent that it implies that the witness’s testimony was about competition between Schein and Patterson for buying group business during the conspiracy period. The testimony cited does not support a finding that Foley was speaking about competition for buying groups. The weight of the record evidence, moreover, establishes that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, the Big Three rejected buying groups during the conspiracy. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198).

54. Joseph Cavaretta testified that there was “fierce competition every day” between Patterson and Schein. (Cavaretta, Tr. 5536–37 (“Q. How would you describe the relationship between Patterson and Henry Schein? A. The industry is small, so it’s cordial, but it was -- it was fierce competition every day.”)). Examples of “fierce competition” between Patterson and Schein included “[r]ecruiting each other’s reps” and “on a regular basis” walking into dental offices “trying to win the business over and take the business from Patterson.” (Cavaretta Tr. 5536-37 (“Q. Can you give examples of what you mean by that? A. Sure. Recruiting each other’s reps. Schein, fortunately, was more successful at that point than Patterson, so we were recruiting the reps on a regular basis. Every day walking into an office, if an office was owned and it was usually based by merchandise of who owned that office or not, and you’re constantly trying to win the business over and take the business from Patterson. Putting in other programs specifically to take the business. Equipment, technology, software. Every day we were competing against Patterson.”))).

Response to Proposed Finding No. 54

The Proposed Finding is misleading to the extent that it implies that the witness's testimony was about competition between Schein and Patterson for buying group business during the conspiracy period. Indeed, one of the examples that Patterson claims supports its finding is about competing for sales representatives (Cavaretta, Tr. 5536-37) – which has nothing to do with competing for any customer segment, including buying groups.

55. Jake Meadows said that Patterson's fierce competition never abated. (Meadows, Tr. 2623) ("Q. Has the fierce competition you mentioned between Patterson and Schein ever abated at any time that you've worked at Schein? A. Never. Q. And that includes the period from 2013 to 2015? A. That's correct.").

Response to Proposed Finding No. 55

The Proposed Finding is misleading to the extent that it implies that the witness's testimony was about competition between Schein and Patterson for buying group business during the conspiracy period. Contrary to any implication that Schein was competing with Patterson (or anyone) for buying group business during the conspiracy period, Mr. Meadows wrote in an October 2014 email, "Just for clarity, we are NOT participating in any GPOs regardless of what promise they bring to us." (CX2354 at 001 (emphasis in original); Meadows, Tr. 2427).

Similarly, in November 2014, Meadows wrote, "We do not currently participate with GPOs nor do we want to." (CX2358 at 001; Meadows, Tr. 2435-2436); *see also* CCFF ¶¶ 816-826, 828-838).

56. For example, on November 25, 2013, Mr. Meadows was forwarded an email in which Schein Dental's Director of Sales reported that "lately the field has been complaining about PDCO undercutting our price." (RX0178 at 1; Meadows, Tr. 2625 ("Q. Okay. So is RX0178 an example of Patterson's fierce competition with Schein? A. Yes.")).

Response to Proposed Finding No. 56

The Proposed Finding is misleading to the extent that it implies that the witness's testimony was about competition between Schein and Patterson for buying group business during the conspiracy period. *See* Complaint Counsel's Response to Patterson's Proposed Finding No. 55.

57. Patterson also competed with Schein over staff. (Meadows, Tr. 2625 ("Q. So was your competition with Patterson -- it wasn't just over customers; it was also over staff? A. Yes.")). Meadows identified RX0396 as an example of this competition. (Meadows, Tr. 2625 ("Q. And is this an example of that? A. Yes.")). RX0396 shows that, on December 18, 2014, Mr. Meadows received an internal Schein email with information about Patterson's discount for two large customers from a former Patterson salesperson who had joined Schein, seeking authorization to offer a competitive Schein discount. (RX0396 at 1; Meadows, Tr. 2626) ("A. He's detailing how we were competing against Patterson. Q. Is this some sort of a request for approval of a rate that he thinks could compete with Patterson's rate? A. Yes. Q. Okay. So this document, RX0396, is this also an example of Patterson's fierce competition with Schein? A. Yes.")).

Response to Proposed Finding No. 57

Complaint Counsel has no specific response.

58. In 2014, Schein even created a new tier commission rate to fend off competition from Patterson over a segment of customers that included buying groups. (Meadows, Tr. 2631 ("Q. Was it a purpose of the creation of Tier 2 to fend off competition from Patterson? . . . THE WITNESS: Yes. To keep our team competitive in the space. Q. And Tier 2 again, as it was defined, could include buying groups; is that right? A. Yes, it could. Q. And the reason that Patterson needed to be fended off was because it was hungry -- A. That's correct. Q. -- for customers? I'm sorry. A. That's correct. Q. And this was in late 2014? A. Yes. Q. So is CX2024 an example of the fierce competition that Patterson and Schein had? A. Yes.))).

Response to Proposed Finding No. 58

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Schein new Tier 2 commission rates for Schein's Special Markets division were related to buying groups, rather than to the commissions paid to Schein's sales reps working with DSO customers. Although the Meadow's testimony was that Tier 2 "could" include buying groups, there is no evidence in the record that Schein and Patterson were "competing" for buying groups. In fact, CX2024, the document about which the witness was being questioned (and to

which his responses apply), does not mention buying groups. The attached slide deck page about the new commission tier references “3 or more locations, high volume” – a description of DSOs, not buying groups. (CX2024, attachment at Slide 9). The record shows that, at the time Schein announced its new tier commission rate, it was faced with Patterson’s entry into the DSO market through Patterson’s own Special Markets division in 2013. (CCFF ¶¶ 589-594). It was not faced with competition for selling to buying groups because Patterson’s Special Markets division was rejecting buying group inquiries in 2014. *See, e.g.* CX3016 at 001 (April 23, 2014 email from Special Markets President McFadden to Patterson Boston Branch Manager who was asking about how to handle an inquiry from a buying group: “I have received several calls from GPO’s [sic] . . . as of this moment I am sure we should pass on these groups.”); *see also* McFadden, Tr. 2685 (“I believe pretty much every inquiry I received from buying groups or GPOs and such, I always told them thank you, but no thanks.”)). In 2014, Patterson’s Special Markets division received between 10 and 25 requests from buying groups but did not do business with those groups. (McFadden, Tr. 2724-2725, 2685; CCFF ¶¶ 609-611, 622-625).

59. Kathleen Titus saw Patterson as “a nemesis.” (Titus, 5286–87 (“Q. Is it fair to say that throughout your career at Henry Schein that Patterson was consistently a vigorous competitor of Henry Schein? A. It was a vigorous competitor, and I would look at them as a nemesis. They were the largest and they were the ones we worried about.”)).

Response to Proposed Finding No. 59

The Proposed Finding is misleading and irrelevant to the extent that it implies that the witness’s testimony was about competition between Schein and Patterson for buying group business during the conspiracy period. Titus’s perceptions about Patterson as a competitor for other business (unrelated to buying groups) is irrelevant.

4. Response to Proposed Findings Regarding “Third Parties Also Testified About Patterson’s Fierce Competition With Schein and Benco.”

60. Dr. John Kois Sr., founder of the Kois Buyers Group, believes that Patterson “has all always acted very competitively in the marketplace.” (Kois Sr., Tr. 223–24). In his 40 years in the dental industry (Kois Sr., Tr. 202), Dr. Kois has not known Patterson, Schein, and Benco to behave as anything other than fierce competitors.” (CX8007 (Kois Sr., Dep. at 134)).

Response to Proposed Finding No. 60

The Proposed Finding is misleading to the extent that it implies that Dr. Kois’s testimony is specifically about competition for the business of the Kois Buyers Group or any other buying group. In fact, Dr. Kois testified that the Kois Buyers Group selected Burkhart because Patterson, Schein and Benco were not willing to bid for the business of Kois Buyers Group. (CX8007 (Dr. Kois, Sr., Dep. at 161-162) (“Q. Take you back again to the fall of 2014 when you were . . . working at setting up the Kois Buying Group with Mr. Ahmed. Did you turn to Burkhart to be the distributor only after you found out from Qadeer that Benco, Schein and Patterson were not willing to do a contract? [. . .] A. Yes.”)). In fact, the record evidence shows that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, the Big Three rejected buying groups – including Kois Buyers Group – during the conspiracy. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198).

61. John Kois Jr. likewise could not “think of any examples where Patterson, Schein and Benco did not try to take customers from each other and/or from Burkhart and Kois Tribal Management.” (CX8008 (Kois Jr., Dep. at 116)).

Response to Proposed Finding No. 61

The Proposed Finding is misleading to the extent that it implies that Mr. Kois’s testimony is specifically about competition for the business of the Kois Buyers Group or any other buying group. In fact, the record shows that the Kois Buyers Group selected Burkhart because

Patterson, Schein and Benco were not willing to bid for the business of Kois Buyers Group. (CX8007 (Dr. Kois Sr., Dep. at 161-162) (“Q. Take you back again to the fall of 2014 when you were . . . working at setting up the Kois Buying Group with Mr. Ahmed. Did you turn to Burkhardt to be the distributor only after you found out from Qadeer that Benco, Schein and Patterson were not willing to do a contract? [. . .] A. Yes.”)).

62. Robert Lowther (Denali) has never known Patterson, Benco, or Schein “to behave in a way that is not competitive.” (RX2961 (Lowther, Dep. at 193)).

Response to Proposed Finding No. 62

The Proposed Finding is misleading and incomplete and lacks foundation to the extent that it implies that Lowther’s testimony is about competition for the business of buying groups. There is no evidence in the record to establish any foundation for Lowther’s knowledge about whether Patterson, Schein and Benco competed for the business of buying groups. There is no evidence in the record that Lowther’s company, the Denali Group, has any of the indicia of a buying group. For example, the Dental Group does not negotiate with dental products distributors for supplies and is not involved in negotiating for the purchase of dental supplies by its customers. (RX2961 (Lowther, Dep. at 21) (“A. Does Denali Group have any involvement in your clients’ purchases of consumables from the distributors? A. We do not manage that process”)). It does not negotiate prices of supplies for its customers. (RX2961 (Lowther, Dep. at 22) (“Q. Is Denali Group ever involved in the negotiations of pricing for consumables with a distributor? A. We are not.”)).

63. Justin Puckett (MB2 and Dental Gator) testified that Patterson and Schein submitted competing bids to win MB2’s business in 2014. (Puckett, Tr. 2309–10 (“Q. You testified on direct that in 2014 Patterson submitted a bid in response to an RFP that you issued. Do you recall that? A. Yes. Q. And did you consider that to be a legitimate, strong bid by Patterson to gain that business? A. Yes. Q. At the time, Henry Schein had the business? A. Yes. Q. If Patterson had been successful with that bid, it would have taken business away from

Henry Schein? A. Yes. Q. After that unsuccessful bid by Patterson in 2014, did Patterson continue to attempt to get business from MB2? A. Yes. Q. And how did they do that? A. They call a lot. They try to take us to dinner, meet them at conferences, et cetera.”)).

Response to Proposed Finding No. 63

The Proposed Finding is misleading and irrelevant. MB2 is a DSO, not a buying group. The cited testimony states that Patterson submitted a bid in response to a request for proposal for MB2; there is no evidence that it submitted a bid for the business of Dental Gator, the affiliated buying group. The Proposed Finding is misleading to the extent that it implies or suggests that Puckett’s testimony is about competition for the business of Dental Gator. Indeed, Patterson’s contemporaneous documents – including communications to discourage a vendor from doing business with Dental Gator – indicate that Patterson affirmatively opposed doing business with Dental Gator during the conspiracy period. *See, e.g.* CX3133 at 001-002 (January 2015 emails between Patterson employee and vendor Kerr); CX3091 at 001 (March 18, 2015 email from McFadden to Guggenheim: “We discussed this. This is the group out of Texas that has a buying group as an acquisition tool. Use this when talking to manufacturers - - clearly this is wrong.”).

64. Complaint Counsel did not introduce any evidence at trial rebutting the evidence in the record—including Patterson’s approach to pricing allowing manual price overrides in the field, extensive price competition from testimony of all Schein, Patterson and Benco witnesses, and the evidence of expansive price competition from the price class change forms—showing that there was “fierce” competition between Patterson, Benco and Patterson in the sale dental supplies throughout Complaint Counsel’s alleged conspiracy period.

Response to Proposed Finding No. 64

Respondent Patterson provides no citations whatsoever for this Proposed Finding. It should, therefore, be disregarded. To the extent that it relies on other Proposed Findings regarding competition unrelated to buying groups, those Proposed Findings are misleading, incomplete and irrelevant, as described above. In particular, the Proposed Finding is misleading and irrelevant to the extent that it implies that evidence that Patterson may have competed for non-buying group

customers has any relevance to whether it conspired with its closest competitors to reject buying group customers. In fact, the record evidence shows that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, the Big Three rejected buying groups during the conspiracy. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198).

d. Responses to Proposed Findings Regarding “Patterson Invaded Schein’s And Benco’s Group Practice Business Right In The Middle Of Their Supposed Conspiracy To Boycott A Type Of Group Practice.”

1. Responses to Proposed Findings Regarding “In Focusing On Its Historic Customer Base Of Solo Dentists, Patterson Fell Behind Schein’s And Benco’s Corporate Dentistry Business.”

65. For most of its history, Patterson had a narrow “strike zone” for its target customers of private practices. (McFadden, Tr. 2789; Rogan, Tr. 3598 (“[W]e are going to be laser focused on Patterson’s strike zone, which—well a big part of it was private practice, and why for years—why we didn’t start that strategic account business for years and years and years, because we didn’t believe it was in our strike zone.”)).

Response to Proposed Finding No. 65

The Proposed Finding is vague and incomplete to the extent that it fails to explain what it means by a “narrow ‘strike zone.’” Moreover, even if the Proposed Finding had contained a clearer citation to its intended meaning, Patterson’s historic focus is irrelevant to whether Patterson conspired with its closest competitors to reject buying group customers. Accordingly, it should be disregarded.

66. Patterson’s decentralized sales force focused almost exclusively on solo and small practices, with only a few offices located within a single branch’s territory. (CX8004 (McFadden, Dep. at 49 (“Historically, our organization was -- was led by an executive leadership team that wanted us to be experts in dealing with solo practitioners and small groups, meaning one to three locations. We were an extremely decentralized organization. Very territory rep sensitive. The corporate office worked for our territory reps. And before 2008, Patterson had absolutely no reason to deviate from that strategy.”))).

Response to Proposed Finding No. 66

The Proposed Finding is vague, incomplete, confusing, and not supported by the evidence. To the extent that Patterson is implying that its branch offices focused on practices that had only a “few offices,” that implication is contradicted by its own documents. For example, Patterson documents show that, at the time the company was establishing its Special Markets division, it was already serving a large number of group practices, including some DSOs. (RX0072 at 001 and 003 (March 14, 2013 email with attachments RX0072_NATIVE_PDCO 00015835 at “Sales Data” Tab, showing Patterson serving over 280 group practices, including DSOs and community health centers, and showing sales data for these entities going back to 2004). In addition, to the extent that the Proposed Finding is addressing Patterson’s strategies or structure “before 2008,” (as suggested by the cited testimony), it is completely irrelevant to the allegations in the Complaint.

67. Even today, solo and small practices account for the vast majority of Patterson’s customer base and of the 200,000 dentists industry-wide. (Misiak, Tr. 1425–26 (“Well, private practice today represents somewhere around 70 percent of the total market, and I would say it was probably closer to 75 or 80 in 2013, so clearly this is the largest segment of the market.”)).

Response to Proposed Finding No. 67

Complaint Counsel has no specific response.

68. Prior to mid-to-late 2013, Patterson had essentially ignored the “group practice” segment of the dental market, including Dental Service Organizations or “DSOs.” (CX8004 (McFadden, Dep. at 48–49)).

Response to Proposed Finding No. 68

The Proposed Finding is misleading, vague, and contrary to the weight of the evidence.

Although, prior to mid-2013, Patterson has not established its Special Markets division to focus on group practices and DSOs (*see* CCFF ¶¶ 589-591), its own documents show that it was

already serving a large number of group practices, including some DSOs. (RX0072 at 001 and 003 (March 14, 2013 email with attachments RX0072_NATIVE_PDCO 00015835 at “Sales Data” Tab, showing Patterson serving over 280 group practices, including DSOs and community health centers, and showing sales data for these entities going back to 2004.)

69. DSOs are characterized by single ownership with a procurement operation that made purchasing decisions. (Misiak, Tr. 1311). Patterson’s decentralized structure made it difficult for Patterson to address this segment because DSOs preferred centralized ordering and service. (CX8004 (McFadden, Dep. at 53–54 (“DSOs wanted to make one phone call to the corporate office to get all of these things done and to have us dispatch the service technicians centrally and for us to handle their account centrally and for them to have one Patterson experience and not multiple Patterson experiences.”))).

Response to Proposed Finding No. 69

The Proposed Finding is compound. Complaint Counsel has no specific objection to the first sentence regarding the characteristics of DSOs. The second sentence is misleading and contrary to the weight of the evidence. *See* Response to Proposed Finding 68. The record evidence also shows that Patterson has the infrastructure to serve buying groups both before and after its established its Special Markets division. (CCFF ¶¶ 595, 653).

70. The 2008-09 financial crisis led to a sharp decline in demand for dental equipment and supplies, as patient visits fell. (CX8004 (McFadden, Dep. at 49–50) (“And in 2008 and 2009, we all know that we entered into the Great Recession and the economy hit the dental world very hard. Dentistry became extremely discretionary. And a publicly held organization where we need growth, the solo practice market and the small group market was growing flat, if not slightly down.”)).

Response to Proposed Finding No. 70

Complaint Counsel has not specific response.

71. The decline led many solo dentists to abandon the chore of running their own practices and, instead, to sell their practices to corporate DSOs that provided the security and centralized purchasing and services of a larger organization, leaving them free to focus on patient care. (RX0043 at 29 (“Industry proponents add that a number of practicing dentists and recent

dental school graduates join a Dentist Practice Management company to maximize their professional potential by focusing exclusively on patient dental care. Additional benefits noted for the dentist include...Economies-of-scale – greater buying power and lower administrative costs that enable dentists to provide services that patients value and can afford.”); RX0572 at slide 39 (“Corporate dental practices have grown significantly, while sole proprietorships have declined in share across ~154,000 U.S. practices.”)).

Response to Proposed Finding No. 71

The Proposed Finding is incomplete and misleading to the extent that it contains characterizations of the reasons for the growth of corporate dentistry (“abandon the chore of running their own practices”), that are unsupported by the evidence cited. The Proposed Finding is also incomplete in that it fails to state that the evidence it cites specifically explains that one reason for dentists joining corporate dental practices is “Economies-of-scale – greater buying power” (RX0043 at 29).

72. These DSOs became the fastest-growing segment of the industry, growing at double-digit rates. (McFadden, Tr. 2689 (“In 2008, after the recession, the vast majority of Patterson’s business is solo practitioners or small partnerships, and that business was flat or slightly down. And being a publicly traded company, we needed to find growth opportunities. And our fiercest competitor, Henry Schein, was growing double digits in the special markets space, and we felt it would be an opportunity for us to go and compete against them in this space and try to take some of their business.”); RX0572 at slide 40 (“Corporates with at least 500 employees are fastest growing type of dental practice.”)).

Response to Proposed Finding No. 72

Complaint Counsel has no specific response.

73. By 2013, Schein and Benco accounted for the majority of DSO sales (75–85% and 15%, respectively), with Patterson being a minor participant. (Foley, Tr. 4637; Cohen, Tr. 807; CX3014 at 5 (Patterson Special Markets Business Plan) (“There are primarily two major competitors in the Special Markets space: Henry Schein and Benco.”); McFadden, Tr. 2690; CX8004 (McFadden, Dep. at 48–49. (“Q. Schein and Benco had the vast majority of business in the Special Markets space when you assumed your position; correct? A. Correct. Q. And at that time, Patterson was – is it fair to say that Patterson was better known as a -- as a -- as the major distributor who had historically ignored the Special Markets space? A. Yes.”))).

Response to Proposed Finding No. 73

Complaint Counsel has no specific response.

2. Responses to Proposed Findings Regarding “Patterson Invested Heavily To Study The DSO Segment, Develop A Plan, And Build A New Infrastructure, Ultimately Launching Patterson Special Markets To Compete With Henry Schein For DSOs.”

74. In late Summer 2012, Patterson hired an experienced consulting firm, Strategic Business Solutions, LLC, to evaluate and make recommendations on the DSO opportunity. (CX8004 (McFadden, Dep. at 50 (Patterson “commissioned a report by Michele Perpich to do a research on the market and [Paul Guggenheim] went to the board of directors to get permission to invest in people and structure and to widen our strike zone to focus on dental service organizations.”))).

Response to Proposed Finding No. 74

The Proposed Finding is misleading and unsupported by the evidence in the record to the extent that it asserts that Strategic Business Solutions, LLC is an “experienced consulting firm.” There is no evidence in the record about the experience or qualifications of this consulting firm. To the extent that Patterson purports to rely on the report of Strategic Business Solutions as having any particular expertise, Patterson failed to identify the entity or its principal as experts. There is also no evidence in the record to support the date when Strategic Business Solutions, LLC was retained by Patterson, as claimed by this Proposed Finding.

75. The lead consultant, Michele Perpich, painstakingly analyzed industry data, purchasing trends, company records, and public information about Patterson’s rivals, and interviewed more than a dozen executives from Patterson, the leading DSOs and their private equity owners, and additional industry experts. (Guggenheim, Tr. 1582–83 (“Q. And so if I show you the Michele Perpich report, would that help refresh your recollection on the timing of that? A. Michele took several months, four or five months, so you’d have to back up from -- generally, yes, this -- that probably was an output of this....Q. All right. And so just going back to the business review plan and the SWOT analysis, following this SWOT analysis in 2012, Patterson hired a consulting firm to evaluate the DSO market; is that fair to say? A. Yes. Q. And the purpose of that evaluation process was to figure out whether Patterson should build out the infrastructure to penetrate the DSO market; is that right? A. Yes.”)).

Response to Proposed Finding No. 75

The Proposed Finding is misleading to the extent that it characterizes the quality, or thoroughness of the work of the consultant, or suggests that the report is reliable. The consultant, Michele Perpich did not testify (either at trial or in a deposition), and there is no evidence in the record that her work was “painstaking” or that she actually interviewed the executives or the entities listed in her report. Even Respondent’s characterization of Perpich as “the lead consultant” appears to be misleading based on the record, as her report lists her as the *only* consultant on that report. Because Respondent Patterson has provided no foundation for the data in the report or offered its author as a witness, any Proposed Findings that rely on the substantive conclusions of the report should be disregarded.

76. In Fall 2012, Perpich provided Patterson’s management with her 99-page report and recommendation that the company develop a plan to enter the DSO space. (RX0043 at 1–99 (Perpich Report); (Guggenheim, Tr. 1582) (Q. Is that the Perpich report? A. Yeah. It’s one -- it’s a document from the -- there’s a lot of documents, but this is one of the documents there. Q. And do you see the date on that is October 2012? A. I don’t see -- oh. Oh, yeah, October 23, 2012, right.”); (RX0043 at 13 (“Active Dental Practice Management Market Segment participation results in 2020 revenue increase of 17.3 percent and additional operating income and dollar contribution of 13.8 percent for the Patterson Dental Business Unit.”)).

Response to Proposed Finding No. 76

Subject to the responses and objections noted in Complaint Counsel’s Response to Proposed Finding No. 75, Complaint Counsel has no specific response.

77. The report mapped out a five-year plan requiring millions of dollars in investment over the next 3-5 years—to build out a “Special Markets” sales and service organization to handle the centralized purchasing and other demands of corporate DSOs, and to create the required IT infrastructure and design software to allow state-of-the-art centralized purchasing, delivery, and service and support. (Guggenheim, Tr. 1777–78 (“I see, Mr. Guggenheim, that the total expenses go from roughly 1.8 million up to 7.8 million between 2012 and 2013 in this and then increasing from there to 13 million and from there to 22, and so on. Was this a multi- -- to get into the DSO piece of the market, which Schein had already been in for a while, was this a multimillion-dollar investment that Patterson was contemplating? A. Absolutely. Q. And was this going to take more than a couple of months? A. Oh, absolutely.....Q. Was Ms. Perpich

telling you all that you had five years of work ahead of you and multimillion-dollar expenses to crack into this DSO segment of the industry? A. Yes, she was.”); RX0043 at 95)).

Response to Proposed Finding No. 77

Complaint Counsel has no specific response.

78. Patterson’s executive team obtained the approval of its board of directors to make this investment in early Spring 2013. (CX8023 (Guggenheim, Tr. 174 (“Q. After this management retreat in November of 2012, did you, as the president of Patterson Dental, propose to the Patterson Companies management and the board of directors that you transform the business, fix these gaps and invade the DSO segment? A. I did. Q. And did you have to have formal board approval for Patterson Companies to do that? A. I believe we -- Scott wanted formal board approval. He wanted the board to -- Q. All right. And that occurred a few months after this management meeting in November of 2012? A. Right.”)); (RX0069 at 3 (“Market Priorities: Build out national account business platform”)).

Response to Proposed Finding No. 78

Complaint Counsel has no specific response.

79. Patterson made the decision to enter the DSO market in early 2013 and launched Patterson Special Markets in September 2013. (RX0118 at 1 (“Please see attached an important announcement from the new Patterson Special Market division”). At this point Patterson widened its strike zone to address DSOs. (McFadden, Tr. 2789–90). Both actions were taken shortly after Complaint Counsel alleges Patterson joined the conspiracy. (Compl. ¶ 36; *see also* RXD0204 at 1 (“Patterson Joined The Alleged Conspiracy in February 2013”)).

Response to Proposed Finding No. 79

The Proposed Finding is misleading and incomplete to the extent that it implies that, prior to September 2013, Patterson did not have the capability to serve corporate dental practices or other customer segments with customers in multiple locations. *See, e.g.*, RX0072_NATIVE_PDCO 00015835 at “Sales Data” Tab (showing Patterson serving over 280 group practices, including DSOs and community health centers, and showing sales data for these entities going back to 2004); CCFF ¶¶ 595 (Patterson had the resources and infrastructure to work with buying groups both before it established its Special Markets division and after Special Markets was formed in 2013. (citing Misiak, Tr. 1510); 592 (Patterson was already serving a number of DSOs when it

established its Special Markets division). Finally, to the extent that the Proposed Finding relies on a demonstrative (RXD0204) as support for the finding, that reliance contravenes the Court's February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence.

80. This strategic decision is evidenced in Patterson's internal strategy plans, in which Patterson identified only two business segments to focus on: (1) private practice and (2) large groups (i.e., DSOs). (RX0046 at 17–20 (“Dental Market #1 – Private Practice” and “Dental Market #2 – Large Group”); Misiak, Tr. 1468–69 (“Q. I don't see a slide in here on the dental business for another dental market, number three, for buying groups or GPOs. Do I have that right? A. That's correct. Q. Were they not part of your strategy back in the fall of 2012? A. They were not part of the strategy in 2012. Q. And why is that? A. Well, we had done the research and tried to make an educated decision for the business based on where the growth was and where we thought we could impact the -- for shareholder value the bottom line for the organization and grow the business profitably, and that was in private practice and DSOs. Q. Just those two segments. A. Correct.)).

Response to Proposed Finding No. 80

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Patterson did not have the resources or infrastructure to do business with buying groups both before and after the creation of Special Markets. Evidence in the record shows that Patterson had the resources and infrastructure to work with buying groups both before it established its Special Markets division and after Special Markets was formed in 2013. (Misiak, Tr. 1510). Neal McFadden, the President of Special Markets moreover testified that, when the Special Markets division was formed, he was interested in any entity that would bring in business, including GPOs. (CX0315 (McFadden, IHT at 169-170); *see* CCFF ¶¶ 601, 602.).

81. A key part of this strategy was to take DSO business from Schein, the dominant DSO player. (Rogan, Tr. 3603–04; McFadden, Tr. 2689 (“And our fiercest competitor, Henry Schein, was growing double digits in the special markets space, and we felt it would be an opportunity for us to go and compete against them in this space and try to take some of their business.”)).

Response to Proposed Finding No. 81

The Proposed Finding is misleading and irrelevant to the extent that it implies that Patterson allowed its Special Markets division to compete for the business of buying groups. On the contrary, on September 4, 2013, McFadden sent a memo to Patterson Regional and Branch managers explicitly excluded the possibility of Special Markets working with buying groups by stating that the Special Markets “definition will not include group purchasing organizations (GPOs).” (CX0158 at 002; McFadden, Tr. 2700-2702; CCFF ¶ 611).

82. A strategic goal of Patterson’s in entering the DSO market was “disruption of HSIC [i.e., Henry Schein].” (RX0046 at 20; Rogan, Tr. 3603).

Response to Proposed Finding No. 82

The Proposed Finding is misleading and irrelevant to the extent that it implies that Patterson, in identifying “goals” for its Special Markets division, allowed that division to compete with Schein for the business of buying groups. On the contrary, on September 4, 2013, McFadden sent a memo to Patterson Regional and Branch managers explicitly excluded the possibility of Special Markets working with buying groups by stating that the Special Markets “definition will not include group purchasing organizations (GPOs).” (CX0158 at 002; McFadden, Tr. 2700-2702; CCFF ¶ 611).

83. Starting in 2013, Patterson invested massively in personnel, software and IT upgrades, and other infrastructure changes to catch up in the DSO segment. (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.”)); CX8027 (Anderson, Dep. at 67 (“At the same time, we were making massive investments in a new IT infrastructure that would help us be more flexible business different types of business models which currently we were not. And at this very same time we were making a major foray into competing in a space that we were underdeveloped. So to me this is a thought-provoker on how do we position ourselves.”))).

Response to Proposed Finding No. 83

This Proposed Finding is misleading and incomplete to the extent that it implies that, prior to building out its Special Markets division, Patterson did not have the resources or infrastructure to work with buying groups. In fact, Patterson had the resources and infrastructure to work with buying groups both before it established its Special Markets division and after Special Markets was formed in 2013. (Misiak, Tr. 1510; CCFF ¶ 592).

84. Neal McFadden, the company's Southeast regional manager, moved to the corporate headquarters outside Minneapolis in June 2013 to lead the newly formed "Patterson Special Markets" organization and began to hire and train a sales and support team. (CX8004 (McFadden, Dep. at 103 ("In June of 2013, when you received this e-mail, you were just becoming head of Special Markets? Is that -- is that the timing? A. That is the timing. I was still living here in South Carolina. I would have been in a -- doing kind of learning my new job but wrapping up my old job. I was in my transition period.")); CX0315 (McFadden, IHT at 274 ("And you were just moving to the Saint Paul, Minnesota area and taking on your responsibilities in building out the special markets division? A. Yes.))).

Response to Proposed Finding No. 84

Complaint Counsel has no specific response.

85. Patterson's work to build the capability to handle centralized demands of corporate DSOs, was monumental, expensive, and risky: historic "decentralization," built to serve local dentists, had long "precluded it from setting up a single point of contact at the corporate office," and it "had to literally figure out a way to become centralized with [its] antiquated IT systems," like "putting a square peg into a round hole." (CX8004 (McFadden, Dep at 51-52 ("We were, and have been historically, a very decentralized organization. All of our systems revolve around our local branches, whereas Henry Schein, for existence -- for example, is a centralized organization that learned to be decentralized, we were a decentralized organization trying to learn to be centralized. Our systems precluded us from setting up a single point of contact at the corporate office and -- and selling that way, so we had to literally figure out a way to become centralized with our antiquated IT systems. So it was putting a square peg into a round hole."))).

Response to Proposed Finding No. 85

The Proposed Finding is misleading, incomplete, and contrary to record evidence to the extent that it implies that, prior to the establishment of Patterson's Special Markets, Patterson did not have the capability to serve corporate dental practices or other customer segments with customers in multiple locations. In fact, the record shows that Patterson had the capability to

serve corporate practices and had been doing so. *See, e.g.*, CCFF ¶ 595 (Patterson had the resources and infrastructure to work with buying groups both before it established its Special Markets division and after Special Markets was formed in 2013) Misiak, Tr. 1510; RX0072_NATIVE_PDCO 00015835 at “Sales Data” Tab (showing Patterson serving over 280 group practices, including DSOs and community health centers, and showing sales data for these entities going back to 2004, and sales for 2012 of over \$140 million to these customer segments); CCFF ¶ 592). In addition, the characterization of Patterson’s build out of new capabilities as “monumental, expensive, and risky,” is not contained in the cited testimony, and is thus unsupported.

86. To safeguard Patterson’s investment—and to meet internal commitments made to the board of directors to secure the green light for the new business segment—management told McFadden and Patterson Special Markets to be “laser focused” on corporate DSOs that owned at least 15 practices and purchased more than \$600,000 in equipment and supplies annually. (CX8023 (Guggenheim, Dep. at 175–76, 191 (“And so I went to the board in 2012 or ‘13, got a commitment from the board, we had very clear directions on growth in that category, and my concern was that Neal was not focusing on what his objective was when he began looking at other parts of the business. One of those items would have been GPOs. And I directed Neal to specifically stay on task with his focus, which was to drive the DSO space group, the group practice space, specifically the large group practice space, which is what he -- what he did, but he would occasionally have these approach and I would direct him -- it wasn’t that I was directing, you know, so much that we weren’t going to focus -- or address those. It was that we were going to focus onIn an effort to keep Mr. McFadden laser focused on the commitment that we had made to the board and the market that he was commissioned to approach, at times I would tell him other markets that I didn’t want him focusing in on, one of those was the GPOs.”))).

Response to Proposed Finding No. 86

The Proposed Finding is not supported by the testimony cited and is contrary to the weight of the evidence. Guggenheim’s testimony makes no reference to “safeguard[ing]” any investment or to focusing on group practices of a certain size. The Proposed Finding is also not supported by the record with respect to the establishment of Special Markets. McFadden testified that, when Special Markets was started, the announcement “meant a lot more than DSOs.” (CX0315

(McFadden, IHT at 169); CCFF ¶ 601). Patterson’s September 4, 2013 memorandum regarding the establishment of Special Markets did not exclude any entity other than GPOs (CX0158 at 002; CCFF ¶ 614), and expressly allowed that other, non-DSO entities such as “[g]overnment, institutions and schools” could qualify to be served by Special Markets (CX0158 at 002; CCFF ¶ 615), contradicting the assertion in this Proposed Finding that Special Markets focused only on large DSOs. *See also* Guggenheim, Tr. 1587-1589 (Special Markets could serve dental schools, prison accounts, federal government accounts, state government accounts, and Community Health Centers, even though those customer segments were not part of Patterson’s corporate strategy).

87. McFadden was instructed that smaller DSOs, community health centers, “buying groups,” and solo practices were distractions that Patterson Special Markets should leave in the capable hands of its regions, branches, and 1,600+ territory representatives and equipment specialists. (CX8004 (McFadden, Dep. at 71–72 (“Q. How did Mr. Guggenheim convey his desire to you that you should be focusing on DSOs? A. He would tell me directly to keep my focus and not get distracted with the noise from the field and requests from the field. He wanted me to be focused on getting a win in the DSO space. Q. What kind of noise from the field was he referring to? A. Almost immediately when we launched Patterson Special Markets, the word Special Markets and our definition connotes more than just dental service organizations. It was really anything outside of the solo world and the small group space....But from a centralized standpoint, Paul made it abundantly clear, Neal, you are to focus on dental service organizations and pass these on to other people. You are to focus on these.”))).

Response to Proposed Finding No. 87

The Proposed Finding is incomplete and contrary to the weight of the evidence to the extent that it mistakenly implies that Special Markets could not (and did not) serve customer segments other than large DSOs. *See* Complaint Counsel’s Response to Patterson’s Proposed Finding No. 86.

The evidence shows that Patterson intended for Special Markets to serve other multi-office customer segments (including government, military, community health centers, Indian health, schools and institutions) (CX3014 at 004; CCFF ¶¶ 615-620), and the Special Markets Business Plan included serving these entities. (CX3014 at 004). *See also* Guggenheim, Tr. 1587-1589

(Special Markets could serve dental schools, prison accounts, federal government accounts, state government accounts, and Community Health Centers, even though those customer segments were not part of Patterson’s corporate strategy). The only entities specifically excluded from Special Markets were GPOs. (CX0158 at 002; CCFF ¶¶ 611, 621).

88. There was a lot of pressure to get DSO sales and for McFadden to stay focused on DSOs. (McFadden, Tr. 2705) (“Paul [Guggenheim] was putting a lot of pressure on us to get some sales because he had put his neck out on the line with the board of directors to build this organization.”); (McFadden, Tr. 2713) (“[Guggenheim] would always tell me to stay focused on the dental service organizations, building out our special markets, trying to get a win and get some revenue to get the pressure off of all of us.”).

Response to Proposed Finding No. 88

Complaint Counsel has no specific response.

89. McFadden was inundated and overwhelmed during Patterson Special Markets’ early months, including with various requests from the field to look at various groups. (McFadden, Tr. 2812). This was because a centralized special markets group was new to Patterson and caused uncertainty in the field as to what it would address. (McFadden, Tr. 2698 (“[T]here was a lot of ambiguity and uncertainty from the field, meaning our sales team and branch managers, so we felt it important to put something together as a definition to let our team know what we were doing” in Special Markets.)).

Response to Proposed Finding No. 89

The Proposed Finding is misleading to the extent that it implies that, prior to the creation of Patterson’s Special Markets division, it did not have the infrastructure to serve buying groups.

The record evidence shows that it had these capabilities. (CCFF ¶ 595 (Patterson had the resources and infrastructure to work with buying groups both before it established its Special Markets division and after Special Markets was formed in 2013.))

90. Patterson Special Markets’ express mission in 2013–14 was to focus on only the biggest DSOs. (RX0119 at 1 (“Effective immediately, current dental corporations with 15 or more owner operated/affiliated locations and a minimum of \$600,000 in potential merchandise will qualify.”)).

Response to Proposed Finding No. 90

The Proposed Finding is misleading and inaccurate. Although the quoted language is correct, there is no language anywhere in the document (RX0119 at 001) stating, implying or even suggesting that Patterson’s Special Markets mission was to focus “on only the biggest DSOs.” It merely states that dental corporations of a certain size will be handled by Special Markets, not that other size groups are excluded. There is no support in the document cited for Patterson’s characterization of the evidence. It should be disregarded.

91. On September 4, 2013, Patterson announced its special markets division internally to the Patterson Sales Force. (CX0158 at 001). The announcement defined the types of accounts Special Markets would handle. (CX0158 at 001). Patterson specified internally that “this definition will not include group purchasing organizations (GPOs).” (CX0158 at 001). GPOs were excluded from the definition of Special Markets to ensure that McFadden would focus on DSOs. (Guggenheim, Tr. 1640).

Response to Proposed Finding No. 91

Complaint Counsel has no specific response to the first three sentences of the Proposed Finding. The fourth and final sentence of the Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that the decision to exclude buying groups was unrelated to the agreement or was not part of a conscious commitment to reject buying groups. Indeed, contrary to Guggenheim’s testimony, the evidence shows that Patterson intended for Special Markets to serve other multi-office customer segments (including government, military, community health centers, Indian health, schools and institutions). (CX3014 at 004; CCFF ¶¶ 615-620; *see also* Guggenheim, Tr. 1587-1589 (Special Markets could serve dental schools, prison accounts, federal government accounts, state government accounts, and Community Health Centers, even though those customer segments were not part of Patterson’s corporate strategy)). The only entities specifically excluded from Special Markets were GPOs. (CX0158 at 002; CCFF ¶¶ 611, 621). The weight of the evidence shows that Patterson had entered into an

agreement no later than February 2013 that it would not do business with buying groups (CCFF ¶¶ 483-501, 513), and that its focus when it established Special Markets complied with that agreement. (CX0158 at 002 (“This definition will not include group purchasing organizations (GPOs).”); *see also* CX3116 at 001 (September 3, 2014 email from Misiak to Guggenheim and Scott Anderson, “GPO noise has been pretty loud from the field. We have said no at every turn.....”); CCFF ¶¶ 606-626).

92. Patterson’s decision to exclude GPOs from the definition of Special Markets—and for Special Markets to focus on DSOs—was an “independent decision.” (Guggenheim, Tr. 1807). Patterson’s management believed that it made business sense for Special Markets to not address “GPOs” and instead focus the division on the market segment it was created for. (Misiak, Tr. 1427–28).

Response to Proposed Finding No. 92

The Proposed Finding is misleading, unsupported by the testimony cited, and contrary to the weight of the evidence. The testimony by Guggenheim cited in the Proposed Finding (Guggenheim, Tr. 1807) was in response to a question about working with a specific entity, not about Patterson’s decision to exclude GPOs from the definition of Special Markets. The testimony cited for Misiak discusses Patterson’s decision to expand into the DSO market, but does not even mention Special Markets, GPOs, or the decision in September 2013 that Special Markets would not include GPOs. The testimony cited does not support a finding that the decision to exclude GPOs from Special Markets was an independent decision. In fact, the weight of the evidence establishes that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, the Big Three rejected buying groups. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198).

- e. **Responses to Proposed Findings Regarding “Patterson Special Markets Went After The Most Attractive Corporate DSOs, Which Were, At That Point, Schein’s Customers.”**

93. The first year of Patterson Special Markets was largely spent building out the centralized systems needed to compete for DSO business. (McFadden, Tr. 2782–85).

Response to Proposed Finding No. 93

The Proposed Finding is incomplete and contrary to the evidence in that it fails to acknowledge evidence that Patterson had the resources and infrastructure to work with buying groups both before it established its Special Markets division and after Special Markets was formed in 2013. (Misiak, Tr. 1510) (CCFF ¶ 595).

94. Patterson hired a key Schein Special Market’s sales rep, Rhonda Durante, as part of its build out its Special Markets division. (McFadden, Tr. 2797). Schein understood that Patterson hired Durante to compete with, and take business from, Schein Special Markets. (Steck, Tr. 3810–11). Patterson took DSO business from Henry Schein after hiring Durante. (McFadden, Tr. 2797).

Response to Proposed Finding No. 94

The Proposed Finding is irrelevant and misleading to the extent that it implies that, after Patterson hired Durante, it competed for buying group business with Schein during the conspiracy period. There is no evidence in the record that Durante was allowed to compete for buying groups. The Proposed Finding is also irrelevant because competing for DSO business is not relevant to whether Patterson and Schein were part of an overarching conspiracy among the Big Three to refuse to work with buying groups.

95. Schein responded to Patterson’s competition over DSOs by lowering prices to retain them. (Steck, Tr. 3809–10; RX0481 at 1 (“Good News – we just fought off Patterson coming at us on this \$1.5M Medicaid group in the Carolinas. Bad news – it probably cost us \$120k in profit to do it.”)).

Response to Proposed Finding No. 95

The Proposed Finding is irrelevant and misleading because it cites to a document discussing competition for a DSO customer in August 2015 (RX0481 at 001). To the extent that the Proposed Finding implies that the customer at issue was a buying group, the Proposed Finding is

misleading. Similarly, to the extent that the Proposed Finding suggests that the email was about competition during the conspiracy period, the Proposed Finding is also misleading and irrelevant.

96. Patterson's efforts eventually succeeded. In January 2015, Patterson won the Mortenson DSO account away Schein after making a very aggressive bid. (Guggenheim, Tr. 1790–91 (“Q. All right. Well, this account -- let's look at number 4 here, Mortenson. Mortenson 110 ordering starts February 2, 2015 for all locations. Tell me what that's a reference to. What is Mortenson? A. Mortenson was a large DSO headquartered in I believe Kentucky. They had -- I think “110” references at that time how many offices maybe they had? And so they were committing to transition their business away from Henry Schein and move it to Patterson.”); (RX0359 at 001; Steck, Tr. 3807–09)). Former Schein Sales rep Rhonda Durante assisted in winning the Mortenson business. (McFadden, Tr. 2797) (“Rhonda helped us bring that one over the line”).

Response to Proposed Finding No. 96

The Proposed Finding is irrelevant, misleading and not supported by the evidence cited. It is misleading and irrelevant to the extent that it suggests that competition for DSO accounts has any relevance to the allegations in the Complaint that Schein, Patterson and Benco entered into an overarching conspiracy not to do business with buying groups. In addition, the testimony cited provides no basis for the assertion that Patterson won the Mortenson DSO account “after making a very aggressive bid.” There is no evidentiary support for Patterson's characterization about the bidding process.

97. The Mortenson account was worth about \$5 million per year. (Foley, Tr. 4734–35 (“Q. Patterson competed for and took away business from Mortenson Dental; correct? A. That is correct. Q. And Mortenson Dental is another large DSO; right? A. Yes. They were doing about \$5 million a year with us when Patterson took it away.”)).

Response to Proposed Finding No. 97

The Proposed Finding is irrelevant and misleading to the extent that it suggests that competition for DSO accounts has any relevance to the allegations in the Complaint that Schein, Patterson and Benco entered into an overarching conspiracy not to do business with buying groups.

Complaint Counsel has no specific response to the accuracy of the statements in the Proposed Finding.

98. Likewise, in late 2016, Patterson won the Heartland Dental DSO business away from Schein. (Misiak, Tr. 1467 (“Q. What’s Heartland Dental? A. So Heartland -- Heartland Dental is the largest DSO in North America, probably the world, as I think about DSOs. And Heartland has approximately 860 offices and is considered by many to be I would say the crown jewel of the DSO space....And it was our largest competitor’s largest account. Needless to say, we went after that right out of the gate when we introduced this new business unit and won that business.”); Guggenheim, Tr. 1791–93 (“Heartland Dental is the largest DSO in the country, headquartered in Effingham, Illinois. They’re the largest DSO, headquartered in Effingham, probably 800-and-some offices around the country. And that’s an organization that a couple years ago we won the bid in an RFP from them and transitioned that business from Henry Schein to Patterson....This is a very long, arduous request for bid, proposal, sales cycles that sometimes take years to consummate. The switching disruption for the client is significant to move the business over, and so this takes a lot of work, lots of pricing negotiations, lots of service negotiations. These are very complex transitions.”); CX8004 (McFadden, Dep. at 171) (“We had just won the Heartland Dental contract October 1st of 2016.”)).

Response to Proposed Finding No. 98

The Proposed Finding is irrelevant and misleading to the extent that it suggests that competition for DSO accounts has any relevance to the allegations in the Complaint that Schein, Patterson and Benco entered into an overarching conspiracy not to do business with buying groups. In addition to the fact that Patterson’s actions in competing for DSO business is irrelevant to the allegations in the Complaint, the Proposed Finding is also irrelevant because the actions described took place in 2016, after the conspiracy ended. Complaint Counsel has no specific response to the accuracy of the statements in the Proposed Finding.

99. The Heartland Dental account was worth \$30 million per year or more. (Foley, Tr. 4733) (“Q. And so Patterson competed for and took away your largest customer, Heartland Dental? A. That is correct. Q. And that was a large DSO customer; right? A. I’m sorry. Q. Heartland was a large DSO -- is a large DSO customer? A. It was our largest DSO customer. Q. I think you said it’s about \$30 million a year? A. A little bit more at that time. Yes.”).

Response to Proposed Finding No. 99

The Proposed Finding is irrelevant and misleading to the extent that it suggests that competition for DSO accounts has any relevance to the allegations in the Complaint that Schein, Patterson and Benco entered into an overarching conspiracy not to do business with buying groups. In addition to the fact that Patterson's actions in competing for DSO business is irrelevant to the allegations in the Complaint, the Proposed Finding is also irrelevant because the actions described took place in 2016, after the conspiracy ended. Complaint Counsel has no specific response to the accuracy of the statements in the Proposed Finding.

100. An April 2016 email shows that a DSO called ImmediaDent moved its business from Patterson to Schein and then back to Patterson, resulting in \$2 million loss of business for Schein. (RX0596 at 001 ("ImmediaDent came to us and back to PDCO due to Saturday service hours in certain regions."); CX8001 (Foster, Dep. at 159) ("Q. So ImmediaDent was a customer that Schein and Patterson competed for vigorously? A. Yes.")).

Response to Proposed Finding No. 100

The Proposed Finding is irrelevant and misleading to the extent that it suggests that competition for DSO accounts has any relevance to the allegations in the Complaint that Schein, Patterson and Benco entered into an overarching conspiracy not to do business with buying groups. In addition to the fact that Patterson's actions in competing for DSO business is irrelevant to the allegations in the Complaint, the Proposed Finding is also irrelevant because the actions described took place in 2016, after the conspiracy ended. Complaint Counsel has no specific response to the accuracy of the statements in the Proposed Finding.

101. Patterson's conduct with respect to aggressively attempting to and succeeding in taking large DSO accounts away from Schein is inconsistent with Complaint Counsel's alleged conspiracy. (Compl. at ¶ 1).

Response to Proposed Finding No. 101

The Proposed Finding is incomplete, unsupported by any evidentiary citations, misleading, irrelevant, and contrary to the weight of the evidence. First, it is incomplete and unsupported in

that it contains no factual citations or references whatsoever, and essentially presents an argument. Second, it is misleading to the extent that it implies that competition between Patterson and Schein for DSO customers overcomes the substantial weight of the evidence that Patterson and Schein did not compete for buying group customers during the conspiracy. The weight of the evidence establishes that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, the Big Three rejected buying groups. (CCFF ¶¶ 606-614, 621-657, 661-1100, 1178-1198). The Proposed Finding is also irrelevant to the extent that it is based on facts regarding competition for non-buying group customers, and (for several of the examples), competition that occurred in 2016 (*see* Patterson’s Proposed Finding Nos. 98 and 100), after then end of the conspiracy period.

f. Responses to Proposed Findings Regarding “Buying Groups in Late 2013 Were Not Attractive Customers For Patterson Special Markets.”

102. In recent years, a small percentage of solo dentists began affiliating themselves to form “buying groups.” (RX0572 at slide 21).

Response to Proposed Finding No. 102

Complaint Counsel has no specific response.

103. There is confusion in the record over the definition of “a buying group.”

Response to Proposed Finding No. 103

The Proposed Finding is incorrect, misleading, and unsupported by any factual citations. As demonstrated by CCFF ¶ 67 (citing to testimony by Kois, Sullivan, Guggenheim, Dr. Goldsmith, Cohen, and Reece, as well as documents created by Porro and Ryan), there is great uniformity in the understanding of the witnesses about the meaning of the term buying group: Dental buying groups are organizations of independent dentists that seek to aggregate and leverage the collective purchasing power of separately-owned and separately-managed dental practices in

exchange for lower prices on dental products. Respondent Patterson’s Proposed Finding, which is unsupported by any citations whatsoever, should be disregarded.

104. Complaint Counsel defines buying groups as “organizations of independent dentists that seek to aggregate and leverage the collective purchasing power of separately-owned and separately-managed dental practices in exchange for lower prices on dental products. Buying Groups are also referred to as ‘group purchasing organizations,’ ‘GPOs,’ ‘buying clubs,’ and ‘buying cooperatives.’” (Compl. at ¶ 3).

Response to Proposed Finding No. 104

Complaint Counsel has no specific response.

105. Yet Complaint Counsel did not establish that prominent buying groups discussed in this case meet this definition. (*See* ¶¶ 106-11, *infra*).

Response to Proposed Finding No. 105

The Proposed Finding misstates the record and is contrary to the weight of the evidence. The evidence shows that buying groups discussed in this case fit exactly with the definition in Paragraph 3 of the Complaint, and the definition used by witnesses for each of the Respondents in this matter, as well as witnesses representing for Kois Buyers Group, Smile Source, and competing distributor Burkhart. See CCFF ¶ 67 and testimony and documents cited therein confirming the definition of buying groups as alleged in the complaint. The Proposed Finding also misstates the record and is contrary to the weight of the evidence which demonstrates that buying groups discussed in this case meet the definition as alleged. *See* CX0322 (Maurer, IHT at 19-20 (Smile Source promotes independent dentistry by obtaining discounts on dental supplies and equipment for its members)); CX8029 (R. Johnson, Dep. at 117 (Klear Impakt wants to grow to help independent dentists get discounts on supplies)); CX0321 (Kois Jr., IHT at 35 (Kois Buyers Group was created “to allow the smaller dentists an option to compete with the larger companies, by reducing some of their overhead.”)); Mason, Tr. 2332-2333 (Dr. Mason tried to

start New Mexico Dental Cooperative because corporations were starting to come into New Mexico at that time, and he wanted to leave the independent dentists in a better place to compete with corporate practices).

106. The Kois Buyers Group, for instance, described itself to Patterson as “not a standard BUYING GROUP” and as “profoundly different” in its presentations to Patterson and Schein. (RX0377 at 3; RX2197 at 003). No fact witness contradicted these statements that the Kois Buyers Group, at the time it approached Patterson, was “not a standard BUYING GROUP,” and was “profoundly different” from buying groups. (RX0377 at 3; RX2197 at 003).

Response to Proposed Finding No. 106

The Proposed Finding is misleading, vague and confusing. First, Respondent’s citations to RX0377 at 003 and RX2197 at 003 are to identical, duplicate documents (not to corroborating evidentiary sources, as suggested). Moreover, contrary to Patterson’s assertions, nothing in that attachment describes the buying group as serving any purpose other than to obtain discounts for the dentist members. *See* (RX0377_NATIVE_PDCO 00021864 at Slide 5 and RX2197_NATIVE_Henry Schein-000069068 at Slide 5). Slide 3 of that attachment (which appears to contain the reference to “not a standard BUYING GROUP”) is, as quoted, misleading. The reference to Kois as “not a standard BUYING GROUP” is to the enhanced financial benefits that the Kois Buying Group could offer to *dental products distributors*, not to the buying group having a different relationship with its member dentists. (RX0377_NATIVE_PDCO 00021864 at Slide 3 and RX2197_NATIVE_Henry Schein-000069068 at Slide 3). That is, the citation referenced have nothing to do with whether the Kois Buyers Group functions as other buying groups. In fact, John Kois, Jr., the President of the Kois Buyers Group testified that Kois was created “to allow the smaller dentists an option to compete with the larger companies, by reducing some of their overhead.” (CX0321 (Kois Jr., IHT at 35)); CCFF ¶140).

107. Similarly, though Complaint Counsel labels Smile Source a buying group. (Compl. ¶ 35), Smile Source views itself as a “franchise DSO,” not a buying group (Maurer, Tr. 2046).

Response to Proposed Finding No. 107

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Smile Source does not function as a buying group, does not market itself to dentists as a buying group, or that distributors have not viewed Smile Source as a buying group – both before, during and after the conspiracy period. In fact, trial testimony shows that distributors (including Respondents) considered Smile Source to be a buying group. (Goldsmith, Tr. 1948-1949 (Schein, Patterson, and Benco referred to Smile Source as a buying group); Guggenheim, Tr. 1799 (“Q. Is this [Smile Source] a buying group? A. I believe so.”); CX3009 at 001 (McFadden: email to sales team: “[W]e have said no to smile source. They are [a] buying club.”); Foley, Tr. 4524; Reece, Tr. 4394; Misiak, Tr. 1314 (“Q. What is Smile Source? A. I believe it is a GPO.”); *see also* CX2801 at 018 (Schein’s Response to RFA ¶ 32 (Schein considered Smile Source to be a buying group))). In addition, Schein’s Sullivan testified that he considered Smile Source to be a buying group. (Sullivan, Tr. 3914 (“Q. You see them as a buying group? A. We – in essence, yes.”); CCFF ¶ 175). The record also shows that Smile Source, advertises itself to dentists as providing “group practice resources for the independent dentist” by negotiating lower prices on behalf of independent dentists (Goldsmith, Tr., 1934-1936; CX0322 (Maurer, IHT at 13)) – which are the essential characteristics of buying groups. *See also* Reece, Tr. 4415-4416 (Burkhart seeks to work with buying groups to support independent dentists who want to stay independent); [REDACTED]

[REDACTED]) CCFF ¶¶ 143-144.

108. Both Smile Source witnesses who testified at trial said that Smile Source is *not* a buying group. (Goldsmith, Tr. 1949 (“Judge Chappell: Did you consider Smile Source or do you consider Smile Source to be a buying group or a -- what is it, GPO? . . . A: I do not consider it to be that. Judge Chappell: Either of those. A: Correct.”); Maurer, Tr. 4969 (“Mr. Maurer, if I heard your testimony right, Smile Source is not a buying group. Is that right? A. Correct.”)).

Response to Proposed Finding No. 108

The Proposed Finding is misleading to the extent that it implies that distributors (including Respondents) did not consider Smile Source to be a buying group. Trial testimony shows that Respondents considered Smile Source to be a buying group. (CX3009 at 001 (McFadden email: “[W]e have said no to smile source. They are [a] buying club.”); Goldsmith, Tr. 1948-1949 (Schein, Patterson, and Benco referred to Smile Source as a buying group); Guggenheim, Tr. 1799 (“Q. Is this [Smile Source] a buying group? A. I believe so.”); Foley, Tr. 4524; Reece, Tr. 4394; Misiak, Tr. 1314 (“Q. What is Smile Source? A. I believe it is a GPO.”); *see also* CX2801 at 018 (Schein’s Response to RFA ¶3 2 (Schein considered Smile Source to be a buying group)). In addition, Schein’s Sullivan testified that he considered Smile Source to be a buying group. (Sullivan, Tr. 3914 (“Q. You see them as a buying group? A. We – in essence, yes.”); *see* CCFF ¶ 175). Smile Source functions as a buying group and markets itself to dentists as a buying group. For example, the record also shows that Smile Source, advertises itself to dentists as providing “group practice resources for the independent dentist” by negotiating lower prices on behalf of independent dentists (Goldsmith, Tr., 1934-1936; CX0322 (Maurer, IHT at 013)) – which are the essential characteristics of a buying group. *See also* CCFF ¶¶ 143-144.

109. Rather, Smile Source is a franchisor. (Goldsmith, Tr. 2040–41 (“Q. And you consider Smile Source to be a franchisor; is that right? A. That is correct.”); Goldsmith, Tr. 2046 (“I’ve called myself or I called Smile Source a franchise.”)). That is, individual dental practices sign franchise agreements with Smile Source that allow members to work together, with each getting a designated, exclusive territory. (Goldsmith, Tr. 2046 (“We utilized a franchise agreement in order to allow our members to work together. Q. Now, each member actually gets a designated territory; isn’t that right? A. That is correct. Q. And Smile Source agrees not to

authorize any other Smile Source franchisee within that designated territory. A. That is correct.”); Maurer, Tr. 4970 (“We are a franchise group.”).

Response to Proposed Finding No. 109

The Proposed Finding is misleading to the extent that it implies that distributors (including Respondents) did not consider Smile Source to be a buying group. Trial testimony shows that Respondents considered Smile Source to be a buying group. (CX3009 at 001 (McFadden email: “[W]e have said no to smile source. They are [a] buying club.”); Goldsmith, Tr. 1948-1949 (Schein, Patterson, and Benco referred to Smile Source as a buying group); Guggenheim, Tr. 1799 (“Q. Is this [Smile Source] a buying group? A. I believe so.”); Foley, Tr. 4524; Reece, Tr. 4394; Misiak, Tr. 1314 (“Q. What is Smile Source? A. I believe it is a GPO.”); *see also* CX2801 at 018 (Schein’s Response to RFA ¶ 32 (Schein considered Smile Source to be a buying group))). In addition, Schein’s Sullivan testified that he considered Smile Source to be a buying group. (Sullivan, Tr. 3914 (“Q. You see them as a buying group? A. We – in essence, yes.”); *see* CCFF ¶ 175). Smile Source functions as a buying group and markets itself to dentists as a buying group. For example, the record also shows that Smile Source, advertises itself to dentists as providing “group practice resources for the independent dentist” by negotiating lower prices on behalf of independent dentists (Goldsmith, Tr., 1934-1936; CX0322 (Maurer, IHT at 013)) – which are the essential characteristics of a buying group. *See also* CCFF ¶¶ 143-144. Complaint Counsel makes no specific response to a finding that Smile Source, a buying group, may also be a franchisor. *See* Goldsmith, Tr. 2046 (“We utilized a franchise agreement in order to allow our members to work together.”)

110. No fact witness contradicted these statements that Smile Source was a franchisor, not a “buying group.”

Response to Proposed Finding No. 110

The Proposed Finding is misleading and contrary to the weight of the evidence. As summarized in response to Respondent Patterson's Proposed Findings Nos. 106-109, above,, numerous witnesses testified that Smile Source was a buying groups. *See, e.g.*, Goldsmith, Tr. 1948-1949 (Schein, Patterson, and Benco referred to Smile Source as a buying group); Guggenheim, Tr. 1799; Foley, Tr. 4524; Reece, Tr. 4394; Misiak, Tr. 1314 ("Q. What is Smile Source? A. I believe it is a GPO."); Sullivan, Tr. 3914 ("Q. You see them as a buying group? A. We – in essence, yes.") In sum, many witnesses contradicted the Proposed Finding. It should be disregarded.

111. The lack of a common, understood meaning of "buying groups" would make it difficult to maintain a conspiracy not to sell to "buying groups." As Patterson's Neal McFadden testified, "buying groups were not all created equally. And they were like a jar of jellybeans. They each tasted differently." (CX8004 (McFadden, Dep. at 119–20)).

Response to Proposed Finding No. 111

The Proposed Finding is misleading, lacks citation to evidentiary support; and is contrary to the weight of the evidence. The first sentence of the Proposed Finding is no more than argument and includes no evidentiary citation; the second sentence is a colorful analogy, but does not does not address the assertion about a common understanding of the meaning of the term "buying group." It is, therefore, irrelevant. In fact, there is substantial evidence in this case regarding a common understanding of the meaning of "buying groups." Numerous witnesses have provided testimony supporting the definition that "dental buying groups are organizations of independent dentists that seek to aggregate and leverage the collective purchasing power of separately-owned and separately-managed dental practices in exchange for lower prices on dental products." *See, e.g.*, Kois, Jr., Tr. 348-349; Sullivan, Tr. 3899 (buying group "mean[s] a group of customers that get together and form a group to negotiate with their larger volume"); Guggenheim, Tr. 1566 (a

buying group is a collection of customers that work together to leverage buying power to secure pricing); Meadows, Tr. 2418-2419; Steck, Tr. 3681-3683; Goldsmith, Tr. 1936, [REDACTED]; [REDACTED]; Cohen, Tr. 432-433; Reece, Tr. 4365; CX0301 (Cohen, IHT at 106); CX8004 (McFadden, Dep. at 19-20 (“[A] buying group is a group of independent dentists that get together to form a group in order to get discounted dental supplies.”). The Respondents also use the term buying group with a common meaning in their documents. *See, e.g.*, CX2487 at 002 (as recognized by Schein, buying groups “seek to leverage their purchasing power” to extract lower prices); CX1156 at 001 (Benco’s Patrick Ryan: “Group Purchasing Organizations. They aggregate the purchase volume of unrelated entities in order to leverage price.”); CCFF ¶ 67. Because the Proposed Finding is contrary to the weight of the evidence and is misleading, it should be disregarded.

112. Unlike corporate DSOs, “buying groups” typically do not create a separate corporate entity and do not have common ownership; each member dentist continues to own and run his or her own practice. (CX8004 (McFadden, Dep. at 97) (“The buying groups, on the other hand, have multiple bill-tos and multiple ship-tos. There is no ownership structure at all involved. And, therefore, they would try to tell us that, yes, we can guarantee compliance, yes, they will do what we say, but there were no guarantees. We could provide the pricing, but there was no volume guarantees.”).

Response to Proposed Finding No. 112

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that buying groups cannot drive incremental increases in volume even if contracts do not require a volume commitment. In fact, the record shows that buying groups can offer access to substantial incremental sales. For example, [REDACTED]

[REDACTED]). Similarly, Patterson bid on Smile Source in 2017 because there was potential for incremental sales. (Rogan, Tr. 3546-3547; CCFF ¶¶ 1315, 1352; *see also*

CCFF ¶¶ 1666, 1672). The record moreover shows that some buying groups offer additional savings if its members' purchases reach a certain threshold. For example, [REDACTED]

[REDACTED]. (Kois Jr., Tr. 345-350; [REDACTED]

[REDACTED]; CX0321 (Kois Jr., IHT at 59-61); CCFF ¶¶ 1691). This provides an additional strong incentive for members to purchase from the selected distributor. In fact, there is record evidence that dentists switch their purchases to buying groups contracted with full-service distributors to take advantage of discounts and lower prices. (CCFF ¶¶ 1690-1693).

Finally, the record shows that, during the time when Patterson did not do business with buying groups, it lost customers and revenues. (CX3089 at 001 (December 18, 2014 email from sales rep to Guggenheim: Patterson lost "high quality / high producing" customers to the Kois Buyers Group that was served by Burkhardt, noting that "the cut is deep to us all."); Guggenheim, Tr. 1665-1667; CCFF ¶ 1738).

113. As a result, "buying groups" provide no centralized purchasing or other services, and purchasing decisions remain with each of the member dentists—who often have strong individual preferences about the products they buy, and, in particular, which distributor they want to provide them with service and support—and they are free to buy from their preferred distributor regardless of which distributor(s) the "buying group" endorses. (CX8004 (McFadden, Dep. at 138) ("The GPOs typically wanted to get their 3 to 5 percent, and that is really all we thought they cared about, and getting membership to get 3 to 5 percent so they could get paid. There was still no guarantee at a local level that this solo practitioner, who happened to be doing business with Benco Dental or Schein Dental, would buy those products from Patterson now. And the GPOs could not and would not -- would not guarantee that, or could not guarantee that because they didn't have any ownership or any authority to tell them exactly what to do."); *see, e.g.*, CX8007 (Kois Sr., Dep. at 139) ("Q. Because the Kois Buying Group has no buying power; is that right? A. That's correct. Q. And the Kois Buying Group members have no commitment to buy anything, right? A. That's correct. Q. They don't have any commitment to buy anything in any volume? A. Correct. Q. Or to buy exclusively from any distributor or supplier? A. Correct. Q. And the Kois Buying Group members can deal directly with distributors or suppliers? A. Correct.")).

Response to Proposed Finding No. 113

The Proposed Finding is misleading, incomplete, and not supported by the evidence cited.

Although Complaint Counsel has no specific response to the statement that buying groups “provide no centralized purchasing or other services, and purchasing decisions remain with each of the member dentists,” it is misleading to suggest that buying groups do not provide distributors access to substantial incremental sales. Contrary to the assertions made in the testimony cited, the evidence shows that buying groups can offer access to substantial incremental sales. For example, [REDACTED]

[REDACTED]). Similarly, Patterson bid on Smile Source in 2017 because there was potential for incremental sales. (Rogan, Tr. 3546-3547; CCFF ¶¶ 1315, 1352; *see also* CCFF ¶¶ 1666, 1672).

The record moreover shows that some buying groups offer additional savings if its members’ purchases reach a certain threshold. For example, [REDACTED]

[REDACTED]. (Kois Jr., Tr. 345-350; [REDACTED]

[REDACTED]; CX0321 (Kois Jr., IHT at 59-61); CCFF ¶1691). This provides an additional strong incentive for members to purchase from the selected distributor. In fact, there is record evidence that dentists switch their purchases to buying groups contracted with full-service distributors to take advantage of discounts and lower prices. (CCFF ¶¶1690-1693).

114. Finally, the record shows that, during the time when Patterson did not do business with buying groups, it lost customers and revenues. (CX3089 at 001 (December 18, 2014 email from sales rep to Guggenheim: Patterson lost “high quality / high producing” customers to the

Kois Buyers Group that was served by Burkhart, noting that “the cut is deep to us all.”); Guggenheim, Tr. 1665-1667; CCFF ¶ 1738). Unlike corporate DSOs, “buying groups” thus do not (and cannot) make any commitment on behalf of their member dentists to buy a set volume of any equipment or supplies; they simply ask distributors for bigger discounts for their members than for other dentists who are not in their buying group and say they will promote that distributor’s products to their members. (CX8013 (Fruehauf, Dep. at 63–65) (Generally, it would be, okay, they want us to provide them an extremely low price in writing that could be sent anywhere and everywhere, but not guarantee me any business. So just from a pure business aspect, I don’t -- I can’t make sense of that, because the limited dealings I’ve had has been with them saying our customers in the buying group are going to have the decision to make, you know, who they do business with, we’re not going to make them do business with Patterson.”)).

Response to Proposed Finding No. 114

The Proposed Finding is misleading, incomplete, and not supported by weight of the evidence.

The Proposed Finding is misleading to the extent that it implies that buying groups do not provide distributors access to substantial incremental sales. The weight of the evident shows that, even without volume commitments, buying groups have provided access to valuable incremental sales. For example, [REDACTED]

[REDACTED]

[REDACTED]). Similarly, Patterson bid on Smile Source in 2017 because there was potential for incremental sales. (Rogan, Tr. 3546-3547; CCFF ¶¶ 1315, 1352; *see also* CCFF ¶¶ 1666, 1672). Moreover, the Proposed Finding is not supported by the cited testimony. The testimony does not actually state that buying groups do not or cannot make a volume commitment; it just speaks to one witnesses thoughts on why buying groups could be less attractive. The Proposed Finding also makes broad generalized statements (*e.g.*, “do not (and cannot) make any commitment”), purporting to describe all buying groups, without any supporting testimony. The testimony in Respondent’s single citation does not support the broad generalizations of the Proposed Finding.

115. Because the “buying group” makes no volume commitment, the distributor cannot generally secure better pricing from its equipment and merchandise suppliers to justify the lower prices demanded. (CX8004 (McFadden, Dep. at 97–98) (“We could provide the pricing, but there was no volume guarantees. I could not go to the manufacturer and get a deviated discount

structure, a netted-down discount structure that would give us a chargeback to mitigate that loss. The manufacturers were not recognizing buying groups so, therefore, we could not even begin to give them pricing because we could not get the right cost to make it worth our while. But, once again, they could never guarantee compliance to ordering from Patterson or any volume guarantees.”)).

Response to Proposed Finding No. 115

The Proposed Finding is misleading, incomplete, and not supported by weight of the evidence.

The Proposed Finding is misleading to the extent that it implies that buying groups, and the incremental sales they offer, would not be attractive to a distributor. The weight of the evidence shows that, even without volume commitments, buying groups have provided distributors access to valuable incremental sales. For example, [REDACTED]

[REDACTED]. Similarly, Patterson bid on Smile Source in 2017 because there was potential for incremental sales. (Rogan, Tr. 3546-3547; CCFF ¶¶ 1315, 1352; *see also* CCFF ¶¶ 1666, 1672).

The record moreover shows that some buying groups offer additional savings if its members’ purchases reach a certain threshold. For example, [REDACTED]

[REDACTED]. (Kois Jr., Tr. 345-350; [REDACTED]; [REDACTED];

CX0321 (Kois Jr., IHT at 59-61); CCFF ¶¶1691). This provides an additional strong incentive for members to purchase from the selected distributor. In fact, there is record evidence that dentists switch their purchases to buying groups contracted with full-service distributors to take advantage of discounts and lower prices. (CCFF ¶¶1690-1693).

The Proposed Finding is also misleading and contrary to evidence in the record which shows that some manufacturers did, in fact work with buying groups. For example, the record shows that Patterson’s Fruehauf wrote to his boss Rogan in July 2013 to inform Rogan that Dentsply (one of Patterson’s largest suppliers) was offering a discount to a buying group through a regional dental distributor, Nashville Dental. (CX3165 at 001-002; Rogan, Tr. 3425-3426, 3552-3553). In August 2013, a Dentsply regional sales manager wrote to Rogan stating, “We treat Smile Source in the same fashion as our other regional and national key account groups and/or buying groups . . . I know there are numerous other manufacturers that participate with them as well that you work with.” (CX3054 at 001; Rogan Tr., 3549-3552). Respondent’s suggestion that a distributor could not seek discounts from a manufacturer is thus contradicted by trial testimony of its own executive.

Finally, despite Patterson’s assertion that the lack of a volume commitment is an impediment to entering into an arrangement with a buying group, after the end of the conspiracy, Patterson did exactly that. [REDACTED]

[REDACTED]

[REDACTED]. [REDACTED]

[REDACTED]; see CCFF ¶¶ 1364, 1365). For all

of these reasons, the Proposed Finding should be disregarded.

116. “Buying groups” pose another obvious risk: if a distributor accedes to their demands and provides significantly lower prices to the members of the “buying group” than to its other, non-member customers, the distributor risks aggravating—and losing—its much-larger pool of non-member dentists. (CX8013 (Fruehauf, Dep. at 59–60) (“Q. Is that because you thought the – your relationship with your best customers would be harmed in some way if they learned that this buying group had been able to get a better deal than they were getting from Patterson? A. Speaking specifically for the way I viewed it, yes.”)).

Response to Proposed Finding No. 116

The Proposed Finding is misleading, incomplete, and contrary to the weight of the evidence.

The Proposed Finding is misleading to the extent that it implies that buying groups, and the incremental sales they offer, would not be attractive to a distributor. *See Responses to Patterson's Proposed Findings Nos. 114-115.* The Proposed Finding is also contradicted by evidence that, after the end of the conspiracy, Patterson bid on and obtained contracts with buying groups. Patterson bid on Smile Source in 2017 (Rogan, Tr. 3546-3547), had conversation with [REDACTED] and entered into contracts with [REDACTED]. [REDACTED]. Patterson's lack of concern about the asserted "risk" undercuts the validity of its Proposed Finding.

117. Working with buying groups also meant Patterson risked "cannibalizing" existing business without gaining enough new business to offset the loss. (Rogan, Tr. 3547-48) ("Cannibalization, obviously if you are going to -- it's a perfect example on Smile Source. If we were going to bring them on with these individual discounts and let's say their members were -- and we did, we ran the math -- and I believe their members were already spending \$3 million with Patterson. So right off the bat, if they don't bring any other customers to us and we give those customers a better deal, we have just slashed a bunch of our prices. We've cannibalized some of our business.").

Response to Proposed Finding No. 117

The Proposed Finding is misleading and incomplete. It is incomplete because it fails to cite Rogan's complete testimony. In the very next set of questions and responses, Rogan's answers paint a different picture than the Proposed Finding suggests:

Q: So Patterson bid on Smile Source knowing that there would be some cannibalization?"

A: Well, the answer is yes.

Q. So cannibalization alone is not a reason not to work with a buying group?

A: No.

(Rogan, Tr. 3547).

The Proposed Finding is also misleading to the extent that it suggests that "cannibalization" was the reason for Patterson's decision to reject Smile Source, the buying group reference in the

Proposed Finding. As noted above, the complete citation to Rogan’s testimony makes it clear that cannibalization alone was not a reason to reject Smile Source. The weight of the evidence shows moreover that, when Patterson turned down Smile Source in 2013 in spite of its members’ \$14 million annual spend, it was because Smile Source was a buying group. (CX3009 at 001 (McFadden email: “[W]e have said no to smile source. They are [a] buying club.”); CCFF ¶ 642). Because the Proposed Finding is incomplete and misleading it should be disregarded.

g. Responses to Proposed Findings Regarding “Patterson Was Skeptical About The Value Of Doing Business With Buying Groups Before, During, And After The Alleged Conspiracy Period.”

118. Patterson viewed “buying groups” skeptically and did not generally sell to them long before February 2013. (CX8004 (McFadden, Dep. at 37) (“Q. And do you recall when it became a topic of discussion? A. Right about the same time that we were receiving the requests from the State of Florida, which could have been around 2011 and 2012. Q. Do you remember anything about substance of those conversations about buying groups that you had with your branch managers? A. Other than what I previously mentioned regarding culture of our organization being extremely territory rep centric, that Patterson built their entire company around supporting our territory reps, that we felt as though this was such a radical change in the dental industry that we could not get our heads around how it could coexist within our culture of supporting independent sales reps and also treating all of our clients the same.”)).

Response to Proposed Finding No. 118

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that, prior to February 2013, Patterson had a policy about whether it would do business with buying groups. Patterson witnesses have repeatedly testified that, prior to February 8, 2013 it did not have a policy. (CX8023 (Guggenheim, Dep. at 134 (no company policy at time received Cohen’s February 8, 2013 email, and Patterson “evaluated individually” each buying group), CX8023 (Guggenheim, Dep at 137) (“don’t have . . . a uniform way to deal with [buying groups]”); McFadden, Tr. 2676 (Patterson did not have a policy regarding buying groups when McFadden was the Southeast Regional Manager from 2009 to 2013); *see also* CX8004

(McFadden, Dep. at 37-38) (McFadden was not aware of any Patterson corporate policy regarding buying groups)); CCF 498-499).

The Proposed Finding is also contrary to the weight of the evidence because, according to Patterson’s sworn interrogatory responses, Patterson did not track whether it had arrangements at a local level, so could not have known if it “did not generally sell to them long before February 2013” as the Proposed Finding states. (CX3504 at 004 (Patterson’s Response to Complaint Counsel’s First Interrogatories ¶ 1) (“Patterson – being a historically decentralized sale organization with local branches servicing local dental practices and generating local sales records – did not centrally track whether its agreements or transactions were with entities fitting the FTC’s definition of “Buying Groups.”))).

Finally, the Proposed Finding is also misleading and contrary to the weight of the evidence because it ignores the fact that Patterson’s sales representatives and branch manager in New Mexico were actively engaged in negotiating with NMDC, a buying group, in early February 2013. (CCF 454-473; *see also* RX0010 at 001 (March 2010 email from branch manager to Guggenheim about discount to be offered to “a group of dentists who have gathered together to boost purchasing power”); CX3422 at 001 (June 2012 email about discounts to be offered to Smile Source dentists in Hawaii)).

119. Patterson salespeople repeatedly met with and evaluated “buying groups,” but declined to sign contracts with them, for years before Complaint Counsel alleges it joined the alleged conspiracy. (RX0401 at 001 (Patterson did not bid on MMCA in 2009 because “it’s a GPO” and the requirements for working with the group included a fee: “every month by the 15th we had to send them a check for 1% of total sales they purchased from Patterson”); RX0029 at 001–002 (March 2012) (Patterson declined to bid on the Florida Dental Association’s group purchasing organization for a second time, after having “spoke[n] with [the] FDA President” several months prior; Mr. McFadden told his superiors, “This stuff scares me. I’m gonna tell him thanks but no thanks.” Patterson’s Scott Anderson chimed in that Patterson’s “advantage program is in essence a GPO for the independent dentist.”); (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.”); Misiak Tr., 1499 (“Q. Mr. Misiak, were buying groups a part of your core strategy at Patterson Dental back in 2009? A. They were not. Q. Why not? A. It didn’t make the strategic initiative board for execution in 2009.”)); CX3010 at 001 (September 2013 email: “In the past we have not done business with GPOs” because they cannot commit to buy certain, set volumes of equipment and supplies on behalf of their members and “we don’t have the resources or the systems to manage them properly.”); CX8004 (McFadden, Dep. at 76–77 (“In my career of 21-plus years at Patterson, I cannot remember us dealing with one single buying group.”); CX8017 (Rogan, Dep. at 068 (Patterson “had always said no” to “buying groups.”))).

Response to Proposed Finding No. 119

The Proposed Finding is misleading, not supported the testimony cited, contrary to the weight of the evidence, and irrelevant. Whether Patterson rejected buying groups prior to the conspiracy is not relevant to whether Patterson participated in a conspiracy to refuse discounts to buying groups. Moreover, this Proposed Finding is misleading as it is contradicted by record evidence that Patterson discounted to buying groups prior to entering the conspiracy in February 2013. For example, RX0010 at 001 (March 31, 2010 email from a branch manager to Guggenheim about approving discounts for “a group of dentists who have gathered together to boost purchasing power.”) and CX3422 at 001 (June 26, 2012 email from Rogan about offering a group discount to Smile Source dentists in Hawaii) show Patterson working with buying groups prior to the conspiracy. Indeed, Guggenheim’s sworn deposition testimony, consistent with Patterson’s interrogatory responses, was that “my gut would tell me, yeah, we’ve probably done business with buying groups and that’s probably been done in branches, you know, for many years.” CX8023 (Guggenheim, Dep. at 141). It was only at trial that Guggenheim changed his testimony and stated that at the time he received Cohen’s February 8, 2013 email (CX0090), Patterson had a policy not to do business with buying groups. (Guggenheim, Tr. 1597-1598).

The examples Patterson offers in support of its Proposed Finding are inapposite. For example, RX0401 does not involve a proposal from a buying group of independent dentists. Rather, it concerns request for a bid for supplying “corrections facilities.” (RX0401 at 00002). Whatever Patterson’s reasons were for rejecting that request in 2009, it is irrelevant to Patterson’s position with regard to working with buying groups of independent dentists. Finally, the Proposed Finding is misleading and irrelevant to the extent that it implies that Patterson’s decisions about doing business with any particular buying group prior to the conspiracy contravenes the evidence that it joined an agreement with its competitors to reject buying groups. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660).

120. Tim Rogan testified that there was no discussion of pursuing buying group business in the fall of 2012 because it would have been “a distraction” and “even today . . . it’s not an opportunity” Patterson is pursuing. (Rogan, Tr. 3605).

Response to Proposed Finding No. 120

The Proposed Finding is misleading and contrary to the weight of the evidence, including other testimony by Mr. Rogan. It is misleading to the extent that it implies that that Patterson’s decisions about doing business with buying group prior to the conspiracy contravenes the evidence that it joined an agreement with its competitors to reject buying groups. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 630-653, 657).

Rogan's testimony that "even today . . . it's not an opportunity" that Patterson is pursuing, is moreover factually incorrect. In an effort to paint buying groups as an unattractive opportunity, Rogan's testimony is contradicted by other testimony he provided. For example, he testified specifically that Patterson bid for the Smile Source buying group contract in 2017. (Rogan, Tr. 3540). The evidence also shows that, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Thus, Rogan's testimony that Patterson is not pursuing buying group opportunities today is contrary to the record evidence.

121. Buying groups usually were not attractive customers to Patterson because they were not under common ownership, had no corporate entity, did not commit to any volume of purchases, and left each member free to buy from any distributor it wanted—in short, Patterson did not see buying groups' proposals as a "two-way agreement." Misiak, Tr. 1469 ("A. Yeah. We did not see it as a well-organized space that could deliver the volume commitments. Q. And that goes back years before this? A. My entire career at Patterson. Q. So going back 22 years. A. Correct."); Guggenheim, Tr. 1768–69 ("[T]hey might have contracts that they sign, but the difference being they're not committing to a purchase volume. There's no real control that they have on whether or not an independent practice would comply with that contract, so they're offering a hope or a goal number that they think they may be able to deliver, but in practice, they don't have any way to mandate or control those purchases. Q. Well, Mr. Guggenheim, you've been in business for 40 years in the dental industry. Why can't you just do business on a hope and a goal? A. Because that's not how business works. We have to -- if we're going to offer incentives to customers and whether that's pricing or service incentives, we have to know that the agreement that's being made is a two-way agreement. Q. Otherwise, you're lowering price, but you're not getting anything in return? A. Exactly."); Guggenheim, Tr. 1844 ("In the case of buying groups, you know, the question we always have is can they mandate the purchases, do they have any influence other than just a we hope that we'll do this number, and that's usually our assessment, is that's what they come down to."); Rogan, Tr. 3478 ("[W]e should at least be able to tell the market -- tell the sales force why we don't think buying groups made sense to Patterson. And the reason I said that is that they can't commit to the spend and they don't reduce Patterson's cost, so we have to continue servicing them at a high level for a low margin."); CX8038 (Misiak, Dep. at 137–138 ("If I thought buying groups could organize and deliver volume commitments, absolutely, that would be a competitive advantage I would be thinking about. But I never believed that."))).

Response to Proposed Finding No. 121

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that that Patterson's decisions about doing business with buying group prior to the conspiracy contravenes the evidence that Patterson joined an agreement with its competitors to reject buying groups. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 630-653, 657).

The Proposed Finding is also misleading and vague to the extent that it does not specify any time period to which the Proposed Finding applies. To the extent that the Proposed Finding suggests that it reflects Patterson's current views, the record shows that, after the conspiracy, Patterson has sought or obtained contracts with buying groups, and that those contracts do not contain volume commitments. [REDACTED]

[REDACTED]; CCFF ¶¶ 1364-1365); *see also* CCFF ¶¶ 1352-1357).

122. Patterson saw most buying groups as middlemen who were in it to take a cut or commission, also known as a "vig," or "taste." (CX3114 at 001) ("Some of these type of relationships are on a GPO (group purchasing organization) basis where a % sales are given to the referring company. . . . this type of relationship has not been a good fit or need for our dental business."); Misiak, Tr. 1498 ("And I reply that basically these type of relationships, GPO I call out, where the percentage of the sales are given to the referring company, others simply pay the insurance company directly for the name of the sponsorship. These are some things I'd learned about them in the -- in the business."); Guggenheim, Tr. 1574 ("Problems that start there with that's a third party basically taking a -- what we would consider a fee to sell his negotiations with us, that's a concern because that puts somebody in between us and our customer."); Guggenheim, Tr. 1602 ("We don't like third parties in between us and our customers."); Guggenheim, Tr. 1574 ("They were concerned about a few things here. Number one, individuals who would organize these groups and take a -- what we call a vig or a fee that we felt was inappropriate because the -- there were individuals who were basically selling their ability to align a group, and we didn't think that was appropriate."); Guggenheim, Tr. 1802 ("This is, you

know, an example of what I described before was common, would be common that consultants or other folks in this business would attempt to leverage their relationships with customers to create a buying group and give them an incentive by selling their business.”); Mar. 14, 2018 Scheduling Hr’g Tr. 13 (“JUDGE CHAPPELL: Okay. And don’t they take a taste? . . . JUDGE CHAPPELL: You don’t want to concede middle man? MS. KAHN: They can be viewed as a middle man.”)).

Response to Proposed Finding No. 122

The Proposed Finding is misleading and contrary to weight of the evidence, and contrary to the testimony of another Patterson witness. The record evidence show that, after the conspiracy ended, Patterson became interested in working with buying groups, even though the structure and nature of those groups had not changed. For example, in November 2015 Rogan sent an email to Guggenheim, providing instructions about Strategic Planning, stating, “You have “global” on your strategic plan. Maybe that moves aside . . . And we add GPO’s/Buying Groups to the strategic plan. Meaning we are going to build out a strategy of how we are going to go to market with them?” (CX3362 at 001). When Rogan was asked about his instruction to Guggenheim regarding adding buying groups to the strategic plan, his testimony was that working with buying groups was *not* unethical. (Rogan, Tr. 3459-3460 (“Q. But you wouldn’t suggest that the company look into something if it was unethical or against your corporate values. THE WITNESS. For – I would never suggest for my company do something unethical. That part is correct.”)) Rogan also testified that Patterson’s proposal to Smile Source included a payment from Patterson to Smile Source, or an amount based on the percentage of dollar spend by Smile Source members (Rogan, Tr. 3542-3543) – exactly the type of payment that Guggenheim referred to as a “vig.” In light of the testimony that Rogan (Patterson’s current VP for North America) does not consider this arrangement to be unethical, the Proposed Finding is contrary to sworn testimony and the weight of the evidence.

The Proposed Finding is also misleading because the inquiry that Patterson rejected in 2009, as referenced in CX3114, was about partnering with an insurance company. The document also does not involve an actual inquiry from a buying group. Rather, it is an internal email with a Patterson employee asking why Patterson has not partnered with insurance companies to extend additional discounts to doctors. Misiak's response is merely his speculation and observation about what buying groups might be doing in 2009. At the time he wrote the email, moreover, he was Vice President of Marketing, Merchandise; he was not in charge of sales.

Finally, the Proposed Finding is irrelevant to the extent that it implies that Patterson's views of buying groups contravenes the evidence that Patterson joined an agreement with its competitors to reject buying groups. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 630-653, 657).

123. Patterson was generally not interested in working with middlemen requiring Patterson pay vigs or kickbacks; it saw these as unethical. (Guggenheim, Tr. 1574 (“The second concern would be that could be ethical issues as we see it. We often have folks like this approach us saying -- for instance, consultants, saying, I have 30 customers -- I have 30 clients of mine, and they do whatever I tell them to do, so what I'd like to do is I'd like to recommend that they buy a product from you, and if they buy that product from you, you'll pay me a fee. That's an ethics issue. And that's oftentimes what we see in these types of situations.”); Guggenheim, Tr. 1802 (“A. A vig is like a kickback, which is something that ethically at our company we are very firm that that's not acceptable. We don't participate with that kind of stuff, so we don't buy business through third parties like this. But it's common that these sorts of things surface. Q. Did you ever suspect that some of these buying groups that were approaching you that were representing people that they said were in buying groups, they were looking for a vig, a kickback? A. Right. They were looking for -- that's oftentimes what's at the core of these.”)).

Response to Proposed Finding No. 123

The Proposed Finding is misleading and contrary to weight of the evidence, and contrary to the testimony of another Patterson witness. The record evidence show that, after the conspiracy ended, Patterson became interested in working with buying groups, even though the structure and nature of those groups had not changed. For example, in November 2015 Rogan sent an email to Guggenheim, providing instructions about Strategic Planning, stating, “You have “global” on your strategic plan. Maybe that moves aside . . . And we add GPO’s/Buying Groups to the strategic plan. Meaning we are going to build out a strategy of how we are going to go to market with them?” (CX3362 at 001). When Rogan was asked about his instruction to Guggenheim regarding adding buying groups to the strategic plan, his testimony was that working with buying groups was *not* unethical. (Rogan, Tr. 3459-3460 (“Q. But you wouldn’t suggest that the company look into something if it was unethical or against your corporate values. THE WITNESS. For – I would never suggest for my company do something unethical. That part is correct.”) Rogan also testified that Patterson’s proposal to Smile Source included a payment from Patterson to Smile Source, or an amount based on the percentage of dollar spend by Smile Source members (Rogan, Tr. 3542-3543) – exactly the type of payment that Guggenheim referred to as a “vig.” In light of the testimony that Rogan (Patterson’s current VP for North America) does not consider this arrangement to be unethical, the Proposed Finding is contrary to sworn testimony and the weight of the evidence.

Finally, the Proposed Finding is irrelevant to the extent that it implies that Patterson’s views of buying groups contravenes the evidence that Patterson joined an agreement with its competitors to reject buying groups. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group

policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 630-653, 657).

124. Patterson was also concerned about how discounting to buying groups would be viewed by its bread and butter customer base of loyal independent dentists. (Guggenheim, Tr. 1574–75 (“The second part was it felt wrong for us to sell to noncustomers or small customers at prices that were substantially lower than we were selling to our best customers. That’s -- we felt there was a bit of an ethics here issue here.”); Guggenheim, Tr. 1657 (The next issue for us is the pricing fairness in our market. This would then allow noncustomers who don’t buy anything from us to potentially receive a lower price than customers that buy tens or even hundreds of thousands of dollars from us. We have an issue with that. We like to control how we implement pricing strategies in our markets, so that’s where we talk about our business model. Those are the larger concerns that we have.”)).

Response to Proposed Finding No. 124

The Proposed Finding is misleading and contrary to weight of the evidence. The record evidence shows that, after the conspiracy ended, Patterson became interested in working with buying groups, even though the structure and nature of those groups had not changed. *See, e.g.*, CX3362 at 001 (November 13, 2015 email from Rogan to Guggenheim about Strategic Planning: “You have “global” on your strategic plan. Maybe that moves aside . . . And we add GPO’s/Buying Groups to the strategic plan. Meaning we are going to build out a strategy of how we are going to go to market with them?”). After the conspiracy was falling apart, Patterson also hired a consulting firm, McKinsey & Co., to analyze the dental distribution market, including conducting an analysis of buying groups. (CCFF ¶ 1329). In addition, after the conspiracy had fallen apart, Patterson hired a new Director of Business Development in January 2016 whose responsibilities included working with buying groups and GPOs. (Rogan, Tr. 3474; CX0312 (Fields, IHT at 24-25); CCFF ¶¶ 1343-1344). To the extent that Patterson’s views were as expressed in the Guggenheim testimony cited in the Proposed Finding, it is not credible that Patterson would, coincident with the demise of the conspiracy, suddenly change its position with respect whether it was appropriate to sell to buying groups.

Finally, the Proposed Finding is irrelevant to the extent that it implies that Patterson’s views of buying groups contravenes the evidence that Patterson joined an agreement with its competitors to reject buying groups. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 630-653, 657-660).

125. Patterson’s David Misiak wrote, in 2009, that GPO relationships “have not been a good fit or need for [Patterson’s] dental business.” (CX3114 at 001).

Response to Proposed Finding No. 125

The Proposed Finding, which cites to a document that dated over three years before Patterson joined the conspiracy, is irrelevant. Moreover, at the time of the document in 2009, Misiak was Patterson’s VP of Marketing, Merchandise, (CX3114 at 001, CX8038 (Misiak, Dep. Tr. at 45), rather its VP of Sales, so may have been expressing an opinion, but was not even in a position to decide with which customers Patterson would do business. For that additional reason, the Proposed Finding is irrelevant. The Proposed Finding is, moreover, irrelevant to the extent that it implies that a Patterson’s views about the “fit” of buying groups contravenes the evidence that, in 2013, Patterson joined an agreement with its competitors to reject buying groups. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 630-653, 657-660). Complaint Counsel has no specific response to the accuracy of the quoted language.

126. Patterson chose not to bid on an entity in 2009 because “it’s a GPO.” (RX0401 at 001).

Response to Proposed Finding No. 126

The Proposed Finding is misleading, vague and unsupported by the document cited. The Proposed Finding is misleading because it suggests, based on an incomplete presentation of the referenced exhibit, that it is related to a bid for a GPO. Looking at the full document, RX0401 at 002 makes it clear that the referenced proposal is for a bid for supplying *corrections facilities* (prisons), and was not a proposal for a buying group serving independent dentists. To the extent that Patterson chose not to submit a bid for the same corrections facilities contract in 2009, the document (and the Proposed Finding) are irrelevant.

127. David Misiak advised Neal McFadden in 2012, “Your response is right,” in response to McFadden saying that he would say “thanks but no thanks” to a “buying group.” (CX0159 at 001).

Response to Proposed Finding No. 127

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that, prior to February 2013, Patterson had a policy about whether it would do business with buying groups. Patterson witnesses have repeatedly testified that, prior to February 8, 2013, Patterson did not have a policy. (CX8023 (Guggenheim, Dep. at 134 (no company policy at time he received Cohen’s February 8, 2013 email, and Patterson “evaluated individually” each buying group), CX8023 (Guggenheim, Dep at 137) (“don’t have . . . a uniform way to deal with [buying groups]”); McFadden, Tr. 2676 (Patterson did not have a policy regarding buying groups when McFadden was the Southeast Regional Manager from 2009 to 2013); *see also* CX8004 (McFadden, Dep. at 37-38) (McFadden was not aware of any Patterson corporate policy regarding buying groups); CCF 498-499).

128. Patterson’s Shelley Beckler wrote, in December 2013, that “[i]n the past we have **not** done business with GPO’s [sic] just because we don’t have the resources or systems to manage them properly.” (CX3010 at 001 (bolding in original, italics added)).

Response to Proposed Finding No. 128

The Proposed Finding is misleading and contrary to the evidence in the record. Testimony at trial from Misiak, the former President of Patterson Dental, was that Patterson had the resources and infrastructure to work with buying groups both before it established its Special Markets division and after Special Markets was formed in 2013. (CCFF ¶ 595 (citing Misiak, Tr. 1510)). Patterson did not call Beckler as a witness to lay any foundation for the statement they quote and there is no foundation for her knowledge – if any – for that statement, which is contrary to the evidence in the record.

129. Patterson’s Neal McFadden wrote, in May 2015, “We *currently* have little appetite to deal with buying groups as we feel they compete directly with our branches and reps.” (RX0451 at 1 (emphasis added)).

Response to Proposed Finding No. 129

The Proposed Finding is incomplete to the extent that it leaves out evidence in the record from the same email chain of which RX0451 is a part. CX0160, a May 20, 2015 email which includes the same inquiry that gave rise to McFadden’s response in RX0451, shows that, prior to the response quoted in the Proposed Finding, McFadden forwarded the email chain to Guggenheim and Rogan, adding a comment, “This is just FYI – as you are building out the specialty segment – these buying groups are popping up everywhere.” McFadden’s comment indicates that, as of May 2015, when the conspiracy was starting to fall apart, buying groups were becoming more prevalent. McFadden’s statement to his sales team, as quoted in the Proposed Finding, is in keeping with his other statements after the start of the conspiracy in which McFadden instructed his team to reject buying groups. *See, e.g.* CX3010 at 001 (McFadden: “[A]s of now we are not

working with GPO's."); CX3016 at 001 (McFadden: "I am sure we should pass on these [buying] groups...."); CX3004 at 001 (McFadden: "For now – I am electing to not participate with [buying groups] – we have said no to several already"); CX3045 at 001 (McFadden: "[D]oes he own all these offices—if not then he is a GPO—we don't deal with GPOs."); *see also* CCF ¶ 630).

h. Responses to Proposed Findings Regarding “Unlike Patterson *Special Markets*, Patterson *Dental*’s Decentralized Salesforce Considered Buying Group Opportunities As They Came.”

130. Patterson’s regions, branches, and 750+ territory representatives were always free to consider “buying groups” and regularly met with them between 2013 and 2015, heard their proposals, and evaluated whether to seek an appointment as their endorsed distributor. (Guggenheim, Tr. 1795 (“Q. [D]id you meet with buying groups throughout this period 2013, 2014, 2015? A. We did. Q. Well, why? I mean, I thought you had an agreement with Chuck Cohen because he sent you an e-mail. Why did you waste your time? . . . A. We would meet with folks. . . Our evaluations would be whether or not they controlled the purchasing that they were representing, so we would always keep an open mind and evaluate that and determine each of these on their face as to whether or not they made sense for the business.”); CX8023 (Guggenheim, Dep. at 185) (Patterson “had a nuanced position on ‘buying groups’ to evaluate them individually in each market based on whether or not they made sense.”); Misiak, Tr. 1395 (“A. As I said earlier, Patterson is very decentralized, and lots of branches have a great sense of entrepreneurial spirit and autonomy and will do business and make agreements with different customers, and so there’s a possibility that we do business with GPOs.”)).

Response to Proposed Finding No. 130

The Proposed Finding is misleading and contrary to the evidence in contemporaneous documents kept in the regular course of Patterson’s business. The evidence shows that, at the time Guggenheim received Cohen’s February 8, 2013 email (CX0090), Patterson did not have a company policy with respect to buying groups or a uniform way of dealing with buying groups and had done business with buying groups. (CX8023 (Guggenheim, Dep. at 134 (no company policy at time received Cohen’s February 8, 2013 email, and Patterson “evaluated individually” each buying group), at 137 (“don’t have . . . a uniform way to deal with [buying groups]”)); CX0314 (Guggenheim, IHT. at 220 (“I believe we do [sell to GPOs]”)); CX8023 (Guggenheim,

Dep. at 141 (“my gut would tell me, yeah, we’ve probably done business with buying groups and that’s probably been done in branches, you know, for many years”)); CX3422 at 001 (June 26, 2012 email from Rogan approving discounts for Smile Source buying group dentists in Hawaii: “Just tell us what discount you want to go with and we will get it loaded.”)).

The record evidence also establishes that, within a few weeks of Guggenheim’s February 8, 2013 email with Cohen (CX0090), Patterson began instructing sales representatives to “stay out” of buying groups. (CX0093 at 001 (Misiak: “stay out” of buying group); CX0106 at 001 (Rogan: “We don’t need GPO’s in the dental business”); CX3116 at 001 (Misiak: “My guidance has been to politely say no [to buying groups] and whether [sic] the storm with these.”); CX3168 at 001 (Rogan: “We don’t sell to buying groups. Let’s talk live.”); CX3010 at 001 (McFadden: “[A]s of now we are not working with GPO’s.”); CX3016 at 001 (McFadden: “I am sure we should pass on these [buying] groups....”); CX3004 at 001 CX3045 at 001 (McFadden: “[D]oes he own all these offices—if not then he is a GPO—we don’t deal with GPOs.”); CX3038 at 001 (Fruehauf: “We generally do not deal with groups that are formed just to get better pricing. Send him my email and I will respond to him.”)). These instructions are all phrased broadly – applying to buying groups generally, not to specific groups.

Moreover, there is no evidence that sales reps (or anyone else) were instructed to ask for additional information to “evaluate” any particular buying group or to obtain additional information about the group before rejecting it. For example, rather than respond to an inquiry from a military dentist about a buying group he was creating by seeking additional information, Patterson’s sales rep responded pursuant to guidance from his Regional Manager, “we do not have a separate discount program for group buyers.” (CX3125 at 001; CX3038 at 001). That is, Patterson rejected the buying group out of hand. Misiak testified, moreover, that he did not

recall Patterson reviewing any data with respect to buying groups. (CX0316 (Misiak, IHT at 266); CCFF ¶ 559). The evidence with regard to Atlantic Dental Care presents particularly compelling demonstration of the fact that Patterson did not “evaluate” buying groups as claimed in the Proposed Finding. Guggenheim admitted that Patterson did not do an independent investigation of whether ADC was a buying group or DSO, relying instead on obtaining information about ADC from Chuck Cohen at Benco. (CX0314 (Guggenheim, IHT at 289-294); CCFF ¶ 560). The weight of the evidence does not support the Proposed Finding.

131. When, during the alleged conspiracy period, Patterson territory representatives asked Patterson executives about “buying groups,” the executives’ response was always the same: to explore the opportunity on its individual merits, to see if made it sense for Patterson. (CX8017 (Rogan, Dep. at 60 (“[P]eople were asking me about buying groups right from the day I got the job up until today they ask me about them and we take a look at them and see if it makes sense for us to do business.”))).

Response to Proposed Finding No. 131

The Proposed Finding is misleading and contrary to the evidence found in contemporaneous documents. The evidence shows that, within a few weeks of Guggenheim’s February 8, 2013 email with Cohen (CX0090), Patterson began instructing sales representatives to “stay out” of buying groups. (CX0093 at 001 (Misiak: “stay out” of buying group); CX0106 at 001 (Rogan: “We don’t need GPO’s in the dental business”); CX3116 at 001 (Misiak: “My guidance has been to politely say no [to buying groups] and whether [sic] the storm with these.”); CX3168 at 001 (Rogan: “We don’t sell to buying groups. Let’s talk live.”); CX3010 at 001 (McFadden: “[A]s of now we are not working with GPO’s.”); CX3016 at 001 (McFadden: “I am sure we should pass on these [buying] groups....”); CX3004 at 001 CX3045 at 001 (McFadden: “[D]oes he own all these offices—if not then he is a GPO—we don’t deal with GPOs.”); CX3038 at 001 (Fruehauf: “We generally do not deal with groups that are formed just to get better pricing. Send him my

email and I will respond to him.”)). These instructions are all phrased broadly – applying to buying groups generally.

There is moreover no evidence that sales reps (or anyone else) were instructed to ask for additional information or “evaluate” any particular buying group or to obtain additional information about the group before rejecting it. The Proposed Finding does not cite a single contemporaneous document in which Rogan – or anyone else at Patterson – instructed the sales team to “explore the opportunity on its individual merits, to see if made it sense for Patterson.” Misiak testified, moreover, that he did not recall Patterson reviewing any data with respect to buying groups. (CX0316 (Misiak, IHT at 266); CCFF ¶ 559). As noted above, the evidence with regard to Atlantic Dental Care presents particularly compelling demonstration of the fact that Patterson did not “evaluate” buying groups (or entities it believed were buying groups) as claimed in the Proposed Finding. On the contrary, in response to Fruehauf’s February 27, 2013 email regarding ADC’s bid proposal (CX0092), Misiak instructed Fruehauf and his sales team to “stay out” of selling to GPOs. (CX0093 at 001; Misiak, Tr. 1349, 1354-1355, 1358, 1368; CCFF ¶ 543). Guggenheim also admitted that Patterson did not do an independent investigation of whether ADC was a buying group or DSO, relying instead on obtaining information about ADC from Chuck Cohen at Benco. (CX0314 (Guggenheim, IHT at 289-294); CCFF ¶ 560). The weight of the evidence does not support the Proposed Finding.

132. In September 2014, Neal McFadden, the head of Patterson Special Markets, declined to attend a convention hosted by a “buying group” in Georgia because of his organization’s focus on corporate DSOs, but he noted that Patterson’s local branch would be welcome to attend: “This is a buying group. *So, if the branch wants to pay the \$5000 and attend they [are] more than welcome to.* But we will not be attending *as a special markets group.*” (RX0348 at 001 (emphasis added); McFadden, Tr. 2819–20 (“Q. When you got this request from Brandy, who you didn’t know, asking for money at a sponsorship event for Tralongo Management, did you consider that a great opportunity for your special markets DSO-focused organization you were building? A. No, it wasn’t. Q. Is this another one of the outlandish

buying group requests that came in? A. Yes. So I just turned right around and told the branch, if they want to do it, they're more than happy to do it, but I'm not going to do it.'')).

Response to Proposed Finding No. 132

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that, after Patterson joined the conspiracy in February 2013, its branch offices were being allowed to bid for buying groups. Rather, the evidence shows that Dave Misiak, the VP of Sales, who oversaw the sales operation and the branch offices, and was responsible for providing guidance to the branches about working with customers (Misiak, Tr. 1300, 1383), consistently told his sales force to “stay out” of buying groups. (CX0093 at 001; Misiak, Tr. 1388-1389 (Misiak provided guidance to Patterson’s branches and regions to say “no” to doing business with buying groups); CX3116 at 001 (Misiak: “My guidance has been to politely say no [to buying groups] and whether [sic] the storm with these.”); Misiak, Tr. 1352-1353 (when Patterson was approached by buying groups, Misiak would “[p]olitely turn them down”)).

133. In May 2015, McFadden again declined an invitation to go beyond his Special Markets corporate DSO mandate—but he again made it clear that Patterson’s local (Maine) branch was free to do so: “*If the local branch wants to do something here then that’s fine by me, but I cannot work with our manufacturers on securing special pricing for a “buying group” that has no ownership in their clients.*” (RX0451 at 001 (emphasis added)). Patterson’s Maine branch manager responded, “Thanks for the insight Neal—we *will handle at the Branch level.*” (RX0451 at 001). May 2015 was a month after the alleged conspiracy ended. (Kahn, Tr. 19). Also in May 2015, Patterson’s Kristin Sammarco, an Operations Specialist in Patterson Special Markets, informed a Patterson account specialist, Shelley Beckler, that at the time, Special Markets was “not working directly with GPOs. The local facilities are working with the branches,” also explaining that “*we continue to allow the branches to work with these accounts.*” (RX0454 at 001 (emphasis added)).

Response to Proposed Finding No. 133

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that, after Patterson joined the conspiracy in February 2013, its branch offices were allowed to bid for buying groups. Rather, the evidence shows that Dave Misiak, the VP of Sales,

who oversaw the sales operation and the branch offices and was responsible for providing guidance to the branches about working with customers (Misiak, Tr. 1300, 1383), consistently told his sales force to “stay out” of buying groups. (CX0093 at 001; Misiak, Tr. 1388-1389 (Misiak provided guidance to Patterson’s branches and regions to say “no” to doing business with buying groups); CX3116 at 001 (Misiak: “My guidance has been to politely say no [to buying groups] and whether [sic] the storm with these.”); Misiak, Tr. 1352-1353 (when Patterson was approached by buying groups, Misiak would “[p]olitely turn them down”)).

The Proposed Finding is also misleading in that it misstates the record regarding the time of the end of the conspiracy. Although Complaint Counsel has introduced evidence that the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015, this did not create a precise “end” date. Complaint Counsel has never taken the position that the entry by Benco into a settlement with the Texas Attorney General created a precise “end” date. (Tr. 19 (Complaint Counsel’s Opening Statement); *see also* Complaint Counsel’s Post-Tr. Br. at 37-38).

Finally, to the extent that the Proposed Finding suggests that Patterson’s branches were, in fact, working with buying groups, it is contrary to Patterson’s sworn statements that it did not have any buying group agreements prior to April 2018. (CX3504 at 004 (Patterson’s Response to Complaint Counsel’s First Interrogatories ¶ 1) (“Patterson is not currently aware of any agreements for the purchase or sale of dental products between itself and entities falling under the FTC’s definition of “Buying Group” [for the period 2009 to April 16, 2018])).

134. Patterson management also evaluated “buying groups” on a case by case basis. *See* (Guggenheim, Tr. 1843 (“Q. Why did you and Mr. Misiak and others at Patterson -- why did you spend your time exploring these various buying group opportunities that were popping up? A. Well, we wanted to sort of understand each in each case, what the organization was about.

The primary questions we had again related to did they have control of the buying habits of these dentists. That would have had us evaluate them differently. Each of these have nuances, so we want to make sure that we fully understand them and have a good handle on what they're presenting."); CX8017 (Rogan, Dep. 97 ("Q. You said that you were evaluating whether -- you were evaluating buying groups and whether to sell to buying groups. Was that true in 2013? A. It 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.")); CX0314 (Guggenheim, IHT at 246 ("Well, we're still evaluating these things, you know, for the value to the business. So each one of these is unique and different. And so generally we're continuing to look at these things *since this point in time and going forward till today.*")))).

Response to Proposed Finding No. 134

The Proposed Finding is misleading and contrary to the evidence in contemporaneous business documents. The evidence shows that, within a few weeks of Guggenheim's February 8, 2013 email exchange with Cohen (CX0090), Patterson began instructing sales representatives to "stay out" of buying groups. (CX0093 at 001 (Misiak: "stay out" of buying group); CX0106 at 001 (Rogan: "We don't need GPO's in the dental business"); CX3116 at 001 (Misiak: "My guidance has been to politely say no [to buying groups] and whether [sic] the storm with these."); CX3168 at 001 (Rogan: "We don't sell to buying groups. Let's talk live."); CX3010 at 001 (McFadden: "[A]s of now we are not working with GPO's."); CX3016 at 001 (McFadden: "I am sure we should pass on these [buying] groups...."); CX3004 at 001 CX3045 at 001 (McFadden: "[D]oes he own all these offices—if not then he is a GPO—we don't deal with GPOs."); CX3038 at 001 (Fruehauf: "We generally do not deal with groups that are formed just to get better pricing. Send him my email and I will respond to him.")). These instructions are all phrased broadly – applying to buying groups generally. There is no evidence that Patterson management instructed its sales reps or anyone else to ask for additional information or "explore" buying group "opportunities." The Proposed Finding does not cite a single contemporaneous document in which Guggenheim, Rogan – or anyone in management at Patterson – instructed the sales team to "explore these various buying group opportunities." Misiak testified, moreover, that he did

not recall Patterson reviewing any data with respect to buying groups. (CX0316 (Misiak, IHT at 266); CCFF ¶ 559).

The evidence with respect to New Mexico Dental Cooperative (NMDC) demonstrates that the Proposed Finding is contrary to the evidence. In that situation (before Patterson joined the conspiracy), Patterson's local branch manager began discussing a partnership with NMDC. (CCFF ¶¶ 454, 462-463, 465-471). Indeed, the local branch manager set up a dinner meeting with the NMDC founders to "help us get guidelines in place." (CX4090 at 002; CCFF ¶¶ 469-471). When Guggenheim was asked about Patterson's position with regard to buying groups *at the time* he communicated with Cohen about NMDC, he explained that Patterson was still evaluating buying groups. (CX0314 (Guggenheim, Dep. at 246) ("I guess at that time we still hadn't, you know, formed a full opinion about it, but to a certain extent might have included buying groups. Q. What do you mean at that time you hadn't formed a full opinion? A. Well, we're still evaluating these things, you know for the value to the business.") When Guggenheim responded to Cohen on February 8, 2013, however, he stated, "Thanks for the heads up. I'll investigate the situation. We feel the same way about these." (CX0090 at 001). Within a few weeks of this exchange, Patterson's position was no to evaluate buying groups, but to "stay out" of buying groups, (CX0093 at 001).

As noted above, the evidence with regard to Atlantic Dental Care presents particularly compelling demonstration of the fact that, after February 8, 2013, Patterson did not "evaluate" or "explore" buying groups (or entities it believed were buying groups) as claimed in the Proposed Finding. In response to Fruehauf's February 27, 2013 email regarding ADC's bid proposal (CX0092), Misiak instructed Fruehauf and his sales team to "stay out" of selling to GPOs. (CX0093 at 001; Misiak, Tr. 1349, 1354-1355, 1358, 1368; CCFF ¶ 543). Guggenheim also

admitted that Patterson did not do an independent investigation of whether ADC was a buying group or DSO, relying instead on obtaining information about ADC from Benco. (CX0314 (Guggenheim, IHT at 289-294); CCF ¶ 560). Guggenheim's reaction to the inquiry from the Kois Buyers Group also demonstrates Guggenheim's rejection of buying groups during the conspiracy period, rather than any effort to "explore" and opportunity. With the Kois Buyers Group, the record evidence shows that Guggenheim decided on August 18, 2014, over a month before Patterson was scheduled see Kois's presentation on September 29, that it would not do business with the Kois Buyers Group. (CX0116 at 001 (August 18, 2014 email from Guggenheim to Rogan, "Agreed ... I'll kill it."); CCF ¶¶ 637-639)

Finally, the evidence in the record shows that Patterson management made no effort to even consider working with buying groups until after the conspiracy started to fall apart. In November 2015, Guggenheim had to be instructed by Rogan to consider adding buying groups to the Patterson Strategic Plan. (CX3362 at 001 (November 13, 2015 email from Rogan to Guggenheim about Strategic Planning: "You have "global" on your strategic plan. Maybe that moves aside . . . And we add GPO's/Buying Groups to the strategic plan. Meaning we are going to build out a strategy of how we are going to go to market with them?")). Because the weight of the evidence does not support the Proposed Finding, it should be disregarded.

135. In late 2015, as the company started to see some "buying groups," like Smile Source, sign up a hundred or more members across multiple locales, it weighed whether Patterson Special Markets—with its infrastructure built on servicing entities with central points of contact—might be better positioned to evaluate them, rather than leaving them to a single local territory representative. (CX8023 (Guggenheim, Dep. at 154–55); CX0312 (Fields, IHT at 29–30)).

Response to Proposed Finding No. 135

The Proposed Finding is misleading because it is not supported by the testimony cited. Neither of the transcript citations in the Proposed Finding makes any mention of Smile Source or of a determination that Patterson's Special Markets was "better positioned" to evaluate buying groups. The first citation, CX8023 (Guggenheim, Dep. at 154–55), merely explains that Wes Fields was brought into Patterson corporate in late 2015 to explore buying groups. The second, CX0312 (Fields, IHT at 29–30)), references the factors that Fields' might consider in evaluating buying groups in 2015, but does not include any facts related to the Proposed Finding. Contrary to the Proposed Finding, other evidence in the record shows that Patterson had the resources and infrastructure to work with buying groups both before it established its Special Markets division and after Special Markets was formed in 2013. (Misiak, Tr. 1510; CCFF ¶ 595). The implication of the Proposed Finding that Patterson's Special Markets division was not "positioned" to work with buying groups during the conspiracy period is unsupported by the testimony cited, and is contrary to the weight of the evidence.

136. By Fall of 2015, Patterson was considering an internal position dedicated in part to "GPO Management." (RX0530 at 001) (October 2015 calendar invitation for a meeting between Guggenheim and Wesley Fields about his new position as of November)).

Response to Proposed Finding No. 136

The Proposed Finding is misleading because it is completely unsupported by the evidence cited. The document cited does not contain any of the information suggested by the Proposed Finding. Rather, it is a vague, unspecified calendar invitation showing a location, but not showing that Guggenheim or Fields were invited to the meeting. The document, moreover, does not contain any information to suggest that it involved an "internal position dedicated in part to 'GPO Management.'" It shows "GPO management" as an agenda item, but provides no reference to "a

position.” In sum, the document does not contain any of the information the Proposed Finding claims. The Proposed Finding offers no other supporting citations. The Proposed Finding should also be disregarded as irrelevant. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 630-653, 657-660). Patterson continued to be part of the conspiracy until it began to fall apart in mid to late 2015. To the extent that Patterson was considered establishing an internal position dedicated to GPO Management in November 2015 (although that fact is not supported by the citations), it is irrelevant to Patterson’s participation in the conspiracy.

137. At the time, Patterson also hired McKinsey & Company to analyze its group practice strategy, and McKinsey’s December 2015 report concluded that Patterson was rightly focused on DSOs but should also keep an eye on “buying groups” to see whether they might continue to grow their membership, centralize their purchases, and become attractive customers. (Rogan, Tr. 3906-07; RX0572 at slide 54).

Response to Proposed Finding No. 137

Complaint Counsel has no specific response.

138. In November 2015, Patterson appointed Wesley Fields as Director of Business Development in its corporate office and instructed him to evaluate larger “buying groups” within Special Markets (and still left regions and branches free to handle smaller “buying groups” as they saw fit). (Misiak, Tr. 1320 (“Q. Did someone do due diligence or analysis before Patterson decided to bid on Smile Source? A. In approximately 2015, we deployed a business development director -- his name is Wes Fields -- to gather information from the field and from the industry about different GPO-type organizations.”); CX0312 (Fields, IHT at 8 (Fields started November 1, 2015); CX0312 (Fields, IHT at 29–30 (“Through evaluation, if there was a GPO that was able to deliver a solid business proposition to us, that would get good business that would fit with us, within our ethics and our type -- our style of doing business, then we would certainly be interested in doing that, working through them. Q. So your directive was that if you were able to find a GPO that was able to deliver a solid business proposition, that you would work with that GPO? A. Yes.”)).

Response to Proposed Finding No. 138

The Proposed Finding is misleading and not supported by the testimony cited to the extent that it suggests there is evidence that Patterson was leaving its “regions and branches free to handle smaller ‘buying groups’ as they saw fit. First, neither of the citations makes any mention of regions or branches. Thus, the testimony cited does not include any support for the Proposed Finding. Even if Fields’ job assignment had been so specified, however, the Proposed Finding is irrelevant. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). Patterson continued to be part of the conspiracy until it began to fall apart in mid to late 2015. Fields’ job assignments in late 2015 have nothing to do with the alleged conspiracy, other than to demonstrate that Patterson became sufficiently concerned about its need to compete with other full-service distributors for buying groups after the conspiracy ended that it hired Fields to work with these groups.

139. Patterson evaluated Smile Source several times over the course of the years. (*See infra* ¶¶ 141, 160).

Response to Proposed Finding No. 139

The Proposed Finding is vague and imprecise as to what is meant by “evaluated,” “several times,” and “over the years.” To the extent that the Proposed Finding cross references Patterson’s Proposed Finding ¶140, that Proposed Finding contradicts Patterson Proposed Finding ¶139 because it expressly states that “Patterson received an inquiry from Smile Source in Fall 2011 . . . which Patterson did not investigate.” If Patterson did not investigate this inquiry, it cannot claim that it “evaluated” Smile Source. Because the Proposed Finding is imprecise and

vague about which other times it claims to have “evaluated” Smile Source, it is not supported by sufficient evidence. It should be disregarded.

140. Patterson received an inquiry from Smile Source in Fall 2011, prior to the commencement of the alleged conspiracy, which Patterson did not investigate. (CX3176 at 001 (“Introduction to Dr. John Wallitschek – I Smiles, Smile Source”)).

Response to Proposed Finding No. 140

Complaint Counsel has no specific response.

141. Patterson evaluated Smile Source in November 2013, when multiple Patterson executives, including Mr. McFadden, the head of Special Markets, and David Misiak, Vice President of Sales, met with Smile Source’s Andrew Goldsmith. (Goldsmith, Tr. 2172–73 (“Q. So at that point you had met with three high-level executives at Patterson; fair? A. Yes. Q. And at the meeting with Mr. Misiak and Mr. McFadden at Patterson’s headquarters in Minnesota, you testified that you gave a presentation on what Smile Source did; correct? A. Yes.”); Goldsmith, Tr. 2174–75 (“Q. So you had the meeting with the two executives from Patterson in Minnesota, and you testified that it was -- it was collegial; correct? A. Yes. Q. They were friendly? A. Yes. Q. They were professional? A. Yes. Q. They heard you out? A. Yes.”); RX0177 at 0001–003 (correspondence between Misiak and Goldsmith); Misiak, Tr. 1398 (“Q. Did you ever communicate with anyone from Smile Source? A. Via e-mail, I believe I -- I communicated with Smile Source, and there was a meeting at the Patterson corporate office as well that I participated in.”)).

Response to Proposed Finding No. 141

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Patterson’s position at the time it turned down Smile Source in 2013 was that it would work with buying groups. The evidence is to the contrary. For example, on the same day that Misiak rejected Smile Source in 2013 (CX3117 at 001), Rogan wrote with respect to another buying group inquiry, “We don’t sell to buying groups. Let’s talk live.” (CX3168 at 001 (November 20, 2013 email from Rogan to Patterson’s Manager of Marketing Communications)).

The fact that Patterson may have been “friendly” and “professional” in communicating with Smile Source is irrelevant to the question of whether Patterson was considering working with a buying groups. Patterson executives did not need to be rude to Smile Source in order to comply

with the agreement with Benco and Schein. Indeed, when Misiak was providing guidance on the no buying group policy, he expressly stated, “[m]y guidance has been to politely say no [to buying groups] and whether [sic] the storm with these.” (CX3116 at 001).

142. McFadden’s “early impression [of Smile Source] . . . was not a very good impression at all.” (CX8004 (McFadden, Dep. at 120)). He was concerned that, because Smile Source at that time was working with Burkhart, Smile Source members ordering from Burkhart might not want to switch that business to Patterson. (CX0315 (McFadden, IHT at 209–10 (“A. Because the dental industry is a very fragmented industry. The dentists become very loyal with their dealers. And so just because Smile Source says we have decided that we want to do business with Patterson, doesn’t necessarily mean that Burkhart client is going to switch all their business to Patterson.”)))).

Response to Proposed Finding No. 142

The Proposed Finding is misleading and lacks credibility to the extent that it implies that Patterson does not compete for customers because of its concern that “dentists become loyal with their dealers” and would not be willing to switch. Contrary to this position, Patterson has elsewhere claimed that it competes vigorously for individual dentists and seeks to win those individual dentists away from its competitors. *See, e.g.*, [REDACTED]. This Proposed Finding is premised on a contrary position that Patterson does *not* compete for individual customers, and specifically, that it could not compete for Smile Source members and individual dentist customers who had previously been served by Burkhart. The record evidence is to the contrary and shows that dentists are willing to switch between distributors to take advantage of lower prices. (Cohen, Tr. 668, 938-941; Sullivan, Tr. 3932; McFadden, Tr. 2846; Ryan, Tr. 1129-1130; Mason, Tr. 2405-2406; [REDACTED]; CX0149 at 001; CCFF ¶ 53).

143. At the beginning of 2013, Smile Source had only 58 franchises signed up. (CX8019 (Moody, Dep. at 36–37)).

Response to Proposed Finding No. 143

Complaint Counsel has no specific response.

144. [REDACTED]

Response to Proposed Finding No. 144

Complaint Counsel has no specific response, and notes that the evidence in the record shows that, at the time Patterson’s Special Markets division was started, McFadden was open to the possibility of working with buying groups. (CCFF ¶¶ 599-601). However, McFadden’s boss, Guggenheim, placed an “extreme amount of pressure” on McFadden to focus exclusively on DSOs and stay away from buying groups. (CX0315 (McFadden, IHT at 240); CCFF ¶ 604).

145. [REDACTED]

Response to Proposed Finding No. 145

Complaint Counsel has no specific response, and notes that the evidence in the record shows that, at the time Patterson’s Special Markets division was started, McFadden was open to the possibility of working with buying groups. (CCFF ¶¶ 599-601). However, McFadden’s boss, Guggenheim, placed an “extreme amount of pressure” on McFadden to focus exclusively on DSOs and stay away from buying groups. (CX0315 (McFadden, IHT at 240); CCFF ¶ 604).

146. Goldsmith, McFadden, and Misiak met in late 2013 at Patterson’s headquarters in Minneapolis. [REDACTED]

Response to Proposed Finding No. 146

Complaint Counsel has no specific response.

147. At Goldsmith's meeting with Patterson, McFadden and Misiak were friendly, professional, and listened to what Goldsmith had to say. (Goldsmith, Tr. 2174 ("Q. So you had the meeting with the two executives from Patterson in Minnesota, and you testified that it was -- it was collegial; correct? A. Yes. Q. They were friendly? A. Yes. Q. They were professional? A. Yes. Q. They heard you out? A. Yes.")).

Response to Proposed Finding No. 147

The Proposed Finding is misleading and irrelevant to the extent that it implies that the fact that Patterson was "friendly" and "professional" is evidence that it was willing to do business with a buying groups. There is no basis in the record for this supposition. On the contrary, the evidence shows that, by the time Patterson was meeting with Smile Source in 2013, Patterson had entered into an agreement that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 630-653, 657). In compliance with its no buying group policy, Patterson turned down Smile Source in 2013 in spite of its members' \$14 million annual spend – and that the reason it turned Smile Source down was because it was a buying group. (CX0297 at 001; CX3117 at 001; CX3009 at 001 (Statement of McFadden: "[W]e have said no to smile source. They are [a] buying club.)); *see also* [REDACTED]; CX0147 at 001).

148. At this point, Smile Source was working with Burkhart as a distributor and was looking to add a second distributor outside of Burkhart's service region. (Goldsmith, Tr. 2173).

Response to Proposed Finding No. 148

Complaint Counsel has no specific response.

149. Smile Source's Andrew Goldsmith also did not offer Patterson the opportunity to replace Burkhart as its distributor partner—rather, Patterson was to supplement Burkhart. (Goldsmith, Tr. 2173 ("Q. So it's fair that at the meeting you were not looking to replace Burkhart, you were in fact looking to add Patterson to service members outside of the Burkhart region; correct? A. Yes.)); Goldsmith, Tr. 2174 ("Q. Okay. But it was your intent for Patterson

to come in and offer discounts to these handful of members outside of Burkhart's region; fair? A. Yes.”)).

Response to Proposed Finding No. 149

Complaint Counsel has no specific response.

150. A few days after this meeting, on November 20, 2013, Misiak wrote Goldsmith, “Thanks for stopping in to see us and following up. Your organization and story is impressive. We are currently not interested but will keep the strategy and Smile Source on the ‘idea board’ and get back to you should things change.” (CX3117 at 001).

Response to Proposed Finding No. 150

The Proposed Finding is misleading to the extent that it implies that it was not against Patterson's self-interest to turn down the 2013 Smile Source opportunity. The evidence in the record shows that Patterson turned down Smile Source in 2013 in spite of its members' \$14 million annual spend because it was a buying group. (CX0297 at 001; CX3117 at 001; CX3009 at 001 (Statement of McFadden: “[W]e have said no to smile source. They are [a] buying club.”); *see also* [REDACTED]; CX0147 at 001); CCF ¶ 642). The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Patterson's position at the time it turned down Smile Source in 2013 was that it would work with buying groups. The evidence is to the contrary. For example, on the same day that Misiak rejected Smile Source in 2013 (CX3117 at 001), Rogan wrote with respect to another buying group inquiry, “We don't sell to buying groups. Let's talk live.” (CX3168 at 001 (November 20, 2013 email from Rogan to Patterson's Manager of Marketing Communications)).

151. Andrew Goldsmith, Smile Source's former Chief Dental Officer, acknowledged that Patterson's decisions with respect to Smile Source in November 2013 were not in parallel with Schein or Benco. (Goldsmith, Tr. 2175–77).

Response to Proposed Finding No. 151

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that differences in responses from Schein, Patterson and Benco preclude a finding of parallel conduct by the three. The weight of the evidence is to the contrary, showing that all three Respondents turned down buying groups during the conspiracy period, all three of Respondents' executives, including Cohen, Guggenheim, and Sullivan, instructed their sales teams to turn down buying groups during the conspiracy period, and all three of Respondents' sales teams understood that the directive not to deal with buying groups came from the top of the company. (CCFF ¶¶ 398-399, 406-425, 527, 534-563, 661-954; *see also* Complaint Counsel's Post-Tr. Br., at Attachment C).

With respect to Smile Source specifically, both Benco and Patterson refused to provide a discount to Smile Source because it was a buying group. Benco rejected Smile Source every year from 2011 through 2013. CCFF ¶ 410 (quoting CX1138 at 001 (2011: "Unfortunately, I don't think we would be able to help you. Your structure meets our definition of GPO, and Benco does not participate in group purchasing organizations"); quoting CX1219 at 002 (2012: "Benco doesn't recognize GPOs as a single customer")); [REDACTED]
[REDACTED]
[REDACTED]). Patterson also rejected Smile Source in 2013: "[W]e have said no to smile source. They are [a] buying club." CCFF ¶ 642 (quoting CX3009 at 001) (emphasis added). [REDACTED]

[REDACTED] CCFF ¶ 642 [REDACTED]
[REDACTED]

Schein's attempt at cheating on the conspiracy by negotiating with Smile Source in 2014 does not negate Respondents' otherwise parallel conduct or the existence of an agreement. Indeed, at

the same time Schein was allegedly working on a bid for Smile Source, it was instructing its team not to do business with buying groups: “Just for clarity, we are NOT participating in any GPOs regardless of what they promise to bring us.” *See, e.g.*, CCFF ¶ 816 (quoting CX2354 at 001); *see also* CCFF ¶¶ 788 (quoting CX2073 at 001 (Dec. 20, 2013 email from Schein’s Foley: “It’s a buying group that we do not participate with, as with all buying groups.”)), 799 (quoting CX2235 at 001 (July 17, 2014 email from Schein’s Titus: “We had a GPO prospect called PGMS. Very intriguing, willing to be exclusive It went to [Sullivan] and he shot it down. I think the meta msg is officially, GPO’s are not good for Schein.”)).

152. Patterson’s decision not to bid on Smile Source’s business in November 2013 was an independent business decision, due in part to Patterson’s skepticism that Smile Source could add value at that time. (McFadden, Tr. 2178–19) (“Q. What was the result of the meeting with Dr. Goldsmith? A. He didn’t make a very good first impression. There was no reason for us to choose to do business with him after we met together. I don’t think he represented Smile Source very well.”); Tr. 2830–31 (“Q. And I think you said you sort of had an unfavorable opinion coming out of the meeting with Mr. Goldsmith; is that right? A. That’s right. . . . Q. Coming out of that meeting, did you say, That’s an opportunity we should pursue right now? A. No.”); *see also* CX3117).

Response to Proposed Finding No. 152

The Proposed Finding is misleading to the extent that it implies that it was not against Patterson’s self-interest to turn down the 2013 Smile Source opportunity. The evidence in the record shows that Patterson turned down Smile Source in 2013 in spite of its members’ \$14 million annual spend because it was a buying group. (CX0297 at 001; CX3117 at 001; CX3009 at 001 (Statement of McFadden: “[W]e have said no to smile source. They are [a] buying club.”); *see also* [REDACTED]; CX0147 at 001; CCFF ¶ 642). [REDACTED]

[REDACTED]. Other documents show that forgoing Smile Source’s business may have been a costly mistake, as Patterson lost business when its own regular customers switched suppliers when they joined Smile Source. CX3186 at 009

(Attachment to June 26, 2017 email from Fruehauf to Rogan, addressing key drivers for Patterson’s Nashville Branch: “1) Continue to lose business to buying groups (i.e. SmileSource and Mari’s List). . . .We have had 5 more clients sign up with Smile Source [dentists names omitted] are the 4 largest with total lost merchandise at \$110k annual sales.”); CX3182 at 001 (May 26, 2017 email from Lepley to Rogan (“Client has signed with SmileSource buying group and if we aren’t close on price they won’t buy from Patterson.”)).

153. On December 31, 2013, a Patterson’s Corporate Collections Manager emailed McFadden and Misiak that every individual doctor listed on Smile Source’s website that she looked up was already a Patterson customer. (CX0148 at 001 (“[W]hen I went to SmileSources website, it looks like each location is under the individual doctor’s name. I checked out some of the names, mainly out of Texas and Denver, and we do conduct business with all that I looked up.”)).

Response to Proposed Finding No. 153

The Proposed Finding is misleading to the extent that it implies that the fact that some Smile Source doctors were already Patterson customers provided a reason to forgo doing business with Smile Source. In fact, if Smile Source members who were current Patterson customers chose to access discounts through Smile Source, they might begin buying their supplies from whatever distributor Smile Source would select, and Patterson would lose those customers. *See, e.g.,* . CX3186 at 009 (Attachment to June 26, 2017 email from Fruehauf to Rogan, addressing key drivers for Patterson’s Nashville Branch: “1) Continue to lose business to buying groups (i.e. SmileSource and Mari’s List). . . .We have had 5 more clients sign up with Smile Source [dentists names omitted] are the 4 largest with total lost merchandise at \$110k annual sales.”); CX3182 at 001 (May 26, 2017 email from Lepley to Rogan (“Client has signed with SmileSource buying group and if we aren’t close on price they won’t buy from Patterson.”)).

The Proposed Finding is also misleading to the extent that it implies that all or nearly all of the Smile Source members were actually Patterson customers. The referenced email is far more limited, stating, “I checked out *some of the names, mainly out of Texas and Denver . . .*” (CX0148 at 001) (emphasis added). There is nothing in the email to suggest that all (or even most) Smile Source dentists were included in the group of “some” that were “checked out.” The reference is, therefore, meaningless.

Moreover, even were it true that most of Smile Source members were already Patterson customers, Patterson would earn incremental revenue as members shifted more of their spend to Patterson were it Smile Source’s preferred vendor. For example, [REDACTED]

[REDACTED]

[REDACTED] CCRF (Patterson) ¶ 152 (citing CX7100 (Marshall Report) at 164 [REDACTED]; see CCFF ¶ 642 (noting Smile Source’s 2013 member spend of \$14 million). Any suggestions that fears about cannibalization stopped Patterson from competing for Smile Source in 2013, are undermined by Patterson’s bid for Smile Source in 2017 under similar circumstances. CCFF ¶¶ 1353-1354. Indeed, contrary to Patterson’s stated excuse, Rogan testified that the risk of cannibalization alone was not justification for Patterson to avoid partnering with a buying group. CCFF ¶ 1354 (citing Rogan, Tr. 3548-3549). Moreover, the totality of the evidence confirmed by Patterson’s internal communications, suggest that Smile Source was rejected not based on cannibalization concerns grounded in an analysis of Smile Source’s membership, but instead based on a blanket policy of refusing to work with a “buying club.” CCFF ¶ 624 (quoting CX3009 at 001).

154. By the end of 2013, Smile Source still had only roughly 145 locations. (Maurer, Tr. 4978).

Response to Proposed Finding No. 154

Complaint Counsel has no specific response.

155. [REDACTED]

Response to Proposed Finding No. 155

The Proposed Finding is misleading to the extent that it implies that [REDACTED] [REDACTED] were relevant to Patterson's decision not to do business with Smile Source. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). Patterson then turned down Smile Source in 2013, despite the fact that it was against Patterson's interest to forgo a very large potential client. Patterson's internal reason for turning down Smile Source, as reflected in contemporaneous business documents, is that Smile Source was a buying group. (CX3009 at 001 (Statement of McFadden: "[W]e have said no to smile source. They are [a] buying club."); CCFF ¶ 642). There is no evidence in the record that Patterson was aware of any of Smile Source's [REDACTED], or if those were of any concern 2013.

156. Trevor Maurer took over Dr. Goldsmith's responsibilities after his termination. (Maurer, Tr. 4938) ("Q. And when did you become president? A. Mid-'13. . . . Q. And what was Dr. Goldsmith's role at Smile Source when you joined? A. So right prior to my arrival he was president, and when I joined, he was demoted to chief dental officer.").

Response to Proposed Finding No. 156

The Proposed Finding is misleading, not supported by the testimony cited, and irrelevant. The testimony cited references Maurer's title, but does not address Maurer's responsibilities. There is, therefore, no support for the Proposed Finding. The Proposed Finding is irrelevant to the extent that it implies that Smile Source's internal personnel decisions were relevant to Patterson's decision not to do business with Smile Source in 2013, which was prior to the time Maurer took on his position.

157. Between 2013 and 2017, Smile Source grew from just 145 franchises at the end of 2013, to over 500 by February 2017. Trevor Maurer wrote to Schein's Mark Mlotek in February 2017:

[REDACTED]

Response to Proposed Finding No. 157

Complaint Counsel has no specific response.

158. Thus, according to Maurer, Smile Source had achieved growth to over 500 franchises nationwide without a relationship with a national, full-service dealer. [REDACTED]

Response to Proposed Finding No. 158

The Proposed Finding is misleading and irrelevant to the extent that it implies that Smile Source and other buying groups were not harmed by the conspiracy among the Big Three. Indeed, the very document that Patterson cites in support shows that the Proposed Finding is factually inaccurate. In Maurer's 2017 email to Mlotek he states, [REDACTED]

[REDACTED]. In addition, the fact that Smile Source was able to grow does not negate the fact that its growth may have been hampered by the conspiracy, [REDACTED]. The Proposed Finding is also misleading to the extent that it implies that Complaint Counsel must show that any particular buying group was harmed by the conspiracy or that the amount of harm must be quantified in order to demonstrate that Schein, Patterson and Benco joined the conspiracy. The weight of the evidence shows that, no later than February 2013, Patterson entered into the agreement not to do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). Finally, Patterson's Proposed Finding No. 159 contradicts this Proposed Finding because it makes clear that Smile Source ultimately determined that it did in fact need a national partner.

159. Also, according to Maurer, *Smile Source* chose when to seek a national partner.

[REDACTED].

Response to Proposed Finding No. 159

The Proposed Finding is misleading to the extent that it implies that Smile Source could have obtained a national partner at the time of its choosing, despite the existence of the no buying group conspiracy involving Patterson, Schein and Benco. In fact, Patterson did not submit a bid in 2013 (CX3009 at 001), and although Schein submitted a bid to Smile Source in 2014, [REDACTED]

[REDACTED] (CCFF ¶¶ 1829-1837). [REDACTED]

[REDACTED]

[REDACTED].

160. In late 2016, Smile Source noticed that Patterson had won the business of Heartland Dental, the largest DSO in the nation. (Maurer, Tr. 4984). Smile Source had also noticed that Patterson was “not really in the group dentistry space prior to that.” (Maurer, Tr. 4985). Patterson’s deal with Heartland caused Smile Source to think that Patterson might be interested in engaging with Smile Source. (Maurer, Tr. 4985).

Response to Proposed Finding No. 160

Complaint Counsel has no specific response.

161. Patterson bid on Smile Source’s business in early 2017, concluding that it was “the most formulated of the buying groups,” and presented a “very competitive bid,” in part because Smile Source “took cost out of the structure” for Patterson by providing certain services its members. (Misiak, Tr. 1323-24 (“Q. So why did you and Tim Rogan decide to bid on Smile Source? A. I think what we talked about was it seemed to be the most well-formulated in its ideas and brand, and we had some e-mails that had come in that were specific around the organization. We’d met with the folks and thought it would be a good opportunity to look into the business further. But “hope” was a good word. Hope is not a strategy.”); Rogan, Tr. 1542–43 (“Because Smile Source has a whole marketing type of wing, so they were going to do a bunch of things that we didn’t need to do. So it made sense for us to discount to them a little bit because we were saving a bunch of money on the other end. So it ended up – it was going to be a more profitable deal than if we had just gone directly to the dentists.”); Rogan, Tr. 3545 (“Smile Source eventually started adding a bunch of marketing services. They started providing a bunch of things that Patterson actually provides, but we weren’t going to have to provide those, and those things are expensive. So they took cost out of the structure. So by 2017 -- and when I looked at their model, looked at what they were providing, what we wouldn’t have to provide, the price we were going to charge, it made business sense. Because of the value they were going to provide that we didn’t have to provide, this was going to be a profitable deal for us, and up until this point, we hadn’t seen that with any other buying groups.”); Rogan, Tr. 3586 (“A. Yes, so they help dental offices market. They help them with clinical education, so they are more proficient/efficient. They help them attract new patients. Just several things that we actually could do as well, so things we weren’t going to have to do. So they were going to offer a lot of -- they offer a lot of things that Patterson can offer, so if we offered them to the dentist, we wouldn’t need Smile Source, but if Smile Source is already offering them and they already have the relationship with the client and we don’t have to offer them, then our cost structure goes down, so we are able to lower our price as well. So we could sell to them at a lower price and actually have the same amount of profit.”); [REDACTED]

[REDACTED]; CX0317 (Rogan, IHT at 176-77 (“Q. Have you -- or has Patterson spent much time doing analysis of the value that buying groups or GPOs provide to the customers? A. Well, every customer is different, so we take a look at each one. Some of them we’ve spent more time on than others. You know, a recent one I’ve spent a lot of time on because we only -- you know, we -- Well, we were going to do business with them but didn’t win the contract. Q. And which one was that? A. A company called Smile Source. So we

spent a lot of time with them. It turns out they provide a lot of value to their clients, and so it was interesting to us because it was value we weren't going to have to provide, we were going to lower our price, but we were -- also the cost structure was going to go down, and they were going to be able to commit to the volume. . . . So I went and presented to them and gave them our full show, everything about what we could do and the value we would provide, and -- and we were beaten.”)).

Response to Proposed Finding No. 161

The Proposed Finding is misleading to the extent that it implies that Patterson's decision to bid for Smile Source's business in 2016 and 2017 is relevant to whether Patterson participated in the conspiracy, which it joined in 2013. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). To the extent that the Proposed Finding has any relevance, the testimony cited in support of the Proposed Finding demonstrates the actions taken by Patterson after the conspiracy when it actually evaluated a buying group. This contrasts with Patterson's cursory rejections of buying group inquiries during the conspiracy. *See, e.g.*, (CCFF ¶¶ 621-652). Patterson's detailed “evaluation” of Smile Source in 2016 stands in clear contrast with its actions during the conspiracy, when, for example, Patterson did not review any data with respect to buying groups. (CX0316 (Misiak, IHT at 266 (Misiak testimony that he did not recall Patterson reviewing any data with respect to buying groups); CCFF ¶ 559).

162. In 2017, Smile Source has its own office, a board room, and management team in the range of a hundred employees, all working to provide services for its members. (Rogan, Tr. 3587–88 (“Q. So Smile Source was a fully fledged entity with an office, with a management team, and a board room, and a hundred employees providing services to the members of Smile Source. Do I have that right? . . . A: Yes.” Q. Can you think of another buying group – during your entire tenure with the company, 25 years, can you think of any other buying group that's ever been brought to your attention that had its own office with a board room and a management team and somewhere in the range of a hundred employees, all working to provide services for

their members? A. I do not. Q. Is that why you engaged with Smile Source and not other buying groups? A. Yes.”)).

Response to Proposed Finding No. 162

The Proposed Finding is misleading to the extent that it implies that Patterson’s decision regarding its bid for Smile Source’s business in 2016 and 2017 is relevant to whether Patterson participated in the conspiracy, which it joined in 2013. It is also misleading and irrelevant to the extent that it implies that other entities (including other entities that work with dentists or buying groups) lack legitimacy because they do not have a “board room” or a “management team in the range of a hundred employees.” There is no evidence in the record about the optimal office space, the required furniture, or the size of a “management team” that is necessary for a company to function successfully. Indeed, John Kois, Jr., the manager of the Kois Buyers Group – a buying group with approximately 570 members – has only one employee. (Kois Jr., Tr. 306, 308, 313-314).

163. One reason Patterson revisited working with Smile Source in 2017 was that manufacturers vouched for Smile Source. (Misiak, Tr. 1319 (“We’d gotten some feedback from manufacturers that their ideas were well-formulated.”)).

Response to Proposed Finding No. 163

The Proposed Finding is misleading and contrary to the evidence in the record to the extent that it implies that manufacturers had not “vouched for” Smile Source in earlier years when Patterson declined to bid. For example, in August 2013, Dentsply (one of Patterson’s largest suppliers) told Patterson Regional Manager Fruehauf, “I wanted to respond to your question about our interaction with the Smile Source account group. We treat Smile Source in the same fashion as our other regional and national key account groups and/or buying groups. We have varying programs for each group that range from net or lower retail pricing, to free good auto processing offers, to cash rebates.” (CX3054 at 001; Rogan, Tr. 3550 (Dentsply is one of Patterson’s largest

manufacturing partners); CCFF ¶31). Fruehauf forwarded the Dentsply email to Rogan and McFadden, so there is no question that this information was shared at the highest levels in 2013. In addition, the Proposed Finding is misleading to the extent that it implies that Patterson's decision regarding its bid for Smile Source's business in 2016 and 2017 is relevant to whether Patterson participated in the conspiracy starting in 2013.

164. Patterson's decision to pursue Smile Source's business in early 2017 was also informed by Smile Source's professionalism. (Rogan, Tr. 3549 ("[S]ome of the manufacturers were saying, 'Hey, this is more than just a bunch of dentists getting together for a better deal. They have actually got some meat to this, and they can maybe bring the spend. They were providing a lot of value to the dentists. You should take a look at this.' And we did, we took a deep look, and they were right. This was more than just a group of people trying to get a better deal."); Rogan, Tr. 3583–84 ("Q. Did they actually have offices where they were hosting you? A. Smile Source? Yes, they do. They have an office building in Houston. Q. What did they -- you mean they had employees? Smile Source has employees? A. They have a whole floor of employees doing all the -- everything from membership to all those marketing services I talked about earlier to answering phones to -- tons of stuff.")).

Response to Proposed Finding No. 164

The Proposed Finding is misleading to the extent that it implies that Patterson's decision regarding its bid for Smile Source's business in 2016 and 2017 is relevant to whether Patterson participated in the conspiracy starting in 2013. The Proposed Finding is also misleading because it is not supported by the testimony cited. There is nothing in the testimony that references "professionalism," or even provides a basis for inferring from the testimony what Patterson means by "professionalism." To the extent that Respondent Patterson is asking for an inference that "professionalism" is determined by whether a business has a "whole floor of employees," there is no testimony in the record to show that one can make a determination about the professionalism or successful functioning of a business based on the number of employees. Indeed, John Kois, Jr., the manager of the Kois Buyers Group – a buying group with approximately 570 members – has only one employee. (Kois Jr., Tr. 306, 308, 313-314).

165. Smile Source then hosted a bid process for distributors, and Schein and Patterson both submitted competing bids in early 2017, and Smile Source chose Schein. (Maurer, Tr. 4985–86).

Response to Proposed Finding No. 165

Complaint Counsel has no specific response.

166. But Smile Source rejected Patterson in favor of Schein. (Rogan, Tr. 3556 (“Q. Going back to the 2017 Patterson bid on Smile Source, did Patterson win that bid? A. We did not. Q. Who won the bid? A. Henry Schein.”)).

Response to Proposed Finding No. 166

Complaint Counsel has no specific response.

i. Responses to Proposed Findings Regarding “After Evaluating Individual Buying Groups, Patterson Usually Decided Not To Work With Them—Especially When They Were Dishonest Or Incoherent.”

167. Patterson was sometimes approached by dentists or organizations it had never heard of, whose proposals and aspirations to form buying groups were vague or seemed like a “diatribe” and did not make business sense to Patterson. (CX3064 at 001 (June 2011; Guggenheim responds to Misiak asking “Know this guy?” regarding George Lennon: “never heard of him”); Guggenheim, Tr. 1798 (“A. Yeah, I was referring to the sort of the story he articulated down below here, which obviously is apparent here: Dental sales specialist with Kodak, Danaher, northwest region manager covering ten states. I thought it was odd that I’d never heard of him if that was the case, so that seemed strange... A. So I just represented kind of a diatribe that seemed odd, and I said it looks like it’s going to be an interesting meeting. Q. Was this an attractive customer to you? A. No.”); CX3176 at 001 (October 2011; Patterson’s Steve Sinclair asks Rogan regarding I Smiles: “Have any of you ever heard of this organization? Any experience with them?”; Rogan forwards to Guggenheim and Misiak: “Here is another one.”); CX3021 at 001 (July 2013, Nexus Dentistry) (“It looks like a consultant has formed a merchandise buying group, but he denied that when I asked.”); Guggenheim, Tr. 1805 (“Do you know whether Mr. Kianor Shah at Nexus Dentistry had a vast client base? . . . A. Knew nothing about him.”)).

Response to Proposed Finding No. 167

The Proposed Finding is misleading, contrary to the evidence in the record, and not supported by the testimony cited. Of the three examples, the first two are from 2011. Both are from over a year before Patterson joined the conspiracy, and are, therefore, irrelevant. The third example

from July 2013, does not support the Proposed Finding because the document and testimony only indicate that Guggenheim knew nothing about the group. Guggenheim's lack of knowledge does not support a finding that doing business with a particular buying group did not make sense. Indeed, it contradicts Patterson's position that it "evaluated" each buying group on its merits. Here, rather than evaluate the group, Patterson's former president could only admit his lack of knowledge. (Guggenheim, Tr. 1805 ("Do you know whether Mr. Kianor Shah at Nexus Dentistry had a vast client base? . . . A. Knew nothing about him.")). Because the Proposed Finding is misleading and lacks evidentiary support for the group referenced during the conspiracy period, it should be disregarded.

168. In 2014, Patterson was approached by a group run *by a veterinarian* who was promoting an upstart buying group (for dental supplies for humans), and that arrangement did not make sense to Patterson. (CX3080; Guggenheim, Tr. 1656-57 ("I think there might be -- this is somebody who's organized a group to buy together. In this case, they're a vet, so I take that to be a veterinarian versus a veteran. But that's -- that was pretty consistently what we would see, is third parties that would want to sell their, you know, ability to roll up a pricing opportunity, and they were something we had historically never -- never been interested in, so what I was telling him here was just another one of the upstart buying groups and we pass on these.))).

Response to Proposed Finding No. 168

The Proposed Finding is misleading and unsupported by the evidence. It is misleading to the extent that it implies that dental products distributors do not or cannot work with buying groups organized by non-dentists. The evidence in the record shows this is clearly not the case. The executives who started Smile Source first formed Vision Source, a buying group for ophthalmologists and optometrists. (CX0322 (Maurer, IHT at 16-17) (founder of Smile Source was Len Ellisor, Chairman of Vision Source Corporation); [REDACTED]; CCFF ¶¶ 152-154). The founders of the dental buying group Klear Impakt first created a buying group for independent audiologists and ear-nose-throat ("ENT") specialists called AudConnex. (R. Johnson, Tr. 5480-5481; CX8029 (R. Johnson, Dep. at 18-20); CCFF ¶¶ 156-157). Dr. Johnson,

the founding partner of Klear Impakt is an audiologist, not a dentist. (R. Johnson, Tr. 5478-5480). Moreover, Guggenheim's written response in his contemporaneous email to McFadden confirms that he was opposed to pursuing the opportunity because it was about a *buying group*, not because of the came from non-dentist. Indeed, his email says, "Nothing unusual here. Typical approach of an upstart buying group. We pass on these as a matter of protecting our business model." (CX3080 at 001). *See also* Guggenheim, Tr. 1657 (When Guggenheim wrote in this April 23, 2014, email to McFadden that "We pass on these as a matter of protecting our business model," he meant that Patterson passed on buying groups.); CCFF ¶¶ 646-647).

169. Also in 2014, a Patterson customer, Dr. George Lennon, approached Patterson Special Markets about an opportunity to work with a group practice, and Patterson invested significant time and effort exploring a potential partnership with Dr. Lennon's group. (CX3419 at 2 (Lennon: "I'm also aware of the time that Patterson spent on this project in terms of man-hours spent with the price quote and talking to manufacturers to gain better pricing for your special markets accounts, so I know your intentions were honest with me."); Guggenheim, Tr. 1809 ("Q. So someone, Neal and his team, spent a fair amount of time on this, and the guy is acknowledging that; is that fair? A. That's fair.")).

Response to Proposed Finding No. 169

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that, when Patterson was exploring a partnership with Dr. Lennon, it believed that Dr. Lennon's group was a buying group. The document itself makes it clear that Patterson only spent time preparing a bid when they thought Dr. Lennon was representing a Community Health Center. (CX3419 at 001). As Guggenheim testified, "fundamentally here these people represented themselves as [a Community Health Center] and came in to Shelly to get a bid, and it wasn't till the end of it after all that that they identified themselves that they were actually a GPO" (Guggenheim, Tr. 1810). The record evidence shows that Patterson's Special Markets division was allowed to work with CHCs (CCFF ¶¶ 616, 620); only GPOs were specifically excluded from its purview. (CCFF ¶¶ 613-614). In the case of Dr. Lennon's group, as soon as

McFadden learned that the entity was a GPO, Patterson pulled out the bid negotiations. (CX3419 at 001-002). Rather than support a finding that Patterson was willing to work with buying groups in 2014, this document shows that it turned down a potential customer as soon as it learned the customer was forming a buying group. The Proposed Finding is contrary to the weight of the evidence and should be disregarded.

170. After conducting its due diligence, Patterson chose not to pursue a business relationship with Mr. Lennon's group because the group was looking for a "vig" and had misrepresented itself as a Community Health Center when it was really a buying group. (CX3419 (McFadden: "I am respectfully declining your offer to participate further in your RFP."); Guggenheim, Tr. 1810 ("A. [F]undamentally here these people represented themselves as CHC and came in to Shelly to get a bid, and it wasn't till the end of it after all that that they identified themselves that they were actually a GPO and that there was this 3 percent vig they were looking for . . . ")).

Response to Proposed Finding No. 170

The Proposed Finding is misleading and contrary to the evidence in the record. The document contradicts the statement that Patterson did due diligence with regard to doing business with a buying group. Rather, it did due diligence to determine whether to do business with a Community Health Center, and rejected Dr. Lennon's group as soon as McFadden learned Dr. Lennon was trying to establish a buying group. In other words, Patterson was not interested in doing business with a buying group. Moreover, despite Guggenheim's testimony, there is nothing in the contemporaneous business documents that state that Dr. Lennon's group was being rejected because it was charging a fee. The email mentions the fee, but rejects Dr. Lennon because his group is a GPO. The record also shows that Patterson does not believe that the payment of fees is unethical or wrong. When Patterson bid for the Smile Source contract in 2017, its proposal included a payment from Patterson to Smile Source, or an amount based on the percentage of dollar spend by Smile Source member. (Rogan, Tr. 3541-3543) – exactly the sort of payment that Guggenheim suggested at trial was a "vig," and therefore objectionable.

171. Patterson evaluated and turned down a number of other buying groups during the conspiracy for valid business reasons. In July 2013, Patterson turned down Nexus Dentistry, a group that claimed to be “looking for a supplier that could serve our vast client base,” but that in fact had eight practices signed up. McFadden, Tr. 2809 (“Tell me what your reaction was after talking with this guy. A. Yeah. I sent Paul an e-mail basically summarizing that he currently has eight practices signed on in California, so he doesn’t have a vast number, as he stated. He’s not a DSO. As Scott said, looks like he’s a consultant and he’s forming a merchandise buying group. But when I asked him and probed that, he was very elusive.”). In February 2014, it turned down Catapult because it wanted a “vig,” which Patterson considered unethical. (Guggenheim, Tr. 1802, 1813–14). In March 2014, Patterson turned down United Orthodontic Buying Group because the group wanted to buy only one item, one x-ray machine. (McFadden, Tr. 2813 (“Q. Was this one of the outlandish things that got dropped in your lap with regard to a buying group? A. It’s one. This was just one item, one x-ray. That’s not what I was built for. We were trying to go after millions of dollars of merchandise business, not one rogue x-ray.”; RX0227 at 1). In April 2014, it turned down the Dental Purchasing Group because the doctor who reached out to Patterson was a veterinarian. (CX3080 at 001; Guggenheim, Tr. 1656–57). In September 2014, it turned down Dr. Steven Sebastian because “he doesn’t even have a company and he doesn’t even have any clients, and yet he’s wanting us to open him up, so it doesn’t make any sense.” (McFadden, Tr. 2814–17).

Response to Proposed Finding No. 171

The Proposed Finding is misleading, contrary to the weight of the evidence, not supported by the evidence cited and irrelevant. The Proposed Finding is misleading to the extent that it implies that, during the conspiracy period, Patterson “evaluated” inquiries from buying groups rather than turning them down simply because they were buying groups. For example, with respect to Nexus Dentistry, McFadden’s testimony is that he turned the group down because it was “not a DSO.” (McFadden, Tr. 2809). With respect to Catapult, CX3287 shows that Misiak rejected the inquiry from the Catapult Group without further inquiry. Guggenheim’s after the fact testimony that Dr. Graham of Catapult was seeking a “kickback” conflicts with the information provided by Misiak, demonstrating that Dr. Graham was seeking compensation in exchange for providing continuing education. Guggenheim’s after the fact efforts to paint this proposal by a customer seeking to establish a buying group as a “kickback” should be disregarded.

Moreover, the record evidence shows that Patterson does not actually consider payment of fees to buying groups to be “unethical,” contrary to Guggenheim’s testimony. For example, when Rogan was asked about his instruction to Guggenheim regarding adding buying groups to the strategic plan in 2014, his testimony was that buying groups were *not* unethical. (Rogan, Tr. 3459-3460 (“Q. But you wouldn’t suggest that the company look into something if it was unethical or against your corporate values. THE WITNESS. For – I would never suggest for my company do something unethical. That part is correct.”)).

Similarly, the evidence does not support Patterson’s after the fact claim that it rejected the Dental Purchasing Group because the group was being formed by a veterinarian. Guggenheim’s written response in his contemporaneous email to McFadden confirms that he was opposed to pursuing the opportunity because it was about a *buying group*, not because of the came from non-dentist. Indeed, his email says, “Nothing unusual here. Typical approach of an upstart buying group. We pass on these as a matter of protecting our business model.” (CX3080 at 001).

There is also no evidence that Patterson “evaluated” Dr. Sebastian’s buying group rather than rejecting it out of hand. Patterson’s contemporaneous documents do not indicate that Patterson rejected Dr. Sebastian because he did not yet have clients; rather, the documents show that Patterson rejected Dr. Sebastian because Patterson did not work with buying groups. (CX3038 at 001 (“We do not have an answer for him. We generally do not deal with groups that are formed just to get better pricing”); CX3125 at 001).

Finally, the references to Patterson’s actions with regard to the United Orthodontic Buying Group (“UOBG”) are inapposite. There is no evidence in the record that UOBG, as a buying

group, was coming to Patterson to seek a contract with Patterson. Rather, the communications in the record involve individual dentists affiliated with UOBG contacting Patterson on their own – hence the interest in a single X-ray machine. There is no evidence in the record that Patterson did any “evaluation” of the UOBG entity at all.

Because Patterson’s contemporaneous documents contradict its later-discovered claims of other business justifications, the Proposed Finding and should be rejected as contrary to record evidence. *See also* CCFF ¶¶ 1166-1169 (Guggenheim could not provide any business rationale or procompetitive justification for his February and June communications with Cohen about buying groups.)

172. When Patterson was approached by Kois in 2014, Patterson engaged with the group, but determined that the group’s proposal was unrealistic because the fledgling Kois Buyers Group falsely suggested the group had more than 1,000 members and agreements with four major vendors to provide its members with significant discounts.¹ (CX0116; CX3170; CX3171; CX3331; CX3172; *see also* RX0336 at 001 (Sybron Dental: “Tim, I talked with our Special Markets Team in Canada and they have not heard of this group and have no record of offering them any pricing on equipment.”); RXD0223 at 001 (Ivoclar Vivadent: “Tim, I checked with our Canadian sales manager. He does not recognize this group’s name at all.”); RXD0224 at 1 (Dentsply: “Tim, I inquired with the director of marketing and they don’t know anything about this.”); Guggenheim, Tr. 1676–77 (“But I remember the numbers that they were proposing in that WebEx meeting seemed completely unrealistic to me. That was my recollection of that. I was -- they were proposing just, you know, tens of thousands -- a lot of customers were going to be involved and it would -- just didn’t seem realistic to me.”); Guggenheim, Tr. 1825 (“Q. When you saw this from this guy qadeerahmed@hotmail.com who says 1500-plus dentists, did you think there’s a great opportunity for the company? A. Oh. No, I did not think that. Q. Did you think that might not be believable? A. Yeah. I was very suspicious about all the assertions in this e-mail. Q. What about that part where he says “Manufacturers Committed”? A. Very suspicious about that, didn’t seem right.”); Guggenheim, Tr. 1826 (“A. Well, he -- this Qadeer was making an assentation that he had commitment from the four largest manufacturers in the industry. I was questioning that. You know, it didn’t seem like the way that they would operate, so I asked him to investigate it and confirm if that’s true. Q. Did it sound believable to you? A. It sounded farfetched.”)).

¹ For a detailed discussion of Patterson’s due diligence with respect to Kois, *see* ¶¶ 561–633.

Response to Proposed Finding No. 172

The Proposed Finding is misleading, contrary to the weight of the evidence, and relies on evidence that was not admitted for substantive facts. The record evidence shows that Guggenheim decided in August 2014, a month before Patterson was scheduled to even meet with Kois to hear Kois's WebEx presentation, that it would not do business with the Kois Buyers Group. The evidence show that Guggenheim communicated his decision to other Patterson executives on August 18, 2014 (CX0116 at 001 (August 18, 2014 email from Guggenheim to Rogan, "Agreed ... I'll kill it."); CX3086 at 001 (Guggenheim: "We have explored this opportunity [with Kois] . . . and decided to pass at this time due to the implications to our margins and therefore our Sales Reps."); CCF 637-639). Although Guggenheim references what he says he learned about Kois from its September 29, 2014 WebEx presentation, the evidence shows that he had already decided not to do business with the Kois Buyers Group in August, well before that meeting. Guggenheim's statement in CX3086 also makes no mention of concern with the strength of the proposal or representations made by Kois's consultant. (CX3086 at 001). Moreover, although Patterson's Rogan sent out inquiries to several manufacturers, he had only received a single response before Guggenheim made his decision to reject the Kois Buyers Group. (CX0116 at 001 (August 18, 2014 email from Guggenheim to Rogan, "Agreed ... I'll kill it.") There is no evidence in the record that Patterson ever heard back from 3M, one of the other major manufacturers Rogan contacted. (CX3171 at 001). Patterson points to a response from Sybron/Kerr (RX0336), but misleads the Court by failing to point out Patterson did not even receive that response until September 2, 2014 – several weeks Guggenheim had decided to reject Kois. The complete response from the Sybron/Kerr representative is equaling telling. He explicitly asked Rogan if the proposal may have come in

under a different name. (RX0336 at 001 (“Could they be going by a different name?”)). In fact, Rogan admitted at trial that he did not ask if any of the vendors had heard from Kois’s consultant, Qadeer Ahmed, and that he didn’t recall if he asked if they had heard of the Kois Buyers Group. (Rogan, Tr. 3665 (“Q. Do you know if you asked any of these manufacturers if they had heard of Qadeer Ahmed? A. I don’t believe I asked them that. Q. Do you know if you asked any of these manufacturers if they had heard of the Kois Buyers Group? A. I – I don’t recall.”)). Thus, there is no evidence in the record that Kois has misrepresented its contacts with vendors, only that Rogan asked a very narrow question and Guggenheim rejected the buying group after receiving a single answer. (CX0116 at 001). This is in keeping with the agreement that Patterson entered into in February 2013 that it would not do business with buying groups.

Furthermore, to the extent that the Proposed Finding relies on and quotes from two documents that are not otherwise in the record (RXD0223 and RXD0224), it should be disregarded.

Reliance on these documents for the substantive information contained therein contravenes the Court’s February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence. Patterson’s attempt to add these documents to the record by calling them demonstratives also circumvents the requirement that exhibits be exchanged before trial (pursuant to the March 14, 2018 Scheduling Order at 2).

Finally, Complaint Counsel notes that Patterson’s Proposed Finding No. 172 includes footnote 1, which cross references specific findings contained in its Proposed Findings Nos. 561-633.

Complaint Counsel refer the Court to Complaint Counsel’s Responses to those Proposed Findings, as well.

173. Despite Patterson’s skepticism, Mr. Guggenheim still “had the phone conversation to hear [the Kois representative] out before making the final decision that Patterson

did not see the Kois Buyers Group as an opportunity for Patterson. (Guggenheim, Tr. 1829 (“Q. Did you ultimately, after listening to the WebEx, decide on your own, internal to Patterson, this Qadeer Ahmed at Hotmail.com with a line in the water who’s telling us he has commitments from manufacturers that they don’t know anything about, that’s not a good opportunity? A. That’s what I determined and, you know, based on the fact that he misrepresented some of the manufacturers. I still had the phone conversation to hear him out. After the phone conversation, I was -- confirmed myself that there was not an opportunity here.”)).

Response to Proposed Finding No. 173

The Proposed Finding is misleading and contrary to the evidence, including contemporaneous internal Patterson communications. The record evidence shows that Guggenheim decided in August 2014, a month before Patterson was scheduled to meet with Kois to hear Kois’s WebEx presentation, that it would not do business with the Kois Buyers Group. The evidence show that Guggenheim communicated his decision to other Patterson executives on August 18, 2014 (CX0116 at 001 (August 18, 2014 email from Guggenheim to Rogan, “Agreed ... I’ll kill it.”); CCFF ¶¶ 637-639). As a consequence of rejecting the Kois Buyers Group, Patterson lost valuable customers and business to Burkhart which secured the Kois contract. (CX3088 at 001-002 (describing customers lost to Burkhart because they were part of the Kois Buyers Group as “top Patterson clients”); Guggenheim, Tr. 1662, 1665-1667; CCFF ¶ 640). *See also* Complaint Counsel’s Responses to Patterson’s Proposed Finding Nos. 561 through 633.

j. Responses to Proposed Findings Regarding “Occasionally, Though, Patterson Dental Salespeople Worked With Buying Groups.”

174. Patterson did work with “buying groups” during Complaint Counsel’s alleged conspiracy period. When a “buying group” presented different characteristics—for example, by committing to buy a set volume of equipment or merchandise or a structure that would lower Patterson’s costs—Patterson considered pursuing its endorsement and selling to its members, as it did with Orthosynetics. (McFadden, Tr. 2728 (“Orthosynetics is a quasi-buying group that focus[es] on orthodontics”); CX8004 (McFadden, Dep. at 119–20 “A. Well, what I learned later on, for lack of a better expression, buying groups were not all created equally. And they were like a jar of jellybeans. They each tasted differently. And we dealt with a group called Orthosynetics, where we sold them technology. We thought that was not going to interfere with our territory reps. And we had our manufacturer partner’s back that they would help us participate in that, and it makes sense to do that.”); CX3081 at 001 (Patterson’s Special Markets

Director to McFadden: “Neal, can we arrange a call with Michael and Paul to discuss Orthosynetics? Historically, at Patterson’s direction we have not included buying groups as part of special markets.”; McFadden forwards to Guggenheim: “Paul, Rhonda deals heavily with Orthosynetics. There are three big groups that she deals with that are affiliated with them. I realize that we’re not going to be doing business with buying groups but this is a specialty group.”; RX0333 at 001 (“Orthosynetics pays all the bills of their offices. They’re not a buying club per se.”) *see also* CX0149 (industry publication describing Smile Source as “[a] lot like OrthoSynetics”).

Response to Proposed Finding No. 174

The Proposed Finding is misleading, contrary to the weight of the evidence, and contradicted by much of the evidence that Patterson asserts support its finding. The weight of the evidence shows that Patterson did *not* work with buying groups during the conspiracy period. As for OrthoSynetics, the example included in the Proposed Finding, the evidence shows that OrthoSynetics was not a buying group – and Patterson did not view it as a buying group. (RX0342 at 001 (September 11, 2014, McFadden email, “They pay the bills for their members. So therefore they’re not like a buying group.”); McFadden, Tr. 2728-2730 (contrasting OrthoSynetics against buying groups: “So [OrthoSynetics] was not a threat I saw to our normal general dental business because this was a small specialty group.”); CCFF ¶ 655). At the time when Patterson’s Special Markets division expressly excluded GPOs, it identified OrthoSynetics in its 2013 Strategic Plan as a DSO entity whose business Patterson wished to attract. (CX3014 at 023-024; CCFF ¶ 611). Finally, when Patterson was asked about its contracts with buying groups, it stated in its sworn interrogatory responses that it knew of no agreements that it with buying groups in the period 2009 through April 18, 2018. (CX3504 at 004 (Patterson’s Response to Complaint Counsel’s First Interrogatories ¶ 1) (“Patterson is not currently aware of any agreements for the purchase or sale of dental products between itself and entities falling under the FTC’s definition of “Buying Group” [for the period 2009 to April 16, 2018])). In that sworn response, OrthoSynetics was never identified by Patterson as a buying group.

175. As of 2014, Patterson had been selling to Jackson Health Systems, a “buying group” per Complaint Counsel’s own definition, for “over 10 years.” When Patterson executives expressed some hesitancy regarding Jackson Health, the local branch manager responded that he was not asking for their opinions or for permission to continue to do business with Jackson Health, but rather was simply sending the vendor application “up to corporate to read before [he was going to] sign on behalf of the company . . . , that’s all.” (RX0271 at 001 (Rogan to Carles: “This is a GPO. They are taking 2% off the top. This is a very slippery slope.”); CX0317 (Rogan, IHT at 254 (“Sitting here today, it sounds like we’ve had a longstanding relationship with this customer and this is just a formality, that we need the contract updated after a couple of years, so maybe the slope isn’t as slippery as I thought it could be. And so he was just moving some paperwork along, and he’s just reminding me of a 10-year relationship is not a big deal, so I’m saying “okay” to that.”))). Patterson continued doing business with Jackson Health throughout Complaint Counsel’s alleged conspiracy period.

Response to Proposed Finding No. 175

The Proposed Finding is misleading, incomplete, contrary to the weight of the evidence, and relies on an incorrect assumption about the definition of what constitutes a “buying group.” The weight of the evidence, including internal Patterson documents, shows that Jackson Health Systems is not a buying group, but is a large medical system in the Miami (Dade County), Florida area. (RX0270 at 001) (May 29, 2014, email from Alain Carles, a Patterson branch manager to Fruehauf, “Anthony, *this is not a GPO*, this is the Jackon [sic] Health system that owns and manages several hospitals in the area.”) (emphasis added); *see also* Rogan, Tr. 3535). Complaint Counsel has consistently defined dental buying groups as “organizations of independent dentists that seek to aggregate and leverage the collective purchasing power of separately-owned and separately-managed dental practices in exchange for lower prices on dental products.” (CCFF ¶ 67). Complaint Counsel has never defined buying groups to mean hospital systems. Consequently, the statement in the Proposed Finding that Jackson Health is a buying group “per Complaint Counsel’s own definition” is factually inaccurate.

The Proposed Finding is also incomplete in that it fails to reference the complete email chains on which it relies. As noted above, on May 29, 2014, Alain Carles explained that Jackson Health

was “not a GPO” but was Jackson health system “that owns and manages several hospitals in the area.” (RX0270 at 001). On May 30, the very next day, Carles explained Patterson’s history of working with the hospital system to Rogan, “The Branch has been selling to the Jackson *system of hospitals and clinics* for over 10 years and we have to fill out the vendor application every couple of years. I sent it up to corporate to read before I sign on behalf of the company” (RX0271 at 001) (emphasis added). The remainder of the Proposed Finding is completely irrelevant, as Patterson’s decisions to do business or not do business with hospital systems is not at issue in this case. In addition, as further confirmation that Patterson did not view Jackson Health as a buying group, when Patterson was asked in discovery about its contracts with buying groups, it stated in its sworn interrogatory responses that it knew of no agreements that it had with buying groups in the period 2009 through April 18, 2018. (CX3504 at 004 (Patterson’s Response to Complaint Counsel’s First Interrogatories ¶ 1) (“Patterson is not currently aware of any agreements for the purchase or sale of dental products between itself and entities falling under the FTC’s definition of “Buying Group” [for the period 2009 to April 16, 2018])). In that sworn response, Jackson Health System was never identified by Patterson as a buying group with which Patterson did business. Patterson’s newly discovered position that Jackson Health is a buying group is unsupported by the evidence, and contradicted by its sworn statements.

Finally, to the extent that the Jackson Health Hospital System has any relevance to Patterson’s decisions regarding dental buying groups, it demonstrates Rogan’s thinking when he mistakenly believed Jackson Health was a buying group. Rather than suggesting that the sale team “evaluate” the customer, his reaction was to reject a long-time customer immediately because of his belief that it was a GPO. (CX0107 at 001 (May 29, 2014 email from Rogan to Alain Carles: “This is a GPO . . . This is a very slippery slope.”)).

k. Responses to Proposed Findings Regarding “Patterson Did Not View Buying Groups As A Threat During The Alleged Conspiracy.”

176. Complaint Counsel contends that two internal SWOT (“Strengths, Weaknesses, Opportunities, Threats”) PowerPoint slides from 2012 and 2014 demonstrate that Patterson viewed buying groups as a threat during the alleged conspiracy. (CC’s Pre-Trial Br. at 41–42 (citing CX3286 at 026 and CX3283 at 010)).

Response to Proposed Finding No. 176

Complaint Counsel has no specific response.

177. CX3286 is an internal Patterson PowerPoint slide from 2012 listing “[e]xpansion of national buying groups, group practices, [and] institutions” as “External Threats.” (CX3286 at 026).

Response to Proposed Finding No. 177

Complaint Counsel has no specific response.

178. Patterson’s Guggenheim testified at trial that the “threat” listed on the 2012 slide was that Patterson would miss out on potential business opportunities with classes of potential customers. (Guggenheim, Tr. 1588-81) (“Q. And why were those things a threat to Patterson? A. I think the discussion here is around our concentration and focus. In the case of group practices, for instance, we were underpenetrated, so that was a threat. Presumably if that were to become 60 percent of the business, we would be un- --improperly positioned for that opportunity. Buying groups obviously, you know, sort of the same thing. It wasn’t an area -- it wasn’t something we were focusing on, so that was something that we were watching, institutions. Infrastructure for -- institutions had complexities around infrastructure and contracts and things that we were not focused on at that time particularly or well-structured for. Q. So were these entities identified as threats because Patterson wasn’t positioned to penetrate those segments? A. In -- yeah. Yeah. I mean, that was not a -- we were under- -- it’s a little different in each case. Each one of these has a little different nuance to it. So yeah, we weren’t positioned. I guess you can say that summarizes but not specific.”); *see also* CX3286 at 001).

Response to Proposed Finding No. 178

The Proposed Finding is misleading, incomplete, contradicted by substantial record evidence and relies on testimony that is not credible. The evidence in the record makes it clear that Patterson viewed buying groups as a threat. This is not only expressed in the 2012 PowerPoint slide referenced in this Proposed Finding, but also in other internal presentations. For example, a

Patterson May 2014 SWOT analysis for a Florida market identifies “emergence of GPOs and our competitors willingness to negotiate with these groups” as a threat. (CX3283 at 010; CCFF ¶ 227). Guggenheim also testified in his deposition that buying groups were threats because “often [they] come with reduced pricing.” (CX8023 (Guggenheim, Dep. at 221-222); CCFF ¶ 228). Other Patterson executives had the same perception. In a March 8, 2012 email, Patterson’s Misiak wrote to Patterson’s Neal McFadden regarding a Florida Dental Association inquiry about forming a dental supply discount program: “I get these more often than I like. This stuff scares me. I’m gonna tell him thanks but no thanks.” (CX0084 at 001; *see also* McFadden, Tr. 2684-2685 (“Q. And then you go on to say, “This stuff scares me. Is that a reference to buying groups? A. . . .So yes, this stuff scared me because I didn’t want to go down this path and disrupt our sales teams.”); CCFF ¶ 237). In a February 11, 2014 email, McFadden wrote that the former President of Patterson, Inc.’s medical supplies division [Mike Orsclen] referred to medical GPOs as a “necessary evil.” (CX3419 at 001; McFadden, Tr. 2706-2707; CX0315 (McFadden, IHT at 28-32, 45); CCFF ¶ 264). McFadden took the “necessary evil” statement to refer to the fact that GPOs offered low margins to medical supply distributors. (CX0315 (McFadden, IHT at 45); CCFF ¶ 264). The evidence in the record also shows that Patterson was concerned that its competitors might move into working with buying groups. For example, when asked “what’s the concern if Schein and Benco bid on this [buying] group?,” Guggenheim testified, “The potential that we could lose the business.” (CX0314 (Guggenheim, IHT at 265-266) (in reference to CX0092 at 001); CCFF ¶ 227).

Guggenheim’s testimony cited in the Proposed Finding suggesting that buying groups were a threat because Patterson would focus on buying groups instead of other customer areas also makes no sense. The slide doesn’t list all of the other things Patterson did not focus on at

“threats.” Guggenheim’s testimony is also contradicted by the fact that internal lack of focus would belong on the separate slide for Internal Threats. Here, “[e]xpansion of national buying groups, group practices, [and] institutions” is listed as an “External Threats.” Guggenheim’s after-the-fact justification defies common sense, is not credible and should be disregarded.

179. CX3283 is an internal Patterson PowerPoint slide from 2014 listing “[e]mergence of GPOs and our competitors [sic] willingness to negotiate with these groups” under “S.W.O.T. Threats.”). (CX3283 at 10).

Response to Proposed Finding No. 179

Complaint Counsel has not specific response.

180. The threat listed on the 2014 slide suggests the absence of an agreement, as it identifies as a “threat” “competitors’ willingness” to work with “buying groups” during the time Patterson was supposed colluding with those competitors not to work with “buying groups.” (CX3283 at 10).

Response to Proposed Finding No. 180

The Proposed Finding is misleading, unsupported by the evidence cited, and is argumentative.

Contrary to the conclusion Patterson seeks to draw, the statement that the “[e]mergence of GPOs and our competitors willingness to negotiate with these groups” (CX3283 at 010) supports a conclusion that Patterson had the on-going concern that arises in any conspiracy or cartel that co-conspirators may cheat on the agreement. If Patterson believed that buying groups were not a good opportunity for dental products distributors (as it has asserted), seeing its competitors move into poor opportunities would seem to be an advantage, not a “threat,” to Patterson. Guggenheim in fact testified that buying groups were threats because “often [they] come with reduced pricing.” (CX8023 (Guggenheim, Dep. at 221-222); CCFF ¶ 228). Moreover, nothing in this document contradicts the evidence showing that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513),

complied with this no buying group policy, and communicated that policy to its sales team. (CCFF ¶¶ 627-660).

181. Meanwhile, other evidence shows Patterson did not consider “buying groups” to be a serious threat. Patterson’s Neal McFadden and Anthony Fruehauf testified that “buying groups” were not worth their time. McFadden testified that “we determined that buying groups, they don’t have any influence or they cannot mandate their clients’ purchase, there was not really any upside from a business perspective that we could see by pursuing buying groups.” (McFadden, Tr. 2673–74). Fruehauf said in his deposition that “buying groups” were a “small part” of his region and that offering an extra discount to the few Patterson customers participating in buying groups would risk angering Patterson’s other, better customers. (CX8013 (Fruehauf, Dep. at 58–59)).

Response to Proposed Finding No. 181

The Proposed Finding is misleading and contrary to substantial other evidence in the record. For example, Patterson’s President, Guggenheim, testified that buying groups were threats because “often [they] come with reduced pricing.” (CX8023 (Guggenheim, Dep. at 221-222); CCFF ¶ 228). In a February 2013 email, Patterson’s Fruehauf wrote to Misiak about a request for a bid from what Fruehauf thought was a buying group, “I have had numerous discussions with [a Patterson branch manager] about our position and what it could mean if we set a precedent of offering lower prices such as this.” (Misiak, Tr. 1337-1339 (referring to CX0093); CX0316 (Misiak, IHT at 272, 275) (buying groups might cause Patterson to lose business, or a percentage of it; a consequence of offering lower prices to buying groups was that profits would be lower on business that Patterson already had); CCFF ¶ 220). A Patterson May 2014 SWOT analysis for a Florida market similarly identifies “[e]mergence of GPOs and our competitors willingness to negotiate with these groups” as a threat. (CX3283 at 010); CCFF ¶ 227). The evidence shows that Respondents viewed buying groups as posing a long-term threat to the industry as a whole, but offering potential short-term gains to any single distributor. (CCFF ¶¶ 221, 223-227, 239-241, 243-250, 252).

182. Likewise, in September 2013—right at the peak of the alleged conspiracy—Patterson’s David Misiak wrote an internal Patterson email stating, “I would not currently classify these as a big threat to the business but the GPO noise has been pretty loud from the field.” (CX0145 at 1) (emphasis added).

Response to Proposed Finding No. 182

The Proposed Finding is misleading because it is contrary to the weight of the evidence. *See* Complaint Counsel’s Response to Patterson’s Proposed Finding No. 181. The Proposed Finding is also irrelevant to the extent that the perception of a threat caused Respondents to enter into an agreement prior to the date of the document cited. The evidence shows that Patterson joined the conspiracy no later than February 2013 (CCFF ¶¶ 483-501, 513), that that it complied with this no buying group policy, and that it communicated that policy to its sales team. (CCFF ¶¶ 627-660). For example, within a few weeks of Guggenheim’s February 8, 2013 email with Cohen (CX0090), Patterson began instructing sales representatives to “stay out” of buying groups. (CX0093 at 001 (Statement of Misiak: “stay out” of buying group); CX0106 at 001 (Statement of Rogan: “We don’t need GPO’s in the dental business”); CX3116 at 001 (Statement of Misiak: “My guidance has been to politely say no [to buying groups] and whether [sic] the storm with these.”); CX3168 at 001 (Statement of Rogan: “We don’t sell to buying groups. Let’s talk live.”); CX3010 at 001 (Statement of McFadden: “[A]s of now we are not working with GPO’s.”); CX3016 at 001 (Statement of McFadden: “I am sure we should pass on these [buying] groups....”); CX3004 at 001 (Statement of McFadden: “For now – I am electing to not participate with [buying groups] – we have said no to several already”); CX3045 at 001 (Statement of McFadden: “[D]oes he own all these offices—if not then he is a GPO—we don’t deal with GPOs.”)).

III. Responses to Proposed Findings Regarding “Every Fact Witness Either Outright Denied That Patterson Participated In An Agreement Or Had No Knowledge Of It Doing So.”

183. Complaint Counsel listed the following individuals in a sworn interrogatory as being “person[s] with knowledge” of Patterson’s participation in the alleged conspiracy: Chuck (Charles) Cohen, Rick Cohen, Paul Jackson, Michael McElaney, Patrick Ryan, Timothy Sullivan, Kathleen Titus, Andrea Hight, Brian Brady, Hal Muller, Randall Foley, Debbie Foster, James Breslawski, Dave Steck, Michael Porro, Jake Meadows, Joseph Cavaretta, Scott Anderson, Paul Guggenheim, Dr. Brenton Mason, Neal McFadden, Dave Misiak, Devon Nease, Tim Rogan, Dr. Joseph Baytosh, Francis (“Frank”) J. Capaldo, Dr. Andrew Goldsmith, John C. Kois, Jr., Dr. John C. Kois, Sr., Trevor Maurer, Jeffrey Reece, Justin Puckett, Mark Rowe, Brian Evans, Randall McLemore, Mark Mlotek, Glenn Showgren, Darci Wingard, Wesley Fields, and Anthony Fruehauf. (RX2958 at 009–12).

Response to Proposed Finding No. 183

The Proposed Finding is misleading in that it misstates Complaint Counsel’s response to Patterson’s Interrogatory No. 4. Complaint Counsel’s response lists the persons shown above as “persons who have knowledge of the facts supporting the allegations in Paragraphs 7, 8 and 38 and the finding of the agreement alleged in the Complaint.” (RX2958 at 010-011). Because the Proposed Finding misstates and misquotes Complaint Counsel’s response, it should be disregarded. The Proposed Finding should also be disregarded to the extent that it is an effort to raise a perceived discovery dispute that Patterson failed to raise in a timely fashion.

184. Every individual listed above who testified in this case² denied before this Court, under penalty of perjury, any knowledge of Patterson participating in the alleged conspiracy. (RX2958 at 9–12; *see infra* Section III(a) (listing a selection of their denials). Indeed, several witnesses testified that Complaint Counsel’s interrogatory response was false. (Foley, Tr. 4735–36) (“Q. That’s false; right, sir? A. That is correct.”); (Titus, Tr. 5279–80) (“That is not true.” . . . “That is not a true statement.”); (Cavaretta, Tr. 5621–22) (“That would be false.”); (Cavaretta, Tr. 5623) (“Q. So the statement in the document is false. A. False, correct.”) (Reece, Tr. 4490–91) (“Q. It’s true that it’s a lie? A. It’s true that I do not have awareness of an agreement specific to group purchasing organizations.”); (Maurer, Tr. 4989–90) (“Q. So this is false. Fair? A. I guess so.”).

Response to Proposed Finding No. 184

² All witnesses listed testified except for Rick Cohen, Glenn Showgren, and Randall McLemore.

The Proposed Finding is misleading and irrelevant in that it relies upon a misstatement of Complaint Counsel's response to Patterson's Interrogatory No. 4. Complaint Counsel's response to Interrogatory 4 states the names of "persons who have knowledge of the facts supporting the allegations in Paragraphs 7, 8 and 38 and the finding of the agreement alleged in the Complaint." (RX2958 at 010-011). The Proposed Finding relies on questions asked of witnesses in which Patterson's counsel misstates Complaint Counsel's response to Interrogatory No. 4. The witnesses' responses are, therefore meaningless. Because the Proposed Finding relies on responses to misstatements and incorrect quotations of Complaint Counsel's response, it should be disregarded. In addition, the opinions of a fact witness about discovery responses are irrelevant to whether the record contains facts supporting the allegations of the Complaint. Accordingly, the Proposed Finding should be also disregarded as irrelevant. Finally, to the extent that footnote 2 is part of this Proposed Finding, the assertion that all of the listed witnesses have testified in connection with this action is inaccurate.

185. Patterson's Requests for Admission 11 and 12 asked Complaint Counsel to admit, respectively, that "no witness has admitted to having personal knowledge of an agreement between Respondents not to do business with Buying Groups," and that "no witness currently or formerly employed by Respondents has admitted to the existence of an agreement between Respondents not to business with Buying Groups." (RX2944 at 9–10).

Response to Proposed Finding No. 185

Complaint Counsel has no specific response.

186. Complaint Counsel denied both requests. (RX2944 at 009–10).

Response to Proposed Finding No. 186

The Proposed Finding is misleading as vague as to the meaning of "both requests."

The Proposed Finding is misleading, incomplete and irrelevant. In citing to Complaint Counsel's response to Patterson's Request for Admission 11 and 12, Respondent Patterson has failed to provide Complaint Counsel's complete response, including Complaint Counsel's General and Specific Objections, which are part of Complaint Counsel's response.

With respect to Patterson's Request for Admission 11, Complaint Counsel's full answer states as follows: "In addition to its General Objections, Complaint Counsel specifically objects to this Request as overly broad and vague, including as to the terms "witness," "admitted," and "agreement." Complaint Counsel also objects to this Request as unduly burdensome and oppressive in that it asks Complaint Counsel to ascertain or disclose information that is in the possession, custody, or control of Respondents. Complaint Counsel further objects that the Request is unduly burdensome where it seeks information that is more readily available to Respondents. Complaint Counsel further objects to this Request as seeking Complaint Counsel's legal conclusion. Subject to and without waiving these objections, Complaint Counsel denies this request."

With respect to Patterson's Request for Admission 12, Complaint Counsel's full response states as follows: "In addition to its General Objections, Complaint Counsel specifically objects to this Request as overly broad and vague, including as to the terms "witness" "admitted," and "agreement." Complaint Counsel also objects to this Request as unduly burdensome and oppressive in that it asks Complaint Counsel to ascertain or disclose information that is in the possession, custody, or control of Respondents. Complaint Counsel further objects that the Request is unduly burdensome where it seeks information that is more readily available to Respondents. Complaint Counsel further objects to this Request as seeking Complaint Counsel's

legal conclusion. Subject to and without waiving these objections, Complaint Counsel denies this request.”

Because the Proposed Finding is a materially incomplete statement of Complaint Counsel’s responses, it is misleading and should be disregarded. In addition, there is substantial evidence in the record before the Court that Respondents engaged in a conspiracy not to do business with buying groups (CCFF ¶¶ 474-1158, 1109-1158), so the Proposed Finding regarding the interpretation of a discovery response is irrelevant.

187. There was no evidence in the record at the time Complaint Counsel completed this sworn response that any witness had admitted to having personal knowledge of Patterson participating in a conspiracy with Schein and Benco not to do business with buying groups.³

Response to Proposed Finding No. 187

The Proposed Finding is misleading, factually inaccurate, and irrelevant. The contents of the evidentiary record during mid-discovery have no bearing on whether Complaint Counsel have proven Respondents’ illegal agreement by a preponderance of the evidence. Nonetheless, the Proposed Finding is factually inaccurate as Respondents’ own documents reveal an admission of the conspiracy. *See, e.g.*, CCFF ¶ 657 (quoting CX0164 at 002 (“[W]e’ve signed an agreement that we don’t do business with [buying groups].”)).

188. There is no evidence in the final record that any witness has admitted to having personal knowledge of Patterson participating in a conspiracy with Schein and Benco not to do business with buying groups. (*Contra* RX2944 at 9–10).

Response to Proposed Finding No. 188

³ Patterson understands and has endeavored to abide by this Court’s Order that “All proposed findings of fact shall be supported by specific references to the evidentiary record.” (Feb. 21, 2019 Order on Post-Trial Briefs). But where a proposed finding of fact involves the absence of evidence in the record supporting a given point, Patterson cannot usually cite the record.

The Proposed Finding is misleading, contrary to the weight of the evidence, and irrelevant. The Proposed Finding is irrelevant because admissions of personal knowledge of a conspiracy are not required to conclude that co-conspirators entered into an agreement. *See* Complaint Counsel's Post-Trial Reply Br. at Benco Section I.A, Patterson Section I.A (Argument).

The Proposed Finding is factually inaccurate as Respondents' own documents reveal an admission of the conspiracy. *See, e.g.*, CCFF ¶ 657 (quoting CX0164 at 002 ("[W]e've signed an agreement that we don't do business with [buying groups].")).

The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent that it implies that Patterson did not participate in a conspiracy with Schein and Benco not to do business with buying groups. The evidence shows that the Big Three did agree, and that key executives participated in or were aware of that agreement, notwithstanding their testimony. For example, the record shows that Cohen communicated Benco's no buying group policy to Guggenheim February 8, 2013 (Cohen, Tr. 501 ("Q. You've communicated Benco's no-buying group policy to Mr. Guggenheim? A. . . . [Y]es.")), and that a few hours after Guggenheim received Cohen's email about Patterson's involvement with NMDC and Benco's no buying group policy, Guggenheim responded to Cohen, "Thanks for the heads up. I'll investigate the situation. We feel the same way about these." (CX0090 at 001; Guggenheim, Tr. 1607-1608); CCFF ¶¶ 483-496). The record shows that Guggenheim meant that Patterson felt the same way about buying groups. (Guggenheim, Tr. 1611-1612; CCFF ¶ 496). The record also shows that Cohen had no business reasons for communicating Benco's no buying group policy. (CX0301 (Cohen, IHT at 243) ("Q. Can you think of any business reason for you to tell Mr. Guggenheim of Benco's no-GPO policy? A. I don't think [there] is a business reason."); CCFF ¶ 488). The record shows that, several months later in June 2013, when Guggenheim learned that Benco was

working with Atlantic Dental Care (“ADC”), a group Patterson thought was a buying group, Guggenheim initiated a communication with Cohen – expressly referencing the earlier communications by attaching Cohen’s February email to the new communication – and asking if Benco was changing its position. (CX0095 at 001 (“I’m wondering if your position on buying groups is still as you articulated back in February? Let me know your thoughts. . . . Sometimes these things grow legs without our awareness!”); CCFF ¶¶ 569-570). The record shows 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 (CX0056; Guggenheim, Tr. 1628; CCFF ¶¶ 570-572).

There is also substantial evidence that Benco and Schein exchanges assurances that neither would work with buying groups (CCFF ¶¶ 661-684, 955-1100), and that Patterson communicated with Schein about buying groups. (CCFF ¶¶ 1123-1132) Indeed, shortly after the communications between Schein and Patterson, Schein’s Foley wrote (in March 2014, at the time Schein has withdrawn from the TDA Annual Meeting), “The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott.” (CX2106 at 001). *See* CCFF ¶ 1185.

Because Patterson’s Proposed Finding is misleading and contrary to the weight of the evidence, it should be disregarded.

189. Complaint Counsel’s denials of Patterson’s Requests for Admission 11 and 12, under penalty of perjury, were false. (RX2944 at 9–10).

Response to Proposed Finding No. 189

The Proposed Finding is misleading, factually inaccurate, and irrelevant. The contents of the evidentiary record during mid-discovery have no bearing on whether Complaint Counsel have

proven Respondents' illegal agreement by a preponderance of the evidence. Nonetheless, the Proposed Finding is factually inaccurate as Respondents' own documents reveal an admission of the conspiracy. *See, e.g.*, CCFF ¶ 657 (quoting CX0164 at 002 (“[W]e’ve signed an agreement that we don’t do business with [buying groups].”)).

To the extent the Proposed Finding is an effort to raise a discovery dispute, it is untimely and irrelevant at the post-trial stage.

a. Responses to Proposed Findings Regarding “Trial Witnesses All Denied Knowledge Of Patterson Participating In A Conspiracy.”⁴

190. Dr. John Kois, Sr., founder and director of the Kois Center and founder of the Kois Buyers Group, had no knowledge of an alleged conspiracy between Patterson and Schein or Benco. (Kois, Sr., Tr. 223 (“Q. Dr. Kois, I have a couple of questions just based on your 40 years of experience as a dentist in the industry. First, just so we’re clear on the record, you’ve been in the industry a long time. You have no firsthand knowledge of any conspiracy between my client Patterson and anyone from Schein or Benco; correct? A. That’s correct.”)).

Response to Proposed Finding No. 190

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Dr. Kois, who was not a party to the conspiracy, was not informed of the conspiracy. That a third party who was not involved in perpetrating the agreement was not informed of the existence of the agreement is irrelevant to whether the agreement existed.

191. John Kois, Jr., currently CEO of the Kois Center and Manager of the Kois Buyers Group, also had no personal knowledge of any agreement between Patterson, Schein, and Benco to not do business with buying groups. (CX8008 (Kois Jr., Dep. at 117 (“Q. And you don’t have any personal knowledge of the existence of any such agreement, do you? A. Any what kind of agreement? Q. Any agreement between Patterson, Schein and Benco to not do business with buying groups? A. I have no knowledge of that.”))).

Response to Proposed Finding No. 191

⁴ Trial witnesses are listed in order of testimony.

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Mr. Kois, who was not a party to the conspiracy, was not informed of the conspiracy. That a third party who was not involved in perpetrating the agreement was not informed of the existence of the agreement is irrelevant to whether the agreement existed.

192. Chuck Cohen, Managing Director of Benco, repeatedly denied forming an agreement of any kind with Patterson relating to buying groups. (*See, e.g.*, Cohen, Tr. 705 (“Q. Did you ever form or seek to form any agreement with Patterson or Schein on buying groups? A. No.”); CX8015 (Cohen, Dep. at 484 (“Q. Mr. Cohen, did you ever reach an agreement with Paul Guggenheim to not deal with buying groups? A. I did not. Q. Did you ever reach an agreement with anyone at Patterson not to provide discounts or deal with buying groups? A. No. Q. Are you aware of any agreement between anyone at Benco and anyone at Patterson to refuse to deal with or provide discounts to buying groups? A. No. Q. Did you ever reach an agreement with Mr. Guggenheim of any kind with respect to buying groups? A. No.”)); CX0301 (Cohen, IHT at 385 (“Q. Do you feel that you reached, at any time, an agreement with Schein and Patterson with respect to whether to sell to buying groups? A. No.”)); *see also* Cohen, Tr. 920-921).

Response to Proposed Finding No. 192

The Proposed Finding is misleading and contrary to the weight of the evidence. The evidence shows that Cohen initiated communications with and participated in a conspiracy with Schein and Patterson not to do business with buying groups. Cohen does not deny the underlying conduct and communications that formed the basis of the agreement. For example, the record shows that Cohen admitted that he communicated Benco’s no buying group policy to Guggenheim February 8, 2013 (Cohen, Tr. 501 (“Q. You’ve communicated Benco’s no-buying group policy to Mr. Guggenheim? A. . . . [Y]es.”)), and that a few hours after Guggenheim received Cohen’s email about Patterson’s involvement with NMDC and Benco’s no buying group policy, Guggenheim responded to Cohen, “Thanks for the heads up. I’ll investigate the situation. We feel the same way about these.” (CX0090 at 001; Guggenheim, Tr. 1607-1608). CCFF ¶¶ 483, 495-496 The record also shows that Cohen had no business reasons for communicating Benco’s no buying group policy. (CX0301 (Cohen, IHT at 243) (“Q. Can you

think of any business reason for you to tell Mr. Guggenheim of Benco's no-GPO policy? A. I don't think [there] is a business reason.")). Cohen, moreover, admitted that he was concerned with communicating with Guggenheim about "the buying group situation" in New Mexico because it was a "customer situation" and might be construed as price fixing. (Cohen, Tr. 539-540).

The record also shows that, several months later in June 2013, when Guggenheim learned that Benco was working with Atlantic Dental Care ("ADC"), a group Patterson thought was a buying group, Guggenheim initiated a communication with Cohen asking if Benco was changing its position. (CX0095 at 001 ("I'm wondering if your position on buying groups is still as you articulated back in February? Let me know your thoughts. . . . Sometimes these things grow legs without our awareness!")). The record shows 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 (CX0056; Guggenheim, Tr. 1628). CCFF ¶¶ 570, 572. Cohen then provided Guggenheim – his competitor – with extensive information about how he evaluated customers and why he did or did not do business with those customers. (CX0062 at 001 (June 8, 2013 email from Cohen to Guggenheim, reiterating Benco's no buying-group policy); Cohen, Tr. 561-562; CCFF ¶ 575). Cohen not only disclosed his policy and his decisions about competing to his competitor, he also assured Guggenheim about his future plans -- that he would "continue monitoring the process to ensure that ADC delivers on their commitment to us," including ensuring that ADC was not a buying group. (Cohen, Tr. 563-564; CX0062 at 001).

The Proposed Finding is also misleading to the extent that it implies that there is not substantial evidence that Benco orchestrated an agreement with Schein that neither would discount to

buying groups. *See, e.g.*, CCFF ¶¶ 661-1100. . Cohen also admitted that he communicated Benco's no buying group policy to Sullivan. Cohen testified that he informed Sullivan of Schein's no buying group policy. (CCFF ¶¶ 662-664; *see also* CX0301 (Cohen, IHT at 195-196) ("Q. Have you ever communicated with anyone at Schein about buying groups? A. I believe I have. Q. Can you tell me about those instances? A. . . I believe I have, at different times, communicated our policy on buying groups."))). The weight of the evidence shows that Benco gained an understanding that Schein had a policy against doing business with buying groups following conversations with Sullivan in 2011. (CCFF ¶ 680; *see also* 661-684). The evidence shows that throughout 2011, Cohen received market intelligence indicating that Schein was working with buying groups. Based on that market intelligence, Cohen understood that Schein worked with buying groups in 2011. (CCFF ¶¶ 665-673). By 2012, however, Cohen no longer believed that Schein would be working with the buying group Smile Source. (CCFF ¶¶ 674-678). In 2013 and 2014, Cohen likewise did not believe that Schein was in the buying group space. (CCFF ¶¶ 675-678). Cohen's belief that Schein was not working with buying groups was *contrary* to the market intelligence that he received indicating that Schein did work with buying groups. (CCFF ¶¶ 665-673, 684-685). Indeed, Cohen continued to receive market intelligence indicating that Schein worked with buying groups throughout the conspiracy. (CCFF ¶¶ 665-673, 684-685; *see also* CX1104; Ryan, Tr. 1252 (testifying that he received an August 2014 email in which Benco territory reps reported to Ryan that Henry Schein was working with Schulman Group))). Consistent with Cohen's knowledge, 2011 was the year that Schein, at the direction of Tim Sullivan, changed its buying group strategy. While Schein had discounted to buying groups historically and profited from such arrangements, by late 2011, Sullivan informed

his employees that he did “NOT want to lead in getting” the buying group initiative started in dental. (CX2456 at 001 (emphasis in original); CCFF ¶¶ 709; *see also* CCFF ¶¶ 712-716).

It is also undisputed that Benco’s Cohen and Schein’s Sullivan communicated on multiple occasions throughout 2011. Between March and December 2011 alone, Cohen and Sullivan called each other at least 13 times for a total duration of 50 minutes and 14 seconds. (CCFF ¶ 347 (CX6027 at 012, 016-017)). Cohen and Sullivan also exchanged a total of 89 text messages in 2011, 23 of which the content was not produced and may have contained buying group communications. (CCFF ¶¶ 349-350 (CX6027 at 003-018)). Six of the 23 text messages for which Respondents did not produce content occurred between March and December 2011. (CX6027 at 005, 010-011, 014 (Rows 62, 63, 64, 106, 110, 133)). Sullivan exchanged additional communications with Cohen, including written notes and voicemail messages that are not reflected in CX6027. (CCFF ¶¶ 353-354; Sullivan, Tr. 3885 (Sullivan produced all cell phone records but could have called Cohen from a land line); Cohen, Tr. 526 (Cohen sent Sullivan notes by mail from time to time); Sullivan, Tr. 3886 (“Q: And you didn’t keep all of the notes that Chuck Cohen sent you over the years, right? A: No.”)). Cohen and Sullivan saw each other at multiple industry events in 2011. (CCFF ¶¶ 358, 380, 379, 381, 363, 383; *see also* Attachment B to Complaint Counsel’s Post-Tr. Br.). Cohen and Sullivan communicated about buying groups multiple other times during the conspiracy. (1) In January 2012, Cohen confronted Sullivan when he discovered that Schein was working with buying group, Unified Smiles. (CCFF ¶¶ 965-972). Ryan passed information to Cohen that Schein was working with a buying group called Unified Smiles with a note “For Timmy [Sullivan] conversation.” (CCFF ¶ 958). Cohen then set up a call with Sullivan and Cohen responded to Ryan’s initial email with the response “Talking this AM” just before his call with Sullivan. (CCFF ¶¶ 964-967). Sullivan and Cohen spoke for

11 minutes and 34 seconds on January 13, 2012. (CCFF ¶ 968). While neither Cohen nor Sullivan remembered the content of the call, Cohen admitted he had buying groups on his mind within the hour he called Sullivan. (CCFF ¶¶ 971-972). (2) Cohen planned to confront Sullivan a second time in July of 2012 after he once again learned from Ryan that Schein was working with a buying group, this time Smile Source. (CCFF ¶¶ 978-983). This time, Ryan forwarded the information to Cohen with a note that says, “Better tell your buddy Tim to knock this shit off.” (CCFF ¶¶ 981-986). Ryan wanted Cohen to tell Sullivan to stop working with buying group Smile Source (CCFF ¶¶ 984-986). Cohen agreed, responding to Ryan by asking him to resend his email without the commentary so that Cohen could “print & send to Tim with a note.” (CCFF ¶¶ 988-992). Cohen testified it would not be a surprise if he sent Sullivan a note about Smile Source. (CCFF ¶ 992). (3) On March 26, 2013, Cohen contacted Sullivan again regarding buying groups. Cohen had emailed a Benco sales representative to ask for the name of the buying group in his area that worked with Schein. (CCFF ¶ 995). Almost immediately after receiving the response from the sales representative, Cohen copied and pasted the Benco sales representative’s email into a text to Sullivan: “As per my guy in Raleigh: ‘Dental alliance. . . . A guy named Sam contacted me about a year ago and asked if Benco was interested. Told him he was out of his tree Could be a rumor, sometimes stories go around. Thanks.” (CCFF ¶ 997). Cohen confirmed at trial that he was informing “Tim Sullivan about market intelligence on Schein doing business with a buying group.” (CCFF ¶ 994; Cohen, Tr. 557 (“Q. So here you’re texting Tim Sullivan about market intelligence on Schein doing business with a buying group. A. Yes.”)). (4) In March 2013, ADC approached Benco asking for a bid for its \$3.5 million dental supply business. (CCFF ¶ 1022). Benco was unsure whether ADC qualified as a buying group so Cohen contacted his competitor, Tim Sullivan, to help determine “how [Benco] would handle

that account.” (CCFF ¶¶ 1023-1032, 1037). On March 25, 2013, Cohen created a calendar entry reminding him to call Tim Sullivan regarding buying groups. (CCFF ¶ 1028). Cohen texted Sullivan asking for a call, and the two set up a time to talk at 5 p.m. on March 25, 2013. (CCFF ¶¶ 1029-1032). Cohen and Sullivan spoke on the call regarding a customer, ADC. (CCFF ¶¶ 1034-1035). Cohen testified that he and Sullivan were “exchanging information” about whether ADC was a buying group or a DSO. (CCFF ¶¶ 1036-1037). (5) Two days later, Cohen learned, through outside counsel hired by Benco, that ADC was not a buying group. (CCFF ¶¶ 1061-1065). Benco decided to bid. (CCFF ¶ 1066). Cohen contacted Sullivan the same day to tell him that Benco *would be bidding* on a potential \$3.5 million customer, ADC. (CCFF ¶¶ 1068-1070). Cohen admitted at trial that he told Sullivan of Benco’s bidding plans because wanted to maintain “a high level of credibility” with Sullivan (CCFF ¶ 1075-1076). In addition, on April 16, 2014, Cohen emailed Sullivan and Guggenheim about the TDA buying group, attaching an article about TDA leveraging the volume purchasing power of TDA members to level the playing field between independent dentists and corporate practices. (CCFF ¶ 1134). Following this email, Sullivan called Cohen and the two spoke the same day for 9 minutes and 16 seconds. (CCFF ¶ 1135).

Accordingly, Cohen’s testimony regarding his lack of knowledge of an agreement is not only contrary to the weight of the evidence, but is hardly credible.

193. Patrick Ryan, Benco’s former Director of Sales and Strategic Markets and current Director of Equipment Research and Development, denied that Benco had any agreement with Patterson relating to buying groups. (Ryan, Tr. 1269 (“Q. Mr. Ryan, did Benco have – to your knowledge, did Benco have an agreement of any kind with my client Patterson regarding buying groups? A. Not to my knowledge. Q. So their allegations are false; correct, sir? A. Yes.”); CX8037 (Ryan, Dep. at 391–92 (“Q. Did you reach any agreement with anyone at Patterson not to compete over anything? A. No. . . . Q. Are you aware of any agreement between Benco and Patterson not to compete for buying groups? A. No, I’m not.”))). Ryan testified that Complaint

Counsel's allegation that Benco and Patterson formed an agreement to refuse to provide discounts to or otherwise compete for Buying Groups was "false." (Ryan, Tr. 1269).

Response to Proposed Finding No. 193

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Benco did not initiate communications with and participate in a conspiracy with Schein and Patterson not to do business with buying groups. For example, the record shows that Cohen admitted that he communicated Benco's no buying group policy to Guggenheim February 8, 2013 (Cohen, Tr. 501 ("Q. You've communicated Benco's no-buying group policy to Mr. Guggenheim? A. . . . [Y]es.")), and that a few hours after Guggenheim received Cohen's email about Patterson's involvement with NMDC and Benco's no buying group policy, Guggenheim responded to Cohen, "Thanks for the heads up. I'll investigate the situation. We feel the same way about these." (CX0090 at 001; Guggenheim, Tr. 1607-1608). CCFF ¶¶ 483, 495-496 The record also shows that Cohen had no business reasons for communicating Benco's no buying group policy. (CX0301 (Cohen, IHT at 243) ("Q. Can you think of any business reason for you to tell Mr. Guggenheim of Benco's no-GPO policy? A. I don't think [there] is a business reason.")).

The record also shows that, several months later in June 2013, when Guggenheim learned that Benco was working with Atlantic Dental Care ("ADC"), a group Patterson thought was a buying group, Guggenheim initiated a communication with Cohen asking if Benco was changing its position. (CX0095 at 001 ("I'm wondering if your position on buying groups is still as you articulated back in February? Let me know your thoughts. . . . Sometimes these things grow legs without our awareness!")). The record shows 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 (CX0056; Guggenheim, Tr.

1628). CCFF ¶¶ 570, 572. Cohen then provided Guggenheim – his competitor – with extensive information about how he evaluated customers and why he did or did not do business with those customers. (CX0062 at 001 (June 8, 2013 email from Cohen to Guggenheim, reiterating Benco’s no buying-group policy); Cohen, Tr. 561-562; CCFF ¶ 575). Cohen not only disclosed his policy and his decisions about competing to his competitor, he also assured Guggenheim about his future plans -- that he would “continue monitoring the process to ensure that ADC delivers on their commitment to us,” including ensuring that ADC was not a buying group. (Cohen, Tr. 563-564; CX0062 at 001).

The Proposed Finding is also misleading to the extent that it implies that there is not substantial evidence that Benco orchestrated an agreement with Schein that neither would discount to buying groups. *See, e.g.*, CCFF ¶¶ 661-1100. The Proposed Finding is also contrary to contemporaneous documents that show Ryan had knowledge of communications between Schein and Benco not to do business with buying groups and even initiated one such conversation. For example, in January 2012, Ryan passed information to Cohen that Schein was working with a buying group called Unified Smiles with a note “For Timmy [Sullivan] conversation.” (CCFF ¶ 958). Cohen then set up a call with Sullivan and Cohen responded to Ryan’s initial email with the response “Talking this AM” just before his call with Sullivan. (CCFF ¶¶ 964-967). Sullivan and Cohen spoke for 11 minutes and 34 seconds on January 13, 2012. (CCFF ¶ 968). Similarly, in July 2012, when Ryan learned that Schein had done business with Smile Source, Ryan wrote to Cohen, his boss, “Better tell your buddy Tim [Sullivan] to knock this shit off.” (CX0018 at 001; Ryan, Tr. 1065; CCFF ¶ 982). He admitted under oath that he was referring to Schein working with Smile Source. (Ryan, Tr. 1065-66; CCFF ¶ 985). Cohen testified that Ryan’s email to Cohen regarding Smile Source (CX0018) was the second time Ryan forwarded

information regarding buying groups to Cohen for communication to Sullivan. (Cohen, Tr. 518; CCFF ¶ 987). Additionally, Ryan called Foley at Schein on October 1, 2013 after receiving market intelligence that Schein might be discounting to the Smile Source buying group. (CCFF ¶¶ 1005-1019). Ryan spoke to his counterpart at Schein, Foley, for 18 minutes; according to Foley's description of the call, (1) he got the impression Benco was anti-buying group; (2) Ryan informed Foley that Benco would not bid on Smile Source; and (3) Ryan wanted to know if Schein would bid on Smile Source. (CCFF ¶¶ 1010-1013). Contemporaneous documents confirm that the call was about Smile Source. (CCFF ¶¶ 1013-1014). Ryan reported the conversation to Cohen saying that he had "talked specifically about" Smile Source with Foley. (CCFF ¶ 1014). Foley also reported that he and Ryan discussed Smile Source on the telephone call. (CCFF ¶ 1017 (quoting CX0243 at 001; Foley, Tr. 4588-4589) ("Next time we talk remind me to tell you about my conversation with Pat Ryan at SM Benco. They're anti Buying Group and Smile Source recently reached out to them. I'm being careful not to cross any boundaries, like collusion.")). Ryan authored several other emails indicating that he was confident that his competitors refused to discount to buying groups. When regional distributor, Burkhart Dental, rebuffed Benco's invitation to stop working with buying groups, Ryan asked Cohen to tell Schein and Patterson to stay the course on their no buying group position just as Benco was. Ryan wrote, "CHUCK---maybe what you should do is make sure you tell Tim [Sullivan of Schein] and Paul [Guggenheim of Patterson] to hold their positions as we are." CCFF ¶¶ 1103 (quoting CX0023 at 001). On February 23, 2013, the final day of an industry conference attended by the Big Three, Ryan wrote, "[A]ll of the major dental companies have said 'NO' [to buying groups], and that's the stance we will continue to take." CCFF ¶ 527 (quoting CX1149 at 002). Ryan testified that he was referring specifically to Benco, Schein, and Patterson through

his statement “all of the major dental companies.” CCFF ¶ 528. Likewise, Ryan wrote in an email to Cohen, “I already KNOW that Patterson and Schein have said NO [to buying groups].” CCFF ¶¶ 1191 (quoting CX0012 at 001). And he instructed a sales representative, “We don’t allow [volume discount] pricing unless there is common ownership. Neither Schein nor Patterson do either.” CCFF ¶ 1193 (quoting CX1185 at 002). Accordingly, Ryan’s testimony is not only contrary to the weight of the evidence, but is hardly credible. The Proposed Finding is misleading and contrary to the evidence. It should be disregarded.

194. Dave Misiak, Patterson’s former North American President, denied Patterson’s involvement in an agreement with Schein or Benco to boycott buying groups. (Misiak, Tr. 1502 (Q. “This document up here is the agreement that the FTC and complaint counsel allege that we had. It says, ‘Benco, Schein and Patterson agreed not to provide discounts to, or otherwise contract with, buying groups of independent dentists.’ Do you have any knowledge of such an agreement with my client Henry Schein? A. Absolutely not. ... Q. Do you have any knowledge of such an agreement with Benco? A. I do not.”); CX8038 (Misiak, Dep. at 314–15 (“Q. Did you ever reach or make any agreement with anyone at Benco about whether to do business with buying groups? A. I did not. Q. Did you ever reach or make any agreement with anyone at Henry Schein about whether to do business with buying groups? A. I did not. Q. Did you ever reach any agreement with anyone at Benco about whether to offer discounts to buying groups? A. I did not. Q. Did you ever reach or make any agreement with anyone at Henry Schein about whether to offer discounts to buying groups? A. I did not.”))). Mr. Misiak was not employed by Patterson at the time of his trial or deposition testimony. (Misiak, Tr. 1291; 1297) (Mr. Misiak left Patterson in May 2018); (CX8038 (Misiak, Dep. at 22)) (same, deposition dated July 25, 2018); *see also* Misiak, Tr. 1502; 1505; 1508-09).

Response to Proposed Finding No. 194

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Patterson did not participate in a conspiracy with Schein and Benco not to do business with buying groups merely because Misiak did not testify that Patterson had reached an agreement. In particular, the Proposed Finding is contrary to extensive documentary evidence that Patterson entered into an agreement with Benco that the Big Three Distributors would not do business with buying groups. For example, the record shows that Cohen communicated Benco’s no buying group policy to Guggenheim February 8, 2013 (Cohen, Tr. 501 (“Q. You’ve

communicated Benco's no-buying group policy to Mr. Guggenheim? A. . . . [Y]es.'')), and that Guggenheim immediately forwarded Cohen's email regarding its no buying group policy to Misiak. (Misiak, Tr. 1329, 1331; Guggenheim, Tr. 1606-1607; CX0091 at 001). The evidence shows that, a few hours after Guggenheim received Cohen's email about Patterson's involvement with NMDC and Benco's no buying group policy, Guggenheim responded to Cohen, "Thanks for the heads up. I'll investigate the situation. We feel the same way about these." (CX0090 at 001; Guggenheim, Tr. 1607-1608). CCFF ¶¶ 483, 495-496.

Shortly after this exchange, Misiak instructed his team not to bid for a group he believed was a buying group, stating, "**Confidential and not for discussion ..our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me.**" (CX0093 at 001 (emphasis in the original); Misiak, Tr. 1356-1358; CCFF ¶¶ 549, 1184; CX0106 at 001). The evidence also shows that, when Guggenheim contacted Benco to ask about Benco working with ADC (which Patterson believed was a buying group) (CCFF ¶¶ 564-587), Guggenheim sent Misiak a copy of his email communication with Cohen. (CCFF ¶¶ 570-571).

Misiak was also personally involved in communications with his counterpart at Schein regarding distributors pulling out of the Texas Dental Association's 2014 Annual Meeting because the TDA sponsored a buying group called TDAPerks Supplies. The contemporaneous documentary evidence shows that Misiak believed that his Schein counterpart had given him a commitment. (CX0112 at 001 (January 21, 2014 email from Misiak to Rogan, forwarding an email from Schein's Dave Steck: "[Steck] already told me they were out. Full blown!")); Misiak, Tr. 1413-1414). Because this Proposed Finding is misleading and contrary to the weight of the evidence, it should be disregarded

195. Paul Guggenheim, former President and CEO of Patterson, denied that he agreed with Chuck Cohen to not sell to buying groups. (Guggenheim, Tr. 1707 (“Q. At any time, in any venue, did you commit to Mr. Cohen that Patterson would not sell or discount to any buying group? A. I have never committed that to anybody outside our organization. Q. Did you agree with Mr. Cohen that you wouldn’t sell to buying groups? A. No.”); Guggenheim, Tr. 1870 (“Q. . . . [D]id you believe that you formed any agreement between Patterson and Benco not to do business with buying groups? A. Absolutely not. Q. And by this ten-second response, did you intend to form any such agreement? A. No.”); *see also* CX8023 (Guggenheim, Dep. at 394 (“Q. Did you ever reach an agreement with anyone at Benco about whether to do business with buying groups? A. No. Q. Did you ever reach an agreement with anyone at Benco about whether to offer discounts to buying groups? A. No.”)); CX8023 (Guggenheim, Dep. at 395 (“Q. Did you ever reach any agreement with Benco about the New Mexico Dental Cooperative? A. Nope. Q. Did you ever reach any agreement with Benco about Atlantic Dental Care? A. No.”)); *see also* Guggenheim, Tr. 1707, 1853, 1862, 1870, 1872).

Response to Proposed Finding No. 195

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Patterson did not participate in a conspiracy with Schein and Benco not to do business with buying groups merely because Guggenheim did not view his communications with his competitor as an agreement. The Proposed Finding is contrary to extensive documentary evidence that Guggenheim entered into an agreement with Benco not to do business with buying groups, and that Patterson was part of an overarching conspiracy not to discount to buying groups. The record also shows that, as part of that conspiracy, the Big Three rejected buying groups. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198). The record shows that Cohen communicated Benco’s no buying group policy to Guggenheim February 8, 2013 (Cohen, Tr. 501 (“Q. You’ve communicated Benco’s no-buying group policy to Mr. Guggenheim? A. . . . [Y]es.”)), and that within few hours of receiving Cohen’s email, about Patterson’s involvement with NMDC and Benco’s no buying group policy, Guggenheim responded to Cohen, “Thanks for the heads up. I’ll investigate the situation. We feel the same way about these.” (CX0090 at 001; Guggenheim, Tr. 1607-1608). CCFF ¶¶ 483, 495-496. The record shows that Guggenheim meant that Patterson felt the same way about buying groups.

(Guggenheim, Tr. 1611-1612). The record also shows that Guggenheim could not identify any business rationale or procompetitive justifications for his February 2013 communications with Cohen. (Guggenheim, Tr. 1605-1606, 1612; CX0314 (Guggenheim, IHT at 234, 235, 248); CCFF ¶ 1168).

The record also shows that, several months later in June 2013, when Guggenheim learned that Benco was working with Atlantic Dental Care (“ADC”), a group Patterson thought was a buying group, Guggenheim initiated a communication with Cohen – expressly referencing the earlier communications by attaching Cohen’s February email to the new communication – and asking if Benco was changing its position with respect to buying groups. (CX0095 at 001 (“I’m wondering if your position on buying groups is still as you articulated back in February? Let me know your thoughts. . . . Sometimes these things grow legs without our awareness!”)). The record shows 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 (CX0056; Guggenheim, Tr. 1628). CCFF ¶¶ 570-572. In addition, the record shows that Guggenheim communicated with Cohen to acknowledge his understanding of (and agreement with) Cohen’s position regarding which entities were covered and which were not covered by their agreement. (CX0062 at 001 (June 10, 2013 Guggenheim email to Cohen: “Sounds good Chuck. Just wanted to clarify where you guys stand.”)) CCFF ¶ 582. As with the February 2013 communication, Guggenheim could not provide any procompetitive justification for his June 2013 communications with Chuck Cohen regarding ADC. (CX0314 (Guggenheim, IHT at 297-299); CCFF ¶ 1169). Guggenheim also could not recall any circumstance in which he reached out to Cohen to gain information on lost business other than the June 2013 communication about ADC. (CX0314 (Guggenheim, IHT at 297-298)).

Contrary to Guggenheim’s testimony, contemporaneous documentary and evidence from Guggenheim’s key executives refer to an overarching agreement among Schein, Patterson, and Benco. (CX0093 at 001 (Misiak: **“Confidential and not for discussion . . . our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me.”**) (emphasis in the original); CCFF ¶¶ 1184; CX0106 at 001 (Rogan: “. . . we don’t need GPO’s in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry.”); *see also* CCFF ¶¶ 603). Schein documents, moreover, confirm this understanding. (CX2106 at 001 (“The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott.”); CCFF ¶ 1185).

Because this Proposed Finding is misleading and contrary to the weight of the evidence, it should be disregarded.

196. Dr. Joseph Baytosh, a practicing dentist and member of the Corydon Palmer Dental Society, had no personal knowledge of an agreement between Benco, Schein, and Patterson not to do business with buying groups. (Baytosh, Tr. 1898 (“Q. Do you have any knowledge of an agreement between Schein, Benco and Patterson not to do business with buying groups? A. No. Q. Other than in this case, have you ever heard of such an agreement? A. Not to my knowledge.”)); CX8030 (Baytosh, Dep. at 68 (“Q. Are you aware that the FTC is alleging in this case that Patterson, Schein, and Benco entered into an agreement in 2013 not to do business with buying groups? A. I’ve read the – that information, yes. Q. Do you have any knowledge of such an agreement? A. No, I do not.”))).

Response to Proposed Finding No. 196

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Dr. Baytosh, who was not a party to the conspiracy, was not informed of the conspiracy. That a third party who was not involved in perpetrating the agreement was not informed of the existence of the agreement is irrelevant to whether the agreement existed.

197. Dr. Andrew Goldsmith, a practicing dentist and former President and Chief Dental Officer at Smile Source, had no knowledge of an agreement relating to buying groups between Patterson and Benco. (Goldsmith, Tr. 2175 (“Q. And by the way, during the meeting, did they stop the meeting and say, Hey, I have to call Chuck Cohen at Benco to see if we can do this because we have an agreement? A. No. Q. Nobody ever said that. A. No.”)).

Response to Proposed Finding No. 197

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Dr. Goldsmith, who was not a party to the conspiracy, was not informed of the conspiracy. That a third party who was not involved in perpetrating the agreement was not informed of the existence of the agreement is irrelevant to whether the agreement existed.

198. Justin Puckett, President of MB2 Dental Solutions and co-founder of Dental Gator, had no personal knowledge of an agreement between Patterson, Benco, and Schein to not offer discounts to buying groups. (Puckett, Tr. 2268–69 (“Q. Do you have any personal knowledge of any agreement between Schein, Benco and Patterson not to offer discounts or otherwise negotiate with buying groups? . . . A. I do not.”)).

Response to Proposed Finding No. 198

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Puckett, who was not a party to the conspiracy, was not informed of the conspiracy. That a third party who was not involved in perpetrating the agreement was not informed of the existence of the agreement is irrelevant to whether the agreement existed.

199. Dr. Brenton Mason, a practicing dentist and co-founder of the New Mexico Dental Cooperative,⁵ had no knowledge of any agreement between Patterson, Benco, and Schein. (Mason, Tr. 2390–91 (“Q. So before we get started, do you have any knowledge of any agreement between Schein, Patterson, and Benco not to offer discounts to or do business with buying groups? A. No, I do not.”)); CX8035 (Mason, Dep. at 69–70 (“Q. Dr. Mason, you don’t have any direct knowledge supporting an allegation that Benco, Schein and Patterson conspired to refuse to offer discounted prices or otherwise negotiate with buying groups; do you? A. No, I do not. Q. You don’t have any direct knowledge that would support the allegation that Benco, Schein and Patterson executives agreed not to provide discounts to or otherwise contract with

⁵ The New Mexico Dental Cooperative was never formed. (CX8035 (Mason Dep. 101:17–20 (“That concept never even came to fruition because we never opened the New Mexico Dental Co-Op. We joined another state.”))).

buying groups? A. I do not. Q. You don't have any direct knowledge to support an allegation that Benco, Schein and Patterson entered into an agreement to refuse to provide discounts to or compete for the business of buying groups? A. I do not."))).

Response to Proposed Finding No. 199

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Dr. Mason, who was not a party to the conspiracy, was not informed of the conspiracy. That a third party who was not involved in perpetrating the agreement was not informed of the existence of the agreement is irrelevant to whether the agreement existed.

Finally, to the extent that Respondent Patterson is seeking a separate finding for the information in footnote 5, that information is irrelevant and misleading. The record evidence shows that NMDC was being established by several New Mexico dentists prior to February 2013, and was in negotiations with Patterson at that time. (CCFF ¶¶455-465). The record further shows that Patterson's local branch manager, Scott Belcheff viewed NMDC as a potential partner and was interested in working with the developing buying groups. CX4090 at 002 (February 7, 2013, email from Belcheff, to Dr. Mason: "I am hoping Patterson can be a partner you trust and that will always do the right thing for you.")).

200. Jake Meadows, Schein's former Vice President of Sales for the Eastern Area and current Vice President of Sales of Special Markets, had no knowledge of an agreement between Patterson, Benco, and Schein. (Meadows, Tr. 2467 ("Q. Complaint Counsel didn't ask you this, but this is their allegation in the case: Benco, Schein and Patterson agreed not to provide discounts to, or otherwise contract with, buying groups of independent dentists. Do you know anything about such an agreement? A. I do not. Q. Have you ever heard of such an agreement? A. Never heard of it."); (CX8016 (Meadows, Dep. at 268 ("Q. So have you personally ever reached any kind of agreement or understanding with anyone from Benco or Patterson about buying groups, GPOs, or any other type of customer? A. No. . . . Q. The FTC alleges in this case that Henry Schein had an agreement with Benco and Patterson to not do business with buying groups or offer them discounts. Do you have any personal knowledge of such an agreement? A. No. Q. Would such an agreement be consistent or inconsistent with your knowledge of the business practices of Henry Schein Dental? A. Very inconsistent."))).

Response to Proposed Finding No. 200

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Meadows, who was not personally a party to the conspiracy or the communications between Schein and Benco or Schein and Patterson, was not informed of the conspiracy. That a person who was not directly involved in perpetrating the agreement was not told of the existence of the agreement is irrelevant to whether the agreement existed.

201. Neal McFadden, President of the Special Markets Division at Patterson, repeatedly denied the existence of an agreement between Patterson and Benco or Schein relating to buying groups. (McFadden, Tr. 2738 (“Q. Was there any kind of agreement that you were referring to about not doing business with -- or not working with GPOs? A. We never had any agreement, any signed agreement, that we would not work with GPOs. It was always a business decision.”)); McFadden, Tr. 2740 (“Q. Did you personally, Neal McFadden, at any time in your 21 years with Patterson, did you strike an agreement with somebody from Benco or somebody from Schein that you would not sell or discount to buying groups? Did you do that, sir? A. I did not.”); CX8004 (McFadden, Dep. at 192–93 (“Q. On paragraph 7, it says, Rather than respond to the threat of buying groups independently, the distributors entered into an agreement to force all this threat through collective coordinated action. Do you have any such agreements involving Schein? A. I do not. Q. Okay. In paragraph 8 it reads, Benco, Schein and Patterson executives agreed not to provide discounts to or otherwise contract with buying groups. Do you know of any such agreements involving any Schein executives? A. I do not.”)); CX8004 (McFadden, Dep. at 112 (“Q. Do you remember what your reaction was to hearing about the investigation? A. Yes. Q. And what was that reaction? A. It was unbelievable. Q. Because -- unbelievable -- why unbelievable? A. Because *we are in such a highly competitive marketplace that it seems outlandish that Patterson Dental would get with Henry Schein and Benco to conspire and agree upon anything.*”) (emphasis added)); *see also* (McFadden, Tr. 2737–38; 2740; 2742; 2781).

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The Proposed Finding is misleading to the extent that it there was no agreement between Schein, Patterson and Benco because McFadden did not know of the agreement. The Proposed Finding is also contrary to the weight of the evidence in the record. For example, on June 12, 2014, McFadden expressly told a potential customer that Patterson has “signed an agreement that we won’t work with GPO’s.” (CX0164 at 002, line 248). (Text message from McFadden to former Patterson employee who was representing an entity called “Choice One”: “Is choice one a GPO or are you all actually acquiring practices? The reason I’m asking is we’ve signed an agreement

that we won't work with GPO's [sic]."). Whether or not there was an actually signed agreement, McFadden's statement to a potential customer is indicative of his belief that there was at least an understanding – and certainly indicative of his desire for a potential customer to believe there was an agreement. McFadden, in an effort to explain that his statement was not correct, asserted that he lied. (CX8004 (McFadden, Dep. Tr. 110-111)).

The record also shows that McFadden, who had been open to the possibility of working with buying groups when he started working with Patterson's Special Markets division, quickly learned that he should not do business with buying groups. *See* CX0315 (McFadden, IHT at 169-170) (McFadden was anxious to develop new business and saw "any sale" as a "potential opportunity" including sales to GPOs); CX0106 at 001 (August 2013 email from McFadden to Misiak and Rogan, "Is it worth it to explore GPO???????"); CX0106 at 001 (Rogan's response to McFadden's GPO interest inquiry, "We don't need GPO's [sic] in the dental business. Schein, Benco, and Patterson have always said no."). *See also* CCFF ¶¶ 597-604. Despite McFadden's earlier interest in buying group business, by September 2013, McFadden told a regional manager that Patterson was "choosing to forgo this route [joining with a GPO] as its [sic] both anti rep, manufacturer and distributor." (CX3116 at 001). CCFF ¶ 606. On September 4, 2013, McFadden sent a memorandum to the whole Patterson sales team that defined Special Markets as excluding GPOs (CX0158 at 002).

McFadden's denials of the existence of an agreement are thus contrary to the weight of the evidence. The Proposed Finding is misleading and should be disregarded.

202. Tim Rogan, Patterson's former Vice President of Marketing and Merchandise and current Vice President and General Manager for North America, also denied the existence of an agreement between Patterson and Benco or Schein relating to buying groups. (Rogan, Tr. 3651 ("Q. Did you, Tim Rogan, ever make any agreement with anyone at Benco about buying

groups? A. No. Q. And are you aware of anyone else at Patterson ever making any kind of agreement with Benco on buying groups? A. No.”); Rogan, Tr. 3652 (“Q. . . . So this is the agreement that the FTC alleges Benco, Schein, and Patterson entered into, and I’ll just read it. It says: ‘The FTC alleges that Benco, Schein, and Patterson agreed not to provide discounts to, or otherwise contract with, buying groups of independent dentists.’ Do you see that? A. Yes. Q. Have you ever reached such an agreement with Schein or Benco? A. No. Q. Do you have any knowledge whatsoever about such an alleged agreement? A. No. Q. Have you ever heard of such an alleged agreement? A. No.”); Rogan, Tr. 3571–72 (“Q. Did someone at Patterson tell you that they had reached an agreement with Benco or Schein about buying groups? A. No.”); CX8017 (Rogan, Dep. at 257–58 (“Q. Okay. And do you know of any such agreements referenced in paragraph 7 involving Schein? A. I do not. . . . Q. Okay. And do you know of any such agreements referenced in paragraph 8 involving Schein executives? A. I do not. . . . Q. Okay. Do you know of anyone at Patterson coordinating their conduct with Schein regarding any customer segment? A. I do not.”)); CX8017 (Rogan, Dep. at 261 (“Q. Are you aware of any agreement between Benco and Patterson regarding GPOs? A. No. Q. Are you aware of any agreement between Benco and Patterson regarding buying groups? A. No.”); *see also* (Rogan, Tr. 3571–3572, 3575, 3651–3652).

Response to Proposed Finding No. 202

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Patterson did not participate in a conspiracy with Schein and Benco not to do business with buying groups merely because Rogan did not himself participate in communications competitors or did not view his boss’s communications as an agreement. The Proposed Finding is contrary to extensive documentary evidence showing that Rogan was aware of communications between Patterson and Benco regarding an agreement between Patterson and Benco not to do business with buying groups. For example, the record shows that, after Cohen communicated Benco’s no buying group policy to Guggenheim in February 8, 2013 (Cohen, Tr. 501 (“Q. You’ve communicated Benco’s no-buying group policy to Mr. Guggenheim? A. . . . [Y]es.”)), Guggenheim immediately forwarded Cohen’s email to Rogan and Misiak. (CX0090 at 001). The record also shows that, several months later in June 2013, when Guggenheim learned that Benco was working with ADC (a group Patterson thought was a buying group), Rogan received a copy of Guggenheim’s communication with Cohen and asking if Benco was changing its position with respect to buying groups. (CX0095 at 001 (“I’m wondering if your

position on buying groups is still as you articulated back in February? Let me know your thoughts. . . . Sometimes these things grow legs without our awareness!”)). As noted above, the record shows 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 (CX0056; Guggenheim, Tr. 1628; CCFF ¶¶ 570-572).

The record also shows that, in August 2013, after Rogan had received copies of the email correspondence between Guggenheim and Cohen, Rogan communicated to others at Patterson that their competitors were saying “no” to buying groups. (CX0106 at 001 (Rogan: “. . . we don’t need GPO’s in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry.”); *see also* CCFF ¶ 603).). In addition, another contemporaneous document in the record shows that Rogan was aware of Guggenheim’s communications with Cohen, and even expressed skepticism about whether Cohen had provided an acceptable explanation of why Benco was doing business with ADC. (CX0097 at 001 (October 2013 email from Rogan to Guggenheim: “Chesapeake buying group deal. You spoke with Chuck Cohen about this, but it is suspect we believe.”))

Because this Proposed Finding is contrary to the weight of the evidence, it should be disregarded.

203. Dave Steck, Vice President and General Manager of Schein Dental, also knew nothing of an agreement between Patterson and Schein relating to buying groups. (Steck, Tr. 3831 (“Q. Do you have any knowledge of any agreement involving Patterson concerning not selling to buying groups? A. I have no knowledge. Q. From your perspective, has there ever been any such agreement? A. Not -- no. Q. And did anyone ever tell you that there was any such agreement? A. No. Q. And did you ever have any reason to believe, Mr. Steck, that there was any such agreement? A. Did not.”); CX8031 (Steck, Dep. at 145–46 (“Q. The FTC alleges in this case that Henry Schein had an agreement with Patterson and Benco to not do business with or give discounts to buying groups. Do you understand that? Q. Do you understand they make that allegation? A. Yes. Q. Do you have any personal knowledge of any such agreement or

understanding? A. No. No, I do not. Q. Would such an agreement be contrary to your understanding of Henry Schein's business practices as it relates to buying groups? A. It would be contrary, yes."); *see also* Steck, Tr. 3831).

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The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Steck, who was not personally a party to the conspiracy or the communications between Schein and Benco or Schein and Patterson, was not informed of the conspiracy. That a person who was not directly involved in perpetrating the agreement was not told of the existence of the agreement is irrelevant to whether the agreement existed.

The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent that contemporaneous documents show that Steck was involved in communications with his counterpart at Patterson regarding the decision by dental products distributors to withdraw from the 2014 Texas Dental Association Annual Meeting because the TDA had sponsored a buying group called TDA Perks Supplies. The record evidence shows that Steck spoke with Misiak on January 6, 2014 for 14 minutes (CX6027 at 036 (Row 298); CCFF ¶¶ 1123, 1124), that Patterson told its competitor that it was planning to pull out of the TDA meeting (CCFF ¶ 1125), and that Steck felt he had an obligation to get back to his competitor about whether Schein would also be pulling out of the TDA meeting. (CX0205 at 002 (January 21, 2014 email from Steck to three Schein managers: "Guys, I have to get back to PDCO on whether or not we are attending the TDA."); CCFF ¶ 1129).

In light of Steck's personal involvement in communicating with his counterpart at Schein's largest competitor about plans to attend an event where distributors typically do business (CX8038 (Misiak, Dep. at 281-282), his denials and the Proposed Finding should be disregarded.

204. Tim Sullivan, President of Schein Dental, denied the existence of any agreement between Schein and Patterson to refuse to provide discounts to or otherwise compete for Buying Groups, and was offended by Complaint Counsel's allegations. (Sullivan, Tr. 4020–21 (“January will be my 30th year with the company, the combined Sullivan/Sullivan Schein/Henry Schein. My father started the company in 1980. He was 50 years old, two kids in college, three in high school. It took guts to do what he did. He was an amazing human being. I joined when we were a \$28 million privately held company. I was part of the company going through the IPOs. My father and I led the discussions with Schein to merge in 1997. I helped build and lead this organization to the company that we are today. And I’m most proud of, through all that, as representing the Sullivan name. When I see Sullivan in the dental industry, I don’t think of Tim Sullivan. I think of Bob Sullivan. And when I read that, I don’t know if people understand the consequences of being falsely accused, the impact it has on family, our team members, customers who know what our brand stands for. There are consequences to falsely accusing people of things we know we didn’t do.”); Sullivan, Tr. 4257 (“Q. Never had any kind of agreement with any of your competitors about buying groups? A. Never.”); RX2941 (Sullivan, Dep. at 466 (“Q. The next paragraph says, ‘Patterson joined the agreement to refuse to provide discounts to or otherwise compete for Buying Groups no later than February 2013.’ Do you have any knowledge of that? A. No.”); RX2941 (Sullivan, Dep. at 528–29 (“Q. In your mind, as the person running Henry Schein Dental, did you ever believe that you entered into any type of agreement with Patterson concerning any aspect of dealing with buying groups? A. No.”); *see also* Sullivan, Tr. 4021; 4230-4231; 4257; 4294-4301; 4303-4304).

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The Proposed Finding is misleading and contrary to the weight of the evidence. The evidence shows that Sullivan entered into an agreement with Cohen not to discount to buying groups. The record evidence establishes that, as early as 2011, Cohen communicated Benco’s no buying group policy to Sullivan. Cohen testified that he informed Sullivan of Schein’s no buying group policy. (CCFF ¶¶ 662-664; *see also* CX0301 (Cohen, IHT at 195-196) (“Q. Have you ever communicated with anyone at Schein about buying groups? A. I believe I have. Q. Can you tell me about those instances? A. . . . I believe I have, at different times, communicated our policy on buying groups.”))). The weight of the evidence shows that Benco gained an understanding that Schein had a policy against doing business with buying groups following conversations with Sullivan in 2011. (CCFF ¶ 680; *see also* 661-684). The evidence shows that throughout 2011, Cohen received market intelligence indicating that Schein was working with buying groups. Based on that market intelligence, Cohen understood that Schein worked with buying groups in

2011. (CCFF ¶¶ 665-673). By 2012, however, Cohen no longer believed that Schein would be working with the buying group Smile Source. (CCFF ¶¶ 674-678). In 2013 and 2014, Cohen likewise did not believe that Schein was in the buying group space. (CCFF ¶¶ 675-678).

Cohen's belief that Schein was not working with buying groups was *contrary* to the market intelligence that he received indicating that Schein did work with buying groups. (CCFF ¶¶ 665-673, 684-685). Indeed, Cohen continued to receive market intelligence indicating that Schein worked with buying groups throughout the conspiracy. CCFF ¶¶ 665-673, 684-685; *see also* CX1104; Ryan, Tr. 1252 (testifying that he received an August 2014 email in which Benco territory reps reported to Ryan that Henry Schein was working with Schulman Group).

Consistent with Cohen's knowledge, 2011 was the year that Schein, at the direction of Tim Sullivan, changed its buying group strategy. While Schein had discounted to buying groups historically and profited from such arrangements, by late 2011, Sullivan informed his employees that he did "NOT want to lead in getting" the buying group initiative started in dental. CCFF ¶¶ 709; *see also* CCFF ¶¶ 712-716.

It is also undisputed that Benco's Cohen and Schein's Sullivan communicated on multiple occasions throughout 2011. Between March and December 2011 alone, Cohen and Sullivan called each other at least 13 times for a total duration of 50 minutes and 14 seconds. (CCFF ¶ 347 (CX6027 at 012, 016-017)). Cohen and Sullivan also exchanged a total of 89 text messages in 2011, 23 of which the content was not produced and may have contained buying group communications. (CCFF ¶¶ 349-350 (CX6027 at 003-018)). Six of the 23 text messages for which Respondents did not produce content occurred between March and December 2011. (CX6027 at 005, 010-011, 014 (Rows 62, 63, 64, 106, 110, 133)). Sullivan exchanged additional communications with Cohen, including written notes and voicemail messages, that are not

reflected in CX6027. (CCFF ¶¶ 353-354 (Sullivan, Tr. 3885 (Sullivan produced all cell phone records but could have called Cohen from a land line)); Cohen, Tr. 526 (Cohen sent Sullivan notes by mail from time to time); Sullivan, Tr. 3886 (“Q: And you didn’t keep all of the notes that Chuck Cohen sent you over the years, right? A: No.”)). Cohen and Sullivan saw each other at multiple industry events in 2011. (CCFF ¶¶ 358, 380, 379, 381, 363, 383; *see also* Attachment B to Complaint Counsel’s Post-Tr. Br.).

Cohen and Sullivan communicated about buying groups multiple other times during the conspiracy. (1) In January 2012, Cohen confronted Sullivan when he discovered that Schein was working with buying group, Unified Smiles. (CCFF ¶¶ 965-972). Ryan passed information to Cohen that Schein was working with a buying group called Unified Smiles with a note “For Timmy [Sullivan] conversation.” (CCFF ¶ 958). Cohen then set up a call with Sullivan and Cohen responded to Ryan’s initial email with the response “Talking this AM” just before his call with Sullivan. (CCFF ¶¶ 964-967). Sullivan and Cohen spoke for 11 minutes and 34 seconds on January 13, 2012. (CCFF ¶ 968). While neither Cohen nor Sullivan remembered the content of the call, Cohen admitted he had buying groups on his mind within the hour he called Sullivan. (CCFF ¶¶ 971-972). (2) Cohen planned to confront Sullivan a second time in July of 2012 after he once again learned from Ryan that Schein was working with a buying group, this time Smile Source. (CCFF ¶¶ 978-983). This time, Ryan forwarded the information to Cohen with a note that says “Better tell your buddy Tim to knock this shit off.” (CCFF ¶¶ 981-986). Ryan wanted Cohen to tell Sullivan to stop working with buying group Smile Source (CCFF ¶¶ 984-986). Cohen agreed, responding to Ryan by asking him to resend his email without the commentary so that Cohen could “print & send to Tim with a note.” (CCFF ¶¶ 988-992). Cohen testified it would not be a surprise if he sent Sullivan a note about Smile Source. (CCFF ¶ 992). (3) On

March 26, 2013, Cohen contacted Sullivan again regarding buying groups. Cohen had emailed a Benco sales representative to ask for the name of the buying group in his area that worked with Schein. (CCFF ¶ 995). Almost immediately after receiving the response from the sales representative, Cohen copied and pasted the Benco sales representative's email into a text to Sullivan: "As per my guy in Raleigh: 'Dental alliance. . . . A guy named Sam contacted me about a year ago and asked if Benco was interested. Told him he was out of his tree Could be a rumor, sometimes stories go around. Thanks.'" (CCFF ¶ 997). Cohen confirmed at trial that he was informing "Tim Sullivan about market intelligence on Schein doing business with a buying group." (CCFF ¶ 994; Cohen, Tr. 557 ("Q. So here you're texting Tim Sullivan about market intelligence on Schein doing business with a buying group. A. Yes.")). (4) In March 2013, ADC approached Benco asking for a bid for its \$3.5 million dental supply business. (CCFF ¶ 1022). Benco was unsure whether ADC qualified as a buying group so Cohen contacted his competitor, Tim Sullivan, to help determine "how [Benco] would handle that account." (CCFF ¶¶ 1023-1032, 1037). On March 25, 2013, Cohen created a calendar entry reminding him to call Tim Sullivan regarding buying groups. (CCFF ¶ 1028). Cohen texted Sullivan asking for a call, and the two set up a time to talk at 5 p.m. on March 25, 2013. (CCFF ¶¶ 1029-1032). Cohen and Sullivan spoke on the call regarding a customer, ADC. (CCFF ¶¶ 1034-1035). Cohen testified that he and Sullivan were "exchanging information" about whether ADC was a buying group or a DSO. (CCFF ¶¶ 1036-1037). (5) Two days later, Cohen learned, through outside counsel hired by Benco, that ADC was not a buying group. (CCFF ¶¶ 1061-1065). Benco decided to bid. (CCFF ¶ 1066). Cohen contacted Sullivan the same day to tell him that Benco *would be bidding* on a potential \$3.5 million customer, ADC. (CCFF ¶¶ 1022, 1068-1070). Cohen admitted at trial that he told Sullivan of Benco's bidding plans because wanted to

maintain “a high level of credibility” with Sullivan (CCFF ¶ 1075-1076). In addition, on April 16, 2014, Cohen emailed Sullivan and Guggenheim about TDA buying group, attaching an article about TDA leveraging the volume purchasing power of TDA members to level the playing field between independent dentists and corporate practices. (CCFF ¶ 1134). Following this email, Sullivan called Cohen and the two spoke the same day for 9 minutes and 16 seconds. (CCFF ¶ 1135).

Sullivan was personally involved in all of the conversations discussed above. The Proposed Finding is therefore contrary to the weight of the evidence.

Finally, the testimony cited in support of this Proposed Finding regarding Sullivan being “offended” by the allegations in a Complaint issued against his company is irrelevant to a finding of violation.

205. Jeffrey Reece, Vice President of Sales and Marketing at Burkhart, had no knowledge of an agreement between Patterson, Benco, and Schein relating to buying groups. (Reece, Tr. 4463–64 (“Q. . . . On the screen is the agreement -- you don’t have this in your binder, sir, but on the screen is the agreement that the FTC alleges in this case that Schein was a participant in, and it says, “Benco, Schein, and Patterson agreed not to provide discounts to, or otherwise contract with, buying groups of independent dentists.” Do you see that? A. I do. Q. Do you have any personal knowledge about whether Schein has ever entered into such an agreement? A. I do not. Q. Do you have any personal knowledge of anything that could be characterized as this agreement here? A. I do not.”); CX8021 (Reece, Dep. at 117–18 (“Q. Do you have any direct or personal knowledge that would support the knowledge that Benco, Schein and Patterson conspired to refuse to offer discounted prices or otherwise negotiate with buying groups? A. No. Q. Do you have any direct or personal knowledge that would support the allegation that Benco, Schein and Patterson executives agreed not to provide discounts to or otherwise contract with buying groups? A. No.”))).

Response to Proposed Finding No. 205

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Reece, who was not a party to the conspiracy (and whose company was not a party to the conspiracy), was not informed of the conspiracy. That a third party who was not

involved in perpetrating the agreement was not informed of the existence of the agreement is irrelevant to whether the agreement existed. Nothing in this Response is meant to address the extensive evidence that Reece received a solicitation from Cohen to join Benco in a conspiracy to not do business with buying groups. Although the evidence of Benco's solicitation to Reece and Burkhart to join the conspiracy is not raised in the Patterson Findings of Fact, this Response should not be viewed as fully addressing the evidence related to that solicitation. *See* CCFF ¶¶ 1199-1251.

206. Randy Foley, Schein's former Vice President of Sales for Special Markets, repeatedly denied the existence of an agreement between Patterson, Benco, and Schein relating to buying groups. (Foley, Tr. 4599–4600 (“Q. Mr. Foley, I want you to take a look at this. RX 5 is the agreement that complaint counsel alleges in this case. Okay? A. Yes. Q. And it states, “Benco, Schein and Patterson agreed not to provide discounts to, or otherwise contract with, buying groups of independent dentists.” Do you see that? A. Yes. Q. Mr. Foley, are you aware of any such agreement between Benco, Schein and Patterson not to provide discounts to or otherwise contract with buying groups of independent dentists? A. No. . . . Q. You’ve never heard of such an agreement. A. Never.”); Foley, Tr. 4600–01 (“Q. And to be clear, you’re not aware of any such agreement involving Schein Special Markets; correct? A. Correct. Q. And you’re not aware of any such agreement involving Henry Schein Dental; is that correct? A. That is correct.”); CX8003 (Foley, Dep. at 381–82 (“Mr. Foley, did you ever enter an agreement with anyone at Patterson to refuse to deal with buying groups? A. No. Q. Are you aware of anyone at Schein entering an agreement with Patterson to refuse to deal with buying groups? A. No. Q. Did you ever enter into an agreement with anyone from Patterson regarding any customers? A. No. Q. Are you aware of anyone at Schein entering into an agreement, arrangement, or understanding of any kind with someone from Patterson regarding any customer? A. No.”)); *see also* Foley, Tr. 4600 (“Q. Mr. Foley, what is your reaction to the allegations here in RX 5? A. I was surprised when I saw that, because I’d been working with buying groups from the day I started with Special Markets until the day I retired. Q. And I believe you’ve already testified that would be from 2009 all the way to 2016. Is that right? A. That is correct.”)).

Response to Proposed Finding No. 206

The Proposed Finding is misleading and contrary to the weight of the evidence. The evidence shows that Benco's Ryan reached out to Foley to discuss buying groups and informed Foley of Benco's bidding position relating to buying groups. Ryan called Foley at Schein on October 1, 2013 after receiving market intelligence that Schein might be discounting to the Smile Source

buying group. (CCFF ¶¶ 1005-1019). Ryan spoke to his counterpart at Schein, Foley, for 18 minutes; according to Foley's description of the call, (1) he got the impression Benco was anti-buying group; (2) Ryan informed Foley that Benco would not bid on Smile Source; and (3) Ryan wanted to know if Schein would bid on Smile Source. (CCFF ¶¶ 1010-1013). Contemporaneous documents confirm that the call was about Smile Source. (CCFF ¶¶ 1013-1014). Ryan reported the conversation to Cohen saying that he had "talked specifically about" Smile Source with Foley. (CCFF ¶ 1014). Foley also reported that he and Ryan discussed Smile Source on the telephone call (CCFF ¶ 1017 (quoting CX0243 at 001; Foley, Tr. 4588-4589) ("Next time we talk remind me to tell you about my conversation with Pat Ryan at SM Benco. They're anti Buying Group and Smile Source recently reached out to them. I'm being careful not to cross any boundaries, like collusion.")). In addition, Foley's own statements in documents suggest that he believed there was an agreement by Patterson, Schein and Benco to act together to stop the growth of buying groups. On March 5, 2014, Foley wrote to a third party at a large national DSO, "The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott." (CX2106 at 001; Foley, Tr. 4596-4598; see CCFF ¶¶ 1194, 1138). Later, after the conspiracy had fallen apart, Foley commented on his knowledge that Schein, Patterson and Benco had previously not done business with buying groups, telling Schein employees, "Keep in mind that I and others have been in contact with Tralongo over the years. Schein, PDCO and Benco all refused to bid on their business when they entered the GPO/Buying Group world." (CX2094 at 001; *see also* CCFF ¶ 1185). Finally, to the extent that Foley's testimony references "RX 5," RX0005 is not the document as described; RX0005 a 2009 Patterson email chain and does not contain a contract. To the extent that the Proposed Finding intends to reference RXD 0005, a

demonstrative, for substantive evidence, it should be disregarded, as it contravenes the Court's February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence.

207. Trevor Maurer, President and CEO of Smile Source, had no knowledge of the facts underlying a conspiracy involving Patterson. (Maurer, Tr. 4990 (“[T]hey said the following persons have knowledge of the facts underlying their conspiracy allegation against my client Patterson. . . . And if we go to the next page, at about the bottom of the list they listed you, Trevor Maurer. Do you see that? A. I do. Q. But you don’t actually have that knowledge, do you, sir? A. That’s correct. Q. So this is false. Fair? A. I guess so. Q. And did they ask your permission to put this false answer with your name on it in their interrogatory answer? A. I don’t know how to answer that, but nobody asked me my permission to put something false in a document, no.”); Maurer, Tr. 4987–88 (“Q. Mr. Maurer, do you have any firsthand knowledge of any Patterson employee ever communicating with anyone from Schein about not selling to buying groups? A. I do not. Q. Do you have any firsthand knowledge of any Patterson witness ever communicating with anyone from Schein about not discounting to buying groups? A. I do not. Q. Do you have any firsthand knowledge of any witness -- employee of Patterson ever communicating with anyone from Benco about not selling to or discounting to buying groups? A. I do not.”); RX2952 (Maurer, Dep. at 69 (“Q. Do you have any direct knowledge supporting the allegation in that FTC complaint that Benco, Schein, and Patterson conspired to refuse to offer discounted prices or otherwise negotiate with buying groups? A. No. Q. Do you have any direct knowledge supporting the allegation in the FTC complaint that Benco, Schein, and Patterson executives agreed not to provide discounts to or otherwise contract with buying groups? A. No. Q. Do you have any direct knowledge supporting the allegation made in the FTC complaint that Benco, Schein, and Patterson entered into an agreement to refuse to provide discounts to or compete for the business of buying groups for their core customer base of independent dentists? A. No.”))).

Response to Proposed Finding No. 207

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Maurer, who was not a party to the conspiracy, was not informed of the conspiracy. That a third party who was not involved in perpetrating the agreement was not informed of the existence of the agreement is irrelevant to whether the agreement existed. The Proposed Finding is also misleading to the extent that the witness was asked a question that misrepresented Complaint Counsel’s discovery responses. Any testimony based on this false premise presented by Patterson’s counsel has no evidentiary value and should be disregarded.

208. Kathleen Titus, Schein's current Director of Group Practice and former Zone Manager for Special Markets, denied the existence of any agreement between Schein and Patterson, and felt personally diminished by Complaint Counsel's allegations. (Titus, Tr. 5280 ("[T]here was no conspiracy."); Titus, Tr. 5192 ("Q. Ms. Titus, are you aware of any agreement between Benco, Schein and Patterson not to provide discounts to or otherwise contract with buying groups of independent dentists? A. Absolutely not, because no agreement existed, and I know that because it was my job to work with buying groups over the last twenty-plus years. In fact, *I find it personally diminishing because I spent so much of my career at Henry Schein working with buying groups.*") (emphasis added); CX8010 (Titus, Dep. at 249 ("Q. The FTC alleges in its complaint that's filed in this action that Henry Schein, Patterson and Benco had an agreement to not do business with buying groups. Do you have any knowledge of such an agreement? A. I do not."); *see also* Titus, Tr. 5192, 5280-5281).

Response to Proposed Finding No. 208

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Titus, who was not personally a party to the conspiracy or directly involved in the communications between Schein and Benco or Schein and Patterson, was not informed of the conspiracy. That a person who was not directly involved in perpetrating the agreement was not told of the existence of the agreement is irrelevant to whether the agreement existed.

209. Titus further testified that Complaint Counsel's sworn response to Schein's Interrogatory 11, naming her as a Schein executive or employee who had "referred to and/or enforced Schein's policy not to provide discounts to or compete for the business of Buying Groups" (RX2957 at 12-13), was false. (Titus, Tr. 5280 ("And you see the part that he just highlighted at the beginning of that sentence, 'Other Schein executives and employees also referred to and/or enforced Schein's policy not to provide discounts to or compete for the business of Buying Groups, including' -- and your name is listed, Kathleen Titus. Is that a true statement? A. That is not a true statement. Q. Have you ever referred to or enforced a conspiracy involving Patterson? A. No, I have not, and there was no conspiracy."))).

Response to Proposed Finding No. 209

The Proposed Finding is misleading and irrelevant. To the extent that the Proposed Finding seeks to establish that a witness disagrees with that Complaint Counsel's response to a discovery request, the finding is irrelevant. Moreover, to the extent that the Proposed Finding relies on the testimony of Titus, a fact witness, to offer an ultimate opinion on what constitutes a conspiracy, it is misleading and irrelevant. Titus, as a fact witness, is not competent to opine on a legal

conclusion. In addition, the weight of the evidence also contradicts Titus' cited testimony. For example, in July 2014, Titus wrote to Cavaretta regarding turning down PGMS, a GPO, "Just delivered the news moments ago to Kathy Khalik. She was absolutely gracious, but clearly devastated. I explained if there was a time in the future they become an MSO that could demonstrate compliance, we would be pleased to revisit." (CX2219 at 002); CX8010 (Titus, Dep. at 208-209)). The next day, Titus wrote to Schein's Showgren and Kevin Upchurch: "We had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. I created this and sent to Joe for review. It went to Tim [Sullivan] and he shot it down. I think the meta msg is officially, GPO's are not good for Schein." (CX2235 at 001; Titus, Tr. 5310-5311.) Although Titus confirmed this statement at her deposition (CX8010 (Titus, Dep. at 151)), she contradicted her sworn deposition testimony when she testified at trial (Titus, Tr. 5312-5313) ("Q. As of the time that you wrote this e-mail [CX2235], it was your understanding that Tim Sullivan had shot down a PGMS agreement? A. No.")). Thus, Titus' contradictory testimony about what had occurred at Schein with respect to dealing with buying groups raises questions of her credibility or her recall of specific facts.

210. Joseph Cavaretta, Schein's current VP of Sales for the Eastern Area and former VP of Sales and Area Manager for the Western Area, was not aware of and did not enter into an agreement relating to buying groups with Patterson. (Cavaretta, Tr. 5529-30 ("Q. They allege that Benco, Schein and Patterson agreed not to provide discounts to, or otherwise contract with, buying groups of independent dentists. Do you see that? A. I do. Q. Do you know anything about such an alleged agreement? A. I do not. . . . Q. Did you ever come to such an alleged agreement with Paul Guggenheim at Patterson? A. No. Q. Did you ever come to such an alleged agreement with anyone at Patterson? A. No. Q. Are you aware of any agreement between Benco, Schein and Patterson not to do business with buying groups? A. I'm not. . . . Q. Are you aware of any agreement or understanding of any way between Benco, Schein and Patterson not to offer discounts to buying groups? A. No, I'm not.)); CX8033 (Cavaretta, Dep. at 255-56 ("Q. The FTC alleges in this case that Henry Schein had an agreement with Benco and Patterson to not do business with buying groups or offer them discounts. Do you have any knowledge of such an agreement? A. No. . . . Q. Would such an agreement, if it existed, be contrary to your understanding of Henry Schein's business practices? A. Yes.)); *see also* Cavaretta, Tr. 5622-5623).

Response to Proposed Finding No. 210

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Cavaretta, who was not personally a party to the conspiracy or to the communications between Schein and Benco or Schein and Patterson, was not informed of the conspiracy. That a person who was not directly involved in perpetrating the agreement was not told of the existence of the agreement is irrelevant to whether the agreement existed.

211. Richard Johnson, co-founder and consultant with Klear Impakt, did not know anything about the alleged agreement and had never heard of it. (R. Johnson, Tr. 5505–06 (“Q. They allege that Benco, Schein and Patterson agreed not to provide discounts to, or otherwise contract with, buying groups of independent dentists. Do you see that? A. Yes. Q. Do you know anything about such an alleged agreement? A. I don’t know anything about that agreement. Q. Have you heard of any agreement like this? A. No, I have not.”); (R. Johnson, Tr. 5507–08 (“Q. Do you have any firsthand personal knowledge regarding my client Patterson entering into an agreement with either Benco or Schein to refuse to deal with buying groups? A. No. Q. And do you have any firsthand knowledge of Patterson entering into an agreement not to discount to buying groups? A. No.”); CX8029 (Johnson, Dep. at 148 (“Q. Do you have any direct knowledge that would support the allegation that Benco, Schein, and Patterson conspired to refuse to offer discounted prices or otherwise negotiate with dental buying groups? A. No. Q. Do you have any direct knowledge supporting the allegation that Benco, Schein, and Patterson executives agreed not to provide discounts to or otherwise contract with buying groups composed of independent dentists? A. No.”))).

Response to Proposed Finding No. 211

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Johnson, who was not a party to the conspiracy, was not informed of the conspiracy. That a third party who was not involved in perpetrating the agreement was not informed of the existence of the agreement is irrelevant to whether the agreement existed.

b. Responses to Proposed Findings Regarding “Non-Trial Witnesses Also Denied The Conspiracy.”

212. Michael Porro, Schein’s former Zone Manager and current Director of Technology for Sales in the East, was not aware of and did not enter into any agreement between Patterson and Schein not to do business with buying groups. (CX8000 (Porro, Dep. at 287 (“Q. Are you aware of any agreement between Schein and Patterson not to do business with buying

groups? A. No. . . . Q. And again, you certainly didn't reach any agreement with anyone at Patterson not to do business with buying groups? A. I have not.”))).

Response to Proposed Finding No. 212

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Porro, who was not personally a party to the conspiracy or to the communications between Schein and Benco or Schein and Patterson, was not informed of the conspiracy. That a person who was not directly involved in perpetrating the agreement was not told of the existence of the agreement is irrelevant to whether the agreement existed.

213. Debbie Foster, Schein's former Director of Sales for Special Markets and current Regional Account Manager, testified that she was not aware of and did not enter into any agreement between Patterson and Schein not to do business with buying groups. (CX8001 (Foster, Dep. at 164–65 (“Q. Are you aware of any agreement between Schein and Patterson not to do business with buying groups? A. No. . . . Q. And you certainly did not reach any agreement with anyone at Patterson not to do business with buying groups? A. No.”))).

Response to Proposed Finding No. 213

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Foster, who was not personally a party to the conspiracy or to the communications between Schein and Benco or Schein and Patterson, was not informed of the conspiracy. That a person who was not directly involved in perpetrating the agreement was not told of the existence of the agreement is irrelevant to whether the agreement existed.

214. Devon Nease, Patterson's former Branch Manager in the Chesapeake Region, was not aware of any agreement between Patterson, Schein, or Benco. (CX8002 (Nease, Dep. at 127 (“Q. Are you aware of any agreement between Benco and Patterson not to do business with so-called buying groups? A. No, sir.”); CX8002 (Nease, Dep. at 137 (“Q. Mr. Nease, do you know of any such agreements referenced in paragraph 8 involving any Schein executives? A. No. . . . Q. Do you know of anyone at Patterson coordinating their conduct with Schein regarding any customer segment? A. No.”))). Nease was not employed by Patterson at the time of his deposition. (CX8002 (Nease, Dep. at 15–16 (Nease left Patterson in August 2014))).

Response to Proposed Finding No. 214

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Nease, who was not personally a party to the conspiracy or to the communications between Patterson and Benco or Patterson and Schein, was not informed of the conspiracy. That a person who was not directly involved in perpetrating the agreement was not told of the existence of the agreement is irrelevant to whether the agreement existed. The Proposed Finding is, moreover, misleading and contrary to the documentary evidence. Evidence in the record shows that, after Nease had been instructed not to bid on ADC business, he learned that Benco had bid on that business and brought Benco's bid to Guggenheim's attention. (CX0094 at 001 (May 31, 2013 email from Nease to Guggenheim: "Just a heads up on a situation in Chesapeake, VA, Benco recently responded to and won a bid proposal with a buying group called Atlantic Dental Care."); Guggenheim, Tr. 1622; 1625-1627); CCFF ¶ 565). After receiving Nease's email, Guggenheim found his earlier emails with Cohen about Benco's no buying group policy, and forwarded the February 8, 2013 correspondence back to Cohen, asking him to confirm that Benco's "position on buying groups [was] still as [Cohen] articulated back in February." (CX0095 at 001; Guggenheim, Tr. 1627-1628; CCFF ¶¶ 568-570). Nease received a "blind copy" of Guggenheim's email to Cohen. (CX0095 at 001; Guggenheim, Tr. 1630; CCFF ¶ 571). When Cohen responded, explaining to his competitor his reasons why he did not view ADC as a buying group, Guggenheim forwarded Cohen's response to Nease, confirming at least indirectly, the joint understanding of which entities were subject to or excluded from bids, stating "I guess that does create a different situation as they would logically buy as one entity. It's a little grey but I guess he has a point.") (CX0096 at 001). Because the Proposed Finding is contrary to substantial evidence in the record, it should be disregarded.

215. Hal Muller, President of Schein Special Markets, denied entering into an agreement or having knowledge of an agreement between Patterson, Benco, and Schein

regarding buying groups. (CX8005 (Muller, Dep. at 223 (“Q. Do you have any knowledge of the allegation made by the FTC that there’s an agreement between Patterson, Benco and Henry Schein regarding buying groups? A. No.”))).

Response to Proposed Finding No. 215

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Muller, who was not personally a party to the conspiracy or to the communications between Schein and Benco or Schein and Patterson, was not informed of the conspiracy. That a person who was not directly involved in perpetrating the agreement was not told of the existence of the agreement is irrelevant to whether the agreement existed.

216. Darci Wingard, the former Manager of Group Strategy and Development and current Director of Alternative Purchasing at Schein, had no knowledge of whether Patterson partners with buying groups. (CX8009 (Wingard, Dep. at 233 (“Q. Okay. Do you have an understanding of whether Patterson partners with buying groups? A. Yeah, I wouldn’t -- I wouldn’t know that. Q. You don’t have any understanding? A. I don’t.”)).

Response to Proposed Finding No. 216

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Wingard, who was not personally a party to the conspiracy or to the communications between Schein and Benco or Schein and Patterson, was not informed of the conspiracy. That a person who was not directly involved in perpetrating the agreement was not told of the existence of the agreement is irrelevant to whether the agreement existed. Wingard’s testimony about her understanding of an agreement should also be disregarded because she did not become a Schein employee until May 2016, approximately a year after the end of the conspiracy. Accordingly, she could have no personal knowledge relevant to the question she was asked.

217. Frank Capaldo, Executive Director and CEO of the Georgia Dental Association and CEO of Integrity Dental Buyers Group, had no personal knowledge of an agreement between Patterson, Benco, and Schein to not do business with buying groups. (CX8011

(Capaldo, Dep. at 33–34 (“Q. And are you aware that the FTC is alleging that Patterson, Schein and Benco entered into an agreement in 2013 not to do business with buying groups? A. Generally, yes. Q. Have you read the complaint in this case? A. I have. Q. You have no personal knowledge of any such agreement, do you, sir? A. I do not.”))).

Response to Proposed Finding No. 217

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Dr. Capaldo, who was not a party to the conspiracy, was not informed of the conspiracy. That a third party who was not involved in perpetrating the agreement was not informed of the existence of the agreement is irrelevant to whether the agreement existed.

218. James Breslawski, President of Schein, denied the existence of any agreement between Patterson, Schein, and Benco and testified that such an agreement would be contrary to Schein’s business practices of working with buying groups. (CX8012 (Breslawski, Dep. at 242) (“Q. The FTC alleges in this action that Henry Schein had an agreement with Patterson and Benco to not do business with buying groups. Do you have any knowledge of such an agreement? A. I do not. Q. Would such an agreement be contrary to Henry Schein’s business practices about working with buying groups? A. It would.”))).

Response to Proposed Finding No. 218

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Breslawski, who was not personally a party to the conspiracy or to the communications between Schein and Benco or Schein and Patterson, was not informed of the conspiracy. That a person who was not directly involved in perpetrating the agreement was not told of the existence of the agreement is irrelevant to whether the agreement existed.

219. Anthony Fruehauf, Patterson’s former Regional Manager for the Southeastern United States and current Regional President for Raleigh-Durham, North Carolina Area, denied the existence of any agreement related to buying groups. (CX8013 (Fruehauf, Dep. at 195–96) (“Q. The Complaint in this case alleges that rather than respond to the threat of buying groups independently, the distributors, that is, Schein, Patterson and Benco entered into an agreement to force all this threat through collective coordinated action. Do you know of any such agreements involving Schein? A. I do not. Q. The Complaint in this matter also alleges that Benco, Schein and Patterson executives agreed not to provide discounts to or otherwise contract with buying groups. Do you know of any such agreements involving any Schein executive? A. I do not.”); *see also* CX8013 (Fruehauf, Dep. at 191 (“I feel strongly that . . . Patterson and our major

competitors fight each other every day tooth and nail and . . . there's . . . absolutely, in my opinion, no merit to the fact that we would ever get involved with our competitors that we don't like very much to form some kind of group to fix pricing. That's just not – it's just impossible in my mind.”))).

Response to Proposed Finding No. 219

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Fruehauf, who was not personally a party to the conspiracy or to the communications between Patterson and Benco or Patterson and Schein, was not informed of the conspiracy. That a person who was not directly involved in perpetrating the agreement was not told of the existence of the agreement is irrelevant to whether the agreement existed.

220. Michelle Lauerman, Advantage Dental's former Dental Services Advisor and current Director of Network and Patient Ambassador, had no personal knowledge of any agreement between Patterson and Benco or Schein relating to buying groups. (CX8014 (Lauerman, Dep. at 184–85 (“Q. Earlier I asked you whether you had any personal knowledge of anything that supported the allegations as you understood them and you said no. I'm asking you does Advantage Dental have any information other than the testimony that you've provided today, that Advantage Dental believes supports or is consistent with the allegations made in the complaint as you understand them? A. I have nothing to offer. I do not know of anything.”))).

Response to Proposed Finding No. 220

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Lauerman, who was not a party to the conspiracy, was not informed of the conspiracy. That a third party who was not involved in perpetrating the agreement was not told of the existence of the agreement is irrelevant to whether the agreement existed.

221. Tracy Moody, executive of Vision Source which is the parent of Smile Source, who retired from the business in December 2012 had no knowledge of Patterson conspiring or agreeing to refuse to discount to buying groups or Patterson executives agreeing with Schein or Benco executives not to deal with buying groups. (CX8019 (Moody, Dep. at 14 (“Q. And when did you retire? A. End of 2012.”); CX8019 (Moody, Dep. at 40–41 (“Q. Do you have any direct knowledge that would support the allegation that Benco, Schein, and Patterson conspired to refuse to offer discounted prices or otherwise negotiate with buying groups? A. No. Q. Do you have any direct knowledge relating to an allegation that Benco, Schein, and Patterson executives agreed not to provide discounts to or otherwise contract with buying groups composed of

independent dentists? A. No. . . . Q. Do you have any knowledge that Benco, Schein, and Patterson entered into an agreement to refuse to provide discounts to or compete for the business of buying groups? A. No.”))).

Response to Proposed Finding No. 221

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Moody, who was not a party to the conspiracy, was not informed of the conspiracy. That a third party who was not involved in perpetrating the agreement was not informed of the existence of the agreement is irrelevant to whether the agreement existed.

222. Brian Brady, Schein’s former National Director of Group Practices and current Senior Director of Sales, had no knowledge of an agreement with Patterson. (CX8020 (Brady, Dep. at 318–19 (“Q. And it’s fair to say you’ve never reached an agreement or understanding with anyone at Patterson about buying groups or GPOs? A. Correct. Q. The FTC alleges in this case that Henry Schein had an agreement with Patterson and Benco to not do business or not offer discounts to buying groups or GPOs. Do you have any knowledge of such an agreement? A. No. Q. Would you say that such an alleged agreement would be contrary to your understanding of Henry Schein’s business principles? A. Yes.”))).

Response to Proposed Finding No. 222

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Brady, who was not personally a party to the conspiracy or to the communications between Schein and Benco or Schein and Patterson, was not informed of the conspiracy. That a person who was not directly involved in perpetrating the agreement was not told of the existence of the agreement is irrelevant to whether the agreement existed.

223. Andrea Hight, Schein’s former National Director of Community Health, former Director of Group Practices, and current Area Sales Manager, denied the existence of an agreement between Patterson, Schein, and Benco not to do business with buying groups. (CX8022 (Hight, Dep. at 192–93 (“Q. The FTC alleges in its complaint filed in this action that Henry Schein, Patterson, and Benco had an agreement to not do business with buying groups. Do you have any knowledge of any such agreement? I have no knowledge at all of any such agreement.”))).

Response to Proposed Finding No. 223

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Hight, who was not personally a party to the conspiracy or to the communications between Schein and Benco or Schein and Patterson, was not informed of the conspiracy. That a person who was not directly involved in perpetrating the agreement was not told of the existence of the agreement is irrelevant to whether the agreement existed.

224. Scott Anderson, Patterson's former President and CEO and current Special Advisor, repeatedly denied the existence of an agreement at his deposition. (CX8027 (Anderson, Dep. at 161–63 (“Q. Are you aware that the FTC in this case has alleged that Patterson, Schein and Benco entered into an agreement to forestall the threat of buying groups through collective coordinated action? A. Yes. Q. Do you know of any such agreements involving Schein? A. No. Q. Are you aware that the FTC in this Complaint has alleged that Benco, Schein and Patterson executives agreed not to provide discounts to or otherwise contract with buying groups? A. No. Q. Do you know of any such agreements involving any Schein executives? A. No.”))).

Response to Proposed Finding No. 224

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Anderson, who was not personally a party to the conspiracy or to the communications between Schein and Benco or Schein and Patterson, was not informed of the conspiracy. That a person who was not directly involved in perpetrating the agreement was not told of the existence of the agreement is irrelevant to whether the agreement existed. The Proposed Finding also misstates Anderson's testimony. Anderson merely stated that he was not aware of any agreement involving Schein. (CX8027 (Anderson, Dep. at 161–63)). The cited testimony does not address his knowledge of an agreement between Patterson and Benco.

225. Joseph Lepley, Patterson's Director of Strategic Pricing, denied the existence of any agreement between Patterson, Benco or Schein relating to buying groups. (CX8028 (Lepley, Dep. at 111–13 (“Q. The Complaint in this matter reads, ‘Rather than respond to the threat of buying groups independently, the distributors entered into an agreement to forestall this threat through collective, coordinated action.’ Do you know of any such agreements regarding Schein? A. I do not have any knowledge of such agreements. Q. The Complaint in this matter also reads, ‘Benco, Schein and Patterson executives agreed not to provide discounts to or otherwise

contract with buying groups.’ Q. Do you know of any such agreements involving any Schein executives? A. I do not have any knowledge of such things.”))).

Response to Proposed Finding No. 225

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Lepley, who was not a party to the conspiracy, was not informed of the conspiracy. Although Lepley is a Patterson employee, he did not begin working at Patterson until November 2015, well after the conspiracy began to fall apart. (CX8028 (Lepley, Dep. at 12). That a person who was not involved in perpetrating the agreement (and who was hired after well after Benco settlement made the enforcement of the conspiracy difficult) was not informed of the existence of the agreement, is irrelevant to whether the agreement existed.

226. Mitchell Goldman, the CEO of Mid-Atlantic Dental Partners, has no knowledge of any agreement between Patterson, Benco, or Schein not to do business with any customer segment. (RX2953 (Goldman, Dep. at 153 (“Q. I have just one question for you: Do you have any knowledge of any agreements between Patterson, Schein, or Benco not to do business with anyone? A. No.”))).

Response to Proposed Finding No. 226

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Goldman, who was not a party to the conspiracy, was not informed of the conspiracy. That a third party who was not involved in perpetrating the agreement was not informed of the existence of the agreement is irrelevant to whether the agreement existed.

227. Ryan Dew, Senior Director of Business Operations at Brasseler, had no personal knowledge of a conspiracy or agreement between Patterson, Benco, or Schein not to do business with buying groups. (RX2955 (Dew, Dep. at 179–80 (“Q. And do you have any direct or personal knowledge that Benco, Schein and Patterson entered into any agreements to refuse to provide discounts to or compete for the business of buying groups? A. I do not.”))).

Response to Proposed Finding No. 227

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Dew, who was not a party to the conspiracy, was not informed of the conspiracy. That a third party who was not involved in perpetrating the agreement was not informed of the existence of the agreement is irrelevant to whether the agreement existed.

228. Robert Lowther, owner and President of The Denali Group, testified that the FTC's allegations regarding an agreement between Patterson, Schein, and Benco are "not true." (RX2961 (Lowther, Dep. at 11 ("From my understanding of what the complaint is alleging, it's not true or correct based on -- on what actually happens in our relationship. . . What the Denali Group does is exactly what - - with Henry Schein, Patterson, and Benco in the past is exactly what the FTC says they do not do.")); *see also* RX2961 (Lowther, Dep. at 193-94 ("A. It's my understanding that there was an alleged -- that the allegation was that there was an agreement between Benco, Patterson, and Schein not to offer discount pricing to individual practitioner buying groups. Q. Okay. Do you have any personal knowledge of such an agreement? A. I do not. That has not been our company's experience with that."))).

Response to Proposed Finding No. 228

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Lowther, who was not a party to the conspiracy, was not informed of the conspiracy. That a third party who was not involved in perpetrating the agreement was not informed of the existence of the agreement is irrelevant to whether the agreement existed.

229. Wesley Fields, Patterson's current Director of Business Development and former General Manager of the Louisville, Kentucky branch, testified that Paul Guggenheim never told him about an agreement between Patterson and Benco or Schein relating to buying groups. (CX0312 (Fields, IHT at 104-05 ("Q. Did Paul Guggenheim ever tell you about any agreement that Patterson had with Benco or Schein relating to GPOs or buying groups? A. No. Q. Mr. Guggenheim never mentioned any agreement that Patterson had with regard to Schein or Benco? A. No."))).

Response to Proposed Finding No. 229

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Fields who was not personally a party to the conspiracy or to the communications between Schein and Benco or Schein and Patterson, was not informed of the

conspiracy. That a person who was not directly involved in perpetrating the agreement was not told of the existence of the agreement is irrelevant to whether the agreement existed. Fields was also not testifying about his own knowledge of whether there was an agreement, but only about whether Guggenheim had told him about an agreement.

230. Mark Mlotek, Schein’s Executive Vice President and Chief Strategic Officer, testified at his investigational hearing that Schein has never had any agreements with Patterson relating to anything. (CX0308 (Mlotek, IHT at 183 (“Q. Has Schein ever entered into any agreement, acquisition or joint venture agreement with Patterson? A. No.”))).

Response to Proposed Finding No. 230

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Mlotek, who was not personally a party to the conspiracy or to the communications between Schein and Benco or Schein and Patterson, was not informed of the conspiracy. That a person who was not directly involved in perpetrating the agreement was not told of the existence of the agreement is irrelevant to whether the agreement existed. The Proposed Finding also lacks foundation for the very broad assertion Patterson and Schein never had any agreement of any kind – including agreements (such as agreements to participate in trade association activities) that likely do not raise antitrust concerns. As such, it is also unreliable and should be disregarded. Mlotek’s testimony also does not address any agreements between Schein and Benco, which were part of the overarching conspiracy.

231. Brian Evans, Benco’s Director of Sales for the West, testified that it would “surprise him” if executives from Benco and Patterson had coordinated with one another to not work with buying groups. (RX1121 (Evans, Class Action Dep. at 279 (“Q. Would it surprise you if executives from Benco and Patterson had coordinated with one another to ban working with buying groups?. . . A. Yes.”))).

Response to Proposed Finding No. 231

The Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Evans, who was not personally a party to the conspiracy or to the communications between Schein and Benco or Schein and Patterson, was not informed of the conspiracy. That a person who was not directly involved in perpetrating the agreement was not told of the existence of the agreement is irrelevant to whether the agreement existed. The Proposed Finding should also be disregarded because it relies on the deposition of Brian Evans taken in a separate private litigation and class action litigation alleging that Respondents had engaged in a conspiracy (*SourceOne, Inc. v. Patterson Companies, Inc., et al.*, No. 2:15-CV-05440 (E.D.N.Y.) and *In re: Dental Supplies Antitrust Litigation*, No 16-CV-00696). Although Respondents have offered that deposition in evidence here, Complaint Counsel did not participate in the deposition and had no opportunity to ask about the foundation for any of Evan's answers. As such, the document should be treated as unreliable hearsay and given no weight. Finally, whether Evans would have been "surprised" by an agreement has very little or no evidentiary value in evaluating whether the Respondents entered into a conspiracy.

232. All party witnesses flatly denied the existence of a conspiracy. (*See supra* Section III).

Response to Proposed Finding No. 232

The Proposed Finding has no specific evidentiary citations, and accordingly, should be disregarded. The Proposed Finding is also misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because certain party witnesses who were not personally involved to the conspiracy or the communications between Schein and Benco or Schein and Patterson, were not informed of the conspiracy. That a person who was not directly involved in perpetrating the agreement was not told of the existence of the agreement is irrelevant to whether the agreement existed. In addition, with respect to persons who were involved in relevant

communications, the weight of the evidence, outlined in response to the Proposed Findings above, provides substantial evidence of the conspiracy to contradict the witnesses' claims.

Finally, the Proposed Finding is confusing and vague to the extent that it references but does not identify "party witnesses." Here, many of Respondents' former employees no longer work for them. For example, Misiak is no longer a Patterson employee (Misiak, Tr. 1291); McFadden is no longer a Patterson employee (McFadden, Tr. 2660); Foley is no longer a Schein employee (Foley, 4505). It is unclear to which witnesses are referenced in this Proposed Finding. Accordingly, because the Proposed Finding is vague and confusing, it should be disregarded.

233. Third party witnesses also testified that they had no knowledge of a conspiracy. (*See supra* Section III).

Response to Proposed Finding No. 233

The Proposed Finding has no specific evidentiary citations, so should be disregarded. In addition, the Proposed Finding is misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because third party witnesses were not informed of the conspiracy. That a third party who was not involved in perpetrating the agreement was not told of the existence of the agreement is irrelevant to whether the agreement existed.

IV. Responses to Proposed Findings Regarding "All But Three Of Patterson's Communications With Benco And Schein In The Record On Their Face Have Nothing To Do With Buying Groups."

234. Complaint Counsel's sworn response to Patterson's Interrogatory Number 7 lists 112 documents that Complaint Counsel claims support the allegation that Patterson joined the conspiracy in February 2013. (RX2934 at 15–18).

Response to Proposed Finding No. 234

The Proposed Finding is misleading because it misstates the question Patterson asked in Patterson's Interrogatory No. 7 (RX2934 at 15), and misstates Complaint Counsel's response.

The Interrogatory did not ask for documents that “support the allegation that Patterson joined the conspiracy in February 2013.” Rather, it asked for the identification of documents *related to* Paragraph 1 of the Complaint. Because this Proposed Finding is premised on a misstatement, it should be disregarded.

235. 35 of the documents Complaint Counsel identified in response to Patterson’s Interrogatory Number 7 are dated from 2011—two years before Patterson allegedly joined the conspiracy: CX3383 (April 2011); CX3384 (May 2011); CX3385 (May 2011); CX3386 (May 2011); CX3387 (May 2011); CX3388 (May 2011); CX3389 (May 2011); CX3390 (May 2011); CX3454 (May 2011); CX3391 (May 2011); CX1354 (September 2011); CX3392 (September 2011); CX1355 (September 2011); CX3393 (September 2011); CX3394 (September 2011); CX3191 (September 2011); CX3397 (October 2011); CX1358 (October 2011); CX3398 (October 2011); CX3399 (October 2011); CX3457 (November 2011); CX3458 (November 2011); CX3400 (December 2011); CX1362 (December 2011); CX3401 (December 2011); CX3402 (December 2011); CX3403 (December 2011); CX1363 (December 2011); CX3404 (December 2011); CX3405 (December 2011); CX1049 (December 2011); CX1050 (December 2011); CX3067 (December 2011); CX1465 (December 2011); CX3406 (December 2011) (hereinafter, the “35 Documents”).

Response to Proposed Finding No. 235

The Proposed Finding is misleading to the extent that it implies that communications prior to the start of the conspiracy are not relevant to establishing prior conduct, historical conduct, concerns about competitive threats, and the tendency of competitors to discuss sensitive competitive information and to act on those discussions.

236. None of the 35 Documents has anything to do with buying groups. (CX3383 (Benco employee asked to tone down his comments about Patterson and recall of Kerr products); CX3384 (same); CX3385 (same); CX3386 (discussing barcoding project); CX3387 (same); CX3388 (discussing re-skinning service vans with Oral Healthcare advertisements); CX3389 (same); CX3390 (same); CX3454 (same); CX3391 (discussing disaster relief efforts); CX1354 (scheduling discussion); CX3392 (same); CX1355 (inquiring into Cohen’s wellbeing after tropical storm); CX3393 (same); CX3394 (same); CX3191 (discussing branch ordering issue); CX3397 (Cohen and Guggenheim discussing upcoming visit); CX1358 (same); CX3398 (same); CX3399 (same); CX3457 (congratulating Guggenheim’s wife for receiving award); CX3458 (same); CX3400 (discussing visit); CX1362 (same); CX3401 (same); CX3402 (Cohen requesting Guggenheim’s address to send note); CX3403 (same); CX1363 (discussing ProDrive inventory and P&G’s new product packaging); CX3404 (same); CX3405 (same); CX1049 (same); CX1050

(same); CX3067 (same); CX1465 (same); CX3406 (same); CX1465 (same) (hereinafter, the “35 Documents”)).

Response to Proposed Finding No. 236

The Proposed Finding is misleading to the extent that it implies that pre-conspiracy communications between competitors about working together, joint actions with respect to suppliers, and possible acquisition plans are not relevant to the firms’ competitive relationship and their likelihood to collude. There is substantial evidence in the record that Cohen had a pattern of contacting Guggenheim and Schein when he saw an opportunity to advance their “mutual” interests by coordinating their actions. (CCFF ¶ 277: ((Cohen, Tr. 492-493 (Cohen had an “open relationship” of trust with the executives at Schein and Patterson in which he felt he could “approach them with issues or to learn.”); ; Guggenheim, Tr. 1546, 1547 (“Q. Is it fair to say that in the past Benco’s Chuck Cohen has contacted you about various dental issues that he wanted you to look into? A. Yeah, that’s fair to say.”); *see also* CCFF ¶¶ 279, 281, 284). Nine of the documents referenced in this Proposed Finding (CX3163, CX3404, CX3405, CX1049, CX1050, CX3067, CX1465, CX3406, and CX1465) are expressly and clearly about Patterson and Benco discussing taking a joint action to put pressure on a major supplier, Procter & Gamble. Unlike the innocuous and misleading characterization of these documents in Patterson’s descriptive parentheticals, these documents provide evidence of a history of Benco asking Patterson and Schein to take action to pressure a mutual supplier, and sharing margin and profitability analysis about those products. (CX1050 at 002; CX1049 at 001-002). CX3067, which Patterson describes as “same,” contains Guggenheim’s commitment to investigate the Procter & Gamble situation, as Benco’s Cohen requested. This document shows that Guggenheim did just what he told his competitor he would do. (Guggenheim, Tr. 1551-1552 (“Q. You responded to Chuck Cohen on December 12, 2011? A. Yes. That’s right. Q. And

you told him, ‘I’m running down the numbers on the P&G issue’? A. Uh-huh. Q. And what did you mean by that? A. I was going to investigate. . . .”); CX3067 (December 12, 2011 email from Guggenheim to Cohen, “I’m running down the numbers on the P&G issue”); *see also* Sullivan, Tr. 3891-3893 (“Q. And you told him that you would ask your team to check this out.? A. I did.); CCFF ¶¶ 291-300.)

237. One of the 35 Documents (CX1049) does not even include any reference to Patterson. (CX1049 at 1–2 (December 2011 email chain between Chuck Cohen and Tim Sullivan)).

Response to Proposed Finding No. 237

The Proposed Finding is misleading to the extent that it suggests that the document is not relevant to the history of inter-firm communication and assurances about joint actions in areas in which the firms compete. CX1049 contains an email from Cohen to Sullivan, which is virtually identical to CX1050, containing an email from Cohen to Guggenheim. Both emails state, “I think you see the issue: we (all of us) are going to lose money on every box we sell.... When we at Benco called this issue to the attention of P&G management, they replied that no one else (i.e. you, Schein, Burkhardt) seemed concerned about it, so they're not going to make any changes. Our feeling is that we distributors either need more margin, or P&G needs to take out the cavity rinse.” (CX1049 at 001-002; CX1050 at 001-002; Guggenheim, Tr. 1547-1550; 1551; Sullivan, Tr. 3890-3891; CX3067 at 002). Guggenheim and Sullivan both responded to Benco that they would look into the issue. (Guggenheim, Tr. 1551-1552 (“Q. You responded to Chuck Cohen on December 12, 2011? A. Yes. That’s right. Q. And you told him, ‘I’m running down the numbers on the P&G issue’? A. Uh-huh. Q. And what did you mean by that? A. I was going to investigate. . . .”); CX3067 (December 12, 2011 email from Guggenheim to Cohen, “I’m running down the numbers on the P&G issue”); (Sullivan, Tr. 3891-3893) (“Q. And you told him

that you would ask your team to check this out.? A. I did.)); CCFF ¶¶ 293-297. And both Patterson and Schein investigated as they had promised Cohen they would. (CCFF ¶¶ 298-300).

238. One of the 35 Documents, CX3386, is an email chain dated May 11-12, 2011 between Rick Cohen, Tim Sullivan, Scott Anderson, and Paul Guggenheim regarding a barcoding project. (CX3386 at 1-2).

Response to Proposed Finding No. 238

The Proposed Finding is misleading to the extent that it implies that the document is only about a barcoding project. In addition to the references to the proposed barcoding project, Rick Cohen tells the executives at his competitors, “[I]’d also like to discuss some other possible projects . . . [I] believe that if the three of us can get on the same page on certain projects, we can easily get some industry traction.” (CX3886 at 001). The record evidence shows that key executives at Schein, Patterson and Benco had an “open relationship” (CCFF ¶¶ 217-272, 277), and communicated regularly, including about competitive issues. *See, e.g.*, CX1049 at 001 and CX1050 at 001-002 (emails from Cohen to Sullivan and Guggenheim asking Sullivan and Guggenheim to raise an issue of Procter & Gamble’s packaging and pricing of a product with Procter & Gamble); CCFF ¶¶ 289-297.

239. When asked about CX3386 at trial, Sullivan testified that Rick Cohen came up with the barcoding project as way to create an industry-wide set of barcodes that all three distributors could use for goods received from manufacturers. (Sullivan, Tr. 4311).

Response to Proposed Finding No. 239

Complaint Counsel has no specific response.

240. The goals of the project were to decrease costs, increase efficiencies, and, in turn, better serve customers. (Sullivan, Tr. 4311).

Response to Proposed Finding No. 240

Complaint Counsel has no specific response.

241. The barcoding project was not a “secret code” for a conspiracy about buying groups and had nothing to do with buying groups. (Sullivan, Tr. 4311).

Response to Proposed Finding No. 241

Complaint Counsel has no specific response.

242. Sullivan further testified that it would be false to assert that CX3386 was evidence of a conspiracy between Schein and Patterson about buying groups. (Sullivan, Tr. 4312).

Response to Proposed Finding No. 242

The Proposed Finding is misleading and irrelevant as the determination of what is “evidence of a conspiracy” is a legal conclusion. Sullivan, as a fact witness, is not competent to opine on a legal conclusion. The Proposed Finding should be disregarded.

243. CX3383 is a May 26, 2011 email from Rick Cohen to Paul Guggenheim, Tim Sullivan, and Gary Price (of the Dental Trade Alliance) suggesting that Schein, Patterson, and Benco re-skin their service vans with “Oral Healthcare Can’t Wait” advertisements. (CX3383 at 1).

Response to Proposed Finding No. 243

The Proposed Finding is misleading, not supported by the evidence cited, and is factually incorrect. CX3383 is an April 30, 2011 document from Chuck Cohen to Don Blakeslee, not a May 26, 2011 email from Rick Cohen. Because this Proposed Finding is not supported by the evidence cited and is factually incorrect, it should be disregarded.

244. Tim Sullivan explained at trial that re-skinning the service vans was Rick Cohen’s idea of a way to educate people about the importance of oral health. (Sullivan, Tr. 4313–14). Sullivan testified that only 50 percent of the population is covered by insurance, which means only 50 percent of people go to the dentist. (Sullivan, Tr. 4313–14). The ad campaign was an idea to raise awareness of the importance of oral health and, in turn, drive patient traffic. (Sullivan, Tr. 4313–14).

Response to Proposed Finding No. 244

Complaint Counsel has no specific response.

245. Sullivan testified that it would be false to claim that CX3388 was evidence of a conspiracy between Schein and Patterson relating to buying groups. (Sullivan, Tr. 4314).

Response to Proposed Finding No. 245

The Proposed Finding is misleading and irrelevant as the determination of what is “evidence of a conspiracy” is a legal conclusion. Sullivan, as a fact witness, is not competent to opine on a legal conclusion. The Proposed Finding should be disregarded.

246. One of the 35 Documents, CX3389, is Mr. Sullivan’s May 26, 2011 response to CX3388, in which Mr. Sullivan writes that he “like[s] the idea” of re-skinning service vans and is “confident [they] could make [it] happen.” (CX3389 at 1; Sullivan, Tr. 4313–14).

Response to Proposed Finding No. 246

Complaint Counsel has no specific response.

247. One of the 35 Documents, CX3390, is Mr. Rick Cohen’s May 26, 2011 response to CX3389, in which he clarifies that his proposal is only to re-skin “new vans” and not to “relabel old vans.” (CX3390 at 1).

Response to Proposed Finding No. 247

The Proposed Finding is misleading to the extent that it implies that the history of communication between and among Benco, Schein and Patterson about how competitors can and should compete are not relevant to this matter. CX3390 at 001 does not merely reference an oral health campaign, it suggests an agreement among competitors to limit spending for the campaign. In the email, moreover, Benco advises its competitors about its plans for its “fleet turnover.” (CX3390 at 001). The document is relevant to the pattern of the Big Three sharing competitively sensitive information.

248. One of the 35 Documents, CX3391, is an email chain spanning May 26-29, 2011, discussing both the re-skinning project as well as the possibility of Patterson, Schein, and Benco coordinating their disaster relief efforts in Alabama and Missouri. (CX3391 at 1–3).

Response to Proposed Finding No. 248

The Proposed Finding addresses a document (CX3391) that contains the same email chain referenced in Proposed Finding Nos. 246 and 247 (CX3390). The Proposed Finding is misleading with respect to that email chain for the same reasons set forth in Complaint Counsel's Response to Patterson's Proposed Finding Nos. 246 and 247, above.

249. Tim Sullivan testified at trial that CX3389, CX3390, and CX3391 are not "some kind of secret code for a buying group conspiracy," but rather were about "trying to think of some way to help people." (Sullivan, Tr. 4316 ("Q. And if we go to the first page of this one again, do you see there's an email from you up at the top, an email from you in May of 2011, saying, 'Guys, what are your thoughts on some type of DTA collaborative effort for disaster relief areas, such as Alabama and Joppa, Missouri?' Those were places that had been hit by hurricanes and floods? A. Yep. Q. Now, Mr. Sullivan, this isn't some kind of secret code for a buying group conspiracy, is it? A. No. Q. This was you all trying to think of some way to help people, right? A. That's right.")).

Response to Proposed Finding No. 249

The Proposed Finding is misleading to the extent that it implies that the history of communication between and among Benco, Schein and Patterson about how competitors can and should compete are not relevant to this matter. As noted above, CX3390 at 001 does not merely reference an oral health campaign, it suggests and agreement among competitors to limit spending for the campaign. In the email, Benco also advises its competitors about its plans for its "fleet turnover." (CX3390 at 001). The document is relevant to the pattern of the Big Three sharing competitively sensitive information. CX3391, which contains the same email chain as CX3390, is misleading for the same reasons.

250. It was false for Complaint Counsel to assert under penalty of perjury that CX3389, CX3390, or CX3391 are evidence of Patterson's participation in a buying group conspiracy. (Sullivan, Tr. 4316) ("Q. It would be false for someone to take these . . . documents and assert, under penalty of perjury, that they were evidence of a buying group conspiracy, wouldn't it? A. Yes, it would.").

Response to Proposed Finding No. 250

The Proposed Finding is misleading, contrary to the evidence in the record, and irrelevant.

Although the Proposed Finding fails to identify where the purported assertion is made, these documents (and others) demonstrate a history of communication between and among Benco, Schein and Patterson about how competitors can and should compete and provide relevant context for other inter-firm competitive communications. For examples, as noted above, CX3390 at 001 does not merely reference an oral health campaign, it suggests and agreement among competitors to limit spending for the campaign. In the email, Benco also advises its competitors about its plans for its “fleet turnover.” (CX3390 at 001). The document is relevant to the pattern of the Big Three sharing competitively sensitive information. To the extent that the Proposed Finding relies on the testimony of Sullivan, a fact witness, to offer an ultimate opinion on what constitutes “evidence of a buying group conspiracy, it is misleading and irrelevant. Sullivan, as a fact witness, is not competent to opine on a legal conclusion. Finally, the Proposed Finding is irrelevant to extent that it is an effort by Patterson to raise a discovery dispute that it failed to raise in a timely fashion. It should therefore be disregarded.

251. The remaining 11 documents pre-dating 2013 from Complaint Counsel’s responses to Patterson’s Interrogatory Number 7 (RX2934 at 15–18), are dated from 2012—the year before Patterson allegedly joined the conspiracy (Compl. ¶ 36): CX1366 (March 2012); CX3408 (March 2012); CX3409 (March 2012); CX1367 (March 2012); CX3410 (March 2012); CX1311 (August 2012); CX1477 (August 2012); CX1478 (August 2012); CX1480 (August 2012); CX1310 (August 2012); CX1481 (August 2012) (the “11 Documents”).

Response to Proposed Finding No. 251

The Proposed Finding is misleading to the extent that it implies that communications prior to the start of the conspiracy are not relevant to establishing prior conduct, historical conduct, concerns about competitive threat, and the tendency of competitors to discuss sensitive competitive information and to act on those discussions.

252. The 11 Documents, on their face, do not mention buying groups or have anything to do with buying groups. CX1366 (discussing sexual harassment training); CX3408 (same); CX3409 (same); CX1367 (same); CX3410 (same); CX1311 (inquiring about receipt of previous email); CX1477 (scheduling meeting); CX1478 (same); CX1480 (same); CX1310 (same); CX1481 (scheduling lunch).

Response to Proposed Finding No. 252

The Proposed Finding is misleading to the extent that it implies that pre-conspiracy communications between competitors about internal corporate policies and competitive plans (as well as communications to scheduling meetings that do not appear to be social events) are not relevant to the firms' competitive relationship and their likelihood to collude. As noted above, there is substantial evidence in the record that Cohen had a pattern of contacting Guggenheim and Sullivan when he saw an opportunity to advance their "mutual" interests by coordinating their actions. (CCFF ¶ 277; Cohen, Tr. 492-493 (Cohen, had an "open relationship" of trust with the executives at Schein and Patterson in which he felt he could "approach them with issues or to learn."); Guggenheim, Tr. 1546, 1547 ("Q. Is it fair to say that in the past Benco's Chuck Cohen has contacted you about various dental issues that he wanted you to look into? A. Yeah, that's fair to say."); *see also* CCFF ¶¶ 279, 281, 284). Thus, the tendency of Patterson and Cohen to communicate about corporate policies that have liability implications may have relevant to the pattern of inter-firm communications. *See, e.g.* CX1366 at 001 (Cohen email to Guggenheim and Sullivan, "Thanks for any assistance or coaching you can provide.").

Similarly, the documents show Benco and Patterson communicating about potentially confidential strategies. *See* CX1477 at 001 (Guggenheim email to Rick Cohen in response to a meeting request, "We are in the middle of a national strategic rollout and the launch of Omnicam from Sirona.") and CX1481 at 001 (Email from Rick Cohen to Guggenheim, "hi paul, do we have a meeting plae for Tuesday? I'm hoping it's a restaurant, for rumor control purposes."). It

is therefore misleading to suggest that documents that do not expressly mention buying groups are irrelevant to the pattern of inter-firm competitively sensitive communications.

253. Two of the 11 Documents also do not have a Patterson employee on the email chain. (*See* CX1310 and CX1311 (August 2012 emails between Mark Mlotek and Rick Cohen)).

Response to Proposed Finding No. 253

Complaint Counsel has no specific response.

254. When asked about some of these 11 Documents at trial, witnesses testified they were unrelated to Patterson’s alleged involvement in a conspiracy. (*See, e.g.,* Sullivan, Tr. 4316–18 (“Q. [CX1366] doesn’t have anything to do with a buying group conspiracy, does it, sir? A. It does not. Q. It would be false for the Government to assert, under penalty of perjury, that this is evidence of a buying group conspiracy, right? A. Correct. . . . Q. Even though they listed [CX3480] under penalty of perjury as evidence of a conspiracy, it was false to do that, correct, sir? A. Yes, sir.”)).

Response to Proposed Finding No. 254

The Proposed Finding is misleading, not properly supported by the evidence cited and irrelevant. First, it is misleading to the extent that it implies that documents that reference a pattern of inter-firm communications – including communications about business sensitive practices – are not relevant. Second, it is misleading to the extent that the evidence cited is based on a misstatement of Patterson’s interrogatory request (and a misstatement of Complaint Counsel’s response). Complaint Counsel’s response identifies documents “related to the conspiracy alleged in paragraph 1 of the Compliant.” The question asked of the witness, Sullivan, is moreover different than the language of the response, so is no more than counsel testimony about a response that does not exist.

The Proposed Finding also does not match the cited evidence in that it asserts that “witnesses testified,” but offers only the testimony of a single witness. To the extent that the Proposed Finding relies on the testimony of that witness, Sullivan, for an ultimate opinion on what

constitutes “evidence of a buying group conspiracy,” it is misleading and irrelevant. Sullivan, as a fact witness, is not competent to opine on a legal conclusion. Sullivan, is similarly incompetent, as a fact witness, to offer any conclusions about the validity of a discovery response that he did not prepare. His statement and this Proposed Finding are irrelevant; the Proposed Finding should be disregarded.

255. Another 32 documents listed in Complaint Counsel’s original (RX2934) and amended (RX2960) responses to Patterson’s Interrogatory No. 7 (RX2934 at 15–18) are dated after February 2013: CX6424; CX6426, CX6428, CX6430; CX6433; CX6436; CX6439; CX6441; CX0065; CX6443; CX6446; CX6447; CX6450; CX6452; CX6453; CX6458; CX6460; CX6461; CX6463; CX6466; CX6468; CX1349; CX3415; CX3416; CX6470; CX6472; CX3417; CX6474; CX1401; CX6477; CX6479; and CX6481 (the “32 Documents”).

Response to Proposed Finding No. 255

Complaint Counsel has not specific response.

256. Of the 32 Documents, 26 are text messages with personal chatter between Scott Anderson and Tim Sullivan relating to topics such as sports, family, holidays, vacations, and a colleague’s passing. (*See, e.g.*, CX6424 (discussing sports); CX6428 (wishing a happy new year); CX6468 (discussing colleague’s passing); CX6472 (discussing vacations); CX6481 (discussing son’s college plans)).

Response to Proposed Finding No. 256

The Proposed Finding is misleading to the extent that it implies that text messages containing personal communications between key executives at Patterson and Schein are not relevant to show the close personal relationship, frequency of communications, references to or suggestions for in person meetings, and opportunity of these individual to collude.

257. These 26 text messages are, on their face, unrelated to buying groups or any alleged conspiracy related to buying groups: CX6424 (discussing sports); CX6426 (discussing sports); CX6428 (wishing a happy new year); CX6430 (discussing sports); CX6433 (same); CX6436 (same); CX6439 (same); CX6441 (same); CX6443 (same); CX6446 (same); CX6447 (same); CX6450 (same); CX6452 (same); CX6453 (same); CX6458 (same); CX6460 (same); CX6461 (same); CX6463 (same); CX6466 (same); CX6468 (discussing colleague’s passing);

CX6470 (discussing sports); CX6472 (discussing vacations); CX6474 (discussing sports); CX6477 (same); CX6479 (same); CX6481 (discussing son's college plans).

Response to Proposed Finding No. 257

The Proposed Finding is misleading to the extent that it implies that text messages containing personal communications between key executives at Patterson and Schein are not relevant to show the close personal relationship, frequency of communications and opportunity of these individual to meet and to collude.

258. Mr. Sullivan was “shocked” to see that the government listed these text messages as evidence of a conspiracy relating to buying groups between Schein and Patterson. (Sullivan, Tr. 4303–04) (“Q. Now, Mr. Sullivan, do you believe that all those texts that we just looked at that were about the Badgers and the Packers and the Vikings and The Players Golf Tournament, would you believe that all of those texts are listed here in the Government’s interrogatory answer as evidence of a conspiracy related to buying groups between Schein and Patterson? A. I’m shocked to see this.”); Sullivan, Tr. 4304 (“Q. Now, can you think of any reason why someone might falsely say that a bunch of texts about college basketball and college football might be related to a buying group conspiracy? A. To paint a picture that doesn’t exist.”)).

Response to Proposed Finding No. 258

The Proposed Finding is irrelevant and should be disregarded. Whether particular pieces of evidence (including evidence demonstrating a close personal relationship, and frequent communications) provide context and are relevant to the existence of a conspiracy is a question for the ultimate fact finder. The personal opinion of a fact witness regarding the significance of particular communications is irrelevant. Similarly, the opinion of a fact witness about the validity of any discovery responses (other than those he prepared) is irrelevant. The Proposed Finding should be disregarded.

259. Complaint Counsel acknowledged at the close of its case-in-chief that the text messages between Anderson and Sullivan listed in its sworn interrogatory response (RX2934 at 15–18) were not “the basis” of Complaint Counsel’s case. (Foley, Tr. 4759) (“MS. KAHN: With respect to the communications between Scott Anderson and Tim Sullivan, that is not the basis of our case. . . . And so to the extent that he is quoting text messages between Scott Anderson and

Tim Sullivan, that is not the core of our case.”). Complaint Counsel did not amend its interrogatory responses to remove these text messages.

Response to Proposed Finding No. 259

The Proposed Finding is misleading, vague and irrelevant to the extent that it implies that particular communications that are “not the core of” the case are not, nonetheless, relevant. Respondent Patterson’s Proposed Finding regarding interrogatory responses is also misleading, vague and irrelevant. The Proposed Finding is vague to the extent that it fails to reference particular interrogatory responses. To the extent that Patterson may be referring to Complaint Counsel’s response to Interrogatory 7, as noted above, documents identified in that response were to “communications *related to the conspiracy.*” (RX2934 at 016) (emphasis added). As this Court has noted, “I know if you leave 50 or 60 out, numbers aren’t syncing up, the other side may complain, hey, what did you leave out. So it would be a cleaner case if everything was on point, but that not the way litigation works.” (Foley, Tr. 4760) To the extent that the Proposed Finding is an effort by Respondent Patterson to raise a discovery dispute that it failed to raise in a timely fashion, it has nothing to do with the record before the Court and should be disregarded.

260. The 7 remaining documents dated after February 2013 are emails scheduling lunch or addressing business topics that have nothing to do with buying groups. CX0065 (Chuck Cohen calendar entry to discuss Amazon response marked completed); CX1349 (Chuck Cohen and Paul Guggenheim scheduling lunch); CX3415 (same); CX3416 (same); CX3417 (Guggenheim sending Cohen a link to Yahoo Finance article about Patterson launching a website dedicated to dental supply integrity); CX1401 (Guggenheim left voicemail for Cohen checking in and asking for a return call) (the “7 Documents”).

Response to Proposed Finding No. 260

The Proposed Finding is misleading to the extent that it suggests that the numerous communications between Guggenheim and Cohen are not relevant to their “open relationship” and opportunity to collude. *See* CX1045 at 001 (October 2011 email from Cohen to his brother, Rick Cohen: “We currently have an open relationship with Schein and Patterson, one that’s

worth maintaining.”); Cohen, Tr. 492-493; CCFF ¶ 277. In addition, Patterson’s descriptions of the cited documents takes those documents out of context, so is both incomplete and misleading. For example, the Proposed Finding refers to CX1349, CX3415, and CX3416 as being about scheduling a lunch. In fact, documents show that Cohen and Guggenheim not only scheduled a lunch, but also met and discussed industry corporate intelligence. (CX1458 at 001 (Cohen Weekly Report December 6, 2014 confirming he met with Guggenheim)).

261. Of these documents, Complaint Counsel only asked trial witnesses about CX0065. CX0065 is a calendar entry from Chuck Cohen’s files to discuss “Amazon response.”

Response to Proposed Finding No. 261

The Proposed Finding is misleading and irrelevant to the extent that it implies that documents that were not used with a particular witness at trial are not in the record. All documents on JX0002a are in the record.

262. When asked about CX0065 at trial, Cohen testified that Amazon is not a buying group and he never reached out to Patterson or Schein about Amazon. (Cohen, Tr. 834 (“Q. Is Amazon a buying group? A. No. Q. Did you ever reach out to Schein or Patterson about Amazon? A. No.”)).

Response to Proposed Finding No. 262

The Proposed Finding is misleading to the extent that it implies that Benco as a company did not expressly plan to reach out to its competitors, Schein and Patterson, to discuss a joint response to what it perceived as a competitive threat from Amazon. Evidence in the record shows that , in 2013, Cohen planned to contact Schein and Patterson when he feared that Amazon was entering the dental distribution industry. Cohen wrote himself a reminder in December 2013, to “[w]ork with Schein & Patterson” to discuss a joint response. (Cohen, Tr. 490-492; CX0065 at 001 (“Subject: Discuss Amazon Response re Distributors . . . start the conversations NOW! Work with Schein & Patterson . . .”); *see also* CX0066 at 001 (January 2014 email from Benco

Director Rick Cohen to Chuck Cohen, with the subject line “RE: Amazon Response . . .”, “We could be the glue to make it happen. If we had a schein/patterson/benco response it would be much more effective than a benco only response.”); CCFF ¶¶ 311-312). Cohen’s reply to his brother’s suggestion about coordinating with Patterson and Schein was: “Good call.” (CX0066 at 001; CCFF ¶ 312.) The Proposed Finding is also misleading to the extent that it suggests the plans and efforts by a company to coordinate a competitive response with its competitors is not relevant to understanding and evaluating other actions to coordinate joint responses or actions.

263. Five of the 32 documents dated after February 2013 are from after April 2015—the month when the alleged conspiracy ended (Kahn, Tr. 19); *see also* RXD0205 at 1 (“The Alleged Conspiracy Ended in April 2015”). CX6474 (May 2015); CX1401 (May 2015); CX6477 (November 2015); CX6479 (November 2015); CX6481 (November 2015).

Response to Proposed Finding No. 263

The Proposed Finding is misleading in that it misstates the record regarding the time of the end of the conspiracy. Although Complaint Counsel has introduced evidence that the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015, this did not create a precise “end” date, and Complaint Counsel has never taken the position that the entry by Benco into a settlement with the Texas Attorney General created a precise “end” date. (Tr., 19 (Complaint Counsel’s Opening Statement); *see also* Complaint Counsel’s Post-Tr. Br. at 37-38).

In addition, to the extent that the Proposed Finding also relies on a demonstrative (RXD0205) as support for the finding, that reliance contravenes the Court’s February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence. Complaint Counsel has no specific response to the accuracy of the dates of the documents cited in this Proposed Finding.

264. The various participants on these interfirm communications had legitimate personal and business topics to discuss, including trade association meetings and activities, potential arm's length business transactions between companies, and potential acquisition or merger opportunities. (*See, e.g.*, CX8027 (Anderson, Dep. at 130–31 (Anderson and Sullivan attended DTA board meetings together during the 2012 to 2016 period)); CX8027 (Anderson, Dep. at 130 (executives from Patterson, Schein, and Benco all attended large dental conventions, such as the ADA, New York meeting, and Chicago meeting, during the 2012 to 2016 period)); RX0202 at 1–4 (PSA, a sales organization representing manufacturers in the dental market, hosted a dinner in early 2014 for Patterson, Schein, and Benco's management and equipment teams); RX0294 at 12 (Patterson and Benco employees attended a CRET annual meeting in 2014); (CX8025 (Sullivan, Dep. at 373–74 (Cohen and Sullivan had in-person meetings in 2013 to 2015 to discuss Schein potentially acquiring Benco))).

Response to Proposed Finding No. 264

The Proposed Finding is misleading to the extent that it implies that inter-firm communications between key executives at Patterson, Schein and Benco are not relevant to show the close personal relationship, frequency of communications and opportunity of these individual to meet and to collude.

265. The Cohen and Guggenheim families have known each other “for decades” and grew up in the dental industry together. (Cohen, Tr. 919) (“Q. Your families have known each other for decades, as I understand it? A. Yes.”); (Guggenheim, Tr. 1545–46) (“Q. And how long have you known Chuck Cohen? A. 40-50 years. Q. Did you guys grow up in the dental industry together? A. We did. Q. And so you knew Chuck Cohen even before you were running Guggenheim Dental. A. Yeah. I knew him from trade meetings and different, you know, social events that we would all be at.”).

Response to Proposed Finding No. 265

Complaint Counsel has no specific response.

266. None of the communications discussed in paragraphs 234 - 463, *supra*, of these findings constitute probative evidence supporting the claim of Patterson participating in the conspiracy alleged.

Response to Proposed Finding No. 266

The Proposed Finding is misleading and unsupported by any citations to the record. It is misleading to the extent that it implies that implies that inter-firm communications between key

executives at Patterson, Schein and Benco are not relevant to show the close personal relationships of the executives, the frequency of their communications and opportunity of these individual to meet and to collude. It also cites to over 220 separate Proposed Findings, many of which have nothing to do with communications. To the extent that any of those Proposed Findings are relevant, Complaint Counsel has addressed the Proposed Findings with individual responses and will not repeat those responses here. Finally, Respondent Patterson has not cited to specific findings or offered specific evidence to demonstrate its assertions regarding the communications referenced in its Proposed Findings 234 through 463. Lacking supporting evidence, this Proposed Finding should be disregarded.

V. Responses to Proposed Findings Regarding “The Three Remaining Communications Involving Patterson Do Not Show Patterson’s Participation In An Agreement To Boycott Buying Groups.”

a. Responses to Proposed Findings Regarding “The February 8, 2013 Emails Regarding the New Mexico Dental Cooperative Did Not Form An Agreement.”

267. On February 8, 2013, Patterson Dental’s President, Paul Guggenheim, received an unsolicited mail from Benco’s President Chuck Cohen about “some noise” Cohen had picked up from public information that a fledgling entity called the New Mexico Dental Cooperative would be hosting a meeting in Patterson’s Albuquerque office. (Guggenheim, Tr. 1699; CX0090 at 1; *see also* RXD0215 at 1 (New Mexico Dental Cooperative Timeline)).

Response to Proposed Finding No. 267

The Proposed Finding is misleading and relies on documents not in the record. Portions of the Proposed Finding are also misleading and contrary to the weight of the evidence. For example, the Proposed Finding is misleading and contrary to record evidence to the extent that it states that Cohen had picked up information about the New Mexico Dental Cooperative (NMDC) from “public information.” In fact, Cohen learned of Patterson’s involvement with NMDC from an email chain (CX0055) forwarded by Don Taylor, a Benco regional manager in New Mexico,

who forwarded an email from a Schein regional manager containing that information. (Cohen, Tr. 528-531; CX0055 at 001; *see also* CX0090 at 002; CCFF ¶¶ 474-478). The Guggenheim testimony cited by Respondent Patterson does not support this assertion in the Proposed Finding, and Patterson has cited no testimony from Cohen about how he learned of Patterson's plans to work with NMDC. In addition, to the extent that the Proposed Finding relies on a demonstrative (RXD0215) as support for the finding, that reliance contravenes the Court's February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence.

268. Cohen volunteered in the email that Benco had a long-standing policy of not selling to "buying groups." (CX0090 at 1 ("FYI: Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups (though we do work with corporate accounts) and our team understands that policy."); Cohen, Tr. 679 ("a policy that's been in place since 1996")).

Response to Proposed Finding No. 268

Complaint Counsel has no specific response.

269. Cohen's email did not ask Guggenheim to do anything. (Cohen, Tr. 705 ("Q. Did you write that e-mail to Mr. Guggenheim for the purpose of forming any agreement? A. No."); Cohen, Tr. 714 ("Q. Did you ask Mr. Guggenheim to do anything? A. No.")).

Response to Proposed Finding No. 269

The Proposed Finding is misleading and contrary to the weight of the evidence. The evidence shows that Cohen forwarded the information to Guggenheim because he "wanted to let [Guggenheim] know about a situation in New Mexico that he might not have heard was taking place in one of their locations." (Cohen, Tr. 712; CCFF ¶ 485). The evidence further shows that Cohen hoped that Guggenheim would also share information with him. (Cohen, Tr. 712-713 ("Q. Why then did you take it upon yourself to send that information to Mr. Guggenheim? A. "I like to give information to get information. I like to be useful [to Guggenheim]. If the shoe was

on the other foot, I would have liked to have known the same information . . . I like to maintain good relationships with my competitors.”); CCFF ¶ 487). In sending his email to Guggenheim, Cohen as aware of the antitrust risk in communicating with a competitor. (CX0057 (Excel worksheet “Chats” tab row 81); *see also* CX0057_EXCERPT at 006) (Cohen text to Benco Regional Manager about NMDC: “I just sent [Guggenheim] a note about [NDMC]. Don’t want to call because it might be construed as price fixing.”); Cohen, Tr. 539-540; CCFF ¶ 513)

Cohen also testified that could not identify any procompetitive justifications for his February 2013 communications with Guggenheim about Benco’s no buying group policy. (CX0301 (Cohen, IHT at 243) (“Q. Can you think of any business reason for you to tell Mr. Guggenheim of Benco’s no-GPO policy? A. I don’t think [there] is a business reason.”); CCFF ¶ 488).

270. Cohen did not expect to hear anything from Guggenheim in response to his email. (CX0057 at 6 (“I don’t expect to hear anything.”); Cohen, Tr. 714 (“Q. Did you expect him to do anything? A. No.”)).

Response to Proposed Finding No. 270

The Proposed Finding is misleading because it is directly contrary to other testimony in the record from Cohen in which he stated that he hoped that Guggenheim would also share information with him. (Cohen, Tr. 712-713 (“Q. Why then did you take it upon yourself to send that information to Mr. Guggenheim? “I like to give information to get information. I like to be useful [to Guggenheim]. If the shoe was on the other foot, I would have liked to have known the same information . . . I like to maintain good relationships with my competitors.”); CCFF ¶ 487).

The quotation from CX0057 in the Proposed Finding is also misleading because it truncates Cohen’s full message. The full text message states, “I don’t expect to hear anything. I just sent him a note about it. Don’t want to call because it might be construed as price fixing. Thanks.”

Thus, the full message supports the finding that Cohen was aware of the potential antitrust

violation his communications with Guggenheim would raise. (Cohen, Tr. 539-540; CCFF ¶ 514).

271. Cohen never followed up with Guggenheim about the email. (Cohen, Tr. 714 (“Did you ever follow up with him? A. I did not.”)).

Response to Proposed Finding No. 271

The Proposed Finding is misleading to the extent that it implies that Cohen did not feel constrained to speak with Guggenheim about NMDC because, in Cohen’s words, a call “might be viewed as price fixing.” When Benco’s New Mexico Regional Manager Don Taylor contacted Cohen on February 26, 2013 about whether Cohen had communicated with Patterson about NMDC, asking if Cohen have been “able to connect with your Patterson contact and if anything came of it” (CX0057 (Excel worksheet “Chats” tab row 80); CX0057_EXCERPT at 006), Cohen responded, “I just sent [Guggenheim] a note about [NDMC]. Don’t want to call because it might be construed as price fixing.” (Cohen, Tr. 539-540; CX0057 (Excel worksheet “Chats” tab row 81)); CCFF ¶¶ 513-514).

The Proposed Finding is also misleading because it suggests that any “follow up” was necessary after Guggenheim responded to Cohen, expressing his agreement with Cohen’s original email. (“Thanks for the heads up. I’ll investigate the situation. We feel the same way about these.” (CX0090 at 001; Guggenheim, Tr. 1607-1608)); CCFF ¶¶ 495-496.)

Finally, the Proposed Finding is misleading and contrary to the weight of the evidence in that it ignores that subsequent communications between Guggenheim and Cohen in June 2013 in which Guggenheim contacted Cohen to ask, “[r]eflecting back on our conversation earlier this year, could you shed some light on your business agreement with Atlantic Dental Care? . . . I’m wondering if your position on buying groups is still as you articulated back in February? Let me

know your thoughts. . . . Sometimes these things grow legs without our awareness!” (CX0095 at 001) (June 6, 2013 email from Guggenheim to Cohen, forwarding back to Cohen his February 8, 2013 email chain). Cohen, in a lengthy June 8, 2013 email to Guggenheim, described Benco’s position with respect to doing business with buying groups. (CX0062 at 001; Cohen, Tr. 561-564; CCF ¶¶ 575-577). It is misleading to imply that Cohen’s June 8, 2013 email to Guggenheim did not constitute “follow up” on his earlier exchanges with Guggenheim.

272. Guggenheim, who received hundreds of emails a day in his role as President of Patterson Dental, dashed off a quick, 10, or 15-second response to Cohen. (Guggenheim, Tr. 1705–06) (“A. Well, I get hundreds of e-mails a day, so I -- and my day during the time of being president was largely absorbed with meetings and meetings and meetings. That morning -- I looked at my calendar -- I was at my son’s eighth grade school conference. I got back. I read the e-mail. I went into meetings. And so I would typically on a given day be responding to 20-30 e-mails quickly. If you’ll look at my e-mails, you’ll see I don’t write long e-mails. This is a typical e-mail. So I banged out a quick response, probably took me 10-15 seconds, fired it off to Chuck and moved on to the next e-mail.”); *see also* RXD0217 at 1).

Response to Proposed Finding No. 272

The Proposed Finding is misleading and irrelevant to the extent that it implies that there is any evidentiary or legal significance to the amount of time a conspirator takes to communicate assent to enter into a conspiracy. It is also contrary to the record evidence, which shows that, upon receiving Cohen’s email describing Benco’s no buying group policy, Guggenheim did not respond immediately. Rather, he forwarded Cohen’s email to his two key subordinates – Tim Rogan, his VP of Marketing, and Dave Misiak, his VP of Sales. (Misiak, Tr. 1329, 1331; Guggenheim, Tr. 1606-1607; CX0091 at 001; CX0314 (Guggenheim, IHT at 255-256) (“A. and why did you sent it specifically to Mr. Misiak and Mr. Rogan and not other individuals at Patterson? A. One’s, you know responsible for our sales and one for our marketing, so those two seemed to be the right people – you know, I would want them to have that information. Q. And why specifically these two roles for the information from Mr. Chuck Cohen? A. Their [sic]

my two closest associates there.”)); CCFF ¶¶ 491-494). Then, after sending Cohen’s email to these key Patterson executives (and two hours after receiving Cohen’s email), Guggenheim replied to Cohen, “Thanks for the heads up. I’ll investigate the situation. We feel the same way about these.” (CX0090 at 001; Guggenheim, Tr. 1607-1608); CCFF ¶ 495). The facts in the record thus contradict Guggenheim’s testimony that he sent a “quick response.”

Finally, to the extent that the Proposed Finding also relies on a demonstrative (RXD0217) as substantive support for the finding, that reliance contravenes the Court’s February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence.

273. Guggenheim’s response, sent on the afternoon of February 8, stated, “Thanks for the heads up. Ill investigate the situation. We feel the same about these.” (CX0090 at 1).

Response to Proposed Finding No. 273

Complaint Counsel has no specific response.

274. Guggenheim’s response did not commit him to take any action with respect to buying groups. (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.”)).

Response to Proposed Finding No. 274

The Proposed Finding is misleading, contrary to the weight of the evidence, and irrelevant to the extent that it implies that an agreement does not exist absent a formal statement of agreement or commitment. In fact, the record evidence shows that Cohen and Guggenheim communicated about and acted in accordance with their understanding. The record shows that Cohen communicated Benco’s no buying group policy to Guggenheim February 8, 2013 (Cohen, Tr. 501 (“Q. You’ve communicated Benco’s no-buying group policy to Mr. Guggenheim? A. . . .

[Y]es.”)), and that a few hours after Guggenheim received Cohen’s email about Patterson’s involvement with NMDC and Benco’s no buying group policy, Guggenheim responded to Cohen, “Thanks for the heads up. I’ll investigate the situation. We feel the same way about these.” (CX0090 at 001; Guggenheim, Tr. 1607-1608); CCFF ¶¶ 483-496). The record shows that Guggenheim meant that Patterson felt the same way about buying groups. (Guggenheim, Tr. 1611-1612; CCFF ¶ 496). The record also shows that Cohen had no business reasons for communicating Benco’s no buying group policy. (CX0301 (Cohen, IHT at 243) (“Q. Can you think of any business reason for you to tell Mr. Guggenheim of Benco’s no-GPO policy? A. I don’t think [there] is a business reason.”); CCFF ¶ 488).

The record also establishes that, several months later in June 2013, when Guggenheim learned that Benco was working with ADC (a group Patterson thought was a buying group), Guggenheim initiated a communication with Cohen – expressly referencing the earlier communications by attaching Cohen’s February email to the new communication – and asking if Benco was changing its position. (CX0095 at 001 (“I’m wondering if your position on buying groups is still as you articulated back in February? Let me know your thoughts. . . . Sometimes these things grow legs without our awareness!”); CCFF ¶¶ 569-570). The record shows 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 (CX0056; Guggenheim, Tr. 1628; CCFF ¶¶ 570-572). Finally, the record shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 630-653, 657).

275. Though Guggenheim wrote “I’ll investigate the situation” in his email to Cohen (CX0090 at 1), Guggenheim did not in fact do any investigation at Patterson after sending the email. (Guggenheim, Tr. 1703–04 (“Q. . . . [S]o you said to Mr. Cohen, I’ll investigate it, but do

I have it right that you did not do an investigation? A. Correct.”); Guggenheim, Tr. 1703 (“Did you -- did you call up the Pinkerton’s detective society and conduct an investigation Mr. Guggenheim? A. No. It’s common language I would use for something like this, yeah, I’ll look into it, I’ll investigate it.”)).

Response to Proposed Finding No. 275

The Proposed Finding is misleading and incomplete to the extent that it suggests that

Guggenheim did not take any other action with respect to NMDC or other buying groups.

Patterson cites to Guggenheim’s response to a leading question from Patterson’s counsel, but this response contradicts Guggenheim’s same-day trial testimony where Guggenheim testified that he could not recall one way or the other whether he investigated the NMDC situation.

(Guggenheim, Tr. 1611) Moreover, it contradicts Guggenheim’s deposition testimony, where Guggenheim admitted, “It’s possible that I called [Patterson’s New Mexico branch manager] and looked into it, but I don’t remember that specifically.” (CX8023 (Guggenheim, Dep. at 121)).

Cohen testified that Guggenheim’s response could mean that he was going to investigate Patterson’s relationship with NMDC or that he “could want to investigate what the regional manager is up to. (Cohen, Tr. 536; CCFF ¶ 501) There is substantial evidence in the record that, when Cohen brought issues affecting the business of dental distributors to Guggenheim’s attention, Guggenheim investigated the issue. *See* CCFF ¶¶ 289-292, 295, 297-298. For example, when Cohen raised an issue of Procter & Gamble’s packaging and pricing of a product with Guggenheim and Sullivan, Guggenheim told Cohen he would investigate – and did do.

(Guggenheim, Tr. 1551-1552 (“Q. You responded to Chuck Cohen on December 12, 2011? A. Yes. That’s right. Q. And you told him, ‘I’m running down the numbers on the P&G issue’? A. Uh-huh. Q. And what did you mean by that? A. I was going to investigate. . . .”); CX8023 (Guggenheim, Dep. at 124-125) (“I think is accurate to say that for the most part I investigated it.”)). Similarly, when Cohen became concerned that not all distributors were including “poison

pill” clauses in their contracts with vendors, Guggenheim investigated and told Cohen what he had learned. (Guggenheim, Tr. 1562-1564; CCFF ¶¶ 301-307). Guggenheim communicated to his competitor Cohen that Patterson was including a similar clause in its own vendor contracts. (Guggenheim, Tr. 1565); CX6027 at 031 (Row 265) (June 18, 2013 text from Guggenheim to Cohen about Patterson’s inclusion of similar clauses); CCFF ¶ 307).

276. Guggenheim’s statement, “We feel the same about these” and “I’ll investigate” (CX0090 at 1), 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.” (Guggenheim, Tr. 1612; *see also* RXD0217 at 1). Neither Guggenheim nor Cohen viewed this email exchange as an agreement to do anything; the brief email exchange did not constitute an agreement to refuse to provide discounts to or otherwise compete for Buying Groups. (Guggenheim, Tr. 1707; Cohen Tr., 714).

Response to Proposed Finding No. 276

The Proposed Finding is misleading and contrary to the weight of the evidence which shows that Guggenheim understood from Cohen’s email that Benco was not doing business with buying groups, and that Guggenheim responded directly to that email, announcing Patterson’s position about working with a customer segment to his competitor. The evidence shows that, after Guggenheim’s exchange of emails with Cohen, Guggenheim knew that the no buying group policy was being communicated to Patterson’s sales team. On February 27, 2013, a few weeks after Guggenheim’s “we feel that same way about these” response to Cohen, Misiak instructed a regional manager not to do business with a buying group, stating, “Confidential and not for discussion ..our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that do me.” (CX0093 at 001) Guggenheim received a copy of this email. (CX0093 at 001).

Finally, to the extent that the Proposed Finding also relies on a demonstrative (RXD0217) as substantive support for the finding, that reliance contravenes the Court’s February 21, 2019

Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence.

277. Guggenheim forwarded Cohen’s email—but not Guggenheim’s response—to David Misiak and Tim Rogan, but he did not ask them to do anything, and they did not recall doing anything. (Guggenheim, Tr. 1607 (“Q. And you sent this e-mail to Mr. Misiak and Mr. Rogan because they were your direct reports? A. Correct. Q. And you thought the information would be relevant to them? A. I forward lots and -- whenever I see something come across my e-mail, I forward a lot of e-mails, so yeah, it’s informational.”); CX0316 (Misiak, IHT at 235 (“Q. Okay. What did you do after you received this e-mail? . . . A: I don’t -- I don’t remember doing anything specific to this e-mail.”)); Rogan, Tr. 3576–77 (“Q. Was there any instruction from Mr. Guggenheim, ‘Tim, you’re the head of merchandise and marketing, I need you to do the following’? Did he instruct you to do anything when he sent this email to you? A. No. Q. Was there anything that you did after you received this email? A. No, not that I recall. No. Q. It relates to a New Mexico Dental Cooperative. Did you call up the New Mexico Dental Cooperative? A. No. Q. Do you even know what the New Mexico Dental Cooperative is? A. I don’t.”))).

Response to Proposed Finding No. 277

The Proposed Finding is misleading to the extent that it focuses on the witnesses’ *lack* of recollection their actions immediately after receiving Cohen’s email, but ignores a series of subsequent actions and communications demonstrating that Misiak and Rogan began to implement a no buying group policy after February 8, 2013. (CX0316 (Misiak, IHT at 235 (“Q. Okay. What did you do after you received this e-mail? . . . A: I don’t -- I don’t remember doing anything specific to this e-mail.”); Rogan, Tr. 3576 (“Q. Was there anything that you did after you received this email? A. No, not that I recall. No.”). By contrast, the evidence in the record shows that, after Guggenheim’s February 8, 2013 email with Cohen (CX0090), Patterson – including Misiak and Rogan – began instructing sales representatives to “stay out” of buying groups. (CX0093 at 001 (Statement of Misiak: “stay out” of buying group); CX0106 at 001 (Statement of Rogan: “We don’t need GPO’s in the dental business”); CX3116 at 001 (Statement of Misiak: “My guidance has been to politely say no [to buying groups] and whether [*sic*] the

storm with these.”); CX3168 at 001 (Statement of Rogan: “We don’t sell to buying groups. Let’s talk live”); CCFF ¶ 630).

278. There is no evidence that anyone at Patterson’s corporate office (in Minnesota) took any action or gave any instruction to Patterson’s New Mexico sales team regarding NMDC during the *weekend* between February 8 (the date of the Cohen/Guggenheim email (CX0090)) and February 11, 2013 (the date the sales team told NMDC it would not participate) (Mason, Tr. 2355). (Guggenheim, Tr. 1703 (“Q. Did you call Mr. Misiak or Mr. Rogan and say, Get to the bottom of this, I need to know what’s going on there? A. No. Q. Did you call Mr. Reinhardt in the southwest, the region manager, and say, Mr. Reinhardt, what’s going on with this situation, I need an investigation? A. I don’t recall contacting anybody. Q. Did you call the branch manager or any territory rep in Albuquerque and ask them what’s going on there? A. No. No recollection of that. Q. All right. Now, did you -- so you said to Mr. Cohen, I’ll investigate it, but do I have it right that you did not do an investigation? A. Correct.”); *see also* CX4090; Mason, Tr. 2388 (“Q. You have no reason to doubt that this was Mr. Reinhardt’s decision, do you? A. No, I don’t.”); RXD0215 at 1 (New Mexico Dental Cooperative Timeline)).

Response to Proposed Finding No. 278

The Proposed Finding is misleading to the extent that it implies that there was no sudden change in Patterson’s position regarding NMDC between February 7, 2013 (when Belcheff wrote encouragingly to Dr. Mason) and February 11, 2013 (when Patterson cut off all discussion by telling Dr. Mason and his colleagues that Patterson would not participate). On February 7 (the day before the Cohen/Guggenheim exchange) Patterson’s local branch manager, Scott Belcheff, sent Dr. Mason an email regarding NMDC partnering with Patterson, writing, “[t]his has the opportunity to be huge” (CX4090 at 002; Mason, Tr. 2349-2350; CCFF ¶ 469). Belcheff also referenced the upcoming February 11 dinner to “help us get guidelines in place” (CX4090 at 002), and stated, “I am hoping Patterson can be a partner you trust and that will always do the right thing for you.” (CX4090 at 002; CCFF ¶¶ 469-470). Belcheff wrote another email, adding, Belcheff wrote, “I definitely want to keep this moving forward[.]” (CX4090 at 001; Mason, Tr. 2352-2353; CCFF ¶ 471). Then, on February 8, 2013, Cohen wrote to Guggenheim to share Benco’s no buying group policy: “FYI: Our policy at Benco is that we do not recognize, work

with, or offer discounts to buying groups (though we do work with corporate accounts) and our team understands that policy.” (CX0056 at 001; CX0090 at 001; Cohen, Tr. 532, 534; Guggenheim, Tr. 1594; CCFF ¶ 483). Guggenheim responded, “Thanks for the heads up. I’ll investigate the situation. We feel the same way about these.” (CX0090 at 001). Three days later – without any other notice or indication of its change in position -- Patterson representatives told the NMDC dentists that Patterson would not work with NMDC. (Mason, Tr. 2354-355; CCFF ¶¶ 503-506).

Patterson’s efforts to create facts when they do not exist should also be disregarded. Dr. Mason’s statement that he had no reason to doubt that Reinhardt’s decision was his own does not provide a factual basis to determine that Reinhardt’s decision was, in fact, his own.

Finally, the Proposed Finding should also be disregarded to the extent that it relies on materials that cannot be cited as substantive evidence. To the extent that the Proposed Finding also relies on a demonstrative (RXD0215) as substantive support for the finding, that reliance contravenes the Court’s February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence.

279. Dr. Brenton Mason had engaged in discussions in early 2013 with local New Mexico Patterson sales personnel Jeff Katt and Scott Belcheff about working together on the yet to be formed New Mexico Dental Cooperative (“NMDC”). (Mason, Tr. 2339).

Response to Proposed Finding No. 279

Complaint Counsel has no specific response.

280. Dr. Mason does not recall the substance of any of his discussions with Katt or Belcheff about establishing the NMDC. (Mason, Tr. 2365–66. Mason cannot provide a chronology of any conversations with Patterson. (Mason, Tr. 2369).

Response to Proposed Finding No. 280

The Proposed Finding is misleading, and contrary to the weight of the evidence. It is misleading to the extent that it implies that Dr. Mason's testimony is subject to question merely because he cannot provide a chronology of all conversations with Patterson representatives over five years ago. The testimony he provided about those communications is in the record, and no chronology is needed to evaluate those communications. *See* Mason, Tr. 2335-2355

281. At the time of Mason's talks with Patterson, NMDC did not yet actually exist. (Mason, Tr. 2367-68 ("At that point in time of the meeting of February 11, there was not a full entity. We were still in the research discovery and trying to put it together."); Mason, Tr. 2368 ("Q. But back in January and February of 2013, there was no entity the New Mexico Dental Cooperative. A. That is correct.")). Mason was merely in the research and development stage. (Mason, Tr. 2368).

Response to Proposed Finding No. 281

The Proposed Finding is misleading to the extent that it implies that NMDC and its founders, Dr. Mason, Dr. Montoya and Dr. Chapman, were not actively seeking supply partners at the time of Dr. Mason's talks with Patterson. It is only common sense that, before a buying group can market itself to dentists, it needs to know if it will have a supply partner and what discounts that partner will offer. To suggest that NMDC was not actively seeking a supply partner to help it recruit members is contrary to the record evidence. The record shows that, once the NMDC founders put the word out, they immediately had 17 offices express an interest in joining. (Mason, Tr. 2343 ("Our goal originally was to put together 50 offices, and we thought that would be difficult or a challenge. One we put the word out and started talking to people, we had 17 offices want to join in immediately, so we – without any effort, we decided we should raise our goal up to 75.")). Dr. Mason also testified that distributors were among the vendors Dr. Mason contacted to work out arrangements to establish NMDC (Mason, Tr. 2333). Mason testified that he personally spoke with both Patterson and Schein about the co-op, and his colleague, Dr.

Montoya spoke with a representative of Benco. (Mason, Tr. 2335-2336). The Proposed Finding is an effort to obscure the facts and should be disregarded.

282. Mason thought NMDC would be a dental cooperative, which he believes to be “a very different animal” from a buying group. (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.”)).

Response to Proposed Finding No. 282

The Proposed Finding is misleading to the extent that it implies that the functions of the dental cooperative would not include the same benefits and functions of a buying group. The record evidence specifically shows that Dr. Mason believed that a dental cooperative includes the same benefits for dentists as a buying group. (Mason, Tr. 2327 (“Q. And does a dental cooperative include the same benefits as joining a buying group. A. Yes, it does.”); Mason, Tr. 2333-2334 (“Q. What was the idea behind your reaching out to distributors? A. To see if we could collectively work with a group to lower our costs.”))

283. On February 4, 2013, NMDC’s Brenton Mason sent a New Mexico industry-wide email blast to dental manufacturers setting a meeting for March 13, 2013 at Patterson’s Albuquerque branch office. (CX0090 at 4). He wrote “We have partnered with Patterson.” (CX0090-04; Mason, Tr. 2340 (“At that point we felt we had worked out a deal with Patterson, so we were being – negotiating.”)). This is the e mail Cohen forwarded to Guggenheim.

Response to Proposed Finding No. 283

Complaint Counsel has no specific response.

284. Dr Mason cannot recall any specific conversation that supports the statement in CX0090 that NMDC “had partnered with Patterson.” (Mason, Tr. 2374–76).

Response to Proposed Finding No. 284

The Proposed Finding is misleading and incomplete to the extent that it excludes those portions of Dr. Mason's testimony in which he testified that he met and spoke with representatives of Patterson (Mason, Tr. 2335-2336), and that his conversations with the Patterson representatives occurred before February 4, 2013 (Mason, Tr. 2339). It is also misleading to the extent that it implies that Dr. Mason's lack of recall about specific conversation meant that he did not have a basis for his belief that "NMDC had partnered with Patterson." In fact, Dr. Mason testified that he had spoken with someone from Patterson to obtain permission to use the room at Patterson's facilities for purposes of the meeting he was scheduling. (Mason, Tr. 2342). He also testified that, at the time he sent his email contained in CX0090, "I believe that we still needed to work out some details of pricing, but we had a deal that was considered – that we had a partner in this." (Mason, Tr. 2343-2344). *See also* CX8035 (Mason, Dep. at 51) ("Our feeling was that we were well on our way to working out a general agreement with Patterson Dental.")

Because the Proposed Finding is incomplete in a way that makes it misleading, it should be disregarded.

285. No later than February 5, 2013 Mason and Patterson's branch manager had set up a meeting for February 11, 2013 with Regional Manager Dan Reinhardt. (CX3333 at 2, February 5, 2013 email from Belcheff ("I also want to confirm our dinner for Monday with Dan."; Mason, Tr. 2379). This meeting was set up before Cohen's February 8, 2013 communication to Guggenheim.

Response to Proposed Finding No. 285

Complaint Counsel has no specific response.

286. On February 7, 2013 Scott Belcheff sent Mason an e mail that states: "We need to cancel this meeting." (CX4090 at 2; Mason, Tr. 2380; *see also* RXD0215 at 1 (New Mexico Dental Cooperative Timeline)). CX4090 predates Cohen's communication to Guggenheim.

Response to Proposed Finding No. 286

The Proposed Finding is misleading, vague and confusing, and misstates the evidence in the record. It is misleading, vague and confusing in that quotes selectively from Belcheff's February 7, 2013 email, and thus suggests incorrectly that Belcheff was cancelling the February 11 dinner meeting with Dr. Mason and the other NMDC founder. A full review of Belcheff's email chain (containing two emails from Belcheff from February 7, 2013), makes it clear that Belcheff was cancelling the meeting scheduled for March, but was not cancelling the upcoming meeting between Patterson and the NMDC dentists scheduled for February 11. (CX4090 at 002 (referenced an upcoming "dinner Monday night" to "help us get guidelines in place.")). Belcheff's emails also make it clear that Patterson wanted to continue to partner with NMDC. Belcheff wrote to Dr. Mason, "I am hoping Patterson can be a partner you trust and that will always do the right thing for you." (CX4090 at 002). The Proposed Finding is misleading to the extent that it implies that Belcheff was critical of Mason's representation that NMDC had partnered with Patterson. There is nothing in Belcheff's email to support that assertion, and Patterson chose not to call Belcheff as a witness.

Finally, to the extent that the Proposed Finding also relies on a demonstrative (RXD0215) as substantive support for the finding, that reliance contravenes the Court's February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence.

287. Mason's February 4 email caused "quite a stir." (Mason, Tr. 2376 ("Q. You would agree with me that the e-mail you sent out on February 4 to a number of manufacturers and some distributors and others in New Mexico entitled New Mexico Dental Cooperative Purchasing created quite a stir. A. Yes, it did.")).

Response to Proposed Finding No. 287

The Proposed Finding is vague and irrelevant. While Complaint Counsel has no specific response to the accuracy of the quotation of Dr. Mason's testimony, the meaning of creating "quite a stir" – or its evidentiary or legal significance – is unclear. Because the meaning of the statements in the Proposed Finding cannot readily be ascertained, it appears to be irrelevant, and should be disregarded.

288. Patterson's sales people in New Mexico, Scott Belcheff and Dan Reinhardt, were getting calls from manufacturers confused by Mason's February 4, 2013 email. (CX4090 at 1; Mason, Tr. 2386 ("Q. And you don't have any reason to dispute that Mr. Belcheff and Mr. Reinhardt were getting calls from manufacturers. A. No."); Mason, Tr. 2385 ("It is my understanding at this point that my previous e-mail confused the dental manufacturing world.")).

Response to Proposed Finding No. 288

The Proposed Finding is misleading and should be disregarded because it attempts to manufacture evidence that is not in the record through a witness who had no direct personal knowledge of that evidence. Although Patterson did not call either Belcheff or Reinhardt as a witness, it attempts to create their testimony by asking Dr. Mason if he has reason to dispute a statement that Belcheff wrote. There is no basis for assuming the veracity of what Belcheff claims in his email to have heard from unidentified manufacturers. The fact that Dr. Mason did not have a reason to dispute what Belcheff wrote does not make the statement true. There is no record evidence that Belcheff and Reinhardt "were getting calls from manufacturers." The Proposed Finding should be disregarded.

289. Dr. Mason interpreted Patterson's *February 7, 2013* email to indicate that Patterson was pulling back and walking back from its discussions with NMDC because of Mason's February 4, 2013 email to manufacturers. (Mason, Tr. 2352 ("[T]here was some pullback by Scott Belcheff after I sent the big e-mail to the manufacturers."); Mason, Tr. 2381 ("A. I -- not necessarily just this one paragraph, but yes, I did see the walk-back from what we originally were discussing. Q. And you just used the term "walk-back." A. Yeah. Q. You saw this February 7 e-mail as being a walking back of what you had a feeling of what Patterson was willing to do. A. That's correct.")).

Response to Proposed Finding No. 289

The Proposed Finding is misleading and contrary to the weight of the evidence. It is misleading to the extent that implies that Patterson Branch Manager Belcheff was not still interested in working with NMDC at the time he sent his February 7, 2013 email. The evidence contained in that email is to the contrary. The February 7, 2013, email from Patterson's Belcheff, to Dr. Mason regarding NMDC references an upcoming "dinner Monday night" to "help us get guidelines in place." (CX4090 at 002). Although Belcheff's email shows that he asked NMDC to cancel a meeting it had scheduled with manufacturers (in part because Patterson wanted to handle manufacturer bids on NMDC's behalf) (CX4090 at 002 ("If Patterson is going to be your preferred vendor then we handle the bid process for you.))), nothing in that email suggests that Patterson was "pulling back" or "walking back" from its previous position. In fact, Belcheff further stated in his email to Dr. Mason, "I am hoping Patterson can be a partner you trust and that will always do the right thing for you." (CX4090 at 002). Belcheff continued, "[t]his has the opportunity to be huge" (CX4090 at 002; Mason, Tr. 2349-2350). Rather than "pulling back, in a second email, also on February 7, Belcheff wrote to Dr. Mason, "I definitely want to keep this moving forward[.]" (CX4090 at 001; Mason, Tr. 2352-2353). None of those statements communicated that Patterson was changing its position about ultimately working with NMDC or was "walking back" from its discussions. Indeed, Dr. Mason testified that he believed that, as of February 7, 2013, his buying group, NMDC, had an agreement with Patterson and that the guidelines of the deal would be "worked out" with Dan Reinhardt. (Mason, Tr. 2352-2353; CCFF ¶¶ 466-473). Because the finding is contrary to the weight of the evidence and therefore misleading, it should be disregarded.

290. Patterson's February 7, 2013 email, signaling to Mason that Patterson was walking back its arrangement with NMDC and stating that the March 13 meeting scheduled in

Mason's February 4 email had to be cancelled (CX4090 at 1; Mason, Tr. 2352; Mason, Tr. 2381), was sent before Paul Guggenheim and Chuck Cohen's February 8, 2013 correspondence (CX0090 at 1; *see also* RXD0215 at 1 (New Mexico Dental Cooperative Timeline)).

Response to Proposed Finding No. 290

The Proposed Finding is misleading to the extent that it is assumed a fact that had not been demonstrated and is contrary to the evidence. The evidence does not show that Patterson's February 7, 2013 email was "signaling to Mason that Patterson was walking back its arrangement with NMDC." On the contrary, Dr. Mason's testimony was that, as of February 7, 2013, he believed that he had a deal with Patterson. (Mason, Tr. 2352-2353). Belcheff's email supported that understanding. (CX4090 at 001 ("I definitely want to keep this moving forward[.]" *See also* Complaint Counsel's Response to Patterson Proposed Finding No. 289. In addition, to the extent that the Proposed Finding relies on a demonstrative (RXD0215) as substantive support for the finding, that reliance contravenes the Court's February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence. Complaint Counsel has no specific response to the fact that the February 7 email from Belcheff was sent before Cohen's February 8, 2013 email.

291. Dr Mason, and his partners Dr Chapman and Dr Montoya, met with the local Patterson sales people, Katt and Belcheff, and Dan Reinhardt, the Region manager, on February 11, 2013 in Albuquerque, New Mexico. (Mason, Tr. 2386-87).

Response to Proposed Finding No. 291

Complaint Counsel has no specific response.

292. The only thing that Mason recalls of the March 11 meeting is that "we were given the message by Mr. Reinhardt that they were not going to be participating." (Mason, Tr. 2387-88).

Response to Proposed Finding No. 292

The Proposed Finding is misleading because it misstates the witness' testimony and is not supported by the citation in the record. First, the record does not mention a March 11 meeting, so there is no testimony whatsoever about a meeting on that date. The Proposed Finding also misstates the witness' testimony about a meeting that did take place. The witness never stated that the "only thing" he recalled about the meeting was the message communicated by Reinhardt. He in fact provided other testimony about what had occurred at the meeting. For example, he also testified that he was surprised by Mr. Reinhardt's statement because, until that communication, he understood that Patterson had agreed to be the preferred vendor for the buying group. (Mason, Tr. 2354-2356; *see also* CX8035 (Mason, Dep. at 86-88)). The Proposed Finding is inaccurate and should be disregarded.

293. Mason testified that he had no reason to doubt this was Reinhardt's decision. (Mason, Tr. 2386).

Response to Proposed Finding No. 293

The Proposed Finding is misleading to the extent that it proffers a fact for which there is no foundation. Patterson did not call Reinhardt as a witness to provide testimony about whether the decision he communicated to Dr. Mason was his own decision. The fact that Dr. Mason did not have a reason to doubt that the decision was Reinhardt's may be relevant to Dr. Mason's state of mind (*e.g.*, believing that Reinhardt has the authority to deliver the message), but is not evidence that Reinhardt's decision was, in fact, his own decision. There is, in fact, no evidence in the record that the decision Reinhardt communicated was his own decision. The Proposed Finding is also misleading to the extent that it implies that a decision by a Patterson Regional Manager was not made pursuant to a communication from corporate headquarters. There is no evidence in the record to support this premise.

294. After the February 11 meeting, Dr Mason's partner Dr. Montoya spoke with the Utah Dental Cooperative and Mason's group became the New Mexico branch of the Utah Dental Cooperative. (Mason, Tr. 2361-62).

Response to Proposed Finding No. 294

Complaint Counsel has no specific response.

295. Schein was the dental distributor working with the Utah Dental Cooperative. (Mason, Tr. 2362:4-8) Mason and the New Mexico branch did business with Schein through the Utah Dental Coop. (Mason, Tr. 2391).

Response to Proposed Finding No. 295

The Proposed Finding is incomplete and therefore misleading to the extent that it provides no date references, making it unclear if the New Mexico Chapter of the Utah Dental Cooperative (also known as the Dental Cooperative of Utah) did business with Schein during any time period relevant to this case. The Proposed Finding is also misleading to the extent that it suggests that Schein did business with either the New Mexico branch or any other branch of the Dental Cooperative of Utah after 2014, when Schein stopped doing business with the Dental Cooperative. See Complaint Counsel Responses to Schein's Proposed Findings of Fact Nos. 581-633 (New Mexico branch) and Nos. 1002-1025 (Dental Cooperative of Utah).

296. There is no evidence showing that anyone at Patterson's corporate office (in Minnesota) gave any instruction to Patterson's New Mexico sales team regarding NMDC during the *weekend* between February 8 (the date of the Cohen/Guggenheim email (CX0090)) and February 11, 2013 (the date the sales team told NMDC it would not participate) (Mason, Tr. 2355). (Mason, Tr. 2388 ("Q. You have no reason to doubt that this was Mr. Reinhardt's decision, do you? A. No, I don't.")).

Response to Proposed Finding No. 296

The Proposed Finding is misleading, contrary to the weight of the evidence, relies on a fact for which there is no foundation, and is irrelevant. The Proposed Finding is misleading to the extent that it implies there is no evidence that Patterson's communication with Benco resulted in

Patterson's termination of the partnership with this buying group. The weight of the evidence in the record is to the contrary. The documentary evidence tells a clear story that, on February 7, 2013, Patterson's local sales manager, Scott Belcheff, invited Dr. Mason and his colleagues to a meeting to work out the details of a partnership. (CX4090 at 002 (February 7, 2013, email from Belcheff to Dr. Mason regarding NMDC referenced an upcoming "dinner Monday night" to "help us get guidelines in place" in which Belcheff further stated, "I am hoping Patterson can be a partner you trust and that will always do the right thing for you.")). Indeed, Dr. Mason received a second email from Belcheff later in the day on February 7, 2013, in which Belcheff wrote, "I definitely want to keep this moving forward[.]" (CX4090 at 001; Mason, Tr. 2352-2353; CCFF ¶¶ 470-471). After Cohen emailed Guggenheim about Patterson's partnership with the NMDC and communicated Benco's no buying group policy to Guggenheim on February 8, 2013 (CX0056 at 001; CX0090 at 001; CX0091 at 001; CCFF ¶¶ 483-484), and Guggenheim responded to his competitor, "Thanks for the heads up. I'll investigate the situation. We feel the same way about these" (CX0090 at 001; Guggenheim, Tr. 1607-1608), Patterson changed its position with respect to working with NMDC. The contemporaneous documents show that Guggenheim promised to investigate his company's partnership with the NMDC buying group. In fact, record evidence shows that, when Benco's Cohen brought other issues to Guggenheim, the latter investigated those issues. *See* CCFF ¶¶ 290-292, 295, 297-298. To the extent that the Proposed Finding implies that Reinhardt's decision was his own based on Dr. Mason's testimony, there is no foundation for that fact. Patterson did not call Reinhardt as a witness to provide testimony about whether the decision he communicated to Dr. Mason was his own decision. The fact that Dr. Mason did not have a reason to doubt that the decision was Reinhardt's may be relevant to Dr. Mason's state of mind (*e.g.*, whether he believed Reinhardt

has the authority to deliver the message), but does not make the underlying asserted fact true.
The Proposed Finding should be disregarded.

297. There is insufficient evidence to find that Cohen's February 8, 2013 email had any impact on local Patterson management's decision with respect to the yet unformed "New Mexico dental Cooperative."

Response to Proposed Finding No. 297

The Proposed Finding should be disregarded because it has no specific evidentiary citations. To the extent that it is relying on other Proposed Findings, it does not identify those findings on which it relies. To the extent that other Proposed Findings in this Section are misleading, not supported by the evidence, irrelevant, contain inaccurate references to evidence, or should be disregarded for other reasons, those findings cannot provide a basis for this Proposed Finding. *See Responses to Patterson's Proposed Findings Nos. 267 to 296.* This Proposed Finding should be disregarded.

298. The February 8, 2013 communication from Cohen to Guggenheim, and Guggenheim's response, is not probative evidence of Patterson's participation in the conspiracy alleged.

Response to Proposed Finding No. 298

The Proposed Finding should be disregarded because it has no specific evidentiary citations. To the extent that it is relying on other Proposed Findings, it does not identify those findings on which it relies. To the extent that other Proposed Findings are misleading, not supported by the evidence, incomplete, irrelevant, contain inaccurate references to evidence, have evidentiary deficiencies, or should be disregarded for other reasons, those findings cannot provide a basis for this Proposed Finding, even if they had been identified. *See Responses to Patterson's Proposed Findings Nos. 267-296.* Finally, the overwhelming weight of the evidence shows that the February 8, 2013 communications between Cohen and Guggenheim about whether their

companies will work with (or refuse to work with) a particular customer segment is highly probative of Patterson's participation in the conspiracy.

b. Responses to Proposed Findings Regarding "The June 6, 2013 Email Regarding Atlantic Dental Cooperative Was Not Enforcement Of A Conspiracy."

299. On June 6, 2013, Guggenheim sent an email to Cohen concerning Atlantic Dental Care. (CX0062 at 2). He wrote that email on top of the February 8, 2013 email from Cohen. (CX0062 at 2).

Response to Proposed Finding No. 299

Complaint Counsel has no specific response.

300. Guggenheim's email asked, "Reflecting back on our conversation earlier this year, could you shed some light on your business agreement with Atlantic Dental Care? I understand they are a group of 55 dentists in and around Chesapeake Va. being led by a practice management consultant that your team has signed a supply agreement with. I'm wondering if your position on buying groups is still as you articulated back in February? Let me know your thoughts....Sometimes these things grow legs without our awareness." (CX0062 at 2).

Response to Proposed Finding No. 300

Complaint Counsel has no specific response.

301. Guggenheim sent the email to gain business intelligence. (CX0314 (Guggenheim, IHT at 299, 300-03)). He did this because he had been approached by the Patterson local branch manager, Devon Nease, at the end of May 2013 concerning Benco winning the ADC bid. (Guggenheim, Tr. 1622; CX0094 at 1). Guggenheim's purpose was to see what he "could learn in terms of field intelligence about what we might be missing here." (CX0314 (Guggenheim, IHT at 285)). Guggenheim was attempting to gain information that would better allow Nease to compete for this business. (CX0314 (Guggenheim, IHT at 287) ("I wanted to see what intelligence I could find out to help Devon get back in there and compete.")).

Response to Proposed Finding No. 301

The Proposed Finding is misleading and incomplete because it cites testimony that it taken out of context. In addition, the Proposed Finding relies on testimony that is not credible and should be disregarded. Although the Proposed Finding cites Guggenheim's investigational hearing testimony that he purportedly sent the email to Cohen to "gain market intelligence," (CX0314

(Guggenheim, IHT at 299), Guggenheim very next statement is that he could not think of any reason why he was asking about Benco's policy with respect to selling to buying groups.

(CX0314 Guggenheim, IHT at 299) ("Q. Can you think of any reason why you would want to know whether Benco still has – still had a policy against selling to buying groups? A. No.")

Guggenheim's testimony that he contacted his competitor to gain "market intelligence" that would allow his branch manager Nease compete for business is also contrary to the question he actually asked in his email. Guggenheim's email to Cohen asks only one question: "I'm wondering if your position on *buying groups* is still as you articulated back in February."

(CX0062 at 002) (emphasis added). The document shows that Guggenheim was not seeking information about anything other than Benco's buying group policy. (CX0062 at 002). The record also shows that Guggenheim did not provide a credible answer about what type of information he was purportedly seeking that would help Nease complete. He testified that an example of what he was seeking was information about ADC's "structure." (CX0314

(Guggenheim, IHT at 288) ("Q. Can you give me one example of some information that would help you understand more about the account? A. Well, an example would be the structure of the business. Q. Structure of Atlantic Dental Care? A. Yeah.") It is not credible that Guggenheim would contact his competitor, finding and attaching a four month-old email describing Benco's no buying group policy, and ask specifically about that policy when Guggenheim was seeking information about ADC's structure – a fact that could more easily be obtained from ADC itself.

In fact, Guggenheim admitted Patterson made no effort to obtain information about ADC's structure from ADC. CX0314 (Guggenheim, IHT at 290) ("Q. And did you or anyone else within Patterson reach out to Atlantic Dental Care to understand more about their structure after this e-mail? A. I didn't. Q. Do you know if anyone else did? A. I'm not aware."). Patterson

has not offered any other reasons for Guggenheim's email to Cohen, which, on its face, asks asks if Benco was deviating from the "position on buying groups" that Benco had "articulated back in February." (CX0062 at 002). Because this Proposed Finding is contrary to the weight of the evidence and lacks credibility, it should be disregarded.

302. Cohen responded to Guggenheim with an explanation of why ADC was a large group practice, not a buying group. (CX0062 at 1).

Response to Proposed Finding No. 302

Complaint Counsel has no specific response.

303. Guggenheim then responded. (CX3301 at 1) ("Sounds good Chuck. Just wanted to clarify where you guys stand.").

Response to Proposed Finding No. 303

Complaint Counsel has no specific response.

304. Both Guggenheim and Cohen deny that this email constituted enforcement of an agreement not to work with buying groups. (Guggenheim, Tr. ("Q. And again, just so the record is crystal clear on this, by this e-mail, did you believe that you were enforcing any agreement between Patterson and Benco not to do business with buying groups? A. Absolutely not. Q. And by this e-mail, did you intend to enforce any such agreement? A. No."); Cohen, Tr. 918–19 ("Q. Is there a secret code that you and Mr. Guggenheim worked out where one of these terms means enforce or enforcement? A. No. Q. Was there ever -- when you were a kid, did you ever use lemon juice to create invisible ink and then you put it over a candle or something and it appears? Did you ever do when you were a kid? A. Yes. Q. Is there -- was there lemon juice with a secret code that's invisible to the rest of us that has 'enforce' or 'enforcement' in there? A. No. Q. I mean, you'd pretty much have to make that up if you were interpreting this to contain the word "enforce" or "enforcement," wouldn't you, sir? A. The answer is no, and Paul ran at that point a much larger operation than Benco did. I'm not in the business of telling him how to run his business. It would not be something I would say even in jest. Q. All right. And just so we're clear, you'd pretty much have to make it up to think that this e-mail thread between you and Mr. Guggenheim somehow had the word "enforce" or "enforcement" in it, wouldn't you? A. I would think so.")).

Response to Proposed Finding No. 304

The Proposed Finding is misleading and contrary to the weight of the evidence. The Proposed Finding is misleading to the extent that it implies that the communications between Guggenheim and Cohen are not relevant evidence of the conspiracy unless they constituted an enforcement action. In fact, they provide strong and clear evidence of that Patterson was monitoring the agreement that it had entered into with Benco not to do business with buying groups, and that it confronted Benco when it suspected cheating. *See* CCFF ¶¶ 564-573. The Proposed Finding is, moreover, contrary to the weight of the evidence. The weight of the evidence shows that, after Guggenheim and Cohen exchanged emails in early February 2013, and Guggenheim provided that assurance that “we feel the same way about these,” (CX0090 at 001), Patterson executives directed their teams not to do business with ADC expressly because they believed it was a buying group. When Fruehauf (Nease’s boss) communicated to Misiak that ADC was seeking a bid, Misiak, in a February 27, 2013 response said:

These co op situations can be very challenging so stay connected. You may have to help [Patterson branch manager] at the meeting communicate our position verbally to the reps. . . .When I get these calls directly I politely say that I appreciate the opportunity, but currently we do [not] participate with group purchasing organizations. Continue to help Devon stay out of this with grace.

(CX0093 at 001; CCFF ¶¶ 544-546).

Misiak also explained that Patterson’s largest competitors, Henry Schein and Benco, refused buying groups as well: **“Confidential and not for discussion ..our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me.”** (CX0093 at 001 (emphasis in original); Misiak, Tr. 1356-1358). The evidence then shows that in June 2013, when Patterson learned that Benco had in fact bid on ADC, Guggenheim wrote to Cohen, first finding and attaching a four month-old email describing Benco’s no buying group policy, and asked specifically about that policy. (CX0062 at 002). Guggenheim asked Cohen to

“shed some light on your business agreement with Atlantic Dental Care” and added, “I’m wondering if your position on buying groups is still as you articulated back in February.” (CX0062 at 002). Whether or not Guggenheim’s June 6, 2013 email to Cohen was enforcing an agreement, it is clear evidence of Guggenheim’s understanding of what he and Cohen agreed to in February. Cohen’s response, moreover, provides additional evidence to corroborate that Benco had an understanding with Patterson about buying groups. Cohen tells his competitor about Benco’s reasons for doing business with his customer ADC, and explains, “we’re going to continue monitoring the process to ensure that ADC delivers on their commitment to us [to be a merged entity].” (CX0062 at 001). In case Cohen has not provided enough information about ADC to his competitor, Cohen adds, Happy to discuss in more detail, if you’d like.” (CX0062 at 001). In sum, the Proposed Finding is contrary to the weight of the evidence and should be disregarded.

305. Guggenheim testified that his June 2013 email was not related to any buying group conspiracy. (Guggenheim, Tr. 1696 (“Q. And that’s it, you asked two questions; is that right? A. Right. Q. Did you tell him about your bid or not to bid or Atlantic Dental Care? A. I did not. Q. Did you commit to him about anything you and your company were going to do with regard to Atlantic Dental Care going forward? A. Never. Q. Did you commit to him anything you or Patterson Dental were going to do with regard to any buying group going forward? A. Absolutely not.”)).

Response to Proposed Finding No. 305

The Proposed Finding is misleading and contrary to the weight of the evidence. *See* Response to Proposed Finding No. 304. The Proposed Finding is also misleading to the extent that it implies that Guggenheim’s email to Cohen, expressly asking Cohen if his “position on buying groups is still as you articulated back in February” (CX0062 at 002) was not about buying groups. In addition, the Proposed Finding is misleading to the extent that it suggests a communication that does not expressly state a commitment to specific collusive behavior cannot not be “related to” a conspiracy.

306. Guggenheim did not change Patterson's business strategy following the June 2013 email exchange with Cohen. (Guggenheim, Tr. 1697 ("Q. After that, did you change the company's strategy? A. No.")).

Response to Proposed Finding No. 306

The Proposed Finding is irrelevant. Patterson adopted a business strategy that it would not do business with buying groups after Guggenheim and Cohen exchanged emails in February 2013. Prior to February 2013, Patterson did not have a strategy regarding dealing with buying groups. (CX8023 (Guggenheim, Dep. at 134 (Patterson had no company policy at time he received Cohen's February 8, 2013 email; Patterson "evaluated individually" each buying group), CX8023 (Guggenheim, Dep at 137) ("don't have . . . a uniform way to deal with [buying groups]"); McFadden, Tr. 2676 (Patterson did not have a policy regarding buying groups when McFadden was the Southeast Regional Manager from 2009 to 2013; *see also* CX8004 (McFadden, Dep. at 37-38) (McFadden was not aware of any Patterson corporate policy regarding buying groups); *see also* CCFF ¶¶ 498-499). By late February 2013, Patterson executives articulated their position with respect to buying groups: "These co op situations can be very challenging so stay connected. You may have to help [Patterson branch manager] at the meeting communicate our position verbally to the reps. . . .When I get these calls directly I politely say that I appreciate the opportunity, but currently we do [not] participate with group purchasing organizations." (February 27, 2013 email from Misiak to Fruehauf). *See* CCFF ¶¶ 543-546. After February, Patterson's managers did not communicate that buying groups would be evaluated individually; rather, the statement from Patterson's VP of Sales instructed, "we do [not] participate with group purchasing organizations." As such, at the time of the June 2013 email exchange, Patterson was not doing business with buying groups. The fact that it continued to reject buying groups after June 2013 is irrelevant to whether it had joined the conspiracy. The Proposed Finding of Fact is irrelevant and should be disregarded.

307. And Patterson never changed its strategy with respect to ADC. (Nease, Dep. at 68–69 (“Q. When you learned that Benco responded to and won the bid proposal, were you concerned about losing sales to Benco? A. Not a lot. Q. Why not? A. We felt we had really good relationships with our offices, and that our plan moving forward was to, you know, continue doing what we’ve always done, and in the Chesapeake area, you know, we had a pretty strong following.”)).

Response to Proposed Finding No. 307

The Proposed Finding is misleading, not supported by the testimony cited, and is contrary to the weight of the evidence. It is misleading because the testimony cited does not support the Proposed Finding. Nease’s cited testimony about Patterson’s “plans moving forward” does not indicate Patterson had any plans whatsoever with regard to ADC. There is nothing in the cited testimony to provide any facts whatsoever about what Patterson’s strategy with respect to ADC itself. The Proposed Finding is, moreover, contrary to the evidence. As detailed in Complaint Counsel’s Response to Patterson’s Proposed Finding No. 306, Patterson’s original strategy when it believed ADC was a buying group was to “stay out.” CCF ¶ 546. After Patterson learned that ADC was not a buying group, Guggenheim directed Nease to “aggressively get after [ADC’s] business and compete.” (Guggenheim, Tr. 1634; CX0314 (Guggenheim, IHT at 303)). The evidence in the record thus shows that Patterson changed its position.

308. Complaint Counsel alleges that, due to the June 2013 email between Guggenheim and Cohen, Patterson “ultimately competed for ADC’s business despite previously notifying ADC that it would not submit a bid.” Compl. ¶ 50.

Response to Proposed Finding No. 308

The Proposed Finding misstates the cited paragraph of the Complaint. Complaint Paragraph 50 (referring to the June 2013 exchange of emails between Guggenheim and Cohen) reads: “Following this exchange, Guggenheim informed Patterson’s sales team to change course and pursue ADC’s business. Patterson ultimately competed for ADC’s business despite previously notifying ADC that it would not submit a bid.” Compl. ¶ 50

309. But there is no evidence in the record that the ADC business was available for bid in June 2013, because Benco had *already won* ADC's business in *May* 2013. (CX0094 at 1; *see also* RXD0214 at 1 (Atlantic Dental Care Timeline)).

Response to Proposed Finding No. 309

The Proposed Finding is misleading to the extent that it implies that Patterson did not seek to obtain the business of ADC once it learned from Cohen that ADC was not a buying group. Following the June 2013 communication with Cohen (CX0062), Guggenheim directed Nease to “aggressively get after [ADC’s] business and compete.” (Guggenheim, Tr. 1634; CX0314 (Guggenheim, IHT at 303)). RX0095, a June 28, 2013 Benco email, further indicates that Patterson made some sort of bid for ADC’s business (RX0095 at 00001) (Benco email stating that the person they were working with at ADC “admitted that our proposal was better than Schein’s and Patterson’s.”)) The evidence in the record thus shows that Patterson became interested in the ADC account and competed for it once it learned from Benco that ADC was not a buying group. The fact that Patterson did not win the business is irrelevant. In addition, to the extent that the Proposed Finding relies on a demonstrative (RXD0214) as substantive support for the finding, that reliance contravenes the Court’s February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence.

310. Indeed, Benco’s having *already won* ADC’s business was the reason for Guggenheim’s June 2013 email. (CX0094 at 1; *see also* RXD0214 at 1 (Atlantic Dental Care Timeline)).

Response to Proposed Finding No. 310

The Proposed Finding is irrelevant, misleading, and relies on evidence not in the record. It is misleading to the extent that it implies that Guggenheim did not contact Cohen because he believed that Cohen had changed his position with respect to buying groups. Guggenheim, believing that ADC was a buying group (and believing Cohen had submitted a bid for a buying

group's business), asked Cohen to "shed some light on your business agreement with Atlantic Dental Care. (CX0062 at 002). He added, "I'm wondering if your position on buying groups is still as you articulated back in February." (CX0062 at 002). The record shows that, following the June 2013 communication with Cohen (CX0062) in which Cohen explained how ADC was *not* a buying group, Guggenheim directed Nease to "aggressively get after [ADC's] business and compete." (Guggenheim, Tr. 1634; CX0314 (Guggenheim, IHT at 303)). Finally, to the extent that the Proposed Finding relies on a demonstrative (RXD0214) as substantive support for the finding, that reliance contravenes the Court's February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence.

311. Also, Patterson had already decided not to bid for the ADC business months earlier, in February 2013, and instead continued to compete for the business of ADC's individual members as Patterson always had. (CX0092 at 1 (February 27, 2013 email from Patterson's Misiak to Guggenheim discussing "stay[ing] out of" the Atlantic Dental Care RFP process)); CX8002 (Nease, Dep. at 51) ("[ADC] announced to the practices that there had been a bid process and that the successful company had been awarded the business, but we didn't necessarily lose the business. We kept doing business with . . . most of our customers."); *see also* RXD0214 at 1 (Atlantic Dental Care Timeline)).

Response to Proposed Finding No. 311

The Proposed Finding is misleading and incomplete to the extent that it omits facts showing that the reason why Patterson had earlier decided not to bid for the ADC business was precisely because it believed ADC was a buying group. For example, in response to Fruehauf's February 27, 2013 email regarding ADC's bid proposal (CX0092), Misiak instructed Fruehauf and his sales team to "stay out" of selling to GPOs. (CX0093 at 001; Misiak, Tr. 1349, 1354-1355, 1358, 1368; *see also* CX0316 (Misiak, IHT at 243) ("Q. Is it fair to say that you told Anthony to not submit a bid for this Atlantic Dental Care group? A. I think, yeah, that's what I say in this email.")). The record evidence shows that Patterson chose not to bid for ADC because it also believed that Benco and Schein would not bid on ADC because it was a buying group. Thus, in

response to Fruehauf's inquiry about ADC's bid proposal (CX0092), Misiak informed Fruehauf that Schein and Benco – like Patterson – did not participate in buying groups in response.

(CX0093 at 001) (“**Confidential and not for discussion ..our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me.**”)

(emphasis in original); *see also* Misiak, Tr. 1356-1358). To the extent that this Proposed Finding implies that Patterson competed for the business of ADC as an entity (at the time it believed ADC was a buying group), this Proposed Finding is misleading. The assertion that Patterson “instead continued to compete for the business of ADC’s individual members” is also contrary to the evidence in the record.

The record moreover shows that, after Benco won the ADC bid, Patterson lost the business of its former customers who were now affiliated with ADC, losing approximately \$900,000 in 2013 alone. (CX3001 at 009 (Current market Assessment Chesapeake S.W.O.T. Analysis of Weaknesses: “Lost approx \$900,000 in supply business with ADC This year.”); CX8013 (Fruehauf, Dep. at 127-130); CX3003 at 002-004; CX8013 (Fruehauf, Dep. at 133-134) (“Q. And does – at the end of the chart there is a bolded total, it looks like, of \$898,411.80. Do you see that? A. I do. A. And so that to you represents the total dollar spend for the dentists who had been Patterson dentists but were now no longer Patterson dentists because they had joined ADC? A. Yeah, I think it represents customers that could still be Patterson clients on some level but had moved the merchandize business to the ADC.”)).

Finally, to the extent that the Proposed Finding relies on a demonstrative (RXD0214) as substantive support for the finding, that reliance contravenes the Court’s February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence.

312. Schein had bid against Benco for ADC's business in April 2013, well before June 2013. (CX2021 at 1 (April 8, 2013 Schein bid for ADC business); *see also* RXD0214 at 1 (Atlantic Dental Care Timeline)).

Response to Proposed Finding No. 312

Although CX2021 is an internal Schein email, and does not provide support for the fact that Schein bid for ADC's business on April 8, 2013, there is, nonetheless, other evidence in the record indicating that Schein, after communicating with Benco about ADC, submitted a bid for ADC's business. *See* CCFF ¶¶ 1061-1097.

To the extent that the Proposed Finding relies on a demonstrative (RXD0214) as substantive support for the finding, that reliance contravenes the Court's February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence.

313. Cohen and Sullivan had some communication concerning ADC in March 2013. (Cohen, Tr. 543-546; Sullivan, Tr. 3945-3946, 3956-3958; CX0058 at 1 (Cohen March 25, 2013 calendar entry to call Sullivan); CX6027 at 27 (Cohen's phone records showing text messages between Cohen and Sullivan in March 2013 and a call between Cohen and Sullivan on March 25, 2013 lasting for 8 minutes and 35 seconds)). There is no evidence in the record that Patterson had any knowledge of those communications or of their substance.

Response to Proposed Finding No. 313

The Proposed Finding is incomplete and therefore misleading to the extent that it fails to fully describe the communications between Cohen and Sullivan in March 2013. *See* CCFF ¶¶ 1061-1097. Complaint Counsel has no specific response with respect to Patterson's knowledge of those communications.

314. The record shows Patterson competed at the individual member level for the business of members of ADC. *See supra* ¶ 311. This was Patterson's approach in February 2013 at the time of Misiak's correspondence with Fruehauf, in the period up to June 6, 2013 and after June 6, 2013.

Response to Proposed Finding No. 314

The first sentence of the Proposed Finding is contrary to the evidence and irrelevant for the reasons set for in the Response to Patterson’s Proposed Finding No. 311. Specifically, the record evidence shows that, Misiak instructed Fruehauf and his sales team to “stay out” of selling to GPOs and not to bid on the ADC request for proposal. (CX0093 at 001; Misiak, Tr. 1349, 1354-1355, 1358, 1368; *see also* CX0316 (Misiak, IHT at 243) (“Q. Is it fair to say that you told Anthony to not submit a bid for this Atlantic Dental Care group? A. I think, yeah, that’s what I say in this email.”)). Patterson chose not to bid for ADC because it also believed that Benco and Schein would not bid on ADC because it was a buying group. Thus, in response to Fruehauf’s inquiry about ADC’s bid proposal (CX0092), Misiak informed Fruehauf that Schein and Benco – like Patterson – did not participate in buying groups in response. (CX0093 at 001)

(“Confidential and not for discussion ..our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me.”) (emphasis in original); *see also* Misiak, Tr. 1356-1358). To the extent that this Proposed Finding implies that Patterson competed for the business of ADC as an entity (at the time it believed ADC was a buying group), this Proposed Finding is misleading and inaccurate.

The assertion that Patterson “instead continued to compete for the business of ADC’s individual members” is also contrary to the evidence in the record. The record shows that, after Benco won the ADC bid, Patterson lost the business of its former customers who were now affiliated with ADC, losing approximately \$900,000 in 2013 alone. (CX3001 at 009 (Current market Assessment Chesapeake S.W.O.T. Analysis of Weaknesses: “Lost approx \$900,000 in supply business with ADC This year.”); CX8013 (Fruehauf, Dep. at 127-130); CX3002 at 002-004 CX8013 (Fruehauf, Dep. at 133-135) (“Q. And does – at the end of the chart there is a bolded total, it looks like, of \$898,411.80. Do you see that? A. I do. A. And so that to you represents

the total dollar spend for the dentists who had been Patterson dentists but were now no longer Patterson dentists because they had joined ADC? A. Yeah, I think it represents customers that could still be Patterson clients on some level but had moved the merchandize business to the ADC.”)).

The remainder of the Proposed Finding regarding “Patterson’s approach” has no evidentiary support whatsoever, so should be disregarded.

c. Responses to Proposed Findings Regarding “Patterson’s January 2014 Call And Email Regarding The 2014 TDA Meeting Was About A Decision Patterson Had Already Made Having Nothing To Do With Buying Groups.”

315. Patterson’s decision not to attend the TDA meeting was based upon the TDA becoming a competitor through the TDAPerksSupplies program which as announced in October 2013 and by disparaging Patterson for alleged price gouging. (Rogan, Tr. 3563–64 (“Patterson made the decision not to attend for several reasons, and one was the competition to Patterson. 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, and I can’t even remember the other reasons, but there were several reasons. But one of them, the one you’re asking, so the answer is, yes, that was one of many reasons.”); (CX0316 (Misiak, IHT at 300 (“Q. Following the creation of the TDA buying group, Patterson decided to withdraw from the TDA annual trade show; is that right? A. Right. Q. And what’s your understanding of why Patterson withdrew? A. Well, I think based on the information that I’ve seen both from the TDA Perks program and heard from Clint Edens, my regional president, the TDA decided to compete with Patterson, made some slanderous comments about Patterson and the pricing structures, and we had a growing concern about supporting a competitor and making strategic investments, which is what a trade show booth is.”))).

Response to Proposed Finding No. 315

The Proposed Finding is misleading and incomplete to the extent that it suggests that the only reason Patterson did not attend the 2014 TDA Annual Meeting was TDA’s decision to endorse the TDA Perks Supply program. Patterson, in its Responses to Complaint Counsel’s Request for Admissions stated that the “TDA’s decision to create and endorse the TDA Perks Supply” was “one of the reasons” Patterson did not attend the 2014 TDA Annual Meeting. (CX3365 at 003).

The record also shows that Patterson did not decide that it would not attend the 2014 TDA Annual Meeting until after a Patterson employee received a telephone call from Benco's Texas Regional Manager Ron Fernandez. Evidence in the record also shows that on October 14, 2013, Cohen instructed Fernandez, to contact Schein and Patterson to discuss cutting back support for TDA's meetings and programs because TDA was starting a buying group. (CX1057 at 001; CX8015 (Cohen, Dep. at 362); CCFF ¶ 1118). After that instruction, Fernandez reported back to Cohen that he had contacted Patterson and Schein employees to coordinate "taking a stand together" against TDA. (CX1278 (Excel worksheet "Chats" tab at row 9) ("I have been talking to the directors of Schein and Patterson. We are going to be taking a stand together against [TDA]."); CCFF ¶ 1119). Patterson documents in the record also show that, prior to Patterson's making the decision to withdraw from the TDA meeting, its Texas manager spoke with representatives of Schein and Benco. (CX0108 at 001) (October 23, 2013 email from Clint Edens to Misiak and Rogan, "As for Patterson, we have briefly discussed this TDAPerks site (not the source) with our dealer competitors at the local San Antonio & Houston level"); CCFF ¶ 1119).

316. Complaint Counsel does not allege that Patterson and Schein and/or Benco boycotted the 2014 TDA Meeting. (Kahn, Tr. 52 ("We do not allege a boycott of the trade show."); *see also* RXD0213 at 1).

Response to Proposed Finding No. 316,

The Proposed Finding is misleading to the extent that it suggests that the communications between and among Patterson, Schein and Benco regarding their decisions to withdraw from the 2014 TDA Annual Meeting do not provide relevant evidence of a conscious commitment to their no buying group agreement, and communications about a response, supporting a finding that Patterson, Schein and Benco were part of an overarching conspiracy not to do business with

buying groups. *See* Complaint Counsel's Post-Tr. Br. at 36-37; Complaint Counsel's Pre-Tr. Br. at 32-35. Finally, to the extent that the Proposed Finding relies on a demonstrative (RXD0213) as substantive support for the finding, that reliance contravenes the Court's February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence.

317. On January 6, 2014, Patterson's David Misiak had a telephone conversation with Schein's Dave Steck in which Misiak informed Steck that Patterson would not be attending the 2014 TDA meeting. (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.")).

Response to Proposed Finding No. 317

Complaint Counsel has no specific response.

318. Patterson had already decided, about two weeks before Misiak's conversation with Steck, not to attend the TDA meeting. (CX3378 at 4).

Response to Proposed Finding No. 318

The Proposed Finding is misleading because it relies on a single, unreliable document. CX3378 is a set of handwritten notes, which contains no information regarding the identify the author or the author's basis for knowledge of the material contained therein. No witness testified about the source of these notes, so there is no basis on which to determine what they are, when they were actually written, or whether the author of the notes is credible. Patterson could have offered a witness to provide testimony about the date of its decision, but did not do so. To the extent that the notes suggest that Patterson was planning to withdraw from the TDA 2014 Annual Meeting, there is no indication that the unknown author of the notes had the authority to make any

decision, or that the decision was made as of the date of the anonymous notes. Because Patterson's Proposed Finding relies on a single, unreliable document, it should be disregarded.

319. Misiak did not ask Schein to pull out of the TDA meeting. (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.”)).

Response to Proposed Finding No. 319

The Proposed Finding is misleading to the extent that it implies that Misiak and Steck, Misiak's counterpart at Schein, did not discuss Patterson's plans regarding attending the 2014 TDA Annual Meeting. The record evidence it clear that Misiak and Steck discussed Patterson pulling out of the TDA Annual Meeting. *See* CCFF ¶¶ 1123-1128; *see also* Patterson's Proposed Finding of Fact No. 317. The record is also clear that, after the call, Steck felt committed to respond to Misiak, and to respond with urgency, about Schein's plans. On January 21, 2014, Steck sent an internal email to three Schein managers, stating “Guys, I have to get back to PDCO on whether or not we are attending the TDA.” (CX0205 at 002; Steck, Tr. 3705; CCFF ¶ 1129).

320. Steck responded to Misiak merely to be polite. (Steck, Tr. 3823 (“Okay. So you had the call with Mr. Misiak on January 6th, and then several weeks later, I understand you wanted to get back to Mr. Misiak. A. Yeah. I felt it was a matter of courtesy.”)).

Response to Proposed Finding No. 320

The Proposed Finding is misleading and incomplete to the extent that it implies that Steck did not view his communication with Misiak as an important communication that needed to be shared with his superiors at Schein. The record shows that, after Steck and Misiak spoke, Steck reported his conversation with Misiak to Schein's President, Tim Sullivan and to Joe Cavaretta. (Steck, Tr. 3703). Steck informed Sullivan that he would follow up with Misiak as to Schein's decision regarding the TDA buying group. (Steck, Tr. 3703). CCFF ¶ 1128. The record also shows that, rather than viewing his response to Misiak as a “mere courtesy,” Steck felt obligated

to respond, and to respond with urgency. On January 21, 2014, Steck sent an internal email to three Schein managers, stating “Guys, I have to get back to PDCO on whether or not we are attending the TDA.” (CX0205 at 002; Steck, Tr. 3705). CCFF ¶ 1129. Then, shortly after Steck had sent his internal email to Schein managers, he emailed Misiak at Patterson under the subject line “Texas,” saying, “Hi Dave, I’ll be calling you to let you know about our decision on the matter we recently discussed in the next couple days.” (CX0112 at 001; Misiak, Tr. 1413-1414; Steck, Tr. 3704). In sum, the evidence in the record indicates that the Proposed Finding is misleading.

321. At the time of the January 6, 2013 call, Schein had not decided whether it would attend the 2014 TDA meeting. (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.”)).

Response to Proposed Finding No. 321

Complaint Counsel has no specific response.

322. Steck emailed Misiak several weeks later to let him know that he would call him back. (Steck, Tr. 3828–29) (“On January 21st at 5:23 p.m., you write back to Mr. Misiak, and you say, “I’ll be calling you to let you know about our decision on the matter we recently discussed in the next couple of days.” Right? A. That’s what it says, yes. Q. You don’t provide any more information than what I just read in that email, correct? A. No.”); *see also* (CX0112 at 1) (“I’ll be calling you to let you know about our decision on the matter we recently discussed in the next couple of days.”).

Response to Proposed Finding No. 322

Complaint Counsel has no specific response.

323. Prior to sending the email contained in CX0112 to Misiak, Steck inquired of Schein’s Joe Cavaretta what Schein’s plans were. (Steck, Tr. 2823, 2825, 2828). Cavaretta told Steck that Schein would have a meeting with the TDA “at the TDA most likely the day before or the first day...If they don’t stop this will be our last year attending the TDA.” (Steck, Tr. 3826–28; CX0205 at 1). Steck did not share any of this knowledge concerning Schein’s planned approach to the TDA with Misiak in his January 21 email or at any point afterwards. (Steck, Tr. 3828–29; CX0112).

Response to Proposed Finding No. 323

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Steck and Misiak had not already communicated about their respective plans with respect to attending the 2014 TDA Annual Meeting in their January 6, 2014 call. In fact, CX0112, the document cited by Patterson in this Proposed Finding clearly shows that Steck had already told Misiak that Schein was planning on pulling out of the 2014 TDA Annual Meeting. (CX0112 at 001) (January 21, 2014 email from Misiak to Rogan, referring to Steck: “He already told me they were out. Full blown!”); Misiak, Tr. 1414; CCFF ¶¶ 1131-1132).

324. Steck testified that he never communicated with Misiak about TDA attendance after sending that email. (Steck, Tr. 3828–29 (“Q. So you don’t tell Mr. Steck -- 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.”)).

Response to Proposed Finding No. 324

The Proposed Finding is misleading to the extent that it implies that there is any relevance to the number of times Misiak and Steck communicated about the plans of their companies to pull out of the 2014 TDA Annual Meeting. The weight of the evidence is clear that Misiak and Steck spoke by telephone on January 6, 2014 about an issue of common interest, the TDA Annual Meeting, and that Misiak communicated Patterson’s plans to his counterpart at Schein. The evidence shows that the call between Misiak and Steck was initiated by Misiak, and that the call lasted 14 minutes. (CX6027 at 036 (Row 298)). CCFF ¶ 1124. It is also uncontested that Misiak told Steck that Patterson was planning to pull out of the TDA Meeting, and Steck

promised Misiak that he would get back to Patterson with Schein's final decision. (Steck, Tr. 3701-3702; CX6027 at 036 (Row 298); *see also* CX2801 at 015 (Schein's Response RFA ¶23 (at some point between December 2013 and January 2014, Patterson's Dave Misiak and Schein's Dave Steck communicated; one topic that was discussed concerned the TDA trade show)); CX3113 at 007 (Answer of Patterson ¶71(c) (TDA was mentioned in January 2014 phone call between Patterson and Schein); Steck, Tr. 3702-3703); CCFF ¶¶ 1124-1126). In addition, the evidence shows that Steck later sent Misiak a follow up email, promising to provide his competitor with additional information.

The record evidence moreover shows that Patterson, Schein and Benco all saw presence at trade shows is an element of competition with other full-service distributors. (Steck, Tr. 3800-3801; CX0302 (Jackson, IHT at 102); CX8038 (Misiak, Dep. at 281-282); CCFF ¶¶ 1151-1152). *See also* CCFF ¶ 1154. Misiak recognized that failing to attend a trade show when one's competitors attended could have adverse competitive consequences. (CX8038 (Misiak, Dep. at 281-282)).

325. Misiak likewise never had a follow-up conversation with Steck. (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.")).

Response to Proposed Finding No. 325

The Proposed Finding is misleading to the extent that it implies that there is any relevance to the whether Steck and Misiak had other conversations after the series of communications about the TDA 2014 Annual Meeting that are in the record and described in Response to Proposed Finding No. 324. *See also* CCFF ¶¶ 1123-1132. The Proposed Finding is also misleading to the extent that it is not supported by the testimony cited. Misiak's testimony was not that he did not have a

follow-up conversation with Steck, but only that he did not recall such a conversation. (Misiak, Tr. 1509-1510).

326. Moreover, Steck did not make the decision as to whether Schein would attend the 2014 TDA meeting. (Cavaretta, Tr. 5617) (“Q. All right. Was Dave Steck involved in any way regarding whether or not Schein was going to attend the TDA trade show in 2014? A. No.”). Cavaretta made the decision that Schein would not attend and testified that the decision had nothing to do with what Patterson or Benco was doing. (Cavaretta, Tr. 5617) (“Q. Did your discussions or your decisions about whether or not you would go to the TDA trade show in 2014 have anything to do with what your competitors were going to do? A. No.”)).

Response to Proposed Finding No. 326

The Proposed Finding is misleading and contrary to the weight of the evidence. The Proposed Finding is misleading because the weight of the evidence shows that the communications between Steck and Patterson played a pivotal role in sharing Schein’s position and intentions with its competitor. Indeed, in December 2013, Steck suggested to Tim Sullivan by email that “we should get together with a group of other dealers and manufacturers and send them [TDA] a petition.” (CX0179 at 001; CX0310 (Steck, IHT at 201-202)). Then, in January 2014, he not only spoke with Misiak, but shared what he had learned with other Schein executives. (Steck, Tr. 3703) (Steck reported his January 6, 2014 conversation with Misiak to Sullivan and Cavaretta). Steck’s series of communications about TDA with a key competitor provides evidence of the overarching conspiracy regardless of whether Steck was tasked with making the final decision regarding attendance.

327. Cavaretta also testified that he had no discussions with Patterson or Benco about the TDA meeting or the TDA Perks Supplies program and that he “did not care one bit” about what they were doing. (Cavaretta, Tr. 5618) (“Q. Did you ever have discussions with any of your competitors about the TDA trade show or the TDA Perks Supplies program? A. No, I did not. Q. Did you have any interest in what they were doing? A. I didn’t care one bit.”)).

Response to Proposed Finding No. 327

The Proposed Finding is misleading and irrelevant to the extent that it implies that Schein did not “care one bit” about what Patterson and Benco were doing regarding attending the 2014 TDA Annual Meeting just because Cavaretta testified that he didn’t care. The evidence, to the contrary, shows that Schein executives saw the decisions and actions of their key competitors as persuasive to Schein’s decision. For example, on March 5, 2014, Foley wrote to a third party about Schein pulling out of the TDA Meeting: “The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott.” (CX2106 at 001; Foley, Tr. 4596-4598; CCFF ¶ 1138). The next day, he reiterated this point internally, writing in an email to Schein employees, “We should join pdco [Patterson] and boycott.” (CX2668 at 002). The next day, Steck responded to Foley, in the same email regarding Texas Dental Association: “Pretty sure we are going to boycott as well.” (CX2668 at 001; CCFF ¶ 1139).

328. Misiak and Steck’s communications on January 6 and January 24 had nothing to do with “buying groups.” (Steck, Tr. 3380 (“Q. From your perspective, did the call with Mr. Misiak have anything to do with the general topic of buying groups? A. No.”)).

Response to Proposed Finding No. 328

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Patterson and Schein did not communicate about their responses to TDA related to its endorsement of TDA Perks Supplies. Evidence in the record leads to the inevitable conclusion that Steck and Misiak were communicating about the TDA Perks Supply program, which is a buying group. The record evidence shows that Schein, Patterson and Benco all viewed TDA Perks Supply as a buying group. (Cohen, Tr. 576 (Cohen saw TDA Perks as a buying group); Ryan, Tr. 1104-1105); (Sullivan, Tr. 4011-4013 (Sullivan viewed TDA Perks as a buying group); (Misiak, Tr. 1403 (TDA Perks is “a program to buy supplies at a discount

through the TDA”). *See* CCFF ¶¶ 1110-1113. The record evidence is also clear: (1) the Big Three viewed TDA’s creation of a buying group as a threat, (2) high-level executives and regional managers alike engaged in inter-firm communications with their competitors about a coordinated response, and (3) none of the Big Three attended TDA’s annual meeting. (CCFF ¶¶ 1109-1155.

In addition, the evidence further shows that the communications between and among Patterson, Schein and Benco about withdrawing from the TDA Annual meeting were related to TDA’s endorsement of TDA Perks Supplies. (CX1328 at 007 (Benco’s Response to RFA ¶8) (Benco’s Ron Fernandez spoke with Schein’s Glenn Showgren by telephone about TDA Perks Supplies on October 15, 2013); *see also* CX0178 at 002-003; CX1289 at 001; CX0108 at 001 (“As for Patterson, we have briefly discussed this TDAPerks site . . . with our dealer competitors at the local San Antonio & Houston level”)).

329. Misiak and Steck’s January 6 and 24 communications do not support the claim that Patterson entered into a conspiracy with Schein and or Benco to not deal with buying groups.

Response to Proposed Finding No. 329

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Patterson and Schein did not communicate about their responses to TDA for its endorsement of TDA Perks Supplies. As shown above, the record evidence shows that Schein, Patterson and Benco all viewed TDA Perks Supply as a buying group. (Cohen, Tr. 576 (Cohen saw TDA Perks as a buying group); Ryan, Tr. 1104-1105); (Sullivan, Tr. 4011-4013 (Sullivan viewed TDA Perks as a buying group); (Misiak, Tr. 1403 (TDA Perks is “a program to buy supplies at a discount through the TDA”). (CCFF ¶¶ 1110-1113). The record evidence is also clear: (1) the Big Three viewed TDA’s creation of a buying group as a threat, (2) high-level

executives and regional managers alike engaged in inter-firm communications with their competitors about a coordinated response, and (3) none of the Big Three attended TDA's annual meeting. (CCFF ¶¶ 1109-1155).

In addition, the evidence further shows that the communications between and among Patterson, Schein and Benco about withdrawing from the TDA Annual meeting were related to TDA's endorsement of TDA Perks Supplies. CX1328 at 007 (Benco's Response to RFA ¶8) (Benco's Ron Fernandez spoke with Schein's Glenn Showgren by telephone about TDA Perks Supplies on October 15, 2013); *see also* CX0178 at 002-003; CX1289 at 001; CX0108 at 001 ("As for Patterson, we have briefly discussed this TDAPerks site . . . with our dealer competitors at the local San Antonio & Houston level . . ."). The January 6 and January 24, 2014 communications between a Schein executive and a Patterson executive -- including Steck's clear belief that he had to get back to Patterson about Schein's decision (CX0205 at 002 (January 21, 2014 email from Steck: "Guys, I have to get back to PDCO on whether or not we are attending the TDA.")) -- are clear evidence of the overarching conspiracy not to do business with buying groups, including the understanding between Patterson and Schein regarding buying groups.

330. No other communications in the record between Patterson and Schein are alleged to concern buying groups.

Response to Proposed Finding No. 330

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it fails to include additional communication regarding TDA Perks Supplies and the TDA 2014 Annual Meeting cited in Complaint Counsel's Response to Respondent Patterson's Proposed Finding No. 329. The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent that it implies that there was no conspiracy merely because all of the co-

conspirators did not have frequent communications. The weight of the evidence establishes that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and as part of that conspiracy, the Big Three rejected buying groups. (CCFF ¶¶ 661-1100, 1178-1198). The record is replete with examples of buying groups that Schein categorically rejected because it had a policy not to do business with buying groups during the conspiracy period. (CCFF ¶¶ 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). The weight of the evidence shows that Benco and Patterson entered into an agreement no later than February 2013 not to do business with buying groups. (CCFF ¶¶ 483-501, 513).

Furthermore, Benco, Patterson, and Schein’s internal documents refer to the overarching conspiracy. (CCFF ¶¶ 1183-1195). For example, on February 27, 2013, Misiak (Patterson) directed a Regional Manager to refuse a buying group, explaining that Patterson’s largest competitors, Schein and Benco, refuse buying groups as well: **“Confidential and not for discussion . . . our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me.”** (CX0093 at 001 (emphasis in original); *see also* CCFF ¶¶ 549-552, 1187). Misiak was also concerned that Schein and Benco would submit bids for buying groups and deny doing so. On February 27, 2013, Misiak wrote to Guggenheim , “I’ve coached [Regional Manager Fruehauf] on how to stay out of this [buying group] with grace. I’m concerned that Schein and Benco sneak into these co-op bids and deny it. . . .” (CX0092 at 001; *see also* CCFF ¶¶ 1187-1189). Then, on August 4, 2013, Rogan (Patterson) wrote to McFadden (Patterson): “Neal, we don’t need GPO’s in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry.” (CX0106 at 001; *see also* CCFF ¶¶ 603, 1190).

Schein's documents similarly refer to an understanding that the Big Three would refuse buying groups. For example, on March 5, 2014, Foley (Schein) wrote to Chad Thompson of Heartland, a major DSO: "The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott." (CX2106 at 001; *see also* CCFF ¶¶ 1138, 1194). Then, on October 28, 2015, Foley again confirmed this knowledge, writing to Schein employees, "Keep in mind that I and others have been in contact with Tralongo over the years. Schein, PDCO and Benco all refused to bid on their business when they entered the GPO/Buying Group world." (CX2094 at 001; *see also* CCFF ¶¶ 947, 1195).

Benco's documents similarly refer to an overarching conspiracy. (CX0023 at 001 (September 16, 2013 email from Benco's Ryan to Cohen: "CHUCK --- maybe what you should do is make sure you tell Tim [Sullivan] and Paul [Guggenheim] to hold their positions as we are.") (emphasis in original); CX1149 at 002 (February 22, 2013 internal Benco post to sales team, stating that buying groups do not catch on "because so far, all of the major dental companies have said, "NO", and that's the stance we will continue to take.") (emphasis in original); *see also* CCFF ¶¶ 1103-1104, 1191-1193).

331. There is no evidence in the record that Patterson had knowledge of any communications between Benco and Schein concerning buying groups. (Sullivan, Tr. 4292 ("Q. See, here's the first thing I wrote here [on RXD0225], "Documents introduced by the Government that show that Tim Sullivan and/or Schein communicated with Patterson about buying groups." Do you see that? A. I see it. Q. But it's blank. A. It is. Q. There were no documents introduced during the Government's case in chief, during your exam, three hours or so, not a single document showing that you or anyone at Schein ever communicated with anyone at Patterson about buying groups, right? A. Correct. Q. Then I had page 2 of my demonstrative. Can we switch to that? See, this one was all the questions and answers. I had my reading glasses there, I was ready to take notes, but they didn't ask you a single question and you didn't give a single answer suggesting that you or anyone at Schein ever communicated with anyone at Patterson about buying groups, right? A. Correct. . . . Q. And as a result, that exhibit that I prepared while I was sitting on the edge of my seat yesterday, waiting for all the evidence

to come pouring in, was blank, right? An absence of evidence, correct? A. Correct.”); *see also* RXD0225 at 1-2).

Response to Proposed Finding No. 331

The Proposed Finding is misleading, contrary to the weight of the evidence, unsupported by the documents cited, and relies on a demonstrative that is not in evidence for substantive facts contained therein. The Proposed Finding, which is about *Patterson’s* knowledge, cites only to the testimony of a Schein witness and to a demonstrative created by Patterson. The Schein witness clearly has no ability to testify about Patterson’s knowledge. On that basis alone, the Proposed Finding should be disregarded.

The Proposed Finding is also contrary to the weight of the evidence, which contains examples showing Patterson’s knowledge of communications between Benco and Schein. For example, on April 16, 2014, Cohen emailed Sullivan and Guggenheim on the same email chain about the TDA buying group. (Cohen, Tr. 577; CX1062 at 001). In that email (which went to both Patterson and Schein), Cohen wrote, “Tim & Paul. . . Thought you’d be interested in this ‘essay’ from our friends at the TDA.” (CX1062 at 001; Cohen, Tr. 577). Clearly, Guggenheim, having received an email about TDA Perks that was from Cohen and was also being sent to Sullivan, “had knowledge of a communication between Benco and Schein about buying groups.”

Finally, to the extent that the Proposed Finding relies on a demonstrative (RXD0225) as substantive support for the finding, that reliance contravenes the Court’s February 21, 2019 Order on Post-Trial Briefs at 3, which prohibits citation to demonstratives as substantive evidence. In particular, the Proposed Finding relies on purported facts shown on the demonstrative as a basis for the substantive facts, and is not permissible.

332. The absence of communications between Schein and Patterson regarding buying groups is strong evidence that Patterson did not enter into a conspiracy with its chief rival not to sell to buying groups.

Response to Proposed Finding No. 332

The Proposed Finding should be rejected because, rather than a factual finding, it seeks to establish a legal conclusion. Respondent Patterson, moreover, does not cite to any support whatsoever for Proposed Finding No. 332. Because the Proposed Finding has no evidentiary support, it should be rejected without additional analysis.

VI. Responses to Proposed Findings Regarding “Other Internal Communications Involving Patterson Are Either Irrelevant Or Been Explained By Uncontested Witness Testimony, Or Both.”

333. Aside from documents referenced in Part V, *supra*, Complaint Counsel contends that the following documents support its allegation that Patterson participated in the conspiracy alleged in the Complaint: CX0012, CX0011, CX0057, CX1278, CX3300, CX3332, CX0106, CX0093, CX0164, CX0179, CX2106, CX2220.

Response to Proposed Finding No. 333

The Proposed Finding is misleading to the extent that it implies or suggests that that these are the *only* documents that support the allegations that Patterson participated in the conspiracy alleged in the Complaint. All of the documents cited in Complaint Counsel’s Proposed Findings of Fact as supporting the allegations in the Complaint, including testimony at trial, documents identified by one of more of the Respondents in Respondents’ Exhibit List, and other documents in the record may support the allegations that Patterson participated in the conspiracy alleged in the Complaint.

CX0012

334. CX0012 is a May 18–19, 2015 email chain between Chuck Cohen and Patrick Ryan regarding Dentistry Unchained, in which Ryan wrote:

The best part about calling these guys is I already KNOW that Patterson and Schein have said NO. So I get something like this.....”We really

wanted to give you this opportunity first” or “We can really help Benco grow” It amuses me to a certain point. (CX0012 at 1).

Response to Proposed Finding No. 334

Complaint Counsel had no specific response.

335. Complaint Counsel cited this email in Paragraph 63 of the Complaint as a “contemporaneous document[]” “confirming the existence of a conscious commitment to a common scheme.” (Compl. ¶¶ 61, 63).

Response to Proposed Finding No. 335

Complaint Counsel has no specific response.

336. Complaint Counsel has asserted that the alleged conspiracy in this case ended in April 2015, when, due to Benco’s April 9, 2015 settlement agreement with the State of Texas, the alleged conspiracy became “difficult, if not impossible, to maintain.” (Kahn, Tr. 19; *see also* RXD0205 at 1 (“The Alleged Conspiracy Ended in April 2015”)).

Response to Proposed Finding No. 336

The Proposed Finding is misleading and misstates the record regarding the time of the end of the conspiracy. The record shows that Complaint Counsel’s has stated that the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015, because the conspiracy became difficult to maintain once Benco was required to log all communications with its competitors. Complaint Counsel has never taken the position that the date of Benco’s settlement created a precise “end” date. (Tr., 19) (Complaint Counsel’s Opening Statement); *see also* Complaint Counsel’s Post-Tr. Br. at 37-38). In addition, to the extent that the Proposed Finding relies on a demonstrative (RXD0205) as substantive support for the finding, that reliance contravenes the Court’s February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence.

337. CX0012 is dated more than a month after the alleged April 9, 2015 end of the conspiracy. (Kahn, Tr. 19).

Response to Proposed Finding No. 337

The Proposed Finding is misleading and misstates the record regarding the time of the end of the conspiracy. As addressed in Complaint Counsel’s Response to Proposed Finding No. 336, neither the Complaint, nor Complaint Counsel, allege that the conspiracy ended on a precise date. Rather, the record shows that Complaint Counsel’s has stated that the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015, because the conspiracy became difficult to maintain once Benco was required to log all communications with its competitors. Complaint Counsel has never taken the position that Benco’s entry into the settlement with the Texas Attorney General created a precise “end” date. (Tr., 19 (Complaint Counsel’s Opening Statement); *see also* Complaint Counsel’s Post-Tr. Br. at 37-38). The Proposed Finding is misleading to the extent that it implies Ryan’s May 2015 email does not reflect awareness of Patterson and Schein positions with regard to buying groups due to the conspiracy. In fact, the document provides an example of that awareness when Benco wrote, “The best part about calling these guys is I already KNOW that Patterson and Schein have said NO.” (CX0012 at 001). By May 2015, Benco was precluded by its settlement agreement with the Texas Attorney General from communicating with its competitors, but an internal communication describing historical knowledge did not need to be logged.

338. Dentistry Unchained *did not exist* before April 2015. (Marshall, Tr. 3273–74) (“Do you see this is a history of Dentistry Unchained? I pulled it off the web. It didn’t take me very long to find it. And if we go to the next page, we see right here, about a third of the way down, “The organization started in April 2015.” Do you see that? A. I see that.); *see also* (RXD0212 at 1) (Dentistry Unchained History Website).

Response to Proposed Finding No. 338

The Proposed Finding is irrelevant, misstates testimony, and relies on evidence not in the record. First, it relies on the testimony of Dr. Marshall, although Dr. Marshall did not make the statement on which it relies. In fact, Dr. Marshall was responding to Patterson counsel’s

question about whether he saw a referenced document. His statement was not an acknowledgement the accuracy or validity of that facts in that document. (Marshall, Tr. 3273–74 (“Do you see that? A. I see that.”) Merely seeing the document does not make the information in the document true. There is, moreover, no record evidence that the information is in fact accurate. Second, Respondent Patterson attempts to use Dr. Marshall, an expert, to provide testimony regarding a factual proposition. This is in direct contravention of this Court’s February 21, 2019 Order on Post-Trial Briefs at 3, prohibiting citation to expert witness testimony to support factual proposition that “should be established by fact witnesses or documents.” Finally, to the extent that the Proposed Finding relies on a demonstrative (RXD0212) as substantive support for the finding, that reliance contravenes the Court’s February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence.

339. Ryan testified that when he wrote, “I already KNOW that Patterson and Schein have said NO,” he meant that, because Benco is smaller than Patterson and Schein, it would only be pitched after Patterson and Schein had passed. (Ryan, Tr. 1209–10 (“Q. So what was the basis for your writing that? A. Just from my experience, we usually got approached after, after Schein and Patterson.”); (CX8037) (Ryan, Dep. at 315 (“[I]f they’re coming to us, the most likely scenario is they’ve already been to Schein and Patterson.”); (CX0304) (Ryan, IHT at 170–71 (“Q: How did you know that Patterson and Schein had said no to this buying group? A. I didn’t. It’s actually kind of a joke. It -- in our -- in my experience, typically as the third-largest player, we get approached third. And it’s usually -- as I go on to say there, it usually starts with a -- with a -- you know, “we can really help Benco grow” kind of thing. Q. And why do you think it is that you get approached third? A. Well, I think our two competitors are larger, and I think they would get the call first. Q. Is the -- I guess I’m trying to read between the lines a little bit, but are you saying that this buying group is only coming to you because Schein and Patterson had turned them down? A. That’s the joke, yes.”)).

Response to Proposed Finding No. 339

The Proposed Finding is misleading, contrary to the weight of the evidence and not credible in light of contrary testimony by the same witness. It is misleading and contrary to the weight of the evidence to the extent that it suggests that Benco was only approached by buying groups after

Schein or Patterson had rejected those groups. In fact, the record shows that buying groups approached all three at the same time. For example, in 2012, Smile Source approached Benco directly – not because it had been turned down by Schein, but because wanted to “explore a relationship” with Benco. (CX0018 at 002). Not only does this document directly contradict Ryan’s testimony, but Ryan admitted at trial that he was the recipient of this email (Ryan, Tr. 1064). There are, moreover, other examples of buying groups reaching out to Benco before learning that the other two “had passed.” The record evidence shows that the New Mexico Dental Cooperative approached Patterson, Schein and Benco. (Mason, Tr. 2335 (NMDC approached “Patterson, Henry Schein and Benco”), 2336 (Dr. Montoya approached Benco); 2361 (“we were declined by the three distributors that we approached”)). The record also shows that, when the Kois Buyers Groups was seeking a distributor, it approached Benco before Schein had communicated its decision. In fact, Dr. Kois approached Chuck Cohen directly in October 2014, the month before Schein decided not to do business with Kois. (RX1039 at 001-002 (October 21, 2014 email from Dr. Kois to Cohen, “I have been approached by a company to organize our members for group purchase opportunities . . . I wanted you to talk to him to see if their [sic] would be an opportunity to work with your company.”); CX4310 at 001 (November 3, 2014 email in which Schein declines to work with Kois); CCF ¶ 929). This directly contradicts Ryan’s claim that groups only came to Benco after others declined. Indeed, Ryan’s trial testimony supports a finding that “I already KNOW that Patterson and Schein have said NO,” was based what he knew from his competitors. At trial, when Ryan was asked about what Benco answered to Dentistry Unchained, he replied “The same as everybody else.” (Ryan, Tr. 1209). This also contradicts his testimony he just thought it “likely” that Benco was approached after

the others. Because the Proposed Finding is misleading and contradicted by the evidence, it should be disregarded.

340. No witness testified contrary to Patrick Ryan regarding CX0012.

Response to Proposed Finding No. 340

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that the lack of contrary testimony on this specific point means that there is no contrary evidence in the record. Of greatest importance, Patrick Ryan himself provided testimony contrary to the reason he provided for his statement about CX0012. *See* Complaint Counsel's Response to Proposed Finding No. 339. CX0012, a contemporaneous document, provides evidence that Benco knew that its competitors would not be bidding for the Dentistry Unchained buying group. (CX0012 at 001: "The best part about calling these guys is I already KNOW that Patterson and Schein have said NO.")

341. Ryan's testimony about how "it usually starts with a . . . 'we can really help Benco grow' kind of thing," (CX0304 (Ryan, IHT at 170–71)), is consistent with Ryan's statement in the email that he expected to hear something like "We really wanted to give you this opportunity *first*." (Ryan, Tr. 1210 ("I would hear some variation of, you know, we wanted to give you guys this opportunity first and we can really help Benco grow and stuff like that, and in my experience, it's -- that's usually a sign that others have been talked to first.")).

Response to Proposed Finding No. 341

The Proposed Finding is incomprehensible and therefore irrelevant. It is not clear how two incomplete statements are consistent, or even how to evaluate whether those statements are consistent. To the extent that this Proposed Finding is seeking to bolster Proposed Finding Nos. 339 and 340. Ryan's conflicting testimony demonstrates that his statements are not credible. For all of the reasons noted in Complaint Counsel's Response to Patterson Proposed Finding Nos. 339 and 340, this Proposed Finding should be disregarded.

342. When he wrote the email, Ryan had “no idea” what Patterson and Schein had done with respect to Dentistry Unchained. (Ryan, Tr. 1255–56 (“Q. And then you go on to say, “Neither Schein nor Patterson do either.” Do you see that? A. Yes. Q. You were just speculating, weren’t you, sir? A. Yes.”)).

Response to Proposed Finding No. 342

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Benco (and Ryan specifically) did not know about the agreement between Benco, Patterson and Schein not to do business with *any* buying group, or that Ryan had not urged Cohen to enforce the agreement. The weight of the evidence demonstrates that Ryan knew about the agreement and sought to enforce it. For example, in July 2012, when Ryan learned in an email from Dr. Goldsmith that Schein had been working with Smile Source, Ryan immediately forwarded Dr. Goldsmith’s email to his boss, Cohen, writing, “Better tell your buddy Tim to knock this shit off.” (CX0018 at 001; Ryan, Tr. 1065). Cohen understood that Ryan was telling him to tell Sullivan to stop recognizing Smile Source as a customer (Cohen, Tr. 518-519) – that is, to enforce the agreement. *See* CCFF ¶¶ 982-986. Similarly, in October, 2013, after Ryan spoke with Schein’s Randy Foley, Ryan wrote to his boss, Cohen, “[Smile Source is] [v]ery familiar. Talked to them three times. Nothing is different. Randy at Schein and I talked specifically about them. Buh-bye.” (CX0019 at 001; Ryan, Tr. 1101). Indeed, Ryan’s trial testimony contradicts the Proposed Finding that he “had no idea” what Patterson and Schein had done with respect to Dentistry Unchained. When asked what Benco had done, his answer was, simply, “The same as everybody else.” (Ryan, Tr. 1209). Finally, to the extent that the Proposed Finding implies that there was no agreement not to do business with buying groups because Benco did not communicate with Schein and Patterson about each individual buying group, it is misleading.

343. There is no evidence in the record that Benco and Patterson communicated about Dentistry Unchained.

Response to Proposed Finding No. 343

The Proposed Finding is misleading and irrelevant to the extent that it suggests there was no agreement that Schein, Patterson and Benco would not work with buying groups because Benco did not communicate with Patterson about each individual buying group that sought their business. The record shows that Patterson and Benco has a clear understanding that they would not do business with buying groups after Cohen and Guggenheim's February 2013 communications about NMDC (CCFF ¶¶ 479-501) and their June 2013 communications about ADC which confirmed that both Patterson and Benco understood that the other company would not work with buying groups. (CCFF ¶¶ 564-586). Ryan's statement that "I already KNOW that Patterson and Schein have said NO" confirms that Ryan continued to believe, in May 2015, that Patterson and Schein were complying with the agreement. *See* Complaint Counsel's Response to Patterson's Proposed Finding Nos. 339-340 for reasons why Ryan's explanations for this statement are contrary to the evidence and not credible.

344. There is no evidence in the record that Patterson had interacted with Dentistry Unchained before Ryan's May 19, 2015 email (CX0012).

Response to Proposed Finding No. 344

The Proposed Finding is misleading and irrelevant to the extent that it suggests there was no agreement that Schein, Patterson and Benco would not work with buying groups because Benco did not communicate with Patterson about each individual buying group that sought their business. The record shows that Patterson and Benco has a clear understanding that they would not do business with buying groups after Cohen and Guggenheim's February 2013 communications about NMDC (CCFF ¶¶ 479-501) and their June 2013 communications about

ADC which confirmed that both Patterson and Benco understood that the other company would not work with buying groups. (CCFF ¶¶ 564-586). Ryan’s statement that “I already KNOW that Patterson and Schein have said NO” confirms that Ryan continued to believe, in May 2015, that Patterson and Schein were complying with the agreement.

345. There is no evidence in the record that Patterson had declined to work with Dentistry Unchained before Ryan’s May 19, 2015 email (CX0012).

Response to Proposed Finding No. 345

The Proposed Finding is misleading and irrelevant to the extent that it suggests there was no agreement that Schein, Patterson and Benco would not work with buying groups because Benco did not communicate with Patterson about each individual buying group that sought their business. The record shows that Patterson and Benco has a clear understanding that they would not do business with buying groups after Cohen and Guggenheim’s February 2013 communications about NMDC (CCFF ¶¶ 479-501) and their June 2013 communications about ADC which confirmed that both Patterson and Benco understood that the other company would not work with buying groups. (CCFF ¶¶ 564-586). Ryan’s statement about Dentistry Unchained that “I already KNOW that Patterson and Schein have said NO” is evidence that, to Ryan’s knowledge, Patterson was not doing business with Dentistry Unchained.

346. Dentistry Unchained first approached Patterson at the end of July 2015. (CX3006 at 1).

Response to Proposed Finding No. 346

Complaint Counsel has no specific response.

347. The first record evidence of Patterson interacting with Dentistry Unchained is from Monday or Tuesday, July 27 or 28, 2015—more than two months after Ryan’s email.

(CX3006 at 1 (“I had a 40 minute phone call with . . . Dentistry Unchained *on Monday, July 28.*”)).⁶

Response to Proposed Finding No. 347

The Proposed Finding is misleading and irrelevant to the extent that it suggests there was no agreement that Schein, Patterson and Benco would not work with buying groups because Benco did not communicate with Patterson about each individual buying group that sought their business. The record shows that Patterson and Benco has a clear understanding that they would not do business with buying groups after the February 2013 communications about NMDC (CCFF ¶¶ 479-501) and the June 2013 communications about ADC which confirmed that both Patterson and Benco understood that the other company would not work with buying groups. (CCFF ¶¶ 564-586).

The Proposed Finding is also misleading to the extent that it implies Patterson’s decision not to do business with Dentistry Unchained was not affected by its knowledge that its competitors were rejecting buying groups due to the agreement. In fact, the record shows that Dentistry Unchained offered to convert 80% of its 226 members to Patterson (CX3006 at 001-002), and that Patterson’s territory manager saw working with the group as a valuable opportunity. Despite this, he rejected Dentistry Unchained because it was a buying group and he understood the decision to reject buying groups came from the “highest levels” of Patterson. (CX3006 at 002) (Email from Western Special Markets Territory Manager to McFadden: “I was honest with them that we have not elected to participate in these types of programs in the past. I was very clear that . . . any decision would be made at the highest levels of our company which could take some time.”)).

⁶ July 28, 2015, was a Tuesday.

348. Late-July 2015 is more than two months after the alleged April 9, 2015 end of the alleged conspiracy. (Kahn, Tr. 19).

Response to Proposed Finding No. 348

The Proposed Finding is misleading and misstates the record regarding the time of the end of the conspiracy. The record shows that Complaint Counsel has stated that the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015, because the conspiracy became difficult to maintain once Benco was required to log all communications with its competitors. Complaint Counsel has never taken the position that Benco's entry into the settlement with the Texas Attorney General created a precise "end" date. (Tr., 19 (Complaint Counsel's Opening Statement); *see also* Complaint Counsel's Post-Tr. Br. at 37-38).

The Proposed Finding is also misleading to the extent that it implies Patterson's decision not to do business with Dentistry Unchained was not affected by its knowledge that its competitors were rejecting buying groups due to the agreement. Indeed, CX3006, the document that references the July 2015 meeting with Dentistry Unchained expressly states Patterson's policy with respect to dealing with GPOs was from "the highest levels" and undercuts any suggestion that Patterson did a case by case analysis of buying groups. (CX3006 at 002) (email from Patterson Western Special Markets Territory Manager to McFadden: "I was honest with them that we have not elected to participate in these types of programs in the past. I was very clear that . . . any decision would be made at the highest levels of our company which could take some time."))

349. Because Patterson's first communications with Dentistry Unchained did not occur until more than two months after the alleged conspiracy ended, and because Dentistry Unchained did not exist during the alleged conspiracy period, there is no evidence that Patterson may have sold supplies or equipment to the Dentistry Unchained but for the alleged conspiracy.

Response to Proposed Finding No. 349

The Proposed Finding is misleading and misstates the record regarding the time of the end of the conspiracy. The record shows that Complaint Counsel has stated that the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015, because the conspiracy became difficult to maintain once Benco was required to log all communications with its competitors. Complaint Counsel has never taken the position that Benco's entry into the settlement with the Texas Attorney General created a precise "end" date. (Tr., 19 (Complaint Counsel's Opening Statement); *see also* Complaint Counsel's Post-Tr. Br. at 37-38). The Proposed Finding is also misleading to the extent that it implies Patterson's decision not to do business with Dentistry Unchained was not affected by its knowledge that its competitors were rejecting buying groups due to the agreement. Indeed, CX3006, the document that references the July 2015 meeting with Dentistry Unchained expressly states Patterson's policy with respect to dealing with GPOs was from "the highest levels" and undercuts any suggestion that Patterson did a case by case analysis of buying groups. (CX3006 at 002) (email from Western Special Markets Territory Manager to McFadden: "I was honest with them that we have not elected to participate in these types of programs in the past. I was very clear that . . . any decision would be made at the highest levels of our company which could take some time."))

Finally, the Proposed Finding is misleading to the extent that it implies that Complaint Counsel must show that, but for the conspiracy, Patterson would have done business with any particular buying group. Whether Patterson may have sold supplies to a particular buying group but for the alleged conspiracy is irrelevant to the factual question of whether Patterson engaged in the conspiracy. Indeed, but for the conspiracy Patterson might have competed for a buying group, but still not done business with that entity because one of its co-conspirators or another

distributor may have won the business. This portion of the Proposed Finding is therefore misleading and irrelevant.

350. Patterson declined to work with Dentistry Unchained after its late-July 2015 approach, writing in an internal email that a “GPO arrangement” can be a “slippery slope.” (CX3006 at 1).

Response to Proposed Finding No. 350

The Proposed Finding is misleading and not supported by the evidence. The Proposed Finding is misleading to the extent that it implies that the reason that Patterson declined to work with Dentistry Unchained was that a “GPO arrangement” can be a “slippery slope.” On the contrary, the document does not state that the referenced language is the reason for the decision. For that reason, citation to that language is not supported by the evidence and is misleading.

The Proposed Finding is also misleading to the extent that it implies Patterson’s decision not to do business with Dentistry Unchained was not affected by its knowledge that its competitors were rejecting buying groups due to the agreement. In fact, the record shows that Dentistry Unchained offered to convert 80% of its 226 members to Patterson (CX3006 at 001-002), and that the territory manager saw working with the group as a valuable opportunity. Despite this, he rejected Dentistry Unchained because it was a buying group and he understood the decision to reject buying groups came from the “highest levels” of Patterson. (CX3006 at 002) (email from Western Special Markets Territory Manager: “I was honest with them that we have not elected to participate in these types of programs in the past. I was very clear that . . . any decision would be made at the highest levels of our company which could take some time.”). The references to Patterson’s policy with respect to dealing with GPOs coming from “the highest levels” undercuts any suggestion that Patterson did a case by case analysis of buying groups.

The record also shows that the Territory Manager again told Dentistry Unchained in January 2016 that Patterson as “not going to participate in a GPO type program at this point (CX0137 at 001), but by early March 2016, once the conspiracy had completely collapsed, it has changed its tune. On March 2, 2016, McFadden wrote about working with Dentistry Unchained, “. . . we must start stretching - - This seems to be the only way for now to insert ourselves into the mix with these GPO’s or quasi . . . all in all I say go for it.” (CX3018 at 001).

351. Then, on January 26, 2016, a Patterson territory manager wrote in an internal, Patterson email that he had met with a Dentistry Unchained representative, and that he had “again explained to her very nicely that *we are not going to participate in a GPO-type program at this point.*” (CX0137 at 1 (emphasis added)).

Response to Proposed Finding No. 351

The Proposed Finding is misleading and incomplete. As explained in response to Patterson Proposed Finding No. 350, the complete set of emails from 2016 regarding Dentistry Unchained tells a different story than what is suggested by this Proposed Finding. the record shows that, in July 2015, Dentistry Unchained offered to convert 80% of its 226 members to Patterson (CX3006 at 001-002). The territory manager saw working with the group as a valuable opportunity. Despite this, he rejected Dentistry Unchained because it was a buying group and he understood the decision to reject buying groups came from the “highest levels” of Patterson. (CX3006 at 002) (email from Western Special Markets Territory Manager: “I was honest with them that we have not elected to participate in these types of programs in the past. I was very clear that . . . any decision would be made at the highest levels of our company which could take some time.”). The references to Patterson’s policy with respect to dealing with GPOs coming from “the highest levels” undercuts any suggestion that Patterson did a case by case analysis of buying groups. Then, in January 2016, the Territory Manager again told Dentistry Unchained in January 2016 that Patterson as “not going to participate in a GPO type program at this point

(CX0137 at 001), as noted in the Proposed Finding. However, by early March 2016, once the conspiracy had completely collapsed, McFadden gave the same territory manager very different instructions. On March 2, 2016, McFadden wrote in one email, “All this looks fine . . . let’s try this out – we need to figure out how to work with these types of organizations.” (CX3018 at 001). Later in the email chain, McFadden is clearer about working with Dentistry Unchained, writing, “. . . we must start stretching - - This seems to be the only way for now to insert ourselves into the mix with these GPO’s or quasi . . . all in all I say go for it.” (CX3018 at 001).

352. Patterson’s decision not to work with Dentistry Unchained is consistent with its case by case assessment of buying groups (*see supra* ¶ 130), and with its historic skepticism concerning the value of dealing with buying groups (*see supra* ¶ 118).

Response to Proposed Finding No. 352

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies Patterson’s decision not to do business with Dentistry Unchained was not affected by its knowledge that its competitors were rejecting buying groups due to the agreement. In fact, the record shows that Dentistry Unchained offered to convert 80% of its 226 members to Patterson (CX3006 at 001-002), and that the Patterson territory manager who spoke with Dentistry Unchained saw working with the group as a valuable opportunity. Despite this, he rejected Dentistry Unchained because it was a buying group and he understood the decision to reject buying groups came from the “highest levels” of Patterson. (CX3006 at 002) (email from Western Special Markets Territory Manager: “I was honest with them that we have not elected to participate in these types of programs in the past. I was very clear that . . . any decision would be made at the highest levels of our company which could take some time.”). The references to Patterson’s policy that it would not do business with GPOs coming from “the highest levels” undercuts any suggestion that Patterson allowed its sales team to do a case by case analysis of

buying groups. Finally, the Proposed Finding is misleading to the extent that it implies Patterson's decision not to do business with Dentistry Unchained was not affected by its knowledge that its competitors were rejecting buying groups due to the agreement.

353. CX0012 does not support Patterson's participation in the alleged conspiracy.

Response to Proposed Finding No. 353

The Proposed Finding is contains no evidentiary citations, and is misleading and contrary to the weight of the evidence described in Complaint Counsel's Responses to Patterson's Proposed Findings Nos. 334-353. CX0012 includes an unambiguous statement by a key Benco executive about the knowledge he had of the behavior of his competitors. Ryan wrote, "I already KNOW that Patterson and Schein have said NO" (CX0012 at 001). His efforts to put a later spin on his written statements are not credible in light of his own contrary testimony. The overwhelming record evidence establishes that buying groups came to Benco as they solicited other distributors, and undercuts his testimony that his statement meant something different than its plain meaning. The Proposed Finding is thus misleading and contrary to the weight of the evidence to the extent that it suggests that Benco was only approached by buying groups after Schein or Patterson had rejected those groups. In fact, buying groups approached all three at the same time. For example, in 2012, Smile Source approached Benco directly – not because it had been turned down by Schein, but because wanted to "explore a relationship" with Benco. (CX0018 at 002). The New Mexico Dental Cooperative approached Patterson, Schein and Benco. (Mason, Tr. 2335 (NMDC approached "Patterson, Henry Schein and Benco"), 2336 (Dr. Montoya approached Benco); 2361 ("we were declined by the three distributors that we approached")). Kois Buyers Groups also approached Benco when it was still considering other distributors. (RX1039 at 001-002 (October 21, 2014 email from Dr. Kois to Cohen, "I have been approached

by a company to organize our members for group purchase opportunities . . . I wanted you to talk to him to see if their [sic] would be an opportunity to work with your company.”); CX4310 at 001; CCFF ¶ 929). Indeed, Ryan’s trial testimony supports further supports a plain and obvious reading of the document. At trial, when Ryan was asked how Benco’s answered Dentistry Unchained, he replied “The same as everybody else” (Ryan, Tr. 1209) – indicative of the fact that he actually knew what his competitors had done. Ryan’s statements in CX0012, read in conjunction with the other evidence, are strongly supportive finding there was a conspiracy. The Proposed Finding should be disregarded.

CX0011

354. CX0011 is an email chain that includes a July 13, 2015 email from Patrick Ryan to other Benco employees in which he responded to an email about a nascent “buying group” by stating, in relevant part

We don’t allow LG pricing unless there is common ownership. Neither Schein nor Patterson do either. (CX0011 at 3).

Response to Proposed Finding No. 354

Complaint Counsel has no specific response.

355. Complaint Counsel cited this email in Paragraph 64 of the Complaint as a “contemporaneous document[]” “confirming the existence of a conscious commitment to a common scheme.” (Compl. ¶¶ 61, 64).

Response to Proposed Finding No. 355

Complaint Counsel has no specific response.

356. CX0011 is dated more than three months after the alleged conspiracy ended on April 9, 2015. (Kahn, Tr. 19).

Response to Proposed Finding No. 356

The Proposed Finding is misleading and misstates the record regarding the time of the end of the conspiracy. The record shows that Complaint Counsel’s has stated that the conspiracy began to

fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015, because the conspiracy became difficult to maintain once Benco was required to log all communications with its competitors. Complaint Counsel has never taken the position that Benco's entry into the settlement with the Texas Attorney General created a precise "end" date. (Tr., 19 (Complaint Counsel's Opening Statement); *see also* Complaint Counsel's Post-Tr. Br. at 37-38). The Proposed Finding is misleading to the extent that it implies Ryan's July 2015 email does not reflect Benco's knowledge and awareness of Patterson and Schein positions with regard to buying groups due to the conspiracy. In fact, the document cited provides an example of that awareness when Benco wrote, "We don't allow [Large Group] pricing unless there is common ownership. Neither Schein nor Patterson do either." (CX0011 at 003). By July 2015, Benco was precluded by its settlement agreement with the Texas Attorney General from communicating with its competitors, but an internal communication describing historical knowledge did not need to be logged.

357. Ryan testified that he was speculating based on his market experience when he wrote "Neither Schein nor Patterson do either," and he had "no idea" what their policies were. (Ryan, Tr. 1127-28 ("Q. And there, you're telling the sales rep that Schein and Patterson don't allow group pricing for buying groups either? A. In my experience. That's been my -- that was my experience at the time."); Ryan, Tr. 1114 ("[T]heir positions' refers to Tim Sullivan's position and Paul Guggenheim's position? A. I had no knowledge of what their actual positions were. Q. What did you mean when you wrote 'their positions'? A. Only that what I could see from the marketplace that it didn't appear that anyone was working with buying groups."); (CX8037 (Ryan, Dep. at 325-26 ("Q. And then you said: 'Neither Schein nor Patterson do either.' Do you see that? A. Yes. Q. What's that referring to? A. It -- it refers to what I saw sometimes in the marketplace, that Schein and Patterson turned GPOs away, like Synergy.")); CX0304 (Ryan, Dep. at 165-66 ("Q. Okay. And how did you know that Schein and Patterson also do not allow LG pricing unless there is common ownership? A. I don't know that as a fact. I think what I was referring to there is just what we had seen in the marketplace. Q. And what -- what were you seeing in the marketplace? A. That I had -- I hadn't personally seen a lot of activity in the GPO market with Schein and Patterson."))).

Response to Proposed Finding No. 357

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Benco (and Ryan specifically) did not know about the agreement between Benco, Patterson and Schein not to do business with *any* buying group. The weight of the evidence is that Ryan knew about the agreement and sought to enforce it. For example, in July 2012, when Ryan learned in an email from Dr. Goldsmith that Schein had been working with Smile Source, Ryan immediately forwarded Dr. Goldsmith's email to his boss, Cohen, writing, "Better tell your buddy Tim to knock this shit off." (CX0018 at 001; Ryan, Tr. 1065). Cohen understood that Ryan was telling him to tell Sullivan to stop recognizing Smile Source as a customer (Cohen, Tr. 518-519) – that is, to enforce the agreement. *See* CCFF ¶¶ 980-986. Similarly, in October, 2013, after Ryan spoke with Schein's Randy Foley, Ryan wrote to his boss, Cohen, "[Smile Source is] [v]ery familiar. Talked to them three times. Nothing is different. Randy at Schein and I talked specifically about them. Buh-bye." (CX0019 at 001; Ryan, Tr. 1101; CCFF ¶¶ 1013-1014). Indeed, Ryan's trial testimony contradicts the Proposed Finding that he "had no idea" what Patterson and Schein had done with respect to Dentistry Unchained. When asked what Benco had done, his answer was, simply, "The same as everybody else." (Ryan, Tr. 1209) – indicative of his knowledge of what others had done. Based on Ryan's statements and these documents, Ryan's testimony that he did not know Schein and Patterson's policies is not credible. Finally, to the extent that the Proposed Finding implies that there was no agreement about not doing business with buying groups because Benco did not communicate with Schein and Patterson about each individual buying group, it is misleading.

358. No witness testified contrary to Patrick Ryan about CX0011.

Response to Proposed Finding No. 358

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that the lack of contrary testimony on this specific point means that there is no contrary evidence in the record. In fact, Ryan's own documents provide contrary evidence. *See, e.g.*, CX0012 at 001 ("The best part about calling these guys is I already KNOW that Patterson and Schein have said NO.") As explained above, Ryan's attempts to minimize what he stated in CX0012 is unavailing. In CX0011, Ryan makes essentially the same statement as he did in CX0012, which is also in the record. *See also* Complaint Counsel's Response to Proposed Finding No. 339. In light of the fact that Ryan's own testimony contradicted his testimony about this point, his testimony is not credible. The evidence also shows that Ryan personally reached out to Schein's Randy Foley to discuss buying groups. (Ryan, Tr. 1099-1100; CX6027 at 036 (Row 290); Foley, Tr. 4576-4578) (18 minute call between Benco's Ryan and Schein's Foley on October 1, 2013); CCFF ¶¶ 1009-1011) The evidence further shows that, in September 2013, Ryan asked Cohen to contact Schein and Patterson to shore up their anti-buying group agreement. (CCFF ¶¶ 1102-1103, 1105-1106). When Ryan learned that a regional distributor, Burkhart might be selling to buying groups, he wrote to Cohen, "CHUCK --- maybe what you should do is make sure you tell Tim [Sullivan] and Paul [Guggenheim] to hold their positions as we are[.]" (CX0023 at 001 (emphasis in original); Ryan, Tr. 1114-1115; Cohen, Tr. 581; CCFF ¶¶ 1103-1105). In light of this substantial testimony, Ryan's story about not knowing Patterson and Schein's policies with respect to buying groups lacks credibility. It is misleading to suggest that the lack of contrary testimony about a single document has any relevance or significance.

359. The only example Ryan knew of Patterson's practices was Patterson turning down Synergy Dental Partners in 2011. (CX8037) (Ryan, Dep. at 326 ("Q. Any other buying groups that you're aware of Schein and Patterson turning away? A. Not that I'm aware of. I know Synergy, 'cause they told me.")); (CX1133 at 1 (Ryan Aug. 18, 2011 email regarding Synergy, stating "BTW, this group approached every full service dealer, including us . . . and were turned down"))).

Response to Proposed Finding No. 359

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies Ryan’s testimony about Patterson’s specific practices contravenes the substantial evidence in the record. It is also misleading the extent that it suggests that the overarching agreement between Patterson, Benco and Schein was specific to particular buying group entities; as a broad agreement applying to all buying groups, Benco would have known that its competitors rejected buying groups generally, even if they did not discuss particular entities. *See, e.g.*, CX0090 at 001 (February 8, 2013 Cohen email to Guggenheim: “Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups (though we do work with corporate accounts) and our team understands that policy.”; Guggenheim’s reply: “We feel the same way about these.”) Moreover, documents authored by Ryan flatly contradict his statement that he knew of only one example of Patterson turning down buying groups. For example, in CX0012 at 001, Ryan wrote about turning down Dentistry Unchained, “The best part about calling these guys is I already KNOW that Patterson and Schein have said NO.” As explained above, Ryan’s attempts to minimize what he stated in CX0012 is unavailing. CX0012, a contemporaneous document, provides evidence that Benco knew that Patterson had turned down Dentistry Unchained. Similarly, in September 2013, Ryan asked Cohen to contact Schein and Patterson to shore up their anti-buying group agreement. CCFF ¶ 1102. When Ryan learned that a regional distributor, Burkhart might be selling to buying groups, he wrote to Cohen, “CHUCK --- maybe what you should do is make sure you tell Tim [Sullivan] and Paul [Guggenheim] to hold their positions as we are[.]” (CX0023 at 001 (emphasis in original); Ryan, Tr. 1114-1115; Cohen, Tr. 581; CCFF ¶ 1102-1105). This further demonstrates that Ryan understood the agreement to be a broad no buying group agreement, not a case-by-case

approach. In light of this substantial contrary evidence, Ryan’s statement that he was not “aware of” any examples of Patterson turning down a buying group other than Synergy is contrary to the weight of the evidence and should be disregarded. .

360. Patterson is not alleged to have joined the alleged conspiracy until early 2013. (RX2958 at 10 (Complaint Counsel’s Supplemental Response to Patterson’s Interrogatory Four) (“Patterson joined the agreement in February 2013.”)).

Response to Proposed Finding No. 360

Complaint Counsel has not specific response.

361. Thus, when Ryan wrote in July 2015 in CX0011, more than three months *after* the alleged conspiracy ceased, he was writing of Patterson’s practices from before August 18, 2011 (Kahn, Tr. 19), more than a year *before* Patterson allegedly joined the alleged Benco-Schein conspiracy (RX2958 at 10 (Complaint Counsel’s Supplemental Response to Patterson’s Interrogatory Four) (“Patterson joined the agreement in February 2013.”)).

Response to Proposed Finding No. 361

The Proposed Finding is misleading and contrary to the evidence in the record on two accounts.

First, it assumes that Ryan’s testimony about Synergy is an accurate statement of the only example of Patterson turning down a buying group. As demonstrated above in Complaint Counsel’s Response to Respondent Patterson’s Proposed Finding No. 359, Ryan’s testimony is contradicted by substantial record evidence – including documents that he wrote and other testimony he provided. CX0011 is clear on its face, and Ryan’s non-credible testimony should be disregarded. As such, his testimony about Synergy is irrelevant. The Proposed Finding is also misleading and misstates the record regarding the time of the end of the conspiracy. The record shows that Complaint Counsel’s has stated that the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015, because the conspiracy became difficult to maintain once Benco was required to log all communications with its competitors. Complaint Counsel has never taken the position that Benco’s entry into the

settlement with the Texas Attorney General created a precise “end” date. (Tr., 19 (Complaint Counsel’s Opening Statement); *see also* Complaint Counsel’s Post-Tr. Br. at 37-38). As such, Ryan’s statements in CX0011 at 003 (“We don’t allow LG pricing unless there is common ownership. Neither Schein nor Patterson do either.”) is clear evidence of Ryan’s knowledge of the no buying group policies of Benco competitors.

362. Complaint Counsel did not take testimony from any Synergy employee in this case.

Response to Proposed Finding No. 362

The Proposed Finding is misleading to the extent that it implies that testimony from Synergy about the actions of the Respondents with respect to Synergy is necessary to establish the overarching conspiracy among Patterson, Schein and Benco. The weight of the evidence establishes that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, the Big Three rejected buying groups. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198). To the extent that there are documents and testimony that reference Synergy Dental Partners, those documents and that testimony are in the record. *See, e.g.*, CX1133 at 001 (August 2011 email from Ryan to Chuck Cohen and others: “BTW, this group approached every full-service dealer, including us...and were turned down”).

363. CX0011 does not support Patterson’s participation in the alleged conspiracy.

Response to Proposed Finding No. 363

The Proposed Finding is misleading and contrary to the weight of the evidence. In addition, there is no evidence cited in support of the Proposed Finding. CX0011 is one Benco document among many that confirm Ryan’s knowledge of his competitors’ actions with regard to buying

groups. Consequently, it supports a finding of conspiracy. As addressed in Complaint Counsel's Response to Respondent Patterson's Proposed Findings Nos. 357-359, Ryan's explanation for his statements in CX0011 are contrary to substantial evidence in the record, including CX0023, a document he wrote to his boss, Chuck Cohen, making it clear that (1) Ryan knew in fall of 2013 that Patterson and Schein had no buying group policies, and (2) he believed that Cohen should contact Patterson and Schein to make sure they enforced those policies. CCF ¶¶ 1101-1105. Ryan's after-the-fact explanations for his statements in CX0011 that conflict with the clear statements in that document should be disregarded because they are unsupported and contrary to the weight of the evidence.

364. Rather, CX0011 is evidence *against* the existence of a conspiracy, in that it shows Ryan was unaware of the alleged conspiracy's end in April 2015. (Kahn, Tr. 19; *see also* RXD0205 at 1 ("The Alleged Conspiracy Ended in April 2015")).

Response to Proposed Finding No. 364

The Proposed Finding is misleading and misstates the record regarding the time of the end of the conspiracy. The record shows that Complaint Counsel's has stated that the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015, because the conspiracy became difficult to maintain once Benco was required to log all communications with its competitors. Complaint Counsel has never taken the position that Benco's entry into the settlement with the Texas Attorney General created a precise "end" date. (Tr., 19 (Complaint Counsel's Opening Statement); *see also* Complaint Counsel's Post-Tr. Br. at 37-38). It is thus not surprising that Ryan did not know of a precise "end" date because there was no such date. His continuing statements in CX0011 ("We don't allow LG pricing unless there is common ownership. *Neither Schein nor Patterson do either.*") (CX0011 at 003)(emphasis added) and CX0012 ("I already KNOW that Patterson and Schein have said NO.") (CX0012 at 001) (emphasis in the original) provides strong evidence that Ryan knew of

the agreement and believed Benco's competitors were still complying with the agreement, even though the settlement with Texas precluded Benco from communicating with its competitors. Finally, to the extent that the Proposed Finding relies on a demonstrative (RXD0205) as substantive support for the finding, that reliance contravenes the Court's February 21, 2019 Order on Post-Trial Briefs at 3, which prohibits citation to demonstratives as substantive evidence.

CX0057

365. CX0057 is a collection of text messages taken from Chuck Cohen's cell phone.

Response to Proposed Finding No. 365

Complaint Counsel has no specific response.

366. The only messages from CX0057 that Complaint Counsel cited at trial as relating to Patterson are a pair of messages between Benco's Don Taylor and Benco's Chuck Cohen. (Kahn, Tr. 46).

Response to Proposed Finding No. 366

The Proposed Finding is misleading to the extent that it implies that evidence in the record that is not specifically referenced at trial is not in the record. This is incorrect. All communications contained in CX0057 are in the trial record.

367. Taylor wrote Cohen the following.

[REDACTED]

Cohen responded to Taylor with the following.

[REDACTED]

Response to Proposed Finding No. 367

Complaint Counsel has no specific response.

368. There is no evidence in the record that any Patterson employee participated in or viewed this exchange.

Response to Proposed Finding No. 368

The Proposed Finding is misleading to the extent that it implies that an internal Benco communication from Chuck Cohen that references a communication with Paul Guggenheim about buying groups is not relevant to the conspiracy at issue in this matter. The communication between Taylor and Cohen in which Cohen admits that he “sent” Guggenheim a “note about [the buying club in Albuquerque]” (CX0057 at 006) corroborates other evidence about the inter-firm communications between Patterson and Benco. (CCFF ¶ 513). Cohen’s statement to Taylor that he “[d]idn’t want to call because it might be construed as price fixing,” also demonstrates that Cohen was aware of the potential antitrust liability his communications with Guggenheim would raise. (Cohen, Tr. 539-540; CCFF ¶¶ 513-517). Other than that, Complaint Counsel has no specific response to the statement that there is no evidence in the record that any Patterson employee participated in or viewed this exchange.

369. Cohen testified that his statement, “Don’t want to call because it might be construed as price fixing,” meant that he had been concerned that a phone call with a competitor regarding a customer, with no written record of what was said, could have been interpreted inappropriately. (Cohen, Tr. 539–540 (“I’m concerned that a call might be taken out of context or might be interpreted inappropriately, and I’m always concerned about price-fixing.”); (CX0301 (Cohen, IHT at 255–56 (“A. I think I mean what it says. I don’t want to call because someone might construe it as price-fixing, and I don’t do price-fixing. Q. Someone might construe what as price-fixing? A. A conversation about customer relationships, things like that, calls get taken out of context. That’s not -- I mean, I was pretty clear in my e-mail to Paul about what I was letting him know about, and I didn’t feel the need to call, nor did I feel that I was going to get any response, nor do I need a response.”))).

Response to Proposed Finding No. 369

The Proposed Finding is misleading and contrary to the weight of the evidence. It is misleading because it relies on statements by Chuck Cohen that lack credibility. Cohen’s testimony that he was concerned that a telephone call “might be taken out of context or might be interpreted

inappropriately” makes no sense when what he did, instead, was to send an email, creating a *written record* of his communication with a competitor about a customer segment. (CX0090).

Cohen’s testimony is also contrary to his other testimony confirming that he had numerous conversations with Paul Guggenheim over the years, including “once in a while about a customer situation.” (Cohen, Tr. 540-541; CCFF ¶ 515). Cohen also admitted he did not recall other situations where he expressed concern that calling Guggenheim would be construed as price fixing. (Cohen, Tr. 540-541; CCFF ¶ 517). Thus, the cited testimony is contrary to Cohen’s other testimony and to a common sense understanding of the meaning of his statements in his communications with Taylor. The Proposed Finding should be disregarded.

370. No fact witness testified contrary to Chuck Cohen about CX0057.

Response to Proposed Finding No. 370

The Proposed Finding is irrelevant and factually incorrect. Cohen himself provided testimony that calls into question the basis for his statements in the testimony cited. For example, he testified that he had numerous conversations with Paul Guggenheim over the years, including “once in a while about a customer situation.” (Cohen, Tr. 540-541; CCFF ¶ 515). Cohen also admitted in his trial testimony that he did not recall other situations where he expressed concern that calling Guggenheim would be construed as price fixing. (Cohen, Tr. 540-541 (“Q. Aside from this one example where you’re telling a colleague that your concerned calling Paul Guggenheim might be construed as price fixing, you don’t recall any instance where you’re telling a colleague that you didn’t want to call Paul Guggenheim because it might be construed as price fixing. A. I do not recall another situation. Q. And you’ve had phone calls with Paul Guggenheim before this exchange, clearly. A. Yes.”); CCFF ¶ 517). The Proposed Finding is an inaccurate statement of the record and is irrelevant. It should be disregarded.

371. Complaint Counsel did not take testimony from Don Taylor in this case. Thus, there is no evidence in the record as to Taylor's intent in sending his initial message to Cohen, or as to Taylor's understanding of Cohen's response to him.

Response to Proposed Finding No. 371

The Proposed Finding is misleading and irrelevant because Taylor's intent in sending his message (and Taylor's understanding of Cohen's response) are not at issue in this case. The messages are clear on their face and require no interpretation. Moreover, both Taylor's statement and Cohen reply are party admissions pursuant to Fed. Rule Evid. 801(d)(2) and are admissible for the truth of the matter stated therein. The Proposed Finding should be disregarded as irrelevant.

372. CX0057 does not support Patterson's participation in the alleged conspiracy.

Response to Proposed Finding No. 372

The Proposed Finding lacks any evidentiary support and it contrary to the weight of the evidence. The evidence shows that Cohen, upon learning from Taylor, Benco's New Mexico Regional Manager, that Patterson was working with NMDC (CX0055 at 001; CCFF ¶ 478, CX0057), told Taylor, "We don't recognize buying groups . . . I'll reach out to my counterpart at Patterson to let him know what's going on in NM." (Cohen, Tr. 528-530; CX0055 at 001; CCFF ¶ 479). Cohen did just that, telling Guggenheim, "Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups (though we do work with corporate accounts) and our team understands that policy." (CX0056 at 001; CX0090 at 001; CX0091 at 001; Cohen, Tr. 532, 534; Guggenheim, Tr. 1594; CCFF ¶¶ 483-484). Guggenheim promptly responded, "Thanks for the heads up. I'll investigate the situation. We feel the same way about these." (CX0090 at 001; Guggenheim, Tr. 1607-1608). CX0057, then, clearly corroborates the other evidence in the record about what Cohen had done. (CX0057 (Excel worksheet "Chats" tab row 80); CCFF ¶ 513). It also demonstrates that Cohen knew that communicating with a

competitor about a “customer situations” raised antitrust issues. CCFF ¶¶ 513-517. CX0057 supports the evidence that Patterson participated in the alleged conspiracy.

CX1278

373. CX1278 is a collection of text messages collected from the cell phone of Benco’s Ron Fernandez.

Response to Proposed Finding No. 373

Complaint Counsel had no specific response.

374. Complaint Counsel did not reference CX1278 at all during trial.

Response to Proposed Finding No. 374

The Proposed Finding is misleading to the extent that it implies that evidence in the record that is not specifically referenced at trial is not in the record. This is incorrect. CX1278 is admitted into the record and all communications contained in CX1278 are in the record. The Proposed Finding is irrelevant.

375. Ron Fernandez was not deposed in this case.

Response to Proposed Finding No. 375

The Proposed Finding is misleading to the extent that it implies that CX1278 and the information contained therein are not in the record absent Mr. Fernandez’s testimony. During the time period relevant to the Complaint, Ron Fernandez was a Benco Regional Manager in Texas. His communications contained in CX1278 are party admissions pursuant to Fed. Rule Evid. 801(d)(2) and have been admitted into the record. His testimony is not required for this document to be in evidence.

376. Ron Fernandez did not testify at trial.

Response to Proposed Finding No. 376

The Proposed Finding is misleading to the extent that it implies that CX1278 and the information contained therein are not in the record absent Mr. Fernandez's testimony. During the time period relevant to the Complaint, Ron Fernandez was a Benco Regional Manager in Texas. His communications contained in CX1278 are party admissions pursuant to Fed. Rule Evid. 801(d)(2) and have been admitted into the record. His testimony is not required for this document to be in evidence.

377. On December 11, 2013, Benco's Ron Fernandez texted Benco's Barrett Spencer,

I have been talking to the directors of Schein and Patterson. We are going to be taking a stand together against them. (CX1278 at 005).

Response to Proposed Finding No. 377

Complaint Counsel has no specific response.

378. CX1278 does not reference "buying groups."

Response to Proposed Finding No. 378

The Proposed Finding is misleading because it takes the text message out of context. The message is part of a chain or messages. The cited message was sent on December 11, 2013 at 11:03. The message chain shows a message from Benco's Barrett Spencer to Fernandez, sent just four minutes earlier at 10:59, asking, "Benco still going to have a booth at the TDA this year?" (CX1278 at 005). The text message chain is clearly about TDA and the TDA Perks Supply Program. The TDA Perks Program is a buying group. The Proposed Finding is, therefore, factually incorrect.

379. CX1278 relates to attendance at the 2014 TDA annual meeting. (CX1278 at 5). Complaint Counsel does not allege an illegal boycott of the TDA as part of its case. (Kahn, Tr. 52 ("We do not allege a boycott of the trade show."); *see also* RXD0213 at 1).

Response to Proposed Finding No. 379

The Proposed Response is misleading and not supported by the document referenced. It also relies on a demonstrative which is not in the record to demonstrate substantive evidence. It is, moreover, misleading to the extent that it misstates what is contained in the text messages in CX1278. CX1278 contains text messages about whether Benco would be contacting its competitors about plans to “take a stand together” against TDA in connection with its establishment of the TDA Perks Supply program. (CX1278 at 005 and 007-008). In other messages contained in the document, it references the concern of a former TDA president about “Patterson and other vendors . . . dropping out” of the TDA annual meeting. The Proposed Finding is misleading to the extent that it suggests that the messages are only about attendance at the TDA Annual Meeting and not also about communications about joint actions by Benco, Patterson and Schein. (CX1278 at 005). The Proposed Finding is also misleading to the extent that it misstates Complaint Counsel’s position with regard to the actions by Patterson, Schein and Benco in pulling out of the 2014 TDA Annual Meeting. Although Complaint Counsel does not allege that these actions constituted a boycott of that meeting, the actions of the Big Three provide evidence that these companies continued to communicate about buying groups to further their overarching conspiracy not to do business with buying groups. *See* CCFF ¶¶ 1118-1136. Finally, to the extent that the Proposed Finding relies on a demonstrative (RXD0213) as substantive support for the finding, that reliance contravenes the Court’s February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence.

380. CX1278 does not support Patterson’s participation in the alleged conspiracy.

Response to Proposed Finding No. 380

The Proposed Finding is not supported by any evidentiary cites and should be disregarded. It is also misleading and inaccurate for the reasons set forth in Complaint Counsel’s Response to

Patterson's Proposed Finding No. 379. CX1278 provides support to other evidence showing that the Big Three communicated about their planned actions to pull out of the 2014 TDA Annual Meeting, in furtherance of their overarching conspiracy to reject buying groups. *See* CCFF ¶¶ 1118-1136.

CX3300, CX3332

381. CX3300 is a July 21, 2014 email exchange between Benco's Mike Wade and Patterson's Arizona Branch Manager, Chad Bushman, initiated by Wade, regarding the Arizona Dental Association (or AzDA) (CX3300 at 1–2). CX3332 is the same July 21, 2014 email exchange as CX3300, except that it includes Wade's reply to Bushman's response to Wade's original email. (CX3332 at 1–2).

Response to Proposed Finding No. 381

The Proposed Finding is misleading and incomplete because it fails to include complete descriptions of the referenced documents. CX3300 not only contains communications between Benco's Mike Wade and Patterson's Chad Bushman, but also contains an email from Bushman's boss, Patterson Texas Regional Manager Dan Reinhardt, instructing Bushman about how to proceed in communicating with his counterpart at Benco. In that portion of the email, Reinhardt tells his subordinate with respect to discussing the Arizona Dental Association (AzDA) buying group plans, "Chad, Please discuss live and no further emails." (CX3300 at 001). CX3332 does not include the email from Reinhardt.

382. Complaint Counsel did not reference CX3300 or CX3332 during trial, did not depose Wade or Bushman, and neither Wade nor Bushman testified at trial.

Response to Proposed Finding No. 382

The Proposed Finding is misleading to the extent that it implies that all documents admitted into evidence needed to be presented at trial, or that all authors of documents in the record should have been called as witnesses. Contrary to the implication of the Proposed Finding, the testimony of Mr. Wade from litigation in a private lawsuit was placed in the record by

Respondents. *See* RX1122 (Wade, Dep. (SourceOne)). In that document, Wade specifically testified that he “reached out to Chad Bushman at Patterson” about AzDA’s endorsement of SourceOne, a company providing dental products to a buying group being started by AzDA. (RX1122 (Wade, Dep. (SourceOne) at 142))

383. Complaint Counsel did not present any evidence about the AzDA during trial.

Response to Proposed Finding No. 383

The Proposed Finding is misleading to the extent that it implies that all documents admitted into evidence needed to be presented at trial, or that all authors of documents in the record should have been called as witnesses.

384. CX3300 and CX3332 do not reference “buying groups” but only address attendance at the 2015 AzDA trade show.

Response to Proposed Finding No. 384

The Proposed Finding is misleading to the extent that implies that the document is not about buying groups because the precise phrase “buying group” is not used. The document expressly discusses Benco’s concern with the Arizona Dental Association (AzDA) developing a buying group – as the Texas Dental Association had done with TDA Perks Supplies. Wade’s July 21, 2014 email to his competitor states:

I wanted to catch up with you and get your take on our friends at the AZDA becoming our competitors? I am sure you are hearing plenty from your reps about the AZDA partnership with SourceOne selling supplies.

Needless to say we are not real happy and we are looking at pulling all our sponsorship including the AZDA meeting. I know that Patterson, Schein and Benco boycotted the Texas Dental Association meeting this year after the TDA did the same thing and wanted to see if we could create the same message here in AZ.”

(CX3300 at 002; *see also* CX1112 at 034 (Answer of Benco ¶73) (admission that email containing the quoted language was sent by Benco’s Arizona regional manager)). Benco’s Wade

has admitted that Benco was considering pulling out of the AzDA annual meeting (called the Western Regional Dental Convention), but had not yet done so at the time he wrote the email. (RX1122 (Wade, Dep. (SourceOne) at 193-195)) Wade further testified that his statement that he knew that “Patterson, Schein and Benco boycotted the Texas Dental Association meeting this year after the TDA did the same thing” was true when he wrote it. (RX1122 (Wade, Dep. (SourceOne) at 193-195)).

385. There is no evidence of any communications between Patterson and Schein concerning attendance at the 2015 AzDA trade show.

Response to Proposed Finding No. 385

The Proposed Finding is misleading to the extent that it implies that, but for direct communications between Patterson and Schein, there was no overarching agreement not to do business with buying groups. The record shows that Schein, Patterson, and Benco employees communicated regarding the AzDA dental convention after the AzDA created a buying group program. (CX1378 at 001 (June 18, 2014, email in which Benco’s Mike Wade reports that he is communicating with Schein and Patterson regarding the Arizona Dental Association annual meeting and buying group); CX2756 at 001 (July 10, 2014, email with Schein’s Kevin Upchurch describing a call from Benco’s Evans discussing AZDA); CX2757 at 001 (July 18, 2014, internal Schein email indicating advance knowledge of Benco’s plans to pull out of the AZDA meeting); CCFF ¶¶ 1156-1158).

386. CX3300 and CX3332 do not support Patterson’s participation in the alleged conspiracy.

Response to Proposed Finding No. 386

The Proposed Finding is misleading and contrary to the weight of the evidence. CX3300 and CX3332 clearly show that Patterson and Benco employees were communicating about plans to

pull out of AzDA annual meeting (known as the Western Regional Dental Convention), and that a Patterson Regional manager, Dan Reinhardt, rather than stopping the inter-firm communications, just told his branch manager to avoid putting the communications in writing. (CX3300 at 001 (“Chad, Please discuss live and no further emails.”)). As noted in Complaint Counsel’s Response to Respondent Patterson’s Proposed Finding No. 385, the evidence in the record shows that Schein, Patterson, and Benco employees communicated regarding the AzDA dental convention after AzDA created a buying group program. CCFF ¶¶ 1156-1158. These communications provide further evidence of the overarching conspiracy among the Big Three to reject buying groups.

CX0106

387. CX0106 is an August 4, 2013 email from Tim Rogan responding to Neal McFadden, who had asked:

I know in the past we have said no
Is it worth it to explore GPO?????? . . . (CX0106 at 1).

Response to Proposed Finding No. 387

Complaint Counsel has no specific response.

388. Rogan responded to McFadden:
We don’t need GPO’s in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry. (CX0106 at 1).

Response to Proposed Finding No. 388

Complaint Counsel has no specific response.

389. No Benco and Schein employees are included in either email.

Response to Proposed Finding No. 389

Complaint Counsel has no specific response.

390. Rogan's statement "We don't need GPOs in the dental business," was his personal opinion at the time based on the fact that GPOs "don't provide any value, they don't help, they don't do anything. They don't provide access to customers. . . . [A]ll they want is a better deal, but they don't provide any value to the customer" (Rogan, Tr. 3572–73).

Response to Proposed Finding No. 390

The Proposed Finding is misleading because it relies on testimony of a witness about a document that he admits he does not recall receiving and to which he does not recall sending a response.

(Rogan, Tr. 3522 ("Q. This is an entire email chain. Portions of it earlier you were not on. I want to ask, do you recall receiving this chain on or about August 4th, 2013? A. Sitting here today, I don't recall it."); Rogan, Tr. 3525 ("You wrote to Mr. McFadden on August 4th, 2013. 'Neal: You don't need GPOs in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry.' Do you recall writing those words on August 4, 2013? A. I don't recall call them. . . .Q. But you don't dispute that you did write those words. A. I don't.")). Rogan's subsequent testimony – provided over five years after he made the statements in his email -- must be seen as no more than speculation as to what he might have been thinking or conjecture after the fact. The testimony from a witness who has no recollection of the document at issue should be disregarded as unreliable.

391. Rogan had developed and held this opinion on his own throughout his entire career at Patterson, without regard for any communications between Chuck Cohen and Paul Guggenheim. (Rogan, Tr. 3573 ("Q. Did you form that opinion because Mr. Guggenheim forwarded an email to you from Mr. Cohen earlier that summer? A. No.")).

Response to Proposed Finding No. 391

The Proposed Finding is misleading and irrelevant. It is misleading to the extent that Rogan's opinion is being offered in connection with a document about which he has no current recollection. *See* Complaint Counsel's Response to Respondent Patterson's Proposed Finding

No. 390. It is also misleading to the extent that, regardless of his personal opinion, Rogan, after receiving Guggenheim's email communication with Cohen, instructed another Patterson executive to whom he was senior to take an action to forgo business with a customer segment. (Rogan, Tr. 3524 ("Q. You had a bigger responsibility, a bigger portion of the business? A. At that time I was responsible for more, yes. Q. You had been a corporate executive much longer than Mr. McFadden had at this point. A. A few more years, yes.")). Rogan also instructed other Patterson team members not to work with buying groups. *See, e.g.*, CX3168 at 001 (November 2013 email from Rogan to Manager of Marketing Communications: "We don't sell to buying groups. Let's talk live.")). The Proposed Finding is also incomplete in that it fails to quote the full document. In CX0106 at 001, Rogan also explains with respect to GPOs, "Schein, Benco and Patterson have always said no." On its face, this is a statement of historical fact ("have always said no"), not an opinion.

392. Rogan's testimony about the origins of his opinions about buying groups is consistent with his testimony in his investigational hearing. (CX0317 (Rogan, IHT at 238 ("So we don't need the buying groups in the dental business because all they do is aggregate -- try to aggregate to try to get a better deal, but not helping out any of the value. So they don't bring any value to the client, so -- which means they don't bring new value to us. We don't -- we don't need them. That's all I was trying to make a point to him on.")))).

Response to Proposed Finding No. 392

The Proposed Finding is misleading and vague to the extent that it suggests that Rogan's investigational hearing testimony provides a clear statement of the reason for his opinion. The testimony cited is vague and somewhat incoherent, so does not provide a clear statement to support the Proposed Finding. The Proposed Finding is also incomplete to the extent that Rogan's full testimony on this issue in the document cited makes it clear that he had not done any due diligence to form his opinion. Specifically, when Rogan was asked about whether he had done any due diligence about buying groups prior to the time of his August 2013 email, he

admitted that he had not spoken with anyone about the value of buying groups. (CX0317 (Rogan, IHT at 238-239) (“Q. And what due diligence had you done to determine that GPOs brought no value? A. From – from being in the industry and learning about these, what I knew about the at the time when I – and what I know about them today, and what I new about them at the time then, and – that was my assessment at the time. A. Was your assessment based on anything else? A. My assessment was based on what I knew. A. Had you talked to anyone specifically about the value that GPOs would bring? A. Not that I recall.”) Finally, even assuming that Rogan’s testimony is “consistent,” there is nothing in the testimony that contradicts the record evidence that, prior to the time of his statements, Patterson entered into an agreement with Benco not to do business with buying groups. (CCFF ¶¶ 483-501, 513), and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 630-653, 657).

393. The entity at issue in CX0106 was a medical GPO, not a dental one. (CX8017 (Rogan, Dep. at 68 (“Well, when I look at -- when I read this, this actually now is talking about Patterson Medical, it’s talking about the University of Miami, it’s talking about the Western North Carolina health network, not dental network, and they are under the GPO premier, so that’s an actual medical GPO.”))).

Response to Proposed Finding No. 393

The Proposed Finding is misleading to the extent that it implies that Rogan’s statement was about medical GPOs. The statement, on its face, references the *dental industry* and references its competitors in providing *dental* services. (We don’t need GPO’s in the *dental* business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry.” (CX0106 at 001) (emphasis added). Rogan specifically testified that he was referring to the “dental industry.” (CX0317 (Rogan, IHT at 237-238).

394. A medical GPO aggregates product, warehouses product, and ships product to the end user. (CX8017 (Rogan, Dep. at 68 (“[W]e’re talking about a true group purchasing

organization from the medical side, which would be aggregator of product, would warehouse the product, would ship the product to the end user.”))).

Response to Proposed Finding No. 394

The Proposed Finding is misleading, irrelevant, and contrary to the weight of the evidence to the extent that it implies that Rogan’s statements were referring to medical GPOs. First, Rogan has testified that he was referring to the dental industry. (CX0317 (Rogan, IHT at 237-238). Second, his statement that “Schein, Benco, and Patterson have always said no” would make no sense if he had been referring to a medical GPO, as Benco is dental supply company only. (Cohen, Tr. 399, 633, 617; JX0003 at 002 (Joint Stipulation of Fact No. 9); CCF ¶ 5). Finally, to the extent that Rogan is testifying about how a medical GPO functions, there is no foundation in the record for his knowledge of this medical industry entity.

395. Patterson already has those capabilities. (CX8017 (Rogan, Dep. at 68–69 (“That’s something that Patterson does. . . . We don’t need somebody to come in and aggregate our product and warehouse it when we already do a very good job at it.”))).

Response to Proposed Finding No. 395

The Proposed Finding is misleading, confusing and irrelevant. First, it is unclear which “capabilities” are referenced. Second, to the extent that the Proposed Finding is suggesting that Patterson had capabilities to establish its own GPO, having those capabilities is irrelevant to the question of whether Patterson entered into an agreement not to do business with buying groups. The record evidence establishes that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, the Big Three rejected buying groups. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198). Patterson has, moreover, never suggested that Rogan’s testimony was about Patterson having the capability to create a GPO.

396. Thus, Rogan said that GPOs were not needed in the dental business. (CX8017 (Rogan, Dep. at 69 (“And so this e-mail is referencing Neal asking about it again and I’m saying we -- you know, he said in the past we’ve said no, in the past we’ve said no, and that’s all I’m clarifying to him, clearly saying we don’t need -- we don’t need these people. They don’t help add any value in the dental industry.”))).

Response to Proposed Finding No. 396

The Proposed Finding is misleading, incomplete, and contrary to the weight of the evidence to the extent that it implies that Rogan’s email was only about his opinion that GPOs were not needed in the dental business. On the contrary, Rogan goes on to write – in an email sent months after the exchange of emails between Cohen and Guggenheim in February and June 2013 – that Patterson’s largest competitors Schein and Benco had “always said no.” (CX0090 at 001; CX0062; CX0106 at 001; Rogan, Tr. 3525 (Schein and Benco were Patterson’s largest competitors in August 2013); CCF 483-496, 564-588). Rogan’s statement that the Big Three have “always” said “no” is a statement of fact, not an opinion. There is, moreover, nothing in Rogan’s statement to McFadden to suggest that Patterson should consider dental buying groups on a case-by-case basis. Rather, the statement is categorical. Because the Proposed Finding relies on an incomplete statement of the quoted document, it is misleading and should be disregarded.

397. As to Rogan’s statement “Schein, Benco, and Patterson have always said no,” Rogan testified at trial that it was his opinion, not a fact. (Rogan, Tr. 3573–74). Rogan further testified that his opinion was not based on any email from Chuck Cohen forwarded by Paul Guggenheim, but from his years in the dental industry. (Rogan, Tr. 3574).

Response to Proposed Finding No. 397

The Proposed Finding is misleading and not credible. It is misleading to the extent that Rogan’s opinion is being offered in connection with a document about which he has no current recollection. (Rogan, Tr. 3522 (“Q. This is an entire email chain. Portions of it earlier you were not on. I want to ask, do you recall receiving this chain on or about August 4th, 2013? A.

Sitting here today, I don't recall it."); Rogan, Tr. 3525 ("Q. You wrote to Mr. McFadden on August 4th, 2013. "Neal: You don't need GPOs in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry." Do you recall writing those words on August 4, 2013? A. I don't recall call them. . . .Q. But you don't dispute that you did write those words. A. I don't.")). Rogan's subsequent testimony -- provided over five years after he made the statements in his email -- must be seen as no more than speculation as to what he might have been thinking or conjecture after the fact. Rogan's testimony that he was expressing his "opinion" about a factual matter of what his competitors "have always" done is also not credible. He was, moreover, providing the information to another Patterson executive who was seeking information about whether to pursue business with a buying group. Evidence in the record shows that McFadden was anxious to develop new business and saw "any sale" as a "potential opportunity," including sales to GPOs. (CX0315 (McFadden, IHT at 169-170); CCFF ¶¶ 601-602). In this context, Rogan's email can only be read as an instruction to forgo business with a customer segment, and a reflection of what Rogan knew about the positions of its competitors. The Proposed Finding is not credible and should be disregarded.

398. Rogan's statement "Schein, Benco, and Patterson have always said no," was based entirely on Rogan's experience competing "head to head every day." (CX8017 (Rogan, Dep. at 73 ("Q. Is there any other basis for your knowledge about whether Schein saw value in the GPO space? A. No not -- only from competing with them from head to head. Q. Same question for Benco. Is there any basis for your statement that Benco had always said no? A. No, just competing head to head with them every day.)); (CX0317 (Rogan, IHT at 239 ("I have no idea if Schein or Benco have policies. What I'm saying here is that to the best of my knowledge they hadn't worked with any buying groups, so there's no reason for us to work with a buying group when we don't think it's a good idea.")))).

Response to Proposed Finding No. 398

The Proposed Finding is misleading and not credible. It is misleading to the extent that Rogan's testimony about the basis for what he wrote in CX0106 is being offered in connection with a document about which he has no current recollection. (Rogan, Tr. 3522 ("Q. This is an entire email chain. Portions of it earlier you were not on. I want to ask, do you recall receiving this chain on or about August 4th, 2013? A. Sitting here today, I don't recall it."); Rogan, Tr. 3525 ("Q. You wrote to Mr. McFadden on August 4th, 2013. 'Neal: You don't need GPOs in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry.' Do you recall writing those words on August 4, 2013? A. I don't recall call them. . . .Q. But you don't dispute that you did write those words. A. I don't.")). Rogan's trial testimony -- provided over five years after he made the statements in his email -- must be seen as no more than speculation as to what he might have been thinking or conjecture after the fact. Rogan testimony should also be rejected as not credible. For example, his testimony that his statement about his competitors was based purely on market observations must be seen as inaccurate. For example, the record is clear that Guggenheim sent Rogan the February 8, 2013 email he received from Chuck Cohen. (Rogan, Tr. 3511 (CX0091 was forwarded to him; he "probably" would have read an email from his boss)). Nonetheless, Rogan's testimony is that he knew about Benco's position *only* from market observations, and not from an email to his boss that expressly stated Benco's position on buying groups. The fact that he cannot recall the email sent to him by his boss, but recalls his "market observations," suggests that Rogan's memory on this topic is incomplete at best. The Proposed Finding is not credible and should be disregarded.

399. Regarding the statement, "I believe it is our duty to uphold this and protect this great industry," Rogan really did believe that the dental industry was a good industry and that Patterson's role was not simply to sell cheap dental supplies, but to supply broader value to its customers. (Rogan, Tr. 3574-75 ("Well, it's a good industry where everybody -- the dentist

makes a good living, the distributor makes a good living, and the manufacturers make a good living, and we are a value -- you know, a value company. So Neal had a tendency to want to chase after anything that came his way, any consumer that wanted to buy dental supplies, and you can't be the -- provide all the value that Patterson does and then -- but sell cheap dental supplies. You have got to figure out what you're going to do. So it was basically me leaning on a colleague saying that you have got to remember that you work for, you know, the Nordstrom's of the dental industry. We provide the value, and you should uphold that as a senior leader of the organization. . . . Q. Was that secret code that you put in this email to reference some kind of conspiracy that Patterson had with Benco or Schein? A. Absolutely not.”).

Response to Proposed Finding No. 399

The Proposed Finding is misleading to the extent that it implies that executives who believe that the dental industry is a “good” industry would not also have engaged in a conspiracy to protect their companies’ margins and exclude the entry of buying group. There is no evidence in the record to support that assertion. There is also nothing inconsistent between believing that the dental industry is a “good” industry and choosing to engage in a conspiracy that allows distributors to maintain higher margins. *See, e.g.*, CCFF ¶¶ 256-266 (executives from each of the Big Three were aware that the successful entry of buying groups and GPOs in the medical supplies distribution market led to low margins for distributors); 637 (citing CX3086 at 001 (statement of Guggenheim on Patterson’s decision to reject a buying group: “We have explored this opportunity [with Kois] . . . and decided to pass at this time due to the implications to our margins and therefore our Sales Reps.”)).

400. Neal McFadden confirmed Rogan’s testimony about the dental industry really being great. (McFadden, Tr. 2710–11 (“Q. What did you understand this e-mail to mean when you received it? A. That Tim Rogan has a big love for Patterson Dental, he loves the dental industry, it’s the only job he’s ever had, and he’s very emotional about upholding and protecting the great industry, so I don’t know why he said what he said, but I believe I interpret the tone to be Tim’s emotion.”). McFadden offered the same testimony at his investigational hearing. (CX0315 (McFadden, IHT at 175 (“A. He has passion and love for Patterson Dental. Q. Why do you understand him to mean that he has love and passion for Patterson Dental by that statement? A. Because he’s only worked for Patterson Dental in this great industry.”))).

Response to Proposed Finding No. 400

The Proposed Finding is not supported by the cited testimony and is irrelevant. The cited testimony is no more than McFadden's speculation about why Rogan "loves the dental industry," but does not provide any factual basis for a conclusion about the "dental industry really being great." In fact, the cited testimony states that McFadden didn't "know why [Rogan] said what he said," calling into question the foundation for his testimony. Even if the citation had provided a basis for that conclusion, however, whether the dental industry is "great" is not an issue in this case. The Proposed Finding is wholly irrelevant and should be disregarded.

401. Rogan testified that as to the word "our," in "our duty," he was referring not to Patterson but to Neil McFadden's role as a senior Patterson employee, responsible for maintaining Patterson's value proposition. (CX0317 (McFadden, IHT at 246 ("I'm writing this to Neil, so reminding him he's a leader of the organization, and he needs to remember talking about value at a fair price is what we do. So I'm trying to remind him that it's his duty to do that."))).

Response to Proposed Finding No. 401

The Proposed Finding is misleading and lacks credibility to the extent that it suggests a strained reading of the document. To the extent that Rogan meant that it was McFadden's duty (as head of Special Markets), it makes no sense that Rogan would have said, "our duty," because Rogan was Patterson's VP of Merchandise Marketing – not part of McFadden's division. Rogan's testimony also makes no sense because the rest of the sentence is about the dental industry, not Patterson's Special Markets division. Reading the sentence as a whole, Rogan's explanation makes no sense. In addition, as referenced in greater detail above, the Proposed Finding is misleading to the extent that Rogan's testimony is about a document he did not recall sending. (Rogan, Tr. 3522 ("Q. This is an entire email chain. Portions of it earlier you were not on. I want to ask, do you recall receiving this chain on or about August 4th, 2013? A. Sitting here today, I don't recall it."); Rogan, Tr. 3525 ("Q. You wrote to Mr. McFadden on August 4th, 2013. 'Neal: You don't need GPOs in the dental business. Schein, Benco, and Patterson have

always said no. I believe it is our duty to uphold this and protect this great industry.’ Do you recall writing those words on August 4, 2013? A. I don’t recall call them. . . .Q. But you don’t dispute that you did write those words. A. I don’t.”). Because he did not recall writing the email, Rogan’s investigational hearing in April 2017, over three years after he wrote the email, must be seen as no more than speculation as to what he might have been thinking or conjecture after the fact. Rogan also testified at that investigational hearing that he did not recall the email. (CX0317 (Rogan, IHT at 230-231) (“Q. Mr. Rogan, do you recall this E-mail? A. I don’t.”))

402. No witness testified contrary to Tim Rogan or Neal McFadden about CX0106.

Response to Proposed Finding No. 402

The Proposed Finding is misleading to the extent that it implies that any contrary testimony is necessary to reach a conclusion that Rogan’s testimony should be disregarded. CX0106 provides clear evidence that Rogan was instructing McFadden not to do business with buying groups and was making a statement in August 2013 that he knew that Patterson’s largest competitors “had always said no” to buying groups, as well. (CX0106 at 001). As demonstrated above, Rogan had no recollection of sending his email. Accordingly, his after the fact testimony about what he meant is pure speculation. All of Respondent’s Proposed Finding regarding Rogan’s testimony about this document should be disregarded. No contrary testimony is needed to reach this conclusion.

403. CX0106 does not support Patterson’s participation in the alleged conspiracy.

Response to Proposed Finding No. 403

CX0106 provides clear evidence that Rogan knew Patterson had a policy against buying groups, was instructing McFadden not to do business with buying groups, and was making a statement in August 2013 that he knew that Patterson’s largest competitors “had always said no” to buying

groups, as well. (CX0106 at 001). As demonstrated above, Rogan had no recollection of sending his email. Accordingly, his after-the-fact testimony about what he meant is pure speculation. CX0106 provides clear evidence that Patterson executives knew that Patterson and its largest competitors had “always said no” to buying groups, and that Rogan was instructing McFadden that Patterson was taking that position. CX0106 therefore clearly supports Patterson’s participation in the conspiracy. The Proposed Finding should be disregarded.

CX0093

404. CX0093 is a February 27, 2013 email exchange between Anthony Fruehauf, then Patterson’s Mid-Atlantic Regional Manager, and his then-boss, David Misiak, about Atlantic Dental Care (“ADC”). (CX8013 (Fruehauf, Dep. at 16)).

Response to Proposed Finding No. 404

Complaint Counsel has no specific response.

405. Complaint Counsel has characterized CX0093 as an instruction from Misiak to his sales team not to work with ADC. (Compl. ¶ 43).

Response to Proposed Finding No. 405

Complaint Counsel has no specific response.

406. In CX0093, Fruehauf emailed Misiak a request for proposal from a “GPO in Chesapeake,” Atlantic Dental Care (or ADC). (CX0093 at 1). Fruehauf relayed concerns he had discussed with Devon Nease, Patterson’s Chesapeake Manager (and Fruehauf’s direct report), about the precedent of discounting to groups like the “GPO in Chesapeake,” and sought Misiak’s guidance. (CX0093 at 1 (“I have had numerous discussions with Devon [Nease] about our position and what it could mean if we set a precedent of offering lower prices to groups such as this. . . . If you can think of any guidance I can offer it would be appreciated.”); (CX8002 (Nease, Dep. at 16, 20 (Nease, Patterson’s Chesapeake Manager, reported to Fruehauf))).

Response to Proposed Finding No. 406

Complaint Counsel has no specific response.

407. When Fruehauf sent this email, he had been concerned about the risk that, by working with ADC, Patterson would endanger its relationships with its other customers in the region. (CX8002 (Nease, Dep. at 103–04) (“Q. The next point down says, “Potential new GPO losses.” What is he referring to there? A. He’s trying to figure out if there will be additional Atlantic Dental Care offices, causing a loss of business to the Chesapeake branch.”))).

Response to Proposed Finding No. 407

The Proposed Finding is misleading and not supported by the evidence cited. The Proposed Finding purports to be a statement of Fruehauf’s concerns, but the testimony cited is from the deposition of Devon Nease. Nease’s testimony provides no basis for a statement about Fruehauf’s claimed concerns. As there is no supporting evidence, the Proposed Finding should be disregarded.

408. At the time he wrote Misiak, Fruehauf’s *existing* position had *already* been that he would “steer clear” of ADC, and Misiak had simply “agreed with it.” (CX8013 (Fruehauf, Dep. at 114 (“As I discussed to him my position, I think he agreed with it, which was, you know, I have a greater risk with the other 250, 300 offices in Chesapeake if I do bid on it.”))).

Response to Proposed Finding No. 408

The Proposed Finding is misleading, not supported by the evidence cited, and is contrary to the weight of the evidence. The cited testimony does not support a finding that “Misiak had simply “agreed with [Fruehauf’s position]”. Rather, Fruehauf’s testimony is ambiguous about whether Misiak had merely agreed with a position that Fruehauf had taken, or had affirmatively instructed Fruehauf on the position that he should take. The weight of the evidence, including both CX0093 and CX0092, make it quite clear that the latter is the case. That is, Misiak was instructing Fruehauf to reject buying groups. When Misiak received Fruehauf’s February 27, 2013 email asking for guidance in responding to Nease’s communication about ADC’s request for a bid, Misiak immediately forwarded Fruehauf’s email to Guggenheim (CX0092 at 001; CCFF ¶ 539). Misiak stated in his cover email to Guggenheim that he had “coached Anthony [Fruehauf] on how to stay out of this with grace” and that he was concerned that “Schein and

Benco sneak into these co-op bids and deny it.” (CX0092 at 001; CCF ¶540; *see also* Misiak, Tr. 1370-1371). Other evidence shows that Misiak (who was Fruehauf’s boss) instructed Fruehauf and his sales team to “stay out” of selling to GPOs. (CX0093 at 001; CX0092 at 001; Misiak, Tr. 1354-1355, 1358, 1368; *see also* CX0316 (Misiak, IHT at 243) (“Q. Is it fair to say that you told Anthony to not submit a bid for this Atlantic Dental Care group? A. I think, yeah, that’s what I say in this email.”)).

409. No witness testified contrary to Fruehauf or Nease regarding the meaning of CX0093.

Response to Proposed Finding No. 409

The Proposed Finding is misleading and confusing to the extent that it references “the meaning of CX0093” without explaining what it means by that reference. For example, Misiak testified that, he was instructing Fruehauf and his sales team to “stay out” of selling to GPOs. (Misiak, Tr. 1354-1355, 1358, 1368; *see also* CX0316 (Misiak, IHT at 243) (“Q. Is it fair to say that you told Anthony to not submit a bid for this Atlantic Dental Care group? A. I think, yeah, that’s what I say in this email.”)). The Proposed Finding is thus misleading to the extent that suggests that there is not substantial evidence in the record to contradict the testimony of Fruehauf and Nease about CX0093 – including Misiak’s own testimony.

410. Misiak’s response, that “when I get these calls directly I politely say that I appreciate the opportunity but currently we do [not] participate with group purchasing organizations,” is similar to an email he sent in March of 2012. (CX0159 at 1). There, Patterson’s Neal McFadden emailed Misiak reporting of a new GPO in Florida and writing “I get these more often than I like. This stuff scares me. I’m gonna tell him thanks but no thanks. Your thoughts?” (CX0159 at 1). Misiak responded, “Your response is right.” (CX0159 at 1).

Response to Proposed Finding No. 410

The Proposed Finding is misleading, vague, confusing, and not supported by evidence in the record. There is no evidence in the record showing that the two emails referenced in the

Proposed Finding are “similar” and it is not clear from reviewing the two documents how they are supposedly are similar. The Proposed Finding is, moreover, vague and confusion as to which similarities exist or which are relevant to the finding. A review of the documents does not elucidate the supposed similarities. CX0093 at 001 – in contrast to CX0159 at 001 – contains clear instructions to Fruehauf about how he should instruct his sales team to reject an entity that was believed to be a buying group and to reject buying groups generally. (CX0093 at 001) It also informs Fruehauf that Patterson’s “2 largest competitors stay out of [buying groups] as well.” (CX0093 at 001; CCFF ¶¶ 549-550). No such statements appear in CX0159. To the extent that both emails involve references to providing polite responses, they are similar. Because the Proposed Finding is vague and confusing as to what Patterson means by “similar to,” or how those similarities are relevant, the Proposed Finding should be disregarded.

411. Patterson is not alleged to have been in a conspiracy with Schein and Benco not to work with “buying groups” in 2012. (Kahn, Tr. 19 (claiming that the alleged conspiracy ended in April 2015); *see also* RXD0205 at 1 (“The Alleged Conspiracy Ended in April 2015”)).

Response to Proposed Finding No. 411

The Proposed Finding is unsupported by the cited evidence which addressed the “end” of the conspiracy, not the beginning. To the extent that the Proposed Finding includes the parenthetical descriptions, it is also misleading because it misstates the record regarding the time of the end of the conspiracy, suggesting that Complaint Counsel’s explanation that the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015 created a precise “end” date. Complaint Counsel has never taken the position that the entry by Benco into a settlement with the Texas Attorney General created a precise “end” date. (Tr., 19 (Complaint Counsel’s Opening Statement); *see also* Complaint Counsel’s Post-Tr. Br. at 37-38). In addition, to the extent that the Proposed Finding relies on a demonstrative (RXD0205) as

substantive support for the finding, that reliance contravenes the Court’s February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence. Complaint Counsel has no specific response to the fact that Patterson is not alleged to have joined the conspiracy in 2012.

412. Misiak’s statement, “Adding value is the absolute key” (CX0093 at 1), is consistent with Patterson trial witnesses who testified that their reticence towards certain “buying groups” was based on a concern of no added value in exchange for a discount. (*See, e.g.*, Misiak, Tr. 1462 (“What would our value proposition be because we didn’t want it to only be price.”); Guggenheim, Tr. 1715–16 (“We just didn’t see that they were adding value”); Rogan, Tr. 3468 (“[H]istorically, the way we understood them is they bring no value to us. They can’t aggregate their spend, and they just try and lower our price, but they still want the white-glove service. It doesn’t make business sense for how our model is set up.”)).

Response to Proposed Finding No. 412

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Patterson did not enter into an agreement not to do business with buying groups, and did not act in compliance with that agreement, including instructing its team not to do business with buying groups. The record evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). For example, within a few weeks of Guggenheim’s February 8, 2013 email with Cohen (CX0090), Patterson began instructing sales representatives to “stay out” of buying groups, and CX0093 is one example of that instruction. CX0093 makes it clear that Misiak was telling Fruehauf to instruct his team to stay out of buying groups. (CX0093 at 001 (“Continue to help Devon [Neasae] stay out of this with grace.”)). Other evidence in the record shows that this was a consistent message from Patterson executives to their sales team. *See, e.g.*, CX0106 at 001 (Rogan: “We don’t need GPO’s in the dental business”); CX3116 at 001 (Misiak: “My guidance

has been to politely say no [to buying groups] and whether [sic] the storm with these.”); CX3168 at 001 (Rogan: “We don’t sell to buying groups. Let’s talk live.”); CX3010 at 001 (McFadden: “[A]s of now we are not working with GPO’s.”); CX3016 at 001 (McFadden: “I am sure we should pass on these [buying] groups....”); CX3004 at 001 (McFadden: “For now – I am electing to not participate with [buying groups] – we have said no to several already . . .”).

413. At the end of his response to Fruehauf, Misiak wrote, “Confidential and not for discussion ..our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me.” (CX0093 at 1).

Response to Proposed Finding No. 413

Complaint Counsel has no specific response.

414. The point of this statement was to collect market intelligence about competitors’ practices. (Misiak, Tr. 1363 (“Well, to reference something that was said recently, part of my role as president of the company is to understand the business environment -- as president of the dental business, I think it was important for me to understand the market, the climate, the environment, the customers and the competition, so I’m asking, if they heard something, to let me know.”); Misiak, Tr. 1364–65 (“A. I’m asking, if you hear differently and have specific proof, to send that to me. Q. Did you want Mr. Fruehauf to tell you if he heard that Schein or Benco were selling to GPOs? A. I’m referencing our two largest competitors and then, if he has specific proof, to send that, so I would say yes.”)).

Response to Proposed Finding No. 414

The Proposed Finding is misleading and contrary to the weight of the evidence. The evidence in the record – including Misiak’s own testimony – does not support Misiak’s statement that he was seeking to collect “market intelligence.” First, his statement “Confidential and not for discussion ..our 2 largest competitors stay out of these as well” (CX0093 at 001) is a statement of what he *already knew*, not a request for additional information. Second, Misiak, had no explanation for why the information, if it were “market intelligence,” would be confidential. (Misiak, Tr. 1363-1364 (“Q. And information about the market, competition, that’s not confidential; right? A. No.”); CCFF ¶¶ 553-554). In addition, while Misiak testified that

information about what his competitors were doing with GPOs was a “data point,” he could not articulate any purpose for the data (Misiak, Tr. 1360-1361), further indicating that his after-the-fact explanation that he was seeking market intelligence is specious. (Misiak, Tr. 1361 (“Q. And how does what your competitors are doing on GPOs impact what Patterson is doing on GPOs? A. It’s just a data point. Q. How so? A. Just information. Q. What do you use that information for? A. Beyond that, it’s just – it’s just data to have. Q. Can you articulate any purpose for the data to have? A. No.”)). Later in Misiak’s testimony, he changed his story, no longer describing his statements as related to market intelligence. His second explanation of the day was that his statements were a “guess or speculation.” (Misiak, Tr. 1508). Because Misiak’s own testimony indicates that Misiak’s testimony is unreliable, the Proposed Finding should be disregarded.

415. No witness testified contrary to Misiak regarding CX0093.

Response to Proposed Finding No. 415

The Proposed Finding is confusing, vague, irrelevant and misleading to the extent that it implies that Misiak testimony about CX0093 supports the findings that Patterson has proposed. In fact, Misiak’s own testimony (as well as other documents in the record and Misiak’s testimony about those other documents) contradict Patterson Proposed Findings Nos. 407-410, 412, and 414.

Because the Proposed Finding does not specify what facts about CX0093 it is referencing, it is unclear what Patterson means by “contrary to Misiak regarding CX0093.” As noted in Complaint Counsel’s Responses to Patterson’s Proposed Findings 407-410, 412 and 414, Misiak’s testimony, as well as other documents such as CX0092, demonstrate that his testimony is not reliable. The Proposed Finding is therefore misleading. No additional testimony is needed to provide a basis for disregarding this Proposed Finding.

416. There is no evidence in the record that Misiak's statement to Fruehauf concerning ADC was based in any manner upon Chuck Cohen's communications to Guggenheim. (CX0090 at 1).

Response to Proposed Finding No. 416

The Proposed Finding is misleading, irrelevant and contrary to the weight of the evidence to the extent that it implies that Patterson did not enter into an agreement not to do business with buying groups, and did not act in compliance with that agreement, including instructing its team not to do business with buying groups. The weight of the evidence shows that Guggenheim communicated with its competitor Benco and Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513).

Misiak received a copy of Cohen's email on February 8, 2013, clearly stating Benco's no buying group policy. (CX0091 at 001; Misiak, Tr. 1329). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). Within a few weeks of Guggenheim's February 8, 2013 email with Cohen (CX0090), Patterson began instructing sales representatives to "stay out" of buying groups. In CX0093, which is a primary example of those communications to the sales team, Misiak instructed his team on February 27, 2013, to "stay out" of buying groups. The evidence shows that Patterson did not make any independent determination of whether it made business sense to work with ADC. Rather, upon hearing (incorrectly) that ADC was a buying group, Misiak instructed his Regional Manager to "stay out." (CX0093 at 001). Patterson did not do an independent investigation of whether ADC was a buying group, but instead relied upon what it learned from Benco. (CX0314 (Guggenheim, IHT at 289-294); CCFF ¶ 560). There is no question that Misiak knew about Benco's policy when he wrote to Fruehauf about ADC. His statement that "**Confidential and not for discussion ..our 2 largest competitors stay out of**

these as well.” (CX0093 at 001) (emphasis in the original) suggest that he was aware of the larger agreement.

417. CX0093 does not support Patterson’s participation in the alleged conspiracy.

Response to Proposed Finding No. 417

The Proposed Finding is misleading and contrary to the weight of the evidence for the reasons set forth in Complaint Counsel’s Responses to Respondent Patterson’s Proposed Finding Nos. 404-417. The weight of the evidence described therein provides an overwhelming showing that CX0093 supports Patterson’s participation in the overarching conspiracy. The Proposed Finding should be disregarded.

CX0164

418. CX0164 includes a series of text messages from Patterson’s Neal McFadden to a former Patterson employee, David McIntosh. (McFadden, Tr. 2736).

Response to Proposed Finding No. 418

Complaint Counsel has no specific response.

419. Among these is one message, dated June 12, 2014, in which McFadden writes McIntosh:

Dave, yes I did get a place in St. Paul Minnesota.
I will check with my calendar and get back with you.
I just want to get some clarity. Is choice one a GPO or are you all actually acquiring practices? The reason I’m asking is we’ve signed an agreement that we won’t work with GPO’s. Just wondering thank you (CX0164 at 2).

Response to Proposed Finding No. 419

Complaint Counsel has no specific response.

420. The record contains no agreement signed by Patterson not to work with GPOs.

Response to Proposed Finding No. 420

Complaint Counsel has no specific response.

421. Complaint Counsel is not alleging that Patterson signed a written agreement not to work with GPOs. (Kahn, Tr. 48).

Response to Proposed Finding No. 421

Complaint Counsel has no specific response.

422. CX0164 does not mention Schein or Benco.

Response to Proposed Finding No. 422

The Proposed Finding is misleading to the extent that it implies that McFadden was not communicating to McIntosh that Patterson had signed an agreement that it would not work with buying groups.

423. David McIntosh was a former Patterson employee who McFadden had terminated McIntosh from Patterson in late 2012 or early 2013. (McFadden, Tr. 2737; CX0315 (McFadden, IHT at 235)).

Response to Proposed Finding No. 423

Complaint Counsel has no specific response.

424. After his termination from Patterson, McIntosh “bounced around” doing “odd jobs” within the dental industry. (McFadden, Tr. 2736; CX0315 (McFadden, IHT at 236)).

Response to Proposed Finding No. 424

The Proposed Finding is misleading to the extent that it implies that, at the time McIntosh contacted McFadden in June 2014, McIntosh did not have a position representing a potential Patterson customer. In fact, the evidence shows that McIntosh was representing an entity called Choice One, which was seeking to do business with Patterson. (CX0164 at 002; CX0315 (McFadden, IHT at 236). The record evidence thus establishes that McFadden was

communicating to a potential client that Patterson had signed an agreement that it “won’t work with GPO’s” (CX0164 at 002).

425. In June 2014, McIntosh reached out to McFadden wanting him to do business with an entity called Choice One. (McFadden, Tr. 2737, 2741; CX0315 (McFadden, IHT at 236). In June 2014, McFadden thought Choice One might be a GPO. (McFadden, Tr. 2742).

Response to Proposed Finding No. 425

Complaint Counsel has no specific response.

426. McFadden lied in his response to McIntosh in claiming there was “a signed agreement not to work with GPOs.” (McFadden, Tr. 2737–38 (“I’ll have to say, just like I’ve said in my deposition, this was not my finest hour right here. I was not being honest with Dave, that we do not have a signed agreement. There was never a signed agreement.”); CX8004 (McFadden, Dep. at 110–11 (Q. And I believe your testimony was that you were embarrassed but you were lying to Mr. McIntosh when you wrote this; is that correct? A. That is true. Q. And is that still your testimony? A. That is. Q. Which part of the message is a lie? A. The fact that we have a signed agreement.”)). McFadden further explain this at his investigational hearing. (CX0315 (McFadden, IHT at 238–39 (“A. I’m embarrassed to say that I lied to Dave here. If I could go back and choose my words differently, I would, but I did it with the intent of shutting him down, of getting clarity around if this is not a bona fide DSO, don’t bother me with it because yes, we have a verbal agreement. Paul was very specific that at this particular time that I was supposed to only focus on dental service organizations and not waste my time and be distracted with other things that came my way; buying groups, study clubs, and things like that. So I’m embarrassed to say that I wasn’t truthful with Dave, but Dave will wear you out.”))).

Response to Proposed Finding No. 426

Complaint Counsel has no specific response.

427. McFadden did not care for McIntosh and saw him as a “pest.” (McFadden Tr. 2742; *see also* McFadden Tr. 2738 (“[G]etting a call from David [McIntosh] is like getting a call from a telemarketer.”)).

Response to Proposed Finding No. 427

Complaint Counsel has no specific response.

428. McFadden thought that, if he claimed Patterson did not work with GPOs, it might end the conversation with McIntosh. (McFadden, Tr. 2737–38, 2742).

Response to Proposed Finding No. 428

The Proposed Finding is misleading and incomplete to the extent that it fails to mention that McFadden's statement that "The reason I'm asking is we've signed an agreement that we won't work with GPO's" (CX0164 at 002) constituted a lie to a potential client to "end the conversation" with that client at a time when McFadden's division, Special Markets, was not yet profitable. ((McFadden, Tr. 2691 (Patterson's expansion into the DSO market through its Special Markets division in 2013 did not become profitable until January 2015 when it won a DSO account from Schein.); CCFF ¶ 626). The text of McFadden's message, moreover, makes it clear that he would have been willing to work with McIntosh if McIntosh represented a DSO. (CX0164 at 002) ("I just want to get some clarity. Is choice one a GPO or are you all actually acquiring practices? The reason I'm asking is we've signed an agreement that we won't work with GPO's. Just wondering thank you.")). To the extent that McFadden was trying to end the conversation with McIntosh, it makes no sense that he was trying to discourage business only if McIntosh was representing a buying group.

429. McFadden saw himself as having a verbal agreement with Paul Guggenheim that McFadden, as the head of Patterson's new Special Markets division, was to focus on DSOs, not GPOs. (CX0315 (McFadden, IHT at 238–39 ("[Y]es, we have a verbal agreement. Paul was very specific that at this particular time that I was supposed to only focus on dental service organizations and not waste my time and be distracted with other things that came my way; buying groups, study clubs, and things like that.")); CX0315 (McFadden, IHT at 240 ("[H]ad I go back in time, I would have just been truthful and say, "Paul has told me to focus on DSOs."); (CX3075 at 2 (September 4, 2013 memorandum announcing the formation of Patterson Special Markets and defining its target customers))).

Response to Proposed Finding No. 429

The Proposed Finding is misleading and contrary to the weight of the evidence which show that, when Patterson's Special Markets was initially first started, the announcement of the division "meant a lot more than DSOs." (CX0315 (McFadden, IHT at 169)). For example, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; CCFF ¶ 600.

The evidence also shows that Patterson’s Special Markets had the resources and infrastructure to work with buying groups. (Misiak, Tr. 1510; CCFF ¶ 595). Finally, the Proposed Finding’s description of CX3075 at 002, a document that it offers in support is incomplete because it incorrectly because it fails to explain that the document expressly excluded all GPOs.

430. McFadden thus responded untruthfully to McIntosh because he did not care for McIntosh and wanted to shut down the conversation. (McFadden, Tr. 2737–38 (“Dave had a personality where he would not take no for an answer. And this was the type of person that when I’d get a text and a request like this, I just want to get rid of it and shut it down because he’s got a personality that we just clash. So bad choice of words on my part, but I just wanted to end the conversation.”); CX0315 (McFadden, IHT at 238–39 (“I did it with the intent of shutting him down, . . . I’m embarrassed to say that I wasn’t truthful with Dave, but Dave will wear you out.”)).

Response to Proposed Finding No. 430

The Proposed Finding is misleading to the extent that it is contradicted not only by the referenced communication, but by McFadden’s other communications with McIntosh, as well.

First, the text of McFadden’s message states that he would have been willing to work with McIntosh if McIntosh was representing a DSO. (CX0164 at 002) (“I just want to get some clarity. Is choice one a GPO or are you all actually acquiring practices? The reason I’m asking is we’ve signed an agreement that we won’t work with GPO’s. Just wondering thank you.”)). To the extent that McFadden was trying to “shut down the conversation” with McIntosh, it makes no sense that he was trying to discourage business only if McIntosh was representing a buying group. In addition, the record shows that, after McFadden’s text message to McIntosh (CX0164), McIntosh replied and requested a meeting. (CX0164 at 002; CCFF ¶¶ 659-660).

McFadden then replied almost immediately and suggested that they set up a meeting in the

future. (CX0164 at 002 (“Thanks Dave. I am travelling a ton over the next few weeks. Maybe we can shoot for mid July?)). McFadden admitted that he was “open” to hearing what McIntosh had to say if McIntosh was talking about a DSO – suggesting that he did not really want to “shut down the conversation.” (McFadden, Tr. 2845; CCFF ¶ 660). Moreover, McFadden ultimately met with McIntosh in Atlanta to discuss McIntosh’s client Choice One (CX0315 (McFadden, IHT at 248)), again suggesting the McFadden’s after-the-fact explanation of why he was lying is not credible.

431. Complaint Counsel did not take testimony from David McIntosh in this case.

Response to Proposed Finding No. 431

The Proposed Finding is misleading and irrelevant. The statement in question was made by McFadden. McIntosh’s understanding of what McFadden meant or whether McIntosh knew McFadden was lying to him is irrelevant. McIntosh was not a party to the conspiracy so would not have been a position to know if McFadden’s representation about having “signed an agreement” was true or not. If anything, McFadden’s message (even if not truthful about the existence of a “signed” document) communicated to McIntosh that he should not contract other distributors, as all would have the same answer pursuant to the “agreement.”

432. No witness testified contrary to McFadden regarding CX0164.

Response to Proposed Finding No. 432

The Proposed Finding is misleading to the extent that it is contradicted by McFadden’s own testimony and his other communications with McIntosh. For example, after McFadden’s text message to McIntosh (CX0164), McIntosh replied and requested a meeting. (CX0164 at 002). McFadden replied almost immediately and suggested that they set up a meeting in the future. (CX0164 at 002 (“Thanks Dave. I am travelling a ton over the next few weeks. Maybe we can

shoot for mid July?)). McFadden admitted that he was “open” to hearing what McIntosh had to say if McIntosh was talking about a DSO – suggesting that he did not really want to “shut down the conversation.” (McFadden, Tr. 2845; CCFF ¶¶ 659-660). Moreover, McFadden ultimately met with McIntosh in Atlanta to discuss McIntosh’s client, Choice One (CX0315 (McFadden, IHT at 248)), again suggesting the McFadden’s after-the-fact explanation of why he was lying is not credible. To the extent that McFadden’s own testimony calls his statements about CX0164 into question, the Proposed Finding should be disregarded.

433. CX0164 does not support Patterson’s participation in the alleged conspiracy.

Response to Proposed Finding No. 433

The Proposed Finding does not contain any evidentiary citations and should be disregarded. To the extent that it calls for a legal conclusion about the evidentiary value of communications to third parties about the existence of a conspiracy, it is not a finding of fact and should be disregarded.

CX0179

434. CX0179 is a December 16, 2013 internal Schein email chain involving Dave Steck, Tim Sullivan, Dean Kyle, and Joe Cavaretta.

Response to Proposed Finding No. 434

The Proposed Finding is misleading in that it misstates the dates and names of the recipients on the email chain. The email chain contains a number of emails, from a number of dates, with many different senders and recipients. The top email matches the description in the Proposed Finding, but many other emails in the chain do not. Because the description is incorrect, the Proposed Finding is incorrect.

435. Complaint Counsel has not explained how it believes CX0179 relates to its allegations against Patterson.

Response to Proposed Finding No. 435

The Proposed Finding is misleading and irrelevant to the extent that it implies that Complaint Counsel needs to provide Respondents with an explanation of each relevant document. On its face, the document is about Schein, Patterson and the TDA Perks Supply program. The document was quoted in ¶71(b) of the Commission’s Complaint, so Respondent Patterson has had full knowledge of the document and its context since Patterson was served with the Complaint. In addition, in its Pre-Trial Brief, Complaint Counsel explained how communications between and among Patterson, Schein and Benco about TDA and the TDA Perks Supply program provides additional evidence of a conscious commitment to their overarching agreement. *See* Complaint Counsel’s Pre-trial Brief (October 2, 2018) at 32-35. The Proposed Finding is misleading and irrelevant.

436. Complaint Counsel did not reference CX0179 during trial.

Response to Proposed Finding No. 436

The Proposed Finding is misleading to the extent that it implies that all documents in the record need to be referenced during trial. CX079 is admitted into the record and contains evidence relevant to communications between Schein and Patterson employees about the companies’ respective decisions to withdraw from the 2014 TDA Annual Meeting. In fact, the document shows that, on December 13, 2013, a Schein zone manager told his boss, “FYI Patterson pulled out of the [TDA] Convention. I firmly believe they made the move expecting us to follow suit.” (CX0179 at 002). This language is cited in ¶71(b) of the Commission’s Complaint, so Respondent Patterson has had full knowledge of the context of the document. Patterson has also admitted that a Schein regional manager in Texas visited a Patterson branch manager in

December 2013. (CX3113 at 007 (Answer of Patterson ¶71(b)), so has had full knowledge of the context of this related communication.

437. Complaint Counsel did not reference CX0179 their pretrial brief.

Response to Proposed Finding No. 437

The Proposed Finding is misleading to the extent that it incorrectly implies that Complaint Counsel needs to reference all relevant documents in its Pre-Trial brief. The document was quoted in ¶71(b) of the Commission's Complaint, so Respondent Patterson has had full knowledge of the document and its context since it was served with the complaint. Moreover, the document, on its face, is about Schein, Patterson and the TDA Perks Supply program. In its Pre-Trial Brief, Complaint Counsel explained how communications between and among the Big Three about TDA and the TDA Perks Supply program provides additional evidence of a conscious commitment to their agreement. See Complaint Counsel's Pre-trial Brief (October 2, 2018) at 32-35. CX0179 has been admitted into evidence and is in the record.

438. CX0179 relates to Patterson's non-attendance at the 2014 TDA meeting. Dean Kyle forwarding an email regarding TDA Perks to Joe Cavaretta, stating:

TDA Perks program just made the leap into capital gear. We do need to meet with them to discuss. FYI Patterson pulled out of Convention. I firmly believe they made the move expecting us to follow suit. (CX0179 at 2).

Response to Proposed Finding No. 438

Complaint Counsel has no specific response.

439. The only reference in CX0179 to Patterson is Kyle's statement that Patterson had pulled out of the 2014 TDA Convention, and that Kyle firmly believed Patterson expected Schein to follow suit. (CX0179 at 2).

Response to Proposed Finding No. 439

The Proposed Finding is misleading to the extent that it implies that there are no other references to distributors generally in the documents. The evidence is to the contrary. In a portion of the email chain in CX0179, dated December 16, 2013, Dave Steck sends an email to Tim Sullivan and Joe Cavaretta, stating, “Personally, I think we should get together with a group of other dealers and manufacturers and send them a petition.” (CX0179 at 001). Less than three weeks later, on January 6, 2014, Steck and Patterson’s Misiak spoke on the phone for 14 minutes. (CX6027 at 036 (Row 298)). Patterson has admitted that Misiak and Steck spoke about the TDA in that call. (CX3113 at 007 (Answer of Patterson ¶71(c))).

440. Kyle had not actually known Patterson’s expectations at the time he wrote the email in (CX0179 at 2), but had instead been relying on his intuition based on 40 years in the dental industry (CX0307 (Kyle, IHT at 299–305)).

Response to Proposed Finding No. 440

The Proposed Finding is misleading and incomplete to the extent that it cites incomplete testimony. In fact, Kyle’s testimony in his investigational hearing that his statement about Patterson pulling out of the 2014 TDA Annual Meeting was *not* based on his 40 years of experience in the industry. (CX0307 (Kyle, IHT at 301)) (“Q. Was there anything in your 40 years of experience that would help you come to the conclusion that Patterson would pull out of a convention expecting Schein to pull out of a convention? A. No.”)) Although Kyle also referred to his “intuition,” he couldn’t explain why he only mentioned Patterson in the email. (CX0307 (Kyle, IHT at 303)) (“Q. And why did you only mention Patterson in this E-mail and not other distributors such as Benco and Burckhardt [sic]? A. I don’t remember.”))

441. CX0179 does not mention or relate to policies concerning buying groups.

Response to Proposed Finding No. 441

The Proposed Finding is misleading to the extent that it implies the document does not relate to buying groups merely because the TDA Perks Supply is not referenced by name. The incorrect implication of the Proposed Finding is that every document must have a self-contained explanation of every issue. The full context of the document, which may be read with other documents and testimony in the record is that on December 13, 2013, a Schein zone manager told his boss, “FYI Patterson pulled out of the [TDA] Convention. I firmly believe they made the move expecting us to follow suit.” (CX0179 at 002). Almost immediately, Steck added another email, stating, stating, “Personally, I think we should get together with a group of other dealers and manufacturers and send them a petition.” (CX0179 at 001; CCFF ¶ 1141). Not long after that, he did, in fact speak with his counterpart at his competitor, Patterson. (CX6027 at 036 (Row 298) (On January 6, 2014, Steck and Misiak spoke on the phone for 14 minutes.); CCFF ¶¶ 1124-1126; *see also* CX0157 at 001; Misiak 1411-1422; CCFF ¶ 1127. Other documents in the record provide additional support for the conclusion that Patterson, Schein and Benco communicated about their concern with the TDA sponsoring the TDA Perks Supply buying group. *See* CX0108 at 001 (“As for Patterson, we have briefly discussed this TDAPerks site . . . with our dealer competitors at the local San Antonio & Houston level . . .”); CCFF ¶¶ 1123-1132).

442. Complaint Counsel does not allege a group boycott of the TDA Meeting in this case. (Kahn, Tr. 52; *see also* RXD0213 at 1).

Response to Proposed Finding No. 442

The Proposed Finding is misleading to the extent that it suggests that the communications between and among Patterson, Schein and Benco regarding their decisions to withdraw from the 2014 TDA Annual Meeting do not provide relevant evidence of an overarching conspiracy, a conscious commitment by the Big Three to their no buying group agreement, and a coordinated

response. *See* Complaint Counsel’s Post-Tr. Br. at 36-37, 61; Complaint Counsel’s Pre-trial Brief at 32-35. In addition, to the extent that the Proposed Finding relies on a demonstrative (RXD0213) as substantive support for the finding, that reliance contravenes the Court’s February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence.

443. CX0179 does not support Patterson’s participation in the alleged conspiracy.

Response to Proposed Finding No. 443

The Proposed Finding has no evidentiary support, so should be disregarded. It is also misleading to the extent that it implies CX0179 does not support a finding of Patterson’s participation in the conspiracy because it does not reference the conspiracy specifically. The incorrect implication of the Proposed Finding is that every document must have a self-contained explanation of every issue. The full context of the document, which may be read with other documents and testimony in the record, is that on December 13, 2013, a Schein zone manager told his boss, “FYI Patterson pulled out of the [TDA] Convention. I firmly believe they made the move expecting us to follow suit.” (CX0179 at 002). Almost immediately, Steck added another email, stating, stating, “Personally, I think we should get together with a group of other dealers and manufacturers and send them a petition.” (CX0179 at 001). Not long after that, he did, in fact speak with his counterpart at his competitor, Patterson. (CX6027 at 036 (Row 298) (On January 6, 2014, Steck and Misiak spoke on the phone for 14 minutes.)). Other documents in the record provide additional support for the conclusion that Patterson, Schein and Benco communicated about their concern with the TDA sponsoring the TDA Perks Supply buying group. *See* CX0108 at 001 (“As for Patterson, we have briefly discussed this TDAPerks site . . . with our dealer competitors at the local San Antonio & Houston level”); CCFF ¶¶ 1123-1132. In sum, CX0179

supports the conclusion that that communications between and among the Big Three about TDA and the TDA Perks Supply program demonstrates their conscious commitment to a no buying group policy.

CX2106

444. CX2106 is a March 5, 2014 email chain that includes a back-and-forth between Schein's Randy Foley and Chad Thompson of Heartland Dental, a DSO and one of Schein's biggest customers at that time. (Foley, Tr. 4708).

Response to Proposed Finding No. 444

Complaint Counsel has no specific response.

445. The chain begins with Thompson asking Foley whether he had heard of the TDA offering a discount program and whether it was working with Schein:

Hey Randy,
Have you heard about the Texas Dental Association offering supplies to members at discount prices? Are they working through Schein on this?
Just wondering. (CX2106 at 2-3).

Response to Proposed Finding No. 445

Complaint Counsel has no specific response.

446. Foley then responds with a pasted message that he says is "the scoop" from Schein's local branch manager:

No, they had reached out in the past but we never did anything with them. They have subsequently developed a relationship with other entities and are selling supplies under the "TDA PERKS" banner. While they don't have many of the major players they have an extensive # of products our clients can purchase. (CX2106 at 2).

Response to Proposed Finding No. 446

Complaint Counsel has no specific response.

447. Thompson then replies:

Interesting, we heard Patterson was boycotting their TDA annual meeting because of this so I thought Schein must have worked with them on it. (CX2106 at 1).

Response to Proposed Finding No. 447

Complaint Counsel has no specific response.

448. Foley writes back a final time:

Thanks. The good thing here is that PDCO, Benco, and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott. (CX2106 at 1).

Response to Proposed Finding No. 448

Complaint Counsel has no specific response.

449. The only testimony Complaint Counsel adduced during trial regarding CX2016 that pertained to Patterson was Randy Foley's testimony that "PDCO" stood for Patterson. (Foley, Tr. 4595).

Response to Proposed Finding No. 449

The Proposed Finding is misleading to the extent that it implies that the document is not clear on its face and that any testimony is necessary to understand the context and meaning of the document.

450. Foley did not discuss the TDA with anyone at Patterson. (Foley, Tr. 4709 ("Q. Mr. Foley, did you ever discuss the TDA with anyone at Patterson? A. No.")). Foley had no personal knowledge of Patterson's practices and was merely speculating based on Thompson's email claiming it was already boycotting the TDA annual meeting. (Foley, Tr. 4710–12).

Response to Proposed Finding No. 450

The Proposed Finding is misleading to the extent that it implies that Foley did not have knowledge about the positions taken by his competitors about withdrawing from the 2014 TDA Annual Meeting due to the establishment of the TDA Perks program. In this document, Foley stated to a third party (and a major customer), "The good thing here is that PDCO, Benco, and us

are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott.” (CX2106 at 001). Foley did not testify that he did not have actual knowledge on which he based his statement, only that he had not personally discussed TDA with anyone at Patterson. Foley’s reply to his customer also states that Benco is also “on the same page,” although Benco is not mentioned in the rest of the email exchange, suggesting that Foley response was not merely prompted by his customer’s reference to Patterson but was a summary of what he knew about his competitors’ positions.

451. Complaint Counsel does not allege a group boycott of the TDA Meeting in this case. (Kahn, Tr. 52; *see also* RXD0213 at 1).

Response to Proposed Finding No. 451

The Proposed Finding is misleading to the extent that it suggests that the communications between and among Patterson, Schein and Benco regarding their decisions to withdraw from the 2014 TDA Annual Meeting do not provide relevant evidence of 2019 a conscious commitment to their no buying group agreement. *See* Complaint Counsel’s Post-Tr. Br. at 36-37, 61; Complaint Counsel’s Pre-trial Brief at 32-35. Finally, to the extent that the Proposed Finding relies on a demonstrative (RXD0205) as substantive support for the finding, that reliance contravenes the Court’s February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence.

452. CX2106 does not support Patterson’s participation in the alleged conspiracy.

Response to Proposed Finding No. 452

The Proposed Finding is has no evidentiary citation and should be disregarded. It is, moreover contrary to the weight of the evidence. CX2106, a series of communications between a Schein executive and a third party, provides evidence to corroborate that Schein, Patterson and Benco

had a conscious commitment to their no buying group agreement, and communicated about a coordinated response to TDA. Foley, in sharing with a third party (and a customer) what actions Schein is taking with respect to buying groups, makes Schein's policy clear. Foley's email, moreover, expresses knowledge of his competitors' attitudes ("PDCO and us are on the same page regarding these buying groups/consortiums" (CX2106 at 001)), not a statement of observable fact that could be gained through market intelligence.

CX2220

453. Complaint Counsel did not reference CX2220 during its case-in-chief at trial.

Response to Proposed Finding No. 453

The Proposed Finding is misleading to the extent that it implies that CX2220 is not in evidence because it was not referenced by Complaint Counsel during the case-in-chief, or that documents in the record need to be referenced at trial to be considered part of the record. The document is in evidence. The Proposed Finding should be disregarded.

454. CX2220 is an internal Schein email exchange regarding the Denali Group.

Response to Proposed Finding No. 454

Complaint Counsel has no specific response.

455. The only reference to Patterson in CX2220 is at the end of an August 29, 2014 email from Schein's Kathleen Titus to Schein's Kristi Tomlinson-Edstrom, in which Titus writes about the Denali Group:

Thanks, Kristi. I do remember them now. They are a consulting group, meaning they sell a suite of services to solo providers. I don't have any direct experience, but most of these groups are attempting to bring their client list to Schein (or others) to secure discounted pricing on supplies/equip. They look at this as adding another high profile benefit to their portfolio offering. They also like to take an "Admin" or "Marketing" fee on the collective volume of their clients. This model is prevalent, but very unhealthy for distribution. They erode our margin on business we

may already have. They compete with us on Business Solution sales. They are yet another layer between us and our customer. They are not loyal. I could give you a dozen reasons, but you get the point. If it makes you feel better, PDCO is not on board for these type of GPO relationships either. (CX2220 at 1).

Response to Proposed Finding No. 455

The Proposed Finding is misleading to the extent that it suggests that the reference to Patterson's position of not doing business with GPOs ("If it makes you feel better, PDCO is not on board for these type of GPO relationships either." (CX2220 at 001)) is not relevant because the reference appears at the end of the email chain. Complaint Counsel has no specific response to the accuracy of the quoted language, including the fact that that Titus wrote to Tomlinson-Edstrom, about rejecting a buying group, "If it makes you feel better, PDCO is not on board for these type of GPO relationships either." (CX2220 at 001).

456. Regarding Titus's statement, "PDCO is not on board for these type of GPO relationships either," Titus testified that she had no personal knowledge as to whether Patterson was on board for GPO relationships as of her email. (Titus, Tr. 5234; *see also* CX8010 (Titus, Dep. at 177 (she had "no idea if Patterson is going after the GPO relationships. I had no intimate knowledge")))).

Response to Proposed Finding No. 456

The Proposed Finding is misleading and is not credible to the extent that it implies that, despite the clear language of the contemporaneous internal document, the witness's much later denial of that clear language should be given greater weight. The document, which is dated August 29, 2014 – during the core of the conspiracy – also establishes one of the reasons the Respondents saw buying groups as a threat. In referencing the industry as a whole, Titus wrote, "[t]his model is prevalent, but very unhealthy for distribution. *They erode our margin on business we may already have.*" (CX2220 at 001) (emphasis added).

457. Titus's statement about Patterson had been based on her not having run into Patterson as a competitor during Schein's interactions with GPOs. (Titus, Tr. 5234 ("[T]his statement was more of a market observation just looking at the dental landscape, being involved in the marketplace, being very focused on developing buying groups myself. And frankly, my comment was speaking to an FSC. In context, I was trying to get her to refocus and keep doing what she was doing. Q. And just to be clear, did you ever have any communications with anyone from Patterson about GPO relationships? A. Absolutely not."); CX8010 (Titus, Dep. at 176 ("So I'm generally stating that I am not seeing Patterson in there as our competitor."))).

Response to Proposed Finding No. 457

The Proposed Finding is misleading to the extent that it tries to suggest that Titus's statements in her email are not relevant to explaining the Respondents motivations for entering into the conspiracy. The document, which is dated August 29, 2014 – during the core of the conspiracy – establishes one of the reasons the Respondents saw buying groups as a threat. In referencing the industry as a whole, Titus wrote, "[t]his model is prevalent, but very unhealthy for distribution. *They erode our margin on business we may already have.*" (CX2220 at 001) (emphasis added).

The Proposed Finding is also misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Titus, who was not personally a party to the conspiracy or directly involved in the communications between Schein and Benco or Schein and Patterson, was not informed of the conspiracy. That a person who was not directly involved in perpetrating the agreement was not told of the existence of the agreement is irrelevant to whether the agreement existed.

458. No witness testified contrary to Titus regarding CX2220.

Response to Proposed Finding No. 458

The Proposed Finding is misleading to the extent that it implies that the Court should only consider testimony and is not permitted to consider all evidence in the record. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows

that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). The record evidence shows that the Big Three were part of an overarching conspiracy. (CCFF ¶¶ 1178-1198). Benco, Patterson, and Schein’s internal documents refer to the overarching conspiracy. (CCFF ¶¶ 1183-1195; *see, e.g.*, CX0093 at 001 (Patterson’s Misiak directing a Regional Manager not to do business with buying groups: “*Confidential and not for discussion . . . our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me.*”) (emphasis in the original); CX2106 at 001 (Schein’s Foley to Chad Thompson of Heartland: “The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott.”); CX2094 at 001 (Schein’s Foley in October 2015: “Keep in mind that I and others have been in contact with Tralongo over the years. Schein, PDCO and Benco all refused to bid on their business when they entered the GPO/Buying Group world.”); *see also* CCFF ¶¶ 1187, 1194, 1195). Benco’s documents similarly refer to an overarching conspiracy. (CCFF ¶¶ 1183, 1191-1193).

459. CX2220 does not support Patterson’s participation in the alleged conspiracy.

Response to Proposed Finding No. 459

The Proposed Finding, contains no evidentiary citations and should be disregarded. It is, moreover, misleading and contrary to the weight of the evidence. CX2220, on its face, demonstrates the understanding of a Schein employee of the behavior of Schein’s key competitor with respect to refusing to work with buying groups. As noted in Respondent Patterson’s Proposed Finding No. 457, Titus was providing advice to her field service representative, and that advice included the statement that “PDCO is not on board for these type of GPO

relationships either.” (CX2220 at 001). This document, is supportive of other record evidence demonstrating that Patterson participated in a conspiracy not to do business with buying groups.

Other

460. CX0092 is a February 27, 2013 internal Patterson email from Misiak to Guggenheim, stating in part: “I’ve coached [Regional Manager] on how to stay out of this [the Atlantic Dental Care RFP process] with grace. *I’m concerned that Schein and Benco sneak into these co-op bids and deny it. . . .*” (emphasis added).

Response to Proposed Finding No. 460

Complaint Counsel has no specific response.

461. Misiak denied that the email had anything to do with an agreement not to work with buying groups. (Misiak, Tr. 1508-09) (“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.”)).

Response to Proposed Finding No. 461

The Proposed Finding is unsupported by the testimony cited. The cited testimony is limited to the questions of whether Misiak was concerned that Schein was *violating* an agreement that it had with Patterson not to work with buying groups. Misiak did not deny that the email had anything to do with such an agreement. Because the Proposed Finding is unsupported by the evidence cited, it should be disregarded.

462. Instead, Misiak testified that his email reflected a desire for business intelligence. (Misiak Tr. 1369) (“Q. What was the concern in your mind? A. Part of my job again is just to understand what the competition is doing, the business environment.”)).

Response to Proposed Finding No. 462

The Proposed Finding is misleading and incomplete, because, when the witness was asked, in the very next questions about the basis for his statements, he had no knowledge of why he had made them. (Misiak, 1369-1371 (“Q. What was the concern if Benco and Schein deny it? A. I don’t

recall what I meant by that. Q. And when you said “deny,” whom did you have in mind that Schein and Benco would deny it to? [overruled objection omitted] A. I don’t remember.”)

Misiak also admitted that he wasn’t sure how Benco and Schein could work with buying groups and deny it. (Misiak, Tr. 1372 (“Q. From your perspective, how could Benco or Schein work with buying groups but deny it? A. I’m not sure.”))

Other testimony from Misiak with respect to the same email chain refutes the suggestion that he was seeking “business intelligence.” While Misiak testified that information about what his competitors were doing with GPOs was a “data point,” he could not articulate any purpose for the data (Misiak, Tr. 1360-1361), further indicating that his after-the-fact explanation that he was seeking market intelligence is specious. (Misiak, Tr. 1361 (“Q. And how does what your competitors are doing on GPOs impact what Patterson is doing on GPOs? A. It’s just a data point. Q. How so? A. Just information. Q. What do you use that information for? A. Beyond that, it’s just – it’s just data to have. Q. Can you articulate any purpose for the data to have? A. No.”)).

463. No witness testified contrary to Misiak regarding CX0092.

Response to Proposed Finding No. 463

The Proposed Finding is unsupported by any evidentiary citation and relies on the incorrect assumption that the previous Proposed Findings regarding CX0092 are an accurate reflection of Misiak’s testimony about the document. Because Patterson’s Proposed Finding Nos. 461 and 462, are incomplete, misleading, contrary to the weight of the evidence or irrelevant, those Proposed Finding and this one should be disregarded.

VII. Responses to Proposed Findings Regarding “There Is No Evidence That Patterson Boycotted Any ‘Buying Group.’”

a. Responses to Proposed Findings Regarding “Patterson Did Not Boycott Entities That Allegedly Sought To Work With Patterson In 2013.”

464. Complaint Counsel contends that the following entities are “buying groups” that “continued to seek supply contracts with Patterson” in 2013: Smile Source, the Dental Cooperative of Utah, the New Mexico Dental Cooperative. (RX2958 at 7–9 (Supplemental Response to Interrogatory 3)).

Response to Proposed Finding No. 464

Although Complaint Counsel has no specific response, whether these three particular buying groups continued to seek supply contracts with Patterson in 2013 it is irrelevant to the determination of the existence of an agreement by Patterson, Schein and Benco not to work with buying groups. The Proposed Finding is moreover is misleading and contrary to the weight of the evidence to the extent that it implies Patterson’s decision with respect to any particular buying group overcomes the overwhelming evidence showing that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups generally. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660).

Smile Source

465. Both Smile Source witnesses who testified at trial said that Smile Source is *not* a buying group. (Goldsmith, Tr. 1949 (“Judge Chappell: Did you consider Smile Source or do you consider Smile Source to be a buying group or a -- what is it, GPO? . . . A: I do not consider it to be that. Judge Chappell: Either of those. A: Correct.”); Maurer, Tr. 4969 (“Mr. Maurer, if I heard your testimony right, Smile Source is not a buying group. Is that right? A. Correct.”). It is a franchise DSO. (Goldsmith, Tr. 2046) (“Q. Okay. Now, Smile Source considers itself a franchise DSO; right? A. Of sorts, yes. Q. You’ve called yourself a franchise DSO before to others in the industry? A. I’ve called myself or I called Smile Source a franchise.”)).

Response to Proposed Finding No. 465

The Proposed Finding is misleading to the extent that it implies that distributors (including Respondents) did not consider Smile Source to be a buying group. Overwhelming and clear trial testimony shows that Respondents considered Smile Source to be a buying group. (Goldsmith, Tr. 1948-1949 (Schein, Patterson, and Benco referred to Smile Source as a buying group); Guggenheim, Tr. 1799 (“Q. Is this [Smile Source] a buying group? A. I believe so.”); Foley, Tr. 4524; Reece, Tr. 4394; Misiak, Tr. 1314 (“Q. What is Smile Source? A. I believe it is a GPO.”)). *See also* CX2801 at 018 (Schein’s Response to RFA ¶32 (Schein considered Smile Source to be a buying group)). In addition, Schein’s Sullivan testified that he considered Smile Source to be a buying group. (Sullivan, Tr. 3914 (“Q. You see them as a buying group? A. We – in essence, yes.”)). *See* CCFF ¶ 175. Smile Source functions as a buying group and markets itself to dentists as a buying group. For example, the record also shows that Smile Source, advertises itself to dentists as providing “group practice resources for the independent dentist” by negotiating lower prices on behalf of independent dentists (Goldsmith, Tr., 1934-1936; CX0322 (Maurer, IHT at 13) – which are the essential characteristics of a buying group. *See also* CCFF ¶¶ 143-144).

466. There is no evidence that any other entity listed in Complaint Counsel’s Supplemental Response to Patterson’s Interrogatory Three is a franchisor. (RX2958 at 7–9 (Supplemental Response to Interrogatory 3)).

Response to Proposed Finding No. 466

The Proposed Finding is vague, confusing, and irrelevant. The reference to “any other entity listed” is unclear as to which specific entities are referenced. The legal status of unidentified entities is irrelevant to the allegations that Respondents participated in a conspiracy that they would not do business with buying groups. As such, the Proposed Finding should be disregarded.

467. Smile Source had its own office, a board room, and a management team in the range of a hundred employees. (*See supra* ¶ 162).

Response to Proposed Finding No. 467

The Proposed Finding is misleading and irrelevant to the extent that it implies that other entities (including other entities that work with dentists or buying groups) lack legitimacy or are unable to contract with dental products distributors because they do not have a “board room” or a “management team in the range of a hundred employees.” There is no evidence in the record about the office space appearance, the required furniture, or the size of a “management team” that is necessary for a company to function successfully. Indeed, John Kois, Jr., the manager of the Kois Buyers Group – a buying group with approximately 570 members – has only one employee. (Kois Jr. , Tr. 306, 308, 313-314). The Proposed Finding is irrelevant and should be disregarded.

468. There is no evidence that any other entity listed in Complaint Counsel’s Supplemental Response to Patterson’s Interrogatory Three has its own office, a board room, and a management team in the range of a hundred employees. (RX2958 at 7–9 (Supplemental Response to Interrogatory 3)).

Response to Proposed Finding No. 468

The Proposed Finding is misleading, unsupported by any factual evidence, and irrelevant. It is misleading and irrelevant to the extent that it implies that other entities (including other entities that work with dentists or buying groups) lack the ability to function successfully or are not viable businesses because they do not have a “board room” or a “management team in the range of a hundred employees.” There is no evidence in the record about the office space appearance, the required furniture, or the size of a “management team” that is necessary for a company to function successfully. As noted above, John Kois, Jr., the manager of the Kois Buyers Group – a buying group with approximately 570 members – is the only employees, so has a management

team of one. (Kois Jr., Tr. 306, 308, 313-314). In addition, neither Patterson nor any other Respondent offered any expert witness to provide testimony about the required size of a company boardroom or management team, and none of the fact witnesses established their expertise to opine on that topic. The Proposed Finding is therefore unsupported by any evidence and should be disregarded.

469. Schein worked with Smile Source until January 2012, when *Smile Source terminated Schein*. (Goldsmith Tr. 2037 (“We made the decision.”)).

Response to Proposed Finding No. 469

The Proposed Finding is misleading to the extent that it implies that, because Schein and Smile Source ended their previous contractual agreement in 2012, Schein and Benco had not agreed not to work with buying groups. The evidence show that, [REDACTED]

[REDACTED]

[REDACTED]. (CCFF ¶¶ 899-915). [REDACTED]

[REDACTED]

[REDACTED] the relationship ended at the beginning of 2012. (CCFF ¶¶ 914-924). For example, in February 2012, Sullivan wrote to Steck, Foley and other Schein employees regarding Smile Source: “Let’s really take this serious and get after it. I’m really less concerned about the actual revenues, although very important too, rather more about what we can do to KILL the buying group model!!!” (CX0199 at 001 (emphasis in original); Sullivan, Tr. 3936-3937; CCFF ¶¶ 729, 758). Complaint Counsel has no specific response to the fact that Schein worked with Smile Source until January 2012.

470. Schein repeatedly attempted to gain back its contract with Smile Source during the period of the alleged conspiracy, making a proposal to Smile Source in 2014 and continuing to pursue Smile Source until 2017. (Maurer, Tr. 4942–46; CX4105 tab 5; RX2444 at 1).

Response to Proposed Finding No. 470

The Proposed Finding is misleading and not supported by the evidence cited. RX2444 shows that Smile Source reached out to Schein in 2015, not that Schein attempted to gain back its contract with Smile Source. The evidence does not support a finding that Schein continued to pursue Smile Source. Maurer likewise testified that *he* reached out to Sullivan in August of 2015, not that Schein made an attempt to gain back its contract or pursued Smile Source. To the extent that the Proposed Finding suggests that Schein attempted to gain back its business with Smiles Source in 2014, it is incomplete. (CCFF ¶¶ 1824-1852). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. To the extent that the Proposed Finding relies on Maurer’s testimony, his testimony is in conflict with other record evidence. For example, although Maurer testified that the 2014 bid was around a [REDACTED] discount off catalog prices (Maurer, Tr. 5004-5005), Schein admits that the proposal was not [REDACTED] off, but was actually 7% off branded supplies with a 2% rebate. (Schein Proposed Finding of Fact ¶ 1163; CCFF ¶¶ 1829-1830). Goldsmith testified that the 2014 bid was

[REDACTED] Corroborating Goldsmith’s view that Schein’s offer was [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

471. Schein expressed an interest in working with Smile Source on the very same day Patterson declined to do so in 2013. (*Compare* CX3117 at 1 (November 20, 2013 Patterson exchange with Smile Source), *with* RX2328 at 1 (November 20, 2013 Schein email to Smile Source stating, “we absolutely would like to discuss further.”)).

Response to Proposed Finding No. 471

The Proposed Finding is misleading to the extent that it suggests that Patterson did not reject Smile Source because it is a buying group. Indeed, on the same day that Misiak rejected Smile Source in 2013 (CX3117 at 001), Rogan wrote with respect to another buying group inquiry, “We don’t sell to buying groups. Let’s talk live.” (CX3168 at 001 (November 20, 2013 email from Rogan to Patterson’s Manager of Marketing Communications)). Rogan’s statement thus reflected Patterson’s general policy about buying groups, not a case-by-case analysis. The Proposed Finding is also misleading to the extent that it suggests that failure of the co-conspirators to act in lock step fashion indicates that they did not enter into an agreement. Indeed, even if they were not acting in a lock step fashion, Patterson’s other co-conspirators, Benco and Schein communicated specifically about whether they would be bidding on Smile Source. On October 1, 2013, Ryan at Benco called Foley at Schein. (CCFF ¶¶ 1010-1014). Following that call, Ryan wrote to his boss Cohen about the call, “[Smile Source is] [v]ery familiar. Talked to them three times. Nothing is different. Randy at Schein and I talked specifically about them. Buh-bye.” (CX0019 at 001). Schein ultimately did not enter into an agreement with Smile Source in 2014.

472. Patterson bid on Smile Source in early 2017, but lost to Schein. (Rogan, Tr. 3540.) (“Q. And at the meeting in early 2017, you and Mr. McFadden and Mr. Hobbs presented a proposal to Smile Source? A. We did. Q. And the purpose was to try to get Smile Source’s business? A. That’s correct.”).

Response to Proposed Finding No. 472

Complaint Counsel has no specific response.

473. Benco rejected Smile Source in 2011 (CX0004 at 1).

Response to Proposed Finding No. 473

Complaint Counsel has no specific response.

474. And Benco's Chuck Cohen, in February 2014 (the middle of the alleged agreement to boycott "buying groups" including Smile Source), met with Smile Source and wrote contemporaneously, [REDACTED]

(CX1060 at 1).

Response to Proposed Finding No. 474

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Benco had changed its no buying group policy in 2014. In April 2014, Cohen was still reaching out to Guggenheim and Sullivan to share his concerns about TDA Perks Supplies, the buying group associated with the Texas Dental Association. (CX1062; CCFF ¶¶ 1133-1136) In June 2014, a Benco employee reported that he was planning to communicate with Schein and Patterson regarding withdrawing from the Arizona Dental Association's annual meeting because of the Arizona Dental Association's affiliation with a buying group. (CX1378 at 001 (June 18, 2014, email from Benco's Mike Wade)).

475. Andy Goldsmith, Smile Source's former Chief Dental Officer, testified that each Respondent responded differently to Smile Source during the alleged conspiracy period. (Goldsmith, Tr. 2177 ("Q. So three different respondents, three different responses; correct? A. Yes.")). Complaint Counsel's expert, Dr. Marshall, acknowledged that Respondents' conduct towards Smile Source was not parallel. (Marshall, Tr. 2954) ("Q. Now let's go to your rebuttal report. It's CX 7101. And let's go to page 50. And you say here that "The Respondents are not alleged to have submitted and lost bids for potentially profitable business. They are alleged to have refused to provide bids at all." Do you see that? A. Yes. Q. Okay. Now, you understand that Schein actually submitted a bid for Smile Source in 2014; right? A. I do. That's in my report. Q. Okay. So if Schein did submit a bid and it lost the bid, at least with respect to Smile Source, it did not refuse to submit a bid to Smile Source in 2014; right? A. Yes. That's discussed in my report.")).

Response to Proposed Finding No. 475

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that differences in responses from Schein, Patterson and Benco preclude a finding of parallel conduct by the three. The weight of the evidence is to the contrary, showing that (1) all

three Respondents turned down buying groups during the conspiracy period, (2) all three of Respondents' executives, including Cohen, Guggenheim, and Sullivan, instructed their sales teams to turn down buying groups during the conspiracy period, and (3) all three of Respondents' sales teams understood that the directive not to deal with buying groups came from the top of the company. (CCFF ¶¶ 398-399, 406-425, 527, 534-563, 661-954; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). The Proposed Finding also cites to an expert to establish an underlying substantive fact, in direct contravention of this Court's February 21, 2019 Order on Post-Trial Briefs at 3, prohibiting citation to expert witness testimony to support factual proposition that "should be established by fact witnesses or documents." It should, therefore be disregarded.

476. The Respondents' dealings with Smile Source are inconsistent with Complaint Counsel's allegation of a conspiracy to refuse to deal with buying groups, and particularly inconsistent with the allegation that "[a]fter the start of the conspiracy, the Distributors coordinated their conduct with respect to this customer segment." (Compl. ¶ 9).

Response to Proposed Finding No. 476

The Proposed Finding is misleading, contrary to the weight of the evidence and lacks evidentiary citations and is little more than argument. As such, it should be disregarded. The Proposed Finding is also misleading and contrary to the weight of the evidence establishing that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, the Big Three rejected buying groups. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198). The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). The record is replete with examples of buying groups that Schein

categorically rejected because it had a policy not to do business with buying groups during the conspiracy period. (CCFF ¶¶ 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). Schein’s documents similarly refer to an understanding that the Big Three would refuse buying groups. For example, on March 5, 2014, Foley (Schein) wrote to Chad Thompson of Heartland: “The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott.” (CX2106 at 001; *see also* CCFF ¶ 1194). The record also shows that Benco had a long-standing no buying group policy, and followed that throughout the conspiracy period. CCFF ¶¶ 394-396; Ryan, Tr. 1029 (“Q. And it is fair to say that once you found out a group was a buying group, the answer was no from Benco, meaning no, Benco wouldn’t work with them? A. Correct. We would tell them what our policy is and move on.”)) Benco’s documents also refer to an overarching conspiracy. (CCFF ¶¶ 1183, 1191-1193). None of the Big Three competed for buying groups during the conspiracy period.

Finally, the Proposed Finding is misleading to the extent that it suggests that failure of the co-conspirators to act in lock step fashion indicates that they did not enter into an agreement. Indeed, even if they were not acting in a lock step fashion, Patterson’s other co-conspirators, Benco and Schein communicated specifically about whether they would be bidding on Smile Source. On October 1, 2013, Ryan at Benco called Foley at Schein. (CCFF ¶¶ 1010-1014). Following that call, Ryan wrote to his boss Cohen about the call, “[Smile Source is] [v]ery familiar. Talked to them three times. Nothing is different. Randy at Schein and I talked specifically about them. Buh-bye.” (CX0019 at 001) Schein ultimately did not enter into an agreement with Smile Source in 2014.

Dental Cooperative of Utah

477. There is no evidence that the Dental Cooperative of Utah interacted with Patterson in 2013 or thereafter.

Response to Proposed Finding No. 477

The Proposed Finding is misleading and contrary to the evidence in the record to the extent that it implies Patterson had no communications with the Dental Cooperative of Utah during the period 2013 or thereafter. CX2239, a Schein document, indicates that Patterson communicated with Andy Eberhardt, an executive with the Dental Cooperative of Utah in May 2014. (CX2239 at 002). The Proposed Finding is also misleading to the extent that it implies that no conspiracy existed absent specific actions to reject specific buying groups. The weight of the evidence shows that all three Respondents turned down buying groups during the conspiracy period, all three of Respondents' executives, including Cohen, Guggenheim, and Sullivan, instructed their sales teams to turn down buying groups during the conspiracy period, and all three of Respondents' sales teams understood that the directive not to deal with buying groups came from the top of the company. (CCFF ¶¶ 398-399, 406-425, 527, 534-563, 661-954; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). Patterson did not need to have specific interactions with the Dental Cooperative of Utah in order to act in accordance with its agreement.

478. There is no evidence that Patterson refused to deal with the Dental Cooperative of Utah or took any actions concerning the Dental Cooperative of Utah based upon the alleged conspiracy.

Response to Proposed Finding No. 478

The Proposed Finding is misleading and contrary to the evidence in the record to the extent that it implies Patterson had no communications with the Dental Cooperative of Utah during the period 2013 or thereafter. CX2239, a Schein document, indicates that Patterson communicated with Andy Eberhardt, an executive with the Dental Cooperative of Utah in May 2014. (CX2239 at 002). The Proposed Finding is also misleading to the extent that it implies that no conspiracy

existed absent specific actions to reject specific buying groups. The weight of the evidence shows that all three Respondents turned down buying groups during the conspiracy period, all three of Respondents' executives, including Cohen, Guggenheim, and Sullivan, instructed their sales teams to turn down buying groups during the conspiracy period, and all three of Respondents' sales teams understood that the directive not to deal with buying groups came from the top of the company. (CCFF ¶¶ 398-399, 406-425, 527, 534-563, 661-954; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). Patterson did not need to have specific interactions with the Dental Cooperative of Utah in order to act in accordance with its agreement not to do business with buying groups.

479. Schein had "a long term legacy relationship" with the Dental Cooperative of Utah (Titus, Tr. 2535).

Response to Proposed Finding No. 479

The Proposed Finding is confusing and unhelpful, as it provides not temporal reference for the period of time during which Patterson is asserting Schein has a "long term legacy relationship" with the Dental Cooperative of Utah, and does not even specify if this relationship was during the conspiracy period. Titus's testimony, moreover, is not located near the page cited (Titus's testimony is found at Titus, Tr. 5190-5341). Because the Proposed Finding is confusing, unsupported, and does not establish a clear fact, it should be disregarded.

480. Schein worked with the Dental Cooperative of Utah from at least 2009 until July 2014. (Cavaretta, Tr. 5601; CX2211 at 1).

Response to Proposed Finding No. 480

The Proposed Finding is misleading and incomplete to the extent that it makes selective reference to statements in the cited document, CX2211. Although the document indicates that Schein had been working with the Dental Cooperative of Utah and was terminating its

relationship, the Henry Schein Dental Zone Manager for its Western Pacific Region also writes in the next page of that document, “The Co-Op is turning into a GPO . . . HSD does not want to enter the GPO world.” (CX2211 at 002).

481. There is no evidence in the record that the Dental Cooperative of Utah continued seeking supply contracts with Patterson in 2013, as alleged. (RX2958 at 7–9 (Supplemental Response to Interrogatory 3)).

Response to Proposed Finding No. 481

The Proposed Finding is misleading and contrary to the evidence in the record to the extent that it implies Patterson was not communicating with the Dental Cooperative of Utah about a possible supply arrangement in 2014. CX2239 provides evidence that Patterson communicated with Andy Eberhardt, an executive with the Dental Cooperative of Utah in May 2014. (CX2239 at 002). The Proposed Finding is also misleading to the extent that it implies that no conspiracy existed absent specific actions to reject specific buying groups. The weight of the evidence shows that all three Respondents turned down buying groups during the conspiracy period, all three of Respondents’ executives, including Cohen, Guggenheim, and Sullivan, instructed their sales teams to turn down buying groups during the conspiracy period, and all three of Respondents’ sales teams understood that the directive not to deal with buying groups came from the top of the company. (CCFF ¶¶ 398-399, 406-425, 527, 534-563, 661-954). Patterson did not need to have specific interactions with the Dental Cooperative of Utah in order to have entered into an overarching conspiracy with Benco and Schein.

b. Responses to Proposed Findings Regarding “There Is No Evidence That Certain Entities Would Have Purchased from Patterson But For A Conspiracy.”

482. Complaint Counsel contends in sworn discovery responses that the following entities are “buying groups” that “may have bought dental equipment or supplies from Patterson but for the alleged conspiracy:” “Catapult Group, Dental Cooperative (Nevada and Utah), Dental

Gator, Dentistry Unchained, Direct Dental, Florida Dental Society, Hampton Roads Dental Partners, Integrity Dental Buyers' Group, Klear Impakt, Kois Buyers Group, New Mexico Dental Cooperative, Schulman Group, Steadfast Medical, Synergy Dental Partners, The Dentists' Service Co., Unified Smiles, and UOBG.” (RX2958 at 7–9 (Supplemental Response to Interrogatory 3)). Complaint Counsel failed to put any evidence in the record that these entities “may have bought dental equipment or supplies from Patterson but for the alleged conspiracy.”

Response to Proposed Finding No. 482

The Proposed Finding is misleading, irrelevant, and incomplete. It is misleading and irrelevant to the extent that it implies that the question of whether particular buying groups “may have bought dental supplies from Patterson but for the alleged conspiracy” is a necessary element of the proof of the conspiracy. The elements of a violation of law is a legal question; Respondent Patterson’s decision to frame a discovery request in a certain fashion does not turn that request into an accurate statement of the law. Whether a particular buying group “may have bought dental equipment or supplies from Patterson but for the alleged conspiracy” is irrelevant to the factual question of whether Patterson engaged in the conspiracy. Indeed, but for the conspiracy Respondent Patterson might have competed for a buying group, but still not done business with that entity because one of its co-conspirators or another distributor may have won the business. Finally, the Proposed Finding is incomplete to the extent that it relies upon a statement from a discovery response, but fails to include Complaint Counsel’s objections, including the objection that the interrogatory “calls for speculation insofar as it calls upon Complaint Counsel to identify what products each such ‘buying group’ would have purchased.” Because the Proposed Finding is premised on an incorrect assumptions of the legal requirements and because relies on an incomplete statement of the facts, it is misleading and should be disregarded.

483. “Buying groups” do not buy anything. (Maurer, Tr. 4970 (“Q. And you don’t buy dental equipment, do I got that right? A. Right. And you don’t buy dental supplies? A. Correct.”); Sullivan, Tr. 4328 (buying groups “do not” actually buy dental supplies; the private practice dentists do); *see also, e.g.*, Sullivan, Tr. 4105 (same); Sullivan, Tr. 4330–31 (same); Cohen, Tr. 684 (same); Rogan, Tr. 3588 (same)).

Response to Proposed Finding No. 483

The Proposed Finding is misleading to the extent that it implies that buying groups do not negotiate discounted prices on dental products and services for their members. The record, including testimony from each of the Respondents, shows a consistent understanding of what buying groups do. That is, dental buying groups are organizations of independent dentists that seek to aggregate and leverage the collective purchasing power of separately-owned and separately-managed dental practices in exchange for lower prices on dental products. (Kois, Jr., Tr. 348-349; Sullivan, Tr. 3899 (buying group “mean[s] a group of customers that get together and form a group to negotiate with their larger volume”)). See CCFF ¶ 67.

Catapult Group

484. Complaint Counsel did not ask any witness at trial about the Catapult Group.

Response to Proposed Finding No. 484

The Proposed Finding is misleading and irrelevant to the extent that it implies that evidence about Patterson’s interactions with the Catapult Group are not in the record because they were not addressed by a witness at trial. The Proposed Finding is also misleading, irrelevant and contrary to the weight of the evidence to the extent that it implies that Patterson did not enter into an agreement not to do business with buying groups generally, and did not act in compliance with that agreement, including instructing its team not to do business with buying groups. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). For example, within a few weeks of Guggenheim’s February 8, 2013 email with Cohen (CX0090), Patterson began

instructing sales representatives to “stay out” of buying groups. (CX0093 at 001 (Statement of Misiak: “stay out” of buying group); CX0106 at 001 (Statement of Rogan: “We don’t need GPO’s in the dental business”); CX3116 at 001 (Statement of Misiak: “My guidance has been to politely say no [to buying groups] and whether [sic] the storm with these.”); CX3168 at 001 (Statement of Rogan: “We don’t sell to buying groups. Let’s talk live.”); CX3010 at 001 (Statement of McFadden: “[A]s of now we are not working with GPO’s.”); CX3016 at 001 (Statement of McFadden: “I am sure we should pass on these [buying] groups....”); CX3004 at 001 (Statement of McFadden: “For now – I am electing to not participate with [buying groups] – we have said no to several already”); CX3045 at 001 (Statement of McFadden: “[D]oes he own all these offices—if not then he is a GPO—we don’t deal with GPOs.”)). Because the conspiracy precluded doing business with dental buying groups generally, it would have included the Catapult Group.

485. On February 12, 2014, Lou Graham, a Patterson customer, emailed Patterson’s David Misiak about meeting regarding the Catapult Group. (CX3287 at 2).

Response to Proposed Finding No. 485

Complaint Counsel has no specific response.

486. Misiak forwarded Graham’s email to Patterson’s Paul Guggenheim, Tim Rogan, Rick Cacciatore, and Rex Plamann, stating:

All, I will respond to Dr Graham, bcc each of you, with a polite pass on this request. . . . (CX3287 at 1).

Response to Proposed Finding No. 486

Complaint Counsel has no specific response.

487. Guggenheim asked, “What exactly is he proposing?” (CX3287 at 1).

Response to Proposed Finding No. 487

Complaint Counsel has no specific response.

488. Misiak responded, “A co op buying group that we pay Catapult (him) and he provided CE.” (CX3287 at 1).

Response to Proposed Finding No. 488

Complaint Counsel has no specific response.

489. Complaint Counsel did not ask any witness at trial about CX3287.

Response to Proposed Finding No. 489

The Proposed Finding is misleading and irrelevant to the extent that it implies that evidence about Patterson’s interactions with the Catapult Group, as referenced in CX3287, are not in the record. The Proposed Finding is also misleading, irrelevant and contrary to the weight of the evidence to the extent that it implies that Patterson did not enter into an agreement not to do business with buying groups generally, and did not act in compliance with that agreement, including instructing its team not to do business with buying groups. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). Because the conspiracy precluded doing business with dental buying groups generally, it would have included the Catapult Group. CX3287 confirms that Patterson took this position with the Catapult Group in February 2014, which was during the conspiracy period. In CX3287, Misiak explains to Guggenheim, Rogan and others, that he will be rejecting the request from a “longtime” Patterson customer representing the Catapult Group: “All, I will respond to Dr Graham, bcc each of you, with a polite pass on this request.” (CX3287 at 001; Guggenheim, Tr. 1812). Misiak’s response confirms that, during the

conspiracy period, Patterson did not evaluate buying groups individually; rather, the document shows that Patterson rejected the buying group out of hand.

490. Patterson's Paul Guggenheim testified, however, that what Dr. Graham was requesting from Patterson was a "vig," or "kickback." (Guggenheim, Tr. 1813–14).

Response to Proposed Finding No. 490

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it suggests that there is anything in the record to support the position that this was the basis for Patterson's decision to reject the Catapult Group at the time. CX3287 shows that Misiak rejects the inquiry from the Catapult Group without further inquiry. In addition, Guggenheim's after-the-fact testimony that Dr. Graham was seeking a "kickback" conflicts with the information provided by Misiak: Dr. Graham was seeking compensation in exchange for providing CE or continuing education. The email itself does not use the word "vig" or "kickback, and Guggenheim's after-the-fact efforts to paint this proposal by a customer seeking to establish a buying group as a "kickback" should be disregarded.

491. Patterson was generally not interested in paying "vigs" or "kickbacks." (Guggenheim, Tr. 1802 ("A. A vig is like a kickback, which is something that ethically at our company we are very firm that that's not acceptable. We don't participate with that kind of stuff, so we don't buy business through third parties like this.")).

Response to Proposed Finding No. 491

The Proposed Finding is misleading, contrary to weight of the evidence, and in particular, contrary to the testimony of another Patterson witness. The record evidence show that, after the conspiracy ended, Patterson was interested in working with buying groups. *See, e.g.*, CX3362 at 001 (November 13, 2015 email from Rogan to Guggenheim about Strategic Planning: "You have "global" on your strategic plan. Maybe that moves aside . . . And we add GPO's/Buying Groups to the strategic plan. Meaning we are going to build out a strategy of how we are going

to go to market with them?”) When Rogan was asked about his instruction to Guggenheim regarding adding buying groups to the strategic plan, Rogan’s testimony was that this was *not* unethical. (Rogan, Tr. 3459-3460 (“Q. But you wouldn’t suggest that the company look into something if it was unethical or against your corporate values. THE WITNESS. For – I would never suggest for my company do something unethical. That part is correct.”)).

492. Thus, the Catapult Group was “not at all” a great opportunity for Patterson. (Guggenheim, Tr. 1814).

Response to Proposed Finding No. 492

The Proposed Finding is misleading, contrary to the weight of the evidence and irrelevant. It is misleading and contrary to the weight of the evidence to the extent that it implies Patterson’s decision with respect to any particular buying group overcomes the overwhelming evidence that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups generally. (CCFF ¶¶ 483-501, 513). The evidence further shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). There is also no evidence in the record that Patterson made any efforts whatsoever to evaluate the Catapult Group as a potential client, despite the fact that the dentist who was seeking to establish the group was a “longtime” Patterson customer. (Guggenheim, Tr. 1812). Rather, during the conspiracy period, Patterson rejected Catapult out of hand.

493. Complaint Counsel’s expert, Dr. Marshall, had no idea what proposal Catapult made to Patterson and whether it was coherent. (Marshall, Tr. 3265 (“I don’t know if it was a coherent proposal I don’t have knowledge of the proposal that was put forward.”)).

Response to Proposed Finding No. 493

The Proposed Finding is misleading, contrary to the weight of the evidence and irrelevant. It is misleading and contrary to the weight of the evidence to the extent that it implies Patterson's decision with respect to any particular buying group overcomes the overwhelming evidence that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups generally. (CCFF ¶¶ 483-501, 513). The evidence further shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). The Proposed Finding is also misleading and irrelevant to the extent that it attempts to establish anything about the quality of Catapult's proposal – a substantive fact -- based on the testimony of an expert. Reliance on an expert to establish an underlying substantive fact is in direct contravention of this Court's February 21, 2019 Order on Post-Trial Briefs at 3, prohibiting citation to expert witness testimony to support factual proposition that "should be established by fact witnesses or documents." There is no other testimony in the record to support this substantive fact. Because this Proposed Finding is misleading and unsupported by evidence, it should be disregarded.

494. There is no communication in the record in which Misiak, or anyone else at Patterson, communicates to the Catapult Group that Patterson was declining to work with it.

Response to Proposed Finding No. 494

The Proposed Finding is misleading to the extent that it implies that Patterson worked with Catapult Group or any other buying group during the conspiracy period. On the contrary, in a sworn interrogatory response, Patterson stated that it did have any agreements to work with buying groups. (CX3504 at 004 (Patterson's Response to Complaint Counsel's First Interrogatories ¶1) ("Patterson is not currently aware of any agreements for the purchase or sale of dental products between itself and entities falling under the FTC's definition of "Buying Group" [for the period 2009 to April 16, 2018])). Misiak's statement, moreover, provides clear

evidence of Patterson's plan to comply with its no buying group policy, as well as evidence that it planned to communicate to the Catapult Group that it was declining to work with it. (CX3287 at 001 ("All, I will respond to Dr Graham, bcc each of you, with a polite pass on this request.")). The Proposed Finding is misleading and should be disregarded.

495. There is also no evidence in the record of Patterson communicating with Benco or Schein about the Catapult Group.

Response to Proposed Finding No. 495

The Proposed Finding is misleading, irrelevant and contrary to the weight of the evidence to the extent that it implies that, because Patterson may not have communicated with its competitors about rejecting a specific buying group, it did not enter into an agreement not to do business with buying groups, and did not act in compliance with that agreement. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). The record is replete with examples of buying groups that Schein categorically rejected because it had a policy not to do business with buying groups during the conspiracy period. (CCFF ¶¶ 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). Schein's documents similarly refer to an understanding that the Big Three would refuse buying groups. For example, on March 5, 2014, Foley (Schein) wrote to Chad Thompson of Heartland: "The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott." (CX2106 at 001; *see also* CCFF ¶ 1194). The record also shows that Benco had a long-standing no buying group policy, and followed that throughout the conspiracy period. (CCFF ¶¶ 394-396; Ryan, Tr. 1029 ("Q. And it is fair to say

that once you found out a group was a buying group, the answer was no from Benco, meaning no, Benco wouldn't work with them? A. Correct. We would tell them what our policy is and move on.”)). Benco's documents similarly refer to an overarching conspiracy. See CCFF ¶¶ 1183, 1191-1193.

496. Thus, there is no evidence that Patterson would have worked with the Catapult Group but for the alleged conspiracy.

Response to Proposed Finding No. 496

The Proposed Finding is lacks any evidentiary support and is irrelevant. Whether Patterson would have worked with any particular buying group “but for the alleged conspiracy” is irrelevant to the factual question of whether Patterson engaged in the conspiracy. Indeed, but for the conspiracy Respondent Patterson might have competed for the Catapult Group, but still not done business with that entity because one of its co-conspirators or another distributor may have won the business. Because the Proposed Finding is irrelevant, it should be disregarded.

497. Patterson's dealings with what has been called the Catapult Group do not support Patterson's participation in the alleged conspiracy.

Response to Proposed Finding No. 497

The Proposed Finding should be disregarded because it contains no evidentiary support and is contrary to the weight of the evidence. The evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). For example, within a few weeks of Guggenheim's February 8, 2013 email with Cohen (CX0090), Patterson began instructing sales representatives to “stay out” of buying groups. (CX0093 at 001 (Statement of Misiak: “stay out” of buying group); CX0106 at 001 (Statement

of Rogan: “We don’t need GPO’s in the dental business”); CX3116 at 001 (Statement of Misiak: “My guidance has been to politely say no [to buying groups] and whether [sic] the storm with these.”); CX3168 at 001 (Statement of Rogan: “We don’t sell to buying groups. Let’s talk live.”); CX3010 at 001 (Statement of McFadden: “[A]s of now we are not working with GPO’s.”); CX3016 at 001 (Statement of McFadden: “I am sure we should pass on these [buying] groups....”); CX3004 at 001 (Statement of McFadden: “For now – I am electing to not participate with [buying groups] – we have said no to several already”); CX3045 at 001 (Statement of McFadden: “[D]oes he own all these offices—if not then he is a GPO—we don’t deal with GPOs.”)). Because the conspiracy precluded doing business with dental buying groups generally, it would have included the Catapult Group.

Patterson’s actions in rejecting the Catapult Group are consistent with and support a finding that Patterson participated in the conspiracy.

Dental Gator

498. MB2 Dental Solutions (“MB2”) is a DSO headquartered in Texas. (Pucket, Tr. 2201–02).

Response to Proposed Finding No. 498

Complaint Counsel has no specific response.

499. As of November 2018, MB2 had been a Schein customer for “coming up on 11 years.” (Puckett, Tr. 2210)

Response to Proposed Finding No. 499

Complaint Counsel has no specific response.

500. In early 2014, MB2 sent a request for proposal to Schein, Patterson, and Benco. (Puckett, Tr. 2271).

Response to Proposed Finding No. 500

Complaint Counsel has no specific response.

501. Dental Gator told Patterson, Schein, and Benco in early 2014 that its purpose was to grow MB2's base of ownership by identifying new practices that MB2 could acquire. (Puckett, Tr. 2272–73 (“Q. And what did you tell Schein about MB2's plans for Dental Gator? A. We told them that we wanted to create this group, we, being MB2, wanted to create this group, being Dental Gator, in order to try to eventually acquire practices that were not for sale on the dental broker market in order to grow MB2's -- you know, our -- basically grow our business with new owners, new affiliated offices. Q. Did MB2 also tell that same thing to Benco in early 2014? A. Yes, ma'am. Q. Did MB2 also tell that same thing to Patterson in early 2014? A. Yes, ma'am. Q. So is it fair to say that the primary purpose of the Dental Gator buying group was to serve as an acquisition tool for MB2 Dental? A. Yes, ma'am.”)).

Response to Proposed Finding No. 501

The Proposed Finding is misleading, misstates that witness' testimony, and is unsupported by the cited testimony. The witness testified that MB2 told Patterson, Schein and Benco that it planned to create a group called Dental Gator. (Puckett, Tr. 2271-2272). There is no testimony in the record that Dental Gator communicated with Patterson or Benco. Because the Proposed Finding is based on inaccurate citations, it should be disregarded.

502. Schein, Patterson, and Benco all responded to MB2's request for proposal. (Puckett, Tr. 2271 (“Q. And did all three respond to the request for proposal? A. Yes, ma'am.”)).

Response to Proposed Finding No. 502

The Proposed Finding is misleading to the extent that it implies that Patterson or Benco submitted responses to a request for proposal to supply Dental Gator, a buying group.

503. Patterson submitted a bid that, if successful, would have taken business away from Schein. (Puckett, Tr. 2309)

Response to Proposed Finding No. 503

The Proposed Finding is misleading to the extent that it implies that Patterson submitted a bid to supply Dental Gator, a buying group, rather than MB2, a DSO. In fact, Patterson submitted a bid for MB2's business (Puckett, Tr. 2309). Despite Puckett's testimony that he told Patterson about Dental Gator in 2014, internal Patterson documents suggest that Patterson was unaware until January 2015 that MB2 was creating Dental Gator, and was hostile to its growth and development. (RX0406 at 001-002 (January 19, 2015 email from Patterson Dallas/Fort Worth Branch Manager to McFadden and Clint Edens: "Below is an email thread from [Patterson sales rep] regarding Dental Gator. . . Gator solicits business from single practitioners and group accounts to offer them MB2's special markets pricing for a \$499 monthly fee. . . . I am bringing this to your attention so you are aware of what Gator is doing and hopefully work with manufacturers to prevent this from happening.")). The Proposed Finding is further misleading to the extent that it implies that Patterson was competing with Schein for the business of a buying group.

504. MB2 chose Schein over Patterson and Benco. (Puckett, Tr. 2271, 2309).

Response to Proposed Finding No. 504

Complaint Counsel has no specific response.

505. Patterson continued to pursue MB2's business in competition with Schein after this, through calls, dinners, and meetings at conferences. (Puckett, Tr. 2309–10 ("After that unsuccessful bid by Patterson in 2014, did Patterson continue to attempt to get business from MB2? A. Yes. Q. And how did they do that? A. They call a lot. They try to take us to dinner, meet them at conferences, et cetera.")).

Response to Proposed Finding No. 505

The Proposed Finding is misleading to the extent that it implies that Patterson has every competed for the business of Dental Gator. To the extent that Patterson has competed for the business of MB2, a DSO, the Proposed Finding is irrelevant.

506. MB2 currently works with Schein and Patterson. (Puckett, Tr. 2209).

Response to Proposed Finding No. 506

Complaint Counsel has no specific response.

507. Dental Gator was created by MB2 in early 2014. (Puckett, Tr. 2201–02, 2218).

Response to Proposed Finding No. 507

Complaint Counsel has no specific response.

508. Though MB2 considered Dental Gator to be a “buying group” (Puckett, Tr. 2215–16), it distinguishes a “buying group” as different from a “buying club,” in that the latter is solely characterized by the question, “do you save money on supplies and things you purchase.” (Puckett, Tr. 2273).

Response to Proposed Finding No. 508

Complaint Counsel has no specific response to the fact that this is Puckett’s statement about whether a buying group was the same as a “buying club.” There is substantial evidence in the record that there is a common understanding of the term “buying group” and that buying group are also referred to as buying clubs. (CCFF ¶¶ 67-68; Meadows, Tr. 2216). Evidence in the record shows that dental buying groups are organizations of independent dentists that seek to aggregate and leverage the collective purchasing power of separately-owned and separately-managed dental practices in exchange for lower prices on dental products. (Kois, Jr., Tr. 348-349; Sullivan, Tr. 3899 (buying group “mean[s] a group of customers that get together and form a group to negotiate with their larger volume”), 3941; Guggenheim, Tr. 1566 (a buying group is a collection of customers that work together to leverage buying power to secure pricing); Meadows, Tr. 2418-2419; Steck, Tr. 3681-3683; Goldsmith, Tr. 1936, [REDACTED]; [REDACTED]; Cohen, Tr. 432-433; Reece, Tr. 4365; CX0301 (Cohen, IHT at 106); CX8004 (McFadden, Dep. at 19-20 (“[A] buying group is a group of independent dentists that get together to form a group in order to get discounted dental supplies.”))).

509. Dental Gator believes it is not a “buying club” because “it tried to do more than that,” such as providing legal, compliance, marketing, dental laboratories, postage, staples, and other services and benefits to its members. (Puckett, Tr. 2273).

Response to Proposed Finding No. 509

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it suggests that the distinction between “buying groups” and “buying clubs” is recognized in the dental industry or is relevant to this case. The evidence in the record shows that other participants in the industry typically use the terms “buying group” and “buying club” interchangeably. (*See, e.g.*, Meadows, Tr. 2216 (“Q. Have you heard of the term ‘group purchasing organization’ or ‘GPO’ for short? A. I have. Q. And what to you understand a group purchasing organization to be? A. I would – I would I guess analogize it very similar to a buying club or a buying group, just a different term.”); *see also* CX1061 at 011 (referring to Smile Source as a “buying club”); CX1198 at 001 (referring to XYZ Dental as a “GPO or ‘buying club’”); CCFF ¶¶ 68, 71).

510. Puckett did not testify that Dental Gator ever approached Patterson or that Patterson ever refused to deal with Dental Gator. No such evidence exists in the record.

Response to Proposed Finding No. 510

The Proposed Finding is misleading, irrelevant and contrary to the weight of the evidence to the extent that it seeks to imply that, because Dental Gator did not approach Patterson, Patterson did not enter into an agreement not to do business with buying groups. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence further shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). Because the conspiracy precluded doing business with dental buying groups, it would have included Dental Gator.

The evidence shows that Patterson's co-conspirator Schein told Dental Gator that it did not work with buying groups. (CCFF ¶ 1788). In entering into its agreement with MB2, Schein prohibited MB2 from using the agreement to form a buying group. (CX4001 at 002 ("[t]his agreement may not be used to grow any Group Purchasing Organization (GPO) type relationship."); Puckett, Tr. 2235-2236; Foley, Tr. 4573-4574)). Whether Dental Gator approached Patterson is irrelevant to the determination of whether Patterson entered into an overarching agreement with Schein and Benco not to work with buying groups. The Proposed Finding should be disregarded as irrelevant.

511. There is no evidence in the record that Patterson and Benco or Schein communicated about Dental Gator.

Response to Proposed Finding No. 511

The Proposed Finding is misleading, irrelevant and contrary to the weight of the evidence to the extent that it implies that, because Patterson may not have communicated with its competitors about a specific buying group, it did not enter into an agreement not to do business with buying groups, and did not act in compliance with that agreement. The weight of the evidence establishes that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, the Big Three rejected buying groups. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198). The evidence further shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). The record is replete with examples of buying groups that Schein categorically rejected because it had a policy not to do business with buying groups during the conspiracy period. (CCFF ¶¶ 661-1100, 1159-1166, 1316-1322; *see also*

Complaint Counsel's Post-Trial Brief, at Attachment C). Schein's documents similarly refer to an understanding that the Big Three would refuse buying groups. For example, on March 5, 2014, Foley (Schein) wrote to Chad Thompson of Heartland: "The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott." (CX2106 at 001; *see also* CCFF ¶ 1194). The record also shows that Benco had a long-standing no buying group policy, and followed that throughout the conspiracy period. CCFF ¶¶ 394-396; Ryan, Tr. 1029 ("Q. And it is fair to say that once you found out a group was a buying group, the answer was no from Benco, meaning no, Benco wouldn't work with them? A. Correct. We would tell them what our policy is and move on.")). Benco's documents similarly refer to an overarching conspiracy. See CCFF ¶¶ 1183, 1191-1193.

512. Nothing in the record of Patterson's dealings with MB2 or in Mr Puckett's testimony supports Patterson's participation in the alleged conspiracy.

Response to Proposed Finding No. 512

The Proposed Finding is misleading, irrelevant and contrary to the weight of the evidence to the extent that it implies that, because Patterson may not have communicated with its competitors about a specific buying group, it did not enter into an agreement not to do business with buying groups, and did not act in compliance with that agreement. The weight of the evidence establishes that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, the Big Three rejected buying groups. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198). The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513), that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its

sales team. (CCFF ¶¶ 627-660). The record is replete with examples of buying groups that Schein categorically rejected because it had a policy not to do business with buying groups during the conspiracy period. (CCFF ¶¶ 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). Schein’s documents similarly refer to an understanding that the Big Three would refuse buying groups. For example, on March 5, 2014, Foley (Schein) wrote to Chad Thompson of Heartland: “The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott.” (CX2106 at 001; *see also* CCFF ¶ 1194). Benco had a long-standing no buying group policy, and followed that throughout the conspiracy period (CCFF ¶¶ 394-396), and its documents similarly refer to an overarching conspiracy. See CCFF ¶¶ 1183, 1191-1193.

In addition, internal Patterson documents show that during the conspiracy period, Patterson was hostile to the development of Dental Gator as a buying group, and was even considering “working with manufacturers” to prevent Dental Gator from developing. (RX0406 at 001-002 (January 19, 2015 email from Patterson Dallas/Fort Worth Branch Manager to McFadden and Clint Edens: “Below is an email thread from [Patterson sales rep] regarding Dental Gator. . . Gator solicits business from single practitioners and group accounts to offer them MB2’s special markets pricing for a \$499 monthly fee. . . . I am bringing this to your attention so you are aware of what Gator is doing and hopefully work with manufacturers to prevent this from happening.”)) This record evidence is consistent with Patterson’s participation in the conspiracy.

Dentistry Unchained

513. Dentistry Unchained *did not exist* before April 2015. (Marshall, Tr. 3273-74) (“Do you see this is a history of Dentistry Unchained? I pulled it off the web. It didn’t take me very long to find it. And if we go to the next page, we see right here, about a third of the way

down, “The organization started in April 2015.” Do you see that? A. I see that.); *see also* (RXD0212 at 1) (Dentistry Unchained History Website).

Response to Proposed Finding No. 513

The Proposed Finding is irrelevant, misstates testimony, and relies on evidence not in the record. First, it relies on the testimony of Dr. Marshall, although Dr. Marshall did not make the statement on which it relies. In fact, Dr. Marshall was responding to Patterson counsel’s question about whether he saw a referenced document. His response was not an acknowledgement the accuracy or validity of that facts in that document. (Marshall, Tr. 3273–74 (“Do you see that? A. I see that.”) Merely seeing the document does not make the information in the document true. There is, moreover, no record evidence that the information is, in fact, accurate. Second, Respondent Patterson attempts to use Dr. Marshall, an expert, to provide testimony regarding a factual proposition. This is in direct contravention of this Court’s February 21, 2019 Order on Post-Trial Briefs at 3, prohibiting citation to expert witness testimony to support factual proposition that “should be established by fact witnesses or documents.” Finally, to the extent that Patterson attempts to offer RXD0212 for the substantive information contained therein, it also violates this Court’s February 21, 2019 Order on Post-Trial Briefs at 3, in that RXD0212 is a demonstrative, and cannot be used to establish a substantive fact.

514. The conspiracy is alleged to have ended in April 2015. (Kahn, Tr. 19; *see also* RXD0205 at 1 (“The Alleged Conspiracy Ended in April 2015”)).

Response to Proposed Finding No. 514

The Proposed Finding is misleading and misstates the record regarding the time of the end of the conspiracy. Neither the Complaint, nor Complaint Counsel, allege that the conspiracy ended on a precise date. Rather, Complaint Counsel has stated and the record shows that the conspiracy

began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015, because the conspiracy became difficult to maintain once Benco was required to log all communications with its competitors. Complaint Counsel has never taken the position that Benco's entry into the settlement with the Texas Attorney General created a precise "end" date. (Tr., 19 (Complaint Counsel's Opening Statement); *see also* Complaint Counsel's Post-Tr. Br. at 37-38). In addition, to the extent that the Proposed Finding relies on a demonstrative (RXD0205) as substantive support for the finding, that reliance contravenes the Court's February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence.

515. The government's own expert was not even aware until trial that Dentistry Unchained was not in existence during the alleged conspiracy period. (Marshall, Tr. 3273 ("Q. Did you realize, when you included Dentistry Unchained in here, that they weren't even in existence during the period from February 2013 to April 2015 when my client was alleged to have entered and exited the conspiracy? A. No."); Marshall, Tr. 3274 ("Q. You just stuck it in paragraph 491 even though it was after the conspiracy was over; right? A. Yeah. By what's being said here, I understand what you're saying. Yes."); *see also* RXD0212 at 1).

Response to Proposed Finding No. 515

The Proposed Finding is misstates the record regarding the time of the end of the conspiracy, and is, therefore misleading and irrelevant. Neither the Complaint, nor Complaint Counsel, allege that the conspiracy ended on a precise date. Rather, Complaint Counsel has stated and the record shows that that the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015, because the conspiracy became difficult to maintain once Benco was required to log all communications with its competitors. Complaint Counsel has never taken the position that Benco's entry into the settlement with the Texas Attorney General created a precise "end" date. (Tr., 19 (Complaint Counsel's Opening Statement); *see also* Complaint Counsel's Post-Tr. Br. at 37-38). The Proposed Finding is therefore misleading and

irrelevant to the extent that it implies that the conspiracy had a firm “end date,” and to the extent that it suggests that actions taken after that date (e.g., later in 2015) were unrelated to the conspiracy. Because the Proposed Finding assumes an incorrect date for the “end date,” it relies on an incorrect premise and should be wholly disregarded. The fact that Dr. Marshall did not know of a non-existent date cannot be an evidentiary finding.

Finally, to the extent that the Proposed Finding relies on a demonstrative (RXD0212) as substantive support for the finding, that reliance contravenes the Court’s February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives for substantive facts.

516. The first record evidence of Patterson interacting with Dentistry Unchained is from Monday or Tuesday, July 27 or 28, 2015—more than two months after the end of the alleged conspiracy. CX3006 at 1 (“I had a 40 minute phone call with . . . Dentistry Unchained on Monday, July 28.”)).⁷

Response to Proposed Finding No. 516

The Proposed Finding is misleading, incomplete, misstates the record regarding the time of the end of the conspiracy, and is contrary to the weight of the evidence. Complaint Counsel has stated and the record shows that the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015, because the conspiracy became difficult to maintain once Benco was required to log all communications with its competitors. Complaint Counsel has never taken the position that Benco’s entry into the settlement with the Texas Attorney General created a precise “end” date. (Tr., 19 (Complaint Counsel’s Opening Statement); *see also* Complaint Counsel’s Post-Tr. Br. at 37-38). The Proposed Finding is misleading and irrelevant to the extent that it implies that the conspiracy had a firm “end date,”

⁷ July 28, 2015 was a Tuesday.

and that it suggests that actions after that date (e.g., later in 2015) were unrelated to the conspiracy.

The Proposed Finding is also misleading to the extent that it implies Patterson's decision not to do business with Dentistry Unchained was not affected by its knowledge that its competitors were rejecting buying groups due to the agreement. In fact, the record shows that in July 2015, Dentistry Unchained offered to convert 80% of its 226 members to Patterson (CX3006 at 001-002), and that the Patterson territory manager saw working with the group as a valuable opportunity. Despite this, he rejected Dentistry Unchained because it was a buying group and he understood the decision to reject buying groups came from the "highest levels" of Patterson. (CX3006 at 002 (Email from Western Special Markets Territory Manager: "I was honest with them that we have not elected to participate in these types of programs in the past. I was very clear that . . . any decision would be made at the highest levels of our company which could take some time."))). The references to Patterson's policy with respect to dealing with GPOs coming from "the highest levels" undercuts any suggestion that Patterson did a case by case analysis or evaluation of buying groups.

The record also shows that the Territory Manager again told Dentistry Unchained in late January 2016 that Patterson was "not going to participate in a GPO type program at this point" (CX0137 at 001). The Territory Manager sent this report to McFadden, who forwarded it to Wesley Fields. (CX0137 at 001). Approximately five weeks later, in early March 2016, Patterson had changed its tune and was ready to launch a discount program with Dentistry Unchained. On March 2, 2016, McFadden wrote about Dentistry Unchained, ". . . we must start stretching - - This seems to be the only way for now to insert ourselves into the mix with these GPO's or quasi . . . all in all I say go for it." (CX3018 at 001).

Complaint Counsel has no specific response to the correction of the day of the week referenced in footnote 7.

517. There is also no evidence in the record of Patterson communicating with Benco or Schein about Dentistry Unchained.

Response to Proposed Finding No. 517

The Proposed Finding is misleading, contrary to the weight of the evidence described in Complaint Counsel's Responses to Respondent Patterson's Proposed Findings Nos. 334-340, 342-345 and 513-517, to the extent that it suggests that the lack of evidence of specific communications between Patterson and Schein or Benco about Dentistry Unchained undercuts a finding of an agreement. On the contrary, the weight of the evidence shows that, starting no later than February 2013, Patterson has joined the conspiracy. CCFF ¶¶ 483-501. There is also substantial evidence in the record establishing that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, the Big Three rejected buying groups. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198). Furthermore, Benco, Patterson, and Schein's internal documents refer to the overarching conspiracy. (CCFF ¶¶ 1183-1195). For example, on February 27, 2013, Misiak (Patterson) directed a Regional Manager to refuse a buying group, explaining that Patterson's largest competitors, Schein and Benco, refuse buying groups as well: **"Confidential and not for discussion . . . our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me."** (CX0093 at 001 (emphasis in original); *see also* CCFF ¶¶ 1187-1189). Then on August 4, 2013, Rogan (Patterson) wrote to McFadden (Patterson): "Neal, we don't need GPO's in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry." (CX0106 at 001; *see also* CCFF ¶ 1190).

Schein's documents similarly refer to an understanding that the Big Three would refuse buying groups. On March 5, 2014, Foley (Schein) wrote to Chad Thompson of Heartland: "The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott." (CX2106 at 001; *see also* CCFF ¶ 1194). Benco's documents also refer internal knowledge of an agreement. *See* CCFF ¶¶ 1183, 1191-1193.

Moreover, because of the agreement that the Big Three would not do business with buying groups generally, the Respondents did not need to communicate about every buying group that sought to do business. In fact, record evidence shows that Benco, in making its decision not to do business with Dentistry Unchained, believed that Patterson and Schein had also turned down Dentistry Unchained. CX0012 includes an unambiguous statement by a key Benco executive about the knowledge he had of the behavior of his competitors. Benco's Patrick Ryan wrote, "I already KNOW that Patterson and Schein have said NO" (CX0012 at 001). At trial, when Ryan was asked about Benco's answer to Dentistry Unchained, he replied "The same as everybody else" (Ryan, Tr. 1209) – indicative of the fact that he actually knew what his competitors had done and that he was not speculating in making the statement in CX0012.

518. Because Patterson's first communications with Dentistry Unchained did not occur until more than two months after the alleged conspiracy ended, and because Dentistry Unchained did not exist during the alleged conspiracy period, there is no evidence that Patterson may have sold supplies or equipment to the Dentistry Unchained but for the alleged conspiracy.

Response to Proposed Finding No. 518

The Proposed Finding is misleading, contrary to the weight of the evidence for the reasons set forth in detail in Complaint Counsel's Response to Respondent Patterson's Proposed Findings Nos. 516 and 517, lacks evidentiary support, and is compound. First, the Proposed Finding is

misstates the record regarding the time of the end of the conspiracy, and is, therefore misleading and irrelevant. Neither the Complaint, nor Complaint Counsel, allege that the conspiracy ended on a precise date. Rather, the record shows that Complaint Counsel's has stated that the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015, because the conspiracy became difficult to maintain once Benco was required to log all communications with its competitors. Complaint Counsel has never taken the position that Benco's entry into the settlement with the Texas Attorney General created a precise "end" date. (Tr., 19 (Complaint Counsel's Opening Statement); *see also* Complaint Counsel's Post-Tr. Br. at 37-38). Second, because the Proposed Finding makes an incorrect assumption about the "date" of the end of the conspiracy, the statement that communications with Dentistry Unchained did not take place until July 2015 is irrelevant. The record also shows that Benco, in making its decision not to do business with Dentistry Unchained, believed that Patterson and Schein had also turned down Dentistry Unchained. The record includes an unambiguous statement by Patrick Ryan, a key Benco executive reflecting his knowledge of the behavior of his competitors. Ryan wrote, "I already KNOW that Patterson and Schein have said NO" (CX0012 at 001). Third, the Proposed Finding does not cite to any specific evidence to support its findings. Finally, the Proposed Finding regarding sales of supplies "but for" the alleged conspiracy is both irrelevant and lacks any evidentiary support. Whether Patterson "may have sold supplies or equipment" to a buying group "but for the alleged conspiracy" is irrelevant to the factual question of whether Patterson engaged in the conspiracy. Indeed, but for the conspiracy Respondent Patterson might have competed for a buying group, but still not done business with that entity because one of its co-conspirators or another distributor may have won the business.

Direct Dental

519. Complaint Counsel has alleged that the alleged conspiracy period ended in April 2015. (Kahn, Tr. 19; *see also* RXD0205 at 1 (“The Alleged Conspiracy Ended in April 2015”)).

Response to Proposed Finding No. 519

The Proposed Finding is misleading because it misstates the record regarding the time of the end of the conspiracy, suggesting that Complaint Counsel’s explanation that the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015 created a precise “end” date. Complaint Counsel has never taken the position that the entry by Benco into a settlement with the Texas Attorney General created a precise “end” date. (Tr., 19 (Complaint Counsel’s Opening Statement); *see also* Complaint Counsel’s Post-Tr. Br. at 37-38). In addition, to the extent that the Proposed Finding relies on a demonstrative (RXD0205) as substantive support for the finding, that reliance contravenes the Court’s February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence.

520. The only document in the record relating to Direct Dental is CX0016, a *November 2015* Benco email chain.

Response to Proposed Finding No. 520

Complaint Counsel has no specific response.

521. CX0016 does not reference Patterson.

Response to Proposed Finding No. 521

Complaint Counsel has no specific response.

522. There is no other testimony or evidence in the record regarding Patterson and Direct Dental.

Response to Proposed Finding No. 522

The Proposed Finding is misleading, irrelevant and contrary to the weight of the evidence to the extent that it implies that, absent specific communication, Patterson did not enter into an agreement not to do business with buying groups, and did not act in compliance with that agreement. The weight of the evidence establishes that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, the Big Three rejected buying groups. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198). The evidence further shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). That agreement precluded working with buying groups generally, and would have included Dental Direct.

523. There is also no evidence in the record of Patterson communicating with Benco or Schein about Direct Dental.

Response to Proposed Finding No. 523

The Proposed Finding is misleading, irrelevant and contrary to the weight of the evidence to the extent that it implies that, because Patterson may not have communicated with its competitors about a specific buying group, it did not enter into an agreement not to do business with buying groups, and did not act in compliance with that agreement. The weight of the evidence establishes that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, the Big Three communicated their no buying group policy to their teams, and rejected buying groups. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198). The evidence further shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group

policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). Schein’s documents similarly refer to an understanding that the Big Three would refuse buying groups. *See, e.g.*, CCFF ¶ 1194. Benco’s documents also refer to an overarching conspiracy, and an understanding that its competitors were rejecting buying groups. *See* CCFF ¶¶ 1183, 1191-1193.

524. Thus, there is no evidence that Patterson may have sold supplies or equipment to Direct Dental but for the alleged conspiracy.

Response to Proposed Finding No. 524).

The Proposed Finding is misleading, irrelevant, and unsupported by any evidentiary citations. The Proposed Finding misleading and irrelevant to the extent that it implies that Complaint Counsel must make a showing that a particular group would have purchased from Patterson “but for” the conspiracy. Whether a Patterson “may have sold supplies or equipment” to a particular buying group “but for the alleged conspiracy” is irrelevant to the factual question of whether Patterson engaged in the conspiracy. Indeed, “but for” the conspiracy Respondent Patterson might have competed for a buying group, but still not done business with that entity because one of its co-conspirators or another distributor may have won the business. The Proposed Finding also lacks citation to any evidence to support its findings. It should be disregarded.

Florida Dental Society

525. No entity called the “Florida Dental Society” appears in the record.

Response to Proposed Finding No. 525

Complaint Counsel has no specific response.

526. Patterson assumes that, in its Supplemental Response to Interrogatory 3, Complaint Counsel was instead referring to the Florida Dental Association (“FDA”).

Response to Proposed Finding No. 526

Complaint Counsel has no specific response, and notes that reference to the Florida Dental Society rather than the Florida Dental Association, was a typographical error. Patterson has been aware of the correct name of this entity because it identified the Florida Dental Association in CX3366 at 010 (Patterson's Responses to Complaint Counsel's First Interrogatories at Exhibit A) as being a buying group with which Patterson had communications.

527. There is one Patterson-related document in the record regarding the Florida Dental Association. (CX0084).

Response to Proposed Finding No. 527

The Proposed Finding is factually incorrect to the extent that it is stating that there is *only* one documents regarding the Florida Dental Association in the record. There are at least three documents in the record regarding the Florida Dental Association: CX0084, CX0159, and CX9068 (Deposition of W. Scott Ruthstrom, COO of FDA Services, Inc., an entity owned by the Florida Dental Association taken in connection with the SourceOne litigation against Patterson, Schein and Benco).

528. In CX0084, on March 8, 2012, a third party writes Patterson's Neal McFadden about a new "dental supply discount program exclusively for FDA members," expressly described as a "GPO." (CX0084 at 1).

Response to Proposed Finding No. 528

Complaint Counsel has no specific response, except to note that the "third party" referenced in CX0084 and in Respondent Patterson's Proposed Finding No. 528 is W. Scott Ruthstrom, the COO of FDA Services. Ruthstrom's deposition is in evidence.

529. McFadden forwarded the email to his supervisor, David Misiak, writing: I get these more often than I like. This stuff scares me. I'm gonna tell him thanks but no thanks. Your thoughts? (CX0084 at 1).

Response to Proposed Finding No. 529

Complaint Counsel has no specific response.

530. Misiak responded:
Your response is right. (CX0084 at 1).

Response to Proposed Finding No. 530

Complaint Counsel has no specific response.

531. This exchange occurred nearly *a year before* Complaint Counsel has alleged that Patterson first entered a conspiracy with Benco and Schein. (Compl. ¶ 36 (alleging Patterson joined a conspiracy in February 2013) *see also* RXD0204 at 1 (“Patterson Joined The Alleged Conspiracy in February 2013”)).

Response to Proposed Finding No. 531

Complaint Counsel has no specific response, but notes that, to the extent that Respondent Patterson is relying on a demonstrative (RXD0204) for a substantive fact, it should be disregarded. See February 21, 2019 Order on Post-Trial Briefs at 3, prohibiting citation to demonstratives for substantive evidence. Complaint Counsel does not dispute that Patterson joined the conspiracy in February 2013. The Proposed Finding is also misleading to the extent that it suggests that CX0084 is not relevant to understanding Patterson’s concern about the potential threat of buying groups. CX0084 corroborates the fact that, even before joining the conspiracy, Patterson viewed buying groups as a potential threat. (CX0084 at001) (McFadden: “I get these more often than I like. This stuff scares me.”)

532. There is also no evidence in the record of Patterson communicating with Benco or Schein about the Florida Dental Association.

Response to Proposed Finding No. 532

The Proposed Finding is misleading, irrelevant and contrary to the weight of the evidence to the extent that it implies that, because Patterson may not have communicated with its competitors

about a specific buying group, it did not enter into an agreement not to do business with buying groups, and did not act in compliance with that agreement. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). Schein's documents similarly refer to an understanding that the Big Three would refuse buying groups. For example, on March 5, 2014, Foley (Schein) wrote to Chad Thompson of Heartland: "The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott." (CX2106 at 001; *see also* CCFF ¶ 1194. There is, moreover, specific evidence in the record that communications between and among Patterson, Schein and Benco regarding withdrawing from the 2014 TDA Annual Meeting may have had a chilling effect on efforts by the Florida Dental Association to establish its buying group for its member dentist. The COO of the entity managing the establishment of the Florida Dental Association's buying group became aware no later than August 2014 of the "backlash" from Schein, Patterson and Benco that TDA had experienced because of TDA Perks. (CX9068 (Ruthstrom (SourceOne), Dep. at 156-158 ("These companies had either pulled out or were going to pull out of the Texas Dental Association show.))) When the Florida Dental Association learned of the actions by Schein, Patterson and Benco with regard to the TDA, the Florida Dental Association became concerned about going forward with its own program. (CX9068 (Ruthstrom (SourceOne), Dep. at 160 ("Q. I believe you testified earlier that learning this news [about TDA] made you cautious about an endorsement of SourceOne, is that right? A. It did. Q. Why did it make you cautious about an endorsement of SourceOne? A. Because I know how important our

trade show is, and Benco, Schein and Patterson are big exhibitors at our meeting, so I didn't want to disrupt our successful trade show.")).

533. Thus, there is no evidence that Patterson may have sold supplies or equipment to the Florida Dental Association but for the alleged conspiracy.

Response to Proposed Finding No. 533

The Proposed Finding is misleading, irrelevant, and unsupported by any evidentiary citations.

The Proposed Finding misleading and irrelevant to the extent that it implies that Complaint Counsel must make a showing that a particular group would have purchased from Patterson "but for" the conspiracy. Whether Patterson "may have sold supplies or equipment" to a particular buying group "but for the alleged conspiracy" is irrelevant to the factual question of whether Patterson engaged in the conspiracy. Indeed, "but for" the conspiracy Patterson might have competed for a buying group, but still not done business with that entity because one of its co-conspirators or another distributor may have won the business. The Proposed Finding also lacks citation to any evidence to support its findings. It should be disregarded.

Hampton Roads Dental Partners

534. Complaint Counsel did not present any evidence at trial regarding Hampton Roads Dental Partners or its relevance to Patterson.

Response to Proposed Finding No. 534

The Proposed Finding is misleading, irrelevant and contrary to the weight of the evidence. It is misleading and irrelevant to the extent that it suggests that only evidence presented at trial may be considered by the Court. The Court may consider all evidence in the record. The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent that it implies that Patterson did not enter into an agreement not to do business with buying groups, and did not act in compliance with that agreement, including instructing its team not to do business with

buying groups. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660).

535. The sole references to Hampton Roads Dental Partners in the record that relate to Patterson are from the deposition of Patterson's Anthony Fruehauf. (CX8013 (Fruehauf, Dep. at 18); CX8013 (Fruehauf, Dep. at 187)).

Response to Proposed Finding No. 535

The Proposed Finding is factually incorrect. CX3039, an email between Patterson's Matt Smith and Fruehauf, references Hampton Roads Dental Partners and relates to Patterson. (CX3039 at 001).

536. Fruehauf was asked at his deposition about CX3039, an email from Patterson's Matt Smith to Fruehauf *dated September 8, 2015*. (CX8013 (Fruehauf, Dep. at 187)).

Response to Proposed Finding No. 536

Complaint Counsel has no specific response.

537. Complaint Counsel has alleged that the alleged conspiracy period ended about *five months before* Smith's email (CX3039 at 1), in *April* 2015. (Kahn, Tr. 19; *see also* RXD0205 at 1 ("The Alleged Conspiracy Ended in April 2015")).

Response to Proposed Finding No. 537

The Proposed Finding is misleading because it misstates the record regarding the time of the end of the conspiracy. Complaint Counsel has stated and the record shows that the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015, because the conspiracy became difficult to maintain once Benco was required to log all communications with its competitors. Complaint Counsel has never taken the position that Benco's entry into the settlement with the Texas Attorney General created a precise "end" date.

(Tr., 19 (Complaint Counsel’s Opening Statement); *see also* Complaint Counsel’s Post-Tr. Br. at 37-38). In addition, to the extent that the Proposed Finding relies on a demonstrative (RXD0205) as substantive support for the finding, that reliance contravenes the Court’s February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence.

538. Complaint Counsel has presented no evidence that the Hampton Roads Dental Group existed before the April 2015 end of the alleged conspiracy. (Kahn, Tr. 19; *see also* RXD0205 at 1 (“The Alleged Conspiracy Ended in April 2015”)).

Response to Proposed Finding No. 538

The Proposed Finding is misleading and factually incorrect. Patterson’s Fruehauf testified that he had been approached by Hampton Roads when he was Patterson’s Regional Manager for its Mid-Atlantic Region during the time period 2012 to 2013. (CX8013 (Fruehauf, Dep. at 16-18)). Thus, Hampton Roads must have existed no later than 2013. The Proposed Finding is also misleading because it misstates the record regarding the time of the end of the conspiracy, suggesting that Complaint Counsel’s statement that the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015 created a precise “end” date. Complaint Counsel has never taken the position that the entry by Benco into a settlement with the Texas Attorney General created a precise “end” date. (Tr., 19 (Complaint Counsel’s Opening Statement); *see also* Complaint Counsel’s Post-Tr. Br. at 37-38). In addition, to the extent that the Proposed Finding relies on a demonstrative (RXD0205) as substantive support for the finding, that reliance contravenes the Court’s February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence. The Proposed Finding is thus contradicted by evidence in the record showing that the Hampton

Roads Dental Group existed during the conspiracy, including during the time the conspiracy was still in effect, but was starting to fall apart.

539. In CX3039, Matt Smith emailed Fruehauf regarding Hampton Roads Dental, which Smith described as a “new buying group in Chesapeake.” (CX3039 at 1).

Response to Proposed Finding No. 539

The Proposed Finding is misleading and factually incorrect. Patterson’s Fruehauf testified that he had been approached by Hampton Roads when he was Patterson’s Regional Manager for its Mid-Atlantic Region during the time period 2012 to 2013. (CX8013 (Fruehauf, Dep. at 16-18). Complaint Counsel has no specific response to the fact that the Proposed Finding quotes CX3039 correctly, but notes that the statement from the document is contradicted by sworn testimony. It should therefore be disregarded.

540. Fruehauf agreed at his deposition that Hampton Roads was a buying group. (CX8013 (Fruehauf, Dep. at 187–88)).

Response to Proposed Finding No. 540

Complaint Counsel has no specific response.

541. Smith’s September 8, 2015 email to Fruehauf explained that Hampton Roads was not requiring any purchasing commitment from its members. (CX3039 at 1 (“So, they are not requiring their members to do anything as far as buy from one source.”)).

Response to Proposed Finding No. 541

Complaint Counsel has no specific response.

542. Still, Smith explained, Hampton Roads had some “high value” Patterson clients signed up, so Smith responded with a proposal “to keep our sheep from wandering.” (CX3039 at 1).

Response to Proposed Finding No. 542

Complaint Counsel has no specific response.

543. Smith said that the proposal gave Hampton Roads “something formal so they can’t say we did nothing.” (CX3039 at 1).

Response to Proposed Finding No. 543

Complaint Counsel has no specific response.

544. Smith’s response did not represent any discount from what Hampton Roads members would have gotten from Patterson individually. (CX8013 (Fruehauf, Dep. at 188) (“Q. So he sent an offer, but it didn’t represent any discount over what those dentists might have gotten from Patterson Dental if they had come to you individually? A. That’s correct.”))).

Response to Proposed Finding No. 544

Complaint Counsel has no specific response.

545. Fruehauf did not believe that Hampton Roads ever materially came together as a buying group. (CX8013 (Fruehauf, Dep. at 188) (“I don’t believe Hampton Roads ever materially came together as a buying group.”))).

Response to Proposed Finding No. 545

The Proposed Finding is vague, unsupported, and irrelevant. To the extent that Respondent Patterson is representing that Fruehauf’s “belief” is a statement of fact, his testimony does not provide sufficient foundation to establish that Fruehauf had any actual personal knowledge of whether “Hampton Road ever materially came together as a buying group.” His speculation or guess is not evidence. In addition, his statement contains no temporal reference, so it is unclear the year or month to which the Proposed Finding applies. Because the finding is vague and imprecise (and unclear as to the relevance of Fruehauf’s “belief”), it should be disregarded.

546. There is also no evidence in the record of Patterson communicating with Benco or Schein about Hampton Roads.

Response to Proposed Finding No. 546

The Proposed Finding is misleading, irrelevant and contrary to the weight of the evidence to the extent that it implies that, because Patterson may not have communicated with its competitors

about a specific buying group, it did not enter into an agreement not to do business with buying groups, and did not act in compliance with that agreement. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). Schein’s documents similarly refer to an understanding that the Big Three would refuse buying groups. For example, on March 5, 2014, Foley (Schein) wrote to Chad Thompson of Heartland: “The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott.” (CX2106 at 001; *see also* CCFF ¶ 1194) Benco’s documents similarly reference its understanding that the Big Three were refusing buying groups. (CX0012 at 001) (Ryan email to Cohen: “The best part about calling these [buying groups] is I already KNOW that Patterson and Schein have said NO.”) (emphasis in original); *see* CCFF ¶¶ 1183, 1191-1193).

547. Thus, there is no evidence that Patterson may have sold supplies or equipment to Hampton Roads Dental Partners but for the alleged conspiracy.

Response to Proposed Finding No. 547

The Proposed Finding misleading and irrelevant to the extent that it implies that Complaint Counsel must make a showing that a particular group would have purchased from Patterson “but for” the conspiracy. Whether Patterson “may have sold supplies or equipment” to a particular buying group “but for the alleged conspiracy” is irrelevant to the factual question of whether Patterson engaged in the conspiracy. Indeed, “but for” the conspiracy Respondent Patterson might have competed for a buying group, but still not done business with that entity because one

of its co-conspirators or another distributor may have won the business. The Proposed Finding also lacks citation to any evidence to support its findings. It should be disregarded.

Integrity Dental Buyers' Group

548. Complaint Counsel did not present any evidence at trial regarding Integrity Dental Buyers' Group ("IDBG") or its relevance to Complaint Counsel's allegations against Patterson.

Response to Proposed Finding No. 548

The Proposed Finding is misleading, irrelevant and contrary to the weight of the evidence. It is misleading and irrelevant to the extent that it suggests that only evidence presented at trial may be considered. The Court may consider all evidence in the record. The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent that it implies that Patterson did not enter into an agreement not to do business with buying groups, and did not act in compliance with that agreement, including instructing its team not to do business with buying groups. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 630-653, 657).

549. The Integrity Dental Buyers' Group did not even come into existence until July 2015, three months after the alleged conspiracy ended. (CX8011 (Capaldo, Dep. at 11-12); Kahn, Tr. 19 (alleging that the purported conspiracy ended in *April* 2015); *see also* RXD0205 at 1 ("The Alleged Conspiracy Ended in April 2015")).

Response to Proposed Finding No. 549

The Proposed Finding is misleading because it misstates the record regarding the time of the end of the conspiracy, suggesting that Complaint Counsel's explanation that the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015 created a precise "end" date. Complaint Counsel has stated and the record shows that the

conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015, because the conspiracy became difficult to maintain once Benco was required to log all communications with its competitors. Complaint Counsel has never taken the position that Benco's entry into the settlement with the Texas Attorney General created a precise "end" date. (Tr., 19 (Complaint Counsel's Opening Statement); *see also* Complaint Counsel's Post-Tr. Br. at 37-38). In addition, to the extent that the Proposed Finding relies on a demonstrative (RXD0205) as substantive support for the finding, that reliance contravenes the Court's February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence. Complaint Counsel has no specific response to the fact that the Integrity Dental Buyers Group was formed in July 2015.

550. Thus, there is no evidence that Patterson may have sold supplies or equipment to IDBG but for the alleged conspiracy.

Response to Proposed Finding No. 550

Proposed Finding misleading and irrelevant to the extent that it implies that Complaint Counsel must make a showing that a particular group would have purchased from Patterson "but for" the conspiracy. Whether Patterson "may have sold supplies or equipment" to a particular buying group "but for the alleged conspiracy" is irrelevant to the factual question of whether Patterson engaged in the conspiracy. Indeed, "but for" the conspiracy Respondent Patterson might have competed for a buying group, but still not done business with that entity because one of its co-conspirators or another distributor may have won the business. In addition, to the extent that the Proposed Finding is relying on an exact "end date" of the conspiracy for its premise, it misstates the record regarding the time of the end of the conspiracy. Complaint Counsel has never taken the position that the entry by Benco into a settlement with the Texas Attorney General created a precise "end" date. Rather, the conspiracy began to fall apart after Benco entered into a

settlement with the Texas Attorney General in April 2015, because it was required to log communications with its competitors after that time. This did not, however, created a precise “end” date. (Tr., 19 (Complaint Counsel’s Opening Statement); *see also* Complaint Counsel’s Post-Tr. Br. at 37-38).

551. Indeed, because IDBG did not exist even until three months after the alleged conspiracy ended, the claim that IDBG may have done business with Patterson but for the conspiracy is physically impossible.

Response to Proposed Finding No. 551

The Proposed Finding, which lacks any evidentiary support, is pure argument and should be disregarded. It is also misleading and irrelevant to the extent that it implies that Complaint Counsel must make a showing that a particular group would have purchased from Patterson “but for” the conspiracy. Whether Patterson “may have sold supplies or equipment” to a particular buying group “but for the alleged conspiracy” is irrelevant to the factual question of whether Patterson engaged in the conspiracy. Indeed, “but for” the conspiracy Respondent Patterson might have competed for a buying group, but still not done business with that entity because one of its co-conspirators or another distributor may have won the business. Finally, to the extent that the Proposed Finding is relying on an exact “end date” of the conspiracy for its premise, it misstates the record regarding the time of the end of the conspiracy. Complaint Counsel has never taken the position that the entry by Benco into a settlement with the Texas Attorney General created a precise “end” date. Rather, the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015, because it was required to log communications with its competitors after that time. This did not, however, created a precise “end” date. (Tr., 19 (Complaint Counsel’s Opening Statement); *see also* Complaint Counsel’s Post-Tr. Br. at 37-38).

552. IDBG reached out to Patterson in September 2015, four months after the conspiracy ended (Kahn, Tr. 19), and Patterson politely declined. (CX3031 at 1) (“After careful consideration Patterson Dental has made the decision not to response to the RFP at this time.”)).

Response to Proposed Finding No. 552

The Proposed Finding is misleading to the extent that the Proposed Finding is relying on an exact “end date” of the conspiracy for its premise, it misstates the record regarding the time of the end of the conspiracy. Complaint Counsel has never taken the position that the entry by Benco into a settlement with the Texas Attorney General created a precise “end” date. Rather, the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015, because it was required to log communications with its competitors after that time. This did not, however, created a precise “end” date. (Tr., 19 (Complaint Counsel’s Opening Statement); *see also* Complaint Counsel’s Post-Tr. Br. at 37-38). The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent that it implies that Patterson did not enter into an agreement not to do business with buying groups, and did not act in compliance with that agreement, including instructing its team not to do business with buying groups. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). Patterson’s actions as the conspiracy became difficult to maintain after April 2015 do not overcome the evidence that Patterson has participated in a conspiracy.

553. Benco also declined working with IDBG in September 2015. (CX1037 at 1) (“Benco will respectfully decline to respond.”)).

Response to Proposed Finding No. 553

Complaint Counsel has no specific response.

554. Schein never formally rejected IDBG at all. (CX0320 (Capaldo, IHT at 84) (“A. No. [Schein] actually never came out and said they didn’t want to work with us. They just never did anything other than continue to lead us down the garden path, never actually say anything but, you know, keep saying that they were supportive of us.”).

Response to Proposed Finding No. 554

Complaint Counsel has no specific response.

555. IDBG reached out to Patterson again in early 2016, many months after the conspiracy allegedly ended. (CX8011 (Capaldo, Dep. at 27) (“Q. And Premier reached out to Patterson on Georgia Dental’s behalf in early 2016; is that right? A. Premier told us that they reached out to all of the suppliers including Schein, Patterson, Benco, Atlanta Dental, Dentsply. Those were companies they told us they were already doing business with on the medical side.”); Kahn, Tr. 19)).

Response to Proposed Finding No. 555

The Proposed Finding is misleading to the extent that it misstates the record regarding the time of the end of the conspiracy. Complaint Counsel has never taken the position that the entry by Benco into a settlement with the Texas Attorney General created a precise “end” date. Rather, the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015, because it was required to log communications with its competitors after that time. This did not, however, created a precise “end” date. (Tr., 19 (Complaint Counsel’s Opening Statement); *see also* Complaint Counsel’s Post-Tr. Br. at 37-38). Complaint Counsel has no specific response to the fact that Integrity Dental Buyers Group reached out to Patterson again in early 2016.

556. Then, in *March 2016*, about a year after the conspiracy allegedly ended (Kahn, Tr. 19), Patterson’s Neal McFadden internally forwarded an Integrity Dental Buyers’ Group request for bids reminder, writing “This is the Georgia dental Association GPO. FYI I believe we’re gonna pass on this one.” (CX0133 at 1).

Response to Proposed Finding No. 556

The Proposed Finding is misleading to the extent that it implies that the efforts by IDBG to reach out to Patterson described in Proposed Finding No. 555 are different than those described in

Proposed Finding 556. The documents in the record indicate that both were part of the same effort. The documents also show that in March 2016 – after the conspiracy had truly fallen apart – Patterson was now interested in working with IDBG. At that time, McFadden wrote to Wes Fields, “Wes - - This is the GPO I met with. Yes, they are intriguing - - I do think it’s worth an opportunity to meet with them and listen. I hate the industry moving this way BUT we need to lean and see if there is a way we can coexist.” (CX0135 at 001). Fields responded, “Thanks Neal. I completely agree that I think we need to continue exploring this market” (CX0135 at 001). To the extent that the Proposed Finding is relying on an exact “end date” of the conspiracy for its premise (referencing March 2016 as “a year after the conspiracy “ended”) it misstates the record regarding the time of the end of the conspiracy. Complaint Counsel has never taken the position that the entry by Benco into a settlement with the Texas Attorney General created a precise “end” date. Rather, the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015, because it was required to log communications with its competitors after that time. This did not, however, created a precise “end” date. (Tr., 19 (Complaint Counsel’s Opening Statement); *see also* Complaint Counsel’s Post-Tr. Br. at 37-38).

Klear Impakt

557. Complaint Counsel did not present any evidence at trial regarding Klear Impakt’s relevance to Complaint Counsel’s allegations against Patterson.

Response to Proposed Finding No. 557

The Proposed Finding is misleading, irrelevant and contrary to the weight of the evidence. It is misleading and irrelevant to the extent that it suggests that only evidence presented at trial may be considered. The Court may consider all evidence in the record. The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent that it implies that Patterson

did not enter into an agreement not to do business with buying groups, and did not act in compliance with that agreement, including instructing its team not to do business with buying groups generally. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660).

558. There is no evidence that Patterson and Klear Impakt had any interactions before April 2015, when the alleged conspiracy ended. (Kahn, Tr. 19; *see also* RXD0205 at 1 (“The Alleged Conspiracy Ended in April 2015”)).

Response to Proposed Finding No. 558

The Proposed Finding is misleading because it misstates the record regarding the time of the end of the conspiracy, suggesting that Complaint Counsel’s explanation that the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015 created a precise “end” date. Complaint Counsel has never taken the position that the entry by Benco into a settlement with the Texas Attorney General created a precise “end” date. (Tr., 19 (Complaint Counsel’s Opening Statement); *see also* Complaint Counsel’s Post-Tr. Br. at 37-38). In addition, to the extent that the Proposed Finding relies on a demonstrative (RXD0205) as substantive support for the finding, that reliance contravenes the Court’s February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence.

559. There is also no evidence of Patterson communicating with Benco or Schein about Klear Impakt.

Response to Proposed Finding No. 559

The Proposed Finding is misleading, irrelevant and contrary to the weight of the evidence to the extent that it implies that, because Patterson may not have communicated with its competitors

about a specific buying group, it did not enter into an agreement not to do business with buying groups, and did not act in compliance with that agreement. The weight of the evidence establishes that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, the Big Three rejected buying groups. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198). The record is replete with examples of buying groups that Schein categorically rejected because it had a policy not to do business with buying groups during the conspiracy period. (CCFF ¶¶ 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). The record evidence also shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 630-653, 657). Benco, which had a long-standing no buying group policy, communicated that policy to its competitors (CCFF ¶¶ 491-500, 474-581, 661-680, 955-1100), and followed that policy throughout the conspiracy period. (CCFF ¶¶ 394-396). The fact that the Big Three did not communicate about rejecting a particular buying group during the conspiracy is irrelevant to finding that the conspiracy occurred.

560. Thus, there is no evidence that Klear Impakt may have purchased supplies or equipment from Patterson but for the alleged conspiracy. (*See* RX2958 at 9 (Complaint Counsel’s Supplemental Response to Patterson’s Interrogatory Three).

Response to Proposed Finding No. 560

The Proposed Finding misleading and irrelevant to the extent that it implies that Complaint Counsel must make a showing that a particular group would have purchased from Patterson “but for” the conspiracy. Whether a particular buying group “may have purchased supplies or equipment from Patterson but for the alleged conspiracy” is irrelevant to the factual question of

whether Patterson engaged in the conspiracy. Indeed, “but for” the conspiracy Respondent Patterson might have competed for a buying group, but still not done business with that entity because one of its co-conspirators or another distributor may have won the business. The Proposed Finding also lacks citation to any evidence to support its findings. It should be disregarded.

Kois Buyers Group

561. Dr. John Kois is a dentist who runs a dental practice with locations in Seattle and Tacoma, Washington. (Kois Sr., Tr. 161).

Response to Proposed Finding No. 561

Complaint Counsel has no specific response.

562. Dr. Kois has worked with Burkhart as his supplier for his personal practice since he started his practice in 1985. (Kois Sr., Tr. 169).

Response to Proposed Finding No. 562

Complaint Counsel has no specific response.

563. Dr. Kois also runs a continuing dental education school in Seattle called the Kois Center. (Kois, Sr., Tr. 163–64).

Response to Proposed Finding No. 563

The Proposed Finding is misleading to the extent that it misstates the testimony of Dr. Kois regarding the Kois Center. The Kois Center is “a private teaching center for practicing dentists . . . a curriculum-based program, which is a graduate program for practicing dentists.” (Kois, Sr., Tr. 163). It was established to “help practicing dentists further their education and improve their delivery of healthcare to their patients.” (Kois, Sr., Tr. 164).

564. Around 2014, Dr. Kois was introduced by one of his students to a Canadian national named Qadeer Ahmed, who ran a company variously called “ProCare Dental Services” or “Equalizer ProServices.” (CX8007 (Kois Sr., Dep. at 30–31, 33); RX0377 at 1).

Response to Proposed Finding No. 564

Complaint Counsel has no specific response.

565. Ahmed gave Dr. Kois the idea to set up the Kois Buyers Group. (CX8007 (Kois, Sr., Dep. at 30)).

Response to Proposed Finding No. 565

The Proposed Finding is misleading to the extent that it implies that Dr. Kois was not interested in establishing a buying group prior to working with Ahmed. Dr. Kois testified that he was seeking distributor contacts in the industry and that one of his students put him in contact with Qadeer Ahmed to make contacts on behalf of the Kois Center. (Kois, Sr., Tr. 187-188). Dr. Kois asked Ahmed to “reach out to the companies and make contacts and see who might be interested in working with [Kois].” (Kois, Sr., Tr. 188).

566. Ahmed told Dr. Kois that he had set up business deals with companies like Walmart, Best Buy, and Sony. (Kois Sr., Tr. 213–14; CX8007 (Kois Sr., Dep. at 59–60)).

Response to Proposed Finding No. 566

The Proposed Finding is misleading because it misstates the testimony cited and misstates the documents referenced in the testimony. Dr. Kois’s trial testimony was that Ahmed had worked with “large companies, big-named companies, that are known throughout the world.” (Kois, Sr. 213-214). He then identified one. (“Yes. I think one would be Walmart.” (Kois, Sr. , 214.) Dr. Kois never identified the other companies listed. The citation to Dr. Kois’s deposition testimony (CX8007 (Dr. Kois, Dep. at 59-60)) also fails to support this finding. In his deposition at the pages cited, Dr. Kois was asked about a document, CX0290, but that document does not state that Ahmed himself had set up business deals with any particular companies. Rather, CX0290 at

002 references the business background of other “partners from ‘ProCare Dental Services.’” RX0377 at 005-007 similarly shows that other people affiliated with ProCare Dental Services have the specified experience. There is nothing in any of the testimony cited that refers to Best Buy or Sony. The Proposed Finding is, moreover, irrelevant because *Dr. Kois’s* knowledge of Ahmed’s business background has nothing to do with Patterson’s action in turning down the Kois Buyers Group.

567. Dr. Kois, however, was “not able to substantiate anything” about Ahmed’s claimed business history. (Kois Sr., Tr. 217).

Response to Proposed Finding No. 567

The Proposed Finding is misleading, incomplete and irrelevant to the extent that it implies that whether Dr. Kois chose to research Qadeer Ahmed’s business history has any relevance to the decision by Patterson executives – who did not speak to Dr. Kois – to turn down the Kois Buyers Group. The record evidence shows that Guggenheim decided in August 2014, a month before Patterson was scheduled to meet with Kois, that it would not do business with the Kois Buyers Group. (CX0116 at 001 (August 18, 2014 email from Guggenheim to Rogan: “Agreed ... I’ll kill it.”); CCFF ¶¶ 638-639) The Proposed Finding is moreover, misleading and incomplete to the extent that it takes Dr. Kois’s testimony out of context. His testimony was that ProCare was a new company and he was not able to find information about it on the Internet. There is nothing in the record suggesting that Dr. Kois had any concern about not being able to locate background on this new company on the Internet, or that he made any other efforts to seek additional information. The record shows that the Ahmed negotiated the contract with Burkhart on behalf of the Kois Buyers Group. (Kois, Sr., Tr. 196).

568. Dr. Kois did not, for instance, contact any of the companies Ahmed claimed to have worked with (like Walmart), to verify Ahmed's claimed experience. (Kois Sr., Tr. 216–17).

Response to Proposed Finding No. 568

The Proposed Finding is misleading, incomplete and irrelevant to the extent that it implies that whether Dr. Kois chose to research Qadeer Ahmed's business history has any relevance to the decision by Patterson executives to turn down the Kois Buyers Group. The record evidence shows that Guggenheim decided in August 2014, a month before Patterson was scheduled to meet with Kois, that it would not do business with the Kois Buying Group. (CX0116 at 001 (August 18, 2014 email from Guggenheim to Rogan: "Agreed ... I'll kill it."); CCFF ¶¶ 638–639). Accordingly, the Proposed Finding should be disregarded as irrelevant. The Proposed Finding is moreover, misleading to the extent that it seeks to imply that Ahmed misrepresented his business background. There is no evidence in the record that this is the case, and Dr. Kois's decision not to contact a series of companies about which Ahmed made no representations (*see* Complaint Counsel's Response to Patterson's Proposed Finding No. 566) cannot provide a basis for assuming one way or another what those inquiries may have found.

569. ProCare's claimed address was [REDACTED]. (CX1032 at 1).

Response to Proposed Finding No. 569

Complaint Counsel has no specific response.

570. This is the building located at [REDACTED]. (Reece, Tr. 4494 ("Q. So this is the office of ProCare Services, the billion dollar company that does billion dollar deals with Walmart and big companies like that. Have you ever been here? A. I have not. Q. Okay. Does that look like a professional office to you? A. It does not."); CX1032 at 1; *see also* RXD0211 at 4).⁸

⁸ The Court may take judicial notice of a Google Maps image, especially one whose accuracy has gone unchallenged. Fed. R. Evid. 201 (judicial notice is appropriate for facts that are "not subject to reasonable dispute"); *Pahls v. Thomas*,



Response to Proposed Finding No. 570

The Proposed Finding is relies upon on evidence that is not in the record, including a demonstrative and counsel testimony. It should, therefore, be disregarded. To the extent that Patterson attempts to offer RXD0211 as an image of Qadeer Ahmed’s house, it violates this Court’s February 21, 2019 Order on Post-Trial Briefs at 3, in that RXD0211 is a demonstrative, and cannot be offered as substantive evidence pursuant to the Court’s February 21, 2019 Order on Post-Trial Briefs at 3. In addition, Respondent Patterson’s attempt to circumvent the

718 F.3d 1210, 1216 n.1 (10th Cir. 2013) (“We take judicial notice of a Google map and satellite image as a ‘source[] whose accuracy cannot reasonably be questioned.’”) (quoting *United States v. Perea-Rey*, 680 F.3d 1179, 1182 n.1 (9th Cir. 2012)).

requirement that exhibits be exchanged before trial (pursuant to the March 14, 2018 Scheduling Order at 2) by citing authority regarding the possible admissibility of a Google Maps image is inapposite. If Patterson had identified this document on its exhibit list and sought to offer the document into evidence, its authenticity, accuracy (and relevance) could have been evaluated or challenged, as appropriate. Patterson did not, however identify or offer this image as an exhibit. Having failed to comply with the requirements of the scheduling order, Patterson now seeks to use a document that is not in the evidentiary record for substantive purposes. The Proposed Finding is also misleading to the extent that it claims to be citing testimony of a witness, but is instead citing testimony of Patterson’s counsel. (Reece, Tr. 4494 (“Q. So this is the office of ProCare Services . . .”)) Indeed, the witness testified that *he had never been to the location* (Reece, Tr. 4494 (“Q. ... Have you ever been here? A. I have not.”)), so there is no basis whatsoever for his testimony regarding this image – even assuming the image had been admitted into evidence. Finally, the Proposed Finding is misleading to the extent that seeks to imply that a photograph (which may or may not be an accurate depiction of a business location) provides any substantive basis for evaluating the business. There is no testimony in the record to establish that this conclusion can be derived from this photograph. The Proposed Finding, which is based wholly on Patterson’s counsel’s testimony, is misleading and irrelevant. It should be disregarded.

571. Burkhart’s Jeffrey Reece, who would eventually work with Ahmed and the Kois Buyers Group, acknowledged that the home at this address did not look like a professional office. (Reece, Tr. 4495 (“So this is the office of ProCare Services, the billion dollar company that does billion dollar deals with Walmart and big companies like that. Have you ever been here? A. I have not. Q. Okay. Does that look like a professional office to you? A. It does not.”)).

Response to Proposed Finding No. 571

The Proposed Finding is misleading to the extent that it claims to be citing testimony of a witness, but is in reality quoting testimony of counsel. (Reece, Tr. 4494 (“Q [Mr. Ostoyich]. So this is the office of ProCare Services . . .”) Indeed, the witness testified that *he had never been to the location* (Reece, Tr. 4494), so there is no basis whatsoever for his testimony regarding this image – even assuming the image had been admitted into evidence. The Proposed Finding is also misleading to the extent that it relies on Reece’s opinion about an image in a demonstrative for a factual determination of what constitutes a “professional office.” Although Reece is well qualified to testify about running a dental distribution company, he was not qualified as an expert to opine about office locations in Canada. Because he was doing no more than providing a personal opinion (about a location he had never visited), he statement has no factual basis. The Proposed Finding should be disregarded.

572. Ahmed used a personal Hotmail account in business emails with Patterson. (CX0115 at 2).

Response to Proposed Finding No. 572

The Proposed Finding is misleading, incomplete and misstates the record. It is also irrelevant. It is misleading and incomplete to the extent that it suggests that Ahmed only used a personal email. Documents – including his earliest emails to Patterson – show that he also used an address at equalizerproservices.com. (CX0116 at 001 (email including address at qadeer.ahmed@equalizerproservices.com); RX1042 (same)). The Proposed Finding is also misleading to the extent that it implies that people who use personal email addresses in a business capacity do not work for legitimate companies. There is no factual or legal basis for this implication. Indeed, the record shows that Patterson sales representatives and its dental business customers regularly use their personal email addresses – including Hotmail accounts -- in official correspondence.

[REDACTED]. There is no basis in the record to support misleading implication that any facts about the legitimacy of a business can be determined based on the use of a personal email address. The Proposed Finding should be disregarded.

573. Dr. Kois did not know of any experience Ahmed or ProCare had with setting up buying groups or arranging distribution in the medical industry. (Kois Sr., Tr. 217–18).

Response to Proposed Finding No. 573

The Proposed Finding is misleading and irrelevant to the extent that it implies that what Dr. Kois knew about Ahmed’s experience in setting up buying groups or arranging distribution in the medical industry has any relevance to the decision by Patterson executives to turn down the Kois Buyers Group. The record evidence shows that Guggenheim decided in August 2014, a month before Patterson was scheduled to meet with Kois, that it would not do business with the Kois Buyers Group. (CX0116 at 001 (August 18, 2014 email from Guggenheim to Rogan: “Agreed ... I’ll kill it.”); CCFF ¶¶ 638-639). Dr. Kois’s knowledge is not relevant to Patterson’s decision. The Proposed Finding is also misleading to the extent that it suggests that experience in setting up dental buying groups is necessary to establish a successful buying group arrangement. For example, Smile Source was established by the executives who established Vision Source, a buying group for ophthalmologists and optometrists. (CCFF ¶¶ 152-153).

574. Dr. Kois also did not know of Ahmed having any experience in the dental industry. (Kois Sr., Tr. 217 (“Q. Did Mr. Ahmed and ProCare Dental Services -- did they have any experience in the dental industry? A. To my knowledge, no.”)).

Response to Proposed Finding No. 574

The Proposed Finding is misleading and irrelevant to the extent that it implies that what Dr. Kois knew about Ahmed's experience in the dental industry has any relevance to the decision by Patterson executives to turn down the Kois Buyers Group. The record evidence shows that Guggenheim decided in August 2014, a month before Patterson was scheduled to meet with Kois, that it would not do business with the Kois Buyers Group. (CX0116 at 001 (August 18, 2014 email from Guggenheim to Rogan: "Agreed ... I'll kill it."); CCFF ¶¶ 637-639). Dr. Kois's knowledge is not relevant to Patterson's decision. The Proposed Finding is also misleading to the extent that it suggests that specific experience in setting up dental buying groups is necessary to establish a successful buying group arrangement. For example, Smile Source was established by the executives who established Vision Source, a buying group for ophthalmologists and optometrists. CCFF ¶¶ 155-154. Evidence in the record also shows that at least one Patterson Branch Manager thought highly of Ahmed's proposed buying group arrangement (CX3082 at 001) (August 11, 2014 email from Marc Beaudet to McFadden, "A couple of weeks ago, one of my very good client[s], approached me in regard to create a Buying Group. I quickly found out they were well organized and serious."). Despite this, Patterson, in keeping with its no buying group directive, rejected the Kois Buyers Group.

575. Dr. Kois also did not know of ProCare having had any specific employees other than Ahmed. (Kois Sr., Tr. 214-15 ("Q. You say here in the second sentence that ProCare, which I guess is Mr. Ahmed, is led by people. Were there other people that you were -- A. I assumed there were other people in his company, that's correct. Q. Had you met any of them? A. I have not met them. Q. Do you know that there were other people, sir? A. I think he mentioned somebody by the name of Bobby. There were people that were involved in his company, but I don't know them. Q. How many employees did he have? A. I don't know.")).

Response to Proposed Finding No. 575

The Proposed Finding is misleading and irrelevant to the extent that it implies that what Dr. Kois knew about the number of employees working for Equalizer ProServices or ProCare Dental

Services has any relevance to the decision by Patterson executives to turn down the Kois Buyers Group. The record evidence shows that Guggenheim decided in August 2014, a month before Patterson was scheduled to meet with Kois, that it would not do business with the Kois Buyers Group. (CX0116 at 001 (August 18, 2014 email from Guggenheim to Rogan, “Agreed ... I’ll kill it.”); CCFF ¶¶ 637-639). Dr. Kois’s knowledge is not relevant to Patterson’s decision. Dr. Kois’s knowledge (or lack of knowledge), moreover does not establish any facts about the size or structure of ProCare Dental Service’s business or its number of employees. In fact, the evidence in the record shows ProCare worked with the Kois Center to establish the Kois Buyers Group. ((Kois, Jr., Tr. 311 (Ahmed ran the Kois Buyers Group from October 2014 to October 2015); Kois Jr., Tr. 311-312 (“Qadeer Ahmed’s company ProCare was working with the Kois Center and Dr. John Kois to put together what became the Kois Buyers Group.”); Kois Jr., Tr. 333)(“Q. Who negotiated the discount with Burkhardt? A. That would be Qadeer Ahmed.”). To the extent that the Proposed Finding implies (without offering supporting evidence) that the number of employees is a proxy for establishing a successful buying group, the record shows that this implication is false. The Kois Buyers Group, which has 570 member, has only one full time employee, Mr. Kois. (Kois, Jr., Tr. 308, 314)

576. Dr. Kois also did not personally meet with Ahmed until long after they began working together. (Kois Sr., Tr. 216 (“Q. All right. Had you -- at this time when you sent out the e-mail he drafted for you, had you -- had you met him face to face? A. I did not. At that time.”); CX8007 (Kois Sr., Dep. at 33 (“Q. Do you remember the approximate year that you met Qadeer Ahmed? A. Actually, I didn’t meet him until he lectured at one of our symposiums, which was the first time I ever met him, and I believe that was 2015 or 2016, I don’t recall the actual date.”))).

Response to Proposed Finding No. 576

Complaint Counsel has no specific response.

577. Dr. Kois entrusted Ahmed with handling all negotiations with potential dental distributors for the Kois Buyers Group and has no knowledge what Ahmed said to Patterson. (Kois Sr., Tr. 188 (“Q. What did you ask Mr. Ahmed to do for the Kois Center? A. To reach out to the companies and make contacts and see who might be interested in working with us.”); Kois Sr., Tr. 219 (“Q. I understand that you tasked Mr. Ahmed to reach out to the distributors, my client, Patterson Companies; is that fair? A. Yes. Q. You were not firsthand involved in those reach-out efforts; he did that on his own. Fair? A. Fair. Q. You don’t know what he said to Patterson Companies; is that fair? A. Fair.”); CX8007 (Kois Sr., Dep. at 35 (“[H]e did all the initiation of the contact and all the negotiation. I had nothing to do with any of that, so I don’t actually know what the conversations were that he had with any of the companies.”))).

Response to Proposed Finding No. 577

The Proposed Finding is misleading, misstates the testimony and is contrary to the weight of the evidence to the extent that it states that Dr. Kois had no knowledge of what Ahmed said to Patterson. Dr. Kois’s testimony is that he was not involved “firsthand” in Ahmed’s communications with Patterson, but his testimony was also that, although he did not have direct correspondence with distributors, he knew that Ahmed reached out to Schein, Patterson and Benco. (Kois, Sr., Tr. 190 (“I never had any direct correspondence with any of the companies other than learning from Ahmed himself, but I know that he reached out to Henry Schein, Patterson and Benco.”))).

578. On August 14, 2014, Ahmed, using his personal Hotmail account, emailed Patterson’s Marc Beaudet under the subject line “Top 4 Dental Manufacturers Committed.” (CX0116 at 2).

Response to Proposed Finding No. 578

The Proposed Finding is incomplete and factually incorrect to the extent that it states that Ahmed emailed Patterson’s Marc Beaudet using a personal email account. The document clearly shows that Ahmed sent his email displaying both his Equalizer ProServices and personal email account. Complaint Counsel has no specific response to the information about the date, recipient or subject line.

579. Ahmed's August 14 email to Patterson stated, in part, "I'm writing to advise that we have verbal confirmation of discount [sic] in the range required (10%-20%) from the following major 4 manufacturers," listing (1) "3M (Canada/US)," (2) "Ivoclar Vivadent," "(3) "Kerr Corporation," and (4) "DENTSPLY." (CX0116 at 2).

Response to Proposed Finding No. 579

Complaint Counsel has no specific response.

580. On August 17, Patterson's Beaudet forwarded Ahmed's email to Patterson's Paul Guggenheim. (CX0116 at 2).

Response to Proposed Finding No. 580

The Proposed Finding is incomplete, and therefore misleading. In forwarding Ahmed's email to Paul Guggenheim, Patterson's Marc Beaudet included his observation about working with Ahmed, "relationship and trust are good so far." (CX0116 at 002). In addition, approximately a week before Beaudet forwarded his email to Guggenheim, he forwarded a similar email to Special Markets President McFadden, also expressing interest in doing business with the buying group being developed by ProCare, describing ProCare as "well organized and serious." (CX3082 at 001) (August 11, 2014 email from Beaudet to McFadden, "A couple of weeks ago, one of my very good client[s], approached me in regard to create a Buying Group. I quickly found out they were well organized and serious.")).

581. Guggenheim forwarded Beaudet's email to Patterson's Tim Rogan, asking him to "see what the 4 vendors mentioned below are doing with this." (CX0116 at 1).

Response to Proposed Finding No. 581

The Proposed Finding is incomplete and therefore misleading. Guggenheim's full message to Rogan was, "I'll address this with Marc but can you see what the 4 vendors mentioned below are doing with this?" (CX0116 at 001). Read in conjunction with Guggenheim's next email to Rogan in this chain, dated August 18, 2014, ("Agreed ... I'll kill it. Just want to make sure

we're not surprised on the vendor side.”) (ellipses in original) (CX0116 at 001), the evidence shows that Guggenheim planned to turn down the buying group, but was concerned about the possibility of making major vendors unhappy.

582. Rogan, who was responsible for Patterson's dealings with these four manufacturers, then contacted the manufacturers. (Rogan Tr. 3635–37; CX3171 (contacting 3M); CX3172 at 1 (contacting Ivoclar); CX3170 (contacting Kerr); CX3331 (contacting Dentsply)).

Response to Proposed Finding No. 582

The Proposed Finding is misleading and incomplete to the extent that it fails to reference that question that Rogan asked each of the manufacturers. In each of the references emails, the subject line was “Equalizer ProServices” and Rogan asked the recipient, “You folks have committed to this buying group or GPO in Canada some sort of deal. Can you tell me what that is?” CX3171 at 001; CX3172 at 001; CX3170 at 001; CX3331 at 001). None of the outgoing emails referenced ProCare Dental Services or Kois Buyers Group. There is, therefore no evidence in the record that any of these vendors was asked about other names under which negotiations may have taken place. Rogan in fact admitted that he did not ask if any of the vendors had heard from Qadeer Ahmed and that he didn't recall if he asked if they had heard of the Kois Buyers Group. (Rogan, Tr. 3665) (“Q. Do you know if you asked any of these manufacturers if they had heard of Qadeer Ahmed? A. I don't believe I asked them that. Q. Do you know if you asked any of these manufacturers if they had heard of the Kois Buyers Group? A. I – I don't recall.”)

583. None of the manufacturers had heard of Ahmed or the Kois Buyers Group. (Rogan Tr. 3656 (“Q. . . . Mr. Guggenheim had asked you on the 17th, August 17th, 2014, ‘Can you see what the 4 vendors mentioned below are doing with this?’ And we just saw that you checked with them and they had never heard of this guy, qadeerahmed@hotmail. Is that fair? A. Yes.”); Rogan Tr. 3639–3644 (discussing responses from Ivoclar (CX0116 at 1) (“They don't know these people.”), Kerr (RX0336 at 1) (“[N]ot heard of this group and have no record of

offering them any pricing.”), and Dentsply (RXD0224 at 1) (“I inquired with the director of marketing and they don’t know anything about this.”))).

Response to Proposed Finding No. 583

The Proposed Finding is misleading, not supported by the cited testimony, and relies upon on evidence that is not in the record as substantive evidence. The first testimony does not appear at the cited location (Rogan, Tr. 3656). With respect to the documents cited, any conclusions that can be drawn from CX0116 at 001 (Ivoclar) and RX0336 at 001) (Sybron/Kerr), are ambiguous at best, as Rogan’s email only referred to arrangements with Equalizer ProServices. As noted in Response to Patterson’s Proposed Finding No. 582, Rogan admitted that, in contacting vendors, Rogan did not ask if any of the vendors had heard from Qadeer Ahmed, and did not recall if he asked if they had heard of the Kois Buyers Group. (Rogan, Tr. 3665) (“Q. Do you know if you asked any of these manufacturers if they had heard of Qadeer Ahmed? A. I don’t believe I asked them that. Q. Do you know if you asked any of these manufacturers if they had heard of the Kois Buyers Group? A. I – I don’t recall.”) The Proposed Finding is also misleading to the extent that it implies that the responses from manufacturers drove Patterson’s determination about whether to do business with Kois. The record evidence shows that Guggenheim decided no later than August 18, 2014 – two weeks before Patterson even received a response from Sybron Dental (one of the vendors), and a month before Patterson was scheduled to meet with Kois – that it would not do business with the Kois Buyers Group. (CX0116 at 001 (August 18, 2014 email from Guggenheim to Rogan, “Agreed ... I’ll kill it.”); RX0336 at 001 (September 2, 2014 email from Sybron/Kerr Dental to Rogan); CCFF ¶¶ 637-639). Finally, with respect to RXD0224, Respondent Patterson is attempting to use this demonstrative for the substantive information it contains. Using a demonstrative as substantive evidence violates this Court’s

February 21, 2019 Order on Post-Trial Briefs at 3. Accordingly, to the extent that this finding relies on RXD0224 is should be disregarded.

584. In other words, Rogan learned that Ahmed was “using a fabricated story” in the hopes of getting Patterson to work with him. (Rogan Tr. 3646–47 (“They were basically telling a story, a fabricated story, trying to get some of the manufacturers to recognize them and to give them the discounts. They also point out at the end that they talk about all these 450 and then 1251 offices, and our largest -- the largest DSO in the country, in the United States right now is Heartland Dental, and they have 850 offices, and they’re -- everybody knows who they are. So if somebody had 1200 offices, we would know who they are. Q. So were you pointing that out to Mr. Guggenheim as a way of saying I’m skeptical of this? A. Yes. Q. And the “line in the water” part and “he wants someone to bite,” what were you indicating with that? A. Indicating that he’s saying that we’ve got the four biggest manufacturers on board, we have got 200 dentists on board, he’s saying that, but clearly nobody’s been able to prove that that’s true. So a line in the water is he’s using a fabricated story to try and get somebody to commit to recognize him as a -- in recognizing him or his group or whatever it is as a buying group or GPO. Q. So you say to Mr. Guggenheim, “I’d tell Marc to be careful here.” Were you concerned that maybe your Toronto branch manager didn’t understand exactly how incoherent a proposal this was from qadeer@hotmail.com? A. Correct.”)).

Response to Proposed Finding No. 584

The Proposed Finding is misleading and contrary to the weight of the evidence in the record. It is misleading to the extent that the document that is the basis for the testimony cited, CX0116, does not provide a basis for Rogan’s conclusions. At that time he wrote his statements in his August 18, 2014 email, he had only heard from one manufacturer – so it would have been impossible for him to have reached a conclusion about what others would have said. *See, e.g.*, RX0366 (response from Sybron/Kerr, dated September 2, 2014). Any conclusion that can be drawn from CX0116 at 001 (Ivoclar) and RX0336 at 001) (Sybron/Kerr), are ambiguous at best, as Rogan’s email asking for information only asked about arrangements with Equalizer ProServices. That is, the evidence suggests that he asked about the wrong entity. Rogan admitted that he did not ask if any of the vendors had heard from Qadeer Ahmed and that he didn’t recall if he asked if they had heard of the Kois Buyers Group. (Rogan, Tr. 3665) (“Q. Do you know if you asked any of these manufacturers if they had heard of Qadeer Ahmed? A. I

don't believe I asked them that. Q. Do you know if you asked any of these manufacturers if they had heard of the Kois Buyers Group? A. I – I don't recall.") The Proposed Finding is also misleading to the extent that it implies that the responses from manufacturers drove Patterson's determination about whether to do business with Kois. The record evidence shows that Guggenheim decided no later than August 18, 2014 – two weeks before Patterson even received a response from Sybron/Kerr Dental, and a month before Patterson was scheduled to meet with Kois – that it would not do business with the Kois Buyers Group. (CX0116 at 001 (August 18, 2014 email from Guggenheim to Rogan, "Agreed ... I'll kill it."); RX0336 at 001; CCFF ¶¶ 637-639)). Rogan's statement questioning the number of likely participants in the Kois Buyers Group is also contrary to the record. Dr. Kois testified that approximately 4,000 dentists have taken a course from the Kois Center. (Kois Sr., Tr. 165), so it is clear that a very large number of dentists would be eligible to participate in the buying group. This calls into question the basis for Rogan's testimony, or the basis for his knowledge about that part of the industry. Finally, the Proposed Finding is relies on counsel's characterizations that are not found in the witnesses testimony.

585. Rogan responded to Guggenheim, advising him that he had just spoken with senior Ivoclar executives who did not know of Ahmed or the Kois Buyers Group. (CX0116 at 1 ("I just spoke with Sarah Anders, Senior VP North America, from Ivoclar, and she spoke with her Canadian Director. They don't know these people so the statement about a verbal is wrong.")).

Response to Proposed Finding No. 585

The Proposed Finding is misleading and incomplete to the extent that it implies that the information that Rogan received was accurate, despite the evidence that he may have asked vendors about the wrong entity. At trial, Rogan specifically admitted that he did not ask the identified vendor (or any other vendor) if they had heard of Qadeer Ahmed, and that he didn't

recall if he asked if they had heard of the Kois Buyers Group. (Rogan, Tr. 3665) (“Q. Do you know if you asked any of these manufacturers if they had heard of Qadeer Ahmed? A. I don’t believe I asked them that. Q. Do you know if you asked any of these manufacturers if they had heard of the Kois Buyers Group? A. I – I don’t recall.”). The only written evidence in the record are Rogan’s email to four vendors, and those only ask about “Equalizer ProServices.” There is no evidence in the record addressing the issue of whether Ahmed contacted the vendors using his own name or that of the Kois Buyers Group. There is, therefore, no record evidence to support the Proposed Finding.

586. About a month later, on or around September 24, 2014, Ahmed, using the company name Equalizer ProServices, transmitted a PowerPoint presentation to Patterson entitled “Dental Program, Invitation to Patterson.” (RX0377 at 1).

Response to Proposed Finding No. 586

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Patterson had not already made a decision to reject the Kois Buyers Group at least a month before Ahmed transmitted the PowerPoint Presentation to Patterson. The record evidence shows that Guggenheim decided no later than August 18, 2014, a month before Patterson was scheduled to meet with Kois, that it would not do business with the Kois Buyers Group. (CX0116 at 001 (August 18, 2014 email from Guggenheim to Rogan, “Agreed ... I’ll kill it.”); CCFF ¶¶ 637-639). Complaint Counsel has no specific response to the fact that Ahmed transmitted a presentation entitled “Dental Program, Invitation to Patterson,” on or about September 24, 2014.

587. In his presentations to Patterson and Schein, Ahmed described the Kois Buyers Group as “not a standard BUYING GROUP.” (RX0377 at slide 3; RX2197 at slide 3). “We are profoundly different,” Ahmed wrote. (RX0377 at slide 3; RX2197 at slide 3).

Response to Proposed Finding No. 587

The Proposed Finding is misleading and irrelevant to the extent that it implies that Patterson had not already made a decision to reject the Kois Buyers Group at least a month before Ahmed transmitted the PowerPoint Presentation to Patterson. The record evidence shows that Guggenheim decided no later than August 18, 2014, a month before Patterson was scheduled to meet with Kois, that it would not do business with the Kois Buyers Group. (CX0116 at 001 (August 18, 2014 email from Guggenheim to Rogan, “Agreed ... I’ll kill it.”); CCFF ¶¶ 637-639). Because Patterson has already made a determination not to do business with the Kois Buyers Group, any statements made in the late September 2014 presentation about the structure of its offering are irrelevant. The Proposed Finding is also misleading to the extent that it implies that Patterson’s decision to reject Kois was not part of its agreement not to do business with buying groups. The record evidence established that Patterson, Schein and Benco were part of an overarching conspiracy not to discount to buying groups, and that, as part of the conspiracy, the Big Three rejected buying groups. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198). The evidence shows that Patterson joined the conspiracy no later than February 2013. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 630-653, 657).

588. In both presentations, Ahmed described Phase 1 of the plan as “Begin pilot program with approximately 1,700 dentists (in the U.S. and Canada), and Phase 2 as “add[ing] an additional 1,000 dentists.” (RX0377 at slide 6; RX2197 at slide 6).

Response to Proposed Finding No. 588

The Proposed Finding is misleading and irrelevant to the extent that it implies that Patterson had not already made a decision to reject the Kois Buyers Group at least a month before Ahmed transmitted the PowerPoint Presentation to Patterson. The record evidence shows that Guggenheim decided no later than August 18, 2014, a month before Patterson was scheduled to

meet with Kois, that it would not do business with the Kois Buyers Group. (CX0116 at 001 (August 18, 2014 email from Guggenheim to Rogan, “Agreed ... I’ll kill it.”); CCFF ¶¶ 637-639). Because Patterson has already made a determination not to do business with the Kois Buyers Group, any specific statements made in the late September 2014 presentation about the structure of Kois’s offering are irrelevant. The Proposed Finding is also misleading to the extent that it implies that Patterson’s decision to reject Kois was not part of its agreement not to do business with buying groups. The record evidence established that Patterson, Schein and Benco were part of an overarching conspiracy not to discount to buying groups, and that, as part of the conspiracy, the Big Three rejected buying groups. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198). The evidence shows that Patterson joined the conspiracy no later than February 2013. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 630-653, 657).

589. Patterson’s Tim Rogan testified that Ahmed’s claims of more than 1,000 dentists were unrealistic, explaining that even the largest DSO in the country, Heartland Dental, has only 850 dentists’ offices. (Rogan Tr. 3646–47 (“They also point out at the end that they talk about all these 450 and then 1251 offices, and our largest -- the largest DSO in the country, in the United States right now is Heartland Dental, and they have 850 offices, and they’re -- everybody knows who they are. So if somebody had 1200 offices, we would know who they are.”)).

Response to Proposed Finding No. 589

The Proposed Finding is misleading because Rogan’s testimony is not credible and is contrary to evidence to the extent that it implies that Rogan conducted any research or even asked any questions to determine if Ahmed had a basis for his statement. In fact, there is evidence in the record to support a finding that a significant number of dentists would have been eligible to participate in the buying group being formed by Kois. Dr. Kois testified that approximately 4,000 dentists have taken a course from the Kois Center, and that in 2014, at least 2,000 would

have taken a course. (Kois, Sr., Tr. 165, 296). All of these dentists would be eligible to participate in the buying group. (Kois, Jr., Tr. 317). This calls into question the basis for Rogan’s testimony, or at the very least, the basis for his knowledge about that part of the industry.

590. Patterson’s Paul Guggenheim likewise remembered participating in a WebEx meeting with Ahmed, and that Ahmed proposed numbers that “seemed completely unrealistic.” (Guggenheim Tr. 1676–77).

Response to Proposed Finding No. 590

The Proposed Finding is misleading and irrelevant to the extent that it implies that Patterson had not already made a decision to reject the Kois Buyers Group at least a month before Guggenheim participated in a WebEx meeting with Ahmed. See CCFF ¶ 638 (Kois WebEx meeting with Patterson took place on September 29, 2014). The record evidence shows that Guggenheim decided no later than August 18, 2014, a month before Patterson was scheduled to meet with Kois, that it would not do business with the Kois Buyers Group. (CX0116 at 001 (August 18, 2014 email from Guggenheim to Rogan, “Agreed ... I’ll kill it.”); CCFF ¶¶ 637-639).

Guggenheim’s testimony should also be disregarded as contrary to other record evidence and not credible. Guggenheim testified that, “they were proposing just, you know, tens of thousands – a lot of customers were going to be involved” (Guggenheim, Tr. 1677). There is no evidence in the record that this is what Kois was proposing, and Patterson has not identified any evidence that Kois was suggesting that it had “tens of thousands” of members. Indeed, Guggenheim’s recollection is clearly out of line with any other numbers in the record – by many multiples. It should be disregarded.

591. In reality, at the time of its outreach to Patterson, the Kois Buyers Group “didn’t even exist” and had zero members. (CX8007 (Kois Sr., Dep. at 38, 135–36)).

Response to Proposed Finding No. 591

The Proposed Finding is misleading to the extent that it implies that a developing buying groups would need to be fully operational before seeking supply contracts. It is only common sense that, before a buying group can begin to market itself to members, it has agreements with suppliers including agreements with contractual discounts. Absent those agreements, the buying group would be unable to market its product to members. Patterson was fully aware of this, as it had been negotiating with the New Mexico Dental Cooperative in February 2013, prior to entering into the conspiracy with Benco and Schein. (CX0090 at 004 (February 4, 2013 email from Dr. Mason (“Frank Montoya, Jason Chapman and I are in the process of starting a dental Cooperative . . . we have partnered with Patterson Dental to provide the individual offices the same opportunities as the larger corporations.”))). The Proposed Finding is also misleading to the extent that it suggests that the Kois Buyers Group did not already have the commitment of a certain number of dentists who agreed to participate at the time it was seeking to negotiate with suppliers. The evidence shows that about 100 Kois members had already committed to participate in the buyers group at that time. (Kois, Sr., Tr. 295).

592. Complaint Counsel presented no witness with first-hand knowledge of Patterson’s response to Ahmed or the Kois Buyers Group. (CX8007 (Kois Dep. at 145 (“Q. You don’t recall Patterson giving any response to this; is that right? A. I have no knowledge of working specifically with any of the companies. I didn’t deal with them at all. Q. And you don’t even know what, if any, response they gave to this pitch? A. I do not. Other than what might have been in an e-mail, I was not personally involved. Q. Right. In terms of what you personally remember yourself? A. Yeah, I don’t know. I don’t know. I don’t remember anything about that. I’m not -- yeah, I have no information about that.”))).

Response to Proposed Finding No. 592

The Proposed Finding is misleading and irrelevant to the extent that it suggests that there is not clear evidence in the record that Patterson turned down the Kois Buyers Group. As noted above, the weight of the evidence shows that Guggenheim decided no later than August 18, 2014, a month before Patterson was scheduled to meet with Kois, that it would not do business with the

Kois Buyers Group. (CX0116 at 001 (August 18, 2014 email from Guggenheim to Rogan, “Agreed ... I’ll kill it.”); CCF ¶¶ 637-639). When Patterson sales representatives later expressed an interest in the Koīs Buyers Group (CX3086 at 003 (November 19, 2014 email: “What are we doing with this????”), Guggenheim responded that Patterson has “decided to pass at this time due to the implications to our margins and therefore our Sales Reps.” (CX3086 at 001). It is thus clear from the record that Patterson turned the Koīs Buyers Group down. Furthermore, Dr. Koīs testified that Ahmed did not share any proposal that he received from Patterson (Koīs, Sr., 190), and Patterson has never suggested that it took any other action. Patterson, which would have known if it had made any overtures to the Koīs Buyers Group, did not offer any evidence of a different response.

593. Dr. Koīs believed that distributors including Patterson turned down the Koīs Buyers Club because it was too small, with no members or ability to negotiate with any manufacturers. (CX8007 (Koīs Sr., Dep. at 37–38 (“Q. Do you know why the -- all three, Benco, Schein and Patterson said they had no interest in the Koīs 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.”))).

Response to Proposed Finding No. 593

The Proposed Finding is misleading and irrelevant to the extent that it implies that Dr. Koīs’s knowledge (or lack of knowledge) or speculation about why Schein, Patterson and Benco turned down Koīs Buyers Group is relevant to whether there was an overarching conspiracy among the Big Three to refuse to do business with buying groups. The weight of the evidence establishes that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, the Big Three rejected buying groups. (CCF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198). The weight of the evidence further shows that Patterson entered into an agreement no later than February 2013 that it would not do

business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 630-653, 657). Guggenheims statement in CX0116 that he planned to reject Kojs (“Agreed ... I’ll kill it.”) (CX0116 at 001); CCFF ¶¶ 637-639), is an example of a buying grup rejection. The Proposed Finding is further misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Dr. Kojs, who was not a party to the conspiracy, was not informed of the conspiracy. That a third party who had not involvement in perpetrating the agreement was not informed of the existence of the agreement is irrelevant to whether the agreement existed.

594. John Kojs Jr., who later came to run the Kojs Buyers Group, also thought that Patterson was not interested in working with the Kojs Buyers Group because, “[a]t the time there were no members, so there wasn’t anything to offer them.” (CC0321 (Kojs Jr., IHT at 157).

Response to Proposed Finding No. 594

The Proposed Finding is misleading and irrelevant to the extent that it implies that Mr. Kojs’s knowledge (or lack of knowledge) and speculation about why Schein, Patterson and Benco turned down Kojs Buyers Group is relevant to whether there was an overarching conspiracy among the Big Three to refuse to do business with buying groups. The Proposed Finding is further misleading and irrelevant to the extent that it suggests that a conspiracy did not exist because Mr. Kojs, who was not a party to the conspiracy, was not informed of the conspiracy. That a third party who had not involvement in perpetrating the agreement was not informed of the existence of the agreement is irrelevant to whether the agreement existed. To the extent that the Proposed Finding references an exhibit “CC0321,” there is no exhibit with that number. Complaint Counsel presumes the reference is to CX0321.

595. As to Schein, Qadeer Ahmed transmitted a “proposal” on October 28, 2014, to Tim Sullivan, again from his personal Hotmail account. (RX2602 at 2).

Response to Proposed Finding No. 595

The Proposed Finding is misleading, unclear and irrelevant. It is misleading and irrelevant to the extent that it implies that there is any evidentiary or other significance to the type of email account used by Ahmed to transmit his proposal. *See* Complaint Counsel’s Response to Respondent Patterson’s Proposed Findings of Fact No. 572 for a more detailed summary of what this implied finding is without merit. To the extent that the Proposed Finding refers to the document as containing a “proposal,” it is unclear what Respondent means or intends to connote by describing the word “proposal” in quotes. Because the Proposed Finding is unclear and its meaning imprecise, it should be disregarded.

596. Describing his proposal to Sullivan, Ahmed wrote, “Essentially it says ‘give us the same deal every other distributor has already offered in writing and we’ll set them aside and work exclusively with you.’” (RD2602 at 2).

Response to Proposed Finding No. 596

There is no exhibit in the record identified as RD2602. Complaint Counsel presumes the correct reference is to RX2602 and responds to the Proposed Finding with respect to that document. Complaint Counsel has no specific response to the accuracy of the language quoted from RX2602 at 002.

597. This statement was false; Ahmed at this point had only spoken with Schein, Patterson, and Benco, and there is no evidence he received written offers from any of them. (Kois Sr., Tr. 250 (Ahmed spoke first only with Schein, Patterson, and Benco)). Indeed, Complaint Counsel has claimed that “all three Respondents turned down the Kojs Buyers Group.” (CC’s Pre-Trial Br. at 37).

Response to Proposed Finding No. 597

The Proposed Finding is misleading and irrelevant to the extent that it implies that communications between Ahmed and Schein in October 2014 regarding the Kois Buyers Group had anything to do with Patterson's decision to reject the Kois Buyers Group. As noted above, the weight of the evidence shows that Guggenheim decided no later than August 18, 2014, a month before Patterson was scheduled to meet with Kois, that it would not do business with the Kois Buyers Group. (CX0116 at 001 (August 18, 2014 email from Guggenheim to Rogan, "Agreed ... I'll kill it."); CCF 637-639). Patterson made its decision more than two months before the communication referenced in the Proposed Finding. The implication of the Proposed Finding is therefore irrelevant.

598. Ahmed's proposal to Schein also mentioned that he had built "more than a few multi-billion dollar companies." (RX2602 at 3). There is no evidence in the record that this claim is true.

Response to Proposed Finding No. 598

The Proposed Finding is misleading and irrelevant to the extent that it implies that communications between Ahmed and Schein in October 2014 regarding the Ahmed's background had anything to do with Patterson's (or any other Respondents') decision to reject the Kois Buyers Group. As noted above, the weight of the evidence shows that Guggenheim decided no later than August 18, 2014 – a month before Patterson was scheduled to meet with Kois – that it would not do business with the Kois Buyers Group. (CX0116 at 001 (August 18, 2014 email from Guggenheim to Rogan, "Agreed ... I'll kill it."); CCF 637-639). Patterson made its decision more than two months before the communication referenced in the Proposed Finding. The Proposed Finding is also irrelevant to the extent that it implies the lack of evidence to corroborate irrelevant proposed facts makes the facts false. There is also no evidence in the

record that Ahmed's statements are false, and no reason to introduce evidence to corroborate irrelevant statements. The finding is irrelevant and should be disregarded.

599. Ahmed proposed, "After you give us the supply deal, we'll spend the time to share our detailed plans with your team, . . ." (RX2602 at 3). Ahmed said, "If we don't deliver, kill the deal." (RX2602 at 3).

Response to Proposed Finding No. 599

Complaint Counsel has no specific response.

600. Sullivan responded, "I appreciate the 'get r done' approach, but it's not a style/approach that I am comfortable working in. I can't get married with a 'no big deal, we can always divorce later' mentality. . . ." (RX2602 at 2). Sullivan suggested, "if we can slow down and really understand your model better that you believe is going to change dentistry, then we believe it's worth rolling up our sleeves and getting to know each other better. (RX2602 at 2). Sullivan asked that Ahmed speak with Schein's John Chatham to "figure out the best next steps," writing, "This will take some time to put together thoughtfully and diligently." (RX2602 at 2).

Response to Proposed Finding No. 600

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein planned to or intended to bid on the Kois Buyers Group at any point. The record evidence shows Sullivan was not interested in bidding on Kois by September 8, 2014. Sullivan communicated to Muller and his boss, Breslawski, regarding Kois on September 8, 2014: "I still believe this is slippery slope and have yet to see a successful one in dental and don't plan to take the lead role. Watching closely." (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295)). On October 23, 2014, Sullivan also stated in response to information he had received about Kois: "I would never sign us up for straight out GPO model." (CX6617 at 001). Schein rejected the Kois Buyers Group in November 2014, and stated that it would "pass" on working with the buying group. (CX4310 at 001); CCFF ¶ 928-929).

601. Ahmed responded to Sullivan, in part, "We have offers on the table and paid members expecting a result." (RX2602 at 1).

Response to Proposed Finding No. 601

Complaint Counsel has no specific response.

602. This statement was false; Ahmed again at this point had only spoken with Schein, Patterson, and Benco, and there is no evidence he received written offers from any of them. (Kois Sr., Tr. 250 (Ahmed spoke first only with Schein, Patterson, and Benco). And again, Complaint Counsel has claimed that “all three Respondents turned down the Kois Buyers Group.” (CC’s Pre-Trial Br. at 37). Finally, the Kois Buyers Group “didn’t even exist” at this time and had no “paid” members. (CX8007 (Kois Sr., Dep. at 38, 135–36)).

Response to Proposed Finding No. 602

The Proposed Finding is misleading and irrelevant to the extent that it implies that communications between Ahmed and Schein in October 2014 regarding the Kois Buyers Group had anything to do with Patterson’s decision to reject the Kois Buyers Group. As noted above, the weight of the evidence shows that Guggenheim decided no later than August 18, 2014, a month before Patterson was scheduled to meet with Kois and over two months before the communication cited in RX2602, that it would not do business with the Kois Buyers Group. (CX0116 at 001 (August 18, 2014 email from Guggenheim to Rogan, “Agreed ... I’ll kill it.”); RX2602 at 001; CCFF ¶¶ 637-639). Patterson made its decision more than two months before the communication referenced in the Proposed Finding. Since the Proposed Finding is irrelevant, the accuracy of Ahmed’s statement is also irrelevant.

603. Complaint Counsel presented no witness with personal knowledge that Schein ultimately turned down Kois. Rather, Kois Sr., testified that he had not heard back from Schein at the time he selected Burkhart. (CX8007 (Kois Sr., Dep. at 167–68)).

Response to Proposed Finding No. 603

The Proposed Finding is misleading and contrary to the weight of the record evidence. Schein’s email to Ahmed turning down the Kois Buyers Group is in the record. *See* CX4310 at 001 (November 3, 2014 email from Schein’s John Chatham: “we need to take a pass on the offer.”)

The Proposed Finding is also misleading to the extent that it suggests that the Court can only consider testimonial evidence. Schein's document speaks for itself. The Proposed Finding is also misleading to the extent it implies that Schein planned to or intended to bid on the Kois Buyers Group. The weight of the evidence establishes that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that, as part of the conspiracy, the Big Three rejected buying groups. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198). The record is replete with examples of buying groups that Schein categorically rejected because it had a policy not to do business with buying groups during the conspiracy period. (CCFF ¶¶ 661-1100, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Tr. Br. at Attachment C). Schein's record with respect to the Kois Buyers Group is also clear. Sullivan communicated to Muller and his boss, Breslawski, regarding Kois on September 8, 2014: "I still believe this is slippery slope and have yet to see a successful one in dental and don't plan to take the lead role. Watching closely." (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295); CCFF ¶ 928-929). On October 23, 2014, Sullivan also stated in response to information about Kois: "I would never sign us up for straight out GPO model."

604. Meanwhile, after Ahmed reached out to Benco's Chuck Cohen, Cohen in turn contacted Dr. Kois suggesting they work together without Ahmed or his companies. (RX1040 at 2-3 ("John... Confidentially, we're currently looking at buying club options, and should have some ideas to discuss sometime in early 2015. That said, whatever we do, I don't think that we'll need to involve an outside company like Equalizer Pro Services or anyone else, they'll just take a cut of the savings. So, with your permission, I'm going to politely give Qadeer our standard answer of: 'thanks but we don't do buying groups.' And then I'll make a note to reconnect on this issue sometime in early 2015.")).

Response to Proposed Finding No. 604

The Proposed Finding is misleading and irrelevant to the extent that it implies that communications between Ahmed and Cohen, and Cohen and Dr. Kois in October 2014 regarding the Kois Buyers Group had anything to do with Patterson's decision to reject the Kois Buyers

Group. As noted above, the weight of the evidence shows that Guggenheim decided no later than August 18, 2014, several months before communication cited in RX1040 at 002-003, and a month before Patterson was scheduled to meet with Kois, that it would not do business with the Kois Buyers Group. (CX0116 at 001 (August 18, 2014 email from Guggenheim to Rogan, “Agreed ... I’ll kill it.”); RX1040 at 002-003; CCF ¶¶ 637-639). The Proposed Finding is, moreover, misleading and confusing to the extent that there is no temporal reference in the expression “meanwhile.” Complaint Counsel has no specific response to the accuracy of the language that is quoted from RX1040.

605. Dr. Kois forwarded Cohen’s email to Ahmed. (RX1040 at 2).

Response to Proposed Finding No. 605

Complaint Counsel has no specific response.

606. Ahmed responded to Dr. Kois, in part, “Appreciate the intelligence, we’ll proceed with people who want to make a difference and make money, too.” (RX1040 at 2).

Response to Proposed Finding No. 606

Complaint Counsel has no specific response.

607. Cohen then wrote to Ahmed, “At Benco, our policy is that we don’t support, or work with, buying groups, so we’ll decline your request.” (RX1042 at 2).

Response to Proposed Finding No. 607

The Proposed Finding is misleading and contrary to the weight of the evidence. The weight of the evidence establishes that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, the Big Three rejected buying groups. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198). The record is replete with examples of buying groups that Schein categorically rejected because it had a policy

not to do business with buying groups during the conspiracy period. (CCFF ¶¶ 661-1100, 1159-1166, 1316-1322; see also Complaint Counsel’s Post-Trial Brief, at Attachment C). The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 630-653, 657). Benco had a long-standing no buying group policy, and followed that throughout the conspiracy period. CCFF ¶¶ 394-396; Ryan, Tr. 1029 (Q. And it is fair to say that once you found out a group was a buying group, the answer was no from Benco, meaning no, Benco wouldn’t work with them? A. Correct. We would tell them what our policy is and move on.”)) Complaint Counsel has no specific response.

608. Ahmed wrote in response, in part, “It is not a buying group in the sense that you would be familiar with the term . . . [t]hat’s why other distributors are pretty intrigued by what we are doing.” (RX1042 at 2).

Response to Proposed Finding No. 608

Complaint Counsel has no specific response.

609. Again, at this point, the only “other distributors” Ahmed had spoken with were Patterson and Schein. (Kois Sr., Tr. 250 (Ahmed spoke first only with Schein, Patterson, and Benco)).

Response to Proposed Finding No. 609

The Proposed Finding is misleading and irrelevant to the extent that it implies that communications between Ahmed and Cohen on October 26, 2014 regarding the Kojs Buyers Group had anything to do with Patterson’s decision to reject the Kojs Buyers Group. As noted above, the weight of the evidence shows that Guggenheim decided no later than August 18, 2014, several months before communication cited in RX1042, and over a month before Patterson

was scheduled to meet with Kojs, that it would not do business with the Kojs Buyers Group. (CX0116 at 001 (August 18, 2014 email from Guggenheim to Rogan, “Agreed ... I’ll kill it.”); RX1042 at 001-002; CCF ¶¶ 637-639).

610. Cohen responded to Ahmed, “Ok, you have my attention. Please help me understand how your plan for a buying group is different.” (RX1042 at 1).

Response to Proposed Finding No. 610

Complaint Counsel has no specific response.

611. Ahmed responded to Cohen, in part, “Between my first note to you and your reply, we have introduced our plan and have received, or are about to receive, written offers from various parties. I believe in respecting those offers and submitting them to the Kojs students for consideration before pursuing a new relationship, . . .” (RX1042 at 1).

Response to Proposed Finding No. 611

The Proposed Finding is misleading to the extent that it implies that Ahmed was turning down Benco. The evidence in the record, including RX1042, the document cited in Respondent Patterson’s Proposed Finding No. 606, shows that Benco turned down Kojs, stating, “At Benco, our policy is that we don’t support, or work with, buying groups, so we’ll decline your request.” (RX1042 at 002).

612. This statement was false; Ahmed again at this point had only spoken with Schein, Patterson, and Benco, and there is no evidence he received written offers from any of them. (Kojs Sr., Tr. 250 (Ahmed spoke first only with Schein, Patterson, and Benco)).

Response to Proposed Finding No. 612

The Proposed Finding is misleading and irrelevant to the extent that it implies that communications between Ahmed and Benco in late October 2014 regarding the Kojs Buyers Group had anything to do with Patterson’s decision to reject the Kojs Buyers Group. As noted above, the weight of the evidence shows that Guggenheim decided no later than August 18,

2014, a month before Patterson was scheduled to meet with Kois and over two months before the communication cited in RX2602, that it would not do business with the Kois Buyers Group. (CX0116 at 001 (August 18, 2014 email from Guggenheim to Rogan, “Agreed ... I’ll kill it.”); RX1042 at 001; CCFF ¶¶ 637-639). Patterson made its decision more than two months before the communication referenced in the Proposed Finding. The Proposed Finding is therefore irrelevant to the issue of Patterson’s decision to act pursuant to its agreement with its competitors. The Proposed Finding is also misleading and irrelevant to the extent that it implies that the communication between Benco and Ahmed had anything to do with Benco’s decision. The evidence shows that Cohen had rejected the Kois Buying Group the previous day, stating, “At Benco, our policy is that we don’t support, or work with, buying groups, so we’ll decline your request.” (RX1042 at 002). The Proposed Finding is also misleading in that it misstates the evidence in RX1042. Unlike the Proposed Finding, when quoted correctly the document say that Kois had received, or was “about to receive, written offers from various parties.” There is no evidence in the record showing this statement is not true. To the extent that the Proposed Finding suggest that Ahmed’s statement is false, there is no evidentiary basis for the finding. The testimony cited moreover does not support the Proposed Finding. Because the Proposed Finding is misleading, inaccurate and irrelevant, it should be disregarded.

613. Cohen interpreted Ahmed’s response as saying, “we really don’t need you,” and to be “ending the conversation with Benco.” (Cohen, Tr. 796–97).

Response to Proposed Finding No. 613

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Kois turned Benco down. The evidence shows that Cohen had already rejected Kois, stating “At Benco, our policy is that we don’t support, or work with, buying groups, so

we'll decline your request.” (RX1042 at 002). Cohen's testimony may be indicative of Cohen's perception, but it is contrary to the weight of the evidence showing Benco had rejected Kojs.

614. Thus, the Kojs Buyers Group turned down Benco in 2014. (RX1042 at 1). Indeed, in forwarding Ahmed and Cohen's exchange to Lin Kahn in 2016, Ahmed wrote “This all reminded me why *we avoided these guys*.” (RX1040 at 1 (emphasis added)).

Response to Proposed Finding No. 614

The Proposed Finding is misleading, unsupported by the evidence cited, contrary to other record evidence, and irrelevant. The Proposed Finding is misleading to the extent that it misstates the facts in the document cited, RX1042. Rather than suggest that Kojs turned Benco down, RX1042 at 002 demonstrates that Cohen rejected Kojs the previous day, October 26, 2014. (RX1042 at 002). Ahmed's reference to his dissatisfaction with Benco, which is expressed in his message in forwarding another document two years later is irrelevant. Respondent Patterson's efforts to turn an oblique reference into a factual determination that is contrary to contemporaneous communications is grabbing at straws. The Proposed Finding should be disregarded.

615. Under Ahmed's stewardship, the Kojs Buyers Group initially charged members between \$199 and \$499 monthly. (Kojs Sr., Tr. 239).

Response to Proposed Finding No. 615

The Proposed Finding is misleading and irrelevant. It is misleading to the extent that it implies that the membership fees had any bearing on Patterson's decision not to do business with the Kojs Buyers Group. The weight of the evidence shows that Guggenheim decided in August 2014, a month before Patterson was scheduled to meet with Kojs, that it would not do business with the Kojs Buyers Group. (CX0116 at 001 (August 18, 2014 email from Guggenheim to Rogan, “Agreed ... I'll kill it.”); CCF ¶¶ 637-639). Because that decision was made long

before Patterson learned the details of how the Kois Buyers Group would be structured, the membership fee amounts (or changes in those amounts) are irrelevant.

The weight of the evidence further establishes that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, the Big Three rejected buying groups – including Kois. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198). There is no evidence in the record that the membership fee charged by Kois had anything to do with the decision by any of the Respondents to reject Kois. The Proposed Finding is therefore irrelevant.

616. This was “way too expensive,” and the Kois Buyers Group was unsuccessful in recruiting members. (Kois Sr., Tr. 239).

Response to Proposed Finding No. 616

The Proposed Finding is misleading and irrelevant. It is misleading to the extent that it implies that the membership amount had any bearing on the decision by Patterson (or any other Respondent) not to do business with the Kois Buyers Group. The weight of the evidence establishes that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that, as part of that conspiracy, the Big Three rejected buying groups. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198). The weight of the evidence also shows that Patterson made its decision to reject Kois long before it had any information about what Kois was offering. Rather, Guggenheim decided in August 2014, a month before Patterson was scheduled to meet with Kois, that it would not do business with the Kois Buyers Group. (CX0116 at 001 (August 18, 2014 email from Guggenheim to Rogan, “Agreed ... I’ll kill it.”); CCFF ¶¶ 637-639). Because that decision was made long before Patterson learned the details of how the Kois Buyers Group would be structured, the membership

fee amounts (or changes in those amounts) are irrelevant. The Proposed Finding is also contrary to the evidence in the record in that, as of September 2015, Kois already had 174 members.

(CX8008 (Kois Jr., Dep. at 107)); CCFF ¶ 168. Dr. Kois did not testify that Kois Buyers Group was “unsuccessful at recruiting members.”

617. Thus, Dr. Kois terminated Ahmed, replacing him with Dr. Kois’s son, John Kois Jr., in October 2015. (Kois Jr., Tr. 222 (Johnny took over in “October of 2015”); Kojs Sr., Tr. 223 (“Q. Just so we’re clear, when you say you separated then because the buying group wasn’t doing that well, did you terminate Mr. Ahmed? A. Yes.”)).

Response to Proposed Finding No. 617

The Proposed Finding is misleading and irrelevant. It is misleading to the extent that it implies that any internal decision that the Kois Buyers Group made in October 2015 had anything to do with Patterson’s decision not to deal with Kois Buyers Group. Indeed, despite the fact that Ahmed was ultimately replaced by Mr. Kois, Dr. Kois has described Ahmed as “a very astute businessman.” (Kois, Sr., Tr. 190). The Proposed Finding is also misleading because the weight of the evidence establishes that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, the Big Three rejected buying groups during the conspiracy period. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198). The weight of the evidence further shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 630-653, 657).

618. John Kois Jr. testified that, when he was brought into the Kois Buyers Group, it lacked direction, clarity, and structure. (CX8008 (Kois Jr., Dep. at 119 (Q. And you stepped into manage Kois Tribal Management in 2015; is that right? A. Yes. Q. And the reason you

were brought in was because at the time the buying group lacked direction and clarity, right? A. And structure.”))).

Response to Proposed Finding No. 618

The Proposed Finding is misleading and irrelevant. It is misleading to the extent that it implies that decision regarding the management of the Kois Buyers Group made in October 2015 had anything to do with the decision by Patterson (or any other Respondent) not to deal with Kois Buyers Group in August 2014. The Proposed Finding is also misleading because the weight of the evidence establishes that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, the Big Three rejected buying groups during the conspiracy period. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198). The weight of the evidence further shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 630-653, 657). Kois’s decisions regarding management changes in October 2015 are irrelevant to the rejection of Kois by all three Respondents in 2014.

619. After taking over the Kois Buyers Group, John Kois Jr. had no contact with Patterson. (Kois Jr., Tr. 383 (“Q. And you didn’t reach out to my client, Patterson Companies, again? A. Correct.”))).

Response to Proposed Finding No. 619

The Proposed Finding is irrelevant because John Kois, Jr. did not take over management of the Kois Buyers Group until October 2015, well after the conspiracy had begun to fall apart.

620. After taking over the Kois Buyers Group, John Kois Jr. cut the membership rate to \$299 per year. (Kois Sr., Tr. 241).

Response to Proposed Finding No. 620

The Proposed Finding is misleading and irrelevant. It is misleading to the extent that it implies that the membership fee amount had any bearing on the decision by Patterson (or any other Respondent) not to do business with the Kois Buyers Group. The Proposed Finding is also misleading because the weight of the evidence establishes that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, the Big Three rejected buying groups during the conspiracy period. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198). The weight of the evidence further shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 630-653, 657). Specifically, with respect to Kois, the evidence shows that Guggenheim decided in August 2014, a month before Patterson was scheduled to meet with Kois, that it would not do business with the Kois Buyers Group. (CX0116 at 001 (August 18, 2014 email from Guggenheim to Rogan, “Agreed ... I’ll kill it.”); CCFF ¶¶ 637-639). The record also shows that Patterson lost valuable customers and business to Burkhart when it did not bid for the Kois account. (CCFF ¶640.)

621. The Kois Buyers Group also fully reimbursed all members who had joined before this reduction and who had paid the higher rate. (Kois Sr., Tr. 240–41).

Response to Proposed Finding No. 621

The Proposed Finding is misleading and irrelevant. It is misleading to the extent that it implies that the membership amount had any bearing on Patterson’s decision not to do business with the Kois Buyers Group. The Proposed Finding is also misleading because the weight of the evidence establishes that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, the Big Three rejected buying

groups during the conspiracy period. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198). The weight of the evidence further shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 630-653, 657). Specifically, with respect to Kois, the evidence shows that Guggenheim decided in August 2014, a month before Patterson was scheduled to meet with Kois, that it would not do business with the Kois Buyers Group. (CX0116 at 001 (August 18, 2014 email from Guggenheim to Rogan, “Agreed ... I’ll kill it.”); CCFF ¶¶ 637-639). Because that decision was made long before Patterson learned the details of how the Kois Buyers Group would be structured, the membership fee amounts (or changes in those amounts) are irrelevant.

622. The Kois Buyers Group made these reimbursements even though it had split the proceeds of its membership fees evenly with Ahmed. (Kois Sr., Tr. 242).

Response to Proposed Finding No. 622

The Proposed Finding is irrelevant. Kois’s membership fees, reimbursement arrangements, or the ultimate resolution of business arrangements between Kois and its former consultant (which occurred after the end of the conspiracy) are completely irrelevant to the question of whether the Respondents entered into a conspiracy not to do business with buying groups. Because the Proposed Finding is irrelevant to this matter, it should be disregarded.

623. The Kois Buyers Group’s reimbursements, in other words, included reimbursements of money that had gone to Ahmed. (Kois Sr., Tr. 242).

Response to Proposed Finding No. 623

The Proposed Finding is irrelevant. Kois’s membership fees, reimbursement arrangements, or the ultimate resolution of business arrangements between Kois and its former consultant (which

occurred long after the end of the conspiracy) are completely irrelevant to the question of whether the Respondents entered into a conspiracy not to do business with buying groups. The weight of the evidence shows that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that, as part of that conspiracy, the Big Three rejected buying groups. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198). The record evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups (CCFF ¶¶ 483-501, 513), that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 630-653, 657). Indeed, in October 2014, shortly after Patterson rejected Kois, McFadden confirmed Patterson's broad no buying group policy, writing, "As a rule we are trying our best to steer clear of all buying groups." (CX3128 at 001).

Kois's business arrangements with its former consultant are irrelevant to this case. The Proposed Finding should be disregarded.

624. Ahmed has never covered the cost of these reimbursements the Kois Buyers Group paid. (Kois Sr., Tr. 242 ("JUDGE CHAPPELL: When you went to 299 a year and when he was gone, did you get money back from him? A: We did not. JUDGE CHAPPELL: Was that something that made you happy? A: No.")).

Response to Proposed Finding No. 624

The Proposed Finding is irrelevant. Kois's membership fees, reimbursement arrangements, or the ultimate resolution of business arrangements between Kois and its former consultant (which occurred long after the end of the conspiracy) are completely irrelevant to the question of whether the Respondents entered into a conspiracy not to do business with buying groups. The weight of the evidence shows that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that, as part of that conspiracy, the Big Three

rejected buying groups. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198). The record evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups (CCFF ¶¶ 483-501, 513), that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 630-653, 657). Indeed, in October 2014, shortly after Patterson rejected Kois, McFadden confirmed Patterson's broad no buying group policy, writing, "As a rule we are trying our best to steer clear of all buying groups." (CX3128 at 001).

Kois's business arrangements with its former consultant are irrelevant to this case. The Proposed Finding should be disregarded.

625. Ultimately, in late 2014, the Kois Buyers Group signed a contract with Burkhart as its distributor. (Kois Sr., Tr. 191). At this point, when Kois selected Burkhart, Schein was still expressing interest in Kois. (Kois Sr., Tr. 266 ("So when Schein was expressing its desire to slow down and proceed thoughtfully and diligently, you made the decision to go forward with Burkhart; is that correct? A. Evidently so.")).

Response to Proposed Finding No. 625

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it asserts or implies that Schein planned to or intended to bid on the Kois Buyers Group. The record shows that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, the Big Three rejected buying groups. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198). The record is replete with examples of buying groups that Schein categorically rejected because it had a policy not to do business with buying groups during the conspiracy period. With respect to Kois specifically, Sullivan communicated to Muller and his boss, Breslawski, regarding Kois on September 8, 2014: "I still believe this is slippery slope and have yet to see a successful one in dental and don't plan to take the lead role. Watching closely." (CCFF ¶ 809 (quoting CX2469 at 002);

CX8025 (Sullivan, Dep. at 295)). On October 23, 2014, Sullivan also stated in response to information he received about Kois: “I would never sign us up for straight out GPO model.” (CX6617 at 001). Although Schein formally rejected the Kois Buyers Group in November 2014 after Kois Buyers Group had selected Burkhart, Schein made its own decision to reject Kois, stating that it would “pass” on working with the buying group. (CCFF ¶¶ 928-929). It is misleading to suggest that Schein would have been willing to work with Kois had Burkhart not made its offer. The documents cited herein contradict that assertion.

Complaint Counsel has no specific response to the portion of the Proposed Fact that states that the Kois Buyers Group signed a contract with Burkhart as its distributor.

626. Burkhart initially did not respond positively to Ahmed and only signed with the Kois Buyers Group after Dr. Kois personally reached out on the strength of his relationship with Burkhart. (CX8007 (Kois Sr., Dep. at 68 (“Q. . . . you said you asked Burkhart to be the distributor and what did – how did they respond? A. So at first they actually weren’t very positive to Qadeer. They basically just responded on my behalf because of the relationship I had with the company, so it turned out that in the end we didn’t use any of Qadeer’s expertise. We relied more on my personal relationship and reputation that I built my whole life in practice and teaching.”))).

Response to Proposed Finding No. 626

The Proposed Finding is misleading and irrelevant. It is misleading to the extent that it implies that Burkhart’s interest in signing with the Kois Buyers Group or negotiates between Burkhart and Kois have any relevance to the decision of Patterson, Schein and Benco to reject Kois. With respect to Patterson, the weight of the evidence shows that Guggenheim decided in August 2014, a month before Patterson was scheduled to meet with Kois, that it would not do business with the Kois Buyers Group. (CX0116 at 001 (August 18, 2014 email from Guggenheim to Rogan, “Agreed . . . I’ll kill it.”); CCFF ¶¶ 637-639). This decision was made long before Kois had even engaged Burkhart in discussions. The ultimate form of business negotiations between Kois and

Burkhart are irrelevant except to the extent that Burkhart, which had rejected Benco's solicitation to join the conspiracy (*see* CCFF ¶¶ 1199-1251), ultimately bid on and obtained the business of the Kois Buyers Group.

627. Burkhart's Jeffrey Reece entered into the agreement with the Kois Buyers Group entirely on the strength of his relationship with Dr. Kois, knowing nothing about Qadeer Ahmed, including whether he was a con artist. (Reece, Tr. 4495-96 ("Q. . . . So it had nothing to do with Qadeer, and it had everything to do with John Kois, who had a respected reputation in the industry, correct? A. That's correct. Q. Qadeer could have been a con artist for all you know, right? A. I guess that's true. I -- what I would say is that I never thought that Dr. Kois would partner with a con artist and -- Q. But you don't know, do you, sir? A. No, sir, I don't.")).

Response to Proposed Finding No. 627

The Proposed Finding is misleading, irrelevant, and based on testimony of counsel that is not in the record. It is misleading to the extent that it implies that Burkhart's interest in signing with the Kois Buyers Group or negotiations between Burkhart and Kois have any relevance to whether there was an agreement by Patterson, Schein and Benco to reject buying groups generally. The weight of the evidence establishes that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, the Big Three rejected buying groups. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198). The evidence shows that Patterson joined that conspiracy no later than February 2013. With respect to Patterson, moreover, the weight of the evidence shows that Patterson did not make an independent evaluation of Kois. Rather, Guggenheim decided in August 2014, a month before Patterson was scheduled see the presentation by Kois, that it would not do business with the buying group. (CX0116 at 001 (August 18, 2014 email from Guggenheim to Rogan, "Agreed ... I'll kill it."); CCFF ¶¶ 637-639). This decision was made long before Kois had even engaged Burkhart in discussions. The ultimate form of business negotiations between Kois and Burkhart are irrelevant except to the extent that Burkhart, which had rejected Benco's solicitation

to join the conspiracy (*see* CCFF ¶¶ 1199-1251), ultimately bid on and obtained the business of the Kois Buyers Group.

The Proposed Finding should also be disregarded because it is based on testimony of counsel about Kois's consultant for which there is no record evidence. Testimony of counsel that amounts to character assassination is not evidence. Counsel's question ("Q. Qadeer could have been a con may for all you know . . .") does not make his statement true. And there is no evidence from this witness (or any other witness) that this unsupported accusation is true. The first part of the Proposed Finding is irrelevant and should be disregarded; the second part is both irrelevant and lack any evidentiary support, so should also be disregarded.

628. Both Dr. Kois and Johnny Kois testified that the Kois Buyers Group had not suffered any harm from not working with a distributor like Patterson. (CX8007 (Kois Sr., Dep. at 89 ("Q. Do you think if a national full service distributor was a partner instead of Burkhart you'd have more members today? A. At this point, I don't think so.")); CX8008 (Kois Jr. Dep. at 134-35 ("Q. And not working with Schein and Patterson or Benco has not impacted the success of your buying group in any way; is that right? A. Not that I can tell.")) (objections omitted).

Response to Proposed Finding No. 628

The Proposed Finding is misleading and incomplete. It is misleading to the extent that it implies, based on selective citations to the testimony, that Kois was not disadvantaged because it was not able to work with a *national* full service distributor. In fact, the trial testimony is contrary to the Proposed Finding and showed that Burkhart had limitations for the Kois Buyers Group even though it was a full service distributor. (Kois Jr., Tr. 352-353 ("Q. Are there limitations in your mind, as Burkhart as a distributor. A. Yes. Q. And what are those limitations? A. Burkhart does not have a – is not a full-service – doesn't have a full service representation in every state in the United States, so there are states with no representation, and to take advantage of the discounts, the practices would need to purchase direct online. And some practices would prefer

to have a rep come into their office to purchase rather than purchase online.”)) Other testimony expanded on this point, making clear that the lack of a full-service distributor in some states has had an effect on recruitment of members. (Kois Jr., Tr. 354 (“Q. Has the lack of full-service distribution in some states had impact on the Kois Buyers Group and most specifically on your ability to recruit member? A. I would say probably that there’s – I’ve had conversations with dentists that would prefer to purchase through a rep in their area, and because there’s no rep for Burkhart, that’s a detractor for the buyers group for them.”)) The Proposed Finding is also irrelevant to the extent that it implies or suggests that a demonstration of harm as the result of a conspiracy is an element of a Section 5 case.

Schulman Group

629. There is no evidence of any interaction between the Schulman Group and Patterson during the alleged conspiracy.

Response to Proposed Finding No. 629

The Proposed Finding is misleading, irrelevant and contrary to the weight of the evidence to the extent that it implies that Patterson did not enter into an agreement not to do business with buying groups, did not seek to enforce that agreement, and did not act in compliance with that agreement, including instructing its team not to do business with buying groups. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). For example, within a few weeks of Guggenheim’s February 8, 2013 email with Cohen (CX0090), Patterson began instructing sales representatives to “stay out” of buying groups. (CX0093 at 001 (Statement of Misiak: “stay out” of buying group); CX0106 at 001 (Statement of Rogan: “We don’t need

GPO's in the dental business"); CX3116 at 001 (Statement of Misiak: "My guidance has been to politely say no [to buying groups] and whether [*sic*] the storm with these."); CX3168 at 001 (Statement of Rogan: "We don't sell to buying groups. Let's talk live."); CX3010 at 001 (Statement of McFadden: "[A]s of now we are not working with GPO's."); CX3016 at 001 (Statement of McFadden: "I am sure we should pass on these [buying] groups...."); CX3004 at 001 (Statement of McFadden: "For now – I am electing to not participate with [buying groups] – we have said no to several already"); CX3045 at 001 (Statement of McFadden: "[D]oes he own all these offices—if not then he is a GPO—we don't deal with GPOs.")). Because the conspiracy precluded doing business with dental buying groups, it would have included the Schulman Group. Whether Schulman specifically interacted with Patterson is irrelevant to whether Patterson entered into an agreement with its competitors. The Proposed Finding should be disregarded.

630. Complaint Counsel presented no evidence at trial of any interaction between the Schulman Group and Patterson.

Response to Proposed Finding No. 630

The Proposed Finding is misleading, irrelevant and contrary to the weight of the evidence to the extent that it implies that Patterson did not enter into an agreement not to do business with buying groups, did not seek to enforce that agreement, and did not act in compliance with that agreement, including instructing its team not to do business with buying groups. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). For example, within a few weeks of Guggenheim's February 8, 2013 email with Cohen (CX0090), Patterson began

instructing sales representatives to “stay out” of buying groups. (CX0093 at 001 (Statement of Misiak: “stay out” of buying group); CX0106 at 001 (Statement of Rogan: “We don’t need GPO’s in the dental business”); CX3116 at 001 (Statement of Misiak: “My guidance has been to politely say no [to buying groups] and whether [*sic*] the storm with these.”); CX3168 at 001 (Statement of Rogan: “We don’t sell to buying groups. Let’s talk live.”); CX3010 at 001 (Statement of McFadden: “[A]s of now we are not working with GPO’s.”); CX3016 at 001 (Statement of McFadden: “I am sure we should pass on these [buying] groups....”); CX3004 at 001 (Statement of McFadden: “For now – I am electing to not participate with [buying groups] – we have said no to several already”); CX3045 at 001 (Statement of McFadden: “[D]oes he own all these offices—if not then he is a GPO—we don’t deal with GPOs.”)). Because the conspiracy precluded doing business with all dental buying groups, it would have included the Schulman Group. Whether Patterson specifically interacted with the Schulman Group is irrelevant to whether Patterson entered into an agreement with its competitors. It is therefore also irrelevant that evidence regarding every specific buying group was not presented at trial. The Proposed Finding should be disregarded.

631. There is also no evidence that Patterson communicated with Benco or Schein about the Schulman Group.

Response to Proposed Finding No. 631

The Proposed Finding is misleading, irrelevant and contrary to the weight of the evidence to the extent that it implies that Patterson did not enter into an agreement not to do business with buying groups, did not seek to enforce that agreement, and did not act in compliance with that agreement, including instructing its team not to do business with buying groups. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows

that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). For example, within a few weeks of Guggenheim’s February 8, 2013 email with Cohen (CX0090), Patterson began instructing sales representatives to “stay out” of buying groups. (CX0093 at 001 (Statement of Misiak: “stay out” of buying group); CX0106 at 001 (Statement of Rogan: “We don’t need GPO’s in the dental business”); CX3116 at 001 (Statement of Misiak: “My guidance has been to politely say no [to buying groups] and whether [*sic*] the storm with these.”); CX3168 at 001 (Statement of Rogan: “We don’t sell to buying groups. Let’s talk live.”); CX3010 at 001 (Statement of McFadden: “[A]s of now we are not working with GPO’s.”); CX3016 at 001 (Statement of McFadden: “I am sure we should pass on these [buying] groups....”); CX3004 at 001 (Statement of McFadden: “For now – I am electing to not participate with [buying groups] – we have said no to several already”); CX3045 at 001 (Statement of McFadden: “[D]oes he own all these offices—if not then he is a GPO—we don’t deal with GPOs.”)). Because the conspiracy precluded doing business with all dental buying groups, it would have included the Schulman Group. Whether Patterson communicated with Benco or Schein about any specific buying group is irrelevant to whether Patterson entered into the agreement with its competitors not to do business with buying groups generally. The Proposed Finding should be disregarded.

632. Thus, there is no evidence that the Schulman Group would have worked with Patterson but for the alleged conspiracy.

Response to Proposed Finding No. 632

The Proposed Finding regarding whether the Schulman Group would have worked with Patterson “but for” the alleged conspiracy is misleading and irrelevant to the extent that it implies that the existence of sales “but for” the conspiracy is necessary to a finding that Patterson participated in the conspiracy. On the contrary, whether a particular buying group may have

bought dental equipment or supplies from Patterson but for the alleged conspiracy is irrelevant to the factual question of whether Patterson engaged in a conspiracy. Indeed, but for the conspiracy Respondent Patterson might have competed for a buying group, but still not done business with that entity because one of its co-conspirators or another distributor may have won the business. Competition for that customer segment would still have occurred even if Patterson made no sale. The Proposed Finding also is misleading, irrelevant and contrary to the weight of the evidence to the extent that it implies that Patterson did not enter into an agreement not to do business with buying groups, did not seek to enforce that agreement, and did not act in compliance with that agreement, including instructing its team not to do business with buying groups. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). Because the Proposed Finding is irrelevant, it should be disregarded.

633. Schein, however, did work with the Schulman Group between February 8, 2013 and April 2015. (CX1104 at 2).

Response to Proposed Finding No. 633

The Proposed Finding is misleading because the evidence cited does not support the Proposed Finding. The document cited is an internal Benco document in which a Benco territory representative expresses a belief as to what Schein is doing in August 2014. There is no basis in the document for the territory representative's casual statement, and no way to judge the reliability of the statement. Contrary the implication of the Proposed Findings, however, other record evidence suggests that, although Schein worked with the Schulman Group, it did not believe the Schulman Group was a buying group. For example, in an April 19, 2013 email

exchange between Tim Sullivan and Schein employees about the Schulman Group, Sullivan wrote, “First I’m hearing about this . . . a buying group program without any advance discussion about it? what are the details? Is there a kickback to Schulman Group?” (CX2047 at 001). Schein’s Michael Porro replied to Sullivan: “Not a buying group.” (CX2047 at 001). Sullivan then replied to Porro: “All sounds good.” (CX2047 at 001). The record evidence thus shows that when Sullivan learned about the Schulman Group, he was assured that it was “Not a buying group.” (CX2047 at 001).

Steadfast Medical

634. Complaint Counsel presented no evidence at trial of any interaction between Steadfast Medical and Patterson.

Response to Proposed Finding No. 634

The Proposed Finding is misleading, irrelevant and contrary to the weight of the evidence to the extent that it implies that Patterson did not enter into an agreement not to do business with buying groups, and did not act in compliance with that agreement, including instructing its team not to do business with buying groups. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). For example, within a few weeks of Guggenheim’s February 8, 2013 email with Cohen (CX0090), Patterson began instructing sales representatives to “stay out” of buying groups. (CX0093 at 001 (Statement of Misiak: “stay out” of buying group); CX0106 at 001 (Statement of Rogan: “We don’t need GPO’s in the dental business”); CX3116 at 001 (Statement of Misiak: “My guidance has been to politely say no [to buying groups] and whether [sic] the storm with these.”); CX3168 at 001 (Statement of Rogan: “We don’t sell to buying groups. Let’s

talk live.”); CX3010 at 001 (Statement of McFadden: “[A]s of now we are not working with GPO’s.”); CX3016 at 001 (Statement of McFadden: “I am sure we should pass on these [buying] groups....”); CX3004 at 001 (Statement of McFadden: “For now – I am electing to not participate with [buying groups] – we have said no to several already”); CX3045 at 001 (Statement of McFadden: “[D]oes he own all these offices—if not then he is a GPO—we don’t deal with GPOs.”)). Because the conspiracy precluded doing business with dental buying groups, it would have included Steadfast Medical. Whether Steadfast Medical specifically interacted with Patterson is irrelevant to whether Patterson entered into an agreement with its competitors. The Proposed Finding should be disregarded.

635. Complaint Counsel did not ask any Patterson witness about Steadfast Medical during trial, or during any deposition, or during any investigational hearing.

Response to Proposed Finding No. 635

The Proposed Finding is misleading and irrelevant to the extent that it suggests that evidentiary record is determined only by testimony at trial or in depositions. It is also misleading, irrelevant and contrary to the weight of the evidence to the extent that it implies that Patterson did not enter into an agreement not to do business with buying groups, and did not act in compliance with that agreement, including instructing its team not to do business with buying groups. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). For example, within a few weeks of Guggenheim’s February 8, 2013 email with Cohen (CX0090), Patterson began instructing sales representatives to “stay out” of buying groups. (CX0093 at 001 (Statement of Misiak: “stay out” of buying group); CX0106 at 001 (Statement of Rogan: “We don’t need

GPO's in the dental business"); CX3116 at 001 (Statement of Misiak: "My guidance has been to politely say no [to buying groups] and whether [*sic*] the storm with these."); CX3168 at 001 (Statement of Rogan: "We don't sell to buying groups. Let's talk live."); CX3010 at 001 (Statement of McFadden: "[A]s of now we are not working with GPO's."); CX3016 at 001 (Statement of McFadden: "I am sure we should pass on these [buying] groups...."); CX3004 at 001 (Statement of McFadden: "For now – I am electing to not participate with [buying groups] – we have said no to several already"); CX3045 at 001 (Statement of McFadden: "[D]oes he own all these offices—if not then he is a GPO—we don't deal with GPOs.")). The weight of the evidence shows that the agreement applied to all buying groups, so Steadfast Medical would have been included whether it had been the subject of specific testimony or not.

636. Steadfast Medical does not appear in anywhere in the record in connection with Patterson except for a March 2013 Patterson spreadsheet listing "Patterson Group Practices." (RX0072 (listing Steadfast in Sales Data tab, Row 230)).

Response to Proposed Finding No. 636

The Proposed Finding is misleading, irrelevant and contrary to the weight of the evidence. It is misleading to the extent that it implies that Patterson did business with Steadfast Medical as a buying group. The document cited, RX0072, is a list of Patterson Group Practices, or DSOs with which Patterson did business. (RX0072 at 001 and RX0072 (Sales Data Tab)). The document, moreover, contains data only through February 2013 (*see* Patterson Post-Hearing Brief at n. 11). Although, for the year 2013, the document shows "year to date" sales to Steadfast Medical of only \$76 through February, it does not indicate whether any sales even took place in February, so provides no basis for a finding that Patterson did business with Steadfast Medical as a buying group at any time after it joined the conspiracy in February 2013. In fact, Patterson has admitted in sworn statements and testimony that it did not do business with buying groups during the

conspiracy period. *See, e.g.*, CX3504 at 004 (Patterson’s Response to Complaint Counsel’s First Interrogatories ¶1) (“Patterson is not currently aware of any agreements for the purchase or sale of dental products between itself and entities falling under the FTC’s definition of “Buying Group” [for the period 2009 to April 16, 2018]); Misiak, Tr. 1392 (not aware of any Patterson branch doing business with buying groups).

The Proposed Finding is also misleading to the extent that it implies that Patterson did not enter into an agreement not to do business with buying groups, and did not act in compliance with that agreement, including instructing its team not to do business with buying groups. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660).

637. This spreadsheet shows that, between 2004 and February 2013, Patterson sold anywhere between \$0 and \$3,904 each year to Steadfast Medical or its component practices. (RX0072 at Sales Data tab, Row 230).

Response to Proposed Finding No. 637

The Proposed Finding is misleading to the extent that it implies that Patterson did business with Steadfast Medical as a buying group and misrepresents the data in the document. First, document cited, RX0072, is a list of Patterson Group Practices, or DSOs with which Patterson did business. (RX0072 at 001 and RX0072 (Sales Data Tab)). The document, moreover shows 2013 “year to date” sales to Steadfast Medical of only \$76 for that period ending February 2013, as the document only contains data through February 2013. (Patterson Post-Hearing Brief at n.11). The document does not indicate when in 2013 the \$76 of sales took place, so provides no evidence that Patterson did business with Steadfast Medical as a buying group at any time after it

joined the conspiracy. In fact, Patterson has admitted in sworn statements that it did *not* do business with buying groups during the conspiracy period. *See, e.g.*, CX3504 at 004 (Response to Complaint Counsel’s First Interrogatories to Patterson ¶1) (“Patterson is not currently aware of any agreements for the purchase or sale of dental products between itself and entities falling under the FTC’s definition of “Buying Group” [for the period 2009 to April 16, 2018]); Misiak, Tr. 1392 (not aware of any Patterson branch doing business with buying groups).

Second, the suggestion in the Proposed Finding that Steadfast Medical made regular purchases of \$3,904 between 2004 and 2013 is misleading, as the only time it made purchases in any year totaling \$3,904 was in 2005 – before the Patterson joined the conspiracy.

Finally, if Patterson did business with Steadfast during the conspiracy, it presumably had records of its business and could have offered evidence to that effect. It did not.

638. There is no evidence that Patterson’s sales relationship with Steadfast changed after February 2013, when Patterson allegedly joined a conspiracy. (RX2958 at 10 (Complaint Counsel’s Supplemental Response to Patterson’s Interrogatory Four) (“Patterson joined the agreement in February 2013.”)).

Response to Proposed Finding No. 638

The Proposed Finding is misleading to the extent that it implies that Patterson ever recognized Steadfast Medical as a buying group or that it regularly did business with Steadfast Medical either before or after Patterson joined the conspiracy. Patterson has admitted that it did not do business with buying groups during the conspiracy period. *See, e.g.*, CX3504 at 004 (Patterson Response to Complaint Counsel’s First Interrogatories ¶1) (“Patterson is not currently aware of any agreements for the purchase or sale of dental products between itself and entities falling under the FTC’s definition of “Buying Group” [for the period 2009 to April 16, 2018]); Misiak, Tr. 1392 (not aware of any Patterson branch doing business with buying groups). To the extent

that the Proposed Finding is suggesting that Patterson did business with Steadfast Medical during the conspiracy period (contrary to its sworn statements), it presumably could have brought that evidence forward at trial or through other documentary evidence. Other than RX0072, which does not cover the conspiracy period and for which no explanatory testimony was offered, Patterson has offered nothing. For example, it offers no explanation of why it would have turned down buying groups offering millions of dollars in annual business (CCFF ¶642 (Patterson turned down Smile Source in 2013 in spite of its members' \$14 million annual spend because it was a buying group. (CX0297 at 001; CX3117 at 001; CX3009 at 001; *see also* Goldsmith, Tr. 2136, but claim to work with a alleged buying group that spent not more than \$76 over two months.

The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent that it implies that Patterson did not enter into an agreement not to do business with buying groups, and did not act in compliance with that agreement, including instructing its team not to do business with buying groups. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660)

639. There is also no evidence that Patterson communicated with Benco or Schein about Steadfast Medical.

Response to Proposed Finding No. 639

The Proposed Finding is misleading, irrelevant and contrary to the weight of the evidence to the extent that it implies that Patterson did not enter into an agreement not to do business with

buying groups, and did not act in compliance with that agreement, including instructing its team not to do business with buying groups. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). Because the conspiracy precluded doing business with all dental buying groups, it would have included Steadfast Medical. Whether Patterson communicated with Benco or Schein about any specific buying group is irrelevant to whether Patterson entered into the agreement with its competitors not to do business with buying groups generally. The Proposed Finding should be disregarded.

640. Thus, there is no evidence that Patterson may have sold supplies or equipment to the Steadfast Medical but for the alleged conspiracy.

Response to Proposed Finding No. 640

The Proposed Finding regarding whether the Steadfast Medical would have worked with Patterson “but for” the alleged conspiracy is misleading and irrelevant to the extent that it implies that the existence of sales “but for” the conspiracy is necessary to a finding that Patterson participated in the conspiracy. On the contrary, whether Patterson “may have sold supplies or dental equipment” to a particular buying group “but for the alleged conspiracy” is irrelevant to the factual question of whether Patterson engaged in the conspiracy. Indeed, but for the conspiracy Respondent Patterson might have competed for a buying group, but still not done business with that entity because one of its co-conspirators or another distributor may have won the business. The Proposed Finding is also misleading, irrelevant and contrary to the weight of the evidence to the extent that it implies that Patterson did not enter into an agreement not to do business with buying groups, and did not act in compliance with that agreement, including

instructing its team not to do business with buying groups. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). Because the Proposed Finding is misleading and irrelevant, it should be disregarded.

Synergy Dental Partners

641. There is no evidence of any interaction between Synergy and Patterson during the alleged conspiracy.

Response to Proposed Finding No. 641

The Proposed Finding is misleading, irrelevant and contrary to the weight of the evidence to the extent that it implies that, absent specific communication between Patterson and a buying group, Patterson did not enter into an agreement not to do business with buying groups, and did not act in compliance with that agreement. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). That agreement precluded working with all buying groups, and would have included Synergy Dental Partners.

642. There is, however, evidence that Synergy and Patterson interacted about a year and a half *before* Patterson allegedly joined the alleged conspiracy. Benco's Patrick Ryan reported internally on August 18, 2011, that all full-service distributors had declined to work with Synergy. (CX1133 at 1).

Response to Proposed Finding No. 642

The Proposed Finding is irrelevant to whether Patterson, Schein and Benco entered into an overarching conspiracy and, during the conspiracy period, refused to do business with all buying groups. In fact, the weight of the evidence shows that Schein, Patterson and Benco were part of an overarching conspiracy not to discount to buying groups, and that, as part of that conspiracy, the Big Three rejected buying groups. (CCFF ¶¶ 483-517, 606-614, 630-653, 657, 661-1100, 1178-1198). The record is replete with examples of buying groups that Schein categorically rejected because it had a policy not to do business with buying groups during the conspiracy period. (CCFF ¶¶ 661-1100, 1159-1166, 1316-1322) – and that list included Synergy. (CCFF ¶ 954). The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 630-653, 657). Although the document cited to an email for the proposition that Benco rejected Synergy (CX1133 at 001) (Ryan’s email: “BTW, this group approached every full service dealer, including us, they came to Benco headquarters in Wilkes-Barre] to see me, and were turned down.”), the email it does not actually state that other distributors turned Synergy down. It merely states that Benco turned Synergy down.

643. Patrick Ryan testified at trial that Synergy itself had reported to him, ahead of his August 18, 2011 email, that Patterson had turned it down. (Ryan, Tr. 1171 (“Q. If we look at the e-mail, CX 1133, the very top e-mail, you were writing to various others at Benco. And there’s a reference there to ‘they came to Wilkes-Barre to see me, and were turned down.’ Do you see that? A. Yes. Q. During that meeting that you had with them in person in Wilkes-Barre, did they tell you anything about Henry Schein? A. Yes. Q. What did they say? A. They said that they -- that Schein had turned them away. Q. And during that meeting in Wilkes-Barre, did they tell you anything about Patterson? A. The same, that they had spoken to Patterson and they were turned down.”)).

Response to Proposed Finding No. 643

To the extent that the Proposed Finding is being offered to show that Patterson actually turned down Synergy Dental Partners in 2011, it should be disregarded as unreliable hearsay, as Ryan's testimony rests wholly on what he claims an unidentified person representing a third party told him. Patterson, which presumably knows whether it had turned down Synergy Dental Partners, chose not to offer any evidence in the record to support this Proposed Finding.

644. Complaint Counsel alleges that Patterson joined the alleged conspiracy in February 2013. (RX2958 at 10 (Complaint Counsel's Supplemental Response to Patterson's Interrogatory Four) ("Patterson joined the agreement in February 2013.")).

Response to Proposed Finding No. 644

Complaint Counsel has no specific response.

645. February 2013 is about a year-and-a-half after August 18, 2011. Thus, Patterson turned down Synergy Dental Partners about a year-and-a-half before Patterson allegedly joined the alleged conspiracy. (CX1133 at 1).

Response to Proposed Finding No. 645

The Proposed Finding is misleading because it relies entirely on unreliable hearsay evidence. Because Respondent Patterson's Proposed Finding No. 642 and 643 have no reliable evidentiary support and should be disregarded (*see* Complaint Counsel's Response to Respondent Patterson's Proposed Findings Nos. 642 and 643), this Proposed Finding is completely unsupported.

The Proposed Finding is also irrelevant to the extent that it implies that Patterson's actions prior to entering into the conspiracy preclude a finding that it conspired with its closest competitors in 2013. In fact, the weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513).

The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660).

646. Thus, there is no evidence that Patterson may have sold supplies or equipment to the Steadfast Medical but for the alleged conspiracy.

Response to Proposed Finding No. 646

This Proposed Finding, which is listed under the “Synergy Dental Partners” section, addresses only Steadfast Medical. The Proposed Finding regarding whether the Steadfast Medical would have worked with Patterson “but for” the alleged conspiracy is misleading and irrelevant for the same reasons set forth in response to Patterson Proposed Finding No. 640, above. That is, it is misleading to the extent that it implies that the existence of sales “but for” the conspiracy is necessary to a finding that Patterson participated in the conspiracy. On the contrary, whether a particular buying group may have bought dental equipment or supplies from Patterson but for the alleged conspiracy is irrelevant to the factual question of whether Patterson engaged in the conspiracy. Indeed, but for the conspiracy Respondent Patterson might have competed for a buying group, but still not done business with that entity because one of its co-conspirators or another distributor may have won the business. The Proposed Finding is also misleading, irrelevant and contrary to the weight of the evidence to the extent that it implies that Patterson did not enter into an agreement not to do business with buying groups, and did not act in compliance with that agreement, including instructing its team not to do business with buying groups. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). Because the Proposed Finding is misleading, irrelevant, and duplicative, it should be disregarded

The Dentists' Service Co.

647. Complaint Counsel presented no evidence at trial of any interaction between Patterson and The Dentists' Service Company (or "TDSC") between February 8, 2013 and April 2015—the period of Patterson's alleged participation in an alleged conspiracy. (RX2958 at 10 (Complaint Counsel's Supplemental Response to Patterson's Interrogatory Four) ("Patterson joined the agreement in February 2013."); Kahn, Tr. 19 (alleging the conspiracy ended in April 2015); *see also* RXD0205 at 1 ("The Alleged Conspiracy Ended in April 2015")).

Response to Proposed Finding No. 647

The Proposed Finding is misleading, irrelevant and contrary to the weight of the evidence. It is misleading and irrelevant to the extent that it suggests that only evidence presented at trial may be considered. The Court may consider all evidence in the record. The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent that it implies that Patterson did not enter into an agreement not to do business with buying groups, and did not act in compliance with that agreement, including instructing its team not to do business with buying groups. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). Finally, the Proposed Finding is misleading because it misstates the record regarding the time of the end of the conspiracy, suggesting that Complaint Counsel's explanation that the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015 created a precise "end" date. Complaint Counsel has never taken the position that the entry by Benco into a settlement with the Texas Attorney General created a precise "end" date. (Tr., 19 (Complaint Counsel's Opening Statement); *see also* Complaint Counsel's Post-Tr. Br. at 37-38). In addition, to the extent that the Proposed Finding relies on a demonstrative (RXD0205) as substantive support for the finding, that reliance contravenes the Court's February 21, 2019

Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence.

648. Indeed, there is no evidence in the record that TDSC existed between February 8, 2013 and April 2015.

Response to Proposed Finding No. 648

The Proposed Finding is misleading and irrelevant because it misstates the record regarding the time of the end of the conspiracy, suggesting that Complaint Counsel’s explanation that the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015 created a precise “end” date. Complaint Counsel has never taken the position that the entry by Benco into a settlement with the Texas Attorney General created a precise “end” date. (Tr., 19 (Complaint Counsel’s Opening Statement); *see also* Complaint Counsel’s Post-Tr. Br. at 37-38).

649. The first document in the record connecting Patterson with TDSC is dated November 13, 2015. (CX0126 at 1).

Response to Proposed Finding No. 649

The Proposed Finding is misleading to the extent that it implies that The Dentists’ Service Co. (TDSC) was not doing business before November 13, 2015. Other documents in the record show that TDSC was communicating with dental products distributors no later than June 20, 2015. (CX2954 at 002 (June 20, 2015 email from Peter DuBois, Executive Director of the California Dental Association to Tim Sullivan announcing the formation of TDSC)). Complaint Counsel has no specific response to the fact regarding the date of CX0126.

650. November 13, 2015 is about eight months after Complaint Counsel claims the alleged conspiracy ended. Kahn, Tr. 19 (alleging the conspiracy ended in April 2015); *see also* RXD0205 at 1 (“The Alleged Conspiracy Ended in April 2015”).

Response to Proposed Finding No. 650

The Proposed Finding is misleading because it misstates the record regarding the time of the end of the conspiracy, suggesting that Complaint Counsel’s explanation that the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015 created a precise “end” date. Complaint Counsel has never taken the position that the entry by Benco into a settlement with the Texas Attorney General created a precise “end” date. (Tr., 19 (Complaint Counsel’s Opening Statement); *see also* Complaint Counsel’s Post-Tr. Br. at 37-38). In addition, to the extent that the Proposed Finding relies on a demonstrative (RXD0205) as substantive support for the finding, that reliance contravenes the Court’s February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence.

651. On November 15, 2015, TDSC’s Knut Meyer wrote to Patterson’s Wesley Fields stating that TDSC was interested in partnering with Patterson. (CX0126 at 1).

Response to Proposed Finding No. 651

Complaint Counsel has no specific response.

652. Meyer’s November 13, 2015 email described TDSC as “a new subsidiary” of the California Dental Association. (CX0126 at 1).

Response to Proposed Finding No. 652

Complaint Counsel has no specific response.

653. Meyer’s November 13, 2015 email also referenced a 16-week promotion period for the TDSC program. (CX0126 at 1).

Response to Proposed Finding No. 653

The Proposed Finding is misleading and incomplete to the extent that it is confusing in its reference to the “16-week promotional period.” CX0126 at 001 makes clear that, as of November 13, 2015, TDSC has just *completed* a 16-week promotional period. (CX0126 at 001 (“During the last 16 weeks since we promoted this program, we have received firm commitments

to participate from more than 600 CDA member dentist practices and are ahead of our plan of having several thousand dental practices participating in the first few years.”) This provides strong evidence that TDSC was in existence and was seeking to promote its buying group program for at least 16 weeks before November 13, 2015, or July 2015, as indicated in Patterson’s Proposed Finding No. 654.

654. Thus, this promotion period would have begun in July 2015, which is also several months after the April 2015 alleged end of the alleged conspiracy. (Kahn, Tr. 19 (alleging the conspiracy ended in April 2015); *see also* RXD0205 at 1 (“The Alleged Conspiracy Ended in April 2015”)).

Response to Proposed Finding No. 654

The Proposed Finding is misleading because it misstates the record regarding the time of the end of the conspiracy, suggesting that Complaint Counsel’s explanation that the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015 created a precise “end” date. Complaint Counsel has never taken the position that the entry by Benco into a settlement with the Texas Attorney General created a precise “end” date. (Tr., 19 (Complaint Counsel’s Opening Statement); *see also* Complaint Counsel’s Post-Tr. Br. at 37-38). In addition, to the extent that the Proposed Finding relies on a demonstrative (RXD0205) as substantive support for the finding, that reliance contravenes the Court’s February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence. Because there was no precise “end date,” it is incorrect to say that July 2015 is “several months” after the end date. The Proposed Finding should be disregarded.

655. There is also no evidence that Patterson communicated with Benco or Schein about TDSC.

Response to Proposed Finding No. 655

The Proposed Finding is misleading, irrelevant and contrary to the weight of the evidence to the extent that it implies that, because Patterson may not have communicated with its competitors about a specific buying group, it did not enter into an agreement not to do business with buying groups, and did not act in compliance with that agreement. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660).

656. Thus, there is no evidence that Patterson may have sold supplies or equipment to TDSC but for the alleged conspiracy.

Response to Proposed Finding No. 656

The Proposed Finding misleading and irrelevant to the extent that it implies that Complaint Counsel must make a showing that a particular group would have purchased from Patterson “but for” the conspiracy. Whether Patterson “may have sold supplies or equipment” to a particular buying group “but for the alleged conspiracy” is irrelevant to the factual question of whether Patterson engaged in the conspiracy. Indeed, “but for” the conspiracy Respondent Patterson might have competed for a buying group, but still not done business with that entity because one of its co-conspirators or another distributor may have won the business. The Proposed Finding also lacks citation to any evidence to support its findings. It should be disregarded.

Unified Smiles

657. Complaint Counsel presented no evidence at trial of any interaction between Patterson and Unified Smiles.

Response to Proposed Finding No. 657

The Proposed Finding is misleading, irrelevant and contrary to the weight of the evidence. It is misleading and irrelevant to the extent that it suggests that only evidence presented at trial may be considered. The Court may consider all evidence in the record. The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent that it implies that Patterson did not enter into an agreement not to do business with buying groups, and did not act in compliance with that agreement, including instructing its team not to do business with buying groups. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). That agreement precluded working with buying groups, generally and would have precluded working with Unified Smiles. Patterson did not need to have specific interactions with the Unified Smiles in order to act in accordance with its agreement.

658. There is no evidence in the record of any interaction between Patterson and Unified Smiles.

Response to Proposed Finding No. 658

The Proposed Finding is misleading, irrelevant and contrary to the weight of the evidence to the extent that it implies that Patterson did not enter into an agreement not to do business with buying groups, and did not act in compliance with that agreement, including instructing its team not to do business with buying groups. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660).

Furthermore, record evidence shows that, at the time the conspiracy was in effect, Patterson's co-conspirator Schein rejected Unified Smiles, reiterating the no buying group policy. (CX2073 at 001 (December 20, 2013 Foley email: "It's a buying group that we do not participate with, as with all buying groups.")). Even as the conspiracy was becoming more difficult to maintain, Foley wrote, in May 2015 about Unified Smiles, "Yes. They are a GPO...They asked Benco and us for the same program as GEDC. Both of us told them to go fly a kite." (CX2105 at 001). Because the agreement to which Patterson was a party precluded working with buying groups generally, it precluded Patterson from working with Unified Smiles.

659. There is also no evidence that Patterson communicated with Benco or Schein about Unified Smiles.

Response to Proposed Finding No. 659

The Proposed Finding is misleading, irrelevant and contrary to the weight of the evidence to the extent that it implies that, because Patterson may not have communicated with its competitors about a specific buying group, it did not enter into an agreement not to do business with buying groups, and did not act in compliance with that agreement. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). Because the agreement to which Patterson was a party precluded working with buying groups generally, it precluded Patterson from working with Unified Smiles.

660. Thus, there is no evidence that Patterson may have sold supplies or equipment to Unified Smiles but for the alleged conspiracy.

Response to Proposed Finding No. 660

The Proposed Finding misleading and irrelevant to the extent that it implies that Complaint Counsel must make a showing that a particular group would have purchased from Patterson “but for” the conspiracy. Whether Patterson “may have sold supplies or equipment” to a particular buying group “but for the alleged conspiracy” is irrelevant to the factual question of whether Patterson engaged in the conspiracy. Indeed, “but for” the conspiracy Respondent Patterson might have competed for a buying group, but still not done business with that entity because one of its co-conspirators or another distributor may have won the business. The Proposed Finding also lacks citation to any evidence to support its findings. It should be disregarded.

UOBG

661. There was no trial testimony about UOBG.

Response to Proposed Finding No. 661

The Proposed Finding is misleading, irrelevant and contrary to the weight of the evidence. It is misleading and irrelevant to the extent that it suggests that the Court may only consider evidence presented at trial. The Court may consider all evidence in the record. The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent that it implies that Patterson did not enter into an agreement not to do business with buying groups, and did not act in compliance with that agreement, including instructing its team not to do business with buying groups. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). That agreement precluded working with buying groups, generally and would have precluded working with UOBG, otherwise known as United Orthodontic Buying Group (RX0277 at 002).

662. There is no deposition or investigational hearing testimony in the record about UOBG.

Response to Proposed Finding No. 662

The Proposed Finding is factually incorrect. Patterson's McFadden provided testimony in his investigational hearing (CX0315 (McFadden, IHT at 157-160)) and his deposition (CX8004 (McFadden, Dep. at 90-92)) about inquiries from UOBG members. In his investigational hearing, McFadden testified about CX0160 (May 20, 2015 email from McFadden to Rogan and Guggenheim, Subject: RE: UOBG GROUP) and CX0162 (May 20, 2015 email from McFadden to Amy Barlage and Lawrence Schmidt, Subject: RE: UOBG GROUP). In his deposition, McFadden testified about CX0162 (May 20, 2015 email from McFadden to Amy Barlage and Lawrence Schmidt, Subject: RE: UOBG GROUP) in his deposition (CX8004).

663. There is no evidence in the record of any interaction between UOBG and Patterson before April 2015, when the alleged conspiracy allegedly ended. (Kahn, Tr. 19; *see also* RXD0205 at 1 ("The Alleged Conspiracy Ended in April 2015")).

Response to Proposed Finding No. 663

The Proposed Finding is misleading, contrary to the weight of the evidence, and factually incorrect. The record shows that Patterson had interactions with UOBG *members* in both 2014 (RX0227) and 2015 (CX0160, CX0162, and RX0451). RX0227 shows that, in 2014, a Patterson branch manager received a request from a dentist affiliated with UOBG who was seeking a discount on a piece of equipment, a Sirona x-ray machine. (RX0227 at 001-002). Although the document shows that the branch manager ultimately contacted the equipment manufacturer to try to get the doctor special pricing (RX0227 at 001 ("They have moved on with contacting Sirona to see if they would have any special pricing they would be able to offer this Dr. . . .")), it also shows McFadden's response when he learned of the request. He immediately forwarded the email to Misiak, stating, "you ever here [sic] of this Ortho group? – sounds like a GPO?"

(RX0227 at 001). The request, however, was not from or about UOBG, and there is no evidence in the record that the buying group itself contacted Patterson; it was from a Patterson customer who wanted to know whether Patterson had access to UOBG's discounted pricing.

In May 2015, a different Patterson branch was contacted by a different orthodontic group, also affiliated with UOBG. (CX0160, CX0162, and CX0451). When the equipment specialist at the branch asked Patterson Special Markets about how to handle the request (which was, again, not a request from the buying group), McFadden forwarded the email to Rogan and Guggenheim. (CX0160 at 001 (May 20, 2015 email: "This is just FYI - - as you are building out the specialty segment - - these buying groups are popping up everywhere.")). Later that day McFadden responded to the branch (and others), "We currently have little appetite to deal with the buying groups as we feel they compete directly with the branches and reps. With that being said, I will follow Dave Misiak's lead here." (CX0162 at 001, RX0451 at 00001) As with the 2014 inquiry, the request at issue did not come from the UOBG group; rather, it from an individual practice.

The Proposed Finding is also misleading because it misstates the record regarding the time of the end of the conspiracy, suggesting that Complaint Counsel's explanation that the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015 created a precise "end" date. Complaint Counsel has never taken the position that the entry by Benco into a settlement with the Texas Attorney General created a precise "end" date. (Tr., 19 (Complaint Counsel's Opening Statement); *see also* Complaint Counsel's Post-Tr. Br. at 37-38). In addition, to the extent that the Proposed Finding relies on a demonstrative (RXD0205) as substantive support for the finding, that reliance contravenes the Court's February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence.

Finally, the Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that lack of interaction between any buying group and Patterson suggests that Patterson did not conspire with its competitors to reject buying groups. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). That agreement precluded working with buying groups, generally and would have precluded working with UOBG during the conspiracy. McFadden's email advising the local branch that he had "little appetite to deal with the buying groups" (CX0162 at 001) – even when there was no actual request from a buying group – demonstrates the general instructions that McFadden and Misiak were providing to their sales teams.

664. The record does include an internal Patterson email chain regarding UOBG, dated May 20, 2015. (See RX0451 at 1–2).

Response to Proposed Finding No. 664

Complaint Counsel has no specific response, but notes that the record also includes CX0160 and CX0162, which are part of the same email chain as RX0451. To the extent that the Proposed Finding implies that the email chain is about an inquiry from UOBG, it is factually inaccurate. The email is about an inquiry from an individual dental practice affiliated with UOBG.

665. May 20, 2015 is after the alleged April 2015 end of the conspiracy. (Kahn, Tr. 19; see also RXD0205 at 1 ("The Alleged Conspiracy Ended in April 2015")).

Response to Proposed Finding No. 665

The Proposed Finding is misleading and irrelevant. As described in detail in Complaint Counsel's Response to Respondent Patterson's Proposed Finding No. 663, the May 2015 email

chain referenced in Proposed Finding Nos. 663 and 664 was not from UOBG, but was from an individual dental practice. As such, it is irrelevant to show any specific interactions between UOBG and Patterson.

The Proposed Finding is also misleading because it misstates the record regarding the time of the end of the conspiracy, suggesting that Complaint Counsel's explanation that the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015 created a precise "end" date. Complaint Counsel has never taken the position that the entry by Benco into a settlement with the Texas Attorney General created a precise "end" date. (Tr., 19 (Complaint Counsel's Opening Statement); *see also* Complaint Counsel's Post-Tr. Br. at 37-38).

Moreover, to the extent that the Proposed Finding relies on a demonstrative (RXD0205) as substantive support for the finding, that reliance contravenes the Court's February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence. In addition, because there was no precise "end date" to the conspiracy, it is incorrect to say that May 20, 2015 is after the "end of the conspiracy."

Finally, the Proposed Finding is, misleading and contrary to the weight of the evidence to the extent that it implies that lack of interaction between any buying group and Patterson suggests that Patterson did not conspire with its competitors to reject buying groups. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660). That agreement precluded

working with buying groups generally and would have it from precluded working with UOBG during the conspiracy.

666. RX0451 begins with a May 20, 2015 email from Lawrence Schmidt, a Patterson employee in Maine, in which he wrote Amy Barlage, another Patterson employee, in part “I was told by a staff person with Vermette Ortho that they are a member of a buying group (UOBG) and should be getting special pricing. . . . Any idea what kind of discounting I should use?” (RX0451 at 2).

Response to Proposed Finding No. 666

The Proposed Finding is misleading to the extent that it is incomplete. For a complete summary of RX0451 and related emails, see Complaint Counsel’s Response to Respondent Patterson’s Proposed Finding No. 663. The quoted language in the Proposed Finding confirms that the inquiry at issue was from an individual dental practice (Vermette Ortho), and not from UOBG. Complaint Counsel has no specific response to the accuracy of the quoted language.

667. Amy Barlage added Neal McFadden to the chain and responded, “Larry, I am looking into this and will get back to you.” (RX0451 at 2).

Response to Proposed Finding No. 667

Complaint Counsel has no specific response.

668. McFadden responded and added David Misiak to the chain: “*We currently have little appetite to deal with the buying groups* as we feel they compete directly with the branches and reps. With that being said, I will follow Dave Misiak’s lead here. We have said no may times in order to remain pure in our intent and consistent across the company. *If the local branch wants to do something here that’s fine* by me but I cannot work with our manufacturers on securing special pricing for a buying group that has no ownership in their clients. I hope this adds a bit of clarity.” (RX0451 at 1 (emphasis added)).

Response to Proposed Finding No. 668

The Proposed Finding is misleading and incomplete to the extent that it leaves out evidence in the record from the same email chain. CX0160 at 001 shows that, minutes before McFadden responded to Amy Barlage and Lawrence Schmidt, he forwarded the email chain to Guggenheim

and Rogan, adding a comment, “This is just FYI – as you are building out the specialty segment – these buying groups are popping up everywhere.” McFadden’s comment indicates that, as of May 2015, buying groups were becoming more prevalent. It also confirms that Dave Misiak, as head of Sales, was the “lead” on instructing branch offices. (RX0451 at 001 (May 20, 2015 McFadden email: “I will follow Dave Misiak’s lead here. We have said no many times in order to remain pure in our intent and consistent across the company.”)) The record evidence supports a finding that Misiak agreed with instructing branches to “steer clear of all buying groups.” (CX3128 at 001; Misiak, Tr. 1392), which contradicts the implication that the branches were free to work with buying groups.

669. Michael Cormier, Patterson’s Maine Branch Manager, then responded to McFadden, “Thanks for the insight Neal – we will handle it at the Branch level.” (RX0451 at 1).

Response to Proposed Finding No. 669

The Proposed Finding is misleading to the extent that it implies that Patterson was, as of May 2015, allowing its branches to work with buying groups. Misiak, as VP of Sales, had been instructing his teams not to work with buying groups. (Misiak, 1298 (VP of sales from 2010 to 2016); Misiak, Tr. 1388-1389 (.Misiak provided guidance to Patterson’s branches and regions to say “no” to doing business with buying groups); Misiak, Tr.1392 (as of October 2014, Misiak was not aware of any Patterson branch office doing business with any buying groups.) There is no evidence in the record that Patterson’s branch ever communicated with UOBG. Moreover, as of April 2018, Patterson did not have any agreement for the sale to any buying group, including UOBG. (CX3504 at 004 (Patterson Response to Complaint Counsel’s First Interrogatories ¶ 1) (“Patterson is not currently aware of any agreements for the purchase or sale of dental products between itself and entities falling under the FTC’s definition of “Buying Group” [for the period 2009 to April 16, 2018])).

670. There is also no evidence that Patterson communicated with Benco or Schein about UOBG.

Response to Proposed Finding No. 670

The Proposed Finding is misleading, irrelevant and contrary to the weight of the evidence to the extent that it implies that, because Patterson may not have communicated with its competitors about a specific buying group, it did not enter into an agreement not to do business with buying groups, and did not act in compliance with that agreement. The weight of the evidence shows that Patterson entered into an agreement no later than February 2013 that it would not do business with buying groups. (CCFF ¶¶ 483-501, 513). The evidence also shows that Patterson complied with this no buying group policy, and that Patterson executives communicated that policy to its sales team. (CCFF ¶¶ 627-660).

671. Thus, there is no evidence that Patterson may have sold supplies or equipment to UOBG but for the alleged conspiracy.

Response to Proposed Finding No. 671

The Proposed Finding misleading and irrelevant to the extent that it implies that Complaint Counsel must make a showing that a particular group would have purchased from Patterson “but for” the conspiracy. Whether Patterson “may have sold supplies or equipment” to any particular buying groups “but for the alleged conspiracy” is irrelevant to the factual question of whether Patterson engaged in the conspiracy. Indeed, “but for” the conspiracy Respondent Patterson might have competed for a buying group, but still not done business with that entity because one of its co-conspirators or another distributor may have won the business. The Proposed Finding is, therefore, irrelevant and should be disregarded.

VIII. Responses to Proposed Findings Regarding “Dr. Marshall’s Conspiracy Opinion”

a. Responses to Proposed Findings Regarding “Dr. Marshall’s Conspiracy Opinions Are Based On His Adoption Of Complaint Counsel’s Readings Of Documents And Testimony, Ignoring Contrary Evidence.”

672. Dr. Marshall does not offer an opinion on the start or end of the alleged conspiracy. (Marshall, Tr. 2889 (“A. Well, the Federal Trade Commission gave me a date range of 2011 to 2015, and I’m not offering an opinion about a start date or an end date for the conspiracy, but I am making a statement about is this a reasonable date range.”); Marshall, Tr. 2947 (“Q. You’re not offering any economic opinion to pin a precise date as to the start of the alleged conspiracy? A. That’s correct. That was not part of my charge.”); Marshall, Tr. 2948 (“Q. But you’re not offering any opinion as to the precise end date of the alleged conspiracy; is that right? A. That is correct.”)).

Response to Proposed Finding No. 672

Complaint Counsel does not disagree but adds that Dr. Marshall testified that he did a reasonableness check of the date range of 2011 to 2015 and found this date range to be reasonable. (Marshall Tr. 2889-2890, 2947).

673. Dr. Marshall relied on Complaint Counsel’s alleged conspiracy period from 2011 to 2015. (Marshall, Tr. 2889 (“A. Well, the Federal Trade Commission gave me a date range of 2011 to 2015”); Marshall, Tr. 2890 (“I found the date range to be reasonable that the FTC had provided to me.”); Marshall, Tr. 2947 (“Q. Now, with respect to the start dates of the alleged conspiracy, you took those dates from the complaint counsel; is that right? A. They gave me a date range of 2011 to 2015, and I did a reasonableness check.”); Marshall, Tr. 2948 (“Q. Okay. Now, with respect to the end date of the alleged conspiracy, you also took that from complaint counsel? A. I -- I -- they gave me the date range of 2011 to 2015, and again, I did a reasonableness check.”)).

Response to Proposed Finding No. 673

This Proposed Finding is inaccurate and misleading because the testimony cited does not support the Proposed Finding. Dr. Marshall did not testify that he “relied” on Complaint Counsel’s alleged conspiracy period. Instead, Dr. Marshall testified that he did a “reasonableness check” of the start and end dates of the conspiracy. (Marshall, Tr. 2947).

674. Dr. Marshall did not offer an opinion as to when Patterson entered into the alleged agreement with Benco and Schein. (Marshall, Tr. 2947-48 (“Q. So you’re not offering any

opinion as to when Patterson entered into any conspiracy with Benco or with Schein. A. I'm looking at the dates of 2011 to 2015 and saying that those date ranges which were given to me were reasonable. Q. Okay. A. So I'm not offering an opinion."); Marshall, Tr. 3109-10 [REDACTED]

Response to Proposed Finding No. 674

Complaint Counsel has no specific response.

675. Dr. Marshall conceded that what the authors of the documents or participants of any conversations "meant [in any e-mail or phone call] is up to them." (Marshall, Tr. 2946 ("Q. And you're not interpreting what the parties meant by any e-mail or phone call, anything along those lines; right? A. I'm looking at the economic content of that information certainly. Q. My question was, you're not offering any -- you're not -- you're not interpreting what the parties themselves meant in any e-mail or phone call; is that right? A. No. I don't know what -- what they meant is up to them. Yes."))).

Response to Proposed Finding No. 675

This Proposed Finding is incomplete and misleading because Dr. Marshall also testified that he is looking at the economic content of the "email[s] and phone calls[s]." (Marshall, Tr. 2946).

676. Yet even as he acknowledged that interpretations of documents are up to the trier of fact, he testified that his status as an economist makes his interpretations of documents correct. (Marshall, Tr. 3141 [REDACTED])

Response to Proposed Finding No. 676

This Proposed Finding is vague as to what is referred to by "interpretation" and incomplete and misleading because it omits that Dr. Marshall explained that when reviewing the evidentiary record, he considers the economic content of the communications and "discussions that Respondents had amongst themselves as to what is or is not a buying group as that issue arose in their discussions." (Marshall, Tr. 2877). Regarding his discussion about inter-firm

communications, Dr. Marshall testified that he is not offering any legal opinions with respect to the communications but is “talking about the competitive environment from the viewpoint of an economist and about the damage to the efficiency of transactions in the economy through collusive conduct by firms that should be competing in the marketplace but are not.” (CX8041 (Marshall, Dep. at 475; *see also* (CX7100 at 123-127, 142-149 (¶¶ 309-327, 342-346) (Marshall Expert Report) (explaining and analyzing the effects of Respondents’ private communications regarding the suppression of rivalry for the business of Buying Groups and stopping their sales forces from doing business with Buying Groups based on his knowledge and expertise as an economist)).

Dr. Marshall describes scholarly publications in antitrust economics that support his review of case-specific facts in connection with economic analysis. (CX7101 at 070 (¶¶ 181-182) (Marshall Expert Rebuttal Report). Additionally, Respondent Schein’s own economic expert, Dr. Carlton, has taken a similar position and confirmed this view in his deposition in this case. (CX8043 (Carlton, Dep. at 83-84) (acknowledging that inter-firm communications can be relevant to economic analysis), 314-315 (describing his assessment of the facts related to a purported Smile Source discount in 2012 and 2014 and reaching an economic conclusion based on those facts)).

677. Dr. Marshall’s opinion that Patterson participated in a conspiracy with Benco and Schein relating to buying groups from 2013 to 2015 relies on his interpretation of a handful of interfirm communications (Marshall, Tr. 3291 (“Q. Correct. That’s your section on interfirm communications; right? Section V.A. A. Yeah. That’s V.A, yes. All right. And just so we’re clear, this is the evidence of interfirm communications that led you to conclude why Patterson acted contrary to its self-interest as you determine from your section V.D study; right? A. I’m looking at the economic content of these communications to make a determination as to why firms did -- acted against their unilateral self-interest, and this is leading me to the conclusion of coordinated action.”)), specifically:

- CX0090 – February 8, 2013, email exchange between from Mr. Cohen and Mr. Guggenheim re: New Mexico Dental Cooperative purchasing (CX7100 at 124).
- CX0062 (cited in CX7100 as CX3108) – June 6-8, 2013 email exchange, also between Cohen and Guggenheim, re: New Mexico Dental Cooperative purchasing (CX7100 at 125).
- CX6027 – phone records showing single January 6, 2014 phone call between Mr. Steck and Mr. Misiak regarding the TDA (CX7100 at 125–26).

Response to Proposed Finding No. 677

This Proposed Finding is inaccurate, incomplete, and misleading to the extent that it suggests that Dr. Marshall's opinion that Patterson participated in the conspiracy with Benco and Schein is limited to Dr. Marshall's review of the inter-firm communications identified in this Proposed Finding. First, Dr. Marshall's testimony about communications was not limited to the documents listed in this Proposed Finding – Dr. Marshall testified that his opinions include inter-firm communications identified in Section V.A of his expert report. (Marshall, Tr. 3291).

Second, this Proposed Finding is incomplete and misleading because it omits that on the communications front, in addition to the inter-firm communications that are a part of the record evidence, Dr. Marshall also reviewed and considered intra-firm communications – notably, Respondents' communications with their sales forces instructing them not to pursue the business of buying groups:

A. So what's discussed there is that there's an incentive to make certain that your sales forces are not doing things you don't want them to do when you've entered into an agreement to not pursue certain lines of business. Each of the respondents is instructing their sales forces, who are coming to them to ask for the right to pursue the business of buying groups, the senior executives are instructing them for each respondent not to pursue the business of buying groups.

So that kind of intrafirm communication occurring in -- for each of the respondents is very important here because if one respondent were to issue such an instruction, but the others did not, then there's a big risk for the one respondent issuing that instruction; namely, their sales force will not be going after the business of buying groups. That implies a reduction in business for that firm. That implies their sales force would be

subject to being recruited by the other firms. And the sales forces are the very -- are a very valuable part of the business of full-service distribution.

Q. So can you explain to us how telling a sales force -- Dr. Marshall, can you explain to us how telling a sales force not to do business with buying groups -- how is that against a firm's unilateral self-interest?

A. Again, if one firm says, Do not do business with buying groups, their sales forces come to senior management, ask for permission to do it, they're instructed not to, if the other firms are not giving that instruction, then the other firms' sales force will be pursuing that business. That will lead to increased profitability for the other firms. And it will subject the first firm, the one who's giving the instruction, it will subject their sales force to being potentially recruited away by the other firms. This is common in cartel situations to see this change in instructions for the sales force being put forward, and this is articulated well in my book.

(Marshall, Tr. 2886-2888; *see also* CX7100 at 142-149 (¶¶ 342-346) (Marshall Expert Report)).

Third, this Proposed Finding is inaccurate and incomplete, because it omits that Dr. Marshall corrected Patterson's counsel during trial that in addition to the inter-firm communications mentioned in this Proposed Finding, he reviewed and considered Respondents' collective inter-firm communications about the Atlanta Dental incident. (Marshall, Tr. 3291 ("A. There's a -- there's additional detail about Atlanta Dental later in this section V, so I want to be clear on that."); *see also* CX7100 at 199-203 (¶¶ 463-473) (Marshall Expert Report)).

Finally, this Proposed Finding is inaccurate and incomplete because it omits that in forming his opinion that Patterson participated in the conspiracy, Dr. Marshall also performed five data-driven profitability case studies and determined that Patterson acted against its unilateral economic self-interest in by having a no buying group policy during the relevant period for Patterson. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150-186 (¶¶ 347-413) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED])

[REDACTED]). Accordingly, consistent with Dr. Marshall's analyses, it was against Patterson's unilateral self-interest to have a no-buying group policy after 2013 whereby it instructed its employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). Prior to 2013, Patterson did not have a no-buying-group policy and, thus, was not acting against its self-interest. (CCFF ¶¶ 627-628). To the extent that Patterson claims that Dr. Marshall's profitability studies are invalid, Patterson is wrong for reasons explained in Response to Proposed Finding Nos. 701, 713-751.

678. Dr. Marshall conceded at trial that CX0090 does not reference any agreement to take any concerted action. (Marshall, Tr. 3307-08 ("Q. You know, I've read that e-mail. We've all been here in the courtroom while you were not. That e-mail does not say, essentially, What are you doing? I thought we weren't bidding for buying groups. In fact, it doesn't say that at all, does it, sir? A. Well, that's how I read the economic content of the e-mail transmissions. Q. Fair enough. But the words in English aren't on that e-mail, are they, sir? A. I didn't understand your question. Q. The words in English on that e-mail do not say, essentially, "What are you doing? I thought we weren't bidding for buying groups," do they, sir? A. I don't think I was quoting from an e-mail, no.")).

Response to Proposed Finding No. 678

This Proposed Finding is inaccurate and misleading because the referenced citations do not support the Proposed Finding: Dr. Marshall did not concede that CX0090 referenced an agreement – there is no reference to any “agreement” or “concerted action” in the testimony cited. Instead, in response to the question “The e-mail does not say, essentially, What are you doing? I thought we weren't bidding for buying groups...those words in English aren't on the e-mail, are they, sir?” Dr. Marshall stated that he was not “quoting from the e-mail.” (Marshall, Tr. 3307-3308).

This Proposed Finding is also irrelevant, inaccurate, and misleading because it improperly calls for a legal conclusion from the economic expert about what constitutes an “agreement” and “concerted action.” Dr. Marshall testified that he is not offering legal conclusions in his

testimony in this case. (CX8041 (Marshall, Dep. at 473 (“Q: You’re not offering any legal conclusions in terms of your testimony in this case; is that right? A: I’m an economist. I offer economic conclusions and opinions, not legal ones.”))).

679. Dr. Marshall also conceded at trial that CX0090 contains no explicit reference to any future concerted action; Marshall instead “presumed,” based on the “economic evidence,” “that he’s [Mr. Guggenheim] going to have a follow-up with people in his organization.” (Marshall, Tr. 3310 (“A. Well, he’s saying, “Thanks for the heads up. I’ll investigate the situation. We feel the same way about these,” referring to buying groups. That suggests that he’s going to have a follow-up with people in his organization.”); Marshall, Tr. 3311 (“A. I’m presuming that the head of Patterson, Mr. Guggenheim, who says, “Thanks for the heads up. I’ll investigate the situation. We feel the same way about these,” namely buying groups, implies that there’s going to be such communication”); Marshall, Tr. 3322 (“Yeah. I’m looking at the economic evidence here.”); Marshall, Tr. 3322 (“I would presume that the senior manager of a company is managing his people, so that’s where I am with that.”))).

Response to Proposed Finding No. 679

This Proposed Finding is inaccurate and misleading because the referenced citations do not support the Proposed Finding: Dr. Marshall did not concede that CX0090 does not reference any future concerted action – there is no reference to any “future concerted action” in the testimony cited.

This Proposed Finding is also irrelevant because it improperly calls for a legal conclusion from the economic expert about what constitutes a “concerted action.” Dr. Marshall testified that he is not offering legal conclusions in his testimony in this case. (CX8041 (Marshall, Dep. at 473 (“Q: You’re not offering any legal conclusions in terms of your testimony in this case; is that right? A: I’m an economist. I offer economic conclusions and opinions, not legal ones.”))).

The Proposed Finding is inaccurate and incomplete because the “economic evidence” that Dr. Marshall refers to in the testimony is not “that he’s [Mr. Guggenheim] going to have follow-up with people in his organization.” Rather, the “economic evidence” that Dr. Marshall is referring

to in the testimony cited is to the communication between Benco's Chuck Cohen and Patterson's Paul Guggenheim about not doing business with buying group New Mexico Dental Cooperative. Marshall, Tr. 3322 ("I'm seeing the two most senior managers of two rival companies having a communication about not doing business with a buying group followed up by Patterson taking direct action to not do business with a buying group. *That's what I'm characterizing as economic evidence here of the communication.*")(emphasis added).

680. This Court explained during trial that, "when it comes to experts, if they are incorrect in the facts that they rely on, that can be a fatal problem." (Judge Chappell, Tr. 5376).

Response to Proposed Finding No. 680

Complaint Counsel does not disagree that the Court made this statement during trial but adds that the Court actually made this statement in when sustaining Complaint Counsel's objection to Respondent Schein's economic expert's trial testimony regarding structural breaks, not to Dr. Marshall's testimony:

DR. CARLTON: Moreover, the second main reason why the numbers go up in 2017 is because of Smile Source. I'll talk a little bit more about Smile Source later. But my understanding is that Schein -- I'll obviously leave it to the judge to decide this, but my understanding of the facts are that Schein was willing to continue to deal with Smile Source in 2012 at the discounted -- ...

MR. DILLICKRATH: Your Honor, I'm going to have to object. Dr. Carlton is simply reviewing facts, his understanding, as he put it, of the facts. He's not giving economic testimony here, and I'm going to object and ask that the last question and answer not be considered.

MR. KASS: Your Honor, he's giving his reasons as to why the sales data does not reflect a structural break, and he's testifying as to his review and the reasons why the sales data says what it says, and that's -- and that's -- an economic expert can testify as to that.

JUDGE CHAPPELL: All right. The objector is clear, is correct, that this is not a fact witness. In fact, when it comes to experts, if they are incorrect in the facts that they rely on, that can be a fatal problem, so just make it clear with this witness that he's not sitting here trying to tell us what the facts are, but this is the facts as he relied upon them...So you need to rephrase that one, and that response in the record will not be considered.

(CX8043 (Carlton, Tr. 5374-5376)).

681. Dr. Marshall acknowledged that feelings and commitments are different things. (Marshall, Tr. 3323–24 (“Q. All right. Got it. Now, you would agree with me that the word “feel” is a different word than the word “commit.” A. That’s not the same word.”)); *see also* RXD0216 (definition of “feel” vs. definition of “commit”).

Response to Proposed Finding No. 681

This Proposed Finding is inaccurate and misleading because the referenced citations do not support the Proposed Finding: Dr. Marshall did not acknowledge that feelings and commitments are different things, he just acknowledged “That’s not the same word.” (Marshall, Tr. 3323).

This Proposed Finding is also irrelevant to the extent that it improperly calls for a legal conclusion from the economic expert about what constitutes a “commitment to a common scheme.” Dr. Marshall testified that he is not offering legal conclusions in his testimony in this case. (CX8041 (Marshall, Dep. at 473 (“Q: You’re not offering any legal conclusions in terms of your testimony in this case; is that right? A: I’m an economist. I offer economic conclusions and opinions, not legal ones.”))).

This Proposed Finding should be disregarded to the extent that it relies on a demonstrative RXD0216 for support, in violation of the Court’s Order On Post-Trial Briefs at 3 (“Do not cite to demonstrative exhibits as substantive evidence.”).

682. Though Dr. Marshall presumed that Guggenheim would issue a communication to his team with instructions on what action to take towards buying groups—especially about the New Mexico Dental Cooperative at issue in Cohen and Guggenheim’s emails—after the February 8, 2013 email, Dr. Marshall could not “put [his] finger on such a communication.” (Marshall, Tr. 3311 (“Q. But sitting here right now with your report in front of you, you can’t find anything that shows that Mr. Guggenheim talked to anybody in the New Mexico branch of Patterson about the New Mexico Dental Cooperative after getting this e-mail from Mr. Cohen; correct? A. . . . I’m not right now able to put my finger on such a communication in response to your question.”); Marshall, Tr. 3312 (“Q. I’m asking you, after spending two and a half-plus million dollars preparing your opinion in this case, if you can point to a single shred of evidence

supporting your opinion that Mr. Guggenheim ever spoke with anyone in the Patterson New Mexico branch about the New Mexico Dental Cooperative after getting an e-mail from Mr. Cohen on February 8, 2013. A. Again, not at this time I can't put my hands directly on it.")).

Response to Proposed Finding No. 682

The Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (Order On Post-Trial Briefs at 3 ("Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents."); *see also* Marshall Tr. at 2884-2885 (J. Chappell: "My advice to both parties, experts are not fact witnesses.")).

Rather than using an expert to establish a fact, Complaint Counsel has adduced witness testimony and contemporaneous documents to show that Guggenheim informed Cohen he would "investigate" his company's discounting arrangement with the New Mexico Dental Cooperative buying group, and that a mere three days later, Patterson ended the discounting arrangement with this buying group. (CCFF ¶¶ 491-512).

683. Dr. Marshall did not know who any of the individuals involved in the Albuquerque decision even *were*, or what any of them had said or done. (Marshall, Tr. 3315–20 ("I don't know -- I'd have to refresh my memory on who all the parties are here. So you're telling me Scott Belcheff works for Patterson. I see that. And then he's sending this to a Dr. Mason. I'm not certain who Dr. Mason is, so I'd have to get my legs underneath me about that, too.")).

Response to Proposed Finding No. 683

This Proposed Finding is misleading and inaccurate because the testimony cited does not support the Proposed Finding. Dr. Marshall did not testify that he "did not know" who any of the individuals involved in the Albuquerque decision were or what any of them had said or done. Instead, Dr. Marshall testified that he'd "have to refresh [his] memory on who all the parties are

here.” (Marshall, Tr. 3315). And while he was “not certain” who Dr. Mason is, Dr. Marshall testified that “[he’d] have to get [his] legs underneath [him] about that” and that he did not “have a recollection right now.” (Marshall, Tr. 3315).

The Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (Order On Post-Trial Briefs at 3 (“Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents.”); *see also* Marshall Tr. at 2884-2885 (J. Chappell: “My advice to both parties, experts are not fact witnesses.”)).

684. Dr. Marshall conceded there is no evidence that any recipient of CX0090 ever communicated with Patterson’s New Mexico managers before Patterson decided to cancel the meeting Patterson was planning to host at its offices and not to work with the New Mexico Dental Cooperative. (Marshall, Tr. 3322 (“A. Well, you’re making -- okay. I don’t have direct or indirect evidence that Mr. -- after Mr. Cohen and Mr. Patterson, the two senior decision makers of these firms, had a conversation about not doing business with the New Mexico Dental Cooperative that that was directly or indirectly communicated to people on the ground in New Mexico.”); Marshall, Tr. 3323 (“A. Right now, 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. At this time.”)).

Response to Proposed Finding No. 684

This Proposed Finding is inaccurate and misleading because the referenced citations do not support the Proposed Finding: Dr. Marshall did not concede that there was no evidence that any recipient of CX0090 ever communicated with Patterson’s New Mexico managers – Dr. Marshall testified that he did not “have direct or indirect evidence that Mr. -- after Mr. Cohen and Mr. Patterson, the two senior decision makers of these firms, had a conversation about not doing business with the New Mexico Dental Cooperative that that was directly or indirectly communicated to people on the ground in New Mexico.” (Marshall, Tr. 3322).

The Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (Order On Post-Trial Briefs at 3 (“Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents.”); *see also* Marshall Tr. at 2884-2885 (J. Chappell: “My advice to both parties, experts are not fact witnesses.”)).

685. Dr. Marshall acknowledged that CX0062 (the June 2013 email exchange between Guggenheim and Cohen regarding Atlantic Dental Care) was sent after the Atlantic Dental Care bid had already been awarded to Benco. (Marshall, Tr. 3305-06 (“Q. The only interfirm communication that you have related to Patterson and Benco and Atlantic Dental Care was after, three weeks after, the bid had already been awarded; correct? A. Right.”)). Dr. Marshall *presumed*, in Court, that the email was saying “essentially, What are you doing? I thought we weren’t bidding for buying groups. Then Cohen is responding, We decided it’s not a buying group.” (Marshall, Tr. 3307). But he then conceded that this was just the “economic content” of the emails—the actual content said no such thing. (Marshall, Tr. 3307).

Response to Proposed Finding No. 685

The Proposed Finding is misleading and inaccurate because the referenced citations do not support the Proposed Finding. Dr. Marshall did not testify that he “presumed” anything about the words in the referenced email. Instead, in response to the question “The e-mail does not say, essentially, What are you doing? I thought we weren’t bidding for buying groups...those words in English aren’t on the e-mail, are they, sir?” Dr. Marshall stated that he was not “quoting from the e-mail.” (Marshall, Tr. 3307-3308).

The Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (Order On Post-Trial Briefs at 3 (“Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents.”); *see*

also Marshall Tr. at 2884-2885 (J. Chappell: “My advice to both parties, experts are not fact witnesses.”)).

686. Yet, again based on the “economic content” of the email, Dr. Marshall presumed that CX0062 said something that the words on the page did not say: “essentially, What are you doing? I thought we weren’t bidding for buying groups.” (Marshall, Tr. 3307-8).

Response to Proposed Finding No. 686

The Proposed Finding is misleading and inaccurate because the referenced citations do not support the Proposed Finding: Dr. Marshall did not testify that he “presumed” anything about the words in the referenced email. Instead, in response to the question “The e-mail does not say, essentially, What are you doing? I thought we weren’t bidding for buying groups...those words in English aren’t on the e-mail, are they, sir?” Dr. Marshall stated that he was not “quoting from the e-mail.” (Marshall, Tr. 3307-3308)

687. Dr. Marshall did not identify the TDA or TDA Perks Supplies as a “buying group.” (Marshall, Tr. 3293-94 (“Q. It’s nowhere -- neither one of these entities, Texas Dental Association or TDA Perks Supplies, are listed in your paragraph 491 of the buying groups that you say Patterson, Schein or Benco were approached by in one or another company turned down; right? A. Yes. Q. And in fact -- A. It’s not in paragraph 491. Q. Right.”)). Dr. Marshall seemed to think that Misiak and Steck were discussing whether to serve as a distributor for the TDA (which is not the case) and not whether to attend a TDA trade show (which is the case). (Marshall, Tr. 3399–3301). He apparently did not know that Source One Dental already was the TDA’s distributor as of Misiak and Steck’s communication—he thought Source One was a buying group. (Marshall, Tr. 3399–3301). He also did not realize that Complaint Counsel is not alleging a boycott of the TDA. (Marshall, Tr. 3299, 3302).

Response to Proposed Finding No. 687

The Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (Order On Post-Trial Briefs at 3 (“Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents.”); *see*

also Marshall Tr. at 2884-2885 (J. Chappell: “My advice to both parties, experts are not fact witnesses.”)).

This Proposed Finding is irrelevant, inaccurate, and should be disregarded to the extent that it suggests that Dr. Marshall should conclusively determine the fact of what is and is not considered a buying group. Both this Court and Dr. Marshall acknowledged that Dr. Marshall is not a fact-finder. (Marshall Tr. at 2884-2885 (J. Chappell: “My advice to both parties, experts are not fact witnesses”), 2946 (Marshall testified that he is “not offering an opinion about the facts.”)).

This Proposed Finding is also incomplete, inaccurate, and misleading to the extent that it suggests that TDA or TDA Perks Supplies (“TDA”) was not a buying group pursuant to the definition alleged in this matter. The Proposed Finding is incorrect and against the weight of the evidence indicating that TDA was a buying group, including other fact-witness testimony that TDA was a buying as well as explanations in Respondents’ own documents. (CCFF ¶¶ 1110-1113).

688. Dr. Marshall saw no direct evidence that the TDA or TDA Perks Supplies ever sought to work with Patterson. (Marshall, Tr. 3298-99 (“Q. No document or piece of testimony in your report, cited in your report, suggests that TDA Perks Supplies or TDA approached Schein or Benco and tried to buy from them either. Correct? A. I think your question is is there anything that directly states that, and I don’t see anything that directly states that.”)).

Response to Proposed Finding No. 688

The Proposed Finding is misleading and inaccurate because the referenced citations do not support the Proposed Finding: Dr. Marshall did not testify that he saw no direct evidence that TDA or TDA Perks Suppliers ever sought to work with Patterson – rather, he stated that he did not “see anything that directly states that.” (Marshall, Tr. 3298-3299). The Proposed Finding

should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (Order On Post-Trial Briefs at 3 (“Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents.”); *see also* Marshall Tr. at 2884-2885 (J. Chappell: “My advice to both parties, experts are not fact witnesses.”)).

689. Dr. Marshall reached his opinion that Patterson’s communications regarding the New Mexico Dental Cooperative, the Atlanta Dental cooperative, or the Texas Dental Association were evidence of a conspiracy without analyzing any data regarding these three entities. (Marshall, Tr. 3203-04 (“Q. Now, those three that you say there are or may be some interfirm communications between my client Patterson and Schein or Benco, you didn’t study the purchases of the New Mexico Dental Cooperative members over here in your section V.D, did you? A. No. Q. Nor the Atlanta [sic] Dental cooperative members, you didn’t study them in your V.D either. A. No. Q. Or members of the Texas Dental Association, you didn’t study their purchases over here in your section V.D either, did you, sir? A. No.”)).

Response to Proposed Finding No. 689

This Proposed Finding is incomplete and misleading because it omits that Dr. Marshall testified that he did not recall having data on Atlantic Dental, New Mexico Dental Cooperative, or TDA Perks Supplies to do the same kind of analysis that he studied in Section V of his Report. (CX8041 (Marshall, Dep. at 375-376, 380)).

This Proposed Finding is inaccurate and incomplete to the extent that it attempts to limit Dr. Marshall’s opinion about Patterson’s participation in the conspiracy to inter-firm communications – it omits that on the communications front, in addition to the inter-firm communications that are a part of the record evidence, Dr. Marshall also reviewed and considered intra-firm communications – notably Respondents’ communications with their sales forces instructing them not to pursue the business of buying groups. (Marshall, Tr. 2886-2888).

This Proposed Finding is also inaccurate and incomplete because it omits that in forming his opinion that Patterson participated in the conspiracy, in addition to considering Patterson's communications, Dr. Marshall also performed five data-driven profitability case studies and determined that Patterson acted against its unilateral economic self-interest in by having a no buying group policy during the relevant period for Patterson. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150-186 (¶¶ 349-413) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED]).

Accordingly, consistent with Dr. Marshall's analyses, it was against Patterson's unilateral self-interest to have a no-buying group policy after 2013 whereby it instructed its employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). Prior to 2013, Patterson did not have a no-buying-group policy and, thus, was not acting against its self-interest. (CCFF ¶¶ 627-628). To the extent that Patterson claims that Dr. Marshall's profitability studies are invalid, Patterson is wrong for reasons explained in Response to Proposed Finding Nos. 701, 713-751.

690. Dr. Marshall conceded that he has called it a "tragedy" "to read about firms that were fined huge amounts for engaging in nominally anticompetitive actions that had no chance of being successful." (Marshall, Tr. 3327). "How," he previously asked, "could a competent manager believe that substantial gains in profits are available for the price of a lunch and one hour of conversation?" (Marshall, Tr. 3327). "Successful explicit collusion requires planning, investments in administration, clear thinking, and hard work." (Marshall, Tr. 3327); *see also* RXD0218 at 1).

Response to Proposed Finding No. 690

The Proposed Finding is misleading and inaccurate because the quotes in this Proposed Finding are not from Dr. Marshall's own trial testimony about the facts of this case but are instead from

Patterson’s counsel reading text from demonstrative RXD0218 to Dr. Marshall during trial.
(Marshall, Tr. 3323-3330).

This Proposed Finding should be disregarded to the extent that it relies on demonstrative RXD0218 (an excerpt from Dr. Marshall’s Book “The Economics of Collusion: Cartels and Bidding Rings”) for support, in violation of the Court’s Order On Post-Trial Briefs at 3 (“Do not cite to demonstrative exhibits as substantive evidence.”).

This Proposed Finding is also irrelevant, incomplete, and misleading because in relation to Patterson’s counsel’s questions about Dr. Marshall’s testimony about the “tragedy” referenced in his book, Dr. Marshall clearly testified does *not* refer to a scenario where a company is accused of colluding over a “one-hour lunch” or “eight second” email, as Patterson’s counsel suggested. (Marshall, Tr. 3327-3328) (Q: It is a tragedy, according to you, in a book published by MIT, when a company gets accused of colluding during a one-hour lunch; right? A. *No. That's not what the intent of this.* The intent of this is to say it's a tragedy when firms engage in collusion and find that they haven't thought through what the implications are for being successful with their -- with the collusion. *That's what this is about.*); (Marshall, Tr. 3328) (again correcting Patterson’s counsel that his interpretation was incorrect); (Marshall, Tr. 3329-3330) (A: “No, again, what you are talking about is monitoring one another’s conduct in an anticompetitive agreement, that can be done very quickly.”); (Marshall, Tr. 3329-3330) (... “A: *That's not what this quote is about*”... “A: *Yeah. Again, it's not what this quote is about.*”) (emphasis added).

691. Dr. Marshall opined that Guggenheim’s February 8, 2013 email represented a structural break for Patterson. (CX7100 at 193–94).

Response to Proposed Finding No. 691

This Proposed Finding is inaccurate, incomplete, and misleading to the extent that it suggests that the email referenced in the Proposed Finding is the only event that Dr. Marshall considered to support his finding for a structural break for Patterson – in addition to the email referenced, Dr. Marshall studied other interactions related to Patterson entering into discussions with New Mexico Dental Cooperative in 2013 related to the 2013 structural break. (CX7100 at 193-194 (¶¶ 440-445); Marshall, Tr. 2891-2892)).

692. Dr. Marshall also opined that he observed a “structural break” in Patterson’s conduct because Patterson pursued the business of Smile Source in 2017, whereas Patterson had declined to do business with Smile Source in 2013. (CX7100 at 198; Marshall, Tr. 2893 (“Q. Did you have anything to say about Patterson and structural breaks, Dr. Marshall? A. One other observation is that in 2016–17 Patterson pursues the business of Smile Source and attempts to win that business.”)).

Response to Proposed Finding No. 692

Complaint Counsel has no specific response.

693. Aside from Patterson’s pursuing Smile Source in 2017, almost 2 years after the alleged conspiracy (Kahn, Tr. 19 (conspiracy ended in April 2015); *see also* RXD0205 at 1 (“The Alleged Conspiracy Ended in April 2015”)), Dr. Marshall observed no other evidence of a structural break in Patterson’s conduct after the alleged conspiracy.

Response to Proposed Finding No. 693

This Proposed Finding that “Dr. Marshall observed no other evidence of a structural break in Patterson’s conduct after the alleged conspiracy” is not supported by any citation to the evidence in the record and should be disregarded. This Proposed Finding should be disregarded to the extent that it relies on a demonstrative RXD0205 for support, in violation of the Court’s Order On Post-Trial Briefs at 3 (“Do not cite to demonstrative exhibits as substantive evidence.”).

The Proposed Finding also misstates the record regarding the time of the end of the conspiracy. The record shows that Complaint Counsel has stated that the conspiracy began to

fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015, because the conspiracy became difficult to maintain once Benco was required to log all communications with its competitors. (Tr. 19). Complaint Counsel has never taken the position that Benco's entry into a settlement with the Texas Attorney General created a precise "end" date. (Tr. 19; *see also* Complaint Counsel's Post Trial Brief at 37-38).

694. Dr. Marshall testified that members of buying groups often buy from distributors other than the one a buying group partners with. (Marshall, Tr. 3018 [REDACTED]).

Response to Proposed Finding No. 694

This Proposed Finding is inaccurate and misleading to the extent that it suggests that a non-exclusive distributor-buying group relationship renders a distributor partnership with a buying group unprofitable. None of the supplier for the buying groups in the five profitability studies demanded volume purchasing or exclusivity commitments from the supplier – Dr. Marshall acknowledged that the buying group dentists members were still free to purchase from other distributors not supplying the buying group. [REDACTED]. And yet, the results in all of the five case different case studies, was that buying groups drive incremental business to the distributor and that it was profitable for the supplier to supply the buying group. These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED]).

Additionally, Dr. Marshall explained that it does not matter that buying group member dentists did not substitute all of their purchases to the buying group distributor, using his Burkhardt Kois 2014 profitability analysis as an example:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

695. Dr. Marshall conceded that parallel conduct can occur in an industry, without collusive behavior, as “common reactions to common factors.” (Marshall, Tr. 2952–53 (“Q. It’s important when you’re trying to determine whether there is a conspiracy first to have parallel conduct and then to determine whether that parallel conduct can be explained by unilateral behavior or whether it is a result of collusive behavior; is that right? A. Sure. There’s barometric pressures in any industry which can lead to parallel conduct.”); Marshall, Tr. 2951–52 (“Q. Parallel conduct can occur in some cases because there might be common reactions to common factors that affect supply and demand; right? A. Mutually recognized interdependence is well-known in our business as to reasons that there may be parallel conduct. Q. And I think you’ve testified on direct that it’s possible that -- it’s possible that the respondents would have reasoned their way to not bidding for buying groups; right? A. That’s a possibility that I have to look at as I’m looking at the unilateral incentive to bid evidence as I move on in my analysis.”); *see also* RXD0210 at 1).

Response to Proposed Finding No. 695

This Proposed Finding is misleading to the extent it suggests that Dr. Marshall conceded that Respondents could have all instructed their employees not to bid on buying groups, without collusive behavior, as common reactions to common factors, given the facts of this case. Instead, the record evidence, consistent of Respondents’ contemporaneous business records and fact witness testimony, shows that all three Respondents turned down buying groups during the conspiracy period, all three of Respondents’ executives, including Cohen, Guggenheim, and Sullivan, instructed their sales teams to turn down buying groups during the

conspiracy period, and all three of Respondents' sales teams understood that the directive not to deal with buying groups came from the top of the company. (CCFF ¶¶ 398-399, 406-425, 527, 534-563, 630-650, 661-954; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

Dr. Marshall's report included many of the record evidence that shows this parallel conduct, explaining in his Report that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight." (CX7100 at 149 (¶ 346)).

Indeed, the facts of this case show that, prior to the start of the conspiracy, Respondents did not engage in the same parallel conduct of instructing their employees to refuse to discount to buying groups. Instead, the facts show that Schein started discounting to buying groups before 2011. (CCFF ¶¶ 432-453). Moreover, the record evidence shows that all three Respondents turned down buying groups during the conspiracy period, all three of Respondents' executives, including Cohen, Guggenheim, and Sullivan, instructed their sales teams to turn down buying groups during the conspiracy period, and all three of Respondents' sales teams understood that the directive not to deal with buying groups came from the top of the company. (CCFF ¶¶ 398-399, 406-425, 527, 534-563, 630-650, 661-954; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). Thus, the premise that Respondents could have engaged in the same parallel conduct of instructing their employees to reject buying groups, absent collusive behavior, is contrary to the facts of this case.

This Proposed Finding should be disregarded to the extent that it relies on a demonstrative RXD0210 for support, in violation of the Court's Order On Post-Trial Briefs at 3 ("Do not cite to demonstrative exhibits as substantive evidence.").

696. Dr. Marshall conceded that not all buying groups present profitable opportunities, for example due to a “cannibalization effect.” (Marshall, Tr. 3002–03 [REDACTED])

Response to Proposed Finding No. 696

This Proposed Finding is incomplete and misleading to the extent that it suggests that Dr. Marshall did not specifically study the effects of cannibalization in relation to Respondents in this matter and conclude that it was still profitable for Respondents to do business with buying groups to reach his opinions – he did.

Specifically, Dr. Marshall examined the effects of potential cannibalization in his five profitability studies and found that the distributor-buying groups relationships were profitable for the distributor despite the potential for cannibalization. (CCFF ¶¶ 1651-1656, 1664-1666, 1672-1673, 1678). Even going further than just analyzing distributor-buying group relationships in his profitability studies, Dr. Marshall also specifically analyzed Kois Buyers Group members in an area where the buying group supplier Burkhardt had a high degree of penetration: Washington State. [REDACTED]

[REDACTED].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]. Because Benco's nationwide share is much less than both Burkhart's share in the State of Washington, and Atlanta Dental's share in the State of Georgia, absent other differences,

Benco would be expected to find supplying a nationwide buying group profitable. (CX7101 at 053 (¶ 133) (Marshall Expert Rebuttal Report)).

To further address any cannibalization concerns for Schein, a larger national full-service distributor than Benco and Patterson, Dr. Marshall did a profitability analyses assessing Schein's profits and losses in doing business with buying groups in relation for the end of Schein's relationship with Smile Source in 2012 as well as in 2017 when Schein again bid for Smile Source's business. (CX7100 at 186 (¶ 413) ("As I noted at the start of this section..., supplying buying groups, all else equal, is likely to be less profitable for a larger distributor. Because Schein is larger than Patterson and Benco, and hence has a higher national share (see Figure 25), given that it was profitable for Schein to start a new relationship with Smile Source in 2017, it should have been profitable for Patterson or Benco to do so as well.)).

697. Dr. Marshall defined cannibalization in this context as follows: "A dental distributor already has a set of dentists, customers, who are buying from them at a price, and when it becomes the distributor for that buying group, those dentists who are already buying from that distributor who sign up for the buying group are going to get lower prices than they were paying before, so they – the distributor is already selling to them some amount. They sign up for the buying group that that distributor is willing to supply, and those customers, the prices for them are just dropping. So that's an unprofit- -- that's -- part of the calculation is unprofitable. That's what I'm referring to as cannibalization." (Marshall, Tr. 3280–81).

Response to Proposed Finding No. 697

This Proposed Finding is incomplete and misleading to the extent that it suggests that Dr. Marshall did not study the effects of cannibalization in relation to Respondents in this matter. Dr. Marshall examined the effects of potential cannibalization in his five profitability studies and found that the distributor-buying groups relationships were profitable for the distributor despite the potential for cannibalization. (CCFF ¶¶ 1651-1656, 1664-1666, 1672-1673, 1678).

In addition to analyzing distributor-buying group relationships in his profitability studies, Dr. Marshall also specifically analyzed Kois Buyers Group members in an area where the buying group supplier Burkhart had a high degree of penetration: Washington State. [REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED].

In addition to analyzing Burkhart's profitability in Washington State, [REDACTED]

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[REDACTED]

[REDACTED]. Because Benco's nationwide share is much less than both Burkhart's share in the State of Washington, and Atlanta Dental's share in the State of Georgia, absent other differences, Benco would be expected to find supplying a nationwide buying group profitable. (CX7101 at 053 (¶ 133) (Marshall Expert Rebuttal Report)).

To further address any cannibalization concerns for Schein, a larger national full-service distributor than Benco and Patterson, Dr. Marshall did a profitability analyses assessing Schein's profits and losses in doing business with buying groups in relation for the end of Schein's relationship with Smile Source in 2012 as well as in 2017 when Schein again bid for Smile Source's business. (CX7100 at 186 (¶ 413) ("As I noted at the start of this section..., supplying buying groups, all else equal, is likely to be less profitable for a larger distributor. Because Schein is larger than Patterson and Benco, and hence has a higher national share (see Figure 25), given that it was profitable for Schein to start a new relationship with Smile Source in 2017, it should have been profitable for Patterson or Benco to do so as well.)).

698. Dr. Marshall also testified that members of buying groups often buy from distributors other than the one a buying group partners with. (Marshall, Tr. 3018 [REDACTED])

Response to Proposed Finding No. 698

This Proposed Finding is inaccurate and misleading to the extent that it suggests that a non-exclusive distributor-buying group relationship renders a distributor partnership with a buying group unprofitable. [REDACTED]

[REDACTED] (CCFF ¶¶ 1651-1656, 1664-1666, 1672-1673, 1678).

Additionally, Dr. Marshall explained that it does not matter that buying group member dentists did not substitute all of their purchases to the buying group distributor, using his Burkhardt Kois 2014 profitability analysis as an example:

[REDACTED]

[REDACTED].

699. Though he listed CX0148 on his list of materials considered (CX7100 at 243), Dr. Marshall did not consider the fact that it shows that, on or about December 31, 2013, a Patterson employee reported to Patterson’s David Misiak and Neal McFadden that Patterson already does business with “all [Smile Source members] that [she] looked up.” (Marshall, Tr. 3283 (“Q. . . . did you see anything, did you review any deposition transcripts or documents in the case, during your 14 months of studying things, that suggested that my client thought Smile Source, after meeting with Mr. Goldsmith, might just be cannibalizing its existing customers? . . . A. I don’t recall anything from the 2013 time frame.”); Marshall, Tr. 3284 (“Q. This document you did not consider as part of preparing your \$2.5 million-plus opinion in this case. A. Well, I don’t recall this right now.”)).

Response to Proposed Finding No. 699

This Proposed Finding is misleading and inaccurate because the testimony cited indicates that Dr. Marshall “does not recall” CX0148, not that he “did not consider” it. The Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (Order On Post-Trial Briefs at 3 (“Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents.”); *see also* Marshall Tr. at 2884-2885 (J. Chappell: “My advice to both parties, experts are not fact witnesses.”)).

700. Instead, Dr. Marshall opined that [REDACTED] after Smile Source approached Patterson in late 2013. (CX7100 at 198).

Response to Proposed Finding No. 700

This Proposed Finding is misleading and incomplete because it omits this statement from Dr. Marshall’s Expert Report that is supported by Patterson’s Misiak’s own testimony. (CX7100 at 198 (¶ 459) (citing CX0316 (Misiak, IHT at 172-173) (“Q: Are you aware of Patterson doing any

further research about Smile Source following this e-mail chain?” A: I am not, up until recently.”)).

701. Dr. Marshall did not study how many Smile Source customers were already customers of Patterson when Smile Source approached Patterson in December 2013 during the alleged conspiracy. (Marshall, Tr. 3282 (“Q. So you don’t recall studying how many Smile Source members were already existing Patterson customers in this time period; correct? A. That’s correct.”); Marshall, Tr. 3288 (“Q. You didn’t study how many members of Smile Source in December 2013 were already Patterson customers and how much they were buying from Patterson; correct? A. Well, not -- not directly as you’re suggesting, but I did again study what was going on with Patterson through the Burkhart-Smile Source study and also the Atlanta Dental-Smile Source study.”)).

Response to Proposed Finding No. 701

This Proposed Finding is misleading and incomplete to the extent that Patterson uses it to support an argument that Dr. Marshall did not analyze potential cannibalization effects with regards to Patterson.

Dr. Marshall examined the effects of potential cannibalization in his five profitability studies and found that the distributor-buying groups relationships were profitable for the distributor despite the potential for cannibalization. (CCFF ¶¶ 1651-1656, 1664-1666, 1672-1673, 1678).

In addition to analyzing distributor-buying group relationships in his profitability studies, Dr. Marshall also specifically analyzed Kois Buyers Group members in an area where the buying group supplier Burkhart had a high degree of penetration: Washington State. [REDACTED]

[REDACTED]

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In addition to analyzing Burkhart's profitability in Washington State, [REDACTED]

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[REDACTED]. Because Benco's nationwide share is much less than both Burkhart's share in the State of Washington, and Atlanta Dental's share in the State of Georgia, absent other differences, Benco would be expected to find supplying a nationwide buying group profitable. (CX7101 at 053 (¶ 133) (Marshall Expert Rebuttal Report)).

To further address any cannibalization concerns for Schein, a larger national full-service distributor than Benco and Patterson, Dr. Marshall did a profitability analyses assessing Schein's profits and losses in doing business with buying groups in relation for the end of Schein's relationship with Smile Source in 2012 as well as in 2017 when Schein again bid for Smile Source's business. (CX7100 at 186 (¶ 413) ("As I noted at the start of this section..., supplying buying groups, all else equal, is likely to be less profitable for a larger distributor. Because Schein is larger than Patterson and Benco, and hence has a higher national share (see Figure 25), given that it was profitable for Schein to start a new relationship with Smile Source in 2017, it should have been profitable for Patterson or Benco to do so as well.)).

702. Paragraph 491 of Dr. Marshall's report lists 38 groups that at least one Respondent determined to be a buying group and at least one Respondent turned down. (CX7100 at —209-13; (Marshall, Tr. 2986 [REDACTED]

[REDACTED].

Response to Proposed Finding No. 702

Complaint Counsel does not disagree and adds that the list of 38 groups identified in this Proposed Finding is in the anticompetitive effects section of his expert report. (Marshall, Tr.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED], 3385).

703. But at least one of the 38 groups listed in paragraph 491 of Dr. Marshall's report—Dental Gator—did not meet these criteria. (CX7100 at 213; Marshall, Tr. 2992–93 [REDACTED])

Response to Proposed Finding No. 703

The Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (Order On Post-Trial Briefs at 3 (“Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents.”); *see also* Marshall Tr. at 2884-2885 (J. Chappell: “My advice to both parties, experts are not fact witnesses.”)).

This Proposed Finding is irrelevant, inaccurate, and should be disregarded to the extent that it suggests that Dr. Marshall should conclusively determine the fact of what is and is not considered a buying group. Both this Court and Dr. Marshall acknowledged that Dr. Marshall is not a fact-finder. (Marshall Tr. at 2884-2885 (J. Chappell: “My advice to both parties, experts are not fact witnesses”), 2946 (Marshall testified that he is “not offering an opinion about the facts.”)).

704. Dr. Marshall was also unaware that another buying group he included in his report's paragraph 491, Dentistry Unchained, was not in existence during the alleged conspiracy

period. (Marshall, Tr. 3273 (“Q. Did you realize, when you included Dentistry Unchained in here, that they weren’t even in existence during the period from February 2013 to April 2015 when my client was alleged to have entered and exited the conspiracy? A. No.”); Marshall, Tr. 3274 (“Q. You just stuck it in paragraph 491 even though it was after the conspiracy was over; right? A. Yeah. By what’s being said here, I understand what you’re saying. Yes.”); *see also* RXD0212 at 1).

Response to Proposed Finding No. 704

The Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (Order On Post-Trial Briefs at 3 (“Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents.”); *see also* Marshall Tr. at 2884-2885 (J. Chappell: “My advice to both parties, experts are not fact witnesses.”)).

This Proposed Finding should be disregarded to the extent that it relies on a demonstrative RXD0212 for support, in violation of the Court’s Order On Post-Trial Briefs at 3 (“Do not cite to demonstrative exhibits as substantive evidence.”).

705. Dr. Marshall’s Paragraph 491 also does not list the Dental Cooperative of Utah, even though Complaint Counsel has alleged that it was a “buying group” that “continued to seek supply contracts with Patterson” in 2013. (RX2958 at 7–9 (Supplemental Response to Interrogatory 3)).

Response to Proposed Finding No. 705

The Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (Order On Post-Trial Briefs at 3 (“Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents.”); *see also* Marshall Tr. at 2884-2885 (J. Chappell: “My advice to both parties, experts are not fact witnesses.”)).

This Proposed Finding is irrelevant, inaccurate, and should be disregarded to the extent that it suggests that Dr. Marshall should conclusively determine the fact of what is and is not considered a buying group. Both this Court and Dr. Marshall acknowledged that Dr. Marshall is not a fact-finder. (Marshall Tr. at 2884-2885 (J. Chappell: “My advice to both parties, experts are not fact witnesses”), 2946 (Marshall testified that he is “not offering an opinion about the facts.”)).

706. Dr. Marshall’s Paragraph 491 also does not list Hampton Roads Dental Partners, Integrity Dental Buyers’ Group, KlearImpakt, Steadfast Medical, The Dental Service Company, or UOBG, even though Complaint Counsel has alleged that all of these were “buying groups” that may have bought dental equipment or supplies from Patterson but for the alleged conspiracy.” (RX2958 at 7–9 (Supplemental Response to Interrogatory 3)).

Response to Proposed Finding No. 706

The Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (Order On Post-Trial Briefs at 3 (“Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents.”); *see also* Marshall Tr. at 2884-2885 (J. Chappell: “My advice to both parties, experts are not fact witnesses.”)).

This Proposed Finding is irrelevant, inaccurate, and should be disregarded to the extent that it suggests that Dr. Marshall should conclusively determine the fact of what is and is not considered a buying group. Both this Court and Dr. Marshall acknowledged that Dr. Marshall is not a fact-finder. (Marshall Tr. at 2884-2885 (J. Chappell: “My advice to both parties, experts are not fact witnesses”), 2946 (Marshall testified that he is “not offering an opinion about the facts.”)).

707. Dr. Marshall's Paragraph 491, in listing the Florida Dental Association and citing CX0084 in support (CX7100 at 210 n.838), also fails to note that CX0084 is dated March 8, 2012, about a year *before* Patterson allegedly joined a conspiracy. (RX2958 at 10 (Complaint Counsel's Supplemental Response to Patterson's Interrogatory Four) ("Patterson joined the agreement in February 2013.")).

Response to Proposed Finding No. 707

The Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (Order On Post-Trial Briefs at 3 ("Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents."); *see also* Marshall Tr. at 2884-2885 (J. Chappell: "My advice to both parties, experts are not fact witnesses.")). Additionally, this Proposed Finding is irrelevant in suggesting that this does not apply to Patterson because paragraph 491 of Dr. Marshall made clear that his report lists 38 groups in the anticompetitive effects section of his report where at least one Respondent determined to be a buying group and at least one Respondent turned down. (CX7100 at 209-213 (¶ 491) (Marshall Expert Report); [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]).

708. Dr. Marshall's Paragraph 491, in listing Synergy Dental Partners and citing CX1133 in support (CX7100 at 212 n.861), also fails to note that CX1133 (stating that Synergy had "approached every full service dealer . . . and were turned down) is dated August 18, 2011, about a year-and-a-half *before* Patterson allegedly joined a conspiracy. (RX2958 at 10 (Complaint Counsel's Supplemental Response to Patterson's Interrogatory Four) ("Patterson joined the agreement in February 2013.")).

Response to Proposed Finding No. 708

The Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not

through expert testimony. (Order On Post-Trial Briefs at 3 (“Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents.”); *see also* Marshall Tr. at 2884-2885 (J. Chappell: “My advice to both parties, experts are not fact witnesses.”)). Additionally, this Proposed Finding is irrelevant in suggesting that this does not apply to Patterson because paragraph 491 of Dr. Marshall made clear that his report lists 38 groups in the anticompetitive effects section of his report where at least one Respondent determined to be a buying group and at least one Respondent turned down. (CX7100 at 209-213 (¶ 491) (Marshall Expert Report); [REDACTED] [REDACTED] [REDACTED]).

709. Dr. Marshall testified that it is rational for distributors to turn down “incoherent,” “irrational,” or “irresponsible” business proposals from buying groups. (Marshall, Tr. 3259 (“[I]f a distributor is talking to someone who they think is interacting with them in an irrational or irresponsible way, it would make sense not to do business with such a person.”); 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.”); *see also* RXD0219 at 1).

Response to Proposed Finding No. 709

Complaint Counsel does not disagree that this Proposed Finding cites to Dr. Marshall’s testimony but notes that it is misleading to the extent that Patterson the quoted testimony is based on a hypothetical and untethered to any specific facts of this case, including any scenario in this case involving Qadeer Ahmed and Kois. In fact, when Patterson’s counsel asked Dr. Marshall about Qadeer Ahmed, Dr. Marshall specifically stated that he did not know about “the Mr. Ahmed part being inserted [by Patterson’s counsel].” (Marshall, Tr. 3260).

710. But when questioned about specific buying groups from his list of 38 in paragraph 491, Dr. Marshall did not know whether any of them presented a coherent proposal to Patterson, including:

- **Dr. Stephen Sebastian’s Buying Club**, (Marshall, Tr. 3263 (“Q. Can you tell me what sort of coherent proposal he made to my client Patterson Companies and when before you put him in this paragraph 491? A. No. Everything that I’ve conveyed is in the footnote in 845 as best as I recall. Q. So you don’t know sitting here today if he made a coherent proposal to my client Patterson Companies. A. No. All the information again is in the footnote. Q. So the answer to my question is no, you don’t know if he made a coherent proposal to my client Patterson Companies. A. That’s correct, I don’t know that.”));
- **Nexus Dentistry**, (Marshall, Tr. 3264–65 (“Q. I’m asking, as to my client Patterson Companies, did Nexus Dentistry approach my client Patterson Companies? A. I don’t know that. Q. So you can’t tell me today sitting here that Nexus Dentistry made a coherent business proposal to my client Patterson Companies; correct? A. Correct, I can’t say that.”));
- **Catapult**, (Marshall, Tr. 3265 (“Q. What about Catapult, number 16? Can you tell us if they made a coherent business proposal to my client Patterson Companies? A. The footnote here is 849. It’s a Patterson document, which is: “I will respond to Dr. Graham with a polite pass on this request.” I don’t know that he made a coherent proposal.”));
- **Dental Purchasing Group**, (Marshall, Tr. 3267 (“Q. Can you tell me anything about the proposal Dental Purchasing Group, LLC made to my client Patterson Companies at all? A. Yeah. I did not review a proposal specifically put forward by Dental Purchasing Group.”; Marshall, Tr. 3271 (“Q. I just asked you, can you sitting here today, after all the study you’ve done of the industry, tell us that this vet, veterinarian, [Dental Purchasing Group] made a coherent proposal to my client? A. I didn’t review the proposal that was made to your client.”)); and
- **Stratus Dental**, (Marshall, Tr. 3274–75 (“What can you tell me about whether Stratus Dental made a coherent proposal to my client Patterson, Dr. Marshall? . . . So I don’t see anything here about the nature of the proposal that was made. . . . Q. So you can’t tell me they made a coherent proposal to my client Patterson; right? A. Not -- no, I can’t, not from the footnote. I don’t have knowledge of that. Q. And you can’t tell me when they made a proposal, if they made a proposal, to my client, can you? A. Yeah. I don’t see that revealed in the footnote, and I don’t have recollection of that.”)).

Response to Proposed Finding No. 710

This Proposed Finding is irrelevant and misleading because Dr. Marshall identified the list of buying groups in the anticompetitive effects section of his expert report and illustrates the anticompetitive effects of number of instances where at least one Respondent turned down an

entity that they thought was a buying group during the relevant period – whether or not a proposal was “coherent” or not is not relevant to the number of buying groups on Dr. Marshall’s list that Respondents turned down. (Marshall, Tr. 2901-2902 (“Q. In the anticompetitive effects section of your report you also identify a list of buying groups. A. Yes. Q. So why did you decide to include evidence with regards to the buying groups in that section of your report? A. So there’s -- these are buying groups that are recognized -- in paragraph 491, they’re buying groups that are recognized as buying groups by at least one of the respondents where at least one of the respondents is not bidding for the business of these buying groups. And the implication here is that there is diminished competition for those buying groups, and the implication is that some of them are not going to get supplied, or if they are going to get supplied, they’re getting supplied at higher prices.”)). The Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (Order On Post-Trial Briefs at 3 (“Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents.”); *see also* Marshall Tr. at 2884-2885 (J. Chappell: “My advice to both parties, experts are not fact witnesses.”)).

711. Dr. Marshall testified at trial that he did not review transcript testimony to determine what it meant when Mr. McFadden wrote “this doctor is a vet” in response to receiving a proposal from the Dental Purchasing Group. (Marshall, Tr. 3269–70 (“Q. All right. Did you review any transcript of the testimony of these three witnesses in the case: Neal McFadden, who was president of Special Markets; Paul Guggenheim, who was president of Patterson Dental; and Dave Misiak, who was vice president of sales? Did you review their testimony in the trial? A. I’m -- I think I’ve looked at some of their testimony, but I don’t recall this, of anything in reference to this. Q. All right. So you don’t remember the part where they discussed this last sentence here in Mr. McFadden’s e-mail which says, “This doctor is a vet not a dentist.” Do you see that part? A. I see that, yeah. Q. Yeah. Did you review the testimony about what that means? A. No, I didn’t review the testimony about what that means.”)).

Response to Proposed Finding No. 711

This Proposed Finding is irrelevant and misleading to the extent that it references “Dental Purchasing Group” in relation the list of buying groups in paragraph 491 or Dr. Marshall’s Expert Report. (CX7100 at 209-213 (§ 491) (Marshall Expert Report)). The buying group list in the anticompetitive effects section of Dr. Marshall’s expert report illustrates the anticompetitive effects of number of instances where at least one Respondent turned down an entity that they thought was a buying group during the relevant period – whether or not the doctor from Dental Purchasing Group was a “vet” is not relevant to the number of buying groups on Dr. Marshall’s list that Respondents turned down. (Marshall, Tr. 2901-2902 (“Q. In the anticompetitive effects section of your report you also identify a list of buying groups. A. Yes. Q. So why did you decide to include evidence with regards to the buying groups in that section of your report? A. So there’s -- these are buying groups that are recognized -- in paragraph 491, they’re buying groups that are recognized as buying groups by at least one of the respondents where at least one of the respondents is not bidding for the business of these buying groups. And the implication here is that there is diminished competition for those buying groups, and the implication is that some of them are not going to get supplied, or if they are going to get supplied, they’re getting supplied at higher prices.”)).

The Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (Order On Post-Trial Briefs at 3 (“Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents.”); *see also* Marshall Tr. at 2884-2885 (J. Chappell: “My advice to both parties, experts are not fact witnesses.”)).

712. Dr. Marshall did not know that the individual starting the Dental Purchasing Group buying group, which is listed in his paragraph 491, was a veterinarian. (Marshall, Tr. 3270 (“Q. Do you, Dr. Marshall, do you know if this dentist, this doctor who left this voice mail about the Dental Purchasing Group, do you know if he’s a veterinarian? A. I don’t know that. Q. So you don’t know if he was proposing to start a dental buying group to brush dogs’ teeth or fill cavities in cats or something like that; right? A. I -- I don’t know what this statement means. They’re -- the statement you’ve highlighted here that said he was a vet and not a dentist.”)).

Response to Proposed Finding No. 712

This Proposed Finding is irrelevant and misleading to the extent that it references “Dental Purchasing Group” in relation the list of buying groups in paragraph 491 or Dr. Marshall’s Expert Report. (CX7100 at 209-213 (¶ 491) (Marshall Expert Report)). The buying group list in the anticompetitive effects section of Dr. Marshall’s expert report illustrates the anticompetitive effects of number of instances where at least one Respondent turned down an entity that they thought was a buying group during the relevant period – whether or not the doctor from Dental Purchasing Group was a veterinarian is not relevant to on the number of buying groups on Dr. Marshall’s list that Respondents turned down. (Marshall, Tr. 2901-2902 (“Q. In the anticompetitive effects section of your report you also identify a list of buying groups. A. Yes. Q. So why did you decide to include evidence with regards to the buying groups in that section of your report? A. So there’s -- these are buying groups that are recognized -- in paragraph 491, they’re buying groups that are recognized as buying groups by at least one of the respondents where at least one of the respondents is not bidding for the business of these buying groups. And the implication here is that there is diminished competition for those buying groups, and the implication is that some of them are not going to get supplied, or if they are going to get supplied, they’re getting supplied at higher prices.”)).

The Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not

through expert testimony. (“Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents.”); *see also* Marshall Tr. at 2884-2885 (J. Chappell: “My advice to both parties, experts are not fact witnesses.”)).

b. Responses to Proposed Findings Regarding “Dr. Marshall’s Reliance On Kois And Smile Source, Without Showing They Are Representative Of Buying Groups At Large, Is Misplaced.”

713. Dr. Marshall did not perform profitability analyses for 36 out of the 38 groups he opines were turned down by at least one Respondent during the alleged conspiracy period. (Marshall, Tr. 2987 [REDACTED])

Response to Proposed Finding No. 713

This Proposed Finding is irrelevant and misleading. First, the Proposed Finding is misleading because Dr. Marshall identified the list of buying groups referenced in this Proposed Finding in the anticompetitive effects section of his expert report – the list is not related to his profitability analyses. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED], 3385).

Second, to the extent that this Proposed Finding suggests that Dr. Marshall only offered an opinion with respect to two buying groups, it is inaccurate, incomplete, and misleading because based in part on his review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents’ self-interest to have a categorical or blanket policy

whereby they instructed employees to reject buying groups as an entire customer segment.

(CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that “[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight.”); *see also* Marshall, Tr. 3387-3384 (“I’m noting, though, that again that they’re making a blanket statement here: We don’t do business with buying groups,” “I am just noting again that they have made statements of a blanket nature: We don’t do business with buying groups,” “It says right here ‘we would consider them a GPO,’ group purchasing organization these types of affiliations as single customer.’ It’s just a blanket statement Buying club, we don’t do business with it. That’s it. It doesn’t reflect any incremental evaluation.”); Marshall, Tr. 3266 (“I’m looking at this quotation and it says ‘Typical approach of an upstart buying group’ ...and it’s passing on this as a matter of policy.’”)).

Third, the Proposed Finding is misleading and incomplete because it ignores that many of these groups were never fully formed because they could not secure supply discounts from Respondents, precluding any data analysis. (CX7101 at 064 (¶ 163) (Marshall Expert Rebuttal Report).)

Fourth, the Proposed Finding is irrelevant and incomplete because it ignores that the buying groups in Dr. Marshall studied in his five profitability studies are representative as they share the common feature of being [REDACTED]

[REDACTED]; *see also* CX8040 (Marshall, Dep. at 212) (explaining that Kois and Smile Source are “the same in the sense of the definition I offer in paragraph 139.”)). Additionally, Dr.

Marshall explained that for buying groups generally “[a]ll these groups will have different management and they’ll be issues that are different between them. But, again, these fall within what’s identified in paragraph 139 of my report.” (CX8040 (Marshall, Dep. at 212)). Regarding why Smile Source and Kois Buyers Group were good case studies for his profitability analysis, Dr. Marshall explained that “Smile Source and Kois had characteristics associated with them that suggested that they were good candidates for investigating the profitability as done in section 5 of my original report.” (CX8040 (Marshall, Dep. at 148)).

Regarding the additional characteristics that made Smile Source and Kois Buyers Group good case studies, Dr. Marshall elaborated:

Q: Why did you choose to study Kois and Smile Source?

A: *So these are highly representative of what’s going on in this following sense. It covers a broad geography of the country. It covered a broad time span going from 2012 through 2017. And in addition to that, there were different sizes of the buying groups at the times I looked at them. For Kois it was at the inception of the buying group. And then in the other studies, we had small size to the buying group, medium size to the buying group, large size to the buying group, so I was able to get a good look at what was going on with buying groups in that diversity.*

(Marshall Tr. 2863 (emphasis added); Marshall, Tr. 3244 (“What I had said is the following, that the Kois and the five studies cover a geography of the United States. And in addition to that, we have buying groups at different stages. We had -- in terms of size. We have -- when they’re at their inception, when they’re small, when they’re medium and when they’re large in size, that this is the nature of the representativeness that I had spoken about with – in my direct testimony.”); *see also* CX8041 (Marshall, Dep. at 382 (“I felt that the data that was available for Kois and Smile Source spoke to a broad range of the issues in this matter; and therefore, I felt comfortable with the analysis being conducted in Section 5 [of the Marshall Expert Report].”)).

714. The only buying groups that Dr. Marshall studied were Kois and Smile Source. (Marshall, Tr. 2972–73 [REDACTED])

Response to Proposed Finding No. 714

This Proposed Finding is inaccurate, incomplete, and misleading in suggesting that Dr. Marshall only offered an opinion with respect to two buying groups. Based in part on his review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also* Marshall, Tr. 3387-3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."); Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group' ...and it's passing on this as a matter of policy.'"))).

This Proposed Finding is incomplete because it ignores that Dr. Marshall explained that Smile Source and Kois Buyers Group were good case studies for his profitability analysis because "Smile Source and Kois had characteristics associated with them that suggested that they were

good candidates for investigating the profitability as done in section 5 of my original report.”
(CX8040 (Marshall, Dep. at 148)).

Regarding the additional characteristics that made Smile Source and Kois Buyers Group good case studies, Dr. Marshall elaborated:

Q: Why did you choose to study Kois and Smile Source?

A: *So these are highly representative of what's going on in this following sense.* It covers a broad geography of the country. It covered a broad time span going from 2012 through 2017. And in addition to that, there were different sizes of the buying groups at the times I looked at them. For Kois it was at the inception of the buying group. And then in the other studies, we had small size to the buying group, medium size to the buying group, large size to the buying group, so I was able to get a good look at what was going on with buying groups in that diversity.

(Marshall Tr. 2863 (emphasis added); Marshall, Tr. 3244 (“What I had said is the following, that the Kois and the five studies cover a geography of the United States. And in addition to that, we have buying groups at different stages. We had -- in terms of size. We have -- when they're at their inception, when they're small, when they're medium and when they're large in size, that this is the nature of the representativeness that I had spoken about with – in my direct testimony.”); *see also* CX8041 (Marshall, Dep. at 382 (“I felt that the data that was available for Kois and Smile Source spoke to a broad range of the issues in this matter; and therefore, I felt comfortable with the analysis being conducted in Section 5 [of the Marshall Expert Report].”)).

715. Dr. Marshall conceded that he did not cite a single piece of evidence showing that Patterson communicated with anyone from Schein or Benco about either Kois or Smile Source. (Marshall, Tr. 3202–03 (“Q. And so paragraph 315 does not say anything or cite anything showing that anybody from Patterson ever talked to anybody from Schein or Benco about either Kois or Smile Source, the only two buying groups you studied in V.D of your report correct? A. I -- that's correct.”)).

Response to Proposed Finding No. 715

This Proposed Finding is misleading and inaccurate because the testimony cited does not support the Proposed Finding: Dr. Marshall does not concede that he did not cite a single piece of evidence showing that Patterson communicated with anyone from Schein or Benco about either Kois or Smile Source – instead, Dr. Marshall testified that he does not cite such a communication in paragraph 315 of his expert report.

The Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (Order On Post-Trial Briefs at 3 (“Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents.”); *see also* Marshall Tr. at 2884-2885 (J. Chappell: “My advice to both parties, experts are not fact witnesses.”)).

This Proposed Finding is inaccurate and misleading to the extent that it suggests that there must be communications between Patterson and Schein or Benco about Kois or Smile Source in order to show that Patterson acted against its own unilateral economic self-interest by not bidding on buying groups in the profitability studies in Section V.D of Dr. Marshall’s Report – rather, Dr. Marshall’s data-driven profitability analysis showed that Patterson acted against its economic self interest by not bidding on buying groups in his profitability studies. (CCFF ¶¶ 1655, 1658-1659, 1665, 1667, 1674).

716. Dr. Marshall testified that Kois and Smile Source were highly representative of other buying groups. (Marshall, Tr. 3245 (“In response to one of the government’s questions, you said Kois and Smile Source were highly representative of other buying groups; right? A. In the sense that I just gave you, yes, they’re representative. Q. Highly, that’s what you said, highly representative; correct? A. Well, I don’t recall “highly,” but I’m fine with that, yes.”))

Response to Proposed Finding No. 716

This Proposed Finding is incomplete because it ignores Dr. Marshall's complete testimony regarding why Kois and Smile Source were representative of other buying groups. Dr. Marshall elaborated:

Q: Why did you choose to study Kois and Smile Source?

A: *So these are highly representative of what's going on in this following sense. It covers a broad geography of the country. It covered a broad time span going from 2012 through 2017. And in addition to that, there were different sizes of the buying groups at the times I looked at them. For Kois it was at the inception of the buying group. And then in the other studies, we had small size to the buying group, medium size to the buying group, large size to the buying group, so I was able to get a good look at what was going on with buying groups in that diversity.*

(Marshall Tr. 2863 (emphasis added); Marshall, Tr. 3244 ("What I had said is the following, that the Kois and the five studies cover a geography of the United States. And in addition to that, we have buying groups at different stages. We had -- in terms of size. We have -- when they're at their inception, when they're small, when they're medium and when they're large in size, that this is the nature of the representativeness that I had spoken about with -- in my direct testimony."); *see also* CX8041 (Marshall, Dep. at 382 ("I felt that the data that was available for Kois and Smile Source spoke to a broad range of the issues in this matter; and therefore, I felt comfortable with the analysis being conducted in Section 5 [of the Marshall Expert Report]."))).

Additionally, Dr. Marshall explained that the Kois and Smile Source buying groups that he studied in his five profitability studies are representative as they share the common feature of being [REDACTED]

[REDACTED]; *see also* CX8040 (Marshall, Dep. at 212) (explaining that Kois and Smile Source are "the same in the sense of the definition I offer in paragraph 139.")). Additionally, Dr. Marshall explained that for buying groups generally "[a]ll these groups will have different management and they'll be

issues that are different between them. But, again, these fall within what's identified in paragraph 139 of my report.” (CX8040 (Marshall, Dep. at 212)).

Like all buying groups, Kois and [REDACTED] do not force members to purchase from contracted distributors—in other words, they do not *require* compliance. (CCFF ¶¶ 1685-1687, 1689-1695; [REDACTED]; CX8040 (Marshall, Dep. at 212)).

717. Dr. Marshall acknowledged that there was no statistical evidence that Kois and Smile Source were representative of other buying groups. (Marshall, Tr. 3243-44 (“Q. . . . did you do any statistical analysis in your report to show that Kois and Smile Source were statistically represented -- representative of other buying groups in the country? A. There’s no statistical representation of that.”)).

Response to Proposed Finding No. 717

This Proposed Finding is misleading and unsupported to the extent that it suggests that a statistical analysis is necessary to determine which groups are representative of other buying groups. Moreover, the Proposed Finding is incomplete because it cuts off Dr. Marshall’s subsequent explanation that “Statistical analysis is not particularly relevant when you’re studying every single dentist you can possibly study. It’s not a sample, is what I am saying.” (Marshall, Tr. 3244).

The Proposed Finding is also incomplete because it omits Dr. Marshall’s testimony explaining why Kois and Smile Source were representative of other buying groups. Dr. Marshall elaborated:

Q: Why did you choose to study Kois and Smile Source?

A: *So these are highly representative of what’s going on in this following sense. It covers a broad geography of the country. It covered a broad time span going from 2012 through 2017. And in addition to that, there were different sizes of the buying groups at the times I looked at them. For Kois it was at the inception of the buying group. And then in the other studies, we had small size to the buying group, medium size to the buying group,*

large size to the buying group, so I was able to get a good look at what was going on with buying groups in that diversity.

(Marshall Tr. 2863 (emphasis added); Marshall, Tr. 3244 (“What I had said is the following, that the Kois and the five studies cover a geography of the United States. And in addition to that, we have buying groups at different stages. We had -- in terms of size. We have -- when they’re at their inception, when they’re small, when they’re medium and when they’re large in size, that this is the nature of the representativeness that I had spoken about with – in my direct testimony.”); *see also* CX8041 (Marshall, Dep. at 382 (“I felt that the data that was available for Kois and Smile Source spoke to a broad range of the issues in this matter; and therefore, I felt comfortable with the analysis being conducted in Section 5 [of the Marshall Expert Report].”)).

Additionally, Dr. Marshall explained that the Kois and Smile Source buying groups that he studied in his five profitability studies are representative as they share the common feature of being [REDACTED]; *see also* CX8040 (Marshall, Dep. at 212) (explaining that Kois and Smile Source are “the same in the sense of the definition I offer in paragraph 139.”)). Additionally, Dr. Marshall explained that for buying groups generally “[a]ll these groups will have different management and they’ll be issues that are different between them. But, again, these fall within what’s identified in paragraph 139 of my report.” (CX8040 (Marshall, Dep. at 212)).

Like all buying groups, Kois and [REDACTED] do not force members to purchase from contracted distributors—in other words, they do not *require* compliance. (CCFF ¶¶ 1685-1687, 1689-1695; [REDACTED]; CX8040 (Marshall, Dep. at 212)).

718. Dr. Marshall concluded that Kois was highly representative of buying groups despite listing, among materials he relied upon that contradicted his opinion, a Kois Buyers Group presentation calling the Kois Buyers Group “profoundly different” from buying groups and “not a standard BUYING GROUP” (CX7100 at 261 (listing CX4060); (Marshall, Tr. 3255 (“Q. And you relied upon this document in forming your opinion that Kois was highly representative even though Qadeer told my client they’re profoundly different and not a standard buying group; right? A. Yeah.”)). Dr. Marshall’s report does not acknowledge this statement by Kois or attempt to reconcile it with Marshall’s conclusion that Kois was highly representative of buying groups. (Marshall, Tr. 3245).

Response to Proposed Finding No. 718

This Proposed Finding is misleading and incomplete because it specifically omits the sentence following the cited testimony where Dr. Marshall’s did, in fact, reconcile the cited document (CX4060) at trial by explaining that “I read this as a standard kind of marketing document.” (Marshall, Tr. 3255; *see also* CX8041 (Marshall, Dep. at 396) (again explaining the nature of the same marketing document “And when you point to things in a document like this about it being not standard or profoundly different, I would think that this is just a -- something you’d see in any solicitation that would be put together by a buying group.”)).

Moreover, the Proposed Finding is also incomplete because it omits Dr. Marshall’s testimony explaining why Kois and Smile Source were representative of other buying groups. Dr. Marshall elaborated:

Q: Why did you choose to study Kois and Smile Source?

A: *So these are highly representative of what’s going on in this following sense. It covers a broad geography of the country. It covered a broad time span going from 2012 through 2017. And in addition to that, there were different sizes of the buying groups at the times I looked at them. For Kois it was at the inception of the buying group. And then in the other studies, we had small size to the buying group, medium size to the buying group, large size to the buying group, so I was able to get a good look at what was going on with buying groups in that diversity.*

(Marshall Tr. 2863 (emphasis added); Marshall, Tr. 3244 (“What I had said is the following, that the Kois and the five studies cover a geography of the United States. And in addition to that, we

have buying groups at different stages. We had -- in terms of size. We have -- when they're at their inception, when they're small, when they're medium and when they're large in size, that this is the nature of the representativeness that I had spoken about with -- in my direct testimony."); *see also* CX8041 (Marshall, Dep. at 382 ("I felt that the data that was available for Kois and Smile Source spoke to a broad range of the issues in this matter; and therefore, I felt comfortable with the analysis being conducted in Section 5 [of the Marshall Expert Report].")).

Additionally, Dr. Marshall explained that the Kois and Smile Source buying groups that he studied in his five profitability studies are representative as they share the common feature of being [REDACTED]; *see also* CX8040 (Marshall, Dep. at 212) (explaining that Kois and Smile Source are "the same in the sense of the definition I offer in paragraph 139.")). Additionally, Dr. Marshall explained that for buying groups generally "[a]ll these groups will have different management and they'll be issues that are different between them. But, again, these fall within what's identified in paragraph 139 of my report." (CX8040 (Marshall, Dep. at 212)).

Like all buying groups, Kois and [REDACTED] do not force members to purchase from contracted distributors—in other words, they do not *require* compliance. (CCFF ¶¶ 1685-1687, 1689-1695; [REDACTED]; CX8040 (Marshall, Dep. at 212)).

719. And Dr. Marshall concluded Smile Source was highly representative of buying groups even as he listed, among materials he relied upon, Smile Source's Trevor Maurer's testimony that Smile Source was *not* a buying group. (Maurer, Tr. 4969 ("Mr. Maurer, if I heard your testimony right, Smile Source is not a buying group. Is that right? A. Correct."); CX0322 (Maurer, IHT at 86 ("Q. Do you consider Smile Source to be a buying group? A. No.")). Dr. Marshall's report does not acknowledge this testimony by Maurer or attempt to reconcile it with Marshall's conclusion that Smile Source was highly representative of buying groups. (Marshall, Tr. 3245).

Response to Proposed Finding No. 719

The Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (Order On Post-Trial Briefs at 3 (“Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents.”); *see also* Marshall Tr. at 2884-2885 (J. Chappell: “My advice to both parties, experts are not fact witnesses.”)).

This Proposed Finding is irrelevant and inaccurate to the extent that it suggests that Dr. Marshall should conclusively determine the fact of what is and is not considered a buying group. Both this Court and Dr. Marshall acknowledged that Dr. Marshall is not a fact-finder. (Marshall Tr. at 2884-2885 (J. Chappell: “My advice to both parties, experts are not fact witnesses”), 2946 (Marshall testified that he is “not offering an opinion about the facts.”)).

This Proposed Finding is also incomplete, inaccurate, and misleading to the extent that it suggests that Smile Source was not a buying group pursuant to the definition alleged in this matter. The Proposed Finding is incorrect and against the weight of the evidence indicating that Smile Source was a buying group, including other fact-witness testimony that Smile Source was a buying as well as explanations in Respondents’ own documents. (CCFF ¶¶ 175, 177-178, 978, 981).

This Proposed Finding is incomplete and misleading because it misconstrues Dr. Marshall’s explanation for why he found Smile Source representative to study:

Q: Why did you choose to study Kois and Smile Source?

A: *So these are highly representative of what’s going on in this following sense. It covers a broad geography of the country. It covered a broad time span going from 2012 through*

2017. And in addition to that, there were different sizes of the buying groups at the times I looked at them. For Kois it was at the inception of the buying group. And then in the other studies, we had small size to the buying group, medium size to the buying group, large size to the buying group, so I was able to get a good look at what was going on with buying groups in that diversity.

(Marshall Tr. 2863 (emphasis added); *see also* CX8041 (Marshall, Dep. at 382) (“I felt that the data that was available for Kois and Smile Source spoke to a broad range of the issues in this matter; and therefore, I felt comfortable with the analysis being conducted in Section 5 [of the Marshall Expert Report].”)).

Like all buying groups, Kois and [REDACTED] do not force members to purchase from contracted distributors—in other words, they do not *require* compliance. (CCFF ¶¶ 1685-1687, 1689-1695; [REDACTED]; CX8040 (Marshall, Dep. at 212)).

720. Dr. Marshall also could not demonstrate which buying groups listed in paragraph 491 of his report (CX7100 at 209–13), were similar to Kois or Smile Source. (Marshall, Tr. 3246–47 (“Q. What -- well, in paragraph 491 of your report you list a whole bunch of other buying groups. Which ones of those have an educational center that’s been in existence for twenty-plus years, that employs 15 people full-time, that’s conducted thousands of training for dentists over a period of 30 to 55 hours for each of the courses? Which ones? A. I don’t have knowledge of that.”); Marshall, Tr. 3256 (“Q. Any dentist who wants to join the Smile Source buying group, they actually have to sign a contract and become a franchisee for several years; right? A. Right. But as a member of the buying group they’re free to use the distributor for Smile Source or any other distributor. Q. Understood. Q. Now, is there any other buying group as part of your paragraph 491 in your report where you list other buying groups, any of those also require members to sign a contract to become franchisees for several years? A. I don’t know that.”)).

Response to Proposed Finding No. 720

This Proposed Finding is inaccurate, incomplete, and misleading in suggesting that Dr. Marshall only offered an opinion with respect to two buying groups. Based in part on his review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents’ self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346))

(Marshall Expert Report) (explaining in his Report that “[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight.”); *see also* Marshall, Tr. 3384-3387 (“I’m noting, though, that again that they’re making a blanket statement here: We don’t do business with buying groups,” “I am just noting again that they have made statements of a blanket nature: We don’t do business with buying groups,” “It says right here ‘we would consider them a GPO,’ group purchasing organization these types of affiliations as single customer.’ It’s just a blanket statement Buying club, we don’t do business with it. That’s it. It doesn’t reflect any incremental evaluation.”; Marshall, Tr. 3266 (“I’m looking at this quotation and it says ‘Typical approach of an upstart buying group’ ...and it’s passing on this as a matter of policy.”)).

The Proposed Finding is misleading because it is not supported by the testimony cited. The testimony cited and Dr. Marshall’s responses refer to specific features such as an “education center” that has been around for “twenty-plus” years, that employs “15 people full-time,” that’s “conducted thousands of training for dentists over a period of 30 to 55 hours for each courses,” and “signing a contract to become a franchisee.” (Marshall, Tr. 3246-3247). The Proposed Finding is incomplete and misleading because it omits Dr. Marshall’s subsequent testimony that “Well, you’ve asked me if there’s any buying group like that. The buying group here is representative in the sense that it’s a buying group like any other buying group. You can choose to use a distributor signed up with the buying group or not. That’s separate from the educational programs and all the rest that you’re referring to.” (Marshall, Tr. 3247).

The Proposed Finding is also incomplete and misleading because it omits Dr. Marshall’s explanation that a common feature of the buying groups that he studied and other buying groups

was that [REDACTED]

[REDACTED]; *see also* CX8040 (Marshall, Dep. at 212) (explaining that Kois and Smile Source are “the same in the sense of the definition I offer in paragraph 139.”)). Dr. Marshall elaborated that for buying groups generally “[a]ll these groups will have different management and they’ll be issues that are different between them. But, again, these fall within what’s identified in paragraph 139 of my report.” (CX8040 (Marshall, Dep. at 212)).

Dr. Marshall also explained that for the buying groups in his profitability studies and buying groups generally, he [REDACTED]

Like all buying groups, Kois and [REDACTED] do not force members to purchase from contracted distributors—in other words, they do not *require* compliance. (CCFF ¶¶ 1685-1687, 1689-1695; [REDACTED]; Marshall, Dep. at 212).

721. Patterson’s expert, Dr. Lawrence Wu, testified that it did not make economic sense for Dr. Marshall to conclude that if it was profitable for certain distributors to work with “two buying groups” (Kois and Smile Source) that one can infer that it would have also been profitable for Patterson to do so, because the undisputed evidence shows that buying groups were very different from one another. Dr. Wu also opined that in his economic opinion—and as Dr. Marshall acknowledged—Smile Source and Kois were organized very differently from other buying groups and thus not “representative” of other buying groups. (Wu, Tr. 5037 (“Given how different buying groups are, I do not see how it makes economic sense to infer that if it was profitable to work with two buying groups that we could infer that it also would have been profitable for Patterson to work with buying groups.”); Wu, Tr. 5039 (“So Dr. Marshall looked at two buying groups. He wants the court to infer that if it was profitable to work with two buying groups, it would have been profitable for Patterson to work with all buying groups. But that only makes sense if those two buying groups are representative of other buying groups, the other 38 buying groups mentioned in Dr. Marshall’s report. The facts show that buying groups are very

different from each other.”); Wu, Tr. 5040 (“And I believe Dr. Marshall also admits that buying groups are very different from each other.”); Wu, Tr. 5040-41 (“They differ in how they’re organized. Some buying groups are very loose collections of dentists. Some are more formally organized. Some buying groups provide services to their members; some buying groups don’t provide any services at all. Some buying groups have many members; some have no members at all. . . . I believe Dr. Marshall testified that he doesn’t know of any other buying group that is organized like Smile Source, and I think he said the same about Kois. He doesn’t know of another buying group that’s organized like Kois.”)).

Response to Proposed Finding No. 721

This Proposed Finding is inaccurate, incomplete, and misleading in suggesting that Dr. Marshall only offered an opinion with respect to two buying groups. Based in part on his review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents’ self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that “[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight.”); *see also* Marshall, Tr. 3387-3384 (“I’m noting, though, that again that they’re making a blanket statement here: We don’t do business with buying groups,” “I am just noting again that they have made statements of a blanket nature: We don’t do business with buying groups,” “It says right here ‘we would consider them a GPO,’ group purchasing organization these types of affiliations as single customer.’ It’s just a blanket statement Buying club, we don’t do business with it. That’s it. It doesn’t reflect any incremental evaluation.”); (Marshall, Tr. 3266 (“I’m looking at this quotation and it says ‘Typical approach of an upstart buying group’ . . . and it’s passing on this as a matter of policy.”))).

This Proposed Finding is unreliable and only cites to Patterson’s economic expert Dr. Wu’s conclusory, self-serving, and unsupported trial testimony. While Dr. Wu testified that “[Kois

and Smile Source] are not representative of other buying groups given how different they are on all the dimensions I mentioned a couple minutes ago, and they're not even similar to each other," Dr. Wu did no analysis of a representative buying group. (Wu, Tr. 5044 (testifying about facts); *see also generally* RX2833 (Wu Expert Report) (no profitability analyses for any buying groups)).

To the extent that this Proposed Finding suggests that Dr. Marhsall's profitability analyses are not representative of other buying groups, Dr. Marshall explained that he studied five different relationships with the Kois Buyers Group and Smile Source because, in addition to having gotten off the ground, these buying groups operate in geographies (Seattle and Atlanta) in which Schein, Patterson, and Benco are likely to have their lowest collective share of sales and another distributor was likely to have a high share of sales. (CX7101 at 045-046, 064 (¶¶ 107-112, 165) (Marshall Expert Rebuttal Report)). These facts addressed potential concerns that the relative sizes of Schein and Patterson make it more costly for them to supply buying groups, both because (1) Schein and Patterson are likely to find itself more profitable to discount when they have a lower share of sales and (2) where Burkhart and Atlanta Dental are large, it illuminates whether a full-service distributor found it profitable to supply a buying group so in a geographic area in which its share of sales was relatively large. (CX7101 at 064 (¶ 165) (Marshall Expert Rebuttal Report)). Differences between the Kois Buyers Group, with its single regional full-service distributor, and Smile Source, with its changing network of distributors over time, provide further reasons to believe that the experiences of distributors with these two groups provides some information about likely outcomes with other potential buying groups that went nowhere as a result of being rejected by Schein, Patterson, and/or Benco. (CX7101 at 64 (¶ 166) (Marshall Expert Rebuttal Report)).

Dr. Marshall also explained that a common feature of the buying groups that he studied and other buying groups was that [REDACTED]

[REDACTED]; *see also* CX8040 (Marshall, Dep. at 212) (explaining that Kois and Smile Source are “the same in the sense of the definition I offer in paragraph 139.”)).

Dr. Marshall elaborated that for buying groups generally “[a]ll these groups will have different management and they’ll be issues that are different between them. But, again, these fall within what’s identified in paragraph 139 of my report.” (CX8040 (Marshall, Dep. at 212)).

Dr. Marshall also explained that for the buying groups in his profitability studies and buying groups generally, he [REDACTED]

Like all buying groups, Kois and [REDACTED] do not force members to purchase from contracted distributors—in other words, they do not *require* compliance. (CCFF ¶¶ 1685-1687, 1689-1695; [REDACTED]; CX8040 (Marshall, Dep. at 212)).

722. Dr. Marshall acknowledged that although Qadeer Ahmed was Kois’s appointed representative that was solely responsible for Kois’s reach-out to Patterson, Dr. Marshall did not know how many employees Qadeer Ahmed’s company, ProCare Services, had aside from Ahmed. (Marshall, Tr. 3249–50 (“Q. How many employees does ProService have? A. I don’t recall that. Q. Well, does it have any employees, other than Qadeer at Hotmail.com? A. I don’t know.”)).

Response to Proposed Finding No. 722

This Proposed Finding is misleading and irrelevant to the extent that it suggests that knowing how many employees Qadeer Ahmed’s company has would change the results of Dr. Marshall’s

data-driven profitability studies indicating that it would have been profitable and in Patterson's self-interest to bid for the business of Kois Buyers Group (and that it was unprofitable for Patterson not to bid on Kois Buyers Group when Burkhardt did). (CCFF ¶¶ 1655, 1657-1659).

The portion of the Proposed Finding indicating that "Qadeer Ahmed was Kois's appointed representative that was solely responsible for Kois's reach-out to Patterson" is unsupported by the cited testimony and should be disregarded.

The Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (Order On Post-Trial Briefs at 3 ("Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents."); *see also* Marshall Tr. at 2884-2885 (J. Chappell: "My advice to both parties, experts are not fact witnesses.")).

723. Dr. Marshall did not know where Qadeer Ahmed was located when he (Ahmed) reached out to Patterson on behalf of the Kois group. (Marshall, Tr. 3251 ("Q. Where is this guy qadeerahmed@hotmail.com -- where is he located? A. I don't have a recollection of that.")).

Response to Proposed Finding No. 723

This Proposed Finding is misleading because Dr. Marshall testified that he "did not have a recollection" of where Qadeer Ahmed was located, not that he did not know. (Marshall, Tr. 3251).

This Proposed Finding is misleading and irrelevant to the extent that it suggests that the location of Qadeer Ahmed when he reached out to Patterson on behalf of the Kois Buyers Group would change the results of Dr. Marshall's data-driven profitability studies indicating that it would have

been profitable and in Patterson's self-interest to bid for the business of Kois Buyers Group (and that it was unprofitable for Patterson not to bid on Kois Buyers Group when Burkhardt did).

(CCFF ¶¶ 1655, 1657-1659).

The Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (Order On Post-Trial Briefs at 3 ("Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents."); *see also* Marshall Tr. at 2884-2885 (J. Chappell: "My advice to both parties, experts are not fact witnesses.")).

724. Dr. Marshall did not know if Qadeer Ahmed was a dentist or had any experience in the dental distribution market. (Marshall, Tr. 3250 ("Q. All right. And this Qadeer Ahmed, did he -- was he a dentist? A. I don't know that. Q. Well, was he -- was he -- had he been in the dental distribution market? Did he have any experience? A. I don't know that.")).

Response to Proposed Finding No. 724

This Proposed Finding is misleading and irrelevant to the extent that it suggests that whether or not Qadeer Ahmed was a dentist or had any experience in the dental distribution market would change the results of Dr. Marshall's data-driven profitability studies indicating that it would have been profitable and in Patterson's self-interest to bid for the business of Kois Buyers Group (and that it was unprofitable for Patterson not to bid on Kois Buyers Group when Burkhardt did).

(CCFF ¶¶ 1655, 1657-1659).

The Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (Order On Post-Trial Briefs at 3 ("Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents."); *see*

also Marshall Tr. at 2884-2885 (J. Chappell: “My advice to both parties, experts are not fact witnesses.”)).

725. Dr. Marshall did not know if Qadeer Ahmed knew anyone at Patterson (Marshall, Tr. 3251 (“Q. Well, did he know people at Patterson? Do you know that? A. I don’t know that.”)).

Response to Proposed Finding No. 725

This Proposed Finding is misleading and irrelevant to the extent that it suggests that whether Qadeer Ahmed knew anybody at Patterson would change the results of Dr. Marshall’s data-driven profitability studies indicating that it would have been profitable and in Patterson’s self-interest to bid for the business of Kois Buyers Group (and that it was unprofitable for Patterson not to bid on Kois Buyers Group when Burkhart did). (CCFF ¶¶ 1655, 1657-1659).

The Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (Order On Post-Trial Briefs at 3 (“Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents.”); *see also* Marshall Tr. at 2884-2885 (J. Chappell: “My advice to both parties, experts are not fact witnesses.”)).

726. Dr. Marshall did not know if Qadeer Ahmed was well-respected in the dental industry or anything about Qadeer Ahmed’s background. (Marshall, Tr. 3251 (“Q. Qadeerahmed@hotmail.com, is he well-respected in the dental industry? A. I don’t have knowledge of that.”); Marshall, Tr. 3253 (“Q. Did he have any experience, this qadeerahmed@hotmail.com, on the Wall Street in New York? A. I don’t know that background of Mr. Ahmed.”)).

Response to Proposed Finding No. 726

This Proposed Finding is misleading because it is unsupported by the testimony cited: Dr.

Marshall did not testify that “did not know...anything about Qadeer Ahmed’s background,” but instead testified that he did not know whether Qadeer Ahmed had “experience...on Wall Street in New York.” (Marshall, Tr. 3251).

This Proposed Finding is misleading and irrelevant to the extent that it suggests that whether Qadeer Ahmed had any experience on Wall Street in New York or is well-respected in the dental industry would change the results of Dr. Marshall’s data-driven profitability studies indicating that it would have been profitable and in Patterson’s self-interest to bid for the business of Kois Buyers Group (and that it was unprofitable for Patterson not to bid on Kois Buyers Group when Burkhardt did). (CCFF ¶¶ 1655, 1657-1659).

The Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (Order On Post-Trial Briefs at 3 (“Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents.”); *see also* Marshall Tr. at 2884-2885 (J. Chappell: “My advice to both parties, experts are not fact witnesses.”)).

727. Dr. Marshall did not know if Qadeer Ahmed had any experience working with buying groups in an industry other than the dental industry. (Marshall, Tr. 3251 (“Had qadeerahmed@hotmail.com -- had he worked for buying groups in a different industry maybe, like medical? A. I don’t have knowledge of that.”)).

Response to Proposed Finding No. 727

This Proposed Finding is misleading and irrelevant to the extent that it suggests that whether Qadeer Ahmed had any experience working with buying groups would change the results of Dr. Marshall's data-driven profitability studies indicating that it would have been profitable and in Patterson's self-interest to bid for the business of Kois Buyers Group (and that it was unprofitable for Patterson not to bid on Kois Buyers Group when Burkhardt did). (CCFF ¶¶ 1655, 1657-1659).

The Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (Order On Post-Trial Briefs at 3 ("Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents."); *see also* Marshall Tr. at 2884-2885 (J. Chappell: "My advice to both parties, experts are not fact witnesses.")).

728. Indeed, even though Qadeer Ahmed was the Kois Buyers Group's sole point of contact with Patterson (Kois Sr., Tr. 219 ("Q. I understand that you tasked Mr. Ahmed to reach out to the distributors, my client, Patterson Companies; is that fair? A. Yes. Q. You were not firsthand involved in those reach-out efforts; he did that on his own. Fair? A. Fair. Q. You don't know what he said to Patterson Companies; is that fair? A. Fair.")); CX8007 (Kois Sr., Dep. at 35 ("[H]e did all the initiation of the contact and all the negotiation. I had nothing to do with any of that, so I don't actually know what the conversations were that he had with any of the companies."))), Dr. Marshall did not even know *who Qadeer Ahmed was* when he (Dr. Marshall) was deposed. (CX8041 (Marshall, Dep. at 429 ("Who's Qadeer Ahmed? A. I'd have to review who Qadeer Ahmed was."))).

Response to Proposed Finding No. 728

The Proposed Finding is misleading because Dr. Marshall testified that he'd "have to review who Qadeer Ahmed was," not that he did not know who Qadeer Ahmed was in the deposition testimony cited. (CX8041 (Marshall, Dep. at 429)). This Proposed Finding is misleading and

inaccurate because the testimony cited does not support the Proposed Finding: the testimony cited does not indicate that Qadeer Ahmed was the Kois Buyers Group's "sole" point of contact with Patterson – Dr. Kois Sr. merely indicated that he (Dr. Kois) was not involved in the conversations when Qadeer Ahmed initiated contact with companies to negotiate about Kois Buyers Group.

This Proposed Finding is misleading and irrelevant to the extent that it suggests that the identify of Qadeer Ahmed was would change the results of Dr. Marshall's data-driven profitability studies indicating that it would have been profitable and in Patterson's self-interest to bid for the business of Kois Buyers Group (and that it was unprofitable for Patterson not to bid on Kois Buyers Group when Burkhart did). (CCFF ¶¶ 1655, 1657-1659).

The Proposed Finding should be disregarded by the Court because Dr. Marshall is being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (Order On Post-Trial Briefs at 3 ("Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents."); *see also* Marshall Tr. at 2884-2885 (J. Chappell: "My advice to both parties, experts are not fact witnesses.")).

729. Dr. Marshall conceded that Patterson's reasons for not working with Kois were rational. (Marshall, Tr. 3258-59 ("Q. . . . Now, you would agree with me, Dr. Marshall, that it would be a perfectly legitimate unilateral decision for a company like my client, Patterson, not to want to do business with a buying group whose representative had sort of an incoherent proposal; right? A. Well, as I said in deposition, if -- if a distributor is talking to someone who they think is interacting with them in an irrational or irresponsible way, it would make sense not to do business with such a person.")).

Response to Proposed Finding No. 729

This Proposed Finding is misleading and inaccurate because the testimony cited does not support the Proposed Finding – the testimony is based on a hypothetical untethered from the facts in the case at hand and does not mention or reference Patterson’s decision not to work with Kois.

Instead, in his profitability analyses, Dr. Marshall found that it would have been profitable and in Patterson’s self-interest to bid for the business of Kois Buyers Group (and that it was unprofitable for Patterson not to bid on Kois Buyers Group when Burkhart did). (CCFF ¶¶ 1655, 1657-1659).

730. Dr. Marshall agreed that any business faced with a similar proposal would be rational in walking away. (Marshall, Tr. 3260 (“And just hypothetically, like if a guy from a Hotmail account who was not a dentist, who’s not in the dental distribution business, did not have a reputation and had never worked for a buying group, if he sent you a proposal that said he had 1,700 members when he actually had none, that might be a good example of an incoherent approach; correct? A. I think it would be the beginning of a conversation between the two parties as to what exactly he had in mind. It seems like a standard marketing document. But I understand that if the conclusion is it’s incoherent management, I can understand someone walking away from that.”)).

Response to Proposed Finding No. 730

This Proposed Finding is vague as to what “similar proposal” is referring to, and the supporting testimony is an incomplete hypothetical. This Proposed Finding is also misleading and inaccurate in representing that “Dr. Marshall agreed that any business faced with a similar proposal would be rational in walking away” when Dr. Marshall actually testified that the hypothetical in the question asked would be a “conversation between two parties as to what exactly he had in mind. It seems like a standard marketing document.” Dr. Marshall then testified that he understands somebody walking away from “incoherent management” “if that is the conclusion.” (Marshall, Tr. 3260).

Instead, in his profitability analyses, Dr. Marshall found that it would have been profitable and in Patterson's self-interest to bid for the business of Kois Buyers Group (and that it was unprofitable for Patterson not to bid on Kois Buyers Group when Burkhart did). (CCFF ¶¶ 1655, 1657-1659).

731. Patterson's expert, Dr. Wu, testified that it was economically improper for Dr. Marshall to base his conclusion that Patterson acted against its unilateral self-interest solely on "after the fact" profitability calculations of *other* distributors dealings with Kois when there was unambiguous record evidence that Kois's appointed representative, Qadeer Amed, made material misrepresentations to Patterson. Dr. Wu testified that, instead, Dr. Marshall should have considered "what Patterson knew and expected at the time it was considering working with that buying group." (Wu, Tr. 5058 ("When Kois approached Patterson in 2013, it was approached by a fellow named Qadeer Ahmed. I believe Mr. Ahmed was claiming that Kois had 1700 members when it really had zero members. I believe Mr. Ahmed also made other claims which Patterson could not verify. But this is exactly the situation that we want to think about. When we want to think about whether it's profitable for Patterson to work with Kois, it's not just a calculation that we can make after the fact by looking at Kois and Burkhart. We have to consider what Patterson knew and expected at the time it was considering working with that buying group.")).

Response to Proposed Finding No. 731

This Proposed Finding is contradicted by the record evidence – specifically, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

This Proposed Finding is unreliable and only cites to Patterson's economic expert Dr. Wu's conclusory, self-serving, and unsupported trial testimony based only on Dr. Wu's interpretation of the facts. The Proposed Finding should be disregarded by the Court because Dr. Marshall is

being relied upon for factual propositions that should be established by fact witnesses or documents, not through expert testimony. (Order On Post-Trial Briefs at 3 (“Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents.”); *see also* Marshall Tr. at 2884-2885 (J. Chappell: “My advice to both parties, experts are not fact witnesses.”)).

Because many of Dr. Wu’s primary opinions involve claims about Patterson’s costs (cost savings and opportunity costs related to dealing or not dealing with buying groups), his opinions should be grounded in a quantifiable framework. However, despite his background as an economist and his \$1,100 hourly fees to offer economic support for Patterson (CCFF ¶ 2005), Dr. Wu admitted that he failed to perform any quantitative analysis to support his central opinions, including whether it was profitable for Patterson to do business with buying groups, including the Kois Buyers Group identified in this Proposed Finding. Rather, Dr. Wu conceded that he merely interpreted documents and testimony to form these opinions.⁹ The table below summarizes Dr. Wu’s unsupported primary opinions and his many corresponding admissions that he failed to perform the necessary analysis to support his claims, rendering Dr. Wu’s opinions regarding the profitability of buying groups unreliable:¹⁰

Opinion Dr. Wu Offered to the Court	Admitted Failure to Perform Quantitative Analysis
Buying groups did not offer Patterson cost savings compared to Patterson dealing with	Q. You did not do any quantitative analysis to show that buying groups would not have offered Patterson cost savings. Correct?

⁹ Wu, Tr. 5079-5080 (admitting that his opinions regarding Patterson’s unilateral interest to do business with these buying groups was his “review of the...documents in the record, yes, which reflects, deposition testimony, documents, contemporaneous business documents, and that would include emails.”); *see also* (Wu, Tr. 5085 (“Q. Similar to what we saw before, the only source you cited in paragraph 85, which provides your opinion on ADC, is a single Patterson document; correct? A. Yes.”)).

¹⁰ *See also* CXD15 (demonstrative from cross-examination of Dr. Wu summarizing his failure to perform quantitative analysis for many key opinions).

individual dentists outside of a buying group. ¹¹	A: I have not done my own quantitative analysis on that question. ¹²
It is likely that contracting with buying groups during the relevant period would have increased Patterson's costs. ¹³	Q. Did you do any quantitative analysis to show that contracting with buying groups would actually have increased Patterson's costs? A. As I said earlier, I did not do any calculations on my own. ¹⁴
The opportunity cost of Patterson dealing with buying groups was 'too high.' ¹⁵	Q: My question is, did you do any quantitative analysis to support the conclusion that Patterson had too high an opportunity cost to deal with buying groups? A. I did not. ¹⁶
In Sept. 2013, Patterson started the special markets division to pursue business with group practices and DSOs, but Patterson could not also handle doing business with buying groups. ¹⁷	Q. So, did you perform any quantitative analysis showing that the special markets division could not also handle doing business with buying groups? A. I did not. ¹⁸
It was more costly for Patterson than for Schein to deal with buying groups. ¹⁹	Q. Did you do any quantitative analysis comparing Patterson's cost of dealing with buying groups with Schein's cost of dealing with buying groups?

¹¹ RX2833 at 020-022, Section 4.2.1 ("Buying Groups Did Not Offer Patterson Cost Savings") (§§ 36-40) (Wu Expert Report); RX2967 (Wu, Dep. at 120)).

¹² RX2967 (Wu, Dep. at 128); Wu, Tr. 5070-71.

¹³ RX2833 at 022, Section 4.2.2 (§ 41) (Wu Expert Report); RX2967 (Wu, Dep. at 132)).

¹⁴ RX2967 (Wu, Dep. at 132-134); Wu, Tr. 5071-5072.

¹⁵ RX2833 at 025 (§ 46) (Wu Expert Report)).

¹⁶ RX2967 (Wu, Dep. at 149); Wu, Tr. 5072-73. Dr. Wu further conceded that he did do any calculation to determine Patterson's opportunity costs at all, (Wu, Dep. at 149), and that he did not do any calculation of what level of opportunity cost would be 'too high' for a firm to deal with buying groups. (RX2967 (Wu, Dep. at 149-150)).

¹⁷ RX2967 (Wu, Dep. at 150).

¹⁸ RX2967 (Wu, Dep. at 151); Wu, Tr. 5073.

¹⁹ RX2967 (Wu, Dep. at 160).

	A. No, I did not. ²⁰
Patterson had unilateral reasons for declining to work with the buying groups it had rejected (addressed in Section 5.3.1 of Dr. Wu's report). ²¹	Q. There is no quantitative analysis anywhere in Section 5.3.1, correct? A. That's correct. ²²
Patterson's decision to not work with Kois was based on the lack of profitability due to unreasonably low margins it saw in contracting Kois. ²³	Q. Did you perform any analysis showing that it would not have been profitable for Patterson to work with Kois? A. No. I have not. ²⁴

In contrast to Dr. Wu, who did not do any quantitative analysis about the profitability of buying groups, Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). Accordingly, consistent with Dr. Marshall's analyses, it was against Respondents' unilateral self-interest to have a no-buying group whereby it instructed its

²⁰ RX2967 (Wu, Dep. at 160); Wu, Tr. 5074.

²¹ RX2967 (Wu, Dep. at 249); RX2833 at 037-040 (Section 5.3.1) ("Patterson's Rationale for Not Dealing with Buying Groups Was Unilateral and in Its Own Self-Interest") (Wu Expert Report).

²² RX2967 (Wu, Dep. at 250); Wu, Tr. 5076.

²³ RX2967 (Wu, Dep. at 258).

²⁴ RX2967 (Wu, Dep. at 258); Wu, Tr. 5080-5081. Dr. Wu further admitted that he did not do any analysis to determine what constitutes an unreasonably low margin as he used that term in paragraph 82 of his expert report discussing this opinion. (Wu, Dep. at 258). In fact, the only source Dr. Wu cited for his conclusions about Kois in paragraph 82 of his expert report is a single email. (Wu, Dep. 259).

employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also* Marshall, Tr. 3387-3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."; Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group'...and it's passing on this as a matter of policy.'"))).

c. Responses to Proposed Findings Regarding "Dr. Marshall's Case Studies Are Unreliable."

1. Responses to Proposed Findings Regarding "Dr. Marshall Studied Only A Fraction Of A Fraction Of Dentists."

732. Dr. Marshall performed five case studies – contained in Section V.D of Dr. Marshall's Report. (CX7100 at 150–190):

- **Case Study 1:** Section V.D.1. of CX7100 – "Analysis of Burkhart & Kois Buyers Group Profitability", covering 2014Q4-2016Q4
- **Case Study 2:** Section V.D.2 of CX7100 – "Analysis of Burkhart & Smile Source profitability", covering 2012-2016
- **Case Study 3:** Section V.D.3 of CX7100 – "Analysis of Atlanta Dental Supply & Smile Source profitability", covering 2013-2016

- **Case Study 4:** Section V.D.4(a) of CX7100 – “Analysis of Schein & Smile Source profitability”; “end of the relationship with Smile Source in 2012”
- **Case Study 5:** Section V.D.4(b) of CX7100 – Analysis of Schein & Smile Source profitability; “start of a new relationship with Smile Source in 2017”

Response to Proposed Finding No. 732

Complaint Counsel has no specific response.

733. Dr. Marshall studied “a small fraction” of dentists – three-tenths of 1 percent or three one-thousandths of independent dentists. (Marshall, Tr. 3219 (Q. 621 dentists out of the 200,000 or so across the country, that’s the basis for your section V.D.1, 2 and 3 opinion; right? A. Those are the dentists that were relevant to study. Yes. Q. 621 out of 200,000; correct? A. Okay. I don’t know if -- I’m not good with the addition, but 621 sounds approximately right, yes. Q. And 621 out of 200,000 is -- it’s a small fraction. A. A small fraction, yes. Uh-huh.”); Marshall, Tr. 3220 (“Q. That’s the basis for your opinion in section V.D.1, 2 and 3 about my client; right? A. For the first three studies would be three one-thousandths of the independent dentists. Q. Three one-thousandths is the same as three-tenths of 1 percent? A. I think so, yes.); *see also* RXD0206A at 1).

Response to Proposed Finding No. 733

This Proposed Finding is irrelevant, misleading, and incomplete to the extent that it suggests that Dr. Marshall should have studied a broader group of dentists than he did. For the buying group member dentists that Dr. Marshall studied in his profitability analyses, Dr. Marshall explained:

[REDACTED]

[REDACTED]

[REDACTED]. The purpose of Dr. Marshall’s five profitability studies was to examine different episodes of dentist purchasing patterns before and after a distributor starts to (or stops) supply a buying group. (Marshall, Tr. 2861-2862).

In the Kois-Burkhart (and his other) profitability studies, Dr. Marshall looked at which distributors buying group member dentists' purchased from *before* the distributor started supplying the buying group and which distributors buying group member dentists' purchased from *after* the distributor started supplying the buying group. (Marshall, Tr. 2865).

Specifically explaining why he studied the Kois Buyers Group member dentists, Dr. Marshall explained that "[w]ell, the [REDACTED] dentists are the only ones to study for that study. They're the only ones who are making these decisions about who to buy from, the only ones who bought anything from Burkhart, who was the supplier, so they're the relevant ones to look at in this case, but they -- they are -- that's -- that's who should be studied in that case." (Marshall, Tr. 3222).

By performing the five profitability analyses, Dr. Marshall was able to assess the substitution behavior patterns of buying group member dentists before and after a distributor begins to (or stops) supplying a buying group. (Marshall, Tr. 2861). Accordingly, studying purchasing patterns of dentists, including dentists who were not a part of buying groups would not have made sense because including non-buying-group dentists in the case studies would not have yielded results relevant to product purchasing pattern switching after a dentist joins a buying group.

Dr. Marshall's profitability studies analyzed the purchasing behavior of *all* dentists who were members of Smile Source and Kois at different points in time. (CX7100 at 150-186 (¶¶ 347-413) (Marshall Expert Report)). This entailed the analysis of hundreds of dentists across the country—[REDACTED]
[REDACTED]. (CX7100 at 151, 162, 170, 176, 182 (¶¶ 354, 375, 368, 398, 408) (Marshall Expert Report)). All five data studies showed the same

result: dentists consistently paid lower prices and margins for dental products after joining a buying group. (CX7100 at 208 (¶¶ 487) (Marshall Expert Report)).

This Proposed Finding should be disregarded to the extent that it relies on demonstrative RXD0206A for support, in violation of the Court's Order On Post-Trial Briefs at 3 ("Do not cite to demonstrative exhibits as substantive evidence.").

734. Dr. Marshall could not show that his studies of a total of 621 dentists is statistically significant. (Marshall, Tr. 3220-21 ("Q. I didn't see -- I didn't see a statistical study in your report anywhere that shows that .003, the dentists you studied, that they're a statistically significant portion of the dentists, the 200,000 dentists across the country. Am I right? A. No. I've not done a statistical study of whether that's a -- what -- so the proportion of dentists in the country, there's only about 5 percent of dentists who are in buying groups at this time, so it's a larger percentage of dentists who are in buying groups, if that's helpful.")).

Response to Proposed Finding No. 734

This Proposed Finding is misleading because the testimony cited does not support the Proposed Finding: nowhere in the testimony cited does Dr. Marshall testify that he "could not show that his studies of 621 dentists is statistically significant." Dr. Marshall testified that he has not done a statistical study of the dentists in the country because "only about 5 percent of dentists are in buying groups." (Marshall, Tr. 3220-21).

This Proposed Finding is irrelevant, misleading, and incomplete to the extent that it suggests that Dr. Marshall should have studied a broader group including non-buying-group dentists. For the buying group member dentists that Dr. Marshall studied in his profitability analyses, Dr. Marshall explained:

[REDACTED]

[REDACTED]. The purpose of Dr. Marshall's five profitability studies was to examine different episodes of dentist purchasing patterns before and after a distributor starts to (or stops) supply a buying group. (Marshall, Tr. 2861-2862).

In the Kois-Burkhart (and his other) profitability studies, Dr. Marshall looked at which distributors buying group member dentists' purchased from *before* the distributor started supplying the buying group and which distributors buying group member dentists' purchased from *after* the distributor started supplying the buying group. (Marshall, Tr. 2865).

Specifically explaining why he studied the Kois Buyers Group members, Dr. Marshall explained that "[w]ell, the [REDACTED] dentists are the only ones to study for that study. They're the only ones who are making these decisions about who to buy from, the only ones who bought anything from Burkhart, who was the supplier, so they're the relevant ones to look at in this case, but they -- they are -- that's -- that's who should be studied in that case." (Marshall, Tr. 3222).

By performing the five profitability analyses, Dr. Marshall was able to assess the substitution behavior patterns of buying group member dentists before and after a distributor begins to (or stops) supplying a buying group. (Marshall, Tr. 2861). Accordingly, studying purchasing patterns of dentists, including dentists who were not a part of buying groups would not have made sense because including non-buying-group dentists in the case studies would not have yielded results relevant to product purchasing pattern switching after a dentist joins a buying group.

Dr. Marshall's profitability studies analyzed the purchasing behavior of *all* dentists who were members of Smile Source and Kois at different points in time. (CX7100 at 150-186 (¶¶ 347-413) (Marshall Expert Report)). This entailed the analysis of hundreds of dentists across the country— [REDACTED] [REDACTED] (CX7100 at 151, 162, 170, 176, 182 (¶¶ 354, 375, 368, 398, 408) (Marshall Expert Report)). All five data studies showed the same result: dentists consistently paid lower prices and margins for dental products after joining a buying group. (CX7100 at 208 (¶¶ 487) (Marshall Expert Report)).

735. Dr. Marshall studied the purchases of [REDACTED] dentists in his case studies V.D.1, 2, and 3 respectively. (CX7100 at 151; CX7100 at 162; CX7100 at 170; Marshall, Tr. 3219 (“Q. And as part of your study, the basis for your section V.D.1, 2, and 3, you study [REDACTED]; right? A. I’m sorry. Those are the numbers that we just discussed, yes.”)).

Response to Proposed Finding No. 735

This Proposed Finding is irrelevant, misleading, and incomplete to the extent that it suggests that Dr. Marshall should have studied a broader group of dentists than he did. For the buying group member dentists that Dr. Marshall studied in his profitability analyses, Dr. Marshall explained:

[REDACTED]

[REDACTED]

[REDACTED]. The purpose of Dr. Marshall's five profitability studies was to examine different episodes of dentist purchasing patterns before and after a distributor starts to (or stops) supply a buying group. (Marshall, Tr. 2861-2862).

In the Kois-Burkhart (and his other) profitability studies, Dr. Marshall looked at which distributors buying group member dentists' purchased from *before* the distributor started supplying the buying group and which distributors buying group member dentists' purchased from *after* the distributor started supplying the buying group. (Marshall, Tr. 2865).

Specifically explaining why he studied the Kois Buyers Group members, Dr. Marshall explained that “[w]ell, the [REDACTED] dentists are the only ones to study for that study. They’re the only ones who are making these decisions about who to buy from, the only ones who bought anything from Burkhart, who was the supplier, so they’re the relevant ones to look at in this case, but they -- they are – that’s – that’s who should be studied in that case.” (Marshall, Tr. 3222).

By performing the five profitability analyses, Dr. Marshall was able to assess the substitution behavior patterns of buying group member dentists before and after a distributor begins to (or stops) supplying a buying group. (Marshall, Tr. 2861). Accordingly, studying purchasing patterns of dentists, including dentists who were not a part of buying groups would not have made sense because including non-buying-group dentists in the case studies would not have yielded results relevant to product purchasing pattern switching after a dentist joins a buying group.

Dr. Marshall’s profitability studies analyzed the purchasing behavior of *all* dentists who were members of Smile Source and Kois at different points in time. (CX7100 at 150-186 (¶¶ 347-413) (Marshall Expert Report)). This entailed the analysis of hundreds of dentists across the country— [REDACTED]

[REDACTED] (CX7100 at 151, 162, 170, 176, 182 (¶¶ 354, 375, 368, 398, 408) (Marshall Expert Report)). All five data studies showed the same

result: dentists consistently paid lower prices and margins for dental products after joining a buying group. (CX7100 at 208 (¶¶ 487) (Marshall Expert Report)).

736. Dr. Marshall studied a fraction of a fraction of dentists in his Case Study 1 – [REDACTED]. (Marshall, Tr. 3221-22 (“Q. So in your V.D.1 analysis you conclude, based on -- well, it’s less than [REDACTED] because it’s only [REDACTED] of the [REDACTED] dentists across the country; right? A. That would be -- it would be then I think [REDACTED] divided by [REDACTED]. Q. Yeah. So that’s, you know, half as much, which I guess that would be [REDACTED] is that fair? A. Approximately. Yeah. Yes.”)).

Response to Proposed Finding No. 736

This Proposed Finding is misleading and unsupported by the testimony cited: Dr. Marshall did not testify that his Case Study 1 was based on a study of a “fraction of a fraction” of dentists. Instead, Dr. Marshall provided the testimony cited in response to Patterson’s counsel’s questions about specific division of numbers.

This Proposed Finding is irrelevant, misleading, and incomplete to the extent that it suggests that Dr. Marshall should have studied a broader group of dentists than he did. For the buying group member dentists that Dr. Marshall studied in his profitability analyses, Dr. Marshall explained:

[REDACTED]

[REDACTED]

[REDACTED]. The purpose of Dr. Marshall’s five profitability studies was to examine different episodes of dentist purchasing patterns before and after a distributor starts to (or stops) supply a buying group. (Marshall, Tr. 2861-2862).

In the Kois-Burkhart (and his other) profitability studies, Dr. Marshall looked at which distributors buying group member dentists' purchased from *before* the distributor started supplying the buying group and which distributors buying group member dentists' purchased from *after* the distributor started supplying the buying group. (Marshall, Tr. 2865).

Specifically explaining why he studied the Kois Buyers Group members, Dr. Marshall explained that “[w]ell, the [REDACTED] dentists are the only ones to study for that study. They’re the only ones who are making these decisions about who to buy from, the only ones who bought anything from Burkhart, who was the supplier, so they’re the relevant ones to look at in this case, but they -- they are – that’s – that’s who should be studied in that case.” (Marshall, Tr. 3222).

By performing the five profitability analyses, Dr. Marshall was able to assess the substitution behavior patterns of buying group member dentists before and after a distributor begins to (or stops) supplying a buying group. (Marshall, Tr. 2861). Accordingly, studying purchasing patterns of dentists, including dentists who were not a part of buying groups would not have made sense because including non-buying-group dentists in the case studies would not have yielded results relevant to product purchasing pattern switching after a dentist joins a buying group.

Dr. Marshall’s profitability studies analyzed the purchasing behavior of *all* dentists who were members of Smile Source and Kois at different points in time. (CX7100 at 150-186 (¶¶ 347-413) (Marshall Expert Report)). This entailed the analysis of hundreds of dentists across the country—[REDACTED]
[REDACTED]. (CX7100 at 151, 162, 170, 176, 182 (¶¶ 354, 375, 368, 398, 408) (Marshall Expert Report)). All five data studies showed the same

result: dentists consistently paid lower prices and margins for dental products after joining a buying group. (CX7100 at 208 (¶¶ 487) (Marshall Expert Report)).

737. Dr. Marshall opined that Patterson acted contrary to its unilateral interest based on studying a fraction of that fraction, i.e., 0.0015, of independent dentists. (Marshall, Tr. 3223 (“Q. So you’re inferring that Patterson Companies acted contrary to its unilateral economic self-interest because, when you studied .0015 of the dentists in section V.D.1, Patterson missed out on \$855,000 in profit over a two-year period; right? A. Yes.”)).

Response to Proposed Finding No. 737

This Proposed Finding is misleading and unsupported by the testimony cited: Dr. Marshall did not testify that Patterson acted contrary to its unilateral interest based on studying a “fraction of a fraction” of dentists. Instead, Dr. Marshall provided testimony in response to Patterson’s counsel’s questions that included a specific division of numbers as explained in Response to Finding No. 736.

This Proposed Finding is irrelevant, misleading, and incomplete to the extent that it suggests that Dr. Marshall should have studied a broader group of dentists than he did. For the buying group member dentists that Dr. Marshall studied in his profitability analyses, Dr. Marshall explained:

[REDACTED]

[REDACTED]

[REDACTED]. The purpose of Dr. Marshall’s five profitability studies was to examine different episodes of dentist purchasing patterns before and after a distributor starts to (or stops) supply a buying group. (Marshall, Tr. 2861-2862).

In the Kois-Burkhart (and his other) profitability studies, Dr. Marshall looked at which distributors buying group member dentists' purchased from *before* the distributor started supplying the buying group and which distributors buying group member dentists' purchased from *after* the distributor started supplying the buying group. (Marshall, Tr. 2865).

This Proposed Finding is misleading and incomplete because it omits the subsequent portion of Dr. Marshall's testimony specifically explaining why he studied the Kois Buyers Group members. Dr. Marshall explained that "[w]ell, the [REDACTED] dentists are the only ones to study for that study. They're the only ones who are making these decisions about who to buy from, the only ones who bought anything from Burkhart, who was the supplier, so they're the relevant ones to look at in this case, but they -- they are -- that's -- that's who should be studied in that case." (Marshall, Tr. 3222).

By performing the five profitability analyses, Dr. Marshall was able to assess the substitution behavior patterns of buying group member dentists before and after a distributor begins to (or stops) supplying a buying group. (Marshall, Tr. 2861). Accordingly, studying purchasing patterns of dentists, including dentists who were not a part of buying groups would not have made sense because including non-buying-group dentists in the case studies would not have yielded results relevant to product purchasing pattern switching after a dentist joins a buying group.

Dr. Marshall's profitability studies analyzed the purchasing behavior of *all* dentists who were members of Smile Source and Kois at different points in time. (CX7100 at 150-186 (¶¶ 347-413) (Marshall Expert Report)). This entailed the analysis of hundreds of dentists across the country—[REDACTED]

[REDACTED]. (CX7100 at 151, 162, 170, 176, 182 (¶¶ 354, 375, 368, 398, 408) (Marshall Expert Report)). All five data studies showed the same result: dentists consistently paid lower prices and margins for dental products after joining a buying group. (CX7100 at 208 (¶¶ 487) (Marshall Expert Report)).

738. Dr. Marshall also studied a fraction of a fraction of dentists in his Case Study 2 – less than 0.0015 of independent dentists in his Case Study 1. (Marshall, Tr. 3229-30 (“Q. But what I want to do is first establish, that’s the 250 dentists you studied in your V.D.2 analysis. A. Right. Q. And so that’s again .0015 of all the dentists in the country, that’s what you studied; right? A. Are you asking me what 250 divided by 200,000 is? Is that the question? Q. Yep. A. I don’t know that. I mean, if you’re representing it to be .0015, that might be correct, yes. It sounds about right. Q. Yeah. I -- I actually rounded up. It was actually a little bit smaller than that, but it’s .0001. Let’s just say that. A. Okay.”)).

Response to Proposed Finding No. 738

This Proposed Finding is misleading and unsupported by the testimony cited: Dr. Marshall did not testify that his Case Study 2 was based on a study of a “fraction of a fraction” of dentists. Instead, Dr. Marshall provided the testimony cited in response to Patterson’s counsel’s questions about specific division of numbers.

This Proposed Finding is irrelevant, misleading, and incomplete to the extent that it suggests that Dr. Marshall should have studied a broader group of dentists than he did. For the buying group member dentists that Dr. Marshall studied in his profitability analyses, Dr. Marshall explained:

[REDACTED]

[REDACTED]

██████████. The purpose of Dr. Marshall's five profitability studies was to examine different episodes of dentist purchasing patterns before and after a distributor starts to (or stops) supply a buying group. (Marshall, Tr. 2861-2862).

In the Kois-Burkhart (and his other) profitability studies, Dr. Marshall looked at which distributors buying group member dentists' purchased from *before* the distributor started supplying the buying group and which distributors buying group member dentists' purchased from *after* the distributor started supplying the buying group. (Marshall, Tr. 2865).

Specifically explaining why he studied the Kois Buyers Group members, Dr. Marshall explained that "[w]ell, the █████ dentists are the only ones to study for that study. They're the only ones who are making these decisions about who to buy from, the only ones who bought anything from Burkhart, who was the supplier, so they're the relevant ones to look at in this case, but they -- they are -- that's -- that's who should be studied in that case." (Marshall, Tr. 3222).

By performing the five profitability analyses, Dr. Marshall was able to assess the substitution behavior patterns of buying group member dentists before and after a distributor begins to (or stops) supplying a buying group. (Marshall, Tr. 2861). Accordingly, studying purchasing patterns of dentists, including dentists who were not a part of buying groups would not have made sense because including non-buying-group dentists in the case studies would not have yielded results relevant to product purchasing pattern switching after a dentist joins a buying group.

Dr. Marshall's profitability studies analyzed the purchasing behavior of *all* dentists who were members of Smile Source and Kois at different points in time. (CX7100 at 150-186 (¶¶ 347-413) (Marshall Expert Report)). This entailed the analysis of hundreds of dentists across the

country— [REDACTED]
 [REDACTED]. (CX7100 at 151, 162, 170, 176, 182
 (¶¶ 354, 375, 368, 398, 408) (Marshall Expert Report)). All five data studies showed the same
 result: dentists consistently paid lower prices and margins for dental products after joining a
 buying group. (CX7100 at 208 (¶¶ 487) (Marshall Expert Report)).

739. Dr. Marshall opined that Patterson acted contrary to its unilateral interest based on studying a fraction of a fraction, i.e., less than 0.0015, of independent dentists in his Case Study 2. (Marshall, Tr. 3231) (“Q. So your basis in section V.D.2 for your opinion that my client acted contrary to its self-interest is based on .0001 of the dentists, and for those dentists you say my client lost roughly half of the \$2.5 million-plus you billed to the government for your opinion so far; right? A. Yeah. Your -- Patterson lost about half of \$2.5 million by not securing the business of Smile Source when Burkhart did. Q. And that’s over a five-year period; right? A. I’m just checking here to see the date range here. It appears to be 2012 to 2016, yes. Q. 2013, 2014, 2015, five years; right? A. Yes.”).

Response to Proposed Finding No. 739

This Proposed Finding is misleading and unsupported by the testimony cited: Dr. Marshall did not testify that his Case Study 2 was based on a study of a “fraction of a fraction” of dentists. Instead, Dr. Marshall provided testimony cited in response to Patterson’s counsel’s questions about specific division of numbers.

This Proposed Finding is irrelevant, misleading, and incomplete to the extent that it suggests that Dr. Marshall should have studied a broader group of dentists than he did. For the buying group member dentists that Dr. Marshall studied in his profitability analyses, Dr. Marshall explained:

[REDACTED]

[REDACTED]

██████████. The purpose of Dr. Marshall's five profitability studies was to examine different episodes of dentist purchasing patterns before and after a distributor starts to (or stops) supply a buying group. (Marshall, Tr. 2861-2862).

In the Kois-Burkhart (and his other) profitability studies, Dr. Marshall looked at which distributors buying group member dentists' purchased from *before* the distributor started supplying the buying group and which distributors buying group member dentists' purchased from *after* the distributor started supplying the buying group. (Marshall, Tr. 2865).

Specifically explaining why he studied the Kois Buyers Group members, Dr. Marshall explained that "[w]ell, the █████ dentists are the only ones to study for that study. They're the only ones who are making these decisions about who to buy from, the only ones who bought anything from Burkhart, who was the supplier, so they're the relevant ones to look at in this case, but they -- they are -- that's -- that's who should be studied in that case." (Marshall, Tr. 3222).

By performing the five profitability analyses, Dr. Marshall was able to assess the substitution behavior patterns of buying group member dentists before and after a distributor begins to (or stops) supplying a buying group. (Marshall, Tr. 2861). Accordingly, studying purchasing patterns of dentists, including dentists who were not a part of buying groups would not have made sense because including non-buying-group dentists in the case studies would not have yielded results relevant to product purchasing pattern switching after a dentist joins a buying group.

Dr. Marshall's profitability studies analyzed the purchasing behavior of *all* dentists who were members of Smile Source and Kois at different points in time. (CX7100 at 150-186 (¶¶ 347-

413)(Marshall Expert Report)). This entailed the analysis of hundreds of dentists across the country— [REDACTED]

[REDACTED]. (CX7100 at 151, 162, 170, 176, 182 (¶¶ 354, 375, 368, 398, 408)(Marshall Expert Report)). All five data studies showed the same result: dentists consistently paid lower prices and margins for dental products after joining a buying group. (CX7100 at 208 (¶¶ 487) (Marshall Expert Report)).

740. Dr. Marshall studied a fraction of a fraction of dentists in Case Study 3 – [REDACTED] of independent dentists. (Marshall, Tr. 3233–34) (“Q. So just to set the facts right, in section V.D.3 you studied [REDACTED] dentists out of [REDACTED] across the country, and that’s [REDACTED] of all the dentists out there; right? A. Yeah. I’m losing that calculation, so I don’t know. We’d have to bring that back up and do that again. Q. All right. But rather than do that, you just agree, it’s a really, really small portion of all the dentists that are out there; right? A. Yeah. [REDACTED] dentists is a small proportion of [REDACTED] dentists. Q. I’m not on [REDACTED]. We already did that. I’m on the [REDACTED]. A. Yeah. [REDACTED] is a small proportion of [REDACTED] dentists.”).

Response to Proposed Finding No. 740

This Proposed Finding is misleading and unsupported by the testimony cited: Dr. Marshall did not testify that his Case Study 3 based on a study of a “fraction of a fraction” of dentists.

Instead, Dr. Marshall provided testimony cited in response to Patterson’s counsel’s questions about specific division of numbers.

This Proposed Finding is irrelevant, misleading, and incomplete to the extent that it suggests that Dr. Marshall should have studied a broader group of dentists than he did. For the buying group member dentists that Dr. Marshall studied in his profitability analyses, Dr. Marshall explained:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. The purpose of Dr. Marshall's five profitability studies was to examine different episodes of dentist purchasing patterns before and after a distributor starts to (or stops) supply a buying group. (Marshall, Tr. 2861-2862).

In the Kois-Burkhart (and his other) profitability studies, Dr. Marshall looked at which distributors buying group member dentists' purchased from *before* the distributor started supplying the buying group and which distributors buying group member dentists' purchased from *after* the distributor started supplying the buying group. (Marshall, Tr. 2865).

Specifically explaining why he studied the Kois Buyers Group members, Dr. Marshall explained that "[w]ell, the [REDACTED] dentists are the only ones to study for that study. They're the only ones who are making these decisions about who to buy from, the only ones who bought anything from Burkhart, who was the supplier, so they're the relevant ones to look at in this case, but they -- they are -- that's -- that's who should be studied in that case." (Marshall, Tr. 3222).

By performing the five profitability analyses, Dr. Marshall was able to assess the substitution behavior patterns of buying group member dentists before and after a distributor begins to (or stops) supplying a buying group. (Marshall, Tr. 2861). Accordingly, studying purchasing patterns of dentists, including dentists who were not a part of buying groups would not have made sense because including non-buying-group dentists in the case studies would not have yielded results relevant to product purchasing pattern switching after a dentist joins a buying group.

Dr. Marshall's profitability studies analyzed the purchasing behavior of *all* dentists who were members of Smile Source and Kois at different points in time. (CX7100 at 150-186 (¶¶ 347-413) (Marshall Expert Report)). This entailed the analysis of hundreds of dentists across the country—[REDACTED]
[REDACTED]. (CX7100 at 151, 162, 170, 176, 182 (¶¶ 354, 375, 368, 398, 408)(Marshall Expert Report)). All five data studies showed the same result: dentists consistently paid lower prices and margins for dental products after joining a buying group. (CX7100 at 208 (¶¶ 487) (Marshall Expert Report)).

741. Dr. Marshall admitted that he did not cite to a single academic, peer reviewed study endorsing the methodology of his roughly 40-page, 79 paragraph analysis he performed in Section V.D. of CX7100, in which he studied only a fraction of a fraction of dentists. (Marshall, Tr. 3241) ("Q. I don't see a single academic, peer-reviewed study that you cited in there endorsing the type of analysis you did of .0003 dentists and .0003 or 4 lost profits. Am I right? No academic study cited there? A. I don't know. I don't think so. I mean, I studied every dentist that was available to study in terms of these buying groups.").

Response to Proposed Finding No. 741

This Proposed Finding is inaccurate and misleading to the extent that it is suggesting that Dr. Marshall's profitability studies are not a recognized method of economic analysis. Dr. Marshall testified that "part of [his] analysis was to look at five natural experiments that presented to me by the data to make a determination in this regard." (Marshall, Tr. 2860). Natural experiments are standard, accepted method of economic analysis in antitrust cases.

This Proposed Finding is irrelevant, misleading, and incomplete to the extent that it suggests that Dr. Marshall should have studied a broader group of dentists than he did or that an academic peer-review study is required to endorse a methodology. For the buying group member dentists that Dr. Marshall studied in his profitability analyses, Dr. Marshall explained:

[REDACTED]

[REDACTED]

[REDACTED]. The purpose of Dr. Marshall's five profitability studies was to examine different episodes of dentist purchasing patterns before and after a distributor starts to (or stops) supply a buying group. (Marshall, Tr. 2861-2862).

In the Kois-Burkhart (and his other) profitability studies, Dr. Marshall looked at which distributors buying group member dentists' purchased from *before* the distributor started supplying the buying group and which distributors buying group member dentists' purchased from *after* the distributor started supplying the buying group. (Marshall, Tr. 2865).

Specifically explaining why he studied the Kois Buyers Group members, Dr. Marshall explained that "[w]ell, the [REDACTED] dentists are the only ones to study for that study. They're the only ones who are making these decisions about who to buy from, the only ones who bought anything from Burkhart, who was the supplier, so they're the relevant ones to look at in this case, but they -- they are -- that's -- that's who should be studied in that case." (Marshall, Tr. 3222).

By performing the five profitability analyses, Dr. Marshall was able to assess the substitution behavior patterns of buying group member dentists before and after a distributor begins to (or stops) supplying a buying group. (Marshall, Tr. 2861). Accordingly, studying purchasing patterns of dentists, including dentists who were not a part of buying groups would not have made sense because including non-buying-group dentists in the case studies would not have

yielded results relevant to product purchasing pattern switching after a dentist joins a buying group.

Dr. Marshall's profitability studies analyzed the purchasing behavior of *all* dentists who were members of Smile Source and Kois at different points in time. (CX7100 at 150-186 (¶¶ 347-413) (Marshall Expert Report)). This entailed the analysis of hundreds of dentists across the country—[REDACTED]
[REDACTED]. (CX7100 at 151, 162, 170, 176, 182 (¶¶ 354, 375, 368, 398, 408) (Marshall Expert Report)). All five data studies showed the same result: dentists consistently paid lower prices and margins for dental products after joining a buying group. (CX7100 at 208 (¶¶ 487) (Marshall Expert Report)).

2. Responses to Proposed Findings Regarding “Dr. Marshall’s Case Studies Speak To Irrelevant Time Periods.”

742. Dr. Marshall acknowledged that his Case Study 4 relates to Schein and Smile Source's relationship one year *prior* to when Patterson allegedly joined a conspiracy and “does not speak to February 2013” when Patterson allegedly acted contrary to its self-interest. (Marshall, Tr. 3211 “Q. It has nothing to do, Dr. Marshall, nothing to do with whether Patterson acted contrary to its self-interest starting in February 2013, does it? A. It doesn't speak to February 2013.”).

Response to Proposed Finding No. 742

This Proposed Finding is inaccurate and misleading in suggesting that Dr. Marshall's testimony and profitability analyses do not show that Patterson was acting against its self interest by having a no buying group policy during the relevant period for Patterson.

Dr. Marshall conducted five profitability analyses (including what Patterson refers to as “Case Study 4”) to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that

buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED]). Accordingly, consistent with Dr. Marshall's analyses, it was against Patterson's unilateral self-interest to have a no-buying group policy after 2013 whereby it instructed its employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). Prior to 2013, Patterson did not have a no-buying-group policy and, thus, was not acting against its self-interest. (CCFF ¶¶ 627-628). To the extent that Patterson claims that Dr. Marshall's profitability studies are invalid, Patterson is wrong for reasons explained in Response to Proposed Finding Nos. 701, 713-751.

743. Dr. Marshall testified that his Case Study 5 relates to Schein and Smile Source's relationship two years after the alleged conspiracy and "all it's showing is the unilateral incentive to bid given the competitive landscape at that time" in 2017, after the alleged conspiracy. (Marshall, Tr. 3213 ("Q. All right. So your study section V.D.4.2 relates to Schein's sales to Smile Source in 2017; correct? A. Yes. Q. Two years after the conspiracy was over; right? A. Correct. Demonstrating the unilateral incentive to bid at that time, yes. Q. All right. And you're not telling the court that somehow your study of the Schein-Smile Source sales in 2017, two years after the conspiracy was over, shed light on whether Patterson participated in a conspiracy two years earlier, are you? A. All it -- I'm sorry. All it's showing is the unilateral incentive to bid given the competitive landscape at that time where both Burkhart and Atlanta Dental were supplying Smile Source and Patterson was pursuing the business.")).

Response to Proposed Finding No. 743

This Proposed Finding is inaccurate and misleading to the extent that it suggests that Dr. Marshall's profitability analyses (including what Patterson refers to as "Case Study 5") do not show that Patterson was acting against its self interest by having a no buying group policy during the relevant period for Patterson.

Dr. Marshall conducted five profitability analyses (including what Patterson refers to as "Case Study 5") to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED])

[REDACTED]). Accordingly, consistent with Dr. Marshall's analyses, it was against Patterson's unilateral self-interest to have a no-buying group policy after 2013 whereby it instructed its employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). Prior to 2013, Patterson did not have a no-buying-group policy and, thus, was not acting against its self-interest. (CCFF ¶¶ 627-628). To the extent that Patterson claims that Dr. Marshall's profitability studies are invalid, Patterson is wrong for reasons explained in Response to Proposed Finding Nos. 701, 713-751.

744. Dr. Marshall testified that his Case Study 5 speaks to "a different competitive landscape" than the other case studies in his report. (Marshall, Tr. 2875-76 [REDACTED])

[REDACTED]

[REDACTED].

Response to Proposed Finding No. 744

This Proposed Finding is inaccurate and misleading to the extent that it suggests that Dr. Marshall's profitability analyses (including what Patterson refers to as "Case Study 5") do not show that Patterson was acting against its self interest by having a no buying group policy during the relevant period for Patterson.

Dr. Marshall conducted five profitability analyses (including what Patterson refers to as "Case Study 5") to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED])

[REDACTED]). Accordingly, consistent with

Dr. Marshall's analyses, it was against Patterson's unilateral self-interest to have a no-buying group policy after 2013 whereby it instructed its employees to categorically reject all buying

groups. (CCFF ¶¶ 630-650). Prior to 2013, Patterson did not have a no-buying-group policy and, thus, was not acting against its self-interest. (CCFF ¶¶ 627-628). To the extent that Patterson claims that Dr. Marshall's profitability studies are invalid, Patterson is wrong for reasons explained in Response to Proposed Finding Nos. 701, 713-751.

745. Dr. Marshall's Case Studies 1, 2, and 3, do not show that Patterson's conduct during the alleged conspiracy was any different than Patterson's conduct in the but-for world. (Marshall, Tr. 3240-41 ("Q. So your analysis if we take out the period that my client allegedly conspired, February 2013 to April 2015, if we take that out, your analysis shows in the but-for world the exact same action supposedly contrary to self-interest by Patterson Companies in the period before and in the period after; correct? A. Yeah. The studies are indicating that it's in the unilateral self-interest to pursue the business of buying groups. Q. Conspiracy or no conspiracy; right? A. The studies are showing the unilateral self-interest -- the unilateral incentive to bid for the business of buying groups, and it's showing also that there's a loss incurred by not securing the business of buying groups.")).

Response to Proposed Finding No. 745

This Proposed Finding is misleading and inaccurate because the testimony cited does not support the Proposed Finding: Dr. Marshall did not testify that his case studies do not show that Patterson's conduct during the alleged conspiracy was any different than Patterson's conduct in the but-for world. Rather, Dr. Marshall testified that his "studies are showing the unilateral self-interest -- the unilateral incentive to bid for the business of buying groups, and it's showing also that there's a loss incurred by not securing the business of buying groups." (Marshall, Tr. 3240-41).

This Proposed Finding is inaccurate and misleading to the extent that it suggests that Dr. Marshall's profitability analyses do not show that Patterson was acting against its self interest by having a no buying group policy during the relevant period for Patterson.

Dr. Marshall conducted five profitability analyses (including what Patterson refers to as "Case Studies 1, 2, and 3") to determine whether a buying group can be incrementally profitable for the

contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED]). Accordingly, consistent with Dr. Marshall's analyses, it was against Patterson's unilateral self-interest to have a no-buying group policy after 2013 whereby it instructed its employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). Prior to 2013, Patterson did not have a no-buying-group policy and, thus, was not acting against its self-interest. (CCFF ¶¶ 627-628). To the extent that Patterson claims that Dr. Marshall's profitability studies are invalid, Patterson is wrong for reasons explained in Response to Proposed Finding Nos. 701, 713-751.

746. Patterson's expert, Dr. Wu, concluded that Dr. Marshall's decision to base his inference on a study of only three distributors—Burkhart, Schein, and Atlanta Dental—was economically improper. Dr. Wu found that Dr. Marshall's inference that it would have been profitable for Patterson to work with buying groups based on a study of only these three distributors did not make "economic sense" because the records shows that the economics of those distributors did not "line up with the economics of Patterson." (Wu, Tr. 5038 ("Dr. Marshall examines not just two buying groups but three distributors and their agreements with those two buying groups. Dr. Marshall concludes that if it was profitable for those three distributors to work with buying groups, then it also would be profitable for Patterson to work with those buying groups. But Dr. Marshall has not shown that the economics of those three distributors line up with the economics of Patterson, so I don't think it makes economic sense to conclude that we can infer that it also would have been profitable for Patterson to work with buying groups."); Wu, Tr. 5046 ("But Dr. Marshall has not shown that the economics for those three distributors are similar to the economics of Patterson. That's what you need if you want to assume, if you want to make that leap, that it also would have been profitable for Patterson. And when I look at it, I think Patterson's economics are completely different.")).

Response to Proposed Finding No. 746

The Proposed Finding is irrelevant because Dr. Marshall's studies analyze the switching behavior of *independent dentists* upon joining a buying group - it is irrelevant that the studies analyzed data of other *distributors*, since all the distributors sell to the same customer base.

This Proposed Finding is unreliable and only cites to Patterson’s economic expert Dr. Wu’s conclusory, self-serving, and supported trial testimony. Because many of Dr. Wu’s primary opinions involve claims about Patterson’s costs (cost savings and opportunity costs related to dealing or not dealing with buying groups), his opinions should be grounded in a quantifiable framework. However, despite his background as an economist and his \$1,100 hourly fees to offer economic support for Patterson (CCFF ¶ 2005), Dr. Wu admitted that he failed to perform any quantitative analysis to support his central opinions, including whether it was profitable or made “economic sense” for Patterson to do business with buying groups, including the Kois Buyers Group and Smile Source referenced in this Proposed Finding. Rather, Dr. Wu conceded that he merely interpreted documents and testimony to form these opinions.²⁵ The table below summarizes Dr. Wu’s unsupported primary opinions and his many corresponding admissions that he failed to perform the necessary analysis to support his claims, rendering Dr. Wu’s opinions regarding the profitability of buying groups unreliable.²⁶

Opinion Dr. Wu Offered to the Court	Admitted Failure to Perform Quantitative Analysis
Buying groups did not offer Patterson cost savings compared to Patterson dealing with individual dentists outside of a buying group. ²⁷	Q. You did not do any quantitative analysis to show that buying groups would not have offered Patterson cost savings. Correct?

²⁵ Wu, Tr. 5079-5080 (admitting that his opinions regarding Patterson’s unilateral interest to do business with these buying groups was his “review of the...documents in the record, yes, which reflects, deposition testimony, documents, contemporaneous business documents, and that would include emails.”); *see also* (Wu, Tr. 5085 (“Q. Similar to what we saw before, the only source you cited in paragraph 85, which provides your opinion on ADC, is a single Patterson document; correct? A. Yes.”)).

²⁶ *See also* CXD15 (demonstrative from cross-examination of Dr. Wu summarizing his failure to perform quantitative analysis for many key opinions).

²⁷ RX2833 at 020-022, Section 4.2.1 (“Buying Groups Did Not Offer Patterson Cost Savings”) (¶¶ 36-40) (Wu Expert Report); RX2967 (Wu, Dep. at 120)).

	A: I have not done my own quantitative analysis on that question. ²⁸
It is likely that contracting with buying groups during the relevant period would have increased Patterson's costs. ²⁹	Q. Did you do any quantitative analysis to show that contracting with buying groups would actually have increased Patterson's costs? A. As I said earlier, I did not do any calculations on my own. ³⁰
The opportunity cost of Patterson dealing with buying groups was 'too high.' ³¹	Q: My question is, did you do any quantitative analysis to support the conclusion that Patterson had too high an opportunity cost to deal with buying groups? A. I did not. ³²
In Sept. 2013, Patterson started the special markets division to pursue business with group practices and DSOs, but Patterson could not also handle doing business with buying groups. ³³	Q. So, did you perform any quantitative analysis showing that the special markets division could not also handle doing business with buying groups? A. I did not. ³⁴
It was more costly for Patterson than for Schein to deal with buying groups. ³⁵	Q. Did you do any quantitative analysis comparing Patterson's cost of dealing with buying groups with Schein's cost of dealing with buying groups?

²⁸ RX2967 (Wu, Dep. at 128); Wu, Tr. 5070-71.

²⁹ RX2833 at 022, Section 4.2.2 (§ 41) (Wu Expert Report); RX2967 (Wu, Dep. at 132)).

³⁰ RX2967 (Wu, Dep. at 132-134); Wu, Tr. 5071-5072.

³¹ RX2833 at 025 (§ 46) (Wu Expert Report)).

³² RX2967 (Wu, Dep. at 149); Wu, Tr. 5072-73. Dr. Wu further conceded that he did do any calculation to determine Patterson's opportunity costs at all, (RX2967 (Wu, Dep. at 149)), and that he did not do any calculation of what level of opportunity cost would be 'too high' for a firm to deal with buying groups. (RX2967 (Wu, Dep. at 149-150)).

³³ RX2967 (Wu, Dep. at 150).

³⁴ RX2967 (Wu, Dep. at 151); Wu, Tr. 5073.

³⁵ RX2967 (Wu, Dep. at 160).

	A. No, I did not. ³⁶
Patterson had unilateral reasons for declining to work with the buying groups it had rejected (addressed in Section 5.3.1 of Dr. Wu's report). ³⁷	Q. There is no quantitative analysis anywhere in Section 5.3.1, correct? A. That's correct. ³⁸
Patterson's decision to not work with Kois was based on the lack of profitability due to unreasonably low margins it saw in contracting Kois. ³⁹	Q. Did you perform any analysis showing that it would not have been profitable for Patterson to work with Kois? A. No. I have not. ⁴⁰

This Proposed Finding is incomplete and misleading to the extent that it suggests that Dr. Marshall did not specifically study the effects of cannibalization in relation to Respondents, including Patterson, in this matter and conclude that it was still profitable for Respondents to do business with buying groups – he did.

Specifically, Dr. Marshall examined the effects of potential cannibalization in his five profitability studies and found that the distributor-buying groups relationships were profitable for the distributor despite the potential for cannibalization. (CCFF ¶¶ 1651-1656, 1664-1666, 1672-

³⁶ RX2967 (Wu, Dep. at 160); Wu, Tr. 5074.

³⁷ RX2967 (Wu, Dep. at 249); RX2833 at 037-040 (Section 5.3.1) (“Patterson’s Rationale for Not Dealing with Buying Groups Was Unilateral and in Its Own Self-Interest”) (Wu Expert Report).

³⁸ RX2967 (Wu, Dep. at 250); Wu, Tr. 5076.

³⁹ RX2967 (Wu, Dep. at 258).

⁴⁰ RX2967 (Wu, Dep. at 258); Wu, Tr. 5080-5081. Dr. Wu further admitted that he did not do any analysis to determine what constitutes an unreasonably low margin as he used that term in paragraph 82 of his expert report discussing this opinion. (RX2967 (Wu, Dep. at 258)). In fact, the only source Dr. Wu cited for his conclusions about Kois in paragraph 82 of his expert report is a single email. (RX2967 (Wu, Dep. 259)).

1673, 1678). Even going further than just analyzing distributor-buying group relationships in his profitability studies, Dr. Marshall also specifically analyzed Kois Buyers Group members in an area where the buying group supplier Burkhart had a high degree of penetration: Washington State. [REDACTED]

[REDACTED].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

In addition to analyzing Burkhart's profitability in Washington State, Dr. Marshall did a similar analysis to Burkhart in Washington State for Atlanta Dental in Georgia with regards to Smile Source, [REDACTED]

[REDACTED]

[REDACTED].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

747. Dr. Wu further concluded that Dr. Marshall's inferences with respect to Patterson were economically improper because he ignored evidence in the record regarding the costs, risks and uncertainties that Patterson faced during the alleged conspiracy period. (Wu, Tr. 5038-39 ("in Dr. Marshall's calculations that it would be profitable to work with buying groups he ignores the costs, risks and uncertainties that Patterson faced during the conspiracy period. If we want to understand why a company did what it did at some point in the past, we really need to understand what factors affected that company's thinking at that time. It's Dr. Marshall ignoring those factors that make it -- make his conclusions unreasonable."); *see also* RXD229 at 1 (same); Wu, Tr. 5056 ("And it was far from clear for Patterson whether or not working with that buying group would be a profitable opportunity. And by "profitable opportunity" the uncertainty is not only whether a buying group would generate incremental revenues. There was also uncertainty about what costs Patterson would have to incur to serve that buying group and whether Patterson would have any cost savings by working with a buying group.")).

Response to Proposed Finding No. 747

This Proposed Finding is unreliable and only cites to Patterson's economic expert Dr. Wu's conclusory, self-serving, and supported trial testimony. Because many of Dr. Wu's primary opinions involve claims about Patterson's costs, such as those identified in this Proposed Findings (cost savings and opportunity costs related to dealing or not dealing with buying groups), his opinions should be grounded in a quantifiable framework. However, despite his background as an economist and his \$1,100 hourly fees to offer economic support for Patterson

(CCFF ¶ 2005), Dr. Wu admitted that he failed to perform any quantitative analysis to support his central opinions, including whether it was profitable or made “economic sense” for Patterson to do business with buying groups, including the Kois Buyers Group and Smile Source referenced in this Proposed Finding. Rather, Dr. Wu conceded that he merely interpreted documents and testimony to form these opinions.⁴¹ The table below summarizes Dr. Wu’s unsupported primary opinions and his many corresponding admissions that he failed to perform the necessary analysis to support his claims, rendering Dr. Wu’s opinions regarding the profitability of buying groups unreliable:⁴²

Opinion Dr. Wu Offered to the Court	Admitted Failure to Perform Quantitative Analysis
Buying groups did not offer Patterson cost savings compared to Patterson dealing with individual dentists outside of a buying group. ⁴³	<p>Q. You did not do any quantitative analysis to show that buying groups would not have offered Patterson cost savings. Correct?</p> <p>A: I have not done my own quantitative analysis on that question.⁴⁴</p>
It is likely that contracting with buying groups during the relevant period would have increased Patterson’s costs. ⁴⁵	<p>Q. Did you do any quantitative analysis to show that contracting with buying groups would actually have increased Patterson's costs?</p>

⁴¹ Wu, Tr. 5079-5080 (admitting that his opinions regarding Patterson’s unilateral interest to do business with these buying groups was his “review of the...documents in the record, yes, which reflects, deposition testimony, documents, contemporaneous business documents, and that would include emails.”); *see also* (Wu, Tr. 5085 (“Q. Similar to what we saw before, the only source you cited in paragraph 85, which provides your opinion on ADC, is a single Patterson document; correct? A. Yes.”)).

⁴² *See also* CXD15 (demonstrative from cross-examination of Dr. Wu summarizing his failure to perform quantitative analysis for many key opinions).

⁴³ RX2833 at 020-022, Section 4.2.1 (“Buying Groups Did Not Offer Patterson Cost Savings”) (¶¶ 36-40) (Wu Expert Report); RX2967 (Wu, Dep. at 120)).

⁴⁴ RX2967 (Wu, Dep. at 128); Wu, Tr. 5070-71.

⁴⁵ RX2833 at 022-23, Section 4.2.2 (¶ 41) (Wu Expert Report); RX2967 (Wu, Dep. at 132)).

	A. As I said earlier, I did not do any calculations on my own. ⁴⁶
The opportunity cost of Patterson dealing with buying groups was ‘too high.’ ⁴⁷	Q: My question is, did you do any quantitative analysis to support the conclusion that Patterson had too high an opportunity cost to deal with buying groups? A. I did not. ⁴⁸
In Sept. 2013, Patterson started the special markets division to pursue business with group practices and DSOs, but Patterson could not also handle doing business with buying groups. ⁴⁹	Q. So, did you perform any quantitative analysis showing that the special markets division could not also handle doing business with buying groups? A. I did not. ⁵⁰
It was more costly for Patterson than for Schein to deal with buying groups. ⁵¹	Q. Did you do any quantitative analysis comparing Patterson’s cost of dealing with buying groups with Schein’s cost of dealing with buying groups? A. No, I did not. ⁵²
Patterson had unilateral reasons for declining to work with the buying groups it had rejected (addressed in Section 5.3.1 of Dr. Wu’s report). ⁵³	Q. There is no quantitative analysis anywhere in Section 5.3.1, correct? A. That’s correct. ⁵⁴

⁴⁶ RX2967 (Wu, Dep. at 132-134); Wu, Tr. 5071-5072.

⁴⁷ RX2833 at 025 (¶ 46) (Wu Expert Report)).

⁴⁸ RX2967 (Wu, Dep. at 149); Wu, Tr. 5072-73. Dr. Wu further conceded that he did do any calculation to determine Patterson’s opportunity costs at all, (RX2967 (Wu, Dep. at 149)), and that he did not do any calculation of what level of opportunity cost would be ‘too high’ for a firm to deal with buying groups. (RX2967 (Wu, Dep. at 149-150)).

⁴⁹ RX2967 (Wu, Dep. at 150).

⁵⁰ RX2967 (Wu, Dep. at 151); Wu, Tr. 5073.

⁵¹ RX2967 (Wu, Dep. at 160).

⁵² RX2967 (Wu, Dep. at 160); Wu, Tr. 5074.

⁵³ RX2967 (Wu, Dep. at 249); RX2833 at 037-040 (Section 5.3.1) (“Patterson’s Rationale for Not Dealing with Buying Groups Was Unilateral and in Its Own Self-Interest”) (Wu Expert Report).

⁵⁴ RX2967 (Wu, Dep. at 250); Wu, Tr. 5076.

Patterson's decision to not work with Kois was based on the lack of profitability due to unreasonably low margins it saw in contracting Kois. ⁵⁵	<p>Q. Did you perform any analysis showing that it would not have been profitable for Patterson to work with Kois?</p> <p>A. No. I have not.⁵⁶</p>
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In contrast to Dr. Wu, who did not do any quantitative analysis about the profitability of buying groups, Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). Accordingly, consistent with Dr. Marshall's analyses, it was against Patterson's unilateral self-interest to have a no-buying group policy after 2013 whereby it instructed its employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also* Marshall, Tr. 3387-3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do

⁵⁵ RX2967 (Wu, Dep. at 258).

⁵⁶ RX2967 (Wu, Dep. at 258); Wu, Tr. 5080-5081. Dr. Wu further admitted that he did not do any analysis to determine what constitutes an unreasonably low margin as he used that term in paragraph 82 of his expert report discussing this opinion. (RX2967 (Wu, Dep. at 258)). In fact, the only source Dr. Wu cited for his conclusions about Kois in paragraph 82 of his expert report is a single email. (RX2967 (Wu, Dep. 259)).

business with buying groups,” “I am just noting again that they have made statements of a blanket nature: We don’t do business with buying groups,” “It says right here ‘we would consider them a GPO,’ group purchasing organization these types of affiliations as single customer.’ It’s just a blanket statement Buying club, we don’t do business with it. That’s it. It doesn’t reflect any incremental evaluation.”; Marshall, Tr. 3266 (“I’m looking at this quotation and it says ‘Typical approach of an upstart buying group’ ...and it’s passing on this as a matter of policy.’”).

This Proposed Finding is also irrelevant and should be disregarded because it relies on demonstrative RXD229 for support, in violation of the Court’s Order On Post-Trial Briefs at 3 (“Do not cite to demonstrative exhibits as substantive evidence.”).

3. Responses to Proposed Findings Regarding “Dr. Marshall’s Calculation Of Patterson’s “Loss” From Not Working With Buying Groups Yields An Infinitesimally Small Number That Would Not Have Been Material To Patterson.”

748. Dr. Marshall inferred that Patterson acted contrary to its economic self-interest in Case Study 1 because Patterson lost a tiny fraction, i.e., 0.0004 or four ten thousandths, of the company’s gross profits over two years by not selling to Kois. (Marshall, Tr. 3228 (“Your \$855,000 in lost profits from the .0015 of the dentists lower couple years there; right? A. I see the calculation. Yes. Q. Four one-hundredths of 1 percent? A. Yeah. It looks like four ten-thousandths, yeah. Uh-huh. Q. Which is the same as four one-hundredths of 1 percent. A. Right.”); *see also* RXD0207 at 1 (“Burkhart & Kois Profitability”).

Response to Proposed Finding No. 748

This Proposed Finding is inaccurate and misleading because the testimony cited does not support the Proposed Finding: Dr. Marshall never testified that Patterson acted contrary to its economic self-interest in Case Study 1 because Patterson lost a “tiny fraction” of the company’s profits over two years by not selling to Kois. Rather, the testimony cited references irrelevant numerical

calculations based on numbers in a demonstrative not in evidence, including a broader group of irrelevant dentists as well as irrelevant numbers from Patterson's financial statements.

This Proposed Finding should be disregarded to the extent that it relies on demonstrative RXD0207 for support, in violation of the Court's Order On Post-Trial Briefs at 3 ("Do not cite to demonstrative exhibits as substantive evidence.").

This Proposed Finding is also inaccurate, incomplete, and misleading because it ignores that in his profitability studies, Dr. Marshall found that Patterson acted contrary to its economic self-interests and lost profit in not bidding for the business of buying groups. (CCFF ¶¶ 1655, 1658-1659, 1665, 1667, 1674).

Additionally, to the extent that the Proposed Finding suggests that foregoing \$855,000 in profit in Case Study 1 was not against Patterson's self-interest, Dr. Marshall explained why Patterson's conduct in 2017 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

749. Patterson's expert, Dr. Wu, testified that it was improper as a matter of economics for Dr. Marshall to infer that Patterson contrary to its unilateral interest by simply foregoing \$855,000 in purported profits, which represented a "tiny, tiny fraction of Patterson's overall revenue." (Wu, Tr. 5050 ("Q. So, Dr. Wu, I think you just testified that 855,000 was a tiny, tiny

fraction of Patterson’s overall revenue? A. Yes. Q. And why is that significant? A. That’s significant because now we can understand why it is that Burkhardt and Atlanta Dental might find it a much more profitable opportunity to go after Kois than Patterson, so it’s not quite right to infer that just because we see Burkhardt going after Kois that we also should have seen Patterson going after Kois.”); Wu, Tr. 5055 (“Dr. Marshall has not shown that the economics for the distributors he studies is similar to the economics of Patterson.”)).

Response to Proposed Finding No. 749

This Proposed Finding is unreliable and only cites to Patterson’s economic expert Dr. Wu’s conclusory, self-serving, and supported trial testimony. Because many of Dr. Wu’s primary opinions involve claims about Patterson’s costs (cost savings and opportunity costs related to dealing or not dealing with buying groups), his opinions should be grounded in a quantifiable framework. However, despite his background as an economist and his \$1,100 hourly fees to offer economic support for Patterson (CCFF ¶ 2005), Dr. Wu admitted that he failed to perform any quantitative analysis to support his central opinions, including whether it was profitable or made “economic sense” for Patterson to do business with buying groups, including the Kois Buyers Group and Smile Source referenced in this Proposed Finding. Rather, Dr. Wu conceded that he merely interpreted documents and testimony to form these opinions.⁵⁷ The table below summarizes Dr. Wu’s unsupported primary opinions and his many corresponding admissions that he failed to perform the necessary analysis to support his claims, rendering Dr. Wu’s opinions regarding the profitability of buying groups unreliable.⁵⁸

Opinion Dr. Wu Offered to the Court	Admitted Failure to Perform Quantitative Analysis
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⁵⁷ Wu, Tr. 5079-5080 (admitting that his opinions regarding Patterson’s unilateral interest to do business with these buying groups was his “review of the...documents in the record, yes, which reflects, deposition testimony, documents, contemporaneous business documents, and that would include emails.”); *see also* (Wu, Tr. 5085 (“Q. Similar to what we saw before, the only source you cited in paragraph 85, which provides your opinion on ADC, is a single Patterson document; correct? A. Yes.”)).

⁵⁸ *See also* CXD15 (demonstrative from cross-examination of Dr. Wu summarizing his failure to perform quantitative analysis for many key opinions).

Buying groups did not offer Patterson cost savings compared to Patterson dealing with individual dentists outside of a buying group. ⁵⁹	<p>Q. You did not do any quantitative analysis to show that buying groups would not have offered Patterson cost savings. Correct?</p> <p>A. I have not done my own quantitative analysis on that question.⁶⁰</p>
It is likely that contracting with buying groups during the relevant period would have increased Patterson's costs. ⁶¹	<p>Q. Did you do any quantitative analysis to show that contracting with buying groups would actually have increased Patterson's costs?</p> <p>A. As I said earlier, I did not do any calculations on my own.⁶²</p>
The opportunity cost of Patterson dealing with buying groups was 'too high.' ⁶³	<p>Q: My question is, did you do any quantitative analysis to support the conclusion that Patterson had too high an opportunity cost to deal with buying groups?</p> <p>A. I did not.⁶⁴</p>
In Sept. 2013, Patterson started the special markets division to pursue business with group practices and DSOs, but Patterson could not also handle doing business with buying groups. ⁶⁵	<p>Q. So, did you perform any quantitative analysis showing that the special markets division could not also handle doing business with buying groups?</p> <p>A. I did not.⁶⁶</p>

⁵⁹ RX2833 at 020-022, Section 4.2.1 ("Buying Groups Did Not Offer Patterson Cost Savings") (¶¶ 36-40) (Wu Expert Report); RX2967 (Wu, Dep. at 120)).

⁶⁰ RX2967 (Wu, Dep. at 128); Wu, Tr. 5070-71.

⁶¹ RX2833 at 022, Section 4.2.2 (¶ 41) (Wu Expert Report); RX2967 (Wu, Dep. at 132).

⁶² RX2967 (Wu, Dep. at 132-134); Wu, Tr. 5071-5072.

⁶³ RX2833 at 025 (¶ 46) (Wu Expert Report)).

⁶⁴ RX2967 (Wu, Dep. at 149); Wu, Tr. 5072-73. Dr. Wu further conceded that he did do any calculation to determine Patterson's opportunity costs at all, (RX2967 (Wu, Dep. at 149), and that he did not do any calculation of what level of opportunity cost would be 'too high' for a firm to deal with buying groups. (RX2967 (Wu, Dep. at 149-150).

⁶⁵ RX2967 (Wu, Dep. at 150).

⁶⁶ RX2967 (Wu, Dep. at 151); Wu, Tr. 5073.

It was more costly for Patterson than for Schein to deal with buying groups. ⁶⁷	<p>Q. Did you do any quantitative analysis comparing Patterson's cost of dealing with buying groups with Schein's cost of dealing with buying groups?</p> <p>A. No, I did not.⁶⁸</p>
Patterson had unilateral reasons for declining to work with the buying groups it had rejected (addressed in Section 5.3.1 of Dr. Wu's report). ⁶⁹	<p>Q. There is no quantitative analysis anywhere in Section 5.3.1, correct?</p> <p>A. That's correct.⁷⁰</p>
Patterson's decision to not work with Kois was based on the lack of profitability due to unreasonably low margins it saw in contracting Kois. ⁷¹	<p>Q. Did you perform any analysis showing that it would not have been profitable for Patterson to work with Kois?</p> <p>A. No. I have not.⁷²</p>

This Proposed Finding is incomplete and misleading to the extent that it suggests that Dr. Marshall did not specifically study the effects of cannibalization in relation to Respondents, including Patterson, in this matter and conclude that it was still profitable for Respondents to do business with buying groups – he did.

⁶⁷ RX2967 (Wu, Dep. at 160).

⁶⁸ RX2967 (Wu, Dep. at 160); Wu, Tr. 5074.

⁶⁹ RX2967 (Wu, Dep. at 249); RX2833 at 037-040 (Section 5.3.1) ("Patterson's Rationale for Not Dealing with Buying Groups Was Unilateral and in Its Own Self-Interest") (Wu Expert Report).

⁷⁰ RX2967 (Wu, Dep. at 250); Wu, Tr. 5076.

⁷¹ RX2967 (Wu, Dep. at 258).

⁷² RX2967 (Wu, Dep. at 258); Wu, Tr. 5080-5081. Dr. Wu further admitted that he did not do any analysis to determine what constitutes an unreasonably low margin as he used that term in paragraph 82 of his expert report discussing this opinion. (RX2967 (Wu, Dep. at 258)). In fact, the only source Dr. Wu cited for his conclusions about Kois in paragraph 82 of his expert report is a single email. (RX2967 (Wu, Dep. 259)).

Specifically, Dr. Marshall examined the effects of potential cannibalization in his five profitability studies and found that the distributor-buying groups relationships were profitable for the distributor despite the potential for cannibalization. (CCFF ¶¶ 1651-1656, 1664-1666, 1672-1673, 1678). Even going further than just analyzing distributor-buying group relationships in his profitability studies, Dr. Marshall also specifically analyzed Kois Buyers Group members in an area where the buying group supplier Burkhart had a high degree of penetration: Washington State. [REDACTED]

[REDACTED].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

In addition to analyzing Burkhart's profitability in Washington State, Dr. Marshall did a similar analysis to Burkhart in Washington State for Atlanta Dental in Georgia with regards to Smile Source, [REDACTED]

[REDACTED]

[REDACTED].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

[REDACTED]

[REDACTED]

Response to Proposed Finding No. 750

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self-interest in Case Study 2 because Patterson lost a “tiny fraction” of the company’s profits. Rather, the testimony cited references irrelevant numerical calculations based on numbers in a demonstrative not in evidence, including a broader group of irrelevant dentists as well as irrelevant numbers from Patterson’s financial statements.

This Proposed Finding should be disregarded to the extent that it relies on demonstrative RXD0208 for support, in violation of the Court’s Order On Post-Trial Briefs at 3 (“Do not cite to demonstrative exhibits as substantive evidence.”).

This Proposed Finding is also inaccurate, incomplete, and misleading because it ignores that in every single of his profitability studies, Dr. Marshall found that Patterson acted contrary to its economic self-interests and lost profit in not bidding for the business of buying groups. (CCFF ¶¶ 1655, 1658-1659, 1665, 1667, 1674).

Additionally, to the extent that the Proposed Finding suggests that foregoing “half of 2.5 million” in profit in Case Study 2 was not against Patterson’s self-interest, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

751. Dr. Marshall concluded that Patterson acted contrary to its economic self-interest in Case Study 3 based on his assumption that Patterson lost an even smaller fraction, i.e., 0.00008, of the company's gross profits over four years by not selling to Smile Source. (Marshall, Tr. 3236-38 ("Q. All right. Now, you see, Dr. Marshall, I divided the few hundred thousand dollars in profit you say my client missed out on by not selling to Smile Source when Atlanta Dental sold them and then I divided by the company's gross profit over those years, and it's .00008. Do you see that? . . . A. Well, I see all that, yeah. . . . Q. That's the basis for your section V.D.3 opinion that my client acted contrary to its economic self-interest; right? A. That Patterson incurred a loss when Atlanta Dental won the business of Smile Source, that was the loss that Patterson incurred on the dentists who bought from Atlanta Dental, the 39 dentists, as a consequence of Atlanta Dental winning the contract, yes."); *see also* RXD209 at 1 ("Atlanta Dental & Smile Source Profitability").

Response to Proposed Finding No. 751

This Proposed Finding is inaccurate and misleading because the testimony cited does not support the Proposed Finding: Dr. Marshall never testified that Patterson acted contrary to its economic self-interest in Case Study 3 because Patterson lost a "tiny fraction" of the company's profits by not selling to Smile Source. Rather, the testimony cited references irrelevant numerical calculations based on numbers in a demonstrative not in evidence, including a broader group of irrelevant dentists as well as irrelevant numbers from Patterson's financial statements.

This Proposed Finding should be disregarded to the extent that it relies on demonstrative RXD0209 for support, in violation of the Court's Order On Post-Trial Briefs at 3 ("Do not cite to demonstrative exhibits as substantive evidence.").

This Proposed Finding is also inaccurate, incomplete, and misleading because it ignores that in every single of his profitability studies, Dr. Marshall found that Patterson acted contrary to its economic self-interests and lost profit in not bidding for the business of buying groups. (CCFF ¶¶ 1655, 1658-1659, 1665, 1667, 1674).

752. The testimony of Dr. Marshall was excluded by a court when he testified for the government in a case involving an antitrust conspiracy. (Marshall Tr. 3180 (“Q. I didn’t ask you for an interpretation. I’m just going through the facts of what happened the last time you testified in a courtroom on behalf of the government in an antitrust case. The defendants moved to exclude your opinion as unreliable, in part, because it was contrary to prior court rulings. Do you see that? A. Yeah. The part “contrary to this Court’s prior rulings,” yes, I see that. Q. And then if we go to the next page, another criticism that the defendants used as a basis for asking the judge to throw your testimony out, this paragraph here that says “Finally.” Do you see this? It says “Dr. Marshall’s opinions don’t ‘fit’ the evidence in this case.” Do you see that? A. I do. Q. So the last time you testified – because that’s the last time you testified in a courtroom on behalf of the government in an antitrust case; right? A. Yes. That’s the only time I’ve been in a courtroom, is those two episodes for this case, 2011 and 2014, prior to this. Q. All right. So the defendants moved to exclude your testimony, and that’s what the judge did; right? A. Yeah. He excluded the testimony four months after the jury verdict. Yes.”); Marshall, Tr. 3186 (“Judge Trenga said, “Having now considered that testimony based on all the evidence in the case, the Court concludes that Dr. Marshall’s testimony should have been excluded under Daubert.” That’s the ruling in the case the last time you testified on behalf of the government in a courtroom in an antitrust case; right? A. Yeah, I recall his decision. Yes. Q. And that’s what he did, he excluded your opinion entirely; right? A. Right. After there had been this jury verdict, he excluded it. I’m sorry.”); *see also* RXD0220 at 1-2 (summary of Dr. Marshall’s prior expert courtroom experience); RXD0221 at 1-27 (Memorandum in Support of Defendants’ Motion *In Limine* to Exclude Dr. Robert C. Marshall’s Testimony and Expert Reports, *U.S. ex rel. Bunk v. Birkart Globistics GmbH & Co.*, Case No. 1:02-cv-01168-AJT-TRJ (2014); RXD0222 at 18 (*U.S. ex rel. Bunk v. Birkart Globistics GmbH & Co.*, 89 F.Supp.3d 778 (2014)).

Response to Proposed Finding No. 752

To the extent this Proposed Finding is propounded in an attempt to exclude Dr. Marshall’s expert testimony from consideration, Respondents are time barred from such an argument, as the deadline to challenge Dr. Marshall under the strictures of *Daubert* has passed. Order Grant’g Joint Mot. to Extend Certain Expert Disc. Deadlines (Sept. 5, 2018) (setting an October 10, 2018 deadline for motions *in limine* as to expert discovery).

This Proposed Finding is irrelevant because it is based on a damages calculation that Dr. Marshall did in an unrelated False Claims Act case more than five years ago. Any suggestion that Dr. Marshall’s damages opinion in that case is relevant to his analysis of anticompetitive effects from a conspiracy in the dental industry is without basis. This Proposed Finding is misleading to the extent that it suggests that Dr. Marshall is not experienced or qualified to serve

as an expert economist – none of Respondents’ counsel asked that Dr. Marshall be disqualified as an expert economist during trial, and Dr. Marshall has served as an expert economist in more than a dozen other matters. (CX7100 at 220-221, Appendix A (Curriculum Vitae of Robert C. Marshall, PhD)).

This Proposed Finding should be disregarded because it relies on demonstrative RXD0220, RXD0221, RXD0222 for support, in violation of the Court’s Order On Post-Trial Briefs at 3 (“Do not cite to demonstrative exhibits as substantive evidence.”).

753. Dr. Marshall’s firm has been paid \$2.5 million for work on this case. (Marshall, Tr. 2858 (“JUDGE CHAPPELL: What’s the total amount you’ve billed the U.S. government for your work in this case? And it includes you or anyone helping you. THE WITNESS: The firm of Bates White, Your Honor -- that’s the only way I’d be able to answer this -- is 2.5 million.”)).

Response to Proposed Finding No. 753

This Proposed Finding is irrelevant to the analyses underlying Dr. Marshall’s opinions in this matter.

754. Dr. Wu concluded that Dr. Marshall’s opinion with respect to Patterson was “not economically reliable.” (Wu, Tr. 5036-37 (“Q. Dr. Wu, did you find Dr. Marshall’s conclusions to be economically reliable? A. My conclusions are that Dr. Marshall’s conclusions are not economically reliable.”); RXD228 at 1 (same)).

Response to Proposed Finding No. 754

This Proposed Finding is unreliable and only cites to Patterson’s economic expert Dr. Wu’s conclusory, self-serving, and supported trial testimony. As explained in more detail in Response to Proposed Finding Nos. 731, 746-747, 749 above, Dr. Wu’s conclusory trial testimony regarding whether or not it was profitable for Patterson to do business with buying groups is not supported by any quantitative economic analyses whatsoever and is solely based on his selective review and interpretation of the record.

Moreover, Dr. Wu's own economic analyses were riddled with errors and unreliable. Because of the litany of substantive errors in Dr. Wu's original expert report that Dr. Marshall identified in his Rebuttal Report, [REDACTED], as well as other issues, Dr. Wu withdrew several substantive analyses addressed in his report and replaced them with new analyses on the night before his deposition. (Wu, Tr. 5102-5103; 5106-5107). Although Dr. Wu provided several revised exhibits to his report, he did not subsequently update his report itself to address the new analyses. [REDACTED].

Even after revising, Dr. Wu's revised exhibits still remained riddled with errors. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. This admission makes clear that Dr. Wu's studies are perfectly consistent with buying groups yielding price benefits to their members—and a conspiracy to suppress buying groups would have the anticompetitive effect of suppressing those benefits. Dr. Wu's analyses also suffer from other fundamental flaws that make it impossible for the Court to rely on them. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED], and [REDACTED]
[REDACTED]
[REDACTED]. [REDACTED]
[REDACTED]. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Thus, for example, [REDACTED]

[REDACTED]

[REDACTED] er

[REDACTED] a finding that

would stand in contrast to his own conclusion that [REDACTED]

[REDACTED]

[REDACTED]. [REDACTED]

[REDACTED]

[REDACTED]. Finally, Dr. Wu’s analysis examined only the pricing for a single dental product in a single state. (CCFF ¶ 2007).

This Proposed Finding should be disregarded because it relies on demonstrative RXD228 for support, in violation of the Court’s Order On Post-Trial Briefs at 3 (“Do not cite to demonstrative exhibits as substantive evidence.”).

IX. Responses to Proposed Findings Regarding “Complaint Counsel Presented No Evidence Of Potential Recurrence.”

755. There is no evidence that Patterson has discussed buying groups with Benco or Schein since Paul Guggenheim’s June 2013 email correspondence with Chuck Cohen. (CX0062 at 1).

Response to Proposed Finding No. 755

The Proposed Finding is misleading and contrary to the weight of the evidence. For example, there is evidence in the record that Patterson discussed TDA and the TDA Perks program with both Benco and Schein. The record shows that, on October 14, 2013, Cohen instructed his

Texas Regional Manager to contact Schein and Patterson (CX1057 at 001; CX8015 (Cohen, Dep. at 362)), and that the manager did as he was instructed. (CCFF ¶¶ 1118-1119; *see also* CX0178 at 002-003; CX1289 at 001; CX0108 at 001 (October 23, 2014 email from Patterson South Central Region Manager to Misiak and Rogan, describing his communications with Patterson’s competitors, “As for Patterson, we have briefly discussed this TDAPerks site . . . with our dealer competitors at the local San Antonio & Houston level . . .”). The evidence in the record also supports a finding that Patterson’s Misiak and Schein’s Steck spoke about the TDA Perks program. (CCFF ¶¶ 1123-1132). Finally the record shows that Cohen communicated with Sullivan and Guggenheim about TDA Perks Supply, sending them a joint email on April 16, 2014, and writing, “Tim & Paul. . . Thought you’d be interested in this ‘essay’ from our friends at the TDA.” (CX1062 at 001; Cohen, Tr. 577; CCFF ¶¶ 1133-1136)). Finally, the evidence also shows that, after receiving Cohen’s email regarding the TDA buying group, Guggenheim made himself a calendar entry task to call Cohen about the TDA Perks letter. (CCFF ¶1136; CX0101 at 001). The Proposed Finding is misleading and should be disregarded.

756. Complaint Counsel has asserted that the alleged conspiracy in this case ended in April 2015, when, due to Benco’s April 9, 2015 settlement agreement with the State of Texas, the alleged conspiracy became “difficult, if not impossible, to maintain.” (Kahn, Tr. 19; *see also* RXD0205 at 1 (“The Alleged Conspiracy Ended in April 2015”)).

Response to Proposed Finding No. 756

The Proposed Finding misstates the record regarding the time of the end of the conspiracy, suggesting that Complaint Counsel’s explanation that the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015 created a precise “end” date. Complaint Counsel has never taken the position that the entry by Benco into a settlement with the Texas Attorney General created a precise “end” date. (Tr., 19 (Complaint Counsel’s Opening Statement); *see also* Complaint Counsel’s Post-Tr. Br. at 37-38). Rather, the

conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015, because it was required to log communications with its competitors after that time. This did not, however, created a precise “end” date.

In addition, to the extent that the Proposed Finding relies on a demonstrative (RXD0205) as substantive support for the finding, that reliance contravenes the Court’s February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence.

757. Complaint Counsel asserts that “respondents started dealing with buying groups after [April 2015].” (Kahn, Tr. 19; *see also* RXD0205 at 1 (“The Alleged Conspiracy Ended in April 2015”); CC’s Pretrial Brief at 50 (“[A]ll three Respondents began competing for buying groups after the conspiracy ended.”)). Specifically, for Patterson, Complaint Counsel asserts that, “in 2016, Patterson’s stance changed; it began to pursue buying groups.” (CC Mot. for Sum. Decision Opp. at 12).

Response to Proposed Finding No. 757

To the extent that the Proposed Finding references April 2015 as a precise date on which Respondents started dealing with buying groups, it misstates the record. Complaint Counsel has never taken the position that the entry by Benco into a settlement with the Texas Attorney General created a precise “end” date. (Tr., 19 (Complaint Counsel’s Opening Statement); *see also* Complaint Counsel’s Post-Tr. Br. at 37-38). Rather, the conspiracy began to fall apart after Benco entered into a settlement with the Texas Attorney General in April 2015, because it was required to log communications with its competitors after that time.

In addition, to the extent that the Proposed Finding relies on a demonstrative (RXD0205) as substantive support for the finding, that reliance contravenes the Court’s February 21, 2019 Order on Post-Trial Briefs at 3 which prohibits citation to demonstratives as substantive evidence.

Complaint Counsel has no specific response to the fact that, after the conspiracy ended, all three Respondents began competing for buying groups.

758. Complaint Counsel's expert, Dr. Robert Marshall, testified that the date range given to him by Complaint Counsel (2011 to 2015) was "reasonable." (Marshall, Tr. 2889–90).

Response to Proposed Finding No. 758

This Proposed Finding is misleading to the extent that it suggests that Dr. Marshall's reasonableness check of the date range of 2011 to 2015 is related to any assessment of potential recurrence – Dr. Marshall's testimony regarding his reasonableness check of the date range is related to his testimony about structural breaks. Dr. Marshall explicitly testified that he does not offer an opinion on the start or end of the alleged conspiracy. (Marshall, Tr. 2889 ("A. Well, the Federal Trade Commission gave me a date range of 2011 to 2015, and I'm not offering an opinion about a start date or an end date for the conspiracy, but I am making a statement about is this a reasonable date range.")).

759. Patterson competed with Schein for Smile Source's business about *two years* later, in 2017, losing to Schein. (McFadden, Tr. 2733–35; Meadows, Tr. 2652–53; *see also* CC's Pretrial Brief at 50 n.284).

Response to Proposed Finding No. 759

Complaint Counsel has no specific response.

760. Patterson hired a business development director, Wesley Fields, in late 2015 with the instruction to explore working with buying groups. (Misiak, Tr. 1320 ("A. In approximately 2015, we deployed a business development director -- his name is Wes Fields -- to gather information from the field and from the industry about different GPO-type organizations."); Guggenheim, Tr. 1654 ("Q. So part of his job in terms of what you told him to do was to explore buying groups. A. That was included in the scope of his business development role. Correct.")).

Response to Proposed Finding No. 760

Complaint Counsel has no specific response.

761. [REDACTED]

(CX8028 (Lepley, Dep. at 37–39)).

Response to Proposed Finding No. 761

Complaint Counsel has no specific response.

762. Schein has worked with buying groups since 2015, including relationships that were entered into prior to 2015. (Foley, Tr. 4591 (Tralongo); Foevalsley, Tr. 4620 (Orthosynetics); Foley, Tr. 4646–47 (IDA Buying Group); CX8005 (Muller, Dep. at 233–234 (Advantage Dental, Commonwealth Purchasing Group, Dental Gator, Dental Partners of Georgia, MMCAP)); *see also* RXD0030 at 1 (demonstrative listing buying groups Schein works with)).

Response to Proposed Finding No. 762

The Proposed Finding is misleading to the extent that it lists entities that are not buying groups and to the extent that it implies that Schein’s doing business with buying groups before or after the conspiracy is relevant. For specific responses to whether the listed groups are buying groups and whether Schein worked with these groups during the conspiracy period, see Complaint Counsel’s Responses to Schein’s Proposed Findings of Fact ¶¶ 1263-1285 (Tralongo); 1026-1037 (OrthoSynetics); 732-748 (IDA Buying Group); 377-394 (Advantage Dental); 634-675 (Dental Gator); 676-689 (Dental Partners of Georgia). Schein has not claimed that it did business with Commonwealth Purchasing or MMCAP. See Schein’s Proposed Findings of Fact ¶¶ 377-1335. The record, however shows that MMCAP is not a buying group. See Complaint Counsel’s Response to Patterson’s Proposed Finding No. 126.

In addition, to the extent that the Proposed Finding is relying on a demonstrative (RXD0030) to establish substantive facts, that reliance contravenes this Court’s February 21, 2019 Order on Post-Trial Briefs at 3, prohibiting citation to demonstratives as substantive evidence.

763. Benco has been doing business through Elite Dental Alliance, a GPO it created, since 2016. (Cohen, Tr. 823–24).

Response to Proposed Finding No. 763

Complaint Counsel has no specific response.

764. Because all three Respondents now work with buying groups (*see supra* ¶¶ 760-63), it is unlikely that Patterson could today reach an agreement with Benco and Schein to refuse to discount to buying groups.

Response to Proposed Finding No. 764

The Proposed Finding is misleading, speculative, and fails to offer any factual support for its speculations. Respondents did not put evidence into the record to demonstrate that it is “unlikely that Patterson could today reach an agreement with Benco and Schein to refuse to discount to buying groups,” and the Proposed Finding offers no evidence to support that point. They also did not put any evidence into the record showing any changed conditions that might preclude them from re-establishing their conspiracy, or engaging in a similar one.

Moreover, although Benco entered into a settlement agreement with the Texas Attorney General on April 9, 2015, the logging provisions of that order (which required Benco to keep records of all communications with any dental supply distributor) were only in effect for three years, so have already expired. (CX6021 at 012-013 (¶ IV.J of Agreed Final Judgment and Stipulated Injunction between the State of Texas and Benco Dental Supply)). Schein, which entered into an order with the Texas Attorney General on August 3, 2017 containing a similar communications logging requirement, will also be free of its logging obligation in August 2019. (CX6023 at 006-007 (¶ IV.J of Agreed Final Judgment and Stipulated Injunction between the State of Texas and Henry Schein, Inc.)). Patterson entered into an order with the Texas Attorney General on April 19, 2018, also containing a requirement that it log communications with competitors, but the Patterson order’s logging requirements only lasted one year. Consequently, those provisions have already expired. (CX6024 at 005-007 (¶ IV.I of Agreed Final Judgment and Stipulated

Injunction between the State of Texas and Patterson Companies, Inc.). The record evidence suggests that Patterson, when left on its own, did not develop strong antitrust compliance policies. For example, the former Chairman and CEO of the Patterson companies has admitted that Patterson's current Principles of Business Conduct and Code of Ethics (which were in effect through at least 2017) did not expressly prohibit discussing with competitors whether it is acceptable to refuse to do business with a class of customers. (CX3196 at 010; CX8027 (Anderson, Dep. at 151-152.)) Accordingly, the evidence in the record supports a finding that, absent an enforceable order, there is nothing to prevent Patterson from reaching an agreement with Benco, Schein, or another distributor to refuse to do business with a buying group or buying groups.

Respectfully submitted,

/s/ Lin W. Kahn

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 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 OF ELECTRONIC FILING

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

June 13, 2019

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