

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



In the Matter of)
)
)

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

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

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

DOCKET NO. 9379

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INTRODUCTION

Respondents, the three largest dental products distributors in the country, conspired to prevent a “price war” by agreeing not to discount to buying groups—entities that negotiate lower prices on dental products on behalf of independent dentists. The agreement was perpetrated through documented emails, text messages, and phone calls between Respondents’ highest-level executives that explicitly discussed the parties’ refusal to discount to buying groups. Respondents’ contemporaneous records attest to their “agreement” and a “duty to uphold” their collective “position” against buying groups, which was carried out with repeated instructions to their sales teams to say “no” to buying groups. Respondents attempt to escape the consequences of their actions by arguing the words on the page do not mean what they say, and that they never abided by the commitments they made to each other. But those arguments are inconsistent with the documented evidence of the parties’ actions. Indeed, at trial, this Court heard the CEO at the center of the conspiracy admit that his communications with his top competitors were fueled by his efforts to maintain a “high level of credibility” and the desire to be “honest and open” with his rivals.¹ This is not the way businesses in a competitive market operate; competitors should not talk with one another about discounting policies, good or bad customer types, or business strategies.

The executives of Henry Schein, Inc. (“Schein”), Patterson Companies, Inc. (“Patterson”), and Benco Dental Supply Co. (“Benco”) (together, the “Big Three”) knew that unfettered competition for buying groups would lead to a “race to the bottom,” driving down margins across the board. The same thing had happened decades ago with the entry of buying groups in the medical supplies industry, and the executives of the Big Three feared the same fate for the dental industry.

¹ Complaint Counsel Post-Trial Proposed Findings of Fact (“CCFF”) ¶¶ 1076 (quoting Cohen, Tr. 723), 278 (quoting Cohen, Tr. 553).

To forestall this threat, Benco adopted a policy in the mid-1990s that prohibited discounting to, or doing business with, buying groups. But as the smallest of the Big Three, Benco feared that its policy would be futile if its larger rivals, Schein and Patterson, “open[ed] this door.” Thus, when Benco’s owner and CEO, Chuck Cohen, saw Patterson and Schein starting to discount to buying groups, he acted. Cohen used his “open relationship” with his counterparts—a relationship fostered by the executives’ long personal history and their custom of exchanging information for their “mutual best interest”—to ensure that Patterson and Schein agreed to the same “no discount” policy.

Through direct exchanges of assurances between the highest-ranking executives, the Big Three entered into a *per se* unlawful agreement to refuse to discount to buying groups. Thus, in early 2013, Benco’s Cohen contacted Patterson’s President, Paul Guggenheim, to alert him to a Patterson discounting arrangement with a buying group and to assure him that Benco had a policy against such discounting. Patterson’s Guggenheim agreed: “we feel the same way about these.” Within three days, Patterson abandoned the buying group arrangement that Cohen had brought to Guggenheim’s attention. Similarly, following communications with Benco, Schein also began to instruct its sales team to reject buying groups—a change in policy from its prior practice of discounting to buying groups. The parties then monitored each other’s behavior, confronted one another when it appeared someone was deviating from the agreement, reassured each other of compliance, and fulfilled their part in the agreement by directing their teams to reject buying groups.

Benco attempted to extend the conspiracy even further by inviting another distributor, Burkhart Dental, to stop discounting to buying groups. When that attempt failed, Benco was prepared to shore up the agreement among the Big Three by telling “Tim [Sullivan of Schein] and Paul [Guggenheim of Patterson] to hold their positions as we are.”²

² CCFF ¶ 1103 (quoting CX0023 at 001).

The Big Three's contemporaneous documents further demonstrate their conscious commitment to their agreement not to discount to buying groups. For example, a Patterson executive confidently instructed his team to reject a buying group knowing that: “[O]ur 2 largest competitors stay out of these as well.”³ Another Patterson executive affirmed the agreement: “Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry.”⁴ Still another Patterson executive explained to a customer that he could not do business with buying groups because of a prior commitment against such conduct: “[W]e’ve signed an agreement that we won’t work with GPOs.”⁵ A Benco executive similarly instructed his team that Schein, Patterson, and Benco all “have said, ‘NO’, and that’s the stance we will continue to take.”⁶ When he instructed others on his team not to deal with buying groups, he told them “Neither Schein nor Patterson do either.”⁷ In fact, the Benco executive even commented, “the best part about calling these [buying groups] is I already KNOW that Patterson and Schein have said NO.”⁸ The same holds true for Schein, whose executive stated: “The good thing here is that PDCO [Patterson], Benco and us are on the same page regarding these buying groups/consortiums.”⁹

The exchange of assurances among the presidents and CEO of the Big Three to refuse to do business with buying groups, followed by their compliance with those assurances, and confrontations when one was suspected of discounting to a buying group, are precisely the type of evidence that has resulted in *per se* unlawful conspiracy findings in numerous prior cases. For example, in *Gainesville Utilities Department v. Florida Power & Light Co.*, the Eighth Circuit found a *per se* unlawful conspiracy on evidence that the top executives of competitors informed

³ CCFF ¶ 549 (quoting CX0093 at 001) (emphasis added, bold in original).

⁴ CCFF ¶ 603 (quoting CX0106 at 001) (emphasis added).

⁵ CCFF ¶ 657 (quoting CX0164 at 002) (emphasis added).

⁶ CCFF ¶ 527 (quoting CX1149 at 002) (emphasis added).

⁷ CCFF ¶ 1193 (quoting CX1185 at 002) (emphasis added).

⁸ CCFF ¶ 1191 (quoting CX0012 at 001) (emphasis added; capitalization in original).

⁹ CCFF ¶ 1138 (quoting CX2106 at 001) (emphasis added).

each other of their refusal to serve customers in the other's territories.¹⁰ In *United States v. Foley*, the Fourth Circuit affirmed a criminal price fixing conviction where a defendant informed competitors that his firm would charge a certain commission rate and the competitors "gave the impression" of doing the same, followed by communications to confront each other about deviations.¹¹ In *United States v. Champion International Corp.*, the Ninth Circuit affirmed a bid rigging conviction because competitors communicated with each other about which sales each competitor was most interested in pursuing.¹² In *In re Plywood Antitrust Litigation*, the Fifth Circuit affirmed a price fixing conspiracy upon evidence of "communication between high-level personnel on pricing policy."¹³ And in *Esco Corp. v. United States*, the Ninth Circuit affirmed a price fixing conviction where the defendant followed a course of conduct suggested by a competitor, even though the defendant never expressly gave an assurance of commitment to the competitor.¹⁴

Respondents' concerted refusal to discount to buying groups is both an agreement to limit discounting (which the Supreme Court has found "falls squarely within the traditional *per se* rule against price fixing")¹⁵ and a group boycott (also held as *per se* unlawful under Supreme Court precedent).¹⁶ Even by the admission of Respondents' own expert, such an agreement is plainly anticompetitive: "As an economist, if there is an agreement among competitors to, not to discount to customers, then I would view that as being anticompetitive."¹⁷ Indeed, Respondents have not even attempted to offer a single procompetitive justification for agreeing with competitors to refuse to do business with buying groups. Thus, even under an abbreviated rule of reason analysis, Respondents' coordinated action is unlawful.

¹⁰ 573 F.2d 292, 297-301 (5th Cir. 1978).

¹¹ 598 F.2d 1323, 1332-35 (4th Cir. 1979).

¹² 557 F.2d 1270, 1273 (9th Cir. 1977).

¹³ 655 F.2d 627, 633-34 (5th Cir. 1981).

¹⁴ 340 F.2d 1000, 1007-08 (9th Cir. 1965).

¹⁵ See *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980).

¹⁶ See *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 422-23 (1990).

¹⁷ CCF ¶ 1175 (quoting RX2967 (Wu, Dep. at 277)).

Unable to justify their conduct, Respondents deny it. First, they claim there was no agreement because the conspirators themselves denied the existence of an agreement. But so too did the defendants in *Gainesville* (who denied the existence of an agreement and claimed the competitor communications were nothing more than “common courtesy”);¹⁸ in *Champion* (who testified the communications “were innocent”);¹⁹ in *Foley* (who “offered explanatory and exculpatory evidence”);²⁰ in *Beaver* (who argued the trial evidence showed “no person voiced their assent to the supposed conspiracy”);²¹ and in *Esco* (who argued “the record is utterly lacking in evidence of agreement”).²² As the First Circuit held in *Advertising Specialty National Ass’n v. FTC*, “It is to be expected that petitioners’ witnesses would deny that there was an agreement, but this testimony does not offset in our judgment the quite compelling documentary evidence of a planned common course of action or understanding . . . which can be properly characterized as an [unlawful] ‘agreement.’”²³ In fact, requiring admissions of agreement would be tantamount to requiring direct evidence of conspiracy, something that no court has required.²⁴

Second, Respondents claim they each had independent business reasons to refuse to discount to buying groups. The business reasons, however, are nothing more than *ex post* rationalizations contradicted by the evidence. Moreover, courts have rejected this argument time and again where the totality of the evidence established an agreement.²⁵ For example, in *Gainesville*, the Eighth Circuit found that “[a]lthough the refusal to serve certain [customers] may have been influenced by valid economic considerations,” it could not ignore the competitor

¹⁸ See 573 F.2d at 298, 301 n.14 (“The officials of the power companies deny the existence of a territorial agreement.”).

¹⁹ See 557 F.2d at 1273 (“The defendants have always asserted that these meetings were innocent, but the court found otherwise.”).

²⁰ See 598 F.2d at 1334 (“Defendants of course offered explanatory and exculpatory evidence.”).

²¹ See 515 F.3d 730, 737 (7th Cir. 2008).

²² See 340 F.2d at 1006.

²³ 238 F.2d 108, 117 (1st Cir. 1956).

²⁴ See, e.g., *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 689 (S.D.N.Y. 2013) (“A plaintiff may rely on either direct or circumstantial evidence to establish that a defendant entered into an agreement in violation of the antitrust laws.”), *aff’d*, 791 F.3d 290 (2d Cir. 2015).

²⁵ See *United States v. Gen. Motors Corp.*, 384 U.S. 127, 142 (1966); *United States v. Apple, Inc.*, 791 F.3d 290, 317-18 (2d Cir. 2015); *Gainesville*, 573 F.2d at 301; *Bond Crown & Cork Co. v. FTC*, 176 F.2d 974, 979 (4th Cir. 1949).

communications about the refusal to serve.²⁶ The court reasoned, “[I]f solid economic reasons existed for refusing to service those [customers], there was no reason for communicating with a competitor about the refusal.”²⁷

Finally, Respondents claim they offered discounts to a few buying groups during the conspiracy period. But perfect compliance with an agreement is not required.²⁸ In fact, many cases have found an agreement even when there was substantial deviation from the agreement. In *Foley*, the court affirmed the price fixing conviction against a defendant even though it only complied with the agreement part of the time, fluctuating between 30% to 70% compliance.²⁹ The court reasoned that “the agreement itself, not its performance, is the crime of conspiracy.”³⁰

In the end, Respondents’ arguments are contradicted by their contemporaneous documents, consisting of words used by Respondents’ own executives, deliberately communicated to their largest horizontal competitors, without any legitimate business justification. Respondents effectively ask this Court to conclude that the wealth of competitor communications about buying groups and internal company documents evidencing a commitment to the Big Three’s collective refusal to do business with buying groups is nothing but an unexplained coincidence. While Respondents would prefer to distort the meaning of otherwise plain language, the picture that these documents paint is not a piece of abstract art subject to wildly different and imaginative interpretations. Rather, it is as crystal clear as a photograph: Respondents entered into an unlawful agreement to prevent a price war by refusing to discount to buying groups.

²⁶ 573 F.2d at 301.

²⁷ *Id.*

²⁸ *See infra* Section IV.D.

²⁹ 598 F.2d at 1333.

³⁰ *Id.*

I. FACTUAL BACKGROUND

A. Benco Maintained an “Open Relationship” With Patterson and Schein For the Big Three’s “Mutual Best Interest.”

Benco, Schein, and Patterson are the only national full-service distributors of dental products and services in the United States.³¹ Together, they have a “combined market share of over 80%.”³² Benco is the smallest of the Big Three with approximately 12% market share.³³ Benco knew that its “very small voice” in the market was nowhere near as powerful as the collective voices of the Big Three.³⁴ As a result, Benco’s co-owner and CEO, Chuck Cohen,³⁵ maintained an “open relationship” with his counterparts at Schein—President, Tim Sullivan—and Patterson—President, Paul Guggenheim—to encourage them to work together to further the Big Three’s “mutual best interest.”³⁶ That open relationship was fostered by the long personal history Cohen shared with Sullivan and Guggenheim: he knew Sullivan since he was young and Guggenheim “his whole life.”³⁷ In fact, Cohen took steps to maintain a “high level of credibility”³⁸ with his competitors and “always wanted to be viewed as honest and open” by Sullivan and Guggenheim.³⁹ Cohen saw “big potential” in maintaining these relationships because they were ones “that [Benco] may need to tap into at some point in the future”⁴⁰—something that Cohen did on multiple occasions.⁴¹

As the smallest of the Big Three, Benco believed it was [REDACTED]

[REDACTED]

³¹ CCFF ¶1449.

³² CCFF ¶ 1458.

³³ CCFF ¶ 1457.

³⁴ CCFF ¶ 280 (quoting Cohen, Tr. 488).

³⁵ Cohen’s title at Benco is Managing Director, which is equivalent to that of a CEO. CCFF ¶ 18.

³⁶ CCFF ¶¶ 277 (quoting Cohen. Tr. 492-493), 280 (quoting Cohen, Tr. 489), 281, 284, 310.

³⁷ CCFF ¶¶ 269-270.

³⁸ CCFF ¶ 1076 (quoting Cohen, Tr. 723).

³⁹ CCFF ¶ 278 (quoting Cohen, Tr. 553).

⁴⁰ CCFF ¶ 282 (quoting CX1045 at 001).

⁴¹ CCFF ¶¶ 282, 284.

[REDACTED]⁴² Benco had the [REDACTED]

[REDACTED]⁴³

To brace against threats of margin erosion, Cohen had a pattern of contacting Sullivan and Guggenheim when he saw the opportunity to advance their “mutual interests” by coordinating their conduct.⁴⁴ For example, Cohen asked Sullivan and Guggenheim to put up a united front against a manufacturer by having their respective marketing teams protest a product pricing, which was unprofitable for each of the Big Three.⁴⁵ Without coordinating their conduct, Benco alone was unsuccessful at demanding “more margin” from the manufacturer because Schein and Patterson had not made similar demands.⁴⁶ After Cohen alerted Sullivan and Guggenheim of this issue, in separate but nearly identical emails,⁴⁷ the competitors assured Cohen they would pursue the issue, which they did.⁴⁸ Cohen admitted at trial this was an example of the Big Three’s “open relationship.”⁴⁹

As another example of the “open relationship,” in 2013, Cohen again contacted Sullivan and Guggenheim to ask for coordination by each adopting a clause in their manufacturer contracts to prevent manufacturers from competing directly against the distributors.⁵⁰ Cohen was concerned that Benco’s unilateral policy of requiring such contractual clauses would be useless at preventing manufacturers from competing, if his larger rivals did not adopt a similar clause.⁵¹ Cohen again sent Sullivan and Guggenheim separate, but nearly identical emails, urging his competitors to “re-examine” their contracts to “make sure” they conformed to Benco’s contracts.⁵² Sullivan and Guggenheim both looked into the issue as Cohen had requested.⁵³

⁴² CCF ¶ 283 [REDACTED].

⁴³ CCF ¶ 283.

⁴⁴ CCF ¶¶ 277, 279, 281, 284, 290.

⁴⁵ CCF ¶¶ 289-295.

⁴⁶ CCF ¶¶ 289, 295 (quoting CX1049 at 001 and CX1050 at 002).

⁴⁷ CCF ¶¶ 290, 292-293, 295-296.

⁴⁸ CCF ¶¶ 297-299.

⁴⁹ CCF ¶ 300.

⁵⁰ CCF ¶¶ 301-303.

⁵¹ CCF ¶¶ 302, 309.

⁵² CCF ¶¶ 304 (quoting CX1055 at 002 and CX2337 at 001), 305-306.

Similarly, when Cohen feared Amazon’s entry in dental distribution would drive down margins, Cohen planned to “[w]ork with Schein & Patterson” on a joint response.⁵⁴ When Cohen was concerned about a manufacturer selling products directly to dentists and bypassing distributors, he contacted Sullivan, who subsequently succeeded in persuading the manufacturer to put an end to the practice.⁵⁵ And when competition for experienced sales people heated up, Cohen and Sullivan signed an agreement that restricted the number of employees that could move between the companies and, at times, lengthened non-competes between the two rivals.⁵⁶

When buying groups—entities that negotiate lower prices on dental products on behalf of independent dentists by aggregating their purchasing power—reached a critical point, Cohen acted consistent with his past practice—he turned to his competitors for a coordinated response.

B. Independent Dentists Join Buying Groups to Save Money on Dental Products.

1. Changes in Dental Industry Gave Rise to Buying Groups.

The vast majority of dentists in the United States are independent dentists, *i.e.*, solo practitioners or dentists in small group dental practices with one or a few locations.⁵⁷ Over the past decade, independent dentists have faced economic challenges due to the growth of corporate dentistry.⁵⁸ Corporate dentistry refers to large group practices that have multiple locations combined under a single ownership structure or management organization, also referred to as Dental Service Organizations (“DSO”s) or Management Service Organizations (“MSOs”).⁵⁹

⁵³ CCFF ¶¶ 307-308.

⁵⁴ CCFF ¶ 311 (quoting CX0065 at 001); *see also* CCFF ¶ 312 (Benco’s co-owner Rick Cohen suggested getting together with Schein and Patterson to discuss Amazon entering dental supplies distribution because Benco “could be the glue to make it happen.”) (quoting CX0066 at 001). Chuck Cohen’s reply to his brother’s suggestion about coordinating with Patterson and Schein was “Good call.” (quoting CX0066 at 001).

⁵⁵ CCFF ¶¶ 285-286.

⁵⁶ CCFF ¶¶ 313-317.

⁵⁷ CCFF ¶¶ 57-59.

⁵⁸ CCFF ¶¶ 60, 114, 118-120, 123.

⁵⁹ CCFF ¶¶ 60-61, 63, 65, 101, 103.

DSOs have a competitive advantage over independent dentists because they can leverage their purchasing power and realize economies of scale in the purchase of dental products.⁶⁰ Distributors have historically provided discounts on dental supplies and equipment to DSOs in the 18-20% range.⁶¹ As the number of DSOs have increased,⁶² independent dentists have found it harder to compete.⁶³

Further adding to independent dentists' economic pressures, insurance companies have reduced reimbursement rates for dental procedures⁶⁴—leading to loss of patients, increased advertising costs, and fewer procedures⁶⁵—and dental school debt has also increased over time.⁶⁶

These economic challenges have driven independent dental practices to seek ways to reduce their overhead, including the cost of their dental products.⁶⁷ In recent years, buying groups have formed as a means for independent dentists to save money on supplies by leveraging the purchasing power of a group while at the same time remaining independent.⁶⁸ The Big Three recognized that “buying groups will expand as independent dentists look for alternatives to organized dentistry,”⁶⁹ and [REDACTED]

[REDACTED]⁷⁰ [REDACTED]

[REDACTED]⁷¹

⁶⁰ CCFF ¶¶ 120-121; *see also* CCFF ¶ 128.

⁶¹ CCFF ¶¶ 121-122.

⁶² CCFF ¶¶ 118-119.

⁶³ CCFF ¶¶ 120-121, 123.

⁶⁴ CCFF ¶¶ 114- 116.

⁶⁵ CCFF ¶ 116.

⁶⁶ CCFF ¶¶ 114, 117, 124.

⁶⁷ CCFF ¶¶ 125-127.

⁶⁸ CCFF ¶¶ 126-127, 139-144.

⁶⁹ CCFF ¶ 129 (quoting CX2487 at 002).

⁷⁰ CCFF ¶ 128 [REDACTED]; *see also* CCFF ¶ 127.

⁷¹ CCFF ¶ 128 [REDACTED].

Buying groups are also referred to as group purchasing organizations (“GPOs”), buying clubs, and buying cooperatives (or co-ops) in the dental industry.⁷² Dental buying groups aggregate the buying power of separately owned and separately managed independent dental practices in exchange for lower prices on dental products.⁷³ Buying groups typically save independent dentists between [REDACTED] off catalog prices on dental supplies.⁷⁴

While the concept of buying groups in the dental industry dates back several decades,⁷⁵ buying groups have grown in importance over the past decade, coinciding with the surge of economic burdens on independent dentistry.⁷⁶ By the year 2011, the Big Three’s executives recognized the surge of buying groups,⁷⁷ noting they were “coming fast and furious”⁷⁸ and “becoming more prevalent.”⁷⁹

2. Buying Groups Have Reduced Prices and Margins in Other Industries.

The Big Three were keenly aware that the successful entry of buying groups in adjacent healthcare industries resulted in a significant decline in margins.⁸⁰ In addition to being widely utilized by medical facilities, buying groups exist for medical specialists such as audiologists and ear-nose-throat specialists,⁸¹ and in the vision industry for ophthalmologists and optometrists.⁸²

⁷² CCFF ¶¶ 68-71.

⁷³ CCFF ¶ 67.

⁷⁴ CCFF ¶¶ 138 (generally); 145 [REDACTED]; 1391, 181, 1843, 1847, 1731 [REDACTED]; 1398-1399 [REDACTED]; 1400-1402 [REDACTED]; 1403-1405 [REDACTED]; 1406-1407 [REDACTED].

⁷⁵ CCFF ¶ 133. Indeed, even dental distributors have formed and joined buying groups of their own. Buying groups of distributors, such as the National Distributing Contracting (“NDC”) and the American Dental Cooperative (“ADC”), helped small, independent dental distributors like Benco and Guggenheim Dental (Paul Guggenheim’s family distribution business, later acquired by Patterson) to leverage their collective buying power and to compete against larger dental distributors. CCFF ¶¶ 158-162.

⁷⁶ CCFF ¶¶ 114, 125-127, 134, 137.

⁷⁷ CCFF ¶¶ 132, 137.

⁷⁸ CCFF ¶ 137 (quoting CX0004 at 001).

⁷⁹ CCFF ¶ 137 (quoting CX2634 at 002).

⁸⁰ CCFF ¶¶ 151, 527, 256-264, 266.

⁸¹ CCFF ¶¶ 151, 156-157.

⁸² CCFF ¶¶ 152, 153-155.

Benco's Director of Sales, Patrick Ryan, explained "GPOs are what [ruined] the medical supply business and why they work on single digit margins."⁸³ He warned that "GPOs are why medical works at the margins they do."⁸⁴ Schein executives expressed the same concern, cautioning the team "as soon as we start doing [GPOs], we will turn into medical" and "[m]argins will go down."⁸⁵ Similarly, a Patterson executive referred to GPOs in the medical industry as a "necessary evil" that resulted in lower margins.⁸⁶

C. The Big Three Feared Competition for Buying Groups Would Lead to a "Price War" and "Race to the Bottom" for the Industry.

Aware of the impact buying groups had on other industries, Benco, Schein, and Patterson feared that unfettered competition for buying groups would lead to a price war among them, driving margins down across the board.⁸⁷ In 2010, Schein's President, Tim Sullivan, reported that if Schein discounted to a buying group, there was a risk of "other competitors then following suit," resulting in a "huge price war."⁸⁸ Similarly, Benco Director of Sales, Ryan, warned the company's sales team that "[i]f this door [to buying groups] is ever opened in dental, it's all over for us . . . it's a race to the bottom."⁸⁹ Ryan testified he was concerned buying groups would lead to competition among the "whole industry," leading to "a race to the bottom in profitability."⁹⁰ He projected that competition for buying groups could lead to a more than 50% drop in gross margins⁹¹—declining from 30% gross margins enjoyed by the Big Three⁹² to just "12% over cost."⁹³ Ryan reiterated this concern in another email, stating that once Schein, Patterson, or

⁸³ CCFF ¶ 527 (quoting CX1149 at 002).

⁸⁴ CCFF ¶ 260 (quoting CX1156 at 001).

⁸⁵ CCFF ¶ 262 (quoting CX0165 at 001).

⁸⁶ CCFF ¶ 264 (quoting CX3419 at 001).

⁸⁷ CCFF ¶ 196.

⁸⁸ CCFF ¶ 197 (quoting CX1149 at 002); *see also* CCFF ¶¶ 241-245.

⁸⁹ CCFF ¶ 198 (quoting CX1149 at 002).

⁹⁰ CCFF ¶ 198 (Ryan, Tr. 1082-1083).

⁹¹ CCFF ¶ 199.

⁹² CCFF ¶¶ 16, 28, 43.

⁹³ CCFF ¶ 198 (quoting CX1149 at 002); *see also* CCFF ¶ 200.

Benco participated with a buying group, “we will turn into medical and be working for 10 percent over cost.”⁹⁴

Similarly, Patterson identified buying groups as a threat in multiple corporate SWOT analyses.⁹⁵ Patterson’s President, Guggenheim, testified that buying groups were threats because “often [they] come with reduced pricing.”⁹⁶ Consistent with this view, a senior Patterson executive informed his team that buying groups would lead to “a slippery slope,” meaning a “race to the bottom in terms of pricing.”⁹⁷ Notably, executives from each of the Big Three used the same “slippery slope” analogy in reference to buying groups.⁹⁸

While a single distributor could attempt to thwart the buying group threat by refusing to discount to such entities, the Big Three knew that if one of them *did* discount to buying groups, the others would also need to lower prices to avoid losing business.⁹⁹ Cohen admitted that Benco was “always concerned about Schein and Patterson . . . partnering with a buying group.”¹⁰⁰ Benco’s Director of Sales, Ryan, echoed the same concern, testifying that he too was concerned about Schein and Patterson working with a buying group.¹⁰¹ In a report to Benco’s senior leadership team, Cohen stated that Benco discounting to a buying group could lead to the “risk” that “other GPOs get started, and are recognized by Schein or PDCO [Patterson].”¹⁰²

[REDACTED]

[REDACTED]

[REDACTED]¹⁰³ [REDACTED]

[REDACTED]

⁹⁴ CCFF ¶ 261 (quoting CX0016 at 002).

⁹⁵ CCFF ¶¶ 226-227. A SWOT analysis identifies the strengths, weaknesses, opportunities, and threats to a business.

⁹⁶ CCFF ¶ 228 (quoting CX8023 (Guggenheim, Dep. at 221-222)).

⁹⁷ CCFF ¶ 201 (quoting CX3016 at 001) and CX8004 (McFadden, Dep. at 105-106)).

⁹⁸ CCFF ¶¶ 201-203; 709-711, 809, 950.

⁹⁹ CCFF ¶¶ 196-197, 200-201.

¹⁰⁰ CCFF ¶ 217 (quoting Cohen, Tr. 470).

¹⁰¹ CCFF ¶ 218.

¹⁰² CCFF ¶ 249 (quoting CX1084 at 007).

¹⁰³ CCFF ¶¶ 214 [REDACTED], 249.

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Patterson’s President, Guggenheim, had the same concern that if Schein and Benco bid on a buying group, there was “[t]he potential that we could lose the business.”¹⁰⁵ In the same vein, Patterson’s SWOT analysis specifically identified “*our competitors’* willingness to negotiate with [GPOs]” as a threat to the company.¹⁰⁶ Similarly, Schein’s President, Sullivan, testified at trial that if Schein rejected a buying group, the buying group might shift Schein’s customers to a competitor.¹⁰⁷ He testified that this would be a risk to Schein’s business and could lead to margin erosion.¹⁰⁸ The Big Three’s buying group strategies were thus interdependent— if one of them discounted to buying groups, the others had to respond competitively.

Given the potential impact of buying groups, Schein’s President, Sullivan, identified buying groups as one of the “Top 5 ‘Keeps Me Up at Night’” issues.¹⁰⁹ Just like Sullivan, Benco’s CEO, Cohen, identified in a senior team strategy document that the “rise of buying groups” was one of the five things he was “most worried about with respect to Benco and where the industry is today.”¹¹⁰ Both Schein’s Sullivan and Benco’s Cohen identified buying groups as something they “watch[ed] closely.”¹¹¹ Benco’s Ryan viewed buying groups as “terrifying.”¹¹² Likewise, Patterson classified the “[e]xpansion of buying groups” as one of three threats the company faced in a SWOT analysis,¹¹³ and

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¹⁰⁴ CCFF ¶ 215 [REDACTED].

¹⁰⁵ CCFF ¶¶ 253 (quoting CX0314 (Guggenheim, IHT at 265-266)).

¹⁰⁶ CCFF ¶ 227 (quoting CX3283 at 010) (emphasis added).

¹⁰⁷ CCFF ¶ 240.

¹⁰⁸ CCFF ¶¶ 240; *see also* CCFF ¶ 239.

¹⁰⁹ CCFF ¶ 224 (quoting CX1083 at 001).

¹¹⁰ CCFF ¶ 229 (quoting CX0054 at 001).

¹¹¹ CCFF ¶¶ 230 (quoting Cohen, Tr. 443), 809 (quoting CX2469 at 002).

¹¹² CCFF ¶ 1021 (quoting CX0015 at 001).

¹¹³ CCFF ¶ 226 (quoting CX3068 at 24); *see also* CCFF ¶¶ 228, 227.

¹¹⁴ CCFF ¶ 225.

D. Benco Was the First to Adopt a No Buying Group Policy.

Benco instituted a no buying group policy in the mid-1990s.¹¹⁵ Pursuant to the policy, Benco refused to discount to, sell to, or recognize buying groups.¹¹⁶ The policy was a blanket rule that applied to all buying groups, regardless of the characteristics of the particular group.¹¹⁷ Pursuant to the policy, Benco rejected many buying groups that approached the distributor for discounts.¹¹⁸ For example, when a buying group contacted Benco in 2011 for volume discounts, Ryan responded: “Unfortunately, I don’t think we would be able to help you. Your structure meets our definition of GPO, and Benco does not participate in group purchasing organizations.”¹¹⁹

Cohen felt strongly about the no buying group policy.¹²⁰ Indeed, one regional manager explained that “Chuck Cohen is adamantly against buying groups,” and “[i]t’s one of the only times I have seen him really get fired up.”¹²¹ As a result, Benco’s no buying group policy was “always communicated” to the sales team, as well as “up and down the company.”¹²²

Benco’s Director of Sales, Patrick Ryan, was in charge of enforcing the no buying group policy.¹²³ He repeatedly instructed the sales team to refuse to discount to buying groups, even when the team wanted to do so to compete for business.¹²⁴ Thus, when a regional manager indicated in early 2011 that a buying group “would be a great opportunity to win some business

¹¹⁵ CCFF ¶¶ 394-395.

¹¹⁶ CCFF ¶¶ 395-396, 399.

¹¹⁷ CCFF ¶¶ 396, 401.

¹¹⁸ *See, e.g.*, CCFF ¶¶ 404-406 (generally), 408 (Synergy Dental Partners, 2011), 409 (Nexus Dental, 2011), 410 (Smile Source, 2011 and 2012), 411 (Dr. Carter buying group, 2012), 412 (Unified Smiles, 2012), 413 (XYZ Dental, 2012), 414 (New Mexico Dental Cooperative, 2013), 415 (DDS Group, 2013), 416 (WheelSpoke LLC, 2013), 417 (Erie Family Medical Equipment, 2013), 418 (American Academy of Cosmetic Dentistry, 2013), 419 (Dental Visits LLC, 2014), 420 (Stephen Sebastian buying group, 2014), 421 (Kois Buyers Group, 2014), 422 (Dental Purchasing Group, 2014), 423 (Insight Sourcing Group, 2014), 424 (Schulman Group, 2014), 425 (Dentistry Unchained, 2015).

¹¹⁹ CCFF ¶ 405 (quoting CX1138 at 001).

¹²⁰ CCFF ¶ 401.

¹²¹ CCFF ¶ 401 (quoting CX1234 at 001).

¹²² CCFF ¶ 399 (quoting Ryan, Tr. 1031-1032).

¹²³ CCFF ¶¶ 402, 405, 403.

¹²⁴ CCFF ¶¶ 406-407.

from Schein,” Ryan responded: “We do not participate in buying groups. Ever.”¹²⁵ and “We all know the answer here, right? Not no, *hell no*.”¹²⁶

E. Schein and Patterson Started Dipping Their Toes into the Buying Group Business to Gain Sales.

By contrast, Schein and Patterson recognized that buying groups could result in new customers and sales, and began discounting to buying groups. Schein was the first to do so.¹²⁷ In September 2010, Schein’s President Tim Sullivan explained to his boss Jim Breslawski that he did not “support [the] concept of buying groups” because of the risks of margin erosion and price war,¹²⁸ but buying groups presented an opportunity for new customers, new sales, and ultimately, increased overall gross profits for Schein.¹²⁹ He decided that the benefits of discounting to buying groups outweighed the risks.¹³⁰ As a result, Schein began discounting to a buying group to “test the model” of potential profitability.¹³¹ By 2011, Schein was working with a few buying groups, such as Long Island Dental Forum, the Dental Co-op of Utah, and Smile Source.¹³² Schein saw value in these relationships, as they were profitable¹³³— the Dental Co-op of Utah was an “over \$1M” account and Smile Source brought in over \$3 million in sales.¹³⁴

Patterson also began negotiating discounts with buying groups. In early 2013, Patterson began discussions with the New Mexico Dental Cooperative (“NMDC”), a buying group created by Dr. Brenton Mason.¹³⁵ On February 4, 2013, after discussions with Patterson, Dr. Mason believed that NMDC and Patterson “had a deal” and his buying group had a “partner” in

¹²⁵ CCFF ¶ 406 (quoting CX1242 at 001-002).

¹²⁶ CCFF ¶¶ 407 (quoting CX1038 at 001) (emphasis added).

¹²⁷ CCFF ¶¶ 440-442.

¹²⁸ CCFF ¶¶ 434 (quoting CX2113 at 001), 435, 433, 436, 437.

¹²⁹ CCFF ¶¶ 438-440, 449-450.

¹³⁰ CCFF ¶¶ 432, 433, 438-439.

¹³¹ CCFF ¶¶ 438 (quoting Sullivan, Tr. 3923-3924), 439.

¹³² CCFF ¶¶ 440-444.

¹³³ CCFF ¶ 453, 446-447, 450-451; *see also* CCFF ¶ 445.

¹³⁴ CCFF ¶ 446 (quoting CX2505 at 002), 447, 450, 451.

¹³⁵ CCFF ¶¶ 454-456; 462-464, 469-471.

Patterson.¹³⁶ That day, Dr. Mason announced to industry participants the concept of the NMDC buying group and its arrangement with Patterson for volume discounts on supplies.¹³⁷ As of February 7, 2013, Patterson believed a partnership with NMDC had the “opportunity to be huge”¹³⁸ and expressed its desire to keep “moving forward” with NMDC.¹³⁹ Based on these communications, Dr. Mason expected the deal would soon be finalized.¹⁴⁰

F. Benco Orchestrated an Agreement with Patterson that Neither Would Discount to Buying Groups.

1. Benco and Patterson Exchanged Assurances that Neither Would Discount to Buying Groups.

News of Patterson’s partnership with the NMDC buying group spread quickly to Schein and Benco. The same day that Dr. Mason sent the announcement of his buying group’s partnership with Patterson on February 4, 2013, Schein’s Regional Manager reported the “concerning” news to his boss.¹⁴¹ A few days later, on February 6, 2013, Schein’s Regional Manager forwarded this buying group information to a Benco employee, asking: “Did you see this? Call me.”¹⁴² The Benco employee then immediately forwarded this information to Benco’s regional manager, Don Taylor, who sent the information to Benco’s CEO, Chuck Cohen, for “feedback and coaching.”¹⁴³

On February 8, 2013, the day after Cohen received news of Patterson’s partnership with the NMDC buying group, he informed his team he would take care of the issue. He wrote: “We don’t recognize buying groups . . . I’ll reach out to my counterpart at Patterson to let him know what’s going on in NM.”¹⁴⁴

¹³⁶ CCFF ¶ 465 (quoting Mason, Tr. 2343-2344); *see also* CCFF ¶¶ 472, 471.

¹³⁷ CCFF ¶¶ 464-465.

¹³⁸ CCFF ¶ 469 (quoting CX4090 at 002).

¹³⁹ CCFF ¶¶ 471 (quoting CX4090 at 001), 463, 469, 470.

¹⁴⁰ CCFF ¶¶ 465, 469-473.

¹⁴¹ CCFF ¶¶ 474-475 (quoting CX0269 at 001).

¹⁴² CCFF ¶ 476 (quoting CX0055 at 002).

¹⁴³ CCFF ¶¶ 476-477 (quoting CX0055 at 002).

¹⁴⁴ CCFF ¶ 479 (quoting CX0055 at 001); *see also* CCFF ¶ 478.

Within five minutes, Cohen emailed Patterson's President Paul Guggenheim. He told Guggenheim that he had learned of Patterson's discounting arrangement with NMDC and made clear that Benco had a policy against such discounting.¹⁴⁵ Cohen forwarded the email about NMDC's discount arrangement with Patterson to Guggenheim, stating:

*Just wanted to let you know about some noise I've picked up from New Mexico. FYI: Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups (though we do work with corporate accounts) and our team understands that policy.*¹⁴⁶

Cohen contacted Guggenheim because he "wanted to let him know about a situation in New Mexico that he might not have heard of that was taking place in one of their locations."¹⁴⁷ Cohen testified that he had not seen Patterson doing business with buying groups prior to February 2013,¹⁴⁸ and that a change in Patterson's buying group strategy posed a risk to Benco of potential loss of customers.¹⁴⁹

Notably, Cohen knew that communications about buying groups with the president of his top competitor might raise price-fixing allegations because it involved "a customer situation."¹⁵⁰ Nonetheless, he circled back with his New Mexico regional manager, Don Taylor, to confirm that he had reached out to Patterson: "I just sent him a note about it. Don't want to call because it might be construed as price fixing."¹⁵¹ Despite having exchanged numerous calls with Guggenheim over the years, both before and after February 2013,¹⁵² Cohen knew that this particular communication about the companies' buying group policies would raise price-fixing allegations.¹⁵³

¹⁴⁵ CCFF ¶¶ 480, 483.

¹⁴⁶ CCFF ¶ 483 (quoting CX0056 at 001) (emphasis added).

¹⁴⁷ CCFF ¶ 485; *see also* ¶ 486.

¹⁴⁸ CCFF ¶ 481.

¹⁴⁹ CCFF ¶ 482.

¹⁵⁰ CCFF ¶¶ 516, 513-514.

¹⁵¹ CCFF ¶ 513 (quoting CX0057 ("Chats" tab in native Excel file)); *see also* CX0057_EXCERPT at 006.

¹⁵² CCFF ¶¶ 515, 352.

¹⁵³ CCFF ¶¶ 516, 513-514.

Before getting the email from Cohen, Patterson's Guggenheim was not aware of Benco's no buying group policy and did not believe it was public information.¹⁵⁴ Guggenheim promptly forwarded Benco's assurance to the two senior Patterson executives who dealt with buying groups—Vice President of Sales, David Misiak, and Vice President of Marketing, Tim Rogan.¹⁵⁵ A few hours later, Guggenheim responded to Cohen, assuring him that Patterson felt the same way about not doing business with buying groups.¹⁵⁶

*Thanks for the heads up. I'll investigate the situation. We feel the same way about these.*¹⁵⁷

Cohen confirmed that he interpreted Guggenheim's email to convey that Patterson's policy was similar to Benco's policy.¹⁵⁸

Just three days after this email exchange, Patterson ended its negotiations with NMDC. On Monday, February 11, 2013, Patterson informed Dr. Mason that it would not be partnering with the NMDC buying group after all.¹⁵⁹ This came as a surprise to Dr. Mason, as he understood that Patterson had already agreed to be the buying group's preferred vendor.¹⁶⁰

2. Benco and Patterson Informed Their Teams the Big Three Would Maintain a United Front Against Buying Groups.

A few weeks after Benco's communications with Patterson, on February 23, 2013, Benco's Patrick Ryan reiterated Benco's no buying group policy to his entire sales team:¹⁶¹

*Benco does not recognize GPOs as a single customer. . . . If this door is ever opened in dental, its [sic] all over for all of us.*¹⁶²

¹⁵⁴ CCFF ¶¶ 489-490.

¹⁵⁵ CCFF ¶¶ 491, 493, 1938. Misiak was in charge of Patterson's U.S. sales organization, and Rogan was in charge of Patterson's pricing department. CCFF ¶¶ 1944-1945, 1947, 1952, 1951.

¹⁵⁶ CCFF ¶¶ 495-496.

¹⁵⁷ CCFF ¶ 495 (quoting CX0090 at 001) (emphasis added).

¹⁵⁸ CCFF ¶ 500.

¹⁵⁹ CCFF ¶¶ 503-505.

¹⁶⁰ CCFF ¶¶ 506, 465; *see also* CCFF ¶ 473.

¹⁶¹ CCFF ¶ 527.

¹⁶² CCFF ¶ 527 (quoting CX1149 at 002) (emphasis added).

Ryan went on to assure the sales team that this threat was contained because the Big Three had all rejected, and would continue to reject, buying groups:

*It [doesn't] catch on here, because so far, all of the major dental companies have said, 'NO', and that's the stance we will continue to take.*¹⁶³

While Ryan did not mention the Big Three by name, he testified that the statement “all of the major dental companies” referred specifically to Benco, Schein, and Patterson.¹⁶⁴

Four days after Ryan's announcement to Benco's sales team, Patterson's VP of Sales, David Misiak, made a similar communication to Patterson employees, instructing them to rejecting buying groups, and assuring them that the three competitors were maintaining a united front.¹⁶⁵ Although a branch manager expressed a fear of “los[ing] a big chunk of business,”¹⁶⁶ Misiak told his team on February 27, 2013:

*When I get these calls directly I politely say that I appreciate the opportunity, but currently we do [not]¹⁶⁷ participate with group purchasing organizations. Continue to help Devon stay out of this¹⁶⁸ [the GPO] with grace.*¹⁶⁹

Just like Benco had done, Misiak assured his team that the Big Three would all stay out of buying groups:

*Confidential and not for discussion . . . our 2 largest competitors¹⁷⁰ stay out of these as well.*¹⁷¹

¹⁶³ CCFF ¶ 527 (quoting CX1149 at 002) (emphasis added).

¹⁶⁴ CCFF ¶ 528.

¹⁶⁵ CCFF ¶¶ 542-544, 540.

¹⁶⁶ CCFF ¶ 547 (quoting CX0093 at 001).

¹⁶⁷ CCFF ¶ 545.

¹⁶⁸ CCFF ¶ 546.

¹⁶⁹ CCFF ¶ 544 (quoting CX0093 at 001) (emphasis added).

¹⁷⁰ Misiak testified that the phrase “2 largest competitors” referred specifically to Schein and Benco. CCFF ¶¶ 552, 550. Misiak confirmed at trial that as of the date of this email, February 27, 2013, he believed Schein and Benco, just like Patterson, were not working with buying groups. CCFF ¶ 550.

¹⁷¹ CCFF ¶¶ 549 (quoting CX0093 at 001) (emphasis in original), 1187.

3. Patterson Confronted Benco When It Suspected Benco of Discounting to a Buying Group.

Despite these assurances, Patterson's Misiak was "concerned that Schein and Benco sneak into these [buying group] bids and deny it."¹⁷² He therefore asked his team to send him "specific proof" if they learned of Schein or Benco working with a buying group.¹⁷³

Misiak's fears appeared to come true a few months later. On May 31, 2013, Patterson's Guggenheim received an email from a branch manager informing him that Benco had successfully bid on a buying group called Atlantic Dental Care ("ADC").¹⁷⁴ Guggenheim believed Benco's agreement with ADC was a deviation from Cohen's prior assurance that Benco would abide by a no buying group policy.¹⁷⁵

He confronted Benco's Cohen in an email on June 6, 2013.¹⁷⁶ And he made sure his team was aware that he was addressing this problem with their competitor—he blind copied Misiak, Rogan, and the branch manager on his email to Cohen.¹⁷⁷ Guggenheim's email stated:

*Reflecting back on our conversation earlier this year, could you shed some light on your business agreement with Atlantic Dental Care? . . . I'm wondering if your position on buying groups is still as you articulated back in February? Let me know your thoughts. . . Sometimes these things grow legs without our awareness!*¹⁷⁸

Cohen knew exactly why his competitor was asking these questions; he understood Guggenheim wanted to know why Benco was doing business with ADC since Cohen gave a prior assurance that Benco had a no buying group policy.¹⁷⁹

Cohen replied to Guggenheim two days later, reaffirming his prior assurance of a no

¹⁷² CCFF ¶¶ 1188 (quoting CX0092 at 001), 540; *see also* CCFF ¶ 541.

¹⁷³ CCFF ¶ 549 (quoting CX0093 at 001), 555.

¹⁷⁴ CCFF ¶ 565.

¹⁷⁵ CCFF ¶ 572; *see also* CCFF ¶ 567.

¹⁷⁶ CCFF ¶¶ 568-570.

¹⁷⁷ CCFF ¶¶ 569-571.

¹⁷⁸ CCFF ¶¶ 568, 570 (quoting CX0095 at 001) (emphasis added).

¹⁷⁹ CCFF ¶ 573.

buying group policy: “As we’ve discussed, we don’t recognize buying groups.”¹⁸⁰ Cohen explained that ADC was not a buying group because each of the individual practices of ADC had merged together, which meant it was a DSO.¹⁸¹ Cohen shared the following information with his competitor:

- This customer had a total of 32 dental practices;
- The 32 practices had “legally merged together”;
- The merged entity was owned by the former practice owners;
- The company was in the process of rebranding all of the offices;
- The company had a board of directors made up of stakeholders that made the decisions.¹⁸²

Cohen also assured Guggenheim that “we’re going to continue monitoring the process to *ensure* that ADC delivers on their commitment to us.”¹⁸³ Despite the details already provided, Cohen offered to “discuss in more detail” if Guggenheim so desired.¹⁸⁴

Guggenheim responded on June 10, 2013, confirming that he understood Cohen’s position that ADC was not a buying group.¹⁸⁵ Guggenheim forwarded Cohen’s reassurance of Benco’s no buying group policy to other Patterson executives and Patterson’s branch manager in charge of ADC’s territory.¹⁸⁶ Given Benco’s position that ADC was not a buying group, Guggenheim told Patterson’s branch manager to compete aggressively for this business,¹⁸⁷ even though the branch was previously instructed not to bid.¹⁸⁸

¹⁸⁰ CCFF ¶¶ 574, 575 (quoting CX0062 at 001).

¹⁸¹ CCFF ¶¶ 575-576.

¹⁸² CCFF ¶ 576.

¹⁸³ CCFF ¶¶ 575 (quoting CX0062 at 001) (emphasis added), 577, 579.

¹⁸⁴ CCFF ¶ 575 (quoting CX0062 at 001).

¹⁸⁵ CCFF ¶ 582; *see also* CCFF ¶ 583.

¹⁸⁶ CCFF ¶¶ 584-585.

¹⁸⁷ CCFF ¶¶ 586-587.

¹⁸⁸ CCFF ¶ 543.

4. Patterson Complied with the Agreement Internally.

At the same time that Guggenheim was exchanging assurances with Benco, Patterson was in the midst of developing a new division, called Special Markets.¹⁸⁹ Special Markets was opened in June 2013 and received numerous requests from buying groups.¹⁹⁰ The head of this new division, Neal McFadden, was open to the possibility of exploring partnerships with buying groups, viewing any sale as a “potential opportunity,”¹⁹¹ and asked his boss, Guggenheim, if he should pursue this business.¹⁹² But Guggenheim placed an “extreme amount of pressure” on McFadden to say “no” to buying groups.¹⁹³ As a result, Patterson’s VP of Marketing, Tim Rogan gave a clear response to McFadden’s request to pursue buying groups:

*We don’t need GPO’s in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry.*¹⁹⁴

To ensure that the sales force stayed away from buying groups, McFadden and Patterson’s VP of Sales, David Misiak, issued a company-wide memo, explicitly stating that the mission of the Special Markets division “will not include group purchasing organizations (GPOs).”¹⁹⁵ From then on, Patterson’s Special Market division refused to discount to buying groups, even though the division was not profitable for more than a year.¹⁹⁶ For example, in May 2014, McFadden instructed a Special Markets specialist, “For now – I am electing to not participate with these [buying] groups – we have said no to several already.”¹⁹⁷

Like its Special Markets division, Patterson’s sales organization, run by VP of Sales,

¹⁸⁹ CCFF ¶¶ 596, 590-591. Patterson’s Special Markets was later renamed “Strategic Accounts.” CCFF ¶ 589.

¹⁹⁰ CCFF ¶ 597.

¹⁹¹ CCFF ¶¶ 598-599; *see also* CCFF ¶ 602.

¹⁹² CCFF ¶ 598.

¹⁹³ CCFF ¶ 604.

¹⁹⁴ CCFF ¶ 603 (quoting CX0106 at 001) (emphasis added).

¹⁹⁵ CCFF ¶ 611 (quoting CX0158 at 002); *see also* CCFF ¶ 605 (CX3072 at 003).

¹⁹⁶ CCFF ¶ 626.

¹⁹⁷ CCFF ¶ 623 (quoting CX3004 at 001).

Misiak, also received “a lot of emails” about buying groups.¹⁹⁸ And just like Special Markets, the sales organization also refused to work with buying groups. Misiak testified at trial that he “remained disciplined as the sales leader of the organization to say no” to buying groups,¹⁹⁹ and he passed that guidance on to Patterson’s sales team.²⁰⁰

The evidence shows that Patterson’s sales force understood the “clear” message from Patterson executives that the company “steer[ed] clear of all buying groups.”²⁰¹

- September 3, 2013, Misiak to CEO Scott Anderson and Paul Guggenheim, describing the guidance he gave to Patterson sales representatives: “We have said no at every turn. . . . My guidance has been to politely say no [to buying groups] and w[ea]ther the storm with these.”²⁰²
- November 20, 2013, Rogan to Patterson’s Manager of Marketing Communications, Jennifer Hannon: “We don’t sell to buying groups. Let’s talk live.”²⁰³
- December 2, 2013, McFadden to Patterson Account Specialist Shelly Beckler: “[A]s of now we are not working with GPOs.”²⁰⁴
- April 23, 2014, Guggenheim to McFadden: “Typical approach of an upstart buying group. We pass on these as a matter of protecting our business model.”²⁰⁵
- April 23, 2014, McFadden to a Patterson branch manager: “[A]s of this moment I am sure we should pass on these [buying] groups.”²⁰⁶
- October 23, 2014, McFadden wrote to another Patterson branch manager: “As a rule we are trying our best to steer clear of all buying groups.”²⁰⁷
- January 14, 2015, McFadden to yet another Patterson’s regional manager: “[D]oes he own all these offices—if not then he is a GPO—we don’t deal with GPOs.”²⁰⁸

¹⁹⁸ CCFF ¶¶ 608, 597 (quoting Misiak, Tr. 2705).

¹⁹⁹ CCFF ¶¶ 609-610; *see also* CCFF ¶ 631.

²⁰⁰ CCFF ¶¶ 609, 636, 610.

²⁰¹ CCFF ¶ 635 (quoting CX3128 at 001).

²⁰² CCFF ¶¶ 607 (quoting CX3116 at 001), 609, 630.

²⁰³ CCFF ¶¶ 630, 632 (quoting CX3168 at 001), 633.

²⁰⁴ CCFF ¶¶ 630, 634 (quoting CX3010 at 001).

²⁰⁵ CCFF ¶ 646 (quoting CX3080 at 001), 647.

²⁰⁶ CCFF ¶¶ 622 (quoting CX3016 at 001), 630.

²⁰⁷ CCFF ¶¶ 635, 650 (quoting CX3128 at 001).

²⁰⁸ CCFF ¶¶ 625, 630, 648 (quoting CX3045 at 001).

Consistent with this policy, Patterson rejected a number of buying groups.²⁰⁹

In fact, in June 2014, when a group of dental offices contacted McFadden for a potential partnership, McFadden asked whether the group was a buying group, explaining: “The reason I’m asking is *we’ve signed an agreement that we won’t work with GPO’s.*”²¹⁰

G. Benco Orchestrated an Agreement with Schein that Neither Would Discount to Buying Groups.

1. Benco and Schein Exchanged Assurances that Neither Would Discount to Buying Groups.

As with Patterson, Benco also informed Schein that Benco refused to work with buying groups as a matter of policy.²¹¹ As established at trial, Cohen “communicate[d] Benco’s no buying group policy to Sullivan.”²¹² Indeed, Benco reached out to Schein to discuss buying groups on no fewer than six occasions.²¹³ As a result of these communications, Benco gained the

²⁰⁹ See, e.g., CCFF ¶¶ 643 (NMDC), 644 (Dr. Stephen Sebastian’s group), 645 (Catapult Group), 646 (Dental Purchasing Group), 648 (Dr. Narducci), 649 (UOBG), 639 (Kois Buyers Group), 642 (Smile Source).

²¹⁰ CCFF ¶ 657 (quoting CX0164 at 002) (emphasis added). While there was an agreement to refuse to work with buying groups, Complaint Counsel is not aware of a “signed” agreement.

²¹¹ CCFF ¶¶ 661-664.

²¹² CCFF ¶ 662. While Sullivan testified that he does not recall Cohen informing him of Benco’s policy regarding buying groups, contemporaneous documents and Cohen’s consistent testimony throughout the Part 2 investigation and Part 3 proceedings demonstrate that Cohen did inform Sullivan of Benco’s policy. CCFF ¶¶ 662-664. See *infra* Sections II.C., II.E..

²¹³ CCFF ¶ 679. As discussed in more detail in Sections I.G.3. – I.G.5. below, the six communications consist of: (1) a communication during which Cohen informed Sullivan of Benco’s no buying group policy (CCFF ¶¶ 662-664); (2) an 11 minute and 34 seconds call between Cohen and Sullivan on January 13, 2012 (CCFF ¶ 968); (3) an 8 minute and 35 seconds call between Cohen and Sullivan on March 25, 2013 (CCFF ¶ 1032); (4) a text message between Cohen and Sullivan on March 27, 2013 (CCFF ¶ 1069); (5) a text message between Cohen and Sullivan on March 26, 2013 (CCFF ¶ 997); and (6) an 18 minute call between Benco’s Ryan and Schein’s Foley on October 1, 2013 (CCFF ¶ 1010). In addition, Cohen planned to send a note in the mail to Sullivan about the buying group Smile Source in July 2012. CCFF ¶¶ 990, 991. That is, of course, merely the evidence for which the two companies left a written trail. Cohen and Sullivan spoke on the telephone dozens of other times (CCFF ¶ 351 (56 calls between 2011 and 2015)); attended numerous industry events together (CCFF ¶¶ 355-356); and attended numerous private in-person meetings together during the relevant period (CCFF ¶¶ 357, 381, 383). Moreover, Sullivan exchanged additional communications with Cohen, including written notes and voicemail messages that are not part of the evidentiary record. CCFF ¶ 353. Sullivan testified that he may also have called Cohen from his office land line telephone, the records for which were not produced to Complaint Counsel. CCFF ¶ 354.

understanding that Schein, just like Benco and Patterson, would adopt a policy against recognizing buying groups.²¹⁴ Cohen testified:

Q. . . . And what did you understand Mr. Sullivan's position was on buying groups at the time of this e-mail [dated September 2013]?

A. Well, if you go back to the wrath [sic] of text messages [with Tim Sullivan], I think that the policy that Henry Schein had was that they do not recognize GPOs."²¹⁵

The evidence shows that Benco knew Schein was working with buying groups in 2011,²¹⁶ but following communications between the companies, Benco executives understood Schein was no longer working with buying groups between 2012 and 2015.²¹⁷

2. Schein Complied with the Agreement Internally.

Benco's understanding of Schein's change in policy was correct. Schein had historically worked with buying groups and found them profitable.²¹⁸ In fact, as of late 2010 and early 2011, Schein's President, Tim Sullivan, was in favor of the company working with buying groups, writing to his boss that he did not "want [] to lose" Smile Source²¹⁹ and was "very excited" about this buying group "business model."²²⁰

In 2011, however, Cohen and Sullivan called each other at least 23 times, texted each

²¹⁴ CCFF ¶¶ 680, 675-678.

²¹⁵ CCFF ¶¶ 676.

²¹⁶ CCFF ¶¶ 665-673.

²¹⁷ CCFF ¶¶ 674-678, 680, 527, 1183, 1191, 1193.

²¹⁸ CCFF ¶¶ 687, 688, 440, 442-453.

²¹⁹ CCFF ¶ 692 (quoting CX2113 at 001); *see also* CCFF ¶¶ 689-694.

²²⁰ CCFF ¶ 696 (quoting CX2899 at 001).

other at least 89 times, and attended numerous industry events together.²²¹ By July 2011, Sullivan's position had changed. In spite of Sullivan's previous enthusiasm for working with the buying group Smile Source, Sullivan informed his bosses, "I don't think you will ever see a full service dealer get involved with GPOs."²²² In December 2011, Sullivan wrote to his employees that he believed Schein did "NOT want to lead in getting [buying groups] started in dental."²²³ He explained that buying groups were "a very slippery slope."²²⁴ He also informed his employees in December 2011 that he did not want to "be the first company to open the floodgates to the dangerous world of GPOs."²²⁵ Indeed, by February 2012, Sullivan wanted to know "what we can do to KILL the buying group model!"²²⁶ Sullivan's anti-buying group position continued throughout the relevant period, for example, in September 2014, he wrote: "I still believe [buying groups are a] slippery slope . . . and don't plan to take the lead role."²²⁷

Beginning in late 2011, at the direct instruction of Sullivan, Schein employees were told to avoid doing business with buying groups.. Thus, an executive, Jake Meadows, stated that selling to a buying group was "against what Tim Sullivan has directed us to do in regards to supporting Buying groups."²²⁸ In another instance, Meadows noted to another Schein executive that "[Tim Sullivan] was going off about how we do not have any buying group agreements and

²²¹ CCFF ¶¶ 348-350, 358, 363. Respondents claim that during these communications, the two executives discussed a different agreement—a no-poach agreement limiting the number of employees that Benco and Schein could hire from each other. *See, e.g.,* Cohen, Tr. at 735, 747. Indeed, such an agreement raises its own anticompetitive concerns. *See, e.g., Deslandes v. McDonald's USA*, No. 17 C 4857, 2018 WL 3105955, at *6 (N.D. Ill. June 25, 2018) (finding that a naked horizontal agreement not to hire competitors' employees is a *per se* violation of the antitrust laws). Regardless, Respondents' contemporaneous documents and phone records show that Schein's change to a no buying group strategy, in line with Benco's strategy, directly coincided with a large number of communications between the two competitors. *See* Section I.G.1., I.G.3-5. Moreover, immediately after Schein's change in strategy, Benco began monitoring and confronting Schein about deviations from a no buying group strategy. *See supra*, Section I.G.3.

²²² CCFF ¶ 705 (quoting CX0185 at 001); *see also* CCFF ¶¶ 701-704, 706.

²²³ CCFF ¶ 709 (quoting CX2456 at 001).

²²⁴ CCFF ¶ 709 (quoting CX2456 at 001); *see also* CCFF ¶ 711.

²²⁵ CCFF ¶ 713 (quoting CX2458 at 001); *see also* CCFF ¶¶ 712, 714-716.

²²⁶ CCFF ¶ 729 (quoting CX0199 at 001). Sullivan claimed that he meant to write "KILL [their] buying group model," referring to the buying group Smile Source. (Sullivan, Tr. 4146.)

²²⁷ CCFF ¶ 809 (CX2469 at 002).

²²⁸ CCFF ¶ 773 (CX0170 at 001).

that we will not do them. Soap boxing about HSD [Henry Schein] and buying groups.”²²⁹ Yet another Schein employee wrote, “from Tim S., HSD does not want to enter the GPO world.”²³⁰ Similarly, another employee informed her colleagues that “Tim [Sullivan] was not in favor of” a buying group agreement,²³¹ and that a buying group prospect “went to Tim [Sullivan] and he shot it down. I think the meta msg is officially, GPO’s are not good for Schein.”²³²

The record is replete with examples of Schein executives and sales representatives at all levels of the company acknowledging Schein’s no buying group policy.²³³

- December 21, 2011: Randy Foley, Director of Sales for Special Markets, rejected buying group Unified Smiles, stating, “[U]nless you have some ‘ownership’ of your practices Henry Schein considers your business model as a Buying Group, and we no longer participate in Buying Groups.”²³⁴
- January 26, 2012: Western Zone Manager Joe Cavaretta wrote to sales representatives, “It is dangerously close but I told him we would not do business with a GPO.”²³⁵
- February 20, 2012: Foley wrote to his direct report, Strategic Account Manager Debbie Torgersen-Foster, “Honestly, within Schein we have a few buying groups (BG) that we wish we didn’t have . . . So, this is a corporate decision, not to participate in these.”²³⁶
- June 8, 2012: Regional Account Manager Andrea Hight wrote to her boss, Foley and Kathleen Titus: “I explained that we do not accommodate GPOs”²³⁷
- May 29, 2013: Cavaretta wrote to two Schein employees, “We try to avoid buying groups at all costs and therefore don’t really recognize them.”²³⁸

²²⁹ CCFF ¶ 850 (quoting CX0176 at 001).

²³⁰ CCFF ¶ 806 (quoting CX2211 at 001). Moreover, Sullivan personally directed employees to refuse buying groups that were elevated to him. For instance, Sullivan instructed Schein employees to reject the buying group Pacific Group Management Services in 2014. CCFF ¶¶ 795, 799, 801. Sullivan also tried to shut down the buying group Dental Gator. CCFF ¶¶ 836-838.

²³¹ CCFF ¶ 795 (quoting CX2219 at 001); *see also* CCFF ¶¶ 796, 798.

²³² CCFF ¶ 799 (quoting CX2235 at 001); *see also* CCFF ¶¶ 801-802.

²³³ *See* Attachment C to Complaint Counsel’s Post-Trial Brief for additional examples of Schein’s no buying group policy.

²³⁴ CCFF ¶ 719 (quoting CX2062 at 001); *see also* CCFF ¶¶ 720, 723, 743.

²³⁵ CCFF ¶¶ 750 (quoting CX0168 at 001).

²³⁶ CCFF ¶¶ 754 (quoting CX0238 at 001), 756, 758.

²³⁷ CCFF ¶ 771 (quoting CX2423 at 004).

²³⁸ CCFF ¶¶ 785 (quoting CX2509 at 001), 787.

- December 20 2013: Foley told his counterpart at Colgate, one of Schein’s manufacturer partners: “It’s a buying group that we do not participate with, as with all buying groups.”²³⁹
- October 8, 2014: a regional manager wrote to Titus, Schein’s Director of Group Practices: “I recently had a conversation with Kathleen regarding this group and they are nothing more than a GPO. It is my understanding that this violates our policy as we do not engage with GPOs.”²⁴⁰
- November 5, 2014: Jake Meadows (Eastern Area Sales Director) wrote to a regional manager: “We do not currently participate with GPOs. . . .”²⁴¹
- December 2014: Sullivan to Cavaretta, “The Dec ‘offsite’ last year I left with a goal to see if we could get Hal [Muller] to shut [Dental Gator] down”²⁴²

Consistent with its then-new policy, Schein rejected a number of buying groups,²⁴³ terminated a few of its legacy buying group arrangements,²⁴⁴ and even began inserting contractual clauses preventing its existing customers from forming GPOs.²⁴⁵

3. Benco Confronted Schein When It Suspected Schein of Discounting to Buying Groups.

Consistent with its understanding that Schein had agreed not to discount to buying groups, in January 2012, Benco began confronting Schein when it received market intelligence that indicated that Schein was deviating from their agreement.

a. Unified Smiles (2012)

On January 11, 2012, Benco learned from a customer that Schein might be offering discounts to the buying group Unified Smiles.²⁴⁶ Within minutes of receiving the news, Benco’s

²³⁹ CCFF ¶¶ 788 (quoting CX2073 at 001), 789.

²⁴⁰ CCFF ¶¶ 811, 812 (quoting CX0260 at 002), 813.

²⁴¹ CCFF ¶ 828 (quoting CX2358 at 001); *see also* CCFF ¶¶ 827, 829-834.

²⁴² CCFF ¶¶ 836 (quoting CX0246 at 001); *see also* 837-838. Dental Gator was a buying group created by one of Schein’s largest DSO customers, even though Schein’s contract with the DSO prohibited the latter from forming a buying group. CCFF ¶¶ 1769-1783. Sullivan and Schein executives tried to end the Dental Gator relationship (CCFF ¶ 1806), and told Dental Gator it could not advertise itself as a buying group. CCFF ¶¶ 1812-1817. Dental Gator ceased operations in 2018. CCFF ¶ 1823.

²⁴³ CCFF ¶¶ 925-954.

²⁴⁴ CCFF ¶¶ 871-898.

²⁴⁵ CCFF ¶¶ 861-869.

Director of Sales, Patrick Ryan, forwarded the information to Chuck Cohen, with the message “For Timmy conversation,” referring to Tim Sullivan of Schein.²⁴⁷ Cohen agreed, responding on January 13, 2012 “Talking this AM...”²⁴⁸ Cohen texted Sullivan the night of January 12, 2012 and the two agreed to speak at 8 a.m. Central Time on January 13, 2012.²⁴⁹

Cohen and Sullivan spoke on January 13, 2012 for 11 minutes and 34 seconds.²⁵⁰ Less than thirty minutes before the scheduled call with Sullivan, Cohen emailed Benco employees to reinforce Benco’s no buying group policy.²⁵¹

In fact, Schein rejected Unified Smiles just weeks earlier by telling the group “we no longer participate in Buying Groups,” pursuant to its change in policy and consistent with its prior exchange of assurances with Benco.²⁵²

b. Smile Source (2012)

A few months later, in July 2012, Benco learned that Schein might be selling to the buying group Smile Source.²⁵³ Minutes after receiving this news, Ryan forwarded Smile Source’s email to Cohen, writing, “Better tell your buddy Tim to knock this shit off.”²⁵⁴ At trial, Ryan admitted that he was telling Cohen to tell Schein’s Sullivan to stop working with the buying group Smile Source.²⁵⁵ And Cohen confirmed that is what he understood from the email.²⁵⁶ Ryan admitted that he used the term “this shit”—referring to Schein working with

²⁴⁶ CCFF ¶¶ 955-957.

²⁴⁷ CCFF ¶¶ 958 (quoting CX1052 at 001), 959-960.

²⁴⁸ CCFF ¶ 967 (quoting CX1052 at 001); *see also* CCFF ¶ 962.

²⁴⁹ CCFF ¶¶ 964-966.

²⁵⁰ CCFF ¶ 968.

²⁵¹ CCFF ¶ 972.

²⁵² CCFF ¶¶ 719-720, 727; *see also* CCFF ¶ 973.

²⁵³ CCFF ¶¶ 978-980. In fact, Schein’s discounting arrangement with Smile Source had ended in the beginning of 2012. CCFF ¶ 914.

²⁵⁴ CCFF ¶ 982 (quoting CX0018 at 001).

²⁵⁵ CCFF ¶¶ 984-985.

²⁵⁶ CCFF ¶ 986.

Smile Source—because he had a “very strong opinion” about buying groups²⁵⁷ and was “frustrated” that Schein would be working with Smile Source.²⁵⁸

Cohen again agreed with Ryan’s suggestion that he contact his competitor:

Please resend this e-mail without your comment on top so that *I can print & send to Tim with a note*. The good news is: perhaps they’re looking to us because Schein told them NO. That works for me.²⁵⁹

At trial, Cohen admitted he was planning to print the Smile Source email indicating Schein’s involvement, and send it to Sullivan with a note.²⁶⁰ In fact, Cohen had a practice of sending Sullivan notes in the mail, and he testified that it would not surprise him if he did send Sullivan a physical note about Smile Source.²⁶¹

c. Dental Alliance (2013)

In March 2013, Cohen emailed a Benco sales representative to ask for the name of the buying group in his area that worked with Schein.²⁶² Within five minutes of receiving the sales representative’s response the following day, Cohen sent his employee’s email to Sullivan in a text message:²⁶³

As per my guy in Raleigh: ‘Dental alliance. They apparently get 7% off of catalog pricing just for joining. Dr. Ben Koren is the dentist involved. A guy named Sam contacted me about a year ago and asked if Benco was interested. Told him he was out of his tree.’ Could be a rumor, sometimes stories go around. Thanks.²⁶⁴

At trial, Cohen explained that in this text message, he was informing “Tim Sullivan about market intelligence on Schein doing business with a buying group.”²⁶⁵ Sullivan tried to call

²⁵⁷ CCFF ¶ 985 (quoting Ryan, Tr. 1065-66).

²⁵⁸ CCFF ¶ 983 (quoting Ryan, Tr. 1192).

²⁵⁹ CCFF ¶ 990 (quoting CX0018 at 001).

²⁶⁰ CCFF ¶ 991; *see also* CCFF ¶¶ 988-989.

²⁶¹ CCFF ¶ 992.

²⁶² CCFF ¶ 995.

²⁶³ CCFF ¶¶ 996-997.

²⁶⁴ CCFF ¶ 997 (quoting CX6027 at 028).

²⁶⁵ CCFF ¶ 994.

Cohen the following morning, and the two spoke for 5 minutes and 36 seconds a few days later.²⁶⁶

d. Smile Source (2013)

On September 24, 2013, Benco's Ryan received market intelligence that Schein might be distributing discounted dental supplies to the buying group Smile Source.²⁶⁷ Within one week, Ryan called his counterpart at Henry Schein, Director of Sales for Special Markets Randy Foley, speaking for 18 minutes.²⁶⁸ Foley testified at trial that Ryan's call gave him the impression that Benco was "anti buying group."²⁶⁹ Ryan told him that Benco was not going to bid on Smile Source²⁷⁰ and wanted to know if Schein would bid on Smile Source.²⁷¹

After the call, Foley informed his boss, Hal Muller, of Benco's no buying group strategy:²⁷²

Next time we talk remind me to tell you about my conversation with Pat Ryan at SM Benco. They're anti Buying Group and Smile Source recently reached out to them. I'm being careful not to cross any boundaries, like collusion.²⁷³

Following the call to his competitor, Ryan reported to Cohen that he had "talked specifically about" Smile Source with "Randy at Schein," referring to Randy Foley of Schein:²⁷⁴

Very familiar [with Smile Source.] Talked to them three times. Nothing is different. Randy at Schein and I talked specifically about them. Buh-bye.²⁷⁵

²⁶⁶ CCFF ¶ 1088.

²⁶⁷ CCFF ¶¶ 1007-1008.

²⁶⁸ CCFF ¶¶ 1009-1010.

²⁶⁹ CCFF ¶ 1012.

²⁷⁰ CCFF ¶ 1011.

²⁷¹ CCFF ¶ 1013.

²⁷² CCFF ¶¶ 1017, 1016.

²⁷³ CCFF ¶ 1017 (quoting CX0243 at 001).

²⁷⁴ CCFF ¶ 1014 (quoting CX0019 at 001).

²⁷⁵ CCFF ¶ 1014 (quoting CX0019 at 001).

4. Benco and Schein Communicated When They Were Uncertain Whether a Customer Qualified as a Buying Group.

In March 2013, the group Atlantic Dental Care, or ADC, approached Benco asking for a bid for its \$3.5 million dental supply business.²⁷⁶ Benco was uncertain whether the customer qualified as a buying group,²⁷⁷ and so contacted Schein on the same day.²⁷⁸

On March 25, 2013, Cohen created a calendar entry to “*Call Tim Sullivan [of Schein] re: Buying Groups.*”²⁷⁹ He then sent Sullivan a text message asking for a phone call, and the competitors spoke around 5 p.m. that day for 8 minutes and 35 seconds.²⁸⁰

Cohen and Sullivan admitted at trial that they spoke about the potential customer, ADC, on that call.²⁸¹ Cohen testified that he and Sullivan were “exchanging information about whether Atlantic Dental Care was a . . . group purchase organization or a DSO.”²⁸² Sullivan testified that on the March 25 call, Cohen said “that they don’t plan to, you know, bid on their – on this group” and Benco was “not interested.”²⁸³

Following the call, Cohen texted Sullivan: “Here’s a link to the press release we discussed,” and copied a link to a press release regarding ADC’s business structure.²⁸⁴ Sullivan expressed to Cohen his appreciation for the information: “Thanks for the follow up on that article. Unusual.”²⁸⁵

²⁷⁶ CCFF ¶ 1022.

²⁷⁷ CCFF ¶¶ 1023, 1025-1027.

²⁷⁸ CCFF ¶¶ 1028-1032.

²⁷⁹ CCFF ¶ 1028.

²⁸⁰ CCFF ¶¶ 1029-1032.

²⁸¹ CCFF ¶¶ 1034-1035.

²⁸² CCFF ¶ 1036.

²⁸³ CCFF ¶¶ 1038-1040. Sullivan’s testimony about his communication with Cohen has changed over time. First, Sullivan testified that Cohen told him on the March 25, 2013 call that Benco was not planning to bid on ADC. CCFF ¶¶ 1039-1040. At trial, Sullivan changed his testimony, and testified to the opposite—that Cohen did *not* say anything about Benco not planning to bid. CCFF ¶ 1041. However, Sullivan admitted that his “recollection at the time” of the prior testimony was that Cohen told him that Benco was not going to bid on ADC. CCFF ¶ 1043.

²⁸⁴ CCFF ¶¶ 1045, 1048.

²⁸⁵ CCFF ¶ 1047; *see also* CCFF ¶ 1051, 1058.

5. Benco Shared Competitively Sensitive Information with Schein to Show that Benco Was Not Deviating From Prior Assurances.

Two days after the initial call between Cohen and Sullivan regarding ADC, on March 27, 2013, Benco learned from outside counsel that ADC was not a buying group.²⁸⁶ That very same day, Cohen contacted Sullivan yet again, in a text message that read:

Tim: Did some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all the practices. So it's not a buying group, it's a big group. We're going to bid. Thanks.²⁸⁷

Cohen admitted under oath that it was against his business interest to tell his competitor that Benco was planning to bid:²⁸⁸

In fact, there's a counter-business reason, which is, I probably, in saying that we're going to bid, I probably, gave more information . . . than a rational business owner would give, which is, hey, we're bidding on it.²⁸⁹

Although sending the text message was against Benco's unilateral self-interest²⁹⁰ Cohen sent the information to Sullivan so that Sullivan would not think he was "duplicitous in [the] first call" or trying to "head-fake" Schein.²⁹¹ On the first call on March 25, 2013, Cohen told Sullivan that Benco was *not* planning to bid on ADC.²⁹² Thus, when Benco came to the opposite conclusion two days later—that it *would* bid on ADC because it was a corporate dental practice rather than a buying group—Cohen followed up to ensure Sullivan had accurate information about Benco's plan to bid.²⁹³

²⁸⁶ CCFF ¶¶ 1061-1065.

²⁸⁷ CCFF ¶ 1069. Following the receipt of March 27, 2013 text message, Sullivan and Cohen tried to reach each other on the telephone several times. CCFF ¶ 1080. On April 3, 2013, they finally connected and spoke for 5 minutes and 36 seconds. CCFF ¶ 1088.

²⁸⁸ CCFF ¶ 1072; *see also* CCFF ¶¶ 1073-1075.

²⁸⁹ CCFF ¶ 1074.

²⁹⁰ CCFF ¶¶ 1073-1075.

²⁹¹ CCFF ¶ 1076.

²⁹² CCFF ¶¶ 1038-1040. This is independently corroborated by the fact that on that day, Benco believed ADC was a buying group and was planning to reject this customer. CCFF ¶ 1024.

²⁹³ CCFF ¶¶ 1061-1070.

These communications between Benco and Schein about ADC perfectly mirror communications between Benco and Patterson. A few months later, after Patterson's Guggenheim discovered Benco was discounting to ADC, he confronted Benco about this apparent buying group arrangement.²⁹⁴ In response, Benco's Cohen shared the same information with Patterson as he did with Sullivan.²⁹⁵

H. Benco Planned to Shore up the Agreement with Schein and Patterson.

In the fall of 2013, Benco was concerned that the Big Three's agreement would collapse when it discovered that a regional distributor, Burkhart, was discounting to buying groups.²⁹⁶ Just as Benco had done with Patterson and Schein, Benco contacted Burkhart to put an end to its buying group discounts.²⁹⁷ Benco's VP of Sales, Mike McElaney, called his counterpart at Burkhart, Jeff Reece, to attempt to stop Burkhart from working with buying groups.²⁹⁸ Benco's McElaney warned Burkhart's Reece that buying groups "were not favorable to the dental industry,"²⁹⁹ and would cause "declining margins" and a "race to the bottom," just like it did in the "medical industry."³⁰⁰

Despite Benco's efforts, Burkhart's Reece refused to agree to stop working with buying groups.³⁰¹ Ryan suggested that Benco instead try to shore up the agreement among the Big Three:

*"CHUCK - - - maybe what you should do is make sure you tell Tim [Sullivan of Schein] and Paul [Guggenheim of Patterson] to hold their positions as we are."*³⁰²

²⁹⁴ CCFF ¶¶ 569-570; *see also supra* Section I.F.3.

²⁹⁵ CCFF ¶ 1071; *see supra* Section I.F.3.

²⁹⁶ CCFF ¶ 1101.

²⁹⁷ CCFF ¶ 1208-1238; *see also infra* Section V for details on Benco's invitation to Burkhart to collude, alleged in Count IV of the Complaint.

²⁹⁸ CCFF ¶¶ 1208-1214.

²⁹⁹ CCFF ¶ 1211.

³⁰⁰ CCFF ¶ 1213; *see also* CCFF ¶¶ 1212, 1214.

³⁰¹ CCFF ¶ 1240.

³⁰² CCFF ¶ 1103 (quoting CX0023 at 001) (emphasis added); *see also* CCFF ¶ 1102.

Ryan admitted at trial that he was specifically referring to Sullivan and Guggenheim staying the course on their no buying group positions, just as Benco was doing.³⁰³ Cohen testified that he believed Ryan was suggesting that he “reiterate” Benco’s no buying group policy to Sullivan and Guggenheim.³⁰⁴

The opportunity to shore up the agreement came quickly, when Benco’s Cohen, Schein’s Sullivan, Patterson’s Guggenheim, and Burkhardt’s Reece were together at the Dental Trade Alliance industry event in Florida on October 15-18, 2013.³⁰⁵ At this event, Benco again confronted Burkhardt about its buying group discounts, sending the message that buying groups were not “healthy for our industry,” “could do damage to our business,” and “threaten our business.”³⁰⁶

I. The Big Three Communicated About the TDA Buying Group.

In 2013 and 2014, the Big Three communicated about another buying group threat—the Texas Dental Association’s (“TDA”) buying group, called TDA Perks.³⁰⁷

The TDA, a state dental association for dentists in Texas, held an annual meeting for its members.³⁰⁸ For years, the Big Three provided financial support to the TDA by attending the TDA annual meeting.³⁰⁹ Weeks after the TDA launched its buying group in October 2013, Cohen instructed his Texas regional manager to contact Schein and Patterson to discuss withdrawing from TDA’s annual meeting because of the buying group.³¹⁰ Cohen also informed his manager that he (Cohen) would reach out to Schein’s Sullivan about the subject.³¹¹ In addition, Schein and Patterson senior executives communicated about withdrawal from the TDA

³⁰³ CCFF ¶¶ 1103-1104.

³⁰⁴ CCFF ¶ 1105.

³⁰⁵ CCFF ¶¶ 1225, 364-366.

³⁰⁶ CCFF ¶¶ 1231-1232, 1226-1228; *see also infra*, Section V (“Benco Invited Burkhardt to Refuse to Discount to Buying Groups”).

³⁰⁷ CCFF ¶¶ 1110-1113, 1118-1137.

³⁰⁸ CCFF ¶ 1109.

³⁰⁹ CCFF ¶ 1117.

³¹⁰ CCFF ¶ 1118.

³¹¹ CCFF ¶ 1120.

meeting. During a 14-minute call in January 2014, Schein's VP of Sales, Dave Steck, and Patterson's VP of Sales, Dave Misiak, discussed withdrawing from the TDA meeting.³¹² Steck reported this conversation to his Sullivan.³¹³ Following the call, Steck wrote to Schein managers, "Guys, I have to get back to PDCO [Patterson] on whether or not we are attending the TDA."³¹⁴ Later that day, Steck followed up with an email to Patterson's Misiak, promising to keep Schein apprised of Schein's plans with the TDA meeting.³¹⁵

Further, on April 16, 2014, Benco's Cohen sent Schein's Sullivan and Patterson's Guggenheim an article advertising the TDA buying group, which discussed TDA Perks leveraging the group buying power of TDA members to level the playing field between independent dentists and corporate dental practices.³¹⁶ Cohen and Sullivan spoke on the phone for 9 minutes that day,³¹⁷ and Guggenheim planned to call Cohen about the TDA buying group article.³¹⁸

Following these competitor communications, Benco, Schein, and Patterson all withdrew from the 2014 TDA annual meeting.³¹⁹ Because of the Big Three's withdrawal, other state dental associations stopped their plans to launch a similar buying group.³²⁰

J. The Big Three Began Competing for Buying Groups in Late 2015.

In April 2015, Benco settled an antitrust investigation into its response to the TDA buying group by entering into an Agreed Final Judgment and Stipulated Injunction with the Texas Attorney General's Office.³²¹ The Final Judgment required Benco to submit a detailed log of its communications with Schein and Patterson, including any communications with Sullivan

³¹² CCFF ¶¶ 1123-1126; *see also* CCFF ¶ 1128.

³¹³ CCFF ¶ 1128.

³¹⁴ CCFF ¶ 1129 (quoting CX0205 at 002).

³¹⁵ CCFF ¶ 1130.

³¹⁶ CCFF ¶¶ 1133-1134.

³¹⁷ CCFF ¶ 1135.

³¹⁸ CCFF ¶¶ 1136-1137.

³¹⁹ CCFF ¶¶ 1142, 1144, 1145.

³²⁰ CCFF ¶ 1155.

³²¹ CCFF ¶ 1159.

or Guggenheim about buying groups.³²² Patterson and Schein entered into similar stipulated agreements with the Texas Attorney General's Office in 2018 and 2017, respectively.³²³

After Benco's settlement with the Texas Attorney General, Respondents' agreement began to fall apart. Benco revised its long-standing policy against buying groups by partnering with its first buying group, Elite Dental Alliance ("EDA").³²⁴ Benco's Cohen testified that he decided to partner with the EDA buying group because of the fear that Schein or Patterson would do the deal if Benco refused.³²⁵ Schein and Patterson also began bidding for several buying groups in late 2015 and after.³²⁶ Benco, in turn, took steps to "get EDA to the next level" to compete against Schein and Patterson's buying groups, noting: "Schein is recognizing 5-10 GPOs. We need to get EDA to the next level."³²⁷

ARGUMENT

II. RESPONDENTS' COORDINATED REFUSAL TO DISCOUNT TO BUYING GROUPS WAS A *PER SE* VIOLATION OF THE ANTITRUST LAWS.

A. Legal Standard for Establishing a *Per Se* Illegal Conspiracy.

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce."³²⁸ A "contract," "combination," or "conspiracy" within the meaning of Section 1 arises from "some form of concerted action."³²⁹ Concerted action is found upon a showing of a "unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement,"³³⁰ or evidence that

³²² CCFF ¶¶ 1160-1161; *see also* CCFF ¶ 1162.

³²³ CCFF ¶¶ 1163-1164. The stipulated agreements are either no longer in effect or are reaching the end of its term. CCFF ¶¶ 1160-1161, 1163-1164.

³²⁴ CCFF ¶¶ 1366-1370.

³²⁵ CCFF ¶ 1383; *see also* CCFF ¶¶ 1165, 1380, 1372, 1379.

³²⁶ CCFF ¶¶ 1166, 1717-1719, 1398, 1400, 1403, 1730, 1734-1735.

³²⁷ CCFF ¶ 1746-1748 (quoting CX1527 ("Chats" tab in native Excel file)); *see also* CX1527_EXCERPT at 018).

³²⁸ 15 U.S.C. § 1. A violation of Section 1 of the Sherman Act constitutes an unfair method of competition under Section 5 of the FTC Act, 15 U.S.C. § 45. *See Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 762 & n.3 (1999); *FTC v. Motion Picture Adver. Serv. Co.*, 344 U.S. 392, 394-95 (1953).

³²⁹ *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 356-57 (3d Cir. 2004).

³³⁰ *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) (quoting *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)).

“reasonably tends to prove that the [defendants] had a conscious commitment to a common scheme designed to achieve an unlawful objective.”³³¹ Concerted action need not take the form of a formal or express agreement.³³² A tacit agreement is just as much a violation as an express agreement.³³³

A plaintiff need only establish that a defendant violated Section 1 by a preponderance of the evidence.³³⁴ In evaluating an alleged antitrust conspiracy, courts must consider the “totality of the evidence,”³³⁵ including both direct and circumstantial evidence.³³⁶ The Supreme Court has warned that “[t]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.”³³⁷ Because conspiracies tend to form in secret, proof of conspiracies rarely consists of direct evidence of an explicit agreement.³³⁸ Conspiracies are almost always proven through inferences that may fairly be

³³¹ *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 767 (1984) (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 108 (3d Cir. 1980)).

³³² *In re Polyurethane Foam Antitrust Litig.*, 152 F. Supp. 3d 968, 978 (N.D. Ohio 2015) (“No formal agreement is necessary to constitute an unlawful conspiracy. . . . The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in any exchange of words.”) (quoting *Am. Tobacco*, 328 U.S. at 809-10) (alteration in original); *Esco*, 340 F.2d at 1008 (“It is not necessary to find an express agreement, either oral or written, in order to find a conspiracy, but it is sufficient that a concert of action be contemplated and that defendants conform to the arrangement.”) (citing *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1948)).

³³³ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007); *Beaver*, 515 F.3d at 738 (“[T]he government was required only to establish that the [defendants] had ‘a tacit understanding based upon a long course of conduct’ to limit their discounts.”) (citing *United States v. Beachner Constr. Co.*, 729 F.2d 1278, 1283 (10th Cir. 1984)).

³³⁴ See *In re Adventist Health Sys./West*, Docket No. 9234, 1994 WL 16010985, at *52 (FTC 1994) (“Each element of the case must be established by a preponderance of the evidence.”); *Steadman v. SEC*, 450 U.S. 91, 101-02 (1981) (Requirement under Section 556(d) of the Administrative Procedure Act that agency orders be “supported by and in accordance with the reliable, probative and substantial evidence” is satisfied by the preponderance-of-the-evidence standard.); see also *In re Chicago Bridge & Iron Co.*, Docket No. 9300, 2004 WL 5662266, at *305, n.4 (FTC 2004) (“[W]e take it as settled law that regardless of the standard under which a reviewing court must accept the Commission’s findings of fact, the Commission (and the Administrative Law Judge (‘ALJ’)) normally must base findings upon a ‘preponderance of the evidence.’”).

³³⁵ *In re Publ’n Paper Antitrust Litig.*, 690 F.3d 51, 64 (2d Cir. 2012).

³³⁶ *Monsanto*, 465 U.S. at 767.

³³⁷ *Cont’l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) (quoting *United States v. Patten*, 226 U.S. 525, 544 (1913)); see also *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655-56 (7th Cir. 2002) (“The question for the jury in a case such as this would simply be whether, when the evidence was considered as a whole, it was more likely that the defendants had conspired to fix prices than that they had not conspired to fix prices.”).

³³⁸ *Apple*, 952 F. Supp. 2d at 689.

drawn from the behavior of the alleged conspirators.³³⁹ Circumstantial evidence is no less persuasive than direct evidence, and in fact, may be “more certain, satisfying and persuasive than direct evidence.”³⁴⁰

1. Horizontal Agreements to Refuse to Discount Are *Per Se* Unlawful.

Despite the Sherman Act’s broad language prohibiting *all* restraints of trade, the Act outlaws only “unreasonable restraints.”³⁴¹ An agreement “may be adjudged unreasonable either because it fits within a class of restraints that has been held to be ‘*per se*’ unreasonable, or because it violates what has come to be known as the ‘Rule of Reason.’”³⁴²

It has long been settled that a horizontal agreement among competitors that “‘interfere[s] with the setting of price by free market forces’” is the archetypal example of a *per se* unlawful restraint.³⁴³ Price-fixing agreements are so “plainly anticompetitive” and “lack any ‘redeeming virtue’” that they are conclusively presumed illegal without further examination under the rule of reason.³⁴⁴ Even if “not . . . aimed at complete elimination of price competition,” price-fixing conspiracies pose a “‘threat to the central nervous system of the economy’ by creating a dangerously attractive opportunity for competitors to enhance their power at the expense of others.”³⁴⁵

An agreement among horizontal competitors to refuse to discount is a form of a price-fixing conspiracy. As the Supreme Court stated in *Catalano, Inc. v. Target Sales, Inc.*, “an agreement to eliminate discounts . . . falls squarely within the traditional *per se* rule against price fixing.”³⁴⁶ Similarly, in *United States v. Beaver*, the Seventh Circuit held that defendants’

³³⁹ *Id.*

³⁴⁰ *Id.* (quoting *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003)).

³⁴¹ *Apple*, 791 F.3d at 320; *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

³⁴² *FTC v. Ind. Fed’n of Dentists (“IFD”)*, 476 U.S. 447, 457-58 (1986).

³⁴³ *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978) (quoting *United States v. Container Corp.*, 393 U.S. 333, 337 (1969)).

³⁴⁴ *Catalano*, 446 U.S. at 646.

³⁴⁵ *Apple*, 791 F.3d at 326 (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940)).

³⁴⁶ 446 U.S. at 647.

coordinated “net-price-discount limit constituted an illegal price-fixing arrangement, and thus was . . . *per se* illegal.”³⁴⁷ In *TFWS, Inc. v. Schaefer*, the Fourth Circuit held that Maryland’s “volume discount ban is . . . a *per se* violation of the Sherman Act.”³⁴⁸

2. Horizontal Agreements to Refuse to Serve a Customer are *Per Se* Unlawful.

As the Supreme Court has stated repeatedly, “[A]ny agreement by a group of competitors to boycott a particular buyer or group of buyers is illegal *per se*,”³⁴⁹ and “the Sherman Act makes it an offense for [businessmen] to agree among themselves to stop selling to particular customers.”³⁵⁰ Thus, in *FTC v. Superior Court Trial Lawyers Ass’n*, the Supreme Court held that an agreement by a group of lawyers to boycott their customers to hold out for higher fees was a *per se* unlawful boycott.³⁵¹ Indeed, even Schein’s antitrust compliance policy stated that “[a]greements with competitors” “[n]ot to do business with [] one or more customers,” and agreements “not to bid,” are “always illegal under the antitrust laws.”³⁵²

B. The Big Three Entered into an Unlawful Agreement to Refuse to Discount to Buying Groups.

The evidence in this case checks all the boxes of a *per se* unlawful conspiracy.³⁵³ The highest-level executives of the Big Three exchanged assurances of a refusal to do business with buying groups,³⁵⁴ and thereafter, consistently instructed their sales teams to reject buying groups.³⁵⁵ As courts have held, evidence that horizontal competitors exchanged assurances of a

³⁴⁷ 515 F.3d at 737 n.3; *see also United States v. Olympia Provision & Baking Co.*, 282 F. Supp. 819, 828 (S.D.N.Y. 1968) (“The uniform minimum discounts . . . constituted illegal price fixing under the circumstances herein.”); *Gen. Motors*, 384 U.S. at 145 (“Elimination, by joint collaborative action, of discounters from access to the market is a *per se* violation of the Act.”).

³⁴⁸ 242 F.3d 198, 210 (4th Cir. 2001).

³⁴⁹ *Fed. Mar. Comm’n v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 250 (1968); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 543 (1978).

³⁵⁰ *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 214 (1951); *Barry*, 438 U.S. at 543.

³⁵¹ 493 U.S. at 422-23.

³⁵² CCFF ¶ 1050.

³⁵³ *See* Attachment A to Complaint Counsel’s Post-Trial Brief for a timeline of the key events of the conspiracy.

³⁵⁴ *See supra*, Sections I.F.1., I.G.1., I.F.3; *see infra*, Section II.C.

³⁵⁵ *See supra*, Sections I.F.2., I.F.4., I.G.2.

common course of action, or that competitors followed conduct “suggested or outlined by a competitor in the presence of other competitors,” proves the existence of a Section 1 agreement.³⁵⁶ Further, when the Big Three suspected each other of deviating from the previously discussed course of action, the executives confronted one another and reassured each other of compliance,³⁵⁷ which courts have found proves assent to an unlawful conspiracy.³⁵⁸ In addition, the Big Three’s internal documents explicitly refer to their collective refusal to do business with buying groups, and a sense of obligation and “duty to uphold” that collective action.³⁵⁹ These documents plainly manifest the Big Three’s “conscious commitment to a common scheme” and a “common design and understanding,” terms used by the Supreme Court to define an antitrust conspiracy.³⁶⁰ Finally, “plus factors,” which are additional circumstances supporting an inference of concerted action,³⁶¹ further confirm the existence of a conspiracy here.³⁶² The Big Three acted against their unilateral self-interest and changed their conduct before and after the conspiracy,³⁶³ which are classic plus factors indicative of an agreement.³⁶⁴

C. The Big Three’s Senior Executives Exchanged Assurances to Reach a Common Understanding.

Respondents’ emails show that Benco’s CEO, Cohen, assured Patterson’s President, Guggenheim, that Benco had a “policy . . . that we do not recognize, work with, or offer

³⁵⁶ *Gainesville*, 573 F.2d at 300-01; *Champion*, 557 F.2d at 1273; *Foley*, 598 F.2d at 1331-32; *Esco*, 340 F.2d at 1007-08.

³⁵⁷ *See supra*, Section I.F.3., I.G.3.; *see infra* Sections II.D., II.E.

³⁵⁸ *See Beaver*, 515 F.3d at 738.

³⁵⁹ *See infra* Section II.F.

³⁶⁰ *See Monsanto*, 465 U.S. at 764 (describing an agreement as a “conscious commitment to a common scheme”); *Copperweld*, 467 U.S. at 771 (stating that a “unity of purpose or a common design and understanding” satisfies the agreement element of Section 1).

³⁶¹ *See In re Pool Prods. Distribution Mkt. Antitrust Litig.*, 988 F. Supp. 2d 696, 711 (E.D. La. 2013).

³⁶² *See infra*, Section II.I.

³⁶³ *See infra*, Section II.I.

³⁶⁴ *See In re Pool Prods.*, 988 F. Supp. 2d at 711.

discounts to buying groups.”³⁶⁵ Guggenheim responded with his own assurance that Patterson “feel[s] the same way about” buying groups.³⁶⁶ As a direct result of this exchange, Cohen understood Patterson would follow the same policy as Benco.³⁶⁷ Cohen similarly assured Schein’s Sullivan that Benco had a no buying group policy, and received the same understanding from Schein.³⁶⁸ As a result of these competitor communications, Cohen “understood that Schein, Patterson, and Benco all had a similar policy with respect to buying groups.”³⁶⁹

Courts have repeatedly held that the exchange of assurances among competitors, much like the Big Three’s communications, constitute a *per se* unlawful conspiracy. In *Gainesville Utilities Department v. Florida Power & Light Co.*, the Eighth Circuit found an unlawful market division agreement on evidence that the competitors informed each other that they would not serve customers in certain territories.³⁷⁰ There, the senior executives of competing firms copied each other when they declined to serve certain customers, and thanked each other in response.³⁷¹ The court acknowledged that “[n]o document expressly sets forth a territorial agreement” between the competitors,³⁷² but found that the “exchange of letters between high executives” “points so strongly to the existence of a conspiracy that ‘reasonable men could not arrive at a contrary verdict.’”³⁷³ The court reasoned that “there was no reason for communicating with a competitor about the refusal.”³⁷⁴

Here, just as in *Gainesville*, Respondents’ senior executives informed each other that they

³⁶⁵ CCFF ¶ 483 (quoting CX0056 at 001). The existence of private, inter-firm communications concerning pricing between high-level executives with pricing authority is probative of a conspiracy. *In re Polyurethane Foam Antitrust Litig.*, 152 F. Supp. 3d at 983 (holding that direct and secret discussions among upper-level executives with pricing authority is probative of a price-fixing conspiracy); *In re Flat Glass Antitrust Litig.*, 385 F.3d at 369 (finding that information exchanges among high-level executives with pricing authority supported inference of a conspiracy).

³⁶⁶ CCFF ¶ 495 (quoting CX0090 at 001).

³⁶⁷ CCFF ¶ 500.

³⁶⁸ CCFF ¶¶ 661-664, 674-678, 680-681.

³⁶⁹ CCFF ¶ 677-678.

³⁷⁰ 573 F.2d at 299.

³⁷¹ *Id.* at 297-98.

³⁷² *Id.* at 300.

³⁷³ *Id.* at 301 (quoting *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969)).

³⁷⁴ *Id.*

would not do business with or discount to buying groups.³⁷⁵ Here, too, Respondents' senior executives thanked each other in response.³⁷⁶ And, just as in *Gainesville*, Respondents here had no reason to communicate with each other about their refusal to do business with buying groups absent an agreement.³⁷⁷

Similarly, in *United States v. Foley*, the Fourth Circuit affirmed a *per se* criminal price fixing conviction where one defendant remarked to his competitors that his firm would charge a certain commission rate, and some competitors “expressed an intention or gave the impression that his firm would adopt a similar change.”³⁷⁸ Following the competitor communications, the defendants took steps to comply with the discussed commission rate.³⁷⁹ Respondents here behaved in the same manner. When Benco assured its competitors of a no buying group policy, Patterson and Schein “expressed an intention or gave the impression” that they would follow the same course of conduct.³⁸⁰ As a result of the communications, Cohen understood from his competitors that they too would abide by a no buying group policy.³⁸¹ And the Big Three followed through by each instructing their sales teams to reject buying groups.³⁸²

Further, in *Esco Corp. v. United States*, the Ninth Circuit held that an illegal conspiracy is found “if a course of conduct . . . once suggested or outlined by a competitor in the presence of other competitors is followed by all—generally and customarily—and continuously for all practical purposes, even though there be slight variations.”³⁸³ The court held that “any conformance to an agreed or contemplated pattern of conduct will warrant an inference of conspiracy.”³⁸⁴ Here, Cohen informed Patterson and Schein of Benco’s no buying group policy,

³⁷⁵ See *supra* Sections I.F.1-I.F.2., I.G.1-I.G.2.; see also CCFF ¶¶ 1179-1180.

³⁷⁶ CCFF ¶¶ 495, 1033, 1047, 1058.

³⁷⁷ CCFF ¶¶ 1167-1172.

³⁷⁸ *Foley*, 598 F.2d at 1332.

³⁷⁹ *Id.*

³⁸⁰ See *supra*, Section I.F.1., I.G.1.

³⁸¹ See *supra*, Section I.F.1., I.G.1.

³⁸² See *supra*, Sections I.F.2., I.F.4., I.G.2.

³⁸³ 340 F.2d at 1008.

³⁸⁴ *Id.*

and both competitors followed suit, and adopted the same policy.³⁸⁵ In fact, although Schein's President, Sullivan, was "very excited" about working with the buying group Smile Source in 2011,³⁸⁶ after talking with Benco,³⁸⁷ Schein took the exact opposite position: by early 2012, Sullivan told his team he wanted to "KILL the buying group model," referring to Smile Source's model.³⁸⁸ And even though Schein had entered into a number of successful legacy buying group arrangements before 2011, by the second half of 2012, Sullivan informed other Schein executives that "I don't think you will ever see a full service dealer get involved with GPOs."³⁸⁹ Indeed, Sullivan sent the clear message within Schein—understood by employees at all levels—that the company was to stay away from buying groups.³⁹⁰ The same is true for Patterson.³⁹¹ After Guggenheim and Cohen exchanged assurances, Patterson management told its employees "[a]s a rule we are trying our best to steer clear of all buying groups."³⁹² Indeed, Guggenheim testified that prior to the exchange of assurances, Patterson did not have a company policy with respect to buying groups and each buying group was "evaluated individually."³⁹³

Respondents proffered no reason why their senior executives shared their buying group policies with their top competitors,³⁹⁴ a factor probative of conspiracy.³⁹⁵ Cohen admitted that he

³⁸⁵ See *supra*, Sections I.F.4. ("Patterson Complied with the Agreement Internally"), I.G.2. ("Schein Complied with the Agreement Internally").

³⁸⁶ CCFF ¶ 696.

³⁸⁷ In 2011, Cohen and Sullivan called each other at least 23 times, texted each other at least 89 times, and attended numerous industry events and meetings together. CCFF ¶¶ 348-350, 358, 363, 366, 379, 381, 383.

³⁸⁸ CCFF ¶¶ 729-732.

³⁸⁹ CCFF ¶¶ 705-706.

³⁹⁰ See *supra*, Section I.G.2.; see also CCFF ¶¶ 734-737, 743-860.

³⁹¹ See *supra*, Sections I.F.2., I.F.4.; see also CCFF ¶¶ 589-654.

³⁹² CCFF ¶¶ 635 (quoting CX3128 at 001), 650.

³⁹³ CCFF ¶ 499. Patterson's President, Guggenheim, testified in deposition that Patterson did not have a buying group policy or a uniform way of dealing with buying groups prior to his exchange of assurances with Benco's Cohen in February 2013. CCFF ¶ 499. Moreover, Guggenheim testified that when he was a regional manager, years before the exchange of assurances, he never received any guidance on whether to do business with buying groups. CCFF ¶ 498. In fact, prior to trial, Guggenheim consistently testified that he believed that Patterson had done business with buying groups in the past. CCFF ¶ 499. At trial, however, Guggenheim offered—for the first time—new and contradictory testimony that Patterson already had a policy not to do business with buying groups when he received Cohen's February 8, 2013 email. CCFF ¶ 499.

³⁹⁴ CCFF ¶¶ 1167-1172, 1077-1078, 1137.

could think of no legitimate business reason to share Benco's no buying group policy with his top competitors.³⁹⁶ Nor could Guggenheim provide any legitimate business rationale for this response to Cohen.³⁹⁷ Absent a conspiracy, it was against the Big Three's unilateral self-interest to share their present and future plans with each other because doing so gave the other a potential competitive advantage.³⁹⁸

The only rational explanation is that the Big Three exchanged assurances to reach a common understanding that they would all refuse to discount to buying groups. It is well established that evidence of "unity of purpose or a common design and understanding" justifies the finding of a Section 1 agreement.³⁹⁹ Here, it is well documented that, following the exchange of assurances, the Big Three had a common understanding of their collective refusal to do business with buying groups::

- “[A]ll of the major dental companies⁴⁰⁰ have said, ‘NO’ [to buying groups], and that’s the stance we will continue to take.”⁴⁰¹
- “Confidential and not for discussion . . . our 2 largest competitors stay out of [buying groups] as well.”⁴⁰²
- “We don’t need GPO’s in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry.”⁴⁰³
- “I already KNOW that Patterson and Schein have said NO [to buying groups].”⁴⁰⁴
- “We don’t allow [volume discount] pricing unless there is common ownership.

³⁹⁵ See, e.g., *Gainesville*, 573 F.2d at 301 (finding a conspiracy where “there was no reason for communicating with a competitor about the refusal” to serve certain customers).

³⁹⁶ CCFF ¶¶ 1167, 1170, 1171.

³⁹⁷ CCFF ¶¶ 1168-1169, 1137.

³⁹⁸ See *infra*, Section II.I.1. (“The Big Three Acted Against their Unilateral Self-Interest.”)..

³⁹⁹ *Am. Tobacco*, 328 U.S. at 810.

⁴⁰⁰ Ryan testified that he was referring specifically to Benco, Schein, and Patterson through his statement “all of the major dental companies.” CCFF ¶ 528.

⁴⁰¹ CCFF ¶ 527 (quoting CX1149 at 002) (emphasis added).

⁴⁰² CCFF ¶¶ 549 (quoting CX0093 at 001) (bolded in original), 1187.

⁴⁰³ CCFF ¶ 603 (quoting CX0106 at 001) (emphasis added), 1190.

⁴⁰⁴ CCFF ¶¶ 1191 (quoting CX0012 at 001), 425.

*Neither Schein nor Patterson do either.*⁴⁰⁵

- “The good thing here is that *PDCO, Benco and us are on the same page regarding these buying groups/consortiums.*”⁴⁰⁶
- “[W]e’ve signed an agreement that we won’t work with GPO’s.”⁴⁰⁷
- “*Schein, PDCO and Benco all refused to bid on their business when they entered the GPO/Buying Group world.*”⁴⁰⁸

In a clear admission of the agreement, Cohen testified that after he communicated with Sullivan and Guggenheim about buying groups, he “underst[ood] that Schein, Patterson, and Benco all had a similar policy with respect to buying groups in September of 2013.”⁴⁰⁹

Respondents claimed that Benco’s knowledge of its competitors’ no buying group policies came from market intelligence, rather than competitor communications. But Cohen’s own testimony undermines this claim:

- “[I]f we go back to the last wrath of text messages [with Tim Sullivan], I think that the policy that Henry Schein had was that they do not recognize GPOs.”⁴¹⁰
- Cohen testified that his understanding of Patterson’s position on buying groups “goes back to the e-mail exchange that we had several months before in the context of the New Mexico cooperative, and [Guggenheim] said, ‘We feel the same way about these.’”⁴¹¹

Further, the evidence shows that the market intelligence Benco received *contradicted*, rather than supported, the understanding that Schein and Patterson had a no buying group policy.⁴¹² Employees from Benco’s sales team had previously informed management just the opposite—that they believed Schein was doing business with buying groups.⁴¹³ Indeed, Cohen

⁴⁰⁵ CCFF ¶ 1193 (quoting CX1185 at 002) (emphasis added).

⁴⁰⁶ CCFF ¶¶ 1194 (quoting CX2106 at 001) (emphasis added), 1138.

⁴⁰⁷ CCFF ¶ 657 (quoting CX0164 at 002) (emphasis added).

⁴⁰⁸ CCFF ¶¶ 1195 (quoting CX2094 at 001) (emphasis added), 947.

⁴⁰⁹ CCFF ¶ 677.

⁴¹⁰ CCFF ¶ 676.

⁴¹¹ CCFF ¶ 500.

⁴¹² CCFF ¶¶ 681-684, 530-533.

CCFF ¶¶ 666-673, 681-684, 530-533, 994-997.

testified at trial that “by November 7, 2011, he had received emails indicating Schein was working with at least three buying groups.”⁴¹⁴ And Ryan testified that “there was no doubt in [his] mind” that Schein was working with a buying group as of September 2011.⁴¹⁵ Moreover, Benco received market intelligence that Patterson entered into a discounting arrangement with the NMDC buying group in February 2013,⁴¹⁶ and that Schein was offering 7% off to the buying group Dental Alliance in March 2013.⁴¹⁷ Despite this market intelligence, Benco understood that the Big Three would collectively refuse to do business with buying groups because of the competitors’ exchange of assurances.

D. The Big Three Confronted Each Other When They Suspected Deviations From the Agreement.

Not only did the Big Three exchange assurances, but they also confronted one another multiple times when they received market intelligence that the others were discounting to buying groups. It is well-settled law that evidence of competitors communicating with one another about deviations from prior assurances is a classic sign of an illegal conspiracy—they constitute attempts to enforce a prior understanding, and attempts to shore up the agreement.⁴¹⁸ In *United States v. Beaver*, the Seventh Circuit upheld a criminal price-fixing conviction in part because of evidence of multiple competitor communications “confronting someone whom they believed was cheating,” which the court found to be persuasive evidence of assent to the conspiracy.⁴¹⁹ As should be the case here.

Shortly after Schein adopted a no buying group strategy in late 2011, Benco began

⁴¹⁴ CCFF ¶ 672.

⁴¹⁵ CCFF ¶ 673.

⁴¹⁶ CCFF ¶¶ 474-478, 533.

⁴¹⁷ CCFF ¶¶ 995-997.

⁴¹⁸ *Foley*, 598 F.2d at 1332-33 (finding evidence of competitors calling each other about failure to adopt a higher commission as probative of conspiracy to raise commission rate); *Beaver*, 515 F.3d at 738-39 (finding evidence of competitors confronting each other about cheating as probative of a price-fixing conspiracy); *United States v. Maloof*, 205 F.3d 819, 830-31 (5th Cir. 2000) (finding that defendant orchestrated an antitrust price-fixing conspiracy by, *inter alia*, informing his competitor when “sales representatives from other companies deviated from the agreed upon pricing”).

⁴¹⁹ 515 F.3d at 738.

confronting Schein about perceived deviations from that strategy. In January 2012, Benco's Ryan forwarded to Cohen field intelligence about Schein working with the Unified Smiles buying group, specifically "for Timmy conversation," referring to Tim Sullivan of Schein.⁴²⁰ Cohen responded "Talking this AM," then then spoke to Sullivan for 11 minutes and 34 seconds.⁴²¹ A few months later, in July 2012, Ryan again forwarded information to Cohen that Schein was discounting to another buying group, Smile Source, with the message "*Better tell your buddy Tim to knock this shit off.*"⁴²² Cohen again responded in agreement: "Please resend this e-mail without your comment on top so that *I can print & send to Tim with a note.*"⁴²³ Cohen admitted he was planning to print the email with information about Schein's involvement with a buying group and send it to Sullivan with a note.⁴²⁴

This evidence confirms the existence of a prior understanding between Benco and Schein. Absent a prior agreement, Ryan's emails to his boss, and Cohen's responses of assent, are simply illogical. Tellingly, Cohen's responses showed not a hint of surprise, or any reproach or disagreement at Ryan's suggestion that he communicate with Schein's Sullivan about buying groups.⁴²⁵ Instead, Cohen responded in the affirmative, and agreed to notify Sullivan of market intelligence that Schein might be discounting to buying groups.⁴²⁶ Alerting a rival to the *rival's* customer discounts could only serve Benco's self-interest if it prompted the rival to stop such discounting. At trial, Benco offered no explanation of why Ryan sent Cohen information about Schein discounting to a buying group, for the *specific purpose* of a conversation with Schein's Sullivan.⁴²⁷

⁴²⁰ CCFF ¶¶ 956-961.

⁴²¹ CCFF ¶¶ 967-968.

⁴²² CCFF ¶ 982 (quoting CX0018 at 001) (emphasis added).

⁴²³ CCFF ¶ 990 (quoting CX0018 at 001) (emphasis added).

⁴²⁴ CCFF ¶¶ 991-992.

⁴²⁵ CCFF ¶¶ 988, 962.

⁴²⁶ CCFF ¶¶ 990, 967.

⁴²⁷ CCFF ¶ 963. As Cohen testified at trial, Ryan "was the one [Benco] person who pretty much knew everything about my conversations with Tim Sullivan." CCFF ¶¶ 974-975. Ryan was aware of the executives' no poach agreement and had a practice of forwarding to Cohen hiring issues to discuss with Sullivan. CCFF ¶ 976-977, 318. It was no different when it came to Ryan's emails to Cohen to contact Sullivan about buying groups—Ryan forwarded information to Cohen in furtherance of the competitors' buying group understanding.

Benco continued to confront Schein when it perceived cheating the following year. In March 2013, Cohen received an email from an employee with market intelligence that Schein was offering a 7% discount to a buying group, and Cohen immediately sent the information to Sullivan to see whether it was accurate.⁴²⁸ Cohen added in his text to Sullivan: “Could be a rumor, sometimes stories go around. Thanks.”⁴²⁹

Again, absent a prior agreement that Schein was not doing business with buying groups, this communication is inexplicable. Why would Cohen alert Sullivan to market intelligence about Sullivan’s company discounting to a buying group? Absent a prior assurance from Sullivan, why would Cohen tell Sullivan that he believed it might be a rumor that Schein was working with this buying group? And, finally, why would Cohen end the message with “Thanks,” showing gratitude for some anticipated action from Sullivan? Benco offered no answers to these questions at trial.⁴³⁰

The confrontations continued in 2013. In October of that year, Benco again contacted Schein out of concern that Schein was distributing discounted products to the buying group Smile Source.⁴³¹ Benco’s Ryan contacted Schein’s Foley, and the two spoke for 18 minutes.⁴³² Ryan informed Schein that Benco was not bidding on Smile Source and wanted to know if Schein would bid on the buying group.⁴³³ Following the call, Ryan informed Cohen that Benco could safely reject Smile Source given his communication with Schein’s Foley:

Very familiar [with Smile Source.] Talked to them three times. Nothing is different. Randy at Schein and I talked specifically about them. Buh-bye.⁴³⁴

⁴²⁸ CCFF ¶¶ 996-997.

⁴²⁹ CCFF ¶ 997.

⁴³⁰ CCFF ¶ 1003. When asked during his investigational hearing why he sent this message to Sullivan, Cohen testified: “The context could have been in the conversation we had the day before. Maybe he said he hadn’t heard of it before. I can’t say, from this vantage point, why I sent it to him. Probably answering a question that was asked or offering information. It might be that.” CCFF ¶ 1004.

⁴³¹ CCFF ¶¶ 1005-1009.

⁴³² CCFF ¶ 1010.

⁴³³ CCFF ¶¶ 1011, 1013.

⁴³⁴ CCFF ¶ 1014.

Benco was not the only one of the Big Three to confront another about cheating. In June 2013, Patterson received market intelligence that Benco was discounting to a buying group, ADC.⁴³⁵ This time, Patterson confronted Benco. Patterson’s President Guggenheim testified at trial that he viewed Benco’s arrangement with this buying group as a deviation from Cohen’s prior assurance of Benco’s no buying group policy.⁴³⁶ Thus, Guggenheim contacted his competitor to ask about this deviation, and to ask for reassurance of a no buying group policy:

Reflecting back on our conversation earlier this year, could you shed some light on your business agreement with Atlantic Dental Care? . . . I’m wondering if your position on buying groups is still as you articulated back in February? Let me know your thoughts. . . Sometimes these things grow legs without our awareness.⁴³⁷

The culmination of the above evidence can only be explained in one way: Respondents were confronting one another with instances of suspected cheating to enforce their prior agreement.

E. Benco Reassured Patterson and Schein of Its Compliance with the Agreement.

Not only did Respondents confront each other with suspected cheating, but Benco reassured both Patterson and Schein that it would maintain its part by refusing to work with buying groups.⁴³⁸ Courts have found evidence of such reassurances probative of a conspiracy.⁴³⁹

When Patterson’s Guggenheim confronted Benco’s Cohen in June 2013 about Benco’s deal with ADC—a customer Patterson believed to be a buying group—Cohen reassured his competitor that he was keeping his side of the agreement: “*As we’ve discussed, we don’t recognize buying groups.*”⁴⁴⁰ Cohen also went to great lengths to explain the reason that Benco’s

⁴³⁵ CCFF ¶¶ 565, 566.

⁴³⁶ CCFF ¶¶ 572, 566.

⁴³⁷ CCFF ¶¶ 570 (quoting CX0095 at 001), 568, 569.

⁴³⁸ CCFF ¶¶ 491-502, 574-588, 661-684, 1061-1100.

⁴³⁹ *See Beaver*, 515 F.3d at 738 (finding conspiracy in part because a defendant reassured a competitor that he was abiding by the discount limit they previously discussed).

⁴⁴⁰ CCFF ¶¶ 575 (quoting CX0062 at 001) (emphasis added), 564-573.

arrangement with ADC was not a violation of the agreement. Cohen listed four reasons to prove that ADC was not a buying group, explaining that each of the individual practices of ADC had merged together, which meant it was a DSO.⁴⁴¹ In doing so, Cohen shared confidential and privileged information from its outside counsel retained by Benco to analyze ADC's SEC filings and incorporation papers.⁴⁴² Cohen proceeded to further allay Guggenheim's suspicion that ADC was a buying group by promising to ensure that ADC merged its practices to become a DSO.⁴⁴³

Absent a conspiracy, it would have been against Benco's self-interest to tell Patterson that ADC—a Benco customer at the time—was not a buying group but a DSO. Benco knew that Patterson had a no buying group policy. Thus, by informing Guggenheim that ADC was not a buying group, but a DSO, Benco armed Patterson with information to compete against Benco for this customer. Further, Benco did this at the expense of sharing privileged information. The only context in which it would have furthered Benco's interest to share this information is if Benco was explaining to Patterson that it was not in breach of their prior understanding that neither would pursue buying groups.

Similarly, Benco reassured Schein it was abiding by the agreement. In Cohen's March 26, 2013 text message to Schein's Sullivan about Dental Alliance, Cohen conveyed that his team had turned down this buying group when they sought a discount from Benco.⁴⁴⁴ Again, there is no legitimate business rationale to convey to a competitor that your company refused to discount to a customer, and Respondents have not identified any. In the context of a conspiracy, however, it makes perfect sense as a reassurance of compliance with the agreement.⁴⁴⁵

Taken together, Respondents' exchange of assurances, followed by confrontations when

⁴⁴¹ CCFF ¶¶ 575-576; *see also* CCFF ¶¶ 580-581.

⁴⁴² CCFF ¶¶ 1062-1065, 1068-1069, *see also* CCFF ¶¶ 575-576.

⁴⁴³ CCFF ¶¶ 575-579.

⁴⁴⁴ CCFF ¶¶ 994-1004.

⁴⁴⁵ *See Beaver*, 515 F.3d at 738 (holding that evidence of competitors confronting one another about cheating, or reassuring each other that they were abiding by the agreement, was evidence of assent to the conspiracy, even if no one explicitly expressed agreement or assent).

they believed someone was deviating, and instances of reassurance, paint a clear picture of their agreement. These are not the acts of fierce competitors, but of conspirators.

F. Respondents' Internal Documents Evidence a Conspiracy.

The evidence of agreement in this case extends beyond the clear and direct competitor-to-competitor communications about buying groups. Contemporaneous internal company documents demonstrate that the senior executives of the Big Three were confident that all three would reject buying groups.⁴⁴⁶ In *B&R Supermarket, Inc. v. Visa, Inc.*, the court held that one credit card company executive's statement about the conduct of all competitors was "direct evidence of a conspiracy," for she "could not speak so confidently on behalf of *all* networks save and except for her knowledge of collusion."⁴⁴⁷ The same applies to Respondents' repeated statements of the Big Three's collective refusal.

More than that, Respondents' internal documents show a "conscious commitment" to this collective refusal, a term that courts often use to define an antitrust agreement.⁴⁴⁸ When Patterson's VP of Sales, Misiak, instructed his team to reject a buying group weeks after the exchange of assurances with Benco, it was based on his understanding that Schein and Benco would "stay out of these as well."⁴⁴⁹ Similarly, Benco's Director of Sales, Ryan, repeatedly instructed his team to reject buying groups based on the understanding that Patterson and Schein would also reject buying groups.⁴⁵⁰

Moreover, a mere two months after the exchange of assurances, Patterson's VP of Marketing, Rogan, instructed another executive, Neal McFadden, against working with buying groups based on "our duty to uphold" the Big Three's collective refusal:

We don't need GPO's in the dental business. *Schein, Benco, and Patterson have*

⁴⁴⁶ CCFF ¶¶ 1183-1195.

⁴⁴⁷ No. C 16-01150 WHA, 2016 WL 5725010, at *6 (N.D. Cal. Sep. 30, 2016); *see also Standard Oil Co. of Cal. v. Moore*, 251 F.2d 188, 208 (9th Cir. 1957) (finding that defendant's statement alluding to the conduct of competitors supported the jury's conclusion of conspiracy).

⁴⁴⁸ *See Monsanto*, 465 U.S. at 764.

⁴⁴⁹ CCFF ¶¶ 549 (quoting CX0093 at 001), 550-552; *see also* CCFF ¶ 1187.

⁴⁵⁰ CCFF ¶¶ 527-528,, 1183, 5632, 1192-1193; *see also* CCFF ¶¶ 406, 408-425,1196.

*always said no. I believe it is our duty to uphold this and protect this great industry.*⁴⁵¹

After receiving this email, McFadden then informed a potential customer that the reason Patterson could not engage with buying groups was that “[W]e’ve signed an agreement that we won’t work with GPOs.”⁴⁵² While there does not appear to be a *signed* agreement among the Big Three, McFadden’s statement undeniably recognized a prior commitment that constrained Patterson’s ability to work with buying groups.⁴⁵³

Indeed, most tellingly, at the same time that Patterson’s Misiak instructed his team to reject a buying group and assured them of the Big Three’s collective refusal to deal, Misiak was “concerned that *Schein and Benco sneak into these co-op bids and deny it.*”⁴⁵⁴ This statement makes no sense in the absence of a prior understanding—to whom would they be denying it and why would they need to deny it to anyone if each firm was merely following its independent business interests? Patterson’s concern that its top competitors would “sneak” into discounting arrangements with buying groups and then “deny” such arrangements lies in sharp contrast to its open competition against Schein and Benco for other customers. Even Misiak, a Patterson executive, could not explain why he was concerned that Schein and Benco would deny working with a buying group:

- Q. What was the concern if Benco and Schein deny it?
A. I don’t recall what I meant by that.⁴⁵⁵
- Q. And when you said “deny,” whom did you have in mind that Schein and Benco would deny it to?
A. I don’t remember.⁴⁵⁶

⁴⁵¹ CCFF ¶ 603 (quoting CX0106 at 001) (emphasis added), 574-583, 585; *see also* CCFF ¶¶ 1190, 1275.

⁴⁵² CCFF ¶ 657 (quoting CX0164 at 001) (emphasis added).

⁴⁵³ Any made-for-litigation claims that this statement was an innocent lie is contradicted by other contemporaneous evidence. CCFF ¶ 658. Indeed, where “testimony is in conflict with contemporaneous documents [courts] give it little weight, particularly when the crucial issues involved mixed questions of law and fact.” *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395-96 (1948).

⁴⁵⁴ CCFF ¶¶ 540 (quoting CX0092 at 001) (emphasis added), 1187.

⁴⁵⁵ CCFF ¶ 1189.

⁴⁵⁶ CCFF ¶ 1189.

- Q. From your perspective, how could Benco or Schein work with buying groups but deny it?
A. I'm not sure.⁴⁵⁷

G. The Big Three's Communications About ADC Evidence a Conscious Commitment to a No Buying Group Agreement.

The Big Three conferred with one another about whether the customer ADC qualified as a buying group, further evidencing their "conscious commitment" to abide by a no buying group agreement. ADC approached each Respondent in early 2013.⁴⁵⁸ Benco did not know whether it could bid on ADC because it was unclear whether ADC was a buying group (subject to the agreement) or a DSO (outside the scope of the agreement).⁴⁵⁹ On March 25, 2013, Cohen created a reminder to "Call Tim Sullivan re: Buying Groups" and then spoke with Sullivan that same day.⁴⁶⁰ At trial, Cohen explained he contacted Schein so that Benco would know "how we would handle that account."⁴⁶¹ This is a direct admission that Benco communicated with his competitor, Schein, so *Benco* would know how to proceed with this customer.

A company contacting its top competitor for help in determining whether to bid on a customer is the antithesis of free and open competition. If Benco and Schein were acting independently, it would have been against Benco's interest to confer with Schein about ADC because, in doing so, Benco would be alerting Schein to this \$3.5 million customer opportunity. In fact, absent a conspiracy, it would have been in both Benco and Schein's unilateral interest for the other competitor to know as little about ADC as possible. Instead, the presidents of the two competitors "exchang[ed] information about whether Atlantic Dental Care was a [] group purchasing organization or a DSO"⁴⁶² to determine whether the account was within the purview

⁴⁵⁷ CCFF ¶ 1189.

⁴⁵⁸ CCFF ¶¶ 1022, 534, 1094, 1097.

⁴⁵⁹ CCFF ¶¶ 1023, 1025-1027.

⁴⁶⁰ CCFF ¶¶ 1028-1036. Sullivan claims that during this call, he told Cohen they should not discuss ADC, but this claim is contradicted by Cohen's testimony and contemporaneous documents. CCFF ¶¶ 1054- 1056.

⁴⁶¹ CCFF ¶ 1037. Benco's Cohen also communicated with Patterson's Guggenheim about whether ADC was a buying group. *See supra*, Section I.F.3. ("Patterson Confronted Benco When it Suspected Benco of Discounting to a Buying Group").

⁴⁶² CCFF ¶ 1036.

of the no buying group agreement.

After getting the advice of outside counsel, on March 26, 2013, Benco concluded ADC was a DSO rather than a buying group.⁴⁶³ Evidencing a conscious commitment to Schein, Benco's Cohen immediately shared this confidential and privileged information with Sullivan, noting that Benco was "going to bid" because ADC was "not a buying group."⁴⁶⁴

By informing Benco's largest rival that Benco was planning to bid on ADC because it was not a buying group, Cohen gave Schein competitively sensitive information about Benco's future bidding plans, which would have provided Schein with a competitive advantage had Benco and Schein been acting independently.⁴⁶⁵ This is one of the hallmark signs of a conspiracy: competitors acting against self-interest by sharing competitively sensitive information to abide by a prior assurance.⁴⁶⁶

Cohen admitted that telling his top competitor Benco was going to bid on ADC may be viewed as "counter-rational,"⁴⁶⁷ but he did so because he did not want Sullivan to think he was "duplicious in [the] first call" or trying to "head-fake" Schein.⁴⁶⁸ As Sullivan testified, on the first call on March 25, 2013, Cohen told him that Benco was *not* planning to bid on in ADC.⁴⁶⁹ Thus, when Benco learned ADC was not a buying group and Benco *would* bid, Cohen was

⁴⁶³ CCFF ¶¶ 1062- 1067.

⁴⁶⁴ CCFF ¶¶ 1069 (quoting CX0196 at 010), 1068, 1069-1070. Following Sullivan's receipt of Cohen's March 27, 2013 text message, Sullivan and Cohen tried to reach each other on the telephone several times. On April 3, 2013, they finally connected and spoke for 5 minutes and 36 seconds. CCFF ¶¶ 1079-1080, 1088.

⁴⁶⁵ See CCFF ¶¶ 48-50, 1068-1070, 1072-1074.

⁴⁶⁶ See *Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130, 162 (N.D.N.Y. 2010) ("The fact that . . . Defendants would be acting against economic self-interest is persuasive evidence that Defendants did not act independently."); *In re High Pressure Laminates Antitrust Litig.*, No. 00-MDL-1368, 2006 U.S. Dist. LEXIS 29431, at *11 (S.D.N.Y. May 15, 2006) (Defendants' sharing of confidential information with competitors was against individual economic self-interest and probative of conspiracy.); *In re Currency Conversion Fee Antitrust Litig.*, No. 05-7116, 2012 WL 401113, at *6 (S.D.N.Y. Feb. 8, 2012) (providing competitors with sensitive business information is against unilateral interests); *Champion*, 557 F.2d at 1273 (Evidence that defendants advised each other about how they intended to bid was indicative of a conspiracy.).

⁴⁶⁷ CCFF ¶¶ 1073.

⁴⁶⁸ CCFF ¶ 1076.

⁴⁶⁹ CCFF ¶ 1038.

concerned Sullivan would think him “duplicitous” if he did not follow up.⁴⁷⁰ The reason, Cohen testified, was he wanted to “maintain a *high level of credibility* with Tim [Sullivan],” and he wanted his competitor to know he was “*honest*.”⁴⁷¹ By Cohen’s own admissions, he texted Sullivan out of a sense of obligation to be truthful with his competitor.

Cohen’s admissions are eerily similar to one of the most often-quoted cartel slogans: “[O]ur competitors are our friends. Our customers are the enemy.”⁴⁷² Cohen’s concern of being perceived by his competitor as “duplicitous” and engaging in a “head-fake” is nothing short of an admission that he did not want Sullivan to think he was cheating. So too is Cohen’s admitted desire to be “honest” and “credible” with Sullivan. Competitors deceive and head-fake one another; conspirators are honest and credible with one another.

H. The Big Three Were Part of One Overarching Conspiracy Orchestrated By Benco as the Ringleader.

The evidence shows that Respondents’ refusal to do business with buying groups was part of one overarching conspiracy, orchestrated by Benco as the ringleader. Respondents’ contemporaneous documents, replete with explicit references to the Big Three collectively turning down buying groups, demonstrate that each understood the agreement reached all three of them. For example, Benco informed its team that “all of the major dental companies [referring specifically to *Benco, Patterson, and Schein*] have said, ‘NO’, and that’s the stance we will continue to take.”⁴⁷³ Patterson’s similarly refer to an overarching agreement among all three Respondents: “[W]e don’t need GPO’s in the dental business. Schein, Benco, and Patterson have always said no”⁴⁷⁴ and “[c]onfidential and not for discussion ... our 2 largest competitors [*Schein and Benco*] stay out of these as well.”⁴⁷⁵ As do Schein’s documents: “[t]he good thing here is

⁴⁷⁰ CCFF ¶ 1076.

⁴⁷¹ CCFF ¶ 1076; *see also* CCFF ¶ 1075.

⁴⁷² *See In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d at 662.

⁴⁷³ CCFF ¶¶ 527 (CX1149 at 002), 528, 1183; *see also* CCFF ¶¶ 1191-1193.

⁴⁷⁴ CCFF ¶¶ 1190 (CX0106 at 001), 1184, 603, 1275.

⁴⁷⁵ CCFF ¶¶ 1187, 1184, 549.

that PDCO, Benco and us are on the same page regarding these buying groups/consortiums,”⁴⁷⁶ and “Schein, PDCO and Benco all refused to bid on their business when they entered the GPO/Buying Group world.”⁴⁷⁷

Moreover, the nature, scope, and goal of Benco’s agreement with Patterson was identical to those of Benco’s agreement with Schein: a joint refusal to do business with, or discount to, buying groups to prevent an industry-wide price war. Indeed, the communications between Benco and Patterson mirrored those between Benco and Schein.⁴⁷⁸

Cohen assured both Sullivan (Schein) and Guggenheim (Patterson) that Benco would maintain a no buying group policy.⁴⁷⁹

- **Q.** You’ve communicated Benco’s no-buying group policy to Guggenheim? **A.** ...[Y]es.⁴⁸⁰
- **Q.** You did communicate Benco’s no-buying group policy to Sullivan; correct? **A.** I believe I did. Yes.⁴⁸¹

In response, Guggenheim and Sullivan assured Benco that they would maintain a no buying group policy.⁴⁸² As Cohen testified:

- **Q.** What did you think Mr. Guggenheim’s position was on GPOs at the time of this e-mail?
A. [I]t goes back to the e-mail exchange that [I had with Guggenheim] several months before . . . and he said, “We feel the same way about these.”
Q. So did you think that his policy was similar to yours?
A. That’s the way I interpreted that sentence. Yes.⁴⁸³

⁴⁷⁶ CCFF ¶¶ 1185 (quoting CX2106 at 001), 1138, 1194.

⁴⁷⁷ CCFF ¶¶ 1185 (quoting CX2094 at 001), 1195, 947.

⁴⁷⁸ Benco’s Cohen had a pattern of contacting Schein’s Sullivan and Patterson’s Guggenheim, through separate bilateral communications, about the same issues that impacted their collective interests. CCFF ¶¶ 279, 289-295, 301-306, 310-312; *see also supra* Section I.A. (“Benco Maintained an ‘Open Relationship’ With Patterson and Schein for the Big Three’s ‘Mutual Best Interest’”).

⁴⁷⁹ CCFF ¶¶ 1179, 503-512, 661-684; *see also supra* Section I.F.1. (“Benco and Patterson Exchanged Assurances that Neither Would Discount to Buying Groups”), I.G.1. (“Benco and Schein Exchanged Assurances that Neither Would Discount to Buying Groups”).

⁴⁸⁰ CCFF ¶ 484; *see also* CCFF ¶ 483.

⁴⁸¹ CCFF ¶ 662.

⁴⁸² CCFF ¶¶ 1180, 503-512, 661-684; *see also supra* Section I.F.1., I.G.1.

- **Q.** And what did you understand Mr. Sullivan’s position was on buying groups at the time of this e-mail?

A. Well, if we go back to the last wrath of text messages [with Sullivan], I think that the policy that Henry Schein had was that they do not recognize GPOs.⁴⁸⁴

- **Q.** Did you understand that Schein, Patterson and Benco all had a similar policy with respect to buying groups in September of 2013?

A. Yes.⁴⁸⁵

Further, in both agreements, there were instances of confrontation when a Respondent suspected cheating.⁴⁸⁶

- Guggenheim to Cohen: “[C]ould you shed some light on your business agreement with Atlantic Dental Care? . . . I’m wondering if your position on buying groups is still as you articulated back in February? . . . Sometimes these things grow legs without our awareness!”⁴⁸⁷
- Cohen to Sullivan: “Dental alliance. They apparently get 7% off of catalog pricing [from Schein] just for joining. . . . Could be a rumor, sometimes stories go around. Thanks.”⁴⁸⁸

In addition, Cohen subsequently reassured both competitors of Benco’s compliance with that policy:⁴⁸⁹

- Cohen to Guggenheim: “As we’ve discussed, we don’t recognize buying groups.”⁴⁹⁰
- Cohen to Sullivan: “[Dental Alliance buying group] contacted me about a year ago and asked if Benco was interested. Told him he was out of his tree.”⁴⁹¹

⁴⁸³ CCFF ¶ 500.

⁴⁸⁴ CCFF ¶ 676.

⁴⁸⁵ CCFF ¶ 677.

⁴⁸⁶ CCFF ¶ 1181.

⁴⁸⁷ CCFF ¶ 570 (quoting CX0095 at 001).

⁴⁸⁸ CCFF ¶ 997.

⁴⁸⁹ CCFF ¶ 1182.

⁴⁹⁰ CCFF ¶ 575 (quoting CX0062 at 001).

⁴⁹¹ CCFF ¶ 997 (quoting CX6027 at 028 (row 245)).

The parallel nature of the Benco/Patterson and Benco/Schein communications is evident from the competitors' exchange of information about the group ADC. Cohen, as the ringleader, shared the identical information about ADC with both Guggenheim and Sullivan:

- **Q.** And here you wrote to Tim Sullivan, "Tim: Did some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all the practices. So it's not a buying group, it's a big group. We're going to bid. Thanks." Did I read that correctly?

A. Yes.

...

Q. You're telling [Sullivan] that your new understanding was that ADC was not a buying group.

A. Yes.

Q. But rather a corporate account.

A. Yes.⁴⁹²

- **Q.** And then you went on to explain [to Guggenheim] why you believed ADC was not a buying group?

A. Yes

Q. What you were explaining to him was that the individual practices of ADC had actually merged together; is that what you were saying?

A. Yes.

Q. And that meant they weren't a buying group, but they were a corporate or big group.

A. DSO. Yes.⁴⁹³

- **Q.** [Y]ou told Tim Sullivan of Schein the same information [as you told Guggenheim of Patterson], that ADC had merged, and so it was a big group and not a buying group?

A. Yes.⁴⁹⁴

⁴⁹² CCFF ¶ 1069-1070.

⁴⁹³ CCFF ¶ 576.

Moreover, that executives from the Big Three communicated with another about their anticipated response to the TDA buying group—including an email from Benco’s Cohen to both Patterson’s Guggenheim and Schein’s Sullivan at the same time,⁴⁹⁵ and Patterson and Schein’s communications on this subject⁴⁹⁶—further proves the overarching conspiracy. Indeed, in an internal email, Schein’s VP of Sales explicitly acknowledged a commitment to respond to Patterson about Schein’s response to the TDA buying group.⁴⁹⁷

Finally, erasing any doubt of the overarching conspiracy among the Big Three, when the regional distributor, Burkhart, rebuffed Benco’s invitation to stop working with buying groups,⁴⁹⁸ Benco’s Ryan asked Cohen to tell Schein and Patterson to stay the course on their no buying group position, just as Benco was maintaining its policy: “CHUCK---maybe what you should do is make sure you *tell Tim [Sullivan of Schein] and Paul [Guggenheim of Patterson] to hold their positions as we are.*”⁴⁹⁹ Cohen understood that Ryan was suggesting he “reiterate” Benco’s no buying group policy to his competitors,⁵⁰⁰ proving that the Benco’s understanding of the Big Three’s collective refusal to discount to buying groups was based on none other than the competitors’ prior exchange of assurances.

I. “Plus-Factor” Evidence Confirms the Existence of an Unlawful Agreement.

“Plus factors” are additional facts or circumstances supporting an inference of concerted action.⁵⁰¹ Plus factors are not necessary where, as here, there is clear evidence of direct competitor communications establishing the existence of the conspiracy, and the case does not

⁴⁹⁴ CCFF ¶ 1071.

⁴⁹⁵ CCFF ¶ 1133.

⁴⁹⁶ CCFF ¶¶ 1123-1132.

⁴⁹⁷ CCFF ¶ 1129.

⁴⁹⁸ CCFF ¶ 1240.

⁴⁹⁹ CCFF ¶¶ 1103 (quoting CX0023 at 001) (emphasis added), 1104.

⁵⁰⁰ CCFF ¶ 1105.

⁵⁰¹ *In re Pool Prods.*, 988 F. Supp. 2d at 711.

rest merely on parallel conduct.⁵⁰² Nonetheless, many of the typical plus factors that courts have relied upon to find a conspiracy further confirms the existence of an unlawful agreement among the Big Three.

1. The Big Three Acted Against Their Unilateral Self-Interest.

Evidence that Respondents acted contrary to their unilateral self-interest supports a finding of conspiracy.⁵⁰³ Courts have held that evidence of competitors communicating about strategic, non-public information is an action contrary to self-interest that would not occur absent an agreement. For example, in *Fleischman v. Albany Medical Center*, the court held that competitor exchange of information that could have been used to compete against each other absent a conspiracy was “persuasive evidence” of conspiracy.⁵⁰⁴ Here, as detailed above in Sections I.F-I.I and Sections II.C-II.H, the presidents and CEO of the Big Three engaged in this very conduct by exchanging their internal policies against discounting to buying groups.⁵⁰⁵ In one instance, in an attempt to avoid the perception of cheating, Benco shared with Schein its future plan to bid on a customer.⁵⁰⁶ Absent a conspiracy, these communications would have given the competitors a competitive advantage, and were thus against Respondents’ unilateral self-interest.

⁵⁰² See *Apple*, 952 F. Supp. 2d at 690 (explaining that plus factor evidence, including that of common motive, acts against economic self-interest, inter-firm communications, and change in conduct, is necessary if alleging parallel conduct); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 323 (3d Cir. 2010) (“[P]lus factors need be pled only when a plaintiff’s claims of conspiracy rest on parallel conduct.”).

⁵⁰³ See, e.g., *Apple*, 952 F. Supp. 2d at 690.

⁵⁰⁴ 728 F. Supp. 2d at 162; see also *In re Currency Conversion Fee Antitrust Litig.*, 2012 WL 401113, at *6 (providing competitors with sensitive business information is against unilateral interests); *In re Polyurethane Foam Antitrust Litigation*, 152 F. Supp. 3d at 991 (“A jury could reasonably conclude that Defendants shared such information with each other because there existed a common understanding of how the information would be used—not to compete, but to collude.”); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 450 (9th Cir. 1990) (Disclosure of “sensitive price information might be considered contrary to a firm’s self-interest,” and support a finding of “common understanding” among firms sharing this information.).

⁵⁰⁵ CCFF ¶ 1254, 474-1158.

⁵⁰⁶ See *supra*, Sections I.G.5. (“Benco Shared Competitively Sensitive Information with Schein”), II.G. (“The Big Three’s Communications about ADC Evidence a Conscious Commitment”); CCFF ¶¶ 1061-1100.

Further, depriving oneself of a profitable sales opportunity is an action against self-interest that points towards conspiracy.⁵⁰⁷ Here, Respondents gave up the opportunity to increase their sales by working with buying groups during the conspiracy period. Schein believed buying groups were an opportunity to win customers from its competitors and grow its profit margins, as evidenced by its buying group agreements before 2011,⁵⁰⁸ but nonetheless instructed its sales force to reject buying groups from late 2011 through 2015.⁵⁰⁹ Indeed, Schein forewent [REDACTED] in profits by not supplying the Kois Buyers Group.⁵¹⁰ Buying groups, as this evidence shows, drives sales to the contracted distributor, at the expense of non-contracted distributors.⁵¹¹ Patterson, too, recognized buying groups could be an opportunity worth exploring,⁵¹² but it refused to work with them during the conspiracy period.⁵¹³ The same is true of Benco.⁵¹⁴ Tellingly, contrary to the Big Three's conduct during the conspiracy, Respondents' sales representatives viewed buying groups as a profitable sales channel.⁵¹⁵ Courts have found similar evidence of executives rejecting sales representatives' desire to work with customers as supportive of a conspiracy.⁵¹⁶

Further showing action against self-interest, Respondents' refusal to deal with buying groups led to lost customers and sales.⁵¹⁷ Distributors that discounted to buying groups during

⁵⁰⁷ See *In re Pool Prods.*, 988 F. Supp. 2d at 713-714 (finding that acts that “risk a loss of market share to the other manufacturers” are acts against economic self-interest supporting claim of conspiracy); see also *Interstate Circuit v. United States*, 306 U.S. 208, 224-25 (1939) (“Each was aware that all were in active competition and that without substantially unanimous action with respect to the restrictions for any given territory there was risk of a substantial loss of the business and good will”); *Toys “R” Us, Inc. v. FTC*, 221 F.3d 928, 935-36 (7th Cir. 2000) (finding that an act that “deprive[s] [one]self of a profitable sales outlet” is evidence supporting a conspiracy).

⁵⁰⁸ CCFF ¶¶ 1256-1266.

⁵⁰⁹ CCFF ¶¶ 733-870, 925-954; see also *supra* Section I.G.2.

⁵¹⁰ CCFF ¶ 1267, 1660, 1680.

⁵¹¹ CCFF ¶ 1267, 1269, 1290, 1296, 1302-1306, 1310, 1651-1661, 1662-1667, 1680.

⁵¹² CCFF ¶¶ 1270-1281, 1283-1289, 600, 602; see also CCFF ¶¶ 454, 469.

⁵¹³ CCFF ¶¶ 1290; see also 503-505, 589-657.

⁵¹⁴ CCFF ¶¶ 1291-1295, 404-427.

⁵¹⁵ CCFF ¶¶ 799-800, 1270, 1285-1286, 1291-1294.

⁵¹⁶ See *Standard Oil*, 251 F.2d at 206-07 (stating that evidence of appellants' sales representatives who wanted to negotiate with, sell to, or “have the opportunity” of working with customer that appellants later turned down supported finding of agreement).

⁵¹⁷ CCFF ¶¶ 1269, 1290, 1294-1296, 1738-1742, 1267, 1310, 1655-1661.

the conspiracy period profited at the expense of the Big Three.⁵¹⁸ For example, Burkhart, a small, regional distributor, began partnering with buying groups in 2011.⁵¹⁹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 522

Burkhart won customers from Schein as a result of its arrangement with Kois, including a \$2 million account in 2014.⁵²³ In fact, [REDACTED]

[REDACTED] 524 The

Big Three’s refusal to bid on profitable buying group opportunities was against their economic self-interest, which is the type of evidence of acts against unilateral self-interest that courts find “consistently tend to exclude the likelihood of independent conduct.”⁵²⁵

2. The Big Three Changed Their Conduct.

While evidence of changed conduct is not required where, as here, the evidence goes beyond parallel conduct,⁵²⁶ the evidence of Respondents’ changes in conduct also leads to the same conclusion that there was an unlawful agreement. Courts have held that evidence of

⁵¹⁸ CCFF ¶¶ 1301-1313, 1651-1654, 1664, 1666.

⁵¹⁹ CCFF ¶ 1300.

⁵²⁰ CCFF ¶¶ 1298, 1301-1306, 1310-1311, 1651-1654, 1664, 1666.

⁵²¹ CCFF ¶¶ 1301, 1727.

⁵²² CCFF ¶¶ 1301; *see also* CCFF ¶¶ 1651-1653.

⁵²³ CCFF ¶¶ 255, 1310-1311.

⁵²⁴ *See* CCFF ¶¶ 1306, 1301, 1653, 1664, 1695.

⁵²⁵ *See Re/Max Int’l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1009 (6th Cir. 1999); *see also In re Pool Prods.*, 988 F. Supp. 2d at 713 (finding that evidence of acts that “risk a loss of market share to the other manufacturers” are acts against economic self-interest supporting claim of conspiracy); *Toys “R” Us*, 221 F.3d at 935 (noting that an act that “deprive[s] itself of a profitable sales outlet” is evidence supporting a conspiracy).

⁵²⁶ *Twombly*, 550 U.S. at 556 n.4; *In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d 1085, 1092-95 (N.D. Cal. 2007) (finding that when allegations of parallel conduct are the basis of a Section 1 claim, plaintiff must allege facts to suggest preceding agreement, such as unprecedented change in behavior); *United States v. N.D. Hosp. Ass’n*, 640 F. Supp. 1028, 1036-37 (D.N.D. 1986) (Even though the defendants did not change their preexisting policies after entering into the agreement, the court nonetheless found the existence of an agreement and a meeting of the minds.); *Champion*, 557 F.2d at 1272 (“[D]espite the innocent beginnings of the noncompetitive bidding, the trial court found collusion in its continuation.”).

changes in conduct strengthen the inference of an unlawful agreement.⁵²⁷ Here, Patterson ended negotiations with buying group NMDC, abandoning its almost-completed arrangement, within three days of exchange of assurances with Benco.⁵²⁸ Similarly, Schein stopped pursuing new buying groups after communications with Benco in 2011, even though it profited from prior buying group partnerships.⁵²⁹

After the conspiracy became difficult to maintain when Benco entered a settlement agreement with the Texas Attorney General in April 2015, Benco, Schein, and Patterson all changed course and began competing for buying groups.⁵³⁰

Schein began working with several buying groups, including Teeth Tomorrow in 2017, Mastermind Group in 2017, and Klear Impakt in 2015.⁵³¹ It also won back the valuable Smile Source account in 2017, which resulted in [REDACTED]

[REDACTED].⁵³² Schein won customers from its competitors by discounting to buying groups.⁵³³ Indeed, in 2016, Schein analyzed the impact of buying groups and anticipated competitor response to buying groups.⁵³⁴

Patterson, too, changed direction – by November 2015, it began analyzing buying groups as a target market in its annual planning process,⁵³⁵ hired a consultant to analyze the buying group market,⁵³⁶ and by January 2016 hired a Director of Business Development whose

⁵²⁷ *B&R Supermarket*, 2016 WL 57255010, at *7 (Defendants’ coordinated, rather than staggered, roll-out of term regarding chargebacks was deemed a “deviation from prior rollouts [which] points a finger of plausible suspicion, and tends to show that the lock-step rollout in the United States flowed from conspiracy, not parallel conduct.”); *In re Domestic Drywall Antitrust Litig.*, 163 F. Supp. 3d 175, 255-56 (E.D. Pa. 2016) (finding defendants’ decision to eliminate job quotes, a feature in the drywall industry for decades, was shift in behavior sufficient to qualify as “traditional conspiracy evidence” pointing towards an agreement).

⁵²⁸ CCFF ¶ 503; *see also supra* Section I.F.1. (“Benco and Patterson Exchanged Assurances that Neither Would Discount to Buying Groups”).

⁵²⁹ CCFF ¶¶ 441-452, 717-727; *see also supra* Section I.G.2. (“Schein Complied with the Agreement Internally”).

⁵³⁰ CCFF ¶¶ 1159-1161; *see also supra* Section I.J.

⁵³¹ CCFF ¶¶ 1317-1318, 1710-1712.

⁵³² CCFF ¶¶ 1319-1320, 1722-1725, 1681.

⁵³³ CCFF ¶¶ 1321-1322, 1724, 1726.

⁵³⁴ CCFF ¶ 1166.

⁵³⁵ CCFF ¶¶ 1325-1328, 1330-1335.

⁵³⁶ CCFF ¶¶ 1328-1329; *see also* CCFF ¶¶ 1335-1336, 1338- 1342.

responsibilities included buying groups.⁵³⁷ Patterson also bid on Smile Source, which did not require volume commitments and risked cannibalizing current customers, even though it claimed to refuse Smile Source during the conspiracy period because such terms and risks were unfavorable.⁵³⁸ Patterson lost the bid to Schein⁵³⁹ and ultimately lost customers to Schein.⁵⁴⁰

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Even Benco made an exception to its no buying group policy by partnering with Elite Dental Alliance in late 2015 or early 2016 in order to avoid losing business to its competitors.⁵⁴² Benco garnered substantial sales through the buying group partnership and considered EDA to be a successful buying.⁵⁴³ Such changes in conduct support a finding of an unlawful agreement.⁵⁴⁴

3. Additional Plus Factors Further Support Finding of Conspiracy.

As explained in Section I.C, the Big Three feared competition for buying groups would lead to a price war, driving down margins across the entire industry.⁵⁴⁵ Similar motives have been instructive and compelling to courts finding an agreement, where absent one, cooperation would not occur for fear of losing business to a competitor.⁵⁴⁶

⁵³⁷ CCFF ¶¶ 1343- 1345.

⁵³⁸ CCFF ¶¶ 1347-1351, 1353-1357, 1717-1721.

⁵³⁹ CCFF ¶ 1357.

⁵⁴⁰ CCFF ¶¶ 1739, 1358-1363.

⁵⁴¹ CCFF ¶¶ 1364-1365.

⁵⁴² CCFF ¶¶ 1366-1383.

⁵⁴³ CCFF ¶¶ 1385-1387.

⁵⁴⁴ See *Toys “R” Us*, 221 F.3d at 935 (finding that change in behavior to refusal to sell to warehouse clubs as evidence supporting finding of conspiracy); *In re Domestic Drywall Antitrust Litig.*, 163 F. Supp. 3d at 255-56 (finding defendants’ decision to eliminate job quotes, a feature in the drywall industry for decades, was shift in behavior sufficient to qualify as “traditional conspiracy evidence” pointing towards an agreement).

⁵⁴⁵ CCFF ¶¶ 196-268; see also *supra* Section I.C

⁵⁴⁶ See *Apple*, 952 F. Supp. 2d at 691 (finding defendants’ common motivation of entering price-fixing conspiracy to challenge “swiftly growing e-book market” that would “severely undermine their more profitable physical book business” and to “protect their then-existing business model” as compelling evidence of conspiracy); *Toys “R” Us*, 221 F.3d at 931-32, 935-36 (affirming Commission’s findings of horizontal agreement where evidence of manufacturers’ common motive to join boycott of warehouse clubs was fear that “rivals who broke ranks and sold to the clubs might gain sales as their expense, given the widespread and increasing popularity of the club format”).

Courts have also found evidence of opportunity to conspire as supportive of an inference of agreement.⁵⁴⁷ Between 2011 and 2015, Cohen, Guggenheim, and Sullivan communicated regularly and had opportunities to meet and discuss buying groups. Respondents' cell phone records alone indicate regular communication – between 2011 and 2015, Cohen exchanged at least 18 calls and 31 text messages with Guggenheim, and at least 56 calls and 267 text message with Sullivan.⁵⁴⁸ Further, the three executives regularly attended and saw each other at the same industry trade shows.⁵⁴⁹

Finally, the Big Three's high collective market share makes the industry conducive to collusion,⁵⁵⁰ as courts have recognized.⁵⁵¹

J. The Big Three's Agreement was *Per Se* Unlawful.

Respondents entered into a horizontal conspiracy to refuse to discount to buying groups, which the Supreme Court has stated “falls squarely within the traditional per se rule against price fixing.”⁵⁵²

⁵⁴⁷ See, e.g., *C-O-Two Fire Equip. Co. v. United States*, 197 F.2d 489, 493 (9th Cir. 1952) (finding evidence of defendants' membership in same association and resulting opportunity for meeting, without evidence of what occurred at meeting, contributed to evaluation of plus factors leading to conclusion of conspiracy).

⁵⁴⁸ CCFF ¶¶ 351-352; see also CCFF ¶¶ 327-350, 353. This count does not reflect any additional communications, including calls on his office landline and voicemail messages that Sullivan may have exchanged with Cohen. CCFF ¶ 353-354.

⁵⁴⁹ CCFF ¶ 356, 358-393; see Attachment B to Complaint Counsel's Post-Trial Brief.

⁵⁵⁰ CCFF ¶¶ 1613-1614, 1458-, 1585-1586, 1596, 1598, 1599.

⁵⁵¹ See, e.g., *Gainesville*, 573 F.2d at 303 (“Economists recognize that when a market is concentrated it is easier to coordinate collusive behavior.”). In addition to high market concentration, the industry was conducive to effective collusion given (1) the low price elasticity of independent dentists' demand, (2) barriers to entry in full-service distribution, (3) a low supply elasticity by non-colluding full-service distributors outside of their relevant geographic and product footprints, and (4) manufacturers' low bargaining power. CCFF ¶¶ 1601-1623.

⁵⁵² See *Catalano*, 446 U.S. at 647 (“[A]n agreement to eliminate discounts . . . falls squarely within the traditional per se rule against price fixing.”); see also *Beaver*, 515 F.3d at 737 n.3 (finding defendants' coordinated “net-price-discount limit constituted an illegal price-fixing arrangement, and thus was . . . *per se* illegal”); *TFWS*, 242 F.3d at 210; *Olympia Provision & Baking*, 282 F. Supp. at 828 (“The uniform minimum discounts . . . constituted illegal price fixing under the circumstances herein.”); *Gen. Motors*, 384 U.S. at 145 (“Elimination, by joint collaborative action, of discounters from access to the market is a per se violation of the Act.”).

Price-fixing conspiracies are not limited to agreements that literally set or fix prices.⁵⁵³ Instead, any horizontal agreement that raises or stabilizes the price of a commodity, or that “interfere[s] with the setting of price by free market forces,”⁵⁵⁴ is *per se* illegal, even where there is “no direct agreement on the actual prices to be maintained.”⁵⁵⁵ Here, Respondents conspired with one another to prevent a “race to the bottom,” which they feared might lead to a more than 50% drop in gross margins.⁵⁵⁶ While the conspiracy did not fix the actual prices of dental products, the purpose and effect was to maintain prices absent the competitive forces of buying groups.

Indeed, dental distributors’ transactional data confirms that an agreement not to do business with buying groups is unquestionably an agreement to maintain prices.⁵⁵⁷ The data shows that when a distributor began working with a buying group, prices and margins dropped.⁵⁵⁸ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] .⁵⁶⁰

⁵⁵³ *Apple*, 791 F.3d at 327.

⁵⁵⁴ *Nat’l Soc’y of Prof’l Eng’rs*, 435 U.S. at 692 (quoting *Container Corp.*, 393 U.S. at 337).

⁵⁵⁵ *Catalano*, 446 U.S. at 647.

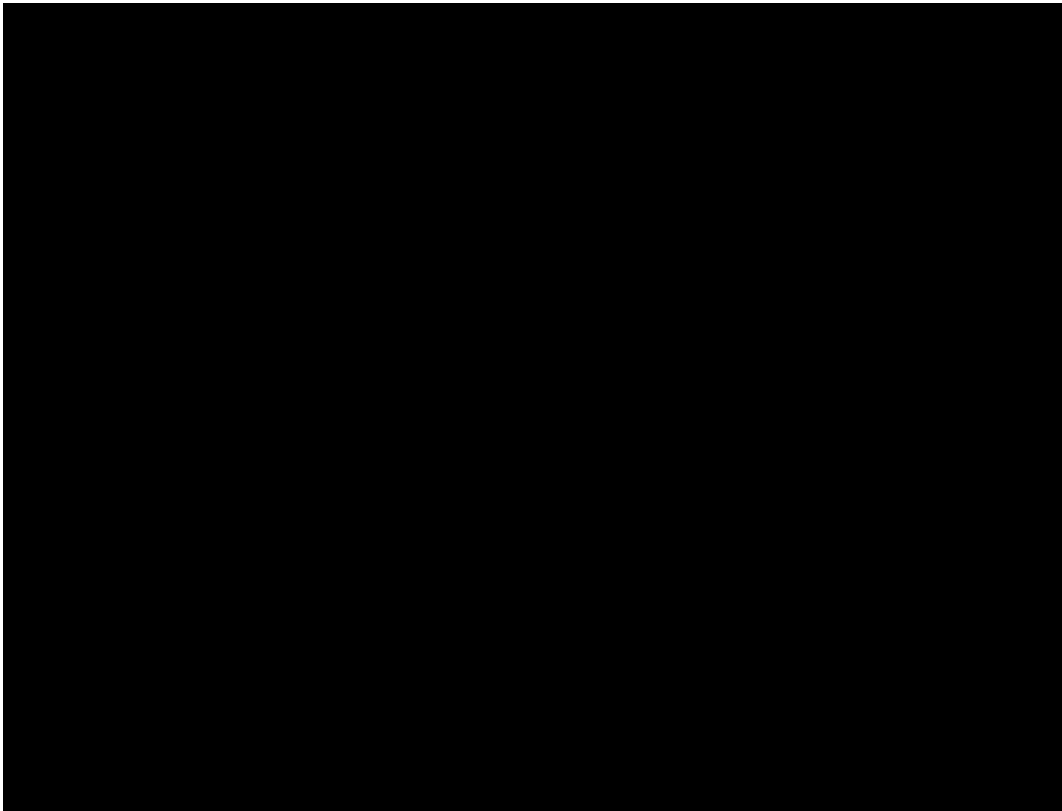
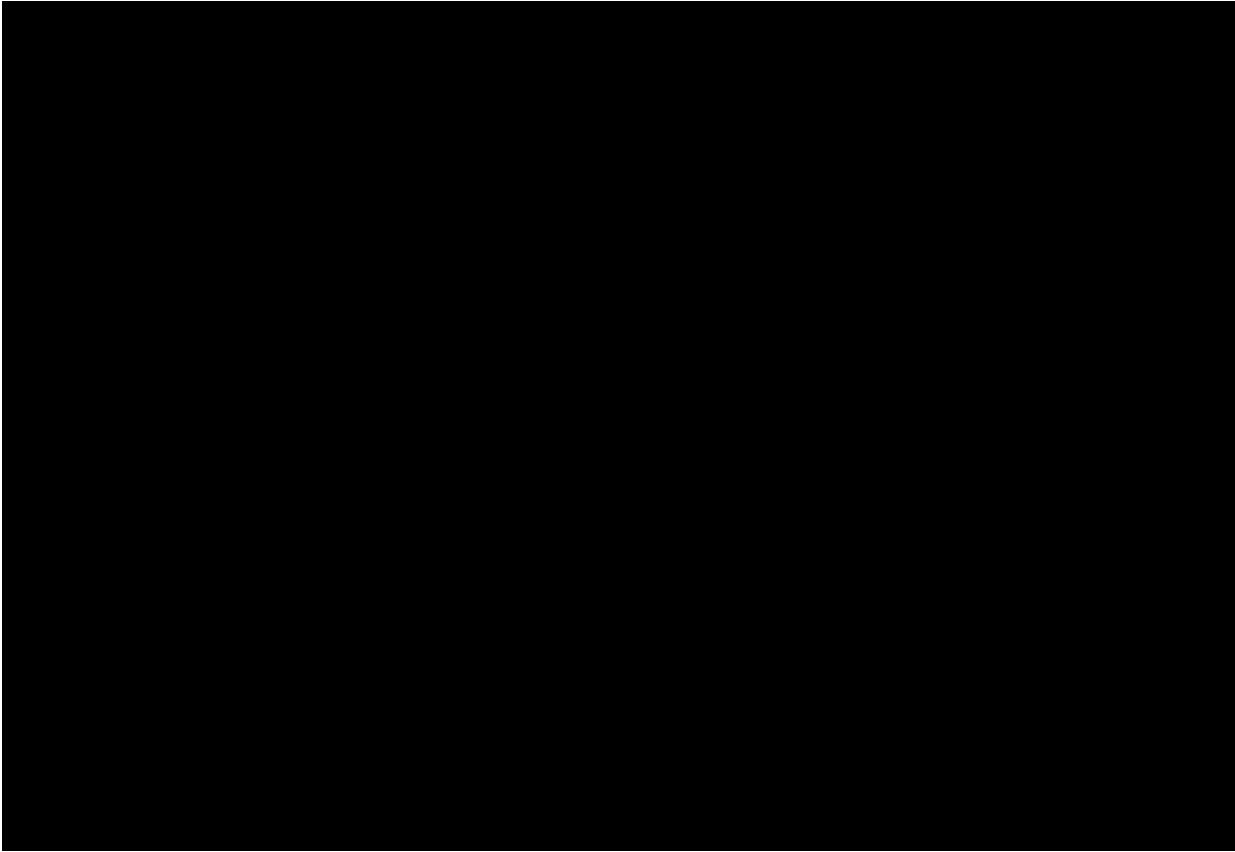
⁵⁵⁶ See *supra* Section I.C. (“The Big Three Feared Competition for Buying Groups Would Lead to a ‘Price War’ and ‘Race to the Bottom’”); see also FOF Section V; CCFF ¶ 199.

⁵⁵⁷ Of course, under the *per se* standard, Respondents’ conduct is presumed unlawful and Complaint Counsel need not show anticompetitive effects. See *Socony-Vacuum Oil*, 310 U.S. at 218.

⁵⁵⁸ CCFF ¶¶ 1423-1433.

⁵⁵⁹ CCFF ¶ 1427. Holding fixed changes in costs and in product mix, paying a lower gross margin means paying a lower price. CCFF ¶ 1427.

⁵⁶⁰ CCFF ¶¶ 1426-1428. The decline in price is compared to actual prices paid by buying group members before joining the buying group; this decline is not based on a comparison to Burkhart’s catalog price.



An agreement among horizontal competitors designed to prevent this decline of prices and margins, implemented by a refusal to serve buying groups, is undeniably a price-fixing agreement that “interfere[s] with the setting of price by free market forces.”⁵⁶¹ Such an agreement has no “redeeming virtue” and is “plainly anticompetitive,” as admitted by Patterson’s economic expert: “As an economist, if there is an agreement among competitors to, not to discount to customers, then I would view that as being anticompetitive.”⁵⁶²

Respondents’ agreement is also *per se* unlawful because it constitutes a horizontal group boycott of a customer, as the Supreme Court held in *FTC v. Superior Court Trial Lawyers Ass’n*.⁵⁶³ In fact, the Court explained that a concerted refusal to serve a customer is, in essence, a price-fixing scheme.⁵⁶⁴

III. RESPONDENTS’ COORDINATED REFUSAL TO DISCOUNT TO BUYING GROUPS WAS UNLAWFUL UNDER THE TRUNCATED RULE OF REASON.

If the Court finds Respondents’ agreement to refuse to discount to buying groups is not *per se* unlawful, Respondents are still liable under a truncated rule of reason analysis—also called an “inherently suspect” analysis.⁵⁶⁵

Supreme Court precedent makes clear that “even when practices are not condemned by a *per se* rule, a full-blown rule-of-reason analysis is not always required.”⁵⁶⁶ A truncated rule of

⁵⁶¹ See *Nat’l Soc’y of Prof’l Eng’rs*, 435 U.S. at 692 (quoting *Container Corp.*, 393 U.S. at 337). As the Supreme Court held in *Catalano*, any agreement that raises or stabilizes the price of a commodity is *per se* illegal, even where there is “no direct agreement on the actual prices to be maintained.” 446 U.S. at 647.

⁵⁶² CCFE ¶ 1175.

⁵⁶³ See 493 U.S. at 422-23.

⁵⁶⁴ *Id.* at 423; see also *Areeda & Hovenkamp* ¶ 1901e (“[T]he concerted refusal to deal directed at the customer itself is simply a price-fixing device.”).

⁵⁶⁵ See *Cal. Dental Ass’n*, 526 U.S. at 770; *PolyGram Holding, Inc. v. FTC* (“*PolyGram Holding II*”), 416 F.3d 29, 34, 36 (D.C. Cir. 2005) (citing *In re PolyGram Holding, Inc.* (“*PolyGram Holding I*”), Docket No. 9298, 2003 WL 25797195, at *14-17 (FTC July 24, 2003) (Comm’n Op.)). Cases analyzed under the inherently suspect standard, rather than *per se* standard, generally involve some claim that the challenged conduct had credible procompetitive justifications, such as with rules adopted by professional associations or conduct by joint ventures. See, e.g., *PolyGram Holding II*, 416 F.3d at 31 (conduct related to joint venture); *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100-101 (1984) (conduct related to NCAA football television plan). Here, there are no proffered procompetitive justifications, nor does Respondents’ conduct involve behavior by professional associations, which further supports application of the *per se* standard.

reason analysis is appropriate when an “observer with even a rudimentary understanding of economics could conclude that the arrangement in question would have an anticompetitive effect.”⁵⁶⁷ Thus, this analysis applies “[i]f, based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition.”⁵⁶⁸ The Complaint alleges violations under both the truncated rule of reason standard (Count III) and the inherently suspect standard (Count II), which courts have found are interchangeable terms for the same legal standard.⁵⁶⁹

Under this standard, the agreement is presumed anticompetitive, and Respondents can avoid liability only by advancing a cognizable, plausible procompetitive justification for the agreement.⁵⁷⁰

A. Respondents’ Agreement Not to Discount to Buying Groups Was Inherently Suspect.

The anticompetitive effect of an agreement among horizontal competitors not to discount is self-evident.⁵⁷¹ Indeed, courts have found that horizontal agreements among competitors to refuse to offer discounts or other benefits are subject to the inherently suspect standard, if not

⁵⁶⁶ *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 360 (5th Cir. 2008) (citing *Texaco, Inc. v. Dagher*, 547 U.S. 1, 7 n.3 (2006) (“To be sure, we have applied the quick look doctrine to business activities that are so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust liability.”)); *Cal. Dental Ass’n*, 526 U.S. at 770-71.

⁵⁶⁷ *Cal. Dental Ass’n*, 526 U.S. at 770.

⁵⁶⁸ *PolyGram Holding II*, 416 F.3d at 36; *see also PolyGram Holding I*, 2003 WL 25797195, at *15 (“A plaintiff may avoid full rule of reason analysis . . . if it demonstrates that the conduct at issue is inherently suspect owing to its likely tendency to suppress competition.”); *NCAA*, 468 U.S. at 109-10 & n.39 (“[T]he rule of reason can sometimes be applied in the twinkling of an eye.”) (quoting P. Areeda, *The “Rule of Reason” in Antitrust Analysis: General Issues* 37-38 (Federal Judicial Center, June 1981) (parenthetical omitted)).

⁵⁶⁹ *See N. Tex. Specialty Physicians*, 528 F.3d at 360-61 (“The ‘inherently suspect’ paradigm that the FTC employed in the present case is a ‘quick-look’ rule-of-reason analysis.”). We therefore use the term “inherently suspect” throughout to refer to these substantively identical legal standards.

⁵⁷⁰ *See PolyGram Holding II*, 416 F.3d at 35-36; *PolyGram Holding I*, 2003 WL 25797195, at *15 (After a plaintiff “demonstrates that the conduct at issue is inherently suspect owing to its likely tendency to suppress competition,” a defendant “can avoid summary condemnation only by advancing a legitimate justification for those practices.”).

⁵⁷¹ *See PolyGram Holding I*, 2003 WL 25797195, at *17 (“The anticompetitive nature of the agreement not to discount is obvious. As the ALJ correctly observed, this is simply a form of price fixing, and is presumptively anticompetitive.”).

treated as *per se* illegal.⁵⁷² For example, in *PolyGram I*, the Commission concluded that Respondents' agreement restraining price discounting is "inherently suspect" and "patently an elimination of a basic form of rivalry between competitors, and properly triggers an obligation by Respondents to come forward with some showing of countervailing procompetitive justification."⁵⁷³ The Commission's decision was upheld on appeal to the D.C. Circuit, which found respondents' agreement unlawful because they failed to identify any procompetitive justification.⁵⁷⁴ Similarly, in *Indiana Federation of Dentists*, the Supreme Court found a horizontal agreement among dentists to refuse to supply x-ray data to insurers was unlawful under a truncated rule of reason because "[n]o elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement."⁵⁷⁵ Similarly, in *North Carolina State Board of Dental Examiners*, the Fourth Circuit upheld the Commission's conclusion that a conspiracy to exclude low-cost competitors from the market was inherently suspect because it was "likely to harm competition and consumers."⁵⁷⁶

The economic principles illustrating the anticompetitive nature of Respondents' agreement not to provide discounts or otherwise compete for the business of buying groups are simple: the elimination of competition among rival suppliers benefits those suppliers at the expense of their customers.⁵⁷⁷ In addition, the coordinated refusal to discount to buying groups

⁵⁷² *Id.* (Commission holding that an agreement to refuse to discount is inherently suspect); *In re Mass. Bd. of Registration in Optometry*, Docket No. 9195, 1988 WL 1025476, at *29 (FTC June 13, 1988) (Initial Decision) (Commission applying an inherently suspect standard and finding a restraint on advertising discounts "especially pernicious" because it eliminated a form of price competition); *IFD*, 476 U.S. at 457-59; *In re N.C. Bd. of Dental Exam'rs*, Docket No. D-9343, 2011 WL 11798463, at *21 (FTC Dec. 2, 2011) (Comm'n Op.) (Commission finding that "[n]o advanced degree in economics is needed to recognize that exclusion of products from the marketplace that are desired by customers is likely to harm competition and consumers, absent a compelling justification").

⁵⁷³ *PolyGram Holding I*, 2003 WL 25797195, at *18, *31 ("[A]n agreement between competitors not to discount is likely to result in higher prices to consumers, restriction of output, and reduced allocative efficiency. . . . Respondents' restraints on price discounting and advertising are inherently suspect, because experience and economic learning consistently show that restraints of this sort dampen competition and harm consumers.").

⁵⁷⁴ *PolyGram Holding II*, 416 F.3d at 37-38.

⁵⁷⁵ *IFD*, 476 U.S. at 459 (quoting *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692).

⁵⁷⁶ *N.C. State Bd. of Dental Exam'rs v. FTC*, 717 F.3d 359, 374 (4th Cir. 2013), *aff'd*, 135 S. Ct. 1101 (2015) ("It is not difficult to understand that forcing low-cost teeth-whitening providers from the market has a tendency to increase a consumer's price for that service.").

⁵⁷⁷ CCFB ¶¶ 1439-1441, 1606-1609.

deprived dentists of the opportunity to aggregate their business to increase their bargaining power vis-a-vis the Big Three.⁵⁷⁸ Absent any offsetting procompetitive justifications—of which there are none—Respondents’ conduct is unlawful.

B. There Were No Procompetitive Benefits from Respondents’ Conspiracy, and Respondents Have Not Offered Any.

To avoid liability, Respondents must provide cognizable justifications, which must explain how the presumptively anticompetitive restraint at issue may permit them “to increase output or improve quality, service, or innovation.”⁵⁷⁹ If, as here, the Respondents identify no cognizable justification or procompetitive benefits for the agreement, “the court condemns the practice without ado.”⁵⁸⁰

Respondents have failed to come forward with *any* procompetitive justification for the agreement not to do business with buying groups.⁵⁸¹ Nor did any of Respondents’ three economic expert witnesses even contend that the agreement among Respondents would have procompetitive benefits.⁵⁸² For instance, Dr. Lawrence Wu denied offering any opinion that “an agreement among respondents not to do business with buying groups would have any pro-competitive benefits,” and frankly admitted that “[a]s an economist, if there is an agreement among competitors to, not to discount to customers, then I would view that as being anticompetitive.”⁵⁸³ Lacking *any* justification for their agreement, Respondents cannot meet their burden, and the Court should deem their conduct illegal under the inherently suspect standard.

⁵⁷⁸ CCFF ¶¶ 1439-1441, 125-132.

⁵⁷⁹ See *PolyGram Holding I*, 2003 WL 25797195, at *15.

⁵⁸⁰ See *Chi. Prof’l Sports Ltd. P’ship v. NBA*, 961 F.2d 667, 674 (7th Cir. 1992), *cert. denied*, 506 U.S. 954 (1992); see also *In re Mass. Bd. of Registration in Optometry*, 1988 WL 490115, at *6 (“But if it is inherently suspect, we must pose a second question: Is there a plausible efficiency justification for the practice? That is, does the practice seem capable of creating or enhancing competition (e.g., by reducing the costs of producing or marketing the product, creating a new product, or improving the operation of the market)? Such an efficiency defense is plausible if it cannot be rejected without extensive factual inquiry. If it is not plausible, then the restraint can be quickly condemned.”).

⁵⁸¹ CCFF ¶¶ 1167-1172, 488, 1078.

⁵⁸² CCFF ¶¶ 1174-1177.

⁵⁸³ CCFF ¶ 1175.

C. Respondents' Agreement Harmed Competition.

Only when a respondent has met its burden to provide a cognizable procompetitive justification for its inherently suspect conduct, must a plaintiff make a more detailed showing that the restraint is likely to harm competition.⁵⁸⁴ Here, of course, no showing of harm to competition is required at all given that Respondents have no cognizable procompetitive justifications for their conspiracy. Even so, the evidence presented at trial demonstrates that Respondents' agreement harmed competition.

Respondents' conspiracy eliminated competition between the three largest dental distributors—together controlling approximately 78%-84% of the market—for discounts to buying groups.⁵⁸⁵ Before the conspiracy, Respondents each decided independently whether to discount to buying groups.⁵⁸⁶ In fact, competition before the conspiracy drove Schein to discount to a few buying groups, and Patterson to near-completion of a buying group arrangement.⁵⁸⁷ During the conspiracy, however, Respondents systematically instructed their respective sales forces to reject buying groups.⁵⁸⁸ As a result, Respondents refused to discount to at least 29 buying groups, including:

1. Academy of General Dentistry Buying Group
2. American Academy of Cosmetic Dentistry
3. Business Intelligence Group

⁵⁸⁴ Even under that more detailed showing, a plaintiff still need not demonstrate price effects and “need not prove actual anticompetitive effects or entail ‘the fullest market analysis.’” *PolyGram Holding I*, 2003 WL 257971951, at *16 (quoting *Cal. Dental Ass’n*, 526 U.S. at 779); see also *N. Tex. Specialty Physicians*, 528 F.3d at 367 (“We agree that proof of higher fees for NTSP physicians is not necessary in this case. As the Supreme Court explained in *FTC v. Indiana Federation of Dentists*, if a practice ‘is likely enough to disrupt the proper functioning of the price-setting mechanism of the market . . . it may be condemned even absent proof that it resulted in higher prices.’”) (alteration in original).

⁵⁸⁵ CCFF ¶¶ 1458, 1455, 1456, 1457, 1450.

⁵⁸⁶ Indeed, even the elimination of the “risk of competition” between the Big Three for buying groups “constitutes [a] relevant anticompetitive harm.” See *FTC v. Actavis, Inc.*, 570 U.S. 136, 157 (2013).

⁵⁸⁷ CCFF ¶¶ 432-453 (Schein sold to buying groups before 2011); CCFF ¶¶ 454-473 (Patterson was negotiating with the New Mexico Dental Cooperative).

⁵⁸⁸ See *supra* Sections I.D. (“Benco Was the First to Adopt A No Buying Group Policy”), I.F.4 (“Patterson Complied with the Agreement Internally”), I.G.2 (“Schein Complied with the Agreement Internally”).

4. Catapult Group
5. Dental Purchasing Group
6. Dental Visits LLC
7. Dentistry Unchained
8. DDS Group
9. Dr. David Carter
10. Erie Family Dental Equipment
11. Florida Dental Association
12. IDA
13. Insight Sourcing Group
14. Kois Buyers Group
15. Dr. Nardduci Buying Group
16. New Mexico Dental Cooperative
17. Nexus Dental
18. Pacific Group Management Services
19. Pearl Network Buying Group
20. Unified Smiles
21. UOBG
22. Smile Source
23. Dr. Stephen Sebastian
24. Save Dentists, Inc.
25. Schulman Group
26. Synergy Dental Partners
27. Tralongo
28. WheelSpoke LLC
29. XYZ Dental

After the collapse of the conspiracy, all three Respondents started doing business with buying groups. Benco entered a discounting contract with the buying group EDA in late 2015;⁵⁸⁹ Schein began discounting to the buying groups Klear Impakt,⁵⁹⁰ Smile Source,⁵⁹¹ Teeth Tomorrow,⁵⁹² and Mastermind Group;⁵⁹³ and Patterson [REDACTED]⁵⁹⁴.

As evidenced by the Big Three's buying group arrangements before and after the conspiracy, dentists who were members of buying groups benefit by receiving discounts off catalog price,⁵⁹⁵ the price that many dentists paid during the conspiracy period.⁵⁹⁶ For example, buying group members had access to the following discounts from the Big Three before and after the conspiracy:

- Schein/Smile Source: [REDACTED]⁵⁹⁷
- Benco/EDA: [REDACTED]⁵⁹⁸
- Schein/Klear Impakt: [REDACTED]⁵⁹⁹
- Schein/Mastermind: blended discount of [REDACTED] for formulary products, and [REDACTED]⁶⁰⁰
- Schein/Teeth Tomorrow: [REDACTED]⁶⁰¹

⁵⁸⁹ CCFF ¶¶ 1366, 1406-1408.

⁵⁹⁰ CCFF ¶¶ 1318, 1398-1399.

⁵⁹¹ CCFF ¶¶ 1319, 1393-1395.

⁵⁹² CCFF ¶¶ 1400-1402.

⁵⁹³ CCFF ¶¶ 1403-1405.

⁵⁹⁴ CCFF ¶¶ 1410-1411.

⁵⁹⁵ See supra, Sections I.B. ("Independent Dentists Join Buying Groups to Save Money on Dental Products"), see also CCFF Section IV.D ("Buying Groups Save Dentists Money and Help Preserve Independent Dentistry").

⁵⁹⁶ CCFF ¶ 1415.

⁵⁹⁷ CCFF ¶¶ 1391-1392 (prior to 2011), 1393-1395 (2017 and current agreements).

⁵⁹⁸ CCFF ¶¶ 1406-1408.

⁵⁹⁹ CCFF ¶¶ 1398, 1399.

⁶⁰⁰ CCFF ¶¶ 1403-1405.

⁶⁰¹ CCFF ¶¶ 1400-1402.

- Patterson's [REDACTED]⁶⁰²

Further, Complaint Counsel's economic expert, Professor Robert Marshall of The Pennsylvania State University, has also offered quantitative analyses that validates the economic principle that aggregation of purchasing power through buying groups leads to lower prices for dentists and lower margins for distributors.⁶⁰³ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁶⁰⁵ as demonstrated below:

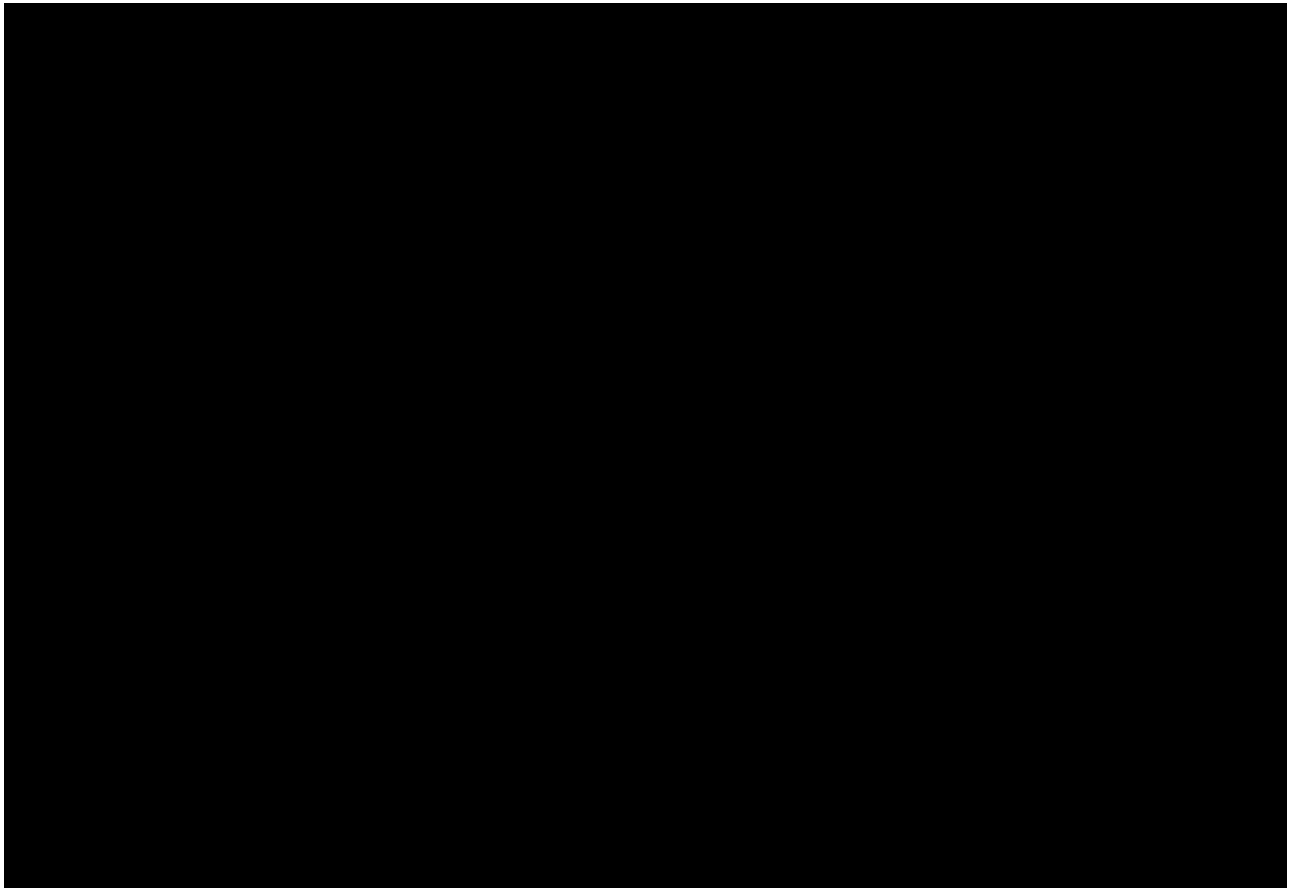
[REDACTED]

⁶⁰² CCFF ¶ 1410; *see also* CCFF ¶ 1411 [REDACTED].

⁶⁰³ CCFF ¶ 1440; *see generally* CCFF XVIII.C ("Dr. Marshall's Empirical Work Also Shows Harm To Competition"); CCFF ¶¶ 1416-1433, 1441.

⁶⁰⁴ CCFF ¶ 1437.

⁶⁰⁵ CCFF ¶ 1438.



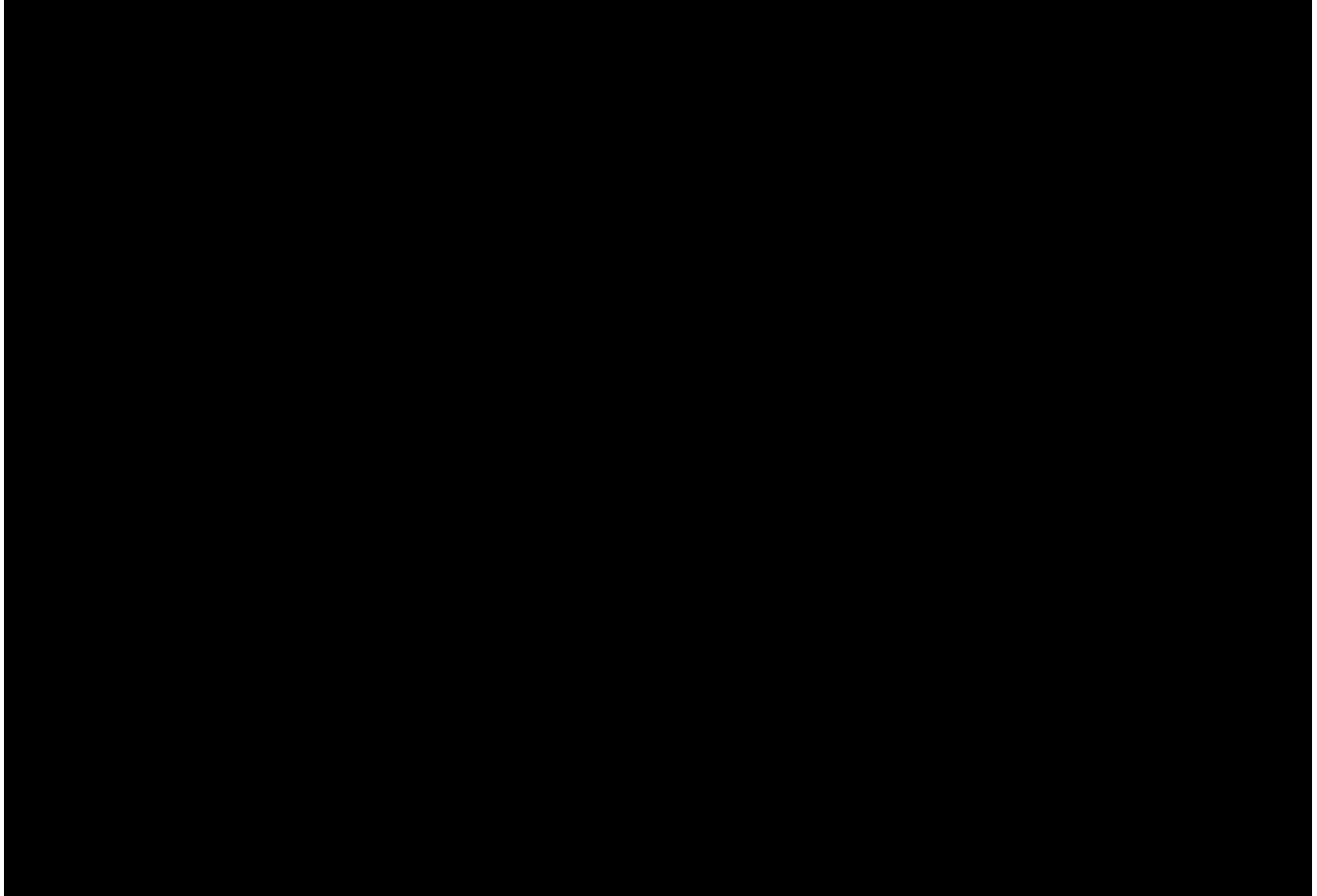
Further, when Schein resumed its contract with Smile Source in March 2017, the prices that Smile Source members paid to Schein declined, as did the margins that Schein charged those dentists.⁶⁰⁶ [REDACTED]

[REDACTED]

[REDACTED]⁶⁰⁷

⁶⁰⁶ CCFF ¶ 1432.

⁶⁰⁷ CCFF ¶ 1433.



While no showing of harm is necessary to establish liability here, the evidence in this case confirms that Respondents' agreement not to discount to buying groups was anticompetitive.⁶⁰⁸

D. Respondents Collectively Have Market Power in the Relevant Markets.

As the Supreme Court has stated, “the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse

⁶⁰⁸ Respondents' primary attempt to argue that there are no anticompetitive effects rests on the flawed and limited analysis of Patterson's paid expert, Dr. Lawrence Wu. [REDACTED]

[REDACTED] This admission makes clear that Dr. Wu's studies are perfectly consistent with buying groups yielding price benefits to their members—and a conspiracy to suppress buying groups would have the anticompetitive effect of suppressing those benefits. Further, Dr. Wu's analysis examined only the pricing for a single dental product in a single state. CCFF ¶ 2007.

effects on competition.”⁶⁰⁹ No allegations regarding the relevant product market, relevant geographic market, or market power are required where, as here, Respondents have engaged in a *per se* violation of the antitrust laws.⁶¹⁰ Nor are relevant market definitions necessary to condemn a restraint under the inherently suspect analysis where, as here, Respondents have put forward no cognizable procompetitive justifications for the restraint at issue.⁶¹¹ Indeed, even had Respondents proffered a cognizable procompetitive justification for the conspiracy, market definition is not required where there is otherwise proof of anticompetitive harm.⁶¹² Nonetheless, the evidence in this case shows that Respondents possess market power in the relevant markets, further buttressing a showing of anticompetitive effects.⁶¹³

Here, Respondents collectively have market power in the relevant product market (full line of dental products and services sold through full-service distributors to independent dentists) and geographic markets (local markets within the United States).

1. The Relevant Product Market Is Full-Service Distribution to Independent Dentists.

The Supreme Court established the “basic rule for defining a product market”⁶¹⁴ in *Brown Shoe Co. v. United States*: “The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product

⁶⁰⁹ *IFD*, 476 U.S. at 460; *In re Realcomp II Ltd.*, Docket No. 9320, 2007 WL 6936319, at *19 (FTC Oct. 30, 2009) (Comm’n Op.).

⁶¹⁰ *See supra*, Section II (“Respondents’ Coordinated Refusal to Discount to Buying Groups Was A *Per Se* Violation of the Antitrust Laws”). Schein’s economic expert, Dr. Dennis Carlton, admitted as much, stating that the “definition of the relevant product and geographic markets has no bearing on whether Respondents’ behavior could be deemed anticompetitive.” CCFF ¶¶ 1523-1524.

⁶¹¹ *See supra*, Section III (“Respondents’ Coordinated Refusal to Discount to Buying Groups Was Unlawful Under the Truncated Rule of Reason”).

⁶¹² *See IFD*, 476 U.S. at 460-61 (“Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, ‘proof of actual detrimental effects, such as a reduction of output,’ can obviate the need for an inquiry into market power, which is but a ‘surrogate for detrimental effects.’”) (quoting 7 P. Areeda, *Antitrust Law* ¶ 1511, p. 429 (1986)).

⁶¹³ *See In re Realcomp II*, 2007 WL 6936319, at *19, *21 (“[I]f the tribunal finds that the defendants had market power and that their conduct tended to reduce competition, it is unnecessary to demonstrate directly that their practices had adverse effects on competition,” as market power serves as a proxy for determining “the potential for genuine adverse effects on competition.”).

⁶¹⁴ *FTC v. Staples, Inc.* (“*Staples 2016*”), 190 F. Supp. 3d 100, 116-17 (D.D.C. 2016).

itself and substitutes for it.”⁶¹⁵ Further, “the ‘product’ that comprises the market need not be a discrete good for sale,” but rather may be a channel of distribution.⁶¹⁶

Courts frequently define relevant product markets using two analyses—the *Brown Shoe* practical indicia and the hypothetical monopolist test.⁶¹⁷ Both of these approaches support Complaint Counsel’s definition of the relevant product market here.

a. The *Brown Shoe* Practical Indicia Show That Full-Service Distribution Is the Relevant Product Market.

In *Brown Shoe*, the Supreme Court identified several “practical indicia” that courts have used to determine the relevant product market.⁶¹⁸ These practical indicia include “industry or public recognition of the [relevant market] as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.”⁶¹⁹ The practical indicia support the conclusion that full-service dental distribution to independent dentists is the relevant product market here.

Full-service distributors provide independent dentists with a distinctive offering of products and services that independent dentists value.⁶²⁰ These valuable attributes of full-service distributors include:

- **Product breadth and diversity:** Full-service distributors offer a comprehensive selection of dental supplies and equipment from a variety of manufacturers.⁶²¹

⁶¹⁵ 370 U.S. 294, 325 (1962).

⁶¹⁶ *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 26 (D.D.C. 2015).

⁶¹⁷ See, e.g., *id.* at 27-34; *Staples 2016*, 190 F. Supp. 3d at 118-22.

⁶¹⁸ See *Sysco*, 113 F. Supp. 3d at 27-30; *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 38-44 (D.D.C. 2009); *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 159-165 (D.D.C. 2000); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 46-49 (D.D.C. 1998); *FTC v. Staples, Inc.* (“*Staples 1997*”), 970 F. Supp. 1066, 1075-80 (D.D.C. 1997); see also *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 50-60 (D.D.C. 2011).

⁶¹⁹ *Brown Shoe*, 370 U.S. at 325; see also *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 21 (D.D.C. 2017); *Sysco*, 113 F. Supp. 3d at 27; *H&R Block*, 833 F. Supp. 2d at 51.

⁶²⁰ CCFF ¶¶ 1447, 1448; see generally FOF Section XX.A.1.d (“Full-Service Distributor Offerings”) (CCFF ¶¶ 1460, 1461, 1462, 1463, 5242, 1465, 1466, 1467, 1468, 1469, 1470, 1471, 1472, 1473, 1474, 1475, 1476, 1477, 1478, 1479, 1480, 1481, 1482, 1483, 1484, 1485, 1486, 1487).

⁶²¹ CCFF ¶¶ 1527, 1447, 1460, 1461, 1448.

- **One-stop shopping and fast delivery:** Full-service distributors provide dentists with a one-stop shop for supplies, and they typically deliver within a day or two.⁶²² This timing is important because it allows dentists to avoid carrying large inventories in their office space.⁶²³
- **Customer service and value-added services:** In addition to supplies and equipment, full-service distributors also offer a variety of value-added services, including sales representatives, equipment servicing and training, equipment installation and repair, sales professional support, and practice management software.⁶²⁴ The convenience of these full-service capabilities allows dentists to spend more time with patients and generate additional revenue.⁶²⁵
- **Prompt supply delivery, equipment service, and maintenance:** Full-service distributors also have the ability to provide prompt and reliable supply delivery and equipment maintenance that are crucial for dental practices.⁶²⁶ Prompt equipment repair is crucial for dental practices because an out-of-service compressor or chair can instantly shut down a practice and prevent a dentist from seeing patients (and in turn, generating revenue).⁶²⁷ A full-service distributor sales representative helps a dentist get faster equipment repair and informs him about new products.⁶²⁸

Respondents and others in the dental industry also recognize full-service distribution as its own line of business.⁶²⁹ For example, Schein’s senior executive James Breslawski explained that full-service dental distribution is distinct from non-full-service distribution, noting that a distributor “must be able to offer a broad array of products and services, including equipment, equipment repair . . . and related I.T. services” to be a dentist’s primary or secondary distributor.⁶³⁰ Similarly, Benco’s CEO Cohen repeatedly acknowledged in ordinary course documents that full-service distribution is distinct from mail-order:

⁶²² CCFF ¶ 1482.

⁶²³ CCFF ¶¶ 1528, 84, 85, 86, 1484, 1579.

⁶²⁴ CCFF ¶¶ 1529, 1448, 1462, 1463, 1464, 1465, 1466, 1468, 1469, 1470, 1471, 1473, 1472, 1483, 1474.

⁶²⁵ CCFF ¶ 1487.

⁶²⁶ CCFF ¶¶ 1531, 87, 1475, 1476, 1478, 1479, 1480, 1481, 1477.

⁶²⁷ CCFF ¶¶ 1532, 88, 1479, 1481, 1580, 87.

⁶²⁸ CCFF ¶¶ 1533, 1480, 1462, 1464, 1465, 1469.

⁶²⁹ CCFF ¶¶ 1534-1536, 1488-1490, 1469-1471, 1492-1494, 1500-1501, 1483, 1486, 1511, 1514, 1506-1508, 1516, 1552.

⁶³⁰ CCFF ¶ 1488.

- “Dentists value the sales rep. They value the service tech, as evidenced by the fact that GPOs can work with Darby [the largest mail-order/internet distributor] all day long, and they choose not to because dentists want the service that a Benco or full-service dealer would provide.”⁶³¹
- “There’s a reason that Schein adopted the full-service model about 12 years ago, when they OWNED the mail-order end of the market, and it’s the same reason that Darby isn’t growing today: a full-service experience is what dentists want.”⁶³²

Further confirming that full-service distribution is its own market, Respondents benchmark their prices against other full-service distributors, not mail-order distributors.⁶³³

Courts applying *Brown Shoe* have found that specialized distribution channels with similar distinct characteristics and industry recognition constitute relevant product markets that are separate from other distribution channels in the same industry. In *FTC v. Cardinal Health*, the court found that wholesale distribution of pharmaceuticals constituted a relevant product market, separate from manufacturer-direct sales and mail-order distribution.⁶³⁴ The court rejected the defendants’ argument that all channels of distribution should be included, concluding that the wholesale distributors provided customers with an efficient way to obtain drugs and services, unavailable through other channels.⁶³⁵ Similarly, in *FTC v. Sysco Corp.*, the court defined a relevant product market consisting of foodservice distributors offering a full array of products and a high level of customer service while excluding from the market definition several other foodservice distribution channels.⁶³⁶ The *Sysco* court specifically cited factors including product breadth and diversity and one-stop shopping, customer service and value-added services, and timely and reliable delivery as distinguishing the relevant product market from other distribution channels.⁶³⁷

⁶³¹ CCFF ¶ 1471.

⁶³² CCFF ¶ 1507.

⁶³³ CCFF ¶ 1500, 1501.

⁶³⁴ 12 F. Supp. 2d at 39-40, 47.

⁶³⁵ *Id.* at 47.

⁶³⁶ 113 F. Supp. 3d at 27-37; *see also Staples 1997*, 970 F. Supp. at 1077 (Relevant market consisted of the sale of office supplies through office superstores, excluding office supplies sold elsewhere.).

⁶³⁷ 113 F. Supp. 3d at 27-30.

As in *Sysco* and *Cardinal Health*, other distribution channels within the broader industry are not part of the relevant product market. While some dental products are sold via mail-order or Internet distributors or by direct-selling manufacturers, these other distribution channels are not reasonably interchangeable with full-service distributors because mail-order and Internet distributors do not offer the same value-added services,⁶³⁸ have a different business strategy and cost structure,⁶³⁹ typically do not employ extensive sales and service teams,⁶⁴⁰ and charge distinct (and typically lower) prices that take into account their fewer benefits and services.⁶⁴¹

Nor are direct-selling manufacturers adequate substitutes for full-service distributors.⁶⁴² Direct-selling manufacturers generally do not sell directly to independent dentists,⁶⁴³ offer niche and specialty products,⁶⁴⁴ do not sell the full array of products that a dentist would need to run his dental practice,⁶⁴⁵ do not offer the same products and brands as full-service distributors offer,⁶⁴⁶ do not offer the same level of services,⁶⁴⁷ do not have the same distribution capabilities,⁶⁴⁸ and do not offer the same product breadth and variety or the convenience of “one-stop shopping.”⁶⁴⁹

b. The Hypothetical Monopolist Test Confirms That Full-Service Distribution Is the Relevant Product Market.

Courts and the Commission also rely on the hypothetical monopolist test (“HMT”) to define the relevant product market.⁶⁵⁰ The HMT asks “hypothetically whether it would be

⁶³⁸ CCFF ¶¶ 1495-1498, 1518, 1503-1508.

⁶³⁹ CCFF ¶¶ 1538, 1492-1494, 1506, 1488-1490.

⁶⁴⁰ CCFF ¶¶ 1496-1497, 1504-1507, 1542.

⁶⁴¹ CCFF ¶¶ 1537-1538, 1493-1494, 1496-1497, 1499.

⁶⁴² CCFF ¶ 1544-1551, 1509-1521.

⁶⁴³ CCFF ¶ 1519, 1517-1518.

⁶⁴⁴ CCFF ¶¶ 1520, 1510-1511, 1547

⁶⁴⁵ CCFF ¶¶ 1545-1546, 1548, 1511-1517.

⁶⁴⁶ CCFF ¶¶ 1518-1519, 1511-1514.

⁶⁴⁷ CCFF ¶ 1549, 1521.

⁶⁴⁸ CCFF ¶¶ 1550, 1521.

⁶⁴⁹ CCFF ¶¶ 1548, 1551, 1511-1517.

⁶⁵⁰ See, e.g., *Sysco*, 113 F. Supp. 3d at 33-34; *Staples 2016*, 190 F. Supp. 3d at 121-22; U.S. Dep’t of Justice & FTC Horizontal Merger Guidelines (“Merger Guidelines”) § 4 (2010).

profitable to have a monopoly over a given set of substitutable products.”⁶⁵¹ If a hypothetical monopolist could profitably impose a small but significant non-transitory increase in price (SSNIP)—typically 5%—over a particular group of products or services, then those products or services constitute a relevant product market.⁶⁵²

As explained fully in his expert reports, Dr. Marshall applied the HMT in this case using two different natural experiments, one based on Benco’s entry into southern California and one based on Darby’s (an internet distributor) relationship as a supplier for Smile Source.⁶⁵³ Both of these HMT analyses confirmed that, in addition to considering qualitative evidence to determine the relevant product market,⁶⁵⁴ the relevant product market was limited to full-service distribution.⁶⁵⁵

c. Respondent Experts’ Criticisms of the Relevant Product Market Are Unfounded.

Respondents’ experts did not offer any alternative definition of the relevant product market in this case. Two of Respondents’ experts, Dr. Wu (Patterson) and Dr. Johnson (Benco), critiqued Dr. Marshall’s analysis and suggested that the relevant product market should be broader than full-service distribution without actually offering any opinion on what the relevant product market should be.⁶⁵⁶ Thus, Respondents merely suggest that mail-order or online distributors and direct-selling manufacturers belong in the relevant product market. But “the mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily

⁶⁵¹ *H&R Block*, 833 F. Supp. 2d at 51-52.

⁶⁵² *Id.*

⁶⁵³ CCFF ¶¶ 1556-1566.

⁶⁵⁴ CCFF ¶¶ 1554-1557, 1564-1565.

⁶⁵⁵ CCFF ¶¶ 1553, 1565. Dr. Marshall did another empirical analysis of Darby to see how much independent dentists purchased from Darby. CCFF ¶ 1566. From this analysis Dr. Marshall found that almost no dentist purchased all of his products from Darby, and that most dentists only bought a small percentage of their purchases from Darby, if anything at all, confirming his findings that Darby is not in the relevant market. CCFF ¶ 1566.

⁶⁵⁶ CCFF ¶¶ 1960-1963, 2015. Meanwhile, Dr. Carlton’s (Schein) view was that the “definition of the relevant product and geographic markets has no bearing on whether the Respondents’ behavior could be deemed anticompetitive.” CCFF ¶ 1523; *see also* CCFF ¶ 1524.

require that it be included in the relevant product market for antitrust purposes.”⁶⁵⁷ As detailed in Section III.D.1.a, *supra*, it would be inappropriate to include mail-order and online vendors or direct-selling manufacturers in the relevant product market because of the numerous and substantial differences between the product and service offerings of those types of suppliers and full-service distributors.

Moreover, Dr. Wu’s and Dr. Johnson’s specific criticisms of Dr. Marshall’s analysis of the relevant product market are unfounded. First, unlike Dr. Marshall, neither Dr. Wu nor Dr. Johnson actually defined a relevant product market in this case, nor did either of them perform the HMT independently.⁶⁵⁸ Second, while Dr. Wu criticized Dr. Marshall’s HMT analysis, Dr. Wu applied the wrong critical loss test in his criticism.⁶⁵⁹ If one applies the correct critical loss test, rather than Dr. Wu’s erroneous version, the HMT confirms Dr. Marshall’s relevant market definition, even using Dr. Wu’s own preferred data.⁶⁶⁰ Third, Dr. Johnson’s view that direct-selling manufacturers should be included in the relevant product market lacks any basis in supporting economic analysis. Dr. Johnson did not do any quantitative analysis to support this view.⁶⁶¹ He also did not study the extent to which direct-selling manufacturers and full-service distributors even sell the same products to dentists.⁶⁶² While Dr. Johnson put forward a pricing analysis cribbed from *another* antitrust case in which Benco hired him to testify, the analysis is irrelevant because it did not isolate the price constraints attributable to any particular source of alleged competition, and thus, has no bearing on the relevant product market.⁶⁶³

⁶⁵⁷ See *Cardinal Health*, 12 F. Supp. 2d at 47 (quoting *Staples 1997*, 970 F. Supp. at 1075).

⁶⁵⁸ CCFF ¶¶ 1960-1963, 2015.

⁶⁵⁹ CCFF ¶¶ 2016-2018.

⁶⁶⁰ CCFF ¶¶ 2019-2025. In his Rebuttal Report, Dr. Marshall responded in detail to Dr. Wu’s erroneous criticisms regarding the HMT.

⁶⁶¹ CCFF ¶¶ 1960-1963, 1967.

⁶⁶² CCFF ¶¶ 1965-1968, 1968.

⁶⁶³ CCFF ¶¶ 1969, 1971, 1973, 1976-1979.

2. The Relevant Geographic Markets Are Local Markets Within the United States.

The relevant geographic markets here are local geographic markets contained within the United States.⁶⁶⁴ The Supreme Court has explained that the relevant geographic market must “correspond to the commercial realities of the industry,” as determined through a “pragmatic, factual approach.”⁶⁶⁵ Courts define the relevant geographic market by assessing the alternative sources of the relevant product or service to which consumers could practicably turn.⁶⁶⁶

Here, the relevant geographic markets are local. Respondents recognized distinct local markets, and they managed their businesses on a local level.⁶⁶⁷ This is because independent dental practices need to receive the various services offered by full-service distributors at the locations of their dental offices.⁶⁶⁸ For example, independent dentists require prompt equipment servicing because delays in service affect dentists’ ability to see patients.⁶⁶⁹ The need for local service naturally limits the scope of the relevant geographic market to those firms that are able to service a given area.⁶⁷⁰ This conclusion is consistent with the approach of the *Horizontal Merger Guidelines*.⁶⁷¹

Respondents’ experts did not dispute that the relevant geographic markets in this matter are no larger than the United States and local in nature.⁶⁷² Respondents’ experts also have not identified any alternative relevant geographic markets that are more appropriate in this case than

⁶⁶⁴ CCFF ¶¶ 1567, 1581.

⁶⁶⁵ *Brown Shoe*, 370 U.S. at 336 (internal quotation and footnote omitted).

⁶⁶⁶ See, e.g., *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 359 (1963); *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1291 (W.D. Mich. 1996); *In re Polypore Int’l, Inc.*, Docket No. D-9327, 2010 WL 9549988, at *16 (FTC Nov. 5, 2010) (Comm’n Op.), *aff’d*, 686 F.3d 1208 (11th Cir. 2012); see also *Merger Guidelines* § 4.2.

⁶⁶⁷ CCFF ¶¶ 1572, 1574-1577.

⁶⁶⁸ CCFF ¶¶ 84, 87-88, 1475-1479, 1482, 1578-1580.

⁶⁶⁹ CCFF ¶¶ 87-88, 1477-1481, 1580.

⁶⁷⁰ CCFF ¶¶ 1476-1482, 1578.

⁶⁷¹ See *Merger Guidelines* § 4.2.2 (“Example 13: Customers require local sales and support. Suppliers have sales and service operations in many geographic areas and can discriminate based on customer location. The geographic market can be defined around the locations of customers.”).

⁶⁷² CCFF ¶¶ 1568-1570.

local markets.⁶⁷³ Indeed, Benco’s expert Dr. Johnson agrees with Dr. Marshall that the relevant geographic markets are local.⁶⁷⁴

As with the relevant product market, a common tool used to assess the relevant geographic market is the HMT.⁶⁷⁵ As described fully in his expert reports, to define the relevant geographic market, Dr. Marshall applied the HMT to two local markets—Atlanta and Seattle—where Respondents faced competition from a regional full-service distributor.⁶⁷⁶ Dr. Marshall chose these two local markets as examples that would be conservative in Respondents’ favor because they are markets in which Respondents are least likely to have collective market power due to the presence of competition from large, regional full-service distributors in these markets.⁶⁷⁷ Dr. Marshall found that the HMT was satisfied for the Atlanta and Seattle metropolitan areas, respectively, thus confirming that the relevant geographic markets are local.⁶⁷⁸ Further, Dr. Marshall compared the prices dentists paid for similar products in different local geographic areas and found that there are meaningful price differences between neighboring local areas, bolstering the conclusion that the relevant geographic markets are local.⁶⁷⁹

3. Respondents Collectively Have Market Power.

High market shares, in combination with barriers to entry, support a finding of market power.⁶⁸⁰ Respondents’ collective market shares are high, as they recognized in their own

⁶⁷³ CCFF ¶ 1571.

⁶⁷⁴ CCFF ¶ 1568. Additionally, Patterson’s economic expert, Dr. Lawrence Wu, does not disagree with Dr. Johnson’s opinion that the relevant geographic markets are no larger than the United States and local in nature. CCFF ¶ 1569. Schein’s economic expert, Dr. Dennis Carlton concedes that a market definition is irrelevant to this case and offers no opinion suggesting that he disagrees with Dr. Marshall’s geographic market definition. CCFF ¶ 1570.

⁶⁷⁵ *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 (3d Cir. 2016).

⁶⁷⁶ CCFF ¶¶ 1581-1584, 1587.

⁶⁷⁷ CCFF ¶¶ 1583-1584, 1587.

⁶⁷⁸ CCFF ¶¶ 1581, 1583, 1591.

⁶⁷⁹ CCFF ¶ 1592.

⁶⁸⁰ *See In re Realcomp II*, 2007 WL 6936319, at *14; *cf. United States v. Microsoft*, 253 F.3d 34, 51 (D.C. Cir. 2001) (“[M]onopoly power may be inferred from a firm’s possession of a dominant share of a relevant market that is protected by entry barriers.”) (citing *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995)).

business documents.⁶⁸¹ A 2011 Schein market analysis stated that the Big Three “have a combined market share of over 80% in the dental supplies and equipment market.”⁶⁸²

Moreover, based on their executives’ testimony at trial, Respondents have a high combined market share, ranging from 78 and 84%.⁶⁸³ Schein’s national market share is approximately 36-38%;⁶⁸⁴ Patterson’s national market share is roughly 30-34%;⁶⁸⁵ and Benco’s national market share is roughly 12%.⁶⁸⁶ Further, Dr. Marshall’s analysis confirms this, [REDACTED]

[REDACTED]⁶⁸⁷ Market shares within the local relevant geographic markets are also high. Even examining markets in which Respondents are least likely to have collective market power, [REDACTED]

[REDACTED]⁶⁸⁸ Shares in some local geographic markets are higher.⁶⁸⁹

Further, there were multiple barriers to entry for full-service distributors, including developing and maintaining a sales force,⁶⁹⁰ offering sufficient service technicians capable of responding to issues promptly and competently,⁶⁹¹ obtaining the requisite infrastructure, pricing, and products to offer one-stop shopping for a full range of dental products,⁶⁹² and [REDACTED]

⁶⁸¹ CCFF ¶ 1458.

⁶⁸² CCFF ¶ 1458 (quoting CX2742 at 032).

⁶⁸³ CCFF ¶¶ 1450, 1455-1458.

⁶⁸⁴ CCFF ¶ 1455.

⁶⁸⁵ CCFF ¶ 1456.

⁶⁸⁶ CCFF ¶ 1457.

⁶⁸⁷ CCFF ¶ 1596. National market shares provide insight into local market shares. Local market shares will not necessarily mirror national shares, but they must average out to the national shares. CCFF ¶ 1589.

⁶⁸⁸ CCFF ¶¶ 1585-1587.

⁶⁸⁹ CCFF ¶ 1590.

⁶⁹⁰ CCFF ¶ 1616.

⁶⁹¹ CCFF ¶ 1617.

⁶⁹² CCFF ¶ 1619.

██████████.⁶⁹³ Respondents’ internal documents underscore the industry’s barriers to entry.⁶⁹⁴

Respondents’ collective market share in the Atlanta and Seattle markets, considered along with Respondents’ collective share nationwide and barriers to entry, indicate that Respondents possess market power throughout most, if not all, local markets across the country.⁶⁹⁵

IV. RESPONDENTS HAVE FAILED TO REBUT COMPLAINT COUNSEL’S EVIDENCE OF AN UNLAWFUL AGREEMENT.

A. Notwithstanding Witness Denials, Contemporaneous Ordinary Course of Business Documents Show the Big Three Conspired.

Despite the strong direct and circumstantial evidence of agreement between the Big Three to refuse to discount to buying groups, the three conspirators denied that they reached an agreement. These denials do not preclude the finding of a conspiracy. Indeed, in a Section 1 case, liability often hinges on the question of whether there existed an agreement, and in countless cases, courts have concluded in the affirmative despite the defendants’ denials of any agreement.⁶⁹⁶ For example, in *Gainesville Utilities Department v. Florida Power & Light Co.*, the Fifth Circuit overturned the trial court’s decision to deny a judgment notwithstanding the

⁶⁹³ CCFF ¶ 1620.

⁶⁹⁴ CCFF ¶¶ 1621-1622.

⁶⁹⁵ CCFF ¶¶ 1588, 1591, 1593-1600.

⁶⁹⁶ See, e.g., *United States v. Capitol Serv., Inc.*, 568 F. Supp. 134, 144-45 (E.D. Wis. 1983) (finding, in a civil bench trial, the existence of a non-bidding agreement even though defendants testified no such agreement existed because “[i]t was not necessary . . . that the Government prove an express agreement. ‘It is enough that a concert of action is contemplated and that the defendants conformed to the arrangement’”) (citing *Paramount Pictures*, 334 U.S. at 142), *aff’d*, 756 F.2d 502 (7th Cir. 1985); *Vitagraph, Inc. v. Perelman*, 95 F.2d 142, 146 (3d Cir. 1936) (upholding the district court’s conspiracy finding even though defendants’ executive and manager witnesses testified that “there was no conspiracy or concerted action between the defendants”); *United States v. Beachner Constr. Co.*, 555 F. Supp. 1273, 1278-79 (D. Kan. 1983) (“Although witnesses denied any overall agreement or understanding or participation in a single conspiracy, there can be no doubt that bid rigging was a way of life in the industry in Kansas.”), *aff’d*, 729 F.2d 1278 (10th Cir. 1984); *Gainesville*, 573 F.2d at 301 n.14 (“The officials of the power companies deny the existence of a territorial agreement, but where such testimony is in conflict with contemporaneous documents we can give it little weight . . .”) (internal quotation omitted); *Champion*, 557 F.2d at 1273 (upholding trial court finding of an agreement to eliminate competitive bidding for timber even though defendants asserted that meetings were innocent).

verdict, finding the existence of an agreement and noting that witness denials could be given little weight where contemporaneous documents conflicted with the denials.⁶⁹⁷ Indeed, the Supreme Court has found that oral testimony that is in conflict with contemporaneous documentary evidence deserves little weight.⁶⁹⁸ Further, as the First Circuit held in *Advertising Specialty National Ass’n v. FTC*, “It is to be expected that petitioners’ witnesses would deny that there was an agreement, but this testimony does not offset in our judgment the quite compelling documentary evidence of a planned common course of action or understanding . . . which can be properly characterized as an [antitrust] ‘agreement.’”⁶⁹⁹

Moreover, because a finding of “agreement” is a mixed question of law and fact, and a term of art under antitrust laws, a witness who believes that he did not enter into an agreement may nonetheless have engaged in unlawful conduct.⁷⁰⁰ Further, because a plaintiff need not prove an express agreement, only that “a concert of action is contemplated and that the defendants conformed to the arrangement,” courts have affirmed conspiracy findings even though defendants testified no agreement existed.⁷⁰¹

B. Respondents’ Purported Independent Business Justifications are Contradicted by the Evidence.

1. Respondents’ Claim that Buying Groups Do Not Lead to Incremental New Business Is Contradicted by the Evidence.

Respondents contend that buying groups are not profitable customer prospects, and that they therefore had independent business justifications for their refusal to bid on buying groups.

⁶⁹⁷ 573 F.2d at 301 n.14.

⁶⁹⁸ *U.S. Gypsum*, 333 U.S. at 395-96 (“On cross-examination most of the witnesses denied that they had acted in concert Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact”).

⁶⁹⁹ *Adver. Specialty Nat’l Ass’n*, 238 F.2d at 117.

⁷⁰⁰ *Capitol Serv.*, 568 F. Supp. at 144-45; see also *Wilder Enters., Inc. v. Allied Artists Pictures Corp.*, 632 F.2d 1135, 1141-42 (4th Cir. 1980) (“[Defendant]’s lack of knowledge about any agreement to violate the Act does not preclude submission of the issue to the jury. Rarely can a formal agreement among alleged conspirators be established, and proof of its existence is not essential.”); *Am. Tobacco Co. v. United States*, 147 F.2d 93, 107 (6th Cir. 1944); *Esco*, 340 F.2d at 1008.

⁷⁰¹ *Capitol Serv.*, 568 F. Supp. at 144-45.

According to Respondents, buying groups do not drive incremental sales to contracted distributors because they do not provide contractual volume guarantees,⁷⁰² and lack a centralized purchasing decision-maker. Without contractual guarantees, Respondents claim, doing business with buying groups would only result in diminished profit margins without increased sales or customers. Substantial evidence, however, shows that buying groups can be profitable for distributors, even without contractual volume guarantees.⁷⁰³

a. Buying Groups Drove Sales to Other Full-Service Distributors During the Conspiracy.

Buying groups drive new business to a distributor, even without a contractual volume guarantee.⁷⁰⁴ Dentists switch their purchases to a buying group's distributor partner, not pursuant to a contractual obligation, but to take advantage of discounts and lower prices.⁷⁰⁵ In fact, the main reason that dentists join buying groups is to save money on dental products.⁷⁰⁶ Members of buying groups that do not contractually guarantee volume, such as Smile Source and Kois, nonetheless increased their purchases from contracted distributors at high rates to take advantage of discounts.⁷⁰⁷

Burkhart gained new customers from competitors, increased its business with existing customers, and grew its sales, profit margins, and substantially increased its market share by discounting to buying groups.⁷⁰⁸ [REDACTED]

[REDACTED]⁷⁰⁹ Similarly, other full-service distributors

⁷⁰² Respondents refer to this as the ability to “drive compliance.”

⁷⁰³ CCFF ¶¶ 1297-1299, 1306, 1381, 1386, 1685-1687, 1689, 1312-1313, 1718; *see also* CCFF ¶¶ 1656, 1666, 1673, 1681.

⁷⁰⁴ CCFF ¶¶ 1297-1299, 1301, 1306, 1313-1312, 1685-1687, 1689, 1694-1697, 1700, 1718, 1723-1725, 1730; *see also* 1652-1654, 1656, 1644, 1666, 1673, 1681, 1727, 1729.

⁷⁰⁵ CCFF ¶¶ 53, 1692-1693; *see also* CCFF ¶ 181.

⁷⁰⁶ CCFF ¶¶ 126, 1692; *see also* CCFF ¶¶ 139, 142-143.

⁷⁰⁷ CCFF ¶¶ 1686-1687, 1689-1690, 1693, 1725, 1727. Smile Source and the Kois Buyers Groups are examples of buying groups that are successful in driving their members to purchase from contracted distributors. CCFF ¶¶ 1299, 1301, 1303; *see also* CCFF ¶¶ 1652-1654, 1656, 1644, 1666.

⁷⁰⁸ CCFF ¶¶ 1298-1306; *see also* CCFF ¶¶ 1651, 1656.

⁷⁰⁹ CCFF ¶ 1303.

like Nashville Dental and [REDACTED] gained sales by partnering with buying groups.⁷¹⁰

[REDACTED]

[REDACTED]⁷¹¹

b. Respondents Profited from Buying Groups Before and After the Conspiracy and Lost Sales by Rejecting Buying Groups During the Conspiracy.

Before and after the conspiracy, Respondents independently decided it was in their unilateral self-interest to discount to buying groups. Prior to 2011, Schein profitably worked with buying groups without contractual volume guarantees, gaining new business and stealing customers from competitors as a result.⁷¹² Since 2015, all Respondents have profitably worked with, and competed by discounting to, buying groups.⁷¹³ Indeed, Patterson bid for at least one buying group they previously rebuffed.⁷¹⁴ Moreover, after the conspiracy, Schein and Patterson both bid for Smile Source's business, despite the lack of volume guarantees, because they saw Smile Source as a profitable opportunity.⁷¹⁵ Schein won the Smile Source bid in 2017, and its relationship with Smile Source has been profitable for Schein.⁷¹⁶ In addition to Smile Source, Patterson has been in negotiations with multiple other buying groups since 2017.⁷¹⁷ Further, after the conspiracy, Benco decided it was in its unilateral self-interest to discount to the buying group EDA, even though it explicitly recognized the risk that members may not switch their purchases to Benco.⁷¹⁸ Benco's discounting arrangement with EDA led to new sales and

⁷¹⁰ CCFF ¶¶ 1312-1313, 1672-1673.

⁷¹¹ CCFF ¶¶ 1314-1315.

⁷¹² CCFF ¶¶ 446-453, 894, 1260-1266, 1700. [REDACTED]

[REDACTED] CCFF ¶ 1267; *see also* CCFF ¶¶ 1678, 1679.

⁷¹³ CCFF ¶¶ 1316, 1319-1321, 1367, 1714-1716, 1722-1724; *see also* CCFF ¶ 1320.

⁷¹⁴ CCFF ¶¶ 1349-1350, 1355.

⁷¹⁵ CCFF ¶¶ 1719, 1686, 1687, 1319-1321, 1719, 1686-1687. Patterson's bid was based on just verbal assurances that Smile Source could be influential in its members' purchasing decisions. CCFF ¶¶ 1720-1721.

⁷¹⁶ CCFF ¶¶ 1724-1726; *see also* CCFF ¶¶ 1681, 1683.

⁷¹⁷ CCFF ¶¶ 1364, 1734-1735.

⁷¹⁸ CCFF ¶¶ 1367, 1372, 1376-1379, 1382-1383.

customers, despite the lack of volume guarantees.⁷¹⁹

Moreover, Respondents' refusal to discount to buying groups during the conspiracy period resulted in lost sales.⁷²⁰ Indeed, Schein's President Tim Sullivan admitted that Schein's rejection of a buying group might shift Schein's customers to a competitor.⁷²¹ This is corroborated by the evidence—when [REDACTED]

[REDACTED].⁷²² This is further evidence that buying groups have the ability to shift sales.⁷²³

2. Respondents' Communications With One Another Undermine Claims of Independent Conduct.

The fact that Respondents' executives communicated with each other about buying groups is fatal to their claim of independent action. Competitor communications about not discounting to buying groups, followed by a refusal to discount, is the antithesis of independent action. Executives from each Respondent admitted that they had no business reason for these communications.⁷²⁴ If Respondents' executives had been acting according to their own independent interests, there would have been no need to discuss with a competitor whether to discount to buying groups.⁷²⁵

⁷¹⁹ CCFF ¶¶ 1381-1383, 1385-1387; *see also* CCFF ¶¶ 1367-1370.

⁷²⁰ CCFF ¶¶ 1312-1313; *see also* CCFF ¶¶ 1655, 1658-1661, 1665, 1667, 1674, 1678-1679.

⁷²¹ CCFF ¶ 240.

⁷²² CCFF ¶¶ 1267, 1301, 1678-1679.

⁷²³ Benco attempts to rebut this evidence through its paid expert, Dr. John Johnson. Dr. Johnson presented Exhibits 8-12 in his expert report to show that Benco experienced sales growth in five specific metropolitan areas ("MSAs") between 2010 and 2017, despite Benco's refusal to do business with buying groups. [REDACTED]

CCFF ¶ 1996. Further, Dr. Johnson admitted that he did not assess whether Schein or Patterson acted in their unilateral self-interest with respect to buying groups. CCFF ¶¶ 1997, 1998. [REDACTED]

[REDACTED] CCFF ¶¶ 1999-2003.

⁷²⁴ CCFF ¶¶ 1078, 1167-1172.

⁷²⁵ *See Gainesville*, 573 F.2d at 301 ("[I]f solid economic reasons existed for refusing service to these cities, there was no reason for communicating with a competitor about the refusal . . .").

3. Respondents' Concerns about Their Competitors Discounting to Buying Groups Undermines Their Claims that Buying Groups Cannot Lead to Incremental Business.

If Respondents' justification were true, and they rejected buying groups because they would only lead to a net loss in profits, Respondents (acting competitively and in their own self-interest) should have been happy to let their competitors enter into unprofitable arrangements with buying groups. The record reflects otherwise. Respondents were concerned about their competitors' buying group relationships, as evidenced by statements such as "I'm concerned that Schein and Benco sneak into these [buying group] bids and deny it" and "Better tell your buddy Tim to knock this shit off." Moreover, Respondents monitored each other's buying group behavior: "Schein just dumped the last GPO they had. In Utah."⁷²⁶; "If you . . . have specific proof [of Schein and Benco doing business with buying groups] please send that to me."⁷²⁷ Finally, Respondents alerted each other when they saw the other was discounting to a buying group.⁷²⁸

If buying groups were bad business decisions, Respondents' executives would not have been concerned about competitors working with buying groups, and would certainly have had no incentive to alert the competitors to potential buying group arrangements. However, Respondents were concerned about their competitors doing business with buying groups because they knew they would be forced to respond competitively if one of their top rivals discounted to buying groups.

4. Respondents' Claimed Independent Business Justifications Are No Defense to an Unlawful Conspiracy.

Even if the evidence supported Respondents' purported independent justifications that buying groups cannot drive sales (which it does not), such justifications are no defense to an

⁷²⁶ CCFF ¶ 1745.

⁷²⁷ CCFF ¶ 549.

⁷²⁸ See *supra* Sections I.F.3 ("Patterson Confronted Benco When It Suspected Benco of Discounting to a Buying Group"), I.G.3 ("Benco Confronted Schein When It Suspected Schein of Discounting to Buying Groups").

unlawful conspiracy, particularly where, as here, there is substantial evidence of a conspiracy.⁷²⁹ Courts have upheld findings of unlawful agreements, despite independent justifications for the underlying conduct, where the totality of the evidence established an agreement.⁷³⁰

In *United States v. General Motors Corp.*, the Supreme Court held that a trial court erred in finding no conspiracy based on evidence that the conspirators were acting to promote their own self-interest, given other evidence of coordinated conduct.⁷³¹ The Court held that, for purposes of determining the existence of an unlawful agreement, “[i]t is of no consequence . . . that each party acted in its own lawful interest.”⁷³² Nor does it matter whether the conduct is economically desirable.⁷³³

Likewise, in *United States v. Apple, Inc.*, the Second Circuit rejected Apple’s claim that there was insufficient evidence of conspiracy because its conduct was consistent with its own independent business interests.⁷³⁴ The court found that the “context of the entire record” supported a finding that Apple participated in a conspiracy to fix prices, including evidence of its communications with co-conspirators about the agreement.⁷³⁵ It held that “the fact that Apple’s conduct was in its own economic interest in no way undermined the inference that it entered an agreement to raise ebook prices.”⁷³⁶ Similarly, in *Gainesville*, the Fifth Circuit upheld a finding that defendants acted pursuant to a conspiracy, despite defendants’ claims that they

⁷²⁹ See *Standard Oil*, 251 F.2d at 211 (finding conduct that may be explainable as a reasonable business decision is “not excusatory of liability” where there is sufficient evidence to support a finding of a conspiracy); *In re Domestic Drywall Antitrust Litig.*, 163 F. Supp. 3d at 251.

⁷³⁰ *Gen. Motors*, 384 U.S. at 142 (“It is of no consequence, for purposes of determining whether there has been a combination or conspiracy under § 1 of the Sherman Act, that each party acted in its own lawful interest.”); *Apple*, 791 F.3d at 317-18 (“[T]he fact that Apple’s conduct was in its own economic interest in no way undermines the inference that it entered an agreement to raise ebook prices.”); *Gainesville*, 573 F.2d at 301; *Bond Crown & Cork*, 176 F.2d at 979 (Innocent explanations must not be considered alone, and must be taken together with the entire record.).

⁷³¹ 384 U.S. at 143.

⁷³² *Id.* at 142.

⁷³³ *Id.*

⁷³⁴ 791 F.3d at 316.

⁷³⁵ *Id.* at 316-19 (“[T]he emails and phone records demonstrate that Apple *agreed* with the Publisher Defendants, within the meaning of the Sherman Act, to raise consumer-facing ebook prices by eliminating retail price competition.”).

⁷³⁶ *Id.* at 317-18.

based their conduct on valid economic considerations.⁷³⁷ The court held that the communications among competitors were inexplicable if defendants were acting independently.⁷³⁸ Moreover, courts have found unlawful agreements where the conduct in question began independently based on unilateral business interests, but later morphed into collusion, confirming that independent justification does not preclude a finding of collusion.⁷³⁹

Thus, here, the assertion of independent business reasons for not discounting to buying groups is no obstacle to proving the existence of an agreement.

C. Schein’s Claim that It Discounted to Buying Groups Does Not Negate Its Participation in the Conspiracy.

Schein claims it discounted to a number of “buying groups” during the alleged conspiracy, thereby proving it was not part of the conspiracy.⁷⁴⁰ But this argument does not withstand scrutiny.⁷⁴¹ Schein’s claims relate to customers that are (1) not buying groups, (2) buying groups that Schein began discounting to either before the conspiracy began in 2011 or

⁷³⁷ 573 F.2d at 301.

⁷³⁸ *Id.* (“[I]f solid economic reasons existed for refusing service to these cities, there was no reason for communicating with a competitor about the refusal . . .”).

⁷³⁹ *Champion*, 557 F.2d at 1273 (“[D]espite the innocent beginnings of the noncompetitive bidding, the trial court found collusion in its continuation.”); *N.D. Hosp. Ass’n*, 640 F. Supp. at 1036-37 (finding an agreement among hospitals not to grant discounts to Indian Health Services and “to adhere to [the hospitals’] independently developed, preexisting policies against granting [such] discounts” was nonetheless an unreasonable restraint where “the effect of defendants’ agreement was to foreclose any potential competition”).

⁷⁴⁰ While Patterson claims that it did business with two buying groups during the conspiracy period—Orthosynetics and Jackson Health—evidence adduced at trial shows that neither of these organizations is a buying group. Orthosynetics is a dental management service organization for orthodontists. CCFF ¶¶ 654-655, 1763. In fact, Patterson’s Special Markets division (which focused on DSO and expressly excluded buying groups from entities with which it will do business), lists Orthosynetics as a DSO entity it wished to attract. CCFF ¶¶ 654. Jackson Health is a large academic medical system in Miami-Dade County, not a dental buying group. CCFF ¶ 656.

⁷⁴¹ Schein also attempts to repackage its claims that it discounted to buying groups through its economic expert Dennis Carlton. But, as the Court has repeatedly stated, Respondents cannot rely on experts as a means of admitting factual evidence. (Tr. at 2884 (J. Chappell: “My advice to both parties, experts are not fact witnesses.”)) Moreover, Dr. Carlton ignored a substantial amount of evidence in this case—he admitted he reviewed only one-third of the deposition testimony, CCFF ¶ 2029, and he did not respond to the wealth of documents showing Schein repeatedly instructed its sales team not to do business with buying groups between 2011 and 2015 anywhere in his expert report. CCFF ¶ 2030.

after the conspiracy began to fall apart in April 2015.⁷⁴² Such evidence does nothing to negate evidence of an agreement.

First, Schein asserts that it discounted to customers that are not dental buying groups.⁷⁴³ Some of these customers are group purchasing organizations in the medical industry and groups of hospitals, community health centers, dental schools, and other healthcare institutions. Such customers have nothing to do with this case.⁷⁴⁴ Others, such as Comfort Dental and Breakaway, are customers that own or manage dental practices, recognized by Schein as DSOs and MSOs, which Schein distinguished from buying groups during the conspiracy period.⁷⁴⁵ Still others, like the Corydon Palmer Dental Society, are dental associations that received rebates from Schein, but had no agreement with Schein for discounts on supplies to any dentists.⁷⁴⁶ Corydon Palmer's former President, Dr. Baytosh, confirmed through testimony at trial that it is not a buying group.⁷⁴⁷ Even Dr. Carlton (Schein's hired expert), who employed an overly broad definition of "buying group" that is not consistent with the Complaint, nonetheless conceded in his report that 30 of Schein's groups do not fit Complaint Counsel's definition of a buying group.⁷⁴⁸

Second, Schein claims that it did business with legacy buying groups (ones that Schein began working with before the conspiracy) and post-conspiracy buying groups. For example,

⁷⁴² CCFF ¶¶ 441-444, 1751-1823.

⁷⁴³ Schein attempts to exaggerate the evidence of Schein's discounting to buying groups by employing a misleading and incorrect definition of "buying group." CCFF ¶¶ 2031, 2033. Dr. Carlton employed this alternative definition of buying groups extensively. CCFF ¶¶ 2032, 2036. If sales for admitted non-buying groups and contested groups are removed from Dr. Carlton's Table 1, the total sales reported in that table would be reduced by more than 95 percent. CCFF ¶¶ 2036. Further, Dr. Marshall found that, once sales for admitted non-buying groups and contested groups are removed from Dr. Carlton's Table 1, the data show that Schein's sales to dentists in buying groups decreased considerably from 2013 to 2015, followed by a significant increase from 2016 to 2017. CCFF ¶ 2037.

⁷⁴⁴ Examples include customers like Acurity (formerly Greater New York Hospital Association), Ascension Health (a medical group organization), the Children's Hospital Association, Colorado Community Health Network, the Arizona Association of Community Health Centers, and the Louisiana Primary Health Care Association. CCFF ¶¶ 1751, 1753-1754, 1757-1758, 1762.

⁷⁴⁵ CCFF ¶¶ 1755-1756, 1759.

⁷⁴⁶ CCFF ¶¶ 1764-1766.

⁷⁴⁷ CCFF ¶ 1764.

⁷⁴⁸ CCFF ¶ 2035. Carlton identifies 14 groups as buying groups of independent dentists. CCFF ¶ 2034.

Schein began working with buying groups such as the Dental Coop of Utah, Smile Source, the Long Island Dental Forum, and Dentists for a Better Huntington before 2011.⁷⁴⁹ That fact does not absolve its participation in the conspiracy beginning in 2011.⁷⁵⁰ The same is true of buying groups Schein began working with after the conspiracy started to fall apart in 2015, such as Klear Impakt, Teeth Tomorrow, and the Mastermind Group.⁷⁵¹

D. Imperfect Compliance with the Conspiracy Does Not Disprove the Existence of an Agreement.

Evidence that Respondents may have occasionally deviated from the agreement does not absolve them of liability. Nor does it erase Complaint Counsel’s evidence of agreement. Perfect compliance with an agreement is not necessary under the antitrust laws, and cartel members often have incentives to (and do) deviate from agreements. It is well-established that deviation from an unlawful agreement (*i.e.*, cheating) does not prevent a plaintiff from proving a conspiracy.⁷⁵² Section 1 of the Sherman Act does not require a perfectly executed conspiracy, and it is the agreement itself that gives rise to liability.⁷⁵³ Courts have recognized that members of price-fixing conspiracies tend to cheat,⁷⁵⁴ often have incentives to do so,⁷⁵⁵ and thus “cartels tend to collapse of their own weight.”⁷⁵⁶ As a result, once parties enter a price-fixing agreement,

⁷⁴⁹ CCFF ¶¶ 440-444.

⁷⁵⁰ Schein executives did not know that some of these “legacy” buying groups existed and found out about them after the conspiracy began falling apart. CCFF ¶ 1767.

⁷⁵¹ CCFF ¶¶ 1317-1319, 1403.

⁷⁵² *Beaver*, 515 F.3d at 739 (“[E]vidence of cheating certainly does not, by itself, prevent the government from proving a conspiracy.”).

⁷⁵³ *Id.*

⁷⁵⁴ *Id.* (“It is not uncommon for members of a price-fixing conspiracy to cheat on one another occasionally . . .”).

⁷⁵⁵ *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 615 (7th Cir. 1997) (“There are inherent strains in a cartel. A member can do better by undercutting the cartel slightly and obtaining enormously increased volume at a slight sacrifice of unit profit than by honoring the cartel price and suffering an erosion of sales because of cheating by less scrupulous members.”) (citing George J. Stigler, “A Theory of Oligopoly,” in Stigler, *The Organization of Industry* 39 (1968)).

⁷⁵⁶ *Id.*

whether they perform the agreement perfectly or successfully is immaterial to the question of liability.⁷⁵⁷

Courts have therefore found unlawful agreements despite evidence of cheating. In *United States v. Beaver*, the Seventh Circuit rejected the defendant's claim that evidence of cheating meant there was no agreement.⁷⁵⁸ Since perfect compliance was not required, the *Beaver* court held that cheating did not prevent the government from proving a price-fixing conspiracy and found these arguments to be "illogical."⁷⁵⁹ It analogized to contract law and noted that a breach of contract does not negate the existence of a contract in the first place.⁷⁶⁰ Similarly, in *In re Brand Name Prescription Drugs Antitrust Litigation*, a case concerning buying groups of pharmacies, the defendants asserted instances of their working with buying groups as evidence that there was no conspiracy targeting buying groups.⁷⁶¹ The court held that instances of non-compliance by working with buying groups did not "erase the factual question of whether the wholesalers joined the conspiracy"⁷⁶² and noted the incentives for cheating in cartels.⁷⁶³

Here, evidence that Schein occasionally deviated from the agreement does not undermine Complaint Counsel's substantial evidence that Respondents entered into, and complied with the agreement by instructing its sales team to reject buying groups.⁷⁶⁴ Indeed, Benco's and

⁷⁵⁷ *Foley*, 598 F.2d at 1333 ("Since the agreement itself, not its performance, is the crime of conspiracy, the partial non-performance of [defendant] does not preclude a finding that it joined the conspiracy.") (citations omitted); see also *Plymouth Dealers' Ass'n of N. Cal. v. United States*, 279 F.2d 128, 132 (9th Cir. 1960) ("[O]nce the agreement to fix a price is made, . . . it is 'immaterial whether the agreements were ever actually carried out, whether the purpose of the conspiracy was accomplished in whole or in part, or whether an effort was made to carry the object of the conspiracy into effect.'") (quoting *United States v. Trenton Potteries Co.*, 273 U.S. 392, 402 (1927)).

⁷⁵⁸ 515 F.3d at 739.

⁷⁵⁹ *Id.*

⁷⁶⁰ *Id.*

⁷⁶¹ 123 F.3d at 615.

⁷⁶² *Id.*

⁷⁶³ *Id.*; see also *Foley*, 598 F.2d at 1332-34 (describing various defendants as not having perfectly complied with the agreement, noting one did not comply 30% of the time, and stating, "the partial non-performance of [defendant] does not preclude a finding that it joined the conspiracy").

⁷⁶⁴ Similarly, Schein's proposal to Smile Source in 2014 does not absolve it of liability. Indeed, the discount offered by Schein was so low (significantly lower than Schein's discounts to Smile Source before the conspiracy and after the conspiracy), that Smile Source could not accept it. CCFF ¶¶ 1829-1830, 1833-1834, 1836, 1843-1847. Tellingly, Sullivan was "not interested" in giving Smile Source its prior discounts. CCFF ¶¶ 1848, 1849, 1851.

Patterson's reactions to Schein's cheating support a finding that Schein participated in the agreement. When Cohen learned that Schein might have been working with the Dental Alliance in 2013, he confronted Sullivan about it.⁷⁶⁵ Patterson's Misiak also discussed Schein's cheating on the agreement.⁷⁶⁶ Absent a prior agreement, discussions of Schein's cheating by competitors, and confrontations about such cheating, would not exist.

V. BENCO INVITED BURKHART TO REFUSE TO DISCOUNT TO BUYING GROUPS.

A. Benco Invited Burkhart to Stop Discounting to Buying Groups to Avoid a "Race to the Bottom."

Following the same pattern of conduct that Benco pursued with Schein and Patterson, Benco invited Burkhart to stop discounting to buying groups. In September 2013, Benco learned that Burkhart was discounting to a buying group.⁷⁶⁷ On September 13, 2013, Benco's VP of Sales Mike McElaney called his counterpart at Burkhart, Jeffrey Reece, to discuss Burkhart's decision to compete for customers by discounting to buying groups.⁷⁶⁸ The call lasted approximately ten to twelve minutes.⁷⁶⁹ On the call, McElaney informed Reece that "group purchasing organizations were not favorable to the dental industry and were not going to be good for Burkhart."⁷⁷⁰ McElaney also warned Reece that buying groups would cause "declining margins" and a "race to the bottom," noting that they were "not good for the medical industry."⁷⁷¹

Following the call, McElaney reported to his boss, Chuck Cohen, and Patrick Ryan that Burkhart refused to agree to stop discounting to buying groups:

⁷⁶⁵ CCFF ¶¶ 997, 999-1002; *see also supra* Section I.G.3.c.

⁷⁶⁶ CCFF ¶¶ 540, 1188-1189.

⁷⁶⁷ CCFF ¶ 1207.

⁷⁶⁸ CCFF ¶¶ 1208-1209.

⁷⁶⁹ CCFF ¶ 1210.

⁷⁷⁰ CCFF ¶¶ 1211.

⁷⁷¹ CCFF ¶¶ 1213-1214; *see also* CCFF ¶ 1252.

I spoke with Jeff Reece at length late Friday about buying groups.
JEFF DOES NOT GET IT!!! . . . I will be meeting Jeff at the ADA meeting
to continue the discussion.⁷⁷²

In response, Ryan suggested that Benco escalate the buying group issue to Jeff Reece's boss, Lori Burkhart.⁷⁷³ A few weeks later, McElaney initiated yet another call to Burkhart's Reece to again warn him that Burkhart should not work with buying groups because doing so was "not good for your business."⁷⁷⁴ Reece believed McElaney overstepped his bounds in telling him how Burkhart should conduct its business.⁷⁷⁵

In October 2013, Reece, McElaney, Ryan, and Cohen all attended a dental industry meeting together in Florida where Benco approached Reece for a third time.⁷⁷⁶ At the meeting, McElaney introduced Reece to Cohen and Ryan of Benco, who again sought to encourage Burkhart to refrain from working with buying groups.⁷⁷⁷

Cohen and McElaney sent a clear message to Reece that buying groups were not "healthy for our industry," "could do damage to our business" and "threaten our business."⁷⁷⁸ From the conversation, Reece understood that Benco was against buying groups because of the danger of "declining margins and that that would ultimately threaten profitability."⁷⁷⁹ The conversation lasted ten to fifteen minutes.⁷⁸⁰ Reece felt "set up" and "angry" that Benco had an "agenda" to persuade Burkhart to stop discounting to buying groups.⁷⁸¹

Over the course of these communications, "Benco [] encouraged Burkhart not to engage in group purchasing organizations based on the fact that that was going to be detrimental to . . .

⁷⁷² CCFF ¶ 1218.

⁷⁷³ CCFF ¶ 1220.

⁷⁷⁴ CCFF ¶¶ 1221, 1222 (quoting Reece, Tr. 4380-4381).

⁷⁷⁵ CCFF ¶ 1224.

⁷⁷⁶ CCFF ¶¶ 1225-1227. Other executives from dental supply distribution companies were at the dental meeting as well: Tim Sullivan of Schein and Paul Guggenheim of Patterson. CCFF ¶ 364.

⁷⁷⁷ CCFF ¶¶ 1226-1229, 1231-1234, 1237, 1244, 1242.

⁷⁷⁸ CCFF ¶ 1231.

⁷⁷⁹ CCFF ¶ 1232; *see also* CCFF ¶ 1233.

⁷⁸⁰ CCFF ¶ 1229.

⁷⁸¹ CCFF ¶¶ 1230 (quoting Reece, Tr. 4385), 1239, 1231, 1232, 1233, 1234.

the business in the dental industry for those that participated.”⁷⁸² Moreover, Benco repeatedly warned Reece that buying groups would harm the dental industry as a whole.⁷⁸³

Benco’s purpose in communicating with Burkhart was to bring Burkhart into the fold of the Big Three’s agreement.⁷⁸⁴ By this point in the fall of 2013, Benco had entered into an agreement with Patterson and Schein that none of them would discount to buying groups.⁷⁸⁵ Unlike Patterson and Schein, however, Burkhart did not agree to join and continued selling to buying groups.⁷⁸⁶ As a result of its continued buying group arrangements, Burkhart gained new customers.⁷⁸⁷

B. Invitations to Collude Are a Quintessential Example of a Section 5 Violation.

The Commission has long held that an invitation to collude is the “quintessential example of the kind of conduct that should be . . . challenged as a violation of Section 5.”⁷⁸⁸ The Supreme Court has explained that Section 5 is not confined to the unfair methods of competition identified in the Sherman Act.⁷⁸⁹ “[A]n unsuccessful attempt to fix prices . . . [is] pernicious conduct with a clear potential for harm and no redeeming value whatever.”⁷⁹⁰ “Solicitation to a conspiracy is dangerous to competition even if it cannot be shown that an ‘offer’ has been ‘accepted.’”⁷⁹¹

⁷⁸² CCFF ¶ 1237 (quoting Reece, Tr. 4391); *see also* CCFF ¶ 1241.

⁷⁸³ CCFF ¶¶ 1238; 1211-1214, 1222, 1231-1234.

⁷⁸⁴ CCFF ¶¶ 1101-1102, 1107.

⁷⁸⁵ *See supra*, Sections I.F, I.G.

⁷⁸⁶ CCFF ¶ 1240; *see also* CCFF ¶ 1251.

⁷⁸⁷ CCFF ¶¶ 1246-1249.

⁷⁸⁸ *In re McWane, Inc.*, Docket No. 9351, 2012 WL 4101793, at *17 (FTC Sept. 14, 2012) (Comm’n Op.) (internal quotation omitted) (alteration in original).

⁷⁸⁹ *Motion Picture Adver. Serv. Co.*, 344 U.S. at 394 (“The ‘Unfair methods of competition’, which are condemned by section 5(a) of the [FTC Act], are not confined to those that were illegal at common law or that were condemned by the Sherman Act.”) (citation omitted); *see also* *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966) (“This broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws.”).

⁷⁹⁰ *Liu v Amerco*, 677 F.3d 489, 494 (1st Cir. 2012) (explaining the policy justification behind making invitations to collude illegal).

⁷⁹¹ *Areeda & Hovenkamp* ¶ 1419d; *see also* *United States v. Am. Airlines, Inc.*, 743 F.2d 1114, 1122 (5th Cir. 1984) (upholding complaint alleging attempted monopolization as unlawful solicitation under Section 2 of the Sherman Act), *cert. dismissed*, 474 U.S. 1001 (1985); *United States v. Ames Sintering Co.*, 927 F.2d 232, 235-36 (6th Cir. 1990) (upholding indictment for attempted mail and wire fraud).

Under Section 5, an invitation to collude describes an improper communication from a firm to an actual or potential competitor that the firm is ready and willing to coordinate on price or output or other important terms of competition.⁷⁹² “The solicitation may appear ambiguous, such as when a competitor merely complains to its rival about the latter’s ‘low price.’ Yet, the ‘objective’ meaning of such a statement to the reasonable observer seems clear: the only business rationale for complaining is to induce a higher price.”⁷⁹³

An invitation to collude is “potentially harmful and . . . serves no legitimate business purpose.”⁷⁹⁴ “[I]n the absence of a procompetitive justification, an invitation to collude can be condemned under Section 5 without a showing that the respondent possesses market power and without proof that the competitor accepted the invitation.”⁷⁹⁵ There are three policy rationales for the Commission’s prosecution of invitations to collude. First, even an unaccepted solicitation may harm competition by facilitating coordination between competitors because it reveals information about the solicitor’s intentions or preferences.⁷⁹⁶ Second, in some cases, it may be difficult to determine whether a competitor has accepted a solicitation.⁷⁹⁷ Finally, finding a violation may deter similar conduct that is potentially harmful and has no legitimate business purpose.⁷⁹⁸

⁷⁹² *In re Fortiline, LLC*, File No. 151-0000, 2016 WL 4379041, at *11 (FTC Aug. 9, 2016) (Analysis to Aid Public Comment); *see also In re U-Haul Int’l Inc.*, File No. 081 0157, 2010 WL 2470328 (F.R.), at *35034-35 (FTC June 21, 2010) (Analysis of Agreement Containing Consent Order to Aid Public Comment); *In re Valassis Commc’ns, Inc.*, Docket No. C-4160, 2006 WL 6679058, at *3 (FTC Apr. 19, 2006) (Complaint) (alleging invitation to collude where respondent stated on earnings call that it would “quote all [competitor’s] first right of refusal customers at the floor price”); *In re Precision Moulding Co.*, Docket No. C-3682, 1996 WL 33412156, at *2 (FTC Sept. 3, 1996) (Complaint) (alleging invitation to collude where respondent told competitor that its prices were “ridiculously low” and the competitor need not “give the product away”); *In re YKK (USA) Inc.*, Docket No. C-3445, 1993 WL 13009644, at *1-2 (FTC July 1, 1993) (Complaint) (alleging invitation to collude where respondent sought to urge competitor to desist from offering free installation equipment).

⁷⁹³ *Areed & Hovenkamp* ¶ 1419a; *see also In re Precision Moulding*, 1996 WL 33412156, at *2 (alleging invitation to collude where respondent told competitor that its prices were “ridiculously low” and the competitor need not “give the product away”).

⁷⁹⁴ *In re Fortiline*, 2016 WL 4379041, at *11 (quoting *In re Valassis Commc’ns*, 2006 WL 6679058, at *8 (Analysis of Agreement Containing Consent Order to Aid Public Comment)) (alteration in original).

⁷⁹⁵ *Id.* (footnote omitted).

⁷⁹⁶ *Id.*; *see also In re Valassis Commc’ns*, 2006 WL 6679058, at *8.

⁷⁹⁷ *See supra* note 796.

⁷⁹⁸ *See supra* note 796.

C. Benco's Solicitation of Burkhart Constitutes a Section 5 Violation.

Benco invited Burkhart on three separate occasions to stop discounting to buying groups, each time stressing that buying groups were not good for the dental industry: stating that buying groups were a “threat;” that they would lead to a “race to the bottom;” and “cause declining margins.”⁷⁹⁹ The words Benco used during its solicitations reflect collective action, rather than unilateral action.⁸⁰⁰ Benco emphasized each time that buying groups were not “healthy” for the dental industry as a whole.⁸⁰¹ Throughout these conversations, “Benco encouraged Burkhart not to engage in group purchasing organizations.”⁸⁰²

Complaining to a competitor about the latter discounting to a customer, and encouraging a competitor to refrain from such discounting, constitutes an invitation to collude.⁸⁰³ In *Liu v. Amerco*, the First Circuit upheld a complaint alleging an unsuccessful attempt to fix prices, finding that encouraging a competitor to change its prices was an “express proposal[] to a competitor to raise prices.”⁸⁰⁴ Similarly, the Areeda & Hovenkamp treatise notes that complaining about a rival’s “low price” constitutes an invitation to collude under Section 5 of the FTC Act.⁸⁰⁵ Here, Benco complained to Burkhart and encouraged Burkhart not to offer discounts to buying groups on three separate occasions. There is no business justification for these communications, and Benco has offered none. “[T]he only business rationale for

⁷⁹⁹ CCFF ¶¶ 1211-1213, 1222, 1231-1234.

⁸⁰⁰ CCFF ¶¶ 1211-1214, 1231-1232, 1234, 1237-1238.

⁸⁰¹ CCFF ¶¶ 1231 (quoting Reece, Tr. 4386); *see also* CCFF ¶¶ 1211-1214, 1232, 1234, 1237, 1238.

⁸⁰² CCFF ¶ 1237 (quoting Reece, Tr. 4391); *see also* CCFF ¶¶ 1228, 1211-1212, 1222, 1231-1232, 1234, 1238.

⁸⁰³ *Liu*, 677 F.3d at 494; Areeda & Hovenkamp ¶ 1419a; *In re Valassis Commc’ns*, 2006 WL 6679058, at *3 (alleging invitation to collude where respondent stated on earnings call that it would “quote all [competitor’s] first right of refusal customers at the floor price”); *In re Precision Moulding*, 1996 WL 33412156, at *2 (alleging invitation to collude where respondent told competitor that its prices were “ridiculously low” and the competitor need not “give the product away”); *In re YKK*, 1993 WL 13009644, at *1-2 (alleging invitation to collude where respondent sought to urge competitor to desist from offering free installation equipment).

⁸⁰⁴ *Liu*, 677 F.3d at 494, 496 (addressing a complaint filed under the Massachusetts unfair competition statute, which is substantially similar to Section 5 of the FTC Act).

⁸⁰⁵ Areeda & Hovenkamp ¶ 1419a (“The solicitation may appear ambiguous, such as when a competitor merely complains to its rival about the latter’s ‘low price.’ Yet, the ‘objective’ meaning of such a statement to the reasonable observer seems clear: the only business rationale for complaining is to induce a higher price.”).

[Benco's] complaining was to induce" Burkhart to refrain from discounting to buying groups, just as Benco refrained from such discounting.⁸⁰⁶ Had Burkhart refused to work with buying groups, their members would have experienced an increase in prices.⁸⁰⁷ As a result, the Court should find that Benco's communications with Burkhart constitute an invitation to collude and, therefore, a violation of Section 5 of the FTC Act.

VI. REMEDY

Upon finding that Respondents have violated Section 5 of the FTC Act, this Court is empowered to develop a remedy to prohibit Respondents from engaging in the unlawful conduct. "[A]ll doubts as to the remedy are to be resolved in [Complaint Counsel's] favor."⁸⁰⁸ Long-established precedent allows this Court wide discretion in its choice of remedy, as long as it reasonably relates to the unlawful act or practice.⁸⁰⁹ The Court is not limited to prohibiting the illegal practices in the precise form in which it finds they existed in the past. Rather, the Court "must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity."⁸¹⁰ As the Supreme Court has said and as this Court has recognized, "[h]aving been caught violating the Act, respondents' 'must expect some fencing in.'"⁸¹¹

⁸⁰⁶ *See id.*

⁸⁰⁷ CCF ¶ 1250.

⁸⁰⁸ *See United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961).

⁸⁰⁹ *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946) ("The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist."); *FTC v. Ruberoid, Co.*, 343 U.S. 470, 473 (1952); *FTC v. Nat'l. Lead Co.*, 352 U.S. 419, 428-29 (1957).

⁸¹⁰ *In re PolyGram Holding, Inc.*, 2003 WL 25797195, at *379-80 (July 24, 2003) (quoting *Ruberoid*, 343 U.S. at 473).

⁸¹¹ *In re 1-800 Contacts, Inc.*, No. 9372, slip op. at 190 (FTC Oct. 27, 2017) (Initial Decision) (quoting *Nat'l Lead*, 352 U.S. at 431).

Furthermore, abandonment or voluntary cessation of the unlawful conduct does not foreclose the Court's discretion to fashion the relief necessary to eliminate future similar conduct.⁸¹²

In accordance, Complaint Counsel seeks a pragmatic but effective order necessitated by Respondents' illegal conduct. As required by the Court's Order on Post-Trial Briefs issued on February 21, 2019, Complaint Counsel explains below and attaches an annotated version of its "Proposed Order" (attached hereto as "Attachment D"), which includes endnotes explaining the purpose of and precedent for each provision in the Proposed Order. Complaint Counsel respectfully requests an order setting forth the following:

Paragraph II.A. Requiring Respondents to cease and desist from and be prohibited from entering into or participating in an agreement or understanding relating to:⁸¹³ (1) conducting business with Buying Groups,⁸¹⁴ including providing or offering discounts or rebates, responding to solicitations, or refusing to do business;⁸¹⁵ (2) preventing or discouraging any Dental Practice Customer⁸¹⁶ from joining or endorsing a Buying Group, including by refusing to provide products or services to a Dental Practice Customer or withholding financial incentives from a

⁸¹² *ITT Cont'l Baking Co. v. FTC*, 532 F.2d 207, 222 n.22 (2d Cir. 1976) (It is "the general rule that voluntary cessation of an illegal practice is no bar to a Commission cease and desist order."); *In re Richard S. Marcus Trading as Stanton Blanket Co.*, 1964 WL 73139, at *10 (FTC 1964) ("In any case of the discontinuance of a practice, the Commission is vested with a broad discretion in the determination of whether the practice has been surely stopped and whether an order to cease and desist is proper."), *rev'd on other grounds*, 354 F.2d 85 (2d. Cir. 1965).

⁸¹³ Paragraph II.A(1)-(4) is modeled after the Final Order, *In re of Toys "R" Us, Inc.*, Docket No. 9278, 1998 WL 34300619, *145 (FTC Oct. 13, 1998) (¶ II) (hereinafter "Toys "R" Us Order"), which was affirmed on appeal upon finding a conspiracy based on similar conduct. *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 930, 939-40 (2000) (affirming Commission's order prohibiting toy manufacturer from, among other things, "entering into, and attempting to enter into any agreement or understanding with any supplier to limit supply or to refuse to sell toys and related products to any toy discounter."). This paragraph is necessary because the record evidence shows that Respondents reached an agreement to refuse to do business with buying groups, including refusing to provide or offer discounts or respond to requests to do business. See *supra* Section II.

⁸¹⁴ Defined in Attachment D, at ¶ I.H.

⁸¹⁵ Paragraph II.A(1) is modeled after the Toys "R" Us Order, which prohibited respondent from entering into any agreement with a supplier to refuse to sell products to a toy discounter. Toys "R" Us Order, at **145 (¶ II.A). The record evidence shows that Respondents reached an agreement to refuse to do business with Buying Groups, including refusing to provide or offer discounts or respond to requests to do business. See *supra* Section II; see also CCF ¶¶ 474-1100.

⁸¹⁶ Defined in Attachment D, at ¶ I.K.

Dental Practice Customer because of its participation or affiliation with a Buying Group;⁸¹⁷ (3) preventing or discouraging an Association⁸¹⁸ from doing business with, endorsing, creating, or partnering with a Buying Group or Distributor,⁸¹⁹ including by withholding advertising or refusing to attend or sponsor the Association's events;⁸²⁰ or (4) preventing or discouraging a Manufacturer⁸²¹ from doing business with Buying Groups, including by withholding or limiting business with a Manufacturer.⁸²²

Paragraph II.B. Requiring Benco, Schein, and Patterson to cease and desist from and be prohibited from inducing, urging, encouraging, assisting, or attempting to induce any Distributor to engage in actions described in Paragraph II.A(1) to (4).⁸²³ Similar provisions designed to prevent future violations were found to be appropriate in conspiracy cases.⁸²⁴

Paragraph II.C. Requiring Benco, Schein, and Patterson to cease and desist from and be prohibited from preventing, discouraging, punishing, or threatening to punish any Association or

⁸¹⁷ Paragraph II.A(2) is modeled after the Toys "R" Us Order, which prevented respondent from pressuring a supplier to limit or withhold products and business from a certain type of customer: toy discounters. Toys "R" Us Order, at **145 (¶ II.B). The record evidence shows that Respondents refused to sell to or provide discounts to a certain type of customer, Buying Groups. See CCFF ¶¶ 17, 34, 408-425, 503, 639, 641, 643-646, 648-649, 743-860, 925-954.

⁸¹⁸ Defined in Attachment D, at ¶ I.F.

⁸¹⁹ Defined in Attachment D, at ¶ I.N.

⁸²⁰ Paragraph II.A(3) is necessary because the record evidence shows that Respondents withdrew sponsorships and attendance at meetings of the Texas Dental Association and Arizona Dental Association after learning that both were creating statewide Buying Groups. See *supra* Section I.I, II.H; see also CCFF ¶¶ 1109-1158.

⁸²¹ Defined in Attachment D, at ¶ I.P.

⁸²² Paragraph II.A(4) is modeled after the Toys "R" Us Order, which prevented respondent from pressuring a supplier to limit or withhold products and business from a toy discounter. Toys "R" Us Order, at **145 (¶ II.B). The record evidence shows that Benco Dental Supply Co. attempted to expand the conspiracy by recruiting other industry participants. See CCFF ¶¶ 1199-1252.

⁸²³ Paragraph II.B is modeled after the Final Order, *In re N.C. Bd. of Dental Exam'rs*, Docket No. 9343, 2011 WL 11798463, *41 (FTC Dec. 2, 2011) (hereinafter "NC Dental Order") (¶ II.G), which prohibited the respondents from urging, encouraging, assisting, or attempting to induce any person, other than the respondents, from engaging in any action that was prohibited by the order. See also Toys "R" Us Order, at **145 (II.D). This paragraph is necessary because the record evidence shows that Benco attempted to expand the conspiracy by recruiting other Distributors. See *supra* Section V; see also CCFF ¶¶ 1199-1252.

⁸²⁴ *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 939-40 (2000) (validating provision in Commission's order prohibiting toy manufacturer from "[u]rging, inducing, coercing, or pressuring, or attempting to urge, induce, coerce, or pressure, any supplier to limit supply or to refuse to sell toys and related products to any toy discounter" because, among other things, "the FTC is not limited to restating the law in its remedial orders . . . [and its orders] can restrict the options for a company that has violated § 5, to ensure that the violation will cease and competition will be restored").

Manufacturer that wants to join, sponsor, partner with, or conduct business a with Buying Group.⁸²⁵

Paragraph II.D. Requiring Benco, Schein, and Patterson to cease and desist from and be prohibited from Communicating⁸²⁶ Business Information⁸²⁷ regarding any Buying Group to a Distributor, or requesting, encouraging, or facilitating the communication of Business Information regarding any Buying Group between or among Distributors.⁸²⁸ As set forth in detail above, the exchange of non-public information between executives of the Big Three is the unlawful conduct at issue. The Court may not only prohibit the unlawful conduct it finds existed, but may issue a remedy that “close[s] all roads to the prohibited goal.”⁸²⁹

Paragraph II.E. Specifying that for avoidance of doubt, nothing in the Proposed Order prohibits Respondents from unilaterally deciding not to enter into any agreement or negotiate with any Buying Group, Dental Practice Customer, Association, or Manufacturer so long as the conduct does not violate Paragraphs II.B, II.C, and II.D of the Proposed Order.

Paragraph III. Requiring Benco, Schein, and Patterson to each maintain an antitrust compliance program that sets forth the policies and procedures Respondent has implemented to comply with the Court’s order, including designating an antitrust compliance officer, providing training, establishing procedures to enable certain individuals to ask questions about and report

⁸²⁵ Paragraph II.C is necessary because the record evidence shows that Respondents withdrew sponsorships and attendance at meetings of the Texas Dental Association and Arizona Dental Association after learning that both were creating statewide Buying Groups. *See supra* Section I.I, Section II.H; *see also* CCFF ¶¶ 1138-1146, 1156-1158. Paragraph II.C is modeled after the Toys “R” Us Order, which prevented respondent from pressuring a supplier to limit or withhold products and business from a certain type of customer: toy discounters. Toys “R” Us Order, at **145 (¶ II.B).

⁸²⁶ Defined in Attachment D, at ¶ I.I.

⁸²⁷ Defined in Attachment D, at ¶ I.G.

⁸²⁸ Paragraph II.D is necessary because the record evidence shows that Respondents engaged in repeated inter-firm communications and exchanged non-public, strategic information with their competitors to reach a prohibited agreement not to sell to or discount to Buying Groups. *See supra* Section I.F-I.I, Section II; *see also* CCFF ¶¶ 474-1100, 1109-1158.

⁸²⁹ *In re PolyGram Holding, Inc.*, Docket No. 9298, 2003 WL 25797195, at *29 (FTC July 24, 2003) (final order) (hereinafter “PolyGram Order”) (quoting *Ruberoide*, 343 U.S. at 473).

violations of the order without fear of retaliation, and establishing policies to discipline certain individuals who fail to comply with the order or the applicable laws.⁸³⁰

Paragraph IV. Requiring Benco, Schein, and Patterson to separately and individually file verified written reports, including an interim report, annual reports for four years,⁸³¹ and additional compliance reports as the Commission may request after an order is issued, which set forth in detail that Benco, Schein, and Patterson each intends to, is complying, and has complied with the Order.⁸³² Benco, Schein, and Patterson are also required to provide documentation of

⁸³⁰ Paragraphs III.A-D are modeled after other Commission Part 3 orders that required distribution of the order to educate and inform relevant individuals of their responsibilities to comply with the order. *See* NC Dental Order, at *41-42 (¶ III); Final Order, *In re N. Tex. Specialty Physicians*, Docket No. 9312, 2005 WL 6241023, **37 (FTC Nov. 29, 2005) (hereinafter “North Texas Specialty Physicians Order”), modified 2008 WL 4235322 (FTC Sept. 12, 2008); *see also* Decision and Order, *In re Ferrellgas Partners, L.P.*, Docket No. 111-0195, 2015 WL 13021965, *14-15 (FTC Jan. 7, 2015) (requiring antitrust compliance program, specified in ¶ III) (hereinafter “Ferrellgas Partners Order”). Paragraph III similarly seeks an effective and efficient manner by which to inform and educate those within the scope of the Proposed Order of their compliance responsibilities.

⁸³¹ Compliance reporting serves to notify the Commission that a respondent is complying with its obligations. The period of such obligations should be long enough to cover all affirmative obligations and ensure that a respondent has and will continue to comply with the order’s prohibitions. Since this Proposed Order is prohibitory, a total four-year reporting requirement is sufficient to ensure that Respondents understand and are complying with their obligations under the Proposed Order. *See* Toys “R” Us, at *146 (ordering 20-year term for annual reporting). *See also* NC Dental Order, at 42 (requiring annual reporting for 3 years); North Texas Specialty Physicians Order, at **38 (requiring annual reporting for 3 years).

⁸³² Paragraph IV is standard in FTC Part 3 orders. *See, e.g.,* NC Dental Order, at *42 (¶ IV); Toys “R” Us Order, at **146 (¶ IV); North Texas Specialty Physicians Order, at **38 (¶ IV.E). Certain provisions of Paragraph IV are modeled after the Ferrellgas Partners Order. Ferrellgas Partners Order, at *14-15 (¶ III.B).

certain communications prohibited by the Proposed Order as part of its verified written reports.⁸³³

Paragraph V. Requiring Benco, Schein, and Patterson to notify the Commission prior to certain changes in its corporate structure that may alter or affect the entities within Respondent that are best able to comply with the order.⁸³⁴

Paragraph VI. Requiring Benco, Schein, and Patterson to permit access to any duly authorized representative of the Commission, upon request and notice and under specified conditions, to its facilities to inspect and copy certain business or other records related to compliance with this order, and to interview officers, directors, or employees of Respondents regarding such matters in order to determine or secure compliance with the order.⁸³⁵

Paragraph VII. An order duration of 15 years, which does not exceed the 20-year term provided in the Policy Statement Regarding Duration of Competition and Consumer Protection Orders, 60 Fed. Reg. 42569 (Aug. 16, 1995).⁸³⁶

⁸³³ Documentation of certain communications, set forth in Paragraph IV.B(4)-(6), is necessary because the record evidence shows a high-level of inter-firm communications between or among competitor Respondents exchanging non-public, strategic information regarding Buying Groups, which facilitated and formed the unlawful agreement, as well as intrafirm communications discussing those exchanges between or among competitor Respondents. *See supra* Section I.F-I.I, Section II; *see also* CCFF ¶¶ 474-1158, 1178-1198. Paragraph IV.B(4)-(6) is modeled after the NC Dental Order, which required respondents to file copies of the communications prohibited under the order. NC Dental Order, at *42 (¶ IV.B); *see also* Toys “R” Us Order, at **146 (¶ IV.B). Paragraph IV.B(4)-(6) does not require filing copies of communications, and only requires inclusion of a narrative as part of written reports demonstrating compliance with the Proposed Order. The Office of the Texas Attorney General entered similar final judgements against Benco, Patterson, and Schein, which required each respondent to maintain and furnish a detailed log of communications with their competitors to the State for a period of time. CCFF ¶¶ 1159-1161, 1163-1164. The orders stopping the conduct at issue are either no longer in effect or are reaching the end of its term. Benco and Patterson are no longer under that requirement, as the term of those orders have expired. CCFF ¶¶ 1160-1161, 1164. Schein remains under its requirement to furnish communication logs for just a few more months, as the requirement ceases in or around August 2019. CCFF ¶1163.

⁸³⁴ *See* North Texas Specialty Physicians Order, at **38 (¶ IV.F).

⁸³⁵ Paragraph VI has been included in previous Commission orders, and it is modeled after the Final Order, *In re ProMedica Health System, Inc.*, Docket No. 9346, 2012 WL 2450574, at *18 (FTC Mar. 22, 2012) (hereinafter “ProMedica Order”). *See also* Polypore Order, at *63 (¶ XII); North Texas Specialty Physicians Order, at **38 (¶ VI); NC Dental Order, at *42-43 (¶ VI).

⁸³⁶ *See, e.g.*, NC Dental Order, at *43 (setting order term of 20 years).

CONCLUSION

Because the evidence establishes that Respondents have violated Section 5 of the FTC Act, as alleged in the Complaint, this Court should enter the Proposed Order, attached as Attachment D, to ensure Respondents cannot engage in anticompetitive conduct.

Respectfully submitted,

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ATTACHMENT A

ATTACHMENT A

TIMELINE OF KEY EVENTS

2011-2014

Pre-2011 Schein did business with BGs. (CCFF ¶¶ 441-444).

Feb. 1 2011 - 3 calls between Cohen & Sullivan.* (CCFF ¶¶ 328-330)

Feb. 9, 2011 - 3 texts between Cohen & Sullivan. (CCFF ¶¶ 349-350).

Feb. 14, 2011 - 2 calls & 2 texts between Cohen & Sullivan. (CCFF ¶¶ 331-332, 349-350).

Feb. 23, 2011 - Sullivan “very excited” about Schein’s future with a buying group and the buying group’s “business model.” (CCFF ¶ 696).

Mar. 21, 2011 - 3 texts between Cohen & Sullivan. (CCFF ¶¶ 349-350).

Mar. 24 2011 - 2 texts between Cohen & Sullivan. (CCFF ¶¶ 349-350).

July 17, 2011 - Sullivan: “**I don’t think you will ever see a full service dealer get involved with GPOs.**” (Emphasis added) (CCFF ¶ 705).

Sept. 25, 2011 - Schein declines Academy of General Dentistry buying group. (CCFF ¶¶ 935, 936).

Oct. 10-13, 2011 - Meeting(s) between Cohen & Sullivan. (CCFF ¶¶ 380,381).

Oct. 14, 2011 - 2 calls between Cohen & Sullivan and 1 text from Cohen: “good to talk today” (CCFF ¶¶ 335, 336, 349-350)

Nov. 2, 2011 - Cohen & Sullivan in-person meeting. (CCFF ¶ 386).

Nov. 3-9, 2011 - 6 calls between Cohen & Sullivan. (CCFF ¶¶ 337-339, 340, 342, 344).

Dec. 7, 2011 - Sullivan: “I am still of position that **we do NOT want to lead in getting this initiative started in dental.** I think that it is a very slippery slope.” (Emphasis added) (CCFF ¶ 709) .

Dec. 21, 2011 - Schein: “[W]e **no longer participate in Buying Groups.**” (Emphasis added) (CCFF ¶ 719).

Dec. 22, 2011 - Schein: “[W]e **don’t want to be the first company to open the floodgates to the dangerous world of GPOs.**” (Emphasis added) (CCFF ¶ 713).

2011

* Calls listed lasted longer than 30 seconds. Additional calls occurred in 2011 that were shorter in length.

Jan. 11, 2012 - **Benco confronts Schein about suspicion that the latter is working with a buying group.** Benco's Ryan forwards email to Cohen about buying group Unified Smiles: "**For Timmy [Sullivan] conversation.**" (Emphasis added) (CCFF ¶ 958).

Jan. 13, 2012 - Cohen confirms he will speak to Sullivan about Unified Smiles: "Talking this AM..." (CCFF ¶ 967).

Jan. 13, 2012 - Prior to call with Sullivan, Cohen sends internal email affirming Benco's no buying group policy. (CCFF ¶ 972).

Jan. 13, 2012 - Call between Cohen and Sullivan for 11 minutes. (CCFF ¶ 968).

Feb. 2, 2012 - Sullivan: "more [concerned] about what we can do to **KILL the buying group model!!**" (Emphasis added) (CCFF ¶ 729).

Feb. 20, 2012 - Schein: "**we have a few buying groups (BG) that we wish we didn't have...** this is a corporate decision, not to participate in [BGs]." (Emphasis added) (CCFF ¶ 754).

July 17, 2012 - Schein: engaging a buying group is "**against what Tim Sullivan has directed us to do...**" (Emphasis added) (CCFF ¶ 773) .

July 25, 2012 – Benco's Ryan to Cohen about Schein working with Smile Source: "**Better tell your buddy Tim [Sullivan] to knock this shit off.**" (Emphasis added) (CCFF ¶ 982).

July 25, 2012 - Cohen to Ryan: "Please resend this e-mail without your comment on top so that **I can print & send to Tim [Sullivan] with a note.**" (CCFF ¶ 990).

- Pre- 2013 - Patterson did not have a buying group policy. (CCFF ¶¶ 499, 627).
- Feb. 8, 2013 - Cohen sends Guggenheim information about Patterson deal with NMDC buying group: “Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups.” (CCFF ¶ 483) .
- Feb. 8, 2013 - Guggenheim responds: “I’ll investigate the situation. **We feel the same way about these.**” (Emphasis added) (CCFF ¶ 495).
- Feb. 11, 2013 - Patterson ends negotiations with NMDC. (CCFF ¶ 503).
- Feb. 23, 2013 - Benco: “**all of the major dental companies have said, ‘NO’ [to GPOs] and that’s the stance we will continue to take.**” (Emphasis added) (CCFF ¶ 527).
- Feb. 26, 2013 - Cohen to Benco manager: “I just sent [Guggenheim] a note about it. Don’t want to call because it might be construed as price fixing.” (CCFF ¶ 513).
- Feb. 27, 2013 - Patterson: “**our 2 largest competitors stay out of [buying groups] as well.**” (Emphasis added) (CCFF ¶ 549).
- Feb. 27, 2013 - Patterson: “I’m concerned that **Benco and Schein sneak into these co-op bids and deny it.**” (Emphasis added) (CCFF ¶ 540).
- Mar. 25, 2013 - Cohen creates a calendar entry to call Sullivan about buying groups to determine whether Benco should bid on potential buying group called Atlantic Dental Care (“ADC”). (CCFF ¶¶ 1026, 1028).
- Mar. 25, 2013 - Call between Cohen and Sullivan for 8 minutes regarding ADC. Cohen tells Sullivan Benco will not bid for ADC. (CCFF ¶¶ 1032, 1034, 1039, 1040).
- Mar. 26, 2013 - Cohen texts Sullivan a link to an ADC article; Sullivan responds: “Thanks for the follow up on that article. Unusual.” (CCFF ¶ 1047).
- Mar. 26, 2013 - Cohen confronts Sullivan about Schein working with buying group Dental Alliance. “**Could be a rumor, sometimes stories go around. Thanks.**” (Emphasis added) (CCFF ¶ 997).
- Mar. 27, 2013 - Cohen texts Sullivan to explain why ADC is not a buying group: “**So it’s not a buying group, it’s a big group. We’re going to bid.**” (Emphasis added) (CCFF ¶ 1069).
- Mar. 27 to Apr. 3, 2013 - 6 calls between Cohen & Sullivan. (CCFF ¶¶ 998, 1079, 1080, 1088).
- Jun. 6, 2013 - **Guggenheim confronts Cohen about suspicion that Benco is discounting to a buying group: “I’m wondering if your position on buying groups is still as you articulated back in February?”** (Emphasis added) (CCFF ¶ 570).

Jun. 8, 2013 - Cohen responds to Guggenheim: “As we've discussed, we don't recognize buying groups.” Cohen explains why ADC is not a buying group. (CCFF ¶ 575).

Jun. 10, 2013 - Guggenheim sends Cohen’s February 6 email to Patterson branch manager, and instructs salesforce to “aggressively get after [ADC’s] business and compete.” (CCFF ¶ 586).

Jun. 18, 2013 - 2 calls between Cohen & Sullivan. (See CCFF ¶ 351).

Jun. 18, 2013 - 2 calls between Cohen & Guggenheim. (See CCFF ¶ 352).

Jun. 20-21, 2013 - 2 calls between Cohen & Guggenheim. (See CCFF ¶ 352).

Aug. 3, 2013 - Patterson: “**Schein, Benco, and Patterson have always said no.** I believe it is our duty to uphold this and protect this great industry.” (Emphasis added) (CCFF ¶ 603).

Sept. 4, 2013 - Patterson internal memo establishes Special Markets - “definition will not include group purchasing organizations (GPOs).” (CCFF ¶ 611).

Sept. 16, 2013 - Ryan to Cohen: “maybe what you should do is **make sure you tell [Sullivan] and [Guggenheim] to hold their positions as we are.**” (Emphasis added) (CCFF ¶ 1103).

Sept. 24, 2013 - Benco's Ryan suspects Schein may be working with Smile Source. (CCFF ¶¶ 1006-1008).

Oct. 1, 2013 - Ryan calls Schein's Foley for 18 minutes re Smile Source. Tells Foley Benco is not going to bid on Smile Source, asks if Schein will bid. (CCFF ¶¶ 1009-1011).

Oct. 1, 2013 - TDA creates buying group program, TDA Perks Supplies. (CCFF ¶ 1110).

Oct. 9, 2013 - Foley: “**Next time we talk remind me to tell you about my conversation with Pat Ryan at SM Benco. They’re anti Buying Group and Smile Source recently reached out to them.** I’m being careful not to cross any boundaries, like collusion.” (Emphasis added) (CCFF ¶ 1017).

Oct. 15-18, 2013 - Cohen, Sullivan, and Guggenheim attend the DTA annual meeting. (CCFF ¶ 364).

Jan. 6, 2014 - Misiak (VP of Sales, Patterson) calls Steck (VP of Sales, Schein) for 14 minutes about attendance at TDA trade show in response to TDA buying group. (CCFF ¶¶ 1124-1126).

Jan. 21, 2014 - Steck emails Misiak about attendance at the TDA trade show. (CCFF ¶ 1130).

Jan. 27, 2014 - Benco's Ryan to Cohen: "Talked to [Smile Source] three times. Nothing is different. **Randy at Schein and I talked specifically about them. Buh-bye.**" (Emphasis added) (CCFF ¶ 1014).

Mar. 5, 2014 - Schein: "**The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums.**" (Emphasis added) (CCFF ¶ 1138).

Apr. 16, 2014 - Cohen emails Sullivan & Guggenheim about the TDA buying group. (CCFF ¶ 1133).

Apr. 16, 2014 - 1 call between Cohen & Sullivan. (CCFF ¶ 1135).

Apr. 22, 2014 - Guggenheim creates a task scheduler to call Cohen Re: TDA Perks letter. (CCFF ¶ 1136).

May 1, 2014 - Neither Benco, Schein, nor Patterson attend TDA trade show. (CCFF ¶¶ 1142, 1144, 1145).

Jun. 12, 2014 - Patterson to a potential buying group: "**[W]e've signed an agreement that we won't work with GPO's.**" (Emphasis added) (CCFF ¶ 657).

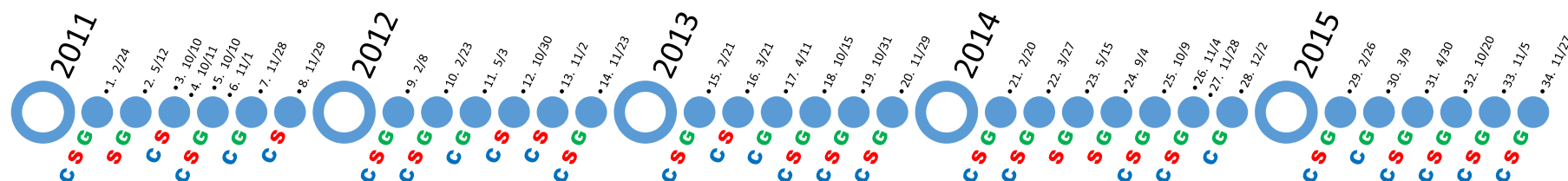
ATTACHMENT B

Industry and Personal Meetings of the BIG THREE

C = Chuck Cohen, Benco

S = Tim Sullivan, Henry Schein

G = Paul Guggenheim, Patterson



1. Chicago Mid-Winter Trade Show; CCFF ¶ 358
2. California Dental Assn. Trade Show; CCFF ¶ 378
3. Dental Trade Alliance Found. BOD; CCFF ¶ 379
4. Party; CCFF ¶ 381
5. American Dental Assn. Meeting; CCFF ¶ 380
6. Dental Trade Alliance Meeting; CCFF ¶ 363
7. Meeting at Benco's HQ; CCFF ¶ 382
8. Confidential Breakfast; CCFF ¶ 383
9. Dentsply Trade Show; CCFF ¶ 376
10. Chicago Mid-Winter Trade Show; CCFF ¶ 359
11. California Dental Assn. Trade Show; CCFF ¶ 384

12. Dental Trade Alliance Meeting; CCFF ¶ 385
13. Dental Trade Alliance Breakfast; CCFF ¶ 386
14. Greater NY Dental Trade Show; CCFF ¶ 369
15. Chicago Mid-Winter Trade Show; CCFF ¶ 360
16. Hinman Dental Trade Show; CCFF ¶ 387
17. California Dental Assn. Trade Show; CCFF ¶ 388
18. Dental Trade Alliance Meeting; CCFF ¶ 364
19. American Dental Assn. Meeting; CCFF ¶ 373
20. Greater NY Dental Trade Show; CCFF ¶ 370
21. Chicago Mid-Winter Trade Show; CCFF ¶ 361
22. Hinman Dental Trade Show; CCFF ¶ 377
23. California Dental Assn. Trade Show; CCFF ¶ 389

24. California Dental Assn. Trade Show; CCFF ¶ 390
25. American Dental Assn. Meeting; CCFF ¶ 374
26. Dental Trade Alliance Meeting; CCFF ¶ 367
27. Greater NY Dental Trade Show; CCFF ¶ 371
28. Lunch; CCFF ¶ 391
29. Chicago Mid-Winter Trade Show; CCFF ¶ 362
30. Meeting; CCFF ¶ 392
31. California Dental Assn. Trade Show; CCFF ¶ 393
32. Dental Trade Alliance Meeting; CCFF ¶ 368
33. American Dental Assn. Meeting; CCFF ¶ 375
34. Greater NY Dental Trade Show; CCFF ¶ 372

ATTACHMENT C

ATTACHMENT C

Schein Complied with the Agreement by Rejecting Buying Groups**2011**

- July 17, 2011, **Tim Sullivan**, President of Schein, informed other Schein executives: “I don’t think you will ever see a full service dealer get involved with GPOs.” (CCFF ¶ 705).
- December 7, 2011, **Sullivan** told his employees that he did “NOT want to lead in getting [buying groups] started in dental.” He explained that buying groups were “a very slippery slope.” (CCFF ¶ 709).
- December 22, 2011, **Sullivan**, told Western Zone Manager Joe Cavaretta that he did not want to “be the first company to open the floodgates to the dangerous world of GPOs.” (CCFF ¶ 713).
- December 21, 2011, Randy Foley, Director of Sales for Special Markets, rejected buying group Unified Smiles, stating: “[U]nless you have some ‘ownership’ of your practices Henry Schein considers your business model as a Buying Group, and we no longer participate in Buying Groups.” (CCFF ¶ 719).
- Late 2011, Schein’s Vice President of Sales, Dave Steck wrote to his boss **Sullivan** regarding Florida Dental Association: “This is the classic ‘buying group’ approach that we aren’t buying into.” (CCFF ¶ 747).

2012

- January 26, 2012, Cavaretta wrote to two sales representatives: “It is dangerously close but I told him we would not do business with a GPO.” (CCFF ¶ 750).
- February 2, 2012, **Sullivan** wanted to know “what we can do to KILL the buying group model!!” (CCFF ¶ 729).
- February 20, 2012, Foley, referring to a conversation with **Sullivan**, wrote to his direct report, Strategic Account Manager Debbie Torgersen-Foster: “Honestly, within Schein we have a few buying groups (BG) that we wish we didn’t have . . . So, this is a corporate decision, not to participate in these.” (CCFF ¶ 754).
- February 21, 2012, Torgersen-Foster sent a presentation to her boss, Foley, based on emails and documents Foley had sent her, “Definition of a Buying Group: NEITHER SM [Special Markets] NOR HSD WOULD TAKE ON: An organization of group [o]f dentists that get together to leverage better pricing from a distributor . . .” (CCFF ¶ 761).
- March 28, 2012, Cavaretta to Regional Manager: “I want to avoid a GPO situation.” (CCFF ¶ 766).

- April 10, 2012, Torgersen-Foster to Foley: “Neither HSD or [sic] Special Markets will participate in buying groups of any kind.” Foley later responded in the same email chain, and told his direct reports: “We get a lot of these requests and have to say no. Did a few and it only led to issues.” (CCFF ¶ 767, 769).
- June 8, 2012, Regional Account Manager Andrea Hight wrote to her boss, Foley: “I explained that we do not accommodate GPOs” (CCFF ¶ 771).
- July 17, 2012, Northwest Zone Manager Jake Meadows wrote to his direct report: “I have to tell you Ron and Dan made a decision that is against what **Tim Sullivan** has directed us to do in regards to supporting Buying groups. We do not want our customers organizing and creating what are known as GPOs it takes the value away from the distributor.” (CCFF ¶ 773).
- September 24, 2012, field sales consultant wrote to Cavaretta: “Everyone keeps saying we don’t do GPO’s.” (CCFF ¶ 782).
- September 24, 2012, Cavaretta to field sales consultant: “The Co-op [Dental Co-op of Utah, a buying group] is exactly what we are trying to avoid.” (CCFF ¶ 783).
- September 24, 2012, Hight to three sales representatives: “We need to make sure they are clear we don’t do GPOs as that subject keeps coming up.” (CCFF ¶ 784).

2013

- May 29, 2013, Cavaretta wrote to two Schein employees: “We try to avoid buying groups at all costs and therefore don’t really recognize them.” (CCFF ¶ 785).
- December 20 2013, Foley told his counterpart at Colgate, one of Schein’s manufacturer partners: “It’s a buying group that we do not participate with, as with all buying groups.” (CCFF ¶ 788).

2014

- June 10, 2014, Cavaretta to Kathleen Titus, Director of Group Practices, Western Area: “GPOs are popping up like crazy so it is nice when we can shut one down” (CCFF ¶ 790).
- July 16, 2014, Titus to Cavaretta and Regional Managers Glenn Showgren and Brian Brady: “I [spoke with] Joe about the [buying group] agreement. **[Sullivan]** was not in favor of it.” (CCFF ¶ 795).
- July 17, 2014, Kathleen Titus wrote to Showgren and Zone Manager Kevin Upchurch: “We had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. . . It went to **[Sullivan]** and he shot it down. I think the meta msg is officially, GPO’s are not good for Schein.” (CCFF ¶ 799).

- July 18, 2014, Upchurch told Titus and Cavaretta: “From [Sullivan], HSD does not want to enter the GPO world.” (CCFF ¶ 806).
- August 29, 2014, Titus to Cavaretta: “It doesn’t help to have a GPO policy if [Special Markets] is opening up these consulting firms.” (CCFF ¶ 808).
- September 8, 2014, Sullivan wrote: “I still believe [buying groups are a] slippery slope . . . and don’t plan to take the lead role.” (CCFF ¶ 809).
- September 14, 2014, Foley to Muller, President of Schein’s Special Markets: “As with other buying groups we continue to say no (at least try to).” (CCFF ¶ 810).
- October 8, 2014, Regional Manager to Titus: “I recently had a conversation with Kathleen regarding this group and they are nothing more than a GPO. It is my understanding that this violates our policy as we do not engage with GPOs.” (CCFF ¶ 811, 812).
- October 25, 2014, Meadows wrote to Jeff Reichardt, a Zone Manager: “Do not forward. Quick note. I’ve received a few [field sales consultant] phone calls over the last few weeks regarding group purchasing organizations (GPO). Just for clarity, we are NOT participating in any GPOs regardless of what they promise to bring us. We can discuss on Monday [Eastern Area] call.” (CCFF ¶ 816).
- November 5, 2014, Meadows wrote to Robert Anderson III, a Regional Manager: “We do not currently participate with GPOs nor do we want to, we will address these issues as they come up but it’s important to continue pointing the team towards business solutions and individual relationships.” (CCFF ¶ 828).
- November 12, 2014, Cavaretta to Regional Manager: “I haven’t heard anything but at this point we are not playing in the GPO space.” (CCFF ¶ 835).
- November 10, 2014, Foley told his boss, Muller: “I also got an email from Tralongo, another growing BG that we said no to.” (CCFF ¶ 942).
- December 15, 2014, Foley told Schein sales employees, referring to Tralongo: “It’s a buying group so we walked away from them—did not bid on the business.” (CCFF ¶ 945).
- December 18, 2014, Foley told Schein employee Daniel Hobson: “This a buying group so we declined to bid (Rhonda declined at my direction).” (CCFF ¶ 944).

2015

- January 7, 2015, Muller to his boss, Jim Breslawski, Chairman and CEO of Henry Schein, Inc. and Sullivan: “Buying Groups: Do we keep saying no?” (CCFF ¶ 839).

- July 1, 2015, **Sullivan** to Cavaretta: “The Dec ‘offsite’ last year I left with a goal to see if we could get Hal [Muller] to shut [Dental Gator] down” (CCFF ¶ 836).
- November 3, 2015, Meadows to Cavaretta: “[**Sullivan**] was going off about how we do not have any buying group agreements and that we will not do them. Soap boxing about HSD and buying groups.” (CCFF ¶ 850).
- November 3, 2015, **Sullivan** wrote: “I had just informed Hal (and team) that we do not have plans to open up new Buying Groups” (CCFF ¶ 841).

ATTACHMENT D

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

In the Matter of

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

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

**PATTERSON COMPANIES, INC.
a corporation.**

DOCKET NO. 9379

[PROPOSED] ORDER

I.

IT IS ORDERED that the following definitions shall apply:

- A. “Benco Dental Supply Co.” means Benco Dental Supply Co., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Benco Dental Supply Co., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Henry Schein, Inc.” means Henry Schein, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Henry Schein, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Patterson Companies, Inc.” means Patterson Companies, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Patterson Companies, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. “Respondents” means Benco Dental Supply Co., Henry Schein, Inc., and Patterson Companies, Inc., individually and collectively.¹
- E. “Antitrust Laws” means the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 et seq., the Sherman Act, 15 U.S.C. § 1 et seq., and the Clayton Act, 15 U.S.C. § 12 et seq.

- F. “Association” means a dental trade association, state dental association, or other professional dental association.²
- G. “Business Information” means, with respect to information regarding Buying Groups, information regarding a Distributor’s (including Respondents’) manner of doing business with a Buying Group, including business and strategic plans, marketing, sales, pricing, pricing and sales strategy, costs, revenues, margins, marketing, and customer information.³
- H. “Buying Group” means a buying club, buying cooperative, buying co-op, group purchasing organization (GPO) or other entity whose members are independent and separately owned and managed dental practices, that negotiates terms for the sale of Dental Products and Dental Services by Distributors or Manufacturers to its members, and which holds itself out as seeking to aggregate and leverage the collective purchasing power of separately owned and separately managed dental practices in exchange for lower prices on Dental Products and Dental Services.⁴
- I. “Communicate” or “Communicating” means exchanging, transferring, or disseminating any information, without regard to the means by which it is accomplished.⁵
- J. “Communication” means any information exchange, transfer, or dissemination, without regard to the means by which it is accomplished, including, without limitation, orally, telephonically, or by mail, e-mail, notice memorandum, text message, or other electronic transmission.⁶
- K. “Dental Practice Customer” means any dental practice that does business in the United States and purchases Dental Products or Dental Services (regardless of size, ownership, or corporate structure).⁷
- L. “Dental Products” means all products, supplies, materials, equipment, and other items used in the provision of dental services by a dentist, dental practice, or any Dental Services business or clinic.⁸
- M. “Dental Services” means any repair, warranty support, business, technical, design or administrative services, or any other ancillary or incidental services used by a dentist, dental practice, or any Dental Services business or clinic.⁹
- N. “Distributor” means any business other than a Buying Group who purchases Dental Products and Dental Services for resale and distribution to Dental Practice Customers. Respondents are included in the definition of Distributor.¹⁰
- O. “Executive and Sales Staff” means Respondents’ officers, directors, and employees whose job responsibilities include, in whole or in part, (i) the sale or pricing of Dental Products or Dental Services or (ii) communications with Distributors or Manufacturers.¹¹
- P. “Manufacturer” means an entity that manufactures Dental Products for sale to Dental Practice Customers.¹²

II.

IT IS FURTHER ORDERED that Respondents, directly or indirectly, or through any corporate or other device, in connection with the sale of Dental Products and Dental Services in

or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from and are prohibited from:¹³

- A. Entering into or participating in an agreement or understanding, whether express or implied, with a Distributor relating to: ¹⁴
 - 1. Conducting business with a Buying Group, including providing or offering discounts or rebates, responding to solicitations, or refusing to do business;¹⁵
 - 2. Preventing or discouraging any Dental Practice Customer from joining or endorsing a Buying Group, including by refusing to provide certain Dental Products or Dental Services to a Dental Practice Customer, or withholding financial incentives, including discounts or rebates, to a Dental Practice Customer because of such Dental Practice Customer’s participation in or affiliation with a Buying Group;¹⁶
 - 3. Preventing or discouraging an Association from doing business with, endorsing, creating, or partnering with a Buying Group or Distributor, including by withholding advertising or refusing to attend or sponsor the Association’s seminars, meetings, or other events;¹⁷ or
 - 4. Preventing or discouraging a Manufacturer from doing business with a Buying Group, including by withholding or limiting business with the Manufacturer.¹⁸
- B. Inducing, urging, encouraging, assisting, or attempting to induce any Distributor to engage in the actions described in Paragraph II.A(1) to (4).¹⁹
- C. Preventing, discouraging, punishing, or threatening to punish any Association or Manufacturer that wants to join, sponsor, partner with, or conduct business with a Buying Group.²⁰
- D. Communicating Business Information regarding Buying Groups (including but not limited to, a Distributor’s willingness to do business with a Buying Group) to a Distributor, or requesting, encouraging, or facilitating the Communication of Business Information regarding a Buying Group between or among Distributors.²¹
- E. For avoidance of doubt, nothing in this Order shall prevent Respondents from unilaterally deciding not to enter into any agreement or negotiate with any Buying Group, Dental Practice Customer, Association, or Manufacturer so long as the conduct does not violate Paragraphs II.B, II.C, and II.D of this Order.

III.

IT IS FURTHER ORDERED that Benco Dental Supply Co., Henry Schein, Inc., and Patterson Companies, Inc. shall each maintain an antitrust compliance program that sets forth the policies and procedures each Respondent has implemented to comply with this Order and with the Antitrust Laws. In connection with this program, each Respondent, Benco Dental Supply Co., Henry Schein, Inc., and Patterson Companies, Inc., shall:²²

- A. Designate an antitrust compliance officer to supervise the design, maintenance, and operation of its program;²³

- B. Provide training regarding Respondent's obligations under this Order and the Antitrust Laws as follows:²⁴
 - 1. No later than 60 days after the Order becomes final, provide training regarding Respondent's obligations under the Order to Respondent's Executive and Sales Staff, or for an employee hired or promoted to Executive and Sales Staff, within 30 days of their employment start date; and
 - a. At least annually for the term of the Order.
- C. Establish a procedure to enable Respondent's Executive and Sales Staff to ask questions about, and report violations of, this Order and the Antitrust Laws confidentially and without fear of retaliation of any kind;²⁵ and
- D. Establish policies to discipline Respondent's Executive and Sales Staff who fail to comply with this Order and the Antitrust Laws.²⁶

IV.

IT IS FURTHER ORDERED that Respondents shall file verified written reports ("compliance reports") in accordance with the following:²⁷

- A. Benco Dental Supply Co., Henry Schein, Inc., and Patterson Companies, Inc. shall separately and individually submit an interim compliance report 60 days²⁸ after the Order is issued, a compliance report one year after the date this Order is issued, and annual compliance reports²⁹ for the next 4 years³⁰ on the anniversary of that date; and additional compliance reports as the Commission or its staff may request;³¹
- B. Each compliance report shall set forth in detail the manner and form in which submitting Respondent, Benco Dental Supply Co., Henry Schein, Inc., or Patterson Companies, Inc., intends to comply, is complying, and has complied with this Order. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether submitting Respondent, Benco Dental Supply Co., Henry Schein, Inc., or Patterson Companies, Inc., is in compliance with the Order. Conclusory statements that the submitting Respondent has complied with its obligations under the Order are insufficient.³² Benco Dental Supply Co., Henry Schein, Inc., and Patterson Companies, Inc. shall each include in its individual reports, among other information or documentation that may be necessary to demonstrate compliance:³³
 - 1. A full description of the substance and timing of all measures it has implemented or plans to implement to ensure that it has complied or will comply with each paragraph of the Order;
 - 2. The name and title of its designated antitrust compliance officer, as required by Paragraph III.A above;
 - 3. A description of all trainings it has conducted in compliance with Paragraph III.B above (excluding trainings described in a prior compliance report);
 - 4. In each compliance report submitted by Benco Dental Supply Co., it shall provide documentation of:³⁴
 - a. Communications between or among:

- i. Any of Benco Dental Supply Co.'s officers, directors, or employees, including the following executives, or their successors: Charles Cohen (Managing Director) and Patrick Ryan (Director, Sales); and
 - ii. Any officer, director, or employee of: (1) Henry Schein, Inc., including the following executives, or their successors: Timothy Sullivan (former President) and David Steck (Vice President and General Manager); and/or (2) Patterson Companies, Inc., including the following executives or their successors: Paul Guggenheim (former President), David Misiak (Vice President, Sales), and Timothy Rogan (Vice President, Marketing). Documentation of such Communication shall identify (name, employer, and job title) the persons involved, the method of communication, the subject matter of the Communication, and its duration; and
 - b. Intra-firm Communications regarding each Communication identified in Paragraph IV.B(4)(a) above, including the name, employer, and job title of all persons involved in the Communication, a description of the subject matter of the Communication, and the duration of the Communication;
5. In each compliance report submitted by Henry Schein, Inc., it shall provide documentation of:³⁵
- a. Communications between or among:
 - i. Any officer, director, or employee of Henry Schein, Inc., including the following executives, or their successors: Timothy Sullivan (former President) and David Steck (Vice President and General Manager); and
 - ii. Any officer, director, or employee of: (1) Benco Dental Supply Co., including the following executives, or their successors: Charles Cohen (Managing Director) and Patrick Ryan (Director, Sales); and/or (2) Patterson Companies, Inc., including the following executives or their successors: Paul Guggenheim (former President), David Misiak (Vice President, Sales), and Timothy Rogan (Vice President, Marketing). Documentation of such Communication shall identify (name, employer, and job title) the persons involved, the method of communication, the subject matter of the communication, and its duration; and
 - b. Intra-firm Communications regarding each Communication identified in Paragraph IV.B(5)(a) above, including the name, employer, and job title of all persons involved in the Communication, a description of the subject matter of the Communication, and the duration of the Communication;
6. In each compliance report submitted by Patterson Companies, Inc., it shall provide documentation of:³⁶
- a. Communications between and among:

- i. Any officer, director, or employee of Patterson Companies, Inc., including the following executives or their successors: Paul Guggenheim (former President), David Misiak (Vice President, Sales), and Timothy Rogan (Vice President, Marketing); and
 - ii. Any officer, director, or employee of: (1) Benco Dental Supply Co., including the following executives, or their successors: Charles Cohen (Managing Director) and Patrick Ryan (Director, Sales); and/or (2) any officer, director, or employee of Henry Schein, Inc., including the following executives, or their successors: Timothy Sullivan (former President) and David Steck (Vice President and General Manager). Documentation of such Communications shall identify (name, employer, and job title) the persons involved, the method of communication, the subject matter of the Communication, and its duration; and
- b. Intra-firm Communications regarding each Communication identified in Paragraph IV.B(6)(a) above, including the name, employer, and job title of all persons involved in the Communication, a description of the subject matter of the Communication, and the duration of the Communication.
- C. Respondents shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov.³⁷

V.

IT IS FURTHER ORDERED that Respondent, Benco Dental Supply, Co., Henry Schein, Inc., or Patterson Companies, Inc., shall notify the Commission at least 30 days prior to:³⁸

- A. Its proposed dissolution;
- B. Its proposed acquisition, merger, or consolidation; or
- C. Any other change in the Respondent, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

VI.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and 5 days' notice to the relevant Respondent, Benco Dental Supply, Co., Henry Schein, Inc., or Patterson Companies, Inc., made to its principal place of business as identified in this Order, registered

office of its United States subsidiary, or its headquarters office, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:³⁹

- A. Access, during business office hours of the respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at the request of the authorized representative of the Commission and at the expense of the Respondent;⁴⁰ and
- B. To interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.⁴¹

VII.

IT IS FURTHER ORDERED that this Order shall terminate 15 years from the date it is issued.⁴²

By the Commission.

April J. Tabor
Acting Secretary

SEAL

ISSUED:

¹ The defined term “Respondents” is modeled after the Final Order, *In re PolyGram Holding, Inc.*, Docket No. 9298, 2003 WL 25797195, at **31 (FTC July 24, 2003) (hereinafter “PolyGram Order”). This is the standard definition for “Respondents” used in Commission orders.

² The purpose of the defined term “Association” is to identify groups that may conduct business with, associate with, or create or form Buying Groups. This definition is necessary because the record evidence shows that Respondents exchanged Business Information regarding Texas Dental Association and Arizona Dental Association, examples of Associations, which created Buying Groups. CCFF ¶¶ 1109-1158.

³ The purpose of the defined term “Business Information” is to identify the type and nature of non-public information shared by competitor Respondents sought to be prohibited in the Proposed Order. This definition is necessary because the record evidence shows that Respondents exchanged non-public, confidential, strategic information regarding Buying Groups. *See* CCFF ¶¶ 474-1100, 1109-1158.

⁴ The purpose of the defined term “Buying Group” is to identify the customer segment that the record evidence shows was the subject of Respondents’ unlawful agreement. *See* CCFF ¶¶ 17, 34, 67-71, 114-145, 474-1158. This defined term is not intended to alter the scope of type of Buying Group described in the Complaint.

⁵ The defined terms “Communicate” or “Communicating” are modeled after the Final Order, *In re N.C. Bd. of Dental Exam’rs*, Docket No. 9343, 2011 WL 11798463, *39 (FTC Dec. 2, 2011) (hereinafter “NC Dental Order”). This is the standard definition for “Communicate” and “Communicating” used in Commission orders.

⁶ The defined term “Communication” is modeled after NC Dental Order, at *39. This is the standard definition for “Communication” used in Commission Orders.

⁷ The purpose of the defined term “Dental Practice Customer” is to identify customers in the Dental Products and Dental Services industry, which forms the basis of prohibitions in Paragraph II of the Proposed Order. This definition is necessary because the record evidence shows that Respondents agreed not to discount to or negotiate with certain Dental Practice Customers. *See* CCFF ¶¶ 10-11, 17, 20, 27, 29, 34, 38-39, 45, 57-113.

⁸ The purpose of the defined term “Dental Products” is to identify the product market and distribution channels relevant to Paragraph II of the Proposed Order. *See* CCFF ¶¶ 7, 12, 20, 24, 27, 39-40, 89-113, 125, 1522.

⁹ The purpose of the defined term “Dental Services” is to identify the product market and distribution channels relevant to Paragraph II of the Proposed Order. *See* CCFF ¶¶ 7, 15, 20, 33, 41, 67-69, 1446-1452, 1462, 1491, 1509, 1522.

¹⁰ The purpose of the defined term “Distributor” is to identify entities that may compete with Respondents in selling, discounting, or doing business with Buying Groups. *See* CCFF ¶¶ 7, 20, 38, 1446, 1491, 1509, 1522. This definition is necessary because the record evidence shows that

Benco Dental Supply Co. attempted to expand the conspiracy by recruiting other Distributors. *See* CCFF ¶¶ 1199-1251.

¹¹ The purpose of the defined term “Executive and Sales Staff” is to specify those individuals subject to the antitrust compliance program detailed in Paragraph III of the Proposed Order. This definition is necessary because the record evidence shows that Respondents’ employees, at various levels ranging from sales representatives to the highest ranking executives, communicated about Buying Groups in furtherance of the conspiracy. *See* CCFF ¶¶ 474-1158. This definition is modeled after the PolyGram Order, at **31.

¹² The purpose of the defined term “Manufacturer” is to identify a distribution channel in the dental industry that may do business with Respondents, Buying Groups, or Dental Practice Customers that may participate in or affiliate with Buying Groups. *See* CCFF ¶¶ 1509. This definition is necessary because the record evidence shows that Respondents exchanged non-public information regarding their Buying Group strategies with Manufacturers and exchanged information regarding Manufacturer-related issues to coordinate or propose collective responses and solutions. *See* CCFF ¶¶ 284-295, 301-306, 788-789.

¹³ Paragraph II is modeled after NC Dental Order, at *40-41 (¶ II). Paragraph II seeks to require Respondents to cease and desist from and prohibit Respondents from future recurrence of the unlawful conduct at issue. *See* Complaint Counsel’s Post-Trial Brief, at Section II. “The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.” *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946); *see also FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952) (“Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past . . . it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity”); *FTC v. Nat’l Lead Co.*, 352 U.S. 419, 428-429 (1957) (“Commission is clothed with wide discretion in determining the type of order that is necessary to bring an end to the unfair practices found to exist.”). Furthermore, even where the unlawful conduct has ceased, “voluntary cessation of an illegal practice is no bar to a Commission cease and desist order.” *ITT Cont’l Baking Co. v. FTC*, 532 F.2d 207, 222 n.22 (2d Cir. 1976).

¹⁴ Paragraph II.A(1)-(4) is modeled after the Final Order, *In re Toys “R” Us, Inc.*, Docket No. 9278, 1998 WL 34300619, **145 (FTC Oct. 13, 1998) (¶ II) (hereinafter “Toys “R” Us Order”), *aff’d*, *Toys “R” Us, Inc. v. FTC*, 221 F.3d 928, 930, 939-40 (7th Cir. 2000). As here, where horizontal competitors agreed to refuse to do business with discounters, this Court issued an order—and the Seventh Circuit affirmed that order—prohibiting respondent from “entering into, and attempting to enter into any agreement or understanding . . .” Toys “R” Us Order, **145 (¶ II); *Toys “R” Us*, 221 F.3d at 940; *see also* Complaint Counsel’s Post-Trial Brief, at Section II.

¹⁵ Paragraph II.A(1) is modeled after the Toys “R” Us Order, which prohibited respondent from entering into any agreement with a supplier to refuse to sell products to a toy discounter. Toys “R” Us Order, at **145 (¶ II.A). The record evidence shows that Respondents reached an agreement to refuse to do business with Buying Groups, including refusing to provide or offer

discounts or respond to requests to do business. *See* CCFF ¶¶ 474-1100; *see also* Complaint Counsel’s Post-Trial Brief, at Section II.

¹⁶ Paragraph II.A(2) is modeled after the Toys “R” Us Order, which prevented respondent from pressuring a supplier to limit or withhold products and business from a certain type of customer: toy discounters. Toys “R” Us Order, at **145 (¶ II.B). This paragraph is necessary because the record evidence shows that Respondents refused to sell to or provide discounts to a certain type of customer, Buying Groups. *See* CCFF ¶¶ 17, 34, 408-425, 503, 639, 641, 643-646, 648-649, 743-860, 925-954.

¹⁷ Paragraph II.A(3) is necessary because the record evidence shows that Respondents withdrew sponsorships and attendance at meetings of the Texas Dental Association and Arizona Dental Association after learning that both were creating statewide Buying Groups. *See* CCFF ¶¶ 1109-1158; *see also* Complaint Counsel’s Post-Trial Brief, at Section I.I, II.H.

¹⁸ Paragraph II.A(4) is modeled after the Toys “R” Us Order, which prevented respondent from pressuring a supplier to limit or withhold products and business from a toy discounter. Toys “R” Us Order, at **145 (¶ II.B). The record evidence shows that Benco Dental Supply Co. attempted to expand the conspiracy by recruiting other industry participants. *See* CCFF ¶¶ 1199-1252.

¹⁹ Paragraph II.B is modeled after the NC Dental Order, which prohibited the respondents from urging, encouraging, assisting, or attempting to induce any person, other than the respondents, from engaging in any action that was prohibited by the order. NC Dental Order, at *41 (¶ II.G); *see also* Toys “R” Us Order, at **145 (¶ II.D). The record evidence shows that Benco Dental Supply Co. attempted to expand the conspiracy by recruiting other Distributors. *See* CCFF 1199-1252; *see also* Complaint Counsel’s Post-Trial Brief, at Section V.

²⁰ Paragraph II.C is necessary because the record evidence shows that Respondents withdrew sponsorships and attendance at meetings of the Texas Dental Association and Arizona Dental Association after learning that both were creating statewide Buying Groups. *See* CCFF ¶¶ 1138-1146, 1156-1158; *see also* Complaint Counsel’s Post-Trial Brief, at Section I.I, Section II.H. Paragraph II.C is modeled after the Toys “R” Us Order, which prevented respondent from pressuring a supplier to limit or withhold products and business from a certain type of customer: toy discounters. Toys “R” Us Order, at **145 (¶ II.B).

²¹ Paragraph II.D is necessary because the record evidence shows that Respondents engaged in repeated inter-firm communications and exchanged non-public, strategic information with their competitors to reach a prohibited agreement not to sell to or discount to Buying Groups. *See* CCFF ¶¶ 474-1100, 1109-1158; *see also* Complaint Counsel’s Post-Trial Brief, at Section I.F-I.I, Section II. The Court can prohibit the unlawful conduct it finds existed, as well as include in its order a remedy that “close[s] all roads to the prohibited goal.” *PolyGram Order*, at **29 (quoting *FTC v. Ruberoid Co.*, 343 U.S. at 473).

²² Paragraph III.A through D are modeled after previous FTC Part 3 orders that required distribution of the order to educate and inform relevant individuals of their responsibilities to comply with the order. *See* NC Dental Order, at *41-42 (¶ III); Final Order, *In re N. Tex. Specialty Physicians*, Docket No. 9312, 2005 WL 6241023, **37 (FTC Nov. 29, 2005) (hereinafter “North Texas Specialty Physicians Order”), *modified* 2008 WL 4235322 (FTC Sept.

12, 2008). *See also* Decision and Order, *In re Ferrellgas Partners, L.P.*, Docket No. 111-0195, 2015 WL 13021965, *14-15 (FTC Jan. 7, 2015) (requiring antitrust compliance program, specified in ¶ III) (hereinafter “Ferrellgas Partners Order”). This paragraph similarly seeks an effective and efficient manner by which to inform and educate those within the scope of the Proposed Order of their compliance responsibilities.

²³ Paragraph IV.A is modeled after the Ferrellgas Partners Order. Ferrellgas Partners Order, at *14 (¶ III.B(1)).

²⁴ Paragraph IV.B is modeled the Ferrellgas Partners Order. Ferrellgas Partners Order, at *14-15 (¶ III.B(2)).

²⁵ Paragraph IV.C is modeled the Ferrellgas Partners Order. Ferrellgas Partners Order, at *15 (¶ III.B(3)).

²⁶ Paragraph IV.D is modeled the Ferrellgas Partners Order. Ferrellgas Partners Order, at *15 (¶ III.B(4)).

²⁷ Paragraph IV is standard in FTC Part 3 orders. *See, e.g.*, NC Dental Order, at *42 (¶ IV); Toys “R” Us Order, at **146 (¶ IV); North Texas Specialty Physicians Order, at **38 (¶ IV.E).

²⁸ This time period is modeled after the NC Dental Order. NC Dental Order, at *42 (¶ IV); *see also* Toys “R” Us Order, at **146 (¶ IV); North Texas Specialty Physicians Order, at **38 (¶ IV.E).

²⁹ Requiring annual reports is standard in Part 3 orders. *See, e.g.*, NC Dental Order, at *42 (¶ IV); Toys “R” Us Order, at **146 (¶ IV); North Texas Specialty Physicians Order, at **38 (¶ IV.E).

³⁰ Compliance reporting serves to notify the Commission that a respondent is complying with its obligations. The period of such obligations should be long enough to cover all affirmative obligations and ensure that a respondent has and will continue to comply with the order’s prohibitions. Since this Proposed Order is prohibitory, a total four-year reporting requirement is sufficient to ensure that Respondents understand and are complying with their obligations under the Proposed Order. *See* Toys “R” Us, at *146 (ordering 20-year term for annual reporting). *See also* NC Dental Order, at 42 (requiring annual reporting for 3 years); North Texas Specialty Physicians Order, at **38 (requiring annual reporting for 3 years).

³¹ This is standard language in FTC Part 3 orders. *See, e.g.*, NC Dental Order, at *42 (¶ IV); Toys “R” Us Order, at *146 (¶ IV); North Texas Specialty Physicians Order, at 38 (¶ IV.E).

³² This purpose of this language is to ensure and assist Respondents in writing acceptable and useful compliance reports that achieve the purpose of Paragraph IV. The language is modeled after the proposed order submitted by Complaint Counsel, *In re Otto Bock HealthCare N. America, Inc.*, Docket No. 9378 (FTC Nov. 20, 2018) (hereinafter “Otto Bock Proposed Order”). Otto Bock Proposed Order, at ¶ VIII.2; *see also* Final Order in *In re Polypore Int’l, Inc.*, Docket No. 9327, 2010 WL 9549988 (FTC Nov. 5, 2010), at *63 (requiring descriptions and statements, set forth in ¶ XI.B., showing respondent’s compliance with order); NC Dental Order, at *42

(requiring “detailed description of the manner and form in which Respondent has complied, or is complying, with this Order.”).

³³ Paragraph IV.B(1)-(3) is designed to ensure that the Commission can monitor the implementation of the Order by Respondents. Similar instructions have been included in previous Part 3 orders. *See, e.g.*, NC Dental Order, at ¶ IV.A-D (requiring detailed information to show manner and form of respondents’ compliance with the order).

³⁴ Paragraph IV.B(4)(a)-(b) is necessary because the record evidence shows a high-level of inter-firm Communications between or among competitor Respondents exchanging non-public, strategic information regarding Buying Groups, which facilitated and formed the unlawful agreement, as well as intra-firm Communications discussing those exchanges between or among competitor Respondents. *See* CCFF ¶¶ 474-1158, 1178-1198; *see also* Complaint Counsel’s Post-Trial Brief, at Section I.F-I.I, Section II. The language is modeled after the NC Dental Order, which required respondents to file copies of communications prohibited under the order. NC Dental Order, at *42 (¶ IV.B); *see also* Toys “R” Us Order, at **146 (¶ IV.B). Paragraph IV.B(4)(a)-(b) does not require filing copies of communications, and only requires inclusion of a narrative as part of compliance reports demonstrating compliance with the Order. The Office of the Texas Attorney General entered a similar final judgements against Benco that required it to maintain and furnish a detailed log of communications with its competitors to the State for a period of time. CCFF ¶¶ 1159-1161. That order, which stopped the conduct at issue, is no longer in effect. CCFF ¶¶ 1160-1161.

³⁵ Paragraph IV.B(5)(a)-(b) is necessary because the record evidence shows a high-level of inter-firm Communications between or among competitor Respondents exchanging non-public, strategic information regarding Buying Groups, which facilitated and formed the unlawful agreement, as well as intra-firm Communications discussing those exchanges between or among competitor Respondents. *See* CCFF ¶¶ 661-1100, 1123-1137, 1156-1158, 1179-1182, 1185; *see also* Complaint Counsel’s Post-Trial Brief, at Section I.G-I, Section II. This language is modeled after the NC Dental Order, which required respondents to file copies of the communications prohibited under the order. NC Dental Order, at *42 (¶ IV.B); *see also* Toys “R” Us Order, at **146 (¶ IV.B). Paragraph IV.B(5)(a)-(b) does not require filing copies of communications, and only requires inclusion of a narrative as part of compliance reports demonstrating compliance with the Proposed Order. The Office of the Texas Attorney General entered a similar final judgement against Schein that required it to maintain and furnish a detailed log of communications with its competitors to the State for a period of time. CCFF ¶ 1163. That order, which stopped the conduct at issue, is reaching the end of its term in or around August 2019. CCFF ¶ 1163.

³⁶ Paragraph IV.B(6)(a)-(b) is necessary because the record evidence shows a high-level of inter-firm Communications between or among competitor Respondents exchanging non-public, strategic information regarding Buying Groups, which facilitated and formed the unlawful agreement, as well as intra-firm Communications discussing those exchanges between or among competitor Respondents. *See* CCFF ¶¶ 474-656, 1123-1146, 1156-1158, 1178-1182, 1184; *see also* Complaint Counsel’s Post-Trial Brief, at Section I.G, Section I.I, Section II. This language is modeled after the NC Dental Order, which required respondents to file copies of the communications prohibited under the order. NC Dental Order, at *42 (¶ IV.B); *see also* Toys “R” Us Order, at **146 (¶ IV.B). Paragraph IV.B(6)(a)-(b) does not require filing copies of

communications, and only requires inclusion of a narrative as part of compliance reports demonstrating compliance with the order. The Office of the Texas Attorney General entered a similar final judgement against Patterson that required it to maintain and furnish a detailed log of communications with its competitors to the State for a period of time. CCFF ¶ 1164. That order, which stopped the conduct at issue, is no longer in effect. CCFF ¶ 1164.

³⁷ This language describes the requirements for verification and is modeled after the Otto Bock Proposed Order. Otto Bock Proposed Order, at ¶ VIII.C.

³⁸ Paragraph V is modeled after the North Texas Specialty Physicians Order and provides the Commission with notice of changes in corporate structure that may alter or affect the entities within Respondents that are best able to comply with the order. *See* North Texas Specialty Physicians Order, at **38 (¶ IV.F).

³⁹ This language is modeled after the Final Order, *In re of ProMedica Health System, Inc.*, Docket No. 9346, 2012 WL 2450574, at *18 (FTC Mar. 22, 2012) (hereinafter “ProMedica Order”). *See also* Polypore Order, at *63 (¶ XII); North Texas Specialty Physicians Order, at **38 (¶ VI); NC Dental Order, at *42-43 (¶ VI).

⁴⁰ This language is modeled after the ProMedica Order. ProMedica Order, at *18 (¶ X.A); *see also* Polypore Order, at *63 (¶ XII.A); North Texas Specialty Physicians Order, at **38 (¶ VI.A); NC Dental Order, at *42-43 (¶ VI.A).

⁴¹ This language is modeled after the ProMedica Order. ProMedica Order, at *18 (¶ X.B); *see also* Polypore Order, at *63 (¶ XII.B); North Texas Specialty Physicians Order, at **38 (¶ VI.B); NC Dental Order, at *43 (¶ VI.B).

⁴² Policy Statement Regarding Duration of Competition and Consumer Protection Orders, 60 Fed. Reg. 42,569 (August 16, 1995); *see also* NC Dental Order, at *43 (setting order term of 20 years).

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 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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I further certify that I delivered via electronic mail a copy of the foregoing document to:

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April 17, 2019

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CERTIFICATE OF ELECTRONIC FILING

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

April 17, 2019

By: /s/ *Lin W. Kahn*
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