UNITED STATES OF AMERICA BEFORE THE FEDERAL TRADE COMMISSION

ON 09 21 2018
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SECRETARY

In the Matter of

BENCO DENTAL SUPPLY CO.,
a corporation,

HENRY SCHEIN, INC.,
a corporation, and

PATTERSON COMPANIES, INC.,
a corporation.

ORIGINAL DOCKET NO. 9379

PUBLIC

PATTERSON'S MOTION [AND PROPOSED ORDER] FOR SUMMARY DECISION

Pursuant to Rule 3.24 of the Federal Trade Commission's Rules of Practice, Respondent Patterson Companies, Inc. ("Patterson") respectfully moves for summary decision in this action. For the reasons set forth in the accompanying memorandum, this motion should be granted.

Dated: September 21, 2018 /s/ Joseph A. Ostoyich

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ATTORNEYS FOR PATTERSON COMPANIES, INC.

UNITED STATES OF AMERICA BEFORE THE FEDERAL TRADE COMMISSION

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BENCO DENTAL SUPPLY CO.,)	
a corporation,)	
)	DOCKET NO. 9379
HENRY SCHEIN, INC.,)	
a corporation, and)	
)	
PATTERSON COMPANIES, INC.,)	
a corporation.)	
)	

[PROPOSED ORDER]

Having carefully considered Respondent's Motion, Complaint Counsel's Opposition, and Respondent's Reply, and all supporting and opposing evidence, and the applicable law, it is hereby ORDERED AND ADJUDGED, that Respondent's Motion for Summary Decision is hereby GRANTED, and this action is DISMISSED.

ORDERED:
By the Commission.

Donald S. Clark
Secretary

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)
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BENCO DENTAL SUPPLY CO.,)
a corporation,)
) DOCKET NO. 9379
HENRY SCHEIN, INC.,)
a corporation, and) PUBLIC
)
PATTERSON COMPANIES, INC.,)
a corporation.)
)

MEMORANDUM IN SUPPORT OF PATTERSON'S MOTION FOR SUMMARY DECISION

REDACTED MATERIAL PROTECTED PURSUANT TO FEBRUARY 13, 2018 PROTECTIVE ORDER ENTERED BY THIS COURT

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INTRODUCTION

A mountain of undisputed evidence—literally, thousands of contemporaneous documents
and sworn answers in depositions—demonstrates that Patterson Dental ("Patterson") consistently
made its own, independent, competitive decisions. That approach was at the core of the
company's strategic goals and its success: it against Benco and Schein
(and its other competitors), them with price cuts and better service to convince
customers to their allegiance to Patterson. It engaged in
extraordinary efforts—the record contains more than
—to business away from Benco and Schein,
their customers, and Those
battles led Patterson to cut prices and provide better support
in a dentist-by-dentist effort to
Beginning in 2013,
Schein and Benco had long dominated the
segment, and it was the fastest-growing part of an otherwise stagnant industry. Patterson
attacked, starting in 2013, and its efforts to invade Schein and Benco's stronghold worked: over
the next three years,

"Buying groups" were a very different type of customer from the corporate DSOs: they were loose affiliations of dentists that were often just starting out and had very few members, were *not* incorporated, did *not* own their member practices, could *not* commit to any set volume of purchases on their behalf, and *always* left their member-dentists free to buy or not buy from any distributor the "buying group" endorsed. In short, they were self-appointed "middle men" who inserted themselves between the distributor and its dentists, and asked for significantly lower product prices from the distributor—and, of course, took their own "taste." In return, the distributor got no concrete commitment to buy anything, and no cost savings because each member-practice still had its own location for bill-to and ship-to and equipment support, maintenance, and repair. As a result, Patterson never considered "buying groups" attractive customers—but it always met with them, evaluated them, and made its own decisions on whether to engage or not. When it made sense for Patterson, the company sold to "buying groups." But when it did not make sense for Patterson, the company did not.

Patterson's conduct—cutting prices,

and making its

own, independent decision on whether to sell to it—is, of course, at the very core of legitimate unilateral conduct under the antitrust laws. "[C]utting prices in order to increase business" "stimulates competition" and is its "very essence." *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993) (affirming judgment as a matter of law for defendant) (citations omitted). A "procompetitive price cut" is "perhaps the most desirable activity (from an

_

¹ 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.").

antitrust perspective) that can take place in a concentrated industry[.]" *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 235 (1st Cir. 1983) (Breyer, J.) (affirming judgment for defendant). Invading a competitor's customer base, meeting with and carefully assessing each customer, and selling to customers on terms that make independent sense, are likewise the epitome of independent and competitive conduct.

That mountain of evidence of Patterson's independent and pro-competitive conduct is insurmountable. But, the fact record here also contains hundreds of sworn denials from every witness in the case that anyone from Patterson agreed with anyone from Benco or Schein to boycott "buying groups." "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." *See City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 130 (D.D.C. 2006) (emphasis added) (citation omitted), *aff'd* 409 F. App'x 362 (D.C. Cir. 2011).

Complaint Counsel has no such evidence. Instead, it has and will point to a small	ll handful
of emails; but on their face those emails do not show any agreement with, or any "c	conscious
commitment" to, Benco or Schein that Patterson would boycott "buying groups."	

These few emails do not raise an inference that Patterson agreed to boycott "buying groups" and they do not come close to being the "significant probative evidence" that is necessary to overcome the mountain of evidence of the company's independent and competitive decision-making and the many, many sworn denials of conspiracy that are in the record. *Moundridge*, 429 F. Supp. at 130. Accordingly, summary decision should be granted in Patterson's favor.

SUMMARY OF UNDISPUTED MATERIAL FACTS

Patterson has been distributing dental equipment (e.g., X-Ray and CAD/CAM machines,
digital radiography sensors, and integrated operatory treatment centers), and consumable
supplies (gloves, cotton rolls, rinse cups, disposable syringes) for over 140 years. SOF ¶ 1. Its
product catalog includes more than 100,000 SKUs. SOF ¶ 2. Patterson employs more than
, organized in eight geographic regions
and more than 70 local branches, who serve tens of thousands of dentists across the country.
SOF ¶ 2.
$\operatorname{SOF} \P 4.$
SOF¶5.

					SOF ¶ 6.
In addition,					
			as discussed	l below. SOF	7.
For most of its 14	0-year history,				
	SOF ¶ 8. Even t	oday,			
	SOF	\P			
			SOF¶1	0.	
			_		
				SOF ¶ 11.	
		SOF ¶ 12.	Starting in	2013, however	r, Patterson
	SOF ¶ 13.				
In recent years, a					
				SOF ¶	14

SOF ¶ 15.		
		SOF
¶ 16.		
SOF ¶ 17.		
SOF ¶ 18.		
	SOF ¶ 19.	For these
reasons, Patterson		
SOF ¶ 20.		

I. Patterson's Independent Decision-Making Resulted In A Waterfall Of Pro-Competitive Price Concessions To Solo And Small Dental Practices Throughout The 2013-16 Period That Continues To This Day

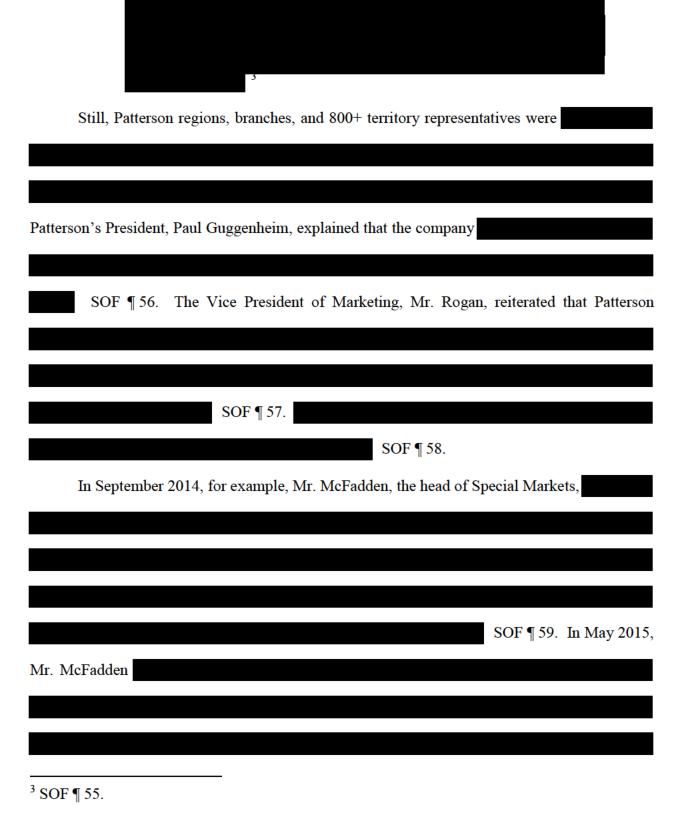
Patterson's strategic goals every year highlight its desire to
¶ 21.
To take share from its competitors, Patterson engaged in brutal competition:
Patterson Companies'
CEO, Scott Anderson, testified that Patterson
SOF ¶ 22, and Patterson Dental's President from May 2010 to 2015, Paul Guggenheim,
described his organization's efforts as SOF ¶ 23. The company was
and in with Schein and Benco and its many other
competitors SOF ¶ 24. Guggenheim's successor, David Misiak, testified
sof ¶ 25. Vice President
of Marketing and Merchandise, Tim Rogan, and other executives and regional managers likewise
testified that the company was
SOF ¶ 26.
SOF ¶ 27.
SOF ¶ 28. But, in addition to that,

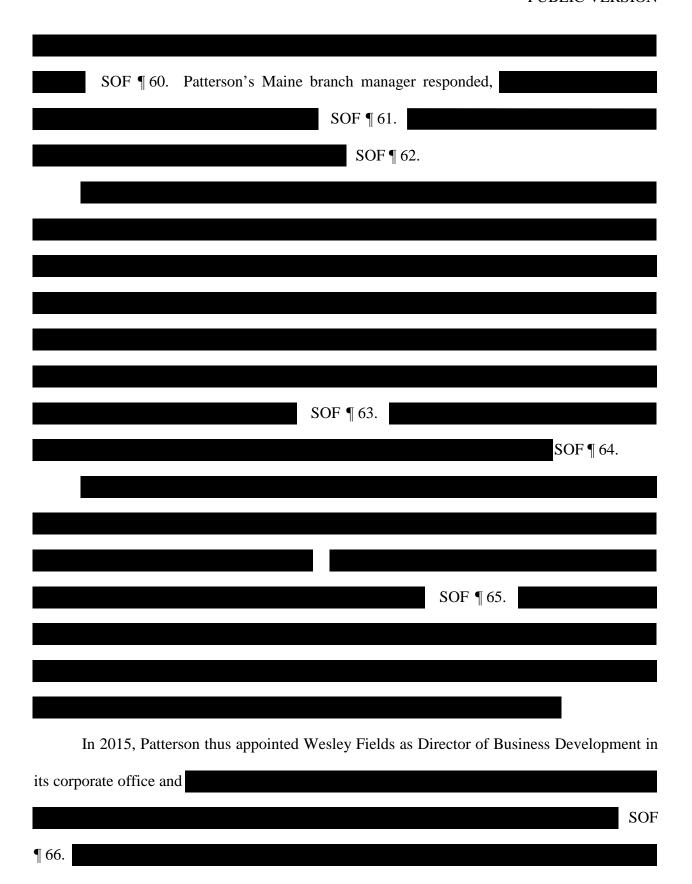
to win or keep business from Schein, Benco, and other
competitors during the 2013-16 period. SOF ¶ 29.
demonstrates just how brutal
Patterson's competitive efforts were throughout this period. In 2013, for example, sales reps
reported:
SOF ¶ 30.
Patterson's efforts to beat Schein, Benco, and its other competitors continued throughout
2014:
SOF ¶ 31.
Patterson's daily price competition continued throughout 2015 and 2016:

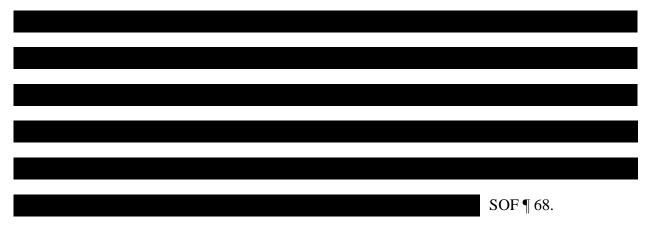
				SOF ¶ 32.		
	II.	Starting In 20 Invade Schein			ly To Build The	Capabilities To
			SOF ¶ 33.			
						SOF
¶ 34.						
						SOF
¶ 35.						
	SOF¶	36.				
	Patter	son thus decided	to			
				SOF ¶ 37. In	late Summer 2012.	, Patterson
				SOF ¶ 38.		
SOF 9	¶ 39. I	In Fall 2012,				

SOF ¶ 40.	
SOF ¶ 41. Patterson's executive team	
SOF ¶ 42. Neal McFadden, the company's Southeast regional manager,	
SOF ¶ 44.	
Patterson's work to build the capability to handle centralized demands of con	porate
	Γ
DSOs, was monumental, expensive, and risky:	
SOF ¶¶ 45, 46.	
SOI	F ¶ 47

			SOF ¶ 48. ²	
				SOF ¶ 49.
	ш.	Patterson Regions, Branches, And Ter- Independently Evaluated "Buying Group Attractive Customers		
		SOF ¶ 50.		
		SOF ¶ 51. Pa	tterson executiv	ves testified,
			SOF	¶ 53.
Market		rson's Shelly Beckler, a territory representative, reported that Patterson	and, later, me	mber of the Special
			9	SOF ¶ 54.
² Com	plaint (Counsel may		







IV. Every Witness Flatly Denied That Patterson Agreed With Benco or Schein To Boycott "Buying Groups"

Every current and former Patterson employee in this case flatly denied participating in the alleged Benco-Schein conspiracy to boycott "buying groups." Patterson Companies CEO ; Patterson Dental President Guggenheim ; his successor, Misiak Anderson, ; Vice President of Marketing and Merchandise, Rogan ; McFadden, head of Patterson Special Markets ; Lepley (as ; Fruehauf, southeast regional corporate designee), Director of Strategic Pricing manager ; Nease, branch manager SOF ¶ 69. Every Schein witness, likewise, James Breslawski, President, , Tim Sullivan, President, David Steck, Vice President of , Brian Brady, Senior Director of Sales , Joseph Cavaretta, Vice President of Sales, Western Area, Jake Meadows, Vice President of Sales, Eastern Area Muller, President of Special Markets, Randy Foley, Vice President of Sales, Special Markets , Debbie Foster, Director of Sales, Special Markets , Andrea Hight, Director of Group Practice , Kathleen Titus, Director of Group Practice Michael Porro, Zone Manager , Darci Wingard, Director of Alternative Purchasing Chanel SOF ¶ 70.

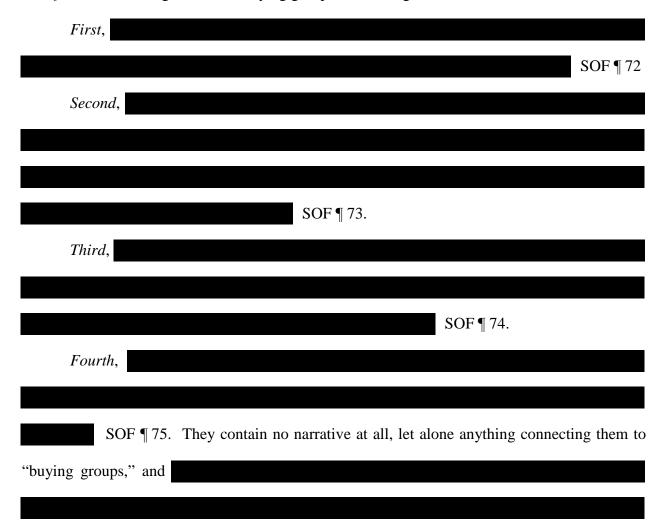
Benco witnesses, too, : Chuck Cohen,

Managing Director , Patrick Ryan, Director of Sales, Strategic Markets . SOF

¶ 71.

V. Patterson Did Not Agree To Boycott "Buying Groups" In Response To Or At Any Other Time

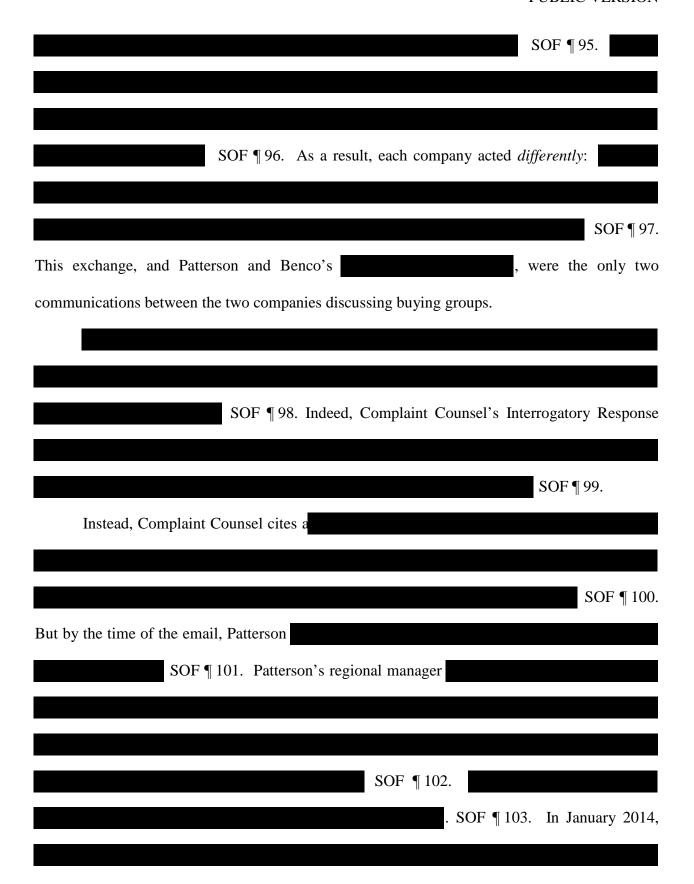
Complaint Counsel's interrogatory responses list numerous documents that, they claim, support their allegation that Patterson joined the alleged Benco-Schein conspiracy in February 2013. But those documents show nothing of the sort. In fact, virtually all those documents *on their face* have nothing to do with buying groups or the allegations in this case.



. SOF ¶ 76.				
What's left, literally, are				
	SOF ¶ 77.			
	"			SOF
				501
¶ 78.				
		SOF ¶ 79.		
SOF ¶ 80.				
In fact,				
			SOF ¶ 81.	

SOF ¶ 82. ⁴	
Instead,	
SOF ¶83	
SOF ¶ 83.	
SOF ¶ 84.	
COP SE SO CO	
SOF ¶¶ 50–68.	
4	
	<i>Id.</i> Misiak testified that
	Id. Misiak further explained that
	Id. Misiak said
	Id

Again, it shows no such thing
Instead,
SOF ¶ 85.
In early 2013, Patterson's Chesapeake branch manager
SOF ¶ 86.
SOF ¶ 87.
SOF ¶ 88. Patterson's branch manager and territor
rep SOF ¶ 89.
SOF ¶ 90. SOF ¶ 91.
COE TO No evidence supports Complaint Councel's assertion the
SOF ¶ 92. No evidence supports Complaint Counsel's assertion that
Patterson changed its approach to SOF ¶ 93.



SOF ¶ 104.	
	COT # 105
	SOF ¶ 105.
	SOF ¶ 106.
	ere Is No Evidence That Patterson Agreed To Boycott Any of the "Buying oups" Identified By Complaint Counsel
SOF ¶ 107.5	
"	SOF ¶ 108.
	SOI 100.
Accordingly, then	re is zero evidence of an agreement to boycott those four "buying groups."
Instead,	
⁵ The record thus	contains no testimony from:
The record thus	contains no testimony nom.
Complain Interrogatories.	nt Counsel's 8-17-2018 Supplemental Responses to Patterson's First Set of

	COE # 110
	SOF ¶ 110.
	SOF ¶ 111.
COE II 112	
. SOF ¶ 112.	
	SOF
¶ 113.	
SOF ¶ 114.	
Finally,	
SOF ¶ 115. It	
501 ⁻ ∥ 115. It	
	SOF ¶ 116.

LEGAL STANDARD

The standard of review for a motion for summary decision under FTC Rule 3.24 is "virtually identical" to that for a motion for summary judgment in federal court under Federal Rule of Civil Procedure 56: the plaintiff must establish a disputed issue of material fact. *In re Polygram Holding, Inc.*, 2002 WL 31433923, at *1 (FTC Feb. 26, 2002) (citing *In re Hearst Corp.*, 80 F.T.C. 1011, 1014 (1972) (noting that "Rule 3.24(a)(4) tracks Federal Rule 56(f)")). The party opposing the motion "may not rest upon the mere allegations or denials of his or her pleading" and instead "must set forth specific facts showing that there is a genuine issue of material fact for trial." 16 C.F.R. §3.24(a)(3); *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). The evidence must be substantial to survive summary judgment: "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (same).

ARGUMENT

The Administrative Complaint alleges that Patterson joined the Benco-Schein conspiracy in February 2013 in violation of FTC Act Section 5. "The existence of an agreement is the hallmark" and "essence" of a conspiracy claim. *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 117-18 (3d Cir. 1999). The agreement must *precede* the alleged fixing of prices. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) ("[W]hen allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent

action.").⁶ Plaintiff thus bears the burden of showing facts demonstrating that defendants agreed in advance upon "a unity of purpose or common design and understanding, or a meeting of minds in an unlawful arrangement." American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946). Thus, the central question in this case is whether Patterson's decisions with regard to "buying groups" in 2013-15 "stem[] from independent decision or from an agreement." Twombly, 550 U.S. at 553.

A plaintiff alleging a Section 1 conspiracy "must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita*, 475 U.S. at 588 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)). "[S]poradic exchanges of shop talk" or "evidence that competitors merely exchanged information" is insufficient to survive summary judgment—particularly where, like here, that information is exchanged *after* each company has already made its own, independent decision. *Moundridge*, 429 F. Supp. 2d at 132; *Baby Food*, 166 F.3d at 125 ("to survive summary judgment, there must be evidence that the exchanges of information had an impact on pricing decisions"); *Kreuzer v. Am. Acad. of Periodontology*, 735 F.2d 1479, 1487 (D.C. Cir. 1984); *In re Wellbutrin XL Antitrust Litig. Indirect Purchaser Class*, 868 F.3d 132, 153 (3d Cir. 2017) ("Mere communication between alleged co-conspirators, without more, is not sufficient to defeat the

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⁶ An agreement under FTC Act Section 5 requires the same proof as an agreement under Sherman Act Section 1. *See, e.g., California Dental Ass'n v. FTC*, 526 U.S. 756, 762 & n.3 (1999) (explaining that Section 5 of the FTC Act "overlaps the scope of § 1 of the Sherman Act"); *FTC v. Cement Institute*, 333 U.S. 683, 691–92 (1948) ("[S]oon after its creation the Commission began to interpret the prohibitions of § 5 as including those restraints of trade which also were outlawed by the Sherman Act, and that this Court has consistently approved that interpretation of the Act.").

presumption of independent action"); *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1036 (8th Cir. 2000) (same).

I. Undisputed Evidence Demonstrates Patterson's Thousands Of Independent Decisions To Discount, Invade Corporate DSOs, And Meet With, Evaluate, And, At Times, Sell To "Buying Groups"

The undisputed record evidence demonstrates that Patterson always acted independently regarding all customers, including "buying groups," and did not joined any alleged Benco-Schein conspiracy to boycott "buying groups" in 2013 or at any time. Instead, an enormous quantity of undisputed facts—thousands of contemporaneous Patterson documents and myriad sworn statements from every Patterson witness—demonstrate that the company acted independently and pro-competitively and day-in and day-out, cut its prices, invaded Schein and Benco's stronghold of corporate DSOs, and met with and evaluated whether to sell to 'buying groups' and sold to them when it made sense to Patterson, and did not, when it did not. Indeed, Patterson granted thousands of price concessions to win away business from Schein and Benco and invested millions of dollars to invade their stranglehold on the DSO market, all to the benefit of the end customer. Patterson's conduct—cutting prices, taking customers from competitors, and independently evaluating "buying groups"—is consistent with what the Supreme Court has held is the "very essence" of legitimate unilateral conduct under the antitrust laws. Brooke Group, 509 U.S. at 226. The uncontradicted, corroborated evidence points to nothing but Patterson's independent decision-making and procompetitive conduct.

Patterson's decision to not work with most "buying groups" was sensible and rational given its strong, unilateral interest in maintaining its relationships with the individual dental practices that were its mainstay. As its witnesses explained exhaustively, Patterson was not eager to cut prices for loosely affiliated groups that could not commit to buying anything in any

volume, that had no single buyers or agreed-upon formularies of available products to work with, and that would insinuate themselves into Patterson's critical relationships with independent dental practices. *See supra* pp. 6, 13. Additionally, Patterson

SOF ¶ 47. Any distraction—such as time spent

evaluating entities unable to commit to buying anything—could have risked millions in capital being spent to pursue the corporate segment in competition with rivals like Schein. *Id.* Yet

See supra p.12. It is black letter law that conduct that is "as consistent with permissible [activity] as with illegal conspiracy does not, standing alone, support an inference of an antitrust conspiracy." *Matsushita*, 475 U.S. at 588. The overwhelming record shows that Patterson's conduct was both procompetitive and in its own self-interest, and Complaint Counsel has not and cannot point to any evidence in the record to refute this.

II. Complaint Counsel's Few Emails Do Not Show That Patterson Joined Any Alleged Benco-Schein Conspiracy In February 2013 Or Afterwards

The record also contains hundreds of sworn denials of any agreement with Schein and Benco not to discount to "buying groups." Every witness asked—from Patterson and the other respondents—either affirmatively denied the existence of such an agreement or testified that they knew nothing of Patterson participating in one. SOF ¶¶ 69–71. The few communications cited in the Complaint do not show any advance communication or commitment to refrain from bidding on any buying group—and there are no communications at all between Patterson and Schein or Benco regarding the four buying groups Complaint Counsel alleges Patterson "refused" to deal with. Each witness involved in the few communications cited also flatly denied Complaint Counsel's interpretations of them. "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." *Moundridge*, 429 F. Supp. 2d at 130 (emphasis added) (citation omitted). Complaint Counsel has not done so.

Complaint Counsel's only "evidence" against Patterson center on two short email strings that, on their face, do not show any conscious commitment to boycott "buying groups." SOF ¶ 77. SOF ¶ ¶ 77–79. **SOF** Thus, the companies behaved differently. There was no discussion regarding boycotting any entity and no commitment to do so. Finally, in late 2013 Patterson's Region Manager for Texas SOF ¶ ¶ 100–106. SOF ¶¶ 105–106. mere "follow-the-leader" conduct is insufficient as a matter of law to establish a violation of Section 1. See Twombly, 550 U.S. at 566 ("[I]f alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a § 1 violation against almost any group of competing businesses would be a sure thing."); *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 53 (7th Cir. 1992) ("One does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry.") (quoting *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 484 (1st Cir. 1988)).

Complaint Counsel's entire case centers on these few documents, but witnesses have explained in detail that Complaint Counsel's inferences regarding the documents are flatly wrong. Complaint Counsel's own contentions (without any testimonial support) do nothing to overcome the insurmountable mountain of evidence showing Patterson's procompetitive conduct and are plainly insufficient to meet their burden of presenting a "material fact" to survive summary judgment. *Moundridge*, 429 F. Supp. 2d at 130 (granting summary judgment where defendants each denied any conspiracy and testified they made independent price and output decisions), 409 F. App'x 362, 364 (affirming summary judgment, holding that the plaintiffs' "few scattered communications" and other evidence "falls far short" of creating a genuine issue of material fact). The emails do not show an advance agreement and, of course, they also show a *disagreement* and plainly non-parallel conduct. *See Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1300 (11th Cir. 2003) (affirming summary

Oil Co. v. Philip Morris USA, 346 F.3d 1287, 1300 (11th Cir. 2003) (affirming summary judgment, holding that "[e]vidence that does not support the existence of a price fixing conspiracy any more strongly than it supports conscious parallelism is insufficient to survive a defendant's summary judgment motion"); Mitchael v. Intracorp, Inc., 179 F.3d 847, 858 (10th Cir. 1999) (affirming summary judgment because "ambiguous conduct that is as consistent with permissible competition as with illegal conspiracy does not by itself support an inference of antitrust conspiracy under Sherman Act section 1"); Baby Foods, 166 F.3d at 122 ("No

conspiracy should be inferred from ambiguous evidence or from mere parallelism when defendants' conduct can be explained by independent business reasons.").

Courts have consistently held the same and rejected such strained inferences. In *Moundridge*, for example, 18 municipalities brought a Section 1 case against a series of energy companies, alleging among other things an agreement to artificially inflate the price of natural gas. The defendants testified there, as here, that they made their price and output decisions independently. 429 F. Supp. 2d at 132. The plaintiffs responded with evidence that the defendants had an opportunity to conspire (during a series of industry meetings) and pointed to internal documents that, they argued, suggested a conspiracy. *Id.*; *Moundridge*, 409 F. App'x at 364. The district court rejected the plaintiffs' argument, noting that they had not even showed that the defendants had lied in their sworn statements. 429 F. Supp. 2d at 134. The D.C. Circuit affirmed, holding that the plaintiffs' "few scattered communications" and other evidence fell "far short" of creating a genuine issue of material fact. 409 F. App'x at 364.

In *Williamson*, the Eleventh Circuit likewise affirmed summary judgment in favor of the defendants despite 11 consecutive parallel price increases announced by every defendant, numerous alleged price "signals" between the defendants suggesting a desire to end a price war (and its subsequent end), regular sharing of very detailed sales information broken down by company, and an expert's opinion that it all amounted to a conspiracy. The Court found that the plaintiffs' evidence was insufficient to overcome defendants' sworn denials and it would be improper to permit the jury "to engage in speculation" in the face of defendants' denials. 346 F.3d. at 1302; *see also Blomkest*, 203 F.3d at 1033, 1037 (affirming summary judgment despite evidence that defendants engaged in "a high level of interfirm communications," including evidence plaintiffs argued demonstrated that the defendants "signaled pricing intentions to each

other," because the evidence was insufficient to overcome defendants' denials and was "far too ambiguous to defeat summary judgment"); *Lamb's Patio Theatre, Inc. v. Universal Film Exchanges, Inc.*, 582 F.2d 1068, 1070 (7th Cir. 1978) (affirming summary judgment because plaintiff had only "its bald allegation of conspiracy to refute the sworn affidavit denying a conspiracy"); *American Key Corp. v. Cumberland Associates*, 579 F. Supp. 1245, 1259 (N.D. Ga. 1983) (affirming summary judgment because each of the defendants submitted "sworn affidavits denying the existence of any contract, combination or conspiracy" and plaintiff failed to "come forward with significant probative evidence supporting its allegations of a conspiracy").

Finally, in *Blomkest*, the Eighth Circuit upheld a grant of summary judgment where the defendants engaged about three dozen "price verification calls" on *completed* sales, not future transactions, around the times that parallel pricing behavior occurred. 203 F.3d at 1033–34. Such a case theory, the court noted, "assumes a conspiracy first, then sets out to 'prove' it." *Id.* at 1033. The court held, "*Subsequent* price verification evidence on particular sales cannot support a [price fixing] conspiracy." *Id.* (emphasis in original)

Here, Complaint Counsel's "few scattered communications" between Patterson and Benco or Schein represent *after-the-fact* communications regarding decisions the companies had already made, and they are buried by an avalanche of unrefuted sworn witness denials and explanations. Complaint Counsel's case consists of nothing more than *its* interpretations and inferences regarding communications about past decisions made—interpretations that no sworn fact witness has agreed with. A plaintiff cannot prevail under Section 1 by seeking to infer an agreement from communications "despite a lack of independent evidence tending to show an agreement and in the face of uncontradicted testimony that only informal exchanges took place."

Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1014 (3d Cir. 1994). A plaintiff's "mere disbelief" of testimony contrary to its case theory is not evidence. *Id*.

CONCLUSION

Patterson respectfully submits there are no disputed facts to resolve, and summary decision should be granted in Patterson's favor.

Dated: September 21, 2018 /s/ Joseph A. Ostoyich

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ATTORNEYS FOR PATTERSON COMPANIES, INC.

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.)	
)	

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

REDACTED MATERIAL PROTECTED PURSUANT TO FEBRUARY 13, 2018 PROTECTIVE ORDER ENTERED BY THIS COURT

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I.	Patterson's	
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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 Statement of Material Facts as to Which There is No Genuine Dispute ("SOF"), in support of its Motion for Summary Decision.

There is no genuine dispute as to the following facts:

SUMMARY OF UNDISPUTED MATERIAL FACTS

- 1. Patterson has been distributing dental equipment (e.g., X-Ray and CAD/CAM machines, digital radiography sensors, and integrated operatory treatment centers), and consumable supplies (gloves, cotton rolls, rinse cups, disposable syringes) for over 140 years. (*See* https://www.pattersoncompanies.com/ who-we-are/default.aspx#section=history.)
- 2. Its product catalog includes more than 100,000 SKUs. (*Id.*)

(Lepley 7-24-2018 (Exhibit 8) FTC Dep. 18:3–17).

5. (Rogan 7-13-2018 (Exhibit 2) FTC Dep. 210:3).

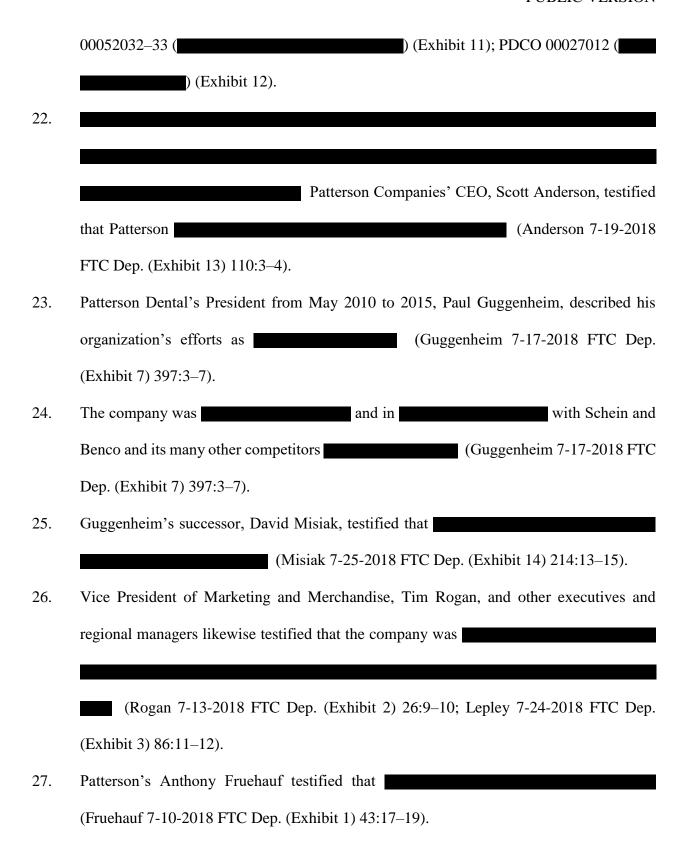
6. (Lepley 30(b)(6) 7-24-2018 (Exhibit 3) FTC

Dep. 90:8-91:7, 92:4-6).

7.	In addition,
	as discussed below.
	(Lepley 7-24-2018 (Exhibit 8) FTC Dep. 24:14–21; 27:24–28:9; 30:4–24; see e.g., PDCC
	00064461-63) (Exhibit 16).
8.	For most of its 140-year history,
	(McFadden 6-21-2018 (Exhibit 4) FTC Dep. 49:7–21).
9.	
	(PDCO 00023794 (Exhibit 5), slide 21).
10.	
	(PDCO 00023794 (Exhibit 5), slide 39).
11.	
	(See McFadden 6-21-2018 (Exhibit 4) FTC Dep. 97:6–17;
	http://www.oralhealthworkforce.org/wpcontent/uploads/2017/09/OHWRC_Trends_in_D
	ental_Service_Organization_Model_2017.pdf).
12.	
-	

				(PDCO 00054455
(Exhibit 6), p	. 57).			
Starting in 20	013, however, F	Patterson		
				(McFadden 4-
20-2017 (Exh	nibit 181) I.H. 52	2:2–7; Anderson 7	7-19-2018 (Exhibit	13) FTC Dep. 67:7–11)
In recent year	rs,			
(Evhibit 5) o	lida 40)			PDCO 00023794
(Exhibit 5), s	nde 49).			
		(McFadden	6-21-2018 (Evhibi	t 4) FTC Dep. 97:6–25
138·5_22· Re	ogan 7-13-2018 I		–221:8) (Exhibit 2)	_
As a result,	_	те Бер. 220.10	221.0) (Eximon 2)	
715 a resurt,				
				(McFadden 6-
21-2018 (Ext	nibit 4) FTC Dep	o. 138:5–22.)		(1:201 000011 0
	, 1	,		

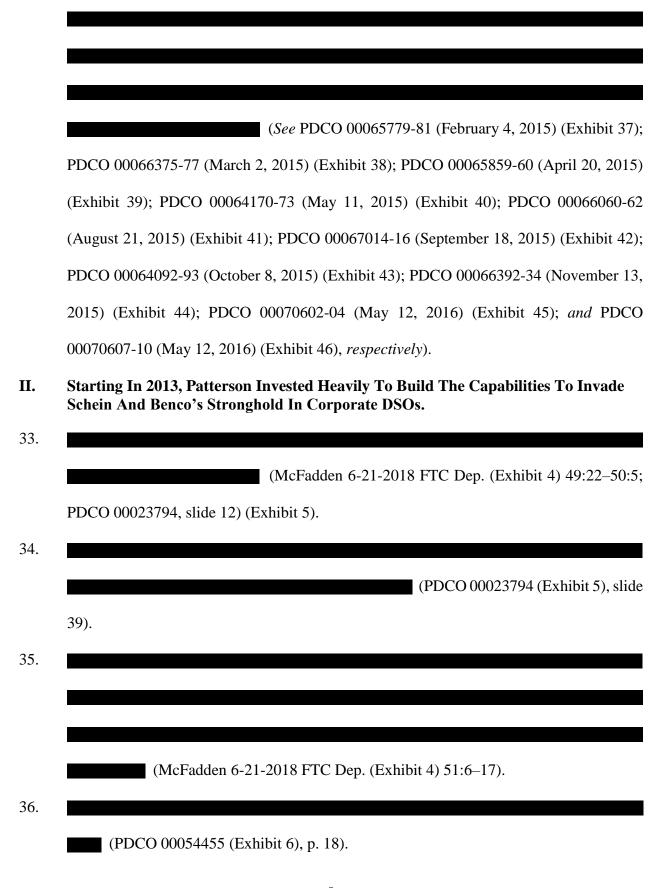
	(McFadden 6-21-2018 (Exhibit 4) FTC Dep. 97:18–98:12.
	(Fruehauf 7-10-2018 (Exhibit 1) FTC Dep. 58:17–59:17.)
For these reason	ons, Patterson
	(Rogan 7-13-2018 (Exhibit 2) FTC D
108:5–16; Mcl	Fadden 6-21-2018 (Exhibit 4) FTC Dep. Tr. 28:3–7; Guggenheim 7-1
(Exhibit 7) FT	C Dep. Tr. 150:6–151:6; Lepley 7-24-2018 (Exhibit 3) FTC Dep. Tr.
90:2).	
Patterson's	
	Throughout the Continues To This Day
2013-16 Perio	
	rategic goals every year highlight



	(Lepley 7-24-2018 FTC Dep. (Exhibit 3)
93:16).	
But, in addition to that,	,
to win or k	eep business from Schein, Benco, and other competitors during
2013-16 period. (Se	ee PDCO 00069522-00107742 and PDCO 00063442-0006
(Exhibit 15).	
	demonstrates just
brutal Patterson's com	npetitive efforts were throughout this period. In 2013, for exa
sales reps reported	
	(See PDCO 000644

			(See PDCO 00065
(January	15, 2014) (Exhibit 26);	PDCO 00070025-	30 (February 28, 2014) (Exhi
PDCO (0065343-45 (April 7, 20	14) (Exhibit 28);	PDCO 00065364-66 (April 16
(Exhibit	29); PDCO 00065398-4	00 (April 24, 201	4) (Exhibit 30); PDCO 00063
(April 3), 2014) (Exhibit 31); PD	OCO 00065503-05	(June 13, 2014) (Exhibit 32);
0006422	4-27 (August 28, 2014)	(Exhibit 33); PD	OCO 00065623-25 (October 8
(Exhibit	34); PDCO 00064157-	-60 (December 1	8, 2014) (Exhibit 35); and
0006573	8-40 (December 11, 2014	4) (Exhibit 36), <i>res</i>	spectively).
Patterson	s daily price competition	on continued throu	aghout 2015 and 2016:

00064752 (June 9, 2013) (Exhibit 23); PDCO 00064843-45 (September 17, 2013) (Exhibit



37.	Patterson thus decided to
	(PDCO 00054455 (Exhibit 6), p. 57).
38.	In late Summer 2012, Patterson
	(McFadden 6-21-2018 FTC Dep. (Exhibit 4) 50:18–25; PDCO 00054455-553) (Exhibit 6).
39.	
	(PDCO 00054455 (Exhibit 6), pp 32–39).
40.	In Fall 2012,
	(PDCO 00054455 (Exhibit 6).
41.	
	(PDCO 00054455 (Exhibit 6),
	pp. 86, 95–96).
42.	Patterson's executive team
	(Guggenheim 7-17-2018 FTC Dep. (Exhibit
	7) 174:14–23; PDCO 00037253-54 () (Exhibit 10).

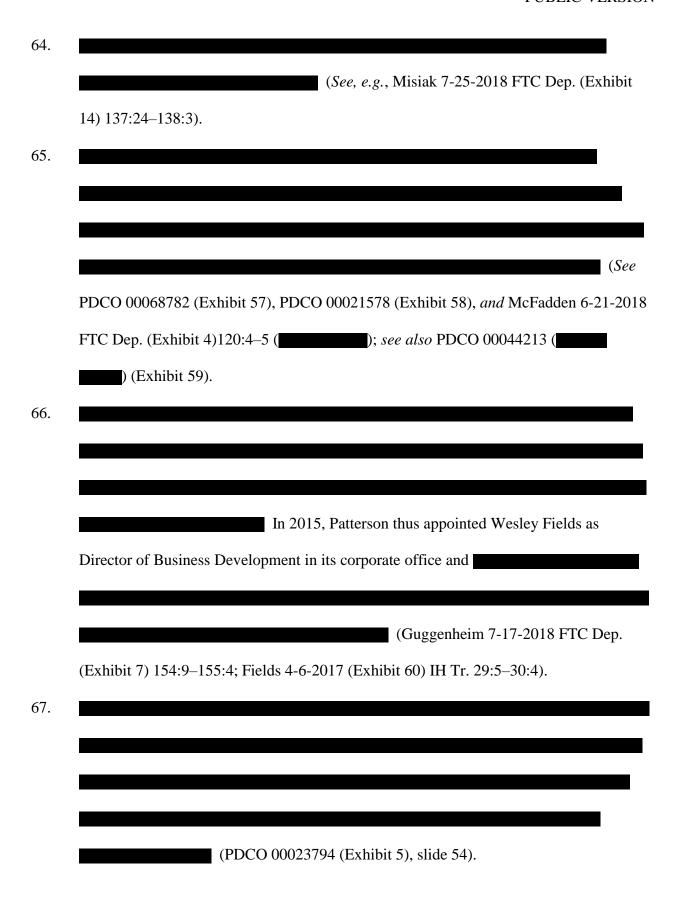
20023794 (Exhibit 5), slide 39). Exhibit 47). Atterson's work to build the capability to handle centralized deas monumental, expensive, and risky:	PattersonDental 00024687 emands of corporate DSOs
exhibit 47). Atterson's work to build the capability to handle centralized described to the capability to the capabil	
atterson's work to build the capability to handle centralized de	emands of corporate DSOs
	emands of corporate DSOs
as monumental, expensive, and risky:	
AcFadden 6-21-2018 FTC Dep (Exhibit 4) 51:25–52:11).	
(McFadden 6-21-2018 FTC Dep (Exhibit 4) 51:25–52	2:11).
о,	
)10 FFG D (F 131 7
(Guggenheim /-1/-20	018 FTC Dep. (Exhibit 7)
75:14-23; 191:12–19).	

			(McFadden 6	-
	21-2018 FTC Dep. (Exhib	it 4) 65:3–67:9; 72:8–20	0).	
49.				
		(PattersonDental 000	024688 (Exhibit 48) (
).	
III.			epresentatives Always Independently d Them Attractive Customers.	r
50.				
		(McFadden 6	6-21-2018 FTC Dep. (Exhibit 4) 81:12	_
	83:16).			
51.				
				_
	(DDCO 2616	05.4		
	(PDCO 2610	,	V (F 141 - 70) PP 00 000 740	_
) (Exhibit 49); PDC	CO 20599 () (Exhibit 50); PDCO 0001512	3
	(March 2012) (Exhibit 51)).		
52.	Patterson executives testif	fied that		
			(McFadden 6-21-2018 FTC Dep).
	(Exhibit 4) 76:25-77:3).			
53.	Patterson		(Rogan 7-13-2018 FTC Dep. (Exhibit	it
	2) 68:7-9).			

Patterson	's Shelly Beckler, a territory representative and, later, member of the
Markets	team, reported that Patterson
	(PDCO 00028076–81 (Exhibit 52).
(McFadd	en 6-21-2018 FTC Dep. (Exhibit 4) 96:23–98:12).
Still, Patt	erson regions, branches, and 800+ territory representatives were
Patterson	's President, Paul Guggenheim, explained that the company
	(Guggaphaim 7 17 2019 ETC Dan 195.14 17 (Ewhiki)
	(Guggenheim 7-17-2018 FTC Dep. 185:14–17 (Exhibit

57.	The Vice President of Marketing, Mr. Rogan, reiterated that Patterson
	(Rogan 7-13-2018 FTC Dep. (Exhibit 2) 13:25–14:2, 60:19–24).
58.	(Rogan 7-13-2018 (Exhibit 2) FTC Dep. 97:3–12).
59.	In September 2014, for example, Mr. McFadden, the head of Special Markets,
	(PDCO 00026064 (Exhibit 53).
60.	In May 2015,
61.	(PDCO 00026237 (emphasis added) (Exhibit 54). Patterson's Maine branch manager responded,
01.	(<i>Id.</i> (emphasis added) (Exhibit 54).
62.	McFadden noted that
	(PDCO 00059246 (emphasis added) (Exhibit 55)

	(See, e.g., PDCO 0	0033478 (
) (Eulikia	50). Cusaankain	- 7 17 2010 FT
) (Exhibit		n /-1/-2018 F1
); 188	3:18–189:5 (
); 188	3:18–189:5 (); 224:14–
	3:18–189:5 (; 272:13–19 (); 224:14–
	; 272:13–19 (-10-2018 FTC Dep		
	; 272:13–19 (-10-2018 FTC Dep		
	; 272:13–19 (-10-2018 FTC Dep); 65:6–23 (. (Exhibit 1) 58:1	7–59:14 (



68. (Mauer 8-9-2018 FTC Dep. (Exhibit 61) 54:3-55:1; Misiak 7-25-2018 FTC Dep. (Exhibit 14) 154:23-156:2; Lepley 7-24-18 FTC Dep. (Exhibit 8) 37:3–16; McFadden FTC Dep. (Exhibit 14) 120:11-23; Rogan I.H. (Exhibit 2) 176:15-25, 397:16-399:19). IV. Every Witness Flatly Denied That Patterson Agreed With Benco or Schein To **Boycott "Buying Groups"** Every current and former Patterson employee in this case flatly denied participating in 69. the alleged Benco-Schein conspiracy to boycott "buying groups." Patterson Companies CEO Anderson, Patterson Dental President Guggenheim; his successor, Misiak Vice President of Marketing and Merchandise, Rogan McFadden, head of Patterson Special Markets Lepley (), Director of Strategic Pricing Fruehauf, southeast regional manager Nease, branch manager (Anderson 7-19-2018 FTC Dep. (Exhibit 13) 161:23–162:12; Guggenheim 7-17-2018 FTC Dep. (Exhibit 7) 400:24-401:11; Misiak 7-25-2018 FTC Dep. (Exhibit

70. Every Schein witness, likewise,

President, Henry Schein

David Steck, Vice President of Sales

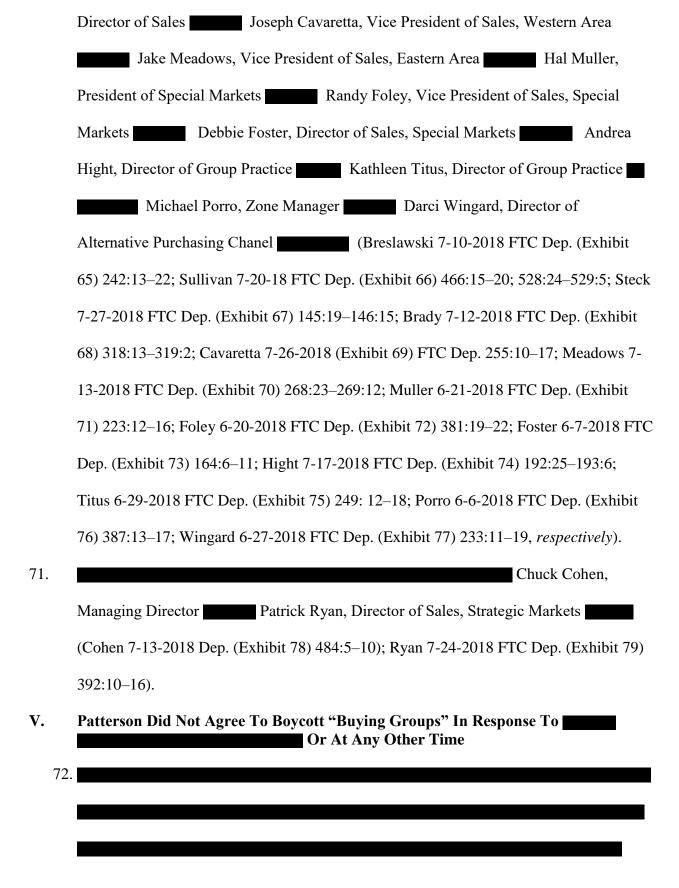
Brian Brady, Senior

FTC Dep. (Exhibit 64) 127:19–22; 134:24–135:2, respectively).

14) 315:21–316:2; 4-18-2017 IH Tr. 10:8–16 (Exhibit 63); Rogan 7-13-2018 FTC Dep.

(Exhibit 2) 261:17–19; 257:20–22; Lepley 30(b)(6) 7-24-2018 FTC Dep. (Exhibit 3)

111:23–11:12; Fruehauf 7-10-2018 FTC Dep. (Exhibit 1) 191:10–15; Nease 6-15-2018



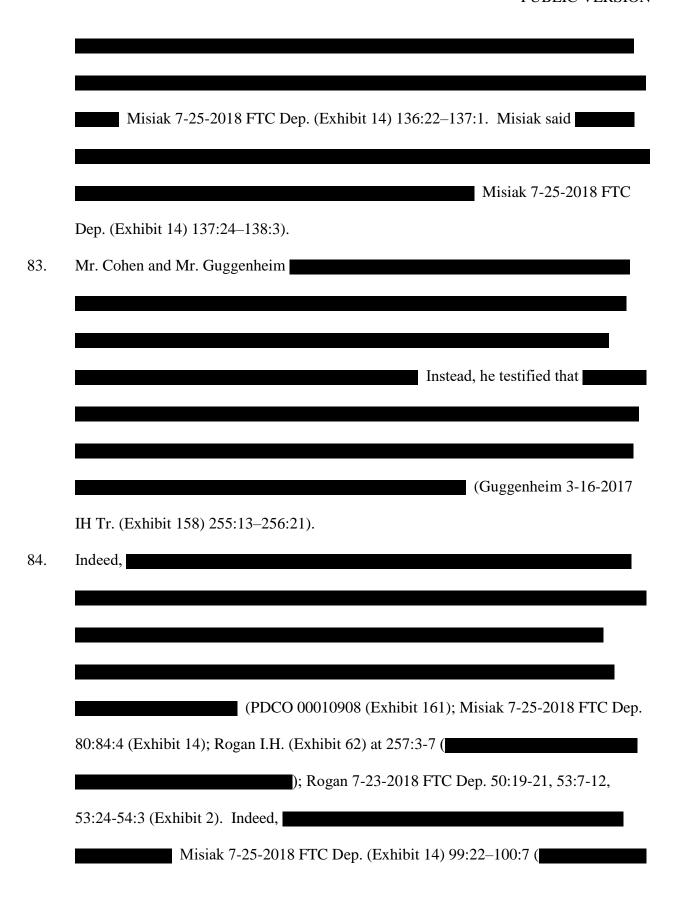
e.g., BDS-FTC00038834 (January 2012) (Exhibit 80); BDS-FTC00007454-55 (March 2012) (Exhibit 81); PDCO 00010794 (March 2012) (Exhibit 82); PDCO 00010801 (March 2012) (Exhibit 83); PDCO 00010804 (March 2012) (Exhibit 84); BDS-FTC00013115 (August 2012) (Exhibit 85); BDS-FTC00013117 (August 2012) (Exhibit 86); BDS-FTC00013118 (August 2012) (Exhibit 87); BDS-FTC00013121 (August 2012) (Exhibit 88); BDS-FTC00013136 (August 2012) (Exhibit 89); BDS-FTC00013140 (August 2012) (Exhibit 90); BDS-FTC00013141 (August 2012) (Exhibit 91), e.g., PDCO 00010481 (April 2011) (Exhibit 92); PDCO 00010482-83 (May 2011) (Exhibit 93); PDCO 00010484 (May 2011) (Exhibit 94); PDCO 00010514 (May 2011) (Exhibit 95); PDCO 00010545-46 (May 2011) (Exhibit 96); PDCO 00010549 (May 2011) (Exhibit 98); PDCO 00010553 (May 2011) (Exhibit 97); PDCO 00010565 (May 2011) (Exhibit 99); BDS-FTC00006347 (September 2011) (Exhibit 100); BDS-FTC00006353 (September 2011) (Exhibit 101); CAPDSI 00026531 (September 2011) (Exhibit 102); PDCO 00010706 (September 2011) (Exhibit 103); PDCO 00010707-08 (September 2011) (Exhibit 104); PDCO 00010711 (September 2011) (Exhibit 105); BDS-FTC 00006460 (October 2011) (Exhibit 106); BDS-FTC00038734 (October 2011) (Exhibit 107); PDCO 00010737-39 (October 2011) (Exhibit 108); PDCO 00010743 (November 2011) (Exhibit 109); BDS-FTC00006594 (December 2011) (Exhibit 110); BDS-FTC00006604 (December 2011) (Exhibit 111); BDS-FTC00006609 (December 2011) (Exhibit 112); BDS-FTC00006611 (December 2011) (Exhibit 114); BDS-FTC00006613 (December 2011) (Exhibit 113); PDCO 00010745-46 (December 2011) (Exhibit 115); PDCO 00010749-50 (December 2011) (Exhibit 116); PDCO 00010752-53 (December

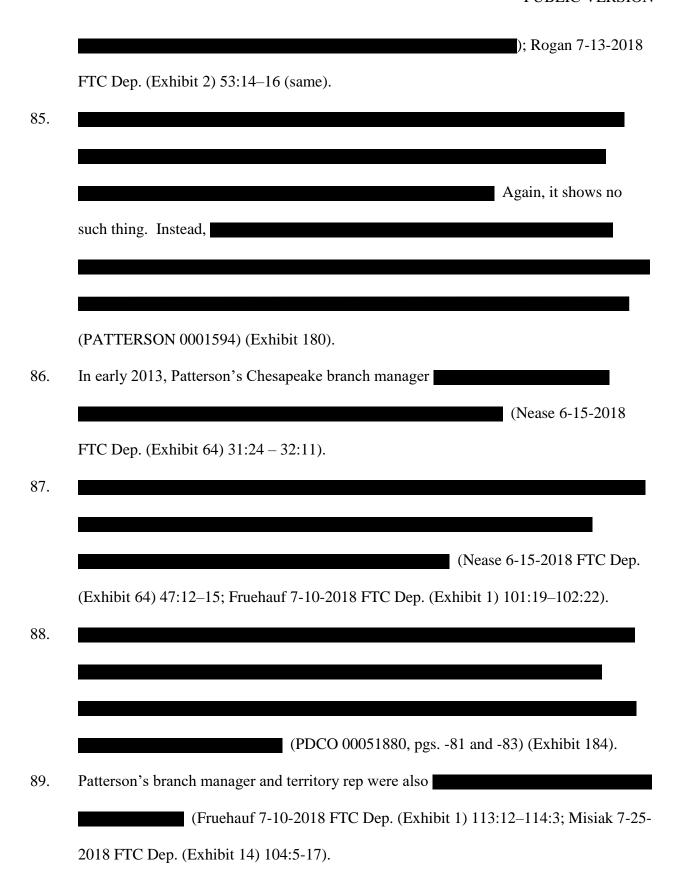
2011) (Exhibit 117); PDCO 00010755 (December 2011) (Exhibit 118); PDCO 00010757 (December 2011) (Exhibit 119); PDCO 00062590 (December 2011) (Exhibit 120). 73. (Henry Schein-000068293 (Exhibit); Henry Schein-000068284 (Exhibit 122) (); Henry Schein-000068234 (Exhibit 123) (Henry Schein-000068279 (Exhibit 124) (BDS-FTC00004759 (Exhibit 125) (); PDCO 00062410 (same) (Exhibit 126); BDS-FTC00006353 (Exhibit 101) (); PDCO 00010755 (Exhibit 118) (); PDCO 00010804 (Exhibit 84) (); See Henry Schein-000068230 (Exhibit 127); Henry Schein-000068232 (Exhibit 128); Henry Schein-000068237 (Exhibit 129); Henry Schein-000068242 (Exhibit 130); Henry Schein-000068245 (Exhibit 131); Henry Schein-000068248 (Exhibit 132); Henry Schein-000068250 (Exhibit 133); Henry Schein-000068252 (Exhibit 134); Henry Schein-000068256-57 (Exhibit 135); Henry Schein-000068260 (Exhibit 136); Henry Schein-000068263-64 (Exhibit 137); Henry Schein-000068269 (Exhibit 138); Henry Schein-000068271-72 (Exhibit 139); Henry Schein-000068274 (Exhibit 140); Henry Schein-000068277 (Exhibit 141); Henry Schein-

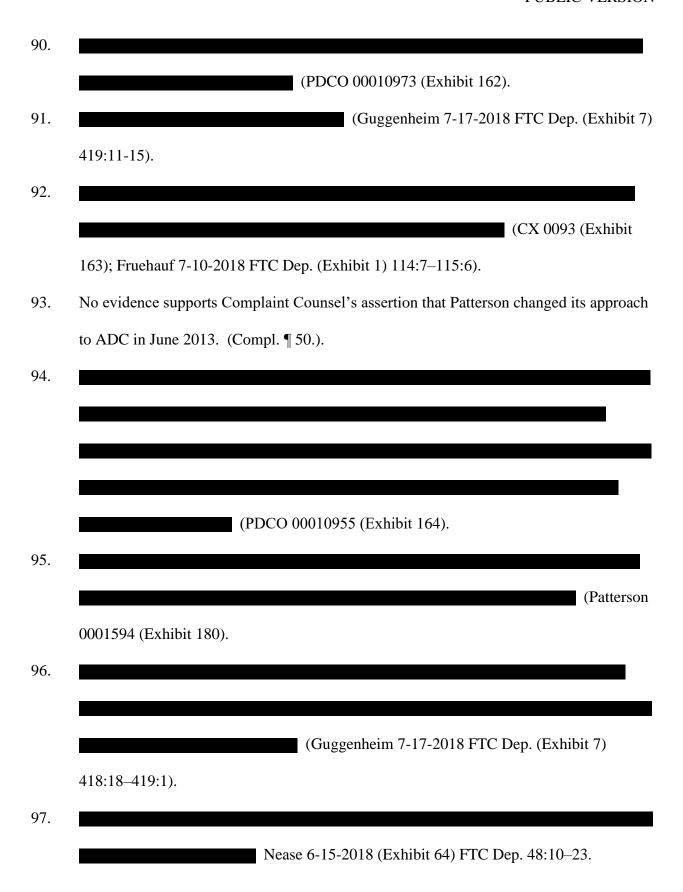
00010988 (Fx	nibit 146) (
•	(<u> </u>		_
	me); PDCO 00011000 (E		·
(Exhibit 149)			
).	
Fourth,			
	See e.g., PDCO 00011087	7-88 and BDS-FTC0000	4759 (Exhibits 150
125) ();	BDS-FTC0000573
(Exhibit 151)); BDS-FTC000
(Exhibit 152)			
); BDS-FT	C00075637 (Exhibit 153)		

	(See e.g., Ander
7-9-2018 FTC Dep. 130:23	3–131:21 (Exhibit 13) (
); 130:5–15 (
); PATTERSO
0000977 (Exhibit 154) (
); PATTERSON 0002247 (Exhibit 155) (
); Sullivan 7-19-2018 F
Dep. (Exhibit 182) 373:17-	-374:23 (
).
What's left, literally, are	
, ,	
(BDS-FTC00085771 (Exh	nibit 156), page 6).
	7/1 U /
	(PDCO 00010959 (Exhibit 183).

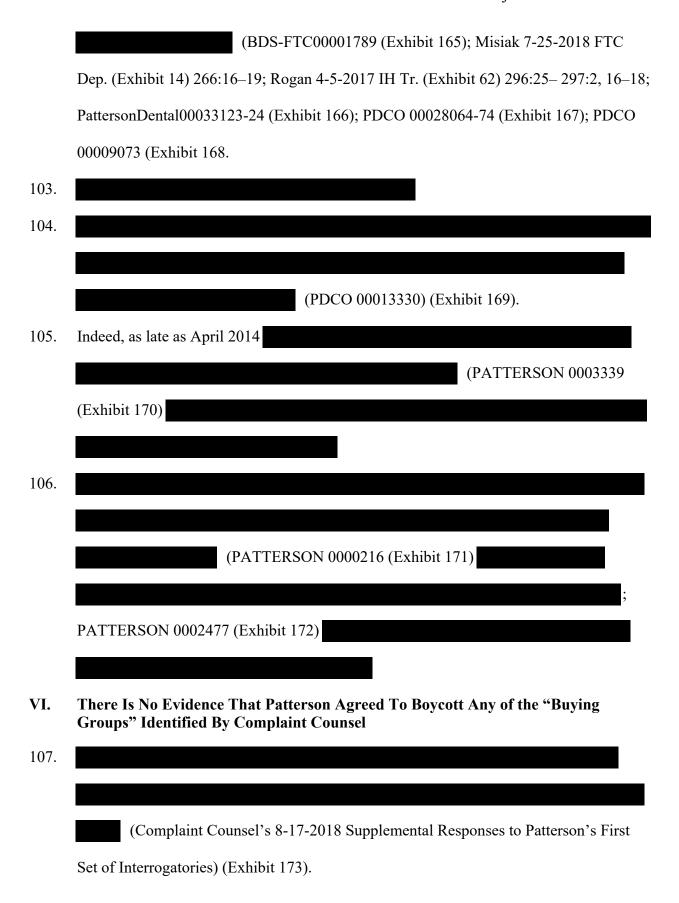
79.	Guggenheim said
	He noted that Patterson
	(Guggenheim 3-16-2017 IH
	Dep. (Exhibit 158) 240:7–243:15; 243:16–18; 244:8–12; 244:19–22).
0.	Guggenheim
	(BDS-FTC00009442 (Exhibit 157) (Cohen wrote in a contemporaneous text message to a
	Benco colleague:
1.	In fact, unbeknownst to Mr. Guggenheim (and to Mr. Cohen, obviously) Patterson's local
	branch manager, Scott Belcheff,
	(CX 4090 (Exhibit 159).
2.	
	(PDCO 00051886 (Exhibit 160). Misiak told
	PDCO 00051886 (Exhibit 160). Misiak testified that
	Misiak 4-18-2017 IH Tr.
	(Exhibit 63) 102:7–9. Misiak further explained that

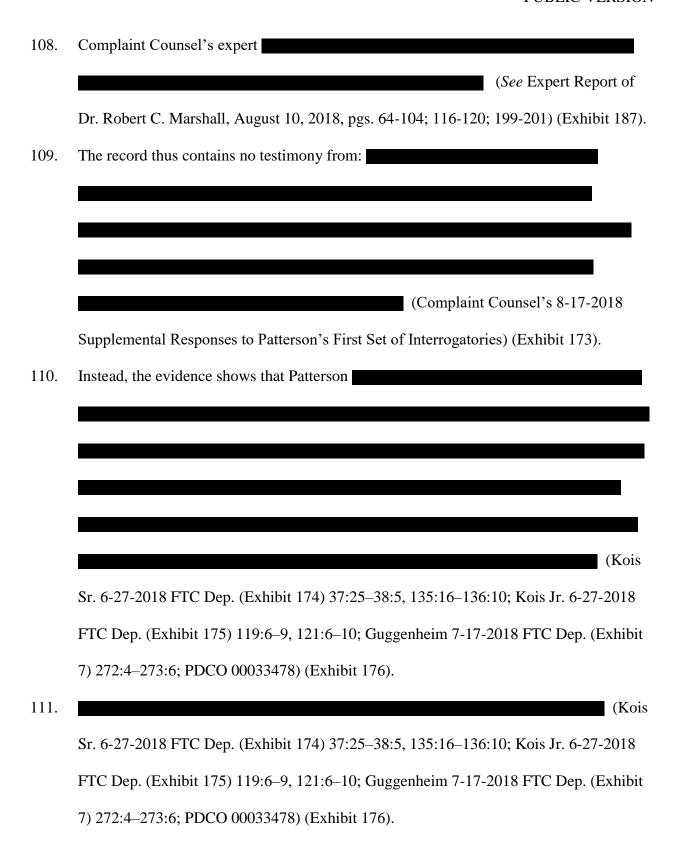


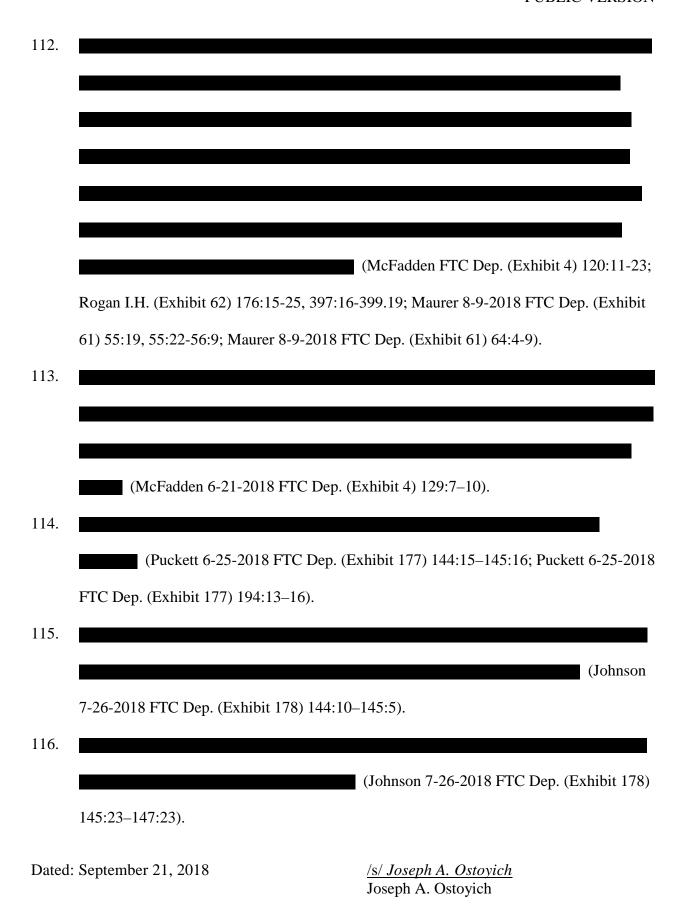




	(Patterson: Scott Anderson, Patterson Companies
	CEO (Exhibit 13) at 160:10-23; Paul Guggenheim, Patterson Dental President (Exhibit
	at 398:4-400:9; David Misiak, Patterson Dental President (Exhibit 14) at 314:24 to 316
	Tim Rogan, Vice President of Marketing and Merchandise (Exhibit 2) at 254:2-25; New
	McFadden, head of Patterson Special Markets (Exhibit 4) at 189:13-191:15, 192:5-25,
	193:2-15, Joe Lepley, Director of Strategic Pricing (Exhibit 8) at 110:4-111:4; Anthony
	Fruehauf, Southeast Regional Manager (Exhibit 1) at 194:6-195:17).
	Indeed, Complaint Counsel's Interrogatory Response
	(See Complaint Counsel's Supplementa
	Responses to Respondent Patterson's First Set of Interrogatories) (Exhibit 173).
	Instead, Complaint Counsel cites
	(Henry Schein 000012145; PDCO 00013330) (Exhibits 185 & 169).
•	But by the time of the email, Patterson
	But by the time of the email, Patterson (PATTERSON 0000941; PATTERSON0000244;







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ATTORNEYS FOR PATTERSON COMPANIES, INC.

EXHIBITS 1 – 187

These exhibits have been marked Confidential and redacted in their entirety

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2018, I filed the foregoing public document electronically using the FTC's E-Filing System, which will send notification of such filing to:

The Honorable D. Michael Chappell Chief Administrative Law Judge Federal Trade Commission 600 Pennsylvania Avenue, N.W., Room H-110 Washington, D.C. 20580

Donald S. Clark
Office of the Secretary
Federal Trade Commission
Constitution Center
400 Seventh Street, S.W.
Fifth Floor
Suite CC-5610 (Annex B)
Washington, D.C. 20024

I also hereby certify that on September 21, 2018, I delivered via electronic mail a copy of the foregoing public document to:

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September 21, 2018 By: /s/ Andrew T. George

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PUBLIC VERSION

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.

September 21, 2018

By: /s/ Andrew T. George

Attorney

Notice of Electronic Service

I hereby certify that on September 21, 2018, I filed an electronic copy of the foregoing Respondent Patterson's Motion for Summary Decision [PUBLIC], with:

D. Michael Chappell Chief Administrative Law Judge 600 Pennsylvania Ave., NW Suite 110 Washington, DC, 20580

Donald Clark 600 Pennsylvania Ave., NW Suite 172 Washington, DC, 20580

I hereby certify that on September 21, 2018, I served via E-Service an electronic copy of the foregoing Respondent Patterson's Motion for Summary Decision [PUBLIC], upon:

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