PUBLIC

ORIGINAL

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

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

RESPONDENT PATTERSON'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS THE CASE AGAINST PATTERSON IN ITS ENTIRETY

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The trial record is crystal clear: Patterson did not conspire with Benco or Schein. Instead, the record at the close of the government's case proves that Patterson consistently made its own, independent and pro-competitive decisions before, during, and after the alleged February 2013-April 2015 conspiracy period:

- Patterson provided its core customer base, the solo and small-practices that account for the vast majority of all dentists, with ***innumerable price concessions*** on individual purchase orders, and ***thousands and thousands of additional documented blanket discounts*** on all purchases—enough discounts to fill the "Marianas Trench," in the Court's words, and a literal wall of price concessions so that they could do things like "take from Schein" and "kick . . . Benco in the mouth . . . and finally kick them out the door," right in the middle of the alleged conspiracy.[1]

- Patterson invaded the fast-growing corporate DSO segment long dominated by Schein (75-85%) and Benco (10%)—right during the heart of their supposed conspiracy—and transformed its business in a multi-year effort, at great expense and great risk, to beat its rivals in their corporate DSO stronghold.[2]

- Patterson met with and evaluated "buying groups" one-by-one and it always made its own decisions about whether to do business with them—***without ever once communicating with Benco or Schein that it was evaluating them or what decision it reached***—as every Patterson witness testified and no other witness refuted.[3] Patterson's independent efforts were exactly the same *before* (Florida Dental

[1] *See* RX0220 and RX0094, respectively; *see also* Trial Transcript VOL 6 (Misiak), 1489:21–1490:7 ("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.").

[2] *See, e.g.*, Trial Transcript VOL 6 (Misiak), 1455:21–1467:11 (Patterson's reinvention to pursue DSOs was an "extremely" complicated, "multimillion-dollar expense," requiring 80-100 new hires that allowed it to beat Schein and win "the crown jewel of the DSO space," Heartland Dental).

[3] Trial Transcript VOL 7 (Guggenheim), 1795:9–17 ("We would meet with [buying groups] . . . . we would always keep an open mind . . . and determine each of these on their face as to whether or not they made business sense."); VOL 8 (Guggenheim) 1843:11–13 ("Each of these [buying groups] have nuances, so we want to make sure that we fully understand them and have a good handle on what they're presenting."); VOL 10 (McFadden) (decisions regarding buying groups "internal to Patterson").

Association,[4] MMCAP,[5] George Lennon,[6] Jackson Health[7]), *during* (Smile Source,[8] Kois,[9] Catapult,[10] Dr. Stephen Sebastian,[11] the Dental Purchasing Group—run by a New Hampshire veterinarian,[12] OrthoSynetics[13]), and *after* the supposed conspiracy (Smile Source,[14] the Georgia Dental Association,[15] Stratus Dental,[16] Dentistry Unchained[17]). Every Patterson witness flatly denied communicating with Benco or Schein about any of these groups—"No" "No, I didn't. I did not" "Never"—and Dr. Marshall admitted that he has no such evidence.[18]

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[4] CX0159 ("I'm gonna tell him thanks but no thanks.").

[5] RX0401 ("it's a GPO," "every month . . . we had to send them a check for 1% of total sales").

[6] CX0146.

[7] RX0271 ("The branch has been selling to the Jackson system of hospitals and clinics for over 10 years").

[8] CX0148 ("I went to Smile Sources website . . . we do conduct business with all that I looked up.").

[9] CX0116 (showing some of Patterson's due diligence on Kois, including "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 . . . .").

[10] Trial VOL 7 (Guggenheim), 1812:16–1814:9 (Catapult wanted Patterson to pay a "vig or fee that we felt was inappropriate").

[11] Trial Transcript VOL 10 (McFadden), 2817:6–19 ("This was no upside to Patterson Dental. And he doesn't even have a company, he doesn't even have any clients . . . so it doesn't make any sense.").

[12] CX3080.

[13] RX0333 (considering whether Patterson's "historical" feelings towards "buying groups" might need to be revised for OrthoSynetics).

[14] Trial Transcript VOL 13 (Rogan), 3538:8–3540:8 (Patterson bid on Smile Source in early 2017).

[15] CX3094 (September 10, 2015 email reflecting Patterson decision not to respond to GDA outreach); CX8011 (Capaldo Dep. 22:23–23:5) (Patterson was not interested in the GDA RFP).

[16] CX3008 (discussing Stratus in late August 2015 as "very complicated" and "touchy").

[17] CX0137 (Patterson "again explained to her very nicely that we are not going to participate in a GPO type program at this point").

[18] Kois: Trial Transcript VOL 7 (Guggenheim), 1829:6–23 (Q. Did you call up Chuck Cohen in between this e-mail and the WebEx and say, Hey, Chuck, I got this guy has a line in the water? A. No. Q. Is it okay to sell him? A. No."); Dental Purchasing Group: Trial Transcript VOL 7 (Guggenheim), 1817:7–15 ("Q. Did you call up Chuck Cohen and ask him permission? A. No. No. Q. Did you decide with Mr. McFadden not to pursue this opportunity? A. I did. Q. And did you decide on your own internal to Patterson Companies? A. Absolutely."); George Lennon/NAICSD: Trial Transcript VOL 7 (Guggenheim), 1810:23–25 ("Q. Did you call Mr. Cohen up at any point in this process and ask him about George Lennon and

- "Buying groups" were never part of Patterson's core strategy, and for good reason. Their members were always free to buy from anyone and did not commit to purchase anything.[19] Often, they were fledgling start-ups with few, if any members, and business plans that were "incoherent" and "outlandish"[20]—circumstances under which Complaint Counsel's expert conceded it would not make sense to do business.[21] Or, if they had members, they were already Patterson customers and thus provided very little upside potential for Patterson to expand its business (*e.g.*, Smile Source in 2013).[22] As a result, Patterson was always skeptical of "buying groups." It declined to do business with them when the "buying group" made no sense (*e.g.*, the New Hampshire veterinarian), but it did business with them when, on occasion, it did make sense (*e.g.*, OrthoSynetics).

Complaint Counsel's opposition brief does not dispute any of this. Instead, it raises red herrings. For example, Complaint Counsel argues that the thousands of price concessions Patterson made to solo and small dentists are irrelevant because none were given to "buying groups." But that's a red herring because "buying groups" *do not buy* anything, as witness after witness testified.[23]

NAICDS? A. Never."); Nexus Dentistry: Trial Transcript VOL 7 (Guggenheim), 1807:14–22 ("Q. Did you -- after you got this, because this is July of 2013, did you call up Chuck Cohen? A. No. No, I didn't. I did not."); Dr. Marshall conceded he cited no evidence that Patterson discussed Kois or Smile Source. Trial Transcript VOL 12 (Marshall), 3202:22–3203:13 ("I don't recall any others, no.").

[19] Trial VOL 8 (Guggenheim), 1845:12–19 (buying groups could not commit to volume).

[20] Trial VOL 10 (McFadden), 2706:2–3 ("Some of them were outlandish."); Trial VOL 13 (Rogan), 3632:3–6. ("Do you remember getting an outlandish or incoherent proposal from someone who was forming a buying group. A. Yes. We still get them today, too."); Trial Transcript VOL 13 (Rogan), 3640:14–17 ("[B]asically the guy was not telling the truth, that he had all these commitments and members and things like that, because nobody had heard of him."); 3639:25–3640:20 (describing Kois's proposal as "outlandish" and "incoherent").

[21] Trial Transcript VOL 12 (Marshall), 3259:4–8 ("[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."); 3260:7–19 ("[I]f the conclusion is it's incoherent management, I can understand someone walking away from that.").

[22] CX0148.

[23] Trial Transcript VOL 17 (Maurer), 4970:1–5 ("Q. And you don't buy dental equipment, do I got that right? A. Right. And you don't buy dental supplies? A. Correct."); Trial Transcript VOL 15 (Sullivan), 4328:22–4329:11 (buying groups "do not" actually buy dental supplies; the private

Complaint Counsel's argument that Patterson's sales to members of the OrthoSynetics and Jackson Health "buying groups" somehow do not count is another red herring. The evidence shows Patterson (and Schein) thought they were "buying groups,"[24] albeit with different characteristics than some other "buying groups" (like the New Hampshire veterinarian), because buying groups varied like "jelly beans" in a jar, "each tasted differently."[25] Patterson's contemporaneously documented belief that it was working with these "buying groups" is obviously relevant to whether Patterson was at the same time committed to a common scheme to "boycott buying groups." Complaint Counsel's unsupported beliefs are not evidence. *Icon Health & Fitness, Inc. v. Strava, Inc.*, 849 F.3d 1034, 1043 (Fed. Cir. 2017) ("Attorney argument is not evidence.").

The trial record contains dozens of sworn denials from every party witness that Patterson ever joined the alleged Benco-Schein conspiracy. For Complaint Counsel to prevail, the Court will have to find that everyone committed perjury.[26] This includes every Patterson witness:

- **Paul Guggenheim** ("Absolutely not." "Never." "No." "No." "I do not." "No." "No." "No." "No." "Absolutely not" "No." "No." "No." "Absolutely not.").[27]

practice dentists are the ones who buy supplies); *see also, e.g.*, 4105:8–22 (same); 4330:21–4331:7 (same); VOL 3 (Cohen), 684:8–11 (same); VOL 13 (Rogan), 3588:5–15 (same).

[24] Trial Transcript VOL 10 (McFadden), 2728:20–22 ("Orthosynetics is a quasi-buying group that focus[es] on orthodontics"); *see also* Trial Transcript VOL 9 (Meadows), 2482:16–21 (identifying Orthosynetics as a buying group Schein did business with between 2011 and 2015).

[25] CX8004 (McFadden Dep.) 119:25–120:4.

[26] *See City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 130 (D.D.C. 2006) ("Facing the sworn denial of the existence of conspiracy, it [is] up to plaintiff to produce significant probative evidence by affidavit or deposition that conspiracy existed if summary judgment is to be avoided.") (citation omitted), aff'd 409 F. App'x 362 (D.C. Cir. 2011).

[27] Trial Transcript VOL 7 (Guggenheim), 1708:1–11; 1707:13–20; VOL 8 (Guggenheim), 1853:6–1854:8; 1870:9–23; CX8023 (Guggenheim Dep. 400:17–402:13).

- **David Misiak** ("Absolutely not." "I did not." "I did not." "I did not." "I did not.").[28]

- **Neal McFadden** ("We never had any agreement, any signed agreement, that we would not work with GPOs." "I do not." "I do not." "I do not." "[T]here is no signed agreement with anyone.").[29]

- **Tim Rogan** ("No." "No." "I do not." "I do not." "I do not." "No." "No.")[30]

It also includes every Benco witness:

- **Chuck Cohen** ("No." "No." "No." "No." "No.")[31]

- **Patrick Ryan** ("Not to my knowledge." "No." "No." "No, I'm not.").[32]

And it includes every Schein witness (Complaint Counsel does not dispute it has no evidence of communications between Patterson and Schein regarding buying groups[33]—a problem where Complaint Counsel argues all three Respondents needed to be on board for the conspiracy to work,[34] and where uncontradicted testimony shows Schein was working with buying groups):

- **Tim Sullivan** ("I don't know if people understand the consequences of being falsely accused . . . There are consequences to falsely accusing people of things we know we didn't do.")[35]

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[28] Trial Transcript VOL 6 (Misiak), 1502:11–13; CX8038 (Misiak Dep. 314:18–315:13).

[29] Trial Transcript VOL 10 (McFadden), 2738:7–12; CX8004 (McFadden Dep. 192:5–193:5); CX0315 (McFadden I.H. 250:24–25).

[30] Trial Transcript VOL 13 (Rogan), 3651:6–12; CX8017 (Rogan Dep. 257:20–258:12; 261:14–19).

[31] Trial Transcript VOL 4 (Cohen), 705:4–6; 713:23–714:6; 921:2–7; CX8015 (Cohen Dep. 484:5–10); CX0301 (Cohen I.H. 385:18–21).

[32] Trial Transcript VOL 5 (Ryan), 1269:20–25; CX8037 (Ryan Dep. 391:5–392:16).

[33] Opp. 18 n.106; *see also* RDX225 (a blank piece of paper listing all documents or testimony showing Schein communicated with Patterson about buying groups); Trial Transcript VOL 15 (Sullivan), 4929:17–4293:13 (Sullivan testifying that Complaint Counsel had not asked him a single question about communications with Patterson).

[34] Trial Transcript VOL 1 (Openings), 25:11-17

[35] Trial Transcript VOL 15 (Sullivan), 4021:11–15.

- **Kathleen Titus** ("Absolutely not, because no agreement existed . . . I find [Complaint Counsel's allegations] personally diminishing because I spent so much of my career at Henry Schein working with buying groups.")[36]
- **Jake Meadows** ("I do not." "Never heard of it." "No." "No.")[37]
- **Dave Steck** ("I have no knowledge." "No." "No." No." "No, I do not.")[38]
- **Randy Foley** ("No." "Never." "I was surprised when I saw [the allegations] because I'd been working with buying groups from the day I started with Special Markets until the day I retired." "No." No." "No." "No.")[39]

Witness after witness also rejected Complaint Counsel's sworn interrogatory responses claiming they had "knowledge" of a conspiracy.[40] Asked about these sworn statements at trial, they testified they were "false," "a lie," "not a true statement," and one witness even noted that no one from Complaint Counsel "asked me my permission to put something false in a document."[41] Complaint Counsel also has no defense for having cited about 60 interfirm text messages about sports, hurricane relief, sexual harassment training, and trade groups in sworn interrogatory responses as "relat[ing] to the conspiracy."[42]

Complaint Counsel's entire case against Patterson hinges on *two* emails between Chuck Cohen and Paul Guggenheim in February and June 2013. The February 2013 email begins by disclosing Benco's *preexisting* (and thus independently decided) policy and does not ask

[36] Trial Transcript VOL 18 Rough (Titus), 96:13–21.

[37] Trial Transcript VOL 9 (Meadows), 2467:7–15; CX8016 (Meadows Dep. 268:10–15; 268:23–269:12).

[38] Trial Transcript VOL 14 (Steck), 3831:13–25; CX8031 (Steck Dep. 145:23–146:15).

[39] Trial Transcript VOL 16 (Foley), 4599:20–4600:15; 4600:16–24; CX8003 (Foley Dep. 381:15–382:7).

[40] RX2960 (Complaint Counsel's Response to Patterson's Fourth Interrogatory).

[41] Trial Transcript VOL 16 (Foley), 4735:22–4736:3; VOL 15 (Reece), 4490:17–4491:7; VOL 18 Rough (Titus), 177:2–178:22; VOL (Maurer), 4990:19–24, respectively.

[42] RX2958 (response to Interrogatory 7).

Guggenheim to do or commit to anything. Nor did Cohen expect a response.[43] And Guggenheim fired off a "ten-second" response to be polite,[44] stating Patterson's preexisting (and thus also independently decided) feelings.[45] Complaint Counsel *assumes* Guggenheim's "ten-second" response "had an immediate impact," causing Patterson to cancel its meeting with NMDC.[46] Complaint Counsel's expert likewise admitted he merely "presume[d]" this:

> 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, but ***I'm not right now able to put my finger on such a communication*** . . . .[47]
>
> * * *
>
> A. Well, you're making -- ***okay. I don't have 1 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. ***However, I would presume*** that the senior manager of a company is managing his people, so that's where I am with that.[48]

Expert presumptions are not facts. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) ("Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them."); Trial Transcript (Pretrial) (Chappell) 25:19–20 ("Do not use experts to elicit facts that should be elicited through a fact witness."). And neither Complaint

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[43] CX0056 (Cohen wrote in a contemporaneous text message to a Benco colleague: "I don't expect to hear anything. I just sent him a note about it.").

[44] Trial Transcript VOL. 1612:21–22 ("[J]ust a cordial response . . . .").

[45] Trial Transcript VOL 7 (Guggenheim), 1611:18–19 ("I mean, this is a ten-second response to an e-mail."); 1705:23 – 1706:4 ("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.").

[46] Opp. 9.

[47] Trial Transcript VOL 12 (Marshall), 3311:10–24; 3321:25-3323:5 (emphasis added).

[48] Trial Transcript VOL 12 (Marshall), 3321:25–3322:9 (emphasis added).

Counsel nor its expert can point to any evidence supporting their assumption that Patterson's Albuquerque branch cancelled a meeting due to Guggenheim's email. Paul Guggenheim testified that he never talked to anyone from NMDC.[49] And, while he did forward Cohen's email to Dave Misiak and Tim Rogan, Guggenheim testified that he did not instruct them or anyone else at Patterson to do anything.[50] Rogan testified that he gave no instruction to Albuquerque and had no idea what the branch did regarding NMDC, and Misiak had no memory of the email.[51] And NMDC's Brenton Mason testified that he had "no reason to doubt" that Patterson's decision was made by its Albuquerque branch.[52] Complaint Counsel's opposition brief ignores all of this.

As to the June 2013 emails, Complaint Counsel's opposition brief ignores the uncontradicted evidence that Patterson made its own decision on ADC months before the emails, that Benco did too, that their decisions were opposite (Benco bid, Schein bid, Patterson didn't bid),[53] and that Patterson *never* pursued ADC's business after the emails (despite Complaint Counsel's assertions to the contrary[54]). Complaint Counsel argues that Patterson monitored and confronted Benco through this email, but both participants on the email (Guggenheim and Cohen) denied that,[55] and Complaint Counsel's "mere disbelief" of witnesses is not evidence. *Alvord-*

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[49] Trial Transcript VOL 7 (Guggenheim), 1704:9–18.

[50] Trial Transcript VOL 7 (Guggenheim), 1700:14–1701:17.

[51] Trial Transcript VOL 13 (Rogan), 3576:18–3577:21; CX0316 (Misiak I.H.) 235:8–12.

[52] Trial Transcript VOL 9 (Mason), ("Q. You have no reason to doubt that this was Mr. Reinhardt's decision, do you? A. No, I don't.").

[53] CX0093; RX3028 (Fruehauf Dep. 114:7–115:6) (Patterson decides not to bid on ADC in February 2013); CX2020; CX2021 (Schein bid for ADC's business in April 2013); CX0094 (Benco bid for ADC's business in May 2013); CX2579 (ADC selects Benco in mid-May 2013).

[54] Compl. ¶ 50 (alleging Patterson "ultimately competed for ADC's business despite previously notifying ADC that it would not submit a bid").

[55] Trial Transcript VOL 8 (Guggenheim), 1872:2–5 ("[B]y this email, did you believe that you were enforcing any agreement between Patterson and Benco not to do business with buying groups? A. Absolutely not."); Trial Transcript VOL 4 (Cohen), 918:19–919:10 ("Q. . . . was there

Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1014 (3d Cir. 1994) (affirming summary judgment on conspiracy claims explaining that "mere disbelief of contrary testimony does not prove agreement.").

ARGUMENT

I. Patterson Acted Independently And Pro-Competitively At All Times.

For each of Patterson's two interfirm communications at the heart of this case—the February 8, 2013 communication regarding the New Mexico Dental Cooperative, and the June 2013 communication regarding Atlantic Dental Care—Complaint Counsel's opposition brief fails to present "evidence that tends to exclude the possibility that the alleged conspirators acted independently," as the Supreme Court requires. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)). Complaint Counsel's brief also fails to rebut or even acknowledge other affirmative evidence that Patterson acted independently.

A. Patterson's Local Team Made Its Own Decision On The New Mexico Dental Cooperative.

Complaint Counsel's own case law makes clear that Cohen and Guggenheim's brief February 8, 2013 email exchange is not "compelling" proof of a conspiracy. Guggenheim never announced an intention to do anything—let alone take a specific action—with respect to buying groups. He simply stated *already held* feelings. [56] That is the exact difference between this case and the case Complaint Counsel heavily relies on for its argument—*Foley*: there, one realtor announced to others at a dinner party that he intended to raise his commission *in the future*. *United*

lemon juice with a secret code that's invisible to the rest of us that has 'enforce' or 'enforcement' in there? A. No.").

[56] CX0090 ("We feel the same way about these.").

States v. Foley, 598 F.2d 1323, 1332 (4th Cir. 1979). Here, neither Guggenheim nor Cohen stated that they would change their business practices regarding buying groups at all. And after-the-fact statements about existing policies (or feelings) "cannot support a [price-fixing] conspiracy." *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1033–34 (8th Cir. 2000) ("*Subsequent* price verification evidence on particular sales cannot support a conspiracy") (emphasis in original).

Complaint Counsel's brief ignores these evidentiary gaps:

First, Complaint Counsel still has not identified any evidence that anyone in Patterson's Minnesota headquarters passed an instruction down to Patterson's Albuquerque sales team over the weekend between the Cohen/Guggenheim emails and Patterson's final decision to break things off with New Mexico Dental Cooperative.[57] Complaint Counsel is asking the Court to do what its expert did: assume without evidence that an instruction was given.[58] But without evidence, the Court cannot make the "daisy chain" of assumptions needed to find that Guggenheim's email caused a cancellation in New Mexico. *See In the Matter of McWane, Inc. & Star Pipe Prod., Ltd.*, 155 F.T.C. 903, 2013 WL 8364918, at *258 (2013) (rejecting conspiracy counts where the record contained over 500 uncontradicted sworn denials and a host of other evidence disproving the claims); *In the Matter of McWane, Inc., A Corp., & Star Pipe Prod., Ltd.*, 2014-1 Trade Cas. (CCH) ¶ 78670, 2014 WL 556261 at *1 (F.T.C. Jan. 30, 2014) (conspiracy claims dismissed by the full Commission).

[57] *See* Mot. 3 (pointing out this deficiency).

[58] *See supra* p.9.

Second, Complaint Counsel still has not produced evidence that Patterson even viewed NMDC as a "buying group."[59] Brenton Mason of NMDC testified under oath that NMDC is not a buying group. [60] Complaint Counsel has therefore also failed to put on evidence tending to exclude the possibility that Patterson declined to work with NMDC for reasons other than the government's view that NMDC was a buying group.

Third, Complaint Counsel still has not accounted for evidence that Patterson's views on NMDC changed—and the Albuquerque branch decided to cancel the meeting—*before* the February 8, 2013 emails. Again, on February 4, 2013, Brenton Mason sent an industry-wide email blast to manufacturers about a partnership he thought NMDC was forming with Patterson.[61] His email "created quite a stir" and, in *his* view, caused Patterson to walk back its arrangement with NMDC as of *February 7—before* Cohen emailed Guggenheim—a view corroborated by Patterson's Scott Belcheff's cancelling the meeting on February 7.[62] Mason was the best positioned to make this assessment, and Complaint Counsel presented no evidence that Mason's view was incorrect. Thus, Complaint Counsel has failed to exclude the possibility that Patterson changed its views towards NMDC because Mason wrote a wild, industry-wide email blast—not because (the government thinks) it was a "buying group."

Fourth, Complaint Counsel does not respond to the fact that every relevant witness has denied that Cohen and Guggenheim's February 8, 2013 email had anything to do with Patterson's Albuquerque branch's decision. Paul Guggenheim testified that he never talked to anyone from

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[59] *See* Mot. 22 (pointing out this deficiency).

[60] Trial Transcript VOL 9 (Mason), 2364:19–2365:1 (Mason testified that NMDC is a dental cooperative, not a buying group).

[61] RX2235-003.

[62] CX4090; Trial Transcript VOL 9 (Mason), 2352:10–14; 2376:6–11; 2381:1–16; and 2385:10–2386:7.

the New Mexico Dental Cooperative.[63] NMDC's Brenton Mason did testify, though, and he said he had no reason to doubt that Patterson's decision was made by its Albuquerque branch.[64] Complaint Counsel may think it knows better than Mr. Masons, but "mere disbelief" of witnesses is not evidence.[65] Thus, Complaint Counsel has not put on evidence tending to exclude the possibility that Patterson's Albuquerque branch decided on its own not to work with NMDC.

B. The Evidence Shows Patterson Made Its Own Decision On Atlantic Dental Care.

Complaint Counsel's unsupported *assumptions* regarding Guggenheim and Cohen's June 2013 communication have been refuted by the witnesses' own testimony—as well as other evidence in the record—and do not meet their heavy burden of "exclude[ing] the possibility that Patterson acted independently. Actually, Patterson and Benco *did* act independently with respect to ADC. Paul Guggenheim thought ADC was a "buying group" and *never* bid on it, Chuck Cohen thought it was not a "buying group" and bid and won its business a month before the emails at issue.[66] Complaint Counsel does not acknowledge the absence of evidence supporting its allegation that, after learning from Chuck Cohen that ADC was not a buying group, Patterson "ultimately competed for ADC's business despite previously notifying ADC that it would not submit a bid."[67] Absent such evidence, Complaint Counsel has not introduced evidence tending

[63] Trial Transcript VOL 7 (Guggenheim), 1704:9–18.

[64] Trial Transcript VOL 9 (Mason), ("Q. You have no reason to doubt that this was Mr. Reinhardt's decision, do you? A. No, I don't.").

[65] *Alvord-Polk*, 37 F.3d at 1014.

[66] CX0092; CX0062; Trial Transcript VOL 3 (Cohen), 548:22–549:2 ("I don't recall when we came to that realization, but I – we did come to the realization that [Atlantic Dental Care] was a DSO.").

[67] Compl. ¶ 50.

to exclude the possibility that Guggenheim's email was an after-the-fact discussion permitted under antitrust law. *Blomkest*, 203 F.3d at 1033–34.

C. Patterson Made Its Own Decisions On "Buying Groups" In General.

Complaint Counsel also offers no response to the Marianas Trench full of evidence that during the alleged conspiracy, Patterson was competing vigorously with Schein and Benco. They did not compete over buying groups because buying groups do not buy anything, and because Patterson generally did not work with them *before or during* the alleged conspiracy.[68] And Complaint Counsel provides no evidence that Patterson competed with Benco or Schein over buying groups *before* the alleged conspiracy and then stopped.

Complaint Counsel makes much of every negative statement Patterson employees made about "buying groups" during the alleged conspiracy.[69] But Complaint Counsel ignores all evidence showing Patterson felt the same way about "buying groups" both before and after Guggenheim heard from Cohen in February 2013.[70]

Pre-conspiracy:

- David Misiak in 2009: "[GPOs] ha[ve] not been a good fit or need for [Patterson's] dental business."[71]
- Neal McFadden in 2012: "I get these [emails from prospective GPOs] more often than I like. . . . I'm gonna tell him thanks but no thanks. . . .

[68] Trial Transcript VOL 6 (Misiak) 1493:16–19, 1499:14–19 (buying groups were not part of Patterson's core strategy in 2009 or 2012); Trial Transcript VOL 13 (Rogan), 3605:18–25 (Patterson was not pursuing buying group business in 2012 because it would have been a distraction); *supra* p.5.

[69] *See* Opp. 16.

[70] *See id.*

[71] CX3114.

David Misiak responding to McFadden: "Your response is right."[72]

- Shelley Beckler in 2014: "These are the reasons we didn't bid on it back in 2009: it's a GPO . . . ."[73]

Post-Conspiracy:

- May 2015: "I also fully realize what a very slippery slope a GPO arrangement can be."[74]

- May 2015: "We *currently* have little appetite to deal with buying groups as we feel they compete directly with the branches and reps."[75]

- August 2015: "I told David that we appreciated the opportunity and that our business plan hasn't typically involved buying groups."

  Neal McFadden: "I think the response to them was spot on."[76]

- January 2016: "[W]e are not going to participate in a GPO type program at this point."[77]

- Tim Rogan at Trial: "Even today, it is – it's not an opportunity to point the organization at. It would be a distraction."[78]

These statements show that Patterson's views and practices towards buying groups were developed unilaterally. Certainly, in refusing to acknowledge the statements' existence, Complaint Counsel has not put on evidence tending to exclude the possibility that Patterson's feelings on buying groups were independently developed.

[72] CX0159. Though Complaint Counsel does not acknowledge it, this email is again perfectly analogous to one Misiak sent on February 27, 2013, which Complaint Counsel continues to hold up as an instruction implementing the conspiracy. Opp. 10.

[73] RX0401.

[74] RX0401.

[75] RX0451 (emphasis added).

[76] CX3008.

[77] CX0137.

[78] Trial Transcript VOL 13 (Rogan), 3605:18–25.

Nor does Complaint Counsel acknowledge any evidence that Patterson thought it *was* working with and competing over a handful of buying groups before and during the alleged conspiracy. Complaint Counsel thinks it knows better; that OrthoSynetics and Jackson Health are not real "buying groups."[79] But the evidence shows Patterson thought they were buying groups, which is all that matters in evaluating whether Patterson was committed to a common scheme to boycott "buying groups."[80]

Turning to Complaint Counsel's two main spurned "buying groups"—Smile Source and Kois—Complaint Counsel offers no response to the fact that each Respondent treated Smile Source differently,[81] or that Smile Source says it is not a "buying group,"[82] or that Patterson bid on Smile Source almost two years after the alleged conspiracy.[83] And Complaint Counsel also does not and cannot contest that Patterson rationally passed on the Kois Buyers Group after finding that the man running it, Qadeer Ahmed, was not truthful in his reach-out to Patterson.

CONCLUSION

Because Complaint Counsel has failed to present evidence tending to exclude the possibility of independent conduct or evidence showing a possibility of recurrence, the Complaint against Patterson must be dismissed.

Dated: February 14, 2019 */s/ Joseph A. Ostoyich*

[79] Opp. 16.

[80] *Supra* n.24.

[81] Trial Transcript VOL 8 (Goldsmith), 2176:22–2177:1 ("Q. So, three different respondents, three different responses; correct? A. Yes.").

[82] Trial Transcript VOL 17 (Maurer), 4936:10–11 ("Smile Source is not a buying group"); RX2952 (Maurer Dep. 18:17–19 ("Q. Do you consider Smile Source to be a buying group? A. No."); CX0322 (Maurer I.H. 86:1–3) ("Q. Do you consider Smile Source to be a buying group? A. No.").

[83] Trial Transcript VOL 13 (Rogan), 3538:8–3540:8 (Patterson bid on Smile Source in early 2017).

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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2019 I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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CERTIFICATE FOR ELECTRONIC FILING

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

Dated: February 14, 2019

By: /s/ *Andrew T. George*
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Notice of Electronic Service

I hereby certify that on February 14, 2019, I filed an electronic copy of the foregoing 2019-02-14 Patterson's Reply ISO Motion to Dismiss the Case Against Patterson in its Entirety, with:

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