PUBLIC VERSION

ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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 FOR SUMMARY DECISION

INTRODUCTION

The case against Patterson is a textbook example of "regulatory hubris" run amok.[1] Complaint Counsel's Opposition brief underscores that hubris and demonstrates why summary decision should be granted.

First, Complaint Counsel crosses through the looking glass to argue that Patterson's motion for summary decision is somehow an "attempt to *evade* judicial scrutiny."[2] That is upside-down on both facts and law. Patterson's motion—like any motion for summary disposition—*invites* the Commission's careful scrutiny of the record: thousands of documented independent decisions to cut prices to solo dentists and small practices, a significant and sustained set of independent decisions to invade the corporate DSO stronghold of Schein and Benco, and a continued approach of engagement and evaluation of "buying groups" on their individual merits, plus sworn denials from every fact witness in this case.

Second, the "scattered" evidence on the other side of the scale is remarkably weak: only two direct communications between Benco and Patterson concerning "buying groups." One concerned the Atlantic Dental Cooperative ("ADC") and occurred in early June 2013—roughly four months ***after*** Patterson decided not to bid to become ADC's distributor, roughly a month ***after*** Benco and Schein each did the opposite and bid to become its distributor, and several

[1] "I want to see the Commission approach its intervention decisions with a philosophy of regulatory humility that has been absent in the last several years. . . . government actors must heed the limits of their knowledge, consider the repercussions of their actions, and be mindful of the private and social costs that government actions inflict." Maureen K. Ohlhausen, Commissioner, Federal Trade Commission, Antitrust Policy for a New Administration (Jan. 24, 2017), available at https://www.ftc.gov/system/files/documents/public_statements/1051993/antitrust_policy_for_a_new_administration.pdf.

[2] *See* Opp. 1 n. 4 (emphasis added)

weeks ***after*** ADC selected Benco. This ***after-the-fact*** communication, and Patterson's ***different conduct*** from Benco and Schein, cannot prove a conspiracy.

The other communication, Paul Guggenheim's expression of an ***existing feeling*** in response to an unsolicited email from Benco's Chuck Cohen on February 8, 2013 [redacted] cannot be a "conscious commitment to a common scheme," *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984), let alone "significant probative evidence." *Lamb's Patio Theatre, Inc. v. Universal Film Exchanges, Inc.*, 582 F.2d 1068, 1070 (7th Cir. 1978) ("Facing the sworn denial of the existence of conspiracy, it was up to plaintiff to produce significant probative evidence by affidavit or deposition that conspiracy existed if summary judgment was to be avoided."). Neither man thought Guggenheim was committing to anything.[3]

Third, Patterson's conduct was consistent before, during, and after the 2013-15 period. For example, on March 8, 2012—nearly a year *before* Patterson's alleged "abrupt shift" on "buying groups"—Neal McFadden emailed David Misiak about a new "Group Purchasing Organization" being formed:

[redacted]

Misiak responded:

[redacted][4]

If this email was from 2013, it would be front and center in Complaint Counsel's case, like a nearly identical one Misiak sent a year later passing along his personal practice of politely declining to work with buying groups.[5] But it is from 2012, so it goes unmentioned.

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[3] RX2969 (Cohen I.H. 246:7–8) (SOF Ex. 179) [redacted]; RX2981 (Guggenheim I.H. 242:15–16) (SOF Ex. 158) [redacted].

[4] RX0029 (SOF Ex. 51).

Fourth, Complaint Counsel heavily cites unsworn statements from its paid expert, Dr. Marshall. Opp. 3 n.7, 3 n.10, 5 n.21, 19 n.113, 20 n.119, 21 n.124, 22, 22 n.127, 28 n.165, 28 n.167, CC-SOF ¶ ¶ 1, 3, 5, 6, 7, 8, 9, 10, 17, 62, 75, 77, 78, 79, 80, 81, 82, 83, 84; CC-SOF Response ¶ ¶ 16, 17, 19, 22–32, 47, 48, 49, 50, 51, 55, 56, 57–58, 59–63, 82, 85, 89, 97, 98, 99, 100, 108, 112, 113. Of course, expert testimony "is not considered for the purpose of establishing the underlying facts," particularly when unsworn.[6]

The Commission should not be tricked by this tactic, particularly since Dr. Marshall's opinion is premised on extraordinary sleight-of-hand. He opines that Patterson acted against its unilateral economic self-interest by not bidding and winning business from two "buying groups" in 2013-15. These were not the two groups referenced in Cohen and Guggenheim's February and June 2013 emails, though. Instead, Dr. Marshall studied ***two different*** entities that Patterson never discussed with Benco and Schein: Kois, which had no members when it reached out to Patterson, and Smile Source, which was unique because its members were franchisees.[7]

One of Dr. Marshall's Smile Source case studies was based on purchases ***before*** Patterson allegedly joined the conspiracy in February 2013, another is from ***after*** the alleged conspiracy ended.[8] Neither can be evidence of a conspiracy, obviously. His three remaining case studies examined 621 dentists out of roughly 200,000 nationwide—0.3% (or three thousandths)—hardly

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[5] CX0093 (SOF Ex. 160).

[6] *See* Scheduling Order 20, *and* FTC Rule 3.24(a)(3) (opposition to summary decision must be supported "by affidavits"), respectively.

[7] RX3022 (Kois Jr. Dep. 129:2–11 (SOF Ex. 175)); RX2037 (Marshall Report, at 143-144) (SOF Ex. 187).

[8] RX2964 (Marshall Dep. Vol. 2 70:5–12; 73:3–6) (SOF Ex. 188).

a statistically-robust sampling size.[9] And he finds [redacted] for the same period—by not bidding to become the distributor for the Kois Buyers Group.[10] From that tiniest of fractions, Dr. Marshall jumps to his conclusion.

If passing up on an extra [redacted] in potential profit means that a company acted against its self-interest, then any company is two misunderstood emails away from such an accusation. The Supreme Court has cautioned against this type of thinking: "Firms do not expand without limit and none of them enters every market that an outside observer might regard as profitable, or even a small portion of such markets." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 (2007) (citing Areeda & Hovenkamp ¶ 307d, at 155 (Supp. 2006)).

Because no evidence-based factual disputes remain, the Commission should grant summary decision and dismiss the case against Patterson.

SUMMARY OF UNDISPUTED FACTS

I. Patterson's Position Towards "Buying Groups" Never Shifted.

Patterson devoted an entire section of its opening brief to testimony that Patterson always considered but was generally skeptical towards "buying groups." Mot. Part III. Complaint Counsel addressed none of it. Instead, Complaint Counsel cites one deeply misleading snippet of Paul Guggenheim's deposition testimony as evidence that Patterson was "still evaluating" buy-

[9] RX2964 (Marshall Deposition Vol. 2, 78:13–23); *Class 8 Transmission Indirect Purchaser Antitrust Litig.*, 140 F. Supp. 3d 339, 356 (D. Del. 2015), aff'd in part, vacated in part, 679 F. App'x 135 (3d Cir. 2017) (analysis of one percent of market "in no way" showed that the plaintiffs could meet their burden in seeking class certification).

[10] RX2037 (Marshall Expert Report) (SOF 187) Figures 60 and 87 [redacted] CX0085-041 (SOF Ex. 190) [redacted].

ing groups up until Chuck Cohen's unsolicited February 8, 2013 email. Opp. 5, 15. Opp. 25–26. But when Guggenheim said, [redacted] he was speaking in the *present tense*. RX2981 (Guggenheim I.H. 246:14–18) (SOF Ex. 158) [redacted].

Patterson's skeptical view of "buying groups" dated from well before Cohen's February 8, 2013 email. *See* Mot. 6. Complaint Counsel lists a few *post*-February 8, 2013 emails discussing "buying groups" negatively, but Patterson executives were saying the exact same things *before* February 8, 2013, such as David Misiak's ***March 8, 2012*** response to Neal McFadden's email proposing to say "no thanks" to a new "Group Purchasing Organization," in which Misiak responded: [redacted][11]

Patterson also did not shift its behavior towards Smile Source or Dentistry Unchained as needed to support the Complaint Counsel's timeline. *See* Opp. 27. Patterson had been declining to work with Smile Source since 2011, and said about it in 2013: [redacted][12] Patterson also explored options for working with Dentistry Unchained a few months after its July 2015 launch, and Neal McFadden believed that Patterson Special Markets ultimately made an offer to Dentistry Unchained and that a local Patterson branch may have worked with it.[13]

[11] RX0029 (SOF Ex. 51).

[12] CX3117; CX3176; RX2952 (Maurer Dep. 26:24–29:1, 42:16–44:01) (SOF Ex. 61); RX2982 (McFadden I.H. 204:18-205:8) (SOF Ex. 181); RX2790 (SOF Ex. 193); RX3042 (Lepley Dep. 69:15:3–79:8) (SOF Ex. 8).

[13] RX3019 (McFadden Dep. 128:2–9; 151:11–17; 152:2–10; 153:16–23) (SOF Ex. 4); CX3006 (SOF Ex. 194).

II. Complaint Counsel's "Direct And Unambiguous Evidence" Has Been Refuted.

No witness supports Complaint Counsel's interpretations of the documents that are the sum of its case.[14]

First, there is Paul Guggenheim's February 8, 2013 response to Chuck Cohen's unsolicited email about Benco's "buying group" policy, and Guggenheim's forwarding of that email to David Misiak and Tim Rogan.[15] Guggenheim testified that he viewed Cohen's email as [redacted] and forwarded it to Misiak and Rogan because [redacted][16] He gave no instructions to Misiak or Rogan in his forwarding email.[17] Nor did Misiak and Rogan interpret it as a directive.[18] As to Guggenheim's statement that he would [redacted] Guggenheim testified that [redacted], which it apparently did.[19] There is no evidence of Guggenheim actually investigating.[20]

Second, there is David Misiak's February 27, 2013 email to Anthony Fruehauf passing along his personal practice of politely declining to work with buying groups.[21] This email is vir-

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[14] The same is true for non-Patterson documents. Patrick Ryan has repeatedly explained that he was joking when he [redacted]—he assumed that Patterson and Schein had already rejected this group because Benco was a smaller player. RX2972 (Ryan I.H. 170:9–172:6) (SOF Ex. 195); RX3049 (Ryan Dep. 314:6–315:22) (SOF Ex. 79).

[15] CX0090 (SOF Ex. 196).

[16] RX2981 (Guggenheim I.H. 255:13–256:21) (SOF Ex. 158).

[17] CX0091 (SOF Ex. 161).

[18] RX3050 (Misiak Dep. 99:22–100:7) (SOF Ex. 14) [redacted] RX3032 (Rogan Dep. 53:14–16) (SOF Ex. 2) (same).

[19] RX2981 (Guggenheim I.H. 240:7–243:15, 244:8–12) (SOF Ex. 158).

[20] RX2981 (Guggenheim I.H. 243:16–18, 244:19–22) (SOF Ex. 158).

[21] CX0093 (SOF Ex. 160).

tually identical to one Misiak had sent *a year earlier*.[22] It is also similar to other pre-alleged-conspiracy emails.[23] Misiak explained that the 2013 email [redacted][24]

Third, there is Guggenheim's June 6, 2013 outreach to Chuck Cohen ADC. Guggenheim did not [redacted] (Opp. 18), as Complaint Counsel contends. Guggenheim repeatedly explained at his deposition, right before and after the portion cited, that his purpose was [redacted][25]

Patterson also never shifted its approach to ADC. Complaint Counsel claims that, after Guggenheim learned ADC was not a buying group, Guggenheim [redacted] Opp. at 11. But Guggenheim repeatedly refused to say that, testifying that [redacted] Also, consistent with Patterson's decentralized sales structure, Guggenheim had no idea whether Patterson had ever bid for ADC's business.[27] It had not.[28]

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[22] RX0029 (SOF Ex. 51); relatedly, *see also,* RX0401 (SOF Ex. 49) [redacted]

[23] RX0401 [redacted] (SOF Ex. 49); RX0020 (August 2011 [redacted] (SOF Ex. 50); RX0029 (March 2012) (SOF Ex. 51).

[24] RX2983 (Misiak I.H. 102:7–9) (SOF Ex. 63).

[25] RX2981 (Guggenheim I.H. 299:1–6, 300:16–303:9) (SOF Ex. 158).

[26] RX2981 (Guggenheim I.H. 303:10–305:25) (SOF Ex. 158).

[27] RX3038 (Guggenheim Dep. 419:11–15) (SOF Ex. 7) [redacted]

[28] RX3017 (Nease Dep. 52:19–21) (SOF Ex. 64).

Fourth, there is Tim Rogan's August 2, 2013 email about [redacted] Opp. 6–7. Rogan testified that this email expressed his view that [redacted][29] Rogan said he was [redacted]

Fifth, there is Neal McFadden's June 2014 text message about having [redacted] Opp. 7. McFadden testified that his text was [redacted][31] McFadden was alluding to Guggenheim's instructions that Patterson Special Markets was supposed to focus only on DSOs.[32] In reality, there was no signed agreement; only Guggenheim's instruction.[33] McFadden did ultimately meet McIntosh, but he delegated the opportunity to a special markets representative so he could avoid McIntosh going forward.[34]

Finally, every knowledgeable witness has testified that Patterson's decision not to attend a trade show was based on the organizer bashing and competing with distributors like Patterson—it had nothing to do with "buying groups."[35]

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[29] RX2984 (Rogan I.H. 249:10–21) (SOF Ex. 62).

[30] RX2984 (Rogan I.H. 239:13–240:4) (SOF Ex. 62).

[31] RX2982 (McFadden I.H. 238:17–22) (SOF Ex. 181).

[32] RX2982 (McFadden I.H. 238:23–25) (SOF Ex. 181).

[33] RX3019 (McFadden Dep. 238:1–239:20) (SOF Ex. 4).

[34] RX2982 (McFadden I.H. 248:3–16) (SOF Ex. 181).

[35] SOF ¶ 102.

III. Patterson's Decisions Were Independent And Reasonable.

Complaint Counsel's "Cast of Characters" omits a key player, Qadeer Ahmed. So, too, does Complaint Counsel's brief and statement of facts, which never mention him. Nor did Dr. Marshall know who Ahmed was.[36]

This is surprising, because Ahmed was the Kois Buyers Group's only contact with Patterson.[37] An outside businessman with no known dental experience, Ahmed came to Patterson in late 2014 claiming thousands of members worldwide, plus four established vendors signed up ready to work with his group.[38] Patterson, skeptical of these wild claims, called one of the vendors, and that vendor had never heard of Ahmed or Kois.[39] Patterson declined and never heard from Ahmed or Kois again.[40]

Burkhart, Complaint Counsel's white knight, had the same reaction to Ahmed and only signed on with Kois after personal outreach from its long-time customer, Dr. John Kois himself (who never reached out to Patterson).[41] Dr. Kois (the group's founder) and Johnny Kois (its current manager) testified that Ahmed was [redacted]

[36] RX2963 (Marshall Dep. Vol. 1 84:11–15) (SOF Ex. 189).

[37] RX3023 (Kois Sr. Dep. 35:11–21) (SOF Ex. 174); RX3022 (Kois Jr. Dep. 129:23–130:5) (SOF Ex. 175).

[38] SOF ¶ 110.

[39] SOF ¶ 110.

[40] SOF ¶ 111.

[41] RX3023 (Kois Sr. Dep. 68:6–19) (SOF Ex. 174) [redacted]; RX3022 (Kois Jr. Dep. 129:2–11) (SOF Ex. 175) [redacted]

[redacted][42] Johnny Kois, who took over for Ahmed in late 2015, would not even say that Ahmed had done anything in his job: [redacted] [43] Kois does not believe that not working with Patterson has affected its success in any way.[44] This is Complaint Counsel's best example of a victimized "buying group."

Complaint Counsel's Smile Source evidence is even weaker. It says that Patterson rejected Smile Source "because it was a buying group," but its only support (aside from improper citations to an unsworn expert report) is Patterson's having declined to work with Smile Source in 2013.[45] But Patterson had been declining to work with Smile Source since the fall of *2011*, and its 2013 declination left Smile Source on the "idea board."[46]

Complaint Counsel offers no evidence that Patterson boycotted its other two alleged "buying group" victims: Dental Gator and KlearImpakt, just the tautology that both entities were "buying groups" and Patterson boycotted all "buying groups."[47] There is no evidence that Patterson ever communicated with KlearImpakt at all.[48]

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[42] RX3023 (Kois Sr. Dep. 125:9–127:4) (SOF Ex. 174).

[43] RX3022 (Kois Jr. Dep. 10:15–19) (SOF Ex. 175).

[44] RX3022 (Kois Jr. Dep. 134:25–135:5) (SOF Ex. 175).

[45] CC Response to SOF ¶ 112.

[46] CX3176 (SOF Ex. 192); RX2952 (Maurer Dep. 26:24-27:1) (SOF Ex. 61); RX2982 (McFadden I.H. 204:18–205:8) (SOF Ex. 181); RX2790 (SOF Ex. 193); RX3042 (Lepley Dep. 69:15:3–79:8) (SOF Ex. 8).

[47] CC-SOF Response ¶¶ 113, 115.

[48] CC-SOF Response ¶ 115.

ARGUMENT

I. Complaint Counsel's Interpretations Of Documents Are Not Direct Evidence.

The fact that every single fact witness in this case has denied Patterson's participation in an agreement is not a trap. It is a reason Complaint Counsel must respond with more than its own interpretations of cut-and-pasted documents. *Cf. City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 130 (D.D.C. 2006). Where contemporaneous documents are subject to multiple interpretations, and where witnesses universally support one interpretation, Complaint Counsel's contrary views do not overrule the witnesses. *Ale v. Tennessee Valley Auth.*, 269 F.3d 680, 689 (6th Cir. 2001) (citing *Riddell v. Guggenheim*, 281 F.2d 836, 840 (9th Cir. 1960) (equivocal documents do not deserve special weight)); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1014 (3d Cir. 1994) ("mere disbelief" of witnesses is not evidence).

a. Patterson's *Continued* Skepticism Towards "Buying Groups" In 2013 Is Evidence Of Independent Decision-Making.

Complaint Counsel's discussion of *United States v. Foley* perfectly illustrates the problem with its case. Opp. 16–17 (discussing 598 F.2d 1323, 1327, 1332, 1334 (4th Cir. 1979)). In *Foley*, after one realtor announced at a dinner party his intention to raise his commission from 6% to 7%, other partygoers raised their commissions to 7%. 598 F.2d at 1332. Here, by contrast, neither Cohen nor Guggenheim stated an intention to *change* their companies' policies towards buying groups, and neither one did. Patterson is like a *Foley* dinner attendee who, hearing that another attendee was *already* charging 7%, truthfully said "me too" (except that Patterson never discussed pricing at all).[49] Such after-the-fact verifications of existing policies "cannot

[49] None of the Patterson communications Complaint Counsel flags discuss pricing. Rather, they discuss Patterson's *existing* feelings towards "buying groups." CX0090 (SOF Ex. 196) [redacted]

support a [price-fixing] conspiracy. *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1033–34 (8th Cir. 2000).

Complaint Counsel also makes much of Patterson's supposed about-face on hosting an event for the New Mexico Dental Cooperative around at the same time as the February 8, 2013 Cohen-Guggenheim email exchange. Opp. 6 n.30, 17. But Complaint Counsel identifies no evidence that Guggenheim, Misiak, or Rogan communicated with the local representative over the weekend before the representative confirmed on February 11 that the event was cancelled.[50]

b. Patterson Did Not And Could Not Enforce An Agreement.

Paul Guggenheim's June 2013 email that allegedly constitutes Patterson's enforcement of an agreement simply asked a question: [redacted] he never complained and certainly did nothing to punish Benco (nor could he).[51] And again, Guggenheim repeatedly explained that his email did have a business purpose—[redacted] which it achieved. *See supra* n.16. This is not comparable with *Foley*, where co-conspirators repeatedly called each other to complain when they found others taking 6% commissions on some listings, 598 F.2d. at 1333, and *United States v. Beaver*, where the conspirators met and discussed ways to raise and stabilize concrete prices, leaving with a "firm understanding that an agreement . . . had been reached." 515 F.3d 730, 734 (7th Cir. 2008).

II. Plus Factors Weigh Against Conspiracy.

a. Patterson Acted Consistent With Its Self-Interest.

As the government argued in *Twombly*, "drawing inferences from what a business fails to do is a problematic exercise; one can analyze the harms and benefit of an action as a discrete

[50] Henry Schein-001403150 (SOF Ex. 198).

[51] CX0095 (SOF Ex. 164).

matter, but the number of territories a business does not enter or products it does not offer is virtually infinite. Even the most vigorous rivals will end up not competing in some respects."[52] Courts must therefore "exercise prudence in labeling a given action as being contrary to the actor's economic interests, lest [they] be too quick to second-guess well-intentioned business judgments of all kinds." *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1310 (11th Cir. 2003). "[I]f a benign explanation for the action is equally or more plausible than a collusive explanation, the action cannot constitute a plus factor." *Id*.

Complaint Counsel's claims suffer from severe hindsight bias. Patterson is faulted for allegedly missing a chance "to secure multiple customers and garner higher market share with one efficient contract." Opp. 21. Yet this assertion cites Kois, which had zero customers when Qadeer Ahmed reached out to Patterson, and which Burkhart initially rejected.[53] If Patterson's reaction to Ahmed was against its self-interest, then Burkhart's was too. Faulting Patterson for not anticipating that Kois would replace Qadeer Ahmed a year later, change its membership structure, and enroll actual members, is absurd. The right to choose one's customers "exemplifies precisely the type of economic system upon which American business thrives," and Patterson had every right not to work with someone like Ahmed.[54]

Another document cited is one in which Smile Source told a trade publication it had [redacted].[55] This choice of citation is surprising. Right

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[52] *Brief for the United States as Amicus Curiae Supporting Petitioners* at 21, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (No. 05-1126), 2006 WL 2482696 (U.S.), at *21.

[53] Opp. 20, n.125; SOF ¶ 110; *supra* n.36.

[54] *G. & P. Amusement Co. v. Regent Theater Co.*, 107 F. Supp. 453, 463 (N.D. Ohio 1952) (finding for the defendant after a bench trial in alleged conspiracy to favor one theater over another for film distribution).

[55] CX0149 (SOF Ex. 201).

above the quoted language (which Complaint Counsel uncritically accepts as true), Smile Source is described as [redacted] Orthosynetics is a "buying group" Patterson worked with *during* the alleged conspiracy, which Complaint Counsel denies is a "buying group."[56] Regardless, Patterson declined to work with Smile Source as early as 2011,[57] and the email shows Patterson was open to reconsidering in August 2014—the middle of the alleged conspiracy.

Complaint Counsel also claims it was against Patterson's self-interest to discuss its bidding strategies and to reveal its no-buying group policy to its biggest competitors. But no communications of bidding strategies are cited. Nor is any evidence cited that Patterson's or Benco's approaches to buying groups were competitively sensitive. Benco had been broadcasting its buying group policy for years.[58] And Patterson's decision not to attend a trade show, to the extent it was first announced by someone from Patterson (and not the TDA president, as the cited email states), would have come from a Texas Regional Manager not alleged to have been aware of an agreement with Benco and Schein.[59]

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[56] CC-SOF 68. Complaint Counsel seizes on favorable language from an internal discussion at Patterson regarding whether OrthoSynetics fit the precise definition of a "buying group." *Id.* But *Patterson* thought its "historical" feelings towards buying groups might need to be revisited for OrthoSynetics. RX0333 (SOF Ex. 58). Similarly, it does not matter what *Complaint Counsel* thinks Jackson Health is based on a website. CC-SOF ¶ 69. What matters that *Patterson* thought it was a "buying group" and worked with it anyways. RX0271 (SOF Ex. 59).

[57] SOF ¶ 112.

[58] RX3049 (Ryan Dep. 341:2–9) (SOF Ex. 79) [redacted]

[59] Opp. 22 (citing CX1289) (SOF Ex. 202). The only communication between Patterson and Schein cited is a January 2014 communication about whether Schein will attend the Texas Dental Association meeting in Spring 2014. Opp. at 11-12. Patterson had decided ***months earlier*** not to pay for floor space at the TDA annual meeting, and in January 2014, Schein simply said it would tell Patterson ***after*** it made its own decision. CX3378 (SOF Ex. 203); CX0112 (SOF Ex.

b. Patterson's Inter-Firm Communications Are Explained, And Complaint Counsel's Disbelief Of The Explanations Is Not Evidence.

The record of horizontal communications "between Patterson and the other Respondents" is not at all "troubling." Opp. 24. Virtually none are with Schein, and none with Schein discuss "buying groups." Most involve irrelevant topics like sports, family, and hurricane relief. Mot. Part V. The only two relating to "buying groups" are, once again, the February and June 2013 exchanges between Cohen and Guggenheim in which no commitments were made.[60]

Complaint Counsel cites *Gainsville Utilities Department v. Florida Power & Light, Co.*, but this case could not be more different. 573 F.2d 292 (5th Cir. 1978). There, as part of an agreed allocation of power customers and service regions, the parties engaged in back-and-forth expressions of gratitude and explicit promises to reciprocate. *See, e.g.*, *id.* at 297 ("Please be assured that if a similar situation should occur concerning your Company, we would be glad to reciprocate."). Whereas here, Patterson's February and June 2013 exchanges with Benco included no commitments; nothing resembling the explicit promises in *Gainsville*.

Complaint Counsel also compares this case with *Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 681 F. Supp. 2d 141, 174 (D. Conn. 2009), a case involving hundreds of inter-firm communications over nearly a decade, during which executives discussed prices and market shares, responses to price increases, and competitors' actions, in addition to meeting offsite, using false names, and directing that written messages be destroyed after reading. *Id.* at 176. Guggenheim and Cohen's *two* communications about "buying groups" are not comparable. *Cf. Moundridge*, 409 F. App'x at 364 (affirming summary judgment and finding that "a few scat-

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169). There was thus no "agreement" about TDA attendance and no discussion of whether to sell or discount to a "buying group."

[60] Opp. 24, n.137.

tered communications and memoranda obtained during discovery" and "presented out of context" fell far short of creating an issue of fact).

c. The Change Of Conduct Factor Weighs In Patterson's Favor.

Patterson encourages the Court to compare this case with *Toys "R" Us*[61] and *Domestic Drywall,* which respectively featured "abrupt shift from dealing with warehouse clubs to boycotting them," and a sudden elimination of job quotes after decades in which they were a common industry feature.[62] *Domestic Drywall* explained, "For a change in conduct to create an inference of a conspiracy, the shift in behavior must be a 'radical' or 'abrupt' change from the industry's business practices." 163 F. Supp. 3d 255 (quoting *Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 410 (3d Cir. 2015).

But here there was no shift, and certainly no "radical" one. Complaint Counsel's only evidence that Patterson changed positions in February 2013 is a misquote of Guggenheim's deposition testimony and an unsupported assumption that a local sales representative must have cancelled a meeting the following Monday because of an email exchange his CEO had had the previous Friday. *See supra* p.12.

ADC is a much worse example. Complaint Counsel states that "[t]he first change in conduct occurred when Misiak instructed the salesforce not to bid, reasoning that ADC was a buying group and Respondents did not work with buying groups." Opp. 26. But Misiak had written a nearly identical email a year earlier. [63] The second alleged ADC shift is again based on a mis-

[61] Opp. 25 (citing 221 F.3d 928 (7th Cir. 2000)).

[62] Opp. 25 (citing 221 F.3d at 935 *and* 163 F. Supp. 3d 255–56).

[63] RX0029 (SOF Ex. 51).

quote of Guggenheim, and Devon Nease, who dealt with ADC, again testified that [redacted] [redacted][64]

CONCLUSION

Complaint Counsel's opposition confirms this is a case in which a "daisy chain of assumptions fails to support or justify an evidentiary inference of any unlawful agreement."[65] Summary Decision should be granted.

Dated: October 17, 2018

/s/ Joseph A. Ostoyich

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[64] RX3017 (Nease Dep. 52:19–21) (SOF Ex. 64).

[65] *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. A Ltd. P'ship.*, 2014-1 Trade Cas. (CCH) ¶ 78670, 2014 WL 556261, at *2 (MSNET Jan. 30, 2014) (conspiracy claims dismissed by the full Commission).

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October 17, 2018

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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.

October 17, 2018

By: /s/ *Andrew T. George*

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Notice of Electronic Service

I hereby certify that on October 17, 2018, I filed an electronic copy of the foregoing 2018-10-17 Patterson MSD Reply [PUBLIC], 2018-10-17 Patterson Supplemental Statement of Fact ISO MSD Reply [PUBLIC], with:

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PUBLIC VERSION

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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.**	)	

SUPPLEMENTAL STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE IN SUPPORT OF RESPONDENT'S PATTERSON COMPANIES, INC.'s REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY DECISION

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Pursuant to Rule 3.24 of the Federal Trade Commission's Rules of Practice, Respondent Patterson Companies, Inc. ("Patterson"), submits this Supplemental Statement of Material Facts as to Which There is No Genuine Dispute ("SOF"), and Response to Complaint Counsel's Statement of Facts, in support of its Motion for Summary Decision.

There is no genuine dispute as to the following facts:

I. SUPPLEMENTAL FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE

1. Paul Guggenheim testified as follows: [redacted] RX2981 (Guggenheim I.H. 246:14–18) (SOF Ex. 158).

2. In a March 8, 2012 email discussing "Group Purchasing Organizations," Neal McFadden wrote to David Misiak: [redacted] RX0029 (SOF Ex. 51).

3. Misiak responded to McFadden's March 8, 2012 email with: [redacted] *Id.*

4. Patterson had been declining to work with Smile Source since 2011, and in 2013 it said about Smile Source: [redacted]" CX3117; CX3176; RX2952 (Maurer Dep. 26:24–29:1, 42:16–44:01) (SOF Ex. 61); RX2982 (McFadden I.H. 204:18-205:8) (SOF Ex. 181); RX2790 (SOF Ex. 193); RX3042 (Lepley Dep. 69:15:3–79:8) (SOF Ex. 8).

5. Patterson talked with Dentistry Unchained in July 2015, just a few months after its launch, and explored options for working together. RX3019 (McFadden Dep. 151:11–17; 152:2–10) (SOF Ex. 4); CX3006 (SOF Ex. 194).

6. Neal McFadden believed that Patterson Special Markets ultimately made an offer to Dentistry Unchained and that a local Patterson branch may have worked with it at one point. RX3019 (McFadden Dep. 128:2–9; 153:16–23) (SOF Ex. 4).

7. Patrick Ryan has repeatedly explained that he was joking when he [redacted]—and that he assumed that Patterson and Schein had already rejected this group because Benco was a smaller player. RX2972 (Ryan I.H. 170:9–172:6) (SOF Ex. 195); RX3049 (Ryan Dep. 314:6–315:22) (SOF Ex. 79).

8. Paul Guggenheim responded to Chuck Cohen's unsolicited email about Benco's "buying group" policy on February 8, 2013, and forwarded the email to David Misiak and Tim Rogan. CX0090 (SOF Ex. 196).

9. Guggenheim testified that he viewed Cohen's February 8, 2013 email as [redacted] and forwarded it to Misiak and Rogan because [redacted] RX2981 (Guggenheim I.H. 255:13–256:21) (SOF Ex. 158).

10. Guggenheim gave no instructions to Misiak or Rogan in his forwarding email. CX0091 (SOF Ex. 161).

11. Misiak and Rogan did not interpret Guggenheim forwarding Cohen's email as any sort of directive. RX3050 (Misiak Dep. 99:22–100:7) (SOF Ex. 14) [redacted]

[redacted] RX3032 (Rogan Dep. 53:14–16) (same) (SOF Ex. 2).

12. As to Guggenheim's statement that he would [redacted], Guggenheim testified that [redacted]. RX2981 (Guggenheim I.H. 240:7–243:15, 244:8–12) (SOF Ex. 158).

13. There is no evidence of Guggenheim actually investigating New Mexico Dental Cooperative. RX2981 (Guggenheim I.H. 243:16–18, 244:19–22) (SOF Ex. 158).

14. David Misiak's emailed Anthony Fruehauf on February 27, 2013 passing along his personal practice of politely declining to work with buying groups. CX0093 (SOF Ex. 160).

15. Misiak's February 27, 2013 email is virtually identical to one Misiak had sent *a year earlier*. RX0029 (SOF Ex. 51); relatedly, *see also,* RX0401 (SOF Ex. 49) [redacted]

16. Misiak's February 27, 2013 email is also similar to other pre-alleged-conspiracy emails. RX0401 (SOF Ex. 49) [redacted]; RX0020 (August 2011: [redacted] (SOF Ex. 50); RX0029 (March 2012) (SOF Ex. 51).

17. Misiak explained that the 2013 email [redacted] RX2983 (Misiak I.H. 102:7–9) (SOF Ex. 63).

18. Guggenheim reached out to Cohen via email on June 6, 2013 about ADC. Guggenheim repeatedly explained at his deposition that the purpose of emailing Cohen was [redacted] RX2981 (Guggenheim I.H. 299:1–6, 300:16–303:9) (SOF Ex. 158).

19. Guggenheim testified that [redacted]. RX2981 (Guggenheim I.H. 303:10–305:25) (SOF Ex. 158).

20. Guggenheim had no idea whether Patterson ever actually bid for ADC's business. RX3038 (Guggenheim Dep. 419:11–15) (SOF Ex. 7) [redacted].

21. Patterson did not bid for ADC's business. RX3017 (Nease Dep. 52:19–21) (SOF Ex. 64).

22. Rogan testified that his August 2, 2013 email abou [redacted]. RX2984 (Rogan I.H. 249:10–21) (SOF Ex. 62).

23. Rogan said he was [redacted] RX2984 (Rogan I.H. 239:13–240:4) (SOF Ex. 62).

24. McFadden explained at his deposition that his June 2014 text message about having [redacted] was [redacted]

[redacted] RX2982 (McFadden I.H. 238:17–22) (SOF Ex. 181).

25. McFadden was trying to get across that, per Guggenheim's instructions, Patterson Special Markets was supposed to be focusing only on DSOs. RX2982 (McFadden I.H. 238:23–25) (SOF Ex. 181).

26. McFadden's text to McIntosh was simply an attempt to brush him off—in reality there was no signed agreement; there was only Guggenheim's instruction. RX3019 (McFadden Dep. 238:1–239:20) (SOF Ex. 4).

27. McFadden did ultimately meet McIntosh, but he delegated the opportunity to a special markets' representative, so he could avoid McIntosh going forward. RX2982 (McFadden I.H. 248:3–16) (SOF Ex. 181).

28. Every knowledgeable witness has testified that Patterson's decision not to attend a trade show was based on the organizer bashing and competing with distributors like Patterson—it had nothing to do with "buying groups." SOF ¶ 102.

29. Dr. Marshall did not know who Qadeer Ahmed was. RX2963 (Marshall Dep. Vol. 1 84:11–15) (SOF Ex. 189).

30. Ahmed was the Kois Buyers Group's only contact with Patterson. RX3023 (Kois Sr. Dep. 35:11–21) (SOF Ex. 174); RX3022 (Kois Jr. Dep. 129:23–130:5) (SOF Ex. 175).

31. An outside businessman with no known dental experience, Ahmed came to Patterson in late 2014 claiming thousands of members all over the world, plus four established vendors signed up ready to work with his group. SOF ¶ 110.

32. Patterson, skeptical of these wild claims, called one of the vendors, and that vendor had never heard of Ahmed or Kois. *Id*.

33. Patterson declined and never heard from Ahmed or Kois again. SOF ¶ 111.

34. Burkhart had the same reaction to Ahmed as Patterson and only signed on with Kois after personal outreach from its long-time customer, Dr. John Kois himself (who never reached out to Patterson). RX3023 (Kois Sr. Dep. 68:6–19) (SOF Ex. 174) [redacted] RX3022 (Kois Jr. Dep. 129:2–11) (SOF Ex. 175) [redacted]

35. Dr. Kois (the group's founder) and Johnny Kois (its current manager) testified that Ahmed was [redacted]. RX3023 (Kois Sr. Dep. 74:9-24) (SOF Ex. 174).

36. Dr. Kois testified that [redacted] at the time it reached out to Patterson. RX3023 (Kois Sr. Dep. 74:9-24) (SOF Ex. 174).

37. Johnny Kois, who took over for Ahmed in late 2015, was not even willing to say that Ahmed had done his job at all: [redacted]. RX3022 (Kois Jr. Dep. 10:15–19) (SOF Ex. 175).

38. And Johnny Kois does not believe that not working with Patterson has affected its success in any way. RX3022 (Kois Jr. Dep. 134:25–135:5) (SOF Ex. 175).

39. Patterson had been declining to work with Smile Source since the fall of 2011, and its 2013 declination left the door open to future collaboration. CX3176; RX2952 (Maurer Dep. 26:24-27:1) (SOF Ex. 61); RX2982 (McFadden I.H. 204:18–205:8) (SOF Ex. 181); RX2790 (SOF Ex. 193); RX3042 (Lepley Dep. 69:15:3–79:8) (SOF Ex. 8).

II. RESPONDENT PATTERSON'S RESPONSE TO COMPLAINT COUNSEL'S STATEMENT OF FACTS

General Objections

Respondent Patterson objects to Complaint Counsel's Statement of Facts on the ground that it is not required to specifically respond to each of Complaint Counsel's "facts" under Rule 3.24. Patterson further objects on the ground that many of Complaint Counsel's statements are factually incorrect, misleading, vague, or merely repeat factual allegations in the Complaint that have been contradicted by the undisputed evidence in this case, as stated in Patterson's Statement of Material Facts. Specifically, and without waiving its right to specifically object to the remaining paragraphs, Patterson objects to the following paragraphs as factually incorrect: ¶¶ 1-12, 15-24, 26-33, 35, 36, 38, 40, 41-48, 50, 51, 56-69, 72, 73, 74-84.

Dated: October 17, 2018

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