PUBLIC

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

| In the Matter of<br><br>Benco Dental Supply Co.,<br>a corporation,<br><br>Henry Schein, Inc.,<br>a corporation, and<br><br>Patterson Companies, Inc.,<br>a corporation.<br><br>Respondents | Docket No. 9379 |
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# RESPONDENT HENRY SCHEIN, INC.'S *CORRECTED* PRETRIAL BRIEF

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# I. INTRODUCTION

This case presents a highly unusual situation in which a company is accused of boycotting the very groups that it actually did business with. Henry Schein, Inc. does business with buying groups today, did extensive business with buying groups throughout the alleged conspiracy period, and has done so since as early as 2002. That undisputed fact alone dooms Complaint Counsel's theory: How can Schein have conspired with its two biggest rivals to boycott the very groups it was doing business with the whole time?

Complaint Counsel's conspiracy "theory" is a Rube-Goldberg contraption that lacks any support in the facts or the law. That theory includes creating customized exceptions for specific buying groups, designing unique parameters that have not been asserted as to either Benco or Patterson, and inconsistently applying its ambiguous definitional requirements of what business model and structure qualifies to be considered a "Buying Group" targeted by the alleged conspiracy. *See* Section III (G), *infra*. But no matter how Complaint Counsel categorizes Schein's buying group customers, the evidence at trial will overwhelmingly show that Schein did business with buying groups throughout the alleged conspiracy. *See* Section III (A), *infra*. In fact, as Schein's expert economist Dr. Dennis Carlton will testify, even Schein's sales to the ***undisputed*** buying groups ***increased*** in three of the four alleged conspiracy years.

The fact that Schein has consistently worked with, and offered discounts to, numerous buying groups is fatal to Complaint Counsel's claims against Schein. *See* Section III (B), *infra*. There is no "direct evidence" of conspiracy; the handful of communications to which Complaint Counsel refers are not "direct evidence" of anything. Nor is there any circumstantial evidence of conspiracy. Here, the supposed evidence of the alleged agreement is so attenuated and ambiguous

that Complaint Counsel cannot at this late stage even identify how or when the purported conspiracy was entered into, by whom, or even what the terms were.

Complaint Counsel claims that Schein boycotted 17 buying groups, terminated two more, and attempted to terminate another. But, as explained in Section III (D) below, the evidence shows that Schein's decision as to each of those groups independently was made for legitimate business reasons. Significantly, Complaint Counsel does not identify any communications between Schein and any other Respondent relating to 15 of the 17 groups. As to the two others, the alleged communications both arose well after Schein made its decision and communicated it to the buying group and the communications involved individuals who were not engaged in and had no responsibility for the buying group negotiations.

Nor can Complaint Counsel divine some global "no buying group" agreement among the Respondents from its collection of cherry-picked and out-of-context communications. Complaint Counsel only identifies six communications between Schein and Benco or Patterson in support of their allegations – none solicited by Schein, none involving the exchange of competitively sensitive information by Schein, and none containing or resulting in an agreement of any kind. They boil down to a few, innocuous, unsolicited communications that may – or may not – have mentioned a buying group at all, but that in any event the undisputed evidence shows did not form an agreement or have any impact on Schein's decision-making.

The evidence will show that Schein evaluated each buying group on a case-by-case basis and made independent decisions as to each of the 20 buying groups that Schein allegedly boycotted – just as it did with the 46 buying groups (including 19 that Schein contends meet Complaint Counsel's definitional requirements) that Schein did business with. Because buying groups were still evolving during the alleged conspiracy period, with a great deal of experimentation, Schein

did not have a one-size-fits-all approach. It neither had a policy of refusing to do business with these groups or a standard contract it could just roll out to each new qualifying group. Instead, Schein evaluated how much new incremental volume each group could bring, and the degree to which the group would cannibalize its existing customers. Factors that both sides' experts universally agree are the facts that a firm, acting in its unilateral self-interest, would consider.

The evidence will show that there are many reasons why it made economic sense for Schein to not do business with a particular buying group, especially if it appeared to Schein that the group could not deliver sufficient incremental volume or cost efficiencies to justify an additional discount to the members. In fact, Complaint Counsel concedes that "buying groups typically do not force members to purchase from their supplier partners," and therefore cannot typically drive incremental volume.[1]

By limiting its alleged conspiracy to only those buying groups whose membership consists entirely of "solo practitioners [and] small group dental practices" that are "separately-owned and separately-managed," Complaint Counsel has artificially limited its theory to the least economically attractive groups and the ones that were therefore most likely to be declined or turned down by Schein absent a strong business case, regardless of any alleged agreement. Notwithstanding, the evidence shows that Schein consistently recognized buying groups, was open to working with buying groups, diligently evaluated those groups, and in the cases where it made economic sense, did work with buying groups.

Notably, despite its two-year investigation and hundreds of thousands of documents, and dozens of depositions, Complaint Counsel can only identify two buying groups for which it claims

[1] *See* Complaint Counsel Opposition to Respondent Patterson Companies, Inc.'s Motion for Summary Decision, at 3 (Oct. 2, 2018).

that Schein acted against its economic self-interest: Smile Source and Kois. But Complaint Counsel's expert, Dr. Robert Marshall, concedes that he did not even *attempt* to evaluate whether either of those agreements would have been profitable for Schein had it won the business. Neither of Dr. Marshall's analyses take into account the discounts that Schein would have had to offer the buying group in order to secure the contract, or in the case of Smile Source, win back the business.

Moreover, Complaint Counsel is simply wrong that Schein acted contrary to its self-interest in either circumstance. Complaint Counsel alleges that Schein terminated Smile Source in 2012, and did not "seriously pursue" it in in 2014.[2] But in fact, Smile Source terminated Schein in 2012 after determining that [redacted] (despite Schein's willingness to continue the relationship). And the contemporaneous documents show that Schein's offer in 2014 was [redacted]. The evidence demonstrates that Schein's efforts to maintain and subsequently win back the Smile Source business did not wane.

As for Kois, Schein also actively engaged and had an entire team exploring the possibility of working with Kois. Kois, however, made unrealistic assumptions on the front end, such as Schein suddenly getting 100% market share and obtaining kickbacks from speculative *patient* growth due to some unexplained referral scheme that Kois was planning. When Schein asked for a deeper understanding of Kois' business model, and time to engage in due diligence, Kois refused and chose to sign up with Burkhart instead (within a week of first approaching Schein). Rejecting such an underdeveloped proposal, in part due to the lack of sufficient time to investigate it, was certainly consistent with Schein's rational, economic interest, and is not indicative of a conspiracy.

[2] Complaint Counsel Pre-Trial Brief ("CC Pretrial Br.") at 17.

The evidence in this case as to Schein is, at best, entirely circumstantial, does not establish that Schein's conduct regarding buying groups paralleled that of Benco or Patterson, and does not establish any of the "plus factors" asserted by Complaint Counsel. Ultimately, the evidence in this case will show that Schein always acted in its unilateral self-interest, did business with many buying groups, made independent decisions as to specific buying groups, and never reached any agreement with Patterson or Benco, its fierce competitors.

## II. FACTUAL BACKGROUND

Schein is currently the largest distributor of dental products in the United States, but that was not always the case. Schein began in 1932 as a local pharmacy in Queens, NY, and it grew as a dealer of dental products first through the use of a mail order catalog and later through its use of field sales consultants ("FSCs") to serve dental practitioners.[3] Today, Schein sells anything and everything needed by a dental office, including: hundreds of thousands of different dental supplies; small and large dental equipment; dental technology; practice management software; and business solutions.[4] Domestically, Schein does so via its mail-order catalog, online portals, 10 distribution centers, 100+ telesales representatives, 800+ FSCs, and hundreds of equipment sales specialists.[5] Schein's competitors include manufacturers of dental products that sell directly to dentists (*i.e.*, direct ship), other full-service distributors, regional distributors, and dozens of online or other "non-traditional" dealers.[6]

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[3] CX5023.

[4] *Id.*

[5] "Henry Schein at a Glance," https://www.henryschein.com/us-en/images/Corporate/henry-schein-at-a-glance-2018-eng.pdf (RX2930); CX5021; RX2673.

[6]

Complaint Counsel conducted a two-year investigation, during which it obtained hundreds of thousands of documents, conducted investigational hearings with 21 witnesses, and spoke to dozens of dentists and other third parties.[7] After filing its claims, Complaint Counsel then obtained the entire discovery record (including expert reports and deposition transcripts) from at least five other matters involving Schein and sought additional discovery from Respondents and third parties. The record in this case totals over 625,000 documents from Schein, over 133,000 documents from Patterson and Benco, over 145,000 documents from third parties, and 45 depositions.

Despite this voluminous record, Complaint Counsel cannot identify any evidence that Schein entered into or participated in the alleged conspiracy. Indeed, at this late date, Complaint Counsel cannot identify when in 2011 the conspiracy began, who formed it, or even the terms of the alleged agreement. As to Schein, Complaint Counsel relies solely on circumstantial evidence, including a total of six alleged exchanges between Schein and another Respondent concerning buying groups: (i) a January 2012 phone call from Benco's Chuck Cohen to Schein's Tim Sullivan during which they allegedly discussed Unified Smiles (a group which Schein had independently declined to do business with a year earlier);[8] (ii) a series of March 2013 text messages and calls between Mr. Cohen and Mr. Sullivan regarding Atlantic Dental Care (which Schein and Benco

[7] RX2938.

[8] CC Pretrial Br. at 14-15. Complaint Counsel relies on an internal Benco email and a call log in support of its assertion. But

both bid on, and Benco won);[9] (iii) a March 2013 text from Chuck Cohen to Tim Sullivan regarding Schein's discount deal with Universal Dental Alliance (which was based on a Schein contract entered in 2011, during the alleged conspiracy);[10] (iv) an October 2013 call from Benco's Pat Ryan to Schein's Randy Foley informing Schein that Benco did not bid on Smile Source (in response to which Mr. Foley said nothing and, after which, Schein bid on the business);[11] (v) a February 2013 email from Schein's Brandon Bergman to Benco's Stewart Hanley forwarding a New Mexico Dental Cooperative's marketing email without comment; and (vi) three email communications between Schein and Patterson in late 2013 and early 2014 about the Texas Dental Association (which is not a buying group).[12]

In contrast, Schein will present overwhelming evidence that it has worked with numerous buying groups over the years, including 2011-2015, and that its decisions regarding each group were made independently. Despite the allegations made in its Complaint, Complaint Counsel has backpedaled and now admits that Schein has done business with and offered discounts to various buying groups before, during, and after the alleged conspiracy—just not all of them.[13] The evidence clearly shows that during the alleged conspiracy period of 2011-2015, Schein initiated, maintained, and renewed business relationships with the very buying groups that it supposedly boycotted.[14] Complaint Counsel's suggestion that Schein developed an internal policy in 2011 to

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[9] CC Pretrial Br. at 27-30.

[10] *Id.* at 15-16.

[11] *Id.*at 16-17; R. Foley Dep. at 354:7-355:10 (RX3018).

[12] CC Pretrial Br. at 15-16.

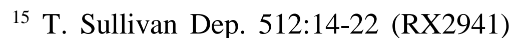
[13] Complaint Counsel Second Amended Response to Schein's Interrogatory No. 1 ("CC Second Amended Response and Objections to Schein's First Rogs.") (RX3087).

[14] *See infra* at Section IV (A).

not do business with buying groups is also directly contradicted by sworn testimony.[15] In fact, Complaint Counsel's evidentiary support for its contention at most establishes that Schein internally expressed concerns and skepticism about doing business with certain buying groups that were solely interested in obtaining a discount without any commitment likely to drive new incremental volume and without delivering any cost efficiencies. For each buying group that Schein is accused of boycotting, the evidence overwhelmingly shows that Schein's internal decision-making had nothing to do with Benco or Patterson.[16] As explained in further detail below, Schein had justifiable and economically rational concerns that led it to selectively, on a case-by-case basis, do business with certain groups, but not others.[17] This well-supported record of Schein's independent conduct, its buying group arrangements and discounts, and its aggressive competition with Benco and Patterson directly contradicts the inferences that Complaint Counsel asks this Court to draw from assorted circumstantial evidence, none of which supports an alleged agreement to restrain price competition.

### A. Schein Is a Full-Service Distributor of Dental Products, Technology, and Services That Has Always Competed Aggressively for the Business of Independent Dentists.

Since Henry Schein opened his pharmacy in 1932, the company bearing his name has grown into the largest provider of health care products and services to dental, animal health, and



[15] T. Sullivan Dep. 512:14-22 (RX2941)

[16] *See infra* Section III (D).

[17] *Id.*

medical practitioners.[18] First built on a dental products catalog that it mailed to dentists, from which dentists ordered their supplies (and which continues to be widely distributed),[19] Schein grew into a full-service distributor of dental products, technologies, equipment, and services.[20] Schein maintains equipment showrooms, regional distribution centers, and substantial teams of sales people, technicians, and customer service representatives. Besides distributing dental supplies and equipment supplied by manufacturers, Schein also offers its own private label brand products.[21] Schein also provides various services to its customers, including product education and training, equipment installation, equipment repair and maintenance, and an array of business solutions services.[22]

Most importantly, Schein offers its customers the high-touch and personalized service of its FSCs. Schein's representatives not only visit a customer's office repeatedly each month to see what the dentist needs, but they advise the practice owner on how he or she can be more efficient.[23]

In short, Schein competes against other distributors by investing in the ability of its FSCs to visit their dental office customers every few weeks, not only to discuss new products and take orders for literally anything the office may need, but also to personally educate, consult, and advise

[18] CX5023.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.;* T. Sullivan IH Dep. 26:12-26:15 (CX0311)

[23] T. Sullivan IH Dep. 26:12-15 (CX0311)

the dentists and their staff how to run a better business.[24] In fact, in 2002, Schein established the Sullivan-Schein University as a first-of-its-kind online program to train its FSCs on the business of dentistry to become more effective business consultants to dentists and deliver value beyond the procurement of supplies and equipment.[25] The FSCs, which are in Henry Schein Dental ("HSD"), mostly focus on serving individual dental practitioners and small-to-mid-size purchasers, customers who represent the traditional private practice model of dentistry.[26]

Schein has offered – and continues to offer – a number of pricing programs and adjustments that [redacted] [27] The transactional data produced by Respondents demonstrates that [redacted] For example, [redacted]

[24] D. Foster Dep. 36:21-36:24 (CX8001); RX2673.

[25] RX2429 at 011.

[26] T. Sullivan IH Dep. 21:24-22:10 (CX0311).

[27] Stiroh Report ("Rpt.") ¶92 (RX2819); CX2028 [redacted]

[28] Stiroh Rpt. ¶106-109 (RX2819); T. Sullivan 30(b)(6) Dep. 39:6-7 (RX2942) [redacted]

[30] This thereby facilitates aggressive price competition between Schein and other distributors.[31]

### B. Schein Has Led the Industry in Penetrating and Serving New Customer Segments, Such as Buying Groups.

Schein

Schein has thrived in an ever-evolving market by: (1) building the unique, value-added market approach to being a full-service distributor; and (2) continually investing in processes and corporate restructuring to enhance Schein's ability to compete for emerging customer segments, such as DSOs and buying groups.[33]

For example, in 1996, Schein introduced a unique, integrated sales and marketing approach to serving customers, which included FSCs, telesales representatives, and direct marketing efforts.[34] As part of this pro-competitive innovation in sales and marketing approaches, and in response to market dynamics, Schein acquired Sullivan Dental Products in 1997, placing Tim Sullivan in charge of HSD.[35]

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[29] CX3381; CX2233 at 004

[30] *See, e.g.*, R. Johnson Dep. 111:3-17 (CX8029)

[31] T. Sullivan 30(b)(6) Dep. 34:20-23 (RX2942);

[32] RX2906.

[33] RX2673 at 002.

[34] *See, e.g.*, *i.d.* at 001; CX5023 at 019.

[35] T. Sullivan IH Dep. 12:2-12 (CX0311); RX2673 at 005.

Around that same time, Schein launched its Special Markets Division to serve Dental Support Organizations ("DSOs"), federal government agencies, and institutional organizations.[36] This division, headed by Hal Muller, penetrated an emerging and highly profitable segment of large group purchasers operating multiple offices under common ownership.[37] Consistent with that approach, Schein's strategy and business philosophy has always been to do business with group purchasing organizations, including buying groups, when they provide value to the dental customer, and when it makes economic sense for Schein to do so.[38] Although Special Markets' core competencies and areas of focus have been well-established group purchasers (*i.e.*, DSOs and Community Health Center ("CHC") groups), Schein worked with more nascent groups lacking the same formal structure and presentable business model.[39]

Although Schein's HSD and Special Market divisions coordinated to execute Schein's mission of reaching as many dentists as possible, each division developed its own approach to targeting and serving customers, providing price discounts, managing different cost structures, and using its own sales teams.[40] As the DSO model became increasingly popular and profitable, and partially in response to the growing consolidation in the dental industry in the 1990s and 2000s, a variety of different types of buying groups began to form. Although these newly emerging groups

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[36] H. Muller IH Dep. 9:4-15 (CX0309); Carlton Rpt. ¶20 (RX2832)

[37] *Id.*

[38] *See infra* Section II (D).

[39] H. Muller Dep. 31:7-10 (CX8005)

[40] H. Muller IH Dep. 13:8-13 (CX0309)

did not fall squarely into the customer segments traditionally served by HSD or Special Markets, Schein's approach to buying groups evolved as the customer segment evolved, and the evolution of DSOs and buying groups is critical to understanding Schein's internal and unilateral decision-making regarding buying groups.

### 1. The Emergence of DSOs.

Until the mid-1990s, Schein's primary customer was the individual dentist, and the single-office dental practice still reflects the way in which most of the 190,000 dentists in the United States practice.[41] By the late 1990s, dentists began consolidating multiple offices into group practices managed by common ownership.[42] A new business model evolved: Dental Practice Management groups ("DPMs") (commonly known as DSOs).[43] These organizations provide its members with non-clinical, centralized support services in administration, business, marketing, procurement, and/or management to dental practices in exchange for a fee.[44] Instead of a traditional group practice where the dentists owned and managed their practice, DPMs typically generated revenue by contracting to manage practices that they do not own. Although that model continues to exist, DSOs became increasingly popular as many discovered they could achieve greater profits by owning the practices rather than just managing them for a fee.

DSOs lower the cost of operating multiple dental practices in numerous ways beyond merely lowering prices. A DSO offers scaled platforms for all the non-clinical aspects of running a dental practice, including: accounting, marketing, human resources, information technology,

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[41]RX0544.

[42] McKinsey & Co. Presentation: "Dental Business Growth Strategy Project: U.S. Market Overview," at 029 (CX3105).

[43] RX2794.

[44] RX0544 at 043-047.

insurance, patient payment collection, banking, payroll, operations, and procurement (including purchasing, supply, returns, and vendor management).[45] Some DSOs offer business counseling or coaching to dentists or practices not owned by the DSO. Other DSOs offer their dentists professional education, training, sponsorship, or research opportunities. Because these support services provide tremendous value to solo practitioners and traditional group practices of all kinds, many dentists affiliate with DSOs today.[46]

Schein recognized that working with this emerging segment of customers was an opportunity to achieve numerous efficiencies. ***First***, DSOs handle all procurement through a single administrative and logistical point of contact to select products and quantities, negotiate pricing, and manage delivery, returns, and payment for numerous offices.[47] This more efficient, centralized purchasing system not only reduces Schein's costs of servicing the customer, but it facilitates large-scale purchasing through one point of contact and thereby reduces pricing.[48] Because DSOs commit to purchase from a limited product formulary (which Special Markets refers to as a "Preferred Product Assortment"), Schein can negotiate better pricing from manufacturers, passing on the savings to these customers.[49] ***Second***, and related to the first point, DSOs are typically willing to commit (either contractually or in practice) large volumes of purchases for all of their owned, managed, or affiliated practices. ***Third***, unlike smaller group

[45] N. McFadden IH Dep. 15:2-12 (CX0315).

[46] *See, e.g.*. CX1254

[47] Carlton Rpt. ¶48 (RX2832).

[48] *Id.* ¶58 (RX2832).

[49] Carlton Rpt. ¶48 (RX2832).

practice models or solo practitioners, DSOs typically do not need the hands-on education and consulting services offered by Schein's FSCs, which further lowers Schein's costs and, in turn, allows Schein to reduce prices.[50]

Through its Special Markets group led by Mr. Muller, Schein was one of the first distributors to pursue DSOs and other large group purchasers like federal government agencies and institutional customers.[51] Special Markets aggressively pursued these customers and grew rapidly in step with the phenomenal growth of the DSOs themselves. Because Special Markets specialized in servicing large clients, it did not provide the same types of services as those provided directly to dentists by HSD's FSCs.[52] Accordingly, although FSCs sometimes visited certain Special Markets accounts (and the equipment sales specialists served their equipment needs), Special Market's costs were lower than HSD's, including the [REDACTED] [REDACTED][53]

### 2. The Emergence of Buying Groups.

As the DSO model took hold, a new form of group purchaser – the "buying group" – started to emerge as early as 2002.[54] In Schein's experience, there were only a few at the outset, and the initial iterations of these groups often involved a loose affiliation of a few, existing Schein customers asking for discounted pricing (off of already discounted, below-catalog prices) in exchange for only the suggestion that each would make an effort to continue purchasing from

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[50] *Id.* ¶22 (RX2832).

[51] H. Muller IH Dep. 15:4-16:9, 27:8-14 (CX0309).

[52] Carlton Rpt. ¶22 (RX2832).

[53] 2015 FSC Compensation Plan, Henry Schein Dental, slides 3-5, 7–9 (CX2024).

[54] D. Wingard 30(b)(6) Dep. 120:15-121:19 (RX2962).

Schein.[55] Some buying groups approached local FSCs, some approached HSD more formally, and others approached Special Markets. As a result, there were multiple individuals at Schein evaluating whether to work with particular buying groups.

Both HSD (led by Tim Sullivan) and Special Markets (led by Hal Muller) engaged with buying groups. Special Markets (with its low-cost structure and no FSCs) offered discounted pricing to some groups in the early years. HSD, with its geographic structure and local FSCs, engaged those opportunities that approached Schein through an FSC. Over time, several conflicts and issues arose. Within HSD, cross-region conflicts emerged when buying groups began to market their Schein discount to dentists in other regions that were already Schein customers being serviced by an FSC.[56] In Special Markets, Mr. Muller's team discovered that buying group relationships often created time-consuming and inconvenient conflicts with FSCs whose services were still demanded by customers but at Special Markets' lower margins (*i.e.*, less commission). Additionally, where a buying group would sign up an existing Schein customer, the existing FSC's negotiated discounts and commissions would suddenly be thrown into disarray.[57]

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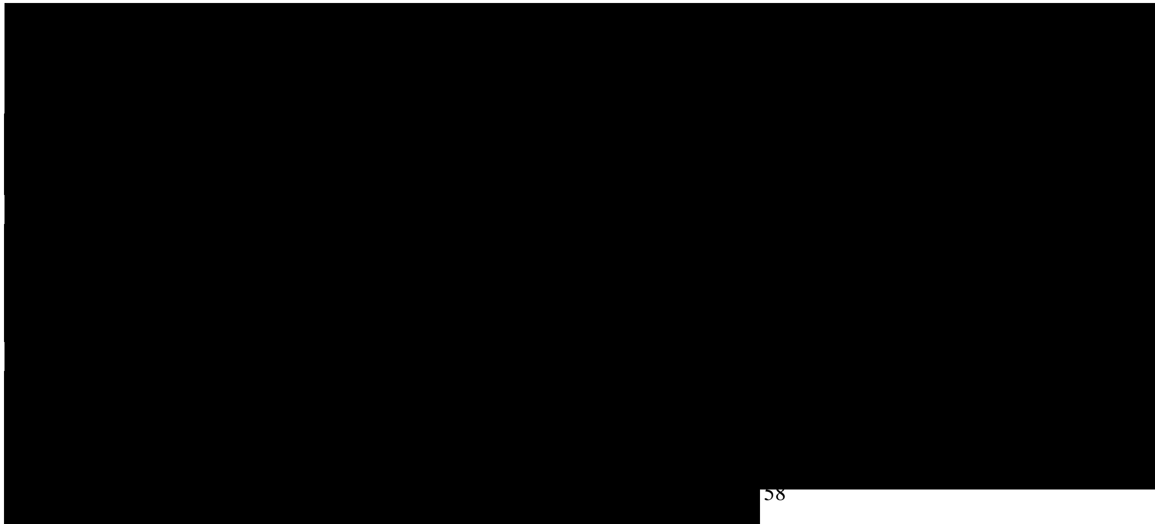
[55] J. Cavaretta Dep. 133:23-134:5 (CX8033) D. Steck Dep. 52:17-53:2 (CX8031)

[56] *See* CX2598.

[57] *See, e.g.,* CX2070

At his deposition, Mr. Sullivan explained the conflicts that arose between HSD and Special Markets (and within HSD) as buying groups emerged:



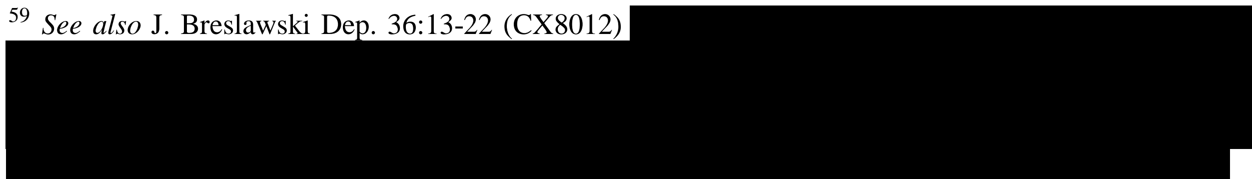
[58]

### 3. Schein Has Repeatedly Evolved Its Evaluation and Decision-Making Process About Buying Groups.

To ensure Schein maintained its position as an industry leader in emerging segments, Schein continuously fine-tuned its internal process for evaluating and pursuing buying groups.[59] Given HSD's focus on competing directly for individual dentists' business and Special Markets' focus on larger groups that could deliver significant cost efficiencies, developing a coherent process for evaluating buying groups, which do not fit neatly within those two divisions, was a challenge. Over time Schein developed best practices for evaluating such opportunities based on its increasing experience doing business with a wide variety of buying group models. When buying groups first began, Schein lacked a formal approach to evaluating them as business

[58] T. Sullivan Dep. 500:21-502:4 (RX2941).

[59] *See also* J. Breslawski Dep. 36:13-22 (CX8012)



partners.[60] Many of the groups that first approached Schein were unsophisticated, typically comprised of dentists that had banded together loosely to try to get a better discount, and usually fizzled on their own.[61] Additionally, Schein has always been skeptical and wary of the discount-only buying group that simply seeks an additional discount, without delivering any incremental volume or cost efficiencies, while also weakening the relationships that FSCs have with their dentists, and thereby weakening the Schein brand among its customers.

Buying groups began to become more prevalent and sophisticated by around 2014.[62] Not all of these groups were loose associations of dentists, as more formal groups were emerging.[63]

In 2014, during the alleged conspiracy, Schein created a new group – called Mid-Markets – focused on serving buying groups and small group practices.[64] The Mid-Market group was part of Schein's full-service dental distribution business under HSD.[65] The Mid-Market team vetted buying groups[66] as it compiled questions and a loose protocol to use when approached by buying groups.[67] But, Schein's understanding of buying groups, the questions to ask, and what qualities would make a good partner, was still developing at this point.[68] Moreover, most buying groups Schein encountered were focused solely on discounts, did not align with Schein's full-service

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[60] *See id.*; RX2487; RX2224; B. Brady Dep. 80:11-81:13 (CX8020).

[61] B. Brady Dep. 77:19-78:10 (CX8020); J. Cavaretta Dep. 142:7-143:13 (CX8033).

[62] J. Cavaretta Dep. 63:24-64:4 (CX8033).

[63] K. Titus Dep. 23:13-19 (CX8010).

[64] Carlton Rpt. ¶19, 23 (RX2832); J. Cavaretta Dep. 64:5-17 (CX8033).

[65] *See id.*

[66] Carlton Rpt. ¶23-24 (RX2832); J. Cavaretta Dep. 95:5-98:11 (CX8033).

[67] J. Cavaretta Dep. 95:5-98:11 (CX8033).

[68] *See id.*

model, or otherwise did not present a compelling case that additional discounts beyond those provided by FSCs would result in additional volume.[69]

Prior to forming its Mid-Market division in 2014, Schein did not make fine organizational distinctions between its larger group practices and its national accounts.[70] With the creation of Mid-Market, Schein developed an approach for the “emerging groups” that were larger than Schein’s traditional customer base of small solo practitioners, but not large enough for Special Markets.[71] And Schein’s experience with buying groups helped it then develop more nuanced approaches to these groups in 2015 and 2016.[72] Indeed, by 2016, as buying groups eventually began to expand their offering while also becoming more national in scope, Schein determined that there might be opportunities to restructure to better match the evolving landscape of group purchasers.[73]

When groups like Klear Impakt began to form and Smile Source began to grow, Schein determined that it needed a dedicated group to evaluate group purchaser opportunities as they came in.[74] These national groups were no longer focused on price only and instead also offered services to members like continuing education, practice management, and HR and payroll, among others,[75] consistent with Schein’s value proposition.[76] Accordingly, in 2016, Schein created the Alternative

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[69] RX2201; *see also infra*, Section III (D).

[70] K. Titus Dep. 24:20-25 (CX8010).

[71] *Id.* 28:7-29:12 (CX8010).

[72] *See, e.g.*, RX2101; RX2279.

[73] J. Cavaretta Dep. 85:12-86:24 (CX8033).

[74] *Id.* at 229:7-24.

[75] *Id.* at 69:3-22.

[76] *Id.* at 134:21-137:2.

Purchasing Channel Group ("APC").[77] Through the APC, Schein formalized and refined its existing process for evaluating and conducting due diligence to ensure that the group would be a good business partner and could drive incremental sales volume to Schein.[78] The APC's goal was not to partner with any group that could check a few boxes, but to instead be selective as to which groups would make a good partner for Schein.[79] The APC has given Schein the formal structure and support it needs to better evaluate and choose partners that will help Schein grow its business while also helping individual practice grow and thrive.[80] This has led to Schein formalizing new relationships with Mastermind and Teeth Tomorrow, among others.[81]

The evidence demonstrates that Schein has invested heavily in developing processes designed to secure buying group opportunities, restructuring its resources to more effectively identify and evaluate potential buying group partnerships, formalizing its evaluation criteria and guidelines regarding such opportunities, and minimizing conflicts resulting from such partnerships. And, at no time did Schein's reaction to the internal conflicts or emerging buying group models result in Schein implementing a policy of not doing business with buying groups. To the contrary, Mr. Sullivan testified

### C. Schein Did Business With Buying Groups Before 2011, and Continued To Do So Throughout the Alleged Conspiracy Period.

[77] Carlton Rpt. ¶19 (RX2832).

[78] B. Brady Dep. 146:12-19 (CX8020); D. Wingard Dep. 75:17-76:5 (CX8009).

[79] CX2203.

[80] D. Wingard Dep. 64:17-65:4 (CX8009).

[81] *Id.* at 175:2-11

[82] T. Sullivan Dep. 502:6-13 (RX2941).

Since at least 2002, Schein has met, negotiated, and worked with group purchasers of all kinds, including DSOs and buying groups. Complaint Counsel does not dispute that Schein did business with buying groups before the alleged conspiracy supposedly began in 2011 or during the alleged conspiracy. Although Complaint Counsel is unable to identify when in 2011 the alleged conspiracy was formed and when in 2015 it ended, the record evidence establishes that Schein continued to do business with buying groups and independently evaluate buying group opportunities during the entirety of that time. As to "legacy" agreements Schein had before 2011, Schein continued to honor existing buying group deals, renewed certain buying groups, and entered into new buying group relationships throughout the alleged conspiracy period.

### 1. Schein Did Business with Buying Groups, Including Buying Groups Within Complaint Counsel's Latest Definition of "Buying Group."

There is also no dispute that Schein did business with buying groups of independent dentists even within Complaint Counsel's contrived definition. For example, Schein had agreements with the Dental Cooperative of Utah from 2007 to 2014, pursuant to which Schein: (i) extended an [redacted]

[redacted]

[redacted][83] Schein also did business with the following groups that the FTC admits fall within its definition: [redacted]

[redacted]

Schein has also done business with buying groups that self-identify as a buying group of independent dentists, and therefore likely fall within Complaint Counsel's definition. Those groups include: [redacted]

[83] Carlton Rpt. at D-1 (RX2832).

Schein also contends that the following buying groups – with which Schein did business – are buying groups of independent dentists that meet the FTC's definition:

Complaint Counsel does not dispute that Schein did business with these groups, nor does Complaint Counsel argue that Schein did not consider these organizations to be buying groups during the alleged conspiracy or when it entered into agreements with them. Instead, even though Complaint Counsel did not depose any of these groups, Complaint Counsel seeks to discount these relationships by arguing that the groups do not appear to meet Complaint Counsel's definitional requirements. Additionally, Schein has communicated with, and evaluated potential partnerships, with many buying groups that Complaint Counsel does not assert have been the subject of any boycott.[84]

Throughout the relevant time period, dentists approached Schein with different ideas and proposals for new buying groups or to solicit Schein to partner with an existing buying group. The business models, structures, and stage of their business differ greatly, but they all "***seek*** to leverage the purchasing power" of multiple dental practices.[85] Some are better than others, some are more formalized, and some are more mature. Schein, based on an evaluation of the previously discussed factors, case-by-case, chose to pursue some buying group opportunities and not others. Where the buying group's model appeared capable of delivering incremental sales and driving compliance among its members, Schein would typically enter into it after due diligence and negotiations.[86]

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[84] *See* Schein Supplemental Response to CC Interrogatory No. 2 (RX3086); Marshall Rpt. at ¶491.

[85] *See* Compl. ¶3 (CX6099).

[86] *See, e.g.*, T. Sullivan IH Dep. 131:4-12 (CX0311)

Even during the alleged conspiracy Schein renewed or continued buying group arrangements that existed prior to 2011, even though it could have terminated them. And, Schein also pursued or entered into new buying group relationships between 2011 and 2015.[87]

### D. Schein Made Independent Decisions as to Buying Groups with Which It Did Not Do Business.

Complaint Counsel contends that, from 2011 through 2015, Schein rejected 17 buying groups, terminated 2 others, and tried to terminate another buying group.[88] Rather than analyze or present how Schein reached its decisions, and evaluate whether they were in fact independently made (which they always were), Complaint Counsel concludes that any buying group that Schein rejected, turned down, or with which it did not close a deal was boycotted as a result of the conspiracy. On the other hand, Complaint Counsel contends that Schein's buying group relationships during this time were either outside the scope of the alleged conspiracy in some way or were the result of Schein "cheating" on the conspiracy.

There is no dispute that Schein declined to partner with certain buying groups after determining such groups would not be a good fit for Schein's business. In each of those instances, the evidence shows that Schein's decision was the result of independent decision-making, not influenced in any way by coordination or communication with Benco or Patterson. The evidence will show that, although Schein did not do business with every buying group that approached it, Schein evaluated each one without regard to either Benco or Patterson. There is also an overwhelming amount of evidence establishing the numerous, economically rational, and unilateral concerns that Schein expressed about extending additional discounts to dentists through

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[87] Schein Supplemental Response to Interrogatory No. 1 (RX3086); Carlton Rpt., Ex. D (RX2832); D. Wingard Dep. 54:8-15 (CX8009).

[88] CC Second Amended Responses to Schein's Rog at 4 (RX3087).

their involvement in buying groups – especially those groups that did not offer any cost efficiencies or incremental volume commitments that made the additional price discounts potentially profitable. Mr. Sullivan testified [89] Mr. Sullivan explained that [90] Compliance is different than exclusivity. While exclusivity means that

Depending on the opportunity presented or the prior buying group experience of the person(s) at Schein evaluating the opportunity, Schein's concerns included the following (or some combination thereof): the dentists involved still wanted the same level of hands-on FSC support; there was no centralized ordering, purchasing, or shipping; the group would not agree to a formulary; the group consisted of, or would primarily target, existing Schein customers rather than potential new customers; the group could not give any volume commitments, or offer to make Schein its exclusive distributor partner; the group did not have a mechanism for driving, monitoring, or enforcing compliance with any purported volume commitment; the group competed

[89] T. Sullivan Dep. at 503:4-504:9 (RX2941)

[90] *Id.* at 503

[91] *Id.* at 511:16-512:4.

with Schein for the provision of certain services; the group would charge Schein and/or the dentists an administrative/membership fee; or the group widely broadcast its specialized pricing to existing Schein customers in a way that was inconsistent with Schein's overall mission to focus on practice care, rather than narrowly focusing only on discounts on supplies.[92]

### E. Complaint Counsel Has Repeatedly Altered Its Theory to Attempt to Minimize the Inconvenient Facts Regarding Schein's Buying Group Business.

Complaint Counsel has repeatedly altered its alleged theory of conspiracy to exclude or explain away inconvenient facts related to Schein's long history of pursuing emerging segments of customers, including group purchasers like buying groups. The investigation focused broadly on GPOs, which Complaint Counsel defined as "any entity leverages, or attempts to leverage, the purchasing power of dental practices under separate ownership to obtain discounts based on the collective buying power of the member dental practices … [and] includes any entity that the Company referred to or defined as a dental [GPO], dental buying cooperative, [or] dental buying group…in the ordinary course of business."[93] As Schein continued to present evidence of numerous buying groups that it had done, or tried to do, business with, Complaint Counsel began an iterative and continuous process of altering its theory of liability to exclude or discount the inconvenient factual stories.

- After Schein highlighted for the Staff the voluminous number of GPOs that Schein contracted with, Complaint Counsel altered the alleged conspiracy to try to exclude Special Markets and that division's extensive and significant relationships with GPOs. Thus, the alleged conspiracy focuses on HSD and Mr. Sullivan.

[92] *See infra*, Section III (D).

[93] Federal Trade Commission 3/29/2016 CID to Henry Schein, Inc. (RX2810).

- When Schein was still able to identify numerous buying group relationships that HSD launched or entered into from 2009-2017, Complaint Counsel then narrowed the time period of the alleged conspiracy to exclude all conduct after 2015, arguing that such buying group relationships would be "tainted" because Schein supposedly changed its business practices in response to the Staff's investigation. Schein explained that, in addition to being untrue, that would be unrealistic because Schein did not know the subject of the investigation when it first learned about its existence in August 2015. Complaint Counsel sought to discount the weight of Schein's 2016 Agreement with [REDACTED] on this basis, but Schein explained that it began negotiating that deal in 2015 and signed it in 2015.

- In response, Complaint Counsel again altered its position in an effort to exclude the [REDACTED] story, this time on the basis that Mr. Sullivan did not know that Schein was entering into the arrangement. In any event, Mr. Sullivan is not now, nor ever was, the sole decision-maker for Henry Schein.[94] As explained below, this theory is seriously flawed because it is not tied to the facts and ignores the existence of termination clauses in the agreements with [REDACTED] and other buying groups. Such termination clauses allowed Schein to terminate the agreement, as Complaint Counsel alleges Schein did as to two buying groups. Yet there is no evidence that Mr. Sullivan instructed anyone to terminate Klear Impakt after he learned of it.

- The Staff also narrowed its theory from GPOs to a smaller set of organizations, *i.e.*, group purchasers that are made up entirely of independently owned dentists. This excluded numerous group purchasers that were more likely to present leveraged purchasing power and demonstrable incremental sales growth. The scope of the groups targeted by the supposed conspiracy changed again when Complaint Counsel filed its case, which defined "Buying Groups"

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[94] T. Sullivan Dep. 57:9-58:4 (CX8025).

as "organizations of [solo practitioners or small group dental practices] 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."[95]

- The Staff now alleges, for the first time in its pretrial brief, that "[t]he conspiracy started to fall apart in 2015 after Benco entered into a settlement agreement with the Texas Attorney General requiring it to log its competitor communications."[96] That settlement was entered on April 9, 2015, and Complaint Counsel seeks to assert that the Court should discount anything Schein did to pursue or enter into agreements with buying groups after that date.[97] Nothing in the record supports the assertion that Schein altered its behavior as a result of Benco's settlement.

- The Staff also seeks to exclude Dental Gator from consideration. Complaint Counsel concedes that it is a buying group and that Schein worked with Dental Gator during the alleged conspiracy. However, Complaint Counsel appears to have modified the conspiracy to exclude any buying groups that are affiliated with a corporate customer of Schein's Special Markets group, and Dental Gator happened to be affiliated with MB2, a DSO customer of Schein's at the time. Of course, this affiliation makes these groups even more significant, and thus, more likely – not less likely – to undermine any alleged conspiracy, if there was one. Complaint Counsel

[95] Compl. ¶1, 3 (CX6009).

[96] CC Pretrial Br. at 12, n. 66.

[97] There is no evidence or factual basis for this modified "end date," and it contradicts Complaint Counsel's theory that the alleged conspiracy proceeded after 2011 without direct communications between Benco and Patterson about every buying group opportunity. Complaint Counsel cannot have it both ways—either the relative dearth of communications between Schein and Benco about buying groups undercuts a claim of conspiracy, or it is consistent with a conspiracy that did not require communications about individual groups. But, it is the latter, then the "end date" is not well-supported.

fails to articulate any reason why Respondents would conspire to boycott tiny, insignificant, or irrelevant buying groups, but not conspire as to the important ones.

- The Staff has further limited the scope of groups that it seeks to consider within the scope of the alleged conspiracy to only "new" buying groups that Schein considered in or after 2011. There is no evidence that such a limitation was ever discussed by anyone for any purpose, let alone with Benco or Patterson. The limitation also results in an illogical theory because Schein's ability to retain its existing buying group contracts would defeat the purpose of the conspiracy. Complaint Counsel asserts that Schein terminated at least two buying groups (Steadfast and Dental Cooperative), and attempted to terminate a third. The theory excluding "legacy" agreements is inconsistent.

- In an attempt to exclude from consideration Schein's 2014 bid for Smile Source's business (for which neither Benco or Patterson bid), Complaint Counsel argues that such attempts to do business with buying groups do not count if the buying group asserts that the offered discounts were not as much as they felt they deserved. The evidence shows that Schein's bid was compelling.

Moreover, even with all its alterations and exceptions, Complaint Counsel still lacks a cogent factual theory as to Schein on a very basic question: Which buying groups did Schein allegedly boycott? Complaint Counsel's list of buying groups that it contends Schein boycotted as the result of an agreement with Benco or Patterson differs from the list of buying groups that Dr. Marshall identifies as the subject of the alleged conspiracy. At least 23 groups out of Dr. Marshall's list of "38 buying groups" that were "turned down" by one or more Respondents are

listed without a single Schein-related piece of evidence cited in support.[98] And seven groups on Dr. Marshall's list are not even buying groups at all according to Complaint Counsel.[99] Notwithstanding this ambiguous and conflicting theory, Dr. Marshall's list is meaningless for Schein because he did not investigate at all ***which*** of his 38 groups "approached" Schein, ***which*** "were turned down" by Schein, and whether the evidence showed that it was in Schein's economic self-interest to turn down any particular group.

Complaint Counsel has chosen to not pursue discovery of groups that would likely reveal additional facts that contradict their theory and claims as to Schein. Of the 46+ buying groups that Schein has done business with (including at least 19 that Schein contends fit Complaint Counsel's definition) and the 51 buying groups that Complaint Counsel concedes fit its definition, Complaint Counsel only took discovery of 12 of these groups. Notably, Complaint Counsel chose to not seek discovery from three of the six groups that it alleges were the subject of communications between Schein and Benco or Patterson – Unified Smiles, Universal Dental Alliance, TDAPerks, and Atlantic Dental Care.[100]

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[98] Marshall Rpt. at 203-206, n.834, 837-850, 853-861, 866-869 (CX7100).

[99] Although Schein asked Complaint Counsel to identify all buying groups it was aware of, Complaint Counsel's response to that contention interrogatory fails to identify the following groups listed in Dr. Marshall's report as being "turned down" by one or more Respondents: XYZ Dental, DDS Group, WheelSpoke LLC, Erie Family Dental Equipment, AACD (American Academy of Cosmetic Dentistry) Buying Group, Dental Visits LLC, Dr. Stephen Sebastian's buying club, Frontier Dental Laboratory, Nexus Dentistry, Catapult, Save Dentists, Inc., Premier GPO, Pipeline Medical LLC, Dental Purchasing Group, LLC, Insight Sourcing Group, MyDentalCorp, Stratus Dental, Dr. David Carter's group, Schulman Group, Dental Gator, Peak Management Group, iSynergy CPA, Direct Dental Sales, DentalSense, Merit Dent Group. *See* CC Second Amended Response and Objections to Schein's First Rogs (RX3087).

[100] Complaint Counsel exhibits are referenced subject to Respondents' objections to admissibility, none of which are waived.

# III. ARGUMENT AND LEGAL ANALYSIS

To prevail against Schein, "Complaint Counsel must prove: (1) the existence of an agreement, combination or conspiracy, (2) among actual competitors (*i.e.*, at the same level of distribution), (3) with the purpose or effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity, (4) in interstate or foreign commerce." *In re McWane, Inc.*, Docket No. 9351, 2013 FTC LEXIS 76, at *50 (FTC, May 8, 2013) (citations and quotations omitted).

The evidence presented at the hearing will fall significantly short of establishing the existence of an agreement among the Respondents to boycott certain buying groups. *See Anderson News, L.L.C. v. Am. Media, Inc.*, 899 F.3d 87, 105 (2d Cir. 2018) (finding no group boycott where certain defendants did business with or negotiated with plaintiff, and internal communications supposedly demonstrating the conspiracy were ambiguous at best); *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 903-4 (9th Cir. 1987) (upholding summary judgment for defendants on a claim of group boycott because defendants maintained that it was in their independent self-interest to refrain from doing business with certain carriers).

## A. Schein's Long History of Doing Business with Buying Groups, Including During the Alleged Conspiracy, Demonstrates Independent and Non-Parallel Conduct.

Schein was an industry leader, doing business with buying groups as early as 2002. Schein continued to pursue, and enter into, business arrangements with buying groups from 2011-2015, and it has restructured its operations twice in the last four years to compete more directly and effectively for the business of new customer segments including buying groups. Schein has done business with at least these buying groups for at least the corresponding years, if not longer:[101]

[101] Schein's Supplemental Responses to CC Interrogatory No. 1. (RX3086) The relationships may have been existed before the listed start date. For example, [redacted] M. Lauerman Dep. 14:13-20 (CX8014); RX2752.

Complaint Counsel, however, has attempted to marginalize the relevance of this long and well-established history. Complaint Counsel argues that some of these groups do not meet the definition for a "Buying Group" specified in the Complaint. Regardless, Complaint Counsel concedes that at least seven of these groups are buying groups within the meaning of the

Complaint.[102] Another four of the groups on this list self-identify as buying groups of independent dentists, including on websites or marketing materials, but Complaint Counsel asserts they are wrong.[103] Schein will show that the remaining firms are buying groups, regardless of whether they meet Complaint Counsel's definition, or that Schein considered them to be buying groups when it entered into or renewed relationships with them.

Complaint Counsel has also sought to limit the relevance of some groups by contending that certain relationships, including those formed prior to 2011, are irrelevant—even though it has identified no discernable start date for the alleged conspiracy or presented any cogent factual basis for the exclusion. Although Complaint Counsel discounts the existence of these "legacy" business relationships that Schein had with numerous buying groups prior to 2011, the evidence shows that Schein *chose* to continue doing business with those buying groups through the alleged conspiracy period. [104] Complaint Counsel's theory is that Schein joined a conspiracy to boycott buying groups in 2011, and thereafter instructed salespersons to not extend discounts to new buying groups, terminated two buying groups (Dental Cooperative and Steadfast), and tried to terminate another buying group (Dental Gator). Yet Complaint Counsel has ignored the many buying groups that Schein could have terminated but did not, and that failure alone is fatal to the plausibility and reasonableness of

[102] Complaint Counsel Responses to Schein's Contention Interrogatories No. 1 (RX2956). *See also* Carlton Rpt. ¶28 (RX2832).

[103] Carlton Rpt. ¶28, Appendix D (RX2832).

[104] RX2320 at 003

the inferences that Complaint Counsel needs to establish its theory as to Schein. Moreover, the resulting theory is illogical. Schein's alleged co-conspirators would not allow Schein to undermine the alleged conspiracy by continuing its sales to buying groups, i.e. engage in the "cheating" Complaint Counsel alleges is not allowed.

The economic evidence in the case further establishes Schein's continued business with buying groups through the alleged conspiracy period, in direct conflict with Complaint Counsel's theory. Dr. Carlton analyzed the transactional sales data for sales to independent dentists that were members of buying groups.[105] Dr. Carlton found that and concluded that "[t]his evidence is inconsistent with Prof. Marshall's claim that Schein stopped doing business with buying groups of independent dentists sometime after December 2011, and inconsistent with the FTC's claim that Schein engaged in a conspiracy to refuse to negotiate with and discount to these types of buying groups."[106] Complaint Counsel's only response to this evidence is that the majority of the sales in Dr. Carlton's analysis were to members of buying groups that do not meet Complaint Counsel's definitional requirements.

However, And he reached that conclusion using data presented to him by Complaint Counsel in a homemade exhibit.[108] As Dr. Carlton explained, the data shows that Schein's sales to undisputed buying

[105] Carlton Rpt. ¶¶18-20 (RX2832).

[106] Carlton Rpt. ¶19 (RX2832).

[107] D. Carlton Dep. 164:1-13 (RX2966).

[108] D. Carlton Dep. Ex. 4. Although omitted from Complaint Counsel's homemade exhibit, the figures are in millions of dollars ($M) (RX2966).

groups actually ***increased*** from 2010 through 2013 and returned to "preconspiracy" levels in 2014 and 2015.[109] Dr. Carlton also explained that a further increase in sales to undisputed buying groups in 2016 and 2017

*i.e.,* during the alleged conspiracy period.[110]

**B. There is No Direct Evidence That Schein Joined the Alleged Agreement.**

Complaint Counsel identifies no direct evidence of any alleged agreement involving Schein to not do business with or otherwise provide discounts to buying groups. Complaint Counsel mischaracterizes a handful of neutral or ambiguous statements that cannot support Schein entering into or participating in an alleged conspiracy with Benco or Patterson without making significant (and unreasonable) inferences. "Direct evidence in a Section 1 conspiracy must be evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted." *See In re McWane, Inc.*, 2013 FTC LEXIS 76, at *553-54 (citations and quotations omitted); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999) (same); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 324 n.23 (3d Cir. 2010) ("[D]irect evidence of conspiracy, if credited, removes any ambiguities that might otherwise exist with respect to whether the parallel conduct in question is the result of independent or concerted action."); *Cosmetic Gallery, Inc. v. Schoeneman Corp.*, 495 F.3d 46, 52 (3d Cir. 2007) ("'Direct' evidence must evince with clarity a concert of illegal action."). "Examples of direct evidence include witness testimony that explicitly refers to an understanding between competitors, documents showing an unlawful agreement, guilty

[109] D. Carlton Dep. 163-164 (RX2966).

[110] D. Carlton Dep. 163:8-164:13 (RX2966).

pleas, and admissions by a defendant." ABA Model Jury Instructions in Civil Antitrust Cases, at 15 (2016 ed.).

Here, none of Complaint Counsel's evidence establishes, without any inferences, that Schein had "a conscious commitment to a common scheme" regarding buying groups with either Benco or Patterson, or that any of Schein's decisions regarding any buying group were definitively the result of concerted action. *See In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 324 n.23 ("[D]irect evidence of a conspiracy … [can be] a document or conversation explicitly manifesting the existence of the agreement in question."). As shown below, none of the documents or testimony that Complaint Counsel contends are direct evidence "establishes" the existence of the alleged agreement or Schein's participation in any such agreement. In many cases, the evidence actually undermines the allegation that an agreement existed, especially when the context of the evidence and explanations of the witnesses involved are considered.

**1. Complaint Counsel Relies On Three Inapposite Authorities That Do Not Support a Finding of Direct Evidence in This Case.**

Complaint Counsel's "direct evidence" cases involve distinguishable and substantially less ambiguous evidence than the supposedly direct evidence in this case. And not a single one supports their contention that there is direct evidence of a conspiracy involving Schein.

First, Complaint Counsel wrongly cites *In re High Fructose Corn Syrup Antitrust Litigation.*, 295 F.3d 651, 662 (7th Cir. 2002) as a direct evidence case. There, the Seventh Circuit explained that all the evidence was circumstantial and held that the district court should not have "disregarded [all the pieces of evidence] because of their ambiguity." *See id.* at 663 ("The evidence is not conclusive by any means—there are alternative interpretations of every bit of it.").

Complaint Counsel cites *High Fructose* in support of its contention that the internal Benco emails and internal Patterson emails "constitute direct evidence of a conspiracy not to work with

buying groups."[111] However, the statements in those emails do not rise to the level of the strongest circumstantial evidence in *High Fructose*, where the statements included: (i) "We have an understanding within the industry not to undercut each other's prices"; (ii) there is an "understanding between companies that … causes us not to … make irrational decisions"; (iii) "competitors['] happiness is at least as important as customers[s'] happiness"; and (iv) "[O]ur competitors are our friends. Our customers are the enemy." *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d at 662. Here, the internal emails are statements based only on speculation and rumors, and there is no evidence that the authors obtained that information from Schein.

Complaint Counsel's second case involves two statements that were found to be direct evidence of the alleged conspiracy, but neither statement is remotely analogous to any statement here. *See B&R Supermarket, Inc. v. Visa, Inc.*, 2016 U.S. Dist. LEXIS 136204 (N.D. Cal. Sept. 30, 2016). In *B&R*, a class of merchants sued credit-card networks and banks alleging they conspired to shift liability for fraudulent charges to merchants by "adopting the same policy shift" and "making it effective on the same day," *i.e.*, the "liability shift date." *Id.* at *1, *4. In the first statement, a senior executive of a card brand publicly stated to all attendees at a "Fraud Summit" that "the card brands are not going to delay the liability shift date," and the court found the statement was direct evidence because she "confidently" stated in a public forum "on behalf of all networks" that each of the defendant-networks planned to adopt the same change in policy effective on the same date—*i.e.*, the alleged conspiracy. *Id.* at *413, *20. Here, the equivalent statement would be a Schein executive publicly stating to all attendees of an industry meeting that 'full-service dental distributors are not going to do business with buying groups starting in 2011.'

[111] CC Pretrial Br. at 27 & n.156; *see also id*. at 38 & n.224 ("This is precisely the type of direct evidence pointing to an explicit agreement.").

The second statement that the *B&R* court held was direct evidence was a defendant-bank CEO telling analysts that "we have gotten the [defendants] … in a room … and we are all trying to work together towards getting much more specific about what we all want to get done by when…." *Id.* at *22. The defendants did not challenge the statement's substance, and the court found that the CEO's admission on its own could establish a conspiracy where "defendants 'got in a room' and fixed a common penalty effective on a common date." *Id.* at *22. Here, there is no admission or statement by anyone that Schein met with Benco and Patterson to discuss reaching a consensus on a common approach that all three would take toward buying groups.

In Complaint Counsel's third case, the plaintiff-dealer testified that one of the defendants directly threatened that if it "went into business, that [the defendants, his competitors,] would do anything they could … to keep [plaintiff] out of business," including "stop[ping] supplies." *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 468-69 (3d Cir. 1998). The court found that the threat plaintiff received was direct evidence that two of the plaintiffs' competitors "had discussed and agreed to act jointly to prevent [him] from competing with them…." *Id.* Here, in contrast, there is no such evidence. The record does not contain a single statement by any Respondent employee saying that Respondents "had discussed and agreed to act jointly to prevent" buying groups from doing business. *See id.*

Although Complaint Counsel asserts that communications between Schein and Patterson regarding the 2014 TDA annual meeting is "direct evidence … of a horizontal agreement," such communications are not direct evidence of any agreement, including any alleged conspiracy to not attend the 2014 TDA meeting.[112] In fact, Judge Cogan explained that the alleged conspiracy

[112] *See* CC Pretrial Br. at 38 (emphasis added). Complaint Counsel carefully avoids asserting that such communications are direct evidence of the alleged agreement to not do business with buying groups. As

regarding the 2014 TDA meeting is only supported by "SourceOne's *circumstantial* evidence," which directly conflicts with Complaint Counsel's assertion that there is direct evidence of a conspiracy regarding TDAPerks or the 2014 TDA meeting.[113] Additionally, the two cases cited in support of this assertion are easily distinguished.

In *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000), the FTC had found that Toys R' Us ("TRU") acted as "the coordinator of a horizontal agreement among a number of toy manufacturers … to restrict the distribution of its products to lowpriced warehouse club stores, on the condition that other manufacturers would do the same." *Id.* at 930. On appeal, the Seventh Circuit noted that the case involved direct evidence of the manufacturers joining the conspiracy with the knowledge and assurance that the others would go along. The potentially direct evidence quoted in the opinion includes the following: TRU's testimony that it "communicated to [its] vendors [*i.e.*, co-conspirators] that [it was] communicating with all [its] key suppliers [*i.e.*, co-conspirators]," that TRU "made a point to tell each of the vendors that [it] spoke to that [it] would be talking to [its] other key suppliers," and that it relayed from one co-conspirator to the other "the message 'I'll stop if they stop.'"[114] *Toys "R" Us, Inc. v. FTC*, 221 F.3d at 933.

Even if such statements were found to be direct evidence of a conspiracy by the competing toy manufacturers to exclude, no such evidence exists here. There are no statements made by Schein to either Benco or Patterson about what Schein would be doing at the TDA meeting or as

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discussed in detail below, Complaint Counsel concedes that the TDA is not a buying group and the TDA's joint venture with SourceOne, TDAPerks, is also not a buying group. *See* Section III (D) *infra*.

[113] *SourceOne Dental, Inc. v. Patterson Cos., Inc., et al.*, ECF 225, at 12, 15-cv-5440 (E.D.N.Y.) (emphasis added).

[114] Notably, the Seventh Circuit also found that "reasonable people could differ on the facts in this voluminous record" and that "some evidence in the record would bear TRU's interpretation," but suggested that it was not permitted from relying on that finding under the applicable standard of review. *Id.* at 930, 935.

to any buying group. And there is no evidence that Schein knew Benco may have been discussing attendance at the TDA meeting with Patterson. There is also no evidence that Schein told Benco or Patterson that its decision would be dependent or conditioned on the other companies' decisions about the TDA meeting or any buying group (and vice versa).[115] Ultimately, each company made its own decision, at different times, and in a sequence that conflicts with Complaint Counsel's theory of Benco being a "ringleader."

The timing and different approaches to the decision not to attend the 2014 TDA Meeting are further evidence that there was no coordinated action by Schein, Benco, and Patterson relating to the TDA. On November 6, 2013, after failing to reserve a booth by the TDA deadline, TDA gave Patterson's booth to another vendor.[116] As a result, Patterson announced that it was not going to attend the 2014 TDA Meeting.[117] Schein took a different course and internally deliberated about whether to attend the TDA and tried to get a meeting with the TDA for months.[118] Eventually, after Schein met with the TDA in April 2014, Schein determined by looking at a publicly available floor map that the TDA had removed Schein as an exhibitor, essentially making the decision for Schein.[119] Schein publicly announced the next day that it would not be attending

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[115] Complaint Counsel misleadingly states that a fifth case it cites is a direct evidence case and inaccurately describes the opinion. *Compare* Complaint Counsel's Pretrial Br., at n.229 (citing *PepsiCo., Inc. v. Coca-Cola Co.*, 315 F. 3d 101, 110 (2d Cir. 2002) *with PepsiCo.*, 315 F.3d at 110. In *PepsiCo.*, the Court did not identify any direct evidence regarding the alleged Section 1 conspiracy. Instead, the portion of the Second Circuit's opinion cited by Complaint Counsel merely refers to the evidence in the *Toys R' Us* case (both circumstantial and direct) as "strong evidence of a horizontal agreement."

[116] RX0166.

[117] RX0195 (In December 2013, Schein reports that word on the street is that Patterson is out of the 2014 TDA meeting and that Patterson's decision has not been well received from dentists and may play in Schein's favor); RX0208 (January 28, 2014 Patterson sample statement in response to customer inquiries that "Patterson has made the business decision to not attend this year's TDA meeting in San Antonio.").

[118] RX0195; RX2361; RX2362.

[119] RX0232.

the TDA meeting.[120] In contrast, Benco never met with the TDA and only made its decision not to attend after Patterson and Schein publicly announced they both would not attend.[121]

None of the evidence satisfies the legal standard for direct evidence of the alleged agreement, because the content of these ambiguous communications do not suggest, let alone establish, the existence of an agreement involving Schein to boycott buying groups. *See, e.g., Hyland v. HomeServices of Am., Inc.*, 771 F.3d 310 (6th Cir. 2014) (affirming summary judgment where plaintiffs took statements made by individual realtors at a real estate commission hearing "out of context and construed them in a highly-strained manner") (citations and quotations omitted); *Superior Offshore Int'l, Inc. v. Bristow Grp., Inc.*, 490 F. Appx. 492, 498 (3d Cir. 2012) (affirming summary judgment where statements made in deposition about a call between two competitors, made shortly before defendants raised their rates, did not constitute direct evidence as "[the] vague description of the conversation suggest[ed] that [the witness] was drawing his own inferences from the words used by the other party to the call.). These cannot be direct evidence because, given the undisputed existence of numerous buying groups with which Schein did business or tried to do business with, such comments require an inference that Schein was acting illogically.

**2. The 2013 Call Between Pat Ryan and Randy Foley Is Not Direct Evidence.**

The October 1, 2013 call that Benco's Pat Ryan made to Schein's Randy Foley was unsolicited and does not establish that Schein and Benco had an agreement regarding Smile Source. This call occurred almost two years after Smile Source terminated Schein's 2011-2012 contract. The contemporaneous documents show that Mr. Foley was careful not to discuss any

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[120] CX2306; RX2122.

[121] CX0063.

competitively sensitive information due to antitrust concerns.[122] Mr. Foley's testimony confirms that.

Mr. Foley was never involved in Schein's business with Smile Source, and he did not report the call to Mr. Sullivan or anybody at Schein involved with Smile Source. In fact, Mr. Foley works in Special Markets, not HSD.[125]

Complaint Counsel's proposed inference is in conflict with the fact that Schein submitted a bid for Smile Source's business within a few weeks of this call and with the lack of evidence that the information conveyed by Mr. Ryan had any impact on Schein's decision.[126]

Contrary to Complaint Counsel's mischaracterization of Mr. Foley's testimony,

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[122] CX0243.

[123] R. Foley Dep. 354:21-23 (CX8003).

[124] *Id.* at 354:24-355:3.

[125] *Id.* at 354.

[126] *See* Section III (D), *infra*.

[127] *See* CC Pretrial Br. at 17.

To the contrary, it establishes that Mr. Foley was (and is) someone who strictly complies with Schein's rules, including on that call by not discussing Smile Source with Mr. Ryan.

**3. Cohen's Unsolicited Alleged Communications about Unified Smiles in January 2012 and ADC and Universal Dental Alliance in March 2013 Are Not Direct Evidence of any Agreement.**

The three identified communications between Tim Sullivan and Chuck Cohen regarding buying groups are not direct evidence of an understanding that both Benco and Schein would boycott buying groups (or any specific buying group), because such a finding requires numerous unreasonable inferences.[131] The communications do not explicitly reference an understanding among the parties, do not contain an admission by either party, and do not show an agreement regarding any buying group.

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[128] R. Foley Dep. 354:11-355:10 (CX8003); R. Foley IH Dep. 177:25-178:21 (CX0306).

[129] *Id.*

[130] *Id.*

[131] Complaint Counsel misunderstands the significance and meaning of direct evidence, because it claims that these communications are "direct evidence that Sullivan and Cohen exchanged competitively sensitive information regarding bidding on buying groups..." CC Pretrial Br. at 12. However, "evidence of the mere exchange of information by competitors cannot establish a [per se] conspiracy..." *Apex Oil Co. v. DiMauro,* 822 F.2d 246, 257-58 (2d Cir. 1987). And, one-sided, unsolicited exchanges cannot establish an agreement. *See Branta, Ltd. Liab. Co. v. Newfield Prod. Co.*, 310 F. Supp. 3d 1166, 1208 (D. Colo. 2018) (no agreement where one defendant "reach[ed] out" to another about coordinating actions); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 133 (3d Cir. 1999) ("[C]ourts generally reject conspiracy claims that seek to infer an agreement from communications despite a lack of independent evidence tending to show an agreement and in the face of uncontradicted testimony that only informational exchanges took place.").

Benco's Mr. Cohen sent an unsolicited text message to Schein's Mr. Sullivan in March 2013 informing him that that Benco was going to bid on the business of Atlantic Dental Care ("ADC") (which Complaint Counsel asserts was not a buying group). But there is no evidence that Mr. Sullivan responded to Mr. Cohen, provided Schein's view of the group to Mr. Cohen, shared Schein's plans as to the group with Mr. Cohen, or otherwise did anything that could be reasonably interpreted as confirming or reaching an agreement regarding ADC or buying groups generally. Indeed, "the existence of meetings or phone conversations among the defendants does not warrant the inference that they agreed about prices, terms of dealing with the plaintiff, or any other subject matter even if such subjects were discussed."[132]

The other buying group-related communications between Mr. Cohen and Mr. Sullivan are: (i) Mr. Cohen sending Mr. Sullivan an unsolicited text in March 2013 stating that he has learned that Schein has a discount program with a buying group named Dental Alliance a/k/a Universal Dental Alliance, which he says Benco rejected back in 2012; and (ii) a call from Mr. Cohen to Mr. Sullivan that neither remembers but that Complaint Counsel asserts involved a discussion of Unified Smiles.

These are not exchanges of "competitively-sensitive bidding" information regarding buying groups, and are not agreements to coordinate on any bid. As explained in further detail in Section III (D) (1), these communications do not even support an inference of any kind of agreement about anything. At most, they are one-way unsolicited sharing of information by Mr. Cohen about past decisions he has made. There is nothing in the evidence of these exchanges that suggests that either party intended to take the same approach as the other, nor does any of the

[132] Areeda & Hovenkamp, *Antitrust Law*, at ¶ 1406a. *Cf. id.* ¶1406c ("[E]ven an agreement to exchange price information is not an agreement to fix prices, unless other circumstances so warrant.").

evidence reference or imply any alleged understanding or agreement regarding past or future plans about buying groups.

The exchange of such information, by itself, is not direct evidence of the alleged conspiracy. For example, in *In re Baby Food*, the court affirmed summary judgment for the defendants even though alleged direct evidence involved substantive communications and exchanges of price information, far beyond one-off text messages and phone calls that exist here, because plaintiffs were "unable to present evidence of conspiracy to fix prices without drawing on inferences from all of the evidence they have introduced." 166 F.3d at 121. Similarly, here, Complaint Counsel cannot establish the alleged agreement from these documents without a large volume of factual inferences, not least of which is the fact that these communications, which all happened in 2013, two years into the alleged conspiracy, prove a 2011 conspiracy. As with the other supposed direct evidence, Complaint Counsel's position rests on an inference that, given Schein's undisputed business with buying groups, Schein was acting illogically.

#### 4. The Four Internal Patterson Emails and Three Internal Benco Emails Speculating About Schein's Buying Group Model Are Not Direct Evidence.

A mere speculative belief expressed internally at Benco or internally at Patterson about Schein's conduct or practices regarding buying groups, without any suggestion that Schein was the source of the information, cannot meet the legal standard for direct evidence.[133] It does not matter how "confidently" the email language may appear to a reader. There is no legal authority supporting Complaint Counsel's reading, given how may inferences are required to establish without ambiguity that the authors of these internal emails had reached (or knew about) an agreement with Schein. The emails do not reference any understanding or agreement involving

[133] *See* CC Pretrial Br. at 25-27 (citing documents).

Schein, and they do not suggest that Schein's conduct was the result of concerted action. The fact that the statements are demonstrably false, and contrary to Schein's buying group agreements going back to 2002, undercuts the assertion that such statements can be direct evidence of anything. And, as explained in detail below, the one "supporting" case cited by Complaint Counsel is highly distinguishable.

[redacted] There is simply zero evidence that Mr. Misiak's "belief" about Schein's conduct regarding buying groups was based on any real facts or any communications he had with anyone at Schein or Benco.

[redacted] This is not unlawful, and it certainly does not constitute direct evidence of Schein's agreement to

[134] D. Misiak IH Dep. 278:18-280:15 (CX0316).

[135] *Id*. at 281:25-282:4.

[136] [redacted]

boycott buying groups. [redacted]

Ultimately, these emails may contain guesses and speculation about Schein's practices regarding buying groups at different times, but they certainly do not establish, without inference and unambiguously, the existence of any common understanding shared by Schein to boycott buying groups.

### C. Schein Did Not Enter Into An Agreement with Benco or Patterson Regarding Buying Groups.

The so-called circumstantial evidence of Schein's participation in the alleged agreement is insufficient because it merely consists of: (1) some sporadic interfirm communications on unrelated topics, only one of which actually references a buying group; (2) internal comments by each of the Respondents about not wanting to do business with certain buying groups; and (3) each Respondent's rejection of, or decision not to offer discounts to, certain buying groups (though not necessarily the same groups). The inference of independent conduct (or even interdependent) conduct from this evidence is just as likely, if not more likely, than Complaint Counsel's requested inference of conspiracy. As this Court explained in *McWane*:

> "[C]ircumstantial evidence alone cannot support a finding of conspiracy when the evidence is equally consistent with independent conduct. In such a case, the evidence of conspiracy would not preponderate." *Re/Max Int'l, Inc. v. Realty One*, Inc., 173 F.3d 995, 1009 (6th Cir. 1999). Thus, "an inference of a conspiracy to restrain trade must be more probable than the inference of independent action in order for the inference of conspiracy to be drawn." *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1488 n.14 (D.C. Cir. 1984). Indeed, where "taken as a whole, the evidence points with at least as much force toward unilateral actions . . . as toward conspiracy," a fact finder cannot reach the latter conclusion without engaging in "impermissible speculation," and such evidence is "insufficient as a matter of law to support a finding of conspiracy." *Venture*

[137] P. Ryan Dep. 248:14-15 (CX8037).

> *Technology, Inc. v. National Fuel Gas Co.*, 685 F.2d 41, 48 (2d Cir. 1982) (reversing jury verdict).

*In re McWane, Inc.*, 2013 FTC LEXIS 76, at *557.

Complaint Counsel's theory of parallel conduct was rejected in *McWane*. Here, Complaint Counsel's circumstantial evidence predominantly consists of internal discussions within Schein, Benco, and Patterson, respectively, about each company's concerns or skepticism about doing business with buying groups or not wanting to do business with every loosely-formed group of dentists that requests additional discount without any promise of incremental volumes or cost efficiencies. Importantly, the nature of these discussions were unique and different within each company. Schein's internal evaluation of whether to do business with certain buying groups materially differs from the record evidence of the positions taken by the other Respondents. Even assuming (which Schein emphatically denies ) that Schein's internal comments about buying groups were similar to those of Benco or Patterson, that is not a valid theory of parallel conduct from which an unlawful agreement can be reasonably inferred. *See In re McWane, Inc.*, 2013 FTC LEXIS 76, at *598. And, even if it was, "the evidence fails to demonstrate that [Respondents] had parallel intentions or took parallel steps or made parallel efforts to" boycott buying groups. *In re McWane, Inc.*, 2013 FTC LEXIS 76, at *605. The buying group-related dealings of the three Respondents during the alleged conspiracy period were anything but parallel:

- Benco had a firm policy predating the time of the alleged conspiracy to not engage with buying groups in any fashion;
- Patterson sporadically evaluated the possibility of doing business with buying groups, although it was focused primarily on growing its corporate account or DSO businesses; and

- Schein continued not only to recognize work with, and offer discounts to buying groups, including expanding its numerous pre-existing buying group relationships and also engaging with new buying groups where it made good business sense to do so.

And, especially here in a market characterized by three large full-service distributors with comparable business models, "Complaint Counsel must prove that the asserted parallel behavior was the result of an actual, manifest agreement …, [which] requires Complaint Counsel to prove certain 'plus' factors…." *In re McWane, Inc.*, 2013 FTC LEXIS 76, at *595-96 (citing cases). Moreover, the inter-Respondent communications on which Complaint Counsel relies are ambiguous and incapable of reasonably supporting the inferences sought. *See, e.g.*, *Eli Lilly & Co. v. Zenith Goldline Pharm., Inc.*, 172 F. Supp. 2d 1060, 1068, 1071 (S.D. Ind. 2001) (disregarding certain of plaintiff's email evidence where plaintiff's interpretations of those emails were based on "unreasonable inference" or were "convoluted and unpersuasive"); *Am. Tel. & Tel. Co. v. Delta Commc'ns Corp.*, 408 F. Supp. 1075, 1093 (S.D. Miss. 1976), *aff'd*, 579 F.2d 972 (5th Cir. 1978) (disregarding alleged evidence of motive that was "completely unreasonable" and "less believable than is the motivating factor of sound business judgment….").

**1. There is No Evidence That Schein and Benco Entered Into an Agreement in 2011 or Later.**

As Complaint Counsel's pretrial brief makes clear, Complaint Counsel has presented no coherent factual theory of how, when, or by whom the alleged and unspecified agreement was formed. Complaint Counsel identifies meetings and communications between Messrs. Cohen and Sullivan during that time period. But Complaint Counsel is not entitled to an inference that those communications related to buying groups or the alleged agreement, especially given the significant volume of documentary evidence showing that each of those communications related to legitimate

topics, including sports, DTA work, or disputes regarding non-compete clauses. Notably, Complaint Counsel's "investigator," Mr. Dandashly, made no effort to assess the potential topics of the communications.

Complaint Counsel's reliance on post-2011 alleged communications between Benco and Schein also does not establish the formation or existence of an agreement in 2011 or any time thereafter. Complaint Counsel's three anecdotes of *alleged* communications relating to Unified Smiles (January 13, 2012), Atlantic Dental Care (March 25-27, 2013), and Universal Dental Alliance (March 26, 2013) involved unsolicited communications by Chuck Cohen to Tim Sullivan. It is unclear if the first actually occurred, but regardless, there is no evidence that Mr. Sullivan reached any agreement or conveyed competitively sensitive information. Moreover, Schein turned down Unified Smiles long before the alleged communication; Schein worked with Universal Dental Alliance before and after Mr. Cohen's unsolicited text; and Schein bid for Atlantic Dental Care's business.

### 2. There Was No Agreement or Understanding Between Schein and Patterson Regarding Buying Groups.

Complaint Counsel does not contend that Schein and Patterson entered into an agreement regarding buying groups at any time. Instead, Complaint Counsel alleges that "Patterson joined the agreement in February 2013," referring to the supposed agreement between Schein and Benco that "began in 2011."[138] Complaint Counsel's theory of indirect, tacit agreement between Schein and Patterson fails as a matter of law because: (i) there are no communications between Schein and Patterson regarding buying groups generally or any specific buying group; and (ii) the handful of unrelated inter-firm communications do not support an inference of any concerted action. Of

[138] CC Second Amended Response to Schein Rog, at 4 (RX3087).

the 16 exhibits that Complaint Counsel intends to introduce at trial showing Patterson-Schein communications, three relate to the Texas Dental Association; one relates to international distribution rights; one is a personal message; and 11 relate to the companies' participation in the Dental Trade Association (an association of companies that provide dental equipment, supplies, materials and services to dentists).

i. The Evidence Regarding the 2014 TDA Meeting Does Not Support the Alleged Existence of an Agreement to Boycott A Buying Group.

The three email communications between Schein and Patterson in 2013 and 2014 about the Texas Dental Association (a membership-based trade association of Texas dentists) do not suggest that either company took any action with respect to buying groups as part of a tacit agreement, because these communications do not even relate to buying groups. They relate to the announcement by the TDA that it had endorsed a competitor on-line distributor for the sale of dental supplies to its member dentists. "In October 2013, the [TDA] launched 'TDA Perks Supplies,' a TDA-branded online marketplace for dental supplies and equipment created through a partnership with SourceOne [a competing online distributor of dental supplies]." *SourceOne Dental, Inc. v. Patterson Cos., Inc., et al.*, ECF 225, at 2, 15-cv-5440 (E.D.N.Y.). As discussed in further detail in Section III (D) below, neither the TDA, nor its online marketplace, is a buying group. The communications between Patterson and Schein about this industry development relate to the companies trying to understand whether a previously-neutral trade association that they had each sponsored financially for many years had overnight endorsed a competitor distributor, and whether the TDA's distributor partner was an unauthorized distributor of certain brands or selling "potentially counterfeit" (*i.e.*, "gray market") products to dentists.[139] The emails do not establish

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[139] *See* CX2886 at 002

or support a reasonable inference of any agreement or understanding between the two companies about either the TDA or buying groups.

Although an alleged conspiracy among the Respondents to not attend the TDA's 2014 meeting is the basis of an active civil lawsuit against Benco and Patterson, the allegations in that case and the unsolicited communications from Patterson's Dave Misiak to Schein's Dave Steck do not relate to Complaint Counsel's alleged agreement regarding buying groups.[140] The Respondents were long-time financial sponsors of annual TDA meetings, a neutral forum for marketing to Texas dentists, and each company independently decided not to sponsor (*i.e.*, attend) the 2014 meeting after learning that the TDA had partnered with a competing distributor actively to drive TDA members from Respondents toward the online competitor. Schein was not asked by the TDA to offer discounts to TDA members through the Perks program or to sell dental supplies through the TDA to its members, as buying groups did.[141]

The January 6, 2014 phone call and January 21, 2014 email exchange between Schein's Dave Steck and Patterson's Dave Misiak regarding the TDA's 2014 meeting do not support a reasonable inference that Patterson and Schein conspired regarding buying groups generally, or any specific buying group.[142] Mr. Misiak made an unsolicited phone call on January 6, 2014 to Mr. Steck to inform him that Patterson had notified the TDA that Patterson would not sponsor the

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[140] *See SourceOne Dental, Inc. v. Patterson Cos., Inc., et al.*, ECF 225, 15-cv-5440 (E.D.N.Y.). Notably, the theory pursued by the plaintiff in that case is a rule of reason theory alleging that Respondents' competitor – not its customers – were harmed.

[141] Although Schein floated to the TDA the idea of a stronger partnership beyond sponsorship of the meeting, there is no evidence that Schein ever treated the TDA as a buying group through which it could offer additional discounts to dentists. Although Schein was not opposed to receiving the TDA's endorsement as a preferred vendor, it was never given the opportunity by TDA to get into enough specifics.

[142] CX0112. *See also* Steck IH Dep. at 174-184 (CX0310). Patterson announced its decision on December 13, 2013, and Schein announced its decision on April 9, 2014. *SourceOne Dental, Inc. v. Patterson Cos., Inc., et al.*, ECF 225, 15-cv-5440 (E.D.N.Y.).

TDA's meeting.[143] There is no dispute that the call was about the meeting, and Mr. Misiak merely informed Mr. Steck that Patterson had conveyed its decision to the TDA (which the TDA had already told Schein) and asked if Schein had made a decision (which Mr. Steck was not involved in making).[144] As Judge Cogan found, "[Mr.] Steck told Misiak that Schein had not yet decided, but that Steck would let Misiak know once it had." *SourceOne Dental, Inc. v. Patterson Cos., Inc.*, et al., ECF 225, at 4, 15-cv-5440 (E.D.N.Y.). Mr. Steck never actually informed Mr. Misiak of Schein's decision, even though he said in an email that Schein would do so after a decision was made.[145]

The remaining evidence of Schein-Patterson communications that Complaint Counsel intends to introduce at the hearing are irrelevant and lend no support to the requested inference that Patterson and Schein conspired not to offer discounts to, or not do business with, buying groups.[146] Complaint Counsel's evidence of Patterson-Schein communications consists entirely

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[143] D. Steck IH Dep. 176:2-7 (CX0310).

[144] See *id.* at 184:12-185:25 (CX0310).

[145] CX2465 at 001. Not only was this email sent after all Respondents had made their respective decisions regarding the 2014 TDA meeting, it has nothing to do with any Respondent's plans or views on selling through buying groups. To the contrary, it contains Mr. Cohen's unsolicited view that TDA's launch of a website selling dental supplies made the TDA a new competitor.

[146] *See, e.g.*, CX3197 at 001

of legitimate trade association activity protected by the First Amendment, personal exchanges, and communications about industry developments like the TDA becoming a distributor of dental supplies. They do not in any way suggest that either Patterson or Schein reached an agreement or made any decisions about buying groups as a result of the communications.

Complaint Counsel's reliance on internal Patterson emails and emails between Patterson and third parties that referenced Schein is misplaced, because those communications cannot support any reasonable inference of an agreement with Schein regarding buying groups. Rather, these communications merely establish Patterson's efforts to gain competitive intelligence about Schein in order to compete *against* Schein.[147]

Consequently, these communications do not, even combined with any other evidence in this case, reasonably "tend to prove that [Patterson and Schein] had a conscious commitment to a common scheme designed to achieve an unlawful objective," let alone the alleged buying group boycott at issue in this case. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 753 (1984).

ii. Complaint Counsel Cannot Establish a Hub-And-Spoke Conspiracy as a Matter of Law.

Complaint Counsel's "Benco was the ringleader" theory amounts to a hub-and-spoke conspiracy, with Benco serving as the "hub," and Patterson and Schein each serving as spokes. Such a theory of agreement fails as a matter of law here.

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[147] *See, e.g.,* CX3497 at 002

First, there are no cases finding that a hub-and-spoke conspiracy can exist where all the spokes and the hub are horizontal competitors, as is the case here, rather than a series of vertical agreements between the spokes and the common hub. *Cf. United States v. Apple, Inc.*, 791 F.3d 290, 314 (2d Cir. 2015) ("These arrangements consist of *both* vertical agreements between the hub and each spoke and a horizontal agreement among the spokes…."); *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 435 (6th Cir. 2008) ("A hub and spoke conspiracy involves a hub, generally the dominant purchaser or supplier in the relevant market, and the spokes, made up of the distributors involved in the conspiracy."); *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 255 (3d Cir. 2010) (same); *In re McCormick & Co.*, 217 F. Supp. 3d 124, 135 (D.D.C. 2016) (a hub and spoke conspiracy "involves a horizontal agreement among the spokes, in addition to vertical agreements between the hub and each spoke.").

Second, even if such a theory was supported by some precedent, Complaint Counsel cannot establish "the critical issue" of "how the spokes are connected to each other," because it cannot and has not attempted to show an agreement between Schein and Patterson. *See In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 327 (3d Cir. 2010); *see also In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1192 (9th Cir. 2015) ("A traditional hub-and-spoke conspiracy has three elements," with the third being "the rim of the wheel, which consists of horizontal agreements among the spokes."). In fact, the absence of a Patterson-Schein agreement legally defeats Complaint Counsel's entire theory. *See, e.g., Dickson v. Microsoft Corp.*, 309 F.3d 193, 203-04 (4th Cir. 2002) ("[A] wheel without a rim is not a single conspiracy. Thus, we agree with the district court that Gravity's attempt in its FAC to plead a single, rimless wheel conspiracy between the OEM Defendants and Microsoft must be rejected."); *United States v. Kemp*, 500 F.3d

257, 291 (3d Cir. 2007) ("[T]here must be overlap among the spokes, not just between the hub and the various spokes."); *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 255 (3d Cir. 2010) (no hub and spoke conspiracy where the "complaint lacks any allegation of an agreement among the Dealers themselves."). On the contrary, any such interferences would be completely unfounded given Schein's track record of working with numerous buying groups before, during, and after the alleged conspiracy period.

**3. Cohen's Unsolicited Communications about ADC in March 2013 Do Not Support Schein's Participation in the Alleged Conspiracy.**

Complaint Counsel contends that communications in 2013 between Chuck Cohen and Tim Sullivan regarding Atlantic Dental Care establish the existence of the conspiracy to boycott buying groups between Schein and Benco.[148] To the contrary, the evidence establishes that Schein conducted a comprehensive internal evaluation of ADC through extensive due diligence and made an independent decision regarding ADC. At most, the evidence shows that Chuck Cohen was seeking more information about Atlantic Dental, but that Tim Sullivan never revealed any competitively sensitive information, cautioned Mr. Cohen not do so (and admonished him when he did), and made an independent judgment to bid for the ADC business.

(i) Schein's Evaluation of the ADC Business Opportunity

After receiving the RFP on March 22, 2013, Schein's local regional and zone manager evaluated the business opportunity of partnering with ADC.[149] They eventually escalated the opportunity to Mr. Sullivan, Mr. Cavaretta, and Mr. Meadows for guidance on whether Schein

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[148] For the reasons explained in Section B above, these communications are legally insufficient to constitute direct evidence of the alleged conspiracy, because they do not reference any agreement or contain any admission establishing, without inference, the unambiguous existence of an understanding that both companies would not bid on buying groups.

[149] CX2019.

should submit a bid on ADC.[150] [151]

Unlike Benco's immediate reaction that it was not interested in submitting a bid to ADC, Mr. Porro wanted to, and did, make contact with the group to evaluate further the business opportunity ADC presented.[152]

On March 31, 2013, Mr. Porro reported to Mr. Sullivan and Mr. Steck regarding his findings after a call with ADC's leader Landy Damsey.[153] [155] Nonetheless, Mr. Porro also recognized that there was risk that Schein's margins would take a hit.[156] [157] Indicating Schein's willingness to work with the various groups that approached it,

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[150] CX2051.

[151] *Id*. at 001; CX1253; M. Porro Dep. 165:13-166:2 (CX8000).

[152] CX2051.

[153] CX2014.

[154] *See id.*

[155] *See id.* at 002.

[156] *See id.*

[157] *See id.* at 001.

Mr. Porro began putting a proposal together that focused on value, not just price alone.[159]

On April 4, 2013, Mr. Porro circulated a draft of the proposal to ADC to Mr. Sullivan, Mr. Steck, Mr. Anderson and Mr. Chatham.[161] At that point, Mr. Sullivan realized that Special Markets should have been involved in evaluating ADC, as it may qualify as an elite DSO.[162] [163] After receiving feedback from Special Markets, Mr. Porro inquired how ADC was going to drive compliance to purchase from Schein.[164] [165] Schein's understanding was that ADC did not have an ownership interest in the practices, but the practices were instead unified via contractual arrangement.[166] After learning this information, Schein and Special Markets had an internal discussion regarding ADC that resulted in doubts about the opportunity ADC presented

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[158] *See id.* at 001.

[159] CX2054.

[160] *See id.* at 013.

[161] *See id.*

[162] *See id.*

[163] *See id.*

[164] *See id.*

[165] CX2021 at 007.

[166] M. Porro Dep. 209:17-210:6 (CX8000).

Schein.[167] ███ [168] Special Market's Mr. Muller also expressed his concerns that partnering with ADC would result in a similar negative reaction from FSCs as Schein's prior relationship with Smile Source.[169]

Despite the concerns, Schein's local management team decided to submit a bid on ADC as it would allow Schein to serve more dentists in the Virginia community.[170] ███ [171] After learning that its bid was not price competitive, HSD sent ADC a second bid that lowered the price on many of the formulary items. While acknowledging that pricing is important, HSD asked ADC to consider all of the elements that Schein had to offer, including that Schein was well-established in the area and would be in the best position to service members of the group.[172] Ultimately, ADC was only concerned about the pricing it could offer its members, as ADC turned Schein's proposal down and decided to partner with Benco.[173]

(ii) Unsolicited Communications from Benco Regarding ADC Cannot Show a Conspiracy.

Contrary to the unsupported statements in Complaint Counsel's pre-trial brief, there is only evidence of two, unsolicited communications from Benco's Chuck Cohen to Schein's Tim

[167] *See id.*

[168] CX2021 at 006.

[169] *Id.*

[170] *Id.*; M. Porro Dep. 179:13-23 (CX8000).

[171] CX2021.

[172] CX2020.

[173] CX0094.

Sullivan regarding ADC, and contemporaneous Schein e-mails demonstrate that such communication had no impact on Schein's independent decision-making to seek business with ADC. Complaint Counsel has no evidence that any other communications between Cohen and Sullivan in March and April 2013 related to ADC, and

On March 25, 2013, Benco's Chuck Cohen texted Schein's Tim Sullivan asking if he was available to talk.[174] The two then had a phone call that lasted approximately 8 minutes and 35 seconds.[175]

On March 27, 2013, Mr. Cohen texts Mr. Sullivan and says that he did additional research on ADC, that it is not a buying group, and Benco is going to bid.[179] Mr. Sullivan tries to call Mr. Cohen later that night, but he does not answer.[180]

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[174] CX1102.

[175] CX0059.

[176] CX0060.

[177] *Id.*

[178] T. Sullivan Dep. 345, 402 (CX8025).

[179] CX0060.

[180] CX4413 at 813.

[181]

Mr. Sullivan wanted to clarify to Mr. Cohen that Mr. Sullivan wanted Mr. Cohen to stop sending him information relating to a customer.[182]

#### 4. Complaint Counsel's Circumstantial Evidence of an Express or Tacit Agreement is Legally Insufficient.

There is no evidence in this case of any agreement between the three Respondents, either explicit or tacit. Besides no direct evidence of Schein entering into or participating in any agreement with Benco or Patterson regarding buying groups, Complaint Counsel's theory lacks any type of circumstantial evidence from which such an agreement could be reasonably inferred.

Mr. Sullivan's attendance (as a board member) at Dental Trade Alliance meetings and events at state dental association meetings does not support an inference of conspiracy. Mere communications between competitors do not prove conspiracy, while plausible motive alone cannot establish actual agreement. *See Valspar Corp. v. E.I. Du Pont De Nemours & Co.*, 873 F.3d 185, 200 (3d Cir. 2017) (emails between competitors discussing prices "may raise some suspicion insofar as they indicate that something anticompetitive is afoot. As we have explained, oligopolistic conscious parallelism is *by nature* anticompetitive *and also* legal.") (emphasis in original); *White v. R.M. Packer Co., Inc.*, 635 F.3d 571, 582 (1st Cir. 2011) (quotations omitted) ("[E]vidence showing defendants have a plausible reason to conspire does not create a triable issue as to whether there was a conspiracy.") (quotations omitted).

[181] T. Sullivan Dep. 410:4-8 (CX8025).

[182] *See id.* at 410:9-13.

The mere fact that a buying group did not have an agreement with Schein, or with another Respondent, is also insufficient to infer the existence of the alleged conspiracy. But that is the basis for Complaint Counsel's entire case against Schein. Even assuming that Complaint Counsel could show (which it cannot) that Schein made a decision about any particular buying group at or around the same time as Benco or Patterson made the same decision, it would be unreasonable to infer that the three companies had entered into an agreement not to do business with buying groups at all. This is especially unreasonable, given Schein's extensive buying group relationships. Conscious parallelism "will be regarded as evidence of an agreement only in those situations in which the similarity of behavior *can only be attributed* to a tacit agreement, and the parties are acting in a manner against their own individual business interest, or there is motivation to enter into an agreement requiring parallel behavior." *Wilcox Dev. Co. v. First Interstate Bank of Oregon, N.A.*, 605 F. Supp. 592, 594 (D. Or. 1985), *aff'd* 815 F.2d 522 (9th Cir. 1987) (emphasis added). Moreover, "evidence of lawful business reasons for parallel conduct will dispel any inference of a conspiracy." *Id.* Respondents were entitled independently to choose not to do business with certain buying groups, and these unilateral decisions do nothing to establish a conspiracy. *See Tidmore Oil Co., Inc. v. BP Oil Co./Gulf Prod. Div., a Div. of BP Oil Co.*, 932 F.2d 1384, 1388 (11th Cir. 1991) (quotations omitted) ("It is elementary, under the antitrust laws,

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[183] T. Sullivan Dep. 513 (RX2941).

[184] C. Cohen Dep.489 (CX8015).

that a supplier has the right to deal, or refuse to deal, with whomever it likes, as long as it does so independently.") (quotations omitted).

Additionally, Respondents' independent decision-making was economically rational, which destroys the notion that there was any tacit agreement among them. *See InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 165 (3d Cir. 2003) ("There are many reasons that a broker-dealer might independently choose not to partner with a fledgling start-up whose technology and business model remained unproven."); *Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758, 764 (5th Cir. 2002) ("[Defendant] could have determined that the potential benefits from its marketing agreement with [Plaintiff] would be outweighed by the loss of business that would result from its continued association with him. Therefore, [Defendant's] decision to alter its relationship with [Plaintiff] is not evidence tending to exclude the possibility of independent behavior."). Because the evidence does not show that the challenged conduct could *only* be attributed to tacit agreement, there can be no finding of a conspiracy.

Complaint Counsel's case law on evidence of tacit agreement is inapposite. Complaint Counsel relies on *In re High Fructose Corn Syrup* for the notion that an "understanding" not to undercut price constitutes evidence of explicit agreement, but this reliance is misplaced.[185] There was more than mere "understanding" about conscious parallelism in that case; there were explicit statements about how competitors favored each other over customers, and implicit statements about conspiracy. One defendant wrote in a memo that "our competitors are our friends" and that "customers are the enemy;" another implied that every business he was in was a price-fixing conspiracy; and a third made reference to new entrants "play[ing] by the rules." *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d at 662 (7th Cir. 2002). The Court considered these

[185] CC Pretrial Br. at 21, 27, 38.

statements, and others like them, in conjunction with statements about an "understanding." With that evidence combined, the Court found that there could be a *possible* conspiracy, and overturned summary judgment in favor of the defendants. Complaint Counsel offers no similar evidence here emphasizing competitor happiness, displaying contempt for customers, or strongly implying the existence of conspiracy.

Complaint Counsel also mischaracterizes *United States v. Foley*, which it cites for the notion that a single competitor's price announcement could constitute evidence of agreement. In doing so, Complaint Counsel states that evidence in *Foley* was "unclear" whether the defendants "expressed an intention or gave the impression" that they would agree to raise prices.[186] In reality, however, that supposedly "unclear" evidence supported a key finding in the case: "there was evidence from which the jury could find that each of the individual defendants . . . expressed an intention or gave the impression that his firm would adopt a similar change." *United States v. Foley*, 598 F.2d at 1332. It was this meeting of the minds, at one time and place, that gave rise to liability—not merely a single company's announcement. *Id.* at 1333 ("[T]he agreement itself, not its performance, is the crime of conspiracy."). Complaint Counsel has demonstrated no such meeting of the minds in the case at hand.

Complaint Counsel also cannot show that Schein entered into the alleged agreement by using internal Benco and internal Patterson communications, because those documents merely show what Patterson and Benco *thought* Schein was doing based on their respective competitive intelligence efforts.

Moreover, DTA communications and DTA meetings also do not establish the alleged agreement. At most these communications show an opportunity to conspire through a legitimate

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[186] CC Pretrial Br. at 39.

trade association, but that limited fact cannot establish an agreement. *Valspar Corp. v. E.I. Du Pont De Nemours & Co.*, 873 F.3d 185, 199 (3d Cir. 2017) (holding that the opportunity to conspire at trade meetings, without evidence that there was an agreement or a discussion or prices at such meetings, did not support a reasonable inference of concerted activity). *See In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 409 (3d Cir. 2015) ("[E]vidence . . . that the executives from the [alleged conspirators] were in the same place at the same time ... is insufficient to support a reasonable inference of concerted activity.")

Complaint Counsel does not allege an enforcement mechanism for the alleged conspiracy, and this significantly weakens the suggestion by Complaint Counsel that there was any parallel conduct or alleged conspiracy. *Petruzzi's IGA Supermarkets v. Darling-Delaware Co.*, 998 F.2d 1224, 1233 (3d Cir. 1993) (A "cartel cannot survive absent some enforcement mechanism because otherwise the incentives to cheat are too great."); *Kleen Prods. LLC v. Int'l Paper*, 276 F. Supp. 3d 811, 842 (N.D. Ill. 2017) ("With no punishment, or even a mechanism to punish, the inference tends toward no agreement."); *In re Titanium Dioxide Antitrust Litig.*, 959 F. Supp. 2d 799, 817 (D. Md. 2013) (crediting the position that "a credible punishment mechanism to penalize cheaters is an important component of a cartel"). The words "enforce" and "punish" do not even appear in Complaint Counsel's pretrial brief, because there is no basis to make such claims.

Notably, Complaint Counsel does not allege, nor can it establish, that Schein monitored or confronted Benco or Patterson regarding the alleged conspiracy.[187] There is simply no evidence that Schein attempted to enforce, enforced, or was the subject of any attempted enforcement to comply with the supposed terms of the conspiracy. More importantly, there is no evidence that

[187] *See* CC Pretrial Br. at ii (claiming that "Benco Monitored and Confronted Schein on Suspicion of Cheating" and that "Patterson Monitored and Confronted Benco on Suspicion of Cheating," but no corresponding claim about Schein).

Benco or Patterson ever punished Schein for its extensive buying group dealings and sales, and that is fatal to Complaint Counsel's claim. Without any evidence of an enforcement mechanism, especially as to Schein, Complaint Counsel's claim that Schein had a "conscious commitment" to the alleged agreement fails as a matter of law. *Just New Homes, Inc. v. Beazer Homes*, 293 F. Appx. 931, 933-34 (3d Cir. 2008) (denying boycott claims because there was no evidence of collusion and there was no punishment for cheating conspirators).

### D. Schein Independently Decided Whether to Do Business with Specific Buying Groups

Facing overwhelming evidence of Schein's steady and undisputed willingness to pursue and offer discounts to buying groups, Complaint Counsel cannot satisfy its burden of demonstrating by a preponderance of the evidence the element of agreement of the alleged conspiracy. *In re McWane, Inc.*, 2013 FTC LEXIS 76, at *564 ("At all times, 'the ultimate burden of persuading the factfinder that a conspiracy exists is on the plaintiff."). An agreement under FTC Act Section 5 requires the same proof as an agreement under Sherman Act Section 1. *See id.* at 552-53; *see also FTC v. Cement Institute*, 333 U.S. 683, 691-92 (1948). Complaint Counsel must therefore prove that Schein, Benco, ***and*** Patterson agreed upon "a unity of purpose or a common design and understanding or a meeting of the minds in an unlawful agreement." *In re McWane, Inc.*, 2013 FTC LEXIS 76, at *552-53. "In other words, there must be a 'conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Id.* at *553 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)). The mere opportunity to conspire cannot establish the existence of a preceding agreement among Respondents. *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 409 (3d Cir. 2015) (the fact that defendants "were in the same place at the same time" was "insufficient to support a reasonable inference of concerted activity."); *Valspar Corp. v. E.I. Du Pont De Nemours & Co.*,

873 F.3d 185, 199 (3d Cir. 2017) (defendants' participation in trade association meetings did not support conspiracy because there was "no evidence that there was any discussion of prices during these meetings and certainly no evidence of an agreement.").

### 1. Schein Made Independent Decisions as to the 20 Buying Groups That It Allegedly Boycotted as a Result of the Conspiracy.

The lack of any direct evidence of the alleged agreement requires Complaint Counsel to establish the agreement through circumstantial evidence. Consequently Complaint Counsel has resorted to ignoring Schein's various buying group relationships and focusing on 17 *other* buying groups, claiming that Schein's internal comments or decisions for those buying groups support an inference of the alleged conspiracy. Yet, the record demonstrates that, during the alleged conspiracy, Schein made independent decisions about each of the 17 groups identified by Complaint Counsel in discovery.

Complaint Counsel contends that, as a result of the alleged conspiracy, Schein did not do business with 17 buying groups, "terminated [existing Schein] agreements" with two other buying groups, and unsuccessfully "tried to shut down" another buying group.[188] Not a single witness out of 39 fact witnesses—including third-party witnesses—has testified that any of Schein's decisions as to these groups were likely the result of any coordination or agreement among the Respondents.

To the contrary, the record testimony and documents about each of these buying groups demonstrates that Schein's decision about each group was made independently for economically rational reasons. The evidence establishes that Schein expressed (internally) the same concerns about these buying groups that it had expressed prior to 2011 about other similar buying groups

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[188] Complaint Counsel should be precluded from introducing evidence as to any other buying group it may contend was boycotted by Schein because Complaint Counsel refused to identify those entities in response to a contention interrogatory expressly asking for the identity of those groups. *See* CC Second Amended Response to Schein's First Rog (RX3087).

and that Schein's decisions were made without any reference to, influence by, or communications with, Benco or Patterson. The evidence also establishes that both HSD and Special Markets considered and evaluated buying group partnership opportunities case-by-case, sometimes referring opportunities to each other for further consideration, which simply would not happen if there was a company-wide policy or practice to decline all buying groups at the front door.

The evidence establishes numerous, consistent factors that contributed to Schein deciding independently not to pursue potential partnerships with these buying groups. Although the specific factors that led to each decision varied, combinations of the following drove Schein's independent decisions about the potential profitability or desirability of a proposed buying group partnership (and were considered in evaluating groups it ultimately did business with): (1) the proposed group was undeveloped or still in its formative phase; (2) the group did not offer, or was unwilling to offer, a commitment to make Schein its exclusive vendor; (3) the group did not offer, or was unwilling to offer, a commitment that all of its members would purchase some volume of their dental products from Schein; (4) the group did not have the ability to drive compliance by its members with any commitment of volume or purchases; (5) the group did not appear to have the ability to divert sales to Schein from other distributors; (6) the group's existing or target members were (or were likely to be) existing Schein customers, making it more likely that Schein would be cannibalizing its own existing sales rather than poaching new business from competitors; (7) the group appeared to be a competitor because it sold services to dentists that competed against Schein's Business Solutions services; (8) the group did not offer any value to its members above what Schein could otherwise provide through its direct marketing, selling, and discounting by FSCs; (9) the group's external marketing was inconsistent with Schein's brand, go-to-market strategy, or full mission to enhance practice care; (10) the group did not offer any efficiencies or

cost savings, particularly because all members would continue to need full FSC support, could not agree on a formulary, and would demand individual bill-to and ship-to procurement support; (11) the lower margins that would be obtained on sales to those dentists exceeded the benefits of any potential additional volume the group might offer; (12) the group included, or sought to add, dentists across multiple Schein regions so as to create conflict and confusion among FSCs attempting to capture the commissions on sales to the dentists in their local area.

In Schein's experience, many buying groups simply were incapable of, or very unlikely to, drive compliance with the terms of the contract.[189] That factor influenced each of Schein's decisions as to other buying groups. Contrary to Complaint Counsel's claim, each of the individual stories below show that there is no evidence supporting or even suggesting that Schein boycotted any of these groups because of the alleged conspiracy.

i. Academy of General Dentistry Buying Group ("AGD").

This national, professional association for general dentists reached out to Schein in 2011 (and again in 2012) to discuss an idea it had for creating a buying group.[190] The record contains no details for the hypothetical buying group, its proposed operations, or what value it would offer to Schein. In deliberations regarding AGD, Mr. Cavaretta expressed concerns regarding new

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[189] RX2340 at 005 ("[redacted] cannot guarantee that its members will purchase from Schein."); RX2806 at 001 ([redacted] has no authority to tell its members what to do."); RX2825 at 002 ([redacted] is committed to making sure your independent practice stays independent – which is why we're never going to tell you who to buy from."); RX2928 (Kois website: "There is no obligation to purchase from any of the listed vendors and no exclusivity agreements."); RX2724 at 001 [redacted]; RX2125 at 001 (Cavaretta: "…I'm not willing to give additional discounts to the Co-op until we start seeing incremental business from them. This has to be a win/win at some point and I feel like we continue to add 'value' via price but I'm not seeing a whole lot in return."); RX2349 at 002 ("In the past a buying club was not in our sites as they could not guarantee volumes from members…").

[190] *See* CX0166 and CX0239.

entities inserting themselves as middle-men into negotiations between Schein and its customers.[191] Complaint Counsel's request that this Court infer from the expression of those individual concerns that Schein refused to deal with this group, as a result of a conspiracy, is unreasonable on its face.

Setting aside that Schein's concerns about this hypothetical buying group idea were expressed in internal emails, no evidence exists that AGD pursued the idea further or succeeded in ever launching the buying group. The record also contains zero evidence that Schein took any action to stymie the creation of the buying group or to refuse to offer it discounts if the group succeeded in forming. In fact, the evidence establishes that in 2014, Schein "presented an option to work with AGD offering several of [Schein's] Business Solutions products… at a discount," noting that the offer had been approved by Mr. Sullivan, President of HSD.[192]

ii. <u>Business Intelligence Group ("BIG").</u>

In February 2011, this marketing and consulting group that had previously been focused on running "Groupon or []other social media" campaigns for "whitening" expressed to a Schein FSC that it was "interested in forming a buying group" focused on supplying teeth whitening merchandise and "any other product for any campaign they run."[193] The "ideas" that BIG was interested in "discuss[ing]" with Schein did not include any details about how the supposed buying group would operate or what value it could provide to Schein.[194] Within hours, in the same email chain and without any reference to Benco or Patterson, both Special Markets and HSD declined

[191] *See* J. Cavaretta IH Transcript 141:1-4 ("A.

[192] CX2439 at 002.

[193] CX0165 at 002-003.

[194] *Id.*

the FSC's offer to set up a meeting with BIG.[195] Kathleen Titus explained that Special Markets' decision was based on the fact that [redacted] suggesting that Special Markets [redacted][196] She suggested that HSD might be interested, and copied Mr. Cavaretta on the email chain.[197] Based on the information about BIG provided in the email, Mr. Cavaretta explained that this was a complicated decision "on many fronts," and expressed concern that allowing BIG or other similar "GPOs" to insert themselves into Schein's long-standing relationships with dentists would reduce HSD's margins and reduce Schein FSC commissions.[198]

In May 2011, Special Markets again declined to pursue a potential partnership with BIG. Hal Muller received an internal email about BIG's "new model" through which BIG competes with Patterson for promotional pricing on "exam, cleaning and whitening," and within an hour, Mr. Muller responded that it was not Special Markets' "type of account."[199] Far from expressing a company-wide policy of not doing business with all buying groups, as Complaint Counsel suggests, Mr. Muller recommended that the opportunity be passed to HSD for further consideration, and noted that it would only have a chance with HSD if BIG "can do a 'growth' deal of some kind."[200] Based on these internal communications, it is clear that both Special Markets and HSD independently evaluated whether there was any potential business opportunity

[195] *Id.*

[196] *Id.* at 002.

[197] *Id.*

[198] *Id.* at 001

[199] RX2311 at 001-002.

[200] *Id*. at 001.

with BIG. Considering that BIG had not yet even formed its own business model at the time it approached Schein in 2011, Schein's decision not to engage with this group was a reasonable one—Schein is not in the business of developing business plans for other entities.

iii. California Dental Association-The Dentists' Service Company ("TDSC").

Although Complaint Counsel contends that Schein refused to enter into an agreement with TDSC as a result of the alleged conspiracy, it has not identified any document supporting that contention. Notably, Dr. Marshall does not even identify TDSC as a buying group that Schein "turned down"[201] The record demonstrates that, in June 2015, the CDA formed a subsidiary named TDSC to provide all dentists in California – many already Schein customers – with services, including "marketing, practice advising, human resources, group purchasing, and assistance with forming group practices."[202] However, TDSC did not issue its RFP until 2016, and even then was merely "preparing for an early 3rd Quarter 2016 Launch to [an] initial alpha group (50 members)."[203] Therefore, the factual timeline of any decision by Schein as to this group would be outside the alleged conspiracy period.

Notwithstanding, Schein's records show that it was willing to do business with the CDA as early as 2014, with Steve Kess suggesting that Schein "try to work with them on [the TDSC program] if at all possible" and John Chatham agreeing that Schein "can certainly partner with [the CDA]."[204] Mr. Sullivan subsequently met with CDA in June 2015 to discuss a potential partnership with newly-formed TDSC, and Schein understood the idea to be focused on providing

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[201] Marshall Rpt. ¶491 (CX7100).

[202] CX2954 at 002.

[203] RX2246 at 002.

[204] RX2338 at 002.

services for the doctors similar to what we offer with Schein's Business Solutions.[205] Far from rejecting, turning down, or declining a potential arrangement with TDSC in June 2015, Mr. Sullivan and his team referred the opportunity to the Mid-Markets group and even internally observed [redacted] [redacted][206] Schein diligently crafted a response to TDSC's "Request for Proposal of Dental Supplies for CDA members" and Schein thereafter met with the CDA to present its proposal. TDSC extended to Schein a proposed agreement in April 2016.[207] As Schein expressed to the TDSC, however, the nature of the proposed agreement with TDSC was problematic for Schein, in large part because it would undermine Schein's existing relationship with its California customers.[208]

TDSC's proposed agreement required Schein to limit its sales to CDA members (*i.e.*, all California dentists) to only a small number of products and that those sales would be placed directly with TDSC, not Schein.[209] As Schein explained at the time: "Our issues are with … removing the positive influence Henry Schein Dental has with customers. With our current market share in California, the TDSC and Henry Schein will become competitors using this process. We cannot encourage good HSD customers to join the TDSC plan without endangering the majority of our business with them."[210] Despite Schein's significant concerns with TDSC's proposed arrangement, Schein continued to negotiate with TDSC to determine whether a mutually beneficial

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[205] RX2155.

[206] *Id.* at 001.

[207] RX2234.

[208] RX2608.

[209] *Id.*

[210] *Id.*at 002.

agreement could be reached. Specifically, Schein offered to propose an alternative process in which Schein would: (1) construct a Schein formulary that would mirror the TDSC formulary (including identical products and pricing); (2) offer the formulary to any customer who joins the TDSC plan; (3) the "mutual" customers could then place orders through the Schein system and Schein would [REDACTED] as if the order was placed through TDSC's own web portal.[211] Although TDSC and Schein were not able to finalize an agreement, it is undisputed that Schein bid for the TDSC business and thereafter continued to work towards a mutually beneficial arrangement for all parties.

iv. Dental Alliance/Universal Dental Alliance.

Complaint Counsel contends that, as a result of the alleged conspiracy, "Schein did not enter into agreements with" a buying group named "Dental Alliance."[212] Complaint Counsel's support for this contention are two, unsolicited text messages from Benco's Chuck Cohen to Tim Sullivan on March 26, 2013 informing Mr. Sullivan that Benco had rejected a Raleigh, NC… buying group named Dental Alliance back in 2012 and noting that Mr. Cohen had learned that Schein was giving the group "7% off of catalog pricing just for joining."[213] As detailed below, the evidence overwhelmingly contradicts Complaint Counsel's theory because it shows that Schein

[211] *Id.*at 002.

[212] CC Second Amended Response to Schein Rog at 4 (RX3087).

[213]CX0060 at 001; CC Pretrial Br. at 15-16.

agreed with UDA in July 2011 and continued to sell to the group through 2015 under the terms of that agreement.[214]

Universal Dental Alliance ("UDA") was a North Carolina-based, self-described "group purchasing organization" focused on "the dental and oral surgery industries."[215] The group approached Schein's Regional Manager in Raleigh, North Carolina, Ryan Steck in May 2011.[216]

[217] The fact that Schein entered into an agreement with UDA in the middle of the alleged conspiracy period directly contradicts Complaint Counsel's theory that Schein "did not enter into agreements" with this buying group or that it had any agreement with Benco relating to such group.

Pursuant to the agreement, Schein extended UDA's members a

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[214] and Complaint Counsel has not clarified which of these entities it contends was rejected by Schein as a result of the alleged conspiracy. Based on the text message relied on by Complaint Counsel, Schein understands that the referenced group operated under the "Universal Dental Alliance" moniker because UDA was based in Raleigh, NC and

[215] RX2350 at 001.

[216] RX2612.

[217] *Id.*; *see also* RX3076

[218] RX2753 at 001.

[219]

In other words, Based on these commitments and efficiencies, the agreement made economic sense for Schein. [220] And, because the buying group account was local, it did not create any conflicts regarding commissions or FSCs between the Regional Manager that opened the account (Ryan Steck) and any other RMs.

[222] In fact, the transactional data shows that Schein sold products to UDA-

[219] RX2350 at 003.

[220] *Id.* at 004.

[221] RX2612.

[222] RX2613; RX2593 at 001; RX2612 at 001.

affiliated dentists at the VPA-based discount prices established by the 2011 contract throughout the relevant time period.[223]

Faced with this overwhelming evidence contradicting its theory, Complaint Counsel can only point to Mr. Cohen's March 26, 2013 text message. That unsolicited text message does not support, and in many ways contradicts, Complaint Counsel's theory. First, Mr. Sullivan knew about Schein's relationship with this buying group as early as October 20, 2011, and potentially earlier.[224] And, even though the 2011 agreement allowed Schein to [REDACTED] [225] Mr. Sullivan never instructed anybody to terminate the agreement, and there is no evidence at Schein that anyone ever terminated this agreement. Second, Mr. Cohen's text message confirms that Schein and Benco made different, independent business decisions as to buying groups during the alleged conspiracy period and did not coordinate when making such decisions. Schein said yes in 2011, and Benco said no in 2012. Mr. Cohen expressly states that, in 2012, he had declined UDA's offer, and his sharing of this fact with Mr. Sullivan for the first time a year later further undermines the suggestion that a conspiracy existed to coordinate the companies' respective approaches to buying groups. Third, Mr. Sullivan testified that he "never spoke to [Mr. Cohen] about Dental Alliance," that the two text messages (CX0196 at 008 and CX0196at 009) were the only communications he ever received from Mr. Cohen about this group, that he never responded to the text messages, and that he never called Mr. Cohen about this group.[226] And there is no evidence that Schein ever terminated the contract or shut down the

[223] *Id.*

[224] RX2349.

[225] RX2350 at 005.

[226] *See* T. Sullivan IH Dep. 308 (CX0311); T. Sullivan Dep. 475-477 (RX2941).

buying group.[227] Complaint Counsel cannot prove that Schein boycotted a buying group that Schein did business with throughout the alleged conspiracy period, and the existence of a text message from Mr. Cohen to Mr. Sullivan about Schein's business with this group establishes that such communications cannot form the basis for Complaint Counsel's theory that Schein had an agreement with Benco to boycott buying groups.

v. <u>Dentistry Unchained.</u>

This organization approached Schein in May 2015 about a buying group it wanted to "roll… out" with various vendors, including one for dental supplies, and the evidence establishes that Schein seriously evaluated and actively pursued a potential partnership for six months.[228] HSD involved Mid-Markets in the process, and determined that the opportunity might make sense if the agreement included a "100% exclusive" term that allowed "solo providers access to act independently should they leave."[229] Dentistry Unchained was trying to rush an agreement, and Schein sent them a non-binding letter of intent in July 2015.[230] While Schein continued to negotiate with Dentistry Unchained (with a focus on the proposed exclusivity term), unbeknownst to Schein, Patterson and Benco were also negotiating a possible partnership with the group. Schein continued to negotiate with the group through February 2016, and even went so far as to do a "beta test" to understand whether the partnership would result in more business for Schein if it was the group's "primary dental partner."[231] Schein expressed concerns internally and to the group about

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[227] Although the organization no longer exists, [redacted]

[228] RX2115 at 006.

[229] *Id.* at 002.

[230] RX2229.

[231] RX3090.

Dentistry Unchained's service offerings not aligning with (and, instead, competing against) Schein's service offerings, and about the group's subsequently announced competitive partnership with Patterson.[232] For those reasons, it decided to forego the partnership.

Three additional facts undermine Complaint Counsel's assertion that Schein's decision about this group was the result of a conspiracy. First, Complaint Counsel mistakenly relies on an internal Benco email in May 2015 incorrectly asserting that Schein had rejected Dentistry Unchained, when the evidence clearly shows that Schein continued negotiating a potential agreement into 2016. This suggests that Benco's inaccurate information was not obtained from Schein and therefore cannot reflect any coordination with Schein. Second, Patterson and Benco made the opposite decision as Schein, and both entered into agreements with the group. Third, Schein's decision to forego a partnership with Dentistry Unchained was made after the alleged conspiracy period based on Schein's internal evaluation of Dentistry Unchained competitive partnerships.

vi. Florida Dental Association Buying Group.

There is no evidence that Schein refused to deal with the Florida Dental Association ("FDA"). To the contrary, the FDA turned Schein's offer down for another distributor. In 2012, the Florida Dental Association ("FDA") approached Schein about supplying discounts to its members.[233] Schein met with and ultimately offered to partner with the FDA, which included, among other things, educational and consulting services, reduced pricing commitments, and other value added services.[234] Despite Schein's offer to help FDA members run a more successful

[232] RX2457.

[233] D. Steck IH Dep. 131:11-133 (CX0310).

[234] *Id.*

practice, the FDA rejected Schein and instead decided to partner with another distributor—Darby Dental Supply LLC ("Darby")—because the FDA stood to gain more in rebate dollars from Darby's offer.[235]

vii. Integrity Dental Buyers Group (GDA).

Schein engaged with the Georgia Dental Association ("GDA") about a potential partnership during the end of the alleged conspiracy period and ultimately informed the GDA that it was not ready to enter into a partnership in February 2016. On July 21, 2015, Schein became aware that the GDA planned to set up its own group purchasing organization called Integrity Dental Buyers Group and, on August 3, 2015, reached out to the GDA for a meeting.[236] On September 29, 2015, Schein's Michael Porro and Scott Carringer met with the GDA to explore a potential partnership between the GDA and Schein.[237] At the meeting, the GDA informed Schein that it wanted to pick one supplier and that the GDA had sent a request for proposal out to Benco, Patterson, Premier, and other distributors.[238]

After the initial meeting with HSD, the GDA proposed to Schein 35% off "normal price."[239] Schein internally discussed questions and concerns with the GDA proposal, what Schein could offer the GDA, and planned to invite the GDA to meet Schein in-person.[240] On January 12, 2016, Schein had a conference call with the GDA regarding a potential partnership.[241] To Schein's

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[235] RX2466.

[236] RX2143; CX0299; F. Capaldo IH Dep. 77:24-78:8, 79:3-8 (CX0320).

[237] CX2038.

[238] *Id.*

[239] RX2433 at 002.

[240] RX2386; RX2433.

[241] CX2037.

surprise, the GDA also invited Premier, a medical GPO that the GDA had been in discussions with, to participate on the conference call without informing Schein.[242] After the conference call, the GDA told Schein that it hoped the two could meet again before the end of January and that it desired to move forward with Schein, "albeit cautiously."[243] But, the conference call left Schein confused as to the GDA's model now proposing a three-way partnership with Premier when it originally told Schein it intended to pick one supplier partner.[244]

After due diligence in evaluating the GDA proposal, Schein determined that, unlike the CDA (to which Schein submitted a proposal in 2016), the GDA was only seeking a formulary by which to offer discounts to its members, instead of a comprehensive program.[245] Consequently, on February 9, 2016, Schein informed the GDA that it was not currently prepared to move into a "formal binding partnership" with the GDA's Integrity Dental Buyers Group, but that it welcomed future discussion and wanted to stay connected.[246] To that end, on May 13, 2016, Schein reiterated its interest in working with the GDA and hope that Schein and the GDA could work together to relaunch efforts.[247] During this time, Schein's Jake Meadows attempted to reach the GDA's Frank Capaldo multiple times. Mr. Capaldo did not return Mr. Meadows's phone calls, and the GDA ultimately partnered with SourceOne in the fall of 2016.[248] Importantly, there is no evidence of any communication between Schein and either Benco or Patterson about the GDA at any time. Instead, the record establishes that Schein's decision not to enter into a formal relationship with

[242] J. Meadows Dep. 260:20-262:18 (CX8016).

[243] CX2037 at 002.

[244] J. Meadows Dep. 260:20-262:18 (CX8016); M. Porro Dep. 224:18-22 (CX8000).

[245] RX2454.

[246] CX2397.

[247] RX2610.

[248] J. Meadows Dep. 282:16-284:6 (CX8016); F. Capaldo Dep. 28:25-29:7 (CX8011).

the GDA was independently-made, economically rational, and occurred after the alleged conspiracy ended.

viii. Kois Buyers Group.

Schein did not refuse to enter into an agreement with this buying group. Schein was presented with a complex proposal for a buying group not yet formed, requiring Schein commit to a partnership *before* the group was formed, *before* all the deal's details were negotiated, *before* Schein's due diligence about the group and the deal was completed, and *before* Schein could meet in-person with the broker. After multiple exchanges with the group's third-party broker and extensive internal consideration of the proposed partnership, Schein independently decided "to take a pass on the offer…based largely on not having enough time to do [its] due diligence and the current dental market conditions."[249] The evidence also shows that Schein expressed genuine interest in a potential partnership with Kois, that Mr. Sullivan and a Schein team invested significant time and resources in evaluating the broker's proposal within a one week period, that the group's founder (Dr. John Kois Sr.) selected Burkhart as the group's exclusive distributor-partner without knowing whether Schein would sign an agreement with the group. More important, there are no communications between Schein and either Benco or Patterson about Kois at any time leading up to Kois's selection of Burkhart, and Complaint Counsel cannot introduce any evidence suggesting otherwise. Complaint Counsel's only support for its contention that Kois

[249] CX4310 at 001.

was the subject of the alleged boycott is the fact that Kois did not enter into an agreement with any of the Respondents in 2014.

[252]

Schein made its own decision about Kois for independent reasons, which is established by the absence of inter-Respondent communications about Kois and the evidence showing that Schein internally discussed Kois's proposal and met with Kois several times during the week it was considering the proposal. Additionally, Patterson, Benco and Burkhart had all made their decisions about Kois before Kois first reached out to Schein. Kois first approached Patterson on September 22, 2014.[253] Kois last communicated with Patterson on October 22, 2014, which followed Patterson internally expressing the reasons why the opportunity did not seem appealing:

[250] J. Kois Sr. Dep. 67-68 (CX8007).

[251]

[252] J. Kois Sr. Dep. 68, 147-48 (CX8007).

[253] RX0355.

[254] On October 21, 2014, Dr. Kois emailed Benco, explaining that he "ha[d] been approached by a company to organize our members for group purchase opportunities" and put Mr. Ahmed in touch with Benco.[255] Mr. Cohen responded almost immediately to Dr. Kois telling him that

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[254] RX0367 at 001; *see also* CX3086 at 001

[255] RX1039 at 001.

[256] *Id.*

[257] CX4284 at 001.

[258] CX4288 at 003. CX4288 at 003.

[260]

Kois first approached Schein on October 22, 2014, and Schein continued to evaluate the proposal until November 3. Kois sent Schein its initial presentation on October 22, 2014, and Kois spoke to Mr. Sullivan the following day.[261] Over the next week, Schein invested significant amount of time and resources discussing the opportunity internally and with Messrs. Ahmed and Chagger.[262] Kois and Schein simply had different timelines and approaches to evaluating a potential business arrangement, causing Kois to reject Schein's request for "more time" to do a "deep dive" analysis of the opportunity, reject Schein's request to "slow down and really understand" the Kois model, and reject Schein's request for a "face to face meeting with [Mr. Ahmed] and Dr. Kois."[263] Instead, Kois proposed that Schein "get a basic initial deal done that gives [Schein] an 'out'," defer its "deep dive" evaluation of the proposal until after the partnership is signed, and proceed "as … rapid as possible."[264] On October 27, within a week of their initial call with Schein, Kois was pressuring Schein to "get a series of little, obvious ideas done as fast

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[259] CX4251 at 001; *see also* CX4285 at 002 (November 3, 6:46am email from Mr. Ahmed to Burkhart saying

[260] J. Kois Sr. Dep. 152:25-153:4 (CX8007).

[261] *Id.*

[262] CX4310.

[263] *Id.* at 010.

[264] *Id.* at 005.

as possible," and to "wrap this up in the next few days."[265] Schein told Kois that, while it appreciated Kois's "'get r done' approach," it was not comfortable with entering into an agreement without sufficient due diligence just because it can be potentially unwound if it doesn't work out.

Pressed repeatedly by Kois for an immediate response, on November 3, 2014, Schein responded that it was going "to take a pass on the offer."[266] But the offer that Schein declined was limited to Kois's request that Schein commit to the partnership *before* negotiating the details and terms, *before* completing its "deep dive" evaluation to "better understand" the proposal, and *before* having the opportunity to "meet face-to-face" with any of Kois's representatives.[267] Schein did not reject Kois's proposal because it was a buying group – Schein simply refused to enter into a complex deal with two unknown parties through the accelerated, 'sign now, figure it out later' process demanded by Kois.

[265] *Id.*at 007.

[266] *Id.* at 005.

[267] *Id.*

[268] J. Kois Sr. Dep. 152 (CX8007); CX4063.

[269] J. Kois Sr. Dep. 152-153 (CX8007).

[270] *Id.* at 167-168.

In early September 2014, Dr. Kois announced to dentists

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[271] *Id.* at 169-170. Dr. Kois also testified that *Id.* at 37-38.

[272] *Id.* at 119; *see also* J. Reece Dep. 98 (CX8021)

[273] *Id.* at 67-68, 119.

[274] *Id.* at 162.

[275] *Id.*

that he would soon launch a buying group, and on October 8, 2014, Dr. Kois sent a wider marketing email again promising a buying group offering and explaining that he would "pick one distribution partner from between Patterson Dental, Henry Schein and smaller distributors."[276] [277] In fact, when Kois first reached out to Schein, it refused to wait a week for a meeting and requested a meeting the following day because "time is of the essence."[278]

Therefore, the evidence overwhelmingly establishes that Kois selected Burkhart to be the buying group's exclusive distributor because it wanted to partner with Burkhart, and that each Respondent made an independent decision as to Kois. That Schein invested considerable time and effort in Kois is hardly consistent with the alleged conspiracy.

ix. Pacific Group Management Services.

Pacific Group Management Services (PGMS) first approached Schein in June 2014. PGMS described itself as a "pioneer in the field of dental support management."[279] Special Markets immediately began its due diligence about the group, and as part of its evaluation sent PGMS questions. PGMS explained

[276] CX0290 at 003; CX2469.

[277] *See, e.g.*, CX3077; CX4285; RX3089 at 001

[278] RX2424 at 002.

[279] RX2206 at 003.

[280] PGMS stated that it was

[281]

Schein was interested in partnering with PGMS.[282] Ms. Titus met with the group and discussed with Brian Brady internally a potential partnership with the group. However, Ms. Titus and Mr. Brady identified certain concerns about whether the group could deliver incremental sales volume:

[285] Schein's internal evaluation at no point mentions Benco or Patterson, or any Schein policy regarding buying groups. And there is no evidence of any communications between Schein and Benco or Patterson about

[280] RX2206 at 003.

[281] *Id.*

[282] B. Brady Dep. 93 (CX8020).

[283] CX0172 at 003.

[284] CX2592 at 004.

[285] CX2219 at 001

this group. On July 16, Ms. Titus explained to PGMS that Schein [redacted] referring to the group's ability to ensure its members would deliver incremental sales volume through the group's contractual commitments to Schein.[286] The evidence therefore shows that Schein reached an independent decision about this group for reasons unrelated to any alleged agreement or internal instructions not to do business with buying groups, after giving it serious consideration and evaluating the group's model, and that Schein's decision was in its economic self-interest.

x. Pearl Network (NYU) Buying Group.

Schein did not do business with this alleged buying group because no such buying group was ever formed, and the idea for its creation was evaluated internally in December 2011 and found not to be a worthwhile investment of Schein's time and resources. Schein's decision was not the result of a blanket instruction to not do business with buying groups or the result of the alleged conspiracy. PEARL stands for "Practitioners Engaged in Applied Research and Learning," and is a hybrid "Practice Based Research Network" intended to connect individual dental practices into a nationwide network to conduct research studies for regulatory submission.[287] In 2008, PEARL Network members included large DSOs like Heartland Dental and Small Smiles.[288]

Schein evaluated an idea the organization had to start a buying group in 2011, and Schein independently chose not pursue a relationship with PEARL at that time because the idea did not seem worthwhile. In December 2011, Josh Naftolin, a Schein Medical employee asked HSD's

[286] CX2219 at 002.

[287] RX2418.

[288] RX2417.

Steve Kess if Schein had considered "creating a dental GPO with Schein as the anchor."[289] Mr. Naftolin had spoken about the idea generally with a Dr. Curro, an NYU professor who had helped establish the PEARL Network.[290] Mr. Kess explained that "the world of dentistry is very different from that of medical . . . especially with the [manufacturer] rebates etc."[291]

[292] Complaint Counsel cites Mr. Sullivan's response as evidence that Schein refused to enter into an agreement with PEARL because of the alleged conspiracy. Mr. Sullivan's response merely catalogs Schein's longstanding concerns about these type of undeveloped, informal ideas to start a buying group that would not drive additional volume to Schein or otherwise offer a profitable business opportunity aligned with Schein's business model:

> [293]

Setting aside that that there was no PEARL Network buying group to boycott, Complaint Counsel's evidence consists entirely of internal Schein documents. No communications with either Benco or Patterson about this group exist. And, no evidence exists that the PEARL Network pursued the idea of creating a buying group beyond the informal brainstorming exchange it had with Schein. The record also lacks evidence that Schein took any action to stymie any effort by

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[289] CX2456 at 005.

[290] *Id.*

[291] *Id.* at 002.

[292] *Id.*

[293] *Id.* at 001.

PEARL to create a buying group, or that it ever refused an actual proposal or terms of an agreement involving discounts for the members of the PEARL Network.

xi. Potomac Valley Dental Care.

Potomac Valley Dental Care was an *idea* for a buying group of dentists in Northern Virginia that solicited bids in April 2016 for a 2017 launch, and it does not appear to have ever actually formed or launched.[294] In October 2015, [REDACTED][295] [REDACTED][296] [REDACTED][297] [REDACTED][298]

The only witness asked about this group was Schein's Jake Meadows, who did not remember the group or whether it even exists. He testified that he "would have suggested [Schein] do [its] due diligence and see what the opportunities are with this group and how they fit in regards to complementing our strategy to grow, retain, and bring our mission to life."[299] Based on the few

[294] RX2379 at 001.

[295] *Id.*

[296] *Id.*

[297] *Id.*

[298] *Id*; CX2393 at 001.

[299] J. Meadows Dep. at 184:24-186:4 (CX8016).

details of the buying group idea presented to Schein in late 2015, it was in Schein's economic self-interest to avoid an agreement with it (assuming it formed), including because Schein was already selling to the primary accounts and the group wanted to select different vendors for supplies and services.

There is also no evidence that the group approached either Benco or Patterson in 2015 or that Schein communicated with Benco or Patterson about this group.[300] Moreover, the group had still not formed in April 2016, over six months after they first told Schein about their idea and at least four months after the alleged conspiracy supposedly ended.

Schein did not submit a bid in May 2016, because

The evidence therefore establishes that Schein's decision to not bid for this buying group's business was made independently and was consistent with Schein's economic self-interest and the strategy it had deployed in the mid-Atlantic region.

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[300] RX2379 at 001.

[301] RX2167 at 004

The group had still not formed by the end of April 2016 and confirmed that they would not be evaluating bids until May 25, 2016. *Id.*

[302] RX2167 at 002.

xii. Smile Source.

Complaint Counsel bookends its conspiracy theory with Smile Source. Schein once did business with buying groups like Smile Source, Complaint Counsel says, but "did an about face" and suddenly stopped working with Smile Source in 2012.[303] And then, just as suddenly, Schein turned back around in 2017 and entered into a contract with Smile Source.[304] The evidence, however, tells a very different story.

In January 2011, within Complaint Counsel's alleged conspiracy period, Schein entered into a service agreement with Smile Source that ran from February 1, 2011 through February 1, 2012.[305] By then, Schein had been offering discounts to Smile Source since at least 2008.[306] Within Schein, the Smile Source account shifted in early 2011 from Hal Muller's Special Markets division to Tim Sullivan's HSD.[307] Shortly before the parties' agreement expired in February 2012, Smile Source terminated Schein,[308] and in January 2012,

Smile Source's termination of Schein in February 2012, during the alleged conspiracy period, is a highly inconvenient fact to Complaint Counsel's theory. Complaint Counsel attempts

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[303] CC Pretrial Br. at 18.

[304] *Id.* at 49-50.

[305] RX2301.

[306] H. Muller Dep. 265:11-14 (CX8005).

[307] CX2454.

[308] A. Goldsmith Dep. at 98:3-16 (CX8039)

[309] A. Goldsmith Dep. at 104:20-21 (CX8039).

to blame the termination on Schein, claiming Schein

[310] Complaint Counsel's theory is factually incorrect. First,

[311] Second, the data confirms that. From 2010 through the end of the relationship,

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Third, the undisputed evidence establishes that

[313] Contemporaneous communications confirm that

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[310] *Id.* at 20.

[311] RX2714.

[312] Carlton Rpt. at 55 (RX2832).

[313] A. Goldsmith Dep. 111:14-17 (CX8039).

[314] Still, the decision was [315]

The evidence shows that Schein invested heavily in its relationship with Smile Source prior to 2012 and also in pursuing a new relationship with Smile Source after it lost the business. This further contradicts Complaint Counsel's theory that Schein effectively terminated Smile Source by not offering greater discounts, and it also contradicts Complaint Counsel's theory that Schein's approach to buying groups "abruptly altered."[316] Smile Source and Schein communicated and met with each other throughout the alleged conspiracy, maintaining an enthusiastic and constructive tenor without change. After an in-person meeting in February 2011, Smile Source wrote to Mr. Sullivan and his team: "thank you so much for extending such a WARM welcome."[317] Mr. Sullivan expressed his "excite[ment] about our future together" in response.[318] Not only does the investment by Schein of Mr. Sullivan's time (and that of his team) strongly suggest that Schein did not have a policy against doing business with buying groups in 2011, it also highlights differences in how Schein approached potential buying group opportunities relative to the other Respondents at the time. In stark contrast to Benco's or Patterson's reaction to Smile Source, which showed no interest in Smile Source, Schein aggressively pursued Smile Source's business and never declined an opportunity to partner with them. This difference is the antithesis of parallel

[314] RX2090 at 002.

[315] *Id.*

[316] *Compare* Complaint Counsel Pretrial Br. at 48 ("[I]n 2011, Schein radically changed its policy on buying groups") *with* T. Maurer Dep. 84:15-85:1 (RX2952)

[317] CX2899 at 001.

[318] CX2899 at 001.

conduct, and it is the antithesis of a conspiracy. After Smile Source's termination of Schein in 2012, Mr. Sullivan wrote to Smile Source, "I look forward to … being partners in business again," and immediately sought "a time to meet."[319] This is hardly the response of a company with a newly formed agreement against buying groups.[320]

Putting Mr. Sullivan's response in context, [redacted] [322] Far from agreeing with or even following Benco's approach, Schein sought to maintain the relationship in the hopes of one day re-acquiring the business (which it ultimately did).

Indeed, Schein continued to pursue Smile Source's business, even though [redacted] [323] This is quantitative, contemporaneous evidence that it can be in Schein's economic self-interest to opt to discount directly to dentists pursuant to its well-established business model, rather than enter into an agreement with a buying group. In October 2013—after Mr. Foley received the unsolicited call from Mr. Ryan on October 1—Tim Sullivan wrote to Smile Source's Andrew Goldsmith that he "would enjoy catching up with you [and]

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[319] RX2090.

[320] Complaint Counsel claims Mr. Sullivan was "happy the Smile Source relationship ended," citing an internal e-mail in which he wrote, "I am really interested to see how and what we can do to retain these customers and judge how effective they're buying group model is. … I'm … concerned … more about what we can do to kill the buying group model." CX0199 at 001. As Mr. Sullivan testified, he wanted to [redacted] (T. Sullivan IH Dep. at 337:2-38:10 (CX0311)). While he encouraged his team to pursue Smile Source members, Mr. Sullivan also engaged with Smile Source directly in pursuit of a renewed relationship.

[321] CX1138 at 001.

[322] CX1219 at 002.

[323] Marshall Rpt. ¶ 376 (CX7100).

look[ed] forward to learning more" about what Smile Source was doing.[324] A month later, Mr. Sullivan reiterated, "Yes, we absolutely would like to discuss further."[325] Patterson, on the other hand, told Smile Source at the time, "We are currently not interested."[326] And Benco had just told Mr. Foley that it had not bid on Smile Source. If Schein was following some no-buying-group agreement, it would have had no reason to continue investing time and resources engaging with Smile Source and seeking a renewed business relationship.

A few months later, in January 2014, Schein and Smile Source met in person. The next month, Schein told Smile Source, "We are excited about the opportunity and will move the process along as fast as possible."[327] [328]

Again, Schein never told Smile Source anything of the kind. One cannot infer an agreement from such divergent approaches.

Schein's efforts in 2014 culminated in a proposal to Smile Source in March.[329] Complaint Counsel seeks to characterize Schein's proposal as not "meaningful,"

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[324] CX2580 at 001; CX2582.

[325] CX2588 at 002. Complaint Counsel speculates about supposed enforcement and monitoring efforts by Benco. Complaint Counsel Pretrial Br. at 15-16. Even if Benco did try to keep Schein in line with Benco's own policy, it failed. Schein never rebuffed Smile Source at any time in the alleged conspiracy period.

[326] CX3117; *see also* CX3294.

[327] CX2588 at 001.

[328] CX1162 at 001; CX1164 at 001.

[329] RX2336.

[330] *Id.*

[331]

Schein believed the Smile Source leadership – and Mr. Goldsmith in particular – wanted to accept Schein's offer "but [it] was voted down by the group."[332] [333] A firm acting pursuant to a no-buying-group agreement would never have invested in a formal proposal in the first place, let alone consider sweetening the offer.

The following year, 2015, Smile Source and Schein rekindled communications. True to form (but not to Complaint Counsel's alleged theory of conspiracy), Tim Sullivan engaged Smile Source with eagerness: "I'd love to connect again."[334] The two met in September, and by January 2016, Mr. Sullivan was looking for "a date in the coming weeks" to make an in-person proposal to Smile Source.[335] Scheduling proved more difficult than hoped, but Schein finally delivered its pitch in May, followed by a meeting in August, and another proposal in November.[336] This time, after more negotiation, it was ultimately accepted.[337]

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[331] T. Maurer IH Dep. 114:13-16 (CX0322); T Maurer Dep. at 82: 3-6 (RX2952)

[332] CX2591 at 002.

[333] *Id.*

[334] RX2444 at 001.

[335] CX2607; CX2608.

[336] CX2626 at 008; RX2160; CX2610.

[337] CX2187.

xiii. Synergy Dental Partners.

Synergy Dental Partners is a buying group with "no ownership interest in its members and has no authority to tell its members what to do."[338] Membership is free, but Synergy receives an administrative fee from suppliers.[339] Complaint Counsel identified no communications between Schein, Patterson, or Benco about Synergy. And contrary to Complaint Counsel's theory, Schein's position on Synergy has remained unchanged: before, during, and after the alleged conspiracy.

Synergy first approached Schein in March 2010. Rick Offut, one of the group's co-founders, approached Schein Special Market's Randy Foley at a dental meeting in Orlando. Mr. Foley told Mr. Offut, "Schein did not do business with group purchasing organizations."[340] Mr. Offut noted his surprise in an email, saying "[w]e found that odd because [Schein] ha[s] contracts with various GPO structures around the country."[341] Special Markets employees forwarded the chain internally and Hal Muller forwarded the chain to Tim Sullivan. Mr. Sullivan noted, "[y]ou know the drill … not interested in GPOs. The risk is much greater if we do sign than if we don't."[342]

Despite Schein's rejection, Synergy partnered with Darby and proved successful. In July 2011, the New York Post mentioned Synergy, and Mr. Muller forwarded the article to other Schein

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[338] RX2826.

[339] RX2826.

[340] CX2451 at 002.

[341] *Id* at 002.

[342] *Id* at 001.

executives.[343] Mr. Sullivan internally described his rationale for Schein's 2010 decision about the group—the risks of signing with a group like Synergy were greater than not signing.[344]

Schein again evaluated Synergy in 2017 and reached the same conclusion it had reached in 2010, which directly contradicts Complaint Counsel's theory of a 2011 structural break in Schein behavior. In the 2017 internal discussion, a Schein rep relayed a manufacturer's concerns about Synergy: "[i]t's just poisonous in a market once they get traction."[345] Ms. Wingard had been evaluating the group, and she also determined Synergy was a "TRUE buying group focused strictly on discounts and driving buying power."[346] Ms. Wingard determined Schein should not pursue a relationship with Synergy.

Complaint Counsel does not allege Schein coordinated with Benco or Patterson in 2010 or 2017. Yet Schein reached the exact same conclusion about Synergy in each instance. Nevertheless, Complaint Counsel argues Schein boycott Synergy between 2011 and 2015 because of an agreement with Benco and Patterson. Complaint Counsel identifies no communications between Schein and Benco or Patterson that discuss Synergy. And Complaint Counsel makes no effort to explain how Schein's legitimate business decisions about Synergy in 2010 and 2017 became coordinated conduct in the intervening years.

xiv. <u>TDAPerks.</u>

In late 2013, Schein heard that the TDA was officially launching a new Perks Program ("TDA Perks").[347] The TDA Perks Program selected SourceOne as its "preferred vendor" to offer

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[343] CX0185.

[344] *Id.* at 001.

[345] CX2189 at 001.

[346] *Id.* at 001.

[347] CX0209.

discounts to its members through a custom-built TDA-branded website.[348] Because the TDA did nothing more than endorse a distributor through its creation of the TDA Perks Program, Complaint Counsel's theory that the TDA is a buying group is misplaced.

Regardless, the TDA did not approach Schein in 2013 to discuss a potential partnership with the TDA prior to launching the TDA Perks Program with SourceOne. The TDA may not have approached Schein because Schein does not build custom websites for specific dental associations. The TDA instead only approached Schein about sponsoring its annual meeting for 2014 ("2014 TDA Meeting"), which Schein agreed and paid to sponsor.[349] Nevertheless, through its endorsement of the SourceOne marketplace, it became apparent to Schein that the TDA was aligning itself with a direct competitor, abandoning its position as a neutral host for full service distributors to display their wares.[350] Consequently, if Schein continued to sponsor the 2014 TDA meeting, it would be financing a competitor, SourceOne. Despite their initial concerns about the SourceOne endorsement, Schein did not immediately cancel its planned attendance at the 2014 TDA Meeting.[351] Instead, Schein asked the TDA for months for a meeting to understand its decision and to explore a potential partnership.[352]

The record is clear that there was no coordinated action regarding the TDA as Schein independently deliberated about the impact the TDA Perks Program would have on its continued participation in the annual TDA Meeting.[353] After months of trying, in April 2014, Schein finally

[348] CX2963; https://tdaperks.com/programs/dental-supplies/.

[349] CX2303.

[350] RX2154; RX2362.

[351] RX0190.

[352] RX2361; CX2303; CX2306; CX2743; RX0211.

[353] RX2361; RX2362; RX0195.

met with the TDA and Schein was able to pitch to discuss different ways that the TDA and Schein could work together.[354] Soon after the meeting, Schein ultimately decided independently not to attend the 2014 TDA Meeting only after the TDA assigned Schein's booth space to another vendor.[355] Schein's decision not to attend the TDA meeting was an economically rational and unilateral decision not to support a meeting financially that disproportionally benefited a competitor.

While Complaint Counsel cites to evidence of competitor communications surrounding the 2014 TDA Meeting, there is *no* evidence of any agreement between Schein and Patterson or Benco relating to the TDA or the 2014 TDA Meeting. Complaint Counsel does not point to any evidence that Schein's Glenn Showgren discussed Schein's plans relating to the TDA nor is there evidence that Mr. Showgren and Mr. Fernandez had discussions on such a topic. There is also no evidence that any agreement relating to the TDA was reached between Schein's Dave Steck and Patterson's Dave Misiak. Instead, the record reveals that Mr. Steck never actually informed Mr. Misiak of Schein's decision relating to the 2014 TDA Meeting.[356] Finally, Complaint Counsel attempts to infer, without citing to any evidence of what the conversation was about, that Schein's Tim Sullivan and Benco's Chuck Cohen spoke regarding TDA Perks on April 16, 2014, based on an unsolicited e-mail Mr. Cohen sent to Mr. Sullivan on that day regarding the TDA Perks Program (an e-mail to which Mr. Sullivan did not respond). Notably, this e-mail was sent after Schein, Benco, and Patterson had all made independent decisions not to attend the 2014 TDA Meeting. The lack of communication between Mr. Sullivan and Mr. Cohen regarding the TDA is further

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[354] RX2361; CX2303; CX2306; CX2743; RX0211; RX2154.

[355] CX2306; RX0216.

[356] *SourceOne Dental, Inc. v. Patterson Cos., Inc., et al.*, ECF 225, at 4, 15-cv-5440 (E.D.N.Y.).

bolstered by the fact that Mr. Sullivan stated that Mr. Cohen had not and would not contact him on a topic such as the TDA.[357]

xv. Unified Smiles.

Unified Smiles was founded by Mr. and Ms. Knysz, the former owners of Great Expressions, a successful dental service organization of now 300 locations, and a long-time Schein partner.[358] On December 8, 2011, Ms. Knysz teased plans with Schein for a new group, Unified Smiles, which would include "a significant number of general and specialty practices," administered "the same way as GEDC with all purchases running through our corporate office."[359] Four days later, Schein Special Markets' Randy Foley met with Ms. Kynsz to discuss this new project.[360] After this meeting, Mr. Foley explained why he would have difficulty offering Special Markets pricing to Unified Smiles because a group like Unified Smiles "cause a lot of friction within [Schein's] private dentist segment as it leads to unwarranted lower pricing for EXISTING customers."[361] Unified Smiles did not have the [REDACTED] that would allow Schein to "negotiate pricing from our vendor/suppliers based on . . . proven volume."[362] Mr. Foley explained that Schein would consider the extent to which Unified Smiles could act as an

[357] RX2362.

[358] RX2174 at 001.

[359] CX2062 at 004.

[360] *Id.*

[361] *Id.* at 001.

[362] *Id.* at 001.

"owner/partner" for its individual practices and further elaborated "we are not talking about 100% ownership."[363]

On January 5, 2012, Unified Smiles announced the group's launch via a letter.[364] On January 11, a local Benco representative forwarded the letter to Benco's Patrick Ryan, adding that Schein was likely involved.[365] Patrick Ryan responded "We've already spoken to them and turned them down" and later that day, Mr. Ryan forwarded the letter to Chuck Cohen.[366]

On January 12, 2012, after both Schein and Benco had independently declined to do business with Unified Smiles, Complaint Counsel alleges that Mr. Cohen spoke to Mr. Sullivan about Unified Smiles and that this exchange supports the existence of the alleged conspiracy. The evidence does not support the allegation. Chuck Cohen texted Tim Sullivan on January 12, 2012 to set up a call, and the two spoke the next day.[367] [368] Therefore, there is no support for Complaint Counsel's suggestion that this conversation reflects the existence of an agreement to boycott Unified Smiles

[363] *Id.* at 001-002.

[364] CX1144.

[365] *Id.*

[366] *Id.*; CX1145.

[367] CX2347; CX6027 at 019.

[368] T. Sullivan Dep. 396:14 (CX8025).

or buying groups generally.[369] The existence of an internal Benco email from Mr. Ryan to Mr. Cohen about Unified Smiles around the same time does not support, let alone establish, that Mr. Cohen discussed the group with Mr. Sullivan. The fact that Mr. Ryan emailed Mr. Cohen after Mr. Cohen had already scheduled his call with Mr. Sullivan undercuts the suggestion that the call was about Unified Smiles.

Several additional facts further undermine Complaint Counsel's boycott allegations regarding Unified Smiles. First, the January 13, 2012 call occurred after both companies had already made their independent decisions. And second, there is no indication Mr. Sullivan even knew about Unified Smiles. [redacted]

[redacted][370] Third, there is no evidence that Mr. Sullivan communicated with Mr. Foley (who had been involved in the Unified Smiles discussion) following the January 13th Cohen call. Fourth, there is no evidence that Schein changed its position or course of conduct following this call. Indeed, the ball was plainly in Unified Smiles' court after Mr. Foley's December 21, 2011 email, and they never responded. Schein's Special Markets division communicated with Unified Smiles. And rather than rejecting the group outright, Mr. Foley offered "starter plans" if the group could meet "DSO criteria" Mr. Foley had developed.[371] Complaint Counsel cites documents from years later to argue that Schein rejected the group as part of a policy not do business with buying groups.[372]

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[369] *See* C. Cohen Dep. 215:8-10 (CX8015); T. Sullivan Dep. 396 (CX8025).

[370] T. Sullivan Dep. 396:17 (CX8025).

[371] CX2062 at 001.

[372] *See, e.g.*, CX2073

Contrary to Complaint Counsel's broader theory about dentist preferences, later documents show many independent dentists preferred to buy products from Schein over Unified Smiles. Schein representatives met with Unified Smiles again in 2013. At this meeting, Unified Smiles personnel noted that Unified Smiles "struggled with the Schein accounts . . . [in which Schein reps] are heavily involved in the Dr.'s business."[373] By contrast, Unified Smiles had more success with the non-Schein. This experience demonstrates the deep individual relationships that are the trademark of Schein's business model. By working closely with dentists, offering innovative business solutions, and discounting products based on sales volumes, Schein offers benefits that can meet or exceed the limited benefits offered by groups like Unified Smiles. This personal connection is difficult for such buying groups to replicate and is one of many reasons dentists often stay with Schein despite available buying group options.

xvi. United Dental Alliance.

Complaint Counsel will present no record evidence that this Dallas-based buying group approached Schein seeking a partnership or business relationship during the alleged conspiracy period, or that anyone at Schein ever refused to consider doing business with this group as a result of some internal instruction or agreement with Benco or Patterson not to do business with buying groups. Not one Schein witness was asked about this group, and not one communication exists between Schein and Benco or Patterson about this group.

An internal Schein email from 2010 refers to the United Dental Alliance having approached Schein in 2007 about potentially forming a buying group, explaining that the organization was "looking for… HSD to provide their members a 20% discount."[374] Schein explained the reason

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[373] RX2174 at 002.

[374] RX3075 at 003.

why it said no: "[B]ased on our business model this would equate to us paying our clients to do business with us."[375] By 2010, Schein learned that the United Dental Alliance had "aligned with Darby."[376]

There is no record evidence that Schein discussed the group again until 2015, when the group was identified on an internally distributed list of buying groups that was circulated in connection with Schein's efforts to evaluate a consistent strategy for evaluating buying groups.[377] Schein was not asked to, nor did it consider partnering with United Dental Alliance, at any point during the alleged conspiracy; nor was anyone at Schein dissuaded from doing so as a result of any alleged instruction to not do business with buying groups.

Consequently, Complaint Counsel's theory about United Dental Alliance is unsupported by a single piece of evidence, and the one email chain discussing this group is an internal 2010 email in which Schein refers to why it independently decided not to pursue an opportunity in 2007, well before the alleged conspiracy.

xvii. Dental Cooperative (Utah and Nevada).

Complaint Counsel admits that the Dental Cooperative is a buying group and that Schein did business with the Dental Cooperative in Utah and in Nevada.[378] Yet, Complaint Counsel claims that Schein's decision in 2014 to end its seven-year relationship with this group was because of the alleged conspiracy.[379] However, Schein will demonstrate its contemporary business documents show that Schein made its decision independently for reasons unrelated to any alleged

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[375] *Id*. at 003.

[376] *Id*. at 003.

[377] CX2267 at 007.

[378] CC Second Amended Response and to Schein's Contention Rogs, 8/17/2018 (RX2956).

[379] CC Second Amended Response to Schein's First Rog, 9/20/2018 (RX3087).

conspiracy or any "instructi[ons] … not to provide discounts" to buying groups.[380] Schein internally expressed serious, economically rational, and unilateral concerns about the Dental Cooperative's inability to drive additional volume to Schein and the organization's evolving business model being in competition with Schein. Complaint Counsel cites no evidence that Schein communicated with Benco or Patterson regarding this group, or that the specific 2014 decision it challenges was the result of coordination with Benco or Patterson.

Schein began working with the Dental Cooperative in Utah beginning in 2007. The Cooperative focused on insurance support, offering help "negotiating rates with PPO's" and "creat[ing] private dental insurance options for small business," while also offering discounted dental supplies.[381] As the group expanded in Utah, it eyed expansion into Nevada, Idaho, Arizona and other states.

A multi-state cooperative, however, draws on resources from multiple Schein branches, which can create internal conflict for Schein. In 2010 the Utah-based group solicited membership in Idaho and Nevada.[382] As part of this expansion, the Cooperative sought additional discounts from Schein "to get all of our new members in Idaho excited."[383] The Cooperative approached Schein staff in Idaho and requested that Schein guarantee an "aggressive agreement that we don't have to worry about being challenged by singular dental practices."[384] In essence, the Cooperative was asking Schein to beat pricing from Schein's own FSCs. As Kathleen Titus later observed, the Cooperative's gain often came at Schein's expense: "we give them special pricing in Utah and

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[380] CC Second Amended Response to Schein's First Rog, 9/20/2018 (RX3087).

[381] CX2505 at 001.

[382] RX2599; CX0272.

[383] RX2599 at 001.

[384] RX2487.

they turn around and present themselves to our top, and I mean very large private practice accounts and study clubs."[385]

Schein could provide discounts, but these discounts did not always translate to volume. By 2011, Mr. Cavaretta observed that Schein "continue[d] to add 'value' via price," but was "not seeing a whole lot in return."[386] Nevertheless, in September 2011, Mr. Cavaretta negotiated a contract to cover the Cooperative's expansion in Nevada.[387] [389]

Within a year, Mr. Cavaretta again observed that "the co-op is not working very well as expected. Many of these docs [*i.e.*, dentists in Nevada] already had equal or better pricing [from Schein FSCs]."[390] The program had been successful in Utah, where the group's expansion helped Schein win business from other distributors, but the program did not work in Nevada where Schein already sold to a large portion of Las Vegas dentists and

[385] CX2811 at 002.

[386] RX2125 at 001.

[387] CX2720.

[388] *Id.*

[389] *Id.*

[390] RX2490 at 001.

[391] CX2750 at 001.

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The relationship became even less appealing and more problematic for Schein in 2014, when Schein learned the Cooperative had entered partnerships with manufacturers Procter & Gamble ("P&G") and Komet for the purchase of dental products directly from those manufacturers.

[396] In May 2014, Kathleen Titus called the Cooperative's Andrew Eberhardt to discuss Schein's concerns, explaining that the Cooperative's model had "lost some relevancy in the changing world of group dentistry" as its primary value-

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[392] RX2384.

[393] CX2646 at 002 & 004.

[394] K. Titus Dep. 126:9-24 (CX8010)

[395] RX2106.; K. Titus Dep. 126:9-24 (CX8010)

[396] RX2209 at 004; K. Titus Dep. 71:16-22 (CX8010)

add offering (i.e., an alternative to dental insurance) was "very complex and difficult to sell."[397] Ms. Titus noted that for the 400 members Mr. Eberhardt claimed to have, those members only did [REDACTED] in collective volume.[398] Such limited volume for a 400-dentist group suggested that Mr. Eberhardt could not "drive compliance" as he claimed.[399]

Rather than terminate the group, Schein attempted to negotiate a business resolution with the Cooperative as late as July 2014. Ms. Titus inquired whether the Cooperative would go exclusive and abandon its P&G and Komet relationships, and Mr. Eberhardt offered to consider it.[400] Then, in June 2014, Schein learned that P&G was promoting the Cooperative at the New Mexico state dental meeting.[401] Joe Cavaretta concluded that "Andy's goals are not aligned with ours. This is the danger of a Co-op…they want their brand front and center and when you help them build up a customer base they use it against you."[402] Ms. Titus met Mr. Eberhardt for an in-person meeting in July 2014 and again asked if Mr. Eberhardt was willing to sign an exclusive relationship with Schein; his answer was a "definitive No."[403]

By July 18, 2014, Ms. Titus, Joe Cavaretta, Jeff Harmon (UT/ID/MT Regional Manager) and Kevin Upchurch (Zone General Manager Western Zone) concluded that Schein should end its relationship with the Dental Cooperative as a result of the mounting issues and business conflicts resulting from the relationship.[404] They determined that Schein would [REDACTED]

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[397] RX2106.

[398] *Id.*

[399] *Id.*

[400] *Id.*

[401] RX2209.

[402] *Id.* at 001-002.

[403] CX0174 at 001.

[404] RX2123.

[405] Jeff Harmon delivered Schein's decision to Eberhardt in person, letting him know that although Schein had a long-standing relationship with the Dental Cooperative, the group's decision to add partnerships with companies like P&G and Komet and its desire to develop competitive relationships to HSD with Darby and others, indicated the parties were "going down two different paths."[406] Consequently, the evidence demonstrates that Schein independently re-evaluated its seven-year relationship with the Dental Cooperative, as the Dental Cooperative's model and value changed over time. Complaint Counsel identified no Schein communications with either Benco or Patterson about the Dental Cooperative, and not one single witness has testified that Schein's decision in 2014 was the result of an alleged agreement or even an internal policy to avoid buying groups.

Additionally, the timing of Schein's decisions do not support Complaint Counsel's theory. Schein worked with the Dental Cooperative for seven years, three of which extended into the alleged conspiracy period, and Schein negotiated a new arrangement with the expanding Cooperative in 2011 (*i.e.*, during the alleged conspiracy period). [407] Schein offered a compromise to preserve the relationship, and it was Mr. Eberhardt, on behalf of the Dental Cooperative, that rejected Schein. Schein's actions are hardly those of a conspirator against buying groups.

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[405] RX2437 at 002.

[406] CX0174 at 001.

[407] K. Titus Dep. 127:7-128:12 (CX8010).

xviii. Steadfast Medical.

Steadfast Medical is a group purchasing organization focused on oral surgeons that markets its ability "to deliver anything an oral surgery practice might need efficiently and LESS EXPENSIVELY."[408] Complaint Counsel admits that Steadfast Medical was a buying group and that Schein did business with Steadfast during the conspiracy period. Complaint Counsel argues that Schein terminated the group in 2014 because of the alleged agreement with Benco and Patterson.[409] The evidence directly undercuts the suggestion that Schein's 2014 decision was the result of any alleged agreement or any alleged instruction by Schein managers to stop discounting to buying groups. To the contrary, [redacted][410]

Schein first heard of Steadfast in 2008. At the time, Steadfast had seven customers, for which it built out new offices and procured their supplies in exchange for a consulting fee.[411] Schein was already selling supplies to a Steadfast office in Arkansas under a custom quote, but the group was interested in a broader relationship.[412] Randy Foley met with the group's co-founder, Jon Staples, in December 2008 and determined that though he saw "'short term' gain [he] also

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[408] RX2885.

[409] CC Second Amended Response to Schein's First Rog, 9/20/2018 at 4 (RX3087).

[410] K. Titus Dep. 71:23-72:24 (CX8010).

[411] RX3073.

[412] *Id.*

[saw] a 'long term' loss" [413] Notwithstanding these concerns, [414]

That relationship continued into 2014, when Ms. Titus discovered the group was redirecting business to competitors. In March 2014, Ms. Titus learned of some 15 oral surgeon accounts in Coppell, Texas without FSC's assigned to them.[415]

[417] In April 2014, Ms. Titus learned that "the redirected business is, in many cases costing the [Oral Surgeon] more in shipping fees and higher product cost."[418] Steadfast sought to "circumvent [Schein's] interaction with the client, and attempt[ed] to prevent [Schein] from selling directly."[419] [420]

In late April, Ms. Titus reached out to Jon Staples to learn more and "discover if there is [a] way to create a better collaboration that provides prosperity to all the stakeholders."[421] Despite

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[413] RX3074.

[414] R. Foley IH Dep. 91:2-4 (CX0306).

[415] CX0171 at 001.

[416] K. Titus Dep. 73:15-74:2- (CX8010).

[417] *Id.*.

[418] CX2207 at 001.

[419] CX2207 at 001.

[420] *See* K. Titus Dep. 74:10-15 (CX8010) (indicating "the customers could have gotten those same products form Henry Schein").

[421] RX2201at 003.

learning that Steadfast was "reallocating business to other suppliers," Ms. Titus attempted to salvage a business relationship with the group by finding "common ground."[422] As Ms. Titus clarified when she was evaluating the Steadfast group, Schein was "not against having GPO partnerships. Quite the contrary, we have a number of them in which all parties are in a position to win."[423]

[425] It was clear that Steadfast had been redirecting Schein's existing business elsewhere. For that reason, and to stop harming Schein's sales, Ms. Titus recommended that Schein end the relationship.[426] On June 10, 2014, Ms. Titus emailed Jon Staples to say that Schein would no longer "support the fulfillment of Steadfast Medical orders," and noted that if Steadfast wanted to pursue an exclusive relationship, Schein "would welcome revisiting a mutually beneficial relationship."[427]

Schein made a rational, independent decision. Rather than offer discounts only to have Steadfast redirect customers to other distributors, Schein ended the relationship. Complaint Counsel identified no evidence that Schein communicated with Benco or Patterson about Steadfast. And Complaint Counsel has no evidence that rebuts the overwhelming volume of

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[422] RX2201 at 001 – 002.

[423] *Id.* at 002.

[424] K. Titus Dep. 75:11-20 (CX8010).

[425] RX2202 at 001; K. Titus Dep. 71:23-72:4 (CX8010).

[426] RX2202 at 001.

[427] RX2207 at 003-004.

documents and testimony establishing that Schein's decision to end the Steadfast relationship was independently-made and economically rational, unrelated to any alleged conspiracy or internal instruction not to do business with buying groups.

xix. New Mexico Dental Cooperative.

The New Mexico Dental Cooperative began as an independent group of Dentists who eventually affiliated with the Utah-based Dental Cooperative. In February 2013, the group's leaders Jason Chapman, Frank Montoya, and Brenton Mason sent a blast email to a group of manufacturers and Patterson representatives, announcing that they were starting a dental cooperative.[428] The group announced they had "partnered with Patterson Dental to provide individual offices the same opportunities as the larger corporations," and invited manufacturers to a meeting at the Patterson Dental branch in Albuquerque, New Mexico.[429] On February 4, 2013, one of the manufacturer representatives on that email forwarded it to Brandon Bergman, the Schein Regional Manager for the area covering New Mexico.[430] On February 6, 2013, Mr. Bergman forwarded the chain to Stewart Hanley at Benco, and requested a call.[431]

Complaint Counsel has identified no evidence that call ever occurred. And Complaint Counsel did not depose either Mr. Hanley or Mr. Bergman, and actually withdrew Mr. Bergman's deposition notice. In short, Complaint Counsel has not shown that Schein coordinated its response to this group with either Benco or Patterson.

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[428] RX2235.

[429] *Id.* at 003.

[430] *Id.*

[431] CX1344 at 003.

By the time Mr. Mason approached Schein, the planned Cooperative had already stalled. On the day Mr. Mason meet with Patterson representatives, February 11, Mr. Mason emailed his partners and the Patterson representatives, explaining exactly the difficulties his group presented:

> "Why do we need doctors to change distributors from Schein/Benco to Patterson? What is the benefit to the offices whom want to participate that make the change from where they are already working? Why would we not want to make a bulk purchase with the manufacturers and each account get billed with whatever company the office chooses to work with for distribution? The manufacturer will send the free goods to the respected offices. Sure the distribution reps are not going to get all the commission, but they will not get all of the commission for the way we thought is [sic] was going to work with Patterson. Sure one distributor is not going to make all of the fee, but some is better than nothing. Basically the distributors have the same clients that had prior to the Co-op concept. At this point, I do not see any benefit converting offices to Patterson Dental. I don't have anything to offer these offices!"[432]

Mr. Mason expressed precisely the characteristics a rational distributor would seek to avoid. Nonetheless, Complaint Counsel cites Benco and Patterson documents as evidence of a conspiracy to boycott Mr. Mason's planned cooperative. Complaint Counsel argues Patterson rejected Mr. Mason's flawed concept on February 11.[433] But Complaint Counsel has not explained how Schein was allegedly involved.

Mr. Mason did not approach Schein until February 20, 2013. According to Mr. Mason, [redacted][434] Yet, Complaint Counsel identified no communications indicating Schein coordinated its response with Benco or Patterson. Mr. Masons' initial group concept included significant red flags. As presented to Patterson, his group wanted discounts but did not expect any doctors to change their buying loyalties.[435]

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[432] CX3334.

[433] CC Pretrial Br. at 22-23.

[434] B. Mason Dep. 58-59 (CX8035).

[435] CX3334.

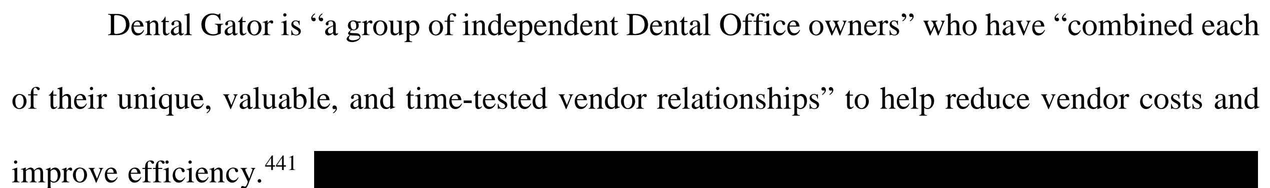
In July 2013, Mr. Mason connected with the Utah-based Dental Cooperative, a long-time Schein customer.[436] And the Cooperative's Andrew Eberhardt emailed Schein in November 2013 to announce the Cooperative was "up and running in New Mexico beginning November 1st."[437]

Dean Kyle (Zone General Manager) spoke with Mr. Eberhardt in late 2013 and argued that the Dental Cooperative was competing with Schein.[438] In Mr. Kyle's opinion, the Cooperative's offering included "several components that were in direct conflict of exclusive relationships Schein has in place."[439] Schein had "much to lose and nothing to gain" from the relationship.[440] Nevertheless, Schein continued its relationship with the Utah-based group. As noted above, the multi-state Dental Cooperative relationship eventually floundered after Schein learned the Cooperative had partnered with P&G to market products in direct competition with Schein's offerings.

Complaint Counsel identified no communications between Schein and Benco or Patterson about this decision, nor has Complaint Counsel explained how Schein's conduct is not an economically rational, independent decision.

xx. Dental Gator.

Dental Gator is "a group of independent Dental Office owners" who have "combined each of their unique, valuable, and time-tested vendor relationships" to help reduce vendor costs and improve efficiency.[441]



[436] RX2462 at 001.

[437] RX2464.

[438] CX0271.

[439] *Id.*

[440] CX0271 at 001.

[441] http://dentalgator.com/our-story/ (RX2838).

[REDACTED][442]

Complaint Counsel does not dispute that Schein offered discounts to Dental Gator members during the alleged conspiracy. Rather, Complaint Counsel asserts Schein "tried to shut down… Dental Gator."[443] This reading mistakes a contract dispute for a boycott.

Schein signed a contract with MB2 on March 20, 2014 and that contract provided "[d]ental practices which are not owned in whole or in part by MB2, must have a formal affiliate agreement in place with MB2."[444] Schein FSCs complained when Dental Gator solicited independent Schein accounts with MB2 pricing.[445] When Schein learned Dental Gator's offices did not meet the contracted-for criteria, Schein informed MB2.[446] Rather than end the relationship, Schein negotiated a new pricing arrangement specifically for Dental Gator offices.[447]

Complaint Counsel identifies no communications between Schein and Benco or Patterson about Dental Gator. Complaint Counsel does not explain how Schein's decisions to enforce its contractual rights and offer discounts to Dental Gator constitute a boycott. And Complaint Counsel does not explain how Dental Gator differs from the DSO-affiliated buying groups Complaint Counsel claims are not buying groups.

### 2. Schein's Decisions Were Not an Abrupt Shift in Policy.

Complaint Counsel's theory is that Schein "shift[ed]," "changed," and "abruptly altered" its approach of working with buying groups at some time between January and December 2011,

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[442] J. Puckett Dep. 41:12-24 (CX8006).

[443] CC Second Amended Response to Schein's First Rog at 4 (RX3087).

[444] CX2725 at 003.

[445] CX2143.

[446] CX2425; CX2431.

[447] RX2303.

and that this demonstrates Schein entering into the alleged conspiracy with Benco.[448] Complaint Counsel's inability to narrow to less than an 11-month period when Schein agreed to a common scheme demonstrates how unreasonable the inference of conspiracy is. Complaint Counsel's support consists almost entirely of internal Schein documents (or communications between Schein and buying group representatives) expressing concerns and skepticism regarding the typical buying groups' inability to drive incremental sales and compliance among members. Complaint Counsel contends that these comments constitute a "change" in Schein's policy, and they constitute a majority of the circumstantial evidence on which Complaint Counsel relies to assert that Schein entered into an agreement with Benco in 2011 to boycott buying groups.

Tellingly, Complaint Counsel ignores and cannot explain the mountain of evidence that, prior to 2011 (and throughout 2011), Schein had been consistently expressing those same concerns and views about buying groups.[449]

Schein's approach to buying groups was consistent before and during the alleged conspiracy period. It was approached by many, evaluated each of them, case-by-case, and

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[448] CC Pretrial Br. at 12 ("Schein abruptly altered its prior pro-buying group position to match Benco's no-buying group policy"); *Id.* at 18 ("By December 2011, Schein's practice of working with buying groups had changed."); *Id.* at 48 ("This drastic change in conduct…").

[449] *See* RX2405 at 001 (4/2/2002 email from Hal Muller: "this type of GPO would kill the margins for both manufacturers and distributors… there would be no increased volume and just lower costs…. In my opinion we need to stop this effort."); CX2153 at 002 (5/24/2010 email from Randy Foley: "the fact that we need to let these groups know when they call us; that they need to either have at least a 35% ownership, or have complete control of purchasing policy that would force the distributor purchases to Schein."); CX2111 at 001 (9/9/2010 email from Hal Muller: "We also determined at the beginning of the year (Dave, Tim, Randy, and myself) that we would entertain organizations that could force compliance."); *Id.* at 009 (8/31/2010 email from Hal Muller: "It would be very important to identify Smile Source has changed to JUST A BUYING GROUP-and if they are you can tell the doctor you wouldn't recommend it as we might be changing our position [as a support of Smile Source]."); CX2113 (9/15/2010 email from Tim Sullivan: "neither of us support concept of buying groups…. The risk to overall HSI…for margin erosion"); CX 2451 at 001 (March 11, 2010 email from Tim Sullivan: "You know the drill … not interested in GPOs. The risk is much greater if we do sign th[a]n if we don't."); CX2503 at 001 (Feb. 2010 email from Hal Muller: "I do not believe in selling to Buying Groups – and we have closed some down already …").

ultimately did business with some. As the company learned more about these groups, it became more selective because it learned that many groups either did not survive or could not deliver incremental sales volume or compliance by its members.

Evidence establishes that pre-2011 Schein had concerns and skepticism toward buying groups that paralleled the comments that Complaint Counsel relies on to argue that Schein joined a conspiracy in 2011, and significantly undermines the reasonableness of the inference that Complaint Counsel seeks to draw from such evidence. Therefore, Schein will prove that it evaluated buying groups during the alleged conspiracy period using the same criteria that it used before 2011, and that Complaint Counsel's "abrupt shift" policy is unsupported.

#### 3. Schein's Post-2015 Sales to Buying Groups Further Undermine the Reasonableness of any Interference of an Alleged Agreement

Complaint Counsel concedes that Schein did business with buying groups after some unidentified time in 2015.[450] Schein continued to renew and extend existing buying group relationships after 2015, and continued to evaluate, case-by-case, new buying group opportunities.[451] Further, the evidence demonstrates that Schein's post-2015 evaluation and decision-making processes about new buying groups mirrored those for similar opportunities in 2011-2015. Schein considered the same factors, and expressed internally the same potential benefits and concerns, as applicable, to each new opportunity. And, because Complaint Counsel

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[450] CC Second Amended Response to Schein's First Rog at 004 (RX3087). There is no factual support for Complaint Counsel's theory that Schein participated in the alleged conspiracy, nor that there was any coordinated or conspiratorial conduct that ended in 2015. This further undermines the reasonableness of an inference that Schein's decisions as to buying groups between 2011 and 2015 were the result of a conspiracy before 2015.

[451] RX2656; RX2276; CX2701; RX2347; RX2348; CX6598; RX2668; RX2638; RX0489.

does not challenge the post-2015 process or decisions, Complaint Counsel's requested inferences from Schein's 2011-2015 decisions are, by extension, unreasonable.

In Spring 2016, after recognizing the increasing prevalence of buying groups as an established customer segment, Schein strategically decided to formalize its processes for evaluating potential buying group opportunities. It developed and implemented another restructuring of its sales model to target these opportunities more effectively, and to provide clear requirements and guidance to FSCs and others about how to evaluate and process buying group opportunities. The new group within HSD was named Alternative Purchasing Channel (APC), and it further shows Schein's continued efforts to be on the forefront of adapting to industry developments and make independent decisions regarding buying groups.

APC's goal was to "be highly selective on which APCs [it] partner[s] with."[452] It formalized the process for evaluating and conducting due diligence on a group to ensure that it could drive incremental sales volume to Schein through various arrangements with which Schein had now become well-educated because of its long doing business with these groups.

The Court should reject Complaint Counsel's request that this Court infer that Schein's 2016 launch of its Alternative Purchasing Channel initiative shows that Schein had been conspiring to refuse to do business with buying groups from 2011 to 2015. The evidence directly contradicts that inference. After monitoring industry developments with regards to buying groups, Schein launched APC to foster the development of its buying group relationships, but nevertheless continued to be selective about the buying groups with which it would do business. The documents show that APC further refined and formalized the evaluation process and factors that Schein had been using to evaluate and vet buying group business opportunities all along, including during the

[452] RX2641 at 003.

alleged conspiracy. Most importantly, the structure of the APC group provided Schein with dedicated resources to develop buying group relationships with groups that controlled their members' purchasing or could otherwise deliver or divert volume away from other distributors.

### E. Parallel Conduct and Plus Factors Are Insufficiently Established by the Evidence.

Here, Complaint Counsel has not established parallel conduct as to the buying groups that it alleges Schein boycotted, or even as to buying groups generally. And Complaint Counsel has failed to present sufficient evidence of plus factors to support the alleged existence of a conspiracy.

#### 1. No Parallel Conduct Established.

Complaint Counsel has not established parallel conduct here, because Schein's conduct as to specific buying groups and buying groups generally has differed so materially from that of Benco and Patterson. *See Anderson News, L.L.C. v. Am. Media, Inc.*, 899 F.3d 87, 105 (2d Cir. 2018) (no parallel conduct where defendants ceased doing business with the plaintiff within three business days of each other but where responses were not uniform and plaintiff was responsible for the tight timeframe of responses); *Jacob Blinder & Sons, Inc. v. Gerber Prods. Co.* (*In re Baby Food Antitrust Litig.*), 166 F.3d 112, 128 (3d Cir. 1999) (noting that conscious parallelism "will not be inferred merely because the evidence tends to show that a defendant may have followed a competitor's price increase," and finding no parallel conduct where there were "many instances" of defendants' prices not moving in alignment); *Hogan v. Pilgrim's Pride Corp.*, 2018 U.S. Dist. LEXIS 41909, at *22 (D. Colo. Mar. 14, 2018) (actions to cut production were not parallel where those actions were taken to different degrees and had disparate effects). Ultimately, Complaint Counsel has not established that Schein's conduct was in any way parallel to that of Benco's or Patterson's, other than showing that all three companies internally expressed similar concerns about the buying group model. In its pretrial brief, Complaint Counsel does not claim to have any

evidence of a single buying group that was contemporaneously considered and rejected by all three Respondents.

Simply showing that Schein internally expressed similar concerns as those internally expressed by Benco and Patterson about certain buying group partnerships not being in their respective economic self-interest is insufficient to support an inference of a conspiracy. Rather, it confirms that the business proposition being offered by these buying groups was unappealing. And, even if all the groups discussed above were unable to secure a partnership with Benco and Patterson, such supposedly parallel conduct would also be insufficient to establish a conspiracy.

Moreover, Complaint Counsel's characterization as "cheating" of every example of Schein's behavior toward buying groups that does not align with its alleged conspiracy is an unreasonable inference, unsupported by the facts. Schein's consistent willingness to meet with, internally evaluate, launch, and renew business relationships with buying groups from 2011-2015 is independent, non-parallel conduct, Complaint Counsel's suggestion these decisions were merely cheating acknowledges that the conduct is not parallel. Crucially, the evidence does not support a finding of cheating because Complaint Counsel cannot first establish that Schein conspired, an impossibility here because the supposed cheating examples are each consistent with Schein's approach toward other buying groups before, during, and after the conspiracy. Additionally, Complaint Counsel's theory that Schein was cheating is inconsistent with the fact that Schein openly did business with at least as many buying groups as it is alleged to have boycotted as a result of the conspiracy.

Unlike the cases cited by Complaint Counsel, here it would be in Schein's economic self-interest to select which distribution channels it uses because, even if Patterson and Benco were to do business with all buying groups, Schein's FSC-based business model is characterized by pricing

flexibility and aggressive discounting, and FSCs in the field would continue to compete for the business of independent dentists. Because most buying groups do not require their members to commit any volume or loyalty to the preferred vendor and because the buying groups don't offer any of the cost-efficiencies of a DSO, Schein's FSCs would still compete effectively by reducing the margins on sales in the same way they would have to if they sold through the buying groups.

Complaint Counsel's theory of parallel conduct fails for the additional reason that Complaint Counsel cannot (and does not attempt to) explain that Darby Dental did business with buying groups throughout the alleged conspiracy period. Darby is an online distributor of dental products, of which Schein owns a significant percentage**.** If Schein entered into an agreement to boycott new buying groups between 2011 and 2015 in an effort to "kill the buying group model," as Complaint Counsel claims, Schein would rationally be expected to have attempted to leverage its ownership in Darby to pressure Darby not to do business with buying groups.[453] No such evidence exists. To the contrary, it is undisputed that Darby did business with buying groups between 2011 and 2015. And, it was also widely known at Schein (and throughout the industry) that Darby was pursuing and winning buying group business.[454] In fact, the evidence shows that

[455] Regardless of whether Complaint Counsel conjures some theory for excluding this inconvenient fact from the scope of its alleged conspiracy, Darby's buying group business seriously undercuts the suggestion that Schein was acting in concert with (or parallel to) Benco and Patterson.

[453] *See* M. Mlotek IH Dep. 94-95 (CX0308) (noting that Schein has owned a significant percentage of Darby since about 1995).

[454] RX2466; CX2145.

[455] RX3084; RX3081; RX3078; RX3079; RX3085; RX3082; RX3083.

### 2. Plus Factors Not Established.

Complaint Counsel's pretrial brief alleges four plus factors to "corroborate" Complaint Counsel's theory that "Respondents agreed not to discount to or compete for buying group customers".[456] Those supposed plus factors are: common motive to conspire, competitor communications, actions against self-interest, and changes in conduct. For the reasons presented in this section and others, Complaint Counsel has failed to establish with sufficient evidence any plus factor.[457]

Therefore, Complaint Counsel's theory on supposed parallel conduct fails because it cannot prove these plus factors and it cannot be afforded the requested inference that any parallel conduct or inter-Respondent communication resulted from a conspiracy.[458] *See Anderson News, L.L.C. v. Am. Media, Inc.*, 899 F.3d 87, 112 (2d Cir. 2018) (insufficient plus factors where defendants showed "plausible and justifiable" reasons for their conduct, defendants' actions were economically sensible on a long-term basis, and increased competitor communications during the relevant time period were nonetheless consistent with permissible activities); *In re Citric Acid Litig.*, 191 F.3d 1090, 1103-04 (9th Cir. 1999) (no reasonable inference of conspiracy where possession of competitor price lists could have come about legitimately and where one defendant's decision not to compete with certain companies could be explained by that defendant's consistent inability to prevail against those companies); *White v. R.M. Packer Co.*, 635 F.3d 571, 581 (1st Cir. 2011) (denying an antitrust claim where six of plaintiffs' nine plus factors demonstrated only

[456] CC Pretrial Br. at 41.

[457] Complaint Counsel's claim that Schein changed its conduct is addressed, I, Section III (D)(2).

[458] There is also no legal precedent or factual support for Complaint Counsel's binary position of absolutes that any parallel conduct by Schein between 2011 and 2015 from the alleged conspiracy, but any non-parallel conduct by Schein during that same time period is "cheating."

that the market was conducive to conscious parallelism, and where other factors did not sufficiently advance the likelihood of express or tacit agreement); *Valspar Corp. v. E. I. du Pont de Nemours & Co.*, 873 F.3d 185, 202 (3d Cir. 2017) (upholding summary judgment for defendants where data exchanged by competitors merely allowed them to calculate their own market share, and internal emails discussing anticompetitive pricing only established that defendants were "aware of the phenomenon of conscious parallelism and implemented pricing strategies in response to it").

(i) Six Unsolicited, One-Sided Exchanges of Information Regarding Buying Groups Does Not Support A Conspiratorial Inference.

As explained in various sections above, the handful of communications between Schein and Benco or Patterson regarding supposed buying groups do not support an inference that Schein had an agreement with Benco regarding buying groups. They are ambiguous, unsolicited by Schein, and temporally or factually disconnected from any decision by Schein and do not align with Complaint Counsel's theory of a 2011 agreement. And the internal emails on which Complaint Counsel relies are also not suggestive of inter-competitor communications or coordination. These communications are therefore insufficient to establish a plus factor in favor of an inference that they were pursuant to the alleged conspiracy. *See Valspar Corp. v. E.I. Du Pont De Nemours & Co.*, 873 F.3d 185, 200 (3d Cir. 2017) (emails from various competitors about not undercutting prices, not competing for a certain customer and being disciplined on price were "only superficially" helpful to plaintiff and did not show that competitors had taken part in illegal activity); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 484 (1st Cir. 1988) (individual pricing decisions do not constitute an unlawful agreement "even when each firm rests its own decision upon its belief that competitors will do the same"); *Weit v. Cont'l Ill. Nat'l Bank & Tr. Co.*, 641 F.2d 457, 465 (7th Cir. 1981) (citing to defendant banks' internal memoranda

expressing their concerns that another bank would start its own credit card system, but finding that such were legitimate business concerns that were not conspiratorial).

(ii) Not Doing Business With Certain Buying Groups Was in Schein's Economic Self-Interest.

Complaint Counsel admits that "buying groups typically do not force members to purchase from their supplier partners," but would instead "seek" to "incentivize" dentists to buy from Schein.[459] Contrary to these assertions, such an arrangement would not enable Schein to "win market share and increase profits" or to "increase [its] sales and profitability."[460] Quite the opposite—by doing business with a buying group, Schein would be foregoing its long-time, successful sales model in favor of an often unproven framework that did not always provide sufficient assurances of incremental sales to customers. It is thus wholly reasonable that Schein would choose to maintain the status quo. *See In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 349 (3d Cir. 2010) (where defendants were reaping large profits from their current business practices, it was natural for them to have "no desire to upset the apple cart"); *InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 165 (3d Cir. 2003) ("There are many reasons that a broker-dealer might independently choose not to partner with a fledgling start-up whose technology and business model remained unproven."); *In re Interest Rate Swaps Antitrust Litig.*, 261 F. Supp. 3d 430, 464 (S.D.N.Y. 2017) (defendants had "good reason" to discourage "development of a new trading paradigm that threatened, some day, to cannibalize their trading profits."). Where there is such an "obvious alternative explanation" for common behavior, allegations of wrongdoing cannot succeed. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 567 (2007).

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[459] Opp. to SD at 3; *see also* Compl. ¶3 (defining "Buying Groups").

[460] *Id.*

A critical distinction between the instant case and the cases relied on by Complaint Counsel is that Schein's decisions made independent economic sense. Findings of a conspiracy in other cases typically hinge on a finding that each company's decision would have been "economically self-defeating" unless the other conspirators did the same. That is not the case here, as the economic and factual evidence show.

Dr. Carlton will testify that [461] The factual record establishes that there were many factors influencing Schein's decisions about whether it would be profitable to discount to a buying group. One particularly important factor for Schein was [462] Schein's full-service offering, value-add services, aggressive discounting, and highly-trained FSCs allow Schein to compete effectively and profitably without having to extend ***additional*** discounts to customers who join a buying group. It would therefore make economic sense for Schein to not discount to a buying group that has not demonstrated it is capable of delivering "a sufficient increase in volume in exchange for [that additional] discount.

[461] Carlton Rpt. at ¶¶40-42 (RX2832).

[462] *Id.*

Schein's early experience with dental buying groups made it even less economically appealing for Schein routinely to deviate from its high-touch core business model of marketing, selling, and discounting directly to dentists. When buying groups started appearing in the mid-to-late 2000s, the first buying group models simply offered to serve as middle-men that sought additional discounts beyond those already offered by Schein's FSCs, with no additional volume commitments to Schein and no additional value to the dentists. These groups sometimes even demanded an administrative fee from Schein, despite their failure to provide any value. As the years passed, more sophisticated and value-oriented buying group business models appeared, and Schein continued to consider and evaluate them on a case-by-case basis.

For all the reasons detailed above, it did not *ex ante* appear to Schein to be a profitable opportunity to enter into many of the business arrangements proposed by buying groups, and nothing in the flawed economic analysis of Complaint Counsel's expert can reasonably suggest otherwise. For example, Dr. Marshall's profitability analysis suffers from serious flaws, including that it is disconnected from the facts and evidence. For example, Dr. Marshall's assertion that the opportunity to partner with Kois in October 2014 would have been profitable to Schein is an ex-post analysis. Dr. Marshall did not analyze the proposal that Schein "took a pass on" in late October 2014, which differed significantly from the arrangement that Kois ultimately entered with Burkhart. Dr. Marshall also did not consider the fact that

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[463] J. Kois Sr. Dep. 77-78, 139, 160 (CX8007).

[465]

Consequently, his conclusion that it would have been profitable for Schein to enter into the Oct. 2014 proposed agreement with Kois is unreliable and incorrect. And even if he could establish that it may have been profitable for Schein to enter into an agreement with Kois, it is unreasonable to then extrapolate that and conclude that every proposed arrangement from every buying group ever received would have been in Schein's economic interest. Moreover, even if Dr. Marshall opines that Schein should have viewed the partnership as profitable, an economist's testimony four years later about a different deal with a different distributor, using the wrong formula, cannot substitute for what Schein believed at the time.[466] And the documents and testimony confirm that Schein's assessment of the deal presented by Kois (*i.e.*, "give us the supply deal now and we'll figure out the rest later") was that it had not been demonstrated to be profitable because it was insufficiently supported by realistic estimates and had not been adequately investigated or tested.[467]

(iii) <u>Complaint Counsel's Alleged Common Motive is Unreasonable and Unsupported.</u>

The evidence and public judicial findings undermine Complaint Counsel's request that this Court find that Respondents were commonly motivated to join the conspiracy and change their

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[464] *Id.* at 160:23-24 ; *see also id.* at 76-77.

[465] *Id.* at 78:18-21 (CX8007).

[466] *See* Carlton Rpt. at 42-46 (RX2832).

[467] CX2714; *see also supra*, Section III (D).

conduct because they "understood that buying groups could slash margins – as occurred in the medical supply distribution market when GPOs arrived."[468] First, as explained above in fn. 492, medical GPOs and dental buying groups are vastly different, structurally and economically.[469] In medical: "GPOs are organizations that negotiate standardized contracts with manufacturers and suppliers of medical devices on behalf of their members. GPOs pool the purchasing power of their members and leverage that power to negotiate lower prices. GPOs do not purchase any products, nor do they sign or otherwise enter into the contracts that they negotiate on behalf of their members. Instead, GPOs negotiate standard form, or model, contracts that the members themselves sign and enter into with manufacturers."[470] These entities more closely resemble DSOs, which Schein has been doing significant and continued business with since well before the alleged conspiracy began.

Complaint Counsel's theory depends on the unsupported and unreasonable inference that all Respondents believed that the small group of "separately owned and separately managed" practices within Complaint Counsel's definition could lead a regulatory and structural overhaul of the dental industry that would have them purchasing directly from manufacturers and cutting out full-service distributors. Complaint Counsel has not introduced any such evidence. Additionally, a critical distinction between medical GPOs and Complaint Counsel's buying groups is that they

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[468] Complaint Counsel Pretrial Br. at 6, 42.

[469] *See generally* Breslawski Decl. May 8, 2017 (RX2933)., *In re Dental Supplies Antitrust Litig.*, 16-cv-696, ECF 188-5 (describing in detail why a comparison of medical and dental supply distribution channels "would likely result in misleading comparisons"); *see also* Order 6/10/2017, *In re Dental Supplies Antitrust Litig.*, 16-cv-696, ECF 203 ("[U]nlike the dental market, the medical market includes large networks of hospitals, surgery centers, outpatient clinics, and physicians, and because health systems purchase in greater volume with centralized purchasing operations, Schein's per-unit medical costs are lower than their per-unit dental costs.").

[470] *Natchitoches Par. Hosp. Serv. Dist. v. Tyco Int'l, Ltd.*, 247 F.R.D. 253, 256 (D. Mass. 2008); *see also FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 42 (D.D.C. 1998) ("While the GPOs do not purchase pharmaceuticals themselves or provide pharmaceutical distribution services, they use the aggregated purchasing power of their individual members to negotiate favorable contracts with manufacturers and wholesalers on behalf of their members.").

merely "seek to leverage" purchasing power, but in most cases do not *actually* leverage *any* power to drive incremental sales volume or ensure its members comply with volume commitments from Schein. *See Precision Dynamics Corp. v. Typenex Med., L.L.C.*, 2014 U.S. Dist. LEXIS 142450, at *5 (E.D. Wis. Aug. 25, 2014) (emphasis added) ("A GPO is an entity ***that leverages*** the purchasing power of a group of businesses to obtain discounts from venders based on collective bargaining power."); *In re Pool Prods. Distrib. Mkt. Antitrust Litig.*, 158 F. Supp. 3d 544, 553 (E.D. La. 2016) (noting that buying groups used their "collective volume of purchases as leverage to negotiate" discounts from manufacturers); *In re Brand Name Prescription Drugs Antitrust Litig.*, 1999 U.S. Dist. LEXIS 550, at *14-15 (N.D. Ill. Jan. 19, 1999) ("[T]o qualify for a contract pricing discount on a particular brand name drug, members of the New Jersey Hospital Association Group Purchasing Program were required to provide Manufacturers a committed volume of drugs for the contract period."). In fact, Complaint Counsel concedes that "buying groups typically do not force members to purchase from their supplier partners," and therefore cannot typically drive incremental volume.[471] Instead, Complaint Counsel argues that buying group members "are incentivized to buy from a buying group's supplier partners to take advantage of lower prices," and that this ***incentive*** for ***potential*** purchases makes it profitable for Schein to enter into an agreement with every buying groups. This theory ignores the countervailing incentives of each dentist having their own product preferences, driven by their practice specialties and modalities, and their own established distributor relationships.

For these reasons, Complaint Counsel has not established sufficient evidence of its alleged common motive across Respondents, and therefore has not established this plus factor.

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[471] *See* CC Opp. to Respondent Patterson Companies, Inc.'s Motion for Summary Decision, at 3 (Oct. 2, 2018).

### F. Complaint Counsel Has Not Met Its Heightened Burden of Proving the Alleged Conspiracy Where Every Witness Denied the Alleged Conspiracy's Existence.

Every witness deposed by Complaint Counsel has under oath denied the existence of the alleged conspiracy, and as described above, Complaint Counsel has failed to present sufficient probative evidence to suggest otherwise. Consequently, Complaint Counsel's claims fail as a matter of law, because it has failed to meet the higher burden that results when no witness to the alleged agreement and no direct evidence of the agreement exists.

Each and every one of Schein's witnesses denied under oath that Schein had entered into any agreement or understanding with Benco or with Patterson not to do business with, or offer discounts to, buying groups.[472] Benco and Patterson witnesses also denied having entered into an agreement of any kind with Schein regarding buying groups.[473] In total, the evidence establishes dozens of sworn denials that anyone at Schein discussed or agreed upon any strategy, policy, or decision as to buying groups with anyone at Benco or Patterson. Complaint Counsel conducted 21 investigative hearings and took 45 depositions—hundreds of hours of testimony—yet it has uncovered not a single admission of, or reference to, any boycott agreement involving Schein.

"Facing the sworn denial of the existence of conspiracy, it [is] up to plaintiff to produce significant probative evidence by affidavit or deposition that conspiracy existed…" *City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 130 (D.D.C. 2006). Indeed, courts repeatedly have held that the proponent of a conspiracy claim faces an increased evidentiary

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[472] M. Porro Dep. 287:13-25, 288:2-5, 288:23-289:12, 290:5-12 (CX8000); J. Cavaretta Dep. 255:10-17, 256:2-8, 256:9-15 (CX8033) ; R. Foley Dep. 381:23-383:11, 408:16-409:2 (CX8003); T. Sullivan Dep. 467:23-468:5, 528:17-529:14 (RX2941); K. Titus Dep. 180:10-21, 248:25-249:18 (CX8010); M. Mlotek Dep. 184:5-16 (CX0308); H. Muller Dep. 223:3-16 (CX8005); D. Steck Dep. 145:23-146:15 (CX8031); D. Wingard Dep. 248:25-249:7 (CX8009); B. Brady Dep. 318:3-319:2 (CX8020); A. Hight Dep. 192:15-193:6 (CX8022); J. Breslawski Dep. 242:13-18, 247:18-248:7 (CX8012); D. Foster Dep. 163:18-165:11, 165:25-166:20 (CX8001); J. Meadows Dep. 268:2-269:5 (CX8016).

[473] *See generally* Patterson Motion for Summary Decision at 14; Patterson Pretrial Br.; Benco Pretrial Br.

burden where, despite there being no witness testimony of such an agreement's existence, the party seeks from the Court a factual finding that the agreement existed. *City of Moundridge v. Exxon Mobil Corp.*, 409 Fed. Appx. 362, 364 (D.C. Cir. 2011) (affirming summary judgment in favor of defendants, holding that the plaintiffs' "few scattered communications" and other evidence "falls far short" of creating a genuine issue of material fact); *see also Baby Foods*, 166 F. 3d at 118-121 (SJ in favor of defendants because plaintiffs failed to present significant evidence of a conspiracy sufficient to overcome defendants' sworn denials); *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287 (11th Cir. 2003) (SJ for defendants where evidence insufficient to overcome sworn denials); *Blomkest Fertilizer, Inc. v. Potash*, 203 F. 3d 1028 (8th Cir. 2000) (SJ despite "a high level of inter-firm communications," because evidence insufficient to overcome defendants' denials); *Weit v. Continental Illinois Nat'l Bank & Trust Co.*, 641 F.2d 457, 462 (7th Cir. 1981) (when defendant puts forward denials of conspiracy, "plaintiffs must come forward with some significant probative evidence which suggests that conscious parallelism is the result of an unlawful agreement"), *cert. denied*, 455 U.S. 988 (1982); *Lamb's Patio Theatre, Inc. v. Universal Film Exchanges, Inc.*, 582 F.2d 1068, 1070 (7th Cir. 1978) ("Facing the sworn denial of the existence of conspiracy, it [is] up to plaintiff to produce significant probative evidence by affidavit or deposition that conspiracy existed if summary judgment [is] to be avoided."); *Kleen Products LLC v. Int'l Paper*, 276 F. Supp. 3d 811, 839 (N.D. Ill. 2017) (SJ in favor of defendants when plaintiffs could not point to evidence sufficient to overcome the fact that all persons deposed "uniformly denie[d] discussion of any agreement or understanding" (internal quotations omitted)); *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 878–79 (7th Cir. 2015) (holding that there was no agreement to conspire when there were no witnesses to an agreement).

Complaint Counsel has not met its burden for Schein. At most, the evidence establishes a few communications about buying groups, but none that reference an agreement or could support a reasonable inference that such an agreement existed. As to each buying group that was the subject of such a communication (i.e., ADC, Unified Smiles, Universal Dental Alliance), the evidence detailed above establishes that Schein's decision about that entity was made independently.

**G. Complaint Counsel's Continually Evolving and Contrived Theory Further Undermines the Plausibility and Reasonableness of the Requested Inferences.**

As described above, Complaint Counsel's theory of liability as to Schein has been a moving target, repeatedly pivoting in response to inconvenient facts. Such continued modification of its liability theory significantly undermines its plausibility, and makes the inferences required to establish the alleged conspiracy even more unreasonable. *See, e.g., In re Nw. Airlines Corp. Antitrust Litig.*, 208 F.R.D. 174, 196 (E.D. Mich. 2002) (Plaintiffs' "evolving theory" was implausible where it changed to account for the fact that defendants enacted the policies at issue over different time periods and did not uniformly enforce such policies); *Tronox Inc. v. Anadarko Petro. Corp.* (*In re Tronox Inc.*), 549 B.R. 21, 46 (S.D.N.Y. 2016) (dismissing all the plaintiffs' various claims where their position as to their claims was a "moving target" and where plaintiffs had "revised their theories at each opportunity"). Each time Complaint Counsel's theory encountered unfortunate facts regarding Schein's long-standing and well-established history of doing business with buying groups, Complaint Counsel attempted to narrow the alleged conspiracy or exclude a buying group from its artificially-defined scope.

While Complaint Counsel investigated an alleged conspiracy in which Schein conspired to not do business with any buying groups from at least 2009 through 2017, Complaint Counsel's theory now appears to be that Schein entered into a conspiracy to (i) not do business with "new"

buying groups (*i.e.*, excluding "legacy" agreements), (ii) or, where a bid was submitted, to not "seriously pursue[] or "make a meaningful effort to gain" the group's business (*e.g.*, Smile Source), (iii) from about December 2011 to "at least" April 2015, (iv) unless: (A) Mr. Sullivan did not know about the group (*e.g.*, Klear Impakt), (B) the group was affiliated with a DSO customer of Schein's (*e.g.*, Dental Gator), or (v) the group provided rebates rather than discounts (*e.g.*, Advantage).[474] Complaint Counsel has also crafted contrived definitions relating to the types of groups that qualify as "Buying Groups," thereby modifying its original theory to avoid inconvenient facts about buying groups Schein did business with. Such artificial definitions are unsupported by the contemporaneous evidence or the testimony. And it is clear that by narrowing the scope of the conspiracy in various ways, Complaint Counsel attempts to exclude this Court's consideration of the "inconvenient fact" that Schein did business with numerous buying groups that it is supposed to have boycotted pursuant to an agreement. *See Viamedia, Inc. v. Comcast Corp.*, 2018 U.S. Dist. LEXIS 138661, at *40-42 (N.D. Ill. Aug. 16, 2018) (granting defendant summary judgment in a tying case where plaintiffs could not explain away the "inconvenient fact" that the defendant executed multiple sale agreements of the tying product without the tied product).

There is not a single document in the record containing a communication between Schein and another Respondent about what constitutes a buying group. Instead, there is a significant volume of evidence showing that, in practice, Schein considered a much broader set of organizations to be buying groups and that it did business with many of them. Schein will introduce significant evidence showing that it did business with entities it considered to be buying groups (and that considered themselves to be buying groups), but that Complaint Counsel refuses to recognize. Among these groups are more sophisticated, mid-size group purchasers as well as

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[474] Complaint Counsel's Amended Response to Schein's First Requests for Admission at 4 (RX2959).

CHCs. Complaint Counsel makes the self-serving argument that these groups do not meet its arbitrary definition of a "Buying Group" – without any supporting evidence or proof that Schein did not truly consider them as such.

Additionally, Complaint Counsel inconsistently applies its own buying group definition in self-serving ways. For example, Complaint Counsel concedes Dental Gator a buying group within its definition, but rejects (without any support or explanation) Schein's contention that Breakaway Practice was a buying group that meets Complaint Counsel's definitional requirements.[475] The evidence establishes that, at the time Schein did business with them, both were buying groups of independently owned dentists and were affiliated with a DSO, and that the independent dentist members of the buying group were given access to some of the DSO's services.[476] The only real difference between the groups appears to be that Schein considered ending its relationship with Dental Gator in 2014 as a result of a contract dispute with the DSO affiliate, and Complaint Counsel is therefore willing to concede it is a buying group within its definition so it can argue that "Schein .. tried to shut [it] down" as a result of the alleged conspiracy.[477] Most recently, Complaint Counsel has attempted to exclude several buying groups from consideration on several bases that are not contained in its Complaint or alleged to be the basis of the alleged agreement.[478]

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[475] *See* CC Supplemental Response to Schein Interrogatory No. 1 (RX 2938).

[476] Compare Puckett 6/25/2018 Dep. 41:4-24 (CX8006) *with* RX2689 (Breakaway has both a "DSO with majority BA ownership" and a "Buying Group" segment. For the buying group segment, the "goal" was to "transition these members" to Breakaway's other offerings.).

[477] *See* CC Second Amended Response and Objection to Schein's First Rogs at 4 (RX 3087); CC Pretrial Br., at 20 & n.111.

[478] *See* Marshall R. Rpt., at Appendix D.

This continued modification and arbitrary application of Complaint Counsel's theory, without factual basis, further undercuts its ability to argue that Schein's conduct was truly parallel. There is no evidence that these nuances and hypertechnical definitional requirements were discussed by, or formed the basis of any understanding between, Schein and either Benco or Patterson. These narrowed facts as to Schein's evaluation of, and business arrangements with, buying groups are not alleged with respect to either Benco or Patterson. And Complaint Counsel has not cited any case where a court found that a conspiracy existed with such vague contours or based on such nuanced parallel conduct. *Cf. In re McWane, Inc.*, 2013 FTC LEXIS 76, at *599-600.

## IV. CONCLUSION

For the foregoing reasons and those that will be presented at the hearing and in post-hearing submissions, Complaint Counsel will be unable to establish that Schein violated Section Five of the FTC Act as alleged in the Complaint. This Court should therefore deny the relief sought in Complaint Counsel's Notice of Contemplated Relief.

Dated: October 15, 2018

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2018, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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**CERTIFICATE 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.

October 15, 2018

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## Notice of Electronic Service

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