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The Federal Trade Commission
Office of the Administrative Law Judge

In the matter of:	)	
Benco Dental Supply Co., a corporation,	)	Docket No. 9379
	)	Judge Chappell
Henry Schein, Inc., a corporation, and	)	
Patterson Companies, Inc., a corporation,	)	
Respondents.	)	

HENRY SCHEIN'S POST-TRIAL BRIEF

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[1] Unless otherwise noted, all emphasis added and internal citations and quotation marks are omitted. Schein's Post-Trial Brief uses the following citing conventions: Schein's Proposed Findings of Fact ("SF"); Respondents' Joint Proposed Findings of Fact ("JF"); Complaint Counsel's Exhibits ("CX") and Demonstratives ("CXD"); Respondents' Exhibits ("RX") and Demonstratives ("RXD").

OTHER AUTHORITIES

I. INTRODUCTION

The unequivocal evidence at trial establishes that Schein did not enter into any agreement with Patterson or Benco to boycott buying groups. Just the opposite. Mountains of documentary evidence and reams of testimony conclusively prove that Schein consistently and independently evaluated buying groups on a customer-by-customer basis and, unlike its rivals, did a substantial amount of business with buying groups not only before and after, but ***during*** the alleged conspiracy.[2] Indeed, Schein had more buying group partnerships than any distributor in the nation – over 25 in all, selling over $30 million annually to buying group members – with its buying group sales volume increasing each year. This is hardly the stuff of a boycott.

Complaint Counsel was required to come forward with direct or circumstantial evidence proving that Schein agreed with Patterson and Benco to engage in a boycott of buying groups. They provided neither. All the contemporaneous evidence reflects that Schein unilaterally and independently evaluated buying groups to determine which made business sense to partner with and which did not, and consistently developed and followed that approach throughout the entire relevant period.

A. Schein Independently Evaluated Each Buying Group and Unilaterally Decided Which to Partner with.

Although it is not Schein's burden to disprove Complaint Counsel's case, the evidence at trial overwhelmingly established that Schein independently and rationally evaluated individual buying groups to determine which made business sense to partner with. Some did, and some did not. Unilateral, legitimate business considerations drove Schein's decisions.

[2] Highlighting the weakness of its case, Complaint Counsel has steadfastly refused even to commit itself to firm dates for the beginning or end of the alleged conspiracy. As best Schein can divine from its changing arguments, Complaint Counsel appears to challenge Schein's dealings with buying groups during the period between December 2011 and April 2015.

Schein, of course, did not approve *every* buying group. In fact, Schein had a deep-seated skepticism of them. Buying groups sought to secure for independent dentists what their larger cousins, Dental Support (or Service) Organizations ("DSOs"), could negotiate. But DSOs control purchasing through ownership, contracts, and sophisticated procurement practices, meaning they can *commit* volume. Buying groups, which are often nothing more than a random list of dentists, cannot. This makes a huge difference. As Brian Brady explained, for some buying groups, the math just doesn't work:

> Let's say, for example they have 50 [dentists] …, and half of those are [already] buying [from Schein]. Will all of those doctors [now go to] 20% off ...? Doctors already buying from us will want [the] more aggressive discount, and doctors who don't buy from us probably aren't going to switch if they have relationships elsewhere [absent a] mandate to buy from Schein."

(SF 1062; CX 2250). Cannibalization concerns appear repeatedly in Schein's contemporaneous documents and throughout the trial record. Steadfast, the Dental Co-Op, and MeritDent are all real-world examples where Schein determined that its buying group partnerships ***reduced*** its sales, rather than added to them. (SF 581-663, 969, 981, 1199-1242). Complaint Counsel's own expert, Dr. Robert C. Marshall, conceded that not [redacted] and that the [redacted] (SF 1693-94; Marshall, Tr. 3002-03). Yet, neither he nor Complaint Counsel identified any real opportunity that Schein rejected and should have accepted.

But there were many buying groups that Schein did choose to partner with. Consider, for example, Schein's buying group activities in 2014, the height of the alleged conspiracy. Complaint Counsel says that Schein had been out of the buying group business for three years. Reality was very different. 2014 was a banner year for Schein's buying group activities. It started with Schein's efforts to rekindle its Smile Source partnership, after having been terminated by Smile

Source two years prior. The ***same day*** that Patterson told Smile Source it was "not interested" in any deal, Tim Sullivan, the President of Henry Schein Dental ("HSD") did the opposite:

> ***Yes, we absolutely*** would like to discuss further… I am confident that there is something here for us to partner on together.

(SF 1159-60; RX 2328). While Benco – like Patterson – also said "no" to Smile Source because they "don't do buying groups," Schein developed a "compelling" and "aggressive" offer with discounts exceeding what most dentists could get on their own. (SF 1153, 1175; CX 1163; CX 2130; CX 2683).

Smile Source ultimately [redacted]

But Schein learned from the experience, and used the proposal to develop a "template … for GPOs going forward." (SF 1167, 1175; CX 2508). This was important because Schein had just completed a corporate re-organization – called Project Pyramid – that transferred primary buying group responsibility from Special Markets to a new group within HSD, called Mid-Market.

Mid-Market employees went to work. They reviewed new opportunities, developed protocols, negotiated with buying groups, and conducted due diligence to determine "when these relationships make sense and when [they do] not." (SF 292; RX 2105). As Mid-Market employee Kathleen Titus explained to one such group in mid-2014:

> ***[W]e are not against having GPO partnerships***. Quite the contrary, we have a number of them in which all parties are in a position to win.

(SF 1223; RX 2201). During the first few months in her new role, Ms. Titus worked tirelessly trying to *save* two buying group relationships that were taking sales *away* from Schein, even proposing that Schein become their exclusive distributor. This is not the conduct of a firm rightly accused of a boycott.

As the year progressed, Schein recognized that it needed a more robust, consistent offer. It held a series of strategy meetings in November and December of 2014 to develop a plan. The

result was a set of forward-looking "Strategic Priorities for 2015," inaugurating a task force to "develop a template/structure for prospective GPO[s]" as "priority one" and the "most important program [the team] will work on this year." (SF 296-97; CX 2475; RX 2097). Shortly after developing this plan, Mr. Sullivan explained to his boss, Mr. Breslawski (President of Henry Schein, Inc.), that Schein was "***'in' on approving Buying Groups***." (SF 308; CX 2144). This too is not the conduct of a firm rightly accused of a boycott.

B. There is No Direct Evidence of Agreement.

In their Opening, Complaint Counsel promised to prove their case through "***direct evidence***" with no need to "go to a [circumstantial evidence] world where we are looking at parallel conduct and trying to infer a conspiracy from that." (Kahn, Tr. 31-32). But direct evidence must be "explicit" and require "no inferences" to show that Schein consciously committed and "conformed to the [alleged] arrangement" with Patterson and Benco. *In re Benco Dental Supply Co.*, 2018 WL 6338485, at *15 (F.T.C. 2018). As a threshold matter, Complaint Counsel did not identify a single suspect communication between Schein and Patterson. And the few sporadic, unsolicited communications Complaint Counsel relies on from Benco do not reveal any agreement. *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1013 (3d Cir. 1994) ("Communications alone … do not necessarily result in liability [because] it is only when those communications rise to level of an agreement … that they become an antitrust violation").

Complaint Counsel has not identified any evidence that Schein disclosed its buying group policies, plans, or practices to Patterson or Benco, or otherwise reached any understanding with them. In fact, the only ***direct evidence*** of whether there was a conspiracy is the sworn denials of each and every fact witness. As this Court has held, "sworn testimony from [Respondents] that they made [competitive] decisions independently and did not … agree to [not compete] … is ***direct evidence*** contrary to the asserted agreement, … and is entitled to weight." *In re McWane, Inc. &*

Star Pipe Prod., Ltd., 155 F.T.C. 903, at *267 (2013), *aff'd in part, rev'd in part*, 2014 WL 556261 (F.T.C. 2014), *aff'd sub nom. McWane, Inc. v. FTC*, 783 F.3d 814 (11th Cir. 2015).

So, without any direct evidence, Complaint Counsel is left with speculative inferences from four *alleged*, unsolicited communications between Mr. Sullivan and Mr. Cohen, three of which are disputed and none of which reveals an agreement.

The first (disputed) communication is a January 13, 2012 unsolicited phone call from Mr. Cohen to Mr. Sullivan. Both testified that the call did not relate to buying groups, and Complaint Counsel failed to show otherwise.

The second (disputed) communication is an ***internal*** Benco email in July 2012 in which Benco's Pat Ryan suggests that Mr. Cohen send a note to Mr. Sullivan about Smile Source. But Mr. Cohen testified that he could not recall sending the note, and Mr. Sullivan testified that he could not recall receiving it. Certainly, a suggestion of a note that may never have existed is not evidence of a conspiracy.

The third communication is an unsolicited phone call (and a few follow-up communications) in late March 2013. Mr. Sullivan described the encounter this way:

> He [Mr. Cohen] started talking about Atlantic Dental Care… He asked if I knew who they were, and I told him I did not. Then he started to tell me more about them, and I immediately stopped him, and said, 'Chuck, this is not a discussion you and I should be having' … [and] I cut off discussion on that topic.

(SF 1492; Sullivan, Tr. 3946). This is exactly what Mr. Sullivan was supposed to do. It is evidence *contrary* to a conspiracy. It "would not be reasonable to infer that [Schein] engaged in illegal activities merely from evidence that an illegal course of action was suggested but immediately rejected." *In re Citric Acid Antitrust Litig.*, 191 F.3d 1090, 1098 (9th Cir. 1999).[3]

[3] Complaint Counsel concedes as much because – when Burkhart's Jeff Reece merely *listened* to Mr. Cohen's (and Mr. McFadden's) multiple attempts to discuss buying groups but did not otherwise object or engage – Complaint

Finally, for its fourth (disputed) communication, Complaint Counsel cites another *internal* Benco document, this one from September 2013. Mr. Ryan had just learned that Burkhart was planning to continue competing for buying groups, so he suggested that Mr. Cohen reach out to Mr. Sullivan and Patterson's Mr. Guggenheim "to tell [them] to hold their positions." (SF 1554; CX 23). But Complaint Counsel's own log of competitor communications shows there was no follow-up communication from Mr. Cohen to Mr. Sullivan. (SF 1555; CX 6027).

These simple facts defeat Complaint Counsel's direct evidence case.

C. There is No Circumstantial Evidence of Agreement.

Lacking any direct evidence, Complaint Counsel is left with the burden of proving a circumstantial case. But its circumstantial case falls apart at every step. "Antitrust law limits the range of permissible inferences that can be drawn from ambiguous evidence," such as the four claimed communications just discussed. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 594 (1986); *In re McWane, Inc. & Star Pipe Prods.*, 2012 WL 5375161, at *6 (F.T.C. 2012). Accordingly, Complaint Counsel must show (i) ***parallel*** conduct, ***and*** (ii) plus factors that "tend to ***exclude*** the possibility" of independent action. *Valspar Corp. v. E.I. Du Pont De Nemours & Co.*, 873 F.3d 185, 194 (3d Cir. 2017). Ultimately, the conduct must be "***so unusual*** that, in the absence of advance agreement, no reasonable firm would have engaged in it." *Id*. at 193. Complaint Counsel has not shown this.

1. There is No Parallel Conduct.

There is a reason why Complaint Counsel did not want to "go to a world where we are looking at parallel conduct." They cannot establish it. ***Every*** witness testified that Schein did

Counsel said that Burkhart "did what it was supposed to do." (SF 354; Kahn, Tr. 20-21). But if Burkhart, with its two to six buying groups, "was not a part of the conspiracy," then Schein, with its twenty-five, was not either. (SF 354-55; Kahn, Tr. 20-21)

business with buying groups, and Schein's sales data unequivocally proves it. Complaint Counsel did not present testimony from even one buying group that Schein supposedly boycotted. Complaint Counsel called just five buying group witnesses: the Dental Co-Op, Corydon Palmer Dental Society, Dental Gator, Smile Source, and Kois. Schein did business with the first three during the alleged conspiracy period and tried to do business with the other two. A boycott was nowhere to be found.

In response, Complaint Counsel does not deny that Schein did business with buying groups. Instead, they modify their theory to try to explain away the facts. They suggest that either the conspiracy was limited to "new" buying groups, or else Schein was "cheating" on the cartel. Neither argument works. As to the first, Complaint Counsel says the conspiracy was in full operation by the time Special Markets Vice President Randy Foley turned down Unified Smiles on December 21, 2011. The very next day, however, senior HSD leadership, including Tim Sullivan, Dave Steck, John Chatham, and Joe Cavaretta, met to discuss MeritDent, a ***new*** buying group. They reached an agreement to work with the MeritDent buying group on February 2012, just a few weeks after the January 13, 2012 call Complaint Counsel cites as supposed "direct evidence" of a conspiracy.

Between 2011 and 2015, Schein continued to enter into new buying group agreements, including with Dental Partners of Georgia, the Schulman Group, Dental Gator, Floss Dental, and Klear Impakt, and it negotiated in good faith with many others. For example, consider the email that Ms. Titus sent to Klear Impakt on January 21, 2015, just days after Mr. Sullivan informed his boss that Schein was "'in' on approving buying groups":

> [We] were very impressed by the clear-eyed vision you have for launching Klearimpakt. Working in the Special Markets space for 15 years, I've seen many iterations on the Member model. Klearimpakt is a testimony that not all are created equal ... ***oh, and cream just rises to the top***! ... It's an understatement to say I

> really liked what I heard and feel very encouraged that our Senior leadership will want to continue the discussion."

(SF 820; CX 2208). An agreement was reached the following August. This is not conduct of an employee instructed to turn down buying groups. And it is not the conduct of a firm rightly accused of a boycott.

Complaint Counsel tries to dismiss all of these efforts as mere "cheating." But cheating is necessarily a secretive endeavor, and there is no evidence that Schein took any efforts to keep its business with buying groups secret. Nor could it. Business with a buying group is by its nature open and notorious. Indeed, buying groups prominently advertise their vendor partners to attract members. This reality was reflected at trial in Benco's and Patterson's market intelligence of Schein's buying group dealings. (*See* SF 126-40). Moreover, Complaint Counsel's own expert admits that conduct is only "cheating" if one first assumes the existence of a conspiracy. Otherwise, it is non-parallel conduct that *defeats* the inference of an agreement. (SF 1634-35; Marshall, Tr. 2958-60). Because a plaintiff cannot *assume* a conspiracy in order to *prove* it, Complaint Counsel's circumstantial case fails. *In re McWane*, 155 F.T.C. at *255.

2. There are No Plus Factors that Tend to Exclude the Possibility of Unilateral Conduct.

Complaint Counsel's case also fails because their asserted plus factors do not "tend to exclude the possibility" of unilateral conduct. Acts against self-interest are the single most important type of plus factor. But determining when a firm has acted irrationally is particularly difficult in concentrated markets because "independent actions taken by oligopolists can be nearly indistinguishable from" concerted action. *Valspar*, 873 F.3d at 191, 194.

That difficulty is compounded here by the nature of the claim, which is that Respondents failed to pursue *supposedly* profitable buying group opportunities that could potentially undermine Respondents' business model. The Supreme Court addressed exactly that situation in *Twombly*,

where dominant telephone carriers allegedly boycotted smaller rivals by refusing to interconnect with them. The Court found the claim ***implausible*** because defendants' "resistance to the upstarts" was nothing "more than natural, unilateral reaction." *Bell Atl. Corp. v. Twombly*, 550 U.S 544, 566 (2007). They "doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword," so "a natural explanation for the noncompetition alleged is that the [defendants] were sitting tight, expecting their neighbors to do the same." *Id*. at 568. Because "resisting competition is ***routine market conduct***," the alleged conduct "was only natural," and so, there was "no reason to infer" a conspiracy. *Id*. at 566.

The *Twombly* plaintiffs tried to overcome this by claiming acts against self-interest. The refusals to deal were not natural, they said, because the defendants "passed up especially attractive business opportunities" by not embracing the upstarts. *Id.* at 568. The Court rejected this, noting that "firms do not expand without limit and none of them enters every market that an outside observer might regard as profitable, or even a small portion of such markets." *Id*. at 569. That is why, as the leading antitrust commentators explain, "[p]arallel decisions by firms not to enter new markets [or business arrangements] create no … inference of conspiracy." Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 307d, at 155 (Supp. 2006).

Here, there were many "good reason[s]" for Schein to try to avoid the "development of a new … paradigm that threaten[s], some day, to cannibalize [its] profits" and demoralize its employees. *In re Interest Rate Swaps Antitrust Litig.*, 261 F. Supp. 3d 430, 464 (S.D.N.Y. 2017). But even in the short term, Complaint Counsel failed to show that Schein acted irrationally or sacrificed profit. Their sole attempt to do so is through economic – not fact – testimony offered by their expert, Dr. Marshall. But Dr. Marshall only analyzed two, non-representative buying groups, Smile Source and Kois. Neither shows that Schein acted against self-interest.

To make Dr. Marshall's analysis relevant, Complaint Counsel must twist the facts to establish that Schein boycotted those two groups. They cannot do so. Complaint Counsel first says that Schein terminated Smile Source in January 2012. ***Except it didn't***. As Smile Source witness Dr. Goldsmith testified, [redacted] (SF 1114, 128; Goldsmith, Tr. 2037). Contemporaneous documents also show that Smile Source "fire[d]" Schein, not the other way around. (SF 1114, 1141; CX 199).

Complaint Counsel next says that Schein induced Smile Source to terminate Schein. ***Except it didn't***. As Dr. Goldsmith wrote to Mr. Sullivan at the time,

[redacted]

(SF 1116-19; RX 2090). Complaint Counsel next says that Schein submitted a fake bid to Smile Source in 2014. ***Except it didn't***. Complaint Counsel never explains why Schein would resort to such subterfuge when it could have just declined to bid. Regardless, Schein documents show that it believed it "made a very aggressive and inclusive proposal to [Smile Source] that many of their execs liked…." (SF 1175; CX 2683). Smile Source President Trevor Maurer confirmed that Schein's offer was comparable to Burkhart's and that he stayed with Burkhart only out of "loyalty." (SF 1178; Maurer, Tr. 4945).

Finally, Complaint Counsel says that Schein boycotted Kois. ***Except it didn't***. After both Patterson and Benco turned Kois down, Mr. Sullivan told Kois that he was "very interested in learning more" about the group. Because the proposal had some strange features – such as promised kickbacks to Schein based on patient revenue and "services [Schein] does NOT provide" as well as unrealistic assumptions of 100% compliance – Schein asked for more information and

time to conduct due diligence. (SF 860-62, 897-901). Kois said no, refusing to "spend the time to share our detailed plans" until "*after* we get a basic initial deal done that gives you an 'out' if we don't deliver." (SF 893-919; RX 2602). But Mr. Sullivan couldn't "get married with a 'no big deal', we can always 'divorce later' mentality." (SF 909; RX 2602). Rather than "slow down" enough to meaningfully engage with Schein, Kois entered an agreement-in-principle with Burkhart, Dr. Kois's long-time supplier, just two days later. (SF 913).

Under these facts, Complaint Counsel cannot show that Schein boycotted either Smile Source or Kois, and therefore, Dr. Marshall cannot show that Schein acted contrary to its self-interest. But even putting that aside, Dr. Marshall's analysis is flawed from start to finish. Dr. Marshall admitted that [redacted] (SF 1715-21; Marshall, Tr. 3026, 3056). His decision to look solely at the profitability of Burkhart's (and even smaller distributors') buying group contracts – a firm with substantially lower market share – both underestimates the degree of cannibalization, and over-estimates the incremental volume, that Schein would experience had it won the contracts. (SF 1601, 1715-20; Marshall, Tr. 3026-29). Indeed, Dr. Marshall's own analyses show that Schein [redacted] on the Smile Source contract when Schein had the business in 2011 and when it regained it in 2017. (SF 1724, 1732; CX 7100; Marshall, Tr. 3121-22, 3073, 3076).[4]

* * * *

Ultimately, Complaint Counsel is left with nothing but speculation and unsupported inference. No direct evidence of a conspiracy. No parallel conduct. No acts against self-interest.

[4] The flaw in Dr. Marshall's analysis is also evident from the fact that it generates false positives, finding that [redacted] (SF 1662-69; Marshall, Tr. 3102, 3239; CX 7100). Dr. Marshall's only response is that [redacted] (SF 1662-69; Marshall, Tr. 3102). Regardless, Dr. Marshall's false positives render his analysis unreliable and unpersuasive.

On the flip side, Schein showed – through mountains of documentary evidence and volumes of testimony – that it has always acted deliberately, rationally, and unilaterally. It embraced those buying groups that made sense, and rejected those that did not. That is not the conduct of a firm rightly accused of a boycott. Judgement should be entered for Schein.

II. THE EVIDENCE

Henry Schein is the nation's largest dental distributor. It wasn't always. It started as a mail-order business back in the early 1930s, and transitioned to a full-service distributor in the late 1990s. Since then, it made its way to the top by establishing itself as a trusted advisor to its customers. It did so, not by saying no to customers, but by anticipating new trends and finding novel ways to do business with them. Today, Schein serves the dental community through two separate divisions: HSD and Special Markets. (JF 12).

HSD is Schein's traditional full-service dental distribution division. (SF 5-19). It employs over 800 Fields Sales Consultants ("FSCs") throughout the country to personally visit and serve independent dentists. (SF 10-12). As Schein's primary contact with its customers, FSCs develop lasting relationships and have substantial autonomy and pricing discretion. (SF 13-19).

In the late 1990s, Schein formed the Special Markets division to serve centralized purchasers like government institutions and DSOs. (SF 20). These organizations have multiple locations, but they make purchasing decisions centrally. (JF 39-49). During the relevant period, both HSD and Special Markets had concurrent authority to engage with buying groups, though primary responsibility changed over time. (SF 26-34). Initially, primarily responsibility resided with Special Markets, which was equipped to establish formularies and negotiate customer-

specific charge-backs with manufacturers. (SF 23-34).[5] As part of a corporate re-organization in April 2014, a new group, called Mid-Market, was created within HSD, which took over primary responsibility for buying groups and, eventually, developed a standard buying group offer. (SF 237-68).

Regardless of which group had primary buying group responsibility, Schein's approach remained consistent. (*See* SF 159-134). It evaluated each group individually to assess whether it was a good fit. (*See* SF 159-341, 375-1335).

A. Schein's Approach to Centralized Purchasing Partnerships.

1. Buying Groups Don't Wield "Purchasing Power" Because They Often Don't Control Purchasing or Deliver Incremental Volume.

Though buying groups tout their *goal* of "leveraging the purchasing power" of their members, few actually *wield* that power because few could deliver incremental volume to their designated distributor. (SF 76-119; *see* JF 55-64). As HSD Vice President Dave Steck explained, Schein's buying group strategy focused on "situations where a large amount of business is either coming our way or threatening to leave us." (SF 316; RX 2402). There were precious few of these situations.

To understand buying group dynamics, one must also understand DSOs. Buying groups arose largely as a response to DSOs, or "corporate dentistry." (SF 36). They sought to secure for independent dentists the same discounts that DSOs achieved, but without having to cede

[5] Despite the testimony from all Schein witnesses that Special Markets had primary responsibility for buying groups prior to April 2014, Complaint Counsel claims the opposite, relying, for example, on a February 2011 email from Ms. Titus, where she wrote, "I can tell you with authority that this ["*consulting group*"] is not something SM would be interested in" as the "participants are Private Practice customers, which rules SM out." (SF 451; CX 165). But this opportunity was referred to Special Markets by HSD Regional Manager Bret McCarroll, in keeping with Special Markets' primary responsibility. (SF 46-53; CX 165). That Special Markets turned down this group because Ms. Titus felt, as she testified, that it was a "better fit" for HSD does not undermine the apportionment of primary responsibility. (SF 453; Titus, Tr. 5335-36).

ownership, control, or independence. (SF *See* SF 35-76; JF 57-62). But ownership and control is not an ancillary by-product of the DSO model; it is integral to it. (*See* JF 39-49).

DSOs provide members with *all* necessary non-clinical, administrative, marketing, and management services, allowing the dentist to focus on clinical dentistry. (SF 40-46). They handle purchasing through central procurement departments managed by dedicated procurement officers, who negotiate formularies and pricing, manage payment, and monitor compliance. (JF 41-49). This allows DSOs to make specific contractual volume commitments, typically 70-80% of member purchases. (JF 43-44; CX 309 (Muller, Dep. at 63); Sullivan, Tr. 3903; Meadows, Tr. 2649).

In contrast, buying groups are not centralized purchasers. (JF 55-64). Despite the name, they do not buy anything and do not control purchasing decisions. (SF 81-85; JF 32, 59-61). In fact, they are often little more than a list of loosely organized independent dentists. (*See* SF 69-72). Not only are they unable to require members to buy from designated suppliers, they often tout their members' freedom to buy from whomever they want. (*See* JF 61; SF 81-85; *e.g.*, RX 290 (Smile Source Franchise Agreement: "You are under no obligation to purchase from our suppliers or to participate in any volume discounts.")).

The ability to control the purchasing decision – or "drive compliance" – is a fundamental difference between DSOs and buying groups. (SF 84-89; *compare* JF 43-45, *with* 59-61). Competing for DSO contracts involves a single-stage competition. A distributor either wins or loses the sale. If it loses, it is out of the game. (*See* JF 45). Not so with buying groups, which involves two stages. At stage one, distributors compete to be the buying group's designated distributor. Little more than a "good housekeeping" seal of approval, winning a buying group contract may be a marketing tool but does not confer any rights on the distributor. (*See* SF 81-89; JF 59-61). Its value is also limited because the distributor does not make *any* sale unless the

member *independently* decides to purchase from that designated distributor rather than from a competitive one. (*See* SF 81-89). Thus, at the second stage, the designated distributor must compete anew to convince the dentists to purchase from it. (*See* SF 81-89).[6]

Thus, winning a buying group contract is often a pyrrhic victory. For example, Dr. Marshall showed that the Kois Buying Group delivered only about 3% of the Kois Tribe members' purchases to Burkhart. (SF 870). And even the members that purchased from Burkhart bought half of their supplies from other distributors (like Schein). (*See* SF 870). Likewise, while Smile Source claimed that it could deliver 90% compliance, the data shows its compliance rates were closer to 50%. (*Compare* SF 86, *with* SF *1124*). Indeed, Dr. Marshall's own analysis showed that [redacted] (SF 1722-41). This was consistent with Schein's evaluation of its own buying groups, such as Steadfast, the Dental Co-Op, and MeritDent, all of whom took business away from Schein or failed to deliver it. (SF 581-633, 969-1001, 1199-1242).

Of course, it is not all black and white. Buying groups differ in their ability to deliver incremental volume. At one extreme are buying groups that, like DSOs, "control the checkbook" – meaning that all purchases run through a central procurement office – or that contractually commit members to purchase specified amounts and have mechanisms to enforce it. (*See* SF 35-119). These groups are extremely rare. In the middle are groups that – as Schein describes them – have some "stickiness" or "cohesiveness" among the members, such that the preferred designation provides some marketing benefit. (*See* SF 60-64, 78-89, 162-79). At the other

[6] Economically, a buying group contract without commitments is equivalent to the distributor granting an *option* to members to purchase at the contract price. In most cases, firms that grant options must be *paid* to do so. Here, the money flows in reverse: most buying groups expect distributors to pay them – in the form of an administrative fee or rebate – for the privilege of taking away the distributor's own pricing flexibility. That is economically irrational.

extreme, are "price-only" buying groups, where members commit to nothing and freely purchase from the cheapest source. (*See* SF 69-72).

Before, during, and after the alleged conspiracy, Schein focused on the first two types of groups, but studiously avoided the third. (*See* SF 162-79, 375-1335). As Schein Vice President Jake Meadows explained to his team in October 2015, "[w]e will not partner with Buying [G]roups that charge a fee to customers to negotiate a lower price [on] their behalf. We will partner with groups that offer some other value that they charge for and we're in a ***marketing partnership*** together." (SF 113, 1535; RX 2172; CX 2020 (granting Schein the right to terminate if the group "turns out to be purely a buying group, defined as "pooling individual volume *purely* to obtain lower prices from suppliers")).

Many trial witnesses explained that the third type of buying group offers nothing that the distributor cannot achieve by itself. (*See* SF 69-72). While even a pure "price-only" buying group might increase sales, the way it does so is by marketing the discount the *distributor* provides. But distributors are perfectly capable of marketing their own discounts without the assistance of buying groups. (*See* SF 111).[7] Nor has Complaint Counsel shown that buying groups deliver ***any*** incremental volume that a distributor could not obtain by offering the same discount directly to individual dentists. (*See* SF 1660-752). This failing drives much of Schein's skepticism about buying groups.[8]

[7] Complaint Counsel introduced no evidence of barriers preventing distributors from lowering price on their own. As rational economic actors, distributors set prices at profit-maximizing levels, and empower their sales representatives to offer individualized discounts when necessary to win a customer. The claim that offering an across-the-board discount to all of a buying group's members delivers incremental volume thus *assumes* that the FSC-driven process is not working efficiently. (*See* SF 1683-84; Wu, Tr. 5185-86).

[8] Complaint Counsel cites to Dr. Marshall's analysis showing that Burkhart's and Atlantic Dental's sales went up when they were awarded the Smile Source and/or Kois contracts. But both of them lowered price to win the contract. Dr. Marshall did not show what their sales would have been had they lowered their prices by the same amount, but offered it directly to the dentist rather than contracting with the buying group entity.

2. Most Buying Groups Pose a Substantial Risk of Cannibalization.

In addition to lacking the ability to drive incremental volume, buying groups also cannibalize existing sales. (SF 90-96). As Complaint Counsel's expert conceded, [redacted] (SF 93-94, 1749; Marshall, Tr. 2972, 3003).

Cannibalization is a serious concern because many dentists are reluctant to switch primary distributors. (*See* JF 36-38; SF 80-81). Dentists establish long-term relationships with their sales representative, who makes frequent visits and becomes familiar with the office's routines, needs, and preferences. (SF 13-14). Switching distributors requires the dentist to sever that relationship, establish new personal relationships, and switch to a potentially different array of products and services. (SF 80-81). Put simply, switching distributors is more like switching financial advisers than brands of peanut butter. As such, a buying group's discounts are *always* more attractive to the designated distributor's existing customers than to dentists who buy from its competitors. As Ms. Titus explained, a buying group's "targets are ***invariably going to be existing HSD customers***." (SF 452; CX 165).

This means that cannibalization often outweighs any incremental volume, unless the designated distributor starts out with a very low share among the group's members. (*See* SF 94-97, 1749; *see also* SF 985). As Dr. Marshall concedes, distributors with larger shares receive less incremental volume and experience greater cannibalization, making buying group opportunities less attractive. (SF 92-94, 1749). Given that Schein had the largest share of any distributor, its skepticism about entering into buying group contracts was well-placed.

3. Buying Groups Create Numerous Internal and External Conflicts.

Schein also encountered many other problems when dealing with buying groups in addition to lack of compliance and high cannibalization rates. These included:

- ***The Middle Man Tax.*** Buying groups are for-profit entities and they demand payment from the distributor, their members, or both. (SF 115-19). Those fees range from a few hundred dollars to over $10,000 per year. (SF 51-52, *see also* SF 480, 503, 833, 854, 924, 962-63). This tax reduces the distributors' competitiveness because it takes money that could otherwise go towards lowering prices. (SF 116).

- ***FSC Conflicts.*** Because FSCs are paid on commission, buying group discounts reduce FSC compensation. (SF 98-101). As Mr. Meadows testified, a 10% discount can cut an FSC's salary by one-third or more. (SF 98). As one FSC wrote to the President of Schein, if "the commission … drops," it "***would not give me any incentive to drive the business***." (SF 98; CX 2298). In addition, buying groups force FSCs to compete with their own company. (*See, e.g.,* SF 189-97). Buying groups compete to attract members (so they can earn fees) by marketing the distributors' discounts. FSCs compete to retain those same customers under their existing relationships, resulting in competition between the FSC and the buying group. This creates ill will and demoralizes the FSCs, especially if the buying group receives better pricing than what the FSC can offer through Schein's standard Volume Purchase Agreements ("VPAs"). (SF 99, 103-06).[9]

- ***Non-Member Customer Conflicts.*** Buying groups may result in unfair discrimination in favor of buying group members over similarly-situated, or even higher-volume, non-member dentists. (SF 108). Additionally, non-members may demand that they receive the buying group price, another form of cannibalization. (SF 108; CX 2456 (buying groups "cause[] all sorts of issues for … local area non-members who then expect the same [and] will change … [a]way from us … out of frustration that their business is viewed as 'not' worthy.")).

- ***HSD-Special Markets Conflicts***. Buying group partnerships created conflicts among Schein's two divisions. (SF 104-06). If Special Markets signed up a buying group, all the group's members appeared on the Special Markets P&L. (SF 105-06). Any members that were long-time HSD customers simply vanished from HSD's books. (SF 105-06).

- ***Manufacturer Conflicts.*** Manufacturers often provide customer-specific discounts, or "charge-backs," if the customer commits to purchasing the specified item. (SF 109). DSOs often receive these, but because buying groups do not make such commitments, charge-backs are unavailable. When DSOs have a buying group arm, however, manufacturers complain that their committed-customer pricing is being arbitraged for non-committed customers. (SF 109).

[9] One could *theorize* that a buying group's added volume compensates the FSC for the reduced commission, but there are only so many hours in a day. If a buying group delivers incremental volume, then additional FSCs would be needed. Existing FSCs would just see a reduction in salary with no corresponding benefit, assuming they were working full time. (SF 100).

- ***DSO Conflicts.*** DSOs make substantial investments to ensure they can drive compliance, and they negotiate pricing based on committed volume. (JF 40-44). Offering similar discounts to buying groups who do not make these investments or commitments unfairly discriminates against the DSO, which often competes against buying groups to attract new members. (*See* SF 409).

- ***Reduction in Pricing Flexibility.*** Buying groups generally require that distributors offer the same price to all its members. (SF 111). But this handcuffs the distributor. (SF 111). For example, if a buying group has both large and small members, a competing distributor could target the large one with aggressive discounts. The buying group's designated distributor would be powerless to react in that scenario, as it would have to lower its price to all members, large and small. (SF 111).

- ***Administrative Burden.*** Buying group partnerships add a layer of complexity and administrative burden. (SF 110). Buying group membership is fluid. Processes need to be established for the buying group to timely inform a distributor of membership changes. (SF 110). This administrative burden has caused numerous problems for Schein and its buying group partners. (*See* SF 110).

B. A Chronological History of Schein's Buying Group Interactions.

Despite all the risks and disadvantages of dealing with buying groups (and the limited advantages), Schein carefully evaluated each buying group opportunity. The following is a chronological account of Schein's buying group activities, focusing on the primary buying groups that Schein partnered with or evaluated.

1. Schein's Selective Approach to Buying Group Partnerships Prior to 2010.

Schein has always carefully considered when to do business with buying groups, entering into partnerships with some buying groups, such as Alpha Omega, OrthoSynetics, Comfort Dental, and the Dental Co-Op. (SF 375-1335). But it also declined many opportunities. As Special Markets President Hal Muller wrote back in 2002:

> I have been the contact person for GPOs for [HSD] and [Special Markets] – we have held a pretty firm line on saying NO to virtually all of them…. [T]his type of GPO would kill margins for … distributors…. In my opinion we need to stop this effort. We have always contended that Schein is a GPO and negotiates the best prices for our customers… [W]e need to continue that line.

(SF 30, 185, 1342; RX 2405). This was nine years before the start of the alleged conspiracy, and Complaint Counsel has not alleged that Mr. Muller has ever communicated with Patterson or Benco.

Throughout the 2000s, Schein remained deeply skeptical of most buying groups. As HSD Vice President Dave Steck explained in 2009, two years before the start of the alleged conspiracy, HSD "normally stay[s] away" from "buying group situation[s]." (SF 189-99, 1082-92; CX 2529; CX 2296). Tim Sullivan testified: "I have always been and I am to today very skeptical about the value that buying groups can bring both to Henry Schein or to its members who are our customers, very skeptical." (SF 160; Sullivan, Tr. 4085). That skepticism, however, did not stop Schein from engaging with buying groups that presented promising opportunities.

2. Pugh Dental Alliance and the 2010 Guidance.

In 2009, Randy Foley was hired as a director of Special Markets, reporting to Mr. Muller. (SF 190). While Mr. Foley focused primarily on DSOs and other institutional purchasers, he and his team also contracted with a number of buying groups. (SF 22, 144, 1300, 1380). One of the first groups he opened after joining Special Markets was Pugh Dental Alliance (Pugh), a local association of dentists in Southeast Florida. (SF 189-91; Foley, Tr. 4657, 4662). Immediately after contracting with Pugh, however, FSCs complained about its impact on their commissions. (SF 194).

Specifically, on December 8, 2009, Florida FSC Scott Schenker emailed Tim Sullivan and Hal Muller, alarmed to learn that he would "no longer be needed," warning that Pugh was "potentially a very cancerous situation." (SF 194; CX 2529). Receiving no response, he elevated his concerns to the President of Schein, Mr. Breslawski. It's "absolutely absurd," Mr. Schenker protested, "that I'm competing with my own company." (SF 195-97; CX 2296). Mr. Schenker's boss, Regional Manager Mike Finnan, echoed this concern, noting that this "could be disastrous"

and that, if it is not promptly "shut down," the FSC team will "be at risk" of losing "some very important customers." (SF 198; CX 2529).

In response to Mr. Schenker's plea for "help," Mr. Breslawski instructed Mr. Sullivan and Mr. Muller to work it out. (SF 200; CX 2529; CX 2296). Debate ensued. Mr. Muller explained that Special Markets justified its aggressive discounts by cutting FSC support. At "that pricing level," Mr. Muller wrote, "we usually ask our field sales consultants to visit less often as … profits have been cut." (SF 201-03; CX 2296). But that was the problem, not the solution. Reducing FSC support is fine for centrally-managed DSOs, but it is not what independent dentists want and it does not address Mr. Sullivan's concerns about the welfare of his team. That is why Mr. Sullivan wrote – two years prior to the start of the alleged conspiracy – that he did "not support us opening Buying Clubs." (SF 203; CX 2296).

After considering a variety of proposals, senior leadership from HSD and Special Markets – Tim Sullivan, Dave Steck, Hal Muller, and Randy Foley – met in person in early 2010 to resolve the debate and establish guidelines for dealing with buying groups. (SF 208-10; Foley, Tr. 4638-41; Sullivan, Tr. 3998, 4098-100). The 2010 Guidance adopted a middle-ground, case-by-case approach, which was consistent with Schein's pre-2010 buying group activities. (*See* SF 208-11). Applying the 2010 Guidance to a buying group nine months later, in September 2010, Mr. Muller noted that they had "determined at the beginning of the year (Dave, Tim, Randy, and myself) that we would entertain organizations that could force compliance." (SF 210; CX 2111). Mr. Foley similarly recounted this meeting to his team, noting that, "[w]hen Hal and I met with Tim and Dave, we decided" that "Buying Groups" needed to have "complete control of purchasing policy that would force the distributor purchases to Schein." (SF 211; CX 2153).

Under the 2010 Guidance, compliance was the guiding principle. Schein partnered with groups that could drive it; and it declined to proceed with those that could not. To illustrate, the following all occurred *prior* to the start of the alleged conspiracy.[10]

- **CF Dental (February 2010)**. About a month after the 2010 Guidance meeting, the CF Dental buying group approached Schein. Mr. Muller noted that he had rebuffed their efforts multiple times, as he did "not believe in selling to Buying Groups." (SF 206-07; CX 2503). In doing so, he distinguished buying groups like CF Dental that seek nothing more than a discount (and a cut for themselves) from those like OrthoSynetics (a buying group Schein does business with), that have a deeper integration between the corporate office and the member and can drive compliance. Mr. Muller explained that, unlike CF Dental, OrthoSynetics "takes a percentage of revenues and the offices get a lot of services for that payment." (SF 207; CX 2503).[11]

- **Synergy Dental (March 2010)**. Schein also declined to partner with Synergy Dental, almost two years before the start of the alleged conspiracy. Both Mr. Foley and Special Markets Director of Marketing Annette Martino explained that, because this was "strictly a GPO for private practices" and that there would "not be any ownership," Special Markets was "not interested." (SF 212-16; CX 2451). Mr. Muller then referred the matter to Mr. Sullivan, who confirmed that he too was "not interested" as the "risk [was] much greater if we do sign than if we don't." (SF 214; CX 2451; *see also* SF 87 ("[Synergy] has no authority to tell its members what to do."). Ultimately, Synergy Dental signed with Schein's business affiliate, Darby Dental. (SF 216; CX 185).[12]

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[10] Complaint Counsel has refused to identify a specific start date for the alleged conspiracy. For purposes of the following list, we use January 13, 2012 as the start date, since that is the first (***disputed***) communication that Complaint Counsel has identified that allegedly concerned buying groups. While Complaint Counsel cites generic, non-buying-group-related communications prior to this date, such evidence is merely opportunity evidence and does not *prove* an earlier start date.

[11] OrthoSynetics is a large buying group that "manages, owns, or ***is under contract to provide services***" to dental offices. (SF 1034). Most OrthoSynetics members are independent dentists. The members, however, agree to purchase [redacted] of the dental merchandise" from Schein, and OrthoSynetics would *sometimes* process the bills on behalf of the local offices. (SF 1026-37; RX 2276; McFadden, Tr. 2729-30; Foley, Tr. 4530). Schein renewed its contract with OrthoSynetics in February 2014. (SF 1032; RX 2276).

[12] Complaint Counsel cites a July 17, 2011 email where Mr. Sullivan expressed his opinion that "[t]hat's where they [Darby] belong. I don't think you will ever see a full-service dealer get involved with GPOs." (SF 216; CX 185). But mail-order/internet distributors do not have commission-based sales teams, so they do not have the same conflicts that full-service distributors do. (JF 31). Mr. Sullivan's statement, therefore, just reflects his opinion about how full-service distributors would react when faced with "common stimuli." *See Twombly*, 550 U.S. at 557 n.4 ("independent responses to common stimuli" provide no basis for a conspiracy inference). In any event, Complaint Counsel has not shown that Mr. Sullivan's opinion was informed by any competitor contact, having identified no such buying-group-related communication prior to this time.

- **Comfort Dental (April 2010)**. While Schein declined to partner with CF Dental and Synergy Dental, the opposite occurred with other buying groups, like Comfort Dental. Comfort Dental is a franchise of independent dentists, like Smile Source. (SF 54-56, 222, 493-511; CX 2109; Foley, Tr. 4632-33). It is not a DSO, and Schein considered them to be "very anti-DSO." *Id*. Comfort Dental was initially an HSD customer, but as they grew, they required more centralized support. *Id*. Comfort Dental sent the business out to bid in April 2010, and Schein decided that "it would be best to have [Special Markets] respond." *Id*. Schein won the business with an "aggressive" "new plan that was designed to save them nearly $1M in merchandise spend." *Id*. Comfort Dental eventually became one of Schein's largest buying groups, with over [redacted] in annual purchases by 2015. (SF 493-511; CX 7101 (Figure 13)).

- **Intermountain Dental Associates ("IDA") (May 2010)**. Schein also partnered with IDA, which has a DSO arm and a buying group arm consisting of independent dentist members in which IDA "DOES NOT have any ownership." (SF 732-48; CX 2153). Expressly referencing the 2010 Guidance, Mr. Foley instructed his team to investigate whether IDA would have "complete control" over their members' purchasing decisions. (SF 740; CX 2153). After confirming sufficient control, Schein allowed IDA to add non-owned, independent dentist members to the contract. (SF 742-43; CX 168). As Zone General Manager Mr. Joe Cavaretta explained in January 2012 (after the start of the alleged conspiracy), "while [it] is dangerously close [to] a GPO," the "difference here is that they will force any customer to purchase from Schein." (SF 743; CX 168). On that basis, Schein continued to do business with IDA.

- **Business Intelligence Groups (February 2011)**. In February 2011, the Business Intelligence Group, a consulting firm, approached Schein seeking to negotiate a Groupon-based discount for whitening products. (SF 446-67; CX 165). Special Market's Kathleen Titus declined, noting that the participants are all "Private Practice customers which rules [Special Markets] out." (SF 451-53; CX 165). While she referred the matter to Joe Cavaretta for HSD's consideration, she cautioned that cannibalization was likely to be high, as "their targets are invariably going to be existing HSD customers." (SF 452; CX 165). Mr. Cavaretta concurred. (SF 454-55; CX 165). This exchange occurred almost a full year prior to the start of the alleged conspiracy.

- **Advantage Dental (July 2011)**. Advantage Dental had a DSO arm and a buying group arm for independent dentists. (SF 377-94). As Mr. Foley testified, "[i]nitially, … both components of Advantage Dental fell under HSD, but when they needed some help on the software in creating … rebates, we moved … the DSO component … to Special Markets." (SF 382; Foley, Tr. 4562-63). Thereafter, the two divisions split the account. Advantage Dental had total annual sales of over $4.3 million in 2014, of which $2.8 million came from the buying group arm served

by HSD, which Mr. Foley referred to as the "competition." (SF 392 n.5; CX 7101; Foley, Tr. 4564; CX 2081).[13]

- **PEARL Network (December 2011)**. In early December 2011, Schein declined to do business with a buying group called the PEARL Network consisting of dentists affiliated with NYU. (SF 1078). As Schein's Steve Kess, Vice President of Global Professional Relations, explained, given "[t]he brand … position of HSD and []SM … [w]ith almost 40% market share," contracting with a national GPO "could be a disaster to our pricing and [gross profit] structure." (SF 1079; CX 2456). Mr. Sullivan echoed this, noting that he was "still of [the] position that we do NOT want to lead in getting this initiative started in dental," as it is "a very slippery slope," and "[a]t the end of the day, [Schein] provide[s] discount 'deals' to those that ***control buying***." (SF 1080; CX 2456). "Simply being a 'member,'" as Mr. Sullivan explained, "has historically provided little value or incentive to drive change in purchasing loyalty at the local GP [general practitioner] practice level, yet causes all sorts of issues for those members and local area non-members who expect the same." (SF 1081; CX 2456). Schein's decision with respect to PEARL Network was consistent with the 2010 Guidance of doing business with groups that could drive compliance, rather than pure "price-only" member models.

3. The Transition of Smile Source from Special Markets to HSD in January 2011.

As Schein gained experience under its 2010 Guidance, it periodically refined the degree of compliance needed to justify partnering with a buying group. (SF 223-36). While Mr. Foley noted in May 2010 that buying groups needed to have "complete control" over the purchasing decision; in practice, that proved to be too restrictive. This came to a head later that year with regard to Smile Source, which the data shows had compliance rates of closer to 50%. (SF 223-36).

It began much as the Pugh situation did. Special Markets had been doing business with Smile Source since 2008. In August 2010, Smile Source signed up its first Florida member, and, to solicit additional ones, Smile Source adopted a multi-level marketing scheme that awarded dentists incentives to "recruit other dentists to purchase through this buying club." (SF 224; CX

[13] Complaint Counsel claims that the Advantage Dental buying group arm is supplied by Darby, and not Schein, relying on a reply email from Mr. Foley drafted quickly (just 7 minutes after the original). (SF 392 n.5; CX 2641). Mr. Foley testified that the inclusion of Advantage Dental in the list of Darby buying groups was a "mistake." (SF 392 n.5; Foley, Tr. 4565-66). Importantly, Darby produced its buying group contracts and Advantage Dental was not among them. (SF 392 n.5; RX 3078-3085).

2111). This upset Florida FSC Scott Schenker, who complained to senior leadership, just as he had done previously about Pugh. (SF 224). His boss, Mr. Finnan, again had his back, protesting that Smile Source presented "another situation similar to Pugh Dental Alliance," that it was "playing [Special Markets and HSD] against each other," and that "[a]ll that can be accomplish[ed] by allowing this activity is deterioration in our Gross profit." (SF 224; CX 2111).

Mr. Muller responded that Smile Source was not just a buying group marketing the discount, but was more, offering "management services for dental offices for a percentage of revenue." (SF 226-27; CX 2111). This, Mr. Muller felt, should limit cannibalization and the degree of competition between the FSC and Smile Source for independent dentists. (SF 228-29). Elevating the issue to Mr. Breslawski, Mr. Muller recommended that Schein "continue the relationship with Smile Source." (SF 225-27; CX 2111). Mr. Sullivan, however, expressed continued concern about cannibalization, explaining that he does "not agree with" allowing Smile Source "to market to other practices … discounts from Schein not otherwise available." (SF 228; CX 2111). Unable to find "common ground," Mr. Muller and Mr. Sullivan scheduled a sit down. (SF 228).

Mr. Sullivan summarized their agreed-upon resolution in September 5, 2010: While "neither of us support the *concept* of buying groups" due to "the risk … for margin erosion" and the potential for "other competitors … following suit and [sparking a] huge price war," Mr. Sullivan wrote, "neither of us want to lose [Smile Source] as an account." (SF 228; CX 2113). As such, they chose to continue the Smile Source partnership. (SF 229; CX 2113).

To address FSCs' concerns, however, Schein decided in late 2010 (prior to the start of the alleged conspiracy) to transfer the Smile Source account from Special Markets to HSD, effective January 2011. (SF 229; CX 2113; CX 2454; CX 238). As Mr. Foley recounted to his team,

> We were doing fine with Smile Source until they offered to enroll a dentist in Miami. As this was an existing HSD customer, the FSC went ballistic and voiced his concerns all the way up to Stan [Bergman, Chairman and CEO of Henry Schein, Inc.]. Hal and I then met with Tim Sullivan and Dave Steck, and decided to move Smile Source to HSD. As there was no central purchasing, and all 15 Smile Source customers were private dentists, we made this happen in January 2011.

(SF 230; CX 238).

As part of the transfer, HSD assigned FSCs to each Smile Source member, but "kept … the same sales plan" and continued to honor the formulary pricing that Special Markets had previously negotiated. (SF 232; CX 2354; RX 2714). Mr. Sullivan met personally with Smile Source leadership to welcome them to HSD. "I remain very excited," Mr. Sullivan wrote, "about our future together and the business model [Smile Source] created," explaining that their service-oriented approach "lines up extremely well with [HSD's] approach." (SF 233; CX 2899). Smile Source's National Director, Todd Nickerson, thanked Mr. Sullivan for "such a WARM welcome." (SF 233; CX 2899).

4. Schein's Partnership with Universal Dental Alliance in May 2011.

In July 2011, HSD opened up Universal Dental Alliance (also referred to as the "Dental Alliance"), which describes itself as a "group purchasing organization (GPO) that focuses exclusively on the dental and oral surgery industries." (SF 1300-35; RX 2350). Dave Steck and Regional Manager Ryan Steck negotiated the Dental Alliance VPA, which provided members with a "straight 7% discount." (SF 1310-15; RX 2612). To incentivize the buying group to focus on "incremental sales and not Henry Schein customers," Schein also paid the group administrative fees ranging from 1.5% to 3% based on whether the sales were incremental or cannibalistic. (SF 1315; RX 2612; Steck, Tr. 3773). The agreement obligated the Dental Alliance to "ensure that each Group Member will utilize [Schein] for $20,000 of dental supply business" in order to be "recognized as a beneficiary of [the] Agreement." (SF 1321; RX 2350). This arrangement differed

from most other buying groups, as Mr. Steck testified, because the contract required "members to individually commit to volume in that range in order to get the 7 percent discount." (SF 1321; Steck, Tr. 3771-72).

Mr. Sullivan was made aware of the Dental Alliance partnership at least by October 20, 2011 when, as with Pugh and Smile Source, the local sales team raised concerns about it. Mr. Sullivan approved the partnership. (SF 1325; RX 2349 ("We've got to undertake this.")). Schein continued its business with Dental Alliance after Benco's Chuck Cohen sent an unsolicited text about the group some three years later. (SF 1327-33; CX 6027). The Dental Alliance contract was automatically renewed on June 30, 2014. (SF 1322; RX 3076; RX 2612 (December 15, 2014 noting that Schein was "negotiating a new contract"); RX 2612 (April 30, 2015 email showing quarterly rebates for Q1 2015)). These facts directly contradict Complaint Counsel's allegation that Schein "did not enter into agreements with Buying Groups between 2011 and 2015, including … Dental Alliance." (SF 1309-35; RX 3087).

5. The Unified Smiles Rejection in December 2011.

In December 2011, Jan Knysz, the *former* owner of one of Schein's largest DSOs, Great Expressions, reached out to Schein. Ms. Knysz had "moved on" and was "in the process of developing" a new entity, called Unified Smiles. (SF 1287; CX 2062). When she reached out to Schein, Unified Smiles "had zero customers" and "did not [even] exist." (SF 1288; CX 2062; Foley, Tr. 4685, 4689).

Ms. Knysz asked Randy Foley, Schein's Director of Sales for Special Markets, to meet in her office building, which she shared with Great Expressions. She insisted that they meet in the basement because she did not want to "get anyone at [Great Expressions] stirred up." (SF 1289; CX 2062). At this clandestine meeting, Ms. Knysz presented Mr. Foley with a copy of Great Expression's "proprietary pricing," and demanded the same pricing for Unified Smiles. But Great

Expressions received its pricing because it was Schein's fifth largest corporate customer. In contrast, Unified Smiles had "no customers whatsoever." (SF 1291; Foley, Tr. 4643-46; 4684-87).

Mr. Foley also learned that Ms. Knysz was not entirely truthful. Her representation that Unified Smiles would "administer operations the same way as [Great Expressions] with all purchases running through [its] corporate office" turned out not to be true. (SF 1292; CX 2062). Mr. Foley discovered that Unified Smiles would be a price-only buying group, with no demonstrable mechanism of compliance. (SF 1293; CX 2062; Foley, Tr. 4688-89 ("she would not be able to drive compliance if she did create her buying group and … she would be price only")).

Mr. Foley was not interested. As he explained, absent "some 'ownership'" of the individual locations, Schein would consider Unified Smiles to be a "Buying Group" and therefore it could not extend DSO pricing to her. (SF 1295; CX 2062). Doing so would "lead to cannibalization" and "friction" with "EXISTING customers," and without compliance, Schein could not negotiate "chargebacks" with manufacturers. (SF 1296; CX 2062; Foley, Tr. 4543-46, 4688).

In declining to partner with Unified Smiles, Mr. Foley told Ms. Knysz in a December 21, 2011 email that Schein "no longer participate[s] in Buying Groups." (SF 1300; CX 2062). Complaint Counsel latches on to this isolated snippet. But this statement must be placed in context. It was written after the pre-alleged-conspiracy kerfuffles with Pugh and Smile Source that resulted in the latter's transition to HSD. No wonder Mr. Foley might not be interested in devoting his team's resources to help a nascent, ill-conceived buying group get off the ground – especially when it was demanding DSO pricing, without any commitment. Whether or not this put a damper on his desire to open new buying groups within Special Markets, Mr. Foley acknowledged that his

statement was "poorly worded." (SF 1300; Foley, Tr. 4691). Special Markets was participating with buying groups at the time, and the 2010 Guidance allowed for buying groups that, unlike Unified Smiles, could drive compliance. (SF 1300; Foley, Tr. 4657, 4690-91). Nonetheless, rather than spend the time to provide Ms. Knysz with such a nuanced explanation, Mr. Foley chose to end the discussions more definitively because the secret basement meeting made him "uneasy" and he did not want to "argue with her anymore." (SF 1300; Foley, Tr. 4684-85, 4691).

At trial, Mr. Foley confirmed that he was the sole decision maker with respect to Unified Smiles. He did not consult with anyone about Unified Smiles, and did not have discussions with Mr. Muller or Mr. Sullivan about it. (SF 229, 1111; Foley, Tr. 4694). Nor does Complaint Counsel identify any communications between Schein and Patterson or Benco relating to buying groups prior to Mr. Foley's decision to reject Unified Smiles on December 21, 2011.[14]

6. Smile Source's Switch to Burkhart in January 2012.

In January 2012 – a year after Schein transferred Smile Source from Special Markets to HSD – Smile Source switched distributors, replacing Schein with Burkhart. (SF 1108-13). Complaint Counsel contends that either Schein terminated Smile Source, or that it surreptitiously induced Smile Source to terminate Schein. The facts are otherwise.

In early 2011, Smile Source was small, with just 15 members [redacted]. (SF 1106; Goldsmith, Tr. 2088, 2103; CX 238). After [redacted], Smile Source [redacted] and to implement it, hired Dr. Andrew

[14] As discussed below, Complaint Counsel alleges that, on January 13, 2012, three weeks ***after*** Mr. Foley rejected Unified Smiles, Benco's Chuck Cohen reached out to Tim Sullivan to discuss Unified Smiles. Both Mr. Cohen and Mr. Sullivan denied that any such discussion occurred. (SF 1422; Cohen, Tr. 747; Sullivan, Tr. 4218-19, 4272-73). Moreover, *both* companies had already independently turned Unified Smiles down before the January 13, 2012 call. (SF 1424-29; CX 1144; Cohen, Tr. 870; Sullivan, Tr. 4218-19, 4268).

Goldsmith as its new President in August 2011. (SF 1106-07; Goldsmith, Tr. 1934, 2072; CX 2299).[15]

[redacted], Dr. Goldsmith sought to replace Schein. (SF 1109-11, 1125; Goldsmith, Tr. 2083-84, 2086; CX 1116 (September 26, 2011 email inquiring "what sort of relationship could be established with Benco"); CX 1138 (Sept. 30, 2011 email; Smile Source "need[s] a new distributor)).

After Benco declined, Smile Source selected Burkhart. (SF 1109-11; Goldsmith, Tr. 1990, 2093). [redacted] (SF 1112-13; Goldsmith, Tr., 1990-91; 2094-95).

Once Smile Source "fire[d]" Schein, the Schein team focused on keeping the Smile Source members' business, which were long-time Schein customers. (SF 1114, 1143-44; CX 199). Smile Source did not have any control over its members' purchasing – a fact touted in its franchise agreement – so the loss of the Smile Source contract did not deprive Schein of the ability to compete for the member dentists, the "ultimate customer." (SF 1141-44; Sullivan, Tr. 3935). Mr. Sullivan urged his team to "take this serious and get after it," as he was "really interested to see how and what we can do to retain these customers and judge how effective [Smile Source's] buying group model is." (SF 1142, 1352; CX 199). Of course, having just lost the account, Mr. Sullivan wanted to see what they "can do to KILL the[ir] buying group model and retain those member customers." (SF 1142-43; CX 199). Ultimately, Schein's suspicions that Smile Source lacked the

[15] Prior to becoming President, Dr. Goldsmith was a practicing dentist with no leadership role in Smile Source and no experience running a franchisor, a buying group, or a DSO. (SF 1107; Goldsmith, Tr. 2040-41). Within a year, Dr. Goldsmith was demoted to Chief Dental Officer, and at the end of 2014, [redacted]. (SF 1107; Maurer, Tr. 4956-58).

ability to drive compliance were proven correct. As Complaint Counsel's expert, Dr. Marshall, calculated, Schein kept the majority of the [redacted] Smile Source had at the time, and earned more revenues from that group than it had prior to termination. (SF 1723-24; RX 3058).

Complaint Counsel and their expert assert that Schein terminated Smile Source (*see* SF 1114, 1131, 1145, 1649-50; Marshall, Tr. 2936-37, 3125), but the evidence is to the contrary. [redacted] (SF 1114; Goldsmith, Tr. 2037 [redacted]). Contemporaneous business documents confirm this, noting that Smile Source "fire[d]" Schein. (SF 1114, 1128; CX 199).

Complaint Counsel alternatively claims that Schein surreptitiously induced the termination. (SF 1121-22, 1129, 1137). But if Schein wanted to terminate Smile Source, it could have just done so. (*See* SF 1121). There was no need for charades. Complaint Counsel also fails to identify when this sham plan was hatched, or cite to any communications where Schein supposedly agreed with Patterson or Benco to induce termination. (SF 1121). Nor does Complaint Counsel identify any internal Schein documents exhibiting such Machiavellian machinations. (SF 1121).[16]

Smile Source also does not support Complaint Counsel's inducement theory. Dr. Goldsmith wrote Mr. Sullivan shortly after termination stating that Schein [redacted]

[16] Complaint Counsel cites to after-the-fact documents by individuals who lack personal knowledge of the Smile Source relationship. (SF 1145; CX 238; CX 2349; CX 2107). This reliance on non-contemporaneous, uninformed emails is not an attempt to get to the truth but to obscure it. For example, in CX 238 Mr. Foley speculated that Smile Source "dumped Schein" because HSD did "not give Smile Source the love that [Special Markets] provided." (SF 1145; CX 238). Mr. Foley testified, however, that he had no involvement with Smile Source at the time. (SF 1145; Foley, Tr. 4590 ("[A]fter Smile Source was out of Special Markets and in HSD, it was no longer of my concern."); 4672 ("Q. … So did you work with Smile Source as of the date of this email, November 2, 2011? A. No."); 4706 ("My responsibility with Smile Source ended in 2010.")). Likewise, CX 2349 is just an email from Mr. Meadows speculating about whose "choice" the termination was. (SF 1145; CX 2349). Mr. Meadows testified that he had no personal knowledge of Smile Source at the time. (SF 1145; Meadows, Tr. 2453).

[redacted] (SF 1117; RX 2090). Expressing gratitude, Dr. Goldsmith explained that it was [redacted] and that it made the [redacted] to Burkhart only because they are [redacted]." (SF 1117-18; RX 2090; Goldsmith, Tr. 2102). Smile Source's Director of Marketing, Todd Nickerson, echoed these sentiments, explaining that he was "appreciative of everything that Henry Schein has done" and that they decided to go with Burkhart only because it was a "better fit … due to [their] size." (SF 1116, 1120; RX 2619).

Despite his feelings at the time, at trial, Dr. Goldsmith tried to blame Schein for his decision to switch to Burkhart. He trotted out four theories, none supported by evidence. He first said that he terminated Schein because of [redacted] (SF 1129; Goldsmith, Tr. 1982). But there is no evidence of such [redacted] Dr. Goldsmith's testimony on this point was excluded for the truth of the matter asserted and is contradicted by the sales data. (SF 1129-32; Goldsmith, Tr. 1979-81).[17] As the following chart shows, Schein's discounts to Smile Source remained flat from

[17] Dr. Goldsmith's [redacted] impression testimony is also not credible. *First*, neither he nor Smile Source produced this analysis (assuming it ever existed). He could not explain how it was constructed, describe the quality or comprehensiveness of the data sources, or recall the magnitude of the price increases. (SF 1132; Goldsmith, Tr. 2116-17). *Second*, Dr. Goldsmith lacked personal knowledge, as he claimed the [redacted] nine months before he joined. (SF 1133; Goldsmith, Tr. 2109-10). *Third*, Dr. Goldsmith started looking for replacement distributors immediately upon being hired, and could not recall any [redacted] (SF 1132; Goldsmith, Tr. 2114-15).

2010 through termination in January 2012.

Table 3
Schein Discount on Smile Source Purchases
2010 – 1Q2012

Quarter	Total Smile Source Purchases	Discount
2010 Q1	$113,512	23%
2010 Q2	$124,496	24%
2010 Q3	$134,890	23%
2010 Q4	$149,376	22%
2011 Q1	$226,571	22%
2011 Q2	$189,574	24%
2011 Q3	$186,903	24%
2011 Q4	$190,836	23%
2012 Q1	$162,357	24%

Source: Marshall Report backup data production.

(SF 1130; RX 2832 (Table 3); *see also* Carlton, Tr. 5380-81).[18]

As an alternative theory, Dr. Goldsmith testified that he terminated Schein because Schein [redacted] (SF 1125, 1134; Goldsmith, Tr. 2079-81). No internal Schein or Smile Source document corroborates that story. (SF 1126, 1134-36). Nor can that tale be squared with the fact that his introductory meeting occurred two weeks *after* Smile Source started looking for replacement distributors. (SF 1109, 1125, 1128, 1134; *compare* Goldsmith, Tr. 2079 (introductory meeting occurred at ADA meeting on October 11-13, 2011), *with* CX 1188 (September 30, 2011 email from Dr. Goldsmith to Benco; "we need a new distributor").

Trying another theory, Dr. Goldsmith [redacted]. (SF 1134; Goldsmith, Tr. 2115-17). But Dr.

[18] Complaint Counsel also relies on Dr. Marshall's Fisher price index to support the [redacted] assertion. (SF 1650). But the Fisher Price Index does not control for changes in manufacturer costs, does not focus on the level of *discounts* from catalog prices (which is the basis for contracting), and does not isolate general market price trends from price increases targeted at Smile Source members. (SF 1651, 1761). In fact, [redacted] (SF 1131, 1651; *see also* Marshall, Tr. 3143-46).

Goldsmith could not recall ever [redacted] (SF 1134; Goldsmith, Tr. 2115; CX 8039 (Goldsmith, Dep. at 170)). Nor was there ever any [redacted] (SF 1135-36; Goldsmith, Tr. 2118). In fact, the entire record contains just one instance where a single Smile Source member – who had just joined – did not receive a $100-$150 discount. (SF 1135; Goldsmith, Tr. 2119-22; CX 2571). Once alerted to the discrepancy, Schein [redacted]. (SF 1135-36; Goldsmith, Tr. 2121-22; CX 2571). This hardly evinces an attempt to induce termination.

Finally, Dr. Goldsmith claimed that he terminated Schein because Schein reduced FSC support. But Dr. Goldsmith admitted that Schein [redacted] (SF 1138; Goldsmith, Tr. 2123). If Schein's FSCs lacked sufficient spark, it was most likely, as Dr. Goldsmith conceded, because they [redacted] (SF 1139; Goldsmith, Tr. 2129). That dynamic is inherent in buying group relationships, which is why [redacted]. (SF 1140; Goldsmith, Tr. 2122-23; 2128-29; RX 2004).

As such, the inducement theory of termination fails.

7. Schein's Partnership with MeritDent in February 2012.

Around the same time that Schein turned down Unified Smiles and Smile Source terminated Schein, HSD was in active negotiations with MeritDent, a buying group of independent dentists based in Las Vegas.

On December 22, 2011 – the ***day after*** Mr. Foley turned down Unified Smiles – senior HSD leadership, including Tim Sullivan, Dave Steck, John Chatham, and Joe Cavaretta, met to discuss MeritDent. (SF 972-73, 1299; CX 2457; CX 2458). Initially, they were skeptical. (SF 970; Sullivan, Tr. 4242-43; Cavaretta, Tr. 5580-81). "As you can imagine," Mr. Cavaretta reported, "they [senior HSD leadership] feel the same as we do that we don't want to be the first company to open the floodgates to the dangerous world of GPOs."[19] (SF 970; CX 2458). Mr. Cavaretta also noted that MeritDent does not "fall into the [Special Markets] world" because they cannot "guarantee that all their business will come to Schein." (SF 971; CX 2458). Nonetheless, Schein fashioned a proposal for MeritDent and negotiations ensued. (SF 972-74; Cavaretta, Tr. 5581-82; Sullivan, Tr. 4243).

After meeting "several times," the parties entered into a purchasing agreement on February 7, 2012 (which, depending on which alleged start date Complaint Counsel chooses to use, is Schein's first act relating to a buying group ***after*** the start of the alleged conspiracy). (SF 974-75; RX 2393; Cavaretta, Tr. 5581-82). The agreement included a "pricing program" that "provide[d] a savings of 15-20% off of HSD cat[a]log" pricing, as well as other discounts and free services. (SF 976-77; RX 2393). As Complaint Counsel's own expert admitted, this was a [redacted] and exceeded the discounts available to a majority of Schein's independent dentists. (SF 976, 980; Marshall, Tr. 3006; CX 7101 (showing that only 40% of customers receive discounts greater than 15%)). The agreement also provided MeritDent with an incentive-based rebate structure, in which the group would receive $5,000 for every 100 customers that purchase more than $15,000 from Schein. (SF 977; RX 2394).

[19] Complaint Counsel's expert listed MeritDent as a supposedly boycotted buying group based on this isolated snippet. Dr. Marshall, however, failed to cite the portion of that email that presented a proposal to MeritDent, and he was unaware of the actual agreement that Schein entered into with MeritDent on February 7, 2012. (SF 980; Marshall, Tr. 2998).

Schein remained willing to "uphold" the agreement throughout the relevant period. (SF 978-79; RX 2394). It did so even though MeritDent failed to attract significant new business. As of 2014, it only had "35 accounts over the $15,000 minimum threshold," and "purchases for the entire group fell" since 2012. (SF 978, 980; RX 2394; *see also* Marshall, Tr. 3002 (conceding that he did not do any analysis of MeritDent to determine whether "signing up MeritDent actually delivered any incremental volume to Schein.")).[20]

8. Schein's Partnership with Sunrise Dental in March 2012.

Sunrise Dental was a buying group of 49 "independently owned" offices. (SF 1243). In March 2012, HSD Zone Manager Jake Meadows entered into negotiations with Sunrise Dental for a "Formulary with decent pricing, a service deal, [and] a discount for items not on the Formulary." (SF 1244; CX 2955). Mr. Meadows noted that most of the members were buying from Patterson or Burkhart Dental, providing an opportunity for incremental sales. (SF 1245; CX 2955).

Mr. Meadows sought approval from HSD's Vice President Dave Steck because, at the time, only Special Markets had contract writing authority to create specialized formularies. (SF 1246-47; Steck, Tr. 3722-34 (based on its experience in the DSO space, Special Markets was "better suited to enter into prime vendor agreements with entities that had a single purchasing or single negotiating point")). Mr. Steck promptly approved. "No problem," Mr. Steck wrote, "we will work this out." (SF 1248-49; CX 2955). As Mr. Steck testified, he "told [Mr. Meadows] to pursue

[20] Based on Schein's experience with MeritDent (among others), Dr. Marshall conceded that his analysis of Smile Source and Kois was incapable of supporting any *general* conclusions about the profitability of dealing with buying groups. (SF 1689-95; Marshall, Tr. 3002-03 ("Q. [B]ased on your analysis of Smile Source and Kois, you assumed that every buying group would deliver incremental volume; is that right? A. I looked at Kois and Smile Source because I felt they'd be representative of buying groups. Q. Clearly not representative of MeritDent where the sales declined; right? [redacted]).

[Sunrise Dental] because, honestly, it's an area of the country where we have low market share, and I felt there was good upside there." (SF 1249; Steck, Tr. 3773-74).

9. Schein's Partnership with Dental Partners of Georgia in May 2012.

In month five of the alleged conspiracy, Schein entered into another written buying group contract, this time with Dental Partners of Georgia ("DPG"), whose members consisted of independent dentists providing pediatric dentistry for Georgia's Medicaid program. (SF 676, 680; Foley, Tr. 4610-11; *see also* RX 2543 (listing unrelated, independent dentist members)). DPG was brought to Special Markets by HSD in 2009, and in the summer of 2012, DPG executed a formal, written agreement. (SF 679-80; Foley, Tr. 4611-12; RX 2543). While DPG did not own or manage any of its member offices, Mr. Foley explained that the group had "stickiness," because they engaged in common reimbursement negotiations with the State Medicaid plan, shared software, and participated in joint education sessions. (SF 683-85; Foley, Tr. 4614-15). Based on this stickiness, DPG, unlike many buying groups, was able to commit its members to purchase "at least 80% of [their] dental merchandise from" Schein. (SF 684-86; Foley, Tr. 4617; RX 2543).[21]

10. Schein's Partnership with the Schulman Group in April 2013.

The Schulman Group is a buying group of "over 175 high level/volume" independent orthodontists "across the country." (SF 1093-94, 1099). In April 2013, Schein and the Schulman Group entered into a "Partnership Program," which provided discounts "on 2,000 of the most common products an Orthodontist purchases," an additional 5% rebate if volume thresholds are

[21] The fact that Mr. Foley continued to nurture, expand, and memorialize buying group relationships during the alleged conspiracy guts any weight Complaint Counsel would give the snippet from Mr. Foley's December 21, 2011 email declining to do business with Unified Smiles. Far from "no longer" doing business with buying groups, Schein (and Mr. Foley) continued to do just that, where the group could exhibit compliance or stickiness. (SF 412-13, 679-87, 737-45, 1029-35).

met, and additional discounts for service, equipment, and technology. (SF 1095-96; CX 2047; RX 2256).[22]

Notably, over a year and half after Schein started working with the group, a Benco FSC reached out to senior Benco leadership "to see if we (Benco) [wanted to] offer a discount for the Schulman Group," as "Henry Schein does." (SF 1102; CX 1104). Benco's Director of Sales Pat Ryan rejected the idea, noting that the "Schulman Group is a buying group … and we don't participate in that business," instructing the FSC not to "put anything in front of them." (SF 1103; CX 1206; Ryan, Tr. 1252). Despite Mr. Ryan's awareness of Schein's relationship with the Schulman Group, neither he nor Mr. Cohen contacted Schein to enforce the supposed conspiracy or took "any action to stop [Schein] from working with … the Schulman Group." (SF 1102; Ryan, Tr. 1252-53; Cohen, Tr. 914). This is a clear instance of non-parallel conduct, and a lack of enforcement of the imagined conspiracy, which refutes any notion that Schein's buying group activities were somehow "cheating."[23]

11. Schein's Attempt to Re-Engage with Smile Source in 2014.

In late 2013, Smile Source started to explore additional or replacement distributors. (SF 1146-47, 1149-51, 1156; Goldsmith, Tr. 2009-14, 2134-39). Both Benco and Patterson turned Smile Source down. Schein, in contrast, actively competed for the business, though Smile Source ultimately rejected Schein's proposal in favor of continuing with Burkhart and contracting with Darby, Schein's business-affiliate. (SF 1156-67).

[22] Though Mr. Sullivan was not initially aware of the negotiations with the Schulman Group, he became involved during the preparations for the roll-out, and approved of it. (*See* SF 1100-01; CX 2047 (April 19, 2013 email from Mr. Sullivan, noting that "[a]ll sounds good" after being informed of the details); Sullivan, Tr. 3999-4000).

[23] Citing only the Benco document, CX 1104, Dr. Marshall listed the Schulman Group as a boycotted entity. But he did not cite any of the Schein documents discussing the Schulman Group, and at trial, Dr. Marshall admitted that he did not know whether Schein did business with the Schulman Group. (SF 1094; Marshall, Tr. 3007-08)

On September 30, 2013, Dr. Goldsmith – now demoted to Chief Dental Officer – reached out to Patterson to explore "possibilities for a partnership." (SF 1107, 1147; CX 3277). Two months later, after meeting with Smile Source, Patterson informed Dr. Goldsmith that it was "not interested." (SF 1148; CX 147; McFadden, Tr. 2717; Misiak, Tr. 1401-2).

Smile Source also reached out to Benco in late 2013 and again in early 2014. (SF 1149-52; Ryan, Tr. 1188-89; CX 19; CX 1162). Mr. Cohen agreed to meet with Smile Source, but re-iterated that "they should know going in that we do NOT work with, or recognize, buying groups." (SF 1153; CX 1163). Mr. Cohen reiterated that message to Smile Source President Trevor Maurer at the ADA Chicago Mid-Winter meeting in February 2014. (SF 1154).

While Patterson and Benco said no, Schein said yes. On October 28, 2013, Dr. Goldsmith reached out to Schein to "discuss some possibilities for … renewing our partnership." (SF 1156-57; CX 2580). Mr. Sullivan met Dr. Goldsmith at the ADA meeting. (SF 1157-58; RX 2328; Goldsmith, Tr. 2014, 2137). A month later, Dr. Goldsmith requested another trade-show meeting if Mr. Sullivan could "foresee any possibility of doing business together." (SF 1159; RX 2328).

Mr. Sullivan immediately responded:

> ***Yes, we absolutely would like to discuss further***. However, I think we need more than a few minutes together on a convention floor. I think we could use a couple of hours discussing details…. ***I am confident that there is something here for us to partner on together***.

(SF 1160; RX 2328). This was the same day Patterson told Smile Source that it was "not interested." (SF 1148, 1159-61; RX 2328; CX 147). As Dr. Goldsmith admitted, [redacted] [redacted] (SF 1161; Goldsmith, Tr. 2139). On January 22, 2014, Smile Source met with Schein to discuss the possibility of working together again. (SF 1162).

Shortly thereafter, Schein prepared a detailed proposal for Smile Source, laying out the framework for a "win-win" partnership with a "clear economic benefit to Smile Source Members ... beyond what they could individually realize." (SF 1163; RX 2213). It offered a "discount on all products and services purchased from Henry Schein Dental," including a 7% discount on branded supplies, a 14% discount on private label supplies, a 10% discount on equipment, a 10% discount on technical service, and a 5% discount on business solutions, practice management software licenses, and CAD-CAM supplies and fees. (SF 1163; RX 2213). Schein also offered a 2% rebate if certain volume conditions were met. (SF 1163; RX 2213).

Schein's proposal was better than most individual dentists could receive on their own, without being unfairly discriminatory to non-members. (SF 1176; Steck, Tr. 3797-98). It offered a *substantial* improvement over Schein's second-highest standard VPA, which was typically reserved for large group practices purchasing at least $35,000 of supplies annually. (SF 1176; CX 2828; RX 2213 (offering an additional 2% volume rebate and discounts on other products and services); Steck, Tr. 3793-98, 3849-50). As Dr. Marshall calculated, this offer provided [redacted], depending on the customer's purchases. (SF 1177; CX 7101).

Smile Source rejected Schein's offer. (SF 1164; Steck, Tr. 3794). As HSD Vice President John Chatham reported,

> Guys, Just spoke with Andrew Goldsmith. They as a group have decided to probably go with Darby [Schein's business affiliate] for their supply business. I truly believe he wanted us and was voted down by the group. We chatted for 20 minutes and I brought up some things he hadn't thought of.… I believe he is going to make one more run with the business leaders.

(SF 1165; CX 2591).[24]

Schein, however, did not give up. It attempted to "sweeten the pot" by "increas[ing] the discount to 9/18 as our 'best and final' offer," representing an improvement of 2% on branded products and 4% on private label products. (SF 1166; Steck, Tr. 3795; CX 2591). Although this offer beat even Schein's ***top*** VPA (typically reserved for customers doing at least $75,000 in volume), Smile Source still turned down the offer. (SF 1166-67; Steck, Tr. 3795-96; CX 2828).

In response, Complaint Counsel argues – inconsistently – that Schein was either trying to cheat on the conspiracy or that it submitted a sham bid that it never wanted to win. As to the first excuse, Dr. Marshall admitted that Schein's bid can be considered "cheating" ***only if*** you first assume a conspiracy; otherwise, it is non-parallel conduct undermining an inference of conspiracy. (SF 1634; Marshall, Tr. 2958-60). Complaint Counsel's labeling of Schein's bid as "cheating" is pure speculation, as there no evidence that Schein sought to keep its Smile Source activities secret. Nor would the relationship have been secret if Schein had won the bid. As such, there is neither evidence of a conspiracy nor of cheating. There is only evidence of Schein actively doing, or seeking to do, business with buying groups.

As to the second excuse, Complaint Counsel cannot explain why Schein would devote so many resources to creating and negotiating a fake bid – and then sweeten it. If it did not want the business, it didn't have to bid. There was no need for subterfuge. Certainly, Patterson and Benco had no qualms about declining the opportunity. (SF 1148, 1153-54). Complaint Counsel cites no evidence suggesting a conspiracy pursuant to which Schein alone would submit fake bids. Nor is

[24] Mr. Chatham's recitation of his conversation with Dr. Goldsmith is the quintessential business record, as it was made "at or near the time" of the conversation, by a participant to the conversation who obviously had "knowledge" of it and who transmitted it during the "ordinary course of business" to others with a need to know so that they could make business decisions about how to proceed. *See* Fed. R. Evid. 803(6).

there any evidence supporting even a plausible reason for Schein to submit a bid (and improve it) for business it supposedly did not even want. (SF 1703; *see* Marshall, Tr. 2957-59).

The evidence shows that Schein submitted the bid in good faith. Internal Schein documents show that Schein believed its offer to be "compelling" and "aggressive," that it wanted to win the business, and that it was disappointed when it didn't. (SF 1175-77; CX 2130 (Mr. Sullivan "felt it was a very compelling offer" and so did one of Smile Source's "key guys"); CX 2508 (describing proposal as a "good effort;" and suggesting that it be "use[d] as a template with changes for GPO's going forward"); CX 2683 (Mr. Sullivan noted that "[w]e made a very aggressive and inclusive proposal to them that many of their execs liked…."); Steck, Tr. 3783-94; Foley, Tr. 4654-55). Smile Source also believed that Schein's offer was competitive and comparable to Burkhart's. (SF 1178; Maurer, Tr. 4942-43, 4945 (testifying that "the pricing was the same" or "similar," but that "the reason we didn't switch to Schein was just loyalty to Burkhart.")).[25]

Despite Smile Source's rejection of Schein, the lines of communication stayed open between the two. (SF 1181; Sullivan, Tr. 4173). In August 2015, Smile Source President Trevor Maurer reached out to see if Mr. Sullivan was interested in catching up, to which Mr. Sullivan replied that he would "love to connect again." (SF 1181; RX 2444). A few months later, Mr. Sullivan met with Mr. Maurer at Smile Source's headquarters. (SF 1181; CX 2606). At the meeting, Mr. Maurer explained that Smile Source had grown and claimed to have over 85%

[25] Dr. Goldsmith's testimony that he was [redacted] by Schein's offer is contradicted by the evidence. (SF 1174; Goldsmith, Tr. 2029). *First*, he testified that he [redacted] (SF 1174; Goldsmith, Tr. 2158, 2160). *Second*, he said that he [redacted] (SF 1174; Goldsmith, Tr. 2160). *Third*, he conceded that he did no [redacted] (SF 1179; Goldsmith, Tr. 2153-54). *Fourth*, Schein's offer is objectively similar to, and perhaps better than, Burkhart's deal, and Complaint Counsel failed to show otherwise. (SF 1178; CX 4105 (**Schein**: supplies: 7-14%, plus 2% volume rebate; equipment, 10% plus 2% volume rebate); RX [redacted]).

purchasing compliance from its members. (SF 1181; CX 2606). Following the meeting, Mr. Sullivan felt that Smile Source had "reached [a] tipping point and will gain momentum" in the future. (SF 1182; CX 2606). Schein went to work on developing a new proposal based on its "new formulary pricing." (SF 1182; RX 2116). [redacted]. (SF 1183-86; CX 4099).

12. Project Pyramid and the Creation of the Mid-Market Group in April 2014.

Given its expertise in developing and negotiating specialized formularies and manufacturer charge-backs, Special Markets held primary responsibility for contracting with centralized purchasers, including buying groups, through April 2014. (SF 25-27, 30-31, 33, 235, 237, 259, 261, 263, 1376, 1387; Meadows, Tr. 2459). For its part, HSD tended to focus on local buying groups that did not require customized formularies and could be served by FSCs offering a standard VPA to all of the group's members. (SF 1386-90).

By 2013, however, the proliferation of DSOs, large group practices, and, to a lesser extent, buying groups, started to tax Special Market's resources. (SF 238-41). Senior HSD leadership also recognized that "GPOs are growing" and began "brainstorming" about "how to allow for investment in" that space. (SF 244; CX 2461 (December 9-10, 2013 strategic offsite agenda); Meadows, Tr. 2582). The solution was a corporate reorganization, called Project Pyramid. (SF 244-47; RX 2392).

Project Pyramid was designed to "[c]reate clearly defined customer segments," develop a "sales organization within HSD" to support centralized purchasers, and "allow Special Markets to focus on government institutions and the largest (or 'elite') DSOs." (SF 247-51; RX 2392; Sullivan, Tr. 4108-10; Meadows, Tr. 2584). Those DSOs were placed at the pinnacle of the

pyramid, and everything below would belong in HSD, and HSD would form a new group – called Mid-Market – to handle community health centers, group practices, and buying groups. (SF 251-53, 257; RX 2392; Sullivan, Tr. 4112-13; Cavaretta, Tr. 5585-87; Foley, Tr. 4607-08).

Mid-Market launched in April 2014, and it took over primary buying group responsibility from Special Markets. As part of the shift, two employees – Kathleen Titus and Andrea Hight – also transitioned from Special Markets to Mid-Market. (SF 257, 261, 264; CX 2352; Sullivan, Tr. 4112-13; Foley, Tr. 4608-09; Meadows, Tr. 2590; Cavaretta, Tr. 5586-88). Though Special Markets continued to retain responsibility for certain groups (and had authority to open new ones), Ms. Titus and Ms. Hight were now on the front lines on behalf of HSD. (SF 263-64; CX 2352 ("We just have to keep sending to Andrea, KT, and Mr. X so they can review requests.")).

With the transition underway, the Mid-Market team began developing a more formalized buying group strategy. As Ms. Titus wrote to her boss, Mr. Cavaretta, on May 8, 2014, "[w]e need to develop our policy on these Dental Management Companies that have a GPO component," as they "are coming out of the woodwork and have a leg in both worlds." (SF 272; RX 2385). Ms. Titus and Ms. Hight undertook developing a "yardstick" by which to measure buying groups and "agreed to in writing when these relationships make sense and when [they do] not." (SF 273; RX 2105).[26]

[26] Complaint Counsel relies on a May 2013 document in which Mr. Cavaretta writes that "[w]e try to avoid buying groups at all costs and therefore don't really recognize them. I'm not aware of any groups in the US where we sell to an association and they in turn sell to their members." (SF 236; CX 2509). Complaint Counsel, however, takes the document out of context. *First*, Mr. Cavaretta was addressing a very specific type of buying group, in which the group ***takes title*** to the supplies, makes one or two purchases a year, and presumably warehouses them before reselling to individual members. (SF 236; CX 2509; Cavaretta, Tr. 5655-65). That closer describes a distributor, not a buying group. Mr. Cavaretta's statement that he is not aware of any such buying group is simply a factual observation. Nor has Complaint Counsel identified any such buying group that approached Schein for a contract. To the extent buying groups do have similar control over the purchasing decision – such as OrthoSynetics and Breakaway – Schein's Special Markets and later HSD have a long history of working with them. (SF 412, 437, 1029; CX 2710; CX 2482 (noting that long-time buying group Breakaway has "complete control of the check book.")). *Second*, Mr. Cavaretta's statement that Schein doesn't "really recognize buying groups" merely provides an explanation to a Special Markets employee for why, if HSD "manages customers who are buying groups," its "account data" systems do not "track

13. Steadfast's Rejection of Schein's Exclusivity Offer in Mid-2014.

Steadfast was one of the first buying groups Ms. Titus encountered in her new role. (SF 1207-08; RX 2885; Foley, Tr. 4676). Special Markets had entered into a relationship with Steadfast sometime before 2012.[27] (SF 1202-04; Foley, Tr. 4676, 4681). Two years later in March of 2014, as Special Markets was undergoing "some [reorganizational] changes," a Schein telesales representative in Reno, Nevada discovered that no FSCs had been assigned to Steadfast members. (SF 1209; CX 171).

The telesales representative forwarded her findings to Ms. Titus, who started to investigate, as she wanted to ensure Steadfast was being served appropriately. (SF 1208-09). Ms. Titus found that the group had abnormally low sales of only $150,000. (SF 1218; CX 171). Comparing sales of customers before and after they joined Steadfast, Ms. Titus discovered that Schein sales had *dropped* by "*nearly half*." (SF 1218-19; Titus, Tr. 5250-51; CX 255). As Ms. Titus reported:

> They are taking perfectly functional HS accounts, opening them under their SM parent called Steadfast, then taking orders from the customer and dividing it up amongst several distributors (our competitors). So business we once had, is being reallocated to our competition like Benco, McKesson, Smart Practice, Etc. If you visit their site you will note that they are a PROCUREMENT service. You might be looking at number[s] that are up, but when you look at the accounts prior to them being opened as Steadfast, we are down 45%.

(SF 1219; CX 255; *see also* Titus, Tr. 5252-54, 57). As Dr. Marshall admitted, it [redacted] with a group like Steadfast, where [redacted]

[those groups] specifically." (SF 236; CX 2509). As such, neither the email nor surrounding facts suggest that Schein did not do business with buying groups.

[27] The record is unclear as to when Steadfast was actually opened. Complaint Counsel identifies a document with a de minimis amount of sales (~$5,000) from 2010. [redacted] (SF 1627; CX 7101 (Figure 13); Marshall, Tr. 2970 [redacted].

[redacted] and [redacted] else. (SF 93-94, 1693-94; Marshall, Tr. 2972).[28]

Rather than immediately terminate Steadfast, Ms. Titus tried to salvage the relationship by seeing if they could develop a "win-win" relationship through an exclusive partnership. (SF 1220). As Ms. Titus wrote to the Steadfast's CEO, Jon Staples:

> As you know, virtually all of your members were set up as Henry Schein customers prior to them signing on for your procurement services. Unfortunately, our reporting shows that under Steadfast …, business for that same group of customers is trending down…. My guess is that Steadfast is reallocating that business to other suppliers. Certainly, you have every right to pursue your business model, however, it appears to be at our expense. ***To be clear, we are not against having GPO partnerships***. Quite the contrary, we have a number of them in which all parties are in a position to win.
>
> I would like to think that is possible with Steadfast as well…. [B]ut in order to continue, we need to find common ground that makes financial/business sense for all stake holders.
>
> I have been impressed with you and your team. ***We do not want to pull the plug on this [fledgling] relationship until both parties agree that our goals are counter to each other***.

(SF 1220-23; RX 2201; *see also* Titus, Tr. 5244-55 (because "[a]ll our customers are precious to us, … I took on that mantle that every relationship can be corrected with proper negotiation, so that was my plan, was to seek out ... a win-win for both stakeholders.")).

True to its name, Steadfast steadfastly refused to engage Ms. Titus in discussions. And her repeated attempts to open a dialog were met with "radio silen[ce]." (SF 1224; CX 255). After waiting over a month and receiving approval from both Mr. Foley and Mr. Cavaretta, Ms. Titus terminated the relationship. (SF 1225-33; RX 2208; Foley, Tr. 4678-80 (noting that he gave the "green light" to terminate the relationship because the relationship had "gone south;" "they were no longer following our basic guideline of driving compliance;" they "refused all meetings" with

[28] As Mr. Cavaretta testified, after Steadfast was ultimately terminated, Schein continued to compete for the members' business, whose sales with Schein actually increased, further demonstrating that buying groups do not always make good on their promise to deliver incremental volume. (*See* SF 1240-41; Cavaretta, Tr. 5596-98).

Ms. Titus after "repeated attempts;" and Ms. Titus provided "proof" backed up by "documentation" that showed Schein was "losing revenue"); Cavaretta, Tr. 5595-96 (noting that Mr. Cavaretta made the final decision without input from Mr. Sullivan)).[29]

Still, Ms. Titus reiterated that, if Steadfast was "interested in exploring an ***exclusive relationship*** with Henry Schein, we would welcome revisiting a mutually beneficial partnership." (SF 1235; RX 2208). Notably, Ms. Titus did not require any ownership (*i.e.*, become more like a DSO) or express reluctance to do business with Steadfast because it was a buying group. To the contrary, Ms. Titus explained that Schein wanted a *closer*, *exclusive* relationship with Steadfast, directly contrary to Complaint Counsel's theory of the case. (SF 1234-35; Titus, Tr. 5258).

Nonetheless, Complaint Counsel asserts that Steadfast supports its case because it represents the termination of a buying group during the alleged conspiracy period. But their theory requires donning blinders to the real, documented reasons for the termination. Moreover, the termination occurred three years after the start of the alleged conspiracy. Complaint Counsel does not claim that Schein reached an agreement in 2011 to engage in delayed termination of buying groups. Nor does Complaint Counsel identify any communications between Schein and Benco or Patterson concerning Steadfast. (SF 1238; CX 6027; *see also* Cohen, Tr. 914; Ryan, Tr. 1258). Rather, the evidence shows that Ms. Titus's concerns about Steadfast arose merely from attempting to ensure that Schein's customers were being served properly after a Reno telesales representative raised potential concerns. (SF 1208-09; CX 171). As Ms. Titus testified, the decision to end the relationship with Steadfast had "absolutely" nothing to do with Patterson or Benco; her "job was

[29] Complaint Counsel speculates (without basis) that Ms. Titus was instructed to review Schein's buying group relationships and systematically shut them down. But every witness, including Ms. Titus and her superiors, denied this. (SF 1210; Titus, Tr. 5249-50 (Q. Did anyone at Schein specifically instruct you to look into the Steadfast Medical buying group relationship? A. Absolutely not."); Foley, Tr., 4681).

to work on behalf of Henry Schein and do what was good for our company and our constituency." (SF 1238; Titus, Tr. 5194-5).

14. The Dental Co-Op's Rejection of Schein's Exclusivity Offer in July 2014.

The Dental Co-Op is a multi-state buying group with chapters in Utah, Idaho, Nevada, and New Mexico. (SF 583, 585). Schein began supplying the Dental Co-Op at some point prior to 2009. (SF 583-84, 587; Cavaretta, Tr. 5601).[30]

In March 2011, the Dental Co-Op's Arizona chapter reached out to Benco seeking a supply relationship. (SF 633; CX 1039). A Benco Regional Manager discussed the opportunity with Pat Ryan, noting that "this would be a great opportunity to win some business from Schein. They certainly do it." (SF 633; CX 1039). Mr. Ryan noted that, "per Chuck [Cohen]," Benco could not "pursue groups like this…. No. Never. Ever. Amen." (SF 633; CX 1039; Cohen, Tr. 908 ("Q. And we established that Benco had said no to the Dental Co-Op of Utah while Schein had said yes…? A. Yes."). But despite learning that Schein was doing business with this group, Benco did not discuss the issue with anyone from Schein. (SF 633; Cohen, Tr. 852-53; Ryan, Tr. 1245). This is yet another instance of non-enforcement of the imagined conspiracy.

Three years later, in May 2014, Kathleen Titus received an email from Francis Keefe, the National Corporate Accounts Manager for Colgate. He was complaining that the Dental Co-Op was "eating up base business" as Colgate/Schein had recently lost two accounts to its competitor

[30] In February 2013, two New Mexico dentists sought to form a buying group. After Patterson turned the group down, its leader, Brenton Mason, reached out to Schein. (SF 1006-08, 1012, 1015; RX 2400; Mason, Tr. 2392-93). But Mr. Mason stated that he was not seeking to "mov[e] dentist[s] from one distributor to another." (SF 1014; RX 2400). As such, Mr. Mason offered no incremental volume, no exclusivity, and no benefit to Schein. (SF 1016, 1018; Mason, Tr. 2394-95). A few months later, in July 2013, the group then formed as the New Mexico chapter of the Dental Co-Op of Utah, receiving their supplies from Schein through Schein's master agreement. (SF 1023-24; Mason, Tr. 2391, 2399-400; RX 2462). As Mr. Mason testified, "Schein never said no to the New Mexico chapter of the Utah Dental Co-Op" and "did in fact partner with the New Mexico chapter of the Utah [Dental] Co-Op." (SF 1024; Mason, Tr. 2404-05).

Proctor & Gamble, maker of Crest/Oral-B. (SF 594; CX 2239; Titus, Tr. 5237). Ms. Titus agreed that "the moment [the Co-Op] signed on with P&G direct and Komet," another direct-selling manufacturer, "it was tantamount to throwing down the gauntlet with Schein and acting as a competitor." (SF 595; CX 2239). Ms. Titus also noted that the Dental Co-Op was doing a poor job of "driv[ing] compliance," as each member was purchasing an average of only $5,000 worth of supplies, giving Schein a paltry 10% share of dentists' annual $40K-$60K purchases. (SF 117, 601; CX 2239; Titus, Tr. 5240-41).

Ms. Titus reached out to the Dental Co-Op CEO to find a solution. (SF 597-98; Titus, Tr. 5241). "He needed a wake-up call," she explained to her superiors, "and in my sweetest voice, I also told him that we were very interested in exploring a healthy sustainable relationship, but it would not be in our interest to share the spotlight with competitors." (SF 598; CX 2239). Ms. Titus proposed an exclusive arrangement. (SF 603; Titus, Tr. 5243-44). After the Dental Co-Op rejected Schein's proposal, Schein terminated the relationship in or around mid-July 2014. (SF 611-16, 619; RX 2437; RX 2604). The Dental Co-Op then signed a new distribution agreement with Schein's business affiliate, Darby. (SF 632; CX 2211; RX 2232).

As with Steadfast (and their incorrect factual assertions regarding Smile Source), Complaint Counsel tries to twist the facts to fit their conspiracy theory, claiming that Schein was bent on conspiratorially terminating all legacy buying groups.[31] But Complaint Counsel identifies

[31] Complaint Counsel cites an email from HSD Zone Manager Kevin Upchurch stating that "[t]he Dental Co-Op is turning into a GPO (even if they don't think they are one now) ... and from Tim S., HSD does not want to enter the GPO world." (SF 624 n.7; CX 2211). Complaint Counsel claims that this demonstrates that Schein did not want to do business with "*buying groups*." As Ms. Titus explained, however, that *interpretation* of the document makes no sense, as Schein was doing business with buying groups. (SF 624 n.7; Titus, Tr. 5248). The confusion stems from the ambiguity of the term GPO. In *most* cases, Schein personnel used the term "GPO" and "buying group" interchangeably. (SF 624 n.7; Steck, Tr. 3741; Sullivan, Tr. 3901). But in some cases, Schein personnel used "GPO" to refer to the type of organization common in medical markets that negotiates directly with manufacturers and uses distributors primarily as a fulfillment organization. (SF 624 n.7; CX 8010 (Titus, Dep. at 266)). In dental markets, however, buying groups typically negotiate with distributors, who in turn negotiate with manufacturers. The Dental

no interfirm communications involving Schein about the Dental Co-Op, and the termination occurred more than three years after the start of the alleged conspiracy.[32] (SF 615, 625; JF 74). In addition, as Ms. Titus testified, no one instructed her to shut down the Dental Co-Op. (SF 597; Titus, Tr. 5248). Rather, Ms. Titus received a complaint from one of Schein's largest manufacturers, investigated the issue on her own, and recommended termination only after the Dental Co-Op rebuffed her efforts to establish a *closer* relationship. (SF 594-603, 611-13). Importantly, Complaint Counsel does not contend that Schein's termination of the Dental Co-Op was economically irrational.[33]

15. Schein's Decision Not to Partner with PGMS in July 2014.

In June 2014, Ms. Titus met with Pacific Group Management Services ("PGMS"). (SF 1058-59; CX 2250). PGMS was a "consulting group" that wanted to offer a discount on supplies to their clients to help defray the cost of their consulting services. (SF 1047, 1062, 1066). Though this was an unusual model for Schein, Ms. Titus explained that the "consensus of the team [was] to move forward with a proposal." (SF 1060; CX 2250). She then developed a proposal that she

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Co-Op was morphing from a traditional dental buying group to the type of GPO that negotiates directly with manufacturers. (SF 624 n.7; Titus, Tr. 5239). It is that type of group that Schein was particularly uninterested in, as it disintermediates Schein from the manufacturer-customer relationship, and turns the group into a direct competitor of Schein's. (SF 624 n.7; CX 2227). As Ms. Titus wrote to Colgate's Mr. Keefe, the Dental Co-Op's decision to negotiate directly with direct-selling manufacturers "portends the empowerment of the GPO infiltration in the dental space and, as this scenario illustrates, the dilution of influence of Distribution." (SF 624 n.7; CX 2227).

[32] Complaint Counsel cites an *internal* Benco document in which Pat Ryan informs Chuck Cohen that Schein had terminated the Dental Co-Op ***over three months earlier***. (SF 625 n.8; CXD 9 (October 2014 text reporting that "Schein had just dumped the last GPO they had … [i]n Utah. Indicating [that] they are not interested in state organization GPO."). This was typical competitive intelligence, does not reflect any interfirm communications between Schein and Benco, and refutes any notion that Schein was "cheating." (SF 625 n.8; Cohen, Tr. 909-10 (noting that this is "simply speculation about Schein's views about … buying groups," that there were no discussions with Mr. Sullivan about the Dental Co-Op, and denying that there was "an agreement to solely terminate buying groups over time.").

[33] Dr. Marshall declined to support Complaint Counsel's contentions regarding the Dental Co-Op, acknowledging that [redacted] (SF 628-29; Marshall, Tr. 2969, 2980).

hoped could "serve as the foundation" for policy on how to do business with these types of entities.[34] (SF 1060; CX 2250).

Issues unique to PGMS, however, soon became apparent. Regional Manager Brian Brady, who later supervised Mid-Market, was concerned about cannibalization, and the inability of a consulting group to drive compliance. (SF 1062; CX 2250). As he explained,

> Let's say, for example they have 50 [dentists] …, and half of those are buying customers from HSD (our Bay Area market share is 55% ...) on VPAs with an average discount of 5-10%. Will all of those doctors [now go to] 20% off.... Doctors already buying from us will want [the] more aggressive discount, and doctors who don't buy from us probably aren't going to switch if they have relationships elsewhere … especially when there is no mandate to buy from Schein.

(SF 1062; CX 2250). Mr. Brady was also concerned that PGMS's own management would not personally commit to using Schein. (SF 1063-64; CX 2250). As he explained, "[m]y impression of this group is they want their cake, and they want to eat it too, and they also want to not try the cake if they don't like the flavor. Even the lead Dr. … who has not signed any contracts" said he would "not work exclusively with Schein." (SF 1063; CX 2250; RX 2228 (noting concerns about lack of guarantees of "gaining incremental business"); Cavaretta, Tr. 5607).

Ultimately, PGMS could not "guarantee that its members will purchase from Schein." (SF 1065; CX 2251). On that basis, Mr. Cavaretta decided not to execute a contract. (SF 1068-72; Cavaretta, Tr. 5610; Titus, Tr. 5228).[35]

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[34] Ms. Titus used the opportunity to start "to establish some real policies that will guide us well into the future." (SF 1052; CX 2219). One such policy was the creation of a multi-page series of due diligence questions, designed to understand the nature of each group's business model and their capacity to drive compliance, deliver incremental volume, and minimize cannibalization. Mr. Cavaretta concurred that the questions "should be standard" for all buying group evaluations. (SF 1052-54; CX 2809).

[35] Complaint Counsel cites an email from Ms. Titus that says "[w]e had a GPO prospect called PGMS …, willing to be exclusive. [Proposal] went to Tim and he shot it down. I think the meta message is officially, GPOs are not good for Schein." (SF 1073; CX 2251). But Ms. Titus never spoke with Mr. Sullivan directly about PGMS. Ms. Titus also testified that those were her words, that Mr. Cavaretta's words "were more measured," and that no one ever told her that Schein could not work with buying groups. (SF 1073; Titus, Tr. 5227). Mr. Cavaretta, who actually had the discussion with Mr. Sullivan, testified that Mr. Sullivan simply said "whatever you want to do, we do." (SF 1070; Cavaretta, Tr. 5609).

16. Kois's Refusal to Provide Schein with Information and its Decision to Partner with Burkhart in October 2014.

After being rejected by both Patterson and Benco, Kois approached Schein in October 2014 with its idea for launching a new buying group. (SF 872-85, 881-83, 893-95; Kois Sr., Tr. 255; RX 2197). Schein engaged Kois in active discussions, but Kois declined to provide Schein with additional information about its proposal, and before discussions could progress, Kois elected to contract with Burkhart. (SF 893-913).

Dr. Kois is a well-respected dentist who founded a continuing-education "teaching center for practicing dentists" located in Seattle, Washington. (SF 843-44; Kois Sr., Tr. 163-64). Approximately 4,000 dentists have attended Dr. Kois's seminars, and have become what he calls "Tribe" members. (SF 847). In mid-2014, Dr. Kois was approached by Qadeer Ahmed, of ProCare Equalizer Services, with a plan for a Kois-branded buying group, called the Kois Buyers Group. (SF 849-50). They struck a deal, with Mr. Ahmed to receive 50% of the revenues, consisting primarily of annual membership fees of between $1,200 and $6,000 per member. (SF 850, 854, 924; Kois, Sr., Tr. 239-42; CX 290).[36]

Mr. Ahmed began soliciting distributors. To entice them, Mr. Ahmed prepared a presentation, without any input from Dr. Kois, that highlighted the uniqueness of his vision. (SF 857-62; Kois Sr., Tr. 255). The presentation contained unusual proposals of dubious legality and painted a rosy financial picture based on unsupported assumptions. (SF 857-64, 869; Kois Sr., Tr. 255). Specifically, Mr. Ahmed claimed that Kois was "not a standard buying group," as "[n]ormal

[36] Complaint Counsel did not call Mr. Ahmed to testify, despite the fact that he alone – and not Dr. Kois – would have had personal knowledge of the distributor selection and negotiation process. Complaint Counsel's failure is particularly striking given that Dr. Kois's direct testimony – that he only "reached out to Burkhart" after being turned down by Schein, Patterson, and Benco (*see* SF 916 n.12; Kois Sr., Tr. 190), is directly contradicted by contemporaneous business records, as he admitted on cross. (SF 916 n.12; Kois Sr., Tr. 250-55 (testifying that Burkhart reached out to Dr. Kois (not the reverse), and that this occurred before anyone reached out to Schein)).

buying groups ask distributors to lose margin [and] do not allow the distributor to recover the margin % which is lost," whereas Kois is "profoundly different" in that it promised to "compensate the distributor for the margin % sacrificed." (SF 859-60; RX 2197). It claimed the ability to transfer members' *patient revenues* to the distributor, such as by sharing revenues on "services which the distributor does NOT" provide. (SF 860; RX 2197). Mr. Ahmed never explained how this could be done legally, or whether any dentists would agree to this. (SF 869).

With respect to the financial model, Mr. Ahmed assumed that all 1,700 Tribe Members would join the "pilot," with an "additional 1,000 dentists" of unknown origin joining in Phase 2 (even though the buying group had no members at the time, and even at its peak, *most* Kois Tribe members had not joined). (SF 847, 854-56, 862, 865-66; RX 2197; CX 7100 (Kois only had [redacted] members by 2015); Reece, Tr. 4481). In addition, Mr. Ahmed assumed that each member would purchase 100% of their supplies through the group, despite the lack of any purchasing commitment. (SF 868-69). Even Dr. Marshall conceded that this assumption was not realistic, as buying groups generally do not deliver that level of compliance, and [redacted]. (SF 870).[37]

With this fantastical proposal in-hand, Mr. Ahmed first approached Patterson on September 22, 2014. (SF 872). Patterson declined the invitation after internally expressing serious doubts about Mr. Ahmed's qualifications, his veracity, and the merits of his proposal. (SF 873-75; RX 377; Guggenheim, Tr. 1825; CX 8007 (Kois Sr., Dep. at 47)).

[37] Dr. Marshall showed that, in 2015, only about [redacted] of Kois Tribe members joined the buying group. (SF 870; CX 7100 (noting that only [redacted] of the "over 2,000 dentists" joined the group)). [redacted] of the members' purchases (SF 870; CX 7100 (showing Burkhart's purchases of only [redacted] out of over [redacted] among Burkhart-purchasing-Kois members)). As such, Burkhart had a [redacted] share Kois Tribe Members' purchases through the buying group.

Undeterred, on October 8, 2014, Dr. Kois sent an email to Tribe members at Mr. Ahmed's request, announcing the formation of the group, inviting members to immediately sign-up, and notifying them that they will be receiving their discount "code" within about "3 calendar weeks." (SF 854-55; CX 290).

Burkhart saw the October 8th invitation and reached out to Dr. Kois, its long-time customer, on October 17, 2014. (SF 877-78; Kois Sr., Tr. 253-54; Reece, Tr. 4432-33). In less than two weeks, on October 30, 2014, Dr. Kois reached an agreement-in-principle with Burkhart. (SF 889; CX 4251 ("we have agreement"); Kois Sr., Tr. 302). Dr. Kois testified that he chose Burkhart because of his own long-standing relationship with the company, and his "reluctan[ce] to move away from doing business with Burkhart." (SF 890-91; CX 8007 (Kois Sr., Dep. at 162); Kois Sr. Tr., 231-32).

Before the Burkhart negotiations were finalized, however, Dr. Kois and Mr. Ahmed continued to look for a back-up in case Burkhart fell through. On October 21, 2014, Dr. Kois reached out to Benco. (SF 881). Mr. Cohen responded that same day, noting that the proposal made no economic sense, since involving an "outside company like Equalizer Pro Care or anyone else" would just "take a cut of the savings." (SF 882; RX 1039). Mr. Cohen advised that he would give Mr. Ahmed Benco's "standard answer of: 'thanks, but we don't do buying groups." (SF 882-83; RX 1039).

The next day, on October 22, 2014, Mr. Ahmed reached out to Schein for the first time. (SF 893; Kois Sr., Tr. 255; RX 2197). Mr. Sullivan tried to schedule a call for the following week, but Kois was insistent on moving faster. (SF 897; RX 2197). Mr. Sullivan accommodated. (SF 896). After speaking with Mr. Ahmed the following day, Mr. Sullivan noted that Schein was "***very interested*** in learning more about this initiative as it certainly seems very unique to anything we've

heard thus far." (SF 897; RX 2602). Because of the proposal's many unconventional aspects, Mr. Sullivan "need[ed] a little time to do some homework" and promised to "follow up" the following week. (SF 897; RX 2602).

A few days later, Mr. Sullivan held an internal meeting where additional questions were raised, prompting him to ask Mr. Ahmed for a "face-to-face meeting" and "a little more time" considering that Schein was "invited to the discussion so late in the game." (SF 899; RX 2602). As Mr. Sullivan testified, "I'm basically saying to him we're not saying no. There are some things that … actually sound like there's some potential opportunity here…. [B]ut we need to analyze this, and I'm not going to rush into an agreement with them." (SF 901; Sullivan, Tr. 4225-26).

Mr. Ahmed, however, ***rejected*** Schein's request for time to conduct pre-deal due diligence. He was willing to spend "serious time" with Schein only "[a]fter we get a basic deal done that gives you an 'out' if we don't deliver on the rest in a timely fashion." (SF 902; RX 2602). Mr. Ahmed then sent an outline of the "basic initial deal," that did little more than summarize the initial presentation. (SF 905-06). He then reiterated that he would "spend the time to share our detailed plans with your team" only "after you give us the supply deal." (SF 906-07; RX 2602; Kois Sr., Tr. 264).

As Mr. Sullivan testified, "[t]hat's not how you enter a contract. That's not how you enter a partnership." (SF 908; Sullivan, Tr. 4227-28). So, Mr. Sullivan wrote back that he appreciated Mr. Ahmed's "'get r done' approach, but [it is] not a style I am comfortable working in. I can't get married with a 'no big deal, we can always divorce later' mentality." (SF 909). Still, Mr. Sullivan sought to continue the discussions: "[I]f we can slow down and really understand your model better …, then we believe it's worth rolling up [our] sleeves." (SF 909; RX 2602). Despite

believing that Schein's interest remained "high," Dr. Kois reached agreement-in-principle with Burkhart just two days later. (SF 912-13; CX 4251; Kois Sr., Tr. 261-62, 66).

The Kois Buyers Group, as originally conceived, was a failure. (SF 922-27). The group was unable to demonstrate savings exceeding the cost of membership. (SF 924, 929). Though Kois had advertised a 15% discount, there were serious "credibility concerns" because individual dentists could obtain higher discounts from Burkhart or other distributors without becoming members. (SF 927; Kois Jr., Tr. 360-61). As such, the group "was not doing very well," "perception of [its] members was not great," and adoption was "very slow." (SF 923; Kois Sr., Tr. 223; CX 8007 (Kois Sr., Dep. at 74-75)). As Mr. John Kois, Jr. testified, "there was confusion amongst the members of what kind of discounts they would receive. And also there was hesitation to purchase for people that weren't purchasing from Burkhart." (SF 926; Kois Jr., Tr. 363-64).

After a year, Dr. Kois terminated the relationship with Mr. Ahmed, and installed his son, Mr. Kois, to run the group. (SF 926; Kois Jr., Tr. 361). Mr. Kois immediately reduced membership fees from $6,000 to $299 per year, and issued retroactive credits from day 1 to all members. (SF 928-29; Kois Jr., Tr. 364-65; Kois Sr., Tr. 240-41). At that point, the buying group began to grow. (SF 929). Schein was never offered the opportunity to participate in the Kois Buyers Group as re-incarnated by Mr. Kois. (SF 935; Kois Jr., Tr. 340-41, 362-63).

17. Schein's Partnership with Dental Gator in Late 2014.

In March 2014, a mid-sized DSO, MB2, renegotiated a new contract with Schein's Special Markets division. (SF 641, 646; CX 4001). At the time, MB2 was considering opening an as-yet-unnamed buying group arm, later called Dental Gator, as a way to attract potential dental office acquisition targets. (SF 641; Puckett, Tr. 2228). MB2, however, did not negotiate the right to extend its MB2 pricing to non-owned, independent dental offices (who were not committed to a

purchase volume), and the contract [redacted].[38] (SF 646-48; CX 4001). Nonetheless, by the Spring of 2014, MB2 had formed Dental Gator, was signing up members, and offering them Schein's MB2 pricing. (SF 649-50,652; Puckett, Tr. 2231, 2288-89).

Schein learned that Dental Gator was 'marketing the discount' in June 2014. (SF 652; Puckett, Tr. 2277). Its advertising also claimed that members could get up to 60% off Schein's catalog price, which MB2's Mr. Puckett conceded was "misleading for sure." (SF 652; Puckett, Tr. 2278; CX 4067).

Special Market's Strategic Account Manager Andrea Hight reached out to MB2, explaining that it was in "breach" of the contract. (SF 653; RX 2283). Ms. Hight also expressed concerns about working with what she called "pure buying clubs." (SF 643; Puckett, Tr. 2275). But she said that Schein would work with "groups that could offer more in terms of … value-added services." (SF 643; Puckett, Tr. 2275). To resolve Schein's concerns, Dental Gator agreed that, going forward, it "would market itself as a value-added partner of Henry Schein, providing a broad spectrum of services to dentists." (SF 653; Puckett, Tr. 2279-80; *see also* CX 4016 (updated Dental Gator website noting that "[o]ur members do see significant savings on variable cost, but our main goal is to help doctor's grow their practice")). This satisfied Ms. Hight, who wrote that "[w]e really do look forward to seeing your great success continue and to be true partners with you to help make that happen." (SF 653; CX 4067).[39]

[38] The MB2 Prime Vendor Agreement obligated MB2 to purchase [redacted] of its supplies from Schein, [redacted]. (SF 646; CX 4001; Puckett, Tr. 2285-86). Dental Gator members made no such commitments. (SF 646; Puckett, Tr. 2285-86).

[39] Complaint Counsel latches on to Ms. Hight's June 10, 2014 email reporting that Dental Gator "assured me they are shutting down the GPO aspect of what happened immediately." (SF 654; CX 247; *see also* CX 2425). Complaint Counsel, however, did not call Ms. Hight to testify. At her deposition, Ms. Hight explained that she merely meant that Dental Gator had to market their "management services." (SF 654; CX 8022 (Hight, Dep. at 161)). When asked about his conversation with Ms. Hight, Mr. Puckett similarly testified that Ms. Hight never asked him to "shut down" Dental Gator and instead the two discussed how Dental Gator needed to stop marketing itself as a pure or price-only buying group (which it agreed to do). (SF 653-54; Puckett, Tr. 2237-38).

In late October 2014, Dental Gator was once again 'marketing the discount,' causing Schein's FSCs to complain. (SF 287, 656). As HSD Zone Manager Michael Porro noted, "[s]o far, the Gator gains have been good HSD customers," and that, given the discounts, this problem is likely to "spread fast when word is out." (SF 286; CX 2360; Meadows, Tr. 2513). Mr. Cavaretta similarly noted that, while Dental Gator was initially only going to "TARGET NON-Schein" customers, that was "obviously" not what was "happening now." (SF 286; CX 2761). This created numerous conflicts, including conflicts between Special Markets and HSD; conflicts between FSCs and Dental Gator; conflicts between members and non-members, and conflicts with manufacturers. (SF 655-56, 659; Sullivan, Tr. 3991, 3997; CX 8005 (Muller, Dep. at 187-88); CX 8003 (Foley, Dep. at 293-94, 303-05)).[40]

To address the issue, senior leadership for Special Markets and HSD met in late November 2014. (SF 294, 660). Following these meetings, Mr. Muller proposed a compromise, in which existing Dental Gator members kept MB2 pricing, and new Dental Gator accounts would receive the same discounted prices that HSD offers to large group practices – under the so-called "G Plan" – but without having to meet any volume requirements. (SF 304, 663; CX 2370; Meadows, Tr. 2566-67).

Mr. Sullivan believed that this was "a good compromise." (SF 302, 662; CX 2370). But HSD Vice President Jake Meadows was still concerned that Schein would be "arming dental gator with a more aggressive offer to [the] average practice than [HSDs] FSCs" could offer, putting them

[40] Complaint Counsel cites an October 25, 2014 email in which Mr. Meadows states that "we are NOT participating in GPOs." (SF 288; CX 2354). As Mr. Meadows explained, he was getting numerous complaints from the field about Dental Gator, and wanted to calm his team by noting that Dental Gator was a Special Markets customer and his strategy of not promoting buying groups had not changed. (SF 288; Meadows, Tr. 2428-30).

at a competitive disadvantage against their own company. (SF 303; CX 2370).[41]

Mr. Sullivan acknowledged the concerns, but noted that Mr. Muller was "trying." (SF 303; CX 2372). After wresting the support of his area Vice Presidents (Mr. Cavaretta and Mr. Meadows), Mr. Sullivan then wrote to his superior, Mr. Breslawski, on January 2015 that he was "going to approve moving forward with [Mr. Muller's] proposal." (SF 308; CX 2144; CX 2372; Meadows, Tr. 2568). In doing so, Mr. Sullivan informed Mr. Breslawski – ***during the alleged conspiracy period*** – that HSD was "'***in' on approving buying groups***," as this situation "won't stop with Dental Gator." (SF 308; CX 2144).

18. The Development of a Standardized Buying Group Offering as a Strategic Priority for 2015.

The fact that DSOs were getting in on the buying group business was an eye-opener for Schein. "I understand the thought that we must support [the Dental Gator compromise]," Vice President John Chatham exclaimed, but "it's not a slippery slope we are going down, it's a cliff with no ropes." (SF 307; RX 2097).

But Schein did not coordinate with its competitors to stop this new reality. Rather, it actively developed a consistent, fair offering for these and other buying groups. (SF 296-331). In late November 2014, senior Schein leadership held an offsite meeting that included discussions of Schein's buying group strategy. (SF 294; CX 2365; CX 2475 (Meeting Notes)). All "agreed there

[41] Complaint Counsel alleges that Schein's 2015 Dental Gator pricing was designed to effectively shut down Dental Gator. But MB2's Mr. Puckett did not support this theory. (SF 634, 665; Puckett, Tr. 2270-71 ("Q. [Y]ou never viewed that price change by Schein as an effort to terminate Dental Gator, did you? A. No, ma'am…. Q. And you never thought that Schein was trying to shut down or terminate Dental Gator, did you? A. I did not.")). Moreover, Schein's internal documents describe the offer as "arming Dental Gator with [an] aggressive offer," rather than something that would "stop this GPO." (SF 303, 665; CX 2370). Mr. Puckett also conceded that Dental Gator's membership growth "had started to slow before the Schein price change for new Dental Gator customers." (SF 666-67; Puckett, Tr. 2298). Indeed, Dental Gator made the independent decision before the price change to stop funding Dental Gator. (SF 666-67; Puckett, Tr. 2298-302). Mr. Puckett also conceded that there were other "market factors and other issues internal to Dental Gator that slowed Dental Gator's growth and that have absolutely nothing to do with Henry Schein." (SF 667; Puckett, Tr. 2306).

was conflict and the current [ad hoc] approach was unacceptable." (SF 294; CX 2034).

Two weeks later, on December 15, 2014, HSD leadership held another strategic meeting to discuss buying groups. (SF 295-96; CX 2475). The team set "strategic priorities for 2015," including (i) "develop[ing] a template/structure for prospective GPOs/MSOs," and (ii) potentially establishing a Schein-owned GPO. (SF 296-97; CX 2475). A separate task force, led by John Chatham and Brian Brady, was established to develop the "HSD GPO response plan." (SF 297; RX 2097). On January 29, 2015 – ***during the alleged conspiracy period*** – Mr. Chatham told his team that developing a standardized GPO program "is the most important program they will work on this year and it is priority one." (SF 297; RX 2097).[42]

The task force worked through various proposals, and eventually developed a standard, consistent offering for buying groups, called the "BG Plan." (SF 322). By September 2015, Schein was ready to launch its standardized buying group offering. As Dave Steck reported,

> We expect to 'launch' our buying group plan shortly after Labor Day. Essentially, we will have two offerings; one for groups that we want to work with, but are not cohesive (example, CDA [California Dental Association]), and the other for the real groups that can commit volume…. The second will obviously be used … only in situations where a large amount of business is either coming our way or threatening to leave us.

(SF 316; RX 2402).

On September 4, 2015, "HSD senior management … gave … the green light to proceed" to implement the new standard buying group offer. (SF 318; CX 192). As Mr. Brady observed,

[42] At around the same time, the Mid-Market team was also working on developing a standard agreement for DSO-affiliated buying groups. On December 29, 2014, the team had an internal call to "develop our policy." (SF 298; CX 2762). As Ms. Titus explained, there are many different buying group models, and Schein needed to develop a "generic PVA [Prime Vendor Agreement]" to cover each one. (SF 298; CX 2762). Complaint Counsel, citing CX 2378, asserts that Mr. Meadows put a stop to this effort a month later. But that document merely reflects the fact that a separate task force, led by Mr. Chatham and Mr. Brady, had been convened. (SF 298; CX 2372 ("I sat in a few minutes [on] the DGPS meeting yesterday and they were discussing a plan to support GPOs. I interjected and told them we were working on this and [they] needed … to 'hold the line' ***while we build a plan***.")). Mr. Meadow's email simply reflects a desire to avoid duplication and potential conflict, not a refusal to deal with buying groups.

"Schein has rarely engaged with these groups, but times are changing," and Schein wanted "to engage [them] in an organized and uniform way, so that we have a set protocol in place for each group." (SF 318-20; CX 192). In deciding whether a particular group is "worth engaging with," Mr. Brady made clear that Schein would continue to look specifically at the "list of members" to determine whether the group could bring incremental volume, or whether it would be largely cannibalistic. (SF 321; CX 192).

The new plan was based on "literally the exact G plan … with [the] same formulary items" that HSD had used for other buying groups, such as Dental Gator and Floss Dental, and other large group practices. (SF 322; CX 192; Meadows, Tr. 2620, 2586; Sullivan, Tr. 4130).[43] The new plan also disincentivized cannibalization by limiting the administrative fee, or rebate, to "incremental sales from the group above and beyond what the members are spending now." (SF 324; CX 192). The plan also required the buying group to commit its members to purchase "at least $15K a year" and the group as a whole to spend at least "$250K" to receive the discounts. (SF 323; CX 192).

19. Schein's Negotiation and Partnership with Klear Impakt Beginning in Late 2014.

While the standardized buying group plan was being finalized, Schein continued to negotiate with buying groups. Brian Brady noted in June 2015 that Mid-Market expected to "have several [buying groups] topping $1.5M in the next 6-12 mos." (SF 300; CX 2133).[44]

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[43] Floss Dental approached Schein in May 2014 wanting to "mimic MB2" and establish an "MSO model," or buying group arm. (SF 761; RX 2105). Schein negotiated with Floss, and ultimately offered them the "G Plan," which was the same plan that formed the basis for the 2014 Smile Source offer and the 2015 Dental Gator agreement. (SF 763; CX 4105; CX 2144). Schein entered into a contract with Floss sometime before January 29, 2015. (SF 757, 764; CX 2372 ("I already did something with Floss Dental"); *see also* CX 2088 (reporting that Dental Gator is "upset" about HSD's favorable deal with Floss Dental)).

[44] Of course, even after the end of the alleged conspiracy period, Schein continued to turn down buying groups that simply demanded a discount without offering anything in return. As Mr. Meadows explained to his team in October, 2015, "[w]e will not partner with [b]uying groups that charge a fee to customers to negotiate a lower price [on] their behalf. We will partner with groups that offer some other value that they charge for and we're in a marketing partnership together…. [W]e can't allow people to profit by dividing us from our customers." (SF 113; RX 2172

One such group was Klear Impakt. Klear Impakt reached out to Schein to discuss a potential supply arrangement "sometime in 2014." (SF 815; R. Johnson, Tr. 5479). On January 21, 2015, Ms. Titus met with the leaders of Klear Impakt, coming away with a strong desire to work with the group:

> [We] were very impressed by the clear-eyed vision you have for launching Klearimpakt. Working in Special Markets for 15 years, I've seen many iterations on the Member model. Klearimpakt is a testimony that not all are created equal ... oh, and cream just rises to the top! ... It's an understatement to say I really liked what I heard and feel very encouraged that our Senior leadership will want to continue the discussion.

(SF 822; CX 2208).

Ms. Titus also explained to senior HSD management the reasons she believed Klear Impakt presented an attractive business opportunity:

> Guys… we need to talk about this one. Most of these are a dime a dozen… consultants that charge the dentists to vomit business 101, then use them to create additional revenue for themselves from the supplier. This one is different [given their facilities, training center, and academic affiliations]. To be clear, I'm not ALL IN, but it passes the first line muster of 'need to explore.' BTW, they actually proactively told me the following; (1) Exclusive to Schein, (2) Will promote our BS [Business Solutions] portfolio; (3) Members will be expected to comply w/ Prime Vendor [Agreement] (with penalties for non-compliance).

(SF 823; CX 2208).

After a number of meetings with Senior HSD leadership where Ms. Titus "gave a very strong recommendation [to] move forward," and extensive work with the Klear Impakt to develop "marketing pieces showcasing HS," Schein signed a contract with Klear Impakt on August 17, 2015. (SF 824, 830, 832; RX 2062; CX 2223; RX 2162; R. Johnson, Tr. 5493-99).[45] The

(turning down Hampton Roads Partners buying group, post-alleged-conspiracy-period)). As Mr. Meadows testified, this statement reflected Schein's consistent policy throughout the relevant period. (SF 162; Meadows, Tr. 2495).

[45] Complaint Counsel argues that Schein's dealings with Klear Impakt do not refute their conspiracy theory for two reasons. *First*, they say that Schein did not execute the contract until August 2015, which *may* be after the end of the alleged conspiracy (depending on which end-date they happen to be asserting). But the evidence shows that Schein actively engaged Klear Impakt at least by January 2015 well before *any* alleged end-date, and that Schein actively

agreement granted exclusivity to Schein, and required members to "agree to purchase a minimum of [redacted] of their supplies from Henry Schein." (SF 824, 834; RX 2162; *see also* RX 2222). In May 2016, Schein transitioned Klear Impakt to its newly developed buying group offer based on the "BG Purchasing Plan," which offered volume-based tiered pricing for members whose annual purchases exceed [redacted] and administrative fees [redacted] (SF 837; RX 602).[46]

20. Schein's Re-Affirmance of its Partnership with Breakaway Dental in June 2015.

Breakaway Dental was another buying group that Schein negotiated with in late 2014/early 2015. Breakaway was initially a Special Markets customer, but was transferred to Mid-Market in 2014. (SF 412-13; Foley, Tr. 4635; Cavaretta, Tr. 5599; Titus, Tr. 5263).[47] At that time, Ms. Titus sought to "collect information" about the group, establish a relationship with them, and find ways to "work together to introduce more Henry Schein products and services into their environment." (SF 414-16; Titus, Tr. 5264-65; RX 2718). As Ms. Titus wrote,

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worked with Klear Impakt throughout 2015. (SF 815-32; CX 2208; RX 2062). Notably, Klear Impakt co-founder, Dr. Richard Johnson, rejected the concept that Schein was not acting diligently and in good faith throughout the negotiations to reach a deal. (SF 819, 826, 829; R. Johnson, Tr. 5479-80, 5493-99). *Second*, Complaint Counsel asserts that Ms. Titus, Mr. Cavaretta, and the rest of the Schein team had gone rogue because Mr. Sullivan did not remember Klear Impakt during a budget meeting later in 2015. What Mr. Sullivan was told about Klear Impakt is a disputed fact. (SF 814; CX 2519 (Mr. Cavaretta noting that he previously informed Mr. Sullivan about Klear Impakt)). It is also irrelevant. Because Schein was actively working with buying groups, the team could not have been under instructions to boycott buying groups at that time, as Complaint Counsel claims.

[46] The Klear Impakt agreement shares much in common with the draft PGMS agreement that Schein considered in July 2014, but differs in critical ways. *First*, while both state that the buying group cannot "guarantee that its members will purchase from Schein," only the Klear Impakt agreement *obligates* Klear Impakt members to "agree to purchase [redacted] of their supplies from Schein." (SF 834). *Second*, the supplies discount was reduced from a proposed [redacted], to a [redacted] discount and an administrative fee of [redacted] for Klear Impakt. (SF 441-42; CX 2251; RX 2162). As such, the Klear Impakt proposal was clearly more financially attractive to Schein.

[47] Benco's Mr. Ryan learned of the relationship between Schein and Breakaway in January 2015, during the alleged conspiracy period. (SF 440; CX 10). Crucially, neither Mr. Ryan nor anyone from Benco "reached out to Schein" to inquire about it, or to enforce the alleged conspiracy. (SF 441-42; Ryan, Tr. 1208). Five months later, Schein renewed its agreement with Breakaway. (SF 434; RX 2348).

> Looks like [Breakaway] started as a consulting group, however, … it appears they have morphed into something slightly different… There is no question [that it] has a GPO component and we are supporting it…. RM/ZRM's are getting heat from their teams … about why … a private practice is set up as a SM customer with all the bennies…. I need to put a system of communication in place so that we have the cooperation from our local teams. I want to assure this is a ***win/win*** for all the stakeholders and if it's falling short, seek to turn it around. ***For the record, Breakaway appears to be a solid partner and Schein supporter***…. [S]o I'm being extremely cautious not to alarm Breakaway.

(SF 424; RX 2718).

On June 29, 2015, Schein entered into a new agreement with Breakaway. (SF 434; RX 2348; Cavaretta, Tr. 5600). The agreement required that Breakaway provide "business services" to the independent practices and have "the ability to require offices to comply with the purchasing commitment" of [redacted] (SF 435; RX 2348).[48] The agreement did not require Breakaway to have any ownership interest in the practice. Rather, it merely prohibited Breakaway from offering the discounted prices to dentists "without commitment to … the prime vendor agreement." (SF 435; RX 2348).[49]

21. Schein's Creation of the Alternative Purchasing Channel in 2016.

Not long after Schein developed its standard buying group offer, it realized that it needed additional infrastructure to keep up with the growing number of buying group opportunities and partnerships. So, in January 2016, Schein began internal discussions about whether Mid-Market

[48] Because Breakaway's commitment was set at [redacted], it received discounts of up to [redacted], as compared to Klear Impakt's [redacted] discounts based on a [redacted] commitment. (SF 435, 832, 834-35; RX 2348; RX 2162).

[49] Complaint Counsel asserts that Breakaway is not a buying group because it has ownership in *some* practices. But Breakaway does not have equity in all members. Rather, like Dental Gator/MB2, Floss Dental, Advantage Dental, and others, it is a hybrid in which it owns some locations but also has a buying group arm consisting of independent dentists. (SF 403-05). As such, fact witnesses considered Breakaway to be a buying group within the FTC's definition. (SF 410-11, 439; Steck, Tr. 3774; Ryan, Tr. 1207; Foley, Tr. 4634; Titus, Tr. 5266). As Mr. Foley explained, "Breakaway is a buying group," whose "whole premise, and hence the name Breakaway, is that they assist dentists, private dentists, that are working at DSOs on how to break away from the DSO and go into practice by themselves… [T]hey were completely anti-DSO." (SF 411; Foley, Tr. 4634-35).

would continue to "be responsible for BGs" in the future.[50] (SF 335; CX 2280). Schein ultimately decided it needed additional resources, hired Darci Wingard, and put her in charge of the newly-developed Alternative Purchasing Channel (APC). (SF 336; Cavaretta, Tr. 5652-54). Under Ms. Wingard's leadership, the APC group now focuses exclusively on buying groups and other non-traditional customers. (SF 337-39; Cavaretta, Tr. 5654).

C. Complaint Counsel's Claims Concerning Benco's Unsolicited and Bilateral Communications.

Schein's long history of buying group dealings unequivocally demonstrates that Schein acted deliberately, rationally, and unilaterally; not conspiratorially. Complaint Counsel, nonetheless, asserts that Schein entered into a "hub-and-spokes" conspiracy with Benco, as the hub, and Patterson as another, late-joining spoke. Complaint Counsel claims they "have direct evidence" of this conspiracy, and therefore, they "need not go to a world where we are only looking at parallel conduct and trying to infer a conspiracy…." (SF 1396; Kahn, Tr. 31-32). The facts do not support Complaint Counsel's claims.

No witness testified that there was any agreement between Schein and Benco or Patterson. (JF 89-118). In fact, every witness denied participation and awareness of any such agreement. (JF 89-118). These denials are the ***sole*** direct evidence in the case concerning the (non)existence of the alleged conspiracy. (JF 82-118).

As to Schein, Complaint Counsel cites four instances they contend constitute, not direct evidence of an agreement or understanding, but direct evidence of communications about buying groups. The parties dispute whether three of the four communications even occurred. Regardless,

[50] Complaint Counsel misreads this document to suggest that it implies that Mid-Market did not have buying group responsibility at the time it was authored. As Mr. Cavaretta testified, however, the document says the opposite: that Mid-Market had such responsibility but they were considering moving it elsewhere, namely to APC. (SF 334-36; Cavaretta, Tr. 5652-53).

such communications, if they occurred, all involved unsolicited outreach by Benco's Mr. Cohen, with no evidence that Schein reached any agreement or shared any information about its buying group practices.[51]

1. The January 13, 2012 Phone Call

On January 12, 2012, Chuck Cohen texted Mr. Sullivan, asking if he was available for a short call. (SF 1434). The call took place at 9:03 am on January 13, 2012, and lasted for 11 minutes and 34 seconds. (SF 1435; CX 6027). Both Mr. Sullivan and Mr. Cohen denied that this call concerned buying groups. (SF 1422, 1436-40; Cohen, Tr. 747; Sullivan, Tr. 4218-19).

While Mr. Sullivan lacks specific recollection of the call (now over seven years ago), Mr. Cohen testified that the call concerned an employment dispute between the two companies. (SF 1436-39; Cohen, Tr. 741, 747). As Mr. Cohen explained, Schein and Benco at the time had an agreement that was designed to settle potential non-compete and corporate raiding litigation, and a dispute had risen in late 2011 concerning a group of FSCs that had left Schein to join Benco. (SF 1422, 1430, 1437; Cohen, Tr. 742, 746-47; CX 6027). Mr. Cohen testified that he reached out

[51] Complaint Counsel also relies on a few miscellaneous communications, none of which suggest any agreement to boycott buying groups. *First*, Complaint Counsel cites so-called "opportunity" evidence consisting of emails, texts, or records of phone calls between Mr. Sullivan and his counterparts *unrelated* to buying groups. To the extent such evidence consists of emails or texts, the *full* content of such communications is in the record. The absence of any reference to buying groups precludes drawing any inference of a conspiracy from them. As for phone calls, contemporaneous emails and texts, as well as witness testimony, demonstrate that such calls were unrelated to buying groups. They too cannot support a conspiracy inference. *Second*, Complaint Counsel cites an unsolicited call Mr. Foley received from Benco's Pat Ryan on October 1, 2013 about Smile Source. But Complaint Counsel made clear during the trial that the "basis of our case comes down to the nature of the relationship and communications between Chuck Cohen, Tim Sullivan, and Paul Guggenheim," and that other communications – such as the isolated, unsolicited communication with Mr. Foley – "are not the basis of our case." (SF 1397; Foley, Tr. 4759). In any event, Mr. Foley only took the call because he believed it related to an attempt to recruit him, and he was careful not share any information about Schein's policies, practices or plans on the call. (SF 1462-63; CX 243 ("I'm being careful not to cross any boundaries, like collusion."); Foley, Tr. 4576, 4579 ("I know I did not share any information about Schein or make any return comment about what Schein would do…")). In addition, Mr. Foley had no responsibility for Smile Source at the time, as the account had been transferred to HSD in January 2011. (SF 1464). *Third*, Complaint Counsel cites communications about the TDA. But as Complaint Counsel concedes, the TDA is not a buying group, and it did not try to solicit a deal from any Respondent. Moreover, the only relevant communication is an email Mr. Cohen sent to Mr. Guggenheim and Mr. Sullivan, passing along a months-old news article about the TDA. It is not evidence of a conspiracy. (SF 1577-78).

to Mr. Sullivan on January 12, 2012 to continue their discussion of the issue. (SF 1431-1439). Corroborating his testimony, Mr. Cohen pointed to the fact that he had an extended 23-minute preparation call with his employment lawyer immediately before, and a short de-brief call immediately after, his call with Mr. Sullivan. (SF 1439; Cohen, Tr. 749; CX 1118).

Despite this evidence, Complaint Counsel seeks an *inference* that the call related to buying groups, and a further inference that an understanding was reached (or re-affirmed) on that call. To support these inferences, Complaint Counsel cites an internal Benco email in which they claim Mr. Cohen suggested to Mr. Ryan that he was going to talk to Mr. Sullivan about Unified Smiles. (SF 1429; CX 1052). But there is no evidence that Mr. Cohen ever raised it with Mr. Sullivan. (SF 1435-1441). Complaint Counsel also notes that, on the morning of the call, Mr. Cohen reviewed Benco's Large Group ("LG") policy, which was drafted to respond to a different group, called Nexus. (SF 1423; CX 1051; Cohen, Tr. 512-15, 878-82; CX 6). There is no evidence, however, of "any connection between [his] revision of the LG policy and [his] call with Mr. Sullivan." (SF 1423; Cohen, Tr. 877). In that regard, Mr. Cohen denied sharing Benco's buying group policy with Mr. Sullivan. (SF 1423; Cohen, Tr. 747-48, 877-78).[52]

Most importantly, both Mr. Cohen and Mr. Sullivan testified that Mr. Sullivan did not share any information about Unified Smiles or Schein's buying group policies or practices. (SF 1438, 1440; Cohen, Tr. 873-74; Sullivan, Tr. 4218-20). As such, the January 13, 2012 call is not direct evidence of any agreement or understanding between Schein and Benco.

[52] It is unclear what Complaint Counsel hypothesizes was discussed on this call. On the one hand, Complaint Counsel claims that the conspiracy pre-existed the January 13, 2012 call. If so, this would simply be a so-called 'enforcement call' limited to Unified Smiles. But on the other hand, Complaint Counsel identifies no prior buying-group-related communication and claims that Benco had just formalized its no-buying-group-policy that day, so they may be contending that the call was not limited to Unified Smiles but was the start of the alleged conspiracy. Either way, it is pure speculation.

2. The July 25, 2012 Internal Benco Email re Smile Source.

Complaint Counsel also claims that they have direct evidence of buying group communications based on an *internal* July, 25, 2012 Benco email relating to Smile Source.[53] (SF 1447; CX 18). But this internal email does not demonstrate that any interfirm communication occurred, or that it formed the basis of any alleged agreement or an attempt to enforce it.

The email begins with an inquiry from Smile Source's Dr. Goldsmith to a Benco email address, which was later forwarded to Benco's head of Special Markets, Pat Ryan. Dr. Goldsmith informed Mr. Ryan that "one of [Smile Source's] members in Maryland has selected [Benco] as the distributor for [Smile Source's] east coast operations," and requested that Benco provide "pricing and service options." (SF 1448; CX 18). In response to Dr. Goldsmith's email, Benco reiterated its position that "Benco Dental does not recognize GPOs as a single customer." (SF 1449; CX 18).

Mr. Ryan then forwarded his response to his boss, Mr. Cohen, saying "tell your buddy Tim to knock this shit off."[54] (SF 1450; CX 18). Mr. Ryan testified this was just a "flippant" remark. (SF 1450; Ryan, Tr. 1065-1066, 1192). Mr. Cohen responded to Mr. Ryan's email, asking him to "[p]lease resend this e-mail without your comment so that I can print & send to Tim with a note." (SF 1450; CX 18). But rather than forward a clean email to Mr. Cohen as requested, Mr. Ryan followed up with a question about whether Smile Source is in fact a buying group. (SF 1451; CX 1147) (forwarding same email string, dated one minute later, noting that "he was quick to tell me

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[53] The Complaint initially relied on this July 25, 2012 internal Benco email (CX 18) to mark the start of the alleged conspiracy. (Complaint ¶ 35 (citing CX 18)). At trial, Complaint Counsel modified its theory, claiming that the document reflected an effort by Benco to begin "enforcing the agreement against Schein each time they suspected that Schein was cheating by discounting to a buying group." (SF 1447; Kahn, Tr. 42; RXD 101).

[54] Mr. Ryan's comment was based on a mis-reading of Dr. Goldsmith's underlying email. Dr. Goldsmith's email states that "***[i]n the past***, we were in Special Markets division of Henry Schein and worked directly with Tim Sullivan." (CX 18). In fact, [redacted] (SF 1111; Goldsmith, Tr. 2098).

he's a 'franchise', not a GPO, although without ownership stake, for all practical purposes what is the difference?"). Mr. Cohen then responded to the question noting that he "agree[d]." (SF 1451: CX 1251). That Q&A apparently side-tracked any notion of sending a note to Mr. Sullivan, and the record of any planned communication dies there. (SF 1452).

There is no evidence that Mr. Cohen actually sent a note to, or otherwise communicated with, Mr. Sullivan about Smile Source or any buying group in or around July 25, 2012. The record does not contain the "clean" email Mr. Cohen requested, and Mr. Cohen testified that he did not recall receiving such an email, printing it out, writing a note on it, or giving it to an assistant to mail (or himself mailing it) to Mr. Sullivan. (SF 1452; Cohen, Tr. 838). Mr. Sullivan also denied receiving any note from Mr. Cohen about Smile Source or buying groups generally. (SF 1452; Sullivan, Tr. 4252-53).[55] Mr. Ryan also testified that he was unaware of any such communication occurring. (SF 1452; Ryan, Tr. 1192, 1248-49).

Complaint Counsel also failed to identify any response by Mr. Sullivan to the supposed note. There are no after-the-fact internal documents purporting to memorialize any communication between Mr. Cohen and Mr. Sullivan about Smile Source. The competitor communication log that Complaint Counsel created contains no contemporaneous contact. (SF 1453; CX 6027). And Complaint Counsel has not shown any change in conduct by either Schein or Benco that could reasonably be tied to such a communication. In fact, when Mr. Sullivan next interacted with Smile Source, he wrote, "I would enjoy catching up with you [and] look forward to learning more." (SF 1157, 1354, 1453; CX 2580).

[55] The Complaint alleges that, "[a] ***few days after*** this exchange" on July 25, 2012, "Ryan rejected [redacted] Complaint ¶ 35. The evidence, however, shows that Mr. Ryan rejected Smile Source on July 25, 2012 ***before*** the exchange between Mr. Cohen and Mr. Ryan. (CX 18). This is another example of Complaint Counsel's allegations directly contradicted by contemporaneous documents. Thus, the evidence does not support any inference that Benco's response to Smile Source was dependent upon any communications or agreement with Schein.

Accordingly, the evidence does not support the allegation that Benco communicated with Schein in or around July 25, 2012 about Smile Source or buying groups generally, or that Benco attempted to "enforce" any pre-existing agreement with Schein, or that Schein reached or re-affirmed any such agreement.

3. The March 25, 2013 and April 3, 2013 Phone Calls.

On March 25, 2013, Mr. Cohen received an internal email from Mr. Ryan, attaching an article about Atlantic Dental Care's ("ADC's") recent securities offering, noting that Mr. Ryan could not "figure out if [ADC] is a buying group or not." (SF 1482; CX 20). Mr. Cohen then sent an unsolicited text to Mr. Sullivan with no indication of subject matter, asking if he was "available to talk." (SF 1483-84; CX 6027). The two spoke for 8 minutes and 35 seconds. (SF 1486; CX 6027). Both Mr. Cohen and Mr. Sullivan testified about the call; and both denied reaching any agreement or understanding about ADC or buying groups generally. (SF 1487-88, 1491-93; Cohen, Tr. 877-78, 899; Sullivan, Tr. 4289-90).

Mr. Cohen testified that he did not have a specific recollection of the call. But, based on his review of the documents before and after the call, believes he called to find out if Mr. Sullivan had any information about ADC. (SF 1487; Cohen, Tr. 553, 721). Mr. Cohen testified that he did not share Benco's buying group policy with Mr. Sullivan, and that Mr. Sullivan did not share any information about ADC, or about Schein's policies, practices, or plans concerning ADC or buying groups generally. (SF 1488-89; Cohen, Tr. 877-78, 899). Mr. Sullivan corroborated this testimony:

> Q. [D]id Chuck Cohen ever share with you that Benco had a policy of not selling or offering discounts to buying groups?
>
> A. He did not.
>
> Q. Did Chuck Cohen ever share with you that Benco had a no buying group policy?

A. He did not.

(SF 1488; Sullivan, Tr. 3944, 3946, 4189). Mr. Sullivan also did not share any information about ADC, as he did not know anything about them at the time, or about Schein's buying group policies, practices or plans. (SF 1490-93; Sullivan, Tr. 4190).

Mr. Sullivan told Mr. Cohen they should not be talking about specific customers, and changed the subject to Mr. Cohen's upcoming meeting in New York, scheduled for the following week to discuss a potential merger between the two companies. (SF 1491-92, 1494-98; Cohen, Tr. 892; Sullivan, Tr. 4190; CX 1486).[56] As Mr. Sullivan explained,

> He [Mr. Cohen] started talking about Atlantic Dental Care to me. He asked if I knew what they were, and I told him, I did not. Then he started to tell me more about them, and I immediately stopped him, and I said 'Chuck, this not a discussion that you and I should be having,' something like that. I don't know the exact words, but I cut off the discussion with him on that topic.

(SF 1492; Sullivan, Tr., 3946).[57]

Later, Mr. Cohen forwarded an article about ADC to Mr. Sullivan. (SF 1499). Mr. Sullivan's only response to the article was to say, "unusual." (SF 1500; CX 6027). Mr. Sullivan again did not reveal any information about Schein's plans or practices. (SF 1500; CX 6027; Sullivan, Tr. 4190; Cohen, Tr. 899).

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[56] Immediately following the March 25, 2013 call, Mr. Sullivan sent a follow-up text, stating "Yes, I'm good with the terms we discussed and I look forward to joining Team Benco! Ps. Want to confirm that the Benco tooth logo will include a picture of me. :)" (SF 1494; CX 6027). Both Mr. Sullivan and Mr. Cohen testified that this this referred to a long-standing joke between the two about who was going to work for whom if the two companies combined. (SF 1495; Cohen, Tr. 895-98; Sullivan, Tr. 3955-56). The joke was apropos of their conversations on the call about the upcoming merger meeting in New York. (SF 1494-98).

[57] Schein employees consistently avoided violating antitrust laws. (SF 1330, 1461-63, 1491-92, 1509, 1565). For example, in response to a contact from a Benco Regional Manager, a Schein Regional Manager noted "I laid out ground rules that I will NOT discuss a pricing response and any action would have to be cleared by my legal team." (SF 1565; RX 2362). Mr. Sullivan praised the response but want to ensure no further communications on the topic occurred, stating that he "[a]gree[d] we should NOT be having these discussions w/ Benco" and noting that "Chuck [Cohen] has not contacted me nor would he on such a topic." (SF 1568; RX 2362; *see also* CX 243 (email from Mr. Foley to Mr. Muller, reporting that he was "careful not to cross any boundaries, like collusion.")).

Two days later, on March 27, 2013, Mr. Cohen sent Mr. Sullivan another unsolicited text, letting Mr. Sullivan know that he "[d]id some additional research on Atlantic Dental Care" and determined that "it's not a buying group" and that they are "going to bid." (SF 1502; CX 60). Mr. Sullivan testified that he did not respond, other than to "remind [Mr. Cohen] again, more sternly, that he should not be contacting me about this." (SF 1507; Sullivan, Tr. 3963).[58]

Ultimately, Schein decided to bid for ADC using a modified "G" plan, the same plan that was used as the basis for its 2014 Smile Source bid a few months later, the Floss Dental agreement in 2014, the Klear Impakt agreement in 2015, and the standard buying group template developed as part of Schein's 2015 strategic priorities. (SF 1535-36; CX 2021). The decision to bid for ADC, however, had nothing to do with Mr. Cohen's March 27, 2014 text. Indeed, Mr. Sullivan remained on the fence about submitting a bid until the very end. (SF 1519-21; CX 2021 (April 5, 2013 Sullivan email: "This smells bad. I think we have as much to lose for winning the bid as we do for losing (or not bidding).")).

4. The September 16, 2013 Internal Email re Burkhart

Complaint Counsel also relies on another ***internal*** September 16, 2013 Benco email as direct evidence of the alleged conspiracy. But that email does not show that any interfirm communication occurred. On September 16, Benco Vice President of Sales Mike McElaney spoke with Burkhart's "Jeff Reece at length … about buying groups," and reported that "JEFF DOES

[58] The April 3, 2013 call was the culmination of some phone-tag, beginning on May 27, 2013 *before* Mr. Cohen sent his follow-up email about ADC. Mr. Sullivan initiated the call because Mr. Cohen sent Mr. Sullivan an unsolicited text about Universal "Dental Alliance," noting that "[t]hey apparently get 7% off of catalog pricing just for joining…. [They] asked if Benco was interested… Told him he was out of his tree… Could be a rumor, sometimes stories go around." (SF 1327, 1504 n.18; CX 6027). Mr. Sullivan testified that he did not realize at the time that "Dental Alliance" was different from ADC, but that he was concerned about Mr. Cohen's communications. (SF 1327-29, 1504, n.18; Sullivan, Tr. 4198). So, he called Mr. Cohen (and eventually reached him on April 3, 2013), to admonish him not to discuss such topics. (SF 1509). Notably, there is no evidence that Schein took steps to stop dealing with Universal Dental Alliance following these communications, and, in fact, the relationship continued at least into 2015. (SF 1332-33, 1504).

NOT GET IT!!!" (SF 1554; CX 23). Upon receiving this report, Benco's Pat Ryan suggested to Chuck Cohen that "*maybe* what you should do is make sure you tell Tim and Paul to hold their positions as we are." (SF 1554; CX 23). But Mr. Cohen denied having had any discussions with Mr. Sullivan about buying groups in response to or otherwise following this email. (SF 1555; Cohen, Tr. 901-02). Moreover, the FTC-prepared log of communications does not reflect any such communications. (SF 1555; CX 6027).[59]

D. The Economic Evidence Does Not Support a Conspiracy Inference.

Although Complaint Counsel claimed that it was relying on direct evidence of an agreement, it also introduced economic testimony to support a circumstantial case. The economic evidence, however, does not support any inference of a conspiracy.

As noted above, Dr. Marshall testified on behalf of Complaint Counsel. He opined that (i) the "economic evidence was inconsistent … with respondents' unilateral behavior and consistent with coordinated action;" (ii) [redacted] (iii) the relevant product market consisted of full-service distribution services, and (iv) the relevant geographic markets were local. (SF 1595; Marshall, Tr. 2902-3, 2912, 2946, 3123).

Schein's expert, Dr. Carlton, testified that Dr. Marshall's opinions are unreliable, and Schein's conduct was consistent with unilateral behavior. (SF 1596-97; Carlton, Tr. 5382-86). Dr. Carlton provided four primary reasons to support his conclusions.

[59] Schein's conduct in this case is certainly no different than, and perhaps materially better than, Burkhart's, which Complaint Counsel contends rebuffed Benco's alleged invitation to collude. Complaint Counsel alleges that Mr. Cohen or other Benco executives tried to persuade Burkhart's Jeff Reece to not do business with buying groups on at least three occasions. (SF 370; Reece, Tr. 4375, 4381, 4386). Each time, Mr. Reece listened but declined to commit to not doing business with buying groups. Mr. Reece did not instruct Mr. Cohen not to discuss such matters with him, and did not report the conversation. (SF 370; Reece, Tr. 4486). In contrast, Mr. Sullivan specifically instructed Mr. Cohen not to discuss such matters with him. (SF 1329-30, 1491-92, 1509). Both Burkhart and Schein did business with some, but not all, the buying groups that were presented to them. (SF 360-62; Reece, Tr. 4460, 4484, 4487-88). In fact, whereas Burkhart had just two buying groups for most of the relevant period eventually going up to 6, Schein had over twenty-five. (SF 355; Reece, Tr. 4394, 4409, 4460).

- ***No Parallel Conduct***. Dr. Carlton found that the evidence demonstrated that Schein did business with buying groups, and thus, there was no evidence of parallel conduct among the Respondents to refuse to do business with such groups. (SF 1598; Carlton, Tr. 5359-60).

- ***No Structural Break***. Dr. Carlton found Dr. Marshall's opinion that the evidence revealed a "structural break" – or change in Schein's behavior – at the beginning and end of the alleged conspiracy was flawed because the evidence showed that Schein did business with buying groups, and had roughly similar sales volume to such groups, before, during, and after the alleged conspiracy. (SF 1599; Carlton, Tr. 5373-74). Dr. Carlton also demonstrated that the evidence does not support Dr. Marshall's claim that Schein induced Smile Source to terminate its relationship with Schein in January 2012 by reducing discounts, since discount levels stayed constant throughout the two years leading up to the termination. (SF 1599; Carlton, Tr. 5381-82).

- ***No Conspiracy Inference from Industry Characteristics***. Dr. Carlton explained that Dr. Marshall's reliance on "industry characteristics," such as high concentration does not support an inference of a conspiracy, since such characteristics are incapable of distinguishing between oligopolistic interdependence and conspiracy. (SF 1600; Carlton, Tr. 5361-62, 5382-83).

- ***No Acts Against Self-Interest***. Dr. Carlton explained that Dr. Marshall's profitability analysis was not capable of reliably demonstrating that Schein acted contrary to its unilateral self-interest. (SF 601; Carlton, Tr. 5362, 5384, 5386-90). In addition to relying on factual assumptions relating to Schein's dealings with Smile Source and Kois that are contrary to the record evidence, Dr. Marshall's profitability analysis is flawed and cannot answer whether Schein sacrificed profit. (SF 1601; Carlton, Tr. 5380-81, 5386-90, 5391, 5393-96).

1. The Economic Evidence Demonstrates a Lack of Parallel Conduct.

Dr. Marshall agreed that, for an economist to reach any conclusion about the existence of a conspiracy, " [i]t's important … first to have parallel conduct and then determine whether that parallel conduct can be explained by unilateral behavior or whether it is a result of collusive behavior." (SF 1604; Marshall, Tr. 2952-53). But Complaint Counsel did not present any economic evidence showing that Respondents engaged in parallel conduct. (SF 1607). Dr. Marshall failed to make a specific finding, or render the specific opinion, that Schein, Patterson, and Benco engaged in parallel conduct. (SF 1608). In contrast, as the following chart, derived

from Dr. Marshall's own report, shows, Schein did business with buying groups, steadily increasing each year from [redacted] in 2009 to [redacted] in 2017. [redacted]

[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
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[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
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[redacted]

(SF 1627; *see* CX 7101).

In response to this data, Complaint Counsel makes two arguments. *First*, they again try to change their theory to fit facts, claiming that the alleged conspiracy may have been more nuanced, limited to "new buying groups," and excluding legacy groups (other than the ones Schein allegedly terminated as part of the conspiracy (*i.e.*, the Dental Co-Op and Steadfast) or allegedly induced

termination (*i.e.*, Smile Source)). Putting aside the lack of communications that would be needed to reach, enforce, and implement such a conspiracy, it does not stand up to the facts. As discussed above, Schein negotiated with and opened a number of new buying groups during the relevant period, and renewed many others, including Universal Dental Alliance (2011), MeritDent (2012), Schulman Group (2013), Dental Gator (2014), and Klear Impakt (2015). (SF 641-650, 815-832, 970-75, 1095-98, 1314-22).

Second, Complaint Counsel alleges that Schein's partnerships with buying groups – and its repeated attempts to negotiate with buying groups – represent pervasive cheating on the alleged conspiracy. But that *allegation* requires *evidence*. Complaint Counsel has presented none. There is no evidence that Schein attempted to keep its buying group business secret to avoid retaliation from Patterson or Benco. In fact, the evidence shows the opposite. Time and again, intelligence of Schein's buying group activities reached Benco and Patterson, and they did *nothing*. (SF 126-140).

Even more fundamentally, as Dr. Marshall conceded, Schein's dealings with buying groups can only constitute "cheating" if a conspiracy is first assumed; otherwise, it is non-parallel conduct that defeats an inference of a conspiracy:

> Q. If Schein submitted a serious bid [to Smile Source in 2014] and you don't assume the existence of a conspiracy, then it's just nonparallel conduct, right?
>
> A. If I assume the nonexistence of the conspiracy, that, I think is fair.
>
> Q. … And only if you assume the existence of a conspiracy, then it's cheating, right?
>
> A. … That's – that would be – yes.
>
> Q. So when Schein does business with a buying group, it's either cheating if you assume the existence of a conspiracy, or nonparallel conduct … [i]f you don't assume the existence of a conspiracy.

> A. Well, again, what I'm saying is that as I read things, it was an insincere attempt to win the business.
>
> Q. [But] obviously, complaint counsel didn't agree with you.
>
> A. I see that.
>
> Q. So if complaint counsel is right, that Schein actually did intend to win the Smile Source business in 2014, then you would have non-parallel conduct if you don't assume the existence of a conspiracy, fair?
>
> A. Well, again, you're saying if you don't assume the existence of a conspiracy. ***Within the assumption of the existence of a conspiracy***[,] it's a legitimate interpretation of cheating…

(SF 1634; Marshall, Tr. 2958-60). Without an assumption of a conspiracy, so-called pervasive "cheating" is nothing more than evidence that there was no conspiracy.

2. The Economic Evidence Does Not Demonstrate a Structural Break.

Dr. Marshall also sought to support his conspiracy conclusion by claiming that there was evidence of a "structural break." But the record evidence does not support this contention.

Dr. Marshall did not conduct any analysis of the sales data to determine whether a change, if any, in Schein's conduct coincided with the start or end of the alleged conspiracy. (SF 1637; Marshall, Tr. 2947). Rather, Dr. Marshall *assumed* the existence of a conspiracy, and simply satisfied himself that the *alleged* start dates were not unreasonable based on his interpretation of a few cherry-picked documents.[60] (SF 1608, 1666). This, however, does not constitute a reliable

[60] Dr. Marshall conceded that he did not examine whether there was a change in frequency with which Schein agreed or declined to do business with buying groups. Moreover, none of the three anecdotes Dr. Marshall relies on establishes a structural break. *First*, Dr. Marshall claims that Unified Smiles is a structural break because Schein declined to do business with it on December 22, 2011. (SF 1643). But Dr. Marshall did not examine whether Schein had declined buying group opportunities before that date (it had). (SF 1645; Marshall, Tr. 2949-50). *Second*, Dr. Marshall claims that the Smile Source termination in January 2012 was structural break. (SF 1643). But Dr. Marshall's opinion is based on the false assumption that Schein terminated Smile Source or surreptitiously induced Smile Source to terminate the relationship. (SF 1129-45). Since that is incorrect, it cannot possibly be a structural break. *Third*, Dr. Marshall claims that Schein's 2017 contract with Smile Source is a structural break. (SF 1643). But Schein competed for Smile Source's business in 2014, and the fact that Smile Source was not ready to re-engage Schein until 2015-17, despite Schein's interest in doing so, does not mean that Schein only then suddenly decided to start doing business with buying groups. (SF 1156-83).

finding of a structural break. Moreover, Dr. Marshall's structural break conclusion is undermined by the data (cited above) that shows that Schein did (an increasing amount of) business with buying groups before, during, and after the conspiracy. (SF 1627, 1636).

3. The Economic Evidence Fails to Show Industry Characteristics Supporting Any Conspiracy Inference.

Dr. Marshall claims that "market structure" is "conducive to collusion." (SF 1657; Marshall, Tr. 2913-16). But, as Dr. Carlton testified, Dr. Marshall's "market structure" opinion is incapable of distinguishing between lawful oligopolistic behavior and unlawful agreement. (SF 1658; Carlton, Tr. 5383-86).

4. The Economic Evidence Does Not Show that Schein Acted Contrary to Its Self-Interest.

Complaint Counsel also fails to demonstrate that Schein acted irrationally or against its own unilateral economic self-interest. Complaint Counsel attempts to do so through Dr. Marshall's profitability analysis of just two buying groups (Smile Source and Kois). But that analysis is not reliable or persuasive. As explained in substantially greater detail in Schein's Proposed Findings of Fact, Dr. Marshall's profitability analysis is flawed for at least the following reasons:

- The analysis does not even attempt to analyze the but-for world, and thus, fails to account for the large discounts and high degree of cannibalization Schein would experience if it won the buying group contract. (SF 1661, 1715-21)
- The analysis is infected by false positives, incorrectly finding acts against self-interest outside of the alleged conspiracy period. (SF 1661, 1662-69)
- The analysis is limited to just two non-representative buying groups, and cannot support the conclusion that *any* of Schein's decisions were irrational. (SF 1661, 1689-95)
- The analysis fails to account for factors relevant to the decision to partner with buying groups, such as the impact on FSCs, potential cannibalization of existing customers, complaints about discriminating against non-members, and the conflicts between Special Markets and HSD. (SF 1661, 1713-14)

- The analysis is premised on the incorrect factual assumption that Schein did not try to compete for the Kois and Smile Source business. (SF 1661, 1696-1712)
- The analysis actually shows that supplying Smile Source would not have been profitable. (SF 1661, 1722-41)
- The analysis cannot distinguish between oligopolistic interdependence and conspiracy. (SF 1661, 1670-75)
- The analysis shows that the alleged conspiracy is ineffective and irrational, because it is always unprofitable so long as *any* distributor could supply the buying group. (SF 1661, 1676-88)

III. LEGAL ANALYSIS

Businesses "have broad discretion to make decisions based on their judgments of what is best for them." *In re Citric Acid*, 191 F.3d at 1101. That principle resolves this case.

The "Sherman Act does not restrict the long recognized right of a trader … engaged in an entirely private business … to exercise his own independent discretion as to the parties with whom he will deal." *Verizon Commc'ns, Inc. v. Trinko*, 540 U.S. 398, 408 (2004). Because every business "has the right to refuse to do business with another, provided [it] acts independently," the "crucial question" in this case is whether Schein ***agreed*** with Patterson and Benco to refuse to deal with, or offer discounts to, buying groups. *In re McWane*, 155 F.T.C. at *223 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)); *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1042 (2d Cir. 1976).[61]

[61] In a multi-party case such as this, Complaint Counsel must show that *each* Respondent participated in the alleged agreement in order find that Respondent liable. *See In re Citric Acid*, 191 F. 3d at 1093-94; *In re McWane*, 155 F.T.C. at *223, *264 (rejecting conspiracy claim against respondent where, "[r]egardless of what the foregoing communications may imply about [the alleged co-conspirators], these communications do not implicate … the Respondent"). Here, Complaint Counsel alleged a hub-and-spoke conspiracy, with Benco at the hub, having initially reached agreement with Schein in 2011 and then Patterson in 2013. To allege an over-arching conspiracy – rather than two separate conspiracies – Complaint Counsel must show that Schein was aware that Benco was entering into a conspiracy with Patterson, and vice versa. There has been no such showing. Complaint Counsel thus cannot sustain their burden to show a single conspiracy. But even if they had, their claim fails as to Schein because there is no proof that Schein reached any agreement with Benco (or Patterson) to boycott buying groups. As such, Schein cannot be held liable.

Here, Complaint Counsel failed to prove that Schein entered into any such agreement, through either direct or circumstantial evidence. *Erie Cty., Ohio v. Morton Salt, Inc.*, 702 F.3d 860, 867-68 (6th Cir. 2012) (an agreement "may ultimately be proven *either* by direct evidence … or by circumstantial evidence [that] negates the likelihood of independent action"); *In re McWane*, 155 F.T.C. at *223 (same).[62]

A. The Direct Evidence Refutes the Claim that Schein Agreed to Boycott Buying Groups.

Complaint Counsel promised to prove their case through direct evidence. "Our theory is that there were undisputed communications between the respondents about buying groups…. [T]hat's what our case is based on. So we need not go to a world where we are only looking at parallel conduct and trying to infer a conspiracy from that. ***We have direct evidence.***" (Kahn, Tr. 31-32). Complaint Counsel, however, did not fulfill this promise.

Direct evidence must be "explicit and require[] no inferences to establish the proposition or conclusion being asserted." *In re McWane*, 155 F.T.C. at *223; *In re Benco Dental Supply Co.*, 2018 WL 6338485, at * 6 (same). Such evidence includes written contracts containing the challenged restraint; admissions by the agreement's participants concerning its existence; recorded phone calls revealing the agreement; or documents memorializing the agreement and authored by persons with knowledge of it. *Superior Offshore Int'l, Inc. v. Bristow Grp., Inc.*, 490 F. App'x 492, 497-98 (3d Cir. 2012); *Mayor & City Council of Balt., Md. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013); *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 226 (3d Cir. 2011).

Such evidence is wholly absent here. There is no written agreement between Schein and its competitors; no witness admitting to the alleged agreement; no recorded phone calls discussing

[62] Complaint Counsel bears the burden of proving a conspiracy by a preponderance of the evidence; ties go to the Respondents. *See In re Adventist Health Sys./West*, 117 F.T.C. 224, at *28 (1994).

the agreement; and no documents memorializing it.

In fact, the *only* direct evidence in the case relating to the existence of an agreement is the sworn ***denials*** of every alleged participant. (JF 82-83, 89-106). As this Court has held, "sworn testimony from [Respondents] that they made [competitive] decisions independently and did not … agree to [not compete] … is ***direct evidence*** contrary to the asserted agreement … and is entitled to weight." *In re McWane*, 155 F.T.C. at *268; *City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 130 (D.D.C. 2006) ("Facing the sworn denial of the existence of conspiracy, it is up to plaintiff to produce significant probative evidence" of the conspiracy).[63]

Lacking any direct evidence of conspiracy, Complaint Counsel seeks to confuse the issue. They have "direct evidence," they say, not of *agreement*, but of mere "communications between respondents about buying groups." (Kahn, Tr. 31). The two are not the same. *Alvord-Polk*, 37 F.3d at 1013 ("communications alone … do not necessarily result in liability [because] it is only when those communications rise to level of an agreement … that they become an antitrust violation"); *In re Baby Food Antitrust Litig.*, 166 F.3d 112,126 (3d Cir. 1999) ("communications between competitors do not permit an inference of an agreement to fix prices unless those agreements rise to the level of an agreement, tacit or otherwise."); *see also Kleen Prods. LLC v. Ga.-Pac. LLC*, 910 F.3d 927, 938 (7th Cir. 2018) ("having the *opportunity* to conspire does not necessarily imply that wrongdoing occurred").[64]

[63] Even if the Court found that every witness lied under oath, Complaint Counsel is still left with an empty plate. "A plaintiff cannot make [its] case just by asking the fact finder to disbelieve the defendant[s'] witnesses." *In re McWane*, 155 F.T.C. at *267; *Venzie Corp. v. U.S. Mineral Prods. Co*., 521 F.2d 1309, 1313 (3d Cir. 1975) ("mere disbelief [does] not rise to the level of positive proof of agreement to sustain plaintiffs' burden of proving conspiracy").

[64] Complaint Counsel knows this. They allege *multiple* communications between Benco and Burkhart about buying groups, yet they say Burkhart rebuffed the alleged invitation to collude, and continued its business with select buying groups. ***That is precisely what Schein did***. Mr. Sullivan expressly admonished Mr. Cohen not to talk about customers – twice – and continued to do business with these groups. (SF 1491-92, 1504, 1509-10; *see also* SF 368-70).

A direct evidence case requires Complaint Counsel to prove the *content* of the alleged communications, and to do so without resort to inference. The "few scattered communications" Complaint Counsel cites "fall[] far short" of this because each requires a long, speculative chain of inferences to go from document to agreement. *City of Moundridge v. Exxon Mobil Corp.*, 409 Fed App'x 362, 364 (D.C. Cir. 2011); *Cosmetic Gallery, Inc. v. Schoeneman Corp.*, 495 F.3d 46, 52 (3d Cir. 2007) (evidence of competitor communications "required several inferences to serve as direct proof of a conspiracy").

There are only four alleged communications between Mr. Cohen and Mr. Sullivan during the alleged four or five-year conspiracy period, three of which involve disputes as to whether they occurred or whether buying groups were even discussed. None involve agreement, and none involve Patterson.

The <u>Disputed</u> January 13, 2012 Call. Mr. Cohen spoke to Mr. Sullivan for 11 minutes and 34 seconds on January 13, 2012. There is no record of what was discussed, and the parties dispute whether buying groups were discussed. Mr. Cohen testified that the call related to an employment dispute, and that he did not discuss Unified Smiles. Mr. Sullivan denied recollection of the call, but testified that he had no knowledge of Unified Smiles and did not disclose Schein's buying group policies, practices, or plans. To find a conspiracy based on this record, therefore, at least the following inferences would be required:

- That a pre-existing conspiracy was already underway, as Complaint Counsel pegs the start of the conspiracy to some undefined point in 2011;[65]

[65] To find that the January 13, 2012 call was in furtherance of the alleged conspiracy, the Court would first need to assume the existence of a pre-existing conspiracy (for which there is zero evidence). That is plainly improper. *In re McWane*, 155 F.T.C. at *255; *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1033 ("[A] litigant may not proceed by first assuming a conspiracy and then explaining the evidence accordingly."). Importantly, Complaint Counsel has never claimed the alleged conspiracy started on January 13, 2012, as doing so would clash with their "structural break" arguments, particularly as to Schein's rejection of Unified Smiles and the *alleged* induced termination of Smile Source.

- That Unified Smiles was actually discussed on the call, and that the discussion was designed to further the alleged conspiracy;
- That Mr. Cohen revealed his policies, plans, or practices concerning Unified Smiles or buying groups generally on that call;
- That Mr. Sullivan knew anything about Unified Smiles and/or shared Schein's views about buying groups with Mr. Cohen; and
- That a common understanding was reached.

Direct evidence this is not. Moreover, to draw these inferences, the Court would need to find that both Mr. Sullivan and Mr. Cohen lied under oath when they testified that none of this occurred. *Cf. In re McWane*, 155 F.T.C. at *253 (where witnesses "denied having any recollection of the telephone calls and/or denied any recollection of what was discussed," it "would be pure speculation … to simply assume" that unlawful agreements were reached).

The Disputed July 25, 2012 Internal Benco Email re Smile Source. Complaint Counsel also relies on an internal July 25, 2012 Benco email in which Mr. Ryan suggests that Mr. Cohen reach out to Mr. Sullivan to "knock this shit off." (SF 1447-54; CX 18). Mr. Cohen denied sending, and Mr. Sullivan denied receiving, any note. Nor is there any record of a contemporaneous communication between the two. A one-way transmittal of a phantom note is not direct evidence.[66]

The March 25, 2013 and April 3, 2014 Calls. Mr. Cohen sent an unsolicited text message to Mr. Sullivan on March 25, 2013 asking to talk by phone. (SF 1483, 1486-87). After the call, a few texts and one follow-up phone call ensued. At most, this is direct evidence of communications, not agreement.

[66] Because Complaint Counsel does not claim that the hypothetical note mentions an agreement, or that Mr. Sullivan ever responded to it (had it been sent to him), the note cannot be *direct evidence* of an agreement. At best, Complaint Counsel seeks an inference that the note would not have been sent absent some pre-existing agreement. But given Mr. Cohen's history of engaging in ***unsolicited*** communications, any inference of a prior agreement based on Mr. Cohen's (alleged) unsolicited note would be speculative and unwarranted.

On the March 25, 2013 call, as Mr. Sullivan recounted,

> [Mr. Cohen] started talking about Atlantic Dental Care… He asked if I knew who they were, and I told him I did not. Then he started to tell me more about them, and I immediately stopped him, and said, 'Chuck, this is not a discussion you and I should be having' … and I cut off discussion on that topic.

(SF 1492; Sullivan, Tr. 3946). Mr. Sullivan further admonished Mr. Cohen when he connected with him a week later, on April 3, 2013, after Mr. Cohen continued to share information. (SF 1509; Sullivan, Tr. 3966, 4205-06).

That is not an *agreement*. At most, it involves Benco sharing information, not the reverse. *See City of Moundridge*, 429 F. Supp. 2d at 132 ("Evidence that competitors merely exchanged information does not establish a conspiracy."). A one-way transmittal of information is not an agreement. *Reserve Supply Corp. v. Owens-Corning Fiberglass Corp.*, 971 F.2d 37, 50 n.9 (7th Cir. 1992) (evidence that defendant "did not respond with any information … or plans" in response to information provided by a competitor "is insufficient to infer an agreement…").

And even if the Court speculated that Benco sought to invite collusion (which it did not), it "remains the plaintiff's burden to prove that [Schein] succumbed to temptation and conspired." *In re McWane*, 155 F.T.C. at *265. As this Court has noted, "[i]t is not enough to point out the temptation and ask that the [Respondents] bear the onerous, if not impossible, burden of proving the negative – that no conspiracy occurred." *Id*. Here, Mr. Sullivan did exactly what he was supposed to do. "It would not be reasonable to infer that [Schein] engaged in illegal activities merely from evidence that an illegal course of action was suggested but immediately rejected." *In re Citric Acid*, 191 F.3d at 1098.

The September 16, 2013 Internal Benco Email Regarding Burkhart. Complaint Counsel also cites an internal Benco email in which Mr. Ryan suggests, after learning that Burkhart intends to compete for buying groups, that Mr. Cohen call Mr. Sullivan and Mr. Guggenheim to "hold

their positions." (SF 1554; CX 23). As with the earlier phantom note, there is no evidence that such a call ever took place, and the call log confirms this fact. (SF 1555; CX 6027). Certainly, this is not direct evidence of an agreement.[67]

B. The Circumstantial Evidence Refutes the Claim that Schein Agreed to Boycott Buying Groups.

Without direct evidence, Complaint Counsel tries their hand at a circumstantial case, despite eschewing that approach in its opening. No matter. The approach fails.

To avoid "mistaken inferences" that "chill the very conduct the antitrust laws are designed to protect … antitrust law limits the range of permissible inferences" that can be drawn "from ambiguous evidence." *Matsushita*, 475 U.S. at 588, 594; *In re McWane*, 2012 WL 5375161, at *6. Accordingly, the circumstantial evidence "must tend to rule out the possibility of independent action." *In re McWane*, 2012 WL 5375161, at *6. This requires the plaintiff to show that the conduct is "so unusual that in the absence of an advance agreement, no reasonable firm would have engaged in it." *Valspar*, 873 F.3d at 193.

Meeting that standard is particularly difficult in concentrated markets because "rational, independent actions taken by oligopolists can be nearly indistinguishable from" concerted action. *Valspar*, 873 F.3d at 191; *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 359 (3d Cir. 2004). Interdependent strategies – like follow-the-leader or wait-and-see – make sense in these markets "because any rational decision [maker] must take into account the anticipated reaction of other

[67] Complaint Counsel cites communications between Patterson and Benco about buying groups. (*See* CX 90; CX 62). They have nothing to do with Schein. *In re McWane*, 155 F.T.C. at *264 (communications that do not involve a Respondent "do not implicate [that Respondent] in the alleged agreement…."). Nor can they be used as evidence of an "overarching conspiracy" involving Schein. *See, e.g.*, *In re Actos End Payor Antitrust Litig.*, 2015 WL 5610752, at *26 (S.D.N.Y. 2015) (evidence of bilateral agreements was not "sufficient factual support" for coordinated action by all the defendants); *In re Optical Disk Drive Antitrust Litig.*, 2011 WL 3894376, at *9 (N.D. Cal. 2011) (an allegation that "auctions involv[ing] only a small subset of defendants" were rigged "is a far cry from establishing plausibility for a broad six year continuing agreement among all defendants….").

firms." *Valspar Corp.*, 873 F.3d at 191. As the Supreme Court explained, such firms "surely [know] the adage about him who lives by the sword," and so they may be "sitting tight, expecting their neighbors to do the same." *Twombly*, 550 U.S. at 568. Because these strategies – collectively, referred to as oligopolistic interdependence – naturally give rise to parallel behavior, they pose a "special problem" for courts in distinguishing lawful from unlawful conduct. *Valspar*, 873 F.3d at 191.

To address this problem, courts have developed a three-step framework through which circumstantial evidence must be analyzed. *First*, Complaint Counsel must show that the Respondents engaged in parallel conduct. *Second*, they must show "the existence of one or more plus factors that tend[] to exclude the possibility" of independent or interdependent conduct. If Complaint Counsel passes *both* steps, then defendants may rebut the conspiracy inference by showing that they acted independently. *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1301 (11th Cir. 2003); *In re Beef Industry Antitrust Litig.*, 907 F.2d 510, 514 (5th Cir. 1990); *In re Baby Food*, 166 F.3d at 122. Complaint Counsel fails each step.

1. Complaint Counsel Failed to Prove that Respondents Engaged in Parallel Conduct.

Complaint Counsel failed to prove parallel conduct. Schein routinely attempted to win the business of, and did business with, buying groups; Benco and Patterson did not.

Proof of parallel action is a necessary element of a circumstantial case. *In re Beef Indus. Antitrust Litig.*, 907 F.2d at 514 (5th Cir. 1990) (a plaintiff "must first demonstrate that the defendants' actions were parallel"); *see also Anderson News, L.L.C. v. Am. Media, Inc.*, 899 F.3d 87, 106-12 ("Without 'parallel acts' … evidence supporting the presence of certain plus factors … can provide little support for a finding of unlawful conspiracy."); *Michelman*, 534 F.2d at 1043 (rejecting conspiracy claim where a defendant "pursued a substantially dissimilar and divergent

course from the others"). Behavior "contrary to the existence of a conspiracy" – such as Schein's dealings with allegedly boycotted buying groups – precludes a finding of parallel conduct. *Valspar Corp.*, 873 F.3d at 196 n.7.

At trial, Complaint Counsel called witnesses from five buying groups: Kois, Smile Source, the New Mexico Dental Co-Op, the Corydon Palmer Dental Society, and Dental Gator. Schein did not boycott any of them.[68] Schein did business with Corydon Palmer, the New Mexico Dental Co-Op (through its affiliation with the broader Dental Co-Op), and Dental Gator. (SF 124, 512-13, 645, 650, 120-23). Schein also did business with Smile Source until 2012, when Smile Source terminated the relationship; and it tried to rekindle that relationship in 2014 (and thereafter), before successfully doing so in 2017. (SF 223, 1111, 1157-67, 1186). As for Kois, Schein was interested in negotiating with Kois, only to have its reasonable requests for information and time for due diligence rejected. *Anderson News, L.L.C.*, 899 F.3d at 105 (no parallel conduct where defendants "undertook independent efforts to negotiate with" the allegedly boycotted plaintiff).[69]

In contrast to Complaint Counsel's failure to prove parallel conduct, Schein introduced reams of evidence showing that it did business with many buying groups. (SF 375-1335). To list just the groups during the conspiracy period (and bolding the groups Complaint Counsel alleges were somehow boycotted):

- Advantage Dental Group
- Alpha Omega
- Breakaway
- Comfort Dental
- Corydon Palmer Dental Society
- **Dental Gator**
- Dental Associates of Virginia
- Dental Partners of Georgia

[68] Complaint Counsel *alleges* Schein boycotted other buying groups, but did not call witnesses to testify or otherwise present evidence of such boycotts.

[69] This is not to say that Schein never declined to do business with certain buying groups. But rejecting a buying group on the merits, after a careful evaluation of the group, is not the same as boycotting it because of an illegal agreement with one's competitors. For example, Complaint Counsel points out that Schein declined to partner with PGMS. But that was not a quick, knee-jerk reaction one would expect in a boycott. Instead, Ms. Titus spent weeks developing a relationship with PGMS, learning about their model, and conducting due diligence. (SF 1051-63). Mr. Cavaretta ultimately decided not partner with PGMS, and for legitimate reasons. (SF 1072, 1074).

- Dentists for a Better Huntington
- Floss Dental
- Intermountain Dental Associates
- Khyber Pass
- Klear Impakt
- Long Island Dental Forum
- **MeritDent**
- OrthoSynetics
- Pugh Dental Alliance
- **Schulman Group**
- **Smile Source**
- **Steadfast Medical**
- Stark County Dental Society
- Sunrise Dental
- The Denali Group
- **The Dental Cooperative**
- **Universal Dental Alliance**

(SF 375-1335).[70] In fact, Schein did around [redacted] in buying group business every year of the alleged conspiracy. (SF 1627-28); *see also Michelman*, 534 F.2d at 1044-46 (a boycott allegation fails where business with the allegedly boycotted entities "increased substantially during th[e] period").

Schein's behavior was diametrically opposite of Benco's and Patterson's. Benco had a policy against doing business with buying groups, and systematically said no to each one. (SF 342-45). Patterson followed a practice of declining business with buying groups. (SF 347, 349). Neither Benco nor Patterson made sales to buying groups during the alleged conspiracy, or made serious attempts to negotiate with them. (SF 1605, 342, 349). Where one Respondent is "declining all orders" and another is doing business with "at least some," the evidence "fall[s] far short of demonstrating parallel behavior." *See Burtch*, 662 F.3d at 228. Not only did Schein negotiate with and do business with numerous buying groups, it constantly reevaluated its internal structures and processes, molding them over time to better serve buying groups – a goal it dubbed a "strategic priority" at the end of 2014. (SF 295-96). No inference can bridge the gulf between Schein's conduct and that of Patterson or Benco.

[70] For most of these groups, Complaint Counsel did not present any evidence at trial to rebut Schein's claim that they were buying groups. As noted in Schein's Proposed Findings of Fact, the evidence indicates that they are properly considered buying groups. (SF 375-1335). More importantly, Schein considered them to be buying groups and did business with them.

Indeed, if there was parallel conduct in this case, it was between Schein and Burkhart, the distributor Complaint Counsel says "did what it was supposed to do" and "was not part of the conspiracy." (SF 354). Both Burkhart and Schein worked with many (but not all) buying groups. (SF 355). Both pursued partnerships with Smile Source. (SF 357). Both evaluated buying groups for "stickiness" and ability to deliver volume, recognizing that not all buying groups present a worthwhile business opportunity. (SF 360-62). Both included buying groups as part of their "key strategies" or "strategic priorit[ies]." (SF 365). Both rejected any alleged invitations to conspire (if the Court speculates that there was such an invitation and not, as Mr. Cohen testified, simply an inquiry designed to obtain competitive intelligence). (SF 354, 1492, 1509, 1524-25). If Burkhart is innocent, so is Schein.

In response, Complaint Counsel plays "whack-a-mole," in an effort to manufacture the appearance of parallelism. *First*, they redefine buying groups to exclude those Schein embraced. But Complaint Counsel's own expert identified buying groups as those groups one or more of the Respondents considered to be a buying group of independent dentists. (SF 1762). By that definition, each of the groups Schein listed above qualifies. Moreover, Complaint Counsel's definitional game is riddled with inconsistency. They say Smile Source, which is a franchisee, is a buying group; but Comfort Dental, which is also a franchisee of independent dentists, is not. They say Dental Gator, the buying group arm of MB2, is a buying group; but Advantage Dental, which also has both a DSO and a buying group arm, is not. But the definitional games do not matter. It is ***undisputed*** that Schein did over [redacted] in annual business with buying groups (and the evidence shows [redacted]. (SF 1616, 1627-28; CX 7101).

Second, Complaint Counsel hypothesizes that the boycott was limited to new buying groups. But Complaint Counsel adduced no evidence that Respondents reached such a nuanced

understanding. Such a conspiracy would also be irrational, since there are no barriers to buying group expansion. This argument also leaves Complaint Counsel's case in knots, as it renders irrelevant all of the evidence about Smile Source, Steadfast, and the Dental Co-Op, which would have been grandfathered under this theory as legacy buying groups, but Complaint Counsel claims were boycotted. Most importantly, this theory is contradicted by the undisputed evidence that Schein negotiated with and opened a number of *new* buying groups during the alleged conspiracy, including Universal Dental Alliance (2011), MeritDent (2012), the Schulman Group (2013), Dental Gator (2014); and Klear Impakt (2015).

Third, Complaint Counsel asks this Court to dismiss all of Schein's efforts to partner or negotiate with buying groups as cheating. But to do so, there must be evidence of a conspiracy (there is none), and there must be evidence indicative of cheating, such as efforts to keep Schein's buying group business secret (there were none). So, Schein's buying group activities can only be cheating if one (impermissibly) assumes a conspiracy. *In re McWane*, 155 F.T.C. at *255 ("under Complaint Counsel's argument, it must first be assumed that there was, in fact, an agreement," which cannot "be presumed"); *Blomkest Fertilizer*, 203 F.3d at 1033 ("a litigant may not proceed by first assuming a conspiracy and then explaining the evidence accordingly").[71] Without such an assumption, Schein's activities are non-parallel conduct that *defeat* a conspiracy inference. *In re McWane,* 155 F.T.C. at *259 (rejecting conspiracy claim, in part, because the evidence regarding

[71] It is true that evidence of cheating does not preclude liability, since the Sherman Act prohibits the agreement, not its efficacy. But that assumes that plaintiffs have proven an agreement through direct evidence. Because that same evidence precludes a finding of parallelism, it defeats a *circumstantial* case. *See In re McWane*, 155 F.T.C. at *267 (distinguishing cases where evidence of cheating did not preclude liability because the "evidence of an agreement, found in the foregoing cases, distinguishes them from the instant case, in which the probative value of Complaint Counsel's 'cheating complaints' first requires an assumption that an agreement existed, which is contrary to the government's burden of proof"); *see also In re Flat Glass,* 385 F.3d at 360 (noting that "plus" factors are designed to serve as "proxies for direct evidence of an agreement" in a circumstantial case based upon parallel pricing conduct).

one alleged conspirator was "inconsistent with the existence of an agreement"); *In re Baby Food*, 166 F.3d at 127 n.9 (dismissing claim of agreement not to enter the Chicago market given evidence of a "formal, written proposal to [a] large Chicago supermarket chain…").

When facts do not fit theory, the theory must fail.[72]

2. Complaint Counsel Failed to Prove Plus Factors Tending to Exclude the Possibility of Unilateral Conduct.

The absence of parallel conduct stops Complaint Counsel's circumstantial case in its tracks. But Complaint Counsel also fails to establish any plus factors that negate the possibility of unilateral action. Plus factors can be "grouped into the following three categories: (1) evidence that the alleged conspirator had a motive to enter into a … conspiracy, (2) evidence that [it] acted contrary to its self-interest[]; and (3) evidence implying a traditional conspiracy." *In re McWane*, 155 F.T.C. at *244. None are present here.

a. There Was No Motive to Conspire.

Complaint Counsel claims that Schein's internal reservations about buying groups supplied the motive to conspire. Those documents show the exact opposite: that Schein had good reason for turning down the groups that it did. There is no need, or motive, to conspire "to do what [is] only natural anyway." *Twombly*, 550 U.S. at 566. And that is all Complaint Counsel has shown.

Complaint Counsel does not deny that concerns reflected in Schein's documents about cannibalization, the impact on FSCs, and the host of other adverse consequences of dealing with buying groups were real. Nor do they deny that risks motivated Schein to turn down the groups that it did. This provides non-conspiratorial reasons for Schein's conduct, and negates any claim that Schein had motive to conspire. *In re Interest Rate Swaps*, 261 F. Supp. 3d at 464 (defendants

[72] Complaint Counsel offers various other excuses to avoid Schein's non-parallel behavior, such as an FSC going rogue, or that Mr. Sullivan was not sufficiently aware of a particular group, or that the group was affiliated with a DSO. But those are all just excuses premised on the *assumption* of conspiracy.

had "good reason" to discourage "development of a new trading paradigm that threatened, some day, to cannibalize their trading profits"); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 349 (3d Cir. 2010) (it is natural for a profitable defendant to have "no desire to upset the apple cart").

Complaint Counsel nevertheless argues that competition would have forced Schein to endure the destruction of its business model had it not locked arms with its competitors. But this argument rests on many unproven assumptions.

Complaint Counsel first assumes that buying groups can actually divert sales from one distributor and deliver them to another. But the evidence did not bear this out. Because most buying groups cannot control the purchasing decision or drive compliance, they cannot shift volume to the designated distributor and away from the others. Without that dynamic, there is no need to conspire with rivals to boycott buying groups.

Complaint Counsel next assumes that, even if buying groups could shift volume from one distributor to another, a distributor would need to be the first out of the gate to embrace buying groups, lest it get left behind forever. Another unproven assumption. The evidence shows that, even when distributors did business with a buying group, the group's growth was relatively modest, and new groups were popping up all the time. If a distributor misses an opportunity, another will always come along. Just look at Schein's repeated efforts to win the Smile Source business. There is no need for a "winner-take-all" race to be first, and so no need to conspire to prevent the race from getting started.

Complaint Counsel assumes that each distributor would have expected the other to jump on the buying-group bandwagon absent conspiracy. But in oligopolistic, interdependent markets, strategies such as wait-and-see or follow-the-leader are perfectly rational, and negate any need or motive to conspire. *In re McWane*, 155 F.T.C. at *247, 267 (no inference of a conspiracy where

the conduct "is at least as consistent with oligopolistic, 'follow-the-leader' behavior, which is not illegal"); *see also Twombly*, 550 U.S. at 566 (defendants "doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword. Hence, a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing")

Finally, Complaint Counsel assumes that the conspiracy would benefit by locking arms. But Marshall's own analysis *disproves* that assumption. He found that [redacted]. (SF 1678-82; Marshall, Tr. 3131-33 (conspiracy unprofitable **"**where there does exist a regional distributor")). But because regional distributors are *everywhere* – often with larger share than Benco – the conspiracy itself does not make sense, precluding a finding of motive. (SF 1682); *Anderson News, L.L.C.*, 899 F.3d at 112 (motive "negated" where "the alleged agreement would harm the alleged conspirators"); *Matsushita*, 475 U.S. at 596-97 ("[I]f petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.").

b. There Were No Acts Against Self-Interest.

Evidence of an act against self-interest requires proof that Schein "would have acted unreasonably" absent "assurances from the other defendants that they would take the same action." *In re McWane*, 155 F.T.C. at *248. This requires Complaint Counsel to show that Schein's actions did "not … amount to good faith business judgment." *Cayman Expl. Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1361 (10th Cir. 1989). They fail in this quest.[73]

[73] Courts do not lightly second-guess business judgment. Because "firms do not expand without limit …," a plaintiff's burden in proving that a defendant unreasonably refrained from pursuing a profitable opportunity is "substantial." *In re Chocolate Confectionary Antitrust Litig.*, 999 F. Supp. 2d 777, 791 (M.D. Pa. 2014); *Twombly*, 550 U.S. at 569.

Every Schein witness testified extensively as to Schein's business rationale for dealing (or not dealing) with buying groups. The factual recitation above further demonstrates that Schein acted reasonably at every turn. Complaint Counsel does not deny that the factors Schein considered were all reasonable. And it does not introduce ***any*** evidence that Schein would have come to any different conclusion, or acted any differently, but for the alleged conspiracy. *See In re Citric Acid*, 191 F.3d at 1100 (rejecting claims of acts against self-interest where defendant "*did* explicitly weigh the costs and benefits"); *see also Valspar Corp.*, 873 F.3d at 200 (evidence of "internal deliberation" over a course of action "may negate an inference of conspiracy").

The closest Complaint Counsel comes is Dr. Marshall's profitability analysis for Smile Source and Kois. But Dr. Marshall conceded that every buying group is different, that the [redacted] that not [redacted] and that each group [redacted] (SF 92, 1693-94; Marshall, Tr. 3002-03). As such, the most that can be said of Dr. Marshall's profitability analysis is that it specifically touches on Kois and Smile Source. It cannot be extrapolated beyond that to draw broad conclusions about Schein's rationality as to buying groups generally.

But even as to Smile Source and Kois, Complaint Counsel's reliance on Dr. Marshall is misplaced. Dr. Marshall's analysis is premised on the *assumption* – for he is no fact witness – that Schein actually boycotted or otherwise refused to deal with those groups. An expert's analysis, however, is not admissible, reliable, or persuasive when his assumptions do not fit the facts. *See* Fed. R. Evid. 702; *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 265 (2d Cir. 2002) (the court must "ensur[e] that an expert's testimony … rests on a reliable foundation"). Here Dr.

The burden is especially high in concentrated markets where self-interest evidence "may only restate the theory of interdependence among oligopolists" and thus have little role to play. *In re McWane*, 155 F.T.C. at *245; *Valspar Corp.*, 873 F.3d at 196 (same).

Marshall assumed that Schein terminated Smile Source or induced Smile Source to terminate it in 2012, that Schein submitted a sham bid to Smile Source in 2014, and that Schein refused to reasonably engage in Kois. None of those facts are true. So his profitability analysis cannot show that Schein failed to exercise "good faith business judgment." *Cayman*, 873 F.2d at 1361.[74]

But even if one were to second-guess Schein's actual conduct, Dr. Marshall's analysis does not show that either the Smile Source or Kois contracts would have been profitable for Schein. Dr. Marshall failed to analyze the but-for world, and failed to account for the discounts that Schein would have had to offer, and the cannibalization it would have experienced, had it won those contracts. (SF 1717-20). In fact, his analysis affirmatively proved the opposite. Schein had the Smile Source contracts in 2011 and 2017. And Dr. Marshall analyzed the profitability of those contracts, and in both cases, Schein [redacted] (SF 1724, 1732).[75]

Dr. Marshall's analyses are further plagued by false positives (finding acts against self-interest even outside the alleged conspiracy) and an inability to distinguish between lawful oligopolistic behavior and conspiracy. (SF 1662-68). These defects cannot be passed over – they are fundamental failings. *See Amorgianos*, 303 F.3d at 267 ("[I]t is critical that an expert's analysis be reliable at every step" because any "step that renders the analysis unreliable under the *Daubert* factors renders the expert's testimony inadmissible").

[74] Dr. Marshall's factual assumptions are based on his reading of the factual record, which he presumes to be [redacted] while conceding he is [redacted] (SF 1700). His opinions must be rejected for that reason as well. *Anderson News*, 899 F.3d at 112 (expert opinion is properly excluded where it "merely recite[s] what is on the face of documents produced during discovery" and "merely interpret[s] defendants' statements"); *Highland Capital Mgmt, L.P. v. Schneider*, 379 F. Supp. 2d 461, 469-70 (S.D.N.Y. 2005) (an expert cannot speculate about the "state of mind and motivations of certain parties" or the "intent … of parties").

[75] Thus, Dr. Marshall's conclusions oppose Complaint Counsel's allegations that Schein would have earned more profit contracting with Smile Source between 2012 and 2016 than by not contracting with it.

c. Communications Do Not Raise An Inference of Conspiracy.

Because conduct in an oligopoly "can be nearly indistinguishable from" a conspiracy, courts assessing circumstantial evidence generally require "proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though" there may not be direct evidence of an actual agreement. *Valspar*, 873 F.3d at 191, 193; *see also In re McWane, Inc.*, 155 F.T.C. at *245 (In an oligopoly, "evidence indicating an actual, manifest agreement is the key to a proper determination.").

In making this determination, "particular attention, and weight, is accorded to whether or not the evidence shows: (1) a "prior understanding" among the Respondents; (2) "a commitment to one another" to refrain from competing; and (3) a "restricted [sense of] freedom of action" because of the "obligation" that one Respondent owes to the others. *In re McWane*, 155 F.T.C. at *246, 267 (rejecting conspiracy claim because "the evidence fails to demonstrate that [decisions] were made because of [these] evidentiary hallmarks for proving the required 'actual, manifest agreement'"). Complaint Counsel has not identified any of these three hallmarks.

(1) There Was No Prior Understanding.

None of the evidence pertaining to Schein indicates a "prior understanding." The January 2012 call between Mr. Cohen and Mr. Sullivan was about hiring issues. (SF 1430-40). There is no more than a mere possibility, based on an internal Benco email, that Unified Smiles might have come up on the call. That is not enough. Mr. Cohen's communications to Mr. Sullivan regarding ADC in 2013 were all unsolicited, and Mr. Sullivan testified, without contradiction, that he immediately told Mr. Cohen they could not speak about specific customers. (SF 1491-92, 1504,

1509-10). There is no evidence that Mr. Sullivan shared any information as to ADC or Schein's plans. This is not the stuff of an "understanding."[76]

At most, Complaint Counsel's evidence of interfirm communications amounts to mere opportunity evidence, which cannot support an inference of wrongdoing.[77] *Petruzzi's IGA Supermarkets, Inc. v. Darling-Del. Co.*, 998 F.2d 1224, 1235, 1242 n.15 (3d Cir. 1993) (treating evidence of social calls and telephone contacts as "[p]roof of opportunity to conspire [which], without more, will not sustain an inference that a conspiracy has taken place"); *Cosmetic Gallery*, 495 F.3d at 53 (an "account" of a "communication between alleged conspirators" was "at best evidence of an opportunity to conspire, not of concerted action"); *Venzie*, 521 F.2d at 1312 (dismissing case because evidence that defendants had made "numerous telephone calls" to each other, at least one of which concerned allegedly boycotted plaintiffs, only proved an opportunity for an agreement).

Complaint Counsel also seeks an inference from communications about the TDA trade show, which Complaint Counsel concedes is not a buying group. (SF 1556). These communications do not evidence a prior understanding. Not only do they indicate unilateral decisions as to the TDA trade show, they indicate that Schein did not communicate any of its plans with Patterson or Benco, and that Schein (and Mr. Sullivan) was intent on keeping Schein's plans to itself. (SF 1556-78; RX 2362 ("Agree that we should NOT be having these discussions w

[76] Mr. Foley behaved in the same, lawful manner, when he received an unsolicited phone call from Benco's Mr. Ryan regarding Smile Source. Mr. Foley did not share any information regarding Schein, reported the conversation to his superiors, and specifically noted he did not cross any lines. (SF 1456, 1461-62).

[77] To the extent Complaint Counsel seeks an inference from just the *number* of interfirm communications, on any topic under the sun (whether sports, jokes, or family foundations), such an inference is impermissible. *See, e.g.*, *In re Baby Food Antitrust Litig.*, 166 F.3d at 133 ("evidence of social contacts and telephone calls [is] insufficient to exclude the possibility that the defendants acted independently"); *In re Chocolate Confectionary Antitrust Litig.*, 999 F. Supp. 2d at 804, *aff'd*, 801 F.3d 383, 406 (3d Cir. 2015) ("[S]ocial contacts between competitors without more are not unlawful.").

Benco. Chuck has not contacted me nor would he on such a topic.")).

Likewise, there is no indication of a prior understanding with Benco or Patterson in Schein's internal documents. They show the opposite. After Schein discontinued its partnership with the Dental Co-Op, for example, Schein's Western Pacific Zone Manager, Kevin Upchurch, believed that Patterson and Benco "might also jump at the opportunity" to partner with the Dental Co-Op. (SF 630). Hardly the "common understanding" Complaint Counsel alleges. What little internal commentary there was at Schein about what Patterson or Benco might be doing with buying groups, it was all based on Schein's interpretation of legitimate market intelligence. (SF 558 n.6, 1278, 1518).

The same is true of internal Patterson and Benco communications about what Schein might (or might not) be doing. (SF 1474-75, 1477, 1585-92). There is no evidence that their internal speculation was the product of a prior understanding, rather than legitimate, run-of-the-mill market intelligence and surmise. Indeed, it is to be expected that "[c]ompetitors in concentrated markets watch each other like hawks." *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 875 (7th Cir. 2015) (Posner, J.). As such, internal discussions about what other competitors might be doing cannot give rise to an inference of agreement.

In the end, Complaint Counsel relies on the same kind of evidence rejected in *In re Text Messaging*. There, plaintiffs thought they had a "smoking gun" in a pair of emails between T-Mobile executives that read, "Gotta tell you but my gut says raising messaging pricing again is nothing more than a price gouge on consumers. … I know the other guys are doing it …," calling T-Mobile's latest price increase "colusive [*sic*] and opportunistic." 782 F.3d at 872. The Seventh Circuit rejected this evidence as indicative of a conspiracy. "Nothing in any of [these] emails suggests that [the executive] believed there was a conspiracy…." *Id.* at 873; *see also In re Baby*

Food, 166 F.3d at 126 ("the mere possession of" a competitor's "memoranda" is not "evidence of concerted action to fix prices … [because] it makes common sense to obtain as much information as possible of the pricing policies and marketing strategy of one's competitors"); *In re K-Dur Antitrust Litig.*, 2016 WL 755623 at *22 (D.N.J. 2016) ("Awareness of a competitor's actions is not enough to create an inference of a conspiracy.").

(2) There Was No Commitment.

There is no evidence that Schein made any kind of "commitment" to Benco or Patterson. There is no hint of such a commitment in any of the documents cited by Complaint Counsel, in any of the testimony elicited at trial, or in Schein's actual behavior toward buying groups. The pervasive evidence of Schein's business with buying groups, and of its careful consideration of buying group opportunities, obliterates any notion that Schein made some commitment not to do business with them.

(3) There Was No Restriction of Freedom.

There is also no indication Schein felt any restriction to its freedom to do business with buying groups as it saw fit. It engaged with the buying groups it wanted to when it wanted to. It fought for Smile Source's business throughout. Its business with buying groups *increased* over the relevant period. It worked throughout the period to develop and refine internal structures and protocols to further *enable* and *enhance* its business with buying groups. (*See* SF 189-341). No one at Schein once said they could not do business with a buying group because of Benco or Patterson. Every time Schein declined a particular buying group, the record reveals legitimate and considered business reasons for doing so. This is the essence of freedom, and should not be curtailed by misapplication of the antitrust laws.

d. There Was No Structural Break or Abrupt Change in Schein's Approach to Buying Groups.

Complaint Counsel puts much stake in their communication evidence, but a handful of communications, standing alone, without evidence of their content, reveals next to nothing. *See Anderson News*, 899 F.3d at 113 (giving "the increased level of interfirm communications" little weight, noting "what exactly they signify eludes us"). Inferences must have basis in fact, and ambiguous evidence is not a license for speculation. *See In re McWane*, 155 F.T.C. at *253, 255, 258 (where witnesses "denied any recollection of what was discussed[,]" it "would be pure speculation … to simply assume" an unlawful agreement).

One way courts assess whether surrounding context supports an inference of conspiracy is to look at whether there was a change in conduct following the suspect communications. *Kleen Prods.*, 910 F.3d at 936-37. To support a conspiracy inference, such a change "must be radical, or abrupt." *Valspar Corp.,* 873 F.3d at 196; *see also Kleen Prods.*, 910 F.3d at 936 (same). This, of course, is a before-and-after analysis. If Schein's behavior was similar "before the [alleged] period as well" as after the alleged conspiracy, there can be no inference. *Kleen Prods.*, 910 F.3d at 936-37 ("A continuation of a historic pattern – including of parallel [conduct] – does not plausibly allow one to infer the existence of a cartel.").

Conversely, changes in conduct that are minor, non-uniform, or explained by extrinsic changes in market conditions also do not support an inference of a conspiracy. *Valspar*, 873 F.3d at 196 (noting that a mere "uptick in frequency of a pre-established industry practice" is far from the sort of "radical or abrupt change" necessary to "indicate conspiracy"); *Kleen Prods.*, 910 F.3d at 936-37 (rejecting inference of conspiracy where "the shift [in defendant's behavior] may be explained by external factors").

Here, Complaint Counsel *alleges* a radical change in Schein's conduct, but failed to *prove* it. Complaint Counsel claims that before December 2011, Schein held its gates wide open to buying groups. Then, as Complaint Counsel's theory goes, everything changed by December 2011, and suddenly, Schein slammed the gates shut and no longer did business with buying groups. In April 2015, according to Complaint Counsel, the gates opened again, and Schein started up its buying group business after a three-and-a-half-year hiatus. There is no evidence supporting these drastic pendulum swings. In reality, Schein always kept its gates closely guarded, letting those buying groups pass who could demonstrate some measure of compliance or otherwise provide value. That has been true at least since HSD and Special Markets leadership developed the 2010 Guidance. (*See* SF 189-341).

The earliest document in the case is from 2002, and it is indistinguishable from the later internal Schein communications that Complaint Counsel says are indicative of conspiracy. In 2002, Hal Muller wrote that he has "been the contact person for GPOs" and "we have held a pretty firm line on saying NO to virtually all of them. … In my opinion we need to stop this effort." (SF 185; RX 2405). This is not the unfettered pro-buying group stance Complaint Counsel alleged.

Schein's skepticism towards buying groups did not change. It is evidenced in internal emails from 2008, 2010, 2011, 2012, and on. (SF 185, 222, 1342). But skepticism is not the same as boycott. Indeed, Schein's sales to buying groups remained remarkably constant before, during, and after the alleged conspiracy period, showing consistent growth every year. (SF 1626-28). There is no indication of a drastic or abrupt change in in Schein's sales patterns. (SF 1626-28).

This is also true at a granular level. Complaint Counsel places Schein's turning point from pro- to anti-buying group on December 21, 2011, when Mr. Foley declined to partner with Unified Smiles after Unified Smiles demanded DSO despite having zero customers. (SF 1293-301). This

was just an instance in which a buying group did not meet Schein's criteria for a beneficial relationship. It was not a sudden shift to anti-buying group. In fact, ***the next day***, on December 22, 2011, Mr. Cavaretta outlined a partnership proposal for MeritDent, which culminated in a signed agreement that lasted at least through 2015. (SF 973). And six months later, Mr. Foley started memorializing Schein's partnership with Dental Partners of Georgia in a written agreement. (SF 680).

Complaint Counsel also claims that Mr. Sullivan and senior leadership started instructing the Schein sales force not to do business with buying groups. Not only did Mr. Sullivan and every other Schein witness deny such claims (SF 1359, 1384), there is no direct evidence of any such instructions. Schein's continued business with buying groups (including new ones) disproves any notion of top-down instructions not to do business with buying groups. The evidence is again precisely the opposite. At Schein, complaints about buying groups primarily came from the bottom up – from Schein's FSCs who saw buying groups as competing for their customers and threatening their commissions. (*See* SF 194-99, 224-25). In response, Mr. Sullivan and others at Schein spent an enormous amount of time assuaging those complaints and devising ways to maintain business with buying groups while keeping Schein's troops happy. (SF 224, 341).

Nor is there evidence of an abrupt or radical change at Schein in April 2015, the alleged end of the conspiracy. Schein continued to sign up new buying groups in 2012, 2013, 2014, 2015, and on. (SF 283, 298-99, 340-41, 832, 975, 1095, 1319, 1341, 1364-65). Complaint Counsel paints Schein's 2017 contract with Smile Source as a momentous change in behavior. It was momentous, but it was not a change in behavior. Schein had been working on its relationship with Smile Source since Smile Source terminated Schein in 2012. Schein submitted an unsuccessful

bid in 2014, kept the communication lines open, and was finally able consummate a deal in 2017. (SF 1186). The deal took patience, persistence, and years of work, not an abrupt change.

The evidence is clear. At all times, Schein acted deliberately, rationally, and unilaterally.

C. Schein's Evidence Rebuts Any Inference of a Conspiracy.

Complaint Counsel's case fails for lack of direct evidence, lack of parallel conduct, and lack of plus factors. Even if an inference of conspiracy could somehow rise from these failings, the evidence rebuts it.[78]

Independent business justifications for the challenged behavior rebut an inference of conspiracy. *City of Moundridge v. Exxon Mobil Corp.*, 2009 WL 5385975, at *6 (Sept. 30, 2009) ("Where there is an independent business justification for the defendants's [*sic*] behavior, no inference of conspiracy can be drawn."). As recounted above, Schein presented such evidence in spades. Its rational and unilateral business decisions, as well as its actual conduct in negotiating with and doing business with buying groups throughout the alleged conspiracy, are reflected in the documents and testimony.

There is no reason to second-guess these decisions years after the fact, particularly when Schein said yes to numerous buying groups after evaluating them. This rebuts any possible inference of conspiracy. *See, e.g.*, *In re Citric Acid*, 191 F.3d at 1105-06 (no inference of conspiracy where the evidence included sworn testimony of independent action, consideration of the costs and benefits of the course of action, and actions inconsistent with the alleged conspiracy); *Wilcox Dev. Co. v. First Interstate Bank of Or., N.A.*, 605 F. Supp. 592, 594 (D. Or. 1985)

[78] Because the ultimate burden of proof rests with Complaint Counsel, Schein only bears the burden of production with respect to showing that it acted independently. It always remains Complaint Counsel's burden to show that the greater weight of the probative and credible evidence negates any possibility of unilateral conduct. *In re McWane*, 155 F.T.C. at *246; *see also City of Moundridge*, 429 F. Supp. 2d at 130 ("At all times, of course, the ultimate burden of persuading the factfinder that a conspiracy exists is on the plaintiff.").

("evidence of lawful business reasons for parallel conduct will dispel any inference of a conspiracy"), *aff'd*, 815 F.2d 522 (9th Cir. 1987).

IV. COMPLAINT COUNSEL'S PROPOSED REMEDY IS UNNECESSARY AND OVERBROAD.

There is no need to address Complaint Counsel's requested relief given the fatal deficiencies in their proof. But Complaint Counsel's requested relief is flawed as well.

Complaint Counsel seeks purely injunctive relief for alleged behavior that, by Complaint Counsel's own allegations, ceased over four years ago. Complaint Counsel does not even allege that the challenged conduct (even if true) is likely or capable of recurrence. In fact, they argue the opposite: that the alleged conspiracy is now, "for all intents and purposes, … impossible to maintain." (SF 768, JF 81). By Complaint Counsel's own theory, then, the challenged behavior is entirely a thing of the past. This precludes any injunctive relief. Complaint Counsel cannot show the requisite "cognizable danger of recurrent violation, something more than the mere possibility…." *Borg-Warner Corp. v. FTC*, 746 F.2d 108, 110 (2d Cir. 1984) (Complaint Counsel bears the "burden of showing that an injunction [is] warranted.").

Thus, Complaint Counsel's failed case against Schein also has no remedy.[79]

V. CONCLUSION

"Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence." *John Adams*.

Despite Complaint Counsel's wishes, inclinations, or passions, they cannot alter the indisputable facts – Schein always acted deliberately, rationally, and unilaterally in embracing and

[79] Even if a remedy were required, Complaint Counsel's proposal is overbroad. The only conduct alleged is that Schein conspired with Benco to boycott buying groups. A simple injunction preventing Schein's HSD and Special Markets from engaging in communications with Benco or Patterson about buying groups, coupled with reasonable notification or dissemination of the injunction to those executives involved in negotiating with buying groups would suffice.

doing business with buying groups that made sense – before, ***during***, and after the conspiracy alleged in this case. There was no boycott by Schein. It is pure fantasy.

Because Schein did business with buying groups, and did not boycott them, the Court should enter judgment in Schein's favor.

Dated: April 11, 2019

Respectfully submitted,

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