PUBLIC

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

In the Matter of

BENCO DENTAL SUPPLY CO.,
a corporation,

HENRY SCHEIN, INC.,
a corporation, and

PATTERSON COMPANIES, INC.
a corporation.

DOCKET NO. 9379

COMPLAINT COUNSEL'S POST-TRIAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

D. Bruce Hoffman
Director

Ian R. Conner
Deputy Director

Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., N.W.
Washington, DC 20580
Telephone: (202) 326-2470
Facsimile: (202) 326-3496

Thomas N. Dahdouh
Regional Director, Western Region
San Francisco and Los Angeles
Federal Trade Commission
Electronic Mail: tdahdouh@ftc.gov
Telephone: (415) 848-5122

Lin W. Kahn
Jeanine K. Balbach
N. Diana Chang
Karen Goff
Josh Goodman
Jessica Moy
Danica Noble
Jasmine Y. Rosner
Ronnie Solomon
Erika Wodinsky
Federal Trade Commission
Bureau of Competition – Western Region
901 Market Street, Suite 570
San Francisco, CA 94103
Telephone: (415) 848-5100
Facsimile: (415) 848-5184
Electronic Mail: lkahn@ftc.gov

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I. JURISDICTION

1. The Federal Trade Commission ("FTC") is an administrative agency of the United States government established, organized, and existing pursuant to the Federal Trade Commission Act, 15 U.S.C. § 41 et seq. (JX0001 at 001 (Joint Stipulations of Law and Facts)).

2. Henry Schein, Inc. sells, or offers for sale, its products and services throughout the United States. (JX0001 at 001 (Joint Stipulations of Jurisdiction, Law, and Fact)).

3. Patterson Companies, Inc. sells, or offers for sale, its products and services throughout the United States. (JX0001 at 001 (Joint Stipulations of Law and Facts)).

4. Benco Dental Supply Co. sells, or offers for sale, its products and services throughout the United States. (JX0001 at 001 (Joint Stipulations of Law and Facts)).

II. THE BIG THREE

A. Benco

5. Benco Dental Supply Co. (or "Benco") is a family-owned dental distribution company based in Pittston, Pennsylvania. (Cohen, Tr. 399, 633, 617; JX0003 at 002 (Joint Stipulation of Fact No. 9)).

6. Benco is a private, for-profit corporation duly formed and organized under the law of the State of Delaware. (CX1112 at 010 (Answer of Benco ¶13)).

7. Benco is a full-service, national distributor that sells dental supplies, equipment, and services to dental practitioners throughout the United States. Benco is the third largest distributor of dental supplies and equipment in the United States. (CX1112 at 011 (Answer of Benco ¶13); JX0003 at 002 (Joint Stipulation of Fact Nos. 6, 9)).

8. Benco is incorporated and sells dental products and services in interstate commerce in the United States. (CX1112 at 010 (Answer of Benco ¶17)).

9. Benco is the largest privately owned dental distributor in the U.S. (Cohen, Tr. 409; JX0003 at 002 (Joint Stipulation of Fact Nos. 9)).

10. In 2016, Benco supplied dental practices across the nation. (Cohen, Tr. 409-410).

11. The vast majority of dentists to whom Benco sells products are independent dentists rather than dentists in corporate practices. (Cohen, Tr. 410).

12. Benco carries a full line of products, offering thirty to forty thousand different products. (Cohen, Tr. 604).

13. Today, the company operates five distribution centers with distribution operations capable of prompt and reliable delivery across the country. (Cohen, Tr. 404, 408).

14. For the majority of Benco's existence, it operated as a regional distributor, with its principal customer base in Pennsylvania, New York, Ohio, and Virginia. (Cohen, Tr. 619-621, 628-629).

15. Benco became a national full-service distributor in 2011. (Cohen, Tr. 410, 631-632; CX8015 (Cohen, Dep. at 47-48)).

16. Benco's gross margins are approximately [redacted]. (Cohen, Tr. 410; [redacted].

17. Benco has received, since 2011, requests for bids or proposals from buying groups for or relating to the sale of dental products. (CX1328 at 016 (Benco's Response to RFA ¶ 38).

18. Chuck Cohen is the Managing Director of Benco, a title he shares with his brother. That position is akin to a CEO. He has been in that position since 1998. He is also a co-owner of Benco. (Cohen, Tr. 399-401).

B. Patterson

19. Patterson Companies, Inc. (or "Patterson") is a publicly traded corporation, organized, existing and doing business under the laws of the state of Minnesota, based in St. Paul, Minnesota. Patterson Dental is a business unit of Patterson Companies. (CX3113 at 002-003 (Answer of Patterson ¶15); CX5035 at 014 (Patterson Companies 2017 Annual Report and 10-K); JX0003 at 002 (Joint Stipulation of Fact No. 8)).

20. Patterson is a full-service, national distributor that sells dental supplies, equipment and services to dental practitioners in the United States. (Guggenheim Tr. 1532; CX3113 at 002-003 (Answer of Patterson ¶15)).

21. Patterson engages in commerce in the United States as defined in 15 U.S.C. §44. (CX3113 at 003 (Answer of Patterson ¶17)).

22. Patterson Dental has approximately 33% of the market for distribution of dental products in North America. (Misiak, Tr. 1327).

23. Patterson is the second largest distributor of dental supplies and equipment in the United States. (Guggenheim, Tr. 1543).

24. Patterson sells and distributes a full range of dental products, carrying over 89,000 SKUs. (CX5035 at 015 (Patterson Companies 2017 Annual Report and 10-K); *see also* Guggenheim, Tr. 1532; [redacted]).

25. Patterson Dental operates approximately 75 sales locations in 40 states. (CX5035 at 033 (Patterson Companies 2017 Annual Report and 10-K)).

26. Patterson distributes dental products from nine fulfillment centers, located in California, Florida, Hawaii, Indiana, Iowa, Pennsylvania, South Carolina, Texas, and Washington. (CX5035 at 033 (Patterson Companies 2017 Annual Report and 10-K)).

27. Patterson buys dental products from manufacturers and sells those products to dentists with a mark-up. (Rogan, Tr. 3426).

28. Patterson's gross margins are approximately 34% to 35%. (Guggenheim, Tr. 1538; Rogan, Tr. 3426).

29. The vast majority of dentists to whom Patterson sells products are independent dentists rather than dentists in corporate practices. (Rogan, Tr. 3427; McFadden Tr. 2748; Misiak, Tr. 1425-1426).

30. At present, Patterson Companies operates in the dental products distribution market and the animal health products distribution market. (Guggenheim, Tr. 1531). From 2004 until 2015, Patterson also operated a medical products distribution business. (Guggenheim, Tr. 1531-1532; CX5034 at 012 (Patterson Companies 2016 Annual Report)).

31. During the time period 2009 to 2017, Patterson's largest suppliers were 3M, Dentsply, KaVo-Kerr, Ivoclar, GC America and Hu-Friedy. (Rogan, Tr. 3425-3426).

32. Patterson promotes its ability to offer a full line of dental products to customers. (CX3365 at 006 (Patterson's Response to RFA ¶ 14)).

33. Patterson provides installation, maintenance, and repair services for dental products to its customers. (CX3365 at 006 (Patterson's Response to RFA ¶ 16)).

34. Buying Groups sought bids or proposals from Patterson for or relating to the sale of dental products during the period January 1, 2009 to the present. (CX3365 at 008 (Patterson's Response to ¶ 28)).

35. Paul Guggenheim was the President of Patterson from May 2010 to May 2016. (Guggenheim, Tr. 1526-1527).

C. Schein

36. Henry Schein, Inc. (or "Schein") is a public company headquartered in Melville, New York. (Sullivan, Tr. 3875; CX5021 at 012 (Henry Schein, Inc. 2017 Annual Report); JX0003 at 002 (Joint Stipulation of Fact No. 10)).

37. Schein is a corporation, as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44. (CX2801 at 008 (Schein's Response to RFA ¶ 1)).

38. Schein is the largest dental distributor in the United States. (Sullivan, Tr. 3876).

39. The company is the "world's largest provider of health care products and services primarily to office-based dental, animal health and medical practitioners" serving "more than 1 million customers worldwide." (Sullivan, Tr. 3873; CX5021 at 012 (Henry Schein, Inc. 2017 Annual Report)).

40. Schein is a full-service, national distributor of dental products. (JX0003 at 002 (Joint Stipulation of Fact Nos. 6 and 10). Schein sells and distributes a full range of dental products, carrying over 200,000 SKUs. (Sullivan, Tr. 4035; Meadows, Tr. 2474; CX5021 at 014 (Henry Schein, Inc. 2017 Annual Report)).

41. Schein operates five distribution centers in North America, enabling delivery across the country. (Sullivan, Tr. 4040). In addition, Schein maintains four in-house equipment repair facilities. (RX2951 (Steck, Class 30b6 Dep. at 14)). Schein employs between 800-825 Field Sales Consultants that specialize in merchandise, 160 sales representatives for equipment, and 80 for technology. (Sullivan, Tr. 4036; RX2951 (Steck, Class 30b6 Dep. at 37-38)).

42. Schein's dental division is the largest part of the company, employing roughly 3,000 employees. Between 1,000 and 1,200 of these employees are sales representatives. (Sullivan, Tr. 3874).

43. Schein's gross margins are approximately 32% to 34%. (Sullivan, Tr. 3876; *see also* Meadows, Tr. 2520-2523 (30% gross profit on merchandise sold to independent dentists, 28% gross profit on DSOs, and 20% gross profit for mid-market customers); Foley, Tr. 4533 (28%-29% is reasonable gross profit for Special Markets)).

44. Schein's gross margins for private practices are higher than for larger customers. (Meadows, Tr. 2520-2523; Foley Tr. 5433; CX0310 (Steck, IHT at 90)).

45. Schein's largest customer segment is private practices rather than corporate practices. (Sullivan, Tr. 4035).

46. Schein has several divisions, including dental, medical, and animal health divisions. (Sullivan, Tr. 3873-3874).

47. Tim Sullivan was the President of Schein's U.S. dental division from 2004 through the end of 2018. (Sullivan, Tr. 3871).

D. Competition Among the Big Three

48. Benco identifies Schein and Patterson as its primary or largest competitors. (Cohen, Tr. 425; Ryan, Tr. 1019; CX0301 (Cohen, IHT at 42)).

49. Schein identifies Benco and Patterson as its primary or largest competitors. (Sullivan, Tr. 3877, 4065; Steck, Tr. 3804; Cavaretta, Tr. 5536, 5540; CX5021 at 013 (Henry Schein, Inc. 2017 Annual Report)).

50. Patterson identifies Schein and Benco as its primary or largest competitors. (Guggenheim, Tr. 1543, 1756; Rogan, Tr. 3511, 3602; McFadden, Tr. 2689, 2748; Titus, Tr. 5286-5287; Cavaretta, Tr. 5536-5537, 5540; CX0314 (Guggenheim, IHT at 48-51)).

51. Schein, Patterson, and Benco compete against each other on price. (Cohen, Tr. 662, 936-937; Sullivan, Tr. 3932; Ryan, Tr. 1241, 1266-1267; Misiak, Tr. 1371, 1450; McFadden, Tr.

2748, 2758-2759, 2780-2781; Rogan, Tr. 3615, 3620; Steck, Tr. 3800-3801; Titus, Tr. 5286-5287; Cavaretta, Tr. 5536-5537, 5540, 5548; Baytosh, Tr. 1905).

52. Schein, Patterson, and Benco offer discounts and lower price programs to attract new customers. ([redacted]; Cohen, Tr. 465, 471-472 (EDA), 645, 936-937; [redacted]; Steck, Tr. 3806-3807; Guggenheim, Tr. 1751-1752; Misiak, Tr. 1450, 1489-1490; McFadden, Tr. 2760, 2765, 2846; Rogan, Tr. 3615-3617; CX8025 (Sullivan, Class 30b6 Dep. at 44-46)).

53. Dentists are willing to switch between the Big Three to take advantage of lower prices. (Cohen, Tr. 668, 938-941; Sullivan, Tr. 3932; McFadden, Tr. 2846; Ryan, Tr. 1129-1130; Mason, Tr. 2405-2406; [redacted]; CX0149 at 001).

54. Respondents have taken market share from each other by offering lower prices. (Cohen, Tr. 645; Guggenheim, Tr. 1728-1729; Misiak, Tr. 1448-1450, 1452-1453; Steck, Tr. 3800-3891).

55. Distributors can steer customers to different manufacturers, meaning dentists are willing to switch brands. (CX8017 (Rogan, Dep. at 83-84); CX0310 (Steck, IHT at 253-254)).

56. Benco identifies Schein as its top competitor for corporate dental practices. (Cohen, Tr. 806; *see also*, Cohen, Tr. 426-428).

III. DENTAL INDUSTRY BACKGROUND

A. Industry Definitions

1. <u>Independent Dentist</u>

57. The vast majority of dentists are independent dentists. (Misiak, Tr. 1425-1426 (private practice today represents 70% of the total market and represented 75-80% of the market in 2013); Rogan, Tr. 3427, 3449 (historically, more than 90% of the dental business was private practice dentists; now about 75% are private practice); CX0303 (McElaney, IHT at 40) ("majority of all dentistry is solo practitioner"); CX3105 at 042; RX0043 at 006)).

58. Independent dentists are solo practitioners who own their dental practices or small group dental practices with one or a few locations. (Steck, Tr. 3676-3678; Mason, Tr. 2324 ("a dentist who owns less than five practices"); Reece, Tr. 4364-4365; CX0322 (Maurer, IHT at 11-12) ("a dentist that owns the practice")).

59. Independent dentists are often referred to as "private practices." (Sullivan, Tr. 3904) (private practice dentists are sometimes referred to as independent dentists); Rogan, Tr. 3427; CX8012 (Breslawski, Dep. at 20); CX0314 (Guggenheim, IHT at 59-60) (a private practice is a privately owned dental practice with generally one or two locations); CX8031 (Steck, Dep. at 22) (a private practice is where dentist owns sole equity in the practice)).

2. <u>Corporate Dentistry</u>

60. Dental Service Organizations ("DSOs") consist of large group practices that have multiple locations combined under a single ownership structure and are part of a corporation. (Cohen, Tr. 808, 411-412; Foley, Tr. 4512; CX0310 (Steck, IHT at 126); CX0301 (Cohen, IHT at 39); Guggenheim, Tr. 1539, 1687-1688; Misiak, Tr. 1310, 1313-1314; CX8021 (Reece, Dep. at 24); [redacted]).

61. Large DSOs can have upwards of 20-25 offices. (CX0314 (Guggenheim, IHT at 61); CX0306 (Foley, IHT at 15)).

62. Smaller DSOs (sometimes called "mid-market" customers) can range from 3-20 locations. (CX0310 (Steck, IHT at 26); Sullivan, Tr. 3901-3902 (a DSO is essentially a corporate dental chain)).

63. DSOs are sometimes referred to as Management Service Organizations ("MSOs"). (Foley, Tr. 4510 (DSO and MSO are "identical but used interchangeably."), [redacted]; Titus, Tr. 5291-5292 (MSO and DSO are interchangeable); CX8025 (Sullivan, Dep. at 236-237) (sometimes no difference

between an MSO and a DSO, a DSO may be more likely to own a practice while an MSO provides management services); CX8010 (Titus, Dep. at 60-61) (MSO and DSO are interchangeable words); CX8003 (Foley, Dep. at 106-107) (MSO and DSO terminology is interchangeable); CX0304 (Ryan, IHT at 48-49); CX8005 (Muller, Dep. at 244); CX0309 (Muller, IHT at 143); CX8006 (Puckett, Dep. at 109-110); CX0307 (Kyle, IHT at 146)).

64. DSOs and MSOs make the purchasing decisions for dental practices. (Sullivan, Tr. 3902 (DSOs and MSOs control their members and contractually drive volume); Foley, Tr. 4513; Misiak, Tr. 1310-1311; Guggenheim, Tr. 1767-1768; Ryan, Tr. 1166; CX8033 (Cavaretta, Dep. at 52-53) (some MSOs have the ability to control purchasing decisions)).

65. Like DSOs, MSOs own or manage dentist practices. (Foley, Tr. 4512; CX8009 (Wingard, Dep. at 25-26) (most of the time MSOs have a common ownership structure); CX8033 (Caveretta, Dep. at 50) (MSOs manage the front end of a dentist's office, some for a fee and some in exchange for equity in a practice); CX0305 (Cavaretta, IHT at 18); CX0309 (Muller, IHT at 141); CX8020 (Brady, Dep. at 251-252) (an MSO provides bookkeeping services, HR management, or a multitude of management-related services)).

66. Examples of DSOs include Heartland Dental, Pacific Dental, Aspen Dental, Great Expressions, and MB2 Dental Solutions. (Misiak, Tr. 1310 (Heartland); Foley, Tr. 4645 (Pacific); Sullivan, Tr. 3903 (Aspen); Foley, Tr. 4543 (Great Expressions was one of Schein's largest customers and received DSO pricing); Puckett, Tr. 2201-2202 (MB2)).

3. <u>Buying Group</u>

67. Dental buying groups are organizations of independent dentists that seek to aggregate and leverage the collective purchasing power of separately-owned and separately-managed dental practices in exchange for lower prices on dental products. (Kois, Jr., Tr. 348-349; Sullivan, Tr. 3899 (buying group "mean[s] a group of customers that get together and form a group to

negotiate with their larger volume"), 3941; Guggenheim, Tr. 1566 (a buying group is a collection of customers that work together to leverage buying power to secure pricing); Meadows, Tr. 2418-2419; Steck, Tr. 3681-3683; Goldsmith, Tr. 1936, [redacted]; Cohen, Tr. 432-433; Reece, Tr. 4365; CX0301 (Cohen, IHT at 106); CX8004 (McFadden, Dep. at 19-20 ("[A] buying group is a group of independent dentists that get together to form a group in order to get discounted dental supplies."); CX2020 at 004 (draft proposal to Atlantic Dental Care by Schein's Michael Porro stated, "This agreement can be terminated with 30 days notice if any of the following occur: If this turns out to be a purely a buying group, defined as 'pooling individual volume purely to obtain lower prices from suppliers of goods and services.'"); CX2487 at 002 (as recognized by Schein, buying groups "seek to leverage their purchasing power" to extract lower prices); CX1156 at 001 (Benco's Patrick Ryan wrote: "Group Purchasing Organizations. They aggregate the purchase volume of unrelated entities in order to leverage price.")).

68. Buying groups are also referred to as buying clubs or buying cooperatives (or co-ops). (Foley, Tr. 4551 (Buying co-op is a buying group); Misiak, Tr. 1366-1367 (use of the terms coop, buying group and GPO were used interchangeably); Ryan, Tr. 1022 (Buying cooperative interchangeable with buying group)).

69. During the conspiracy period, buying groups were also referred to as group purchasing organizations ("GPOs"). (Cohen, Tr. 437-438 (testifying that he thought buying group and GPO meant the same thing, and used the terms interchangeably, before his investigational hearing); Guggenheim, Tr. 1566-1567 (in the dental industry, the terms GPO and buying groups are used synonymously); Steck, Tr. 3685; CX8031 (Reece, Dep. at 26); CX0301 (Cohen, IHT at 106-107); Meadows, Tr. 2419; Foley, Tr. 4510-4511; CX0311 (Sullivan, IHT at 115); CX8004

(McFadden, Dep. at 22); CX1156 at 001 (Benco's Director of Sales stating GPOs are "exactly the same" as buying groups); CX0301 (Cohen, IHT at 106-107); CX0314 (Guggenheim, IHT at 163-164); CX1084 at 001 ("Group Purchasing Organization (GPO): A group of independent offices that join together to leverage their purchasing power for a bigger discount.")).

70. While many witnesses testified that they now understand GPO to refer to groups that function like medical GPOs, witnesses admitted that during the 2011-2015 period, they used "buying group" and "GPO" interchangeably. (Cohen, Tr. 433-434; Misiak, Tr. 1308; Rogan, Tr. 3432; Foley, Tr. 4511).

71. The terms "buying group" and "GPO" are used interchangeably in the dental industry. (Steck, Tr. 3685-3686; CX8004 (McFadden, Dep. at 22); Guggenheim, Tr. 1566 (in the dental industry, the terms "GPO" and "buying groups" are used synonymously); *see also* Guggenheim, Tr. 1567 (within Patterson Dental, there was no distinction between the terms "GPO" and "buying group"); Misiak, Tr. 1366-1367 (terms "co-op," "buying group" and "GPO" were used interchangeably); Rogan, Tr. 3429 (terms "buying groups" and "GPOs" used interchangeably in the dental business), 3428 (Patterson's VP for Marketing referred to buying groups as GPOs), 3430 (in Rogan's 25 years of experience at Patterson, people at Patterson used the term GPO to refer to buying groups); Sullivan, Tr. 3901 ("Q. And you've used the term 'GPO' to refer to buying groups of dentists? A. Yes. Q. And you've used the term 'GPO' interchangeably with 'buying groups.' A. That is correct. Q. You have heard others at Schein use the terms interchangeably as well? A. Correct."); Foley, Tr. 4510-4511; Reece, Tr. 4367-4368 (terms used interchangeably at Burkhart); Meadows, Tr. 2216 ("Q. Have you heard of the term 'group purchasing organization' or 'GPO' for short? A. I have. Q. And what to you understand a group purchasing organization to be? A. I would – I would I guess analogize it very similar to a

buying club or a buying group, just a different term."); Meadows, Tr. 2426 ("Q. In this e-mail you referred to buying groups as GPOs; correct? A. I used the term twice -- or excuse me – yes, I used both terms in this e-mail. Q. You used the words interchangeably. A. Correct."); Titus, Tr. 5291 ("Q. You use the terms 'buying group' and 'GPO' interchangeably, don't you? A. Yes."); CX8010 (Titus, Dep. at 186 ("Buying groups and GPOs, I consider that an interchangeable term."); CX0304 (Ryan, IHT at 108) ("Q. Are you familiar with the term 'buying group'? A. Yes. Q. What does that term mean to you? A. It's just another word to me for 'GPOs.' Q. Are the two terms interchangeable, then? A. To me, they are."); CX8005 (Muller, Dep. at 28-29) ("Q. You distinguish between GPOs that exist in medical and groups that pool volume for lower prices in dental. A. They're two different terms and structures for buying groups. You could easily say a GPO is a buying group. . . . Q. Although GPRs and buying groups in dental refer to different entities, sometimes you refer to buying groups as GPOs? A. I think Schein as an organization it is, yes the terms are interchangeable.")).

4. <u>Buying Groups Are Distinguished from DSOs and MSOs.</u>

72. Buying groups are distinguishable from dental support (or service) organizations ("DSOs") and managed service organizations ("MSOs"). (Sullivan, Tr. 3902 (defining DSO and MSO); Steck, Tr. 3689; Foley, Tr. 4512-4513; CX8021 (Reece, Dep. at 63); CCFF ¶¶ 73, 76).

73. A dental practice that joins a DSO or MSO sells its entire practice to another entity or turns over business management and non-clinical operations to another entity. (Meadows, Tr. 2491-2492; Foley, Tr. 4512-4513; CX2835 at 002-010).

74. In contrast to DSOs or MSOs, a dental practice that joins a buying group simply pays a fee to gain benefits (such as discount dental products), and continues to exist as an independent business owned by the dentist. (Kois, Sr., Tr. 180-181 (independent dentists pay fee to join Kois Buyers Group); Kois, Jr., Tr. 308, 312-313 (Kois Buyers club negotiates prices for member

dentists but has "no role as the manager between the relationship between the vendor and the member of the group other than helping to establish the discount."); Reece, Tr. 4367 (buying groups are generally "group of independent practices that kind of band together, ideally for a common cause or theme, and it's individual ownership."); *see also* [redacted].

75. With DSOs and MSOs, the dentists lose control of purchasing, company financials, and other business decisions. (Cohen, Tr. 412-413; Meadows, Tr. 2491-2492; Foley, Tr. 4512-4513; Sullivan, Tr. 3903; CX2482 at 001 ("Breakaway is a DSO/MSO combo with complete control of the check book."); (Steck, Tr. 3774) (Sunrise Dental was not a buying group, rather an MSO or managed franchise)).

76. Buying groups do not make purchasing decisions for their members. (Kois, Jr., Tr. 312-313; Puckett, Tr. 2287; Foley, Tr. 4512-4513; Cohen, Tr. 691).

5. <u>Buying Groups Are Also Distinguished from Medical or Healthcare GPOs.</u>

77. Dental buying groups are also distinguished from medical or healthcare GPOs because the members of dental buying groups are dental practices, while the members of medical or healthcare GPOs are hospitals or healthcare facilities. (Rogan, Tr. 3430-3431; CX8017 (Rogan, Dep. at 68-69); CX8012 (Breslawski, Dep. at 232); CX8037 (Ryan, Dep. at 172); CX0309 (Muller, IHT at 208-209); CX0319 (Reece, IHT. at 72-73); CX0318 (Smurr, IHT at 27-28)).

78. Medical GPOs are not dental buying groups. (Foley, Tr. 4511; Rogan, Tr. 3429 ("GPOs as they're known in the medical business . . . do not exist in the dental business."), 3432 ("I think the GPO on the medical side serves a purpose that doesn't really work in the dental business."), 3432-3433 (medical GPOs offer services that dental buying groups do not offer and in medical

GPOs, the medical provider does not get to choose what product they use; they're told and the GPO provides)).

B. Practice of Dentistry

79. As of 2017 there are approximately over 196,000 dentists practicing in the United States. (CX5005 at 006).

80. Dentists require a broad range of products in the course of treating patients and operating a dental practice. (Cohen, Tr. 403-404 (Benco provides range of products and equipment a dentist uses in office)). A general practitioner can purchase hundreds of distinct products or stock keeping units ("SKUs") in a single month. (CX3113 at 003 (Answer of Patterson ¶18)).

81. Dental products include dental supplies, dental equipment, technology, and other items used in the provision of dental services by a dentist or dental practice. Dental supplies are sometimes referred to as sundries or merchandise, and include items such as gloves, hand instruments, face masks, toothbrushes, anesthetic solutions, composites, amalgams, bonding agents, and bibs. Dental equipment includes imaging devices, compressors, dental chairs, stools, lights, microscopes, hand-pieces, lasers, delivery systems, monitor mounts, workstations, cabinetry, CAD/CAM systems, film or X-ray processors, cameras, sterilizers, autoclaves, and sensors. (JX0003 at 001 (Joint Stipulations of Fact, Nos. 1-3); see also Kois, Sr., Tr. 167-168; CX1112 at 011-012 (Benco Answer ¶19); CX3113 at 003 (Patterson Answer ¶19)).

82. The market for all dental products sold nationwide is roughly $10 billion annually. (CX3105 at 004).

83. Dental consumables are roughly 70% of the dental supply business in North America, while dental equipment is roughly 30%. (CX3288 at 004).

84. Because dental offices typically cannot store and manage large quantities of supplies in-house, they rely on frequent, small quantity orders, and rapid and complete order fulfillment.

(CX8031 (Steck, Dep. at 143); *see also* CX5019 at 004; CX5035 at 011; CX1112 at 015-016 (Answer of Benco ¶28); CX3113 at 004 (Answer of Patterson ¶28)).

85. Some dental supplies have expiration dates, a date beyond which the product should not be used in a patient's mouth. (Kois Sr., Tr. 179-180).

86. Small practices may not find it feasible to buy in volume to obtain a discount on products that have expiration dates because a small practice may not be able to utilize the product before it would expire. (Kois Sr., Tr. 179-180).

87. Prompt and reliable equipment maintenance is also crucial for dental practices. (CX1112 at 015-016 (Answer of Benco ¶28)).

88. 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). (Steck, Tr. 3789-3790 (testifying that technical service emergency response time is one of the most popular offerings from Schein); CX8030 (Baytosh, Dep. at 63-64) (testifying that when his equipment breaks down, he needs it serviced right away because he cannot operate without some of the pieces of equipment)).

C. Respondents' Customer Segments

89. There are several customer segments within the dental products industry including independent dentists, corporate dental practices or dental service organizations ("DSOs"), buying groups, and institutional dental customers. (CCFF ¶¶ 90-100 (independent dentists), 101-106 (corporate dentistry), 107-113 (institutional customers)).

1. <u>Independent Dentists Make Up the Vast Majority of Respondents' Revenues.</u>

90. Independent dentists make up the vast majority of Respondents' revenues. (Sullivan, Tr. 3904; CX2585 at 074; Steck, Tr. 3677; Cohen, Tr. 410-411 (80 percent of Benco's revenues

come from independent dentists); CX8015 (Cohen, Dep. at 77); CX8028 (Lepley, Dep. at 34); *see also* CCFF ¶¶ 92-95, 97-99).

91. Generally private practice dentists are the most profitable in terms of gross margin. (Steck, Tr. 3680).

92. Independent dentists make up the majority of Benco's customer base. (Cohen, Tr. 410).

93. Independent dentists make up the vast majority of Patterson's customer base. (Rogan, Tr. 3427).

94. Sales to independent dentists have accounted for the majority of Patterson's sales of dental products from January 1, 2009 to the present. (CX3365 at 007 (Patterson's Response to RFA ¶21)).

95. Independent dentists make up the majority of Schein's customer base. (Steck, Tr. 3677, 2679; Foley, Tr. 4513 (Henry Schein Dental is four times the size of Schein Special Markets)).

96. Independent dentists make up the majority of Burkhart Dental Supply ("Burkhart")'s customer base. (Reece, Tr. 4364-4365; [redacted]

97. Eighty percent of Benco's sales are to independent dentists. (Cohen, Tr. 410-411).

98. Independent dentists make up about 90% of Patterson's business today. (Rogan, Tr. 3427-3428). Historically, private practice dentists made up more than 90% of its business. (Rogan, Tr. 3428).

99. Independent dentists make up 70-80 percent of Henry Schein Dental's customer base today, down from potentially 80-90 percent ten years ago. (Steck, Tr. 3678). Independent dentists provide the majority of Schein's revenues. (Sullivan, Tr. 3903-3904).

100. Independent dentists make up approximately [redacted] of Burkhart's revenues. [redacted]

2. Corporate Dentistry

101. A characteristic of dental service organizations or DSOs is that the dental practices have common ownership and are part of a corporation. (Cohen, Tr. 412; Misiak, Tr. 1310, 1313, 1314).

102. Respondents also sell dental products to corporate dental practices known as DSOs. (Meadows, Tr. 2460; McFadden, Tr. 2689-2690, 2785 (Schein and Benco were in special markets space when Patterson entered); Cohen, Tr. 411-412; [redacted]; CX0314 (Guggenheim, IHT at 61); CX0310 (Steck, IHT at 26); CX0306 (Foley, IHT at 15)).

103. DSOs are a growing segment in dentistry and consist of large group practices that have multiple locations combined under a single ownership structure. (Cohen, Tr. 808, 411-412; CX0310 (Steck, IHT at 126); CX0301 (Cohen, IHT at 39); CX3105 at 004 (McKinsey Report); Guggenheim, Tr. 1687-1688; CX8031 (Steck, Dep. at 19); CX1112 at 007 (Answer of Benco ¶3) (DSOs have grown in recent years; "DSOs are characterized by common ownership, as opposed to buying groups, which are not.")).

104. Schein serves its DSO customers through its Special Markets divisions. (Foley, Tr. 4509-4510 (Schein's Special Markets Division sells to non-private dental practices such as DSOs, MSOs, federal government, institutional accounts and the dental schools); Steck, Tr. 3734; CX0306 (Foley, IHT at 12)).

105. Benco serves its DSO customers through its "Strategic Markets" division. (Ryan, Tr. 1014; CX0304 (Ryan, IHT at 57-58)). Benco routinely sells supplies and equipment to DSOs. (CX1112 at 007 (Answer of Benco ¶3)).

106. Patterson serves its DSO customers through a division that was originally called "Special Markets" and later called Strategic Accounts. (McFadden, Tr. 2670; CX0315 (McFadden, IHT at 80, 96-97)).

3. Other Institutional Customers

107. Respondents also sell dental products to healthcare clinics for indigent populations known as Community Health Centers ("CHCs"). (Steck, Tr. 3691; McFadden, Tr. 2697; Foley, Tr. 4509; CX0306 (Foley, IHT at 14, 49); CX8021 (Reece, Dep. at 25)).

108. CHCs are federally recognized not-for-profit community institutions that provide health services to indigent patients in communities across the country. (JX0003 at 001-002 (Joint Stipulation of Fact No. 4); Mason, Tr. 2322-2323; CX8021 (Reece, Dep. at 25); CX8020 (Brady, Dep. at 32); CX8033 (Cavaretta, Dep. at 47)).

109. CHCs are not comprised of independent dentists. (Ryan, Tr. 1017-1018, 1136-1137; CX8021 (Reece, Dep. at 25); CX8003 (Foley, Dep. at 31); CX8033 (Cavaretta, Dep. at 48)).

110. Some CHCs belong to buying groups. (Ryan, Tr. 1135-1137; Titus, Tr. 5209; CX8020 (Brady, Dep. at 33); CX8005 (Muller, Dep. at 229); CX8033 (Cavaretta, Dep. at 48)).

111. Independent dentists are not eligible to join CHC buying groups and CHC buying groups do not provide discounts for independent dentists. (CX8031 (Steck, Dep.at 19-20); CX8020 (Brady, Dep. at 33-34); CX8003 (Foley, Dep. at 31); CX8037 (Ryan, Dep. at 211)).

112. Other dental products customers include large institutions such as hospitals, correctional facilities, public health departments, and other federal or state government customers. (Guggenheim, Tr. 1583; Reece, Tr. 4364-4365; Steck, Tr. 3746).

113. Institutional customers are not owned by dentists. (CX8021 (Reece, Dep. at 26)).

IV. INDEPENDENT DENTISTS JOIN BUYING GROUPS TO SAVE MONEY ON DENTAL PRODUCTS.

A. Changes in the Dental Industry Gave Rise to Buying Groups.

114. Independent dentists have faced challenges over the past decade due to decreasing insurance reimbursements, increased student debt, and the growth of corporate dentistry or DSOs. (CCFF ¶¶ 115-124).

115. Insurance companies have reduced reimbursement rates for dental procedures, further adding to independent dentists' economic pressures. (Sullivan, Tr. 3905-3907; CX3105 at 014; Goldsmith, Tr. 1931; [redacted]).

116. Lower insurance reimbursement rates for dental procedures have led to loss of patients, increased necessity to advertise to acquire new patients, and fewer procedures. (Sullivan, Tr. 3905-3907).

117. Dental school student debt has been increasing. (CX3105 at 063 (average dental student debt as increased approximately 66 percent in the last decade); CX0319 (Reece, IHT at 46-47); RX2952 (Maurer, Dep. at 106-107); [redacted]; CX0303 (McElaney, IHT at 75); RX0043 at -00006, -00023, -00024, -00034 (Dental Practice Management Segment Project Report by Michele D. Perpich, Oct. 23, 2012)).

118. The number of independent dentists has been shrinking and larger group practices and corporate dentistry has been on the rise. (Sullivan, Tr. 3904; [redacted]; CX3105 at 042, 044, 049 (McKinsey & Company, Dental business growth strategy project: U.S. market overview, December 2015)).

119. In recent years, the industry has seen a dramatic increase in the number of corporate dental chains. (CX1346 at 003-005; Goldsmith, Tr. 1929-1930). In 2000, corporate practices accounted for only 5% of the market, but by 2013, that number rose to 11%. (CX3105 at 004

(McKinsey & Company, Dental business growth strategy project: U.S. market overview, December 2015); *see also* CX2314 at 005 (Treacy & Company market analysis)).

120. DSOs leverage their purchasing power and realize economies of scale, leading to a competitive advantage over independent practices. (CX2314 at 005 (Treacy & Company market analysis); Goldsmith, Tr. 1929-1930; CX8021 (Reece, Dep. at 66); CX0319 (Reece, IHT at 46)).

121. For a number of years, dental distribution companies have provided discounts on dental supplies and equipment to DSOs. (Cohen, Tr. 423-424 (at Benco, corporate and DSO customers pay lower prices than do independent dentists); Foley, Tr. 4566 (DSO pricing includes rebates and manufacturer discounts); CX0305 (Cavaretta, IHT at 152) (DSO formulary pricing is at a deeper discount); Misiak, Tr. 1425 (DSO business includes formulary pricing); CX8021 (Reece, Dep. at 020) (Burkhart was doing business with special market customer types before 2012)).

122. Dental distributors historically provided discounts on dental supplies and equipment to DSOs in the 18-20% range. (CX8005 (Muller, Dep. at 79) (confirming a 18-20% discount as typical for special markets customers); CX0309 (Muller, IHT at 60, 67) (stating that 18-20% is the default range of discounts to special market customers, it can go much higher for individual items)).

123. As the number of chain practices increased, independent dentists found it harder to compete. (Sullivan, Tr. 3907 (increased pressure from corporate dentistry and general economic decline); CX3418 at 016 (Patterson presentation to sales team stating "[p]rivate practices are seeing increased pressure from Group Practice"); Goldsmith, Tr. 1929-1931, 1938-1939; Reece, Tr. 4368-4369; CX0320 (Capaldo, IHT at 128-130, 133)).

124. Dental school debt has increased pressure on independent dentists. (CCFF ¶ 117; RX2952 (Maurer, Dep. at 106-107); CX0303 (McElaney, IHT at 75) CX0319 (Reece, IHT at 46-47)).

B. Buying Groups Cropped Up As a Means for Independent Dentists to Compete with Corporate Dentistry.

125. Economic challenges caused private practice dentists to seek ways to reduce overhead costs, including cost of dental products. (Sullivan, Tr. 3907-3908; CX0305 (Cavaretta, IHT at 100-101); CX0320 (Capaldo, IHT at 129-131)).

126. One way dentists try to increase profitability is by joining a buying group to try to get savings on supplies. (Sullivan, Tr. 3907-3908; Mason, Tr. 2332-2333 (Dr. Mason tried to start a buying group because corporations were starting to come into New Mexico at that time, and he wanted to leave the independent dentists in a better place to compete with corporate practices); CX0321 (Kois Jr., IHT at 19-22); [redacted]; R. Johnson, Tr. 5479 (purpose of buying group KlearImpakt is to keep dentists strong and independent); CX0320 (Capaldo, IHT at 34) (GDA formed a buying group to save money on supplies for its members); Puckett, Tr. 2220 (Dental Gator buying group sought to secure greater discounts for independent dentists than the dentists could secure on their own)).

127. Buying groups cropped up as a means for independent dentists to combat these challenges by leveraging purchasing power of a group while at the same time remaining independent. (Reece, Tr. 4415-4416; [redacted]; (Goldsmith, Tr. 1934-1936; [redacted]

[redacted]; CX0322 (Maurer, IHT at 19-20) (Smile Source promotes independent dentistry by obtaining discounts on dental supplies and equipment for its members); CX8029 (R. Johnson, Dep. at 117 (KlearImpakt wants to grow to help independent dentists get discounts on supplies)).

128. In a January 8, 2014 strategic report, Benco noted that by joining a buying group, dentists will enjoy lower prices through leveraged buying without having to sell their practices and join a DSO. ([redacted]).

129. A Schein document, prepared for a October 2016 workshop to analyze buying groups, described Schein's concern with buying groups as follows: "We also expect that buying groups will expand as independent dentists look for alternatives to organized dentistry. We believe our margins will come under pressure as group practices and buying groups seek to leverage their purchasing power." (CX2487 at 002).

130. In an August 27, 2013 email, Benco's Patrick Ryan wrote: "Group Purchasing Organizations. They aggregate the purchase volume of unrelated entities in order to leverage price. We do not recognize them. GPOs are why medical works at the margins they do." (CX1156 at 001).

131. Guggenheim testified that buying groups are "a collection of customers that work together to leverage buying power to secure pricing and service incentives" and clarified that secure pricing meant "potentially lower pricing." (Guggenheim, Tr. 1566; *see also* CX0314 (Guggenheim, IHT at 163)).

132. The Big Three observed that more and more buying groups were forming and attempting to form in the last decade. (CX2634 at 002; CX0004 at 001; CX0084 at 001; McFadden, Tr. 2683-2684; CCFF ¶¶ 1281, 1289).

C. Buying Groups Have Grown in the Dental Industry in Past Decade Coinciding with the Increasing Pressures on Independent Dentistry.

133. The concept of buying groups in the dental industry dates back several decades. (CX2287 at 001 (Schein May 2016 email, referring to four existing buying groups dating back to 2004 as "inherited messes"); Cohen, Tr. 445, 877, 998-999 (Benco's no buying group policy dates to 1996); Sullivan, Tr. 3912-3913 (the earliest buying group that Sullivan remembers Schein doing business with is Alpha Omega and Sullivan believes Schein was doing business with them by at least 1997); Guggenheim, Tr. 1601-1602 (discussing guidance of not doing business with buying groups going back to 2000)).

134. The number of buying groups in the dental industry has increased over the last decade. (Sullivan, Tr. 3907-3910; Cohen, Tr. 811-812; CX8025 (Sullivan, Dep. at 66-67); CX0106 at 001 (Patterson's Neal McFadden wrote: "I used to get 1 [request to do business with a GPO] per month")).

135. The membership count of existing buying groups, has increased over the last decade. (CCFF ¶¶ 137, 167-168, 183).

136. The number of buying groups approaching Schein has increased in the last 5 to 10 years. (Sullivan, Tr. 3911).

137. In or around 2011, an increasing number of buying groups attempted to form, existing buying groups began growing in membership, and Schein, Patterson, and Benco were seeing more buying groups looking for discounts. (CX0304 (Ryan, IHT at 111, 114) (has seen an increase in number of GPOs in the dental industry in the last five or ten years); McFadden, Tr.

2683-2684 (hearing more and more from reps in field about buying groups); CX2634 at 002 ("[T]his is another buying group in the making…it is becoming more prevalent as these Pied Pipers find lost souls who buy into their concepts."); CX2635 at 001 (buying group model "is becoming more popular"); CX0165 at 001-002; CX2879 at 088; Foley, Tr. 4542 (Buying groups were popping up in May of 2011); CX2060 at 001 ("A lot of activity concerning buying groups, lately."); CX2636 at 002 ("Buying group opportunities continue to arise at a seemingly increasing rate."); CX2843 at 001; CX0226 at 001-002; CX0009 at 001; CX0166 at 001-002; CX0004 at 001 (buying groups "are coming fast and furious"); CX2389 at 001; CX2837; CX0070; CX0146; CX0201; CX2742 at 008 (Situational Analysis: Competitors, Henry Schein, Inc. 2011-2013 Strategic Plan); CX0311 (Sullivan, IHT at 126-127); CX0301 (Cohen, IHT at 182); CX0314 (Guggenheim, IHT at 170, 172-173); CX0084 at 001-002).

D. Buying Groups Save Dentists Money and Help Preserve Independent Dentistry.

138. Buying groups save dentists money. ([redacted]; *see also* CCFF ¶¶ 139-145, 181, 1391-1398, 1401-1402, 1404-1411, 1728, 1730-1731).

139. Buying groups market themselves as a means of helping independent dentists survive. (Goldsmith, Tr. 1934-1935; Reece, Tr. 4415-4416 (Burkhart seeks to work with buying groups to support independent dentists who want to stay independent); [redacted]; CX2246 at 001-002 (Georgia Dental Association attempted to put together a buying group to be "a DSO for the small dentist" and to "help the members of the dental community given the adversity in the marketplace")).

140. For example, the president of Kois Buyers Group testified that the company was created "to allow the smaller dentists an option to compete with the larger companies, by reducing some of their overhead." (CX0321 (Kois Jr., IHT at 35)).

141. The founder of the Kois Buyers Group testified that "[t]he Kois Buyers Group is an opportunity for smaller practitioners to buy items at a sale price all year long." (Kois Sr., Tr. 179).

142. The buying group helps independent dentists compete by giving them "more reasonable prices" on equipment and dental supplies. (Kois Sr., Tr. 196-197).

143. Another buying group, Smile Source, advertises itself as providing "group practice resources for the independent dentist" by negotiating lower prices on behalf of independent dentists. (Goldsmith, Tr., 1934-1936; CX0322 (Maurer, IHT at 13); CX0146 at 001-002; [redacted]).

144. A Smile Source marketing flyer advertised "Smile Source Preserving Independent Dentistry" and described the "vision" as empowering independent practitioner "dentists with the collective buying and practice enhancement power of corporate chains" with an invitation on how to become a member. (CX4232 at 004).

145. Patrick Ryan's analysis of a Kois/Burkhart invoice showed that for commonly purchased dental products, [redacted]).

E. Respondents Had a Common Understanding of the Term Buying Group.

146. Executives of Schein had a common understanding that a buying group is a collection of independent dentists banding together to negotiate lower prices. (Sullivan, Tr. 3899-3900; Meadows, Tr. 2418-2419; Steck, Tr. 3681-3682).

147. Executives of Patterson had a common understanding that a buying group is a collection of independent dentists banding together to negotiate lower prices. (Guggenheim, Tr. 1566; CX0314 (Guggenheim, IHT at 163); Misiak, Tr. 1306-1307; Rogan, Tr. 3428).

148. Executives of Benco had a common understanding that a buying group is a collection of independent dentists banding together to negotiate lower prices. (Cohen, Tr. 432-433; Ryan, Tr. 1036-1037; CX0301 (Cohen, IHT at 106); CX1084 at 001).

149. Importantly, Schein, Patterson, and Benco also understood the distinction between buying groups of independent dentists and other forms of dental entities that aggregated purchasing power, such as CHCs and DSOs. (CX8005 (Muller, Dep. at 278) (Schein contract clause that prohibits CHC buying groups from extending their negotiated pricing to private practice dentists); Foley, Tr. 4566-4568 (Advantage Dental Primary Vendor Agreement with Schein prohibits sharing DSO pricing with buying group component); CX2081 at 002 ("Similar PVA as with MB2, Advantage adheres to it by not bringing in the BG component."); Foley, Tr. 4573-4574; CX4001 at 002 (MB2 Primary Vendor Agreement with Schein prohibits growing GPO type relationships); RX2276 at 002 (Orthosynetics Primary Vender Agreement covers offices under the control of Orthosynetics); CX0158 at 002 (Patterson Special Markets "definition will not include group purchasing organizations (GPOs)."); Cohen, Tr. 548-550 (Benco decided to bid for the business of Atlantic Dental Care ("ADC") when it learned that ADC was a DSO and not a buying group)).

F. Buying Groups Successfully Entered Other Industries As a Means For Practitioners to Save Money.

150. Buying groups have successfully entered other industries as a means for practitioners to save money on supplies. (CCFF ¶¶ 151-157, 158-160, 162).

151. For example, GPOs are prevalent in the medical industry. (CX8029 (R. Johnson, Dep. at 18-22); Misiak, Tr. 1308 (Patterson's medical division does day-to-day business with GPOs); Rogan, Tr. 3432-3433; CX8033 (Cavaretta, Dep. at 49) (GPOs more prominent and prevalent in medical); CX8037 (Ryan, Dep. at 169-173)).

152. Vision Source is a buying group in the optometry market. ([redacted]).

153. The executives who started Smile Source first formed Vision Source, a buying group for ophthalmologists and optometrists. (CX0322 (Maurer, IHT at 16-17) (founder of Smile Source was Len Ellisor, Chairman of Vision Source Corporation); [redacted]; CCFF ¶ 152).

154. [redacted]; CX0319 (Reece, IHT at 104) (Smile Source's mission was to preserve independent dentistry "You may or may not be aware that [Smile Source] started on the optical side, and so they had a model that was already pretty well vetted, in terms of approach and it worked quite well for them…on that side of the business. They thought that there was an opportunity to step in and create a similar type of large fraternity like that, that could help protect [dentists'] independence. It is still working well on the optical side today and it continues to gain momentum on the dental side as well.")).

155. Vision Source helps optometrist save money by aggregating members to provide volume discounts – as the group grew Vision Source had more leverage with the vendors. (CX8019 (Moody, Dep. at 44-45)).

156. The founders of the dental buying group KlearImpakt first created a buying group for independent audiologists and ear-nose-throat ("ENT") specialists called AudConnex. (R. Johnson, Tr. 5480-5481; CX8029 (R. Johnson, Dep. at 18-20)).

157. AudConnex "was designed to help [the hearing imbalance and ENT] industry to keep independent ENTs' and audiologists' practices strong and relevant," including securing discounts for these doctors. (R. Johnson, Tr. 5480-5481; CX8029 (R. Johnson, Dep. at 18-21)).

158. Dental distributors, including Benco and Guggenheim Dental (Paul Guggenheim's family-owned distribution company that was later acquired by Patterson) benefitted through their membership in buying groups for distributors. These buying groups, including the National Distributing Contracting ("NDC") and the American Dental Cooperative ("ADC"), helped small, independent dental distributors like Benco and Guggenheim Dental to leverage their collective buying power in dealings with manufacturers, and to compete against larger dental distributors. (CCFF¶¶ 159-162).

159. Benco was a founding member of NDC, a buying group for small, independent distributors. (Cohen, Tr. 437-438; CX8015 (Cohen, Dep. at 111); CX0304 (Ryan, IHT at 150)). NDC was previously called the American Dental Cooperative. (Cohen, Tr. 437-438). Benco's membership in NDC helped Benco negotiate better terms and deals in purchasing products from dental product manufactures. (Cohen, Tr. 438-439). NDC also helped Benco compete against larger distributors. (Cohen, Tr. 438-439).

160. Paul Guggenheim was previously the President and a Board Member of ADC, a buying group of independent regional and local distributors that sought to aggregate their business in order to get better programs and to be able to acquire national lines of products. (CX0314 (Guggenheim, IHT at 28-30); Guggenheim, Tr. 1546). Guggenheim testified that the American Dental Cooperative was formed in order to achieve larger buying power and to aggregate the business of small and independent distributors. (CX0314 (Guggenheim, IHT at 28-30)).

161. Guggenheim Dental, a dental distribution company owned by Paul Guggenheim's family, was a regional, full-service distributor that was later acquired by Patterson. (Guggenheim, Tr. 1528-1529).

162. Guggenheim Dental benefitted from the buying power it achieved through its membership in the American Dental Cooperative. (CX0314 (Guggenheim, IHT at 31-33). The American Dental Cooperative helped Guggenheim Dental, an independent distributor, gain access to certain product lines that it otherwise would not have had access to based on its individual purchasing volume. (CX0314 (Guggenheim, IHT at 32)).

G. Kois Buyers Group Background

163. Kois Buyers Group is a buying group. (Kois Sr., Tr. 179-180; Kois Jr., Tr. 308, 310, 312).

164. The group was formed by Dr. John C. Kois, Sr. in 2014 to help small practices achieve enough purchase volume to obtain cost savings. (Kois Sr., Tr. 179).

165. Dr. John C. Kois, Sr. is one of the dental industry's key opinion leaders, and a well-known clinical educator. (Cohen, Tr. 567-568; Reece, Tr. 4409; [redacted]; Guggenheim, Tr. 1660).

166. The exclusive U.S. distributor for the Kois Buyers Group is Burkhart Dental Supply. (Kois Sr., Tr. 182-183; Kois Jr., Tr. 322).

167. As of September 2015, the Kois Buyers Group had 174 members. (CX8008 (Kois Jr., Dep. at 107)).

168. As of October 2018, the Kois Buyers Group has 570 members. (Kois Jr., Tr. 308).

169. To be eligible for membership, a dentist must have taken a course from the Kois Center and paid an annual membership fee of $299. (Kois Jr., Tr. 317-318).

170. The Kois Center is a private teaching center for practicing dentists located in Seattle, WA. (Kois Sr., Tr. 163).

171. Dr. John C. Kois, Sr. is the director and founder of the Kois Center. (Kois Sr., Tr. 161, 164; CX8007 (Kois Sr., Dep. at 13)).

172. The Kois Center is world-renowned; it works with dentists from all over the world. (CX8007 (Kois Sr., Dep. at 13)).

173. Approximately 4,000 dentists have taken a course at the Kois Center. (Kois Sr., Tr. 165).

174. The nickname for the group of dentists who have taken a course at the center is “the Tribe.” (Kois Sr., Tr. 165).

H. Smile Source Background

175. Smile Source is a buying group. (Goldsmith, Tr. 1948-1949 (Schein, Patterson, and Benco referred to Smile Source as a buying group); Guggenheim, Tr. 1799; Foley, Tr. 4524; Reece, Tr. 4394; Misiak, Tr. 1314-1320; CX2801 at 018 (Schein’s Response to RFA ¶32 (Schein considered Smile Source to be a buying group)).

176. Smile Source was based in Kingwood, Texas in around 2011. (Goldsmith, Tr. 1934-1937).

177. Smile Source is a group of dentists that formed to preserve independent practice dentistry. (Goldsmith, Tr. 1934).

178. The goal of Smile Source is to level the playing field for independent dentists against corporate group practices by providing resources and discounts that independent dentists could not get on their own by leveraging economies of scale. (Goldsmith, Tr. 1934-1936).

179. In 2012, Smile Source partnered with Burkhart. (Goldsmith, Tr. 1947-1948,; Reece, Tr. 4394-4397).

180. Burkhart offered Smile Source an aggressive pricing structure to support their growth. (Reece, Tr. 4397).

181. On average, Smile Source members saved [redacted]

182. Burkhart gained new customers and new sales through its partnership with Smile Source. (Reece, Tr. 4408).

183. Smile Source had 21 members at the beginning of 2011 and 28 members at the end of 2011. (RX2952 (Maurer, Dep. at 26-27)). At the end of 2012, Smile Source had 58 members. (RX2952 (Maurer, Dep. at 27)). At the end of 2013, Smile Source had 145 members. (RX2952 (Maurer, Dep. at 27-28)). At the end of 2015, Smile Source had 352 members. (RX2952 (Maurer, Dep. at 28)). At the end of 2016, Smile Source had 470 members. (RX2952 (Maurer, Dep. at 28)). At the end of 2017, Smile Source had 562 members. (RX2952 (Maurer, Dep. at 28)).

184. [redacted]

I. Other Buying Groups Background

185. The Georgia Dental Association ("GDA") formed a buying group known as GDA Supplies Plus. (CX8011 (Capaldo, Dep. at 11); CX0320 (Capaldo, IHT at 7-8)). The buying

group is housed in a subsidiary of the GDA called the Integrity Dental Buyers Group. (CX8011 (Capaldo, Dep. at 11); CX0320 (Capaldo, IHT at 7-8)).

186. The GDA formed a buying group so their members could save money. (CX0320 (Capaldo, IHT at 34)).

187. The GDA sent a Request for Proposal ("RFP") to Benco on September 8, 2015, seeking a bid from Benco to be the distributor for GDA's buying group, and Benco replied on September 13, 2015, that it declined to respond to the RFP, writing "Benco, as a matter of policy, does not participate in GPOs." (CX1036 at 001; CX1037 at 001; CX0320 (Capaldo, IHT at 98)).

188. The GDA sent an RFP to Patterson on September 8, 2015, seeking a bid from Patterson to be the distributor for GDA's buying group, and Patterson replied on September 10, 2015 that it would not respond to the RFP. (CX3031 at 001-003; CX0320 (Capaldo, IHT at 29, 94)).

189. The GDA sent an RFP to Henry Schein by or before September 11, 2015, seeking a bid from Henry Schein to be the distributor for GDA's buying group, and the GDA never heard back. (CX2246 at 001; CX0320 (Capaldo, IHT at 29-30, 75-76)).

190. The GDA reached an agreement around the beginning of Fall 2016 with SourceOne for its buyers group program. (CX8011 (Capaldo, Dep. at 28-29); CX0320 (Capaldo, IHT at 32-34)).

191. The GDA launched its buyers group program with SourceOne on December 16, 2016. (CX0320 (Capaldo, IHT at 32-34)).

192. SourceOne is an intermediary to the manufacturers. [redacted]. Being an intermediary to the manufacturers means that SourceOne only owns the software dentists use for ordering, but SourceOne has agreements with certain distributors and

manufacturers to deliver or distribute the dental supplies. [redacted]

193. SourceOne does not have access to all of the manufacturers that GDA dentists seek for dental supplies. (CX0320 (Capaldo, IHT at 42-43)).

194. SourceOne does not provide servicing on dental equipment. (CX0320 (Capaldo, IHT at 52-54)).

195. GDA has helped its buying group members compete with large DSOs by leveraging its members economies of scale. (CX0320 (Capaldo, IHT at 130-131)).

V. THE BIG THREE FEARED COMPETITION FOR BUYING GROUPS WOULD LEAD TO A "PRICE WAR" AND A "RACE TO THE BOTTOM" FOR THE INDUSTRY

A. Executives of The Big Three Viewed Buying Groups as a Threat.

196. Respondents were afraid that buying groups would lead to a price war between the dental products distributors. (CCFF ¶¶ 197-202, 198, 204, 208, 215, 217).

197. In 2010, Schein's President, Tim Sullivan, reported to Jim Breslawski, the president of Henry Schein North America Dental, that if Schein discounted to a buying group, there was a risk of "other competitors then following suit" resulting in a "huge price war." (CX2113 at 001; Sullivan, Tr. 3921-3922).

198. In a February 23, 2013 SharePoint bulletin post, Patrick Ryan, a Benco executive, instructed his team that "[i]f this door [to buying groups] is ever opened in dental, it's all over for all us….it's a race to the bottom" that could lead to a decline in margins to just "12% over cost." (CX1149 at 002; Ryan, Tr. 1075-1083). Ryan confirmed at trial that he was referring to buying groups leading to a race among the whole industry to the bottom in terms of profitability. (Ryan, Tr. 1082-1083). Ryan testified: "Q. And when you wrote "a race to the bottom, you meant a

race to the bottom in profitability? A. Yes. Q. And you meant a race among the whole industry. A. Yes.") (Ryan, Tr. 1082).

199. Ryan projected that buying groups could lead to a more than fifty percent drop in gross margins if competitors started discounting to buying groups. (CX1149 at 002 (Statement of Ryan: buying groups could lead to decline in margins to just 12% over cost); Ryan, Tr. 1082-1083; Cohen, Tr. 410 (Benco's gross margins are approximately 30%); [redacted]).

200. Benco's Chuck Cohen testified that he believed buying groups could erode margins for all dental distributors. (Cohen, Tr. 440-441; CX0301 (Cohen, IHT at 168)).

201. In an April 23, 2014 email Neal McFadden, a Patterson executive, informed Patterson's sales team that buying groups would lead to "a slippery slope." (CX3016 at 001). McFadden testified that by "slippery slope" he meant "a race to the bottom in terms of pricing." (CX8004 (McFadden, Dep. at 105-106)).

202. Executives from each of the Big Three described the rise of buying groups as a "slippery slope." (CCFF ¶¶ 201, 203, 709- 711, 713, 809, 950).

203. In a November 5, 2011 email to other Benco executives, Cohen wrote [redacted]

204. Each Respondent, and its executives understood that buying groups could lower prices, slash Respondents' margins, and fundamentally affect Respondents' pricing power. (CCFF ¶¶ 197- 201, 208-211, 213, 214, 216, 219, 220, 228).

205. Typically, an industry's profitability decreases as customers' buying power increases. (CCFF ¶¶ 128, 216, 259-261, 1232, 1606).

206. Schein's Jake Meadows wrote in a July 17, 2012 email: "We do not want our customers organizing and creating what are known as GPOs it takes the value away from the distributor." (CX0170 at 001; Meadows, Tr. 2426).

207. Schein's Jake Meadows testified that one of the negatives of doing business with buying groups was that "…existing customers would be the ones that would go take advantage of that discount…if you discount an existing customer…we still have to service that customer, still have to put the same amount of resources towards that customer." (Meadows, Tr. 2507).

208. In a February 2012 email to his direct reports, Schein's Randy Foley wrote: "When existing customers enroll [in a buying group], it simply erodes margins." (CX0238 at 001; CX8003 (Foley, Dep. at 132-133); Foley, Tr. 4552-4555).

209. In a November 14, 2014 email, Schein's Michael Porro wrote about a dental office that may not have been purchased by the DSO MB2: "If they are not buying in, it's a buying group and HSD gets crushed on margins." (CX2034 at 001).

210. Patterson's Neal McFadden testified that dealing with buying groups could affect Patterson if the company was "lowering our cost to our existing clients." (CX8004 (McFadden, Dep. at 79-80)).

211. A Benco document titled "Buying Clubs" lists as a point [redacted]

212. Schein's Sullivan testified at trial that buying groups can be threats. (Sullivan, Tr. 3911). Sullivan agreed that if Schein does not work with a buying group, that buying group might instead become a customer of a competitor. (Sullivan, Tr. 3912).

213. Schein's Sullivan testified that buying groups can lead to a decrease in margins for Schein. (Sullivan, Tr. 3912).

214. The Benco Strategic Planning Retreat Agenda for 2014 listed as an intended agenda item: [redacted]; *see also* CCFF ¶¶ 128, 215-216).

215. Cohen testified that [redacted]

216. [redacted]

217. Benco's Chuck Cohen testified he was concerned that Schein or Patterson would sign up with Elite Dental Alliance ("EDA") if Benco did not. (Cohen, Tr. 470). Cohen testified that "Benco is always concerned with what Schein and Patterson does" including "partnering with a buying group." (Cohen, Tr. 470). Cohen further testified that Schein and Patterson opening up buying groups was a risk to Benco; and "[a]ny time Schein or Patterson changes their strategy there's a risk to Benco . . . that we will lose customers." (Cohen, Tr. 466-467).

218. Ryan was concerned about Schein and Patterson working with buying groups. (Ryan, Tr. 1116-1117).

219. In an August 2011 email, a Patterson sales representative relayed her concerns to McFadden and a Patterson branch manager that the Florida Dental Association was considering the formation of a buying group that would lead to lower margins for Patterson. (McFadden, Tr. 2803-2804 (referring to RX0020)).

220. In a February 2013 email, Patterson's Fruehauf wrote to Misiak about a request for a bid from what Fruehauf thought was a buying group. Fruehauf wrote: "I have had numerous discussions with [a Patterson branch manager] about our position and what it could mean if we set a precedent of offering lower prices such as this." (Misiak, Tr. 1337-1339 (referring to CX0093); CX0316 (Misiak, IHT at 272, 275) (buying groups might cause Patterson to lose business or a percentage of it a consequence of offering lower prices to buying groups was that profits would be lower on business that Patterson already had)).

221. On July 13, 2015, Schein's East Coast sales director, Jake Meadows, wrote in a SWOT analysis that buying groups were a threat. (CX2377 at 001; Meadows, Tr. 2444-2447). A SWOT analysis identifies strengths, weaknesses, opportunities and threats. (Meadows, Tr. 2444-2445). "Threat" as used in a SWOT analysis refers to risk. (Meadows, Tr. 2445).

222. In a reply to Meadow's July 13, 2015 email, Schein's West Coast sales director, Joe Cavaretta, agreed with Meadows stating "LOL . . . this is almost exactly what I had." (CX2377 at 001).

223. In a February 2014 email, Schein's Sullivan suggested that GPOs be added to a Schein strategic plan document as a potential threat to the dental market. (CX2618 at 001).

224. In an October 2014 email, written in advance of an executive planning meeting, Schein's Sullivan lists "Buying Group mentality" as one of the "Top 5 'Keeps Me Up At Night'" issues. (CX0183 at 001; Sullivan, Tr. 3908-3911). Sullivan testified that he was referring to the

prevalence of buying groups and the fact that his team had reported this customer trend to him. (Sullivan, Tr. 3910; CX0311 (Sullivan, IHT at 154-155)).

225. [redacted]

226. The SWOT (Strengths, Weaknesses, Opportunities, and Threats) Analysis in a Patterson FY 2013 Dental Business Planning Document (dated February 2012) identifies the "Expansion of national buying groups" as a threat. (CX3068 at 024; Guggenheim, Tr. 1579-1580). Patterson strategic plans included SWOT analyses, which reflect strengths weaknesses, opportunities and threats to the business. (Guggenheim, Tr. 1579).

227. A Patterson May 2014 SWOT analysis for a Florida market identifies "emergence of GPOs and our competitors [*sic*] willingness to negotiate with these groups" as a threat. (CX3283 at 010).

228. Patterson's President, Guggenheim, testified that buying groups were threats because "often [they] come with reduced pricing." (CX8023 (Guggenheim, Dep. at 221-222)).

229. In an email dated October 6, 2014, Benco's Cohen identified "rise of buying groups" as one of the five things he was "most worried about with respect to Benco and where the industry is today." (CX0054 at 001; Cohen, Tr. 442-444 (testifying that CX0054 was prepared for senior team strategy meeting)).

230. Benco's Chuck Cohen testified that buying groups was one of things he "watch[ed] closely." (Cohen, Tr. 443).

231. In a conversation with Mitchell Huber, Benco's Director of Sales, Patrick Ryan referred to buying group Smile Source as "terrifying." (CX0015 at 001; Ryan, Tr. 1043; CX8037 (Ryan, Dep. at 339-340); CX0304 (Ryan, IHT at 190)).

232. [redacted]

233. In May 2014, Cohen received an email about a presentation he had made to a meeting of the Distributor Leadership Council in April 2014, summarizing his presenation about buying groups: "[S]mall dentists join these clubs to compete with the large corporate practices that already have leverage; these clubs are a real threat to Chuck." (CX0052 at 003).

234. In a July 11, 2013 email, Benco's Regional Manager for the Rocky Mountain Region, described buying groups as "death to dealers." (CX1233 at 001).

235. In notes from a Benco meeting on April 9, 2014, buying clubs are identified as "a real threat to Chuck [Cohen]." (CX0052 at 003; CX0301 (Cohen, IHT at 146-147)).

236. A transcript of a conversation between Benco's Ryan and Mitchell Huber, Ryan states that Smile Source is "terrifying." (CX0015 at 001; Ryan, Tr. 1043; CX8037 (Ryan, Dep. at 339-340); CX0304 (Ryan, IHT at 190)).

237. In a March 8, 2012 email, Patterson's Misiak wrote to Patterson's Neal McFadden regarding a Florida Dental Association inquiry about forming a dental supply discount program: "I get these more often than I like. This stuff scares me. I'm gonna tell him thanks but no thanks." (CX0084 at 001).

238. In Respondents' view, buying groups posed a long-term threat to the industry as a whole, but offered potential short-term gains to any single distributor. (CCFF ¶¶ 221, 223- 227, 239-241, 243-250, 252).

239. Schein's President, Tim Sullivan, testified about the "primary risk" posed by buying groups: "if we decide not to and the group decides to work with one of our competitors and now that puts our business at risk . . . we would want to know that, and that does matter to us."

(CX0311 (Sullivan, IHT at 254); *see also* CX0311 (Sullivan, IHT at 158, 254); CX0311 (Sullivan, IHT at 224) (Sullivan further explaining, "if we decide not to work with the [buying] group and the group decided to work with one of our competitors, and then those customers that were already existing business of ours now are members of this group move their business, we lose the business.")).

240. Schein's President, Tim Sullivan, testified at trial that if Schein rejected a buying group, the buying group might shift Schein's customers to a competitor. (Sullivan, Tr. 3912). This would be a risk to Schein's business and could lead to a decrease in margins—also known as margin erosion. (Sullivan, Tr. 3912).

241. In notes from a November 2015 budget meeting, Graham Stanley, the Chief Financial Officer of at least Henry Schein's U.S. dental business wrote: "Tim [Sullivan] clearly set out that HS should not be first to cooperate with GPOs, but also don't want to be last." (CX0189 at 002; Meadows, Tr. 2443-2444; Steck, Tr. 3843-3844 (Steck testified that all recipients of this document were in management, that Graham Stanley is a very trustworthy individual, and that Steck has no reason to doubt Graham Stanley's notes were accurate)).

242. In a presentation for a September 2013 meeting, Schein executives prepared a slide titled: "What do we not know about GPO's" that listed the point "Will they be successful in baiting a Dental company into working with them?" (CX0193 at 014).

243. In a November 18, 2014 email, Schein's Jake Meadow identified the following "critical questions to present to the group": "How can we stop the progression…Which competitors are embracing these relationships?" (CX2364 at 001).

244. Schein was concerned about how it would compete if buying groups had relationships with other distributors. (Meadows, Tr. 2599 (testifying about CX2364 at 001 ("How can we stop the progression…Which competitors are embracing these relationships?")).

245. In a January 28, 2015 email about MB2 and Dental Gator, Schein's Jim Breslawski wrote that Schein didn't want to "help open the floodgates on buying groups." (CX0188 at 001).

246. Internal Benco documents also show that Benco believed Schein and Patterson's conduct with respect to buying groups directly affected Benco's ability to maintain a no buying group policy. (CX1218 at 007 ("Our Risks" include "Other GPOs get started, and are recognized by Schein or PDCO."); [redacted]).

247. [redacted]

248. When Benco found out that Schein was working with Smile Source, it wanted to "push EDA to the next level as a way of competing against Schein's GPO." (Cohen, Tr. 480).

249. In Case Study of the EDA, Chuck Cohen identified that a "risk" of discounting to the EDA buying group was "[o]ther GPOs get started, and are recognized by Schein or PDCO [Patterson]." (CX1084 at 007; *see also* Cohen, Tr. 466). Cohen testified that he reviewed this case study with Benco's senior team. (Cohen, Tr. 453-456).

250. McFadden believed that buying groups could be a potential opportunity for Patterson if Henry Schein was participating in them. (McFadden, Tr. 2709 (testifying that McFadden asked Rogan in August 2013 about Patterson exploring GPOs because: "I see here that Henry Schein is participating in this particular group, and I thought that this . . . could be a future potential

opportunity if Henry Schein was participating in them . . . ."); *see also* CX0106 (August 2, 2013 email, McFadden wrote to Misiak and Rogan: "Is it worth it to explore GPO???????")).

251. Patterson executive, Rogan, believed there was no reason for Patterson to work with a buying group if Benco and Schein were also not competing for them. (CX0317 (Rogan, IHT at 239-240) (testifying about a statement Rogan wrote in an email in August 2013 ("Schein, Benco, and Patterson have always said no."): "What I'm saying here is that to the best of my knowledge [Benco and Schein] hadn't worked with any buying groups, so there's no reason for us to work with a buying group when we don't think it's a good idea . . . if our biggest competitors aren't doing it, I don't understand why – I'm basically saying to him, 'I don't understanding why you're even asking about this.'"); *see also* CX0106 (August 4, 2013 email from Rogan to McFadden, Misiak, and Josh Killian: "We don't need GPO's in the dental business. Schein, Benco, and Patterson have always said no.")).

252. Patterson's executives concede that the company's buying group strategy depended on Benco and Schein's conduct. (CCFF ¶¶ 250, 251; *see also* McFadden, Tr. 2709 (McFadden asked Rogan in August 2013 about Patterson exploring GPOs because GPOs could be "a future potential opportunity if Henry Schein was participating" in a group); CX0317 (Rogan, IHT at 239-240) (Rogan testified that if biggest competitors aren't working with buying groups, there is no reason for Patterson to work with buying groups)).

253. When asked "what's the concern if Schein and Benco bid on this [buying] group?," Patterson's President, Paul Guggenheim, testified "The potential that we could lose the business." (CX0314 (Guggenheim, IHT at 265-266) (in reference to CX0092 at 001)).

254. Burkhart identified the same dilemma; Burkhart also identified the risk that if they didn't engage with buying groups, they would lose customers to distributors willing to work with buying groups. (Reece, Tr. 4371).

255. Through partnering with buying groups to offer discounts, Burkhart gained customers from Schein. (CX4220 at 001 (Burkhart gained a $2 million dollar account from Henry Schein through the Kois Buyers Group)).

B. Respondents Knew Buying Groups in The Medical Supplies Industry Drove Down Margins.

256. Executives from each of the Big Three were aware that the successful entry of buying groups and GPOs in the medical supplies distribution market led to low margins for distributors. (CCFF ¶¶ 258- 264, 266-268).

257. In the medical distribution market, the rise of buying groups resulted in a significant decline in the distributors' margins. (CCFF ¶¶ 258-264, 266).

258. In a February 23, 2013 SharePoint bulletin post, Ryan, a Benco executive, wrote "GPOs are what [ruined] the medical supply business and why they work on single digit margins." (CX1149 at 002; Ryan, Tr. 1081-1082).

259. When Benco's Ryan wrote in his Sharepoint post in CX1149 at 002 that "GPOs are what [ruined] the medical supply business and why they work on single digit margins. If this door is ever opened in dental, it's all over for us….it's a race to the bottom," his reference to "a race to the bottom" meant a race to the bottom in profitability in the whole dental industry. (Ryan, Tr. 1081-1083).

260. In an August 27, 2013 email, Benco's Ryan warned his team about the impact of buying groups on the medical industry, explaining that "GPOs are why medical works at the margins they do. . . . No thanks." (CX1156 at 001; Ryan, Tr. 1080-1081).

261. In a November 4, 2015 email, Benco's Ryan wrote "Once a national dealer opens this door [to buying groups], in less than 5 years, we will turn into medical and be working for 10% over cost." (CX0016 at 002). Ryan testified at trial that Schein, Patterson, and Benco were all national dealers; and Darby was not one of the national dealers Ryan was referencing in CX0016. (Ryan, Tr. 1088-1089). When Ryan wrote, "opens this door" in CX0016, he was referring to participation with buying groups. (Ryan, Tr. 1089-1090).

262. In a February 1, 2011 email, Schein's Joe Cavaretta wrote in response to an email about a group looking to form a buying group that "dealing with GPOs is incredibly risky" because "as soon as we start doing this, we will turn into medical. Margins will go down. . . . This is a bad deal all the way around." (CX0165 at 001; Cavaretta, Tr. 5643-5646; CX0305 (Cavaretta, IHT at 131-132)). At trial, Cavaretta testified that he used the word GPO in this email to refer to buying group. (Cavaretta, Tr. 5644-5645; CX0165 at 001). Cavaretta testified that it was his understanding that the medical supply industry operated at lower margins as compared to dental. (Cavaretta, Tr. 5645).

263. In an August 25, 2011 email, Schein's Cavaretta wrote in response to an email about a group trying to form a buying group to get discounts that "[o]nce the buying groups [enter] our market the dental model as we know it will change." (CX0166 at 002-003; Cavaretta, Tr. 5646-48). Cavaretta testified that what he was referring to "the model could potentially change to medical, who had that type of strategy, because margins could go down . . ." (Cavaretta, Tr. 5646-48).

264. In a February 11, 2014 email, Patterson's McFadden wrote that the former President of Patterson, Inc.'s medical supplies division [Mike Orsclen] referred to medical GPOs as a "necessary evil" because "rather than selling directly to the end user, [Patterson] had to go

through this GPO to get to the end user." (CX3419 at 001; McFadden, Tr. 2706-2707; CX0315 (McFadden, IHT at 28-32, 45)). Patterson's McFadden took the necessary evil statement to refer to the fact that GPOs offered low margins to medical supply distributors. (CX0315 (McFadden, IHT at 45)).

265. Patterson Medical had to pay a percentage of sales to the GPOs with which it worked. (McFadden, Tr. 2726-2727).

266. In a November 2015 email to a Benco territory representative, Ryan stated his concern about the effect that dealing with buying groups would have on margins: "Once a national dealer opens this door, in less than five years, we will turn into medical and be working for 10 percent over cost." (CX0016 at 002).

267. When Ryan used the term "national dealer" in CX0016 at 002, he was referring specifically to Schein, Patterson and Benco. (Ryan, Tr. 1087-1089).

268. When Ryan wrote "opens the door" in CX0016 at 002, he was referring to participating in a buying group. (Ryan, Tr. 1089-1090).

VI. BENCO MAINTAINED AN "OPEN RELATIONSHIP" WITH PATTERSON AND SCHEIN FOR THE BIG THREE'S "MUTUAL BEST INTEREST."

A. Open Relationship Among The Big Three Presidents.

269. Guggenheim and Cohen have known each other for at least 40 years. (Guggenheim, Tr. 1545 (Guggenheim has known Cohen 40-50 years); Cohen, Tr. 482 (Cohen has known Guggenheim "my whole life, 40 years.")). Guggenheim and Cohen grew up together in the dental industry. (Guggenheim, Tr. 1545).

270. Sullivan and Cohen have known each other for several decades. (Cohen, Tr. 481-482 (Cohen has known Sullivan for 35 years); Sullivan, Tr. 3877 (Sullivan has known Cohen for more than 20 years)).

271. Cohen has maintained a business relationship with Sullivan. (Cohen, Tr. 482-483; CX0301 (Cohen, IHT at 312, 320)).

272. Cohen has maintained a relationship with Guggenheim. (Cohen, Tr. 482-483; [redacted]).

273. Cohen communicated with Guggenheim through various means including phone calls, text messages, emails, and in-person meetings over the past ten years. (Cohen Tr. 482-483; [redacted]).

274. Cohen has communicated with Sullivan through phone calls, text messages, emails, and in-person meetings over the past ten years. (Cohen, Tr. 483-484).

275. Over the past ten years, Sullivan has communicated with Cohen through various means, including phone calls, text messages, emails and in-person meetings. (Sullivan, Tr. 3877-3878).

276. Guggenheim has known Sullivan for 10 to 12 years. (Guggenheim, Tr. 1545).

277. Chuck Cohen, had an "open relationship" of trust with the executives at Schein and Patterson in which he felt he could "approach them with issues or to learn." (Cohen, Tr. 492-493; CX1045 at 001 (October 2011 email from Chuck Cohen to his brother, Rick Cohen: "We currently have an open relationship with Schein and Patterson, one that's worth maintaining."); *see also* CX0301 (Cohen, IHT at 277-278) ("I work very hard to have a good relationship with Tim Sullivan and the guys at Schein, as well as the people from Guggenheim [Patterson]. I know [*sic*] them for a long time. I have a lot of respect for them. And I believe that honesty and forthrightness is important to a good business relationship like that. I give information, I get information, and I think credibility is important.")).

278. Cohen always wanted to be viewed as honest and open with Tim Sullivan and Paul Guggenheim. (Cohen, Tr. 553 ("Q. And you always want to be viewed as honest and open with

Tim Sullivan and Paul Guggenheim; right? A. I want to maintain a credible, good relationship with both, with my counterparts, yes. Q. And you would hate for Tim Sullivan to find out that you had lied to him or had been not fully forthcoming with respect to the ADC situation? A. My reputation is important, and I wouldn't like anyone to think I was lying to them. Q. But specifically I'm talking about Tim Sullivan of Henry Schein.").

279. Cohen has contacted his counterparts at Patterson and Schein about issues in the dental industry. (Cohen, Tr. 484). Occasionally, Cohen has reached out about the same dental industry issue to Sullivan at Schein and Guggenheim at Patterson—with each competitor in separate communications. (Cohen, Tr. 484-485).

280. Benco is smaller than Schein and Patterson (Cohen, Tr. 430; *see also* CCFF ¶¶ 23, 38), and Cohen believed that Benco's voice alone was not as loud as Schein, Patterson, and Benco's voices together. (Cohen, Tr. 488 ("I have a very small voice in the business. Those guys have big voices…Sometimes our mutual best interest is good for me."); Cohen, Tr. 489 ("Q. And again, that was because Benco's voice alone is not as loud as Benco, Schein and Patterson's voices together? A. We're a small player in the market, and there's sometimes when there's mutual best interest, so yes.")).

281. Cohen initiated multiple contacts with Tim Sullivan and Paul Guggenheim to seek outcomes in their mutual best interests. (Cohen, Tr. 485, 487-489; Cohen, Tr. 488 ("Sometimes our mutual best interest is good for me."); Cohen, Tr. 489 ("We're a small player in the market, and there's sometimes [I initiate communication] when there's mutual best interest")).

282. In an October 2011 email to Rick Cohen, Chuck Cohen's brother and a co-owner of Benco, Chuck Cohen described the "big potential" of an upcoming visit by Guggenheim was "maintaining our current strong and open relationship" with Patterson because it was one "that

[Benco] may need to tap into at some point in the future." (CX1045 at 001). Cohen illustrated this point by recounting a recent episode in which the executives of Patterson had passed on sensitive information to Benco, noting that as a result, Benco needed those specific, friendly leaders at Patterson to remain in charge. (CX1045 at 001 ("Example: Larry [Cohen] & Paul [Guggenheim] have personally just shared thoughts & strategies regarding Dentsply's introduction of a mid-priced tooth line, and found out that (surprise!) Dentsply management was giving each of us a different story. A win for Patterson doesn't mean a loss for us - - - we need the current management of Patterson to get some wins so they aren't overthrown!")). Cohen also states in this email that he "would be happy to accommodate the request" if Tim Sullivan wanted a tour of Benco's facilities because "we need to be good neighbors." (CX1045 at 001).

283. Benco had a lot of the same expenses as Schein and Patterson (CX8015 (Cohen, Dep. at 311)), but did not have the same volume of customers as Schein and Patterson. (CX1071 at 001 (October 2014 email from Chuck Cohen, forwarding an April 2014 document, "At Benco, we have the expenses and overhead, but we don't have the volume."); [redacted]; CX1078 at 001 (June 2015 Cohen note: "In light of declining margins due to buying clubs & Amazon, need to consolidate. Get bigger or be gone, we don't have the scale to survive with the cost structure.."); [redacted].

B. Pattern of Cooperation Among the Big Three to Confront Threats to Distributors Together.

284. Cohen had a practice of contacting Sullivan and Guggenheim to seek cooperation between the firms. (Cohen, Tr. 484-489 ("Sometimes our mutual best interest is good for me");

Guggenheim, Tr. 1546, 1547; ("Q. Is it fair to say that in the past Benco's Chuck Cohen has contacted you about various dental issues that he wanted you to look into? A. Yeah, that's fair to say."); Sullivan, Tr. 4080 ("Q. So we've looked at three instances, that KaVo Kerr handpiece issue, the P&G issue, and now the poison pill issue, where Mr. Cohen reached out to you about manufacturers. A. Correct.")).

285. In 2010, Cohen contacted Sullivan about a manufacturer that was selling a product directly to dentists on its website, even though Schein and Benco were both distributors for this manufacturer. (Sullivan, Tr. 3887-3888; CX2346 at 003). After receiving Cohen's call, Sullivan immediately emailed Schein executives characterizing Cohen as being "furious about this" development in the call between them. (CX2346 at 003; Sullivan, Tr. 3888).

286. Schein's VP of Equipment, Brian Watson contacted the manufacturer about the issue (CCFF ¶ 285) that Cohen brought to Tim Sullivan's attention, and the manufacturer agreed to suspend its practice of selling directly to dentists. (CX2346 at 001-002; Sullivan, Tr. 3888-3889).

287. Cohen subsequently texted Sullivan to let him know the "good news" that the issue Cohen had contacted Sullivan about was resolved and the manufacturer would rescind the offending plan to sell directly to dentists. (Sullivan, Tr. 3888-3889; CX2346 at 001).

288. Sullivan and the Schein executives already knew from an internal Schein email that the manufacturer about which Cohen had contacted Sullivan had agreed to cease selling directly to dentists. (CX2346 at 001). Sullivan nonetheless copied or re-typed Cohen's text message and shared it in its entirety with the Schein executives. (Sullivan, Tr. 3888-3889; CX2346 at 001).

289. On another occasion, in late 2011, Cohen reached out to dental products manufacturer Proctor & Gamble because he wanted a change to the packaging and pricing of a Procter &

Gamble product. (Cohen, Tr. 488-489). The company declined. (Cohen, Tr. 489 ("Their response is: We're Procter & Gamble, and we're not making the change you suggest.").

290. After Cohen learned that Procter & Gamble would not agree to his request to change the packaging and pricing of the product, Cohen sent emails to brought the issue to both of Benco's closest competitors asking Sullivan of Schein and Guggenheim of Patterson to raise the issue of Procter & Gamble's packaging and pricing of the product with Proctor & Gamble. (Cohen, Tr. 489; CX1049 at 001 (December 10, 2011 email from Cohen to Sullivan); CX1050 at 001-002 (December 10, 2011 email from Cohen to Guggenheim); *see also* CX2422 at 001-002 (December 11, 2011 email from Sullivan to Schein's Vice President, Merchandise Marketing, forwarding Cohen's December 10, 2011 email)).

291. Cohen asked Sullivan and Guggenheim at his competitors' companies for help in addressing the issue with Proctor & Gamble packaging and pricing of a product because Benco is "a small player in the market, and there's sometimes when there's mutual best interest." (Cohen, Tr. 489).

292. On December 10, 2011 at 3:39 pm, Cohen sent an email to Guggenheim sharing Benco's margin and profitability analysis on the Procter & Gamble product and asking Guggenheim to raise Benco's pricing issue with Patterson's marketing department and ultimately with Proctor & Gamble. (Guggenheim, Tr. 1547-1549; Cohen, Tr. 488-489; CX1050 at 002 (Cohen email to Guggenheim, "But I am giving you the heads up in the hopes that you'll make someone on your Marketing team aware of the issue, and then maybe bring it to the attention of P&G management.")).

293. On December 10, 2011 at 3:42 pm, within minutes of sending his email to Guggenheim, Cohen sent a nearly identical email to Sullivan sharing Benco's margin and profitability analysis

on the product and asking Sullivan to raise Benco's pricing issue with Schein's marketing department and ultimately with Proctor & Gamble. (Cohen, Tr. 488-489; CX1049 at 001-002 (Cohen email to Sullivan, "But I am giving you the heads up in the hopes that you'll make someone on your Marketing team aware of the issue, and then maybe bring it to the attention of P&G management."); Sullivan, Tr. 3890-3891).

294. Cohen's nearly identical December 10, 2011 emails to Sullivan and Guggenheim asked Sullivan and Guggenheim to keep Cohen's role in raising the issue quiet asking them not to "mention this e-mail to your team, I'd rather it not get back to Amy Moorman that I put this issue on your radar." (CX1049 at 001-002; CX1050 at 002).

295. Cohen's nearly identical December 10, 2011 emails to Sullivan and Guggenheim regarding Procter & Gamble spelled out the collective issue and the collective solution he was proposing. Both emails state, "I think you see the issue: we (all of us) are going to lose money on every box we sell…. When we at Benco called this issue to the attention of P&G management, they replied that no one else (i.e. you, Schein, Burkhart) seemed concerned about it, so they're not going to make any changes. Our feeling is that we distributors either need more margin, or P&G needs to take out the cavity rinse." (CX1049 at 001-002; CX1050 at 001-002; Guggenheim, Tr. 1547-1550; 1551; Sullivan, Tr. 3890-3891; CX3067 at 002).

296. One of the few differences between Cohen's nearly identical December 10, 2011 emails to Sullivan and Guggenheim was his individual references to seeing each of them in person a few weeks before. (CX1050 at 001 (Cohen to Guggenheim: "Great to see you in PA a few weeks ago, thanks for making the trip. Two quick issues ...."); CX1049 at 001 (Cohen to Sullivan: "Great to see you a few weeks ago in NYC!")).

297. Both Sullivan and Guggenheim responded to Cohen that they would look into the issue Cohen raised in his December 10, 2011 email regarding Procter & Gamble. (Guggenheim, Tr. 1551-1552 ("Q. You responded to Chuck Cohen on December 12, 2011? A. Yes. That's right. Q. And you told him, 'I'm running down the numbers on the P&G issue'? A. Uh-huh. Q. And what did you mean by that? A. I was going to investigate. . . ."); CX3067 (December 12, 2011 email from Guggenheim to Cohen, "I'm running down the numbers on the P&G issue . . . ."); (Sullivan, Tr. 3891-3893) ("Q. And you told him that you would ask your team to check this out.? A. I did.)).

298. Patterson investigated the issue about Procter & Gamble's packaging and pricing of a product that Cohen brought to Guggenheim's attention. (Guggenheim, Tr. 1552-1554, 1564-1565; *see also* CX8023 (Guggenheim, Dep. at 124-125) ("I think is accurate to say that for the most part I investigated it.")).

299. Schein investigated the issue about Procter & Gamble's packaging and pricing of a product that Cohen brought to Sullivan's attention. (Sullivan, Tr. 3891-3893; Sullivan Tr. 3893) ("Q. And you told him that you would ask your team to check this out.? A. I did. Q. And, in fact, you had done just that. We saw you had forwarded Chuck Cohen's email to Paul Hinsch, VP of marketing, right? A. Correct. Q. You also told Chuck Cohen that you appreciate him bringing this to your attention. Do you see that. A. I do."); CX2422 at 002 (Sullivan forwards Cohen's email to Hinsch on December 10; Hinsch responds to Sullivan, "I don't think we focused on the plan with the rinse. I will ask the team to do so."); CX1049 at 001 (December 11, 2011, email from Sullivan to Cohen, "Thanks Chuck. I will ask team to check this out. I don't think we included that in our analysis. I appreciate you b[r]inging to my attention. I'll be in touch.")).

300. Cohen testified that his communications with Sullivan and Guggenheim regarding the Procter & Gamble issue are an example of his open relationship with Schein and Patterson. (Cohen, Tr. 493).

301. In 2013, Benco had a policy of including “poison pill” clauses in its manufacturer contracts to prevent the manufacturers from using the Benco’s transactional data to sell to Benco’s customers directly without going through distributors. (Cohen, Tr. 485-486). Benco’s poison pill clause required manufacturers to give Benco three year’s notice before selling directly to customers. (Cohen, Tr. 485).

302. Benco learned from a manufacturer that Schein and Patterson did not have the same policy requiring a poison pill clause. Benco was concerned because, in Cohen’s words, “If Benco signed a contract with a manufacturer that contained a poison pill clause, but Schein and Patterson had not, Benco’s customer base is still at risk if that manufacturer goes direct.” (Cohen, Tr. 487).

303. Cohen contacted and urged Sullivan of Schein and Guggenheim of Patterson to include specific poison pill contractual provisions in their contracts with manufacturers. (Cohen, Tr. 487-488).

304. In separate but nearly identical June 12, 2013, emails, Cohen urged Sullivan and Guggenheim to adopt Benco’s policy to include poison pill clauses in their respective manufacturer contracts. (Cohen, Tr. 486-488; (Guggenheim, Tr. 1556-1595; CX1055 at 001-002 and CX2337 at 001 (“In every negotiation since [the first meeting with the manufacturer], we insisted on, and received, the three-year ‘poison pill’ clause . . . . At Benco, we’re NOT changing our stance on this issue, and urge you to re-examine the agreements you’ve already signed to make sure they include the ‘poison pill’ clause.”)).

305. On June 12, 2013, Cohen wrote to Guggenheim, “At Benco, we’re NOT changing our stance on this issue, and urge you to re-examine the agreements you’ve already signed to make sure that they include the ‘poison pill’ clause.” (CX1055 at 002).

306. On June 12, 2013, Cohen wrote to Sullivan, “At Benco, we’re NOT changing our stance on this issue, and urge you to re-examine the agreements you’ve already signed to make sure that they include the ‘poison pill’ clause.” (CX2337 at 001).

307. After receiving Cohen’s June 12, 2013 email regarding Benco’s concern with inclusion of poison pill clauses, Guggenheim looked into the issue. (Guggenheim, Tr. 1560-1564); CX3222 (Cohen email to Guggenheim, “I received your message on the HF issue, glad you’re on top of it.”). Guggenheim later communicated with Cohen to inform Cohen of what he had learned. (Guggenheim, Tr. 1562-1564). Guggenheim communicated to Cohen the fact that Patterson had included the clause at issue in its own contracts. (Guggenheim, Tr. 1565); CX6027 at 031 (Row 265) (June 18, 2013 text from Guggenheim to Cohen about Patterson’s inclusion of similar clauses)).

308. After receiving Cohen’s June 12, 2013 email regarding Benco’s concern with inclusion of poison pill clauses, Sullivan looked into the issue. (CX2337 at 001 (June 13, 2013 email from Sullivan to Paul Hinsch: “Paul, what are your thoughts in general regarding this issue? . . . . Right now, which suppliers do we share such end-user data with?”)). Sullivan also forwarded Cohen’s June 12, 2013, email to his boss. (Sullivan, Tr. 4079-4080; CX2337 at 001).

309. On June 11, 2013, Paul Jackson wrote to Cohen asking to discuss the issue of manufacturers seeking end user data, noting that “Patterson and or Schein are getting sloppy about giving end user data.” (CX1023 at 002). In response, on June 12, 2013, Cohen reported the communications with his competitors in an email to Benco’s Paul Jackson, saying, “I sent the

email to Tim [Sullivan] & Paul [Guggenheim], will let you know when I hear back… Don't sign without the poison pill." (CX1023 at 001).

310. Cohen testified that his communications with Schein and Patterson urging them to adopt Benco's policy of insisting on poison pill language in contracts with manufacturers is an example of their open relationship. (Cohen, Tr. 493) (Q. The examples we talked about earlier about the manufacturer poison pill, would that be an example of the open relationship? A. Yes. That would be an example of a relationship where we – I've learned from them, they have learned from us, and we have a relationship where I feel like I can approach them with issues or to learn, so yes, I would say that's the right way to put it.)).

311. In 2013, Cohen planned to contact Schein and Patterson when he feared that Amazon was entering the dental distribution industry. Cohen wrote himself a reminder in December 2013, to "[w]ork with Schein & Patterson" to discuss a joint response. (Cohen, Tr. 490-492; CX0065 at 001 ("Subject: Discuss Amazon Response re Distributors . . . start the conversations NOW! Work with Schein & Patterson . . ."); *see also* CX0066 at 001 (January 2014 email from Benco Director Rick Cohen to Chuck Cohen, with the subject line "RE: Amazon Response . . .", "We could be the glue to make it happen. If we had a schein/patterson/benco response it would be much more effective than a benco only response.")).

312. On January 18, 2014, Benco's co-owner, Rick Cohen, suggested getting together with Schein and Patterson to discuss Amazon entering the dental supply distribution market. Rick Cohen wrote, "Schein won't talk to Patterson about it. They hate each other too much. We could be the glue to make it happen." (CX0066 at 001). Chuck Cohen's reply to his brother's suggestion about coordinating with Patterson and Schein was: "Good call." (CX0066 at 001).

313. Schein and Benco signed a hiring agreement between the two companies. (Sullivan, Tr. 3893; Ryan, Tr. 1054). The hiring agreement between Benco and Schein, signed by Sullivan and Cohen, was in effect for seven years, from March 2009 until it terminated on March 31, 2016. (CX2450 at 001-010; Sullivan, Tr. 3921; Cohen, Tr. 646).

314. The hiring agreement between Benco and Schein, signed in 2009, placed limitations on the number of certain types of hires that could be made between the companies. (Sullivan, Tr. 3894 ("Q. And does this confirm that the number – the limit on the number of hires between Benco and Schein was three per zone per half a year? A. Yes, it does."); Ryan, Tr. 1057-1058).

315. By 2011, Cohen and Sullivan negotiated changes in the hiring agreement between Schein and Benco to increase the length of time of the hiring limitation period to six months. (CX1420 at 001 (November 2011 email from Ryan, ". . . effective immediately . . . . 3 hired from HSI per Schein ZONE (map to be provided) every 6 MONTHS") (emphasis in original); Ryan, Tr. 1057 ("Q. And if I'm understanding you correctly, before November2011, the time period piece of this [hiring agreement] was shorter than six months. A. That's my recollection.")).

316. Both Cohen and Sullivan enforced the terms of the hiring agreement. For example, Sullivan texted Cohen that "We should chat soon. Rick Rietman makes 4th recent hire in Central Atlantic zone." (CX6027 at 025 (Row 209); Sullivan, Tr. 3893-3894). Cohen responded that he would check on the hiring concern from Sullivan. (CX6027 at 025 (Row 220)). Cohen ultimately informed Sullivan there had been only three hires and the agreement was not violated. (CX6027 at 025 (Row 221); Sullivan, Tr. 3894); *see also* Cohen, Tr., at 737, 747 (maintaining the hiring agreement with Schein was a high priority)).

317. Schein and Benco expanded the hiring agreement by agreeing to apply its limits to a specific employee not covered in the original 2009 contract. (CX6027 at 025 (Row 223);

Sullivan, Tr. 3895 ("Q. And Chuck Cohen wrote in that message in row 223, 'We agreed that [the former Schein employee] would sit even though she didn't have a contract.' Do you see that? A. I do. Q. And 'sit' there, that refers to this employee not contacting the former Schein customers that she had worked with. A. That's correct.")).

318. Patrick Ryan had responsibility for enforcing the hiring agreement between Schein and Benco on behalf of Benco. (Ryan, Tr. 1055-1056). For example, Ryan disseminated information about the 2011 changes in the hiring agreement negotiated by Sullivan and Cohen to other directors at Benco so that they could follow through on the terms of the agreement. (Ryan, Tr.1054-1057; CX1420 at 001). Chuck Cohen reported his conversations with Tim Sullivan to Patrick Ryan. (Ryan, Tr. 1055; Cohen, Tr. 747).

319. Ryan suggested additional changes to the hiring agreement between Schein and Benco, and explicitly asked Cohen to negotiate those changes directly with Sullivan. (Ryan, Tr. 1058-1060; CX1420 at 001 ("I have asked [Cohen] to go back to Tim [Sullivan] and try to eliminate service techs from this, or at the very worst, make it 3 sales, 3 service per zone per 6 months")).

320. In 2012, Benco also invited Burkhart to enter a hiring agreement. (Reece, Tr. 4391-4392; CX4263 at 001-007; CX4261 at 001).

321. Benco invited Burkhart to sign a hiring, non-solicitation, agreement on "just how we were going to handle these things going forward." (Reece, Tr. 4391-4392; CX4262 at 001-003 ("Proposed Protocol for New Hires"); CX4263 at 001-007 (proposed hiring agreement)). Benco's Mike McElaney informed Burkhart that it had hiring agreements with Patterson and Schein. (Reece, Tr. 4392).

322. McElaney reported to Ryan on the status of his attempts to get Burkhart to sign a hiring agreement. (CX0080 at 001 ("FYI, Burkhart may be close to signing the agreement. Have Troy hold off on Lane for another week.")).

323. The employment agreement proposed by Benco to Burkhart limited the ability of sales representatives recruited by one company from the other to compete for certain business for a period of time. (CX4263 at 002-007; Reece, Tr. 4392).

324. Burkhart declined Benco's offer to enter into a hiring agreement with Benco. (Reece, Tr. 4392; CX4260 at 001 (Burkhart turned down proposed agreement); CX0303 (McElaney, IHT at 100, 165); *see also* CX4261 (internal Burkhart email raising antitrust concerns about the proposed agreement)).

325. Henry Schein executives suggested entering into agreements with its competitors as a way to solve competitive issues. F or example, in 2010, when Schein CEO Stanley Bergman wanted to relieve pressure from Benco expanding through a "national roleout [*sic*]," he suggested to Schein executives that Schein should be "aggressive" in going after Benco sales representatives. If that didn't work, "Tim [Sullivan] should call Chuck [Cohen] to tell him 'we can have a full blown war' or we can have a ceasefire." (CX2331 at 001).

326. A Schein executive recommended responding to a competitive threat to distributors by acting jointly with its competing distributors, rather than individually. In an email to other Schein executives, Dave Steck suggested that Schein "get together with a group of other dealers and manufacturers and send [TDA] a petition. A few individual letters have already gone to them." (CX0179 at 001).

C. Summary of Communications Between the Big Three Executives.

327. On January 31, 2011 at 23:55 (UTC), Sullivan called Cohen. The call lasted 20 seconds. (CX6027 at 003 (Row35)).

328. On February 1, 2011 at 00:18 (UTC), Cohen called Sullivan. The call lasted 49 seconds. (CX6027 at 003 (Row37)).

329. On February 1, 2011 at 14:14 (UTC), Sullivan called Cohen. The call lasted 35 seconds. (CX6027 at 003 (Row40)).

330. On February 1, 2011 at 14:19 (UTC), Cohen called Sullivan. The call lasted 17 minutes 14 seconds. (CX6027 at 003 (Row 39)).

331. On February 14, 2011 at 20:30 (UTC), Sullivan called Cohen. The call lasted 49 seconds. (CX6027 at 004 (Row50)).

332. On February 14, 2011 at 20:43 (UTC), Cohen called Sullivan. The call lasted 31 seconds. (CX6027 at 004 (Row51)).

333. On February 14, 2011 at 21:04 (UTC), Sullivan called Cohen. The call lasted 8 seconds. (CX6027 at 004 (Row54)).

334. On February 14, 2011 at 21:23 (UTC), Sullivan called Cohen. The call lasted 18 seconds. (CX6027 at 004 (Row56)).

335. On October 14 2011 at 20:34 (UTC), Sullivan called Cohen. The call lasted 21 minutes 30 seconds. (CX6027 at 012 (Row120)).

336. On October 14 2011 at 20:56 (UTC), Sullivan called Cohen. The call lasted 59 seconds. (CX6027 at 012 (Row 121)).

337. On November 3, 2011 at 20:04 (UTC), Sullivan called Cohen. The call lasted 33 seconds. (CX6027 at 016 (Row 143)).

338. On November 3, 2011 at 20:05 (UTC), Sullivan called Cohen. The call lasted 36 seconds. (CX6027 at 016 (Row 144)).

339. On November 4, 2011 at 21:05 (UTC), Cohen called Sullivan. The call lasted 18 minutes 41 seconds. (CX6027 at 016 (Row 146)).

340. On November 7, 2011 at 17:29 (UTC), Sullivan called Cohen. The call lasted 31 seconds. (CX6027 at 016 (Row 147)).

341. On November 8, 2011 at 23:37 (UTC), Cohen called Sullivan. The call lasted 13 seconds. (CX6027 at 017 (Row 152)).

342. On November 8, 2011 at 23:45 (UTC), Sullivan called Cohen. The call lasted 5 minutes 51 seconds. (CX6027 at 017 (Row 155)).

343. On November 9, 2011 at 00:02 (UTC), Sullivan called Cohen. The call lasted 4 seconds. (CX6027 at 017 (Row 156)).

344. On November 9, 2011 at 00:44 (UTC), Sullivan called Cohen. The call lasted 1 minute 16 seconds. (CX6027 at 017 (Row 157)).

345. In 2011, Sullivan called Cohen at least 16 times. (CX6027 at 003-004, 012, 016-017).

346. In 2011, Cohen called Sullivan at least 7 times (CX6027 at 003-004, 016-017).

347. Between March and December 2011, Cohen and Sullivan called each other at least 13 times. The total duration for the 13 calls shown in CX6027 (Communications Log Summary) between Cohen and Sullivan was 50 minutes and 14 seconds. (CX6027 at 012, 016-017).

348. In 2011, Cohen and Sullivan called each other at least 23 times. The total duration for the 23 calls shown in CX6027 (Communications Log Summary) between Cohen and Sullivan was 1 hour 10 minutes and 58 seconds. (CX6027 at 003-004, 012, 016-017).

349. Cohen and Sullivan exchanged a total of 89 text messages in 2011. (CX6027 at 003-018).

350. Of the 89 text messages exchanged between Cohen and Sullivan in 2011, there are 23 text messages with no content available. (CX6027 at 003-005, 010-011, 014).

351. Between 2011 and 2015, Cohen and Sullivan exchanged at least 56 calls and 225 text messages. (CX6027 at 003-057).

352. Between 2011 and 2015, Cohen and Guggenheim exchanged at least 18 calls and 31 text messages. (CX6027 at 003-057).

353. Tim Sullivan exchanged additional communications with Chuck Cohen, including written notes and voicemail messages, that are not reflected in CX6027. (*See* Sullivan, Tr. 3885 (Sullivan produced all cell phone records; could have called Cohen from a land line); Cohen, Tr. 526 (Cohen sent Sullivan notes by mail from time to time); Sullivan, Tr. 3886 ("Q. And you didn't keep all of the notes that Chuck Cohen sent you over the years, right? A. No.")).

354. Sullivan produced his cell phone records to the Federal Trade Commission but acknowledged that he could have called Cohen from his office land line. (Sullivan, Tr. 3885).

355. Cohen, Sullivan and Guggenheim saw each other at multiple industry events each year during the conspiracy period. (CCFF ¶¶ 358-380, 384-389; *see also* Cohen, Tr. 595-597 (Guggenheim and Cohen regularly attended the DTA, "it's not that big a meeting" and they typically saw each other); Guggenheim, Tr. 1678-1679 (Guggenheim attended DTA meetings regularly); CX8023 (Guggenheim, Dep. at 373); CX8015 (Cohen, Dep at 359-360); Sullivan, Tr. 3878 (Sullivan attends the DTA annual meeting every year, and typically sees and would see Cohen at the meeting); Sullivan, Tr. 3879 (Sullivan attended the Chicago Midwinter Meeting and sometimes saw Chuck Cohen there); Sullivan, Tr. 3879-3880 (Sullivan typically attended five to six dental industry conventions each year and "might run into" Chuck Cohen at those meetings)).

356. Cohen, Sullivan, and Guggenheim all registered to attend at least 20 trade shows between 2011 and 2015. (CCFF ¶¶ 358-364, 367-375, 377; Attachment B to Complaint Counsel's Post-Trial Brief).

357. The executives of Schein, Patterson, and Benco have visited each other at their companies' corporate offices. (CX1045 (October 2011 email from Chuck Cohen to Rick Cohen "I've personally visited both Schein's & Patterson's corporate offices" and discussing accommodating Sullivan and Guggenheim visiting Benco)).

358. In 2011, Cohen, Sullivan, and Guggenheim all registered to attend Chicago Dental Society Midwinter Meeting, held February 24-26, 2011 in Chicago, IL. (CX4360 at 007-013; CX4443-a at 001). Documents show that Sullivan attended the 2011 Chicago Dental Society Midwinter Meeting. (CX6580 at 058, 065-067).

359. In 2012, Cohen, Sullivan, and Guggenheim all registered to attend the Chicago Dental Society Midwinter Meeting, held February 23-25, 2012 in Chicago, IL. (CX4360 at 014-020; CX4444-a at 001). Documents show that Sullivan attended the 2012 Chicago Dental Society Midwinter Meeting. (CX6580 at 097-100).

360. In 2013, Cohen, Ryan, Sullivan, Guggenheim, Misiak, and Rogan all registered to attend the Chicago Dental Society Midwinter Meeting, held February 21-23, 2013 in Chicago, IL. (CX4360 at 021-027; CX4445-a at 001). Documents show that Cohen and Sullivan attended the 2013 Chicago Dental Society Midwinter Meeting. (CX1507 at 001-002 (Cohen); CX6580 at 149-156 (Sullivan)).

361. In 2014, Cohen, Sullivan, and Guggenheim all registered to attend the Chicago Dental Society Midwinter Meeting, held February 20-22, 2014 in Chicago, IL. (CX4360 at 028-035;

CX4446-a at 001). Documents show that Cohen and Sullivan attended the 2014 Chicago Dental Society Midwinter Meeting. (CX1060 at 001-002 (Cohen); CX6582 at 002 (Sullivan)).

362. In 2015, Cohen, Sullivan, and Guggenheim all registered to attend the Chicago Dental Society Midwinter Meeting, held February 26-28, 2015 in Chicago, IL. (CX4360 at 036-042; CX4447-a at 001). Documents show that Cohen and Sullivan attended the 2015 Chicago Dental Society Midwinter Meeting. ([redacted]; CX6582 at 075-076 (Sullivan)).

363. Cohen, Sullivan, and Guggenheim all registered to attend the Dental Trade Alliance annual meeting, held November 1-3, 2011 in Washington, DC. (CX4373; CX4374 at 001). Documents show that Cohen and Sullivan attended the November 2011 Dental Trade Alliance annual meeting. (CX1420 at 001 (November 2011 email referencing Cohen speaking with Sullivan at DTA meeting); CX1443 at 001-002 (Cohen); CX6580 at 090-091 (Sullivan)).

364. Cohen, Sullivan, and Guggenheim all registered to attend the Dental Trade Alliance annual meeting, held October 15-18, 2013 in Ponte Vedra Beach, FL. (CX4378; CX4449-a at 001-008; CX4145 at 002-003; CX4336 at 002). Documents and testimony show that Guggenheim, Cohen and Sullivan attended the October 2013 Dental Trade Alliance annual meeting. (Guggenheim, Tr. 1679; Cohen, Tr. 590-591; Sullivan, Tr. 3878-3879; *see also* CX6581 at 002-003 (Sullivan)).

365. Benco, Schein, and Patterson are all members of the Dental Trade Alliance. (Cohen, Tr. 595; Guggenheim, Tr. 1678-1679). Cohen "regularly attended the DTA meeting" as did Sullivan and Guggenheim. (Cohen, Tr. 595-596). Cohen reported typically seeing Guggenheim and Sullivan at the DTA annual meeting as "[i]t's not that big a meeting." (Cohen, Tr. 596).

366. Cohen, Guggenheim, and Sullivan all attended the Dental Trade Alliance meeting in October of 2013. (Cohen, Tr. 590-591; Sullivan, Tr. 3878-3879; Guggenheim, Tr. 1678-1679; CX1112 at 028-029 (Answer of Benco ¶59)).

367. Cohen, Sullivan, and Guggenheim all registered to attend the Dental Trade Alliance annual meeting, held November 4-7, 2014 in Indian Wells, CA. (CX4381; CX4382 at 001). Documents show that Sullivan attended the November 2014 Dental Trade Alliance annual meeting. (CX6582 at 056-065 (Sullivan)).

368. Cohen, Sullivan, and Guggenheim all registered to attend the Dental Trade Alliance annual meeting, held October 20-23, 2015 in Bonita Springs, FL. (CX4308 at 002-007; CX4386 at 001). Documents show that Cohen and Sullivan attended the October 2015 Dental Trade Alliance annual meeting. (CX1502 at 001-003 (Cohen); CX6582 at 104-105 (Sullivan)).

369. Cohen, Sullivan, and Guggenheim all registered to attend the Greater New York Dental Meeting held November 23-28, 2012 in New York, NY. (CX4431 at 016; CX4432 at 005; CX4433 at 003; CX1448 at 002; *see also* CX6580 at 132-134, 139 (Sullivan)).

370. Cohen, Sullivan, and Guggenheim all registered to attend the Greater New York Dental Meeting held November 29 to December 4, 2013 in New York, NY. (CX4431 at 024; CX4432 at 007; CX4433 at 006; CX4451-a at 001).

371. Cohen, Sullivan, and Guggenheim all registered to attend the Greater New York Dental Meeting held November 28 to December 3, 2014 in New York, NY. (CX4431 at 032; CX4432 at 010; CX4433 at 008; CX4452-a at 001). Documents show that Cohen and Sullivan attended the 2014 Greater New York Dental Meeting. (CX1458 at 001-003 (Cohen); CX6582 at 061-065 (Sullivan)).

372. Cohen, Sullivan, and Guggenheim all registered to attend the Greater New York Dental Meeting held November 27 to December 2, 2015 in New York, NY. (CX4431 at 041; CX4432 at 013; CX4433 at 012; [redacted]). Documents show that Sullivan attended the 2015 Greater New York Dental Meeting. (CX6582 at 120-122).

373. Cohen, Sullivan, and Guggenheim all registered to attend the American Dental Association Annual Session held October 31 to November 3, 2013 in New Orleans, LA. (CX4400; CX4401; CX4402; CX4403 at 001). Documents show that Cohen and Sullivan attended the 2013 American Dental Association Annual Session. (CX1418 at 001 (Cohen); CX6581 at 005-007 (Sullivan)).

374. Cohen, Sullivan, and Guggenheim all registered to attend the American Dental Association Annual Session held October 9-14, 2014 in San Antonio, TX. (CX4404; CX4405; CX4406; CX4407 at 001). Documents show that Cohen and Sullivan attended the 2014 American Dental Association Annual Session. (CX1457 at 001 (Cohen);CX6582 at 053-055 (Sullivan)).

375. Cohen, Sullivan, and Guggenheim all registered to attend the American Dental Association Annual Session held November 5-10, 2015 in Washington, DC. (CX4408; CX4409; CX4410; CX4411 at 001). Documents show that Cohen and Sullivan attended the 2015 American Dental Association Annual Session. (CX1499 at 001 (Cohen); CX6582 at 118 (Sullivan)).

376. Cohen, Sullivan, and Guggenheim were all scheduled to make presentations at the Dentsply Industry Trade Show held February 8-10, 2012 in Miami, FL. (CX1504 at 001 (email from Cohen forwarding Dentsply email with schedule for presentations by Cohen, Sullivan and Guggenheim)).

377. Cohen, Sullivan, and Guggenheim all registered to attend the Hinman Dental Meeting held March 27-29, 2014 in Atlanta, GA. (CX4423 at 001; CX4426). Documents show that Sullivan attended the 2014 Hinman Dental Meeting. (CX6582 at 009-010)).

378. Sullivan and Guggenheim registered to attend the California Dental Association meeting in Anaheim, California held May 12-14, 2011. (CX4350 (Registration data for CDA 2011); CX4340 at 001). Expense reports confirm Sullivan's attendance. (CX6580 at 073-077).

379. Cohen and Sullivan participated in the Dental Trade Alliance Foundation Board Meeting held on October 10, 2011 in Las Vegas, NV. (CX1463 at 002 (Cohen weekly report confirming attendance); CX6580 at 082 (Sullivan expense report)).

380. Cohen and Guggenheim registered to attend the American Dental Association Annual Session, held in Las Vegas, NV from October 10-13, 2011. (CX1463 at 002 (Cohen's weekly report confirming attendance); CX4395 (Patterson registration data for ADA 2011); CX4396 (Schein registration data for ADA 2011); CX4398). Sullivan's expense reports show that he also attended the ADA meeting in Las Vegas in October 2011. (CX6580 at 083-084 (Sullivan expense report)).

381. On October 12, 2011, Cohen emailed Sullivan's executive assistance, Carol Pampel, that he saw Tim [Sullivan] yesterday at the GC party and that they will meet by phone later in the week. (CX1044 at 001; *see* CX1043 (meeting between Cohen and Sullivan was originally scheduled to be in person)).

382. In his "weekly update" for November 28, 2011, Cohen wrote: "unrelated meeting, the CEO of Patterson's dental division [Guggenheim] . . . visited with us in PA last week." (CX1444 at 002; CX1403 at 002; *see also* CX1045 at 001).

383. On November 29, 2011 Cohen and Sullivan attended a "Confidential Breakfast" at the home of Schein executive Stan Bergman in New York City. (CX2300 at 001 (appointment confirming Cohen and Sullivan will attend "confidential breakfast" 11/29); CX1444 at 002 (Cohen weekly report "met with Schein senior management"); CX1403 at 002 (Cohen notes November meeting with key Schein leaders to "explore opportunities for us to work together 'quietly'" and noting "Schein has a long history of covertly aligning with (co-opting?) competitors and vendors, either through partnerships or small ownership steaks"); CX0231 at 001 (December 2011 email following up after the meeting between Benco and Schein executives); CX1462 at 001 (email from October 2011 setting the date for the 11/29 breakfast meeting); CX1464 (November 2011 email Cohen confirming meeting and adding his father Larry Cohen to the meeting; *see also* CX1045 at 001).

384. Cohen and Guggenheim registered for the California Dental Association meeting held in Anaheim, CA on May 3-5, 2012. (CX4353 (Registration data for CDA 2012 Annual Meeting); CX1441 at 001 (Cohen May 6 Weekly Report confirming attendance at CDA); CX4342 at 001).

385. Cohen and Sullivan registered to attend the Dental Trade Alliance Annual Meeting held in Napa, CA on October 30 to November 2, 2012 and documents confirm their attendance. (CX4304 at 006-007 (Sullivan and Cohen registrations reflected in DTA program); CX1440 at 002 (Cohen weekly report confirming attendance at DTA 2012); CX6580 at 124-129 (Sullivan expense report for attendance at DTA, Napa 2012); CX4375 (Registration data for DTA 2012)).

386. Cohen and Sullivan attended the Dental Trade Alliance CRET breakfast meeting in Napa, CA on November 2, 2012. (CX1440 at 002 (Cohen weekly report confirming meeting with DTA leadership on CRET); CX3450 at 001 (email from Cohen to Sullivan and others coordinating breakfast meeting at DTA)).

387. Cohen and Sullivan attended the Hinman Dental Meeting, including a team dinner, held in Atlanta, GA on March 21-23, 2013. (CX1422 at 002 (Cohen weekly report confirming attendance); CX6580 at 149-156 (Sullivan expense report)).

388. Cohen and Guggenheim registered to attend the California Dental Association meeting in Anaheim, CA held April 11-13, 2013 and documents confirm Cohen's attendance. (CX4351 (Registration data for CDA 2013); CX4343 at 001; CX1423 at 002 (Cohen weekly report confirms attendance).

389. Sullivan and Guggenheim registered for the California Dental Association meeting held in Anaheim, CA on May 15-17, 2014 and documents confirm Sullivan attended. (CX4352; CX6582 at 020-023 (Sullivan expense reports); CX4345 at 001).

390. Sullivan and Guggenheim registered to attend the California Dental Association meeting in San Francisco, CA on September 4-6, 2014. (CX4356; CX4346 at 001).

391. Cohen and Guggenheim arranged a lunch meeting on December 2, 2014. (CX1458 at 001 (Cohen Weekly Report December 6, 2014 confirming he met with Guggenheim); CX1349 at 001; CX1348 at 001).

392. Cohen and Guggenheim met during the week of March 9, 2015. (CX1117 at 001 (Cohen Weekly Report for March 9-15, 2015 reporting meeting with Guggenheim to discuss supply chain initiative)).

393. Cohen and Guggenheim registered to attend the California Dental Association meeting held in Anaheim, CA on April 30 to May 2, 2015. (CX4354; CX4347 at 001).

VII. BENCO WAS FIRST TO ADOPT A NO BUYING GROUP POLICY.

394. Benco had a longstanding no buying group policy, which it instituted when buying groups were merely a nascent customer segment. (*See* CCFF ¶¶ 132, 395).

395. Starting in the mid-1990s, Benco had a policy of not recognizing or selling to buying groups. (Cohen, Tr. 444-445; Ryan, Tr. 1027-1028; *see also* CX8015 (Cohen, Dep. at 138)).

396. Benco's no buying group policy applied to all buying groups, regardless of the services the group provided. (CX1372 at 002 (Statement of Cohen: "Benco does NOT currently recognize as a single customer . . . Any kind of GPO whether they provide additional services or not.") (emphasis in original); Ryan, Tr. 1029 (Q. And it is fair to say that once you found out a group was a buying group, the answer was no from Benco, meaning no, Benco wouldn't work with them? A. Correct. We would tell them what our policy is and move on.")).

397. Benco always had the ability to sell to buying groups. (Ryan, Tr. 1031).

398. Cohen relied on Patrick Ryan to disseminate Benco's no buying group policy. (Cohen, Tr. 515).

399. Benco's no buying group policy was "always communicated" to the sales team, as well as "up and down the company." (Ryan, Tr. 1031-1032; CX1146 (Ryan explaining no buying group policy to regional managers); CX8037 (Ryan, Dep. at 46-50); *see also* CX0090 at 001 (Statement of Cohen to Guggenheim: "Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups . . . and our team understands that policy.")).

400. Ryan and Cohen were the decision makers about buying groups at Benco. (Cohen, Tr. 717-718, 810).

401. Cohen was "adamantly against" and "extremely opposed" to buying groups and felt strongly about Benco's no buying group policy. (CX1234 at 001 (Statement of Don Taylor (Benco Regional Manager): "Chuck Cohen is adamantly against buying groups. He will not let us participate because he doesn't think everyone should get the same price. It's one of the only times I have seen him really get fired up."); CX1040 at 001 (Statement of Mark Rowe (Benco

Director of Sales): "Chuck has always been extremely opposed to any hint of a buying group."); Ryan, Tr. 1031 at 001 (Cohen felt strongly about Benco's no buying group policy); *see also* CX8037 (Ryan, Dep. at 42-43); CX1048 at 001 (Statement of Mike McElaney (Benco Director of Sales, Northeast): "I spoke with Chuck over the weekend and he fells]sic] this is a buying group which he opposes.")).

402. Ryan was in charge of enforcing Benco's no buying group policy. (Ryan, Tr. 1025; *see also* Cohen, Tr. 472-473).

403. Cohen explained that buying group "requests would all be routed to Ryan." (Cohen, Tr. 810).

404. Benco rejected buying groups that approached it seeking discounts. (Cohen, Tr. 446; CX1120 at 001 (Statement of Cohen: "[W]e don't offer discounts to buying groups or similar groups of dentists"); CX1372 at 002 (Statement of Cohen: "Benco does NOT currently recognize as a single customer . . . Any kind of GPO whether they provide additional services or not."); CX1242 at 001 (Mar. 24, 2011 email from Pat Ryan to Regional Manager: "We do not participate in buying groups. Ever."); Ryan, Tr. 1032-1033 (Benco rejected buying group called Nexus); CX1143; CX0301 (Cohen, IHT at 111-112); *see also* CCFF ¶¶ 408-425).

405. Ryan also turned down many buying groups on behalf of Benco. (Cohen, Tr. 811; CX1138 at 001 (Statement of Ryan: "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."); *see also* CCFF ¶¶ 408-425).

406. Ryan instructed his sales team to turn down buying groups, even when the sales team inquired about or expressed an interest in competing for buying group business. (CX1242 at 001-002; Ryan, Tr. 1042-1043). On March 24, 2011, a Regional Manager (Brian Evans) wrote

regarding a buying group, "If we can, this would be a great opportunity to win some business from Schein." (CX1242 at 002). In response, Ryan wrote, "We do not participate in buying groups. Ever." (CX1242 at 001).

407. On March 24, 2011, Ryan forwarded an email from his sales team regarding the Dental Cooperative buying group to Cohen and other Benco employees and wrote: "We all know the answer here, right? Not no, hell no." (CX1038 at 001).

408. Benco did not bid for Synergy Dental Partners in 2011. (Ryan, Tr. 1131, 1170-1171; CX1133 at 001 ("this group approached every full-service dealer, including us…and were turned down")).

409. Benco did not bid for Nexus Dental in 2011. (Ryan, Tr. 1032-1033; CX1143 at 001 ("While we realize the supplies are a small part of what you are doing, it still meets our definition of a buying group, as it aggregates the volume of completely unrelated practices, without any centralized services, in order to leverage price. We simply can't open that door")).

410. Benco did not bid for Smile Source when it approached Benco in 2011 and 2012. (Cohen, Tr. 517; CX1138 at 001 (Statement of Ryan to Smile Source in 2011: "Unfortunately, I don't think we would be able to help you. Your structure meets our definition of GPO, and Benco does not participate in group purchasing organizations"); CX1219 at 002 (Statement of Ryan to Smile Source in 2012: "Benco doesn't recognize GPOs as a single customer")).

411. Benco did not bid for a buying group started by a dentist, Dr. David Carter, in 2012. (CX1197 at 001 (Statement of Ryan: "They are trying to start a buying group. Told them we don't recognize buying groups.")).

412. Benco did not bid for Unified Smiles in 2012. (CX1144 at 001 (Statement of Ryan: "We've already spoken to them and turned them down")).

413. Benco did not bid for XYZ Dental in 2012. (CX1198 at 001 (Statement of Ryan: "In order for us to recognize a group of offices as a single customer, they must meet one of the following ownership definitions . . . If this group does not meet one of these ownership models, we would consider them a GPO or "buying club" and Benco does not recognize these types of affiliations")).

414. Benco did not bid for the New Mexico Dental Cooperative in 2013. (Cohen, Tr. 528-530; CX0055 at 001 (Statement of Cohen: "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")).

415. Benco did not bid for the DDS Group in 2013. (CX1200 at 001).

416. Benco did not bid for WheelSpoke LLC in 2013. (CX1199 at 001 (Statement of Ryan: "Benco does not recognize 'buying groups' … Cannot open this account")).

417. Benco did not bid for Erie Family Dental Equipment in 2013. (CX1238 at 001 (Statement of Ryan: "We absolutely positively do NOT participate in GPOs. NO if ands or buts")).

418. Benco did not bid for the American Academy of Cosmetic Dentistry's buying group in 2013. (CX1202 at 001 (Statement of Ryan: "Benco Dental does not participate in GPOs or buying groups")).

419. Benco did not bid for Dental Visits LLC in 2014. (CX1226 at 001 (Statement of Ryan: "Benco has a firm policy of non recognition of GPOs as a single customer")).

420. Benco did not engage with dentist, Dr. Stephen Sebastian, in 2014, after identifying his efforts were aimed to create a buying group. (CX1167 at 001 ("Talked to him. Buying club. A bunch of military dentists coming out of the Army and want to form a 'military' club")).

421. Benco did not bid for the Kois Buyers Group in 2014. (CX1240 at 001 (Statement of Cohen to Kois Buyers Group: "At Benco, our policy is that we don't support, or work with, buying groups, so we'll decline your request"); Cohen, Tr. 565-566; CX1075 at 001 (Statement of Cohen: "I spoke with the gentleman who's putting it together, and told him that we don't work with buying clubs"); *see also* Ryan, Tr. 1131).

422. Benco did not bid for the Dental Purchasing Group in 2014. (CX1228 at 001 (Statement of Ryan: "No, thank you")).

423. Benco did not bid for Insight Sourcing Group in 2014. (Ryan, Tr. 1133; CX1205 at 001 (Statement of Ryan: "Be polite but tell them we don't participate")).

424. Benco did not bid for Schulman Group in 2014. (CX1207 at 001 (Statement of Ryan: "Buying group. Don't put anything in front of them"); CX1206 at 001 (Statement of Brian Evans (Benco's Director of Sales –West): "The Schulman Group is a buying group (of sorts) and we don't participate in that business")).

425. Benco did not bid for Dentistry Unchained in 2015. (Ryan, Tr. 1131; CX0012 at 001 (Statement of Ryan: "The best part about calling these guys is I already KNOW that Patterson and Schein have said NO")).

426. Cohen testified that Benco was "concerned about any change in the strategy at Schein and Patterson," including partnering with a buying group, which he viewed as a risk of customer loss to Benco. (Cohen, Tr. 470; Cohen, Tr. 467 ("Q. And a change in Schein or Patterson's strategy could be a risk for Benco to lose customers? A. Any time Schein or Patterson changes their strategy there's a risk to Benco that . . . we will lose customers.")).

427. Cohen identified that one risk of Benco starting a buying group was that Schein or Patterson would follow suit and "blunt the innovation." (Cohen, Tr. 466 ("Q. One of the risks of

Benco creating [Elite Dental Alliance] was that other GPOs get started and are recognized by Schein and Patterson; is that right? A. That is one of the risks I wrote. Yes. Q. And why is it a risk to Benco if Schein or Patterson opened up buying groups as well? A. Well, it's always a risk when we innovate and we're copied by our major competitors because its blunts the innovation.")).

428. Ryan testified that he was concerned about Schein and Patterson working with buying groups. (Ryan, Tr. 1116-1117).

429. Ryan was frustrated when he learned that Schein was doing business with Smile Source. (CX8037 (Ryan, Dep. at 116-117) ("Q. And did Dr. Goldsmith's reference to Henry Schein doing business with . . . Smile Source frustrate you? [Objection] Why is that I believe that all distributors should feel like we do.").

430. In a July 25, 2012 email, Ryan referred to Schein working with a buying group as "this shit" because he had a "strong opinion on GPOs." (CX0018 at 001; Ryan, Tr. 1065-1066; *see also* CCFF ¶ 982).

431. In a transcript of a conversation between Benco's Patrick Ryan and Mitchell Huber, Ryan stated that Smile Source is "terrifying" and expresses concern about "full service guys get[ting] in to serving buying groups." (CX0015 at 001 (Statement of Ryan: "They are terrifying . . . If it's just Darby, I don't care as much….but when the full service guys get in… Huber: Yeah, the last thing we want is reliable service for these groups"); Ryan, Tr. 1043; CX0304 (Ryan, IHT at 190)).

VIII. SCHEIN AND PATTERSON STARTED DIPPING THEIR TOES INTO BUYING GROUP BUSINESS TO GAIN SALES.

A. Schein Sold to Buying Groups Before 2011.

432. In September 2010, Sullivan explained to his boss, Jim Breslawski, that the benefits of working with buying groups outweighed the risks. (*See infra* CCFF ¶¶ 433-439).

433. On September 15, 2010, Sullivan sent an email to Breslawski, and Hal Muller about Schein supplying to a buying group, Smile Source. (Sullivan, Tr. 3921; CX2113 at 001).

434. In Sullivan's September 15, 2010, email to Breslawski, Sullivan wrote: "Hal [Muller] and I met this morning . . I think we agreed on the following . . . neither of us support concept of buying groups." (CX2113 at 001; Sullivan, Tr. 3921).

435. In Sullivan's September 15, 2010, email to Breslawski, he stated that "neither of us" referred to Sullivan and Muller. (CX2113 at 001; Sullivan, Tr. 3921).

436. In Sullivan's September 15, 2010, email, he wrote that working with buying groups "may benefit [Special Markets] to some extent" but that it could lead to "margin erosion" for Schein. (CX2113 at 001; Sullivan, Tr. 3921-3922).

437. Sullivan also stated in his September 15, 2010, email that working with buying groups could lead to a "huge price war" if Schein's competitors followed suit and discounted to buying groups. (CX2113 at 001; Sullivan, Tr. 3921-3922).

438. In his September 15, 2010 email to Breslawski, Sullivan told to Breslawski that he was "inclined to 'allow'" a buying group account because that business provided an opportunity to increase overall gross profit for Schein. (CX2113 at 001; Sullivan, Tr. 3923, 3924 ("Q. You were in favor because even though Schein would get lower margin, Schein would get get more gross profit dollars. A. Again, I was in favor to test the model, test the theory.")).

439. Despite the risks he identified in working with buying groups, Sullivan wanted to "test the model" of working with a buying group to realize the opportunity of increased gross profits. (Sullivan, Tr. 3923-3924).

440. Schein was working with buying groups before 2011. (*See infra* CCFF ¶¶ 441-444).

441. Schein began working with buying group Long Island Dental Forum in 2006. (Cavaretta, Tr. 5576-5577; CX2895 at 013 (Schein's Response to IROG ¶1)).

442. Schein began working with buying group Dental Co-op of Utah (The Dental Cooperative of (Utah) in 2007). (Sullivan, Tr. 3913-3914; CX2895 at 013 (Schein's Response to IROG ¶1)).

443. Schein began working with buying group Smile Source in 2008. (Sullivan, Tr. 3914; CX2895 at 013 (Schein's Response to IROG ¶1)).

444. Schein began working with buying group Dentists for a Better Huntington in 2009. (RX2264 at 002; CX2895 at 012 (Schein's Response to IROG ¶1)).

445. On January 18, 2006, Cavaretta wrote to Dr. Alan Faber of Long Island Dental Forum and said: "I want to thank you for the opportunity to be part of the Long island Dental Forum. I'm sure that we will experience a mutually beneficial relationship." (Cavaretta, Tr. 5577; CX2724 at 017).

446. Schein's "business with [Dental Co-op] was growing" when it did business with the buying group in 2009, and by July 2011, Muller recognized the Dental Co-op of Utah as "one of the largest HSD account (over $1M)." (CX2505 at 002 (July 2011 email from Muller to Steck); CX8033 (Cavaretta, Dep. at 178); *see also* CX2634 at 001).

447. Schein's Special Markets relationship with Smile Source was profitable and resulted in $3 million in sales, half of which came from Schein's competitors. (CX2469 at 001 (September

2014 email from Muller to Sullivan and Breslawski, referring to Smile Source: "When they were with us they did $3M, half from us and half they got us from our competitors")).

448. Sullivan identified the Smile Source account as an account he did not "want to lose" because it was "$1 million and growing." (Sullivan, Tr. 3922-3923; CX2113 at 001 (September 2011 email from Sullivan to Breslawski)).

449. In his September 2010 email regarding Smile Source, Sullivan was pointing out that Smile Source was an opportunity for $1 million in revenue to Schein. (Sullivan, Tr. 3923; CX2113 at 001).

450. Sullivan saw value in the potential $1 million revenue opportunity from the Smile Source account. (Sullivan, Tr. 3923 ("Q. And you saw value in the fact the [the Smile Source account] was $1 million and growing, right? A. Yes.")).

451. Foley and Muller also viewed the Smile Source relationship as an opportunity or benefit to Schein, and as a profitable customer. (Foley, Tr. 4535 ("Q. What did you think of Smile Source's plans for growth? A. I was in agreement with their business plan . . . I believe they had a great opportunity for both us and Schein to see some good growth with them."); CX8005 (Muller, Dep. at 53-54) (through Smile Source, Schein garnered new customers from competitors; Smile Source enabled Schein to grow its customer base); CX8003 (Foley, Dep. at 50) ("Q. Smile Source was a very profitable customer when it belonged to Special Markets? A. Yes. Q. Smile Source was growing its member base when it belonged to Special Markets? A. Yes."); CX0306 (Foley, IHT at 124-125) ("Q. Was Smile Source a profitable customer when it belonged to special markets? A. Yes, very. Q. How so? A. They were growing . . . Q. Did Smile Source bring new customers to Henry Schein who were previously serviced by other distributors? A. Yes. Q. How do you know? A. I remember them . . . bringing in . . . a bigger

customer . . . I remember a big win that was a Patterson account."); CX0309 (Muller, IHT at 101) (Smile Source relationship was "beneficial" in that it brought customers to Schein that were buying from a competitor)).

452. Foley testified that Smile Source was "doing approximately $900,000 in merchandise" when it worked with Schein Special Markets. (Foley, Tr. 4532-4533).

453. Discounting to buying groups presented revenue and profit opportunities to Schein that it valued. (CCFF ¶¶ 446-452, 693).

B. Patterson Also Planned to Start Selling to Buying Groups.

454. Patterson began discussing a partnership with buying group New Mexico Dental Cooperative ("NMDC") between late 2012 and early February 2013. (Mason, Tr. 2335, 2339-2340, 2342-2344; CX0090 at 004).

455. NMDC was established sometime in late 2012 or early 2013 by Dr. Brenton Mason, Dr. Jason Chapman, and Dr. Frank Montoya. (Mason, Tr. 2331, 2333-2337, 2339).

456. The purpose of the New Mexico Dental Cooperative was to provide services to independent dental practices (dentists who owned fewer than five practices). (Mason, Tr. 2331-2332).

457. Once Dr. Mason and the founders of NMDC started to put the word out about putting together a buying group, interest from independent dentists in joining the New Mexico buying group was higher than expected. (Mason, Tr. 2342-2343 (original goal was to sign up 50 offices; after putting the word out, they raised their membership goal); CX0090 at 005).

458. Dr. Mason's job in connection with the development of NMDC was to see if NMDC could negotiate discount pricing with vendors of dental consumables and equipment. (Mason, Tr. 2333 (Mason's job was to "look into vendors to see if we could negotiate pricing for our sundries and equipment.")).

459. Dr. Mason and Dr. Montoya reached out to distributors to see if they would work with their buying group to lower costs to independent dentist members. (Mason, Tr. 2331-2334).

460. NMDC preferred to seek the services of a full-service distributor because full-service distributors offered dental supplies, software, sundries, sales representatives, dental equipment installation, and service technicians. (Mason, Tr. 2334-2335).

461. NMDC reached out to full-service distributors Patterson, Henry Schein, and Benco. (Mason, Tr. 2331, 2334-2335).

462. Dr. Mason spoke with representatives of Patterson and Schein regarding a potential partnership with NMDC. (Mason, Tr. 2335-2336).

463. Dr. Mason spoke and met with the following Patterson employees: Jeff Katt, sales representative; Scott Belcheff, Katt's boss and Albuquerque Branch Manager; and Dan Reinhardt, Belcheff's boss. (Mason, Tr. 2344-2345).

464. On February 4, 2013, Dr. Mason sent an email to dental industry members, including Belcheff and Katt, informing them that NMDC had "partnered with Patterson Dental." (CX0090 at 004; Mason, Tr. 2340-2341 ("At that point we felt we had worked out a deal with Patterson…")).

465. By the time Dr. Mason sent his February 4, 2013 email to dental industry members (CX0090 at 004-006), Dr. Mason believed that NMDC "had a deal" with Patterson. Dr. Mason believed that NMDC and Patterson "still needed to work out some details of pricing, but we had a deal that was considered – that we had a partnership in this." (Mason, Tr. 2343-2344; *see also* CX0090 at 004). Dr. Mason's February 4, 2013 email to dental industry members invited them to a meeting that would take place at Patterson's Albuquerque showroom on March 13, 2013 at 6:00 p.m. (CX0090 at 004-006). Dr. Mason had the permission of a Patterson employee to use

the company's showroom and had set the date and time of the meeting with the employee. (Mason, Tr. 2341-2342).

466. On Thursday, February 7, 2013, Belcheff sent an email to Dr. Mason regarding the March 13, 2013 vendor meeting that Dr. Mason had scheduled. Belcheff's email stated that "there was some confusion" on his part and asked Dr. Mason to cancel the meeting. (CX4090 at 001-002; Mason, Tr. 2347).

467. Belcheff's February 7, 2013 email to Dr. Mason, was the first time he reached out to Dr. Mason about Dr. Mason's February 4, 2013 email to industry members inviting them to a vendor meeting. (Mason, Tr. 2348).

468. Prior to Belcheff's February 7, 2013 email to Dr. Mason, Belcheff had not indicated any confusion regarding the March 13, 2013 vendor meeting that Dr. Mason scheduled. (Mason, Tr. 2348).

469. In Belcheff's February 7, 2013, email to Dr. Mason, Belcheff wrote, regarding NMDC, "[t]his has the opportunity to be huge . . . ." (CX4090 at 002; Mason, Tr. 2349-2350).

470. The February 7, 2013, email from Patterson's Belcheff, to Dr. Mason regarding NMDC referenced an upcoming "dinner Monday night" to "help us get guidelines in place." (CX4090 at 002). Belcheff further stated in his email to Dr. Mason, "I am hoping Patterson can be a partner you trust and that will always do the right thing for you." (CX4090 at 002).

471. Dr. Mason received a second email from Belcheff later in the day on February 7, 2013, in which Belcheff wrote, "I definitely want to keep this moving forward[.]" (CX4090 at 001; Mason, Tr. 2352-2353).

472. Following this email (CX4090) from Belcheff, Dr. Mason expected that a dinner meeting with Patterson representatives scheduled for February 11, 2013 would proceed and would allow Patterson and NMDC to "set up the guidelines of how we would proceed." (Mason, Tr. 2350).

473. Dr. Mason believed that, as of February 7, 2013, his buying group, NMDC, had an agreement with Patterson and that the guidelines of the deal would be "worked out" with Dan Reinhardt. (Mason, Tr. 2352-2353).

IX. BENCO ORCHESTRATED AN AGREEMENT WITH PATTERSON THAT NEITHER WOULD DISCOUNT TO BUYING GROUPS.

A. Benco Discovered Patterson Was On the Cusp of Discounting to a Buying Group.

474. On February 4, 2013, Michael Stanislawki of Midmark, a dental products manufacturer, forwarded a copy of Dr. Mason's February 4, 2013 email (CX0055) to Brandon Bergman, who was Schein's Albuquerque Regional Manager. (CX0090 at 002-006; *see also* CX0055 at 002; CX0091 at 003; CX0269 at 001).

475. Bergman forwarded Stanislawski's email (CX0055) to Schein Zone Manager Dean Kyle two minutes after receiving it, and added a message to Kyle: "Would you take a look at this? I know we spoke about it already but concerning." (CX0269 at 001; CX0307 (Kyle, IHT at 15, 17, 177) (identifying positions for Bergman and Kyle)).

476. On February 6, 2013, Bergman forwarded Stanislawski's email (CX0055) to Stewart Hanley of Benco, with the message, "Did you see this? Call me." (CX0055 at 002; *see also* CX0090 at 002; CX0091 at 002-003). Five minutes later, Hanley forwarded the email chain to Mike Trimble at Benco. (CX0055 at 001-002). Within two hours, Trimble forwarded the same email chain (CX0055) to Don Taylor, a Benco Regional Manager. (CX0055 at 001; *see also* CX0090 at 002; CX0091 at 002; Cohen, Tr. 529-530).

477. On February 7, 2013, Don Taylor forwarded the email chain (CX0055) containing information regarding NMDC's partnership with Patterson to Cohen for "feedback and coaching." (CX0055 at 001; Cohen, Tr. 529-530; *see also* CX00901 at 002; CX0091 at 001).

478. Cohen learned of Patterson's involvement with NMDC on February 7, 2013 from the email chain (CX0055) forwarded by Taylor, a Benco regional manager in New Mexico, who forwarded an email from a Schein regional manager containing that information. (Cohen, Tr. 528-531; CX0055 at 001; *see also* CX0090 at 002).

479. On February 8, 2013, after learning about Patterson's involvement with NMDC, Cohen informed Taylor that Benco had a no buying group policy, and stated: "We don't recognize buying groups . . . I'll reach out to my counterpart at Patterson to let him know what's going on in NM." (Cohen, Tr. 528-530; CX0055 at 001).

480. On February 8, 2013, five minutes after Cohen had written to Benco's Don Taylor that he would "reach out to my counterpart at Patterson," Cohen forwarded the email chain that he had received from Taylor (CX0055) to his counterpart, Paul Guggenheim. (CX0090 at 001; Cohen, Tr. 532-533; CX0091 at 001; Guggenheim, Tr. 1594; *see also* CX0056 at 001).

481. Cohen "found it surprising" that Patterson had partnered with NMDC and thought it "would have been very unusual for Patterson to sell to buying groups" because he thought Patterson did not work with buying groups at the time in February 2013. (Cohen, Tr. 528, 531-532; CX0301 (Cohen, IHT at 236) ("As far as I know, at the time of this e-mail, Patterson never sold to buying groups, never recognized buying groups.")).

482. A change in Patterson's buying group strategy posed a risk to Benco of potential loss of customers. (Cohen, Tr. 466-467).

483. On February 8, 2013, Cohen forwarded the email chain regarding Patterson's involvement with NMDC (CX0055) to his competitor, Guggenheim, and he informed Guggenheim of all of the details of Benco's own no buying group policy, including that Benco's sales team understood that policy:

> 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.

(CX0056 at 001; CX0090 at 001; CX0091 at 001; Cohen, Tr. 532, 534; Guggenheim, Tr. 1594).

484. Cohen communicated Benco's no buying group policy to Guggenheim. (Cohen, Tr. 501 ("Q. You've communicated Benco's no-buying group policy to Mr. Guggenheim? A. . . . [Y]es.")).

485. Cohen forwarded the information about Patterson's arrangement with NMDC to Guggenheim because he "wanted to let [Guggenheim] know about a situation in New Mexico that he might not have heard was taking place in one of their locations." (Cohen, Tr. 712).

486. Cohen forwarded the information about Patterson's arrangement with NMDC to Paul Guggenheim because he thought Guggenheim may not have known about Patterson's involvement with NMDC. (Cohen, Tr. 712).

487. Cohen shared the information about Patterson's arrangement with NMDC with Guggenheim because he hoped that Guggenheim would also share information with him. (Cohen, Tr. 712-713 ("I like to give information to get information. I like to be useful [to Guggenheim]. If the shoe was on the other foot, I would have liked to have known the same information . . . I like to maintain good relationships with my competitors.")).

488. Cohen could not identify any procompetitive justifications for his February 2013 communications with Guggenheim about Benco's no buying group policy. (CX0301 (Cohen,

IHT at 243) ("Q. Can you think of any business reason for you to tell Mr. Guggenheim of Benco's no-GPO policy? A. I don't think [there] is a business reason.")).

489. Cohen's February 8, 2013 email regarding NMDC (CX0056) was the first time Guggenheim became aware of Benco's no buying group policy. (Guggenheim, Tr. 1596; *see also* CX0314 (Guggenheim, IHT at 237, 238)).

490. As of February 8, 2013, Guggenheim did not believe that Benco's policy of not selling to buying groups was public information. (Guggenheim, Tr. 1596-1597 ("Q. Did you believe that Benco's policy of not selling to buying groups was public information? A. No. I don't – I didn't think so."); *see also* CX0314 (Guggenheim, IHT at 239)).

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

491. On February 8, 2013, approximately 20 minutes after receiving an email from Cohen regarding its no buying group policy, Guggenheim forwarded it to Misiak and Rogan, and let them know of Benco's policy of not working with buying groups. (Misiak, Tr. 1329, 1331; Guggenheim, Tr. 1606-1607; CX0091 at 001).

492. In February 2013, Dave Misiak was in charge of Patterson's U.S. sales organization, and Tim Rogan was in charge of Patterson's pricing department. (CCFF ¶¶ 1944, 1945, 1947, 1952).

493. Moreover, Misiak and Rogan were senior executives within the company who dealt with buying groups. (CCFF ¶ 1938).

494. Guggenheim forwarded Cohen's February 8, 2013 email to Misiak and Rogan because they were his direct reports. (Guggenheim, Tr. 1607).

495. A few hours after Guggenheim received the February 8, 2013 email from Cohen about Patterson's involvement with NMDC and Benco's no buying group policy, Guggenheim responded to Cohen:

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

(CX0090 at 001; Guggenheim, Tr. 1607-1608).

496. In testimony, Guggenheim confirmed that his response to Cohen's February 8, 2013, email about Patterson's involvement with NMDC and Benco's no buying group policy (CX0090) meant that Patterson felt the same way about buying groups. (Guggenheim, Tr. 1611-1612).

497. On other occasion where Cohen raised issues about Patterson's business conduct, Guggenheim "investigated" and looked into those issues and responded to Cohen to inform him of what he learned. (CCFF ¶¶ 297-298, 307).

498. When Guggenheim was Patterson's Southwest Regional Manager, years before he exchanged assurances with Cohen about buying groups in 2013, he did not receive any guidance from Patterson corporate about whether to do business with GPOs. (CX8023 (Guggenheim, Dep. at 38) ("Q. While you were southwest regional manager, did you receive any guidance from Patterson corporate on whether to do business with GPOs? A. Not directly, no. Q. What about indirectly? A. No.")). At trial, Guggenheim changed his testimony, and stated that Patterson had provided guidance since 2000 not to do business with buying groups. (Guggenheim, Tr. 1573-1574).

499. At the time Guggenheim received Cohen's February 8, 2013 email (CX0090), Patterson did not have a company policy with respect to buying groups or a uniform way of dealing with buying groups and had done business with buying groups. (CX8023 (Guggenheim, Dep. at 134 (no company policy at time received Cohen's February 8, 2013 email, and Patterson "evaluated individually" each buying group), 137 ("don't have . . . a uniform way to deal with [buying groups]"); CX0314 (Guggenheim, IHT. at 220) ("I believe we do [sell to GPOs]"); CX8023

(Guggenheim, Dep. at 141) ("my gut would tell me, yeah, we've probably done business with buying groups and that's probably been done in branches, you know, for many years")). At trial, Guggenheim changed his testimony and stated that at the time he received Cohen's February 8, 2013 email (CX0090), Patterson had a policy not to do business with buying groups. (Guggenheim, Tr. 1597-1598).

500. Cohen interpreted Guggenheim's statement in his February 8, 2013 email (CX0090) that "we feel the same way" to mean that Patterson's policy with respect to dealing with buying groups was similar to Benco's policy. (Cohen, Tr. 589-590; CX0090 at 001). Cohen testified: "Q. What did you think Mr. Guggenheim's position was on GPOs at the time of this e-mail? A. I thought – it goes back to the e-mail exchange that we had several months before in the context of the New Mexico cooperative, and he said, 'We feel the same way about these.' Q. S o did you think that his policy was similar to yours? A. That's the way I interpreted that sentence. Yes." (Cohen, Tr. 589-590).

501. Cohen testified that if he himself "had received a similar alert, there's a lot of things about the investigation that [he] might do," and stated that Guggenheim's response (CX0090) could mean that Guggenheim would investigate Patterson's relationship with NMDC. (Cohen, Tr. 536).

502. Dave Misiak did not recall whether he knew of Benco's practices regarding buying groups prior to February 2013. (Misiak, Tr. 1333).

C. Patterson Ended Negotiations With a Buying Group Three Days After Exchange of Assurances with Benco.

503. On February 11, 2013, just three days after the February 8, 2013, communication between Cohen and Guggenheim (CX0090), Patterson communicated to NMDC that it would

not bid on NMDC as originally expected. (CX8035 (Mason, Dep. at 54-55); CX4090 at 001-002).

504. On February 11, 2013, Dr. Mason and NMDC co-founders Dr. Frank Montoya and Dr. Chapman met with a Patterson sales representative, Jeff Katt, Patterson's Albuquerque Branch Manager Scott Belcheff, and Patterson's Regional Manager Dan Reinhardt at a restaurant to discuss NMDC. (Mason, Tr. 2354).

505. At the February 11, 2013 meeting between NMDC founders and Katt, Belcheff, and Reinhardt, Reinhardt informed Dr. Mason that Patterson would not work with NMDC. (Mason, Tr. 2354-355).

506. Patterson's decision to end negotiations with NMDC, communicated to Drs. Mason, Montoya and Chapman on February 11, 2013, surprised Dr. Mason because, until then, he understood that Patterson had agreed to be the preferred vendor for the buying group. (Mason, Tr. 2354-2356; *see also* CX8035 (Mason, Dep. at 86-88)).

507. Following Patterson's sudden refusal to work with the NMDC buying group, Dr. Mason approached Schein to explore the opportunity. (Mason, Tr. 2358-2359, 2387).

508. Dr. Mason communicated with Schein's Rick (Roderic) Dolk on February 20, 2013. (Mason, Tr. 2358-2359; CX2672 at 001).

509. After Dr. Mason communicated with Dolk on more than one occasion, Dr. Mason learned that Schein would not be participating in supplying NMDC. (Mason, Tr. 2359).

510. Dr. Mason understood that Dr. Montoya, another NMDC co-founder, had spoken with Benco about Benco supplying NMDC. Based on information from Dr. Montoya, Dr. Mason believed that Benco had also refused to work with NMDC. (Mason, Tr. 2360-2361).

511. Having no full-service distributor, NMDC's attempt to build a buying group was stymied. (Mason, Tr. 2357-2358; CX3334). Instead, Dr. Chapman, Dr. Mason, and Montoya agreed to join an existing co-op, the Dental Co-op of Utah, as the New Mexico branch. (Mason, Tr. 2361-2362).

512. In fact, after the intra-firm communications, Patterson, Henry Schein, and Benco all turned down the opportunity to work with the dentists setting up a buying group in New Mexico. (Mason, Tr. 2335 (approached "Patterson, Henry Schein and Benco"), 2361 ("we were declined by the three distributors that we approached")).

D. Benco Worried That Communications With Patterson About Buying Groups Could Lead to Price Fixing Allegations.

513. On February 26, 2013, Benco's New Mexico Regional Manager Don Taylor contacted Cohen about whether he had communicated with Patterson about NMDC, stating in a text message, "This buying club in Albuquerque is starting to grow legs. Curious if you were able to connect with your Patterson contact and if anything came of it." (CX0057 (Excel worksheet "Chats" tab row 80); Cohen, Tr. 538-539; *see also* CX0057_EXCERPT at 006). Cohen responded to Taylor in a text: "I just sent [Guggenheim] a note about [NDMC]. Don't want to call because it might be construed as price fixing." (Cohen, Tr. 539-540; CX0057(Excel worksheet "Chats" tab row 81); *see also* CX0057_EXCERPT at 006).

514. Cohen was aware of the potential antitrust violation his communications with Guggenheim would raise. (Cohen, Tr. 539-540).

515. Cohen had numerous conversations with Paul Guggenheim over the years, including "once in a while about a customer situation." (Cohen, Tr. 540-541).

516. Cohen was concerned with communicating with Guggenheim about "the buying group situation" in New Mexico because it was a "customer situation" and might be construed as price fixing. (Cohen, Tr. 539-540).

517. Cohen did not recall other situations where he expressed concern that calling Guggenheim would be construed as price fixing. (Cohen, Tr. 540-541).

E. Benco Informed Its Team the Big Three Will Maintain a United Front Against Buying Groups.

518. Shortly after Guggenheim's email exchange with Cohen regarding NMDC (CX0090), Respondents' executives, Guggenheim, Misiak, Rogan, Cohen, Ryan, and Sullivan, attended the Chicago Dental Society industry meeting held on February 21-23, 2013 ("February 2013 Chicago Midwinter Meeting"). (CCFF ¶¶ 519-526).

519. The Chicago Midwinter Meeting is a large dental trade meeting held every February in Chicago. (Misiak, Tr. 1373; Guggenheim, Tr. 1613). This meeting is typically attended by dentists, as well as distributors and manufacturers of dental products who display their products for dentists. (Misiak, Tr. 1373).

520. Patterson and other dental products distributors attended the February 2013 Chicago Midwinter Meeting. (Guggenheim, Tr. 1613-1614).

521. Cohen attended the February 2013 Chicago Midwinter Meeting. (CX1507 at 002 (Statement of Cohen: "[a]ttended Chicago Mid-Winter Meeting" in February 2013); CX4360 at 025 (2013 Chicago Dental Society registration listing "Charles Cohen"); CX1149 at 001 (Statement of Cohen: "Busy days at Chicago Mid-Winder meeting."); CX8015 (Cohen, Dep. at 29, 40-41, 44)).

522. Guggenheim testified that he "believed" he attended the February 2013 Chicago Midwinter Meeting. (Guggenheim, Tr. 1614; *see also* CX4360 at 022 (2013 Chicago Dental Society registration listing "Paul Guggenheim")).

523. Misiak testified that he typically attends the February Chicago Midwinter Meeting. (Misiak, Tr. 1373-1374).

524. Rogan attended the Chicago Midwinter meeting every year. (CX0317 (Rogan, IHT at 38)).

525. Ryan attended the February 2013 Chicago Midwinter meeting, and testified that he had attended most of the Chicago Midwinter meetings for the last 30 years. (Ryan, Tr. 1084-1085; CX8037 (Ryan, Dep. at 11-12)).

526. Sullivan attended the February 2013 Chicago Midwinter meeting. (CX6580 at 149-156 (Sullivan's expense report showing attendance at Chicago Midwinter Meeting in 2013); CX4360 at 026 (2013 Chicago Dental Society registration listing "Tim Sullivan"); *see also* Sullivan, Tr. 3879)).

527. On February 23, 2013, the final day of the February 2013 Chicago Midwinter Meeting, Ryan instructed Benco's sales team: "Benco does not recognize GPOs as a single customer. GPOs are what [ruined] the medical supply business and why they work on single digit margins. If this door is ever opened in dental, its [*sic*] all over for all of us. . . . [P]icture a day when every single customer of yours is in some kind of buying club and all margins are now 12% over cost and its [*sic*] a race to the bottom. 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." (CX1149 at 002 (emphasis in original); Ryan, Tr. 1075-1078, 1080-1083).

528. Ryan's statement on February 23, 2013 in CX1149 (that "all of the major dental companies have said "'NO'," the reference to "all of the major dental companies" (emphasis in original)) included Benco, Schein and Patterson. (Ryan, Tr. 1083).

529. CX1149 depicts a Daily Activity Stream Summary, which is an internal bulletin board or communication tool used to communicate with the sales team, including the territory sales reps, the equipment specialists, and sales management. (Ryan, Tr. 1076-1078). The bulletin board served as a repository for questions and documents, and harnessed the knowledge of the whole organization. (Ryan, Tr. 1078).

530. Ryan admitted at trial that, prior to the February 2013 Chicago Midwinter Meeting, the "marketplace" information he received contradicted his statement on the Benco bulletin (CX1149) that "all of the major dental companies" had refused buying groups. (Ryan, Tr. 1083-1084; *see also* CCFF ¶¶ 532-533).

531. Ryan received an email on March 24, 2011 from Taylor in which Taylor reported to Ryan that he believed Schein was doing business with a buying group. (CX1039 at 001; Ryan, Tr. 1245 ("Q. And Mr. Taylor reported to you that he believed Henry Schein was doing business with the Dental Cooperative; right? A. Yes. Q. You considered the Dental Cooperative to be a buying group; right? A. Yes."); *see also* Cohen, Tr. 852 ("Q. Now, Mr. Taylor notes that Schein is doing business with buying groups in 2011? A. That's what the e-mail indicates.")).

532. In September 2011, Ryan received an email stating the Schein had been doing business with a buying group. (CX1116; Ryan, Tr. 1049-1050 ("Q. So here, Dr. Goldsmith was telling you that Smile Source was working with Henry Schein? A. That's what he says, yes.")).

533. Benco received market intelligence that Patterson entered into a discounting arrangement with the NMDC buying group in February 2013. Prior to Ryan's February 23, 2013 statement in

CX1149 ("all of the major dental companies have said, 'NO', and that's the stance we will continue to take") (emphasis in original)), Ryan saw an email sent on February 4, 2013 that indicated Patterson was going to partner with a buying group. (CX1215; Ryan, Tr. 1069-1070 ("Q. And so Dr. Mason, who was the founding member of this buying group, indicated that Patterson had partnered with the buying group? A. That's what he says, yeah."); Ryan, Tr. 1083-1084).

F. Patterson Also Informed Its Team the Big Three All "Stay Out" of Buying Groups.

534. In February 2013, Devon Nease, Patterson Branch Manager for its Chesapeake Region, met with a dentist (Dr. Mike Fernandez) who provided Nease with a bid proposal from an entity called Atlantic Dental Care, or ADC. (CX0092; CX8002 (Nease, Dep. at 16, 30-32)).

535. Nease was responsible for overseeing the operations and sales of Patterson's Chesapeake Branch. (CX8002 (Nease, Dep. at 17)).

536. The bid proposal from Dr. Fernandez described ADC as "a group of general dentists in the Southeastern region of Virginia" who "were looking to preserve their autonomy and independent practice and take advantage of the economy of scale that a large corporate or group practice enjoys." (CX0092 at 004; CX8002 (Nease, Dep. at 40-41); CX0092 identified as bid proposal from Dr. Fernandez). The "Proposal Requirements" listed "[a]ggresively priced solutions that provide increased discounts and overall lower costs." (CX0092 at 005).

537. On February 27, 2013, Nease sent an email to Anthony Fruehauf, Patterson's Mid-Atlantic Regional Manager and forwarded ADC's bid proposal. (CX0092 at 002; *see also* CX8002 (Nease, Dep. at 40)).

538. On February 27, 2013, the same day that Fruehauf received the ADC bid proposal from Nease, Fruehauf forwarded ADC's proposal to Misiak with the following message:

> I have attached an RFP that the GPO in Chesapeake will be sending out. I have had numerous discussions with Devon [Nease] about our position and what it could mean if we set a precedent of offering lower prices to groups such as this. Devon is on board and understands our position. His concern was more of how he would be judged if we lost a big chunk of business.

(CX0092 at 001; CX8013 (Fruehauf, Dep. at 99-100)).

539. When Misiak received Fruehauf's February 27, 2013 email asking for guidance in responding to Nease's communication about ADC's request for a bid, Misiak immediately forwarded Fruehauf's email to Guggenheim. (CX0092 at 001).

540. Misiak stated in his February 27, 2013 email to Guggenheim that he had "coached Anthony [Fruehauf] on how to stay out of this with grace" and that he was concerned that "Schein and Benco sneak into these co-op bids and deny it." (CX0092 at 001; *see also* Misiak, Tr. 1371).

541. Misiak testified that, in his email in CX0092 at 001, he was referring to buying groups or GPOs when he wrote "co-op bids." (Misiak, Tr. 1365-1366; CX8038 (Misiak, Dep. at 160)).

542. Misiak's February 27, 2013 email (CX0092) was about GPO strategy, and he directed his sales team not to bid for ADC's business. (Misiak, Tr. 1351, 1358; *see also* CX0316 (Misiak, IHT at 243) ("Q. Is it fair to say that you told Anthony to not submit a bit for this Atlantic Dental Care group? A. I think, yeah, that's what I say in this email.")).

543. In response to Fruehauf's February 27, 2013 email regarding ADC's bid proposal (CX0092), Misiak instructed Fruehauf and his sales team to "stay out" of selling to GPOs. (CX0093 at 001; Misiak, Tr. 1349, 1354-1355, 1358, 1368; *see also* CX0316 (Misiak, IHT at 243) ("Q. Is it fair to say that you told Anthony to not submit a bit for this Atlantic Dental Care group? A. I think, yeah, that's what I say in this email.")).

544. Misiak's response to Fruehauf's February 27, 2013 email regarding ADC's bid proposal (CX0092) stated:

> These co op situations can be very challenging so stay connected. You may have to help [Patterson branch manager] at the meeting communicate our position verbally to the reps. . . .When I get these calls directly I politely say that I appreciate the opportunity, but currently we do [not] participate with group purchasing organizations. Continue to help Devon stay out of this with grace.

(CX0093 at 001).

545. Where Misiak wrote in CX0093 that "currently we do participate with group purchasing organizations" he meant to write "currently we do *not* participate with group purchasing organizations." (emphasis added) (Misiak, Tr. 1350).

546. Misiak testified that, when he wrote "stay out of this with grace" in CX0093, "this" referred to the GPO. (Misiak, Tr. 1354-1355).

547. Fruehauf's February 27, 2013 email (CX0092) stated that Nease feared "los[ing] a big chunk of business" as a result of declining to bid on the ADC group. (CX0092 at 001; CX8013 (Fruehauf, Dep. at 102-103)).

548. In response to Fruehauf's inquiry about ADC's bid proposal (CX0092), Misiak informed Fruehauf that Schein and Benco – like Patterson – did not participate in buying groups in response. (CX0093 at 001; Misiak, Tr. 1356).

549. Misiak also explained that Patterson's largest competitors, Henry Schein and Benco, refused buying groups as well:

> **Confidential and not for discussion ..our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me.**

(CX0093 at 001 (emphasis in original); Misiak, Tr. 1356-1358).

550. When Misiak wrote in CX0093 that Patterson's two largest competitors "stay out of these as well," he meant that Schein and Benco stayed out of GPOs, just as Patterson stayed out of GPOs. (Misiak, Tr. 1357-1358).

551. At the time that Misiak wrote in CX0093 that Patterson's two largest competitors "stay out of these as well," he believed that Schein and Benco stayed out of GPOs, just as Patterson stayed out of GPOs. (Misiak, Tr. 1357-1358).

552. In Misiak's statement in CX0093 that Patterson's "2 largest competitors stay out of these as well," the reference to "2 largest competitors" meant Schein and Benco, "these" meant GPOs, and "as well" meant Schein and Benco were staying out of the GPO business like Patterson. (CX0093 at 001; Misiak, Tr. 1356-1358).

553. Misiak testified that his statements in CX0093 ("Confidential and not for discussion ..our 2 largest competitors stay out of these as well") were about market information, and he admitted that market information is neither "confidential" nor something that was "not for discussion" by his sales team. (Misiak, Tr. 1363-1364 (Q. And information about the market, competition, that's not confidential; right? A. No. . . . Q. I'm asking you, is information about the market and competition in general – is that confidential information and not for discussion for your employees? A. No.")).

554. Misiak could not offer any explanation for why he wrote "Confidential and not for discussion" when he told Fruehauf that Benco and Schein did not participate in buying groups. (CX0093 at 001; Misiak, Tr. 1363-1364).

555. In response to Fruehauf's inquiry about ADC's bid proposal (CX0092), Misiak instructed Fruehauf to inform him if Benco and Schein were selling to GPOs and to send him specific proof if he had it. (CX0093 at 001 (Statement of Misiak; "If you hear differently [about Schein and

Benco selling to buying groups] and ha[d] specific proof please send that to me."); Misiak, Tr. 1364).

556. Misiak could not provide any reason why he asked Fruehauf for "specific proof" that Patterson's competitors were acting contrary to the position he described. (Misiak, Tr. 1363-1364).

557. Patterson's branch managers understood Patterson's position was not to focus on buying groups. (CX0093 at 001 ("Devon understands our position"); Misiak, Tr. 1349-1350 (Patterson's position in February 2013 was not to do business with GPOs)).

558. Misiak was not aware of any analysis of how many Patterson customers it might lose by foregoing the ADC opportunity. (Misiak, Tr. 1341).

559. Misiak did not recall Patterson reviewing any data with respect to buying groups. (CX0316 (Misiak, IHT at 268)).

560. Patterson did not do an independent investigation of whether ADC was a buying group or DSO, relying instead on obtaining information about ADC from Benco. (CX0314 (Guggenheim, IHT at 289-294)).

561. Nease was concerned that Patterson would lose business by refusing to bid on ADC. (CX8002 (Nease, Dep. at 46)).

562. Fruehauf thought a "significant . . . chuck of [revenue] was in jeopardy" if Patterson lost the ADC business. (CX8013 (Fruehauf, Dep. at 101-102)).

563. Fruehauf did not recall any instance other than the instruction not to bid on ADC where Patterson communicated to a salesperson that he or she would not be "judged unfavorably" as the result of a loss of business. (CX8013 (Fruehauf, Dep. at 106)).

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

564. Following the agreement with Benco, Patterson actively monitored and confronted Benco on suspicions of cheating. (CCFF ¶¶ 565-573; *see also* Guggenheim, Tr. 1627-1628).

565. On May 31, 2013, Nease sent Guggenheim an email informing him that Benco had bid for and won the business of Atlantic Dental Care. (CX0094 at 001 ("Just a heads up on a situation in Chesapeake, VA, Benco recently responded to and won a bid proposal with a buying group called Atlantic Dental Care."); Guggenheim, Tr. 1622; 1625-1627)).

566. Patterson initially viewed ADC as a buying group. (CX0093 at 001; Misiak, Tr. 1335-1336; *see also* CX0092 at 001 ("Attached is an RFP from a dentist who's formed a Co-op.")).

567. At the time Guggenheim received Nease's May 2013 email and learned Benco won ADC's business (CX0094), Guggenheim had not forgotten Cohen's earlier email about Benco's policy of not doing business with buying groups (CX0056). (Guggenheim, Tr. 1627).

568. After learning from Nease that Benco bid for and won ADC's business (CX0094), Guggenheim located an email from Cohen from four months earlier, which explained Benco's no buying group policy (CX0056), and he responded to Cohen. (Guggenheim, Tr. 1627).

569. On June 6, 2013, Guggenheim sent an email to Cohen and asked his competitor to "shed some light on [Benco's] business agreement with Atlantic Dental Care." (CX0095 at 001; Guggenheim, Tr. 1627-1628).

570. In his June 6, 2013 email to Cohen, forwarding their February 8, 2013 correspondence, Guggenheim asked Cohen to confirm that Benco's "position on buying groups [was] still as [Cohen] articulated back in February." (CX0095 at 001; Guggenheim, Tr. 1627-1628; *see also* Cohen, Tr. 560). Guggenheim's June 6, 2013 email to Cohen 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!

(CX0095 at 001).

571. Guggenheim's June 6, 2013 email to Cohen blind copied Misiak, Rogan, and Nease. (CX0095 at 001; Guggenheim, Tr. 1630).

572. Guggenheim viewed Benco's bidding on and doing business with ADC as a deviation from what Cohen previously told him about Benco's policy not to do business with buying groups in February 2013 (CX0056). (Guggenheim, Tr. 1628).

573. Cohen understood that Guggenheim's June 2013 email (CX0095) asked how Benco doing business with buying group ADC was consistent with the no buying group policy that Cohen had communicated to Guggenheim in February 2013 (CX0056). (Cohen, Tr. 561).

H. Benco Reassured Patterson It Will Continue to Abide By a No Buying Group Policy.

574. Cohen replied to Guggenheim's June 6, 2013 email (CX0095) two days later on June 8, 2013, and he reiterated to Guggenheim that Benco had a no buying-group policy. (Cohen, Tr. 561-562; CX0062 at 001).

575. Cohen's June 8, 2013 response to Guggenheim set forth a detailed explanation for Benco's decision to bid for ADC. Cohen stated:

> As we've discussed, we don't recognize buying groups. On the Atlantic Dental Care situation, here's our understanding after several in-depth conversations…
>
> . . . . [W]e believe this meets our criteria for a large group practice. We've asked to see the merger documents once they are completed, to confirm that they've really become a legally merged entity, and we're going to continue monitoring the process to ensure that ADC delivers on their commitment to us. Happy to discuss in more detail, if you'd like.

(CX0062 at 001; Cohen, Tr. 561-564).

576. In Cohen's June 8, 2013, response to Guggenheim, he also provided multiple reasons why ADC was not a buying group, including that ADC had a total of 32 practices; the 32 practices had "legally merged together"; the merged entity was "owned by the former practice owners"; ADC was in the "process of rebranding all of the offices Atlantic Dental Care"; and the company had a board of directors "made up of some of the stakeholders who makes the decisions." (CX0062 at 001; Cohen, Tr. 562-563 ("Q. And then you went on to explain why you believed ADC was not a buying group. A. Yes. . . . 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.")).

577. In Cohen's June 8, 2013 response, he assured Guggenheim about his future plans -- that he would "continue monitoring the process to ensure that ADC delivers on their commitment to us," including ensuring that ADC was not a buying group. (Cohen, Tr. 563-564; CX0062 at 001).

578. Cohen testified that Guggenheim did not request further discussion and that it seemed like Guggenheim was satisfied with his response. (Cohen, Tr. 564; CX0062 at 001).

579. Cohen's email to Guggenheim described the criteria that exempted ADC from the nobuying group agreement and assured Guggenheim that he would "continue monitoring the process to ensure that ADC delivers on their commitment to us," including ensuring that ADC was not a buying group. (CX0062 at 001; CCFF ¶¶ 574-577).

580. Based on what Guggenheim learned from Cohen's June 8, 2013 email (CX0062), Guggenheim now viewed ADC as a DSO rather than a buying group. (Guggenheim, Tr. 1636).

581. On June 10, 2013, Guggenheim responded to Cohen June 8, 2013 email (CX0062) and confirmed that he understood Cohen position about bidding for ADC's business. (Guggenheim, Tr. 1633; *see also* CX0096 at 001 (confirming to a sales manager that Cohen has made "an exception" because ADC was a DSO, not a buying group)).

582. Guggenheim's June 10, 2013 response to Cohen stated, "[s]ounds good Chuck. Just wanted to clarify where you guys stand." (CX0062 at 001).

583. Guggenheim was satisfied with Cohen's June 8, 2013 response (CX0062). (Guggenheim, Tr. 1633-1634; *see also* CX0096 at 001 (Guggenheim forwarded Cohen's email to Nease, the branch manager for the region where ADC was located, explaining to Nease, "I guess that does create a different situation as they would logically buy as one entity. It's a little grey but I guess he has a point.")).

584. Guggenheim forwarded the email exchange with Cohen (CX0062) to his boss, CEO of Patterson Companies, Scott Anderson. (CX0097 at 001).

585. Guggenheim forwarded the email exchange with Cohen (CX0062) to McFadden. (CX0098 at 001).

586. Following the June 2013 communication with Cohen (CX0062), Guggenheim directed Nease to "aggressively get after [ADC's] business and compete." (Guggenheim, Tr. 1634; CX0314 (Guggenheim, IHT at 303)).

587. Based on Benco's communication from Cohen to Guggenheim (CX0062) in June 2013 that ADC was under common ownership and was not a buying group, Guggenheim changed his position and felt that Patterson should compete for the ADC business. (Guggenheim, Tr. 1634).

588. Internal communications at Patterson referenced other instances when Patterson was concerned Benco was working with buying groups when it had a no buying group policy. (*See,*

e.g., CX3169 at 001 (Statement of Rogan: "Benco is a distributor like us. Where are these supplies coming from? If this is a GPO (group purchasing organization), we need to know:"); Rogan, Tr. 3526-3527 (Rogan was asking if Tralongo was a GPO)).

I. Patterson Ensured Compliance with Agreement Internally.

589. Patterson served its DSO customers through a division that was originally called "Special Markets" and later called Strategic Accounts. (McFadden, Tr. 2670; CX0315 (McFadden, IHT at 80, 96-97)).

590. Patterson was developing its Special Markets division by May 2013. (McFadden, Tr. 2670, 2689).

591. Patterson's Special Markets division was created to manage large accounts. (CX3014 at 004 ("Patterson Dental Special Markets will focus on large group practices"); CX0158 at 002).

592. Patterson was already serving a number of DSOs at the time it established its Special Markets division. (RX0072 (Excel worksheet "Sales Data" tab)).

593. At the time Patterson established its Special Markets division in 2013, the DSO market was dominated by Schein, with Benco also serving the DSO market. (Guggenheim, Tr. 1540; *see also* Misiak, Tr. 1464; McFadden, Tr. 2690).

594. Patterson looked at what its competitors were doing as a model when it designed its Special Markets division. (McFadden, Tr. 2690-2691).

595. Patterson had the resources and infrastructure to work with buying groups both before it established its Special Markets division and after Special Markets was formed in 2013. (Misiak, Tr. 1510).

596. In June 2013, at the same time that Guggenheim and Cohen communicated about why Benco chose to bid on and do business with ADC (CX0062), Patterson was building out its

Special Markets division to do business with DSOs and other multi-office entities. (CCFF ¶¶ 587, 590).

597. McFadden received numerous requests from buying groups inquiring whether Patterson was interested in bidding on their business. (McFadden, Tr. 2705 (Patterson's Special Markets division started getting "a lot of emails from buying groups"); CX8004 (McFadden, Dep. at 116-117); *see also* CX3116 at 001; Misiak, Tr. 1386 ("Q. What did you mean by 'the GPO noise has been pretty loud from the field'? A. I can't remember exactly what I meant when I sent this back in 2013, probably that I've received a lot of e-mails. Q. E-mails about what? A. About GPOs or buying groups….from our branch infrastructure, from our sales reps.")).

598. McFadden approached Guggenheim at times to ask if he should pursue buying groups. (Guggenheim, Tr. 1642-1643).

599. McFadden was open to the possibility of working with buying groups. (CCFF ¶¶ 600, 601).

600. [redacted].

601. When Special Markets was first started, the announcement "meant a lot more than DSOs." (CX0315 (McFadden, IHT at 169)).

602. McFadden was anxious to develop new business and saw "any sale" as a "potential opportunity," including sales to GPOs. (CX0315 (McFadden, IHT at 169-170; *see also* CX0106 at 001 (Statement of Misiak: "Is it worth it to explore GPO???????")).

603. In August 2013, Rogan cautioned McFadden, who was interested in exploring a buying group: "We don't need GPO's in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry." (CX0106 at 001).

604. McFadden's boss, Guggenheim, placed an "extreme amount of pressure" on McFadden to focus exclusively on DSOs and stay away from buying groups. (CX0315 (McFadden, IHT at 240)).

605. In July 2013, just months prior to the September 2013 company-wide Special Markets memo, Patterson's McFadden and Guggenheim discussed excluding "buying co-ops" from the definition of Special Markets. McFadden sent Guggenheim an email on July 15, 2013 with a draft of definitions for customers that would be eligible to work with Patterson's Special Markets. (CX3072). McFadden identified one of the criteria to meet the definition of Special Markets as follows: "To be considered a Special Markets account with Patterson Dental the following requirements must be met: . . . [m]ust have a formal management structure – not a buying co-op." (CX3072 at 003). McFadden asked Guggenheim for his advice on this definition, and asked Guggenheim to discuss further. (CX3072 at 002).

606. On September 3, 2013, McFadden told a regional manager that Patterson was "choosing to forgo this route [joining with a GPO] as its [*sic*] both anti rep, manufacturer and distributor." (CX3116 at 001).

607. On September 3, 2013, Dave Misiak e-mailed Guggenheim and Scott Anderson (CEO of Patterson Companies) that the "GPO noise has been pretty loud from the field. We have said no at every turn….Benco has also crept into few of these… My guidance has been to politely say no and whether [*sic*] the storm with these." (CX3116 at 001; *see also* CX3074 at 001).

608. When Misiak said that "GPO noise has been pretty loud from the field" in CX3116, he meant that he was hearing about GPOs from Patterson's branch offices. (Misiak, Tr. 1386).

609. Patterson's management team was saying "no" to doing business with GPOs. (CX3116 at 001; Misiak, Tr. 1386-1387 ("Q. And when you wrote 'said no at every turn,' what was that referring to? A. Meaning it wasn't part of our strategy, so I've remained disciplined as the sales leader of the organization to say no. . . . Q. Said no to GPOs? A. Yes.")).

610. Misiak "remained disciplined as the sales leader of the organization to say no" to buying groups. (Misiak, Tr. 1387). Misiak passed that guidance on to Patterson's sales team. (Misiak, Tr. 1388; CX3116).

611. McFadden sent a memo to regional and branch managers on September 4, 2013, which explicitly excluded the possibility of Special Markets working with buying groups by stating that the Special Markets "definition will not include group purchasing organizations (GPOs)." (CX0158 at 002; McFadden, Tr. 2700-2702; *see also* Misiak, Tr. 1394 ("A. That meant that the investments made and the infrastructure built out would not focus on GPOs. Q. And why was this sentence included in this memo? A. Because at a corporate level GPOs were not part of the strategy for the special markets group."); Rogan, Tr. 3530 (Special Markets was a division that would not work with GPOs)).

612. Guggenheim and Misiak provided input into the definition of Special Markets in CX0158. (McFadden, Tr. 2699).

613. The September 4, 2013 memorandum from McFadden defining Special Markets as excluding GPOs (CX0158) was approved by Guggenheim. (Guggenheim, Tr. 1641-1642).

614. The September 4, 2013 memorandum regarding the establishment of Patterson's Special Markets division did not exclude any type of entity other than GPOs. (CX0158 at 001; McFadden, Tr. 2703).

615. The September 4, 2013 memorandum regarding the establishment of Patterson's Special Markets division expressly stated that "Government, institutions and schools" could qualify to work with Patterson's new Special Markets division. (CX0158 at 002).

616. Patterson's Special Markets division was responsible for selling to other non-private practice customers, including prisons, dental schools, state and federal government customers, community health centers ("CHCs"), and medical or health clinics. (McFadden, Tr. 2670; Misiak, Tr. 1397-1398).

617. Patterson's Special Markets division dealt with non-DSO entities, including government, military, community health centers, Indian health, schools and other institutions, and it submitted bids for these customers. (McFadden, Tr. 2696-2697).

618. McFadden drafted a business plan for Patterson's Special Markets division. (McFadden, Tr. 2695; CX3014 ("Special Markets Business Plan")).

619. Guggenheim reviewed Patterson's Special Markets Business Plan (CX3014). (McFadden, Tr. 2695; *see also* CX8004 (McFadden, Dep. at 61)).

620. The Special Markets Business Plan stated that Patterson's Special Markets division would "also cater to federal customers, including government, military, community and Indian health, schools and institutions." (CX3014 at 004).

621. In compliance with directives from Misiak and Rogan, Patterson consistently denied buying groups. (*See* CCFF ¶¶ 603, 634-651).

622. Patterson's Special Markets Division continued to reject buying group inquiries in 2014. In April 2014, McFadden sent an email to Patterson's Boston Branch Manager who was asking about how to handle an inquiry about Patterson working with a buying group, writing, "I have received several calls from GPO's . . . as of this moment I am sure we should pass on these groups." (CX3016 at 001 (April 23, 2014 email from McFadden to Patterson Boston Branch Manager Edward Ferrero)). McFadden then forwarded his email to the branch manager on to Guggenheim. (CX3016 at 001).

623. In May 2014, McFadden wrote to his Director of Operations, Amy Barlage, and a business operations specialist in Patterson's Special Markets division and instructed them not to participate with a buying group. (CX3004 at 001 (May 19, 2014 email from McFadden: "For now – I am electing to not participate with these [buying] groups – we have said no to several already.")).

624. In 2014, Patterson's Special Markets division received between 10 and 25 requests from buying groups but did not do business with those groups. (McFadden, Tr. 2724-2725; 2685).

625. Patterson's Special Markets Division continued to reject buying group inquiries in early 2015. (CX3045 at 001 (Statement of McFadden: "[D]oes he own all these offices—if not then he is a GPO—we don't deal with GPO's.")).

626. Patterson's expansion into the DSO market through its Special Markets division in 2013 did not become profitable until January 2015 when it won a DSO account from Schein. (McFadden, Tr. 2691).

J. Patterson Instructed Its Sales Team to Refuse to Do Business with Buying Groups.

627. Patterson did not have a policy regarding buying groups when McFadden was the Southeast Regional Manager from 2009 to 2013. (McFadden, Tr. 2676; *see also* CX8004

(McFadden, Dep. at 37-38) (McFadden was not aware of any Patterson corporate policy regarding buying groups); CX8004 (McFadden, Dep. at 28-29) (McFadden Southeast Regional Manager 2009 to 2013); *see also* CCFF ¶¶498-499).

628. When Guggenheim was a Regional Manager of Patterson's Southwest Region from 2000 to 2010 (Guggenheim, Tr. 1529), he received no guidance from Patterson corporate on whether to do business with GPOs. (CX8023 (Guggenheim, Dep. at 38)).

629. There were times when Misiak himself had to determine if a customer was a buying group or a DSO. (Misiak, Tr. 1312). He would depend on information from his field organization to tell him if a group was a DSO or a buying group. (Misiak, Tr. 1313).

630. Within a few weeks of Guggenheim's February 8, 2013 email with Cohen (CX0090), Patterson began instructing sales representatives to "stay out" of buying groups. (CX0093 at 001 (Statement of Misiak: "stay out" of buying group); CX0106 at 001 (Statement of Rogan: "We don't need GPO's in the dental business"); CX3116 at 001 (Statement of Misiak: "My guidance has been to politely say no [to buying groups] and whether [*sic*] the storm with these."); CX3168 at 001 (Statement of Rogan: "We don't sell to buying groups. Let's talk live."); CX3010 at 001 (Statement of McFadden: "[A]s of now we are not working with GPO's."); CX3016 at 001 (Statement of McFadden: "I am sure we should pass on these [buying] groups…."); CX3004 at 001 (Statement of McFadden: "For now – I am electing to not participate with [buying groups] – we have said no to several already . . . ."); CX3045 at 001 (Statement of McFadden: "[D]oes he own all these offices—if not then he is a GPO—we don't deal with GPOs.")).

631. By February 27, 2013, Patterson had a strategy of not doing business with buying groups. (Misiak, Tr. 1339 ("Q. And was – were GPOs a part of the strategy on February 27, 2013? A. GPOs were not part of the strategy."); Misik, Tr. 1419 ("GPOs were not part of the corporate

strategy."), 1353 ("part of strategy is what you're not going to do"); Misiak, Tr. 1352-1353 (when Patterson was approached by buying groups, Misiak would "[p]olitely turn them down"); CX8038 (Misiak, Dep. at 105-106)).

632. In November 2013, Patterson VP of Merchandise Marketing Tim Rogan wrote in an email to Patterson's Manager of Marketing Communications, "We don't sell to buying groups. Let's talk live." (CX3168 at 001 (November 20, 2013 email from Rogan to Jennifer Hannon).

633. Rogan testified that, in using the term "we" in his November 20, 2013 email to Hannon, he meant that Patterson didn't sell to buying groups. (Rogan, Tr. 3527; CX3168 at 001).

634. On December 2, 2013, in response to an inquiry from a Patterson Account Specialist who was asking about how to handle an inquiry from a group purchasing organization, McFadden responded, "as of now we are not working with GPO's." (CX3010 at 001).

635. Patterson's salesforce understood the "clear" message that Patterson "steer[ed] clear of all buying groups." (CX3128 at 001 (Statement of McFadden: "As a rule we are trying our best to steer clear of all buying groups."); CX3342 at 001 ("I want to make sure that GPO's are not something we as a company are choosing to partner with at this point. I know Dave [Misiak] has been clear about this in the past and I wanted to verify that this still is the case.")).

636. Misiak provided guidance to Patterson's branches and regions to say "no" to doing business with buying groups. (Misiak, Tr. 1388-1389).

637. In compliance with the directive not to do business with buying groups, Patterson consistently denied buying groups. (CX3086 at 001 (Statement of Guggenheim: "We have explored this opportunity [with Kois] . . . and decided to pass at this time due to the implications to our margins and therefore our Sales Reps."); CX3031 at 001 ("Patterson Dental has made the decision not to respond to the [GDA] RFP at this time.")).

638. On August 18, 2014, before a scheduled WebEx meeting with Kois on September 29, 2014 to learn about Kois' business model, Guggenheim wrote to Rogan, "Agreed…I'll kill it" referring to the request for a proposal from Kois Buyers Group. (CX0116 at 001; Guggenheim, Tr. 1676-1678).

639. Patterson did not bid for the Kois Buyers Groups in 2014. (CX3086 at 001).

640. Patterson lost valuable customers and business to Burkhart when it did not bid for the business of Kois Buyers Group. (CX3088 at 001-002 (describing customers lost to Burkhart because they were part of the Kois Buyers Group as "top Patterson clients"); Guggenheim, Tr. 1662, 1665-1667).

641. Patterson did not bid for Smile Source in 2013. (Misiak, Tr. 1402; CX3117 at 001) (Statement of Misiak: "[w]e are currently not interested.")).

642. Patterson turned down Smile Source in 2013 in spite of its members' $14 million annual spend because it was a buying group. (CX0297 at 001; CX3117 at 001; CX3009 at 001 (Statement of McFadden: "[W]e have said no to smile source. They are [a] buying club."); *see also* [redacted]; CX0147 at 001).

643. Patterson did not bid for the New Mexico Dental Cooperative in 2013. (CX8035 (Mason, Dep. at 54-55); CX4090 at 001-002; *see also* CCFF ¶ 503).

644. Patterson did not bid for a buying group founded by a dentist, Dr. Stephen Sebastian, in 2014. (CX3038 at 001 ("We do not have an answer for him. We generally do not deal with groups that are formed just to get better pricing"); CX3125 at 001).

645. Patterson did not bid for the Catapult Group in 2014. (CX3287 at 001 (Statement of Misiak: "I will respond to Dr. Graham . . . with a polite pass on this request.").

646. Patterson did not bid for the Dental Purchasing Group in 2014. (CX3080 at 001 (April 23, 2014, Statement of Guggenheim: "Typical approach of an upstart buying group. We pass on these as a matter of protecting our business model").

647. When Guggenheim wrote in his April 23, 2014, email to McFadden that "We pass on these as a matter of protecting our business model," he mean that Patterson passed on buying groups. (Guggenheim, Tr. 1657; CX3080 at 001).

648. Patterson did not bid for a buying group founded by a dentist in Orlando, Dr. Nardduci, in January 2015. (CX3045 at 001 (January 14, 2015, Statement of McFadden to Southwest Region Manager Fruehauf about an inquiry from Dr. Narducci: "If he calls I will ask him for financial – does he own all these offices – if not then he is a GPO – we don't deal with GPO's…")).

649. Patterson did not bid for a buying group called UOBG in May 2015. (CX0162 at 001 (Statement of McFadden: "We currently have little appetite to deal with the buying groups as we feel they compete directly with the branches and reps . . . [w]e have said no many times in order to remain pure in our intent and consistent across the company.")).

650. In October, 2014, Patterson's President of Special Markets, Neal McFadden, instructed one of its branch managers to "steer clear of all buying groups." (CX3128 at 001 (October 23, 2014 Statement of McFadden to Branch manager: "As a rule we are trying our best to steer clear of all buying groups.")). Patterson's VP of Sales, Dave Misiak, agreed with McFadden's statement that Patterson was trying to steer clear of buying groups. (Misiak, Tr. 1391-1392)

651. At the time of Misiak's instruction to "steer clear of all buying groups," (CX3128), Misiak was not aware of any Patterson branch office doing business with any buying groups. (Misiak, Tr. 1392).

652. As President of Patterson, Guggenheim never personally "said yes" to selling to a buying group and never instructed anyone else within Patterson to "say yes" to a buying group. (Guggenheim, Tr. 1654).

653. Patterson's decision not to do business with buying groups prior to the creation of Special Markets was not due to lack of infrastructure or resources to work with these groups. (*See* CCFF ¶ 595).

654. Patterson's Special Markets division, which focused on DSO business and expressly excluded buying groups included Orthosynetics in its 2013 Strategic Plan as a DSO entity whose business Patterson wished to attract. (CX3014 at 023-024; CCFF ¶ 611).

655. Orthosynetics is not a buying group. (RX0342 at 001). On September 11, 2014, McFadden stated that Orthosynetics was "not like a buying group." (RX0342 at 001).

656. Jackson Health is not a buying group, but it is a large academic medical system in the Miami (Dade County), Florida area. (RX0270 at 001). On May 29, 2014, Carles, a Branch Manager at Patterson, wrote that Jackson Health was not a GPO. (RX0270 at 001; *see also* Rogan, Tr. 3535).

K. "We've Signed an Agreement that We Won't Work with GPO's."

657. On June 12, 2014, McFadden received a text message from a former Patterson employee, Dave McIntosh, requesting a potential partnership with Patterson on behalf of a group of dental offices called Choice One. (CX0164 at 002). In response, McFadden wrote: "Is choice one a GPO or are you all actually acquiring practices? The reason I'm asking is we've signed an agreement that we won't work with GPO's." (CX0164 at 002; McFadden, Tr. 2736-2737).

658. McFadden testified that he lied to McIntosh in CX0164 about having signed an agreement because he wanted to end the conversation. (McFadden, Tr. 2737-2738 ("I just want

to get rid of it and shut it down . . . I just wanted to end the conversation."); CX8004 (McFadden, Dep. at 110-111)).

659. After McFadden's text message to McIntosh (CX0164), McIntosh replied and requested a meeting. (CX0164 at 002).

660. McFadden replied almost immediately and suggested that they set up a meeting in the future. (CX0164 at 002 ("Thanks Dave. I am travelling a ton over the next few weeks. Maybe we can shoot for mid July?)). McFadden was "open" to hearing what McIntosh had to say if McIntosh was talking about a DSO. (McFadden, Tr. 2845).

X. BENCO ORCHESTRATED AN AGREEMENT WITH SCHEIN THAT NEITHER WOULD DISCOUNT TO BUYING GROUPS.

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

661. Cohen informed Sullivan of Benco's position with regard to bidding on buying groups. (Cohen, Tr. 500-501; CX0301 (Cohen, IHT at 195-196, 199); CX8015 (Cohen, Dep. at 233-237); CX0311 (Sullivan, IHT at 260-263, 269); CX8025 (Sullivan, Dep. at 344-345)).

662. Cohen communicated Benco's no buying group policy to Sullivan. (Cohen, Tr. 501) ("Q. You did communicate Benco's no-buying group policy to Mr. Sullivan; correct? A. I believe I did. Yes."); *see also* CCFF ¶¶ 663-664).

663. Cohen testified at his deposition that he communicated Benco's no buying group policy to Sullivan on at least one occasion. (CX8015 (Cohen, Dep. at 241) ("I can't estimate a specific number. I know I've done it at least once.")).

664. Cohen testified at his investigational hearing that he communicated Benco's no buying group policy to Sullivan. (CX0301 (Cohen, IHT at 195-196) ("Q. Have you ever communicated with anyone from Schein about buying groups? A. I believe I have. Q. Can you tell me about

those instances? A. I don't recall any specifics, but I believe I have, at different times, communicated our policy on buying groups. When asked, I answer. . . . Q. And who did you – who did you communicate with? A. I communicate with Tim – I communicated in that situation with Tim Sullivan."); CX0301 (Cohen, IHT at 200) ("We don't recognize buying groups and offer a lower price to their customers. We choose not to do that . . . that is our policy, and I communicated that policy [to Sullivan] is my recollection.")).

665. Benco knew that Schein was working with buying groups in 2011. (CCFF ¶ 666-673).

666. On September 30, 2011, Dr. Goldsmith sent an email to Ryan, attached a document titled, "Special Markets Pricing.docx," and noted that the attached document contained an "example of the pricing we get now." (CX1217 at 001-002; *see also* CX1041 at 003-006).

667. Dr. Goldsmith's pricing attachment (CX1217) identified Schein as the manufacturer, indicating that Schein was supplying products to Smile Source. (Cohen, Tr. 499 ("Q. . . . [D]o you see the price list that's attached that Schein is listed? A. Yes. Q. And that's an indicator that Schein was supplying products to Smile Source? A. It's an indicator that Schein was supplying products to Smile Source. Yes.").

668. Ryan forwarded Dr. Goldsmith's email and attachment to Cohen the same day, September 30, 2011. (CX1041 at 001).

669. Smile Source informed Benco in 2011 that Schein was its supplier. (CX1041 at 001-006; CX1116 (Statement of Dr. Goldsmith: "We currently use Henry Schein for our services, but, want to see what sort of relationship could be established with Benco."); Ryan, Tr. 1049-1050 (testifying that Dr. Goldsmith told him in CX1116 that Smile Source was working with Henry Schein); Cohen, Tr. 497-500 (testifying that he received an email from Ryan indicating that Schein supplied Smile Source)).

670. On March 24, 2011, Don Taylor wrote to Ryan, Troy Stout, and Mark Rowe of Benco: "I spoke with Pat about this earlier and got the sense that we could not pursue groups like this [Dental Cooperative] per Chuck. If we can, this would be a great opportunity to win some business from Schein." (CX1039 at 001; Cohen, Tr. 852). Taylor's email noted that Schein was doing business with buying groups in 2011. (CX1039 at 001; Cohen, Tr. 852).

671. Cohen had a conversation with Ryan about Taylor's email. (CX1039). (Cohen, Tr. 851-852; *see also* CX1038 (Statement of Ryan: "We all know the answer here, right? Not no, hell no.")).

672. Cohen testified that "by November 7, 2011, [he] received e-mails indicating Schein was working with at least three buying groups." (Cohen, Tr. 867-868 (testifying that "by November 7, 2011, [he] received e-mails indicating Schein was working with at least three buying groups.")).

673. Ryan testified, "there was no doubt in [his]mind that [Schein was] working with Smile Source," a buying group in September 2011. (Ryan, Tr. 1250-1251 (testifying that "there was no doubt in [his] mind that [Schein was] working with Smile Source," a buying group in September 2011); *see also* Ryan, Tr. 1050-1051 (testifying that Smile Source informed him that it was working with Henry Schein in September 2011, and Ryan had no reason to doubt that information)).

674. By July 2012, Cohen did not believe Schein was working with the buying group Smile Source. (Cohen, Tr. 525).

675. In 2013, Cohen understood that he was not competing against Schein and Patterson for buying groups because Schein and Patterson were not in the buying group space. (Cohen, Tr. 569-570; CX0301 (Cohen, IHT at 296)).

676. In 2013, Cohen understood that "the policy that Henry Schein had was that they do not recognize GPOs." (Cohen, Tr. 583-584; CX0301 (Cohen, IHT at 310) ("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, I think that the policy that Henry Schein had was that they do not recognize GPOs.")).

677. Cohen believed that Schein, Patterson, and Benco all had a similar policy with respect to buying groups in 2013. (Cohen, Tr. 590) ("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.")). In 2013, Cohen believed that Benco was not competing against Schein and Patterson for buying groups. (Cohen, Tr. 568-570; CX0301 (Cohen, IHT at 296)). Cohen testified: "Q. Your understanding was that in 2013 you were not competing against Schein and Patterson for buying groups? A. In 2013, just like in 1996, we weren't competing with anybody for buying groups. Q. And you understood that Patterson and Schein weren't in that space either at that time? A. That's correct." (CX0301 (Cohen, IHT at 296); Cohen, Tr. 568-570).

678. Likewise, in 2014, Cohen understood that no distributor, neither Benco, Schein, nor Patterson had aligned with a buying group. (Cohen, Tr. 570; CX0301 (Cohen, IHT at 150) ("Q. In 2014, did you understand that no big distributor had aligned with a buying group? A. Well, 'big' is a relative term, but in 2014, no distributor – Benco, Schein – neither Benco, Schein, nor Patterson had aligned with a buying group.")).

679. Benco reached out to Schein to discuss buying groups on no fewer than six occasions during the period from 2011 through 2014. (CCFF ¶¶ 661-664 (Cohen informed Sullivan of Benco's no buying group policy); ¶¶ 955-972 (11 minute 34 second call between Cohen and Sullivan on January 13, 2012); ¶¶ 944-1004 (text message between Cohen and Sullivan on

March 26, 2013); ¶¶ 1005-1119 (18 minute call between Benco's Ryan and Schein's Foley on Octoer 1, 2013); ¶¶ 1022-1048, 1050-1051 (8 minute and 35 second call between Cohen and Sullivan on March 25, 2013); ¶¶ 1061-1071(text message between Cohen and Sullivan on March 27, 2013).

680. Through communications with Schein, Benco's executives gained the understanding that Schein had a policy against recognizing buying groups during the conspiracy period. (*See* CCFF ¶¶ 675-678,).

681. Benco's understanding that Schein did not work with buying groups during the conspiracy period was contrary to market intelligence Benco received. (CCFF ¶¶ 670-673, 683-684).

682. Benco's sales team informed Cohen and Ryan that Schein was doing business with buying groups. (CCFF ¶¶ 666-673, 683-684; *see also* Cohen, Tr. 851-852, 967; CX1039 at 001; CX1038 at 001; CX1052 at 001; CX0061at 001).

683. On January 11, 2012, Cohen received an email from a Benco territory representative (Michael Paquette) informing him of market intelligence that Schein would be participating in the buying group Unified Smiles. (CX1052; Cohen, Tr. 501-503).

684. On March 25, 2013, Chuck Cohen received an email from a Benco sales representative (Jamie Kasinski) informing him of market intelligence that Schein worked with a buying group called Dental Alliance. (CX0061 at 001; Cohen, Tr. 556-557, 967).

685. INTENTIONALLY LEFT BLANK.

B. Schein Ensured Compliance With the Agreement Internally.

686. Following communications with Benco, Schein initiated a no buying group strategy. (CCFF ¶¶ 345-350, 661-664, 717-954

1. Schein Historically Worked With Buying Groups.

687. Schein had worked with some buying groups prior to 2011. (Sullivan, Tr. 3912-3914; CCFF ¶¶ 432-453).

688. For example, Schein had a contract with a buying group called Smile Source from 2008, as well as the Dental Cooperative of Utah from 2007. (Sullivan, Tr. 3912-3914; CX0174 at 001 (2014 email discussing end of relationship with Utah Co-op after 8 years of working together); CX8034 (Cavaretta, Dep. at 68)).

689. On September 15, 2010, Sullivan emailed his boss, Jim Breslawski about supplying Smile Source, and Sullivan wrote: "[N]either of us support concept of buying groups. Whereas it may benefit SM to some extent, the risk to overall HSI (due to having 40% share in market) for margin erosion, image, as well as other competitors then following suit and huge price war breaks out." (CX2113 at 001; Sullivan Tr. 3921).

690. On September 15, 2010, Sullivan identified to his boss the potential downsides of Schein discounting to Smile Source: (1) discounting to Smile Source could lead to margin erosion; (2) discounting to Smile Source could have a negative impact on Schein's image; and (3) discounting to Smile Source could lead to other competitors then following suit and a huge price war breaking out. (Sullivan, Tr. 3921-3922; CX2113 at 001).

691. In spite of the risks of discounting to Smile Source, Sullivan did not want to lose Smile Source as an account customer in September 2010. (Sullivan, Tr. 3922-3923; CX2113 at 001).

692. In the same email dated September 15, 2010 (CX2113), Sullivan wrote: "[N]either of us wants to lose [Smile Source] as an account. They are $1 million and growing." (CX2113 at 001; Sullivan, Tr. 3922-3923).

693. Sullivan testified that Smile Source was doing, or had the potential to bring in, $1 million in revenue to Schein at the time of his September 15, 2010 email (CX2113). (Sullivan, Tr.

3923). Sullivan saw value in the fact that Smile Source was $1 million and growing. (Sullivan, Tr. 3923).

694. On September 15, 2010, Sullivan also wrote: "I am inclined to 'allow' this account to join (not that it's up to me/us) and see what happens. After all, Scott and HSD (per Hal) only get about 30% of this accounts [*sic*] business today. So if theory works, we would get 100% at lower margins, but all parties win in overall GP $'s." (CX2113 at 001; Sullivan, Tr. at 3923-3924).

695. Sullivan's September 15, 2010 email (CX2113) identified that, "working with Smile Source, could bring Schein more of [an individual] dentist's business" at lower margin. (Sullivan, Tr. 3924). Sullivan testified that he was in favor of testing the Smile Source model because "even though Schein would get lower margin, Schein would get more gross profit dollars." (Sullivan, Tr. 3924).

696. On February 23, 2011, Sullivan explained to buying group Smile Source that he was very excited about Smile Source's "business model." (CX2899 at 001 (Statement of Sullivan: "I remain very excited about our future together and the business model you have created. As we discussed, your approach to your members lines up extremely well with our approach to them as customers."); Sullivan, Tr. 3931-3932).

697. Sullivan's February 23, 2011 email (CX2899) followed a meeting between Schein and Smile Source the day before. (Sullivan, Tr. 3931).

698. At the time of Sullivan's February 23, 2011 email (CX2899), Smile Source had executives and an office. (Sullivan, Tr. 3931).

699. Following this email, Sullivan and Cohen attended the Chicago Dental Society Midwinter Meeting, held February 24-26, 2011 in Chicago, IL. (CCFF ¶ 358; CX8015 (Cohen, Dep. at 40-41)).

700. By the second half of 2011, Sullivan's tone regarding buying groups had changed. (CCFF ¶¶701-707; *see also* CCFF ¶¶ 709-716, 729-732).

701. On July 17, 2011, Sullivan responded to an email chain with senior Schein executives, including Breslawski, Bergman, Mlotek, and Muller regarding the buying group Synergy. (CX0185 at 001; Sullivan, Tr. 3940).

702. Breslawski was Sullivan's boss at the time of the email (CX0185). (Sullivan, Tr. 3942).

703. Bergman, chairman and CEO of Henry Schein, was Breslawski's boss at the time of the email (CX0185). (Sullivan, Tr. 3942).

704. Mlotek was an executive vice president of Henry Schein, Inc. responsible for business development. (Sullivan, Tr. 3942).

705. On July 17, 2011, Sullivan informed his boss, Breslawski, along with Bergman, Mlotek, and other Schein executives (CX0185), "I don't think you will ever see a full service dealer get involved with GPOs." (CX0185 at 001; Sullivan, Tr. 3943).

706. When Sullivan wrote "GPOs" in CX0185, he was referring to buying groups. (Sullivan, Tr. 3943).

707. At the time he wrote the email in CX0185, Sullivan had knowledge that Schein had entered into a number of discounting arrangements with buying groups. (Sullivan, Tr. 3943).

708. By December 2011, Schein's practice of working with buying groups had changed. (CCFF ¶¶709-727).

709. On December 7, 2011, Sullivan informed his direct report, Steck, and other Schein employees that he did not want to lead in getting buying groups started in dental. (CX2456 at 001; Sullivan, Tr. 3944). Specifically, on December 7, 2011, Sullivan wrote an email with the subject: "Follow up on Dental GPO," and stated: "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." (CX2456 at 001 (emphasis in original); Sullivan, Tr. 3943-3944).

710. In this December 7, 2011 email (CX2456), Sullivan referred to a GPO as a slippery slope. (Sullivan, Tr. 3944; CX2456 at 001).

711. This was not the only time that Sullivan used the term "slippery slope" to refer to a GPO. (Sullivan, Tr. 3944).

712. On December 22, 2011, Sullivan had a meeting with Cavaretta, Steck, and Chatham regarding a buying group based in Las Vegas, Merit Dent. (Cavaretta, Tr. 5579-5580 ("I don't remember the specific conversation, but I wrote it in the e-mail, so I had to have a conversation with them"); Sullivan, Tr. 3975-3977; CX2457 at 001; CX2458 at 001).

713. On December 22, 2011, Cavaretta wrote, "I just met with Tim, Dave and John about the Merit Dent group. As you can imagine they feel the same as we do that we don't want to be the first company to open the floodgates to the dangerous world of GPOs." (CX2458 at 001). Cavaretta's email (CX2458) referred to a meeting with Sullivan, Steck, and Chatham. (Cavaretta, Tr. 5579).

714. Cavaretta wrote his email (CX2458) within a few hours of a meeting that took place with Sullivan. (Sullivan, Tr. 3978; Cavaretta, Tr. 5579-5580 ("I don't remember the specific conversation, but I wrote it in the e-mail, so I had to have a conversation with them.")).

715. Sullivan did not recall what he said at the December 22, 2011 meeting with Cavaretta. (Sullivan, Tr. 3978).

716. After December 22, 2011, Cavaretta was promoted at Schein. (Sullivan, Tr. 3978).

2. __By December 21, 2011, Schein "no longer participate[d] in Buying Groups."__

717. In December 2011, Janet Knysz was interested in created a buying group called Unified Smiles. (Foley, Tr. 4549).

718. In December 2011, Knysz approached Schein regarding partnering with Unified Smiles. (Foley, Tr. 4545 (Knysz was communicating with Foley regarding a potential relationship with Unified Smiles); CX2062 at 004-005).

719. On December 21, 2011, Foley wrote to Knysz of Unified Smiles: "[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." (CX2062 at 001; Foley, Tr. 4545). Foley testified that was the first time he told Knysz of Unified Smiles that Henry Schein did not participate in buying groups. (Foley, Tr. 4545-4546).

720. On December 21, 2011, Foley turned down Unified Smiles informing Knysz of Schein's new policy that it "no longer participate[d] in Buying Groups." (CX2062 at 001; Foley, Tr. 4545, 4549 ("Q. Did Schein bid for Unified Smiles' business after this e-mail? A. No. I ended the conversation with her.")).

721. Foley's email referred to Unified Smiles as a buying group. (Foley, Tr. 4545 ("Q. You're referring –are you referring to Unified Smiles as a buying group in that last sentence? A. Yes."); CX2062 at 001).

722. On December 21, 2011, Foley wrote: "Buying Groups cause a lot of friction within our private dentist segment as it leads to unwarranted lower pricing for EXISTING customers."

(CX2062 at 001 (emphasis in original); Foley, Tr. 4546). By this sentence in CX2062, Foley meant that Unified Smiles would cannibalize private practice dental practices that were currently doing business with Schein. (Foley, Tr. 4546).

723. Foley sent Unified Smiles Schein's minimal requirements for ownership to be considered a DSO. (CX2062 at 002; Foley, Tr. 4546-4547).

724. To be a DSO, Schein required Unified Smiles to make the business and operational decisions of the practice. (CX2062 at 001-002; Foley, Tr. 4549).

725. Foley informed Unified Smiles that it would not work with Unified Smiles unless it met Schein's requirements to be a DSO. (CX2062 at 001-002; Foley, Tr. 4545-4549).

726. Foley wrote in CX2062 that if Unified Smiles could meet the requirements for a DSO, "[w]e'd be happy to work with you under this type of arrangement." (CX2062 at 001).

727. Following the email chain, CX2062, Schein did not bid for Unified Smiles' business. (Foley, Tr. 4549 ("Q. Did Schein bid for Unified Smiles' business after this e-mail? A. No. I ended the conversation with her.")).

3. <u>In February 2012, Sullivan Informed Employees He Wanted to "KILL the buying group model."</u>

728. In or around January 2012, Schein's relationship with Smile Source ended. (Sullivan, Tr. 3935-3936).

729. On February 2, 2012, Sullivan wrote to Steck, Foley and other Schein employees regarding Smile Source: "Let's really take this serious and get after it. I'm really less concerned about the actual revenues, although very important too, rather more about what we can do to KILL the buying group model!!" (CX0199 at 001 (emphasis in original); Sullivan, Tr. 3936-3937).

730. In CX0199, Sullivan directed his team to "track the Smile Source customers" and attempt to "keep the business" from those customers. (Sullivan, Tr. 3936; CX0199 at 001).

731. In CX0199, Sullivan informed his team that he was less concerned about the "actual revenues" from the Smile Source members and "more about what we can do to KILL the buying group model!" (CX0199 at 001; Sullivan, Tr. 3936-3937). When Sullivan wrote "actual revenues," in CX0199, he was referring to revenues from Smile Source members. (Sullivan, Tr. 3937; CX0199 at 001).

732. If Schein lost an independent dentist or DSO customer, Sullivan would not tell his team that he wanted to see what could be done to "kill their business model," but instead Schein would "work [its] tail off to show them [Schein's] value . . . to earn their business back." (Sullivan, Tr. 3933-3935).

4. Following Sullivan's Guidance, Schein Executives Directed the Salesforce to Refuse to Sell to Buying Groups.

733. Schein executives instructed the salesforce that Schein wanted to avoid buying groups. (CCFF ¶¶ 743-954).

734. Schein employees understood that Sullivan had directed employees that Schein should avoid working with, or selling to, buying groups. (CCFF ¶¶ 709-716, 754-758, 772-781, 793-807, *see also* CCFF ¶¶ 728-732, 836-838, 840-860).

735. Sullivan personally directed Schein employees to refuse to bid on buying groups. (CCFF ¶¶ 709-716, 728-732, 754-758, 772-781, 793-807, 836-838, 840-860).

736. Sullivan informed employees of Henry Schein that he viewed buying groups with disfavor. (CCFF ¶¶ 709-716, 728-731, 754-758, 772-781, 793-807, 836-838, 840-860).

737. Henry Schein employees understood that Schein had a policy of not working with buying groups during the late-2011 to 2015 period. (CCFF ¶¶ 743-954).

738. Sullivan was involved in the decision-making process with regard to all buying group decisions, including those relating to Special Markets. (Sullivan, Tr. 3998-3999).

739. Sullivan was involved in buying group decisions and buying group discussions relating to Special Markets even though he was President of Henry Schein Dental. (Sullivan, Tr. 3998-3999).

740. Even though Dental Gator was a Special Markets customer, Sullivan was involved in decisions about what to do about Dental Gator. (Sullivan, Tr. 3997-3998).

741. Cavaretta sometimes worked directly with Sullivan regarding buying groups, even though he reported to Steck. (Steck, Tr. 3840).

742. Meadows sometimes worked directly with Sullivan regarding buying groups, even though he reported to Steck. (Steck, Tr. 3840).

a) Schein Instruction to Refuse to Sell to Buying Groups.

743. On December 21, 2011, Foley wrote to a buying group, Unified Smiles, that Schein "no longer participate[s] in Buying Groups." (CX2062 at 001; Foley, Tr. 4545).

744. Foley forwarded his email to the buying group to Rhonda Durante. (CX2062 at 001).

745. Durante was an SAM who reported directly to Randy Foley. (Foley, Tr. 4542). Schein refers to strategic account managers in Special Markets as SAMs. (CX0311 (Sullivan, IHT at 111)).

746. Foley forwarded his email to Durante to keep her in the loop as she would be responsible for calling on the account if they were a DSO. (Foley, Tr. 4547).

747. Steck created an activity report for the dates of November 14 through December 30, 2011. (CX0201 at 001; CX0310 (Steck, IHT at 128-129) (document created in the 2011/2012 timeframe)). The activity report stated: "Have had two internal calls and one external call on

partnering with the Florida Dental Association. This is the classic 'buying group' approach that we aren't buying into." (CX0201 at 001).

748. Steck testified that "we" in the sentence "This is the classic 'buying group' approach that we aren't buying into" (in CX0201) refers to Schein Dental. (CX0310 (Steck, IHT at 133)). Steck testified that "classic buying group" (in CX0201) referred to a group of dentists looking for a group discount "for no particular reason and no particular commitment." (CX0310 (Steck, IHT at 134-135)).

749. Steck's activity reports were usually sent to Sullivan. (CX0310 (Steck, IHT at 129)).

750. On January 26, 2012, Cavaretta wrote to Melanie Bingham and Hight regarding IDA: "It is dangerously close but I told him we would not do business with a GPO." (CX0168 at 001; Cavaretta, Tr. 5641).

751. On January 26, 2012, Cavaretta then wrote: "The difference here is that they will force any customer to purchase from Schein which is more along the lines of a corp account." (CX0168 at 001; Cavaretta, Tr. 5642). By "corp account," Cavaretta meant corporate practice or a DSO. (Cavaretta, Tr. 5642).

752. Bingham was a field sales consultant ("FSC") who reported through Cavaretta at the time of the email CX0168. (Cavaretta, Tr. 5641-5642).

753. In response, on January 26, 2012, Hight wrote to Cavaretta and Bingham that even if a group forced their members to buy from Schein, Special Markets would not work with them because "they really look like a GPO which we don't do." (CX0168 at 001).

754. On February 20, 2012, Foley wrote to Debbie Torgersen-Foster, "Honestly, within Schein we have a few buying groups (BG) that we wish we didn't have. There's a large one

under HSD in Utah and we used to have one in Special Markets called Smile Source." (CX0238 at 001; Foley, Tr. 4553; *see also* CCFF ¶ 2047).

755. Torgersen-Foster was a SAM who reported directly to Foley. (Foley, Tr. 4553; CX8003 (Foley, Dep. at 132)). Schein refers to strategic account managers in Special Markets as SAMs. (CX0311 (Sullivan, IHT at 111)).

756. On February 20, 2012, Foley wrote to his direct report: Torgersen-Foster, "When existing Schein customers enroll, it simply erodes margins. When the BG markets their reduced spend, existing customers come to Schein and say, 'I don't want to join their group but I want their pricing' (per Tim Sullivan). So, this is a corporate decision, not to participate in these." (CX0238 at 001; Foley, Tr. 4554-4556).

757. Sullivan informed Foley that buying groups could cannibalize sales and reduce margins, and commented to Foley that "a buying group with reduced pricing would simply reduce that existing margin, so there's cannibalization." (Foley, Tr. 4555).

758. Foley wrote regarding the end of the Henry Schein and Smile Source relationship: "Tim Sullivan is happy that we are less one more BG." (CX0238 at 001). Foley was referring to buying group when he wrote "BG." (Foley, Tr. 4554).

759. On February 21, 2012, Foley received an email from Torgersen-Foster in which she wrote: "When you have a moment (ha, ha) can you take a look at the following presentation I made up using a bunch of the emails and documents you have given me? I am meeting with the Charlotte and Raleigh teams this Thurs and want to make sure it makes sense. Thanks boss!" (CX2065 at 001; Foley, Tr. 4557-4558). The subject of the email was: "Presentation To HSD." (CX2065 at 001). Torgersen-Foster attached a document titled, "HSD BG vs. DSO document for Meetings.docx." (CX2065 at 001).

760. On February 21, 2012, Foley received a presentation from Togersen-Foster in which she identified definitions of DSO, buying group, and large practice group "using a bunch of the emails and documents [Foley gave her]." (CX2065 at 001; Foley, Tr. 4557-4558).

761. Torgersen-Foster wrote to Foley on February 21, 2012: "Definition of a Buying Group: NEITHER SM NOR HSD WOULD TAKE ON: –An organization or group [o]f dentists that get together to leverage better pricing from a distributor, share best practices and/or network. –No centralized billing; dentists are individually paying their own bills –Dentists and support staff are not employed by one company or LLC –The lead person or entity is leasing equipment and supplies to the dentist." (CX2065 at 002 (emphasis in original)). In this sentence, SM refers to Special Markets and HSD refers to Henry Schein Dental. (CX8001 (Torgersen-Foster, Dep. at 57); CX2065 at 002).

762. Foley would normally correct his direct report if he did not agree with something his direct report had written. (Foley, Tr. 4559).

763. Foley received this email from Torgersen-Foster, but he did not recall making any corrections to Torgersen-Foster's definitions. (Foley, Tr. 4559-4560; CX2065 at 001).

764. Torgersen-Foster created the presentation attached to CX2065 to review it with the salesforce: "I created the document so I would have something to review with the teams. It was part of my job to meet with the local teams and help support them." (CX8001 (Torgersen-Foster, Dep. at 47-48); CX2065 at 002).

765. When preparing the presentation, Torgersen-Foster tried to make sure that the presentation accurately reflected the emails that Foley had given to her. (CX8001 (Torgersen-Foster, Dep. at 53-54)).

766. On March 28, 2012, Cavaretta wrote to Steve Dutson, a Regional Manager: “I want to avoid a GPO situation.” (CX2563 at 001). Cavaretta’s email was in reference to MeritDent. (CX2563 at 001; Cavaretta, Tr. 5649).

767. On April 10, 2012, Foley received an email from his direct report, Torgersen-Foster in which she wrote to Foley, Durante, and Troy Neil: “Neither HSD or Special Markets will participate in buying groups of any kind. They just erode our margins and rarely bring any new business to the table.” (CX2003 at 001; Foley, Tr. 4561). In CX2003, Torgersen-Foster told Neil that Schein did not do business with buying groups of any kind. (Foley, Tr. 4561).

768. Foley testified that he would correct Torgersen-Foster if he thought she was making inaccurate statements about Schein’s policies in her email (CX2003). (Foley, Tr. 4562). He did not correct Torgersen-Foster’s April 10, 2012 email (CX2003). (Foley, Tr. 4562).

769. Later in the email chain (CX2003), Foley responded to Neil, Torgersen-Foster, and Durante regarding buying groups: “We get a lot of these requests and have to say no. Did a few and it only led to issues.” (CX2003; Foley, Tr. 4562).

770. Neil, Torgersen-Foster and Durante all reported to Foley. (Foley, Tr. 4560-4561; CX8003 (Foley, Dep. at 266)).

771. On June 8, 2012, Hight wrote to her boss, Foley, and Titus regarding a telephone call with Sunrise Dental: “I explained that we do not accommodate GPOs . . . .” (CX2423 at 004). In a later email in the same chain (CX2423), Hight wrote on June 21, 2012: “I have not budged of course on how a customer needs to be structured and very adamant about no GPO type situation.” (CX2423 at 002).

772. In July 2012, Jake Meadows was the Northwest Zone Manager and Acting Regional Manager. (Meadows, Tr. 2421).

773. On July 17, 2012, Meadows wrote to a Henry Schein field sales consultant, Patty Delikat: "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." (CX0170 at 001; Meadows, Tr. 2424).

774. At the time Meadows wrote this email (CX0170), he reported to Steck, who reported to Sullivan. (Meadows, Tr. 2424).

775. At the time of this email (CX0170), Delikat reported directly to Meadows. (Meadows, Tr. 2422).

776. Delikat was seeking Meadows's permission regarding a buying group that she was putting together in CX0170. (Meadows, Tr. 2421).

777. The decision Meadows referenced in his email (CX0170) was "a decision that Ron and Dan had made was to build a presentation or build an offer for a buying group." (Meadows, Tr. 2425).

778. Meadows testified that he would not have misled Delikat regarding what Sullivan directed. (Meadows, Tr. 2425-2426).

779. Meadows testified that he would not make up false guidance regarding what Tim Sullivan directed. (Meadows, Tr. 2426).

780. Meadows referred to buying groups as GPOs in this email chain (CX0170). (Meadows, Tr. 2426).

781. Meadows used the terms buying group and GPO interchangeably. (Meadows, Tr. 2426).

782. On September 24, 2012, Bingham, a field sales consultant wrote to Cavaretta: "Everyone keeps saying we don't do GPO's." (CX0169 at 001).

783. On September 24, 2012, Cavaretta wrote to a field sales representative: "The Co-op is exactly what we are trying to avoid." (CX0169 at 001). Co-op refers to the Dental Co-op in Utah. (CX0305 (Cavaretta, IHT at 155)).

784. On September 24, 2012, Andrea Hight wrote to three Schein employees: "We need to make sure they are clear we don't do GPOs as that subject keeps coming up. (CX0169 at 002).

785. On May 29, 2013, Cavaretta wrote: "We try to avoid buying groups at all costs and therefore don't really recognize them." (CX2509 at 001; Cavaretta, Tr. 5640).

786. The subject of the May 29, 2013 email (CX2509) was: "How do you define buying groups?" (CX2509 at 001; Cavaretta, Tr. 5639).

787. Cavaretta wrote this May 29, 2013 email (CX2509) to two employees of Henry Schein: Toh who worked in Special Markets and Campbell who worked in Henry Schein Canada. (Cavaretta, Tr. 5640).

788. On December 20, 2013, Foley wrote to Francis Keefe regarding Unified Smiles: "It's a buying group that we do not participate with, as with all buying groups." (CX2073 at 001; Foley, Tr. 4552). "It's" (in CX2073) referred to Unified Smiles. (Foley, Tr. 4552).

789. At the time of the email (CX2073), Keefe was Foley's counterpart at Colgate, a manufacturer partner. (Foley, Tr. 4550).

790. On June 10, 2014, Cavaretta wrote to Titus: "Thanks for leading the charge on this KT. GPO's are popping up like crazy so it is nice when we can shut one down and still keep the business from the individual customers. Nice job!" (CX2216 at 001; Cavaretta, Tr. 5596). Meadows and several other Schein employees were also included in the "To" field of the email. (CX2216 at 001).

791. On June 10, 2014, Titus sent an email to Jon Staples, the CEO of Steadfast, and stated: "Effective this Friday; 06/13/14, Henry Schein will no longer support the fulfillment of Steadfast Medical supply orders." (CX2216 at 002; Titus, Tr. 5255 (Staples is CEO for Steadfast)).

792. Cavaretta sent his June 10, 2014 email within hours after Schein terminated its relationship with Steadfast. (CX2216 at 001; Cavaretta, Tr. 5596).

793. Pacific Group Management Service ("PGMS") is a buying group. (Titus, Tr. 5310-5311).

794. On June 12, 2014, Titus wrote to her boss, Cavaretta regarding PGMS: "[T]his is (yet another) potential hybrid-GPO partner, but only with a carefully crafted deal that guarantees compliance, exclusivity and the opportunity to market Schein business solutions. I sent them some tough questions thinking it would scare them off, but alas, they raised the stakes by moving to Dir of Ops." (CX2809 at 002; Titus, Tr. 5316-5317). Titus acknowledged that she wrote this email. (Titus, Tr. 5316-5317).

795. On July 16, 2014, Titus wrote to Glenn Showgren, Brian Brady, Cavaretta, and Nicole Lena: "I s/w Joe today about the agreement. Tim was not in favor of it." (CX2219 at 001; Titus, Tr. 5314-5315). Titus testified that her email referenced the PGMS agreement; "s/w" meant "spoke with"; "Tim" referred to Tim Sullivan. (Titus, Tr. 5314-5315; CX2219).

796. Titus informed her colleagues, including her boss, Cavaretta, that Sullivan was not in favor of the PGMS buying group agreement. (Titus, Tr. 5315-5316; CX2219 at 001).

797. Titus did not personally speak with Sullivan, but she was sharing information in CX2219 that she learned from Cavaretta. (CX2219 at 001; Titus, Tr. 5315).

798. On July 16, 2014, Titus also wrote to Cavaretta regarding turning down PGMS: "Just delivered the news moments ago to Kathy Khalik. She was absolutely gracious, but clearly

devastated. I explained if there was a time in the future they become an MSO that could demonstrate compliance, we would be pleased to revisit." (CX2219 at 002). Titus explained that if PGMS became an MSO, Schein would be willing to work with them. (CX8010 (Titus, Dep. at 208-209); CX2219 at 002).

799. On July 17, 2014, Titus wrote to Showgren and Kevin Upchurch: "We had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. I created this and sent to Joe for review. It went to Tim and he shot it down. I think the meta msg is officially, GPO's are not good for Schein." (CX2235 at 001; Titus, Tr. 5310-5311; *see also* Sullivan, Tr. 3982-3985 (discussing CX2235)). Titus testified that "Tim" referred to Tim Sullivan; and "Msg" meant message. (Titus, Tr. 5311, 5313). Titus attached a document titled, "Pacific Group Management Services and Henry Schein Inc, Prime Vendor Agreement (attachment named "PacificGroupManagementServicesHSagreement 071014.docx") to her July 17, 2014 email. (CX2235 at 001, 002-009).

800. PGMS was willing to be exclusive with Schein. (Titus, Tr. 5311; CX2235 at 001). Titus viewed exclusivity as a positive for Schein. (Titus, Tr. 5311).

801. At the time Titus wrote her email in CX2235, it was her understanding that Tim Sullivan had shot down the PGMS agreement. (CX2235 at 001; Titus, Tr. 5313; CX8010 (Titus, Dep. at 151)). At trial, Titus was asked: "As of the time that you wrote this email [CX2235], it was your understanding that Tim Sullivan had shot down a PGMS agreement," to which Titus answered, "No." (Titus, Tr. 5312-5313). Titus's trial testimony is directly contradictory to her testimony at her deposition. (CX8010 (Titus, Dep. at 151) ("Q. So as of the time that you wrote this e-mail [CX2235], it was your understanding that Tim Sullivan had shot down a PGMS agreement? A. Yes.")). Titus's trial testimony is also contradicted by her email, CX2235. (CX2235 at 001

("We had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. I created this and sent to Joe for review. It went to Tim and he shot it down.")).

802. As of the date Titus wrote her email in CX2235, she felt that the message from above was that GPOs are not good for Schein. (CX2235 at 001; Titus, Tr. 5313-5314; CX8010 (Titus, Dep. at 149)). At trial, Titus was asked, "So on the date that you wrote this e-mail [CX2235], you felt that the message from above was that GPOs are not good for Schein," to which Titus answered, "That's incorrect." (Titus, Tr. 5313-5314). Titus's trial testimony is directly contradictory to her testimony at her deposition (CX8010 (Titus, Dep. at 149) ("Q. On the date that you wrote this e-mail, you felt that the message from above was that GPOs are not good for Schein? A. Yes, and that statement was not – I did not have intimate knowledge, it was what I was thinking it meant.")). Titus's trial testimony is also contradicted by her email, CX2235. (CX2235 at 001 ("I think the meta msg is officially, GPO's are not good for Schein.")).

803. Sullivan reviewed the PGMS agreement in concept with Cavaretta. (Sullivan, Tr. 3983-3984).

804. INTENTIONALLY LEFT BLANK

805. Titus would not have purposely misled her colleagues, Showgren and Upchurch, regarding Tim Sullivan. (Titus, Tr. 5312).

806. On July 18, 2014, Upchurch, a Zone Manager, wrote to Cavaretta, Titus, and Harmon: "The Co-Op is turning into a GPO (even if they don't think they are one now), from what KT has observed in Texas, NM and from Tim S., HSD does not want to enter the GPO world." (CX2211 at 002).

807. In response, Cavaretta wrote: "Thanks Kev. I understand the GPO issue as I'm working with KT on other issues in the Western Area also." (CX2211 at 001).

808. On August 29, 2014, Titus wrote to her boss, Cavaretta: “It doesn’t help to have a GPO policy if SM is opening up these consulting groups.” (CX2220 at 001).

809. On September 8, 2014, Sullivan wrote to Muller and his boss, Breslawski regarding Kois: “I still believe this is slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role. Watching closely.” (CX2469 at 002; CX8025 (Sullivan, Dep. at 295)).

810. On September 14, 2014, Foley wrote to Muller and Peter Jugoon (President of Schein dental in Canada): “As with other buying groups we continue to say no (at least try to).” (CX2079 at 001; Foley, Tr. 4649-4650).

811. On October 8, 2014, Russ Baker exchanged emails with Scott Janszak and others regarding Dental Gator. (CX0260 at 002-004).

812. Baker then wrote to Titus and Hight, and other Schein employees: “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 GPO’s.” (CX0260 at 002).

813. Baker was a Schein regional manager for one of the Southeastern states. (Titus, Tr. 5319).

814. In October 2014, Meadows was Eastern Area Sales Director. (Meadows, Tr. 2426-2427).

815. As Eastern Area Sales Director, Meadows reported directly to Steck, and Steck reported to Sullivan. (Meadows, Tr. 2416; Steck, Tr. 3675-3676).

816. On October 25, 2014, Meadows wrote to Jeff Reichardt: “Do not forward. Quick note. I’ve received a few FSC 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 EA call.” (CX2354 at 001 (emphasis in original); Meadows, Tr. 2427).

817. In that email (CX2354), FSCs referred to field sales consultants. (Meadows, Tr. 2427). "EA call" referred to Eastern area call. (Meadows, Tr. 2598).

818. Meadows testified that FSCs were calling him directly regarding group purchasing organizations at the time of this October 2014 email (CX2354). (Meadows, Tr. 2427).

819. Meadows testified that "group purchasing organizations" refers to buying groups in his October 24, 2014 email (CX2354). (Meadows, Tr. 2428; CX2354 at 001).

820. FSCs reported to zone managers who reported to Meadows in October 2014. (Meadows, Tr. 2427).

821. Reichardt was a Zone Manager in October 2014. (Meadows, Tr. 2431).

822. It was part of Meadows' job to provide instructions to Reichardt. (Meadows, Tr. 2431).

823. Meadows would not expect Reichardt to ignore any of Meadows' direction or instruction. (Meadows, Tr. 2431).

824. Meadows would not make up false guidance or instruction to lead Reichardt astray. (Meadows, Tr. 2431).

825. At the time of his deposition, Meadows did not recall writing this email chain (CX2354), and he could not think of anything that would refresh his recollection as to what he meant by the words that he used in the email chain. (Meadows, Tr. 2432-2433; CX8016 (Meadows, Dep. at 147-148)).

826. Meadows informed Reichardt that "we" are not participating in GPOs regardless of what those GPOs promised to bring. (Meadows, Tr. 2433).

827. In November 2014, Meadows was Eastern Area Sales Director. (Meadows, Tr. 2434). As Eastern Area Sales Director, Meadows reported directly to Steck, and Steck reported to Sullivan. (Meadows, Tr. 2416; Steck, Tr. 3675-3676).

828. On November 5, 2014, Meadows wrote to Robert Anderson III, copying Steck, Sullivan, and Porro, and stated: "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." (CX2358 at 001; Meadows, Tr. 2435-2436).

829. Anderson III was a regional manager at the time of this November 5, 2014 email chain (CX2358). (Meadows, Tr. 2434). At the time of this November 5, 2014 email chain (CX2358), Anderson reported to Michael Porro who reported to Meadows. (Meadows, Tr. 2434-2435).

830. Meadows's email to Anderson III, in which he wrote, "We do not currently participate with GPOs nor do we want to" included Sullivan and Meadows's boss, Steck. (CX2358 at 001; Meadows, Tr. 2436).

831. Meadows testified that when he wrote, "this GPO" in CX2358, he was referring to Atlantic Dental Care. (Meadows, Tr. 2436-2437).

832. Meadows testified that he did not know whether Atlantic Dental Care owned the practices and there was "misinformation" about the business model of the group. (Meadows, Tr. 2435). Meadows knew that Atlantic Dental Care was a group of dentists. (Meadows, Tr. 2435).

833. Later in the email chain (CX2358), Meadows then wrote an email to Sullivan and Steck, taking Anderson III off the email chain: "I've got this. Another GPO fight. Unless there is another dialogue you'd like to see from me to the team, we're forging ahead!" (CX2358 at 001; Meadows, Tr. 2437).

834. Meadows did recall receiving a response from Sullivan with a different dialogue that Sullivan wanted Meadows to deliver to the team. (Meadows, Tr. 2437).

835. On November 12, 2014, Cavaretta wrote to a Regional Manager, Dave Jacklin: “I haven’t heard anything but at this point we are not playing in the GPO space.” (CX2234 at 001; Cavaretta, Tr. 5592-5593).

836. On July 1, 2015, Sullivan wrote: “So Dental Gator is now a friend? The Dec ‘offsite’ last year I left with a goal to see if we could get Hal to shut it down, but knew that could be a challenge due to the parent company being a EDSO of ours in SM.” (CX0246 at 001).

837. Sullivan testified at trial that his July 1, 2015 email (CX0246) related to Dental Gator; “Dec” meant December; “EDSO” referred to elite DSO; “SM” referred to Special Markets; and Hal referred to Hal Muller. (CX0246; Sullivan, Tr. 3996-3997).

838. Sullivan approached Muller to discuss shutting down Dental Gator at an offsite meeting in December 2014. (CX0246 at 001; Sullivan, Tr. 3996-3997; CX0309 (Muller, IHT at 176)).

839. On January 7, 2015, Muller sent notes to his boss, Breslawski, and Sullivan; the notes state in part: “Buying Groups: Do we keep saying no?” (CX2141 at 001-002).

840. On March 9, 2015, Sullivan emailed regarding a potential meeting with the American Dental Association to discuss ways to help the association increase its membership. (Sullivan, Tr. 3986; CX2478 at 001). Sullivan wrote to Steck, Chatham, and others at Henry Schein: “No problem . . . just make sure he doesn’t think this will include any sort of ‘discount off supplies’ program too. We are not going to create a buying group with ADA members.” (CX2478 at 001; Sullivan, Tr. 3986-3987).

841. On November 3, 2015, Sullivan wrote to Meadows: “You slid me a note about this group during the SM Budget Meeting. I had just informed Hal (and team) that we do not have plans to open up new Buying Groups, but have a plan ready to roll if needed. Did we just recently add

Klear Impact? Who are they, where, etc." (CX0176 at 001-002; Sullivan, Tr. 3980-3981; *see also* Meadows, Tr. 2438-2439; CX2392 at 002).

842. Meadows testified that "Hal" in CX2392 referred to Hal Muller, the president of the Special Markets Division. (Meadows, Tr. 2439).

843. Sullivan attended a Special Markets budget meeting on or around November 2, 2015. (Sullivan, Tr. 3980-3981). That meeting was part of an overall executive planning meeting. (Sullivan, Tr. 3981).

844. At the Special Markets Budget Meeting on or around November 2, 2015, Sullivan informed Muller and his team that Schein did not have plans to open up new buying groups. (CX2392 at 002; Meadows, Tr. 2439; Sullivan, Tr. 3981).

845. After Sullivan informed Muller and his team that Schein did not have plans to open new buying groups (at the November 2015 Special Markets Budget Meeting), Meadows slid Sullivan a note to let Sullivan know that Henry Schein Dental was having discussions with Klear Impakt. (Meadows, Tr. 2439; CX2392 at 002; CX0176 at 001; Sullivan, Tr. 3981).

846. On November 3, 2015, Cavaretta wrote to Meadows regarding Meadows' note to Sullivan: "Did you slide the note to Tim on this?" (CX0176 at 001). The same day, Meadows wrote to Cavaretta regarding Meadows's note to Sullivan: "I really did think he was aware and I only sad sown thing [*sic*] because he was taking such a hard stand in front of everyone. Again sorry to catch you off guard." (CX2392 at 001; Meadows, Tr. 2440).

847. When Meadows wrote, "sad sown thing" (CX2392), it was a typo and he meant to write, "said something." (Meadows, Tr. 2440).

848. Meadows had the impression that Sullivan was taking a hard stand that Henry Schein Dental was not opening up buying groups. (Meadows, Tr. 2440).

849. Sullivan did not know about Schein's work with Klear Impakt at the time of the November 2, 2015 meeting. (Sullivan, Tr. 3981-3982).

850. On November 3, 2015, Meadows wrote to Cavaretta: "He 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." (CX0176 at 001; Meadows, Tr. 2441). When Meadows wrote, "he" in the November 3, 2015 email, he meant Tim Sullivan. (Meadows, Tr. 2441).

851. At the time of this email (CX0176), Meadows reported to Steck who reported to Sullivan. (Meadows, Tr. 2442).

852. Meadows would not have made something up that Sullivan said. (Meadows, Tr. 2442).

853. When Meadows recounted something that Sullivan said, he would have tried to be accurate. (Meadows, Tr. 2442).

854. Meadows attended a meeting on or around November 3, 2015 in which Tim Sullivan was one of the speakers and Sullivan spoke regarding buying groups. (Meadows, Tr. 2442).

855. On November 3, 2015, Graham Stanley sent meeting notes from a November 2, 2015 meeting to Breslawski, Sullivan, Steck, Cavaretta, Meadows, and other Schein management via email with the subject "Meeting notes: Nov 2." (CX0189 at 001). In that email, Stanley wrote: "Tim clearly set out that HS should not be first to cooperate with GPOs, but also don't want to be last." (CX0189 at 002; Steck, Tr. 3843 (all individuals copied on the email are in management positions at Schein)).

856. Stanley was Schein's chief financial officer at the time of this email (CX0189). (Steck, Tr. 3978-3979).

857. Stanley's email in CX0189 reflected notes from a planning meeting that took place on November 2, 2015. (Steck, Tr. 3979).

858. In those November 2, 2015 meeting notes (CX0189), "Tim" referred to Tim Sullivan. (Meadows, Tr. 2444; Steck, Tr. 3844).

859. In those November 2, 2015 meeting notes, Stanley referred to buying groups as GPOs. (Meadows, Tr. 2444).

860. In those November 2, 2015 meeting notes, "HS" referred to Henry Schein. (Sullivan, Tr. 3979).

861. Schein required some of its DSO customers to agree that that they would not become a buying group. (CCFF ¶¶ 862-870; *see also* CCFF ¶¶ 1791-1794, 1795-1799).

862. RX2291 is the Prime Vendor Agreement between Advantage Dental DSO and Henry Schein. (Foley, Tr. 4566-4567). Foley signed the Prime Vendor Agreement on behalf of Schein. (Foley, Tr. 4567).

863. Schein's Prime Vendor Agreement for Advantage Dental DSO, specifies that discounts are only available to those dental practices that are owned or managed by Advantage Dental. (RX2291 at 002; Foley, Tr. 4567-4568). Foley testified regarding Paragraph 2 of the Agreement: "Basically all three categories want to have some type of ownership into the practice, show that these practices belong to the DSO component and they're not part of their buying group component." (Foley, Tr. 4567-4568).

864. On March 15, 2012, Foley sent Meadows an email with the subject, "Terms not to be a Buying Group" and he pasted paragraph 2 from the Prime Vendor Agreement for Advantage Dental DSO (RX2291). (CX2066 at 001-002; CX8003 (Foley, Dep. at 244) ("I'm sending him a cutout of Advantage Dental's proposal distinguishing between the DSO segment and that part that relates to a buying group for Advantage Dental. I'm not sure why Jake requested it, but this is straight out of Advantage's contract"); *see also* RX2291 at 002).

865. On November 10, 2014, Foley wrote to Muller: "Advantage Dental also has a BG component. They do $1.5M in merchandise with us for their owned practices and who knows how much with our competition on the BG practices. Similar PVA as with MB2, Advantage adheres to it by not bringing in the BG component." (CX2081 at 002).

866. On October 21, 2014, Foley wrote an email to Sullivan, Muller, Cavaretta, and Steck regarding Dental Gator:

> Dental Gator is owned by our EDSO, MB2 Dental. MB2 is a $2M plus merchandise customer and recently became Dentrix Enterprise's largest software purchaser. Similar to Heartland Dental, MB2 goes after offices by setting them up as 'consulting practices' to win them eventually as MB2 owned offices. In the last few months, 10 practices have joined Dental Gator and 3 of them have converted to full MB2 ownership. Thus their model is working. In our prime vendor agreement we spelled out specific terms and restrictions about these consulting offices to prevent Dental Gator from being a typical GPO . . . .

(RX2294 at 001).

867. CX4001 is the 2014 Prime Dental Supplier and Equipment Agreement between MB2 and Henry Schein. ([redacted]; Foley, Tr. 4573-4574). Foley signed the agreement on behalf of Schein. (Foley, Tr. 4573-4574; [redacted]).

868. The 2014 Agreement between MB2 and Henry Schein states: "This agreement may not be used to grow any Group Purchasing Organization (GPO) type relationship which is defined as a relationship whose purpose is to generate revenue for the parent company by allowing others to benefit from the terms of the prime vendor relationship." (CX4001 at 002; Foley, Tr. 4574).

869. On August 13, 2014, Hight sent an email to Foley and two other Schein employees with the subject: "Updated Narrative and Draft PVA." (CX2878 at 001). Hight attached a draft Prime Vendor Agreement, which stated: "This agreement may not be used to grow any Group Purchasing Organization (GPO) type relationship." (CX2878 at 126).

870. On June 9, 2014, Hight explained to a Schein employee that she spelled out "no gpo language" in an agreement with a DSO: "Right now I am drawn into a really tough situation with a $3million a year customer that has sneakily created a gpo that I have to shut down. I did the initial negotiations with them for their business, fortunately I spelled out no gpo language in our agreement." (CX2426 at 001).

b) Schein Shut Down Two Profitable Buying Groups.

871. Titus was transferred from Special Markets to Henry Schein Dental in or around March of 2014. (Titus, Tr. 5287-5288). Upon her transfer to Henry Schein Dental, Titus started working in the mid-market division. (Titus, Tr. 5197-5198).

872. After Titus was transferred to Henry Schein Dental in 2014, she reported to Cavaretta. (Titus, Tr. 5288).

873. On May 8, 2014, Titus wrote to her boss, Cavaretta with a list of "hot topics," which listed "Breakaway, Dental Coop, SmileSource, Steadfast." (RX2385 at 001; Titus, Tr. 5295). These topics were taking up a significant portion of her time as of the date she wrote this email. (Titus, Tr. 5296). Titus wanted to speak with her boss about these four companies because they had a GPO component. (Titus, Tr. 5296).

874. Shortly after Titus was transferred to Henry Schein Dental, she started doing some discovery on a group that Schein worked with called Steadfast Dental. (Titus, Tr. 5296-5297).

875. On March 25, 2014, Titus sent an email to Cavaretta and McLemore with the subject, "Buying Group STEADFAST DENTAL, do we shut this down?" and wrote: "We need to discuss this. . . I'm still in discovery on their DNA (we think it's a DSO called OMSP), but there is no question this is a buying group. They did $150K last year. Rick H was asked repeatedly to deal with it, but nothing ever happened." (CX0171 at 001 (emphasis in original); Titus, Tr.

5301-5302). Titus reported to Cavaretta as of the time of this email, CX0171. (Titus, Tr. 5300). McLemore was a regional manager for Texas, where Steadfast was located. (Titus, Tr. 5300).

876. Steadfast Dental was a buying group. (Titus, Tr. 5297).

877. Titus sought permission from her superiors to "shut down" Steadfast Dental. (Titus, Tr. 5297).

878. On June 10, 2014, Titus wrote to Staples, CEO of Steadfast: "After examination of your GPO business model we have concluded that continuation of our current relationship is counter to our business practices. Unfortunately, it is my duty to inform you that effective this Friday; 06/13/14, Henry Schein will no longer support the fulfillment of Steadfast Medical supply orders." (CX2216 at 002; Titus, Tr. 5260).

879. Titus sought to cease doing business with Steadfast because Steadfast's "GPO business model" was "counter to [Schein's] business practices." (CX2216 at 002; Titus, Tr. 5260 (describing Steadfast's business model in recommending that Schein cease working with Steadfast)). Steadfast's GPO business model was in place for the entirety of Henry Schein's relationship with Steadfast. (Titus, Tr. 5299-5300).

880. Schein ended its relationship with Steadfast even though Schein sold $150,000 worth of supplies to Steadfast members in 2013. (CX0171 at 001; Titus, Tr. 5301-5302).

881. Titus considered $150,000 of business to be a large client for Henry Schein. (Titus, Tr. 5302).

882. Titus received permission from her superiors to deliver the message to Steadfast Dental that Schein was terminating the relationship. (Titus, Tr. 5298).

883. Cavaretta made the decision to end Schein's relationship with Steadfast. (Cavaretta, Tr. 5595-5596).

884. Foley also made the decision to end Schein's relationship with Steadfast. (Foley, Tr. 4680).

885. After Schein ended its relationship with Steadfast, Titus' boss, Cavaretta praised her for "shut[ting] down" a GPO; on June 10, 2014, Cavaretta wrote: "GPO's are popping up like crazy so it is nice when we can shut one down and still keep the business from the individual customers." (CX2216 at 001).

886. On February 10, 2014, Titus wrote to Keefe, an employee of Colgate: "The decision of HSD to treat them as a GPO is a legacy decision that I do not believe, if presented with the same circumstances today, HSD would have embraced." (CX2227 at 004; Titus, Tr. 5305-5306). Titus's statement in CX2227 related to the Dental Co-op of Utah. (CX2227 at 004; Titus, Tr. 5305).

887. Schein's decision to work with the Dental Co-op of Utah was a legacy decision. (Titus, Tr. 5305-5306).

888. Titus did not believe that HSD would have embraced the Dental Co-op in 2014. (Titus, Tr. 5305).

889. Schein first started making sales to the Dental Co-op of Utah beginning in 2007. (CX2801 at 018 (Schein's Response to RFA ¶30 (Schein had a business arrangement with the Dental Cooperative of Utah regarding the sale of dental products and made sales in connection with that arrangement as early as 2007))).

890. Shortly after Titus was transferred to Henry Schein Dental in March 2014, she started doing some discovery on a group that Schein worked with called the Dental Co-op of Utah. (Titus, Tr. 5304).

891. The Dental Co-op of Utah was a buying group. (Titus, Tr. 5304).

892. Titus elevated the issue of whether to shut down the Dental Co-op of Utah to her superiors. (Titus, Tr. 5304).

893. Schein stopped doing business with the Dental Co-op of Utah in 2014. (Titus, Tr. 5304; CX2801 at 018 (Schein's Response to RFA ¶31)).

894. Schein did more than a million dollars of business with the Dental Co-op of Utah in the 2014 time period. (Titus, Tr. 5305 (testifying that she thinks it was twice one million dollars' worth of business); CX2227 at 002 ("I think HSD does over $1M with the offices connected to this group"); CX2420 at 002 ("Dental COOP in Utah is a true GPO . . . the COOP does around $2 million a year.")).

895. On July 29, 2014, Kyle wrote to Cavaretta regarding Dental Gator: "We really need to shut the Dental Gator down." (CX0175 at 001). Cavaretta responded to Dean Kyle: "I agree . . . as this is the second big GPO we will be shutting down. . . Co-op is the other." (CX0175 at 001).

896. At her deposition, Titus testified that prior to moving to Henry Schein Dental, she had never terminated a relationship with any groups. (CX8010 (Titus, Dep. at 80); Titus, Tr. 5309). At trial, Titus testified as follows: "Q. When you were in Special Markets, you never terminated a relationship with any groups? A. I did." (Titus, Tr. 5309). This testimony is directly contradictory from her testimony at her deposition: "Q. Did you ever, prior to moving over to Henry Schein Dental . . . back when you're in special markets, did you ever terminate a relationship with any group? A. No." (CX8010 (Titus, Dep. at 80)).

897. In 2014, Schein ended its relationship with the Dental Cooperative of Utah and Steadfast Dental, two buying groups Schein worked with prior to 2011. (CCFF ¶¶ 871-896).

898. On April 14, 2014, Hight reported to Foley and Titus that the Dental Co-op in Utah is a "true GPO" and she stated that she informed Harmon, the individual who managed the Dental Coop relationship, "we are very careful about not going GPOs." (CX2420 at 002).

c) Sullivan Was Happy that Schein's Relationship with Smile Source Ended.

899. Schein contracted with buying group Smile Source in 2008. (Sullivan, Tr. 3914; RX3086 at 008 (Schein's Third Supplemental Response to IROG ¶1)).

900. Smile Source initially contracted with Schein's Special Markets division. (Steck, Tr. 3687; Foley, Tr. 4526; [redacted]).

901. In early 2011, Muller and Sullivan decided to move the Smile Source account from Schein Special Markets to Henry Schein Dental because there was no central billing, central purchasing, and all of the members were private dentists. (Foley, Tr. 4526-4527, 4552-4555; CX0238 at 001; Steck, Tr. 3687 (Smile Source transferred internally from Special Markets to Henry Schein Dental because Smile Source members were private practices)).

902. On February 20, 2012, Foley wrote: "Hal and I then met with Tim Sullivan and Dave Steck, and decided to move Smile Source to HSD. As there was no central billing, central purchasing and all 15 Smile Source customers were private dentists, we made this happen in January, 2011." (CX0238 at 001). Foley's email (CX0238) was about the decision to move Smile Source to HSD. (Foley, Tr. 4553-4554).

903. In October 2011, [redacted].

904. [redacted]

[redacted]

905. [redacted]

906. [redacted]

907. [redacted]

908. [redacted]

909. Emails from 2011 confirmed Dr. Goldsmith's testimony on [redacted] (CCFF ¶¶ 910-912).

910. On November 7, 2011, Nickerson of Smile Source wrote to Brady and Chatham of Schein: "We did a spot check on one of our newest additions to the Smile Source. Dr. Jonathon Okabe and compared his pricing to our Special Market pricing from Dr. James Choy and found out that he is not receiving our negotiated pricing." (CX2571 at 002).

911. On November 7, 2011, Brady responded to Nickerson that he would "look into this today" but by December 20, 2011, the issue had not been resolved. (CX2571 at 002). On December 20, 2011, Nickerson of Smile Source wrote to Brady of Schein: "We have still not heard back on the credit for Dr. Jonathon Okabe in Hawaii?? I had promised him that would be

taken care of and he has heard nothing. He just spent 15 minutes speaking very harshly about this situation and we need to make sure that it gets resolved and credited by year end." (CX2571 at 002).

912. On January 25, 2012, Schermerhorn, a field sales consultant, wrote to Meadows and Aaron (a regional manager who reported to Meadows) regarding a conversation he had with a customer: "He was unaware of most of the details for the decision to terminate our relationship with Smile Source however he did hear that some of the expectations of Smile Source from us were not being met." (CX2349 at 002; Meadows, Tr. at 2449-2450).

913. [redacted]

914. The relationship between Schein and Smile Source came to an end at the beginning of 2012. [redacted] Steck, Tr. 3688; Sullivan, Tr. 4156).

915. [redacted]

916. Schein documents support [redacted] that the Schein-Smile Source relationship ended because of Schein's behavior toward Smile Source. (CX0238 at 001 ("HSD did not give Smile Source the love that SM provided, so they recently dumped Schein."); CX0238 at 001 ("Tim Sullivan is happy that we are less one more BG."); CX2624 at 001 ("[W]e invited [Smile Source] to find a new distributor."); CX2107 at 002 ("We ended the Smile Source relationship when they became more of a GPO then [*sic*] a 'management company.'");

CX2349 at 001 ("[I]t was more our choice I believe to stop doing business with [Smile Source.] It's closer to a GPO.")).

917. On February 20, 2012, Foley wrote, "HSD did not give Smile Source the love that SM provided, so they recently dumped Schein and went to Burkhart." (CX0238 at 001).

918. On February 20, 2012, Foley wrote regarding the end of the Schein/Smile Source relationship: "Tim Sullivan is happy that we are less one more BG." (CX0238 at 001). Foley was referring to buying group when he wrote "BG." (Foley, Tr. 4554).

919. On February 27, 2013, Showgren wrote to Alguire, a field sales consultant regarding Smile Source: "Too long of a story to email. Basically we invited them to find a new distributor." (CX2624 at 001).

920. On July 11, 2014, Foley wrote: "We ended the Smile Source relationship when they became more of a GPO then [*sic*] a 'management company.'" (CX2107 at 002).

921. On January 26, 2012, Meadows wrote to Porro, the director of sales: "John Nathan was working closely on this and it was more our choice I believe to stop doing business with the group. It's closer to a GPO." (CX2349 at 001; Meadows, Tr. 2450-2452). Meadows' email was questioning whether Schein would want to win back the Smile Source group. (Meadows, Tr. 2452). When Meadows wrote, "It's closer to a GPO," "It's" referred to Smile Source. (Meadows, Tr. 2453).

922. Meadows would not have put something in an e-mail to Porro that he did not believe to be true. (Meadows, Tr. 2453).

923. Sullivan was happy that Schein's relationship with Smile Source ended. (CCFF ¶¶ 918, 924; *see also* CX0238 at 001 ("Tim Sullivan is happy that we are less one more BG.")).

924. On February 2, 2012, Sullivan wrote that he was more concerned with "what we can do to KILL the buying group model!" than the lost revenues from the Smile Source account. (CX0199 at 001 (emphasis in original); Sullivan, Tr. 3937; *see also* CCFF ¶¶ 728-732

d) Schein Rejected Buying Groups During the Conspiracy Period.

925. Schein did not offer Florida Dental Association a discount on supplies for its buying group. (CX0310 (Steck, IHT at 132); CX0201 at 001).

926. Steck testified that Florida Dental Association sought a discount for its members and Schein "refused because it [was] not within the parameters that we dealt with." (CX0310 (Steck, IHT at 132)).

927. Steck wrote regarding Florida Dental Association in late-2011, "This is the classic 'buying group' approach that we aren't buying into." (CX0201 at 001).

928. Schein declined to work with Kois Buyers Group in November 2014, stating that it would "pass" on working with the buying group. (CX4310 at 001; *see also* Kois Sr., Tr. 190, 196 (Schein, Patterson, and Benco rejected Kois Buyers Group)).

929. On November 3, 2014, Chatham wrote to Ahmed, a representative of Kois Buyers Group and copied Sullivan and Steck: "We have conferenced as a team and at this point believe we need to take a pass on the offer." (CX4310 at 001).

930. Henry Schein declined to work with the New Mexico Dental Cooperative. (Mason, Tr. 2354-2355).

931. Schein declined to work with PMGS, a buying group, in July 2014. (Titus, Tr. 5228 (Schein made decision not to partner with PGMS); CX2219 at 002; CX2235 at 001 ("GPO prospect called PGMS . . . went to Tim and he shot it down."); Titus, Tr. 5216-5217 (PGMS was a buying group); *see also* CCFF¶¶ 801-805).

932. On July 16, 2014, Titus wrote, "Just delivered the news moments ago to Kathy Khalik. She was absolutely gracious, but clearly devastated. I explained if there was a time in the future they become an MSO that could demonstrate compliance, we would be pleased to revisit. I offered her the compromise Tim suggested to enroll the fully owned locations in a SM program." (CX2219 at 002).

933. PGMS was willing to enter into an exclusive contract with Schein. (Titus, Tr. 5226, 5311; CX2235 (Statement of Titus: "We had a GPO prospect called PGMS. Very intriguing, willing to be exclusive.")).

934. On December 21, 2011, Foley declined to work with Unified Smiles informing Knysz of Schein's new policy that it "no longer participate[d] in Buying Groups." (CX2062 at 001; Foley, Tr. 4545-4546; *see also* CX2073 (Statement of Foley: "It's a buying group that we do not participate with, as with all buying groups.")).

935. Academy of General Dentistry ("AGD") is an organized group that educates dental professionals. (Cavaretta, Tr. 5646). In August 2011, AGD approached Schein regarding a buying group they were attempting to form. (CX0166 at 002; Cavaretta, Tr. 5646-5647).

936. On August 25, 2011, Gadd, a Schein FSC wrote to Cavaretta, "AGD is trying to negotiate a deal for members of the AGD to get discounts (a buying group in other words) and I know they have approached Schein." (CX0166 at 002; Cavaretta, Tr. 5647).

937. Cavaretta responded to Gadd: "As for the AGD buying group . . . I haven't heard anything about this but I doubt this will happen. Once the buying groups entire [*sic*] our market the dental model as we know it will change. I will ask John or Dave about our progress but I would assume at this point that nothing is going to happen." (CX0166 at 002Cavaretta, Tr. 5648).

938. On September 14, 2014, Penrose wrote, "[W]e are not considering any 'buying group' program with AGD at this time." (CX2439 at 002).

939. Henry Schein declined to work with AGD during the conspiracy period. (CCFF 935-938).

940. In early 2011, Schein bid on the Tralongo buying group. (Foley, Tr. 4568).

941. In 2014, Schein refused a request to bid on Tralongo's buying group component. (Foley, Tr. 4568-4569; CX2081 at 002; CX2697 at 001; CX2083 at 001).

942. On November 10, 2014, Foley wrote to Muller, "I also got an email from Tralongo, another growing BG that we said no to." (CX2081 at 002).

943. Foley instructed his sales team not to meet with the Tralongo buying group in 2013 or 2014. (Foley, Tr. 4593; *see also* CX2083 at 001; CX2081 at 002; CX2697 at 001).

944. On December 18, 2014, Foley wrote to Daniel Hobson regarding Tralongo, "This a buying group so we declined to bid (Rhonda declined at my direction)." (CX2083 at 001).

945. On December 15, 2014, Foley wrote to Schein employees regarding Tralongo, "It's a buying group so we walked away from them—did not bid on the business." (CX2697 at 001).

946. On October 27, 2015, Scott Carringer, a Regional Manager located in the Atlanta area, emailed Foley regarding Tralongo. (CX2094 at 003; Foley, Tr. 4594). Carringer wrote, "Randy we will wait for your instructions as to what to do." (CX2094 at 003).

947. On October 28, 2015, Foley wrote to Schein employees, "Schein, PDCO and Benco all refused to bid on their business when they entered the GPO/Buying Group world . . . ." (CX2094 at 001). Foley testified that this email is regarding Tralongo. (Foley, Tr. 4594-4595).

948. In December 2011, Pearl Network at NYU expressed interest to Schein in "creating a dental GPO with Schein as the anchor." (CX2456 at 005).

949. Steve Kess elevated the issue of working with Pearl Network's potential buying group to Sullivan and Steck on December 7, 2011. (CX2456 at 001 ("By cc of this email and chain I have shared it with HSD Leadership.")).

950. Sullivan responded to the idea of working with Pearl Network 's potential buying group: "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." (CX2456 at 001; Sullivan, Tr. 3943-3944).

951. Schein declined to work with Pearl Network's buying group. (CCFF ¶¶ 948-950).

952. On May 22, 2013, Schein employee Paul Berkey asked whether his colleagues had heard of Synergy Dental Partners, a "dental gpo . . . based out of Charlotte, NC." (CX0252 at 001). Foley responded, "They approached us about a year ago and we said no." (CX0252 at 001).

953. On September 14, 2014, Foley wrote to Muller and Peter Jugoon regarding Synergy Dental Partners, "I believe our local North Carolina team was entertaining the option for Schein to be a distributor for this group, but later decided against it. As with other buying groups we continue to say no (at least try to)." (CX2079 at 001; Foley, Tr. 4650-4651).

954. Schein declined to work with Synergy Dental Partners during the conspiracy period. (CX0252 at 001; CX2079 at 001).

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

1. <u>Unified Smiles (2012)</u>

955. On January 11, 2012, Benco learned from a customer that Schein might be offering discounts to the buying group Unified Smiles. (CCFF 956-961; CX1144 at 001; Ryan, Tr. 1061-1062, 1246; *see also* Cohen, Tr. 743-744; CX1052 at 001).

956. On January 11, 2012, Ryan received an email from Paquette, a Benco territory representative, regarding the buying group, Unified Smiles. (CX1144 at 001).

957. Paquette asked whether Benco would participate in the buying group and indicated that a doctor thought Schein "would be" participating in Unified Smiles. (CX1144 at 001; Ryan, Tr. 1061-1062). Ryan understood Paquette to be saying that a doctor thought that Schein would be participating in the buying group, Unified Smiles. (Ryan, Tr. 1061-1062, 1246-1247).

958. On January 11, 2012, minutes after receiving the information that Schein would be participating in the buying group, Unified Smiles (in CX1144), Ryan forwarded the email to his boss, Cohen, and wrote, "For Timmy conversation." (CX1052 at 001; Ryan, Tr. 1061-1063; Cohen, Tr. 503).

959. Ryan testified that "Timmy" in CX1052 referred to Tim Sullivan of Henry Schein. (Ryan, Tr. 1063).

960. Cohen testified that "Timmy" in CX1052 referred to Tim Sullivan of Henry Schein. (Cohen, Tr. 504).

961. Based on Ryan's email (CX1052), Cohen understood that Unified Smiles was a buying group. (Cohen, Tr. 743-744).

962. In response to Ryan's email (CX1052), Cohen did not inform Ryan that he would not talk to his competitor, Sullivan, regarding a potential customer, Unified Smiles. (Cohen, Tr. 503; Ryan, Tr. 1063).

963. At trial, when asked about his January 11, 2012 email (CX1052), Ryan did not provide any testimony explaining why he specifically sent information about Schein discounting to a buying group to Cohen for a conversation with Sullivan. (Ryan, Tr. 1173-1176).

964. Instead, after receiving Ryan's email (CX1052) on January 11, 2012, Cohen texted Sullivan that same day to schedule a time to speak on the phone. (CX2347 at 001-003 (January 12, 2012 text messages between Cohen and Sullivan); Cohen, Tr. 507-508).

965. On January 12, 2012, Cohen texted Sullivan to schedule a time to talk on the phone; Cohen wrote, "You around to talk for a few minutes tomorrow?" (CX2347 at 001).

966. Sullivan responded and Cohen and Sullivan scheduled a call for "8:00 am central" on January 13, 2012. (Cohen, Tr. 507-508; CX2347 at 001-003).

967. On January 13, 2012, Cohen responded to Ryan's email (CX1052) and informed him that he was, "Talking this AM…" with Sullivan (Cohen Tr. 503; CX1052 at 001; *see also* CX8015 (Cohen, Dep. at 216); CX8037 (Ryan, Dep. at 110)).

968. On January 13, 2012, Cohen and Sullivan spoke on the phone for 11 minutes and 34 seconds. (Cohen, Tr. 511; CX6027 at 019 (Row 170)).

969. Cohen and Sullivan spoke on the telephone on January 13, 2012 regarding Unified Smiles. (CCFF ¶¶ 958-968, 970-972).

970. Cohen does not have an independent recollection of what was discussed on the January 13, 2012 call with Tim Sullivan. (Cohen, Tr. 973-975).

971. Cohen admitted he "had buying groups on his mind" on January 13, 2012 at 8:39 a.m., less than thirty minutes before his call with Sullivan. (Cohen, Tr. 516).

972. Thirty minutes before his call with Sullivan, Cohen emailed Benco employees reinforcing Benco's no buying group policy. (Cohen, Tr. 514; CX1051). Specifically, on January 13, 2012 at 8:39 a.m., Cohen emailed Ryan and asked him to tell Benco's VP of Sales, Mike McElaney, to review Benco's no buying group policy with Benco's sales management team. (Cohen, Tr. 515 ("Q. So there in that second sentence in your e-mail on January 13, 2012, less than 30 minutes before your call with Tim Sullivan, you were telling . . . Patrick Ryan [to] tell the VP of sales to review Benco's no-buying group policy with the team? A. With the management team, the sales management team. Yes."); CX1051 at 001).

973. Neither Schein nor Benco bid on Unified Smiles. (Cohen, Tr. 744 (Benco did not respond to Unified Smiles); Foley, Tr. 4552, 4549 (Schein did not bid on Unified Smiles); *see also* CX2062 at 001; CX1144 at 001).

974. Cohen kept Ryan informed of most of his communications with Sullivan. (Cohen, Tr. 976-977). Cohen testified, "Pat Ryan was the one internal person who pretty much knew everything about my conversations with Tim Sullivan." (Cohen, Tr. 745).

975. Cohen admitted at trial that Ryan "was the one [Benco] person who pretty much knew everything about my conversations with Tim Sullivan." (Cohen, Tr. 745; *see, e.g.*, Ryan, Tr. 1055).

976. Ryan was aware of Cohen and Sullivan's agreement limiting the number of hires between Benco and Schein. (Ryan, Tr. 1054-1059; CX1420 (Statement of Ryan: "I just heard from Chuck at the DTA regarding his conversation with Tim Sullivan about changes Tim wanted to the Global. Chuck agreed to, effective immediately….3 hires from his per Schein ZONE (map to be provided) every 6 MONTHS.") (emphasis in original)).

977. In furtherance of the hiring agreement between Cohen and Sullivan, Ryan had a practice of forwarding hiring issues to Cohen to communicate with Sullivan. (Ryan, Tr. 1059 ("I had asked [Cohen] to try to modify the deal [with Tim Sullivan]."); CX1420 (Statement of Ryan: "I have asked [Cohen] to go back to Tim and try to eliminate service techs from this, or at the very worst, make it 3 sales, 3 service per zone per 6 months.")).

2. <u>Smile Source (2012)</u>

978. On July 25, 2012, Cohen again reached out to Sullivan when he learned from another buying group, Smile Source, that Schein might be selling to a buying group. (CCFF 979-980; CX0018 at 001).

979. On July 25, 2012, Ryan was forwarded an email from Dr. Goldsmith of Smile Source. (CX0018 at 001-002).

980. On July 25, 2012, Dr. Goldsmith wrote that he wanted to "explore a relationship" with Benco and informed Benco that "[i]n the past we [Smile Source] were in Special Markets division of Henry Schein and worked directly with Tim Sullivan." (CX0018 at 002; Ryan, Tr. 1064-1065).

981. In response, Ryan informed Dr. Goldsmith that Benco would not work with Smile Source because it was a group purchasing organization. (CX0018 at 001).

982. Minutes after receiving Dr. Goldsmith's July 25, 2012 email, Ryan forwarded Dr. Goldsmith's email to his boss, Cohen, writing, "Better tell your buddy Tim to knock this shit off." (CX0018 at 001; Ryan, Tr. 1065).

983. Ryan testified that he was "frustrated" that Schein would be working with Smile Source. (Ryan, Tr. 1066, 1192).

984. At trial, Ryan testified that his July 25, 2012 email (CX0018) to Cohen referred to Sullivan as "Tim" and "knock it off" meant to stop doing something. (Ryan, Tr. 1065-1066; CX0018 at 001).

985. Ryan also admitted that "this shit" in his July 25, 2012 email (CX0018) to Cohen referred to Schein working with Smile Source. (Ryan, Tr. 1065-1066; CX0018). Ryan testified that he wrote "this shit" because "I personally have a very strong opinion of GPOs." (Ryan, Tr. 1065-1066).

986. Cohen understood that Ryan was telling him to tell Sullivan to stop recognizing Smile Source as a customer. (Cohen, Tr. 518-519).

987. Ryan's email to Cohen (CX0018) was the second time Ryan forwarded information regarding buying groups to Cohen for communication to Sullivan. (Cohen, Tr. 518).

988. Cohen did not inform Ryan that he would not contact Sullivan regarding a potential customer. (Ryan, Tr. 1067).

989. Cohen did not tell Ryan that he thought it was a bad idea to contact Tim Sullivan of Schein. (Cohen, Tr. 519-520).

990. Cohen responded to Ryan's July 25, 2012 email (CX0018):

> 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.

(CX0018 at 001 (emphasis in original)).

991. At the time Cohen wrote his email (CX0018), he was planning to print the email without Ryan's comment and send it to Sullivan with a note. (Cohen, Tr. 522).

992. Cohen sent Sullivan notes in the mail from time to time, and he testified that it would not surprise him if he did send Sullivan a physical note about Smile Source. (Cohen, Tr. 526-527; CX0301 (Cohen, IHT at 223)).

993. Despite Dr. Goldsmith's statements to Benco that Smile Source had worked with Schein, at the time of this email chain (CX0018) in July 2012, Cohen was skeptical that Henry Schein would be working with Smile Source. (Cohen, Tr. 524-26 ("I think I would– I would say that they were not working with Henry Schein.")).

3. <u>Dental Alliance (2013)</u>

994. On March 26, 2013, Cohen notified Sullivan of market intelligence that Schein may be doing business with a buying group. (CCFF ¶¶ 995-1004).

995. On March 25, 2013, Cohen reached out to a Benco sales representative, Jamie Kasinki, to ask him for the name of the buying group in his area that worked with Schein. (CX0061 at 001; Cohen, Tr. 556).

996. On March 26, 2013, Kasinki responded to Cohen and informed him that Schein was selling to Dental Alliance. (Cohen, Tr. 556-557; CX0061 at 001).

997. Within minutes of receiving Kasinki's email on March 26, 2013 (CX0061), Cohen copied and pasted that email message into a text message to Sullivan:

> 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.

(Cohen, Tr. 557-558; CX6027 at 028 (Rows 245-246); CX0061 at 001; *see also* CX0196 at 008-009, Sullivan, Tr. 4196-4197).

998. Sullivan tried to call Cohen the following morning but did not reach him. (CX6027 at 028 (Row 247); Sullivan, Tr. 3959).

999. Cohen texted Sullivan on March 26, 2013 (CX6027) about market intelligence on Schein doing business with a buying group. (Cohen, Tr. 556-557 ("Q. You wanted more information about Schein working with this buying group. A. I wanted more market intelligence on the topic. Yes.")).

1000. Cohen texted Sullivan on March 26, 2013 (CX6027) and told him the market intelligence could be a rumor or false information that Schein was working with that buying group. (Cohen, Tr. 559; CX6027 at 28 (Row 246)).

1001. Cohen texted Sullivan on March 26, 2013 and told Sullivan Benco had turned down the Dental Alliance buying group. (Cohen, Tr. 558)

1002. On March 26, 2013, Cohen forwarded to Sullivan the email from Kasinki including the part about Benco having turned down Dental Alliance. (Cohen, Tr. 558; CX0061 at 001).

1003. Cohen offered no explanation at trial for why he sent his own employee's email to Sullivan or why he notified Sullivan of rumors of Schein discounting to a buying group. (*See* Cohen, Tr. 557-558).

1004. Cohen testified at his investigational hearing regarding his March 26, 2013 text to Sullivan, "Q. And why were you sending Mr. Sullivan this text? A. T he 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." (CX0301 (Cohen, IHT at 287)). Cohen could not explain why he was communicating with Sullivan about buying groups. (CX0301 (Cohen, IHT at 287) ("I can't imagine any specific reasons why we were or why we weren't. I suppose it looks like the topic came up in this conversation.")).

4. <u>Smile Source (2013)</u>

1005. Schein and Benco communicated about Smile Source once more in the fall of 2013 when Smile Source approached both companies regarding potentially working together. (CCFF ¶¶ 1006-1019).

1006. In the fall of 2013, Ryan wondered if Schein was discounting to Smile Source. (Ryan, Tr. 1099; CX1158 at 001).

1007. On September 24, 2013, Ryan received market intelligence from Brian Evans (Benco Director of Sales-West) that manufacturers were giving discounts to Smile Source. (CX1158 at 002 ("Apparently our vendor partners (mostly eq) giving discounts to members of this group when making purchases."); CX8037 (Ryan, Dep. at 255) ("Q. In Mr. Evans' earliest e-mail – this is dated September 24th, 2013. The subject is 'Smile Source.' Mr. Evans was telling you that manufacturers were giving discounts to members of Smile Source? A. Yes, that's what it says.")).

1008. On September 24, 2013, Ryan wrote regarding Smile Source, "I know exactly who they are. We've had 2 run ins with them. Who are vendor partners and is it going through HSI?" (CX1158 at 001). At trial, Ryan explained that he asked Evans whether Henry Schein was supplying Smile Source. (Ryan, Tr. 1098-1099). Ryan's reference to "HSI" in CX1158 was a reference to Henry Schein. (Ryan, Tr. 1098-1099; CX8037 (Ryan, Dep. at 255)).

1009. About a week later, on October 1, 2013, Ryan called his counterpart at Henry Schein, Foley. (Ryan, Tr. 1099-1100; CX6027 at 036 (Row 290); Foley, Tr. 4576-4578).

1010. The October 1, 2013 call between Ryan and Foley lasted 18 minutes. (Ryan, Tr. 1100-1101; Foley, Tr. 4578-4579; CX6027 at 036 (Row 290)).

1011. On the October 1, 2013 phone call, Ryan informed Foley that Benco would not bid on Smile Source. (Foley, Tr. 4579; CX0306 (Foley, IHT at 176, 183, 185); CX8003 (Foley, Dep. at 354-355) ("I received a call from Pat Ryan at Benco Dental . . . he basically was making a statement – it was around the Smile Source time – that they didn't like working with buying groups and wasn't going to bid on it.")).

1012. On the October 1, 2013 phone call, Foley "got the impression that they're anti buying group." (Foley, Tr. 4584, 4589; CX0243 at 001).

1013. Foley testified that on the October 1, 2013 phone call, Ryan wanted to know whether Schein would bid on Smile Source. (CX0306 (Foley, IHT at 182)).

1014. Following the call on October 1, 2013 with Foley, Ryan wrote to his boss, Cohen:

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

(CX0019 at 001; Ryan, Tr. 1101). Ryan's reference to "Randy" in CX0019 meant Foley. (Ryan, Tr. 1101).

1015. Ryan would not have intentionally written something false to Cohen. (Ryan, Tr. 1102).

1016. At trial, Foley testified that he waited a week to tell his boss, Muller, about the call with Patrick Ryan. (Foley, Tr. 4586).

1017. In response to an email concerning other matters regarding Smile Source, Foley reported his October 1, 2013 call with Ryan to his boss, Muller. (Foley, Tr. 4589). On October 9, 2013, Foley wrote to Muller:

> 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.

(CX0243 at 001; Foley, Tr. 4588-4589).

1018. Foley did not report the call to anyone else at Schein. (Foley, Tr. 4589).

1019. Foley was "uneasy" about the discussion because it was regarding a potential customer and it is "against company . . . rules" to discuss customers with competitors. (CX0306 (Foley, IHT at 177-178); Foley, Tr. 4585-4586).

1020. Following these communications, Benco declined to work with Smile Source in 2013 and 2014. ([redacted]; Ryan, Tr. 1131; *see also* CX8015 (Cohen, Dep. at 266-267) (Benco did not do business with Smile Source in 2014)).

1021. On August 14, 2014, Ryan described Smile Source as "terrifying." (Ryan, Tr. 1045; CX0015 at 001).

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

1022. On March 22, 2013, a customer called Atlantic Dental Care, PLC ("ADC") approached Benco asking for a bid for its $3.5 million dental supply business. (CX0021 at 003-004 (email from Atlantic Dental Care to Benco Regional Manager He Zhao)).

1023. On March 25, 2013 at 10:22 a.m., He Zhao, BencoRegional Manager for Virginia, forwarded the ADC request for a bid to Ryan, writing, "Attached is the opportunity I picked your brain about. They claim to not be a buying group. The bid deadline is 4/5. Please let me know if this is something I can pursue." (CX0021 at 002-003).

1024. On March 25, 2013, Ryan responded to Zhao's email from earlier that day and instructed him not to bid on ADC. (CX0021 at 002 ("We're out"); Ryan, Tr. 1093-1094 ("We're out" meant "Benco would not bid on ADC")).

1025. On March 25, 2013 at 2:45 p.m., Ryan emailed his boss Cohen with an urgent request: "We need to speak about this quickly. I can't figure out if this is a buying group or not." (CX0020 at 001 (email from Ryan to Cohen, forwarding article entitled, "Atlantic Dental Care Plc raises $56,000 as noted in SEC filing")).

1026. The subject of Ryan's March 25, 2013, email to Cohen was "buying group?" In this email, Ryan forwarded to Cohen a news article regarding Atlantic Dental Care. (CX0020 at 001).

1027. Ryan was asking to speak quickly with Cohen because Ryan could not figure out whether the group, ADC, was a buying group or not. (Cohen, Tr. 543).

1028. Cohen created a calendar entry on March 25, 2013 reminding himself to "Call Tim Sullivan re: Buying Groups." (CX0058 at 001; Cohen, Tr. 543).

1029. Cohen followed through on his March 25, 2013, calendar entry (CX0058 at 001). Shortly after Cohen received Ryan's March 25, 2013 email regarding buying groups, Cohen contacted Sullivan, his counterpart at Henry Schein. (CX6027 at 027 (Row 237);Cohen, Tr. 544).

1030. On March 25, 2013, at 4:13 p.m., about an hour and a half after Cohen received Ryan's email, Cohen sent Sullivan a text message asking for a phone call. (CX6027 at 027 (Row 237) (text message from Cohen to Sullivan, "You around? Available to talk?"); Cohen, Tr. 544)

1031. Sullivan responded to Cohen's text message within two minutes. Cohen and Sullivan set a time to talk at 5 p.m. Eastern Time that day. (CX6027 at 027 (Rows 238-239); Cohen, Tr. 545).

1032. At 4:57 p.m. Eastern Time on March 25, 2013, Sullivan called Cohen and the two spoke for 8 minutes and 35 seconds. (Cohen, Tr. 544-546, 968; Sullivan, Tr. 3945-3946; CX6027 at 027 (Row 240)).

1033. Four minutes after the March 25, 2013 telephone call between Sullivan and Cohen, Sullivan sent Cohen a text message thanking him for the call. (CX6027 at 027 (Row 241) ("Hi Chuck. Thanks for the call."); Sullivan, Tr. 3957)).

1034. Cohen admits that he and Sullivan discussed ADC in their March 25, 2013, telephone call. (Cohen, Tr. 546, 968; CX0301 (Cohen IHT at 271)).

1035. Sullivan admits that he and Cohen discussed ADC in their March 25, 2013 telephone call. (Sullivan, Tr. 3946-3947; CX0311 (Sullivan, IHT at 261)).

1036. Sullivan and Cohen discussed whether ADC was a buying group or corporate group, and ADC in general, on the March 25, 2013 telephone call. (Cohen, Tr.at 547-548; *see also* CX0301 (Cohen, IHT at 271-272 ("[W]e were exchanging information about whether Atlantic Dental Care was a group buying or group purchase organization or a DSO."))).

1037. Cohen testified that the reason he contacted Sullivan on March 25, 2013 was to obtain helpful "facts" and "knowledge." (Cohen, Tr. 719-720). Cohen testified that the purpose of gathering that information from Sullivan was that "[i]t would help us make our decision and it would help us form an opinion and a ruling on how we would handle that account." (Cohen, Tr. 720).

1038. Sullivan testified under oath at his investigational hearing that, in his March 25, 2013 call with Cohen, Cohen "basically said to me that they [Benco] don't plan to, you know, bid on their – this group . . ." (CX0311 (Sullivan, IHT at 260-261)).

1039. Sullivan testified under oath at his investigational hearing that he did not recall Cohen "saying why, just that he was – they were not going to go to bid on [ADC]." (CX0311 (Sullivan, IHT at 299-300) ("Q. During the call Mr. Cohen indicated to you that they were not going to bid on Atlantic Dental Care because it was a buying group; is that right? A. I don't recall him saying why, just that he was – they were not going to go bid on it."))

1040. Sullivan testified under oath at his investigational hearing that, on the March 25, 2013 call, Cohen said, "we're not interested" in ADC. (CX0311 (Sullivan, IHT at 261)).

1041. At trial, Sullivan testified that he did not recall Cohen saying during the March 25, 2013 call that Benco was not planning to bid on ADC. (Sullivan, Tr. 3946-3947; 3949 ("As I sit here today, I don't remember him [Cohen] saying that."). Sullivan's trial testimony is contradicted by his previous, sworn testimony, in which he testified that Cohen did inform him on the March 25, 2013, call that Benco was not planning to bid on ADC. (CX0311 (Sullivan IHT at 260-261, 299-300)).

1042. At trial, Sullivan testified that he no longer recalled the March 25, 2013 telephone call the same way he had at his investigational hearing. (Sullivan, Tr. 3949). Sullivan admitted that, at the time of his investigational hearing, he testified that Cohen had informed him that they were not going to bid on Atlantic Dental Care. (Sullivan, Tr. 3948).

1043. At trial, Sullivan acknowledged that it was his "recollection at the time" of his investigational hearing that Cohen informed him on March 25, 2013, that that Benco was not going to bid on ADC. (Sullivan, Tr. 3948 ("Q. So you testified that Chuck Cohen somehow, at some point, told you that they were not going to bid on Atlantic Dental Care, right? A. That was my recollection at the time.")). Sullivan's investigational hearing occurred on May 25, 2017. (CX0311 (Sullivan, IHT at 001)). The investigational hearing occurred closer in time to the March 25, 2013 call at issue than Sullivan's trial testimony on December 13, 2018.

1044. Text messages following the March 25, 2013 call corroborate Cohen's testimony that he and Sullivan discussed whether ADC was a buying group. (CCFF 1045-1047; *see also* Cohen Tr. 546; CX6027 at 028-029 (Rows 243, 244, 248); CX0196 at 005, 010).

1045. Following the March 25, 2013 telephone call, Cohen texted Sullivan at 10:50 p.m. Eastern Time: "Here's a link to the press release we discussed." (Cohen, Tr. 546; CX6027 at 028 (Row 243). In his text message to Sullivan, Cohen pasted a link to a press release regarding Atlantic Dental Care. (CX6027 at 028 (Row 243) ("Here's a link to the press release we discussed http://marketbrief.com/atlantic-dental-care-plc/d/form-d/2012/11/21/9835185")).

1046. Cohen's 10:50 p.m. text to Sullivan on March 25, 2013 specifies that the two men discussed ADC on their telephone call. (CX6027 at 028 (Row 243) ("Here's a link to the press release we discussed . . .")).

1047. Sullivan responded to Cohen's 10:50 p.m. text message on March 25, 2013, "Thanks for the follow up on that article. Unusual." (CX6027 at 028 (Row 244); Cohen, Tr. 546; Sullivan, Tr. 3957).

1048. Benco believed that the information in the press release regarding ADC would help determine whether ADC was a buying group. (CX0304 (Ryan, IHT at 227) (testifying regarding forwarding Cohen the press release about ADC: "Q. Did you think there was something in this information that you pasted into the e-mail that would help determine whether ADC was a buying group? A. I - I think that's what I thought at the time."); CX0020 at 001 (email from Ryan to Cohen, forwarding press release regarding ADC); Cohen, Tr. 722 (press release that Cohen sent to Sullivan was about the "merger of Atlantic Dental Care's practices into one entity"); Cohen, Tr. 966 (press release sent to Sullivan contained additional information about ADC)).

1049. Sullivan called the March 25, 2013 call from Cohen "crazy." (Sullivan, Tr. 3952; CX0311 (Sullivan, IHT 267-268)). Sullivan testified that at some point in the call, "a red flag went up." (Sullivan, Tr. 3947-3948, 3951-3952). Despite the "red flag," Sullivan did not report the call to Schein's Legal Department, Human Resources Department, or Senior Vice President of Administration. (Sullivan, Tr. 3954-3955). Sullivan did not report the call to anyone even though Schein's Antitrust Compliance Policy required such reporting. (Sullivan, Tr. 3954-3955; CX2673 at 017-018).

1050. Schein's Antitrust Compliance Policy states, "If you find yourself inadvertently in a situation where one or more competitors wish to discuss forbidden antitrust subjects, decline to discuss such subjects and let the competitor know that it is against Company policy to discuss such topics. . . . Always report every such incident to the Legal Department, the Human Resources Department or the Senior Vice President of Administration of the Company." (CX2673 at 017; Sullivan, Tr. 3953-3954). Schein's Antitrust Compliance Policy also states that "[a]greements with competitors" "[n]ot to do business with (to 'boycott') one or more customers" and agreements "not to bid" are "always illegal under the antitrust laws." (CX2673 at 001; Sullivan, Tr. 3868-3869).

1051. Within minutes after the March 25, 2013 telephone call ended, Sullivan thanked Chuck for the call. (CX6027 at 027 (Row 241)). Sullivan wrote, "Hi Chuck. Thanks for the call. Yes, I am good with the terms we discussed and I look forward to joining Team Benco! Ps. Want to confirm that the Benco tooth logo will include a picture of me." (CX6027 at 027 (Row 241)).

1052. Sullivan admits that the portion of his March 25, 2013 text message to Cohen regarding "joining Team Benco" is a joke. (Sullivan, Tr. 3956; CX6027 at 027 (Row 241)).

1053. Cohen also admits that this text was a joke, and he did not recall trying to recruit Sullivan to join Benco on the March 25, 2013 telephone call. (Cohen, Tr. 555).

1054. At trial, Sullivan testified that during the March 25, 2013 call, he told Cohen that they should not discuss ADC. (Sullivan, Tr. 3946, 3950-3951). Sullivan's testimony is contradicted by Cohen's testimony. (Cohen, Tr. 559).

1055. Cohen testified at trial that he did not recall Sullivan ever telling Cohen to stop contacting him about buying groups. (Cohen, Tr. 559 ("Q. You don't recall Mr. Sullivan ever telling you to stop contacting him about buying groups? A. No.")).

1056. Cohen also testified that he did not recall Sullivan ever giving Cohen the impression that the he and Sullivan should not be talking about buying groups. (Cohen, Tr. 559 ("Q. You don't recall Mr. Sullivan ever giving you the impression that you two should not be talking about buying groups. A. No.")).

1057. Sullivan admitted that shortly after his March 25, 2013, call with Cohen, Cohen sent Sullivan a link via text message to an article about ADC and referred to it as "the press release we discussed." (Sullivan, Tr. 3956-3957; *see* CX6027 at 027 (Row 243)).

1058. Sullivan admitted that, four minutes after receiving the March 25, 2013 text from Cohen with a link to the article about ADC, Sullivan responded to Cohen's text message, thanking Cohen for the article and commenting on it. (Sullivan, Tr. 3957; *see* CX6027 at 028 (Row 244) ("Thanks for the follow up on that article. Unusual.")).

1059. Sullivan further admitted that the next day, March 26, 2013, Cohen sent him yet another text message about a buying group. (Sullivan, Tr. 3957-3958; *see* CX6027 at 028 (Row 245)).

1060. The following morning, March 27, 2013, Sullivan attempted to call Cohen, but did not connect. (Sullivan, Tr. 3959; CX6027 at 028 (Row 247)).

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

1061. On March 27, 2013, two days after the initial March 25 call between Cohen and Sullivan regarding ADC, Benco had determined that ADC owned all the practices involved, and that it therefore did not qualify as a buying group. (CCFF ¶¶ 1062-1065; Cohen, Tr. 548-549; CX0196 at 010).

1062. After conferring with outside counsel, retained to analyze ADC's SEC filings and incorporation papers, on March 27, 2013, Ryan had an understanding of ADC's business structure, and concluded that ADC was not a buying group. (Ryan, Tr. 1200-1202, 1270-1272).

1063. On March 27, 2013, Ryan spoke with outside counsel on the telephone regarding ADC. Following that call, Ryan had the understanding that ADC was not a buying group, but was a corporate dental practice because ADC owned all the practices. (Ryan, Tr. 1201-1202).

1064. The contents of Ryan's phone call with outside counsel was confidential information that was not made public. (Ryan, Tr. 1271-1272).

1065. Ryan explained what he learned from outside counsel regarding ADC to Cohen. (Ryan, Tr. 1272).

1066. Benco decided to bid on ADC after concluding it was not a buying group. (Cohen, Tr. 549; CX0196 at 010; CX6027 at 029 (Row 248)).

1067. Benco decided to bid on ADC after conferring with outside counsel. (Ryan, Tr. 1201-1202; CX0301 (Cohen, IHT at 209-210)).

1068. Shortly after deciding to bid on ADC, Cohen reached out to Sullivan to inform him that Benco would bid on ADC because it was not a buying group. (Cohen, Tr. 549-550).

1069. On March 27, 2013, Cohen sent the following text message to 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.

(Cohen, Tr. 549; CX0196 at 010; *see also* Sullivan, Tr. 3959; CX6027 at 029, (Row 248). Cohen testified: "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." (Cohen, Tr. 549).

1070. Cohen's March 27, 2013, text to Sullivan informed Sullivan of Cohen's new understanding that ADC was not a buying group, but was a corporate account. (Cohen, Tr. 549; CX0196 at 010 ("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 . . ."). Cohen testified: "Q. And you're telling him [Sullivan] that your new understanding was that ADC was not a buying group. A. Yes. Q. But rather a corporate account. Q. Yes." (Cohen, Tr. 549).

1071. Cohen provided Sullivan with the same information regarding ADC that he also provided to Guggenheim of Patterson: "that ADC had merged, and so it was a big group and not a buying group." (Cohen, Tr. 562) ("Q. And as a side note, you recall that you told Tim Sullivan of Schein the same information, that ADC had merged, and so it was a big group and not a buying group. A. Yes.").

1072. Cohen admitted at trial that it was against Benco's business interest to tell Sullivan that Benco was going to bid on a corporate group. (Cohen, Tr. 550).

1073. Cohen admitted that his text message to Tim Sullivan regarding bidding on ADC was an instance of counter-rational conduct. (Cohen, Tr. 552).

1074. Cohen previously testified under oath that informing Sullivan of Benco's decision to bid was counter to his rational self-interest: "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." (CX0301 (Cohen, IHT at 277); Cohen, Tr. 551-52)

1075. Cohen believed that it was against Benco's business interest "in the smaller picture" to share its competitive position with its largest rival, but that "in the larger picture" he did so to maintain credibility with Sullivan in the long term. (Cohen, Tr. 551-552; *see also* CX301 (Cohen, IHT at 277-278)).

1076. Cohen provided Benco's bidding information to Sullivan because he "did not want [Sullivan] to think I was "duplicitous in his first call and was trying to head-fake them" if he did not follow up. (Cohen, Tr. 723). Cohen testified, "I wanted to be perceived as an honest purveyor of information and maintain a high level of credibility with Tim and others." (Cohen, Tr. 723). Cohen would hate for Tim Sullivan to find out that Cohen had not been fully forthcoming with respect to the ADC situation. (Cohen, Tr. 553).

1077. Cohen admitted that from time to time he acted irrationally from a business perspective in communicating with Sullivan and Guggenheim. (Cohen, Tr. 552).

1078. Sullivan likewise could not offer any procompetitive justifications. (CX0311 (Sullivan, IHT at 268) ("Q. Can you think of any reason for Mr. Cohen to communicate what he did with you? . . . A. I cannot.")).

1079. Following the receipt of Cohen's March 27, 2013, text message regarding bidding on ADC, Sullivan attempted to reach Cohen over the phone but was unable to do so. (Sullivan, Tr. 3959; CX6027 at 029 (Row 250)).

1080. Following the receipt of the March 27, 2013 text message regarding bidding on ADC, Sullivan and Cohen tried to reach each other on the telephone several times. (Sullivan, Tr. 3959, 3963; CX6027 at 029, (Row 250 (Sullivan calls Cohen on March 27), Rows 253 and 254 (Cohen calls Sullivan twice on March 28) and Row 255 (Sullivan calls Cohen on April 3)).

1081. ADC also sought a bid from Schein in 2013. CX8000 (Porro, Dep. at 133, 139-140).

1082. After failing to connect with Cohen by telephone on March 27, 2013, the very next call Sullivan made was to Michael Porro. (Sullivan, Tr. 3968). Michael Porro was the Schein manager in charge of the zone where Atlantic Dental Care was located. (Sullivan, Tr. 3967).

1083. Sullivan reached Porro by telephone on March 25, 2013, and spoke to him. (Sullivan, Tr. 3969).

1084. On April 1, 2013, days after receiving the March 27, 2013 text message from Cohen stating that ADC was not a buying group and that Benco would be bidding, Sullivan told Porro and other Schein executives that Schein should bid on ADC. (Sullivan, Tr. 3967-3968; CX2021 at 022 (Sullivan email to Porro and four others, subject: "Re: Atlantic Dental Care – HOT. . . I think we should take a shot at this.") (emphasis in original)).

1085. On April 1, 2013, Sullivan wrote, “I think we should take a shot at this.” (CX2021 at 022). Sullivan meant that Schein should take a shot at bidding on Atlantic Dental Care. (Sullivan, Tr. 3968).

1086. On March 31, 2013, Porro wrote in an email that he had talked to Sullivan and “[t]he thinking is that Benco, a decent player in the market and always hungry, will put in a bid.” (CX0198 at 013).

1087. On March 31, 2013, Porro, in an email to Sullivan and others, identified the risk in not bidding for ADC’s business, and the upside of obtaining new business if Schein won. (CX0198 at 014 (“If we win the upside is the other business we don’t currently get.”)).

1088. On April 3, 2013, Cohen and Sullivan finally reached each other by telephone. They spoke for 5 minutes and 36 seconds. (Sullivan, Tr. 3963; CX6027 at 029 (Row 256)).

1089. At trial, Sullivan claimed that during the April 3, 2013 call, Sullivan told Cohen that he should “stop sending me information about customers.” (Sullivan, Tr. 3966). Sullivan’s testimony is contrary to sworn testimony that he provided at his investigational hearing when he was asked about the same April 3, 2013 phone call. At his investigational hearing, Sullivan testified that he did not know what his April 3, 2013 call with Cohen was about, but that he did not believe it was possible that the call related to Atlantic Dental Care. (CX0311 (Sullivan, IHT at 310-311)).

1090. Sullivan’s testimony regarding his April 3, 2013, call with Cohen is also contrary to Cohen’s testimony. Cohen testified at trial that he did not recall Sullivan ever telling Cohen to stop contacting him about buying groups. (Cohen, Tr. 559). Cohen also testified that he did not recall Sullivan ever giving Cohen the impression that the two men should not be talking about buying groups. (Cohen, Tr. 559).

1091. On April 5, 2013, Tim Sullivan sent an email to Porro, Muller, Steck, and Foley regarding Benco's bid on ADC, stating, "I'm guessing Benco will approach with a 'no FSC' proposal." (CX2054 at 001 (email from Sullivan, "Subject: Re: Atlantic Dental Care – HOT") (emphasis in original)).

1092. Subsequent to the March 2013 communications between Sullivan and Cohen regarding ADC, Benco bid on ADC. (Ryan, Tr. 1093-1095; Sullivan, Tr. 3969; CX1417 at 001-006).

1093. Subsequent to the March and April 2013 communications between Sullivan and Cohen regarding ADC, Schein bid on ADC. (Sullivan, Tr. 3969; CX2020 at 001-007).

1094. On April 8, 2013, Porro sent Sullivan Schein's planned proposal to Atlantic Dental Care. (CX2021 at 001, 026-029).

1095. Schein's planned proposal to ADC included language that permitted Schein to terminate the agreement if Schein discovered that ADC was a buying group. (Sullivan, Tr. 3970-3971; CX2021 at 028).

1096. Schein's planned proposal to ADC stated, "This agreement can be terminated with 30 day notice if . . . Schein finds out that is purely a buying group, defined as 'pooling individual volume purely to obtain lower prices from suppliers of good and services." (CX2021 at 028).

1097. Sullivan initially viewed ADC as nothing more than a buying group and planned to "walk away" from the group. In an April 4, 2013, email to Porro, Muller, Steck, Foley, and others, regarding ADC, Sullivan stated, "Our first reaction to this was it was simply a buying group and we were going to walk away." (CX2021 at 013; Sullivan, Tr. 3969).

1098. On April 4, 2013, Sullivan also wrote, "However the more MP dug onto this the more of a Comfort Dental group this seems to be. Seeing as this then qualifies as potential Elite DSO just as Comfort is, we probably need Randy involved." (CX2021 at 013; Sullivan, Tr. 3969).

1099. Comfort Dental is an Elite DSO. (Sullivan, Tr. 3969).

1100. Benco won the ADC bid. (Cohen, Tr. 553; Ryan, Tr. 1095).

XI. BENCO PLANNED TO SHORE UP THE AGREEMENT WITH SCHEIN AND PATTERSON.

1101. In the fall of 2013, Benco discovered that the fourth largest distributor, Burkhart, was discounting to buying groups. (CCFF ¶¶ 1207, 1201, 1459; *see generally* Section XVI, *infra*). In response, McElaney of Benco spoke with Jeff Reece of Burkhart regarding buying groups. (CCFF ¶¶ 1208, 1209, 1212). Following his call with Reece, McElaney reported to Cohen, his boss, "JEFF [REECE] DOES NOT GET IT!!" (CX0023 at 001 (emphasis in original); CCFF ¶1218).

1102. In response to news that Burkhart was discounting to buying groups, Ryan asked Cohen to contact Tim Sullivan and Paul Guggenheim to shore up the agreement. (CCFF 1103, 1105, 1106).

1103. On September 16, 2013, Ryan wrote to Cohen in response to concern that Burkhart was selling to buying groups: "CHUCK --- maybe what you should do is make sure you tell Tim [Sullivan] and Paul [Guggenheim] to hold their positions as we are[.]" (CX0023 at 001 (emphasis in original); Ryan, Tr. 1114-1115; Cohen, Tr. 581).

1104. At trial, Ryan testified that his September 16, 2013, email referred to telling Tim Sullivan and Paul Guggenheim to hold their "position" of not working with buying groups, just as Benco was holding its position of not working with buying groups. (Ryan, Tr. 1114-1115; *see also* Cohen, Tr. 581-582).

1105. Cohen believed that Ryan was suggesting Cohen reach out and reiterate Benco's no buying group policy to Sullivan and Guggenheim. (Cohen, Tr. 581-582).

1106. At the time of Ryan's September 16, 2013, email, Benco had a no buying group policy (Cohen, Tr. 444-445), and Cohen understood that Benco, Schein, and Patterson all had a similar policy with respect to buying groups. (Cohen, Tr. 582, 590; CX0301 (Cohen, IHT at 310)).

1107. Around the time of this exchange, Cohen approached Burkhart about joining the conspiracy. (CCFF ¶¶ 1226, 1227, 1228, 1230, 1231, 1233, 1234, and 1237).

1108. In February of 2014, Paul Jackson of Benco emailed Cohen and McElaney about Burkhart's business with buying groups. (CX0040 at 001). Twice in the email chain (once in a February 10, 2014, email, and once in a February 11, 2014, email) Jackson asks McElaney to contact Burkhart about buying groups being harmful to dental companies. The February 11 email states, "Mike, please talk some cents [*sic*] into them"; the February 10 email states, "Mike, maybe you can give someone at Burkhart a call to help them understand most GPO contacts have to be able to install equipment nationwide. Last I checked there is no hope of Burkhart being nationwide." (CX0040 at 001).

XII. THE BIG THREE COMMUNICATED ABOUT THE TDA BUYING GROUP.

A. Background on TDA Perks

1109. The Texas Dental Association, also known as "TDA," holds a meeting for its members annually. (Rogan, Tr. 3561-3562; Steck, Tr. 3691).

1110. In October 2013, TDA launched a buying group referred to as TDA Perks. (Cohen, Tr. 576; Rogan, Tr. 3562). The buying group was supplied by SourceOne. CX2616 at 001-002; CX9024 (Osio (SourceOne), Dep. at 80-82).

1111. Benco viewed TDA Perks as a buying group. (Cohen, Tr. 576 (Cohen saw TDA Perks as a buying group); Ryan, Tr. 1104-1105).

1112. Schein viewed TDA Perks as a buying group. (Sullivan, Tr. 4011-4013 (Sullivan viewed TDA Perks as a buying group); CX2746 at 003 (With respect to TDA creating the TDA Perks program, Sullivan writes in an April 28, 2014 email: "I don't believe that creating a Buying Group mentality with State Associations is a good long term strategy."); CX2616 at 003-004; CX2747 at 001).

1113. Patterson viewed TDA Perks as a buying group. (Misiak, Tr. 1403 (TDA Perks is "a program to buy supplies at a discount through the TDA"); CX0316 (Misiak, IHT at 298-299) (TDA Perks Supply program is "a buying group put together by the Texas Dental Association"); Misiak, Tr. 1407 (Misiak previously stated under oath that TDA Perks was a buying group)).

1114. The TDA Perks program was a threat to Respondents because it was a buying group—and because TDA planned to facilitate the state association buying group model in other states as well. (Steck, Tr. 3697; *see also* CX9024 (Osio, SourceOne Dep. at 118-121, 123); CX2746 at 003-004).

1115. TDA planned to facilitate the opening of the state dental association buying group model in Arizona, Florida, Illinois, Louisiana, South Carolina, North Carolina, Pennsylvania, Michigan, and Virginia. (CX9024 (Osio, SourceOne Dep. at 118-121, 123)).

1116. Schein, Patterson, and Benco viewed the TDA buying group as a threat. (Steck, Tr. 3697; CX1062 (new competitor); CX2746 at 003-004 (viewed as competition); CX2616 at 002-003 (fear of losing customers); CX0108 at 002 (viewed as competition)).

1117. For years, Schein, Patterson, and Benco provided financial support for the TDA by paying to attend its annual meetings and trade shows. Schein paid the Texas Dental Association to attend its annual TDA Trade Show. (CX0305 (Cavaretta, IHT at 207); CX0311 (Sullivan, IHT at 358-359)). Patterson also paid for its booth at the TDA annual trade show, and provided other monetary support to the TDA apart from paying for its booth. (CX0317 (Rogan, IHT at

323)). Benco paid for its booth at the 2014 TDA trade show, prior to withdrawing. (CX0301 (Cohen, IHT at 337)).

B. Cohen Instructed Regional Manager to Contact Competitors Regarding TDA.

1118. On October 14, 2013, Cohen instructed his Regional Manager in Texas, Ron Fernandez, to contact Schein and Patterson to discuss cutting back support for TDA's meetings and programs because TDA was starting a buying group. (CX1057 at 001; CX8015 (Cohen, Dep. at 362)). On October 14, 2013, Cohen wrote, "Suggest that we make it clear to the TDA that we will be cutting back our support of their meetings & programs, but that's your call. Also, give a heads up to our friends from Patterson, Schein, Midwest, etc. . . ." (CX1057 at 001).

1119. The Regional Manager (Ron Fernandez) followed that direction and contacted Patterson and Schein employees to coordinate "taking a stand together" against TDA. (CX1278 (Excel worksheet "Chats" tab at row 9) ("I have been talking to the directors of Schein and Patterson. We are going to be taking a stand together against [TDA]."); CX1328 at 007 (Benco's Response to RFA ¶8) (Benco's Ron Fernandez spoke with Schein's Glenn Showgren by telephone about TDA Perks Supplies on October 15, 2013); *see also* CX0178 at 002-003; CX1289 at 001; CX0108 at 001 ("As for Patterson, we have briefly discussed this TDAPerks site . . . with our dealer competitors at the local San Antonio & Houston level . . . .")).

1120. On October 16, 2013, Schein Regional Manager (Glenn Showgren) provided a detailed report of a call he had with Benco's Ron Fernandez to his supervisor, Joe Cavaretta. He wrote in an email to Joe Cavaretta:

> Call was mostly about the TDA Merch Program. The bullet points for Joe are below.
>
> - Benco considering suspending all activities with the TDA including pulling out of the state show.

- Chuck Cohen will be reaching out to, or has reached out to, Tim Sullivan to see if HSD would do the same thing.
- Ron wanted to know if I have a relationship with local [Patterson Regional Manager] to see if they would consider pulling out as well.
- I will be having lunch with Ron week after next to discuss concerns and share what we have found out about the program.
- I laid out ground rules that I will NOT discuss a pricing response and any action would have to be cleared by my Legal Team before communicating with the TDA.

(CX0178 at 002-003).

1121. In late 2013, Benco's Regional Manager Ron Fernandez communicated with Patterson's John Hyden by telephone about the 2014 TDA Annual Meeting. (CX1328 at 007-008 (Benco's Response to RFA. ¶11); CX3365 at 003 (Patterson's Response RFA ¶3)). In that call, Hyden told Fernandez that Patterson would not be attending the 2014 TDA Annual Meeting. (CX3365 at 003 (Patterson's Response RFA ¶3)).

1122. In December 2013, a Schein regional manager in Texas visited a Patterson branch manager. (CX3113 at 007 (Answer of Patterson ¶71(b)). On December 13, 2013, Schein zone manager passed this information along to his boss, stating, "FYI Patterson pulled out of the [TDA] Convention. I firmly believe they made the move expecting us to follow suit." (CX0179 at 002).

C. Patterson and Schein Communicated About TDA Buying Group.

1123. High-ranking executives at Schein and Patterson communicated about a response to TDA Perks. (Steck, Tr. 3697; CCFF ¶¶ 1124-1126, 1128-1132).

1124. On January 6, 2014, Patterson's Misiak called Schein's Steck. (CX6027 at 036 (Row 298)). The two spoke for 14 minutes. (CX6027 at 036 (Row 298)).

1125. On that January 6, 2014 telephone call, Patterson's Misiak informed his counterpart at Schein, Steck, that Patterson was planning to pull out of the TDA meeting. (Steck, Tr. 3701-

3702; CX6027 at 036 (Row 298); *see also* CX2801 at 015 (Schein's Response RFA ¶23 (at some point between December 2013 and January 2014, Patterson's Dave Misiak and Schein's Dave Steck communicated; one topic that was discussed concerned the TDA trade show)); CX3113 at 007 (Answer of Patterson ¶71(c) (TDA was mentioned in January 2014 phone call between Patterson and Schein)).

1126. According to Steck, on that January 6, 2014 call, Steck told Patterson that Schein had not made a decision on attending the 2014 TDA. (Steck, Tr. 3702). Steck promised to get back to Misiak with Schein's final decision. (Steck, Tr. 3702-3703).

1127. On January 7, 2014, the day after Misiak spoke with Steck, Misiak received information about the TDA Perks program from Clint Edens, a Patterson regional manager for the Texas region. (Misiak, Tr. 1411-1412; CX0157 at 001). Edens sent Misiak information about the TDA Perks program, stating "Dave, let me now if you need anything else." (CX0157 at 001; Misiak, Tr. 1411-1412).

1128. Steck reported his conversation with Patterson's Misiak to Schein's President, Tim Sullivan and to Joe Cavaretta. (Steck, Tr. 3703). Steck informed Sullivan that he would follow up with Misiak as to Schein's decision regarding the TDA buying group. (Steck, Tr. 3703).

1129. On January 21, 2014, Steck sent an internal email to three Schein managers, stating "Guys, I have to get back to PDCO on whether or not we are attending the TDA." (CX0205 at 002; Steck, Tr. 3705).

1130. On the same day, January 21, 2014, but after Steck had sent his internal email to Schein managers, Steck emailed Misiak at Patterson under the subject matter "Texas," saying, "Hi Dave, I'll be calling you to let you know about our decision on the matter we recently discussed in the next couple days." (CX0112 at 001; Misiak, Tr. 1413-1414; Steck, Tr. 3704).

1131. Misiak forwarded Steck's January 21, 2014 email to his colleague, Tim Rogan, Patterson's VP for Merchandise Marketing, stating, "[Steck] already told me they were out. Full blown!" (CX0112 at 001; Misiak, Tr. 1413-1414). Rogan responded, "That sucks. You should call him. 'Thought I could trust you' type of conversation." (CX0112 at 001).

1132. Misiak could think of no other way to read this email other than to mean that Steck had communicated that Schein had pulled out of the TDA Annual Meeting. (Misiak, Tr. 1414; CX8038 (Misiak, Dep. at 290-293)).

D. Benco Communicated With Both Schein and Patterson About TDA Buying Group.

1133. On April 16, 2014, Cohen emailed Sullivan and Guggenheim on the same email chain about the TDA buying group; Cohen forwarded an article promoting the TDA Perks program. (Cohen, Tr. 577; CX1062 at 001). Cohen wrote, "Tim & Paul. . . Thought you'd be interested in this 'essay' from our friends at the TDA." (CX1062 at 001; Cohen, Tr. 577).

1134. The article discussed TDA Perks leveraging the volume purchasing power of TDA members formerly only available to corporate practices to level the playing field between independent dentists and corporate dental practices. (CX1062 at 003).

1135. Sullivan and Cohen spoke by telephone on April 16, 2014, for nine minutes and 16 seconds. (CX6027 at 042 (Row 344)). Sullivan initiated the telephone call. (CX6027 at 042 (Row 344)).

1136. After receiving Cohen's email regarding the TDA buying group, Guggenheim made himself a calendar entry task to call Cohen about the TDA Perks letter. (CX0101 at 001). The task "Percent Complete" is 100%. (CX0101 at 001).

1137. Guggenheim is not aware of any business reasons why he planned to call Cohen, the managing director of his competitor Benco, about the TDA Perks letter. (Guggenheim, Tr. 1684).

E. Following Inter-Firm Communications, the Big Three Did Not Attend TDA's Annual Meeting.

1138. Following these communications, Schein's Randy Foley explained that the Big Three were on the same page regarding TDA. On March 5, 2014, Foley wrote to Chad Thompson of Heartland: "The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott." (CX2106 at 001; Foley, Tr. 4596-4598).

1139. The following day, on March 6, 2014, Foley wrote by email to Schein employees regarding Texas Dental Association: "We should join pdco and boycott." (CX2668 at 002). On a later email in the same email chain, dated March 7, 2014, Steck wrote to Foley regarding Texas Dental Association: "Pretty sure we are going to boycott as well." (CX2668 at 001).

1140. On October 25, 2013, Patterson's VP for Marketing, Tim Rogan, responded to an email from Clint Edens, Patterson's South Central Regional Manager, who asked Rogan for guidance in responding to TDA about its TDA Perks Program. (CX0109 at 001-002). Rogan instructed Edens that he should "tell them [Patterson is] seriously considering pulling out," and added that "just PDCO or HSIC pulling out of their annual meeting will mitigate any profits" TDA would make from sales. (CX0109 at 001).

1141. In December of 2013, Schein's VP of Sales Dave Steck suggested to Tim Sullivan by email that "we should get together with a group of other dealers and manufacturers and send them a petition." (CX0179 at 001; CX0310 (Steck, IHT at 201-202)). Steck received and/or shared information from manufacturers, Ivoclar, Planmeca, and Dentsply, about participation with the TDA. (CX0310 (Steck, IHT at 236-238, 242, 276); CX0208 at 001; CX0209; CX0210 at 001).

1142. Schein withdrew from the TDA meeting in early April under Tim Sullivan's approval. (Steck, Tr. 3706; CX2306 at 001-002; CX0310 (Steck, IHT at 186)). This was the first time Schein had not attended the TDA for nearly two decades. (Steck, Tr. 3692).

1143. Schein's former Director of Sales, Michael Porro believed Schein withdrawing along with other distributors and vendors "sends a clear message." (CX2049 at 001).

1144. Benco pulled out of the 2014 TDA Annual Meeting in early April, too, because "Schein & Patterson are as well." (CX0063 at 001). Benco did not attend TDA's annual trade show in 2014, which was the first time Benco did not attend since beginning operations in Texas. (Cohen, Tr. 576).

1145. Patterson did not attend the TDA Annual Meeting in 2014. (Misiak, Tr. 1408-1409).

1146. One of the reasons Patterson did not attend the 2014 TDA Annual Meeting was TDA's decision to create TDA Perks Supplies. (CX3365 at 003 (Patterson's Response to RFA ¶2); Rogan, Tr. 3563-3564).

1147. Schein began attending the TDA trade show again in 2016. (Sullivan, Tr. 4016).

F. The Big Three Previously Attended the TDA Meeting but Wanted to Send a Strong Message.

1148. Schein, Patterson, and Benco knew that TDA relied on fees paid by distributors to exhibit at its annual show. (CX0178 at 001 (October 2013 email from Schein's Cavaretta to Sullivan regarding pulling out of 2014 TDA meeting: "They need our money from these shows and it is our biggest leverage opportunity."); CX2049 (April 2014 email from Schein's Porro to Kyle: "Love the backing out of TDA move. That sends a clear message! They need that $$$"); CX0109 at 001 (October 2013 email from Patterson's Rogan to Region Manager: "State

Associations fear we'll pull out all the time. . . .just [Patterson] or [Henry Schein] pulling out of their annual meeting will mitigate any profits they will make from the mail orders sales."); *see also* CX1057 at 001).

1149. Schein's Sullivan wanted to send a "strong" message to TDA and other trade associations that they risked losing distributor support if they continued to offer buying group programs. (CX2746 at 002-004 (April 2014 email from Schein's Sullivan: "I don't believe that creating a Buying Group mentality with State Associations is a good long term strategy. . . there are a few that are starting to dip their toes into competing with us and I support sending a strong message in return."); *see also* CX2049 at 001 (April 2014 email from Porro to Kyle: "Love the backing out of TDA move. That sends a clear message!")).

1150. Patterson's Rogan testified that, by Patterson pulling out of the TDA show, TDA would lose money. (CX0317 (Rogan, IHT at 303) ("Q. You stated that Mr. Edens was trying to send a message and making the business decision to pull out of the TDA trade show; right? A. Yes. Q. What do you understand that message was? A. Well, we spend a lot of money, and that goes to the trade association for us being able to exhibit at that meeting . . . So by pulling out . . . they would lose that money.")).

1151. Schein's Sullivan understood that pulling out of the TDA Annual Meeting was a "major move." (CX0178 at 001 (October 2013 email from Schein's Sullivan)). Sullivan understood it could cost them customers because TDA's membership was made up of customers. (CX0178 at 001, October 2013 email from Schein's Sullivan to Cavaretta, "[TDA] also represent[s] out [*sic*] customers. Their membership is made up of customers. They vote with their dollars too."). Patterson's Rogan testified that pulling out of the TDA meeting was a disservice to Patterson's salespeople because they sell and meeting with customers at trade shows. (CX0317 (Rogan, IHT at 319) ("Q. And why would pulling out of the TDA been a disservice to Patterson Salespeople? A. Because they sell things at these trade shows and meet with customers at these trade shows.")).

1152. Presence at trade shows is an element of competition with other full-service distributors. (Steck, Tr. 3800-3801; CX0302 (Jackson, IHT at 102); *see also* CCFF ¶ 1154).

1153. Schein, Patterson, and Benco did not attend the TDA meeting following the creation of the TDA Perks buying group. (CCFF ¶¶ 1142, 1145, 1144).

1154. The absence of the largest dental distributors limited competition at the 2014 TDA meeting. (RX1135 (Reece, Dep. at 11)). Burkhart, the largest full-service distributor in attendance at the TDA meeting, gained sales as a result of the non-participation of Schein, Patterson, and Benco. (RX1135 (Reece, Dep. at 11); CX4276 at 001 (June 2014 email from Burkhart's Lout to Sundheimer: "The TDA situation, with PDS, HS and Benco not showing up, has given [Burkhart] a nice burst in the last month on new clients. This… will really help in the coming months"); CX4275 at 001 (June 2014 email from Burkhart's Inman to Reece "New Clients from the TDA" reflecting $9K in new sales from a single Burkhart branch following the 2014 TDA meeting)).

1155. State dental associations that had planned to launch a dental supplies buying group program similar to TDA Perks were discouraged from doing so because of the withdrawal from the 2014 TDA Annual Meeting by Schein, Patterson and Benco. (CX9024 (Osio, SourceOne Dep. at 142-145, 233) (Question to Donovan Osio, Managing Director of TDA Financial, "Q. Can you list for me the associations that told you that they were deferred from endorsing SourceOne by the boycott of the 2014 Texas meeting? A. I believe it was South Carolina, Virginia, Louisiana, and Colorado, I believe."); CX9051 (Blackwell, SourceOne Dep. at 423-424 exh. 211) (April 11, 2015, Minutes of the Board of Directors of the Louisiana Dental Association: "Dr. Maginnis was informed by representatives of Patterson and Henry Schein that if the LDA/LDS proceeds with the endorsement of SourceOne, Schein and Patterson would not exhibit at future [New Orleans Dental Conference] events and the other suppliers they bring with them would also pull out . . . RESOVLED, that the board delay the decision on the endorsement of SourceOne Dental"); CX9052 (Brockhaus, SourceOne Dep. at 156-158, 105, exh. 243) (January 2015 email from Associate Executive Director of the Colorado Dental Association to SourceOne executive: "Our Finance Council met over the weekend to discuss joining into the GPO with Texas and Arizona. The group is a little concerned about the major dental suppliers in our area, Schein, Patterson and others pulling their support to the CDA and our largest component society . . ."); CX9071 (Trotter, SourceOne Dep. at 41-42) (Assistant Executive Director of Washington State Dental Association testified that information about a "boycott potentially happening with the Texas Dental Association . . . that major suppliers decided not to exhibit at the Texas Dental Association annual conference" was a negative factor in the dental association's consideration of using SourceOne))).

G. The Big Three Followed the Same Pattern of Inter-firm Communications With Respect to the Arizona Dental Association Meeting.

1156. Schein, Patterson, and Benco employees communicated regarding the Arizona Dental Association (AzDA) after the AzDA created a buying group program. (CX1378 at 001 (June 18, 2014, email in which Benco's Mike Wade reporting that he is communicating with Schein and Patterson regarding the Arizona Dental Association (AZDA) annual meeting and buying group); CX2756 at 001 (July 10, 2014, email with Schein's Kevin Upchurch describing a call from Benco's Evans discussing AZDA); CX2757 at 001 (July 18, 2014, internal Schein email indicating advance knowledge of Benco's plans to pull out of the AZDA meeting); *see also*

CX2801 at 010 (Schein's Response to RFA ¶8) (on or about April 9, 2014, Schein's Upchurch received a phone call from Benco's Fernandez concerning AzDA)); CX2801 at 011 (Schein's Response to RFA ¶9) (on or about June 18, 2014, Benco's Wade left a voicemail message for Schein's Upchurch regarding AzDA)); CX2801 at 011 (Schein's Response to RFA ¶10) (on or about July 10. 2014, Schein's Upchurch received a phone call from Benco's Evans regarding AzDA)); CX2801 at 011 (Schein's Response to RFA ¶¶11, 12 (on or about July 14, 2014, Schein's Upchurch left a voicemail message for Benco's Mike Wade regarding AzDA; after missing a return call from Wade, Upchurch left another voicemail message on July 18, 2014)); CX1331 at 001 (July 30, 2014, Benco internal email reporting that Schein, Patterson, and Benco have all exchanged assurances that they will not support the Arizona Dental Association meeting in response to AzDA's buying group program); CX1328 at 006 (Benco's Response to RFA ¶5 (Benco did not attend the 2015 AzDA Annual Meeting)); CX2801 at 009 (Schein's Response to RFA ¶5 (Schein was not an exhibitor at the Arizona Dental Association's Annual Meeting in 2015)).

1157. Patterson's Southwest Regional Manager, Dan Reinhardt, received a copy of a Patterson communication with Benco, and rather than stopping the communication merely cautioned his branch manager, "Please discuss live and no further emails." (CX3300 at 001).

1158. On July 21, 2014, Benco's Arizona Manager sent an email to Patterson's Arizona branch manager about AzDA Perks, stating, "I know that Patterson, Schein and Benco boycotted the Texas Dental Association meeting this year after the TDA did the same thing and wanted to see if we could create the same message here in [Arizona]." (CX3300 at 002). Patterson's Arizona Branch Manager responded to Benco's Manager that it would also withdraw its sponsorship and attendance at the AzDA annual meeting if information that Benco provided about AzDA Perks was true. (CX3300 at 001; CX1112 at 034 (Answer of Benco ¶73) (admission that email containing the quoted language was sent by Benco's Arizona regional manager)).

XIII. THE BIG THREE BEGAN COMPETING FOR BUYING GROUPS IN LATE 2015.

1159. In April 2015, Benco settled an antitrust investigation into its refusal to attend the TDA annual meeting by entering an Agreed Final Judgment and Stipulated Injunction with the Texas Attorney General's Office on April 9, 2015 (the "2015 Benco Final Judgment"). (CX6021; CX1328 at 013 (Benco's Response to RFA ¶29)). Exhibit CX6021 contains the State of Texas Original Petition and the Agreed Final Judgment and Stipulated Injunction with the Office of the Texas Attorney General.

1160. The 2015 Benco Final Judgment required Benco to submit a detailed log of its officers, directors, or sales employees' communications, whether written or oral, with any distributor competitor for a three-year period. (CX6021 at 012 ¶J). Specifically, it required Benco to: "[f]or a period of three (3) years, maintain and furnish to the State on a twice yearly basis, a log of all oral and written communication, relating in whole or in part to the distribution or sale of dental supplies in the United States, between or among (1) any of Benco's officers, directors, or sales employees, and (2) any person employed by or associated with any dental supply distributor." (CX6021 at 012 ¶J). It also required Benco to provide detailed information about any such communications, and to identify (by name, employer, and job title) the author and recipients of all participants in the communications, the date, time, and a good faith estimate of the duration of the communication, the medium of the communication, and a description of the subject matter of the communication. (CX6021 at 012 ¶J).

1161. The 2015 Benco Final Judgment required Cohen to log and submit any communications with Sullivan or Guggenheim about buying groups to the Texas Attorney General's Office. (CX6021 at 012 ¶J).

1162. The 2015 Benco Final Judgment also permanently enjoined Benco from communicating with, or agreeing with, competitors about refusing to sell dental supplies to any third party. Specifically, it enjoined Benco from "[a]dvising in writing, declaring, announcing, providing notice, or otherwise intentionally communicating a message to any dental supply distributor that Benco will or may … Contract with or terminate a contract with any other dental supply distributor or discounter." (CX6021 at 009 ¶E). It also, among other things, enjoined Benco from "[c]ontinuing, maintaining, entering into, or attempting to enter into any agreement or understanding with any manufacturer or distributor to limit supply or refuse to sell dental supplies to any third party, or through or by means of any distribution channel." (CX6021 at 009 ¶A).

1163. Schein entered into a similar Agreed Final Judgment and Stipulated Injunction with the Office of the Texas Attorney General on August 3, 2017 (the "2017 Schein Final Judgment"). (CX6023). The 2017 Schein Final Judgment required Schein to submit a detailed log of certain executives' communications (including Sullivan), whether written or oral, with any distributor competitor for a two-year period. (CX6023 at 006 ¶I). Specifically, it required Schein to: "[f]or a period of two (2) years, maintain and furnish to the State on a twice yearly basis, a log of all oral or written communications, relating in whole or in part to the distribution or sale of dental supplies in the United States, between or among (1) the HSD employees with the following titles as of the date of third Order and their successors or functional equivalents: President; General Manager; Area Vice President, Sales – West; and Zone and Regional Managers, Sales covering Texas; and Vice President for Merchandise Marketing, Dental; and (2) any person employed by or associated with another dental supply distributor." (CX6023 at 006 ¶I).

1164. Patterson entered into a similar Agreed Final Judgment and Stipulated Injunction with the Office of the Texas Attorney General on April 19, 2018 (the "2018 Patterson Final Judgment"). (CX6024). The 2018 Patterson Final Judgment required Patterson to submit a detailed log of certain executives' communications (including Guggenheim), whether written or oral, with any distributor competitor for a one-year period. (CX6024 at 005 ¶I). Specifically, it required Patterson to: "[f]or a period of one (1) year, maintain and furnish to the State on a twice yearly basis, a log of all oral or written communications relating in whole or in part to the distribution or sale of dental supplies in the United States, between or among (1) the Patterson employees with the following titles as of the date of this Order and their successors or functional equivalents: CEO, President (currently Dave Misiak), Vice President and General Manager, (currently Tim Rogan), Vice President of Marketing, (currently Josh Killian), Paul Guggenheim, Clint Edens, and Chad Bushman; and (2) any person employed by or associated with another dental supply distributor." (CX6024 at 005 ¶I).

1165. In a July 18, 2015 email to Cohen about the Elite Dental Alliance buying group, Julie Radzyminski expressed concern about Schein or Patterson signing with the Elite Dental Alliance. She stated: "if we don't agree, they will sign with either Schein or Patterson." (CX1079 at 001). Julie Radzyminski was a Benco executive responsible for Benco's relationship with the Elite Dental Alliance and Cain Watters. (Cohen, Tr. 480).

1166. By October 2016, Sullivan was concerned about Benco and Patterson partnering with buying groups. In October 2016, Sullivan responded to an internal Schein questionnaire concerning buying group strategy, entitled "Project Rockstar Pre-Workshop Questionnaire". (CX2487 at 001). The questionnaire concerned Schein's strategy relating to buying groups, customer consolidation, and other industry dynamics, and asked the recipient to identify key issues, outcomes, and players. (CX2487 at 002). Sullivan identified the impact that buying group organizations would have on the full-service segment of the industry as a "key question" to be answered. (CX2487 at 003). Sullivan further identified Patterson and Benco as key "players," and identified their partnering with buying groups as one of the most important items in relation to buying group strategy. (CX2487 at 004).

XIV. THE BIG THREE HAVE NOT OFFERED A PROCOMPETITIVE EXPLANATION FOR THESE INTER-FIRM COMMUNICATIONS REGARDING A CUSTOMER SEGMENT.

1167. Benco's Chuck Cohen could not identify any procompetitive or business justifications for his February 2013 communications with Patterson's Paul Guggenheim about Benco's no buying group policy. (CX0301 (Cohen, IHT at 243); *see also* CX1112 (Answer of Benco ¶¶77-79) (summarily denying the allegations and failing to identify any efficiencies that can be balanced against anticompetitive effects)).

1168. Guggenheim could not identify any business rationale or procompetitive justifications for his February 2013 communications with Benco's Chuck Cohen. (Guggenheim, Tr. 1605-1606, 1612; CX0314 (Guggenheim, IHT at 234, 235, 248); *see also* CX3113 (Answer of Patterson ¶¶77-79 (summarily denying the allegations and failing to identify any efficiencies that can be balanced against anticompetitive effects)).

1169. Guggenheim cannot provide any procompetitive justification for his June 2013 communications with Chuck Cohen regarding ADC. (CX0314 (Guggenheim, IHT at 297-299)).

1170. Chuck Cohen could not provide any business justification for his June 2013 communications with Patterson's Paul Guggenheim explaining Benco's policies about doing business with a customer segment to a competitor. (CX0301 (Cohen, IHT at 292-298, 105)).

1171. Cohen could not provide any business justification for communications with Schein's Tim Sullivan about ADC. At trial, Cohen testified that he communicated with Sullivan about buying groups to "gather[] market intelligence." (Cohen, Tr. 553). But, Cohen's prior sworn testimony in this matter contradicts his trial testimony. Cohen previously described the communication was "counter-business" or "more information than [] a rational business owner would give" and testified that he could not provide any legitimate business justification for these communications that he described as potentially "improper" and "counter-business." (CX0301 (Cohen, IHT at 277); CX8015 (Cohen, Dep. at 239) ("Q. Sitting here today, can you think of any reason for you to talk to Mr. Sullivan about buying groups? . . . A. Sitting here today, I cannot recall any specific reason I would talk to Tim about buying groups."); CX0301 (Cohen, IHT at 287) ("Q. And why . . . were you and Mr. Sullivan discussing buying groups? We've now seen a couple of examples of that. A. Why we were? . . . I can't imagine any specific reasons why we were or why we weren't. I suppose it looks like the topic came up in this conversation.")).

1172. Schein's Tim Sullivan could not provide any legitimate business justification for communications with Chuck Cohen about ADC. (CX0311 (Sullivan, IHT at 268)).

1173. Respondents' executives testified that these communications with their competitors made them feel "uneasy," were "against our company rules," or "crazy," and may have been "improper." (CX0306 (Foley, IHT at 177-178) ("I remember being uneasy on the call" and "it's against our company, you know, rules for me to discuss customers and trades secrets and what we're dealing with customers."); (CX0311 (Sullivan, IHT at 268) ("I thought it was crazy that [Cohen] called."); (CX0301 (Cohen, IHT at 277) ("maybe [calling Sullivan] was an improper thing to do.")).

1174. None of Respondents' three economic expert witnesses contend that the agreement among Respondents would have procompetitive benefits. (*See* CCFF ¶¶ 1175, 1176, 1177, *infra*.).

1175. Dr. Wu does not offer any opinion that "an agreement among respondents not to do business with buying groups would have any pro-competitive benefits," and 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." (RX2967 (Wu, Dep. at 277, 279)).

1176. Dr. Carlton does not discuss whether there is any procompetitive justification for any conspiracy among Respondents in the context of his report, nor does he provide an analysis of a procompetitive reason for any explicit communications because "[t]hat didn't seem relevant, given the evidence in the case as I understand it." (RX2966 (Carlton, Dep. at 233-235)).

1177. Dr. Johnson does not "think [he] could offer an opinion" about procompetitive benefits in this matter, nor has he done any analysis on any procompetitive benefits. (RX2965 (J. Johnson, Dep. at 274); RX1131 (J. Johnson, Source One Dep. at 98) (could not think of any procompetitive economic justifications for an agreement not to offer discounts to buying groups.)).

XV. THE BIG THREE WERE PART OF ON OVERARCHNG CONSPIRACY ORCHESTRATED BY BENCO AS RINGLEADER.

1178. Communications between Benco and Patterson mirrored those between Benco and Schein. (*See, e.g.*, CCFF ¶¶ 1179-1180, 483-484, 661-664, 495-496, 500-501, 674-680 1069-1071, 576, 1133).

1179. Cohen assured Guggenheim that Benco would maintain a no buying group policy. (CCFF ¶¶ 483-484; *see also* CCFF ¶¶ 489-490). Cohen also assured Sullivan that Benco would maintain a no buying group policy. (CCFF ¶¶ 661-664).

1180. Guggenheim assured Cohen that Patterson would maintain a no buying group policy. (CCFF ¶¶ 495-496, 500-501). Sullivan assured Cohen that Schein would maintain a no buying group policy. CCFF ¶¶ 674-680; *see also* CCFF ¶ 681-682).

1181. In Benco/Patterson agreements, there were instances of confrontation upon suspected cheating. (CCFF ¶¶ 569-570, 572-573). In the Benco/Schein agreement, there were instances of confrontation upon suspected cheating. (CCFF ¶¶ 997, 982-986, 989-992).

1182. Cohen reassured Guggenheim of Benco's compliance with its no buying group policy. (CCFF ¶¶ 574-577, 579). Cohen reassured Sullivan of Benco's compliance with its no buying group policy. (CCFF ¶ 997).

1183. Benco's documents refer to an overarching agreement among Schein, Patterson, and Benco. (CX0023 at 001 ("CHUCK --- maybe what you should do is make sure you tell Tim [Sullivan] and Paul [Guggenheim] to hold their positions as we are.") (emphasis in original); CX1149 at 002 (buying groups do not catch on "because so far, all of the major dental companies have said, "NO", and that's the stance we will continue to take.") (emphasis in original); *see also* CCFF ¶¶ 1103-1104)).

1184. Patterson's documents refer to an overarching agreement among Schein, Patterson, and Benco. (CX0093 at 001 ("Confidential and not for discussion . . our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me."); *see also* CCFF 5511, 8721, 8723, 8722)).

1185. Schein's documents refer to an overarching agreement among Schein, Patterson, and Benco. (CX2106 at 001 ("The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott."); CX2094 at 001 (Schein, PDCO and Benco all refused to bid on their business when they entered the GPO/Buying Group world."); *see also* CCFF 5755, 3097)).

1186. The Benco/Patterson and Benco/Schein agreements were part of one overarching conspiracy. (CCFF ¶¶ 1178-1185, 1187-1198)

1187. On February 27, 2013, Misiak (Patterson) directed a Regional Manager to refuse a buying group, explaining that Patterson's largest competitors, Henry Schein and Benco, refuse buying groups as well:

> **Confidential and not for discussion . . our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me.**

(CX0093 at 001 (emphasis in original); Misiak, Tr. 1356-1358; *see also* CCFF ¶¶ 549-552).

1188. On February 27, 2013, Misiak wrote to Guggenheim, "I've coached [Regional Manager Fruehauf] on how to stay out of this [buying group] with grace. I'm concerned that Schein and Benco sneak into these co-op bids and deny it. . . ." (Misiak, Tr. 1368; CX0092 at 001; *see also* CCFF 539-540). Misiak testified that "this" referred to ADC. (Misiak, Tr. 1367; CX8038 (Misiak, Dep. at 159)).

1189. Misiak was concerned that Schein and Benco would submit bids for buying groups and deny it. (CX0092 at 001; CX8038 (Misiak, Dep. at 160)). At trial, Misiak could not recall why he was concerned that Schein and Benco would "sneak into" bids and "deny it." (Misiak, Tr. 1369 ("Q. What was the concern if Benco and Schein deny it? A. I don't recall what I meant by that"); Misiak, Tr. 1370 ("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."); Misiak, Tr. 1372 ("Q. From your perspective, how could Benco or Schein work with buying groups but deny it? A. I'm not sure.").

1190. On August 4, 2013, Rogan (Patterson) wrote to McFadden: "Neal, we don't need GPO's in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry." (CX0106 at 001; McFadden, Tr. 2710; *see also* CCFF ¶¶ 603).

1191. On May 19, 2015, Ryan (Benco) received an inquiry from Dentistry Unchained, a buying group with 226 dentists that "want[ed] to use Benco"; in response, Ryan wrote to Cohen: "The best part about calling these [buying groups] is I already KNOW that Patterson and Schein have said NO." (CX0012 at 001; Ryan, Tr. 1123-1124).

1192. On July 13, 2015, Scott Jack emailed Ryan regarding 50 to 75 dentists that were in the process of starting a buying group. (Ryan, Tr. 1126; CX1185 at 002). Jack wrote, "I'd rather not deal with a group like this but also need to keep about $1M in current business from joining." (CX1185 at 002; Ryan, Tr. 1126). Jack also asked Ryan to explain how "large group practices work and what the pricing difference is compared to Partnersharing." (CX1185 at 002; Ryan, Tr. 1126).

1193. On July 13, 2015, Ryan wrote to Scott Jack a sales representative who was concerned about losing $1 million in "current business" to a buying group: "We don't allow [volume discount] pricing unless there is common ownership. Neither Schein nor Patterson do either." (Ryan, Tr. 1126-1127; CX1185 at 002)

1194. On March 5, 2014, Foley (Schein) wrote to Chad Thompson of Heartland: "The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott." (CX2106 at 001; Foley, Tr. 4596-4598; *see also* CCFF ¶ 1138).

1195. On October 28, 2015, Foley wrote to Schein employees, "Keep in mind that I and others have been in contact with Tralongo over the years. Schein, PDCO and Benco all refused to bid on their business when they entered the GPO/Buying Group world." (CX2094 at 001). Foley testified that this email is regarding Tralongo. (Foley, Tr. 4594-4595; *see also* CCFF ¶ 947).

1196. Benco complied with the agreement with Schein and Patterson by refusing to bid for buying groups between 2011 and 2015. (*See* CCFF 404-425).

1197. Patterson complied with the agreement with Benco and Schein by refusing to bid for buying groups between 2013 and 2015. (*See* CCFF ¶ 631-653).

1198. Schein complied with the agreement with Benco and Patterson by refusing to bid for buying groups between 2011 and 2015. (*See* CCFF ¶¶ 925-954; *see also* 733-860).

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

1199. Burkhart is a family-owned, distributor of dental supplies, equipment and technical services. (Reece, Tr. 4357-4358, 4365; JX0003 at 002 (Joint Stipulation of Fact No. 7)). It has been in the dental supply business for 130 years. (Reece, Tr. 4358).

1200. Burkhart is a direct competitor of Benco, Schein, and Patterson. (Reece, Tr. 4363, 4377; Rogan, Tr. 3437; *see also* Cohen Tr., 572).

1201. Burkhart is the 4th largest dental distributor. (Reece, Tr. 4363; Cohen, Tr. 572; Rogan, Tr. 3437-3438; Ryan, 1046). Burkhart has annual sales around $200 million. (Reece, Tr. 4364).

1202. Burkhart is a full-service dental products distributor. (Reece, Tr. 4361; Cohen, Tr. 675; JX0003 at 002 (Joint Stipulation of Fact No. 7)).

1203. Burkhart is not a national full-service distributor. It is a regional dental products distributor, headquartered in Tacoma, Washington. (Reece, Tr. 4357). Burkhart operates throughout the Northwest and the western United States. (Reece, Tr. 4357, 4365-4366; CX0319

(Reece, IHT at 16) (Burkhart's regions include Alaska, Washington, Oregon, Idaho, Utah, Calfiornia, Colorado, Arizona, Texas and Oklahoma); Ryan, Tr. 1046, 1089; Sullivan, Tr. 3936).

1204. Burkhart formed a Special Markets Division in 2011 to work with groups including buying groups. (Reece, Tr. 4393).

1205. Burkhart's began discounting to buying groups in 2011, starting with Amerinet. (Reece, Tr. 4466-4467).

1206. Smile Source approached Burkhart about a potential partnership in 2011. (Reece, Tr. 4465). Burkhart began discounting to Smile Source in 2012. (Reece, Tr. 4466-4467; CX4232 at 008 (Smile Source Roll-Out Schedule, dated January 2nd, 2012); Goldsmith, Tr. 1947-1948, [redacted]).

1207. In or around September 2013, Benco learned that Burkhart had entered into a supply agreement with a buying group. (CX1112 at 026-027 (Answer of Benco ¶53)).

1208. On September 13, 2013, Benco's VP of Sales, Mike McElaney, called his counterpart at Burkhart, Jeffrey Reece, to discuss buying groups. (CX1328 at 011 (Benco's Responseto RFA ¶22) (McElaney spoke with Reece by telephone on September 13, 2013); CX0303 (McElaney, IHT at 27-28); CX0319 (Reece, IHT at 150)).

1209. McElaney called Reece because he had just learned that Burkhart "was moving forward with an agreement to service a GPO." (CX0303 (McElaney, IHT at 27-28) (McElaney contacted Reece because Burkhart "was moving forward with an agreement to service a GPO, and I called him and I said, 'You know, hey, what's up?'"); Reece, Tr. 4377-4378; CX8021 (Reece, Dep. at 106)).

1210. The September 13, 2013, call from McElaney to Reece about buying groups lasted approximately 10-12 minutes. (Reece, Tr. 4379; CX8021 (Reece, Dep. at 107) ("Q. Most of the call was about the topic of GPOs and not other things? A. That's correct."); CX0023 at 001 (Statement of McElaney: "I spoke with Jeff Reece at length late Friday about buying groups.")).

1211. On the September 13, 2013 call, McElaney informed Reece that "group purchasing organizations were not favorable to the dental industry and were not going to be good for Burkhart. . . ." (Reece, Tr. 4377).

1212. On the September 13, 2013 call to Burkhart about buying groups, Benco's McElaney informed Reece that the group purchasing model was a threat to the dental industry. (CX0319 (Reece, IHT at 153) ("He, more than anything, I think, just wanted to be really clear that he thought it was a threat. Q. That buying groups are a threat? A. That a group purchasing model is a threat to our industry. . . Q. And do you – do you recall how you ended the call with Mr. McElaney? A. You know, I don't remember any angry discussion . . . but it was clear to me that he wanted me to know that he didn't think it was acceptable."); CX0319 (Reece, IHT at 153) (McElaney "wanted to be really clear that he thought it [the group purchasing model] was a threat.")).

1213. McElaney said that buying groups were a "race to the bottom" and caused "declining margins," noting that they were "not good for the medical industry." (Reece, Tr. 4378 ("Q. And what did Benco's McElaney say about . . . the buying groups in the industry? A. Well, he inferred and said directly that it was not good for the medical industry and that it's not good for the company, that – declining margins, it's a race to the bottom.")).

1214. Reece testified that, on the September 13, 2103 call, McElaney expressed concern regarding Burkhart discounting to buying groups:

> I think [McElaney] just expressed his concern about group purchasing organizations, and, you know, the fact that . . . it took [the medical] industry down and certainly made the whole distribution model obsolete, and there was a genuine fear there that that could happen in dentistry as well.

(CX0319 (Reece, IHT at 150-151); *see also* Reece, Tr. 4379 ("[H]e said directly that it was not good for Burkhart's business")).

1215. Reece challenged McElaney over his assertion that discounting to buying groups was bad for the industry and ended the call. (Reece, Tr. 4378-4379).

1216. Reece did not share with McElaney Burkhart's business rational for working with buying groups, other than to say that Burkhart's management wanted to work with buying groups. (CX0303 (McElaney, IHT at 30)).

1217. Benco had a no buying group policy at the time that it encouraged Burkhart to refrain from working with buying groups. (CX0303 (McElaney, IHT at 30-31)).

1218. Following that conversation, McElaney reported to his boss, Cohen, Ryan, and Paul Jackson at Benco in a September 16, 2013 email:

> 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.

(CX0023 at 001 (emphasis in original)).

1219. Cohen never told McElaney to stop contacting Burkhart about buying groups. (Cohen, Tr. 580-581).

1220. Ryan responded to McElaney's September 16, 2013 email, "Maybe we should discuss with Lori as well." (CX0023 at 001). Ryan's email referred to Benco raising the discussion of buying groups with Lori Isbell Burkhart, owner of Burkhart. (CX0023 at 001; Ryan, Tr. 1111-1113).

1221. Approximately three to four weeks after McElaney's September 13, 2013 call to Reece, McElaney made a second, unsolicited call to Reece. (Reece, Tr. 4380 (McElaney initiated the call)).

1222. The second call from McElaney to Reece was "very similar" to the first, although "not as social." (Reece, Tr. 4380, 4381). In this second call, McElaney directly warned Reece against working with buying groups. (Reece, Tr. 4380-4381 (McElaney told Reece "you need to be very careful here, that group purchasing organizations are not good for your business.")).

1223. The second 2013 call from McElaney to Reece was shorter than the first call. Reece estimated that it lasted six minutes. (Reece, Tr. 4381). As had occurred with the first call from McElaney, Reece terminated the call. (Reece, Tr. 4379, 4381).

1224. Reece took offense to McElaney's second 2013 call regarding buying groups, believing that McElaney "was overstepping his bounds as a friend to tell me how to do business and how – and tell Burkhart how to do business." (Reece, Tr. 4381).

1225. In October 2013, Reece, McElaney, and Cohen all attended the Dental Trade Alliance Annual Meeting in Ponte Vedra Beach, Florida. (Reece, Tr. 4383-4384; CX1112 at 028-029 (Answer of Benco ¶59) (Cohen attended the DTA annual meeting in Ponte Vedra Beach, Florida in October 2013)); *see also* CX4145 (McElaney, Cohen, and Reece all registered for Dental Trade Alliance Annual Meeting); CX4449-a at 001 (2013 Dental Trade Alliance Annual Meeting in Ponte Vedra Beach, Florida took place from October 15-18, 2013)). Ryan also attended the Dental Trade Alliance Annual Meeting in Ponte Vedra Beach, Florida in October 2013. (Ryan, Tr. 1107-1108; CX0027 at 001; CX4145 (Ryan registered for the Dental Trade Alliance Annual Meeting)).

1226. During one day of the 2013 Dental Trade Alliance meeting around lunchtime, McElaney approached Reece and asked him to come to be introduced someone. (Reece, Tr. 4383). McElaney brought Reece to a table on a patio occupied by Cohen and Ryan. (Reece, Tr. 4383-

4384; Ryan, Tr. 1107-1108). Reece believed McElaney wanted to introduce him to Cohen because Cohen and Reece had never had a formal introduction. (Reece, Tr. 4384).

1227. After Reece had been introduced to Cohen and Ryan, Cohen launched into a conversation with Reece about working with buying groups. (Reece, Tr. 4384 ("Q. How did the conversation begin? A. Very respectfully . . . And then [Cohen] proceeded to share similar thoughts about group purchasing organizations with me as Mr. McElaney had previously."); CX0319 (Reece, IHT at 154) ("They kind of went immediately to their disappointment that, 'are you sure you really know what you are getting yourself into by working with buying groups?'"); *see also* CX1112 at 028-029 (Answer of Benco ¶59) (Cohen spoke with Reece at the October 2013 Dental Trade Alliance annual meeting)).

1228. According to Reece, the conversation immediately veered into buying groups with Cohen and McElaney sending a clear message that Burkhart's participation in buying groups was not acceptable:

> [T]hey kind of went immediately to their disappointment, that "Are you sure you really know what you are getting yourself into by working with buying groups?" . . . [I]t was clear that Chuck wanted to send a very clear message that it wasn't acceptable.

(CX0319 (Reece, IHT at 154-155)).

1229. The Benco executives spoke to Reece for ten to fifteen minutes at the 2013 Dental Trade Alliance Meeting. (Reece, Tr. 4387).

1230. Reece felt "set up" by McElaney and the Benco executives he was introduced to at the 2013 Dental Trade Alliance Annual Meeting because "Mike McElaney took advantage of that situation and what was meant to be just a casual introduction clearly turned into something with an agenda." (Reece, Tr. 4385).

1231. Cohen's agenda with Reece was "to tell me [Reece] that he really felt that group purchasing organizations were not healthy for our industry and that it could do damage to our business and threaten our business." (Reece, Tr. 4385).

1232. When Cohen told Reece that buying groups could "threaten our business," Reece understood that Cohen meant "declining margins and that that would ultimately threaten profitability." (Reece, Tr. 4386).

1233. During Cohen's conversation with Reece at the 2013 Dental Trade Alliance Annual Meeting, Cohen was not specific to certain buying groups, but rather spoke against working with buying groups in general. (Reece, Tr. 4386) ("Q. Did Mr. Cohen address Burkhart's work with buying groups? A. I don't recall him being specific to a certain buying group that we were working with. I think he spoke in a more general sense.")).

1234. When Reece spoke with Cohen at the 2013 Dental Trade Alliance Annual Meeting, Cohen expressed "a very strong opinion about group purchasing organizations and that it wasn't positive for our industry." (Reece, Tr. 4385; *see* also CX8021 (Reece, Dep. at 112) (Cohen "proceeded to challenge me on why Burkhart was working with group purchasing organizations, of which I took great offense to")).

1235. Over the ten to fifteen minute meeting initiated by Benco at the 2013 Dental Trade Alliance Annual Meeting, Reece, said very little. (Reece, Tr. 4387) Reece did not inform Cohen what he thought about buying groups. (Reece, Tr. 4386). Reece felt uncomfortable and incredulous at Benco's suggestion of how Burkhart should conduct its business. (Reece, Tr. 4387).

1236. Reece ended the conversation with Cohen and the other Benco executives. (Reece, Tr. 4388; CX8021 (Reece, Dep. Tr. at 113)).

1237. Through the two telephone conversations between McElaney and Reece, and the in-person meeting between Reece, Cohen, Ryan, and McElaney at the 2013 Dental Trade Alliance Annual Meeting, "Benco had encouraged Burkhart not to engage in group purchasing organizations based on the fact that that was going to be detrimental to our business and certainly to the business in the dental industry for those that participated." (Reece, Tr. 4391).

1238. Over the course of the two telephone conversations between McElaney and Reece, and the in-person meeting between Reece, Cohen, Ryan, and McElaney at the 2013 Dental Trade Alliance Annual Meeting, Benco executives repeatedly warned Reece to be careful and represented that buying groups were not favorable to the dental industry, a threat, detrimental, and not good for Burkhart. (Reece, Tr. 4377, 4379, 4380, 4385, 4386, 4391)

1239. Reece took offense to the statements by Benco executives about doing business with buying groups and did not appreciate being told how Burkhart should run its business. (Reece, Tr. 4381, 4387). Reece was angry at the end of the third conversation. (Reece, Tr. 4388).

1240. Burkhart did not change its policy or strategy with regard to working with buying groups as a result of the telephone calls from McElaney. (Reece, Tr. 4446, 4487). Burkhart continued selling to buying groups following the three Benco attempts to persuade the company to change its course from working with buying groups. (Reece, Tr. 4397-4398 (Smile Source), Reece, Tr. 4409-4410 (Kois)).

1241. Benco encouraged Burkhart not to engage in buying groups. (Reece, Tr. 4391, 4444-4445 ("What Mr. Cohen told me was that it was not in Burkhart's best interest to be working with group purchasing organizations."); CX8021 (Reece, Dep. at 110-111) ("My recollection is very clear that Chuck Cohen asked me about group purchasing organizations and that his opinion was that it was not good for the industry and it was not good for Burkhart and that you might want to be careful about that.”)).

1242. Ryan testified that he is “sure” that he and McElaney from Benco spoke with Guggenheim of Patterson at the 2013 DTA Meeting Annual. (Ryan, Tr. 1119).

1243. A contemporaneous email confirms executives from Benco met with Schein, Patterson, and Burkhart at the 2013 DTA meeting in Florida. (CX0027 at 001). In an October 20, 2013 email, McElaney described how he and Ryan met with representatives of other distributors at the 2013 DTA meeting. (CX0027 at 001). McElaney identifies Sullivan and Guggenheim by name and states what they told Benco about their ratio of service technician to sales representatives from conversations at the 2013 DTA Annual Meeting. (CX0027 at 001; Ryan, Tr. 1118-1120).

1244. Ryan testified he met Reece at the October 2013 Dental Trade Alliance Annual Meeting and was introduced to Reece by McElaney or Cohen. (Ryan, Tr. 1107-1108).

1245. On October 23, 2013, a few days after the October 2013 Dental Trade Alliance Annual Meeting where McElaney introduced Reece to Ryan and Cohen, Ryan sent a text message to Cohen that “I think I figured out what Jeff Rees [*sic*] was talking about with that buying group,” (Ryan, Tr. 1121, 1123).

1246. [redacted]

1247. The Kois Buyers Group alone accounted for more than [redacted]

[redacted].

1248. [redacted]

1249. [redacted]

1250. Had Burkhart declined to work with buying members, members of buying groups would have experienced increases in prices. (CX7100 at 214 (¶ 494) (Marshall Expert Report) (Had Burkhart elected to not supply the Kois Buyers Group and Smile Source, their members would have experienced an increase in prices)).

1251. Reece never contacted Schein, Patterson, or Benco to see if they were discounting to buying groups, nor did he share Burkhart's strategy with regard to buying groups or any specific customer with any competing dental products distributor. (Reece, Tr. 4375).

1252. Mike McElaney's health rendered him unavailable for trial. (Ryan, Tr. 1110; Cohen, Tr. 573).

XVII. "PLUS-FACTOR" EVIDENCE CONFIRMS THE EXISTENCE OF AN UNLAWFUL AGREEMENT.

A. The Big Three Engaged in Repeated Unexplained Communications about Buying Groups with Their Top Competitors.

1253. Executives of the Big Three engaged in repeated and regular communications regarding buying groups. (CCFF ¶¶ 474-1100, 1109-1158).

B. The Big Three Acted Against Their Unilateral Self Interest.

1. <u>Discussion of Buying Group Strategies.</u>

1254. The Big Three discussed their positions and strategies regarding buying groups throughout the conspiracy period. (CCFF ¶¶ 474-1100, 1109-1158).

2. <u>Refusing to Bid on Buying Groups.</u>

1255. Selling or discounting to buying groups was in each of the Big Three's unilateral self-interest, but each refused to bid on buying groups during the conspiracy period. (*See infra* Section CCFF ¶¶ 1256-1296).

a) Schein

1256. Schein thought buying groups provided an opportunity to win business from competitors and grow its profit margins. (CCFF ¶¶ 12567-1269).

1257. Sullivan stated that buying groups were beneficial and an opportunity to win customers from competitors. (Sullivan, Tr. 3911-3912).

1258. Meadows also believed that buying groups presented the opportunity to bring in new customers and increase profit margins. (Meadows, Tr. 2652).

1259. Foley also stated that Schein Special Markets viewed buying groups favorably. (Foley, Tr. 4528).

1260. Foley also believed buying groups "would bring in clients that [Schein] wouldn't have before" and "for existing customers, it – again, it could lead to longer retention on the customer." (CX0306 (Foley, IHT at 78-79)).

1261. Schein benefitted through buying group relationships, and Schein witnesses testified that buying groups were an opportunity to win customers from competitors. Foley testified that buying groups allowed Schein to gain customers it did not previously have. (CX8003 (Foley, Dep. at 189); CX0306 (Foley, IHT at 78-79)). Foley testified that buying groups also could lead to longer retention rates for Schein's existing customers. (CX0306 (Foley, IHT at 78-79)). Meadows testified that buying groups were a great opportunity for Schein, as they helped Schein fulfill its mission, retain business, and expand market share by bringing in new sales from competitors. (CX8016 (Meadows, Dep. at 29)).

1262. As described above, Schein had profitable partnerships with buying groups prior to 2011. (CCFF ¶¶ 440-453).

1263. For example, Schein's Smile Source relationship was viewed as a growth opportunity. (Foley, Tr. 4535).

1264. Schein gained new customers by selling to Smile Source. (Foley, Tr. 4534; CX8005 (Muller, Dep. at 53-54); CX0309 (Muller, IHT at 101)).

1265. Sullivan thought the Smile Source account was valuable. (Sullivan, Tr. 3922-3933).

1266. Sullivan did not want to lose the Smile Source account because it was bringing at least $1 million of business to Schein. (Sullivan, Tr. 3922-3923; CX2113 at 001).

1267. [redacted]

1268. Schein also identified other buying group opportunities during the conspiracy period that it rejected. (CCFF ¶¶ 733-870, 925-954).

1269. Schein's refusal to work with buying groups resulted in lost sales and profit. (CCFF ¶¶ 1267, 1655, 1658, 1660, 1665, 1667).

b) Patterson

1270. Patterson sales representatives and executives asked about opportunities to sell to buying groups, which some Patterson executives viewed as growth opportunities. (CCFF ¶¶ 1271-1289).

1271. On August 2, 2013, McFadden sent an email to Rogan and Misiak forwarding a request regarding a buying group, Dental Branch. (CX0106 at 001).

1272. In the August 2, 2013 email, McFadden asked: "I know in the past we have said no[.] Is it worth it to explore GPO???????" (CX0106 at 001; McFadden, Tr. 2708-2709).

1273. McFadden explained that he believed Schein was working with Dental Branch and that he thought it "could be a future potential opportunity" for Patterson. (McFadden, Tr. 2709).

1274. In the August 2, 2013 email, McFadden asked Rogan and Misiak whether they should ask the regional manager "the amount of request they get" from buying groups and stated that he "used to get 1 per month in the SE" when he served as the Southeast Region Manager. (CX0106 at 001; McFadden, Tr. 2709).

1275. On August 4, 2013, Rogan replied to McFadden: "Neal, we don't need GPO's in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry." (CX0106 at 001; McFadden, Tr. 2710).

1276. McFadden also told Guggenheim that buying groups could be a good opportunity for Patterson. (McFadden, Tr. 2713).

1277. On November 9, 2013, Rogan sent an email to Misiak and attached a slide deck to be presented at an annual strategic planning session. (CX0104 at 006; Rogan, Tr. 3500-3501).

1278. That slide deck Rogan shared with Misiak in November 2013 identified "Buying Groups, Coops, and Dental Societies" as "critical." (CX0104 at 006; Rogan, Tr. 3502-3503).

1279. Rogan explained that the slide titled "Most Critical Issues/Opportunities" was intended to discuss the following questions: "What are the most critical, impactful external issues," "most critical, impact internal issues," and "[w]hat are the greatest opportunities for competitive advantage and growth." (CX0104 at 006; Rogan, Tr. 3503).

1280. In 2014, McFadden still continued to receive "a lot of requests from buying groups." (McFadden, Tr. 2724-2725).

1281. On April 23, 2014, McFadden sent another email to Guggenheim and Misiak about buying groups, stating "[t]hese groups are popping up everywhere." (CX3080 at 001).

1282. In response to McFadden's April 23, 2014 email, Guggenheim wrote: "Neal, Nothing unusual here. Typical approach of an upstart buying group. We pass on these as a matter of protecting our business model." (CX3080 at 001).

1283. On May 30, 2014, McFadden sent a third email to Guggenheim and Misiak regarding buying groups, and he wrote: "Paul and Dave, This is something that we need to really sit down and discuss. These types of study club, small group, GPO's popping up." (CX0163 at 001; McFadden, Tr. 2713-2714).

1284. In his May 30, 2014 email, McFadden wrote to Guggenheim and Misiak that GPO's were "an opportunity . . . to utilize special market net down pricing to help with the branches. Just my two cents. Your call." (CX0163 at 001; McFadden Tr. 2713-2714).

1285. On October 23, 2014, James Stewart, Patterson's Branch Manager in Rochester, New York, sent an email to McFadden and asked: "is Patterson participating in a group buy program through Kois?" (CX3128 at 001).

1286. On September 11, 2014, another sales manager named Joseph Techar emailed McFadden to ask whether Patterson would engage with buying groups. (RX0342 at 002; McFadden, Tr. 2727).

1287. McFadden responded to Techar's September 11, 2014 email that "[a]s a rule we do not deal with buying groups," and he noted that he had a conference call scheduled shortly thereafter to discuss the issue with Guggenheim. (RX0342 at 001-002; McFadden, Tr. 2727-2728).

1288. On June 23, 2014, Amy Barlage, Director of Operations for Special Markets at Patterson, sent an email to McFadden that listed as a proposed topic for the "first ever Special Market Enterprise wide meeting" the following July: "GPO's to sell or not to sell?" (CX3013 at 001).

1289. On May 20, 2015, McFadden sent Rogan and Guggenheim another email alerting them that "buying groups are popping up everywhere." (CX0160 at 001).

1290. Patterson recognized the potential opportunities that buying groups presented, but its refusal to work with buying groups resulted in lost business and profits. (CCFF ¶¶ 597-611, 621-625, 631-651, 1270-1289).

c) Benco

1291. Benco's sales representatives wanted to sell to buying groups. (Ryan, Tr. 1040).

1292. Benco's regional managers also wanted to sell to buying groups. (Ryan, Tr. 1041).

1293. Don Taylor, Benco's regional manager for Colorado and New Mexico, sent an email to Ryan and others at Benco and stated that working with a buying group in Arizona "would be a great opportunity to win some business from Schein." (CX1242 at 002; Ryan, Tr. 1042-1043).

1294. On February 22, 2013, Benco sales representative Gerald Barto posted a message on Benco's internal bulletin board and stated that he lost two customers because Benco's no buying group policy did not allow him to extend discounts to multiple offices that were not all under common ownership. (CX1149 at 001; Ryan, Tr. 1078-1080).

1295. Barto wrote on the bulletin board: "there must be some program that we have (even if made up) for what just happened to me . . . I'm frustrated and just wanted to get off my chest. One Dr. was fighting for me to get all, instead I lost two." (CX1149 at 001).

1296. Benco's refusal to work with buying groups resulted in lost customers and business . (CCFF ¶¶ 6404-6405, 1655, 1658, 1661).

d) Burkhart And Manufacturers Found it Profitable to Work With Buying Groups.

1297. During the conspiracy period, other distributors, Burkhart, Atlanta Dental, and Nashville Dental, and their manufacturer partners, profited from working with buying groups. (CCFF ¶¶ 1298-1306, 1310-1315).

1298. Burkhart profited from offering discounts to the Smile Source and Kois buying groups. (Reece, Tr. 4416).

1299. Burkhart's existing customers that went on to join the Kois Buyers group ended up spending more money overall on supplies from Burkhart. (Reece, Tr. 4413-4414; [redacted]).

1300. Burkhart began partnering with buying groups in 2011. (Reece, Tr. 4370, 4466; [redacted]).

1301. Through its buying group partnerships, Burkhart enjoyed sales growth driven by new customers that switched to Burkhart from its competitors. [redacted]; Reece, Tr. 4408, 4411; [redacted]

[redacted].

1302. [redacted]

1303. [redacted]

1304. [redacted]

1305. [redacted]

1306. Burkhart [redacted]

1307. Burkhart continues to seek opportunities with new buying group clients. (Reece, Tr. 4415-4416).

1308. Burkhart has experienced growth in the number of buying groups in the dental industry. (Reece, Tr. 4416).

1309. Burkhart sees its relationships with buying groups as a way to support independent dentists. (Reece, Tr. 4369).

1310. On December 19, 2014, Jeff Reece received an email notifying him that Burkhart won a customer "from Schein with $2MM in production" by selling to Kois. (CX4220 at 001).

1311. Burkhart gained customers from Schein by supplying buying groups during the conspiracy period. (CX4220 at 001).

1312. [redacted]

1313. In addition, Nashville Dental also gained sales as a result of working with Smile Source. (CX4238 at 001 (The "So far, Smile Source has worked out well for us and we have managed to create a pretty strong relationship between our reps and most of their key members. It has contributed to a good share of our growth for the year and we seem to be establishing ourselves as partners in those office")).

1314. [redacted]

1315. [redacted]

3. The Big Three Changed Their Conduct.

a) Schein

1316. Following the conspiracy, Schein bid on and worked with buying groups. (CCFF ¶¶ 1317-1319).

1317. Schein entered into an agreement with buying group Teeth Tomorrow in May 15, 2017. (RX2684 at 001; CX2802 at 008 (Schein's Response to IROG ¶1)).

1318. Schein entered into an agreement with buying group Klear Impakt in August 17, 2015. (R. Johnson, Tr. 5479; RX2162 at 001; CX2802 at 008 (Schein's Response to IROG ¶1 (2016 to Present)).

1319. Schein won back the Smile Source account in 2017, signing a new agreement effective on March 1, 2017. (Maurer, Tr. 4938; CX4128 at 001; CX2802 at 008 (Schein's Response to IROG ¶1)).

1320. Selling to Smile Source following the conspiracy was profitable**.** [redacted].

1321. In April 2016, a Schein manager, Kam Gantos, noted, "[w]e have found that [buying groups] often pull over significant business from doctors who in the past considered PDCO [Patterson] or Benco as their primary distributor." (CX2602 at 002).

1322. Selling to or discounting to buying groups after the conspiracy was beneficial to Schein. (CCFF ¶¶ 1320-1321, 1723, 1724, 1726, 1681, 1683).

b) Patterson

1323. After the conspiracy, Patterson also analyzed the buying group opportunity and bid on several buying groups. (CCFF ¶¶ 1324-1365).

1324. From 2015 to 2016 period, Tim Rogan served as the VP of Strategy and Organizational Effectiveness at Patterson Companies. (Rogan, Tr. 3423-3424).

1325. During this 2015 to 2016, Rogan also served as the VP of Marketing for Patterson Dental. (Rogan, Tr. 3424).

1326. As the VP of Strategy and Organizational Effectiveness, Rogan was in charge of the annual strategic planning process for Patterson Companies. (Rogan, Tr. 3444).

1327. On November 10, 2015, Rogan sent an email to Guggenheim regarding a planning meeting to prepare for the annual strategic planning process. (Rogan, Tr. 3445; CX3362 at 002).

1328. In response to Guggenheim's request to share an overview of the annual strategic planning process, on November 13, 2015, Rogan responded that he had hired McKinsey & Co. to do a "deeper dive" on the North American dental business that he wrote "will be based on facts." (CX3362 at 001; Rogan, Tr. 3446).

1329. When Patterson hired McKinsey in November of 2015, it was the first time that Patterson hired a consultant to in part analyze the buying group market. (Rogan, Tr. 3455).

1330. Rogan wrote to Guggenheim that "we add GPO's/Buying Groups to the strategic plan." (CX3362 at 001; Rogan, Tr. 3448).

1331. Rogan wrote in the November 13, 2015 email: "Meaning we are going to build out a strategy of how we are going to market with them? Maybe we start our own or buy one?" (CX3362 at 001; Rogan, Tr. 3448).

1332. Rogan was suggesting putting critical issues on the strategic plan in his November 2015 email. (Rogan, Tr. 3447).

1333. Rogan, as a senior executive with 25 years of experience at Patterson Dental, was also suggesting to Guggenheim that Patterson start its own buying group or buy a buying group as part of the strategic plan. (Rogan, Tr. 3451-3452; CX3362 at 001).

1334. Rogan was making these suggestions to Guggenheim, who he viewed as "the leader of the dental business at the time." (Rogan, Tr. 3448).

1335. On December 17, 2015, Rogan received a slide deck from McKinsey titled "Dental business growth strategy project: Second review session." (CX3178 at 002 (hereinafter "McKinsey December 2015 Discussion Document")).

1336. The McKinsey December 2015 Discussion Document stated that it conducted a "deep dive on a few key manufacturer – and customer-related market trends," including "GPOs." (CX3178 at 008).

1337. Rogan thought the contents of the McKinsey December 2015 Discussion Document was consistent with his suggestion to Guggenheim to hire a consulting firm to analyze, in part, GPOs and buying groups. (Rogan, Tr. 3461-3462).

1338. According to the McKinsey December 2015 Discussion Document, in November 2015 "[m]ost of the GPOs remain small, but several have had moderate success and have partnered with mid-level distributors like Burkhart and Darby." (CX3178 at 016; Rogan, Tr. 3462-3463).

1339. The McKinsey December 2015 Discussion Document did not say Schein or Benco had partnered with buying groups. (Rogan, Tr. 3463).

1340. McKinsey also prepared a more detailed report titled, "Dental business growth strategy project: US Market Overview" for Patterson dated February 2016. (Rogan, Tr. 3464; CX3181 at 001 (hereinafter "McKinsey February 2016 Report"); *see also* CX8014 (Rogan, Dep. at 160)).

1341. Rogan reviewed the McKinsey February 2016 Report and thought the report was accurate. (Rogan, Tr. 3465).

1342. The McKinsey February 2016 Report again stated that "GPOs remain 3-5% of the market, though few have had moderate success and have partnered with mid-level distributors like Darby." (CX3181 at 051; Rogan, Tr. 3466).

1343. Around January 2016, Patterson hired Wes Fields as a Director of Business Development. (Rogan, Tr. 3474; CX0089 at 004).

1344. Part of Fields' responsibilities in business development included buying groups and GPOs. (Rogan, Tr. 3474; CX0312 (Fields, IHT at 24-25)).

1345. Patterson hired Fields in early 2016 even though the McKinsey February 2016 Report had found that buying groups and GPOs were a very small part of the market. (Rogan, Tr. 3476-3477; CCFF ¶ 1342).

1346. Rogan did not believe his suggestion that Patterson's partner with a buying group compromised Patterson's values or ethics. (Rogan, Tr. 3459-3460).

1347. In 2017, after the conspiracy fell apart, Patterson submitted a bid on a buying group, Smile Source. (Rogan, Tr. 3540-3541; *see also,* McFadden, Tr. 2733-2734 (Patterson did not submit a bid until after 2016 meeting with Trevor Maurer of Smile Source); Maurer, Tr. 5002-5003 (Patterson put in a bid after November 2016 meeting)).

1348. Rogan, and Misiak, were involved in the decision to pursue Smile Source's business. (Misiak, Tr. 1318).

1349. The 2017 bid was the first time Patterson bid for Smile Source's business. (Rogan, Tr. 3541).

1350. During the conspiracy, in 2013-2014, Patterson had the opportunity to bid on Smile Source but did not. (CCFF ¶¶ 600, 641-642).

1351. McFadden explained that the decision not to bid on Smile Source in 2013 and 2014 was in part because Patterson "didn't understand the business model" and "didn't believe at the time that [Smile Source] had influence and could guarantee merchandise volume." (McFadden, Tr. 2719-2720).

1352. Patterson bid on Smile Source in 2017 because there was potential for incremental sales. (Rogan, Tr. 3546-3547).

1353. Patterson bid on Smile Source in 2017 even though there was the risk of "cannibalization," *i.e.*, that some Smile Source members were already Patterson customers. (Rogan, Tr. 3547-3548).

1354. Rogan did not believe that the risk of cannibalization alone was a reason for Patterson not to work with a buying group. (Rogan, Tr. 3548-3549).

1355. Patterson's 2017 bid for Smile Source's business proposed offering discounts to Smile Source members. (Rogan, Tr. 3542).

1356. Patterson's proposal also included a payment from Patterson to Smile Source, or an amount based on the percentage of dollar spend by Smile Source members. (Rogan, Tr. 3542-3543).

1357. Patterson lost the 2017 bid on Smile Source to Schein. (Misiak, Tr. 1327; Rogan, Tr. 3556).

1358. On June 26, 2017, Anthony Fruehauf sent Rogan an email attaching a "state of the union" report for Patterson's Southeastern Region. (Rogan, Tr. 3556-3557; CX3186 at 001).

1359. In the June 2017 report, Fruehauf identified a key driver for the Nashville region that stated: "Continue to lose business to buying groups (i.e., Smile Source and Mari's List)." (CX3186 at 009; Rogan, Tr. 3557-3558).

1360. Fruehauf's report also stated: "We have had 5 more clients sign up with Smile Source…" (CX3186 at 009; Rogan, Tr. 3558).

1361. Rogan understood that Fruehauf's report was identifying 5 customers that the Patterson Nashville branch lost to competitors supplying Smile Source. (Rogan, Tr. 3558).

1362. Fruehauf quantified that loss as representing "$110k annual sales." (CX3186 at 009; Rogan, Tr. 3558).

1363. Rogan thought it was mostly likely that Patterson's actual loss would be greater than the $110,000, as that figure represented the loss for just for one branch and for one fiscal year. (Rogan, Tr. 3559).

1364. [redacted]

1365. [redacted]

c) Benco

1366. After the conspiracy, Benco launched its own buying group and bid on other buying groups. (CCFF ¶¶ 1367-1369, 1372).

1367. Sometime after June 2015, Benco partnered with Cain, Watters & Associates, an accounting firm that works with dentists, to create the Elite Dental Alliance ("EDA"). (Cohen, Tr. 452-453; CX1280 at 003 (Cohen forwarding an email on June 8, 2015 from Benco sales representative to Cain Watters and asking Cain Watters if rumor from sales representative about "an effort on behalf of Cain Waters [*sic*] to put into place a purchasing consortium for single practitioners to gain leverage on product pricing" was true)).

1368. EDA is a buying group. (Cohen, Tr. 448; CX0301 (Cohen, IHT at 107)).

1369. EDA is the first buying group Benco has worked with and provided discounts to. (Cohen, Tr. 449; CX8015 (Cohen, Dep. at 287, 300) (Other than EDA, Benco has never partnered with another Buying Group going back to 1996)).

1370. Working with EDA represented a change to Benco's policy regarding buying groups. (Cohen, Tr. 451).

1371. Cohen's notes from a meeting held on November 10 and 11, 2015 stated: "If Benco could start a good GPO it would be to their advantage over Schein and Patterson (Elite Dental Alliance)." (CX1239 at 002).

1372. Cohen created a case study titled, "Case Study: Elite Dental Alliance." in December 2015 that analyzed the pros and cons of partnering with Cain, Watters & Associates to create EDA. (Cohen, Tr. 453-454; CX1084 at 001).

1373. Cohen shared that case study with Benco's top level executives. (Cohen, Tr. 456).

1374. Cohen stated in his case study: "Currently, only two significant distributors recognize GPOs: Darby . . and Burkhart." (CX1084 at 001-002; Cohen, Tr. 461).

1375. In that case study, Cohen did not identify Schein or Patterson as recognizing buying groups. (Cohen, Tr. 461; CX1084 at 001-002).

1376. Cohen believed that one of the upsides of working with EDA is that Benco could add more than 250 customers and gain more than 25 million in sales. (Cohen, Tr. 465-466; [redacted]).

1377. Cohen hoped that EDA would not only bring new customers but also bring Benco more than $25 million in sales or purchases. (Cohen, Tr. 463, 465-466).

1378. Cohen thought EDA was an opportunity for Benco, the third largest distributor, to build "an infrastructure to compete nationally and. . .make sure the infrastructure is profitable." (Cohen, Tr. 465).

1379. At the same time, Cohen's case study identified a risk of creating EDA - "[o]ther GPOs get started, and are recognized by Schein or PDCO." (CX1084 at 007; Cohen, Tr. 466).

1380. Cohen believed that if Schein or Patterson worked with buying groups, Benco risked losing customers. (Cohen, Tr. 467).

1381. EDA members were not contractually required to purchase from Benco. (Cohen, Tr. 467).

1382. Cohen recognized that not contractually requiring EDA member to purchase from Benco as a risk in his case study, which he identified as – "Customers sign up for EDA, and they go back to their incumbent supplier and negotiate a similar deal, and stay with the incumbent." (CX1084 at 007; Cohen, Tr. 468-469).

1383. Despite the risks, Benco decided to work with EDA to avoid losing the EDA partnership, and other partnerships, to Schein or Patterson. (Cohen, Tr. 471).

1384. In evaluating the risk of working with EDA, Cohen noted to his senior executives: "[A]s the #3 player in the market, with our infrastructure built out, it's in our best interest to break the mold in order to grow quickly and leverage our fixed investments." (CX1084 at 002; *see also* CX1218 at 002).

1385. Discounting to EDA provided Benco with new customers. (Cohen, Tr. 471).

1386. Discounting to EDA provided Benco with new sales. (Cohen, Tr. 472).

1387. Cohen believes EDA is a successful buying group. (Cohen, Tr. 471).

1388. INTENTIONALLY LEFT BLANK.

4. The Big Three Shared a Common Motive to Conspire.

1389. Leading up to the conspiracy, executives of the Big Three feared that buying groups would lower their, and the entire full-service industry's, pricing power and margins. CCFF ¶¶ 196-268).

5. The Executives of the Big Three Communicated Regularly and Had Opportunities to Conspire.

1390. Executives of the Big Three know each other, communicated regulary, and registered for or attended the same industry events during the conspiracy period. (CCFF ¶¶ 269-393).

XVIII. RESPONDENTS' CONSPIRACY WAS ANTICOMPETITIVE.

A. Respondents' Buying Group Discounts Before And After The Conspiracy Period.

1. Smile Source Discounts

1391. Prior to 2011, Schein Special Markets originally provided Smile Source [redacted], and additional discounts based on Schein's formulary. [redacted]; Foley, Tr. 4524-4526; Steck, Tr. 3776-3777).

1392. [redacted]; CX2571 at 001 (December 2011 email stating Smile Source customers receive discounts just above [redacted]); CX2454 at 001 (January 2011 email stating Smile Source customers receive [redacted] off catalog for non-formulary products) [redacted]).

1393. [redacted]

1394. [redacted]

1395. [redacted]

1396. Patterson's 2017 bid for Smile Source's business proposed offering discounts to Smile Source members. (Rogan, Tr. 3542); (CX8028 (Lepley, Dep. at 37).

1397. Smile Source's President Trevor Maurer described Patterson's 2017 bid to Smile Source as "very competitive" and "similar" to Schein's bid to Smile Source. (Maurer, Tr. 4985-4986; [redacted]

2. KlearImpakt Member Discounts

1398. Schein entered into an agreement with buying group KlearImpakt in August 17, 2015. (R. Johnson, Tr. 5479; RX2162 at 001; RX3086 at 016 (Schein's Response to IROG ¶1)). In 2015, the buying group KlearImpakt offered its dentist members formulary discounts in the range of [redacted] off Schein's catalog price for thousands of dentists' most commonly used items. (CX8029 (R. Johnson, Dep. at 88-89); [redacted]

[redacted]

1399. [redacted]

3. Teeth Tomorrow Discounts

1400. Schein began working with Teeth Tomorrow after they entered into a three-year agreement that began on May 15, 2017. (RX3086 at 013, 016 (Schein's Response to IROG ¶1); [redacted]

1401. [redacted]

1402. [redacted]

4. Mastermind Discounts

1403. Schein has been one of Mastermind Group's dental supply ordering vendors since 2017. (RX3086 at 013, 016 (Schein's Response to IROG ¶1); RX2695 at 001 (2017 Primary Vendor Agreement between Schein and Mastermind Group).

1404. Mastermind's formulary discount is a blended discount of [redacted] off of catalog pricing. (CX2718 at 005).

1405. Through its 2017 agreement with Schein, the Mastermind Group allows its members to purchase dental supplies at a discount through a formulary and receive additional discounts ranging from [redacted]

5. <u>Elite Dental Alliance Discounts</u>

1406. [redacted]

1407. [redacted]

1408. Benco's Tier 1 pricing is equivalent to catalogue pricing. (Cohen, Tr. at 929-930).

6. <u>Patterson's Other Post-Conspiracy Discounts To Buying Groups.</u>

1409. In 2017, Patterson Southeastern Regional President Anthony Fruehauf reported to Tim Rogan that buying groups were offering substantial discounts. (CX3186 at 002 (for the Atlanta Region, "[Georgia Dental Association]/GPO and competitive dealer network is continuing with substantial discounting strategy (20-35% off our pricing plus service, lab, etc.)"; CX3186 at 009 ("Continue to lose business to buying groups (i.e., SmileSource and Mari's List).").

1410. [redacted]

1411. [redacted]

B. Respondents' Conspiracy Harmed Competition.

1412. Respondents' not bidding for the business with buying groups or ending relationships with buying groups resulted in elevated prices of dental supplies. (CCFF¶¶ 1413-1441*; see also* Marshall, Tr. 2894).

1413. Less bidding pressure in the full-service dental supply distribution market means dentists paid higher prices than they would have if more full-service distributors supplied buying groups. (Marshall, Tr. 2894-2895).

1414. If Respondents did not bid on a buying group, and there was no other full-service distributor option in the area to supply a buying group, the buying group would not get a benefit from lower prices. (Marshall, Tr. 2894, 2899).

1415. During the relevant period, most independent dentists paid catalog prices for their dental supplies. (Cohen, Tr. 414, 422 (explaining that Benco Tier 1 pricing is catalogue pricing, and that the "lion's share" of independent dentists pay Tier 1 catalogue prices); [redacted]; CX0301 (Cohen, IHT at 78); CX3241; Rogan, Tr. 3625-3627, 3667-3669 (referencing CX3241 and explaining that the majority of Patterson's customers were paying catalogue prices during the relevant period and that discounts were flat during that time)).

C. Dr. Marshall's Empirical Work Shows Harm To Competition.

1416. [redacted]

1417. Dr. Marshall examined whether buying group members benefited by paying lower prices for their dental supply purchases after a distributor signed up with a buying group. (Marshall, Tr. 2861; CX7100 at 150 (¶351) (Marshall Expert Report)).

1418. [redacted]

1419. [redacted]

1420. [redacted]

1421. [redacted]

1422. [redacted]

1. <u>Prices And Margins Drop When Full-Service Distributors Discount To Buying Group Members Dentists.</u>

1423. When a full-service distributor discounts to a buying group, prices and margins drop. (CCFF¶¶ 1424-1433).

1424. [redacted]

1425. [redacted]

1426. Burkhart reduced its margins on dental supplies when it supplied the Kois Buyers Group, which translated into substantially lower prices for dentists. (Marshall, Tr. 2865-2866; *see also* [redacted]

1427. [redacted]

1428. [redacted]

1429. [redacted]

1430. Similar to when Burkhart partnered with Kois, Smile Source member dentists got lower prices when Burkhart signed up to supply Smile Source, and Burkhart lowered its margins. (Marshall, Tr. 2869-2870; *see also* [redacted]

1431. Similar to when Burkhart partnered with Kois, distributor Atlanta Dental decreased its margins when it partnered with Smile Source because Atlanta Dental was offering lower prices to Smile Source member dentists. (Marshall, Tr. 2872; *see also* [redacted]).

1432. Schein's transactional data show that when Schein resumed providing a discount to Smile Source members in March 2017, Smile Source members paid lower margin and prices. [redacted]

1433. [redacted]

2. <u>Prices And Margins Increase When Full-Service Distributors Do Not Work With Buying Groups.</u>

1434. [redacted]

1435. In Dr. Marshall's Schein-Smile Source 2012 data analyses, Dr. Marshall examined the pricing impact on the dentists supplied by Schein during Schein's pre-2012 partnership with Smile Source and after Schein's relationship with Smile Source ended. (Marshall, Tr. 2873; *see also* [redacted]).

1436. In Dr. Marshall's Schein-Smile Source 2012 data analyses, Dr. Marshall found that the prices that these dentists supplied by Schein were paying for Schein products increased after Schein ended its relationship with Smile Source. (Marshall, Tr. 2873; *see also* [redacted]).

1437. [redacted]

1438. [redacted]

1439. Economic theory predicts that the elimination of competition among rival suppliers benefits those suppliers at the expense of their customers. (CX7100 at 206 (¶ 483) (Marshall Expert Report)).

1440. [redacted]; *see also* CCFF ¶¶ 1416-1437).

1441. Dr. Marshall's data analyses show that dentists extract lower prices when they aggregate their purchases and leverage their collective bargaining power. (CX7100 at 128 (¶ 330) (Marshall Expert Report); CCFF ¶¶ 1435-1433; *see also* [redacted]).

3. <u>Respondents' Conspiracy Slowed The Formation And Growth Of Dental Buying Groups.</u>

1442. [redacted]

1443. [redacted]

1444. [redacted]

1445. [redacted]

XIX. MARKET DEFINITIONS

A. Channels of Distribution for Dental Products

1446. There are three main distribution channels for the purchase of dental products: (1) full-service distributors; (2) mail-order or internet distributors; and (3) direct-selling manufacturers. (Section XIX.A (CCFF ¶¶ 1447-1521)).

1. Full-Service Distributors

1447. Full-service distributors address all of the needs of dental practices, providing consumables, durables, and installation and repair services. (Guggenheim, Tr. 1532-1533; Sullivan, Tr. 3869-3870; CX0311 (Sullivan, IHT at 45-46); CX8015 (Cohen, Dep. at 56-57) (Benco as a full-service distributor has a "full array of products"); JX0003 at 002 (Joint Stipulation of Fact No. 5)).

1448. Full-service distribution includes offering supplies and supply representatives, equipment, installation, service technicians, software, and other goods and services for running a dental office. (Mason, Tr. 2334-2335; Sullivan, Tr. 3869-3870; Rogan, Tr. 3553-3554 (full-service encompasses distributors that have service technicians and salespeople); CX0311 (Sullivan, IHT at 45-46); CX5005 at 006 (Form 10-K for Patterson Companies, 2017)).

a) National Full-Service Distributors

1449. Schein, Patterson, and Benco are the only "full-service" distributors of dental supplies and equipment with a national footprint. (Ryan, Tr. 1019; [redacted]; Meadows, Tr. 2418 (Schein is a national full-service distributer); Guggenheim, Tr. 1532 (Patterson is a national full-service distributor); Guggenheim, Tr. 1544 (when Guggenheim was Patterson's president, Schein and Benco were Patterson's only full-service national competitors); Cohen, Tr. 409, 430 (Benco is a national full-service distributor); CX8017 (Rogan, Dep. at 31)).

1450. In 2013, Schein, Patterson and Benco were the largest distributors of dental products in the United States. (Rogan, Tr. 3526).

1451. In full-service distribution, Schein, Patterson, and Benco all view one another as major competitors. (CX0301 (Cohen, IHT at 47); CX0314 (Guggenheim, IHT at 55); CX0311 (Sullivan, IHT at 55) ("Q. Sure. And I'm just trying to understand if you disagree with the statement that Patterson and Benco are Schein's primary competitors in the U.S. dental market. THE WITNESS: I don't disagree with the statement, but I would refer to them as our largest."); CX5018 at 005 (Form 10-K for Henry Schein, Inc., 2015) ("In the dental market, our primary competitors are the Patterson Dental division of Patterson Companies, Inc. and Benco Dental Supply Company."); CCFF ¶¶ 48, 49, 50).

b) Regional Full-Service Distributors

1452. In full-service distribution, in addition to Schein, Patterson, and Benco, there are regional and local full-service distributors that operate on a multi-state level, within a single state, or that cover some smaller area within a state. (Guggenheim, Tr. 1756; Reece, Tr. 4455; Goldsmith Tr. 1946 (Atlanta Dental Supply and Nashville Dental); RX2591 (Steck, Class 30b6 Dep. at 26); Rogan, Tr. 3553-3554 (Nashville Dental is a regional, full-service distributor)).

1453. Burkhart is considered a regional distributer that does not have national coverage. (Reece, Tr. 4365-4366; Goldsmith, Tr. 1946; Kois Jr., Tr. 352-353).

1454. Burkhart is a distant 4th compared to the Schein, Patterson, and Benco. (Reece, Tr. 4363-4364). Burkhart is a $200 million dollar a year company compared to multibillion dollar Henry Schein and Patterson and $800 million dollar Benco. (Reece, Tr. 4363-4364). Compared to Schein, Patterson, and Benco, Burkhart, the next-largest full-service distributor, [redacted]; CX3105 at 024 (McKinsey & Company, Dental business growth strategy project: U.S. market overview, December 2015)).

c) Full-Service Distributor Market Shares

1455. Schein's national market share is approximately 36-38%. (Sullivan, Tr. 3876; CX0311 (Sullivan, IHT at 51); *see also* CX0082 at 008 (February 2012 Patterson Competitive Analysis, reporting that Schein "accounts for 36% of the U.S. dental market"); CX3105 at 024 (McKinsey & Company, Dental business growth strategy project: U.S. market overview, December 2015)).

1456. Patterson's national market share is roughly 30-34%. (Misiak, Tr. 1327 (Patterson has approximately 33% of the dental business in North America); CX3105 at 024 (McKinsey & Company, Dental business growth strategy project: U.S. market overview, December 2015)).

1457. Benco's national market share is roughly 12%. (Cohen, Tr. 409; CX0301 (Cohen, IHT at 61); CX1112 at 006 (Answer of Benco ¶2) (Benco currently accounts for approximately 11% of the sales of dental supplies sold through dental distributors; its percentage of sales has changed over time); CX3105 at 024 (McKinsey & Company, Dental business growth strategy project: U.S. market overview, December 2015)).

1458. Based on Respondents' executives' testimony and documents, Benco, Patterson, and Schein's collective national market share is approximately 78-84%. (*See* CCFF ¶¶ 1455-1458; *see also* CX2742 at 032 (Henry Schein 2011-2013 Strategic Plan, in the United States, the "top three distributors have a combined market share of over 80% in the dental supplies and equipment market."); CX3105 at 024 (McKinsey & Company, Dental business growth strategy project: U.S. market overview, December 2015)).

1459. The next largest full-service distributor, Burkhart, [redacted]; CX3105 at 024 (McKinsey & Company, Dental business growth strategy project: U.S. market overview, December 2015); Rogan, Tr. 3437 (Burkhart is fourth largest distributor); *see also* [redacted]).

d) Full-Service Distributor Offerings

(1) <u>Comprehensive Selection Of Dental Consumable Supplies & Equipment</u>

1460. Full-service distributors offer a comprehensive selection of dental consumable supplies and equipment from a variety of manufacturers. (Cohen, Tr. 403-404; Guggenheim, Tr. 1532 (a full-service distributor all the product lines that dentists use, along with the equipment and technology); Sullivan, Tr. 3869-3870; Meadows, Tr. 2474 (Schein has approximately 100,000 SKUs in its catalog); Misiak, Tr. 1293 (full-service distributors offer all the products that a dental office might need); [redacted]; CX8015 (Cohen, Dep. at 56-57) (Benco as a full-service distributor has a "full array of products"); CX0311 (Sullivan, IHT at 45-46)).

1461. Full-service distributors offer a comprehensive selection of products, with thousands of SKUs across all major product categories. (CX5018 at 006 (Form 10-K for Henry Schein, Inc., 2015) (Schein offers over 110,000 different SKUs to its customers, including 52,000 to its dental customers); [redacted]; CX8015 (Cohen, Dep. at 56-57) (Benco as a full-service distributor has a "full array of products")).

(2) Full-Service Sales Representatives Add Value

1462. In addition to offering dental consumable supplies and equipment, full-service distributors also offer value-added services to customers through their sales and service teams, including equipment installation and repair, sales representative support, and business and practice-management solutions. (CX2536 at 011-013 (February 2014 Henry Schein Dental/Smile Source Partnership Proposal describing the full portfolio of Schein's offerings); Sullivan, Tr. 3869-3870; Cohen, Tr. 404-406; Guggenheim, Tr. 1532 -1534; Reece, Tr. 4361-4362; CX5005 at 006 (Form 10-K for Patterson Companies, 2017); CX5020 at 005 (Form 10-K for Patterson Companies, 2015); CX1112 at 013-014 (Answer of Benco ¶24); CX3113 at 003 (Answer of Patterson ¶24) (admitting that full-service distributors offer a comprehensive selection of products, with thousands of SKUs across all major product categories, and value-added services to customers through their sales and service teams, including equipment installation and repair, sales representative support, and business and practice-management solutions); CX0321 (Kois Jr., IHT at 30)).

1463. The role of full-service distributor local representatives "was generally to do everyday things, to help make sure that if [a dentist] needed a repair, a repair technician got there quickly; if [a dentist was] having difficulty placing an order; if [a dentist] needed a referral to another resource. Just basically everyday things that could easily be solved." (CX8022 (Hight, Dep. at 17-18)).

1464. Full-service distributors' sales representatives help customers learn of new products, and control inventory of supplies. (Kois Sr., Tr. 169-170.)

1465. Sales representatives take orders and help arrange service for equipment. (Kois Sr., Tr. 170-171.)

1466. Full-service company representatives offer training on equipment. (Kois Sr., Tr. 171).

1467. Full-service distributors generally charge higher prices to account for these value-added services. (CX8017 (Rogan, Dep. at 44-45)).

1468. A Patterson February 28, 2012, strategic document states, "Our customers derive value in their relationship with their sales representative and the value-added services we provide." (CX0082 at 008).

1469. Having a sales representative come to the office is important to dentists because the sales representative's visit "allows me to ask a lot of questions, get support on supplies, answer questions on new materials, bring samples into my office. She helps facilitate returns very easily and has been very helpful in purchasing new equipment for the office as far as directing me to manufacturers that would work well with what I have in my office." (CX8030 (Baytosh, Dep. at 60-61)).

1470. Explaining the value of the sales representative, Schein's Dave Steck (VP & General Manager) stated that "[Schein] believe[s] the value of putting in a professional salesperson and the service support behind that salesperson that is expensive to provide . . . is a value to the customer. If we didn't we wouldn't do it. It is a very expensive thing to do. So that is why we put that in, we believe [the professional representative] is a value to the customer, along with the prices we sell at." (CX0310 (Steck, IHT at 115-116)).

1471. According to Benco's Managing Director Chuck Cohen, "Dentists value the sales rep. They value the service tech, as evidenced by the fact that GPOs can work with Darby [a telesales/Internet distributor] all day long, and they choose not to because dentists want the service that a Benco or full-service dealer would provide." (CX0301 (Cohen, IHT at 384)).

1472. Some full-service distributors offer inventory management as a service to their dentist customers. (CX0321 (Kois Jr., IHT at 30) ("A lot of the reps of these companies will come in and manage the inventory for the dentist and tell them when products are low, when they need to order. If they don't have one of those reps, the staff has to do that. Depending on how good their staff is, that can either be a plus or a minus.")).

(3) <u>Full-Service Technical Services Add Value</u>

1473. In addition to price, dentists care about "[v]alue, service, support, breadth of product, the ordering system, the quality and relation – quality of the sales rep, the quality of the service technician . . ." (CX8015 (Cohen, Dep. at 142)).

1474. Schein's Michael Porro (Zone Manager, Atlantic Coast) testified that "[f]ull service means everything. Equipment, technology, consultation services. We can help design their offices. We have a group of business solutions and value-added pieces that will, again, as noted before, help their practice grow so they can be successful in their profession. We have service. So all those things, in our definition of it, is full service." (CX8000 (Porro, Dep. at 58-59, 79-80) (further describing full-service value to customer stating that "we need to go out there and educate them on what we have to offer . . . that just makes us have to spend a little more time to help them understand the aspects that they have not seen because they've typically bought online, so we have to educate them higher.")).

(4) Full-Service Prompt Supply Delivery and Equipment Service Add Value

1475. A major factor affecting independent dentists' buying decisions is confidence in obtaining supplies quickly and frequently; storage is an issue in some cases. (CX8037 (Steck, Dep. at 143-144)).

1476. Full-service distributors have large distribution facilities across the country. (Cohen, Tr. 404 (Benco has five distribution centers across the country); Sullivan, Tr. 4040 (Schein has five distribution centers across the country); CX8017 (Rogan, Dep. at 69) (Patterson has seven distribution centers across the country)).

1477. Patterson's Tim Rogan (VP of Marketing, Merchandise) testified that Patterson's "real value" is that Patterson can take better care of its customers because it has better service technicians and is able to service equipment quickly so that if a dentist's office is down, Patterson can get the office up quickly. (CX0317 (Rogan, IHT at 92-93)).

1478. Schein has service techs at every location at every branch across the country and that the speed at which a repairman can fix broken equipment is important to dentists because "the quicker you can get something fixed, the better. If it's something they use every day in their practice, possibly, depending on what it was, the sooner you can get it fixed intuitively, the better." (CX8000 (Porro, Dep. at 72, 71) (explaining that equipment repair is not a "perk" but a "need.")).

1479. When a dentist's equipment breaks down, he needs it serviced right away because he cannot operate without some of the pieces of equipment. (CX8030 (Baytosh, Dep. at 63-64)).

1480. A full-service distributor sales representative helps a dentist notify the company that something is broken and get faster equipment repair. (CX8007 (Kois Sr., Dep. at 24)).

1481. [redacted]

(5) <u>Full-Service "One Stop" Shopping Adds Value</u>

1482. Full-service distributors provide dentists with a one-stop shop for supplies, and they typically deliver within a day or two. (Cohen, Tr. 403-408; Guggenheim, Tr. 1532-1534; CX3299 at 006 (In a 2014 Patterson presentation, Patterson describes a full-service distributor as "A distributor can add value by aggregating products and becoming a one stop shop for the customer"); Sullivan, Tr. 4040-4041 (Schein provides one to two day delivery from five distribution centers across the country); CX8015 (Cohen, Dep. at 56-57) (Benco delivers within one or two days shipping time to the customers)).

1483. Dentists prefer working with a full-service distributor. (Mason Tr. 2334; CX8023 (Guggenheim, Dep. at 229) (Guggenheim testified that dentists prefer to do business with a "value-added" distributor like Patterson because "[w]e deliver tremendous resources and value to dentists in the markets. Technology resources, service support resources, information reporting resources, sales resources.")).

1484. Dentists see efficiencies in purchasing from dental products distributors because a distributor can aggregate shipments more efficiently. (Rogan, Tr. 3560-3561).

1485. Dentists prefer working with a full-service distributor. (Mason, Tr. 2334).

1486. Buying groups also prefer working with national full-service distributors. [redacted]; CX4253 at 002 (a March 2014 letter to Burkhart from the Catapult Group, in which the Catapult GPO notes that it is looking for a national distributor to service its members and is turning down a willing Burkhart); CX0320 (Capaldo, IHT at 73-74) (the GDA wanted to work with a national distributor or a local full-service distributor in setting up its buying group); *see* RX2951 (Steck, Class 30b6 Dep. at 34) ("If you're going to sell dental equipment, you have to have a service component or the doctors won't buy it from you.")).

1487. The "convenience of full-service capabilities" allows dentists to spend more time with patients and generate additional revenue. (CX5030 at 005 (Form 10-K for Patterson Companies, 2015)).

(6) Distinct Full-Service Distribution Business Model

1488. Schein's senior executive James Bewslawski recognizes full-service dental distribution as a distinct line of business, noting that:

> Most dentists will contract with one or two full service dental distributors, and fill any remaining needs from various other supply and equipment providers. To be a primary or secondary dealer, the dealer must be able to offer a broad array of products and services, including equipment, equipment repair, supplies, and (increasingly) technology products and related I.T. services.

(RX2933 at 006 (Declaration of James Bewslawski)).

1489. Because dentists use mechanical dental equipment with virtually every patient visit – and because such equipment gets heavy use resulting in significant wear and tear – timely equipment service is important component of the package of full-service for dental distribution that Schein provides. (RX2933 at 006-007 (Declaration of James Bewslawski)).

1490. Schein's senior executive James Bewslawski explained that Schein spends "tens of millions of dollars each year" to provide its services to its dental customers because equipment and service is a "significant driver in [Schein's] dental business." (RX2933 at 006-007 (Declaration of James Bewslawski)).

2. Non-Full-Service Distributors (Mail-Order, Telesales, and Online Distributors)

1491. In addition to purchasing products from full-service distributors, dentists can also purchase products from mail-order, telesales, or online distributors ("non-full-service distributors"). (Goldsmith, Tr. 1947, [redacted]; Steck, Tr. 4050-5051, Kois Sr., 172-174).

a) Non-Full-Service Distributors Are Based On A Fundamentally Different Business Model Than Full-Service Distributors.

1492. Non-full-service distributors are based on a fundamentally different business model than full-service distributors. (CX0311 (Sullivan, IHT at 69-70)).

1493. Non-full-service distributors, such as Darby, usually offer lower prices than full-service distributors because they have different cost and overhead structures. (CX8023 (Guggenheim, Dep. at 324-325); CX0311 (Sullivan, IHT at 69-70); CX0301 (Cohen, IHT at 42); [redacted]).

1494. Schein's President, Tim Sullivan, explained that non-full-service distributors are based on a fundamentally different business model than full-service distributors: "[T]here's the full-service dealers and then the non-full-service dealers. We're all [] approaching the same customer, but our go-to-market strategies are different . . . . Our cost structure is different; the services that we provide is [*sic*] different. So our cost structure is higher in order to provide all the services that we provide." (CX0311 (Sullivan, IHT at 69-70)).

b) Non-Full-Service Distributors Generally Do Not Offer As Many Products As Full-Service Distributors.

1495. Non-full-service distributors generally do not offer as many products and services as full-service distributors. (CX1112 at 014 (Answer of Benco ¶25); CX6026 at 006 (Answer of Schein ¶25); CX3113 at 003-004 (Answer of Patterson ¶25).

c) Non-Full-Service Distributors Do Not Generally Employ Sales Or Technical Service Representatives.

1496. Unlike the full-service distributors, non-full-service distributors do not generally employ sales representatives or service technicians. [redacted]; CX0319 (Reece, IHT at 28-29); CX8023 (Guggenheim, Dep. at 324-325); CX0305 (Cavaretta, IHT at 48); RX2591 (Steck, Class 30b6 Dep. at 27)).

1497. Online distributors do not have a technical service team and do not normally sell equipment. (Cohen, Tr. 1046-1047; Sullivan, Tr. 4050-4051; Guggenheim, Tr. 2008-2009 (Darby); CX0319 (Reece, IHT at 28-29)).

d) Non-Full-Service Distributors Do Not Offer Value-Added Services.

1498. Non-full-service distributors do not offer value-added services akin to full-service distributors, such as technology and business solutions. (CX8025 (Sullivan, Dep. at 25); CX8031 (Steck, Dep. at 141); CX0305 (Cavaretta, IHT at 48); *see also* CX5005 at 008-009 (Form 10-K for Patterson Companies, 2017); CX0304 (Ryan, IHT at 37) (Darby generally only distributes consumables)).

e) Non-Full-Service Distributors Do Not Have Distribution Facilities Across The Country.

1499. Non full-service distributors do not have distribution facilities across the country. [redacted]).

f) Full-Service Distributors Do Not Benchmark Prices Against Non-Full-Service Distributors.

1500. [redacted]

1501. Schein does not consider non-full-service distributor market prices in setting its catalog prices. (CX0311 (Sullivan, IHT at 67-69); CX0310 (Steck, IHT at 60-61) (if Schein was competing for an account with Darby, Steck would tell account they have to pay more for extra services Schein would provide); [redacted]).

g) Darby, A Non-Full-Service Online Distributor, Is Distinct From Full-Service Distributors.

1502. Darby is the largest non-full-service (online) distributor. (CX0301 (Cohen, IHT at 46)).

1503. Darby is an online distributor of dental supplies that sells merchandise – supplies and equipment – but not larger equipment, and it does not provide in-office services. (Ryan, Tr. 1046-1047; Goldsmith, Tr. 1947; CX0310 (Steck, IHT at 60); CX0315 (McFadden, IHT at 72-73); CX0314 (Guggenheim, IHT at 52-54)).

1504. Darby does not sell products face-to-face, meaning that it does not have local level sales representatives. (CX8023 (Guggenheim, Dep. at 324-325); CX9005 (Cohen, SourceOne Dep. at 485) ("There is also a range of competitors, like Darby and Safco, that don't have full, you know, face-to-face selling people."); CX0314 (Guggenheim, IHT at 52-54); CX0310 (Steck, IHT at 60)).

1505. Darby also did not have equipment service capabilities prior to its partnership with Dental Fix RX in February 2016. (CX8023 (Guggenheim, Dep. at 324-325); CX0304 (Ryan, IHT at 192); CX2593 at 002 (announcement of Darby's partnership with Dental Fix Rx)).

1506. Patterson's Guggenheim described Darby as "more of a price position offering" and that "[Darby's] value offer is that they're a low-priced provider in the market. They don't provide technical service, they don't provide sales presence, they don't provide local connection to customers, and we spend hundreds of millions of dollars on infrastructure to do things that they've elected not to do provide and sell at a lower cost . . ." (CX 8023 (Guggenheim, Dep. at 324-325)).

1507. In a March 15, 2013 email, Benco's Chuck Cohen wrote, "[A] good sales rep adds value to a dental practice, value that can't be matched by a catalog or even a robust website - - - and value that far exceeds the amount of money the average dental practice can save without a catalog. . . . 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." (CX1053 at 001; Steck, Tr. 4050-4051 ("So the difference – the big difference between full service…and the online companies is they only talk about the supplies piece…[w]e don't believe the non-full-service business has grown much more than, I don't know, 12, 14, 15 percent of the market, I don't know, but it's a small space.")).

1508. Benco's Patrick Ryan was not as concerned when non-full service distributors such as Darby were supplying buying groups, but he grew more concerned when full-service distributors started servicing buying groups due to "tougher competition" from full-service distributors' "value-added services." (Ryan, Tr. 1043-1049; CX0304 (Ryan, IHT at 188-194); CX0015 ("Shit. I know Burkhart got Nashville and Atlanta involved [with Smile Source]. If it's just Darby, I don't care as much…but when full service guys get in….")).

3. <u>Direct-Selling Manufacturers.</u>

1509. Dentists can also purchase some dental supply products from direct-selling manufacturers. (Kois Sr., Tr. 168, 175; Cohen, Tr. 602; Ryan, Tr. 1140-1141; Goldsmith, Tr. 1950-1951 (discussing discounts to Smile Source dentists from direct sale)).

1510. Direct-selling by manufacturers represent a small segment of the dental market. Estimates for this segment range from 10% to 25%, but these are typically niche and specialty products, such as root canal supplies, rotary supplies, and bleaching products. (CX8030 (Baytosh, Dep. at 57-58); CX0301 (Cohen, IHT at 47); CX0317 (Rogan, IHT at 278-279); CX0304 (Ryan, IHT at 28)**;** CX0082 at 008; CX3280 at 019; CX3105 at 024 (McKinsey & Company, Dental business growth strategy project: U.S. market overview, December 2015, 75% of dental products go through distributors Patterson and Schein)).

a) Direct-Selling Manufacturers Offer Limited Dental Supplies And Do Not Sell Dentists A Full Line Of Dental Products

1511. Direct-selling manufacturers offer limited dental supplies and do not typically offer or directly sell the full range of products a dentist needs to run a dental practice. (Ryan, Tr. 1140-1141); Kois Sr., Tr. 176; [redacted]; CX0304 (Ryan, IHT at 27-28); CX8030 (Baytosh, Dep. at 57-58)).

1512. Instead, many dental supply products are only available through distributors. (CX0321 (Kois Jr., IHT at 84); Ryan, Tr. 1141 (direct selling manufacturers do not carry a full line of products)).

1513. No direct-selling manufacturer offers the full range of dental products necessary to run a dental practice. (Ryan, Tr. 1141; Kois Sr., Tr. 176; Misiak, Tr. 1293 (Young Innovations does not offer all the products a dentist's office would require); CX0304 (Ryan, IHT at 28)).

1514. A dental practice doing business only with manufacturers would be unable to purchase the full set of products available from full-service distributors. Dentist Joseph Baytosh testified that he asked manufacturers whether he could purchase supplies directly from them, but they informed him that they sell through dental supply companies. (CX8030 (Baytosh, Dep. at 57)). Dr. Baytosh further stated that the direct-selling manufacturers that he purchases from only sells specialty items like endodontic supplies, orthodontic supplies. (CX8030 (Baytosh, Dep. at 57-58)).

1515. According to Benco's Patrick Ryan, dentists cannot only rely on manufacturers to run a practice. (CX0304 (Ryan, IHT at 27-28) ("Q. Okay. So there are no full-line manufacturers that sell direct that carry a full line of products for dentists? A. No.")).

1516. Direct-selling manufacturers do not offer dentists the convenience of "one-stop-shopping" offered by distributors. (CX8000 (Porro, Dep. at 55 ("Q. and if I'm a dentist, can I source everything I need through direct selling from manufacturers?... A. No."), at 57 ("Q. But as far as you know, there are no one-stop shops direct manufacturers to dentists with all the supplies? A. As far as I know, no.")).

1517. Direct-selling manufacturers were not a viable avenue for dentists and buying groups to secure supply agreements for a full line of dental products because dental product manufacturers typically do not sell directly to dentists. (CX8030 (Baytosh, Dep. at 57); CX8017 (Rogan, Dep. at 85-86); CX0321 (Kois Jr., IHT at 84)).

b) Direct-Selling Manufacturers Do Not Sell The Same Products Through Distributors

1518. Direct-selling manufacturers that sell directly to dentists generally do not also sell the same products through distributors, and direct-selling manufacturers that sell through distributors do not typically sell the same products directly to dentists. (Kois Sr., Tr. 176; CX0082 at 008; CX0304 (Ryan, IHT at 26-28)).

1519. Most of the direct-selling manufacturers that Patterson works with sell only through distributors and do not sell directly to dentists. (Rogan, Tr. 3561-3562).

c) Direct-Selling Manufacturers Sell Primarily Niche Or Specialty Products Directly To Dentists

1520. Direct-selling manufacturers typically specialize in niche products, such as root canal supplies. (Guggenheim, Tr. 1756-1757; Ryan, Tr. 1141; CX8030 (Baytosh, Dep. at 57-58); CX0304 (Ryan, IHT at 28) ("Q. . . . If a dentist is only relying on direct-selling manufacturers, what they would be missing that they would need? A. Direct-selling manufacturers typically are niche products."); CX0317 (Rogan, IHT at 279) ("We don't have manufacturers decide to sell direct very often."); CX3280 at 019 ("Some of the largest 'direct sales' categories occur in the specialty markets . . .")).

d) Direct-Selling Manufacturers Do Not Have Distribution Capabilities

1521. Direct-selling manufacturers also do not have the distribution or service capabilities of full-service distributors. According to a Patterson strategic analysis, direct selling manufacturers cannot compete with the distribution networks of full-service distributors. (CX0082 at 008 (attachment to February 28, 2012 email from Guggenheim to Love) ("Direct companies continue to hit a wall at a certain volume as they cannot compete with the coverage of the distribution network.")).

B. The Relevant Product Market Is Dental Products And Services Sold Through Full-Service Distributors To Independent Dentists.

1522. The relevant product market is the dental products and services sold through full-service distributors to independent dentists. (CCFF ¶¶ 1525-1566).

1523. Dr. Carlton declined to do any analysis of the market definition because the "definition of the relevant product and geographic markets has no bearing on whether Respondents' behavior could be deemed anticompetitive." (RX2832 at 010-011 (¶12, n.15) (Carlton Expert Report); *see also* Carlton, Tr. 5470).

1524. Dr. Carlton describes the market definition as "superfluous" to this matter and explains that is the reason that he does not address it in his report. (RX2966 (Carlton, Dep. at 228-229)).

1. <u>Qualitative Evidence Demonstrates That No Reasonable Substitute Exists For Products and Services Offered By Full-Service Distributors To Independent Dentists.</u>

a) No reasonable substitute exists for the products and services offered by full-service distributors to independent dentists.

1525. No reasonable substitute exists for the products and services offered by full-service distributors to independent dentists. (Section XIX.A (CCFF ¶¶ 1447-1448, 1460-1521); CCFF ¶¶ 1526-1551).

1526. Full-service distributors provide independent dentists with a distinctive offering of products and services that independent dentists value. (Section XIX.A.1 (CCFF ¶¶ 1447-1448, 1460-1490)).

1527. Full-service distributors offer independent dentists a comprehensive selection of dental supplies and equipment from a variety of manufacturers. (CCFF ¶¶ 1447, 1460-1461, 1476, 1482, 1484, 1487, 1527).

1528. Full-service distributors provide independent dentists with a one-stop shop for supplies, and they typically deliver within a day or two – prompt and efficient delivery is an important component of full-service distribution because it allows dentists to avoid carrying large inventories in their office space. (CCFF ¶¶ 1475, 1476, 1482, 1484, 84-86).

1529. 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. (CCFF ¶¶ 1447-1448, 1462-1474, 1483).

1530. The convenience of these full-service distribution services and capabilities allows dentists to spend more time with patients and generate additional revenue. (CCFF ¶ 1487).

1531. Full-service distributors also have the ability to provide prompt and reliable equipment maintenance that is crucial for dental practices. (CCFF ¶¶ 87-88, 1479-1481, 1532, 1533).

1532. 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). (CCFF ¶¶ 87-88, 1479, 1481).

1533. A full-service distributor sales representative helps a dentist get faster equipment repair and informs him about new products. (CCCF ¶¶ 1480).

1534. Independent dentists have expressed that they value the prompt service, breadth and diversity of offerings, as well as the relationships with sale and technical representatives that are distinct value-added offerings of full-service distributors. (CCCF ¶¶ 1464, 1469, 1483, 1471, 1473).

1535. Buying groups also prefer working with full-service national distributors. (CCFF ¶ 1535).

1536. Respondents also recognize full-service distribution as its own line of business because independent dentists value the services that Respondents offer as well as their relationships with Respondents' sales representatives. (CCFF ¶¶ 1469-1471, 1483, 1486, 1488-1490, 1492-1494, 1501, 1500, 1506-1508, 1511, 1516).

(1) Non-full-service distributors are not adequate substitutes for national full-service distributors.

1537. Non-full-service distributors, such as Darby, are not an adequate substitute for full-service distributors to independent dentists. (CCFF ¶¶ 1492-1508, 1538-1534).

1538. Non-full-service distributors have a different business strategy and cost structure than full-service distributors. (CCFF ¶¶ 1492-1494, 1488-1490, 1506, 1538).

1539. Full-service distributors do not benchmark prices against non-full-service distributors. (CCFF ¶¶ 1500, 1501).

1540. Non-full-service distributors do not offer dentists as comprehensive a selection of products or the breadth of additional value-added services that are available through full-service distributors. (CCFF ¶¶ 1471, 1495-1498, 1503, 1506-1508).

1541. The products sold by Darby, the largest non-full-service distributor, did not cover the full-line of products and services sold by full-service distributors. (CCFF ¶ 1503).

1542. Non-full-service distributors typically do not employ sales and service teams as part of their standard business model, nor do they offer other business and practice-management solutions. (CCFF ¶¶ 1496, 1497, 1504, 1505, 1507).

1543. Non-full-service distributors are not a substitute for full-service distributors because independent dentists would lose the convenience and time savings associated with "one-stop-shopping" through a distributor if they worked with a non-full-service distributor. (*See* CCFF ¶¶ 1482, 1495, 1499, 1619).

(2) Direct-selling manufacturers are not adequate substitutes for national full-service distributors.

1544. Direct-selling manufacturers are also not an adequate substitute for full-service distributors. (CCFF ¶¶ 1510-1521, 1545-1551).

1545. During the relevant time period, relatively few independent dentists would substitute from a full-service distributor to a direct-selling manufacturer because direct-selling manufacturers do not sell the same range of products sold by full-service distributors. (CCFF ¶¶ 1511-1517).

1546. Direct-selling manufacturers offer only limited dental supplies and do not typically offer or directly sell independent dentists the comprehensive selection of products and brands that a dentist needs to run a dental practice. (CCFF ¶¶ 1511-1520, 1545-1548).

1547. Direct-selling manufacturers generally only sell niche and specialty products directly to independent dentists. (CCFF ¶¶ 1510-1511, 1514, 1520).

1548. An independent dentist doing business only with direct-selling manufacturers would not be able to purchase a full array of products needed to run his dental practice from direct-selling manufacturers. (CCFF ¶¶ 1511-1517).

1549. Direct-selling manufacturers do not offer independent dentists the same value-added sales and technical services that full-service distributors offer. (CCFF ¶ 1521).

1550. Direct-selling manufacturers do not have and cannot offer independent dentists the distribution or service capabilities of full-service distributors. (CCFF ¶ 1521).

1551. Direct-selling manufacturers do not offer independent dentists the same product breadth and variety or the convenience of "one-stop-shopping." (CCFF ¶¶ 1511-1516).

b) Respondents Viewed Each Other As Each Other's Primary Competitors.

1552. Schein, Patterson, and Benco are the only "full-service" distributors of dental supplies and equipment with a national footprint, and they identify each other as their primary or largest competitors. (Section II.D; CCFF ¶¶ 552, 1449-1451).

2. <u>The Hypothetical Monopolist Test Further Confirms That The Relevant Product Market Is Dental Products And Services Sold Through National Full-Service Distributors To Independent Dentists.</u>

1553. Complaint Counsel's economic expert, Dr. Marshall, concluded that the appropriate relevant market in this matter is the full line of dental products and services sold through full-service distributors to independent dentists. (CX7100 at 010, 072-073 (¶¶10, 176-179) (Marshall Expert Report)).

1554. Dr. Marshall concluded that direct-selling manufacturers are not in the relevant product market. (Marshall, Tr. 2908-2909; [redacted]).

1555. Dr. Marshall also concluded that non-full-service distributors, such as Darby, are not in the relevant product market. (Marshall, Tr. 2905; [redacted]).

1556. Dr. Marshall based his product market findings on both the qualitative evidence identified in Section XIX.B.1 (CCFF ¶¶ 1525-1552), *supra,* as well as the analytical framework in the U.S. Department of Justice & Federal Trade Commission Horizontal Merger Guidelines (2010) ("Merger Guidelines"). [redacted].

1557. Dr. Marshall also conducted a Hypothetical Monopolist Test to determine the relevant product market. (CX7100 at 071-073 (¶¶172-179) (Marshall Expert Report)).

1558. The Hypothetical Monopolist Test is well-established for assessing a relevant product market. (CX7101 at 18 (¶36) (Marshall Expert Rebuttal Report) (citing Merger Guidelines, § 4.1.4); *see also* CX7100 at 071-073 (¶¶172-175, 179) (Marshall Expert Report)).

1559. The Merger Guidelines state that "[m]arket definition focuses solely on demand substitution factors, i.e., on customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service." (CX7101 at 024 (¶57) (Marshall Expert Rebuttal Report) (quoting the Merger Guidelines, p. 7)).

1560. The hypothetical monopolist is the union of all firms in the candidate product market, i.e., there is a single seller of products in the candidate market. (CX7101 at 018 (¶36) (Marshall Expert Rebuttal Report)).

1561. The Hypothetical Monopolist Test asks if the hypothetical monopolist can profitably increase price in a small but significant manner. (CX7101 at 018 (¶36) (Marshall Expert Rebuttal Report)).

1562. If substitution by customers to products outside the candidate market would make the price increase unprofitable, then the candidate market fails. (CX7101 at 018 (¶36) (Marshall Expert Rebuttal Report)). A new candidate market is then considered by adding additional products and then conducting the exercise again. (CX7101 at 018 (¶36) (Marshall Expert Rebuttal Report)). If this second candidate market also fails, more products are added until the hypothetical monopolist can profitably increase price. (CX7101 at 018 (¶36) (Marshall Expert Rebuttal Report)). At that point, the candidate market is validated under the hypothetical monopolist test. (CX7101 at 018 (¶36) (Marshall Expert Rebuttal Report)).

1563. A hypothetical monopolist may have many product lines under its control. (CX7101 at 018 (¶36) (Marshall Expert Rebuttal Report)).

a) Dr. Marshall Performed Two Types Of Hypothetical Monopolist Tests To Determine The Relevant Product Market

1564. In defining the relevant product market in this matter, Dr. Marshall performed two kinds of natural experiments that applied the Hypothetical Monopolist Test ("HMT") to study customer switching patterns in response to price increases:

- The hypothetical monopolist has a uniform percentage price increase across all of its product lines that fall under the umbrella of the candidate product (based on Darby's relationship as a supplier for Smile Source).
- The hypothetical monopolist has a price increase in one of the product lines (based on Benco's entry into southern California).

[redacted]; *see also* CX7101 at 018 (¶37) (Marshall Expert Rebuttal Report)).

1565. Both of Dr. Marshall's HMT analyses confirmed that the relevant product market was limited to full-service distribution. [redacted]

b) Dr. Marshall Performed An Additional Empirical Analysis To Determine The Relevant Product Market.

1566. In addition to the HMT analyses he conducted, Dr. Marshall did one other analysis of Darby to define the relevant market. (Marshall, Tr. 2908; [redacted]). This analysis studies how much independent dentists purchased from Darby. (Marshall, Tr. 2908; [redacted]). From this empirical analysis, Dr. Marshall found that almost no dentists purchased all of its products from Darby, and that most dentists only bought a small percentage of their purchases from Darby, if anything at all, confirming Dr. Marshall's findings that Darby and other non-full-service distributors are not in the relevant market. (Marshall, Tr. 2908; [redacted]).

C. The Relevant Geographic Markets Are No Larger Than the United States and Local in Nature.

1567. The relevant geographic markets are no larger than the United States, and regional geographic markets contained therein. (CCFF ¶¶ 1568-1592).

1. Respondents' Experts Do Not Dispute That The Relevant Geographic Markets Are No Larger Than The United States And Local In Nature.

1568. Benco's economic expert, Dr. John H. Johnson, IV, agrees with Dr. Marshall that the geographic markets are no larger than the United States and local in nature. (J. Johnson, Tr. 4788-4789; RX2834 at 013 (¶17) (Johnson Expert Report); RX2965 (J. Johnson, Dep. at 29)).

1569. Patterson's economic expert, Dr. Lawrence Wu, does not disagree with Dr. J. Johnson's opinion that the relevant geographic markets are no larger than the United States and local in nature. (RX2967 (Wu, Dep. at 245)).

1570. Schein's economic expert, Dr. Carlton concedes that a market definition is irrelevant to this case and offers no opinion that he disagrees with Dr. Marshall's geographic market definition. (RX2832 at 010-011 (¶12, n. 15) (Carlton Expert Report); RX2966 (Carlton, Dep. at 228-231); Carlton, Tr. 5470).

1571. Respondents' experts have not identified any alternative relevant geographic markets that are more appropriate in this case than local markets. (*See generally* [redacted]).

2. Qualitative Evidence Supports That The Relevant Geographic Markets Are Local In Nature.

a) Respondents Recognize That Local Markets Are Distinct.

1572. Benco, Patterson, and Schein all view markets at the local or regional levels, not at the national level. (CX0311 (Sullivan, IHT at 53-55); CX0301 (Cohen, IHT at 58-59); CX8023 (Guggenheim, Dep. at 140-141) (Patterson is a decentralized organization, all customer engagement happens at the branches in the markets)).

1573. Schein's President Tim Sullivan testified that while Patterson and Benco are the company's largest competitors, "every market is unique" locally. (CX0311 (Sullivan, IHT at 53-55)).

1574. Benco's Chuck Cohen described markets in a local sense when he testified that while the company does not divide markets, "when you look at markets, you can look at MSAs like cities, you can look at states, you can look at regions." (CX0301 (Cohen, IHT at 58-59)).

b) Respondents Manage Their Businesses On A Local Level.

1575. Patterson President Paul Guggenheim described that Patterson operates a decentralized business model where "[w]e provide branch or individual business entities in each of the significant markets around the country, so there's roughly 70-some, 70 of those branches today. And that largely we have entirely operating business unit [*sic*] inside those branches, meaning customers that are in a particular market are served entirely—almost entirely by that local presence." (CX0314 (Guggenheim, IHT at 34-35)).

1576. Patterson manages the business of independent dental practices at the local branch level. (CX0314 (Guggenheim, IHT at 34-36) ("customers that are in a particular market are served entirely -- almost entirely by that local presence," excepting things like shared support services, logistics, and shipping, which are provided by the corporate office); CX0314 (Guggenheim, IHT at 62-63) (the business of private practices is handled by Patterson's local branches, with some facilitation by the corporate office for items such as financing a large equipment purchase)).

1577. Similar to Patterson, Schein also makes decisions related to bidding on customers and buying groups, pricing, and vendor chargebacks locally. (CX0311 (Sullivan, IHT at 33-34, 172, 109)).

c) Independent Dentists Value Full-Service Distribution Services Provided Promptly And Locally.

1578. The need for same or next-day product delivery and same-day servicing to the customer's office or member location(s) typically limits the scope of regional markets. (CCFF ¶¶ 1476-1482).

1579. Independent dentists typically cannot store and manage large quantities of supplies in-house, and rely on frequent, small quantity orders. (CCFF ¶¶ 84, 86, 1475, 1484).

1580. Independent dentists require prompt equipment servicing because delays in service affect dentists' ability to see patients. (CCFF ¶¶ 87-88, 1477-1481).

3. <u>The Hypothetical Monopolist Test Further Confirms That The Relevant Geographic Markets Are Local In Nature.</u>

1581. Pursuant to the Hypothetical Monopolist Test ("HMT"), the relevant geographic markets are local in nature and no larger than the United States. (Marshall, Tr. 2909-2912; [redacted]).

1582. Dr. Marshall performed the Hypothetical Monopolist Test and assessed the relevant geographic markets from the perspective and locations of an independent dentist's purchasing decisions, as well as considering the locations of the sales offices of the full-service distributors. (Marshall, Tr. 2910-2912; CX7100 at 090-091 (¶¶228, 231) (Marshall Expert Report)).

1583. Dr. Marshall performed the Hypothetical Monopolist Test on the Atlanta, Georgia market as well as the Seattle, Washington markets, and he determined that the relevant geographic markets are local in nature. (Marshall, Tr. 2910-2913; CX7100 at 092, 108 (¶¶ 233-275) (Marshall Expert Report)).

1584. Dr. Marshall specifically chose to study the Atlanta and Seattle markets as a part of his geographic market HMT because Respondents faced competition from a large regional full-service distributor in each of these markets: Atlanta Dental and Burkhart. (CX7100 at 092

(¶233) (Marshall Expert Report)). Because of this competition from large regional full-service distributors, these two cities are likely areas in which Respondents' market power was less than the market power suggested by their average shares across the United States. (CX7100 at 092 (¶233) (Marshall Expert Report)).

1585. [redacted]

1586. [redacted]

1587. Dr. Marshall analyzed these the local markets of Atlanta and Seattle as illustrations of areas where he expected Respondents to have the lowest collective market share. (CX7100 at 092 (¶234) (Marshall Expert Report)).

1588. Respondents' collective market share in the Atlanta and Seattle markets, considered along with Respondents' collective national share, indicates Respondents possess market power throughout most, if not all, local markets across the country. (CX7100 at 092 (¶234) (Marshall Expert Report)).

1589. Local market shares will not necessarily mirror national shares, but they must average out to the national shares. (CX7100 at 056-057 (¶127) (Marshall Expert Report)).

1590. Dr. Marshall selected Atlanta and Seattle to study for his geographic market analyses because they were likely areas in which Respondents' market power was less than the market power suggested by their average shares across the United States. (CX7100 at 115 (¶295) (Marshall Expert Report)). Dr. Marshall explained that because shares vary across geographic markets, for the Atlanta and Seattle shares to be lower than nationwide shares, other geographic markets must have shares higher than the national average. (CX7100 at 115 (¶295) (Marshall Expert Report).

1591. Dr. Marshall's analyses of the Atlanta and Seattle geographic markets are representative of similar analyses that could be performed throughout the United States. (CX7100 at 109 (¶278) (Marshall Expert Report)). Because Respondents' collective shares remains high even in the Atlanta and Seattle geographic markets, it is unnecessary to perform such analyses throughout the country to reach a general opinion about their market power in local markets throughout the country. (CX7100 at 109 (¶278) (Marshall Expert Report)).

4. <u>Price Comparisons Also Confirm That The Relevant Geographic Markets Are Local In Nature.</u>

1592. To confirm that the relevant geographic markets are local in nature, Dr. Marshall also 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 Dr. Marshall's conclusion that the relevant geographic markets are local. [redacted]).

XX. DR. MARSHALL DETERMINED THAT RESPONDENTS COLLECTIVELY HAVE MARKET POWER IN THE RELEVANT MARKETS.

1593. Based on his empirical analysis, Dr. Marshall determined that [redacted].

1594. Based on his empirical analysis, Dr. Marshall determined that [redacted].

1595. Based on his empirical analysis, Dr. Marshall determined that [redacted].

1596. Based on his empirical analysis, Dr. Marshall determined that [redacted].

1597. In addition to national market power, Schein, Patterson, and Benco have market power in and around the two cities where they faced competition from a large, regional full-service distributor: Atlanta and Seattle. (Marshall, Tr. 2912; [redacted]).

1598. Based on his empirical analysis, Dr. Marshall determined that [redacted].

1599. Based on his empirical analysis, Dr. Marshall determined that [redacted].

1600. Schein, Patterson, and Benco's collective market share in Atlanta and Seattle, considered along with their collective national share, indicates that they possess market power throughout most, if not all, local markets across the country. [redacted]

XXI. DR. MARSHALL OBSERVED MARKET STRUCTURE CONDUCIVE TO COLLUSION AGAINST BUYING GROUPS.

1601. The structure of the market for the full line of dental products and services sold through full-service distributors to independent dentists was conducive to effective collusion against dental buying groups. (Marshall, Tr. 2916; [redacted]; CCFF ¶¶ 1602-1623)).).

1602. To determine whether a particular market is conducive to collusion, Dr. Marshall examines demand and costs conditions through the lens of Porter's Five Forces, as described by Michael Porter of the Harvard Business School in his book Competitive Strategy. (Marshall, Tr. 2913; *see also* CX7100 at 111 (¶281, n. 427) (Marshall Expert Report)).

1603. The Porters Five Forces framework is widely cited and applied to understand collusive behavior. (Marshall, Tr. 2914; [redacted]).

1604. In the Porters Five Forces analysis, the center force is the inter-firm rivalry. (Marshall, Tr. 2913; [redacted]).

1605. The perimeter forces surrounding this center force in this Porters Five Forces model are threat of new entrants (barriers to entry), bargaining power of suppliers, threat of substitute products and services (availability of substitute goods), and bargaining power of buyers. (Marshall, Tr. 2913-2915; [redacted]).

A. Bargaining Power of Buyers

1606. The bargaining power of buyers is one of the five forces that affect industry profitability in the Porter's Five Forces model. [redacted]; CX7100 at 127-129 (¶329, n.496, ¶332) (Marshall Expert Report)).

1607. When a set of independent dentists function together in a buying group, then they aggregate the potential foregone profits of the full-service distributors serving them. (CX7100 at 128 (¶330) (Marshall Expert Report)).

1608. Aggregating purchases for potential foregone profits for the full-service distributors serving the independent dentists increases the dentists' collective bargaining power and allows them to extract lower prices. (CX7100 at 128 (¶330) (Marshall Expert Report)).

1609. Respondents focused their attention on controlling the rise of the bargaining power of buyers by keeping them as independent dentists and not allowing the rise of buying groups. (Marshall, Tr. 2915-2916; [redacted]).

B. Low Price Elasticity Of Independent Dentists' Demand.

1610. Independent dentists (and dental buying groups composed of independent dentists) have a relatively low price elasticity of demand for the full line of dental products and services sold through full-service distributors. (CX7100 at 111-114 (¶¶282-290) (Marshall Expert Report)).

1611. Specifically, there are three economic reasons the elasticity of demand for the products and services bought from full-service distributors was low: (1) these products and services were essential to the practice of dentistry; (2) these products and services did not have close economic substitutes; and (3) these products and services were only a small portion of the overall cost of dental procedures. (CX7100 at 111-112 (¶¶283-286) (Marshall Expert Report)).

1612. Additionally, research indicates that the demand for dental services has been inelastic. (CX7100 at 113-114 (¶287) (Marshall Expert Report)).

C. High Collective Share Of Schein, Patterson, and Benco.

1613. Concentration, or a small number of sellers, is a structural factor that is conducive to effective collusion. (CX7100 at 011, 114-115 (¶¶12, 290-295) (Marshall Expert Report)).

1614. During the relevant period, Schein, Patterson, and Benco accounted for a combined [redacted].

D. Barriers To Entry In Full-Service Distribution.

1615. Barriers to entry are a structural factor that is conducive to effective collusion. ([redacted]; (CX7100 at 115-116 (¶296) (Marshall Expert Report)).

1616. Recruitment, training, and retention of sales representatives is a barrier to entry to full-service distribution of dental supplies. (CX2594 at 053, 055 (Henry Schein Global Dental Group 2015–2017 Strategic Plan Situation Analysis includes Schein emphases on investment in career development and training, "We need highly trained, specialized sales reps and service technicians" . . . "We need Business Solution Specialists that can speak to customers at a higher level and present full range of solutions"); RX2951 (Steck, Class 30b6 Dep. at 49-51) (rookie salesmen are rookies for 2-3 years and paid a base salary plus commission on what they sell, after which they can earn higher commissions); [redacted]).

1617. Sufficient service technicians to respond to issues competently and promptly is a barrier to entry to full-service distribution of dental supplies. (CX0301 (Cohen, IHT at 384) ("Dentists value the sales rep. They value the service tech, as evidenced by the fact that GPOs can work with Darby [mail-order distributor] all day long, and they choose not to because dentists want the service that a Benco or full-service dealer would provide.”); CX0311 (Sullivan, IHT at 45-46) (full-service distributors can answer any and all needs of a dental office, including equipment installation, repair, and service); CX5005 at 008 (Form 10-K for Patterson Companies, 2017) (Patterson differentiated itself based in part on its highly-trained and experienced service technicians); [redacted]; RX2951 (Steck, 30b6 Dep. at 28-29) (Schein competes using high-quality trained technicians who respond quickly to service calls); [redacted]

1618. Pricing from manufactures as well as other favorable terms from manufacturers that lower costs for large full-service distributors is a barrier to entry to full-service distribution of dental supplies. (CX0302 (Jackson, IHT at 040) (identifying that a challenge of starting up a dental distributor startup is obtaining product lines from manufacturers); CX7100 at 116 (¶297) (Marshall Expert Report)).

1619. Obtaining the requisite infrastructure, specifically: warehouse or distribution centers to store a comprehensive selection of products, local showrooms, and service vans for “one stop shopping” is a barrier to entry to full-service distribution of dental supplies. [redacted]; CX8017 (Rogan, Dep. at 69) (Patterson has seven distribution centers and can deliver product to 95 percent of the country in one day); CX8015 (Cohen, Dep. at 47-48) (discussing infrastructure needed for Benco to better supply west coast); CX8031 (Steck, Dep. at 143) (independent dentists need quick and frequent deliveries because they have limited storage space and "run out of stuff"); CX7100 at 116 (¶297) (Marshall Expert Report)).

1620. [redacted]

1621. A February 2012 Patterson market analysis stated that "The risk associated with . . . new entrants is minimal. . . . Due to the duopoly nature of the North American distribution landscape a high barrier to entry limits the threat of new entrants in the space." (CX0082 at 009 (attachment to February 28, 2012 email from Guggenheim to Love)).

1622. Benco Senior Team Retreat Notes from June 2013 asked, "How attractive is our industry on the 'five forces' framework? Best: High barriers to entry, low power of customers." (CX1246 at 002).

E. Manufacturers Have Little To No Bargaining Power Against Distributors.

1623. Manufacturers have little or no bargaining power against distributors. (CX0082 at 009 ("Patterson Dental enjoys significant influence and channel power with our vendor partners."); CX8017 (Rogan, Dep. at 83-84) (when a manufacturer started selling direct to Patterson customers, Patterson reps moved customers to different manufacturers); CX0317 (Rogan, IHT at 277-278) (Patterson reps steering customers away from Dentsply products after Dentsply started selling direct); CX1254 at 011; CX2633 at 021 (May 2016 Boston Consulting Group presentation to Schein notes fragmented customer and supplier base); CX3299 at 006 (July 2014 Patterson presentation notes industry has "classic hour glass shape…many manufacturers, many customers"); CX7100 at 118-120 (¶303) (Marshall Expert Report)).

XXII. DR. MARSHALL OBSERVED CHANGES IN THE BIG THREE'S CONDUCT INDICATIVE OF COLLUSIVE BEHAVIOR.

1624. Although in an oligopoly one may observe interdependence and parallel conduct among firms, changes in conduct are a known indicator of collusive behavior. (CX7100 at 190 (¶427) (Marshall Expert Report)).

1625. Structural breaks are a part of the economic analysis of collusive conduct. (Marshall, Tr. 2889; CX7100 at 190 (¶427) (Marshall Expert Report)).

1626. There are structural changes that support Complaint Counsel's conspiracy start date of 2011, including Schein ending its relationship with Unified Smiles and Smile Source. (Marshall, Tr. 2948; [redacted]).

1627. Prior to 2011, Schein had done business with a few buying groups (*See* Section VIII.A (CCFF ¶¶ 432-453); CCFF ¶¶ 687; *see also* CX7100 at 191 (¶429) (Marshall Expert Report)).

1628. The first structural break was in December 21, 2011, when Schein rejected the buying group Unified Smiles because Schein "no longer participate[s] in buying groups." (Marshall, Tr. 2890-2891; CX7100 at 190 (¶428) (Marshall Expert Report) (citing CX2062 at 001) (Dec. 21, 2011 email from Foley to Durante forwarding email sent to Unified Smiles informing them that Schein no longer participates in Buying Groups)).

1629. The rejection of Unified Smiles is a structural break because Schein stated that Schein does not do business with buying groups with regards to Unified Smiles – "[t]hat's different from just turning down Unified Smiles." (Marshall, Tr. 2949-2950).

1630. INTENTIONALLY LEFT BLANK.

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1632. A structural break in Patterson's conduct is when it entered discussions with buying group New Mexico Dental Cooperative in 2013, then rejected the buying group after receiving an email from Cohen (Benco) about it. (CCFF ¶¶ 454, 1743, 643, 414; CX0090 at 001 (February 8, 2013 email from Guggenheim to Cohen regarding the New Mexico Dental Cooperative); CX7100 at 193-194 (¶¶440-445) (Marshall Expert Report)).

1633. Another observation of a structural break with regards to Patterson is in 2016-2017 when Patterson pursues the business of buying group Smile Source and attempts to win Smile Souce's business. (CCFF ¶¶ 1347-1357; Marshall, Tr. 2893; CX7100 at 198 (¶459) (Marshall Expert Report)).

1634. Benco instituted a no buying group policy in 1996. (CX1112 at 003 (Answer of Benco, Preliminary Statement); CX8015 (Cohen, Dep. at 278)).

1635. There is a structural break in Benco's conduct in late 2015 and early 2016 when it began working with a buying group called Elite Dental Alliance ("EDA"). (Section XVII.B.2.c (CCFF ¶¶ 1366-1387); Marshall, Tr. 2891; [redacted]).

1636. In 2017, Schein resumed its relationship with Smile Source, indicating another break where Schein changed its behavior to resuming the pursuit of buying group business. CCFF ¶¶ 1316, 1319; (Marshall, Tr. 2891; [redacted];).

XXIII. DR. MARSHALL OBSERVED CONDUCT INCONSISTENT WITH THE BIG THREE'S UNILATERAL INTERESTS AND CONSISTENT WITH COORDINATED ACTION.

1637. Schein, Patterson, and Benco's conduct of not bidding for buying group business was inconsistent with acting in their own unilateral economic self-interest. (CCFF ¶¶ 1647-1684; *see also* Section XVII.B.1 (CCFF ¶¶ 1254-1315)).

1638. A firm acts against its own unilateral economic self-interest when there is some action that could be profitable for it, but it declines to take the action. (Marshall, Tr. 2859-2860; CX7100 at 127-128 (¶¶328-330) (Marshall Expert Report)).

1639. To determine whether Respondents acted against their own unilateral self-interests, Dr. Marshall conducted five data experiments that examined whether or not it was profitable for dental supply distributors, including Respondents, to bid for and obtain the business of buying groups. (Marshall, Tr. 2859-2861; CX7100 at 150-187 (¶¶347-415) (Marshall Expert Report)).

1640. As a part of these data analyses, Dr. Marshall also examined whether it was costly for Respondents not to bid for and obtain the business of buying groups. (Marshall, Tr. 2860-2861; CX7100 at 150 (¶351) (Marshall Expert Report)).

1641. Dr. Marshall's data analyses were based on data from dental supply distributors and examined specific episodes of a distributor doing business or not doing business with a buying group. (Marshall, Tr. 2860; [redacted]).

1642. For these profitability analyses, Dr. Marshall studied the Kois Buyers Group and Smile Source because these buying groups cover a broad geography of the country and a broad time span from 2012 through 2017. (Marshall, Tr. 2863; *see generally* [redacted]).

1643. In addition, for his profitability analyses, Dr. Marshall studied several different sizes of buying groups (small, medium, and large buying groups). (Marshall, Tr. 2863; *see generally* [redacted]).

1644. [redacted]

[redacted]

1645. [redacted]

1646. Based on all of his different profitability studies, Dr. Marshall concluded that Respondents all had a unilateral economic self-interest to bid for the business of buying groups. (Marshall, Tr. 2876; [redacted] CCFF ¶¶ 1647-1684).

A. Dr. Marshall's Kois-Burkhart 2014 Profitability Study.

1647. Dr. Marshall studied the Kois Buyers Group at its inception when Burkhart started supplying it in November 2014. (Marshall, Tr. 2864; [redacted]).

1648. Dr. Marshall did this profitability analysis of Kois Buyers Group members' purchases to determine whether Patterson, Benco, and Schein were forgoing profits by not pursuing the Kois Buyers Group member business as their dentist customers substituted away from them and towards Burkhart, the lower-priced supplier of the Kois Buyers Group. (Marshall, Tr. 2867).

1649. As a part of his Kois-Burkhart 2014 profitability study, Dr. Marshall examined the dental supply purchases of the Kois Buyers Group member dentists who bought something from Burkhart in 2015-2016. (Marshall, Tr. 2864; *see also* [redacted]).

1650. For this same set of dentists who bought something from Burkhart in his Kois-Burkhart 2014 profitability study, Dr. Marshall also studied whether the Kois Buyers Group members purchased something from Benco, Patterson, and Schein during this same time period (before and after Burkhart started supplying the Kois Buyers Group). (Marshall, Tr. 2865; *see also* [redacted]).

1651. Burkhart's market share increased as a result of Burkhart supplying the Kois Buyers Group. (Marshall, Tr. 2865; *see also* Marshall, Tr. 2919; [redacted]).

1652. Marshall Report Figure 57 depicts [redacted].

1653. [redacted]

1654. [redacted]

1655. Schein, Patterson, and Benco each lost sales from Kois Buyers Group member dentists as well as share during the time period that Burkhart was supplying Kois Buyers Group. [redacted]

1656. By studying the trade-off between increased share and reduced margin, Dr. Marshall determined that it was profitable for Burkhart to supply the Kois Buyers Group. (Marshall, Tr. 2866, [redacted]).

1657. Dr. Marshall also evaluated the same trade-off (market share and margin) for Benco, Patterson, and Schein in not bidding on Kois Buyers Group. (Marshall, Tr. 2867, [redacted]).

1658. Based on the trade-off evaluation in his Kois-Burkhart 2014 profitability study, Dr. Marshall found that Patterson, Benco, and Schein's sales shares fell and that not supplying Kois Buyers Club was unprofitable for Patterson, Benco, and Schein. (Marshall, Tr. 2867; *see also* [redacted]).

1659. Dr. Marshall's Kois-Burkhart 2014 profitability study shows that Patterson lost $855,000 of profits from its decision not to supply Kois Buyers Group. [redacted]

1660. [redacted]

1661. [redacted]

B. Dr. Marshall's Burkhart-Smile Source 2012 Profitability Study.

1662. As a part of his profitability studies, Dr. Marshall also analyzed Burkhart's partnership with the buying group Smile Source that started in 2012 – at this time, Smile Source was quite small. (Marshall, Tr. 2867-2868; *see also* [redacted]).

1663. In this Burkhart-Smile Source 2012 profitability study, Dr. Marshall examined dentists who purchased products from Burkhart between 2012 and 2016 when Burkhart was partnered with Smile Source. (Marshall, Tr. 2868; *see also* [redacted]).

1664. When Burkhart partnered with Smile Source in 2012, Burkhart gained sales from the Smile Source dentists. (Marshall, Tr. 2870; *see also* [redacted]).

1665. When Burkhart partnered with Smile Source in 2012, Schein, Patterson, and Benco's shares generally declined for the Smile Source dentist members that Burkhart was supplying.

[redacted]

1666. When Burkhart partnered with Smile Source in 2012, Burkhart made incremental profits from its partnership with Smile Source. (Marshall, Tr. 2870; [redacted]

1667. Losing business from dentists as a result of Burkhart's partnership with Smile Source was costly for Schein and Patterson. [redacted].

1668. [redacted]

C. Dr. Marshall's Atlanta Dental-Smile Source 2013 Profitability Study.

1669. Dr. Marshall also conducted an analyses of Atlanta Dental's partnership with Smile Source as a part of his profitability studies. (Marshall, Tr. 2871; *see also* [redacted]).

1670. Atlanta Dental is a regional full-service distributor with a significant presence in Georgia. (Goldsmith, Tr. 1946; Cohen, Tr. 644-645).

1671. Similar to what Burkhart did in its partnerships with the Kois Buyers Group and Smile Source, Atlanta Dental decreased its margins and offered lower prices to the Smile Source customers. (Marshall, Tr. 2872; [redacted]).

1672. Dr. Marshall found that when Atlanta Dental signed up to supply Smile Source, Atlanta Dental gained incremental volume of transactions and market share. (Marshall, Tr. 2872; [redacted]).

1673. Dr. Marshall found that supplying Smile Source was profitable for Atlanta Dental. (Marshall, Tr. 2872; [redacted]).

1674. In Dr. Marshall's Atlanta Dental-Smile Source 2013 profitability study, Schein, Patterson, and Benco incurred losses by not signing up to supply Smile Source. (Marshall, Tr. 2872; [redacted]).

D. Dr. Marshall's Schein-Smile Source 2012 Profitability Study.

1675. Dr. Marshall studied the profitability of Schein's relationship with Smile Source in two instances. (Marshall, Tr. 2872-2876; [redacted]).

1676. First, Dr. Marshall studied the end of Schein's relationship with Smile Source in 2012. (Marshall, Tr. 2873; [redacted]).

1677. This Schein-Smile Source 2012 profitability study is different from Dr. Marshall's other profitability case studies because the other profitability studies examined the relationship of a distributor signing up with a buying group, while in comparison, the Schein-Smile Source 2012 profitability study examined a scenario of the end of a distributor relationship with a buying group. (Marshall, Tr. 2873-2874; [redacted]).

1678. [redacted]

1679. [redacted]

1680. [redacted] (Marshall, Tr. 2875; [redacted].

E. Dr. Marshall's Schein-Smile Source 2017 Profitability Study.

1681. Dr. Marshall confirmed that it was profitable for Schein to do business with a buying group when he studied the profitability of Schein's subsequent 2017 partnership with Smile Source. (Marshall, Tr. 2875; [redacted]).

1682. Dr. Marshall's Schein-Smile Source 2017 study differed from his other profitability case studies because the competitive landscape was different during the time period of this particular profitability study. (Marshall, Tr. 2875-2876). In contrast to previous profitability studies where the regional distributor was the only bidder for the buying group, this 2017 case study examined the profitability of bidding when there were two other regional distributors already supplying Smile Source, as well as Patterson bidding on Smile Source in competition with Schein's bidding. (Marshall, Tr. 2875-2876).

1683. Even in the more competitive 2017 landscape, Dr. Marshall found that it was profitable for Schein to win Smile Source's business 2017. (Marshall, Tr. 2876; [redacted]).

1684. Based on his profitability studies, Dr. Marshall concluded that, in addition to being a profitable opportunity for a regional distributor such as Burkhart and Atlanta Dental, buying group opportunities are also profitable for a larger full-service distributor like Schein. (Marshall, Tr. 2874, 2872; [redacted]).

XXIV. RESPONDENTS HAVE FAILED TO REBUT COMPLAINT COUNSEL'S EVIDENCE OF AN UNLAWFUL AGREEMENT.

A. Respondents' Purported Independent Business Justifications are Contradicted by the Evidence.

1. Respondents' Claim that Buying Groups Cannot Drive New Business is Contradicted by the Evidence.

1685. Buying groups are profitable for distributors, even without contractual volume guarantees. (CCFF ¶¶ 1320, 1381, 1385-1387, 1651, 1656, 1681, 1686-1687, 1689, 1718, 1723-1724, 1726).

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

1686. [redacted]; *see also* CX8021 (Reece, Dep. at 88)).

1687. [redacted]; *see also* CX8021 (Reece, Dep. at 87-88)).

1688. EDA members were not contractually required to purchase from Benco. (Cohen, Tr. 467).

1689. The Kois Buyers Group does not have any purchasing requirements for its members. That is, there is no requirement that Kois members purchase any particular quantity of product or from any particular vendor. (Kois Jr., Tr. 319; *see also* CX0321 (Kois Jr., IHT at 62)).

1690. Dentists are not required to purchase from the buying group vendors, but they have an incentive to do so to take advantage of savings. [redacted]; CX4223 at 001

(Kois Burkhart contract exclusivity terms); CCFF ¶¶ 1386, 1411, 1686, 1687, 1688, 1691, 1692, 1728, 1727, 1731).

1691. Some buying groups offer additional savings if its members' purchases to reach a certain threshold. For example, [redacted] (Kois Jr., Tr. 345-350; [redacted] CX0321 (Kois Jr., IHT at 59-61).

1692. Indeed, the main reason that dentists join buying groups is to save money on products. (Steck, Tr. 3681-3682; [redacted]; Reece, Tr. 4365).

1693. Dentists switch their purchases to buying groups contracted with full-service distributors to take advantage of discounts and lower prices. (CCFF ¶¶1690-1692).

1694. Burkart, Nashville Dental, and Atlanta Dental, all full-service distributors, profited from working with these and other buying groups during the conspiracy period. (CCFF ¶¶ 1297-1315).

1695. Distributors gained sales, and their partnerships with buying groups were profitable. (CCFF ¶¶ 1651-1656, 1663-1664, 1666, 1672-1673, 1683-1684).

1696. INTENTIONALLY LEFT BLANK.

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1698. Dental product manufacturers also gained market share by working with distributors that gave discounts to buying groups. (CCFF ¶¶ 1314-1315).

1699. Dr. Marshall conducted an analyses of Atlanta Dental's partnership with Smile Source. (Marshall, Tr. 2871). Atlanta Dental is a regional distributor with a significant presence in

Georgia. Similar to the other profitability studies, Dr. Marshall found that when Atlanta Dental signed up to supply Smile Source, it gained incremental volume of transactions for market share for Atlanta Dental. (Marshall, Tr. 2872). Similar to Burkhart, Atlanta Dental decreased its margins because it was offering lower prices to the Smile Source customers but, in the end, there was an increase in profits for Atlanta Dental. (Marshall, Tr. 2872). Here, again, Schein, Patterson, and Benco incurred losses by not signing up to supply Smile Source. (Marshall, Tr. 2872).

b) Respondents Profited from Buying Groups Before and After the Conspiracy

1700. Prior to 2011, Schein profitably worked with buying groups, and it gained new business and stole customers from competitors as a result. (*See infra* CCFF ¶¶ 438, 441, 442, 443, 444, 446, 447, 448, 449, 450, 451).

1701. By July 2011, Muller recognized the Dental Co-op of Utah as "one of the largest HSD account (over $1M)." (CX2505 at 002).

1702. Muller stated that while a customer of Schein's Special Markets division, Smile Source brought in roughly $3 million in sales. (CX2469 at 001 (Statement of Muller: "When they were with us they did $3M, half from us and half they got us from our competitors.")).

1703. In 2010, Smile Source was the buying group that Sullivan identified in an email to his boss as the account he did not "want to lose" because "[t]hey are $1 million and growing." (Sullivan, Tr. 3922-3923; CX2113).

1704. In 2010, Sullivan was pointing out that Smile Source was an opportunity for $1 million in revenue to Schein. (Sullivan, Tr. 3923; CX2113).

1705. Sullivan saw value in the potential $1 million revenue opportunity from Smile Source. (Sullivan, Tr. 3923).

1706. Foley and Muller also viewed the Smile Source relationship as an opportunity or benefit to Schein. (Foley, Tr. 4535 (Smile Source is "a great opportunity . . . to see some good growth with them"); CX8005 (Muller, Dep. at 53-54) (Smile Source provided Schein with new customers from competitors); CX0309 (Muller, IHT at 101) (Smile Source relationship was "beneficial" in that it brought customers to Schein who had been buying from a competitor)).

1707. Smile Source was "doing approximately $900,000 in merchandise" when it worked with Schein Special Markets. (Foley, Tr. 4532-4533).

1708. Discounting to buying groups presented revenue and profit opportunities to Schein. (CCFF ¶¶ 438, 446-453, 1256-1266).

1709. Since 2015, all Respondents have profitably worked with and compete for buying groups. (*See* CCFF ¶¶ 466, 1316-1318, 1320-1322, 1349, 1364, 1385-1387, 1681, 1718, 1724-1725, 1732, 1734).

1710. Schein entered into an agreement with buying group Teeth Tomorrow in May 15, 2017. (RX2684 at 001).

1711. Schein entered into an agreement with buying group Mastermind Group in August 2017. (RX2695 at 001).

1712. Schein entered into an agreement with buying group Klear Impakt in August 17, 2015. (R. Johnson, Tr. 5479; RX2162 at 001).

1713. Even Benco, which had a long-standing policy against buying groups, started working with buying groups since 2015. (*See* CCFF ¶¶1385, 1386, 1325).

1714. Discounting to EDA provided Benco with new customers. (Cohen, Tr. 471).

1715. Discounting to EDA provided Benco with new sales. (Cohen, Tr. 472).

1716. Cohen believes EDA is a successful buying group. (Cohen, Tr. 471).

1717. Schein, Patterson, and Benco bid for buying groups since 2015 that they previously rebuffed. (*See* CCFF ¶¶1718, 1349, 1350).

1718. In 2017, Schein and Patterson both bid for Smile Source's business, despite lack of volume guarantees and no change in Smile Source's business model. (*See* CCFF ¶¶ 544, 1681).

1719. Patterson bid on Smile Source in 2017 because there was potential for incremental sales. (Rogan, Tr. 3545-3546).

1720. Rogan testified that Patterson's 2017 Smile Source bid was based on Smile Source's verbal assurances that it could be influential in its members' purchasing decisions. (CX0317 (Rogan, IHT at 399-402)).

1721. However, Patterson's 2017 bid proposal to Smile Source did not contain "any volume commitments." (McFadden, Tr. 2735).

1722. [redacted]

1723. Selling to Smile Source following the conspiracy was profitable. [redacted]

1724. By doing business with Smile Source since 2017, Schein has gained business from its competitors, and has increased its business with existing customers. (Cavaretta, Tr. 5628).

1725. [redacted]; Foley, Tr. 4534).

1726. Schein manager, Kam Gantos, noted, "[w]e have found that [buying groups] often pull over significant business from doctors who in the past considered PDCO [Patterson] or Benco as their primary distributor." (CX2602 at 002).

1727. [redacted]

1728. Kois Buyers Group members informed Kois that they save somewhere between 3% and 15% on their supplies by virtue of their membership. (CX0321 (Kois Jr., IHT at 62-63)). Kois testified that Kois Buyers Group members get "at least a 15 percent discount off" of the manufacturer's retail price through the Kois Buyers Group. (Kois Jr., Tr. 327).

1729. Dr. Marshall found that it was profitable for Schein to do business with Smile Source in 2017. (CCFF ¶¶ 1681-1684).

1730. To win the bid for Smile Source in 2017, Schein offered Smile Source an aggressive discount, even without contractual volume guarantees. (CCFF ¶¶ 1731-1733).

1731. Under its 2017 agreement with Smile Source, Schein offered discounts to Smile Source members on a product formulary. [redacted]

1732. Schein entered into an agreement with the buying group Smile Source in or around February 2017. (Cavaretta, Tr. 5628).

1733. Schein's 2017 agreement with Smile Source is not exclusive. In addition to Schein, Smile Source has agreements with other full-service distributors, such as Burkhart Dental, Atlanta Dental, and Nashville Dental. (Cavaretta, Tr. 5628-5629).

1734. In addition to Smile Source, Patterson has been in conversations with "five or so" buying groups since late 2017. (CX8028 (Lepley, Dep. at 37)).

1735. Following the conspiracy period, Patterson also entered into agreements with other buying groups, including Dr. Levin's buying group and the Lake Harbor group, in or around May 2018. (CX8028 (Lepley, Dep. at 37-39)).

1736. [redacted]

1737. INTENTIONALLY LEFT BLANK.

c) Respondents Lost Business by Refusing to Discount to Buying Groups

1738. During the time when Patterson did not do business with buying groups, it lost customers and revenues. (*See, e.g.*, CX3089 at 001 (Patterson lost "high quality / high producing" customers to the Kois Buyers Group that was served by Burkhart, noting that "the cut is deep to us all."); Guggenheim, Tr. 1665-1667).

1739. When Patterson lost the bid for Smile Source in 2017, it lost Patterson customers who were Smile Source members and would now purchase supplies from a competing distributor. (Rogan, Tr. 3556; *see also* CX3186 at 009 (in one region in one period, Patterson lost four customers with total sales of $110,000)).

1740. On February 22, 2013, Benco sales representative Gerald Barto posted a message on Benco's internal bulletin board, stating that he lost two customers because Benco's no buying group policy did not allow him to extend discounts to multiple offices that were not all under common ownership. (CX1149 at 001-002; Ryan, Tr. 1078-1080).

1741. Barto wrote on the bulletin board: "there has to be some program that we have (even if made up) for what just happened to me . . . I'm frustrated and just wanted to get off my chest. One Dr. was fighting for me to get all, instead I lost two." (CX1149 at 001).

1742. Benco sales representatives lost business by abiding by Benco's no buying group policy. (CCFF ¶¶ 1294-1295, 1740-1741, 1655, 1658, 1661).

2. Respondents' Concerns about their Competitors Dealing with Buying Groups Undermines Claims of an Independent Business Interest.

1743. Cohen reached out to Guggenheim about the New Mexico Dental Cooperative in February 2013, because he thought Guggenheim might not have known that Patterson was preparing a discounting arrangement with a buying group. Cohen testified: "I 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." (Cohen, Tr. 712).

1744. In August 2014, Benco's Pat Ryan told Benco's Mitchell Huber in an internal conversation about buying groups: "Shit. I know Burkhart got Nashville and Atlanta involved. If it's just Darby, I don't care as much…but when full-service guys get in…" (CX0015 at 001).

1745. On October 7, 2014, Ryan told Chuck Cohen via text message: "Schein just dumped the last GPO they had. In Utah." (CX0057 (Excel worksheet "Chats" tab row 100); *see also* CX0057_EXCERPT at 009). Cohen understood that Ryan was telling him that Schein had stopped working with their last buying group in Utah. (Cohen, Tr. 570-571).

1746. In July 2017, Ryan alerted Cohen to the fact that Schein was working with 5-10 buying groups. On July 12, 2017, Ryan told Cohen via text message: "Schein recognizing 5-10 GPOs." Cohen responded to Pat Ryan: "Which GPOs? Do you know the deal?" Ryan responded: "Smile[ ]Source for sure. They're opening the door. They don't think they can grow now without it." (CX1527 (Excel worksheet "Chats" tab rows 39-41); *see also* CX1157_EXCERPT at 004).

1747. After learning about Schein doing business with buying groups in 2017, Cohen responded to Ryan: "Interesting…We have to push EDA to [the] next level." (CX1527 (Excel worksheet “Chats” tab row 42); see also CX1527_EXCERPT at 004). Cohen testified that EDA referred to the Elite Dental Alliance. (Cohen, Tr. 479-480).

1748. After learning from Ryan that Schein was recognizing 5-10 GPOs in July 2017, Cohen sent this information to Julie Radzyminski via text message. Julie Radzyminski was Benco’s Vice President of Business Development, and was in charge of Benco’s relationship with the Elite Dental Alliance. (Cohen, Tr. 480). Cohen texted Radzyminski “[j]ust heard from Pat that Schein is recognizing 5-10 GPOs. We need to get EDA to the next level.” (Cohen, Tr. 480; *see also* CX1527 (excel worksheet “Chats” tab row 161); *see also* CX1527_EXCERPT at 018).

B. Schein’s Arguments Concerning the Alleged Agreement are Contradicted by the Evidence.

1. <u>Schein Enforced a Policy against Buying Groups during the Conspiracy Period.</u>

1749. Sullivan and other Schein executives rejected buying groups, and instructued Schein’s sales force not to engage with buying groups by referring to a policy not to deal with buying groups. (CCFF ¶¶ 696-870).

1750. Schein rejected or instructed sales representatives against working with numerous buying groups or potential buying groups during the conspiracy period, including but not limited to: (1) the Academy of General Dentistry Buying Group (CX0166 at 002 (August 25, 2011, email from Schein’s Cavaretta: “I haven’t heard anything about this but I doubt this will happen. Once the buying groups entire [*sic*] our market the dental model as we know it will change”); Cavaretta, Tr. 5646-5648); (2) Business Intelligence Group (CX0165 at 001 (February 1, 2011, email from Schein’s McCarroll to Cavaretta,Cavareta writes: “[d]ealing with GPOs is incredibly risky on many fronts.” to which McCarroll replies “I will let them know that we only deal with dental practices directly.”)); (3) Kois Buyers Group (CX2469 at 002-003 (September 8, 2014, email from Schein's Sullivan to Muller regarding announcement of the Kois Buyers Group: "I still believe this is a slippery slope . . . don't plan to take the lead role."); CX2470 at 001 (September 9, 2014, email from Schein's Sullivan to Breslawski regarding the Kois Buyers Group: "I don't think we want to be the first in this game."); Sullivan, Tr. 4005-4006); (4) Pacific Group Management Services (CX2251 at 001 (July 17, 2014, email from Schein's Titus to Showgren regarding PGMS GPO: "It went to Tim [Sullivan] and he shot it down."); (5) Synergy Dental Partners (CX0185 at 001 (July 17, 2011, email from Schein's Sullivan to Mlotek: "I don't think you will ever see a full service dealer get involved with GPOs."); (6) Unified Smiles (CX2062 at 001-002 (December 21, 2011, email from Schein's Foley to Unified Smiles' Knysz: "we no longer participate in Buying Groups."); and (7) Pearl Network (CX2456 at 001 (December 7, 2011, email from Schein's Sullivan to Kess: "I am still of position that we do NOT want to lead in getting this initiative started in dental.")).

2. <u>Schein's Asserted "Buying Groups" Do Not Disprove its Participation in the Conspiracy.</u>

1751. Acurity is an entity whose members are hospitals, hospital clinics, and dental schools. (RX2962 (Wingard, Dep. at 21)). Schein only entered into an agreement with Acurity in 2018. (RX2962 (Wingard, Dep. at 23); CX2919 at 001 (February 5, 2018, email from Schein's Harrison referencing Acurity agreement just signed by Meadows)). Acurity changed its name in 2017, and was previously known as the Greater New York Hospital Association, and its membership includes 300 hospital and health systems and health related facilities. (CX2922 at 001).

1752. Schein first began working with Advantage Dental in 2009. (CX8005 (Muller, Dep. at 238)).

1753. The Arizona Association of Community Health Centers is an entity that represents Community Health Centers. (CX8005 (Muller, Dep. at 239)).

1754. Ascension Health Resource and Supply Management Group, LLC is a medical group purchasing organization that serves facilities run by Catholic charities, such as hospitals and clinics. (CX8005 (Muller, Dep. at 239); CX2706 at 018 (Schein's 2015 Agreement with Ascension defining Ascension Health as a non-profit corporation "comprised of health ministries, hospitals, facilities and affiliates")). Hal Muller testified that Ascension Health is a "traditional medical GPO" and "there are no solo practitioners involved in this agreement." (CX0309 (Muller, IHT at 191-192)).

1755. As of August 2015, Schein considered Breakaway to be a combination of a DSO and an MSO that centrally managed and controlled its members' dental products purchases. (Cavaretta, Tr. 5633; CX8033 (Cavaretta, Dep. at 237-238); CX2482 at 001). In August 2015, Cavaretta told Sullivan: "Break away is a DSO/MSO combo with complete control of the check book." (CX2482 at 001). By "complete control of the check book," Cavaretta testified that he meant that Breakaway owned or controlled the practices. (CX8033 (Cavaretta, Dep. at 237-238)).

1756. As of August 2015, Schein did not believe that Breakaway was a buying group or had a buying group component. (CX8033 (Cavaretta, Dep. at 238-39) ("Q. So as of the time of this email in August 2015, you weren't aware of the buying group component? A. No."); CX2482 at 001). At trial, Cavaretta testified that he did not know whether he aware of any buying group component to Breakaway in August 2015. (Cavaretta. Tr. 5633-5634). Cavaretta's testimony was contradicted by his prior sworn deposition testimony in this matter, in which he testified that he was not aware of any buying group component to Breakaway in August 2015. (Cavaretta, Tr. 5636-5637; CX8033 (Cavaretta, Dep. at 238-39)). Cavaretta's trial testimony is also contradicted by Cavaretta's own emails from 2015, in which he stated that Breakaway was a combination of a DSO and an MSO. (CX2482 at 001).

1757. Children's Hospital Association is an organization comprised of children's hospitals, and it does not represent private practice dentists. (CX8005 (Muller, Dep. at 240)).

1758. Colorado Community Health Network is an entity that represents Community Health Centers, and its members do not include any private practice dentists. (CX8005 (Muller, Dep. at 240)).

1759. Comfort Dental is a customer that Schein considers to be an elite DSO. (Sullivan, Tr. 3969 ("Q. Comfort Dental was an elite DSO? A. It was."); CX2021 at 013 (Tim Sullivan identifying Comfort Dental as an "Elite DSO" customer)).

1760. The Commonwealth Purchasing Group is an entity that represents Community Health Centers, and its members do not include any private practice dentists. (CX8005 (Muller, Dep. at 241)).

1761. Council Connections is an entity comprised of Community Health Centers, and its members do not include any private practice dentists. (CX8005 (Muller, Dep. at 241)).

1762. Louisiana Primary Health Care Association is an entity comprised of Community Health Centers, and its members do not include any private practice dentists. (CX8005 (Muller, Dep. at 251); RX2270 at 017 (2011 supply agreement between Schein and Louisiana Primary Care Association stated: "Schein is offering [Louisiana Primary Health Care Association] members the discount schedule it has established for Primary and Community Health Centers across the nation.")).

1763. OrthoSynetics is a MSO. (RX2276 at 002 (2014 Schein Primary Vendor agreement with OrthoSynetics states: "OrthoSynetics is a company that manages, owns or is under contract to provide services to specific dental offices.”)). OrthoSynetics has centralized purchasing and provides management and hiring services for its offices. (Foley, Tr. 4529-4532; CX2710 at 001).

1764. Corydon Palmer Dental Society was not a buying group; it was strictly a rebate program. (Baytosh, Tr. 1889-1890).

1765. A rebate program for a dental society in exchange for free exhibit space is not a buying group. (Baytosh, Tr. 1888-1890 (Corydon Palmer Dental Society is not a buying group), 1892-1893, 1895-1897 (Corydon Palmer signed a contract with Schein for rebates paid to the society. The contract included free exhibit space at the society’s continuing education seminars);

[redacted]

1766. In 2015, Corydon Palmer signed a contract with Schein for rebates payable to the Corydon Palmer Dental Society. (Baytosh, Tr. 1888-1890, 1892-1893, 1895-1897; [redacted]). Under the agreement, Corydon Palmer dentist members did not receive a discount off catalog pricing from Schein. (Baytosh, Tr. 1892-1893; [redacted]).

1767. Schein executives did not know that Schein engaged with certain buying groups and learned about them only after the conspiracy. On May 10, 2016, Brady wrote to Steck: “Want to make sure you aren’t in the dark on this. . . .We discovered four existing buying groups dating back to 2004.” (CX2287 at 001.) Steck was not aware of those four existing buying groups dating to 2004. (CX8031 (Steck, Dep. at 129) (“Q. Were you aware of the four existing buying groups dating to 2004? A. No.”). On May 10, 2016, Steck referred to the four existing buying groups as “inherited messes.” (CX2287 at 001) (“[U]nfortunately, part of your job is cleaning up inherited ‘messes’.”)).

1768. MB2 Dental Solutions ("MB2") is a DSO. It was a growing and important customer for Schein's Special Markets Division, doing over $2 million in business with Schein in 2014, and considered one of the top 50 customers for Schein Special Markets. (CCFF ¶¶ 1769, 1776-1779).

1769. MB2 is a DSO. (Puckett, Tr. 2201-2202).

1770. Justin Puckett is the President of MB2. (Puckett, Tr. 2201).

1771. MB2 currently has 112 locations in eight states. (Puckett, Tr. 2203-2204).

1772. All of MB2's locations, or affiliate practices, are under common ownership. (Puckett, Tr. 2205).

1773. Each of MB2's locations operates as a dental practice or office. (Puckett, Tr. 2207).

1774. MB2 provides a number of centralized management services to its locations including marketing, billing and collections, compliance, legal, IT, procurement, and a call center. (Puckett, Tr. 2205-2206).

1775. As a part of its procurement services, MB2 centrally purchases dental products for all of its locations, including merchandise and equipment. (Puckett, Tr. 2206).

1776. MB2 is a large DSO customer of the Schein Special Markets Division. (Puckett, Tr. 2212-2213; Sullivan, Tr. 3989). MB2 has been a Schein customer for 11 years. (Puckett, Tr. 2210).

1777. MB2 is one of the top 50 customers for Schein Special Markets. (Foley, Tr. 4570; CX8005 (Muller, Dep. at 166)).

1778. Schein considered MB2 an "elite DSO" and a "very" important DSO customer. (Foley, Tr. 4570).

1779. Puckett believed MB2 was an important customer of Schein because MB2 spent a lot of money with Schein. (Puckett, Tr. 2214).

1780. In the past twelve months, MB2 purchased approximately $8 million from Schein. (Puckett, Tr. 2214).

1781. MB2's annual purchases through Schein has grown each year since MB2s inception. (Puckett, Tr. 2214).

1782. In 2014, MB2 was doing at least $2 million or more in merchandise business with Schein. (Foley, Tr. 4570; RX2294 at 001 (Statement of Foley: "MB2 is a $2M plus merchandise customer."); CX8003 (Foley, Dep. at 292); CX0188 at 001 (Statement of Muller: "Please remember this is a $2M+ customer.")).

1783. In 2014, MB2 Dental Solutions created a separate company called Dental Gator. (Puckett, Tr. 2214-2215). Dental Gator was a buying group of private practice dental offices not affiliated with MB2. (Puckett, Tr. 2215-2216). MB2 created Dental Gator as a way to identify potential acquisition targets for MB2. (Puckett, Tr. 2221; CX2482 at 001 ("[Dental Gator] is a recruiting arm for MB2."). Dental Gator sought to secure greater discounts for independent dentists then the dentists could secure on their own. (Puckett, Tr. 2220). At its largest, Dental Gator had 27 members. (Puckett, Tr. 2267). Dental Gator no longer exists after being legally dissolved in late 2018. (Puckett, Tr. 2267).

1784. Dental Gator was a customer of Special Markets. (Sullivan, Tr. 3997).

1785. In January or February of 2014, Justin Puckett, President of MB2, met with Schein representatives to discuss a request for proposal on the MB2 business to include Dental Gator. (Puckett, Tr. 2227).

1786. At the 2014 meeting, MB2 representatives told Schein about their idea to create Dental Gator to help "procure dentists who were not affiliated with MB2" "by using dental supplies and other services to get them to sign up" with MB2. (Puckett, Tr. 2228).

1787. Schein asked if MB2 would have an equity ownership in Dental Gator customers. (Puckett, Tr. 2229).

1788. Schein told MB2 that it did not work with buying groups. Hight of Schein told Puckett that Schein did not work buying groups "formed for the sole purpose of just saving money on supplies with no true affiliation with each other." (Puckett, Tr. 2237-2238). Puckett testified at his deposition that Schein told MB2 it had a policy not to work with buying clubs. (CX8006 (Puckett, Dep. at 67)). Puckett uses the terms "buying group" and "buying club" interchangeably to refer buying groups. (Puckett, Tr. 2216). Schein told Dental Gator it was concerned that Dental Gator was a pure buying club. (CX8006 (Puckett, Dep. at 82)). Schein asked MB2 whether it would be managing the Dental Gator practices. (Puckett, Tr. 2231). Schein asked MB2 whether it was seeking to acquire ownership in the Dental Gator practices. (Puckett, Tr. 2253). Schein told MB2 that an ownership interest was required in the Dental Gator members' practices. (CX8006 (Puckett, Dep. at 68-69)). After MB2 formed Dental Gator, Schein continued to ask questions about Dental Gator's business model. (CX8006 (Puckett, Dep. at 83-84)).

1789. Schein entered into a supply agreement with MB2 in 2014 (the "2014 MB2 Agreement"). (Puckett, Tr. 2211, 2225-2226).

1790. The 2014 MB2 Agreement was for the MB2 side of the business. (Foley, Tr. 4574). The 2014 MB2 Agreement that did not reference Dental Gator by name and there was no separate agreement for Dental Gator at that time. (Puckett, Tr. 2231-2232). Puckett negotiated the 2014 agreement with Andrea Hight, a Schein employee who reported to Randy Foley and Hal Muller. (Puckett, Tr. 2225-2226). Puckett signed the 2014 MB2 Agreement on behalf of MB2, and Foley signed it on behalf of Schein. (CX4001 at 006).

1791. In its 2014 agreement with MB2, Schein imposed limits on to whom MB2 was allowed to offer its Schein pricing. (Puckett, Tr. 2233; Foley, Tr. 4573-4574; CX4001 at 002).

1792. The 2014 MB2 Agreement prohibited MB2 from using the agreement to form a buying group. The 2014 MB2 Agreement stated that "[t]his agreement may not be used to grow any Group Purchasing Organization (GPO) type relationship." (CX4001 at 002;Puckett, Tr. 2235-2236; Foley, Tr. 4573-4574;). MB2 did not add this provision into the 2014 MB2 Agreement. (Puckett, Tr. 2236). Puckett believed that someone from Schein added this provision into the 2014 MB2 Agreement. (Puckett, Tr. 2236). There is no similar provision in the most recent version of MB2's agreement with Schein, signed in November 2016 for the period of January 1, 2017 through the end of 2019. (Puckett, Tr. 2238, 2211; [redacted]).

1793. Schein added a provision into the 2014 MB2 Agreement to prevent Dental Gator from becoming a "typical GPO." In an October 2014 email to Sullivan and other Schein executives, Foley stated: "In our prime vendor agreement we spelled out specific terms and restrictions about these consulting offices to prevent Dental Gator from becoming a typical GPO." (RX2294 at 001). Foley testified that he was referring to the provision in the 2014 MB2 Agreement stating: "[t]his agreement may not be used to grow any Group Purchasing Organization (GPO) type relationship." (Foley, Tr. 4572-4574; *see also* CX2665 at 002 (April 1, 2014 email in which Foley, in reference to MB2 Dental, writes: "There is also concern that in addition to the $2M for the practices owned by MB2, that they are also trying to expand their presence as a Buying Group. We added stipulations in their agreement to prevent this.")).

1794. The agreement also stated, "[d]ental practices which are not owned in whole or [in] part by MB2, must have a formal affiliate agreement in place with MB2. MB2, or such associated entity, agrees that for all such offices, the primary relationship will comprise [the] business management services and shall include the ability to require offices to comply with the purchasing commitment and payment terms of this agreement." (CX4001 at 002; Puckett, Tr. 2239; Foley, Tr. 4573-4574).

1795. Special Markets did not pursue the Dental Gator relationship, and never submitted a bid for Dental Gator's business. (CX8005 (Muller, Dep. at 169, 268)). Schein never bid for Dental Gator's business when it was established. (Sullivan, Tr. 3991). Dental Gator became a Schein customer without Schein's knowledge initially. (CX8005 (Muller, Dep. at 268)).

1796. Schein viewed MB2's use of the 2014 Agreement for Dental Gator as a breach of the 2014 MB2 Agreement. MB2 formed Dental Gator without Schein's permission, and without talking to Schein first. (CX0309 (Muller, IHT at 103-104)). In January 2015, Muller stated in an internal Schein email: "I don't believe we have an Agreement on these offices – and that they were introduced to us without our choice. . . our arrangement with MB2 was never predicated on a buying group and it is against what we want to do as a Company." (CX2641 at 002).

1797. On April 1, 2014, Schein's Hight wrote to Foley regarding a conversation with Dental Gator: "We continue to stress that if it looks at any time like a GPO we will disenroll." (CX2427 at 001).

1798. In June 2014, Schein's Hight spoke to MB2 by phone, including Puckett, about MB2's breach of the 2014 MB2 Agreement through Dental Gator. Hight reported on the call with MB2 to Foley and Muller: "Dr. T and Justin Puckett, general counsel for MB2, just called me. As expected they were very worried about being in breach – to the point of stuttering. . . . They have assured me they are shutting down the GPO aspect of what happened immediately. . . . They assured me they will make sure they meet MSO criteria moving forward and will stay clear of anything remotely GPO in nature." (CX0247 at 001).

1799. On June 9, 2014, Hight drafted a letter to send to MB2 regarding Dental Gator; she wrote: "As you know, we discussed how very important Schein's position is in that we do not support nor contract with GPOs. To that end, we also included GPO language in the prime vendor agreement." (CX2431 at 001-002; CX8022 (Hight, Dep. at 175) (testifying that the email was a draft letter to MB2)). In a later email on the chain, Hight wrote to Cavaretta: "[MB2] signed a PVA that very specifically said no GPO relationship. This was a point of some discussion with them on negotiations. We dug our heels in and they agreed." (CX2431 at 001). In response, Cavaretta replied: "Shut this down. The letter is very well written. In [*sic*] 100% behind you on this." (CX2431 at 001).

1800. Schein's Hight also reported on her June 2014, phone call with MB2 about Dental Gator to Cavaretta. In an email to Cavaretta on June 10, 2014, Hight wrote: "[T]hey will make sure they do not represent in their marketing anything that looks like a GPO and that they will focus on practice management. . . . I did in process of conversation let them know we had identified a couple of GPO models in Texas and were in the process of closing those down." (CX2425 at 001).

1801. In an October 2014 email, Tim Sullivan inquired about what type of customer Dental Gator was, and whether it was a GPO. (RX2294 at 002 ("Who are they? What are they? Is this a GPO?")).

1802. Schein viewed Dental Gator as a buying group, and was concerned about maintaining a consistent strategy with respect to other buying groups. (Sullivan, Tr. 3991-3993; CX2761 at

001). In October 2014, Cavaretta told Sullivan: "This is a straight up GPO and if we allow, I'm not sure how we say no to other GPOs. . . . Understandably, they want to leave it alone because they don't want to upset MB2. I don't think that is a consistent strategy with where we want to go per our last meeting with you [Sullivan] and Dave [Steck]." (CX2761 at 001).

1803. Sullivan told Cavaretta that Dental Gator was not a buying group if its members converted to offices that were owned by MB2, and became a part of the DSO. (Sullivan, Tr. 3993-3994; CX2761 at 001 ("If these convert to ownership office I would not put in to the straight up GPO bucket.")). Sullivan referred to an ownership model of other Schein customers that were DSO customers, such as Heartland, Comfort Dental, and Mortenson. (Sullivan, Tr. 3993; CX2761 at 001).

1804. Schein struggled internally with how to treat Dental Gator because MB2 was such a large customer and Schein did not want to upset MB2 over the Dental Gator issue. (Sullivan, Tr. 3991).

1805. Schein was concerned about losing MB2 as a customer if it tried to end the relationship with Dental Gator. (CX0175 at 001 (in a July 29, 2014, email, Schein's Kyle wrote: "If we do this it could cost us the MB2 business."); CX2425 at 001 (in a June 10, 2014 email, Schein's Hight wrote that Foley instructed Hight "not to do anything as it would be putting $2million plus a year at risk" regarding Dental Gator); CX0188 at 001 (in a January 28, 2015 email, Schein's Muller wrote about Dental Gator: "Please remember this is a $2M+ customer.")).

1806. Sullivan and other HSD executives sought to end the relationship between Special Markets and Dental Gator. Sullivan tried to end the relationship between Special Markets and Dental Gator, and discussed this with Hal Muller, head of Special Markets. (CX0246 at 001). In a July 1, 2015 email, Schein's Sullivan wrote: "The Dec 'offsite' last year I left with a goal to see if we could get Hal to shut it down, but knew that could be a challenge due to the parent company being a EDSO of ours in [Special Markets].” (CX0246 at 001). In a July 2014 email, Schein sales manager Kyle wrote to Cavaretta: “We really need to shut the Dental Gator down.” (CX0175 at 001). Cavaretta replied: “I agree…as this is the second big GPO we will be shutting down…Co-op is the other.” (CX0175 at 001). In an October 2014 email, Cavaretta stated that he was not comfortable promoting Dental Gator. (RX2294 at 003 (“This is going to create major confusion in the field and I’m not comfortable at all promoting this GPO.”)).

1807. Sullivan and Muller disagreed about how to handle Dental Gator. (Sullivan, Tr. 3991). Special Markets wanted to keep the Dental Gator relationship, as it was a way of keeping MB2 as its customer. (CX8005 (Muller, Dep. at 169-170)).

1808. Sullivan was involved in decisions concerning Dental Gator, a buying group handled through Special Markets, because the members were private practice dentists. (Sullivan, Tr. 3997).

1809. Muller told Sullivan and Breslawski in January 2015 that Dental Gator was “not a pure buying group- they have 12 services they offer.” (CX0188 at 001). Muller testified that he felt he had to defend Dental Gator to Sullivan and Breslawski, by telling them Dental Gator was not a typical buying group, and that it was part of one of Schein’s largest customers. (CX0309 (Muller, IHT at 181-182)).

1810. Schein would not have done business with Dental Gator, but for Schein’s relationship with MB2. (CX8005 (Muller, Dep. at 197)).

1811. In January 2015, Breslawski, to whom both Sullivan and Muller reported directly, told Sullivan and Muller: “It is important that while accommodating for unique reasons here, we don’t help open the floodgates on buying groups!” (CX0188 at 001).

1812. Schein also imposed guidelines on how MB2 could advertise Dental Gator that applied to all of Dental Gator's advertising. (Puckett, Tr. 2241-2242). Schein told Dental Gator that it could not advertise itself as a buying club. (CX8006 (Puckett, Dep. at 72)).

1813. Puckett testified that MB2 "agreed that [Dental Gator] would never advertise . . . that we were a strict buying group for the sole purpose of buying Henry Schein supplies to save money." (Puckett, Tr. 2242). This applied to all of Dental Gator's advertising. (Puckett, Tr. 2242).

1814. Dental Gator's website was "DentalGator.com." (Puckett, Tr. 2243).

1815. As a result of Schein's advertising restrictions, Dental Gator added a statement on its website that it was not a buying group. Dental Gator had a frequently asked question on its website that said, "Question: Are you a buying group?" followed by "Answer: No." (Puckett, Tr. 2243-2244; CX4016 (February 18, 2015, email from Gill to Puckett: "Is Dental Gator a buy [*sic*] group? Dental Gator is not a buy [*sic*] group"). This statement was added to Dental Gator's website in February 2015. (Puckett, Tr. 2247; CX5002 (web capture of Dental Gator website from February 2015)).

1816. Puckett testified that the statement that Dental Gator was not a buying group was on the website because of "the advertising guidelines that [MB2 and Dental Gator] agreed to with Henry Schein, to provide clarity that we were not formed as a buying group." (Puckett, Tr. 2244).

1817. Schein also objected to a fax and a YouTube video marketing Dental Gator's promised savings on Henry Schein supplies. (Puckett, Tr. 2248-2249, 2253-2254).

1818. Dental Gator initially offered is members pricing from the 2014 MB2 contract with Schein. (Puckett, Tr. 2256).

1819. In 2015, Schein raised pricing by cutting the discounts for new Dental Gator members. (Puckett, Tr. 2256). The discount cut only applied to Dental Gator accounts, and not to MB2 accounts. (Puckett, Tr. 2258). Schein cut the discounts to Dental Gator by 10 to 15 percent. (Puckett, Tr. 2256-2257; CX4015 at 001 (February 18, 2015 email from Dental Gator President Patrick Gill telling Puckett that Schein raised prices 10 to 15%: "We really don't have anything special for [Dental Gator] on supplies. If a doctor is getting a decent deal on supplies right now, he will Probably be paying a little more with [Dental Gator] for those same supplies")). Puckett understood Patrick Gill to be saying that independent dentists would be paying more for dental supplies with Schein's discount cut. (Puckett, Tr. 2259-2260).

1820. Schein's price increases hurt Dental Gator, and affected Dental Gator's growth; Dental Gator started to see sales dwindle and decrease after Schein's price increase. (CX8006 (Puckett, Dep. at 90-91)).

1821. Dental Gator's growth slowed at the time of Schein's reduced discounts in 2015. (Puckett, Tr. 2263; CX4021 at 001 (March 6, 2015 "DG Feb update" email from Gill to others at MB2 reporting on Dental Gator membership numbers); CX4027 at 001 (August 6, 2015 "DG July update" email from Gill to others at MB2 reporting on Dental Gator membership numbers)). Dental Gator did not grow much between March and July 2015, and only added one member. (Puckett, Tr. 2263-2266; CX4021 at 001 (2015 "DG Feb update": Dental Gator had 23 members in March 2015); CX4027 at 001 (2015 "DG July update": Dental Gator had 24 members in July 2015)).

1822. In March 2015, after the discount cut, Dental Gator was looking to partner with another distributor other than Schein. (Puckett, Tr. 2265).

1823. Dental Gator ceased operations and was legally dissolved in late 2018. (Puckett, Tr. 2267).

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

1824. [redacted]

1825. Dr. Goldsmith reached out to Tim Sullivan and John Chatham of Henry Schein to schedule a meeting. [redacted]; RX2328 at 001 (November 20, 2013, email from Goldsmith to Sullivan and Chatham)).

1826. In early 2014, Dr. Goldsmith and Trevor Maurer of Smile Source met with John Chatham and Tim Sullivan of Henry Schein at Schein's office in West Allis, Wisconsin. [redacted]; Maurer, Tr. 4940-4941).

1827. Schein presented a partnership proposal to Smile Source. [redacted]; CX2508; CX2536; Sullivan, Tr. 4007; Maurer, Tr. 4942).

1828. The partnership proposal presented to Smile Source was dated February 13, 2014. On August 25, 2014, Steck sent Cavaretta an email with an attachment titled, "SmileSource14 copy.pptx." (CX2508 at 003-013). The attached partnership proposal was dated February 13, 2014. (CX2508 at 003). Steck testified that the attachment was the final version of the proposal presented to Smile Source. (Steck, Tr. 3783-3784). Similarly, on September 9, 2014, Sullivan asked to see "the proposal that we outlined to Smile Source earlier this year." (CX2536 at 002). In response, Dave Steck forwarded an attachment titled, "SmileSource14 copy.pptx". (CX2536 at 001). The attached partnership proposal was dated February 13, 2014. (CX2536 at 005).

1829. Schein's partnership proposal to Smile Source in early 2014 offered a 7% discount off of catalog for private label brand merchandise. (CX2508 at 011; CX2536 at 014; [redacted]; Steck, Tr. 3790).

1830. Schein's 2014 partnership proposal to do business with Smile Source members offered [redacted]; *compare* Steck, Tr. 3777-3778 (the discount to Smile Source members in 2011 was [redacted]) *with* Steck, Tr. 3790 (Schein's 2014 offer to Smile Source was for 7% off standard products); CX2536 at 014).

1831. Steck wrote that the Smile Source 7% discount proposal "bombed." (CX2508 at 001).

1832. Steck prepared the presentation for Smile Source dated February 13, 2014. (Steck, Tr. 3784; CX2508 at 003). Steck did not attend the meeting where the presentation was presented to Smile Source. (Steck, Tr. 3846). Steck does not have personal knowledge of the meeting with Smile Source and does not know what was discussed. (Steck, Tr. 3847).

1833. [redacted]

1834. [redacted]

1835. [redacted]

1836. [redacted]

1837. [redacted]

1838. [redacted]

1839. At the beginning of 2012, Smile Source had around [redacted] members. [redacted]; RX2952 (Maurer, Dep. at 26-27) (at the end of 2011, Smile Source had around 28 members)). In 2014, Smile Source had around [redacted]; RX2952 (Maurer, Dep. at 27) (at the end of 2013, there were 145 Smile Source locations)). *See also* CCFF ¶ 183.

1840. Schein's offer to Smile Source was the same discount that it offered to individual dentists who agreed to purchase at least $35,000 from Schein. (Steck, Tr. 3792-3794; *see also* [redacted]

1841. [redacted]

1842. Steck offered testimony regarding an alleged phone call between John Chatham and Dr. Goldsmith in which Schein made a 9/18 discount proposal to Smile Source. (Steck, Tr. 3796-

3797). Steck was not on the alleged call between John Chatham and Dr. Goldsmith in 2014. (Steck, Tr. 3796-3797, 3847). Steck has no personal knowledge of that call. (Steck, Tr. 3847). The testimony that Steck offered about that phone call consists solely of information he heard from John Chatham. (Steck, Tr. 3847-3848).

1843. [redacted]; CX2571 at 001; *see also* CX2454 at 001 (January 27, 2011, email stating Smile Source customers receive [redacted] off catalog for non-formulary products) [redacted]).

1844. [redacted]

1845. On December 20, 2011, Brian Brady of Schein wrote to John Chatham, Dr. Goldsmith, and other Schein and Smile Source employees: "Since July 2009 he has received our highest discount of [redacted] off in Hawaii, so he was already getting our highest discount. Smile Source is a larger discount but only by a couple % points." (CX2571 at 001 [redacted]).

1846. On December 20, 2011, Brian Brady of Schein wrote to Joe Cavaretta, John Chatham, Dr. Goldsmith, and other Schein and Smile Source employees: "Smile Source has incredibly aggressive pricing and just to confirm . . . . MORE aggressive than current [redacted]." (CX2571 at 001) [redacted]).

1847. [redacted]

1848. Sullivan acknowledges that Smile Source wanted [redacted] off of catalog in 2014, and Schein would not make that offer. (CX2470 at 002 (September 9, 2014 email from Sullivan to Breslawski); Sullivan, Tr. 4003-4004; CX2683 at 001 (June 5, 2015, email); Sullivan, Tr. 4006-4008) [redacted])).

1849. On September 9, 2014, Sullivan wrote to his boss, Breslawski and Muller regarding Smile Source: "We met with them earlier this year, made a great proposal and they turned us down. Yes, they would love to get back with us for [redacted] off catalog pricing to all their members with no commitments to purchase from us, plus a kickback to them. Not interested." (CX2470 at 002; Sullivan, Tr. 4003-4004; [redacted])). Sullivan testified that he was not interested in a deal with Smile Source at the discount level of [redacted] off catalog pricing. (Sullivan, Tr. 4004; [redacted])).

1850. On June 5, 2015, Stanley Bergman asked Sullivan whether Smile Source was a credible group. (CX2683 at 001). In response, Sullivan wrote: "We've met with them several times and have alignment on purpose and values, but they want [redacted] discount for members that we just can't do. We made a very aggressive and inclusive proposal to them that many of their execs liked, but without the discount they wouldn't move." (CX2683 at 001; Sullivan, Tr. 4007-4008; [redacted])).

1851. Sullivan understood at the time that Smile Source wanted [redacted] off for their members. (Sullivan, Tr. 4007-4008; [redacted])). Sullivan would not have made a false statement to his boss. (Sullivan, Tr. 4008).

1852. [redacted]

XXV. WITNESS BACKGROUND

A. Lay Witnesses Who Testified At Trial

1. Third Party Witnesses

Dr. Joseph Baytosh of Corydon Palmer Dental Society (Dr. Baytosh, Tr. 1875-1923)

1853. Dr. Joseph Baytosh is the former President of Corydon Palmer Dental Society ("Corydon Palmer"). He acted as president of Corydon Palmer in 2014. (Baytosh, Tr. 1880).

1854. Prior to his presidency at Corydon Palmer, Dr. Baytosh served as secretary, vice president, and president-elect of Corydon Palmer. (Baytosh, Tr. 1880).

1855. Dr. Baytosh also served on the Corydon Palmer executive board from 2011-2013. (Baytosh, Tr. 1880).

1856. Before serving as an executive for Corydon Palmer, Dr. Baytosh also served on the Corydon Palmer Board of Trustees for three years, and as Corydon Palmer's Chairman of Continuing Education. (Baytosh, Tr. 1879).

1857. He joined Corydon Palmer as a member shortly after graduating dental school 30 years ago, and is a practicing dentist in Girard, Ohio. (Baytosh, Tr. 1878, 1876).

Dr. Andrew M. Goldsmith of Smile Source (Dr. Goldsmith, Tr. 1925-2190)

1858. Dr. Andrew M. Goldsmith served as Smile Source's Chief Dental Officer from 2013-2014. (Goldsmith, Tr. 1934, 2041-2042).

1859. [redacted]

1860. In 2011, Dr. Goldsmith took on the role of President of Smile Source. He held this role until 2013. (Goldsmith, Tr. 1934, 1938).

1861. As President of Smile Source, and a part of Smile Source's management team, Dr. Goldsmith had responsibilities for recruiting and retaining members, building a website, developing a vendor program, evaluating the value proposition for members, building a brand, market research negotiating vendor discounts, reviewing invoices, meeting with manufacturers and distributors, promoting the business model, and setting educational standards. (Goldsmith, Tr. 1934, 1951-1952, 1955-1956).

1862. Dr. Goldsmith became a Smile Source member in about 2010. (Goldsmith, Tr. 1938).

1863. Dr. Goldsmith is a practicing independent dentist in Houston, Texas. He has practiced dentistry for 20 years. (Goldsmith, Tr. 1926).

<u>Dr. Richard Johnson of Klear Impakt</u> (R. Johnson, Tr. 5478-5525)

1864. Dr. Richard Johnson is a founding partner and part owner of Klear Impakt. (R. Johnson, Tr. 5478-5479, 5481).

1865. Dr. Richard Johnson and his partners started Klear Impakt sometime in 2014. (R. Johnson, Tr. 5511).

1866. As part of his responsibilities from August 2015 to the present, Dr. Richard Johnson negotiates discounts and pricing with Henry Schein. (R. Johnson, Tr. 5481; 5511 (1st agreement with Schein signed in 2015)).

<u>Dr. John C. Kois, Sr. of Kois Buyers Group</u> (Kois, Sr., Tr. 160-303)

1867. Dr. John C. Kois, Sr. founded the Kois Center in 1994, and he served as its Director since its inception. (Kois Sr., Tr. 163-164).

1868. In 2014, Dr. Kois, Sr. founded the Kois Buyers Group. (Kois Sr., Tr. 179-181).

1869. Dr. Kois, Sr. is a self-employed dentist practicing in the state of Washington. (Kois Sr., Tr. 161).

1870. Dr. Kois started practicing dentistry in 1977, and joined the U.S. Air Force in 1978. (Kois Sr., Tr. 161-162).

1871. Dr. Kois, Sr. is also an assistant professor at the University of Washington and continues to teach through the Kois Center. (Kois Sr., Tr. 163-164).

John Constantine Kois, Jr. of Kois Buyers Group (Kois Jr., Tr. 304-390)

1872. John C. Kois, Jr. is the CEO of Kois Center, and has held that position since March 2015. (Kois Jr., Tr. 306).

1873. From 2015 to present, Kois, Jr. has also acted as the Manager of Kois Tribal Management. (Kois Jr., Tr. 307).

1874. Kois Tribal Managment runs the Kois Buyers Group. (Kois Jr., Tr. 307).

1875. Kois, Jr. also serves as the Manager of Kois Buyers Group. In that capacity, he manages and maintains vendor relationships, memberships, and the website. (Kois Jr., Tr. 306, 309).

Dr. Brenton Mason of New Mexico Dental Co-op (Mason, Tr. 2321-2409)

1876. In late 2012 or early 2013, Dr. Brenton Mason along with Dr. Jason Chapman, and Dr. Frank Montoya sought to establish the New Mexico Dental Co-op for independent dentists. (Mason, Tr. 2331, 2339 (began discussions in 2012-2013)).

1877. As part of his duties in putting together the New Mexico Dental Co-op, Dr. Mason looked to negotiate supplies and equipment pricing with vendors, including dental supply distributors. (Mason, Tr. 2333-2334).

1878. From 2002 through 2014, Dr. Mason owned his own dental practice in Albuquerque, New Mexico. (Mason, Tr. 2324). He owned three offices and had a contract with a fourth. (Dr. Mason, Tr. 2324).

1879. Currently, Dr. Mason is a practicing dentist at a general dentistry family practice called Valencia Family Dental. (Mason, Tr. 2322).

Trevor Maurer of Smile Source (Maurer, Tr. 4935-5018)

1880. Trevor Maurer is the President and CEO of Smile Source. (Maurer, Tr. 4935).

1881. In late 2012, Maurer joined Smile Source as the Vice President of Business Development. (Maurer, Tr. 4937). He was promoted to President in mid-2013 and CEO in late-2013. (Maurer, Tr. 4937-4938).

Justin Michael Puckett of MB2 Dental Solutions (Puckett, Tr. 2200-2319)

1882. Justin Michael Puckett is the President of MB2 Dental Solutions. (Puckett, Tr. 2201).

1883. He has held the position of President of MB2 Dental Solutions since December 2013. (Puckett, Tr. 2201).

1884. As President of MB2 Dental Solutions, Puckett deals with helping dental offices grow, as well as overseeing all corporate operations. (Puckett, Tr. 2204).

1885. Prior to becoming President of MB2 Dental Solutions, Puckett also served as its General Counsel. (Puckett, Tr. 2204).

1886. Puckett was Vice President of Finance and General Counsel for another DSO called Floss Dental before joining MB2 Dental Solutions. (Puckett, Tr. 2205).

<u>Jeffrey Richard Reece of Burkhart Dental Supply</u> (Reece, Tr. 4357-4496)

1887. Jeffrey Reece is Vice President of Sales and Marketing for Burkhart. (Reece, Tr. 4357-4358).

1888. Reece's responsibility for marketing at Burkhart started two years ago, but he has held the VP of Sales position since 2008. (Reece, Tr. 4359).

1889. His responsibilities as VP of sales include overseeing the growth, success, and strategic vision for the sales division. (Reece, Tr. 4359).

1890. As the VP of Marketing, he is responsible for the brand and the strategic vision of the marketing division. (Reece, Tr. 4359).

1891. Over the past 20 years with Burkhart Dental Supply, Reece filled other positions such as Branch Manager, Continuing Education Division, and Director of Marketing. (Reece, Tr. 4358).

2. <u>Respondents' Executives and Former Executives</u>

a) Benco

<u>Charles ("Chuck") Cohen</u> (Cohen, Tr. 398-1001)

1892. Charles ("Chuck") Cohen is the Managing Director of Benco, a title he shares with his brother, Rick Cohen. (Cohen, Tr. 399-400). The Managing Director title is akin to being the Chief Executive Officer of the company. (Cohen, Tr. 400). Cohen both co-owns and co-manages Benco Dental with his brother. (Cohen, Tr. 399-400).

1893. Cohen took on a leadership role at Benco Dental in 1996, and became the Managing Director about twenty years ago. (Cohen, Tr. 401).

1894. Cohen oversees the company's strategy for development and expansion, human resources, finance, sales, and marketing. (Cohen, Tr. 401).

1895. From 1989 to 1994, Cohen worked as a Territory Representative for Benco Dental in New York. (Cohen, Tr. 402). He also took on roles in Benco's sales and marketing until around 1994. (Cohen, Tr. 402).

1896. Before leaving for college in 1994, Cohen served as Benco Dental's first Marketing Director. (Cohen, Tr. 402).

Patrick Ryan (Ryan, Tr. 1009-1277)

1897. Patrick Ryan is the Equipment Research and Development Field Director of Strategic Markets for Benco Dental, a position he took on in June of 2018. (Ryan, Tr. 1015-1016). He also manages a book of DSO business. (Ryan, Tr. 1016).

1898. Ryan held multiple positions within Benco Dental concurrently. (Ryan, Tr. 1012-1013 (Director of Sales and Director of Special Markets); 1013-1015 (Director of Special Markets and Director of Business Development)).

1899. Ryan took on the Director of Business Development position in 2011. (Ryan, Tr. 1014). In this position, Ryan managed the growth of Benco Dental into 30 new geographic markets. (Ryan, Tr. 1015).

1900. Ryan became the Director of Special Markets (also known as "Strategic Markets") Division in 2006. (Ryan, Tr. 1013-1014).

1901. While in this position, Ryan reported directly to Chuck Cohen. (CX8037 (Ryan, Dep. at 23-24)).

1902. As Director of Special Markets, Ryan was responsible for large groups such as DSOs, community health centers, and federal government customers. (Ryan, Tr. 1014).

1903. As Director, Ryan managed nine employees in the Strategic Markets Division. (Ryan, Tr. 1014).

1904. In 2002, Ryan became the Director of Sales with responsibility for all regions including 48 states. (Ryan, Tr. 1011-1012). In this position, Ryan had approximately eight direct reports and 60-100 indirect reports including Territory Representatives and Equipment Specialists. (Ryan, Tr. 1012-1013).

1905. Ryan started at Benco Dental as a Territory Representative in 1993, and received a promotion to Regional Manager in 2000. (Ryan, Tr. 1011).

b) Schein

<u>Joe Cavaretta</u> (Cavaretta, Tr. 5525-5662)

1906. Joe Cavaretta worked for Henry Schein Dental for 18 years, starting in 2001. He began to work for another company, Dental Whale Services in February of 2019. (Cavaretta, Tr. 5527).

1907. Between 2011 and 2015, Cavaretta held the following positions at Schein: Western Zone Manager, Western Zone Director, Vice President of Sales for the West, and finally Vice President of Sales for the East. (Cavaretta, Tr. 5540).

1908. During the years 2011 through 2015, Cavaretta reported to Dave Steck. (Cavaretta, Tr. 5540-5541).

<u>Keith Randall ("Randy") Foley</u> (Foley, Tr. 4505-4741)

1909. From 2013 to December 2016, Randy Foley was the Vice President of Sales for Schein Special Markets. (Foley, Tr. 4508).

1910. While Vice President, Foley reported to Hal Muller. (Foley, Tr. 4516).

1911. Dave Steck was Foley's counterpart in Henry Schein Dental. (Foley, Tr. 4520).

1912. From 2009 to 2013, Foley was the Director of Sales for Schein Special Markets. (Foley, Tr. 4508).

1913. As Director and then Vice President of Henry Schien Special Markets, Foley's responsibilities included setting the strategy for Special Markets, managing a sales budget of almost $500 million, and managing sales teams for DSOs, Federal Government, and Dental Schools. (Foley, Tr. 4514-4515).

1914. Foley also personally managed the top 50 DSOs known as "Elite DSOs." (Foley, Tr. 4514).

<u>Jason ("Jake") Meadows</u> (Meadows, Tr. 2409-2658)

1915. As of September 2017, Jason ("Jake") Michael Meadows has served as Henry Schein's Vice President of Sales of Special Markets. (Meadows, Tr. 2411-2412). In this position, he is responsible for all sales in the United States. (Meadows, Tr. 2412).

1916. Meadows held the position of Vice President of Sales, Eastern Area for Henry Schein Dental from 2015 to 2017. (Meadows, Tr. 2412). In this position, Meadows oversaw all sales east of the Mississippi. (Meadows, Tr. 2413).

1917. Prior to serving as the Vice President of Sales, Eastern Area, Meadows was the Director for Sales, Eastern Area for one year from 2014 to 2015. (Meadows, Tr. 2413).

1918. While serving as the Vice President of Sales, Eastern Area, Meadows reported to Dave Steck. (Meadows, Tr. 2416).

1919. From 2011 to 2015, Meadows was Henry Schein Dental's Northwest Zone General Manager and reported to Dave Steck and Joe Cavaretta. (Meadows, Tr. 2416-2417).

1920. The Northwest Zone territory under Meadows' management included Alaska, northern California, Idaho, Montana, portions of Nevada, Oregon, and Washington state. (Meadows, Tr. 2417).

<u>David ("Dave") Arthur Steck</u> (Steck, Tr. 3671-3865)

1921. David ("Dave") Arthur Steck is Henry Schein Dental's Vice President and General Manager. (Steck, Tr. 3671-3673).

1922. Steck took on this position in 2005. (Steck, Tr. 3671-3673).

1923. As HSD's Vice President, Steck's responsibilities include oversight of field sales operations cross the United States, and he had anywhere from 6 to 16 direct reports, including field sales consultants, equipment specialists, and technology specialists. (Steck, Tr. 3672-3675).

1924. Both Cavaretta and Meadows reported to Steck. (Steck, Tr. 3674-3675).

1925. As Henry Schein Dental's Vice President and General Manager, Steck reported to Tim Sullivan. (Steck, Tr. 3674-3675).

1926. Steck was Foley's counterpart within Henry Schein Dental. (Foley, Tr. 4520).

Timothy ("Tim") Sullivan (Sullivan, Tr. 3866-4356)

1927. In the first quarter of 2019, Timothy ("Tim") Sullivan expected to take on the role of Executive Advisor for the Henry Schein's Global Dental Group. (Sullivan, Tr. 3867, 3872).

1928. From 1997 until the end of 2018, Sullivan held the position of President of Henry Schein Dental for North America. (Sullivan, Tr. 3867, 3871-3872 (explaining that he held the title of "President" of Henry Schein Dental for the majority of his 21 years with the company)).

1929. In his role as President of Henry Schein Dental for North America, Sullivan was responsible for the overall business strategy for a team of roughly 3,000 Henry Schein employees including between 1,100-1,200 sales representatives. (Sullivan, Tr. 3872-3874).

1930. When he was President of Henry Schein Dental North America, Sullivan reported to Jim Breslawski. (Foley, Tr. 4519).

1931. Sullivan served as the President of Schein's U.S. dental business from 2004 through the end of 2018. (Sullivan, Tr. 3871).

1932. As President of Henry Schein Dental North America, Sullivan's responsibilities included setting the market strategy and tone and culture for Schein's dental business. (Sullivan, Tr. 3871-3872).

1933. Sullivan anticipated that his role would change in early 2019 to an executive advisor to Schein's Global Dental Group. (Sullivan, Tr. 3867, 3872).

Kathleen Titus (Titus, Tr. 5190-5341)

1934. Kathleen Titus is a business consultant for Henry Schein. (Titus, Tr. 5190-5191).

1935. In 2014, Titus took on the role as Director of Group Practices, Western Area for Henry Schein Dental's Mid-Market division, and held this position until January 2019. (Titus, Tr. 5191, 5287-5288). In this position, Titus reported to Joe Cavaretta. (Titus, Tr. 5288).

1936. Titus was a Zone Manager for Schein's Special Markets for fifteen years until being transferred to Henry Schein Dental in 2014. (Titus, Tr. 5287-5288). As a Zone Manager, Titus reported to Randy Foley and Hal Muller. (Titus, Tr. 5192-5193).

c) Patterson

Paul Andrew Guggenheim (Guggenheim, Tr. 1524-1874)

1937. Paul Guggenheim was the president of Patterson Dental from May 2010 until April or May 2015. (Guggenheim, Tr. 1526-1527). At that time, he became the CEO of Patterson Dental and remained in that position until May 2016. (Guggenheim, Tr. 1527).

1938. When Guggenheim was President and CEO of Patterson Dental, the individuals who would evaluate GPOs for the company were Dave Misiak, Tim Rogan, Neal McFadden and Wesley Fields. (CX0314 (Guggenheim, IHT at 225)).

1939. From May 2016 to May 2017, Guggenheim was the Chief Innovation Officer for Patterson Dental. (Guggenheim, Tr. 1529-1530; CX8023 (Guggenheim, Dep. at 22)).

1940. From May 2017 to the present, Guggenheim has been President of Patterson's Western Region, a similar role to position he had with Patterson Dental from 2000 to 2010. (Guggenheim, Tr. 1530; CX8023 (Guggenheim, Dep. at 20-22)).

Matthew Neal ("Neal") McFadden (McFadden, Tr. 2659-2848)

1941. Neal McFadden was the President of Patterson's Special Markets division from July 2013 until he left the company in 2017. (McFadden, Tr. 2668). That division has also been called Strategic Accounts. (McFadden, Tr. 2670). From 2009 until July 2013, McFadden was the manager of Patterson's Southwest Region. (McFadden, Tr. 2668-2669; CX8004 (McFadden, Dep. at 28, 29)).

1942. As President of Special Markets, McFadden reported to Paul Guggenheim from 2013 to 2015. (McFadden, Tr. 2670-2671).

1943. In May 2015, McFadden began reporting to David Misiak. (McFadden, Tr. 2671; CX8004 (McFadden, Dep. at 54)).

David ("Dave") Misiak (Misiak, Tr. 1289-1517)

1944. David ("Dave") Misiak was Patterson Dental's Vice President of Sales from 2010 to 2016. (Misiak, Tr. 1297-1298).

1945. As VP of Sales for Patterson Dental, Misiak was in charge of Patterson Dental's entire United States sales operation. (Guggenheim, Tr. 1606).

1946. During the time that Misiak was the VP of Sales for Patterson Dental, he reported to Paul Guggenheim. (Misiak, Tr. 1299).

1947. During the time Misiak was the VP of Sales for Patterson Dental, he provided guidance to Patterson Dental's regions and branch office about working with customers. (Misiak, Tr. 1383).

1948. In late 2016, Misiak became the president of Patterson Dental. (CX0316 (Misiak IHT, at 11-12). He left Patterson Dental in approximately May 2018. (Misiak, Tr. 1297).

1949. Misiak is currently employed by Young Innovations (Misiak, Tr. 1291). Ninety-seven percent of Young Innovation's business is for consumable products, which it sells through Schein, Patterson, Benco and other dental products distributors. (Misiak, Tr. 1293-1294). Schein, Patterson and Benco are three of Young Innovations' larger customers. (Misiak, Tr. 1294).

<u>Timothy ("Tim") Rogan</u> (Rogan, Tr. 3418-3669)

1950. In May 2017, Timothy ("Tim") Rogan become Patterson's Vice President and General Manager for North America. (Rogan, Tr. 3421, 3423).

1951. Rogan has worked for Patterson since 1993. (Rogan, Tr. 3420-3421). From 2009 to May 2017, Rogan was Patterson's Vice President of Marketing for Merchandise. (Rogan, Tr. 3423).

1952. During the time Rogan was Patterson's Vice President of Marketing for Merchandise, he was responsible for consumables (merchandise) relationships with vendors, global sourcing, customer loyalty program, and pricing. (Rogan, Tr. 3424, 3513; Guggenheim, Tr. 1606-1607).

1953. Rogan reported to Paul Guggenheim until approximately January 2016. (Rogan, Tr. 3424-3425).

B. Expert Witnesses Who Testified at Trial

1. <u>Complaint Counsel's Expert Witness</u> (Marshall, Tr. 2855-3417)

a) Dr. Robert Clifford Marshall

(1) <u>Background</u>

1954. Dr. Marshall is a Distinguished Professor of Economics at Penn State University, where he is also co-director of the Center for the Study of Auctions, Procurements and Competition Policy. (Marshall, Tr. 2856).

1955. Dr. Marshall has a Ph.D. degree in economics from the University of California, San Diego ("UCSD"), a master's degree in economics from UCSD, and an undergraduate degree is from Princeton University. (Marshall, Tr. 2856). He specializes in the fields of industrial organization, auctions, procurements, as well as the economics of collusion. Dr. Marshall has published several articles on economics of collusion. (Marshall, Tr. 2856-2857). Among his publications on the topic of collusion is a book, *The Economics of Collusion: Cartels and Bidding Rings*, published by MIT Press, and a paper entitled, "Tacit Collusion in Oligopoly," which is published in *The Handbook of International Antitrust*. (Marshall, Tr. 2857).

1956. Dr. Marshall has been a professor of economics for over 35 years. (Marshall, Tr. 2856). He spent the first twelve years of his career at Duke University and then left to go to Penn State in 1995, where he had been recruited to be the department head. (Marshall, Tr. 2856). Dr. Marshall is a partner of the economic consulting firm Bates White LLP. (Marshall, Tr. 2857).

1957. To educate himself about the industry, Dr. Marshall talked with a number of individuals who are participants in the industry, reviewed the record in the case tounderstanding the market participants, including manufacturers, full-service distributors, online distributors, and dentists. (Marshall, Tr. 2859).

2. Respondents' Expert Witnesses

a) Dr. John Henry Johnson, IV (J. Johnson, Tr. 4772-4933)

(1) Background

1958. Dr. John H. Johnson, IV is a professional economist and the owner of the economic consulting firm, Edgeworth Economics. (J. Johnson, Tr. 4773).

1959. Dr. Johnson charged an hourly rate of $975 for his work on this case. (RX2834 at 067 (Appendix B) (Johnson Expert Report)).

(2) Dr. Johnson Failed To Do Any Quantitative Analysis To Define The Relevant Market To Assess Respondents' Conspiracy

1960. Dr. Johnson admitted that he did not conduct a hypothetical monopolist or a SSNIP (small but significant and non-transitory increase in price) test to define a relevant product market in this FTC matter. (J. Johnson, Tr. 4929; RX2965 (J. Johnson, Dep. at 30, 184-187,)).

1961. Dr. Johnson admitted that he did not define a relevant product market in this FTC matter. (J. Johnson, Tr. 4929; RX2965 (J. Johnson, Dep. at 30, 185,187)).

1962. Dr. Johnson did not define a relevant product market for *SourceOne Dental, Inc. v. Patterson Companies, Inc. et al* ("SourceOne Action"). (RX2965 (J. Johnson, Dep. at 51)).

1963. Dr. Johnson admitted that he did not define a relevant product market for *In Re: Dental Supplies Antitrust Litigation* ("Dental Supplies Class Action"). (RX2965 (J. Johnson, Dep. at 52)).

(3) Dr. Johnson Failed To Do Any Investigation Or Relevant Analysis To Support His Opinion That The Relevant Market Should Include Direct-Selling Manufacturers

1964. Dr. Johnson opines that the relevant product market should include direct selling manufacturers. (J. Johnson, Tr. 4784-4785; RX2834 at 015-023 (¶¶ 23-30) (Johnson Expert Report)).

1965. Dr. Johnson did not include any data or opine in his report in this matter on how dentists substitute between suppliers in response to a price change. (RX2965 (J. Johnson, Dep. at 60-61)).

1966. Dr. Johnson acknowledged that he did not study the question of whether there are some products that are sold directly that are not sold through distributors. (RX2965 (J. Johnson, Dep. at 59)).

1967. Dr. Johnson acknowledged he did not conduct any empirical analysis of whether dentists would switch to direct-selling manufacturers if distributors raised prices. (RX2965 (J. Johnson, Dep. at 59)).

1968. Dr. Johnson did not interview any manufacturers, including direct selling manufacturers, to learn about the distribution chain in the dental supplies industry. (*See* [redacted]; *see also* RX2834 at 068-085 (Appendix C) (Johnson FTC Expert Report) (listing no interviews relied upon); *see also* [redacted]).

(4) Dr. Johnson's Pricing And Entry Analysis From His SourceOne Report Is Irrelevant And Does Not Support His Opinion That the Relevant Market Is Broader Than Full-Service Distribution

1969. Dr. Johnson admitted that the allegations in the SourceOne Action are different from those in this FTC Case. (J. Johnson, Tr. 4904).

1970. Dr. Johnson acknowledged that the allegations in the Dental Supplies Class Action were different then in this FTC case. (J. Johnson, Tr. 4904-4905).

1971. Dr. Johnson acknowledged that the SourceOne Action does not involve a conspiracy not to discount to buying groups. (J. Johnson, Tr. 4904).

1972. Dr. Johnson acknowledged the Dental Supplies Class Action does not involve a conspiracy not to discount to buying groups. (J. Johnson, Tr. 4905).

1973. Dr. Johnson's assignment in the SourceOne Action was to assess the economic analysis provided by the plaintiff's expert Dr. Leitzinger. [redacted]; RX2965 (J. Johnson, Dep. at 14)).

1974. Dr. Johnson's assignment in the Dental Supplies Class Action was limited to the assessment of the expert economic opinions offered by the plaintiffs' experts Dr. Solow and Dr. McClave, in that matter. (J. Johnson, Tr. 4776;[redacted]).

1975. Dr. Johnson claimed that non-full-service distributors, such as Darby, act as a constraint on Benco's pricing and, thus, should be included in the relevant market. [redacted]; J. Johnson, Tr. 4806).

1976. Dr. Johnson admitted that in his FTC Case report that he did not do pricing analysis in which he isolated what part of Benco's price changes were the result of competition in a market from Darby. (J. Johnson, Tr. 4914-4915; RX2965 (J. Johnson, Dep. at 263-264)).

1977. In his SourceOne Expert Report, Dr. Johnson analyzed how Benco's pricing and margins changed as Benco entered new geographic areas. (RX2965 (J. Johnson, Dep. at 103, 260-264)).

1978. The pricing analyses in Dr. Johnson's SourceOne Expert Report did not provide information about what specifically Benco was responding to with its price changes. (RX2965 (J. Johnson, Dep. at 263-264)).

1979. Dr. Johnson admitted that his analyses of Benco's pricing in his SourceOne expert report would capture changes in price due to competition from Schein and Patterson. (J. Johnson, Tr. 4915; RX2965 (J. Johnson, Dep. at 263-264)).

(5) Dr. Johnson's Exhibit 2 Is Misleading and Does Not Support Dr. Johnson's Opinion That The Relevant Market Is Broader Than Full-Service Distribution

1980. Dr. Johnson's Exhibit 2 purports to show that dentists regularly source dental products across multiple suppliers, and this relates to Dr. Johnson's opinion on the relevant product market in this matter. (J. Johnson, Tr. 4905-4906; RX2965 (J. Johnson, Dep. at 38-40); RX2834 at 019-021 (¶ 27) (Johnson Expert Report)).

1981. Exhibit 2 lists the dental product purchases of only the seven named plaintiffs in the Dental Supplies Class Action. (J. Johnson, Tr. 4906; RX2965 (J. Johnson, Dep. at 39-40); RX2834 at 019-021 (¶ 27) (Johnson Expert Report)).

1982. The seven dentists listed in Exhibit 2 of Dr. Johnson's report in this matter are not a random sample. (RX2965 (J. Johnson, Dep. at 40); J. Johnson, Tr. 4906)).

1983. Dr. Johnson agreed that there were approximately 188,000 dentists in the United States. (J. Johnson, Tr. 4906; RX2965 (J. Johnson, Dep. at 40)).

1984. Dr. Johnson agreed that Exhibit 2 of his report in this matter thus represents the purchases of only 0.00003723 percent of dentists in the United States. (J. Johnson, Tr. 4907-4908).

1985. One of the seven named plaintiffs in the Dental Supplies Class Action and listed in Dr. Johnson's Exhibit 2 is Evolution Dental in New York. (RX2834 at 020-021 (Exhibit 2) (Johnson Expert Report)).

1986. At trial, Dr. Johnson was not able to recall if Evolution Dental was a dentist's office or a dental laboratory. (J. Johnson, Tr. 4908-4909).

1987. Dr. Johnson admitted that five of the six dental offices listed in Exhibit 2 of his report in this matter are not buying group members. (J. Johnson, Tr. 4909).

1988. Dr. Johnson admitted that Exhibit 2 does not identify which supplier is the primary supplier for each dentist listed in the exhibit. (J. Johnson, Tr. 4909-4911; RX2965 (J. Johnson, Dep. at 40)).

1989. Dr. Johnson admitted that Exhibit 2 of his report in this matter does not show what products each dentist listed in the exhibit bought from the suppliers listed in the exhibit. (J. Johnson, Tr. 4909; RX2965 (J. Johnson, Dep. at 41)).

1990. Dr. Johnson admitted that Exhibit 2 of his report in this matter does not identify the quantity each dentist purchased from each of the suppliers listed in Exhibit 2. (J. Johnson, Tr. 4911; RX2965 (J. Johnson, Dep. at 41)).

1991. Dr. Johnson admitted that Exhibit 2 of his report in this matter does not indicate if a dentist bought most of their dental supplies from a full-service distributor. (J. Johnson, Tr. 4912).

1992. Dr. Johnson admitted that Exhibit 2 of his report in this matter does not indicate a supplier listed in the exhibit has products that are not available for purchase from a full-service distributor. (J. Johnson, Tr. 4912; RX2965 (J. Johnson, Dep. at 41-42)).

1993. Dr. Johnson admitted that Exhibit 2 of his report in this matter does not show how many times the dentists purchased from each of the suppliers listed in the exhibit. (J. Johnson, Tr. 4912; RX2965 (J. Johnson, Dep. at 42)).

1994. Dr. Johnson admitted that if a dentist purchased only once from one of these suppliers listed in Exhibit 2 of his report, that supplier would still be listed in the exhibit. (J. Johnson, Tr. 4912; RX2965 (J. Johnson, Dep. at 43)).

(6) Dr. Johnson's Exhibits 8-12 Are Red Herrings That Do Not Actually Include Any Profitability Analysis Related to Buying Groups

1995. 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]

1996. [redacted]; RX2965 (J. Johnson, Dep. at 232); RX2834 at 041 (¶65) (Johnson Expert Report) (describing Exhibits 8 through 12)).

1997. Dr. Johnson did not offer an opinion on whether Schein acted in its unilateral self-interest with respect to buying groups. (J. Johnson, Tr. 4899; RX2965 (J. Johnson, Dep. at 23)).

1998. Dr. Johnson did not offer an opinion on whether Patterson acted in its unilateral self-interest with respect to buying groups. (J. Johnson, Tr. 4899; RX2965 (J. Johnson, Dep. at 24)).

1999. In Exhibit 9 of his report, Dr. Johnson purports to show Benco's annual sales to dentists for 2010 to 2017 in the Los Angeles-Long Beach-Anaheim, CA MSA. ([redacted]; RX2834 at 043 (¶68) (Johnson Expert Report)).

2000. Dr. Johnson opines that Exhibit 9 shows Benco's sales growing in the Los Angeles-Long Beach-Anaheim, CA MSA over the time period from 2013 to 2016 from $6.19 million to $12.2 million, although Benco was not working with buying groups during this time. [redacted]; RX2834 at 043-044 (¶69) (Johnson Expert Report)).

2001. Dr. Johnson reports that for Dr. Marshall's data, during the same time period, 2013 to 2016, Kois Buyers Group members in the Los Angeles-Long Beach-Anaheim, [redacted]

2002. [redacted]

[redacted]

2003. [redacted]

b) **<u>Dr. Lawrence Wu</u>** (Wu, Tr. 5019-5189)

(1) <u>Background</u>

2004. Dr. Lawrence Wu is the President of NERA, an economic consulting firm. (Wu, Tr. 5067).

2005. Dr. Wu charged an hourly rate of $1,100 per hour for his work on this case. (Wu, Tr. 5066-67).

(2) <u>Dr. Wu's Revised Exhibits 5A, 5B, 5C, 13A, and 13B Are Flawed</u>

2006. Despite his revisions to exhibits in his report the night before his deposition, Dr. Wu's revisions to his expert report Exhibits 5A, 5B, 5C, 13A, and 13B ("Amended Exhibits") are still flawed. (CCFF ¶¶ 2007-2014; Wu, Tr. at 5102-5103, 5106-5107).

2007. All of Dr. Wu's Amended Exhibit analyses examined only the pricing for a single dental product (Septocaine) in a single state (Washington State). [redacted]

2008. [redacted]

2009. [redacted]

2010. [redacted]

2011. [redacted]

2012. Rather than present any statistical analysis of the data underlying his exhibits, Dr. Wu simply presented the exhibits themselves. [redacted]

2013. None of the analyses Dr. Wu's Revised Exhibits examine the counterfactual "but-for" world absent Respondents' conspiracy. [redacted]

2014. Specifically, in all of his Revised Exhibits, Dr. Wu failed to account for the fact that the prices that buying group members paid during the conspiracy period may have been inflated because of Respondents' conduct. [redacted]

(3) Dr. Wu Applied The Wrong Critical Loss Test In His Criticisms Of Dr. Marshall's Relevant Market Definition

2015. Dr. Wu did not define the relevant product market in this case, nor did he independently perform the hypothetical monopolist test to define the relevant market. [redacted]

2016. Dr. Wu criticized Dr. Marshall's hypothetical monopolist test ("HMT") analysis, but Dr. Wu applied the wrong critical loss test in his criticisms of Dr. Marshall's Benco Southern California HMT analysis. (CX7101 at 020-021 (¶¶ 44-47) (Marshall Expert Rebuttal Report)).

2017. In Dr. Marshall's Benco Southern California HMT analysis, the proper way to analyze whether Darby is in the relevant market is to determine whether the recapture rate is greater than the critical loss, as Dr. Marshall did in his original analysis. (CX7101 at 020 (¶ 44) (Marshall Expert Rebuttal Report)).

2018. Dr. Wu erroneously did not use the criterion of whether the recapture rate is greater than the critical loss and instead used an incorrect framework in which the hypothetical monopolist raises the prices for all full-service distributors, not just the prices charged by Benco. (CX7101 at 020 (¶ 44) (Marshall Expert Rebuttal Report)). As a result of this error, Dr. Wu used the wrong criterion when analyzing the Southern California data to determine whether Darby should be included in the relevant product market. (CX7101 at 020 (¶ 45) (Marshall Expert Rebuttal Report)).

2019. In Benco's Southern California HMT analysis, Dr. Marshall applied the correct analysis and concluded that the HMT supported the relevant product market of full-service dental distribution after calculating that the critical loss was substantially less than the recapture rate of a hypothetical monopolist. (CX7100 at 088-090 (¶¶ 220-226) (Marshall Expert Report)).

2020. Dr. Wu also criticized Dr. Marshall's Benco Southern California HMT analysis based on the data Dr. Marshall used to represent the southern California market. (RX2967 (Wu, Dep. at 227-225)).

2021. Dr. Wu's Benco Southern California analysis is based on faulty sample of data. (CX7101 at 020-021 (¶¶ 46-47) (Marshall Expert Rebuttal Report)).

2022. Dr. Wu put forward data consisting of all the dentists in the entirety of Southern California, including many that did not consider Benco's prices relevant to their purchasing decisions. (CX7101 at 020-021 (¶¶ 46-47) (Marshall Expert Rebuttal Report)).

2023. Dr. Wu failed to ensure that these dentists in his Benco Southern California analysis are in fact the ones that faced the price increase by the hypothetical monopolist. (CX7101 at 020-021 (¶¶ 46-47) (Marshall Expert Rebuttal Report)). Looking back in time, dentists who were buying something from Benco had to decide from whom to purchase once Benco exited. (CX7101 at 020-021 (¶¶ 46-47) (Marshall Expert Rebuttal Report)). It is the decisions of these dentists that is central to the analysis for product market definition. (CX7101 at 020-021 (¶¶ 46-47) (Marshall Expert Rebuttal Report)).

2024. Even using Dr. Wu's own preferred set of data to represent the Southern California market, Dr. Marshall showed in his Expert Rebuttal Report that the HMT for a candidate market of full-service dental distribution would still be satisfied. (CX7101 at 020-021 (¶¶ 46-47) (Marshall Expert Rebuttal Report)).

2025. In other words, using Dr. Wu's choice of data and the right natural experiment framework actually confirms Dr. Marshall's conclusion that Darby and other non-full-service distributors are not in the relevant product market. (CX7101 at 020-021 (¶¶ 46-47) (Marshall Expert Rebuttal Report)).

(4) Dr. Wu Did Not Do Any Analysis Of The Products And Services That Darby Offered During The Relevant Period

2026. Dr. Wu admitted that he did not do any analysis of the products and services Darby actually offered during the relevant time period. (RX2967 (Wu, Dep. at 238)).

c) Dr. Dennis Williams Carlton (Carlton, Tr. 5349-5471)

(1) Background

2027. Dr. Dennis Carlton is a senior managing director of Compass Lexecon, an economic consulting firm. (RX2832 at 071 (Carlton Expert Report)).

2028. Dr. Carlton charged an hourly rate of $1,600 per hour for his work on this case. (Carlton, Tr. 5419).

(2) Dr. Carlton Ignored A Substantial Amount Of Evidence In Forming His Opinions

2029. Dr. Carlton admitted that he only reviewed around one-third of the deposition testimony in this matter. (Carlton, Tr. at 5425-5426).

2030. Dr. Carlton did not provide a response in his expert report to the Schein documents with examples of Schein executives and Schein sales representatives at all levels of the company referring to a no buying group policy. (*See* RX2832 (Carlton Expert Report)).

(3) Dr. Carlton's Application Of A Broader Definition Of "Buying Groups" In Table 1 And Appendix D Of His Report Leads To Misleading Results

2031. In his expert report, Dr. Carlton employed a broader definition of "buying group" than the definition alleged in this matter. (RX2832 at 008 (¶8, n.6) (Carlton Expert Report) ("I interpret the FTC's definition of 'Buying Groups' to include only buying groups of independent dentists and small group practices, as defined in the footnote above, in which the buying group does not have any ownership stake in any of its members. For the purpose of my report, I refer to the FTC's definition of buying group as 'buying groups of independent dentists,' while using the general term ‘buying groups’ to represent any entity, other than a DSO, that seeks to negotiate prices on behalf of its members.”)).

2032. Dr. Carlton used his broader definition of a buying group extensively in his expert report. (RX2966 (Carlton, Dep. at 100-101) (explaining that the definition of buying group alleged in this matter pertains to individuals in Category 1 & Category 2 of the Carlton Report Appendix D and Table 1 while “everything else” are “other buying groups” that do not fall under the definition as alleged in this matter), 102-103 (explaining that the quoted term “buying group” in his expert report is broader than the definition alleged and encompasses all entities besides DSOs “that negotiate[ ] prices on behalf of its individuals members.”)).

2033. Dr. Carlton admitted that the “buying groups” in his Appendix D include groups that are not comprised of independent dentists. (Carlton, Tr. at 5438-5439).

2034. Dr. Carlton identified 14 groups in his expert report as buying groups of independent dentists. [redacted]

2035. In his expert report, Dr. Carlton identified 30 of Schein’s groups as entities that do not fit the definition of a buying groups of independent dentists, and Dr. Carlton identified these as something other than buying groups of independent dentists. [redacted]

2036. Dr. Marshall explained that if sales for admitted non-buying groups and contested groups are removed from Table 1 in Dr. Carlton’s Expert Report (RX2832 at 018-019 (¶29) (Carlton

Expert Report)), the total sales reported in that table would be reduced by more than 95 percent. (CX7101 at 032-034 (¶¶80-82) (Marshall Expert Rebuttal Report)).

2037. Dr. Marshall determined 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. (CX7101 at 034 (¶82) (Marshall Expert Rebuttal Report)).

C. Witnesses Who Testified by Deposition and/or Investigational Hearing Only.

1. Respondents' Employees and Former Employees

a) Benco

Michael ("Mike") McElaney (CX0303)

2038. Mike McElaney was the Acting Director of Sales, Northeast, and Regional Manager of New England for Benco Dental starting in December 2016. (CX0303 (McElaney, IHT at 10-11)).

2039. Prior to his Acting Director position, McElaney held the position of Vice President of Sales at Benco for two and a half years, from 2013 to 2016. (CX0303 (McElaney, IHT at 11)).

2040. From 2011 through 2013, McElaney was Director of Northeast at Benco. (CX0303 (McElaney, IHT at 11-12); CX0070 at 001-002)).

Paul Jackson (CX0302)

2041. Paul Jackson was Vice President of Marketing for Benco Dental from 1996 until at least March 2017. (CX0302 (Jackson, IHT at 12)).

b) Schein

Brian Brady (CX8020)

2042. Brian Brady was Henry Schein Dental's Regional Manager for a territory that included San Diego and Hawaii from December 2008 until December 2012. (CX8020 (Brady, Dep. at 20)).

2043. Brady was Henry Schein Dental's Regional Manager for the San Francisco Bay Area from December 2012 until January of 2015. (CX8020 (Brady, Dep. at 16-17)).

2044. Brady was the National Director of Group Practice for Mid Market at Henry Schein Dental from approximately January 2015 through early September 2017. (CX8020 (Brady, Dep. at 10, 12)).

James Breslawski (CX8012)

2045. James Breslawski was the president of Henry Schein North America Dental, which oversaw both Henry Schein Dental and Henry Schein Special Markets from 2005 to present. (Foley, Tr. 4516, 4519; CX8012 (Breslawski, Dep. at 39))

2046. In 2018, James Breslawski became the Vice Chairman at Henry Schein Inc. (CX8012 (Breslawski, Dep. at 39)).

Deborah ("Debbie") Foster (CX8001)

2047. In 2015, Debbie Foster (or Debbie Torgensen-Foster) became the Regional Account Manager for Henry Schein Dental's Mid-Markets Division. She has held this position since early 2015. (CX8001 (Foster, Dep. at 7, 14-15); *see also* CX8001 (Foster, Dep. at 7) (explaining name change in 2011)).

2048. Before joining Henry Schein Dental, Foster was the Director of Sales for Special Markets from 2005 to 2015. (CX8001 (Foster, Dep. at 13, 15)). While in the Director of Sales position, Torgersen-Foster reported to Randy Foley. (CX8001 (Foster, Dep. at 17)).

Andrea Hight (CX8022)

2049. In July 2018, Andrea Hight became the Western Area Sales Manager for Henry Schein Practice Solutions. (CX8022 (Hight, Dep. at 8)). Just prior to this, Ms. Hight held the National Director of Community Health for Henry Schein Special Markets for one year. (CX8022 (Hight, Dep. at 9-10)).

2050. From 2014 to 2017, Ms. Hight was Henry Schein Mid-Market Division's Area Director for Managed Group Practice and Community Health. (CX8022 (Hight, Dep. at 10, 21)).

2051. In 2008 or 2009, Ms. Hight became a Regional Account Manager for Henry Schein Special Markets. (CX8022 (Hight, Dep. at 14-15)). Randy Foley was her direct supervisor from about 2009 to 2014. (CX8022 (Hight, Dep. at 19).

Dean Kyle (CX0307)

2052. Dean Kyle was a Zone General Manager for Henry Schein from 1998 until January 2015. (CX0307 (Kyle, IHT at 15)).

2053. Kyle became a national recruiter for Henry Schein in January 2015. (CX0307 (Kyle, IHT at 14, 15)).

Hal Muller (CX8005; CX0309)

2054. Hal Muller was the President of Henry Schein Special Markets from 2008 through 2018. (CX8005 (Muller, Dep. at 9); CX0309 (Muller, IHT at 8))

2055. Hal Muller, as president of Henry Schein Special Markets, reported to Jim Breslawski. (CX8005 (Muller, Dep. at 67); Foley, Tr. 4516).

<u>Michael Porro</u> (CX8000)

2056. Michael Porro started his current position as Henry Schein Dental's Director of Technology for Sales, East in January of 2018. (CX8000 (Porro, Dep. at 9)).

2057. From 2014 through 2018, Porro was a Zone Manager for Henry Schein Dental's Atlantic states. (CX8000 (Porro, Dep. at 10-11) (Zone Manager for Atlantic South for 2016-2017 and Zone Manager for Atlantic Coast for 2014-2016)).

2058. Porro was the Corporate Director of Sales for HSD from 2012-2013. (CX8000 (Porro, Dep. at 11)).

2059. From about 2010-2011, Porro was Director of CAD/CAM for HSD. (CX8000 (Porro, Dep. at 11-12)).

2060. Porro started at HSD in 2005 as the Regional Manager for Schein in south Texas. He held this position until 2010. (CX8000 (Porro, Dep. at 11-12)).

c) Patterson

<u>Scott Anderson</u> (CX8027)

2061. In July of 2017, Scott Anderson became a Special Advisor to Patterson. Anderson's position as Special Advisor is supposed to extend through the end of June 2019. (CX8027 (Anderson, Dep. at 14)).

2062. From May 2010 to June 30, 2017, Anderson served as the Chief Executive Officer and President of Patterson Companies,Inc. (CX8027 (Anderson, Dep. at 15-16)).

<u>Wesley Fields</u> (CX0312)

2063. As of April 2017, Wesley Fields was Director of Business Development for Patterson. He started this position in November 2015. (CX0312 (Fields, IHT at 8)).

2064. From 2013 to 2015, Fields held the position of Branch Manager for Patterson's Louisville, Kentucky branch. (CX0312 (Fields, IHT at 8-9)).

2065. Fields was a Territory Sales Rep for Patterson from 2008 to 2013. (CX0312 (Fields, IHT at 13)).

Anthony Fruehauf (CX8013)

2066. Anthony Fruehauf was Branch Manager of Patterson's Raleigh/Durham branch from around 2005 to 2012. (CX8013 (Fruehauf, Dep. at 12-13)).

2067. Fruehauf was Region Manager of Patterson's Mid-Atlantic Region for approximately one and a half years, from 2012 through part of 2013. Sometime in 2013, Patterson consolidated its Mid-Atlantic and Southeast Regions. After that consolidation, Fruehauf became the Southeast Region Manager for Patterson. (CX8013 (Fruehauf, Dep. at 16 -17)). He remained in that position until at least July 2018. (CX8013 (Fruehauf, Dep. at 16-17)).

2068. During Fruehauf's tenure as Southeast Region Manager for Patterson, Patterson changed the name of his position from Southeast Region Manager to Southeast Region President. (CX8013 (Fruehauf, Dep. at 18-19)).

2069. Fruehauf has also used the name "Louis Fruehauf" in emails at Patterson. (CX8013, Dep. at 93).

Joseph Lepley (CX8028)

2070. Joseph Lepley started working for Patterson Dental in November 2015 as its Director for Strategic Pricing. (CX8028 (Lepley, Dep. at 12)).

2071. In Lepley's position as Director for Strategic Pricing at Patterson, he was responsible for managing merchandise pricing for all customer segments. (CX8028 (Lepley, Dep. at 12).

Devon Nease (CX8002)

2072. Devon Nease was Branch Manager for Patterson's Chesapeake branch from August 2011 to August 2014. (CX8002 (Nease, Dep. at 17, 19-20); Guggenheim, Tr. 1622).

Michael Smurr (CX0318)

2073. Michael Smurr was Branch Manager of the Wisconsin Milwaukee Sales Office for Patterson Dental from August 1, 2000 to December 1, 2008. (CX0318 (Smurr, IHT at 10-11)).

2074. Smurr was Director of Marketing for Merchandise, from approximately December 2008 until at least April 2017. (CX0318 (Smurr, IHT at 10-11)).

2. Third Party Witnesses

Frank Capaldo of Georgia Dental Association (CX8011)

2075. Frank Calpaldo is the Executive Director and Chief Executive Officer of the Georgia Dental Association ("GDA"). (CX8011 (Capaldo, Dep. at 11)).

2076. When GDA formed the GDA Supplies Plus buying group in July 2015, Capaldo became the Chief Executive Officer of the Integrity Dental Buying Group, the GDA subsidiary that houses GDA Supplies Plus. (CX8011 (Capaldo, Dep. at 11-12)).

Tracy Moody (CX8019)

2077. Tracy Moody joined Vision Source as the Vice President for Growth and Development in 2000. (CX8019 (Moody, Dep. at 16-17)). He became Chief Operating Officer of Vision Source in 2005. (CX8019 (Moody, Dep. at 20)).

2078. Moody was part of the team that founded Smile Source. (CX8019 (Moody, Dep. at 20-21)).

Donovan Osio of Texas Dental Association (CX9024)

2079. Donovan Osio is the General Manager of Texas Dental Association Financial Services, Inc., a wholly-owned subsidiary of the Texas Dental Association ("TDA"). (CX9024 (Osio, SourceOne Dep. at 12).

Respectfully submitted,

/s/ Lin W. Kahn
Lin W. Kahn
Federal Trade Commission
Bureau of Competition – Western Region
901 Market Street, Suite 570
San Francisco, CA 94103
Telephone: (415) 848-5100
Facsimile: (415) 848-5184
Electronic Mail: lkahn@ftc.gov

COMPLAINT COUNSEL'S PROPOSED CONCLUSIONS OF LAW

I. THE FEDERAL TRADE COMMISSION HAS JURISDICTION

1. The Federal Trade Commission ("FTC or "Commission") has jurisdiction over the subject matter of this proceeding, pursuant to Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45.

2. The Commission has jurisdiction over Respondent Benco Dental Supply Co. ("Benco").

3. Respondent Benco is, and at all relevant times has been, a corporation as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

4. The Commission has jurisdiction over Respondent Henry Schein, Inc. ("Schein").

5. Respondent Schein is, and at all relevant times has been, a corporation as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

6. The Commission has jurisdiction over Respondent Patterson Companies, Inc. ("Patterson").

7. Respondent Patterson is, and at all relevant times has been, a corporation as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

8. Respondents Benco, Schein, and Patterson's challenged restraint relates to an agreement not to discount to dental buying groups, which is in or affects commerce, as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

9. Respondent Benco's solicitation of Burkhart not to discount to dental buying groups is in or affects commerce, as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

10. Section 5 of the FTC Act prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."[1]

11. Unfair methods of competition under Section 5 of the FTC Act include any conduct that would violate Section 1 of the Sherman Act.[2]

II. RESPONDENTS AGREED NOT TO DISCOUNT TO BUYING GROUPS

12. Section 1 of the Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States."[3]

13. A "unity of purpose or a common design and understanding"[4] satisfies the agreement element of Section 1.

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[1] 15 U.S.C. § 45(a)(1).
[2] *FTC v. Cement Inst.*, 333 U.S. 683, 694 (1948).
[3] 15 U.S.C. § 1.

14. The Supreme Court has also described an agreement as a "conscious commitment to a common scheme designed to achieve an unlawful objective."[5]

15. Further, an inter-firm exchange of competitive information followed by tacit coordination is sufficient to find a violation of Section 1 of the Sherman Act.[6]

16. A "tacit" agreement is just as much an antitrust violation as an "express" agreement.[7]

17. Indeed, "[i]t is not necessary to find an express agreement . . . but it is sufficient that a concert of action be contemplated and that defendants conform to the arrangement."[8]

18. Complaint Counsel need only establish Respondents' agreement by a preponderance of the evidence.[9] In other words, a plaintiff need only present evidence that is sufficient to allow the fact-finder "to infer that the conspiratorial explanation is more likely than not."[10]

19. A conspiracy may be established through either direct or circumstantial evidence, or a combination of the two. Because it is unlikely that conspirators will formally sign a written agreement, proof of conspiracies rarely consists of direct evidence of an explicit agreement.[11] "Rather, conspiracies nearly always must be proven through inferences that may fairly be drawn from the behavior of the alleged conspirators."[12]

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[4] *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946).
[5] *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980)).
[6] *Accord Esco Corp. v. United States*, 340 F.2d 1000, 1008 (9th Cir. 1965) (Agreement is satisfied "if a course of conduct . . . once suggested or outlined by a competitor in the presence of other competitors, is followed by all . . . and continuously for all practical purposes, even though there are slight variations. . . . An exchange of words is not required. Thus not only action, but even a lack of action, may be enough from which to infer a combination or conspiracy."); *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 Co. v. United States*, 328 U.S. 781, 809-810 (1946)); *see United States v. Foley*, 598 F.2d 1323, 1332-34 (4th Cir. 1979) (finding an agreement where defendants adopted similar business policy following receipt of competitive information from a rival)..
[7] *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (distinguishing independent conduct from an agreement—either tacit or express).
[8] *Esco*, 340 F.2d at 1008.
[9] *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 656, 663 (7th Cir. 2002); *In re Adventist Health Sys./West*, 117 F.T.C. 224, 297 (1994) ("Each element of the case must be established by a preponderance of the evidence.").
[10] *In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012) (quoting Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law (hereinafter "Areeda & Hovenkamp") ¶ 1403(b)).
[11] *Esco*, 340 F.2d at 1006-07; *In re Elec. Books Antitrust Litig.*, 859 F. Supp. 2d 671, 681 (S.D.N.Y. 2012).
[12] *Elec. Books Antitrust Litig.*, 859 F. Supp. 2d at 681.

20. Circumstantial evidence is no less persuasive than direct evidence.[13]

A. The Totality of the Evidence Establishes Respondents' Agreement

21. To determine whether an antitrust conspiracy exists, courts must consider the "totality of the evidence."[14] "The 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."[15]

22. Proof of an agreement can include evidence that competitors exchanged assurances of a common course of action,[16] followed conduct "suggested or outlined by a competitor,"[17] communicated about perceived deviations from prior assurances or reassured each other that they would abide by prior assurances,[18] or made statements about the collective action of competitors,[19] among other evidence that make the inference of agreement more likely than not.

23. In *Gainsville Utilities Department v. Florida Power & Light Co.*, the totality of direct communications between high-level executives of rival utility companies led the court to find an agreement to divide the market, reasoning: "Indeed, if solid economic reasons existed for refusing service to [each other's territory], there was no reason for communicating with a competitor about the refusal, and certainly not for expressing such decisions in terms of hopeful, if not expected, reciprocity."[20]

24. In *United States v. Champion International Corp.*, defendant lumber buyers claimed that their individual interests in particular U.S. forestry sales was plain to all, nonetheless a tacit no-bid agreement was found where "the defendants did not leave the exchange of this information to chance" and met to advise each other about their plans to bid on future

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[13] *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 689 (S.D.N.Y. 2013), *aff'd* 791 F.3d 290 (2d Cir. 2015).
[14] *Id*.
[15] *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) *superseded by statute on other grounds*, Foreign Trade Antitrust Improvement Act of 1982, 15 U.S.C. § 6a (quoting *Am. Tobacco Co. v. United States*, 147 F.2d 93, 106 (6th Cir. 1944)).
[16] *Gainesville Util. Dep't v. Fla. Power & Light Co.*, 573 F.2d 292, 300-01 (5th Cir. 1978).
[17] *United States v. Champion Int'l Corp.*, 557 F.2d 1270, 1273 (9th Cir. 1977); *Esco*, 340 F.2d at 1007-08; *Foley*, 598 F.2d at 1331-32.
[18] *See United States v. Beaver*, 515 F.3d 730, 738 (7th Cir. 2008) (Defendant's "assertion that 'no person voiced their assent to the supposed conspiracy' rings hollow. Such assent was voiced when the coconspirators either confronted others about cheating on the cartel, or reassured others . . . that they were abiding by the agreement.").
[19] *See Standard Oil Co. of Cal. v. Moore*, 251 F.2d 188, 208 (9th Cir. 1957) (defendant's statement alluding to the conduct of competitors supported the jury's conclusion of conspiracy); *B&R Supermkt. v. Visa, Inc.*, No. C 16-01150 WHA, 2016 WL 5725010, at *6 (N.D. Cal. Sep. 30, 2016) (finding 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").
[20] 573 F.2d at 299, 301.

forestry sales, and indeed refrained from bidding on one another's' preferred sales.[21] "Whether or not anyone ever agreed at those meetings to bid or to refrain from bidding in any way, there was no doubt that the defendants 'had an understanding' about bidding."[22]

25. The totality of the record evidence makes it more likely than not that Respondents had a common understanding that they would not discount to buying groups.

B. Plus Factors Confirm Respondents' Agreement

26. Plus factors are required when a plaintiff relies solely on parallel conduct to prove an agreement.[23] In such a case, plus-factor evidence serves as a proxy for direct evidence of agreement.[24]

27. Where, as here, evidence of agreement goes beyond parallel conduct, plus-factor evidence is not necessary.[25] Nonetheless, plus-factor evidence may further corroborate evidence establishing an agreement violating Section 1.

1. Actions Against Self-Interest

28. Actions against unilateral economic self-interest is plus-factor evidence that supports a finding of conspiracy.[26]

29. "Evidence that the defendant acted contrary to its interests means evidence of conduct that would be irrational assuming that the defendant operated in a competitive market."[27]

30. For example, sharing competitively sensitive information with rivals is a plus factor contributing to the finding of an agreement.[28]

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[21] 557 F.2d at 1273.
[22] *Id.*
[23] *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 323 (3d Cir. 2010).
[24] *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d Cir. 2004).
[25] *Ins. Brokerage Antitrust Litig.*, 618 F.3d at 323; *Apple*, 952 F. Supp. 2d at 690.
[26] *Apple*, 952 F. Supp. 2d at 690.
[27] *Flat Glass Antitrust Litig.*, 385 F.3d at 360-61.
[28] *See Ross v. Bank of Am.*, No. 05-7116, 2012 U.S. Dist. LEXIS 19760, at *17-18, 26 (S.D.N.Y. Feb. 8, 2012) (noting credit card defendants "arguably acted against their unilateral interests by . . . providing competitors with certain sensitive business information" about their plans to change contract arbitration clauses and finding such actions constituting a plus factor supportive of agreement); *see also In re Polyurethane Foam Antitrust Litig.*, 152 F. Supp. 3d 968, 991 (N.D. Ohio 2015) ("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. And a jury can draw that inference without 'threaten[ing] to chill procompetitive behavior.'") (internal citation omitted).

31. In *Fleishman v. Albany Medical Center*, competitor exchanges of information that could have been used to outcompete rivals absent a conspiracy was "persuasive evidence" of conspiracy because such exchanges were against self-interest.[29]

32. Respondents sharing competitively sensitive information was against their economic self-interest and indicative of an agreement.

33. Depriving oneself of a profitable sales opportunity is another action against self-interest that points towards conspiracy.[30]

34. Toy manufacturers' decisions to forego sales to warehouse club stores, a growing and profitable sales channel, was conduct against self-interest that was indicative of an agreement in *Toys "R" Us v. FTC*, especially where each manufacturer feared its competitors would steal market share by selling to warehouse stores.[31]

35. Respondents' actions against their economic self-interest by failing to pursue buying groups suggests an agreement was more likely than not.

2. Change in Conduct

36. Changes in conduct constitute plus-factor evidence of a conspiracy.[32]

37. In *Toys "R" Us*, the toy manufacturers' shift from dealing with warehouse clubs to boycotting warehouse clubs was indicative of an agreement and inconsistent with independent action.[33]

38. The many examples of Respondents' changes in conduct with respect to their general buying group policies as well as whether to discount to individual buying groups make the inference of agreement more likely than not.

3. Other Plus Factors: Motive, Opportunity, and Market Concentration

39. Courts recognize motive to conspire as a plus factor in finding an agreement based on parallel conduct.[34]

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[29] 728 F. Supp. 2d 130, 162 (N.D.N.Y. 2010).

[30] *Toys "R" Us v. FTC*, 221 F.3d 928, 935 (7th Cir. 2000) (finding an agreement after it was "suspicious for a manufacturer to deprive itself of a profitable sales outlet"); *In re Pool Prods. Distrib. Mkt. Antitrust Litig.*, 988 F. Supp. 2d 696, 713 (E.D. La. 2013) (acts that "risk a loss of market share to the other manufacturers" are acts against economic self-interest supporting claim of conspiracy); *see also Standard Oil*, 251 F.2d at 206-07 (evidence of appellants' sales representatives who wanted to negotiate with, sell to, or "have the opportunity" of working with a customer that appellants later turned down supported finding of agreement rather than independent business decision).

[31] 221 F.3d 928, 931-32, 935-36 (7th Cir. 2000).

[32] *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) (when allegations of parallel conduct are the basis of a Section 1 claim, must allege facts to suggest preceding agreement, such as unprecedented change in behavior).

[33] 221 F.3d at 936.

40. In *Apple*, defendants' common motivation of challenging the "swiftly growing e-book market" that would "severely undermine their more profitable physical book business" and "protect[ing] their then-existing business model" was compelling plus-factor evidence of conspiracy.[35]

41. Respondents' motive to conspire to combat the growing threat posed by buying groups is plus-factor evidence pointing towards conspiracy.

42. Similarly, evidence of opportunities to conspire is supportive of an inference of agreement.[36]

43. In *C-O-Two Fire Equipment Co. v. United States*, fire extinguisher manufacturers argued that their in-person meetings had no probative value as to whether an agreement was reached where plaintiffs lacked direct evidence of what transpired at the meetings.[37] The court disagreed, finding that opportunity to collude evidence was a plus factor deserving of consideration as part of the totality of the evidence.[38]

44. Respondents repeated face-to-face meetings, joint attendance at industry events, unsaved notes and letters, and one-on-one telephone calls provide plus-factor evidence relevant to a finding of agreement.

45. "Economists [and courts] recognize that when a market is concentrated it is easier to coordinate collusive behavior."[39]

46. Respondents' high collective market share makes the full-service dental distribution industry conducive to collusion.

C. Respondents' Denials are Unavailing

47. Self-serving witness denials do not preclude a conspiracy finding in an antitrust case.[40]

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[34] *Flat Glass*, 385 F.3d at 360-61; *see Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 222 (1939) (finding a "strong motive for concerted action" where the film distributors sought higher ticket prices for first-and second-run theaters, but needed agreement by all distributors to increase profits, else they were in active competition with one another); *Toys "R" Us*, 221 F.3d at 931-32, 935-36 (toy manufacturers' common motive to boycott a discount sales channel was instructive in finding an agreement, especially where absent the agreement, individual manufacturers would not have boycotted for fear that their competitors would have stolen market share by selling to warehouse stores).

[35] 952 F. Supp. 2d at 691.

[36] *C-O-Two Fire Equip. Co. v. United States*, 197 F.2d 489, 493 (9th Cir. 1952); *see also In re Coordinated Pretrial Proceedings in Petrol. Prods. Antitrust Litig.*, 906 F.2d 432, 453 (9th Cir. 1990) ("[P]ermitting an inference of conspiracy from direct competitor contacts will not have significant anticompetitive effects.").

[37] *C-O-Two Fire Equip.*, 197 F.2d at 493.

[38] *Id.*

[39] *See, e.g., Gainesville Utils. Dep't*, 573 F.2d at 303.

48. "It is to be expected that [Respondents'] witnesses would deny that there was an agreement, but [such] testimony does not offset . . . compelling documentary evidence of a planned common course of action or understanding."[41]

49. Oral testimony that is in conflict with contemporaneous documentary evidence deserves little weight.[42]

50. Requiring admission of agreement would be tantamount to requiring direct evidence of conspiracy—a standard that finds no support in the law.[43]

51. Respondents' executives' denials do not offset the documentary evidence supporting an inference of agreement.

D. Claims of Independent Business Justification Are No Defense to an Unlawful Conspiracy

52. Whether conspiracy conduct is consistent with independent business justifications does not preclude a finding of collusion.[44]

53. "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."[45]

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[40] *See, e.g.*, *id.* at 301 n.14 (overturning denial of judgment notwithstanding the verdict relying on witness denials); *Champion Int'l*, 557 F.2d at 1273 (upholding trial court finding of an agreement to eliminate competitive bidding for timber where defendants asserted that meetings were innocent, but court found otherwise); *Vitagraph, Inc. v. Perelman*, 95 F.2d 142, 146 (3d Cir. 1936) (upholding a finding of conspiracy even though defendants' witnesses denied any conspiracy); *United States v. Capitol Service, Inc.*, 568 F. Supp. 134, 144-45 (E.D. Wis. 1983), *aff'd*, 756 F.2d 502 (7th Cir. 1985) (finding agreement despite defendants' testimony that no agreement existed); *United States v. Beachner Const. Co.*, 555 F. Supp. 1273, 1278-79 (D. Kan. 1983), *aff'd*, 729 F.2d 1278 (10th Cir. 1984) ("[A]though 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.").

[41] *Advert. Specialty Nat'l Ass'n v. FTC*, 238 F.2d 108, 117 (1st Cir. 1956).

[42] *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395-96 (1948) ("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".); *Gainsville Utils. Dep't*, 573 F.2d at 301 n.14 (Where defendants' executives testimony denying an agreement "is in conflict with contemporaneous documents we can give it little weight.").

[43] *See, e.g.*, *Apple*, 952 F. Supp. 2d at 689 ("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.").

[44] *Standard Oil*, 251 F.2d at 211 ("[I]f there is sufficient evidence to support a finding that a merchant entered into such an agreement, combination, or conspiracy, the fact that his individual refusal to deal may be explainable as a reasonable business decision is not excusatory of liability.").

[45] *United States v. Gen. Motors Corp.*, 384 U.S. 127, 142 (1966).

54. In *United States v. North Dakota Hospital Ass'n*, 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."[46]

55. In *Apple*, "the 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."[47]

56. Respondents' claims that refusing to discount to buying groups was in their economic interests, (while contradicted by the documentary evidence and expert testimony) do not prevent a finding of a horizontal agreement.

E. Imperfect Compliance Does Not Negate the Existence of an Agreement

57. Perfect compliance with an anticompetitive agreement is not necessary to prove an agreement in violation of Section 1.[48]

58. Section 1 condemns the *agreement*, as that is the trigger for danger to the marketplace.[49]

59. Once an anticompetitive agreement is established, whether actors performed the agreement perfectly or successfully is immaterial to the question of liability.[50]

60. Just as a breach of contract does not negate the existence of a contract, nor does imperfect compliance negate the existence of an anticompetitive agreement.[51]

61. In *In re Brand Name Prescription Drugs Antitrust Litigation*, as here, the defendants' assertions of working with buying groups to disprove a conspiracy targeting buying groups did not "erase the factual question of whether the defendants joined the conspiracy."[52]

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[46] 640 F. Supp. 1028, 1036-37 (D.N.D. 1986).
[47] *See United States v. Apple, Inc.*, 791 F.3d 290, 318 (2d Cir. 2015).
[48] *Beaver*, 515 F.3d at 739 ("[E]vidence of cheating certainly does not, by itself, prevent the government from proving a conspiracy.").
[49] *Id.*
[50] *Foley*, 598 F.2d at 1333 ("Since the agreement itself, not its performance, is the crime of the conspiracy, the partial non-performance of [defendant]. . . does not preclude a finding that it joined the conspiracy."); *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)).
[51] *Beaver*, 515 F.3d at 739.
[52] 123 F.3d 599, 615 (7th Cir. 1997); *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 thirty percent of the time, and stating, "the partial non-performance of [defendant] does not preclude a finding that it joined the conspiracy").

III. RESPONDENTS' AGREEMENT IS UNLAWFUL *PER SE*

62. It is long-settled law that agreements among horizontal competitors to fix prices are illegal *per se*.[53]

63. Even where "'not . . . aimed at complete elimination of price competition,'" horizontal price-fixing poses 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," and is illegal *per se*.[54]

64. "[P]rice-fixing includes more than the mere establishment of uniform prices."[55]

65. "[A]n agreement to eliminate discounts" is one such type of agreement that "falls squarely within the traditional *per se* rule against price fixing."[56]

66. In *Catalano, Inc. v. Target Sales, Inc.*, an agreement among horizontal competitors to eliminate interest free credit was condemned, as both the credit terms and the discount were an "inseparable part of the price."[57]

67. An agreement among rivals to boycott a particular customer is also plainly anticompetitive. "[A]ny agreement by a group of competitors to boycott a particular buyer or group of buyers is illegal *per se*."[58] "[T]he Sherman Act makes it an offense for respondents to agree among themselves to stop selling to particular customers."[59]

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[53] *Nat'l Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (quoting *United States v. Container Corp.*, 393 U.S. 333, 337 (1969) ("[A]n agreement that 'interferes with the setting of price by free market forces' is illegal on its face."); *accord Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 646-47 (1980) (price-fixing agreements are "plainly anticompetitive" and presumed illegal without further examination); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) ("[P]rice-fixing agreements are unlawful *per se* under the Sherman Act and [ ] no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.").
[54] *Apple*, 791 F.3d at 326 (quoting *Socony-Vacuum Oil*, 310 U.S. at 224 n.59).
[55] *Socony-Vacuum Oil*, 310 U.S. at 222.
[56] *Catalano*, 446 U.S. at 648; *accord TFWS, Inc. v. Schaefer*, 242 F.3d 198, 210 (4th Cir. 2001) ("[V]olume discount ban is [] a *per se* violation of the Sherman Act."); *United States v. Stop & Shop Cos.*, Crim. No. B 84-51, 1984 U.S. Dist. LEXIS 22103, at *1 (D. Conn. Nov. 8, 1984) ("[A]s a matter of substantive law, a conspiracy to discontinue double coupons is a form of price-fixing and therefore a *per se* violation of the Sherman Act."); Areeda & Hovenkamp ¶ 2022c (*per se* rule governs "agreements eliminating or restricting discounts or rebates"); *see also 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.").
[57] 446 U.S. at 648.
[58] *Fed. Maritime Comm'n v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 250 (1968); *accord St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 543 (1978).
[59] *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951), *overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 763-64 (1984).

68. In *FTC v. Superior Court Trial Lawyers Ass'n*, the lawyers' "concerted refusal to serve an important customer" (indigent criminal defendants) to compel higher attorney fees was held to be the essence of a *per se* price-fixing scheme.[60]

69. Respondents' agreement not to discount to buying groups constituted a *per se* offense under Sherman Act Section 1, 15 U.S.C. §1, and FTC Act Section 5, 15 U.S.C. § 45(a).

IV. RESPONDENTS' AGREEMENT IS UNLAWFUL UNDER THE TRUNCATED RULE OF REASON

70. "When restraints are not *per se* unlawful, and their net impact on competition not obvious, the conventional rule-of-reason approach requires courts to engage in a thorough analysis of the relevant market and the effects of the restraint in that market."[61]

71. "[E]ven when practices are not condemned by a *per se* rule, a full[-]blown rule-of-reason analysis is not always required."[62] A truncated rule of reason (or inherently suspect) 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."[63] 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."[64]

72. Under this standard, the agreement is presumed anticompetitive, and Respondents can avoid liability only by advancing a cognizable, plausible procompetitive justification for the agreement.[65]

A. Respondents' Agreement is Inherently Suspect

73. Certain categories of restraints almost always tend to raise price or reduce output, and hence are treated as "inherently suspect," or presumptively anticompetitive.[66]

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[60] 493 U.S. 411, 415-17, 422-23 (1990); *accord* Areeda & Hovenkamp, ¶ 1901e ("[T]he concerted refusal to deal directed at the customer itself is simply a price-fixing device.").
[61] *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 825 (citation omitted).
[62] *N. Tx. 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.")); *accord Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770-71 (1999).
[63] *Cal. Dental*, 526 U.S. at 770 (1999).
[64] *Polygram Holding, Inc. v. FTC ("Polygram Holding II")*, 416 F.3d 29, 36 (D.C. Cir. 2005); *accord In re Polygram Holding, Inc. ("Polygram Holding I")*, 136 F.T.C. 310, 344 (July 24, 2003), *aff'd*, *Polygram Holding II*, 416 F.3d 29 (D.C. Cir. 2005) ("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."); *see also NCAA v. Bd. of Regents of Univ. of Okla.* 468 U.S. 85, 109 n.39 (1984) ("[T]he rule of reason can sometimes be applied in the twinkling of an eye.") (internal quotation omitted).
[65] *Polygram Holding II*, 416 F.3d at 35-36; *PolyGram Holding I*, 136 F.T.C. at 345.
[66] *In re Realcomp II Ltd.*, Docket No. 9320, 2007 WL 6936319, at *21 (FTC Dec. 10, 2007); *Polygram Holding I*, 136 F.T.C. at 344-45.

74. Respondents' agreement not to discount to buying groups is presumptively anticompetitive because it (1) restrained competitive bidding and (2) prohibited discounting to a customer segment. As such, the agreement deprived independent dentists of the opportunity to aggregate their purchasing volume to increase their bargaining power vis-a-vis the Respondents.

75. Agreements suppressing bidding are presumptively unlawful.[67] "[N]o elaborate industry analysis is required to demonstrate the anticompetitive character of . . . an agreement [that] operates as an absolute ban on competitive bidding. [Such a ban] 'impedes the ordinary give and take of the market place.'"[68]

76. Similarly, agreements to refuse discounts are "inherently suspect because such restraints by their nature tend to raise prices and to reduce output."[69]

77. Respondents' agreement not to discount to buying groups is presumptively anticompetitive, especially as buying groups are a customer segment whose intrinsic purpose is to aggregate purchasing power to achieve discounted prices for their members.

78. The inquiry into Complaint Counsel's burden ends with evidence of Respondents' agreement not to discount to buying groups—a presumptively anticompetitive agreement.

79. Once anticompetitive harm is presumed, the burden of production shifts to the defendant to provide a substantial procompetitive justification.[70]

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[67] *Nat'l Soc'y of Prof. Eng'rs*, 435 U.S. at 692; *see also FTC v. Actavis, Inc.*, 570 U.S. 136, 157 (2013) (eliminating the "risk of competition" is a relevant antitrust harm).

[68] *Nat'l Soc'y of Prof. Eng'rs*, 435 U.S. at 692-95.

[69] *Polygram Holding I*, 136 F.T.C. at 353, 382-83 ("The anticompetitive nature of the agreement not to discount is obvious. [T]his is simply a form of price fixing, and is presumptively anticompetitive . . . 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."); *see also N.C. State Bd. of Dental Exam'ers*, 717 F.3d 359, 374 (4th Cir. 2013) ("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."); *In re Mass. Bd. of Registration in Optometry*, Docket No. 9195, 1988 FTC LEXIS 159, at *126 (June 13, 1988) (an agreement not to advertise discounts was "especially pernicious" as it eliminated a form of price competition).

[70] *Polygram Holding I*, 136 F.T.C. at 345, 349-50 ("If the challenged restrictions are of a sort that generally pose significant competitive hazards and thus can be called inherently suspect, then the defendant can avoid summary condemnation only by advancing a legitimate justification for those practices. . . . [T]he defendant must come forward with a substantial reason why there are offsetting procompetitive benefits.").

B. Respondents Have Offered No Plausible, Cognizable Justification for their Agreement

80. To avoid liability, Respondents must provide cognizable justifications, which must explain how the presumptively anticompetitive restraint at issue may permit defendants to increase output or improve quality, service, or innovation.[71]

81. "The proponent of the restraint bears a heavy burden of establishing an affirmative [benefit] that competitively justifies the demonstrated competitive harm."[72]

82. Respondents offered no procompetitive justification for their agreement.

83. As an anticompetitive agreement without offsetting benefits, Respondents' agreement not to discount to buying groups constitutes an unfair method of competition in violation of FTC Act Section 5, 15 U.S.C. §45(a), and Section 1 of the Sherman Act, 15 U.S.C. § 1.

C. Respondents' Agreement Caused Anticompetitive Harm

84. Where Respondents' agreement is inherently suspect and Respondents lack any cognizable, procompetitive justification for their agreement, no further showing of harm is necessary.

85. Nonetheless, Complaint Counsel has shown direct evidence, through its expert and other documentary proof, that Respondents' agreement harmed competition.

86. Where there is a showing of harm to competition, Complaint Counsel need not show the parties "had market power and that their conduct tended to reduce competition,"[73] which is simply an alternative method of showing harm.

87. Nonetheless, Complaint Counsel has shown that Respondents have market power in the relevant markets.

88. Market power is the collective "ability [of firms] to significantly affect prices and other outcomes in [an antitrust] market."[74]

89. An antitrust market consists of a relevant product market and a relevant geographic market.[75]

90. The key factors in identifying the bounds of a relevant product market are "(1) the reasonable interchangeability of use" by consumers and "(2) the cross-elasticity of demand between the product itself and substitutes for it."[76]

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[71] *Id.* at 345-47.

[72] *In the Matter of 1-800 Contacts*, Docket No. 9372, Initial Decision, slip op. at 201 (F.T.C. Oct. 27, 2017), *available at* https://www.ftc.gov/system/files/documents/cases/docket_9372_1-800_contacts_inc._initial_decision_final_redacted_public_version.pdf.

[73] *Realcomp II*, 2007 WL 6936319, at *19.

[74] *California v. Safeway, Inc.*, 651 F.3d 1118, 1154 (9th Cir. 2011).

[75] *Brown Shoe Co. v. United States,* 370 U.S. 294, 324 (1962).

91. The relevant geographic market is the "area of effective competition . . . in which the seller operates, and to which the purchaser can practicably turn for supplies."[77]

92. The relevant product market in which to analyze competitive effects from Respondents' agreement is full-service distribution of dental products and services to independent dentists.

93. The relevant geographic market in which to analyze competitive effects from Respondents' agreement is local markets within the United States.

94. Respondents have market power in the provision of full-service distribution of dental products and services to independent dentists in local markets within the United States.

V. BENCO'S INVITATION TO BURKHART TO JOIN THE AGREEMENT VIOLATES SECTION 5

95. An invitation to collude can justify a remedy under Section 5 of the FTC Act, even if the invitation does not result in an unlawful agreement under Section 1 of the Sherman Act.[78]

96. An invitation to collude is unlawful where a respondent explicitly or implicitly proposes to a competitor terms of coordination that, if accepted by the competitor, would constitute a violation of the Sherman Act.[79]

97. "The invitation 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."[80]

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[76] *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 119 (D.D.C. 2004) (quoting *Brown Shoe*, 370 U.S. at 325); *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 157 (D.D.C. 2000); *FTC v. Staples*, 970 F. Supp. 1066, 1074 (D.D.C. 1997).

[77] *Tampa Elec. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961).

[78] Areeda & Hovenkamp ¶ 1419d; *see also Liu v. Amerco*, 677 F.3d 489, 494 (1st Cir. 2012) ("[A]n unsuccessful attempt to fix prices . . . . [is] pernicious conduct with a clear potential for harm and no redeeming value whatever."); Areeda & Hovenkamp ¶1419d ("Solicitation to a conspiracy is dangerous to competition even if it cannot be shown that an 'offer' has been 'accepted.'").

[79] *See In re U-Haul Int'l Inc.*, FTC File No. 081 0157, *published at* 75 Fed. Reg. 35033, 35034-35 (June 21, 2010); *In re Valassis Commc'ns, Inc.*, Docket No. C-4160, 2006 FTC LEXIS 25, at *5 (Compl. Apr. 19, 2006) (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 FTC LEXIS 386, at *3 (Compl. Sept. 3, 1996) (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 FTC LEXIS 161, at *2-3 (Compl. July 1, 1993) (alleging invitation to collude where respondent sought to urge competitor to desist from offering free installation equipment).

[80] Areeda & Hovenkamp ¶ 1419a.

98. Respondent Benco's complaints about buying groups to Burkhart and its encouraging Burkhart to refuse to discount to buying groups constituted an invitation to collude, in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a).

VI. THE PROPOSED ORDER IS WARRANTED

99. Respondents Benco, Schein, and Patterson's agreement constituted unfair methods of competition in or affecting commerce in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. Such agreements and acts may recur in the absence of the Proposed Order in this proceeding.

100. Respondent Benco's solicitation of Burkhart constituted unfair methods of competition in or affecting commerce in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. Such acts may recur in the absence of the Proposed Order in this proceeding.

101. Entry of the Proposed Order is necessary and appropriate to remedy and prevent the violations of law found to exist.[81]

102. A remedy is appropriate even where a respondent no longer engages in the illegal conduct if there is a sufficient danger of recurrence; a temporary pause in illegal conduct does not preclude the issuance of an order.[82]

103. The Court has "wide discretion" in its choice of remedy where there is "a reasonable relation to the unlawful practices found to exist."[83]

104. The Court is not limited to prohibiting the illegal practices in the precise form in which it finds they existed in the past. 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."[84]

105. The evidence supports the Court entering an order consistent with the Proposed Order, which enjoins Respondents from engaging in the challenged by the Complaint.

[81] *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428-30 (1957).
[82] *Polygram Holding I*, 136 F.T.C. at 379.
[83] *Jacob Siegal Co. v. FTC*, 327 U.S. 608, 611-13 (1946).
[84] *Polygram Holding I*, 136 F.T.C. at 379.

IN THE MATTER OF SCHEIN/PATTERSON/BENCO
DOCKET NO. 9379

COMPLAINT COUNSEL'S WITNESS INDEX

NAME	TITLE	COMPANY	TRANSCRIPT CITE **TOTAL**	TRANSCRIPT CITE ***IN CAMERA***	DATE	VOLUME
Complaint Counsel's Opening Statement	N/A	N/A	11:06 - 66:09	N/A	10/16/2015	1
Dr. John Kois Sr.	Founder Dentist	Kois Buyers Group Kois Center	160:06 - 303:23	N/A	10/17/2018	2
John C. Kois Jr.	Manager Chief Executive Officer	Kois Buyers Group Kois Center	304:09 - 390:08	N/A	10/17/2018	2
Charles Cohen	Chief Executive Officer	Benco	398:17 - 1001:19	N/A	10/18/2018 10/24/2018	3 4
Patrick Ryan	Equipment Research and Development/Field Director of Strategic Markets	Benco	1009:14 - 1277:16	1143:01 - 1147:02	10/25/2018	5
David Misiak	President (Former)	Patterson Dental	1289:16 - 1517:12	N/A	10/26/2018	6
Paul Guggenheim	President & CEO (Former)	Patterson Dental	1524:22 - 1874:12	N/A	10/31/2018-11/1/2018	7
Dr. Joseph Baytosh	Dentist	Corydon Palmer	1875:08 - 1923:05	N/A	11/1/2018	8
Dr. Andrew Goldsmith	President and Chief Dental Officer (Former) Dentist	Smile Source	1925:23 - 2190:22	1942:01 - 1942:07 1959:01 - 2032:24 2036:01 - 2038:04 2050:01 - 2050:06 2053:01 - 2168:08 2184:01 - 2184:10 2189:01 - 2191:18	11/1/2018	8
Justin Michael Puckett	President	MB2 Dental Solutions	2200:18 - 2319:22	2284:01 - 2286:17	11/7/2018	9
Dr. Brenton Mason	Founder (Former) Dentist	New Mexico Dental Cooperative	2321:02 - 2409:10	N/A	11/7/2018	9
Jason ("Jake") Meadows	Vice President of Sales of Special Markets	Henry Schein	2409:20 - 2658:22	N/A	11/8/2018 11/8/2018	9 10
Matthew (Neal) McFadden	President of Patterson Special Markets (Former)	Patterson Dental	2659:09 - 2848:07	N/A	11/8/2018	10
Dr. Robert Clifford Marshall	CC Expert Professor of Economics & co-Director of the Center for the Study of Auctions, Procurements and Competition Policy	Penn State University	2855:17 - 3417:07	2917:01 - 2944:21 2962:01 - 3150:04 3413:07 - 3416:04	11/14/2018 11/16/2018	11 12
Timothy Rogan	Vice President & General Manager of North America	Patterson Dental	3418:14 - 3669:25	N/A	11/16/2018 12/12/2018	12 13
Dave Steck	Vice President & General Manager of Dental Division	Henry Schein	3670:07 - 3865:21	N/A	12/12/2018 12/13/2018	13 14
Timothy Sullivan	President of North American Dental Group	Henry Schein	3866:01 - 4356:22	4160:11 - 4163:16	12/13/2018 12/14/2018	14 15
Jeffrey Reece	Vice President of Sales & Marketing	Burkhart Dental Supply	4357:04 - 4496:14	4418:15 - 4440:24 4472:18 - 4485:23	12/14/2018	15
Keith "Randall" Foley	Vice President of Sales of Special Markets (Former)	Henry Schein	4505:18 - 4741:25	4624:10 - 4630:04	12/19/2018	16

NAME	TITLE	COMPANY	TRANSCRIPT CITE **TOTAL**	TRANSCRIPT CITE ***IN CAMERA***	DATE	VOLUME
Dr. John Henry Johnson, IV	Respondent Benco's Expert Economist & Owner of an economic consulting firm	Edgeworth Economics	4772:13 - 4933:16	4845:01 - 4854:12 4866:01 - 4872:18 4923:01 - 4927:18	2/7/2019	17
Trevor Maurer	President & CEO	Smile Source	4935:09 - 5018:09	4953:01 - 4960:03 5007:01 - 5016:14	2/7/2019	17
Dr. Lawrence Wu	Respondent Patterson's Expert Economist & President	NERA Economic Consulting	5019:09 - 5189:25	5108:01 - 5178:03	2/7/2019 2/8/2019	17 18
Kathleen Titus	Director for Mid-Markets Emerging Group Sales (Former)	Henry Schein	5190:09 - 5341:14	N/A	2/8/2019	18
Dr. Dennis William Carlton	Respondent Schein's Expert Exonomist & Professor	Compass Lexecon	5349:12 - 5471:04	N/A	2/14/2019	19
Dr. Richard Johnson	Founding Partner	Klear Impakt	5478:09 - 5525:06	5500:17 - 5502:12 5519:22 - 5524:18	2/15/2019	20
Joe Cavaretta	Vice President of Sales, East (Former)	Henry Schein	5525:12 - 5662:10	5556:18 - 5565:15 5629:22 - 5631:13 5659:03 - 5661:07	2/15/2019	20

REDACTED IN ENTIRETY

COMPLAINT COUNSEL'S EXHIBIT INDEX

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COMPLAINT COUNSEL'S DEMONSTRATIVE INDEX

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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:

April Tabor
Acting Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I further certify that I delivered via electronic mail a copy of the foregoing document to:

Geoffrey D. Oliver, Esq.
Jones Day
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
T: 202.879.3939
F: 202.626.1700
gdoliver@jonesday.com

Howard Scher, Esq.
Kenneth L. Racowski, Esq.
Carrie Amezcua, Esq.
Thomas Manning, Esq.
Buchanan Ingersoll & Rooney PC
Two Liberty Place
50 S. 16th Street, Suite 3200
Philadelphia, PA 19102-2555
T: 215 665 8700
F: 215 665 8760
howard.scher@bipc.com;
kenneth.racowski@bipc.com;
carrie.amezcua@bipc.com;
thomas.manning@bipc.com

Counsel For Respondent Benco Dental Supply Company

John P. McDonald, Esq.
Locke Lord LLP
2200 Ross Avenue
Suite 2800
Dallas, TX 75201
T: 214.740.8000
F: 214.740.8800
jpmcdonald@lockelord.com

RespondentScheinCounsel@lockelord.com

Lauren Fincher, Esq.
Sarah Lancaster
Locke Lord LLP
600 Congress Ave.
Ste. 2200
Austin, TX 78701
T: 512.305.4700
F: 512.305.4800
lfincher@lockelord.com;
slancaster@lockelord.com

Colin Kass, Esq.
Owen Masters
Stephen Chuck
Proskauer Rose LLP
1001 Pennsylvania Ave, N.W.
Suite 600 South
Washington, DC 20004-2533
T: 202.416.6800
F: 202.416.6899
ckass@proskauer.com;
omasters@proskauer.com;
schuck@proskauer.com

Rucha Desai
David Munkittrick
David Heck
Proskauer Rose LLP
Eleven Times Square
New York, NY 10036
T: 212-969-3628
rdesai@proskauer.com;
dmunkittrick@proskauer.com;
dheck@proskauer.com

Counsel For Respondent Henry Schein, Inc.

Joseph Ostoyich
William Lavery
Andrew George
Jana Seidl
Kristen Lloyd
Baker Botts L.L.P.
1299 Pennsylvania Ave NW
Washington, DC 20004
T: 202.639.7905
joseph.ostoyich@bakerbotts.com;
william.lavery@bakerbotts.com;
andrew.george@bakerbotts.com;
jana.seidl@bakerbotts.com;
kristen.lloyd@bakerbotts.com

James J. Long, Esq.
Jay Schlosser, Esq.
Scott Flaherty, Esq.
Ruvin Jayasuriya, Esq.
William Fitzsimmons, Esq.
Briggs and Morgan
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
T: 612.977.8400
F: 612.977.8650
jlong@briggs.com
jschlosser@briggs.com
sflaherty@briggs.com
rjayasuriya@briggs.com
wfitzsimmons@briggs.com

Counsel For Respondent Patterson Companies, Inc.

April 17, 2019

By: *<u>/s/ Lin W. Kahn</u>*
Attorney

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*
Attorney