PUBLIC

The Federal Trade Commission
Office of the Administrative Law Judge

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

HENRY SCHEIN'S PROPOSED FINDINGS OF FACT

Dated: April 11, 2019

RECORD REFERENCES

References to the record are made using the following citation forms and abbreviations:

CX # - Complaint Counsel Exhibit

RX # - Respondent Exhibit

CXD # - Complaint Counsel Demonstrative Exhibit

RXD# - Respondent Demonstrative Exhibit

Name of Witness, Tr. xx -Trial Testimony

CX/RX # (Name of Witness, Dep. at xx) - Deposition Testimony

CX/RX # (Name of Witness, IHT at xx) - Investigational Hearing Testimony

JSLF ¶ x - Joint Stipulations of Law and Fact

Complaint ¶ x - Complaint Counsel's Complaint filed February 14, 2018

Answer ¶ x - Respondent Henry Schein, Inc.'s Answer to Complaint

RRFA No. x – Respondent's Response to Complaint Counsel's Requests for Admission

CRFA No. x – Complaint Counsel's Response to Respondent's Requests for Admission

CMTD at x – Complaint Counsel's Opposition to Patterson's Motion to Dismiss

CC Pretrial Br. at x – Complaint Counsel's Pretrial Brief

SF – Schein's Proposed Findings of Fact

JF – Respondents' Joint Proposed Findings of Fact

{ bold } - *In Camera* Material

TABLE OF CONTENTS[1]

[1] Unless otherwise noted, all emphasis added.

I. HENRY SCHEIN, INC.

1. Through its dental business, Henry Schein, Inc. ("Schein") sells essentially anything and everything a dentist would need to operate his or her practice. (Sullivan, Tr. 4046-50).[2]

2. Besides distributing dental supplies and equipment supplied by manufacturers, Schein also offers its own private label brand products. (CX 5023).

3. Schein provides various services to its customers, including product education and training, equipment installation, equipment repair and maintenance, and an array of business solutions services. (CX 5023; CX 0311 (Sullivan, IHT at 26 ("I consider us a full-service distributor. We do basically anything and everything within the dental office and dental practice."))).

4. Schein's dental business consists of two separate divisions: Henry Schein Dental ("HSD") and Special Markets. The two divisions collaborate with each other on certain matters, but otherwise operate independently. That is, neither division reports to the other. (Sullivan, Tr. 4091; Meadows, Tr. 2460, 2475 ("Special Markets and Henry Schein Dental are two divisions, so I could not approve that those customers and those sales would move over to a different division."); CX 0309 (Muller, IHT at 12-13); CX 8033 (Cavaretta, Dep. at 198)).

A. Henry Schein Dental ("HSD")

5. HSD is the larger of the two divisions, focusing on providing full-service distribution services to independent dentists. (*Compare* Sullivan, Tr. 3872-74 (there are "roughly 300 team Schein members" in HSD, not including FSCs [Field Sales Consultants]) *with* CX 0309 (Muller, IHT at 25-26 (Special Markets has "99 employees"))).

[2] Unless otherwise noted, the term "Schein" in these Proposed Findings of Fact only refers to the dental business and dental divisions within Henry Schein, Inc.

6. In 1997, Schein acquired Sullivan Dental Products and placed Tim Sullivan in charge of HSD. (CX 0311 (Sullivan, IHT at 12); RX 2673-005). Mr. Sullivan is not now, nor ever was, the sole decision-maker for HSD or Schein. (CX 8025 (Sullivan, Dep. at 57-58)).

7. HSD's primary customer is the individual dentist, and the single-office dental practice still reflects the way in which most dentists in the United States practice. (Steck, Tr. 3677-79 (estimating that "70 to 80 percent of HSD's customer base are private practices … [b]ut ten years ago, private practices were 80 to 90 percent of HSD's customer base"); *see also* RX 0544-00023, 00039).

8. Full-service distribution entails not just the sale of supplies and equipment, but also a variety of value-added services, including sales representatives, equipment servicing, sales professional support, and practice management software. (CX 5023; Sullivan, Tr. 3869-70, 4050 ("So you can click here and get some supplies from us or anyone online as well, but you can't click here for the rest of this [practice care] wheel."); CX 0311 (Sullivan, IHT at 26, 45-46)).

9. Schein's dental field sales force, including its Field Sales Consultants ("FSCs"), falls within HSD. During the relevant period, HSD was led by its President, Tim Sullivan. (Sullivan, Tr. 3871-72).

10. HSD sells supplies, equipment, and technology via its 800-plus FSCs, 100-plus telesales representatives, hundreds of equipment sales specialists, five distribution centers, and online portals. (RX 2930; CX 5021; RX 2673; Sullivan, Tr. 3875, 4040-41).

11. HSD maintains over 70 equipment centers and showrooms, regional distribution centers, and substantial teams of sales people, technicians, and customer service representatives. (Sullivan, Tr. 3875, 4040-41; CX 5023).

12. HSD has a team of about 170 equipment sales specialists and 800 equipment service technicians located throughout the United States, whose sole responsibility is to sell and service dental equipment, respectively. Each of the dental equipment service technicians has a company-provided van so that they can quickly repair any broken equipment with minimal disruption to the dentist's business. (Sullivan, Tr. 4036-39; Steck, Tr. 3802).

13. HSD offers its customers the high-touch and personalized service of its FSCs. They visit a customer's office repeatedly each month to advise the practice owner on how he or she can be more efficient and profitable. (CX 0311 (Sullivan, IHT at 26); Sullivan, Tr. 3869-70, 4039-40, 4058-60; Cavaretta, Tr. 5541-2, 5548; Steck, Tr. 3784-86; Meadows, Tr. 2525).

14. FSCs also visit their customers about every two weeks to discuss new products and take orders for anything the office may need. (CX 8001 (Foster, Dep. at 36); RX 2673).

15. HSD has offered – and continues to offer – a number of pricing programs and adjustments that FSCs can make on a customer- and order-specific basis to lower the price on any given product below the catalog price, even down to cost. (Sullivan, Tr. 4064-65; Steck, Tr. 3760-61, 3791; Cavaretta, Tr. 5552-53 ("if I am an FSC … I can create a custom quote where I put the 10, 20, 50, 80 items on there that are special pricing to that customer"); Meadows, Tr. 2471).

16. FSCs can also give discounts on any particular product within seconds by simply using an iPad, and do not need any approvals to do so. (Cavaretta, Tr. 5549-51).

17. HSD's pricing programs are called Volume Purchase Agreements, which provide discounts to dentists who can commit to purchase a particular volume. (Meadows, Tr. 2554; Steck, Tr. 3797-98; Sullivan, Tr. 4064).

18. FSCs mostly focus on serving individual dental practitioners and small- to mid-size purchasers, customers who represent the traditional private practice model of dentistry. (Meadows, Tr. 2629; CX 0305 (Cavaretta, IHT at 49-50); CX 0311 (Sullivan, IHT at 21-22)).

19. Schein also provides many business consulting services at no cost to the dentist, which requires Schein to hire and train sales consultants. (RX 2429-010-11 (Schein's FSCs are trained to assist dental offices with products, clinical techniques, and practice management solutions to improve an office's "efficiency, productivity [and] profitability"); Steck, Tr. 3801; Cavaretta, Tr. 5548; Sullivan, Tr. 4036-37, 4058-60).

B. Special Markets.

20. Schein's Special Markets division, launched in 1996, primarily serves customers other than independent dentists, such as federal and state government purchasers, dental schools, community health centers ("CHCs"), other institutions, and Dental Support Organizations ("DSOs"). (CX 0309 (Muller, IHT at 9); Foley, Tr. 4509; Sullivan, Tr. 4109-10; Steck, Tr. 3733; Titus, Tr. 5196; Foley, Tr. 4637; RX 2392). During the relevant period, Schein's Special Markets division was led by its President, Hal Muller. (Foley, Tr. 4516; Steck, Tr. 3807).

21. Through its Special Markets division, Schein was one of the first distributors to pursue DSOs and other large group purchasers like federal government agencies and institutional customers. (CX 0309 (Muller, IHT at 9, 15-16); Foley Tr. 4509; McFadden Tr. 2783-84).

22. Mr. Foley testified that DSO customers were Special Markets' "bread and butter." (Foley, Tr. 4637).

23. Because Special Markets specializes in servicing large clients, it does not need to provide the same types of individualized services that FSCs provide directly to dentists, including

regular FSC support such as visiting the dentist's office every two weeks. (Sullivan Tr. 4093-94; CX 8016 (Meadows, Dep. at 271-72); CX 0309 (Muller, IHT at 20, 59-60)).

24. Accordingly, although FSCs sometimes visited certain Special Markets accounts (and the equipment sales specialists served their equipment needs), Special Markets' costs are lower than HSD's costs, which include the commissions HSD paid to FSCs. (CX 2024 (2015 FSC Compensation Plan, Henry Schein Dental, Slides 7-9); Foley, Tr. 4661; Meadows, Tr. 2522-23.

25. Special Markets also has expertise in negotiating with central procurement agents, developing specialized formularies, negotiating customer-specific discounts from manufacturers, and working with central entities to drive compliance. (CX 8003 (Foley, Dep. at 27-28, 39, 109, 119, 342-43); CX 0306 (Foley, IHT at 63, 69); CX 8005 (Muller, Dep. at 63, 94); Steck, Tr. 3731).

26. In addition to DSOs and other centralized purchasers, Special Markets also worked with buying groups. (CX 8005 (Muller, Dep. at 31); CX 8003 (Foley, Dep. at 39)).

27. Due to Special Markets' strengths, it typically worked with buying groups that were centrally managed, had broad geographic reach or required customer formularies. CX 8003 (Foley, Dep. at 27-28, 39, 109, 119, 342-43 ("Special Markets had a more – had more flexibility in the price and how it attached pricing plans to multiple sites associated with a similar group. It also had … a better way to create a central site and do reporting for all the sub-sites.")); CX 0306 (Foley, IHT at 63, 69); CX 8005 (Muller, Dep. at 63, 94); Steck, Tr. 3731).

28. Although Schein's HSD and Special Markets' divisions coordinated to execute Schein's mission, each division developed its own approach to targeting and serving its customers, providing price discounts, managing different cost structures, and using its own sales teams. (CX 0309 (Muller, IHT at 13 ("We each have our own marketing, merchandising and sales teams."))).

29. Throughout the relevant period, both divisions have had at least some involvement or responsibility for Schein's buying group relationships, though primary responsibility shifted during the relevant period. (Sullivan, Tr. 4091-92, 4113; Meadows, Tr. 2616; Foley, Tr. 4523).

30. From the beginning of the relevant period to mid-2014, primary responsibility for buying groups rested with Special Markets. (Sullivan, Tr. 3918, 4091, 4112-13; Steck, Tr. 3735-36; Cavaretta, Tr. 5588; Meadows, Tr. 2464, 2481; Titus, Tr. 5196-98; Foley, Tr. 4607-09; *see also* RX 2405 (April 2, 2002 email from Mr. Muller stating that he has "been the contact person for GPOs for [HSD] and SM [Special Markets]")).

31. As Schein's Jake Meadows testified, "prior to the creation of Mid Markets" in mid-2014, the HSD field sales force "had responsibilities for doing due diligence, but generally the centralized contracting and the creation of formularies … fell to Special Markets." (Meadows, Tr. 2481).

32. A formulary is a more focused group of products from Schein's total offerings ("say five or six thousand products" out of a hundred thousand) that Schein would "heavily discount … on a pricing list." (Meadows, Tr. 2474, 2477-80).

33. In mid-2014, primary responsibility for buying groups shifted to the newly-created Mid-Market group within HSD. (Meadows, Tr. 2482 (explaining that "after the creation of Mid Markets," the HSD team "had the same responsibilities" for conducting due diligence, but also now had "contracting responsibilities"); Foley, Tr. 4610, 4607; Steck, Tr. 3745-46; Titus, Tr. 5198).

34. Regardless of which division had primary responsibility for buying groups, however, Schein employed a consistent approach to dealing with buying groups. Both Special Markets and

HSD were generally skeptical of buying groups, engaged buying groups cautiously, and made careful case-by-case partnership decisions. (SF 159-88, 189-341).

II. AT ALL TIMES, SCHEIN ACTED DELIBERATELY, RATIONALLY, AND UNILATERALLY WHEN EVALUATING BUYING GROUP OPPORTUNITIES.

A. Buying Groups.

1. *The Evolution of Buying Groups.*

35. "[B]uying groups have always existed in some shape or form, but … they started really becoming a little bit more prevalent over the last four years…." (CX 0305 (Cavaretta, IHT at 137); CX 8025 (Sullivan, Dep. at 66-67); Ryan, Tr. 1039; Foley, Tr. 4542 (buying groups "were popping up through my entire time at Schein.")).

36. Buying groups arose largely in response to "corporate dentistry." (Goldsmith, Tr. 1935; Reece, Tr. 4415-16).

37. In September 2015, Schein's Brian Brady wrote that buying groups were starting to form at "2-3x the level that they were just a year ago," and in a variety of forms – not just "private groups…, but entire state dental associations are now looking to form their own groups." (CX 0192-003 ("The landscape of our industry is changing and it's crucial we get ahead of the curve using all resources possible."); Steck, Tr. 3761-62).

38. As described in more detail below (SF 375-1135), Schein has done business with buying groups since they existed, and as it observed the growth and evolution of buying groups, Schein evolved its internal structures and strategies to take advantage of the opportunities in the buying group space. (*See e.g.*, Cavaretta, Tr. 5530-31, 5590-91; SF 35-42, 159-341).

39. As of February 2016, buying groups still represented only a small fraction of the dental market. (Rogan, Tr. 3465-67; CX 3181). Only a small fraction of dentists are members of buying groups. (RX 0572-49 [redacted]).

40. Buying groups come in all shapes, forms, and sizes. (Cavaretta, Tr. 5569).

41. Schein's Dave Steck described some of the "different structures" in a 2015 presentation: "Annual Fee Based; Percent of Gross Based; 'Loose' and 'Binding' Commitments; Dental Associations; Study Clubs, etc." (CX 2835-008; Steck, Tr. 3746-48 (some groups were "more desirable," such as "ones that could commit volume").

42. However, a majority of groups that approached Schein were either not yet formed or otherwise lacked structure of any kind. (SF 69-72).

2. *The Franchise Model.*

43. Some buying groups are set up as a franchise system, much like McDonald's. (*See* Goldsmith, Tr. 2046).

44. Under a franchise system, members sign a franchise agreement that allows the member to use the buying group's name and participate in purchasing, education, marketing, and any other programs the buying group offers in accordance with the terms of the agreement. (*See, e.g.*, RX 0290-00099-100; Goldsmith, Tr. 2046 ("We utilized a franchise agreement in order to allow our members to work together."); Maurer, Tr. 4936 ("As a franchise, they get separate territories and they get a number of business service offerings from us.")).

45. Examples of franchised buying groups include Smile Source and Comfort Dental. (Goldsmith Tr. 2064-65; Maurer, Tr. 4962; Meadows, Tr. 2500-01; Sullivan, Tr. 3914; Foley, Tr. 4632-4633).

46. Schein did business with both Smile Source and Comfort Dental. (SF 223-36, 493-511, 1105-86).

a. Smile Source.

47. Smile Source is a franchised DSO that was formed around 2006. (Meadows, Tr. 2500; Sullivan, Tr. 3914; Goldsmith, Tr. 2046, 2070).

48. Smile Source registers as a franchise, and its members pay Smile Source a franchise fee. (Goldsmith, Tr. 2042).

49. Smile Source members are considered franchisees and are given exclusive territories. (Goldsmith, Tr. 2046).

50. Smile Source members are entitled to operate under the Smile Source trademarks, though there is conflicting evidence concerning whether Smile Source members actually do so. (RX 0290 (franchise agreement requiring Smile Source members to operate under the Smile Source trademarks); Goldsmith, Tr. 2047 (testifying that most members do not operate under the Smile Source logo)). Smile Source also offers members education and marketing support. (Goldsmith, Tr. 1935; Maurer, Tr. 5017).

51. In exchange for the services Smile Source provides, each member pays a substantial fee. [redacted] (Goldsmith, Tr. 1970-71, 2125). The franchise fee has changed from time to time. [redacted] (Goldsmith, Tr. 1971-72). [redacted] (RX 2952 (Maurer, Dep. at 42-43)).

52. [redacted] (Goldsmith, Tr. 2053-54).

53. Though Smile Source is not a traditional buying group given its franchise structure, it has a buying group component. Schein viewed Smile Source as a buying group and treated it as such. (RX 2956-004; RX 3087-004).

b. Comfort Dental

54. Comfort Dental is another "franchisee/franchisor-type buying group, similar to Smile Source." (Foley, Tr. 4632-4633).

55. Comfort Dental has agreements with each of its members allowing them to operate as a franchisee. (Foley, Tr. 4633-34).

56. Comfort Dental describes itself as a dental franchise, with its locations independently owned and operated. (RX 2877).

3. *The DSO-Affiliate Model.*

57. Some DSOs have created buying group affiliates or arms, the members of which are independent dentist offices. (Puckett, Tr. 2214-15; *see also* CX 2372-002 (noting "[m]any of the DSOs are starting to open 'affiliates'….")).

58. Examples of DSOs that created separate buying groups comprised of independent dentists include Intermountain Dental Associates, Tralongo, Advantage Dental, Dental Gator, and Floss Dental. (Foley, Tr. 4642-43 ("IDA was an existing, small DSO that fell under Special Markets, and they are now wanting to create a buying group where they have no ownership of their affiliate offices…"), 4590, 4712; RX 2947 (Cavaretta, Dep. at 85-86); Foley, Tr. 4699-700; Sullivan, Tr. 4096; RX 2105; CX 2084).

59. Schein did business with IDA, Tralongo, Advantage Dental, Dental Gator, and Floss Dental. (SF 377-94, 634-75, 732-48, 757-64, 1263-85).

4. *The Value-Added Services Model.*

60. Some buying groups offer more to their members than just discounts. Such value-added services can include education, training, financial, and marketing services. (*See* CX 4109-004; R. Johnson, Tr. 5482, 5484-88).

61. Klear Impakt is a good example of this kind of buying group. It offers its members a wide range of services beyond just discounted supplies, such as "streamlining and efficiency class[es] that would teach people the process of a patient walking through an office from beginning to end"; phone training classes; patient experience classes; financing assistance for patient procedures or office expansion or acquisition; hiring assistance through personality assessments; business coaches; marketing; business management; leadership training and coaching; and waiting room television programming. (R. Johnson, Tr. 5482, 5484-89; CX 4109-004).

62. These kinds of value-added services and offerings help a buying group obtain "stickiness," or the ability to retain members by providing value beyond just discounts. (Meadows, Tr. 2544-45).

63. Groups without such "stickiness" often fail. (Reece, Tr. 4460).

64. Dr. Richard Johnson – co-owner and founder of Klear Impakt – testified that the additional services and training were important to Klear Impakt's success as a buying group. (R. Johnson, Tr. 5478-79, 5484).

5. *The Dental Association Model.*

65. Some dental associations have sought to create discounted purchasing programs for their existing membership. Local dental associations, such as the Stark County Dental Society and the Corydon Palmer Dental Society, have done this, as have state dental associations, including the California Dental Association, the Florida Dental Association, and the Georgia Dental Association. (SF 468-86, 512-47, 749-56, 765-85, 1187-98).

6. *The Consulting Group Model.*

66. Some dental consulting firms – firms that provide independent dentists with business and marketing consulting services – have sought to add a discounted purchasing component.

Business Intelligence Group ("B.I.G."), a "marketing and consulting group" is an example. (CX 0165).

67. B.I.G. ran marketing campaigns for its dental clients, such as Groupon-like campaigns for whitening services. (CX 0165). In early 2011, B.I.G. sought to also supply the whitening products and other products for its clients in addition to running the marketing campaigns. (CX 0165).

7. *The Procurement Service Model.*

68. Some buying groups operated as nothing more than a procurement service or agent for members. Under that model, member orders would first go to the buying group, which would reallocate the orders to the lowest bidder. So, for example, if a member ordered ten items from Schein, but another distributor had a lower bid for five of those items, only the remaining five items would go to Schein. Steadfast operated its buying group in this way. (Titus, Tr. 5298-99; Cavaretta, Tr. 5595 (Steadfast would "tak[e] … Henry Schein business, and then … farm[] it out to different dealers….").

8. *The List-of-Dentists Model.*

69. Many of the groups that approached Schein were unsophisticated and typically comprised of dentists that had banded together loosely to try to get a better discount. (CX 8020 (Brady, Dep. at 77-78); CX 8033 (Cavaretta, Dep. at 142-43); CX 8031 (Steck, Dep. at 52-53 (describing groups with just "a very loose membership … that doesn't really follow the directive of the group that they're part of."))); *see also* CX 0319 (Reece, IHT at 76 ("[T]hen there are other ones that … seem[] like … a couple of guys that over cocktails decided they wanted to save money on supplies, so they formed a group of buddies.")); CX 8005 (Muller, Dep. at 42 ("I got a call a couple years ago from a graduate student from a school in Pennsylvania who called and said that he was going to put a bunch of dentists together to form a buying group….")).

70. Because such groups did not present any kind of value proposition or promise of compliance or exclusivity to Schein, "from a business standpoint [it made] very little sense for [Schein] to do business with them." (CX 8033 (Cavaretta, Dep. at 133-34); Steck, Tr. 3728-29 ("some simply collect a fee from a customer and promise them a large discount on dental supplies and really don't offer much value to us because they're asking for a larger discount than we would give a normal dentist without a commitment"); Cavaretta, Tr. 5564-65.

71. Schein has always been skeptical and wary of the discount-only buying group that simply seeks an additional discount without delivering any incremental volume or cost efficiencies. (SF 183-88).

72. Such groups also weaken the relationships that FSCs have with their dentists, and thereby weaken the Schein brand among its customers. (Meadows, Tr. 2560 ("Henry Schein, our brand and what we've worked on for a lot of years is presenting our brand as a high-touch, high-valued brand in the marketplace. And if a buying group were to present our brand as a price-only brand or a fulfillment house only and push aside the value that we create with our FSCs and our service, that would be detrimental to our brand in the marketplace."); Sullivan, Tr. 4085, 4090 ("Many of the groups … that we've met with, that don't have that stickiness, don't have the compliance, don't have other things that drive value for their members who are our customers, and it is only around price, I believe that devalues our brand or what Henry Schein stands for."); Cavaretta, Tr. 5544-45; Titus, Tr. 5199).

9. *The Co-Op Model.*

73. "A dental cooperative is a group of individuals that collaborate for the entire business," including "credit cards, insurance negotiation, dental supplies, the equipment, business insurance, banking[,] … everything that would be needed to run the business." (Mason, Tr. 2327).

74. The Utah Dental Co-Op is an example of the co-op buying group model. Dr. Brenton Mason, who was a founding member of the New Mexico chapter of the Utah Dental Co-Op, distinguished the co-op model from just a buying group: "The buying group deals with … mostly the dental supplies and the dental equipment. The cooperative deals with the entire business." (Mason, Tr. 2327-28, 2331).

75. The New Mexico chapter of the Utah Dental Co-Op did not require its members to purchase through the co-op or from the co-op's vendors. (Mason, Tr. 2405).

76. Even though Schein had a partnership with the Utah Dental Co-Op, including the New Mexico chapter of the Utah Dental Co-Op, Dr. Mason moved to a different buying group called Synergy and purchased from a different distributor, Darby Dental. (Mason, Tr. 2405-06; *see also* CX0185 (noting Synergy's "[w]ebsite reads 'is a purchasing organization based on the concept of leveraging the purchasing power of independent dental practices to negotiate discounts with suppliers[.] Example of contract with Darby that results in an average discount of 17%....")).

10. *The Economics of Buying Groups.*

77. Because, as collections of independent dentists, buying groups were unlike the independent solo and small group practices served by HSD, and also unlike the DSOs served by Special Markets, buying groups presented unique economic considerations and issues. (Meadows, Tr. 2491-95, 2550, 2630 (explaining the differences); Foley, Tr. 4688; Reece, Tr. 4462 (DSOs have "more structured support"); CX 8012 (Breslawski, Dep. at 20-22 ("DSOs distinguish themselves from Private Practice Dentists…. They feel sales consultants in many of those customers is not necessary. We have more of a corporate-to-corporate management program."))).

a. Potential Benefits of Buying Groups.

78. Some buying groups might be able to present an economic benefit to a distributor if they had the ability to bring new customers to the distributor that the distributor could not otherwise obtain by offering a discount to the individual members. (Meadows, Tr. 2487, 2489-90).

79. Some buying groups might be able to complement Schein's mission to help its customers grow their practices and enhance practice care by offering extra value like education and marketing services. (Meadows, Tr. 2487-88, 2495). Schein calls this "stickiness." (Meadows, Tr. 2487-88, 2495, 2544-45; RXD 0015).

80. This kind of "stickiness" is particularly important for buying groups. Offering nothing more than price discounts cannot guarantee that dentists will shift their purchases, because many dentists make their purchasing decisions on more than just price. (Meadows, Tr. 2506-07 ("dentists are very hard to win or they're hard to change their behaviors"), 2508-09 (describing time investment related to learning new ordering logistics when switching distributors); Kois Sr., Tr. 227 (discussing dentists' brand loyalty)).

81. As Dr. Kois Sr. testified, his purchases of dental products typically "are all trust-based purchases, so we have to have the confidence that the company has quality products." (Kois Sr., Tr. 173). "[I]t really depends for me not just on the price but working with the company and the relationship with the company. My patients are dentists. I have to really trust every product that I use for them, and I'm really completely dedicated to providing the best quality that I can for my patients, so I take no chances." (Kois Sr., Tr. 173-74, 227; *see also* Kois Sr., Tr. 176 ("JUDGE CHAPPELL: I've heard you mention quality more than once regarding who you go to to purchase. I have not heard you mention price as a factor; is that correct? THE WITNESS: That's correct. JUDGE CHAPPELL: Not a factor. THE WITNESS: On the specific products that I purchase

from direct companies, the price isn't the factor."); Meadows, Tr. 2508 ("[B]ecause a customer's behavior is so hard to change, … I don't believe that we would get the new customer growth that we would expect from that buying group if they were only price-focused.")).

82. Buying groups that offer exclusivity with a particular distributor might also be able to offer an economic benefit to a distributor. Outside of that promise of exclusivity, customers would have other choices within the buying group. (Meadows, Tr. 2488, 2495; RXD 0015).

83. Buying groups that could offer a commitment to purchase from a particular distributor might also be able to present an economic benefit for a distributor like Schein. (Meadows, Tr. 2488, 2490-91; RXD 0015). Without such a commitment, buying group members would be able to cherry-pick and "basically only pick the items that were cheapest on the formulary" rather than "give [Schein] all their business…." (Meadows, Tr. 2491).

84. As Schein's Kathleen Titus explained at trial, "exclusivity and compliance go hand in hand. [Y]ou can promise exclusivity. However, if you don't have compliance, it's an empty promise…." (Titus, Tr. 5201-02).

85. Buying groups that do not drive any purchasing compliance do not have buying power. The Kois Buyers Group, for example, advertises that "[t]here is no obligation to purchase from any of the listed vendors and no exclusivity agreements. You are free to purchase as little or as much as you like from any of them." (RX 2928; Kois Sr., Tr. 246-249; Kois Jr., Tr. 319 ("There's no purchasing requirements, and there's no requirement to purchase from anybody in quantity or vendor.")). As such, Dr. Kois agreed that Kois Buyers Group does not actually have any buying power. (Kois Sr., Tr. 249-50; Kois Jr., Tr. 366-67; *see also* Kois Jr., Tr. 337 ("I think for an offer that has no minimum quantity to purchase and no requirement to purchase from the people and no

legal document that says they're required to offer that discount, I think offering any kind of discount that they get is a very favorable outcome.")).

86. Compliance is one of the fundamental problems with buying groups. (Sullivan, Tr. 4098; Cavaretta, Tr. 5660-61 [redacted]; Marshall, Tr. 3088-89 [redacted]).

87. Many buying groups simply were incapable of, or unwilling to, drive compliance. (RX 2340-005 ("PGMS cannot guarantee that its members will purchase from Schein…."); RX 2806-001 ("[Synergy] has no authority to tell its members what to do."); RX 2825-002 ("UnifiedSmiles is committed to making sure your independent practice stays independent – which is why we're never going to tell you who to buy from."); RX 2928 (Kois website: "There is no obligation to purchase from any of the listed vendors and no exclusivity agreements.")).

88. Complaint Counsel concedes that "buying groups typically do not force members to purchase from their supplier partners," and therefore cannot typically drive incremental volume. (*See* CC Opp. to Respondent Patterson Companies, Inc.'s Motion for Summary Decision, at 3 (Oct. 2, 2018)).

89. The ultimate goal of doing business with a buying group would be to reach new customers, but not all buying groups could offer that benefit. (Meadows, Tr. 2489). It generally took some combination of exclusivity, commitment, or stickiness. (Meadows, Tr. 2506).

b. Risks and Conflicts Posed by Buying Groups.

90. While some buying groups might offer some economic benefits, buying groups also pose risks. One of the "most glaring" is cannibalization. (Meadows, Tr. 2506-07; RXD 0015).

91. Cannibalization occurs when a distributor offers a buying group discounts, and the buying group just offers "those discounts to existing customers that [the distributor] already had." (Meadows, Tr. 2506).

92. Complaint Counsel's expert, Dr. Marshall, described the "cannibalization effect": [redacted] (Marshall, Tr. 2926-27).

93. [redacted] (Marshall, Tr. 3002-03). As a result, not every buying group is a profitable opportunity, particularly "if the cannibalization effect is overwhelming everything" else. (Marshall, Tr. 2972, 3002-03).

94. The cannibalization effect means that, all else equal, supplying a buying group is likely to be less profitable for a larger distributor than a smaller distributor. (Marshall, Tr. 2972 (noting it [redacted] that poses a substantial risk of cannibalization); Cohen, Tr. 685-86 ("if it's a group of a hundred dental – individual dental practices, of whom 30 are already Benco clients, and then we offer a discount to all 100, the only customers who take advantage of it are the 30 customers we already had, now we've got the worst of both worlds, where we've offered a discount to existing clients without adding any new clients.")).

95. Dr. Kois Sr.'s dental practice exemplifies the cannibalization that buying groups can cause. Burkhart made more money from its sales to Dr. Kois before the Kois Buyers Group was formed than after. (Kois Sr., Tr. 289).

96. Burkhart confirmed that its contract with the Kois Buyers Group cannibalized its existing customers. (Reece, Tr. 4412-13 (Burkhart kept existing customers who joined the Kois Buyers Group, but "at an expense" because "[i]t would have reduced the price that they paid for some of the same supplies that they would have previously bought from us….")).

97. In addition to the risk of cannibalization, buying groups could negatively impact a distributor's FSCs, who are paid a commission based on gross profit from a particular customer. (Meadows, Tr. 2519 ("[I]f we discount a customer, the FSC makes less."); RXD 0015).

98. Mr. Meadows explained the impact on FSCs at trial. If a buying group negotiates an extra 10-percent discount and signs up the independent dentist, the FSC's commission declines by one-third. (Meadows, Tr. 2520-22; RXD 0015-002). The drop in FSC commission posed by buying groups "deincentivize[s]" FSCs to "continue to call on that customer." (Meadows, Tr. 2525-26). As one FSC wrote to the President of Schein, Inc., if "the commission … drops," it "would not really give me any incentive to try and drive the business." (CX 2298-002).

99. This caused many FSCs to see buying groups as "the enemy" and their competition because, like FSCs, buying groups were signing dentists that would otherwise be FSC customers. FSCs were concerned buying groups would "eliminate the FSC job or [impact] their commissions." (CX 2033; Meadows, Tr. 2532-34).

100. The prospect of new customers from a buying group (assuming the buying group is capable of delivering new customers) does not solve the conflict with and impact on FSCs because FSCs are already working "40-plus hours" a week. So, "in order to handle" the new customers, Schein "would have to hire new FSCs." The added business would not necessarily go to existing FSCs. (Meadows, Tr. 2526-28).

101. Lower compensation to FSCs for the same amount of work impacts Schein's ability to retain good FSCs, who might look "to go to Patterson or Benco" if Schein was "paying … at a lower rate…." (Meadows, Tr. 2528).

102. Schein's Dave Steck estimated that between 2011 and 2015 a good sales representative "could certainly bring $2 million a year" in business, meaning the loss of a good FSC could result in considerable lost business. (Steck, Tr. 3803).

103. If Special Markets signed up the buying group and placed the buying group on a Special Markets formulary, HSD's FSCs who served dentists who joined that buying group would suffer an even greater reduction in commission because the commission rate under Special Markets formularies goes down to 10 percent. That would reduce the FSC's take-home commission to 2 percent of sales. (Meadows, Tr. 2549-51).

104. In addition to creating conflicts with its FSCs, buying groups could create conflicts between Schein's two divisions: HSD and Special Markets. (Meadows, Tr. 2532; RXD 0015).

105. HSD and Special Markets compete for sales credit to hit quotas and budgets. If Special Markets signs up a buying group whose members were existing HSD customers, not only are those customers cannibalized and FSC compensation reduced, but HSD loses the sales credit. (Meadows, Tr. 2552-53).

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

> We both [HSD and Special Markets] had buying groups in our P&Ls … But the communication … between the two divisions was not great. And there were times that Hal would be -- and his team were out making proposals that impacted single-office space practitioners that we, as HSD, are servicing. And once they became some sort of a special markets account, those sales would then transfer, at least the consumables, over onto the special markets P&L. That would impact our field sales consultants, who continue to call on those customers and provide incredible value. Commissions were reduced. Our sales force would obviously not be happy with

> that outcome. And so it was creating conflicts of who should be focusing on these groups versus not. Some groups we'd [HSD] want to work with; some we didn't. Some Hal would want to; some we [HSD] wouldn't. So there was not complete agreement internally on the exact strategy around them, who was going to be approaching them. And then we had our own inherent internal conflicts from a P&L standpoint and [FSC] conflict[s].

(RX 2941 (Sullivan, Dep. at 500-02)).

107. Signing up a buying group could also create conflicts across regions at Schein. (Meadows, Tr. 2545-47; RXD 0015). For example, if a regional manager in the West signed up a buying group with members nationwide, it might help win some customers from Burkhart in the West, but could pose cannibalization issues for existing Schein customers in the East and affect compensation for Schein's FSCs in the East. (Meadows, Tr. 2545-49).

108. Buying groups could also create conflicts directly with HSD's existing customers. Schein's discount programs – to independent dentists and DSOs – are based on volume commitments, but if those discounts were made available to buying group members who did not meet the volume commitments, Schein's other customers may view that as unfair treatment. (Meadows, Tr. 2555-57; RXD 0015; *see also* CX 2456-001 (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'.")).

109. Some of Schein's manufacturer partners also extend discounts (called chargebacks) for high-volume customers. If Schein started offering those discounts to buying group members that did not meet the volume thresholds, the buying group could cause conflicts with Schein's manufacturer partners as well and "undermine[] [Schein's] relationship with [its] manufacturers." (Meadows, Tr. 2557-59; Foley, Tr. 4696-98; Puckett, Tr. 2266-67 (describing how Schein "[was] getting pressure from their distributors and manufacturers, mostly manufacturers, regarding Dental Gator"); RXD 0015).

110. Schein's business with buying groups also caused administrative burdens. To track buying group members, for example, it had to create separate systems that could track members across regions. (Meadows, Tr. 2559-60; RXD 0015; *see also* CX 2362 (describing administrative difficulties in setting up Dental Gator accounts in HSD)).

111. Buying groups also limit the pricing flexibility of Schein's FSCs. For example, in 2015, Hal Muller emailed HSD executives to request that Schein FSCs not discount to dentists that were members of certain buying groups because FSC discounts could put the buying group agreements at risk. (CX 0248-001). As Mr. Meadows explained, "from an FSC's perspective, if those customers' pricing is already set, and let's say that a box of gloves costs $10 on their formulary and Patterson or Benco can walk through the door and say, I'll give it to you for nine, if we can't adjust our price down to nine to match or beat our competitor's … offer, that limits our ability to grow within this group." (Meadows, Tr. 2529-30).

112. Buying groups could also have a negative impact on the Henry Schein brand. While some groups could complement Schein's full-service, high-touch, high-value model and philosophy, groups that were "price-only" could tarnish Schein's brand. (Meadows, Tr. 2560; RXD 0015).

113. Thus, whenever Schein was confronted with a buying group opportunity, it had to weigh the group's potential benefits against its potential risks and conflicts. (*E.g.*, SF 159-82; *see also, e.g.*, RX 2172 ("We 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.")).

114. As discussed below, Schein has faced these trade-offs and conflicts with buying groups for numerous years, including prior to the alleged conspiracy, and each time worked through them with each group rather than ceasing business with buying groups altogether. (*E.g.*, SF 189-341).

c. Not All Buying Groups Can Save Dentists Money Through Discounts on Supplies.

115. Many buying groups charge dentists a membership fee. (Goldsmith, Tr. 1971; Puckett, Tr. 2224; Kois Sr., Tr. 238; Baytosh, Tr. 1887-88; CX 0320 (Capaldo, IHT at 39)).

116. These "middleman fees" can eat into discounts – money that would otherwise go to dentists. (Meadows, Tr. 2505 ("if … a buying group … was just purely after middleman fees and then ultimately didn't provide that stickiness to us, considering the fact that we could negotiate a lower price with these customers and were willing to and ready, I didn't -- I didn't see value…."); *see also* Rogan, Tr. 3532 ("we provide a lot to the dental offices, and it costs a lot of money to do that, and so to give that middle party 2 percent for just being a middle party when we could deal directly didn't make any business sense.")).

117. Because many buying groups charged their members fees, it could be difficult if not impossible for many buying groups to actually save their dentist members money. [redacted] (Goldsmith, Tr. 2055). [redacted] (Goldsmith, Tr. 2061; RXD 0010). [redacted] (Goldsmith, Tr. 2061; RXD 0010; Meadows Tr. 2497 ("Depending on the size of the office, anywhere between $40,000 to $60,000 a year.")). [redacted]

[redacted] (Goldsmith, Tr. 2061, 2065; RXD 0010). [redacted] (Goldsmith, Tr. 2066; RXD 0010). [redacted] Nor has Complaint Counsel presented evidence that any buying group captured 100% of a member's purchases.

118. [redacted] (Goldsmith, Tr. 2073). [redacted] (Goldsmith, Tr. 2074-75). [redacted] (Goldsmith, Tr. 2073-74; RXD 0011).

119. [redacted] (Goldsmith, Tr. 2074; RXD 0012).

B. Every Witness Asked at Trial Testified that Schein Did Business with Buying Groups.

1. *Buying Group Witnesses.*

120. Dr. Andrew Goldsmith, former President and Chief Dental Officer of Smile Source, testified that: (1) Smile Source already had a contract with Schein when he joined the company in August 2011; (2) Schein continued to work with Smile Source, even when it might not have made

[3] As Dr. Goldsmith noted, Smile Source also negotiated discounts on lab fees and other items (Goldsmith, Tr. 2187-88), but that just underscores how much a buying group would need to offer in order to actually save a dentist money.

sense; (3) even after Smile Source [redacted] in early 2012, Schein remained willing to work with Smile Source; and (4) at no time was he told that [redacted] or that Schein would [redacted] (Goldsmith, Tr. 1934, 1974-75, 2036-37, 2098, 2103-04, 2137-39).

121. Mr. Trevor Maurer, President and CEO of Smile Source, started with Smile Source in 2012 and similarly testified that: (1) Schein did business with Smile Source prior to when Mr. Maurer began working at Smile Source; (2) he was never told that Schein did not do business with buying groups; (3) in 2014, Schein tried to win Smile Source's business with a competitive proposal that "was similar to the deal [Smile Source] had in place with Burkhart," but that Smile Source "rejected" the proposal out of "loyalty [to] Burkhart;" (4) Tim Sullivan remained open to working with Smile Source after 2014; and (5) Henry Schein entered into a contract with Smile Source in February 2017, which continues today. (Maurer, Tr. 4937-39, 4942-43, 4945-47).

122. Mr. Justin Puckett, one of the founders of the buying group Dental Gator, testified that Schein was Dental Gator's distributor from 2014 until Dental Gator closed in 2017. (Puckett, Tr. 2211, 2219; 2231; 2269; 2294). Mr. Puckett also testified that no one at Schein ever told him that Schein did not work with buying groups. (Puckett, Tr. 2275-76).

123. Dr. Brenton Mason, one of the founding members of the New Mexico chapter of the Utah Dental Co-Op, testified that Schein did business with the Utah Dental Co-Op, including the New Mexico chapter of the Utah Dental Co-Op in at least 2013 and 2014. (Mason, Tr. 2391, 2402, 2405).

124. Dr. Joseph Baytosh, former President of the Corydon Palmer Dental Society, testified that in 2014, Schein offered the opportunity to set up "a formulary of products with Henry Schein"

and create an "up-front discount program" for Corydon Palmer Dental Supply members, as well as a rebate program. (Baytosh, Tr. 1906-07, 1910-11). Dr. Baytosh testified that Corydon Palmer and Schein entered into an agreement for a rebate program on January 1, 2015. (Baytosh, Tr. 1910-12). Dr. Baytosh also testified he was never told that Schein does not work with buying groups. (Baytosh, Tr. 1911).

125. Dr. Richard Johnson, co-founder and co-owner of the buying group Klear Impakt, testified that Klear Impakt's discussions with Schein started in 2014 and culminated with a vendor agreement in August 2015. (R. Johnson, Tr. 5479, 5481, 5501). Mr. Johnson testified that he was never told that Schein does not work with buying groups. (R. Johnson, Tr. 5490-91; 5493-94).

2. *Patterson Witnesses.*

126. Mr. Guggenheim, Patterson's President during the alleged conspiracy, testified that he "all along believed" that Schein was working with buying groups because Schein is a "very aggressive company" and "tended to be an innovator working with alternative groups before anyone else." (Guggenheim, Tr. 1817-18, 1856-57).

127. On multiple occasions, Mr. Guggenheim sent and received competitive intelligence that Schein was working with what he understood to be buying groups, including Dental Gator and Klear Impakt. (Guggenheim, Tr. 1861-62; RX 0387, CX 3091, CX 3236).

128. Mr. Guggenheim, aware that Schein was working with buying groups, never asked Schein to stop selling to buying groups and never contacted anyone at Schein about buying groups. (Guggenheim, Tr. 1855-56, 1862).

129. Mr. Neal McFadden, Patterson's President of Special Markets, similarly had "the impression that Schein is in [the buying group] space." (McFadden, Tr. 2841; CX 0161). Mr. McFadden testified that he sent and received competitive intelligence on numerous occasions that

Schein was working with buying groups. (McFadden, Tr. 2707-09; 2713-15 (Patterson's "number one sales rep" reported that "a very good Patterson client" was forming a buying group and Schein was supplying it), 2839-41; CX 0106; CX 3091; RX 0387; CX 0163).

130. Despite being aware that Schein was working with buying groups, Mr. McFadden never contacted anyone at Schein about Schein offering discounts to buying groups. (McFadden, Tr. 2836).

131. Mr. Dave Misiak, former Vice President of Sales for Patterson during the alleged conspiracy, testified that Smile Source is a buying group and that Schein won Smile Source's business. (Misiak, Tr. 1297-98, 1327; CX 3117). Mr. Misiak also received competitive intelligence on numerous occasions that Schein was working with buying groups. (CX 3176; CX 0163; CX 3091; CX 3134).

132. Mr. Misiak never took any actions to stop or prevent Schein from working with buying groups, nor did he have any discussions with anyone at Schein about Schein's different philosophy on buying groups. (Misiak, Tr. 1505).

133. Mr. Tim Rogan, Patterson's Vice President and General Manager for North America, testified that he received competitive intelligence that Schein had a "different approach" than Patterson's approach of saying no to buying groups, and was working with a number of them. (Rogan, Tr. 3420-21, 3654-57, 3659-60 ("clearly we've pointed out a few cases where [Schein was] working with GPOs"), 3661; CX 0106; CX 3091; CX 3176; CX 3134).

134. Mr. Rogan did not contact anyone at Schein or take any action to prevent Schein from continuing its approach of offering discounts to buying groups. (Rogan, Tr. 3653, 3655-58).

135. Patterson's non-action with regard to Schein's business with buying groups is inconsistent with Complaint Counsel's alleged conspiracy. (Complaint ¶ 1).

3. *Benco Witnesses.*

136. Mr. Chuck Cohen, Benco's Managing Director and Co-Owner, received competitive intelligence that Schein was working or negotiating with buying groups, including Smile Source, Dentists for a Better Huntington, the Dental Co-Op, and the Kois Buyers Group. (Cohen, Tr. 401, 852, 867-68, 912-13; CX 1039; CX 1047; CX 1048; CX 1074; CX 1116).

137. Mr. Cohen testified that he did not take any action to prevent Schein from offering discounts to buying groups. (Cohen, Tr. 715, 843, 852-53, 867-68 ("[B]y November 7, 2011, you had received emails indicating that Schein was working with at least three buying groups… Did you call Mr. Sullivan about any of them? A. I did not."), 885, 913-14 ("Did you pick up the phone or text or email Mr. Sullivan to see if the information about Schein negotiating with Kois was true? A. No.")).

138. Mr. Patrick Ryan, Benco's Director of Sales, received competitive intelligence that Schein was working with buying groups during the alleged conspiracy period, including Smile Source, Dental Gator, Dentists for a Better Huntington, the Dental Co-Op, and the Schulman Group. (Ryan, Tr. 1245-53; CX 1039; CX 1047; CX 1104; CX 1116; CX 1158).

139. Even though he was aware Schein was working with buying groups, Mr. Ryan testified that he did not contact anyone at Schein or take any action to prevent Schein from doing business with buying groups. (Ryan, Tr. 1245, 12467-48, 1251-53, 1257-58).

140. Benco's non-action with regard to Schein's business with buying groups is inconsistent with Complaint Counsel's alleged conspiracy. (*See, e.g.*, Complaint ¶¶ 1, 8, 31).

4. *Schein Witnesses.*

141. Mr. Joe Cavaretta, former Vice President of Sales for the West at Schein and now President of the buying group Dental Whale (previously Breakaway), identified five buying groups that in his mind addressed the compliance issues that buying groups face: Dental Whale, Smile

Source, Synergy, Klear Impakt, and Mastermind Group. (Cavaretta, Tr. 5526, 5540, 5569-70, 5598-99). Schein worked with four of the five. (Cavaretta, Tr. 5570).

142. Mr. Cavaretta also testified that Schein worked with buying groups throughout his 17-year tenure at Schein. (Cavaretta, Tr. 5535, 5568, 5620 ("Henry Schein was doing business with buying groups my whole time employed by them.")).

143. Mr. Randy Foley, former Vice President of Special Markets at Henry Schein, testified that "both HSD and Special Markets work with buying groups" and that there was never a policy at Henry Schein not to do business with buying groups. (Foley, Tr. 4523, 4659).

144. Mr. Foley also testified that Schein worked with buying groups throughout his career at Schein, which spanned from 2003 to 2016. (Foley, Tr. 4507, 4603, 4606).

145. Mr. Foley identified at least four buying groups that Special Markets had a pre-existing relationship with prior to him joining Special Markets in 2009: Dental Partners of Georgia, OrthoSynetics, Smile Source, and Ciraden. (Foley, Tr. 4603-04).

146. Mr. Foley also identified at least seven buying groups that he personally helped open after he joined Special Markets in 2009: Pugh Dental Alliance, Steadfast Medical, Dental Gator, Intermountain Dental Associates, Tralongo, and Comfort Dental. (Foley, Tr. 4605).

147. Mr. Jake Meadows, Vice President of Sales for Special Markets at Henry Schein, has been employed by Schein since 2001 and testified that between 2011 and 2015 Schein worked with at least "Smile Source. Comfort Dental. OrthoSynetics. Dental Partners of Georgia. … [and] Klear Impakt." (Meadows, Tr. 2417, 2482 ("I know there's a longer list.")).

148. Mr. Meadows also testified that Schein did not have a policy not to do business with buying groups. (Meadows, Tr. 2470).

149. Ms. Kathleen Titus, former Director of Mid-Market at Henry Schein, testified that Schein "definitely" was working with buying groups during the alleged conspiracy, identifying the Dental Co-Op, Steadfast, Dental Gator and Breakaway as examples. (Titus, Tr. 5194, 5198, 5233, 5248-49, 5258, 5235, 5268).

150. Ms. Titus also testified that she worked with buying groups for her entire twenty-plus year career at Schein and has never heard of a policy at Schein not to work with buying groups. (Titus, Tr. 5191, 5193).

151. Mr. David Steck, Vice President and General Manager of Henry Schein, has been employed at Schein since 2005 and testified that Schein worked with numerous buying groups, including Smile Source, Alpha Omega, and Breakaway. (Steck, Tr. 3671, 3686, 3765-66, 3774).

152. Mr. Steck also testified that he had never heard of any policy at Schein not to work with buying groups. (Steck, Tr. 3709).

153. Mr. Timothy Sullivan, President of Henry Schein Dental during the alleged conspiracy, testified that Schein "worked with several" buying groups over the course of the alleged conspiracy, including Klear Impakt, Smile Source, Dental Co-Op, Universal Dental Alliance, Dental Gator, and MeritDent. (Sullivan, Tr. 3997-98, 4098, 4128, 4140-41, 4182, 4233, 4240, 4243).

154. Mr. Sullivan also testified that there has never been a policy at Schein not to do business with buying groups. (Sullivan, Tr. 4086-87).

155. Schein's relationship with numerous buying groups during the alleged conspiracy period is inconsistent with Complaint Counsel's allegations. (*See, e.g.*, Complaint ¶ 1).

5. *Expert Witnesses*

156. Complaint Counsel's expert, Dr. Robert Marshall, testified that Schein worked with buying groups during the alleged conspiracy. (Marshall, Tr. 2962 [redacted]).

157. Patterson's expert, Dr. Lawrence Wu, testified that "Schein and smaller company Burkhart … [dealt] with buying groups" during the alleged conspiracy period. (Wu, Tr. 5075).

158. Schein's expert witness, Professor Dennis Carlton, testified that Schein worked with buying groups before, during, and after the alleged conspiracy period. (Carlton, Tr. 5366, 5368, 5439).

C. Schein Evaluated Each Buying Group Opportunity, Weighing the Pros & Cons.

159. Schein has worked with buying groups from as early as the late 1990s through the present. (Sullivan, Tr. 4020 (Schein provided discounts to and competed for the business of new buying groups for Mr. Sullivan's "entire 21 years at Schein"); Titus, Tr. 5191-93 (Ms. Titus, who started at Schein in 1994 and retired in 2018, testified: "I worked with buying groups for essentially my entire career up until the time I retired."); Cavaretta, Tr. 5535-36 (confirming that Schein was working with buying groups when he started in 2001 and never stopped working with buying groups during his 18 years at Schein); Foley, Tr. 4600 ("I'd been working with buying groups from the day I started with Special Markets [in 2009] until the day I retired [in 2016].")).

160. While Schein has always been skeptical of the value of buying groups, Schein has nevertheless worked with them when it made business sense. (Sullivan, Tr. 4085 ("I have always been and I am to[o] 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.... I've seen some work,

and we've taken a chance and we've engaged with some, and many we don't see work."), 4205, 4256-4257, 4243-44; Cavaretta, Tr. 5568-70, 5574-76 (despite various challenges, "some buying groups did represent an opportunity where there was mutual growth"); Titus, Tr. 5199 ("Some are good and healthy business partners for Henry Schein and some are not so good, and it was my job to help to establish those that made sense and those that perhaps did not.")).

161. Schein generally looks to partner with buying groups that "shar[e] the same values and integrity that we have at Henry Schein, the same reverence and respect for the dentists who we're focused on, those that offer more than just an opportunity to buy consumables at a discount, someone who shares our vision for developing the productivity and profitability of a dentist and also offers some added value like business solutions as well as education." (Titus, Tr. 5200; *see also* Sullivan, Tr. 4090). However, Schein is not interested in partnering with buying groups that are simply "looking to just build an additional revenue stream on the back of [a] dentist [and] gain access to Henry Schein's customer list." (Titus, Tr. 5202).

162. Schein has always evaluated each buying group on a case-by-case basis, primarily looking for exclusivity, compliance, and stickiness. (Meadows, Tr. 2495, 2506, 2544; Sullivan, Tr. 4088, 4098-99; Cavaretta, Tr. 5574-76; Titus, Tr. 5199-202; Foley, Tr. 4638-39, 4614-15; *see also* RXD 0015-001).

163. Exclusivity refers to a buying group's willingness to work exclusively with Schein. (Titus, Tr. 5201, 5236-37; Meadows, Tr. 2487-88; RX 2941 (Sullivan, Dep. at 511-12 (describing exclusivity as "whatever group that [Schein] signed up with, they have exclusively said Henry Schein is the sponsor … [but] their member[s]… can still purchase from wherever they choose"))).

164. From Schein's perspective, exclusivity is important because "we were going to pour a lot of resources into helping that buying group round out their offering, be supportive to them,

understand each other's cultures and environment, so in order to justify the amount of resources that we were pouring into that relationship, we would look for an opportunity to be exclusive with that buying group, so we wouldn't want to have them invite our competitors to share that same partnership." (Titus, Tr. 5201).

165. Compliance refers to a commitment by the buying group membership to purchase from Schein. (Sullivan, Tr. 4088, 4100; Meadows, Tr. 2487-88; RX 2941 (Sullivan, Dep. at 511-12 (describing compliance as the group's members "understand[ing] who their dealer partner is, [and] they actually are complying with the terms … of the agreement that [Schein has]"))).

166. Schein looked for "[buying group] partners that c[an] actually move the needle, meaning that they c[an] enforce a certain amount of compliance and ... affect and influence the behavior of those [buying group] customers to buy from Henry Schein." (Titus, Tr. 5201-02; *see also* Sullivan, Tr. 4088).

167. Stickiness refers to value-added services and characteristics such as camaraderie, education, or other services that complement Schein's value proposition and would help a buying group retain and influence its membership. In other words, it is a group's "effectiveness with the members." (Sullivan, Tr. 4004, 4088; Meadows, Tr. 2487-88, 2506, 2544-45; Cavaretta, Tr. 5568-69; Foley, Tr. 4621-22).

168. Not all buying groups exhibit the characteristics of exclusivity, compliance, and stickiness. (Sullivan, Tr. 4088-90; Foley, Tr. 4615-16, 4618; Titus, Tr. 5202; Cavaretta, Tr. 5555, 5660-61; *see also* Reece, Tr. 4460).

169. Based on Schein's experience in asking prospective buying group partners whether they would be able to influence their members to purchase from Schein, "typically, the answer is

no." (Cavaretta, Tr. 5568-69). Buying groups "can't commit to a number because they don't have control over where these dentists buy." (Cavaretta, Tr. 5568-69).

170. In contrast to DSOs that guarantee volume, "if [buying groups] didn't have a commitment ... we would be rolling the dice or taking the chance on whether or not those customers would buy Henry Schein through that discount." (Meadows, Tr. 2491-92).

171. Lack of compliance is also problematic for Schein, because "if there is no commitment between the buying group and the membership to do business with Henry Schein, then [Schein] would potentially advance a discount to a customer who … would cherry-pick [Schein] and basically only pick the items that were cheapest on the formulary or on the list versus give [Schein] all their business" (Meadows, Tr. 2490-91; *see also* Sullivan, Tr. 4098).

172. Because compliance is always a challenge for buying groups, Schein looked for "mechanisms in place where [the group was] able to communicate and educate their members on why it was important that they were buying from the dealer that was supporting the buying group." (Cavaretta, Tr. 5574-76; Titus, Tr. 5207-08 ("[W]e were looking for somebody that could effect [*sic*] influence with those dentists who buy from Henry Schein, and those dentists had to have a degree of credibility with their dentists. They had to be offering something more than just an opportunity to get a discount in order to have that credibility….")).

173. However, Schein has discovered that if "there is not an actual business structure in place, it usually leads to there's no value proposition, there's no compliance, and it's just a loose group and from a business standpoint makes very little sense for us to do business with [those buying groups]." (CX 8033 (Cavaretta, Dep. at 133-34); *see also* Sullivan, Tr. 4090 (stating that many of the buying groups that Schein meets with "don't have that stickiness, don't have the

compliance, don't have other things that drive value for their members who are our customers, and it is only around price … [which] devalues our brand or what Henry Schein stands for.")).

174. Schein has also evaluated the makeup of a buying group's membership to assess potential profitability and the risk of cannibalization. (Sullivan, Tr. 4088-4089, 4126; Titus, Tr. 5208; Cavaretta, Tr. 5607-08 ("[W]e have to establish a baseline of a business that's already in there."), 5571-72; Meadows, Tr. 2489-90).

175. Cannibalization occurs when a distributor offers a buying group discounts, and the buying groups offers "those discounts to existing customers that [the distributor] already had," which reduces gross profit for the distributor. (Meadows, Tr. 2506; Steck, Tr. 3730).

176. As Mr. Cavaretta testified, "if a buying group is a good opportunity for one dealer, it doesn't necessarily mean it's a good opportunity for Henry Schein," especially considering that the risk of cannibalization is higher for Schein as the largest distributor in the dental market. (Cavaretta, Tr. 5574, 5607-08; Sullivan, Tr. 4089).

177. Schein would specifically evaluate whether adding discounts – beyond any discounts extended through Schein's typical business model of working with dentists through their full-service FSCs – would lower Schein's profits by cannibalizing Schein's sales to existing customers and therefore make discounting through buying groups less profitable than not discounting to the buying group. (Meadows, Tr. 2489-90; Cavaretta, Tr. 5571-72).

178. Mr. Sullivan testified that not "every buying group relationship result[s] in Schein increasing its sales to existing customers," and not "every buying group relationship that [HSD] enter[s] into result[s] in Schein taking business away from its competitors." (RX 2941 (Sullivan, Dep. at 503-04) ("[B]ased on history in certain groups, we've seen that business does not transfer over."); *see also* Sullivan, Tr. 4088-89; Meadows, Tr. 2489, 2506-07).

179. Thus, Schein had justifiable and economically rational concerns that led it to selectively, on a case-by-case basis, do business with certain groups but not others. (Cavaretta, Tr. 5607-08 (noting that PGMS was not "in alignment, they weren't promising any type of compliance which would help grow the business, there was no value proposition, and it was just pretty much risk for Henry Schein's business"); Foley, Tr. 4621-22 (describing partnering with the OrthoSynetics buying group due to its "stickiness with Schein," including the fact that the group hosted software for all their members and "worked with their members to drive compliance to buy from Schein"); Titus, Tr. 5251, 5259 (describing Schein's decision to stop working with the Steadfast Medical buying group due in part to the almost 50% decline in a portion of Schein's business after partnering with Steadfast)).

180. As Kathleen Titus wrote to the leadership of the Klear Impakt buying group in January 2015, Schein does "not enter in to relationships like this lightly," but when it does, it is "fully committed to the cause." (CX 2208-002).

181. Though Schein formalized its buying group evaluation process over time, the criteria and "yardstick to measure whether a customer or a buying group entity was a good fit for Henry Schein" has essentially remained the same. (Titus, Tr. 5208).

182. At all times, Schein acted deliberately, rationally, and unilaterally in evaluating buying group opportunities based on what was in the best interest of Schein – and Schein alone. (Meadows, Tr. 2467, 2599; 2621; Titus, Tr. 5192, 5194, 5275, 5228, 5248; Sullivan, Tr. 4068, 4254, 4257, 4292-93; Cavaretta, Tr. 5528-29, 5605, 5610, 5566-68, 5621).

D. From Time Immemorial, Schein Was Skeptical of Buying Groups, Though It Did Business with Them from Time to Time.

183. Complaint Counsel claims that before the alleged conspiracy, "Schein had historically worked with some Buying Groups," but after the alleged conspiracy started, it "did an about face

and initiated a no-buying group strategy…." (Complaint ¶ 33; CC Pretrial Br. at 18). The evidence does not support this contention.

184. Before Schein created its Mid-Market group in 2014, the primary responsibility for buying groups at Schein was the Special Markets division, led by Hal Muller. (Sullivan, Tr. 4091, 4113; Foley, Tr. 4514, 4607; Steck, Tr. 3731-32; Cavaretta, Tr. 5588; Meadows, Tr. 2476; Titus, Tr. 5336).

185. As with other Schein executives like Tim Sullivan and Joe Cavaretta, Mr. Muller has always been skeptical about the value of buying groups. (Sullivan, Tr. 4085; Cavaretta, Tr. 5568-5570). For example, in an April 2002 email regarding a group referred to as "IFS," Mr. Muller notes that:

> [T]his type of GPO would kill the margins for both manufacturers and distributors. The way I see it – everyone would have to play – thus there would be no increased volume and just lower costs…. 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… we need to continue that line.

(RX 2405).

186. Schein's skepticism and concerns regarding the value of buying groups existed before, during, and after the alleged conspiracy. In another example, on December 3, 2008 – three years before the conspiracy allegedly began – Joe Cavaretta sent the Steadfast proposal to Tim Sullivan noting: "This sounds like a GPO to me, and I'm not sure if we want to get involved with them … I wanted to bounce this off the two of you before I just said no." (RX 2411).

187. Yet, as noted below, Schein ultimately had a relationship with Steadfast, including during the alleged conspiracy. (SF 1199-242; Foley, Tr. 4681; CX 0306 (Foley, IHT at 91)).

188. Despite Schein's long-standing skepticism of whether buying groups were worthwhile opportunities, Schein did enter into partnerships with some buying groups where it made sense. Schein began and continued relationships with a number of buying groups in the years before

Complaint Counsel alleges the conspiracy began. Examples include Alpha Omega, the Dental Co-Op, Dentists for a Better Huntington, Long Island Dental Forum, Smile Source, and Comfort Dental. (*See* SF 397, 498-503, 583-91, 719-24, 940-48; *see also* CX 8005 (Muller, Dep. at 31 ("When, to your knowledge, did Schein first start doing business with buying groups? A. Probably before I was there, and I've been there for 28 years."))).

E. Schein Evolved Its Buying Group Infrastructure to Match the Evolving Marketplace.

1. *Pugh Dental Alliance, Conflicts Between Special Markets and HSD, and the 2010 Guidance.*

189. Pugh Dental Alliance was one of the buying groups that Special Markets opened before the alleged conspiracy. (Foley, Tr. 4522, 4605, 4662-63).

190. Randy Foley opened the Pugh Dental Alliance account shortly after he started in Schein's Special Markets division in 2009. (Foley, Tr. 4522, 4605, 4662-63).

191. The Pugh Dental Alliance was a local association of female dentists in Southeast Florida created by Jody Pugh, whose wife was a dentist and had a number of friends who were also female dentists. (Foley, Tr. 4657, 4662).

192. The Pugh Dental Alliance provided merchandise discounts and other services "to private dental practices." (CX 2529-002, -012 ("These are private practice offices….")).

193. Schein provided discounts to the group under a formulary plan, and Special Markets Equipment created "a 'start up' equipment formulary with Midmark." (CX 2529-002).

194. Shortly after the Pugh Dental Alliance buying group opened, however, it started causing "friction" with Schein's local FSCs, who thought the buying group relationship would take accounts away from the FSCs. (Foley, Tr. 4639, 4661-66; Steck, Tr. 3766-70; CX 2529-004-05, -007 ("One of my larger accounts … contacted me last week to ask me if I ever heard of Pugh Dental Alliance.… It seems they were solicited … and were told if they joined the alliance … they

could continue to buy from [Henry Schein] on the website…. The Dr inquired what would happen to his Schein rep. He was informed he would no longer be needed.”)).

195. Mr. Scott Schenker was the local FSC, and he wrote to Mr. Breslawski on January 5, 2010 that Pugh Dental Alliance “was opened through special markets,” and that the Pugh Dental Alliance “sales person informed [his] account [that] they could join the alliance for $2,000/yr, eliminate their FSC[,] and save as much as 20% on their supply bills and continue to order from” Henry Schein. (CX 2296-002-03).

196. Mr. Schenker also described the danger of cannibalization given that the members “are mostly [Henry Schein] customers with various FSCs [including] quite a few more of [his] own customers…. This is a potentially cancerous situation.” (CX 2529-011).

197. Mr. Schenker continued, “It’s absolutely absurd that I should be put in a situation that I’m competing with my own company.” (CX 2296-002).

198. 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.” (CX 2529-010).

199. Two years before the start of the alleged conspiracy, Mr. Steck asked Randy Foley to “look into [Pugh]” because it sounded “like a buying group situation, which [Schein] normally stay[s] away from.” (CX 2529-007).

200. In response to Mr. Schenker’s plea for “help,” Mr. Breslawski instructed Mr. Sullivan and Mr. Muller, the leaders of HSD and Special Markets, to work out the conflicts created by the Pugh Dental Alliance partnership. (CX 2529-011; CX 2296-002).

201. 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 obviously profits have been cut." (CX 2296-001).

202. Mr. Muller also wrote that "[w]e really don't have a lot of time for this infighting … however we need to be open to some of these people that are doing creative approaches to the market – and find the right way to deal with them…." (CX 2529-009).

203. As Mr. Muller did in 2002, Mr. Sullivan expressed skepticism towards buying groups, almost two years before the start of the alleged conspiracy. (CX 2296-001 ("I do not support us opening Buying Clubs.")).

204. By January 7, 2010, Mr. Muller had discussed the issue with Mr. Pugh, who decided to discontinue the growth of the buying club, which had not been very successful. (CX 2529-012). However, as Mr. Foley testified, Pugh Dental Alliance still operated as a buying group. (Foley, Tr. 4666).

205. For its part, Schein agreed to keep the formulary discount plan in place for the existing members, and Mr. Muller "asked for a business plan to see how [Schein] can work with them going forward." (CX 2529-012).

206. The next month, February 2010 (nearly two years before the start of the alleged conspiracy), Mr. Muller again expressed his skepticism towards buying groups when Mr. Cavaretta raised issues relating to CF Dental Group and a group called Dentist United in Las Vegas that asked for the "same group pricing we gave Smile Source." (CX 2503-001). Mr. Muller noted that he had rebuffed CF Dental's efforts multiple times, as he did "not believe in selling to buying groups." (CX 2503-001).

207. In doing so, Mr. Muller 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. (CX 2503-001; *see also* SF 206, 1026-36). "[T]he problem," Mr. Muller explained is that, unlike CF Dental, OrthoSynetics "takes a percentage of revenues and the offices get a lot of services for that payment." (CX 2503-001).

208. In early 2010, the leadership of HSD and Special Markets – Tim Sullivan, Dave Steck, Hal Muller, and Randy Foley – got together to discuss these conflicts and issues with buying groups. (Sullivan, Tr. 4098-99; Foley, Tr. 4638-41; CX 2111-001).

209. At the meeting, Messrs. Sullivan, Steck, Muller, and Foley developed and agreed on a set of general guidelines for doing business with buying groups. (Sullivan, Tr. 4098-99; Foley, Tr. 4638-41; CX 2111-001; CX 2153).

210. Primarily, the four agreed that if a buying group "could drive compliance, then … they could be a good opportunity for Schein." (The "2010 Guidance"). (Foley, Tr. 4638-41; Sullivan, Tr. 4098-99; CX 2111 (Hal Muller: "We also determined at the beginning of the year (Dave, Tim, Randy and myself) that we would entertain organizations that could force compliance.")).[4]

211. 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." (CX 2153-002).

[4] The term "force compliance" did not have a fixed definition, but typically meant that the entity had the ability to make purchase commitments, require members to purchase from the designated distributor, or, at a minimum, heavily influence the dentist's purchasing decision beyond merely transmitting Schein's offer to the dentist. (Sullivan, Tr. 4099-4100).

212. After developing the 2010 Guidance with respect to buying groups, Schein continued to approach such groups with skepticism. In March 2010, for example, the buying group Synergy Dental asked Special Markets for a bid regarding Ace bone grafting products. (CX 2451).

213. 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." (CX 2451-001; Foley, Tr. 4641).

214. Mr. Muller forwarded the opportunity to Mr. Sullivan to give HSD a chance to evaluate the opportunity as well. Mr. Sullivan also declined, noting "the risk is much greater if we do sign th[a]n if we don't." (CX 2451).

215. Schein discussed Synergy again in July 2011 (still before the beginning of the alleged conspiracy), and came to the same conclusion that it was not a good fit for Schein. (CX 0185-001).

216. Ultimately, Synergy Dental signed with Schein's business affiliate, Darby Dental. (CX 0185-001; Sullivan, Tr. 4171).[5]

217. Schein had another opportunity to apply the 2010 Guidance in May 2010, when the Intermountain Dental Associates came to Schein with a buying group offering. Mr. Foley described the mechanism by which a buying group could satisfy the compliance requirement: "When Hal and I met with Tim and Dave we decided: … on Buying Groups … they need to … have complete control of purchasing policy that would force the distributor purchases to Schein." (CX 2153-002).

[5] Complaint Counsel cites Mr. Sullivan's opinion reflected in CX 0185 that "[t]hat's where they [Darby] belong. I don't think you will ever see a full service dealer get involved with GPOs." (CX 0185-001). 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). In any event, CX 0185 is *before* the alleged conspiracy period, and 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.

218. Messrs. Sullivan, Steck, Muller, and Foley also discussed working with DSOs that had "at least 35 percent ownership," such as Pacific Dental. (Foley, Tr. 4641, 4643-45).

219. After confirming that the IDA buying group could drive compliance, Schein entered into a partnership with IDA. (Foley, Tr. 4645-47).

220. Schein's careful skepticism towards buying groups continued. In a September 2010 internal email, for example, Mr. Sullivan wrote (a year before the alleged conspiracy began) that buying groups present a "risk to overall HSI [Schein]," including "margin erosion, image, as well as competitors then following suite [*sic*] and a huge price war break[ing] out." (CX 2113).

221. Mr. Sullivan's concerns reflect legitimate, unilateral decision-making in a concentrated industry. (Carlton, Tr. 5385-90).

222. Many groups did show enough promise for Schein to partner with, and Schein continued its partnerships with, for example, Comfort Dental, Smile Source, the Dental Co-Op, and others. (CX 2109-002; RX 2712; Sullivan, Tr. 4131, 4181-82). However, that is not to say those relationships did not create their own conflicts and issues within Schein, particularly Smile Source.

2. *Continued Conflicts Between Special Markets and HSD, Implementation of the 2010 Guidance, and the Transfer of Smile Source from Special Markets to HSD in January 2011.*

223. Schein was the first distributor to contract with Smile Source, entering into a relationship with Smile Source in or around 2008 through its Special Markets division. (Goldsmith, Tr. 2071).

224. In August 2010, a field sales consultant raised concerns about Schein's relationship with Smile Source. In an August 31, 2010 email, Schein Regional Manager Mike Finnan sent an email to, among others, Special Markets President Hal Muller and HSD President Tim Sullivan,

expressing concerns about Smile Source and its attempt to recruit an existing HSD customer served by Florida FSC Scott Schenker. (CX 2111-010 ("One of Scott Schenker's customers, Dr. Roy Greenberg … is being recruited by a company called Smile Source…. The main purpose … will be to recruit other dentists to purchase through this buying club….")). Mr. Finnan explained that the "customer is not a corporate accounts customers[,] [h]e is simply a solo practitioner," and noted the resulting conflict: "This appears to be another situation similar to Pugh Dental Alliance that is playing us against each other," and "[a]ll that can be accomplish[ed] by allowing this activity is deterioration in our [g]ross profit." (CX 2111-010).

225. After receiving this email, Mr. Sullivan and Mr. Muller worked to develop a plan for addressing these concerns. Mr. Muller noted Smile Source was more than just a buying group and "expects more [than] just purchases." (CX 2111-009 ("Unlike Pugh, this group expects more [than] just purchases…. Smile Source is trying to emulate OCA with management services for dental offices for a percentage of revenue or actual fees for each admin function…")).

226. Mr. Muller explained that, if Smile Source had changed into a just a discount-only buying group (meaning that it was primarily focused on offering discounted supplies), then it might not be an attractive business partner because without these value propositions any "FSC can say 'I can put you on the same program, save your fee to them'. Then we will be pushing them to the competition." (CX 2117-006).

227. Mr. Muller recommended "continu[ing] the relationship with Smile Source." (CX 2111-007). He explained that Smile Source "is much more than [just] a buying group," and that doing business with Smile Source was consistent with the guidance they had developed earlier in the year that Schein would entertain buying groups that could "force compliance." (CX 2111-001 ("I feel that this much more than a buying group… We also determined at the beginning of the

year (Dave, Tim, Randy, and myself) that we would entertain organizations that could force compliance.”)).

228. 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 [that would] not otherwise [be] available.” (CX 2111-006). Unable to find “common ground,” Mr. Muller and Mr. Sullivan scheduled a sit down. (CX 2111-001). Two weeks later, Mr. Sullivan summarized the understanding that he and Mr. Muller had reached concerning Smile Source and the HSD account that Smile Source was recruiting. Specifically, Mr. Sullivan and Mr. Muller “agreed” that “neither of us support the concept of buying groups” due to “the risk … for margin erosion” and the potential for “other competitors (CX 2113).

229. They agreed to work out a “mutually beneficial plan” to “allow” Smile Source to proceed, which ultimately involved transferring the account from Special Markets to HSD. (CX 2113; *see also* Sullivan, Tr. 4132, 4138-40). This transfer was designed to resolve conflicts with the FSCs and better serve Smile Source. (Sullivan, Tr. 3926-28, 4132, 4134-35, 4138-40). On October 13, 2010, Schein had a “very positive” conference call with Smile Source to discuss Schein’s proposal to transfer the Smile Source account to HSD. (Sullivan, Tr. 4135-36). Schein also wanted to set up another meeting with Smile Source so that it could “pitch [Schein’s] total value story,” as Schein believed that it could add value to Smile Source’s members other than just pricing discounts. (Sullivan, Tr. 4136).

230. In January 2011, Smile Source was transferred to HSD. (CX 2454; CX 0238). 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." (CX 0238-001).

231. Complaint Counsel offered no evidence to show that the Smile Source transfer from Schein's Special Markets division to HSD was the result of any conspiracy with Patterson or Benco. Complaint Counsel did not even claim the conspiracy had started in late 2010 or January 2011. There was no evidence of any communications at this time – or any time – between Schein and Patterson or Benco about Smile Source. Rather, the evidence shows that Schein's decision was consistent with its unilateral self-interest, and that the transfer of Smile Source from Special Markets to HSD reflected a good faith effort to address multiple competing interests, including the desire to continue the Smile Source relationship and to resolve conflicts with FSCs. (SF 223-36).

232. As part of the transfer to HSD, HSD continued providing the same discounts to Smile Source members that Special Markets had provided. (CX 2454 ("[W]e have just received a major account Smile Source from our special markets team…. They have special pricing based on the Special market formulary pricing."); RX 2714-001 ("Since Smile Source has been moved over to [HSD,] these accounts need to be moved over [to HSD] and kept on the same Sales Plan.")).

233. In February 2011, senior leadership for HSD, including Tim Sullivan, met with senior leadership for Smile Source. At this meeting, the parties expressed their mutual desire for the relationship to grow. (CX 2687; CX 2899). Todd Nickerson, Smile Source's National Director of Business Development, thanked Schein for "extending such a WARM welcome to us," and noted Smile Source's "excite[ment] about the future of our business relationship…." Mr. Sullivan responded, "I remain very excited about our future together and the business model you have created," explaining that their service-oriented approach "lines up extremely well with [HSD's]

approach." (CX 2899-001). However, due to Smile Source only having 25 members, Mr. Sullivan remained skeptical of whether Smile Source could provide value to its members. (Sullivan, Tr. 4142). This grew into a concern when around eight months after Schein's positive meeting with Smile Source in February 2011, Schein did not see any growth in Smile Source's membership or "additional penetration in the existing members." (Sullivan, Tr. 4143; CX 2299-001).

234. As Schein worked to resolve the conflicts posed by Smile Source, it continued to evaluate other buying group requests. In July 2012, for example, an FSC brought a buying group opportunity to Jake Meadow's attention. (CX 0170). He did not reject the request but instead asked a "standard group of questions" to evaluate the opportunity: "Who is the leader here with [this] group? How many offices is this? … Were the service discounts approved, by who? How much will each office buy?" (CX 0170; Meadows, Tr. 2468-70).

235. When Mr. Meadows heard that the discounts had already been approved, he expressed frustration that it had not been forwarded to the Special Markets team first, as they had primary responsibility for buying groups at the time and the ability to write centralized purchaser contracts and establish formularies. (Meadows, Tr. 2470-72, 2474-76 (explaining that he told the FSC that they had not followed the process Mr. Sullivan had directed as to doing business with buying groups)).

236. Complaint Counsel relies on a May 2013 email where Mr. Cavaretta wrote to a Special Markets employee 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." (CX 2509-001). However, in the email, 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, and noting that it was not a type of buying group that Schein had a relationship with. (CX 2509-001-02; Cavaretta, Tr. 5655-65). Complaint Counsel has not identified any buying group fitting that description that approached Schein for a contract. Moreover, Mr. Cavaretta's statement that Schein doesn't "really recognize [buying groups]" is merely an explanation to a Special Markets employee for why, if HSD "manages customers who are buying groups," its "account data" systems do not "track [those groups] specifically." (CX 2509-001).

3. *Project Pyramid, the Creation of Mid-Market in April 2014, and the Shift of Primary Responsibility for Buying Groups from Special Markets to HSD.*

237. Prior to 2014, Special Markets had primary responsibility of buying groups. (Foley, Tr. 4607-08; Cavaretta, Tr. 5588; Sullivan, Tr. 4091; Titus, Tr. 5336).

238. However, the Elite DSO segment was growing and Special Markets did not have the resources to continue to properly serve all of its current customers, including a growing buying group segment. (Foley, Tr. 4608-4609).

239. Elite Account status included groups that were doing over $1 million in sales or had ten or more practice locations. (RX 2392-006).

240. Schein decided to create a new division within HSD, called Mid-Market, to allow Special Markets to focus primarily on Elite DSO's and allow HSD to serve other growing customer segments, including buying groups. (RX 2392-002; Foley, Tr. 4607; Sullivan, Tr. 4106-4107; *see also* Cavaretta, Tr. 5584-85).

241. Schein began developing its strategy for the formation of Mid-Market in late 2013. (Cavaretta, Tr. 5583).

242. On December 9, 2013, HSD started a two-day offsite meeting attended by Tim Sullivan, Dave Steck, Jake Meadows, and Joe Cavaretta, among others ("2013 Offsite Meeting"). (CX 2461-001).

243. HSD typically holds offsite meetings once or twice a year outside of the HSD offices, which provides the opportunity for uninterrupted discussion about important action items. (Meadows, Tr. 2582; Sullivan, Tr. 4107).

244. At the 2013 Offsite Meeting, Tim Sullivan presented on the topic of "how do we change our operating model to allow for investment in key priorities," which included discussion on the impact of the growth of Corporate Accounts Group business and the growth of GPOs. (CX 2461-005 ("GPOs are growing" and Schein needed to "brainstorm[]" about how "to allow for [further] investment in [that space]."); Sullivan, Tr. 4107-08). The topic of the growth of GPOs was on the agenda because Schein was being approached more often with buying group inquiries, and, due to past internal conflict between HSD and Special Markets, wanted to determine its go-to-market strategy. (Sullivan, Tr. 4108; Foley, Tr. 4608-09).

245. After the 2013 Offsite Meeting, HSD realized it did not have a specific offering for customers with three to twenty practice locations nor did it have a formal strategy on buying groups. (Cavaretta, Tr. 5531, 5583-85).

246. Given that DSOs were increasing in popularity, more offices wanted multisite locations, and buying groups were approaching Schein more frequently, Schein wanted to develop a strategy to better serve these customers in an evolving market. (Cavaretta, Tr. 5584-85; Sullivan, Tr. 4106-08).

247. Schein's desire to formulate such a strategy to serve growing customer segments, including buying groups, led to the creation of Project Pyramid. (Cavaretta, Tr. 5584-5586; Sullivan, Tr. 4106-08).

248. The purpose of Project Pyramid was to create a structure within Schein to properly serve these growing customer segments, including resources such as a pricing plan, value proposition, personnel, and data analytics. (Sullivan, Tr. 4106-08; Cavaretta, Tr. 5585).

249. Shortly after the 2013 Offsite Meeting, HSD and Special Markets met to discuss their "Collaboration Plan" relating to Project Pyramid and the internal structure that was being developed to appropriately serve customer segments. (RX 2392-001; Sullivan, Tr. 4108-09; Cavaretta, Tr. 5585-86).

250. A main goal for Project Pyramid was to "[c]reate clearly defined customer segments" to ensure that Schein had the right resources to address the needs of its customers. (RX 2392-002; Sullivan, Tr. 4108-09; Meadows, Tr. 2584). Another goal was to "[c]reate a sales organization within HSD to support" various groups that were centralized purchasers, such as large group practices, CHCs, and institutional customers that HSD had not typically served in the past. (RX 2392-002; Sullivan, Tr. 4109-10).

251. This transfer of responsibility would allow Special Markets to "focus primarily on Elite DSO, Federal and Dental School customers," as the DSO segment was growing and Special Markets was struggling to handle its existing customer segments. (RX 2392-002; Foley, Tr. 4607-08).

252. At the time, HSD did not have a formal system in place to serve centralized purchasers, and Project Pyramid aimed to address that issue. (Sullivan, Tr. 4110; Meadows, Tr. 2585).

253. With the Mid-Market space developed through Project Pyramid, HSD took responsibility for a diverse range of customers, from DSOs that did not qualify as Elite – which "owned the practices…, could drive compliance and wanted certain pricing" – to "buying groups that did not own the practices," creating "a problem with compliance, yet they wanted pricing." (Cavaretta, Tr. 5591). This required "a lot of balancing … in the field," as HSD continued to learn how to deal with these various kinds of customers. (Cavaretta, Tr. 5591).

254. Buying groups were not called out as a specific customer segment in documentation relating to Project Pyramid because it was not a large enough customer segment at that time to be specifically identified on the presentation. (Sullivan, Tr. 4110-11; Meadows, Tr. 2586).

255. However, buying groups were definitely a part of Project Pyramid. (Cavaretta, Tr. 5587). While Schein planned to address buying groups within Project Pyramid, at that time it was simply not a key strategic priority. (Sullivan, Tr. 4110-11 ("It was a tactical thing we were going to address within this project, but it was not going to make the key priority list."); Cavaretta, Tr. 5587 ("I was the leader of that space, so I know for a fact that it [buying groups] was part of the mid-market space.")).

256. Schein originally planned to name the new HSD division serving certain Project Pyramid groups as "Henry Schein Dental Special Markets." (Sullivan, Tr. 4111-12). However, Schein decided against that name and instead named the new division "Mid-Market." (Sullivan, Tr. 4112; Meadows, Tr. 2587).

257. In early 2014, the Mid-Market division was created within HSD to serve groups consisting of large group practices, CHCs, a portion of institutional customers, buying groups, and customers interested in having multisite locations. (Sullivan, Tr. 4112; Cavaretta, Tr. 5585-87; RX 2392).

258. Large group practices or smaller DSOs that fell under Mid-Market consisted of groups that were doing $150,000 to $1 million in sales per year or had three to nine practice locations. (RX 2392-006).

259. Prior to the creation of Mid-Market, Special Markets had primary responsibility for CHCs, institutional customers, buying groups, and large group practices. (Foley, Tr. 4607).

260. The result of Project Pyramid was that Special Markets would now mainly serve Elite Accounts, such as Elite DSO's, Federal Government accounts, and Dental Schools. (RX 2392-006). Individual private practice dentists would continue to be served by HSD. (RX 2392-006).

261. With the creation of Mid-Market, the primary responsibility for buying groups transferred from Special Markets to Mid-Market. (Sullivan, Tr. 4112-13; Foley, Tr. 4608; Meadows, Tr. 2590; Cavaretta, Tr. 5586-87).

262. As a result, some of the buying groups that previously resided in Special Markets transferred over to Mid-Market. (Foley, Tr. 4635). Breakaway, a Special Markets buying group, transferred to Mid-Market in 2014. (Foley, Tr. 4635; Titus, Tr. 5249). Steadfast, another Special Markets buying group, transferred to Mid-Market in 2014. (Titus, Tr. 5249).

263. However, not all of the Special Markets buying groups transferred to Mid-Market. (Foley, Tr. 4609). Instead, Special Markets continued to work with OrthoSynetics, Comfort Dental, and Intermountain Dental Associates, among other buying groups, because Special Markets determined that it could serve these customers better than Mid-Market. (Foley, Tr. 4619-4620, 4634, 4646-47). Despite the shift in primary responsibility, Special Markets continued to work with and enter into relationships with buying groups after the formation of Mid-Market. (Sullivan, Tr. 4112-13; Cavaretta, 5588-5589; Foley, Tr. 4609).

264. In 2014, Kathleen Titus and Andrea Hight both transferred from the Special Markets division to work in the Mid-Market division of HSD. (Meadows, Tr. 2587-90; CX 2352-002 ("We just have to keep sending to Andrea, KT, and Mr. X so they can review requests."); Sullivan, Tr. 4112-13; Foley, Tr. 4608-10; Cavaretta, Tr. 5586-88). Andrea Hight moved to the role of Director of the Central United States for Mid-Market because she was an expert on CHCs. (Foley, Tr. 4610; RX 2392-005). Kathleen Titus was transferred to the role of Director of the Western United States for Mid-Market because she was strong with large group practices or smaller DSOs. (Foley, Tr. 4610; Titus, Tr. 5198; RX 2392-005).

265. Joe Cavaretta became the Western Area Director for HSD and had primary responsibility over the newly formed Mid-Market division and buying groups specifically. (Cavaretta, Tr. 5540, 5587-5589).

266. With the creation of Mid-Market, Schein developed an approach for the "emerging groups" that were larger than Schein's traditional customer base of small solo practitioners, but not large enough for Special Markets. (CX 8010 (Titus, Dep. at 28-29)).

267. In 2014, Tim Sullivan tasked Joe Cavaretta, in his role as Western Area Director for HSD, with developing a strategy on working with buying groups. (Cavaretta, Tr. 5530-31).

268. The Mid-Market team vetted buying groups as it compiled questions and a loose protocol to use when approached by buying groups. (CX 8033 (Cavaretta, Dep. at 95-98)).

4. ***The Dental Gator Conflict and HSD's Decision to Make the Development of a Formal Buying Group Offering a "Strategic Priority" for 2015.***

269. The creation and implementation of Mid-Market was time-consuming and continued throughout 2014 and 2015. (Cavaretta, Tr. 5534-35, 85).

270. Joe Cavaretta worked closely with Kathleen Titus, Andrea Hight, Keith Gauzza, and Jake Meadows in developing the Mid-Market space. (Cavaretta, Tr. 5587-88).

271. At the time Mid-Market was created, Schein did not have a formal strategy for buying groups. (Cavaretta, Tr. 5590; Titus, Tr. 5215-16). Instead, Schein evaluated buying groups on a case-by-case basis. (Cavaretta, Tr. 5590-91; Steck, Tr. 3741).

272. On May 8, 2014, Ms. Titus emailed Joe Cavaretta that they needed "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." (RX 2385-001). Later that month, Ms. Titus and Mr. Cavaretta had a discussion regarding buying groups and how Schein needed to create a document that could be distributed throughout HSD to aid in evaluating buying groups and to provide guidance on when a buying group relationship made business sense for Schein. (Titus, Tr. 5213, RX 2105-001).

273. Ms. Titus and Ms. Hight undertook developing the criteria Schein should consider when evaluating a buying group so that all buying groups could be evaluated by the same "yardstick." They "agreed … in writing when [a buying group] relationship make[s] sense and when it does not." (Titus, Tr. 5213-14; RX 2105-001). The goal was to collectively brainstorm a strategy to grow Schein's buying group segment in a healthy way that made business sense for Schein. (Titus, Tr. 5214-15).

274. As part of developing Schein's buying group strategy, Ms. Titus developed a set of questions to aid in vetting groups that approached Schein. (CX 2809-005; Titus, Tr. 5219-20). The "due diligence" questions included how many members the group had, what services it offered its members, if the group could drive compliance, and whether the group was willing to be

exclusive, among others. (CX 2809-005; Titus, Tr. 5218-5219). These questions were to become a standard practice in Schein's evaluation of buying groups. (Titus, Tr. 5220-22; CX 2809-001).

275. While Schein was making strides in developing its strategy around what made a good buying group partner, it still needed to develop a standard offering for buying groups. (Titus, Tr. 5219-5221; CX 2809-002 ("we need to make sure we have our systems and offering down cold and the team understands how to present")).

276. As of June 2014, Schein did not have a formal offering with respect to buying groups. (Titus, Tr. 5221; CX 2809-001). However, Schein was working on developing specific sales plans for buying groups to ensure that Schein was treating buying groups consistently by giving them similar discounts "across the board." (Titus, Tr. 5220-5221).

277. On October 3, 2014, HSD had an internal meeting to discuss Mid-Market and "GPO/MSO strategy" with Mr. Sullivan. (RX 2409-002; Cavaretta, Tr. 5589, 5591-92).

278. With the creation of Mid-Market and certain buying groups being transferred over from Special Markets, HSD was receiving more inquiries from its FSCs and customers regarding buying groups, and "from a resource standpoint[,] [was] becoming overwhelmed." (Cavaretta, Tr. 5590).

279. In late 2014, HSD was still evaluating buying groups on an "ad hoc" basis. (Cavaretta, Tr. 5590-91).

280. HSD needed a more consistent approach to engaging with buying groups and determining what type of offering to provide them. (Cavaretta, Tr. 5590-91). This was not a simple task and created a balancing act for Schein, because buying groups did not own offices – and therefore had a harder time with compliance than a DSO – yet they wanted the same pricing. (Cavaretta, Tr. 5590-91).

281. While buying groups were not a top priority for Schein from a growth standpoint, Mr. Cavaretta continued to develop Schein's buying group strategy throughout 2014. (Cavaretta, Tr. 5592-94).

282. Even as Schein fine-tuned its strategy and offering to buying groups, Schein continued to work with buying groups with which it already had established relationships. (Cavaretta, Tr. 5593). These included Alpha Omega, Stark County Dental Supply, Long Island Dental Forum, Dental Partners of Georgia, OrthoSynetics, Comfort Dental, Advantage Dental, The Denali Group, Dentists for a Better Huntington, and Intermountain Dental Associates. (SF 377-98, 493-511, 548-71, 676-89, 717-25, 732-48, 937-49, 1187-98).

283. Schein also continued to engage with new buying groups in 2014, such as Klear Impakt and Dental Gator. (R. Johnson, Tr. 5479; Puckett, Tr. 2228-31).

284. Around this time, Joe Cavaretta, Tim Sullivan, Dave Steck, Randy Foley and Hal Muller agreed that Special Markets and HSD needed to be "aligned on a strategy with existing [buying groups]" within Schein. (CX 2761-002).

285. The Dental Gator buying group created conflict between the divisions that needed to be resolved. (CX 2475-006; Sullivan, Tr. 3991, 3994-95). Special Markets had formed a relationship with Dental Gator in March 2014, as Dental Gator was formed by some of the owners of MB2, one of Special Markets' largest DSO customers. (SF 634-46; Sullivan, Tr. 3987, 3990).

286. Dental Gator began to cannibalize existing Schein customers. (CX 2360-001 ("[s]o far, the Gator gains have been good HSD customers … the hook is [discounted] supplies … [t]his will spread fast when the word is out."); CX 2761-001 ("Patrick [Dental Gator President and CEO] was originally hired to TARGET NON-Schein customers only … obviously that is not happening

now."); Meadows, Tr. 2513 ("good HSD customers…[w]ho already buy from us and this is the cannibalization.")).

287. In October 2014, HSD began receiving complaints from its FSCs about the fact that Dental Gator was receiving the same pricing as MB2, even though Dental Gator was not a DSO. (Meadows, Tr. 2532-34; CX 2761; CX 2354; CX 2370; CX 0260; CX 2032; CX 2362; CX 2033; Foley, Tr. 4572-73).

288. Complaint Counsel cites an October 25, 2014 email in which Mr. Meadows states that "we are NOT participating in GPOs." (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. (Meadows, Tr. 2428-30).

289. Like the 2010 conflicts that arose with Pugh Dental and Smile Source, Schein FSCs were concerned that they would now be competing with both Dental Gator and Special Markets and ultimately receive reduced commissions. (Meadows, Tr. 2574-75).

290. Schein's partnership with Dental Gator also created conflicts with Schein's other DSO and buying group customers. In May 2014, Floss Dental, a DSO customer of Schein's, wanted to "mimic MB2" with the creation of a buying group arm, like MB2 did with Dental Gator. (RX 2105; CX 2084).

291. Floss Dental had both fully owned offices and "members that were individual or independent practices…." (Titus, Tr. 5212).

292. By that point in 2014, Ms. Titus and Mr. Cavaretta had been working on a document on which everyone had consensus that could be used to "evaluate more efficiently and create more parity on those relationships with buying groups that made … good business sense for us." (Titus,

Tr. 5213; RX 2105-001 ("Andrea and I have agreed to in writing when these relationships make sense and when it does not.")).

293. That guidance helped Schein develop a program with Floss Dental that allowed its independent practices to "have reduced Schein pricing on the G plan," contingent on those practices purchasing 80% of their supplies from Schein. (RX 2105; CX 2084).

294. In November 2014, HSD had another offsite meeting during which it discussed its strategic priority to collaborate with Special Markets on a "GPO/MSO strategy" so that both divisions would be better aligned on how to approach buying groups. (CX 2365; CX 2475-006; Sullivan, Tr. 4115-16). All "agreed there was conflict and the current [ad hoc] approach was unacceptable." (CX 2034-001).

295. At the November 2014 offsite meeting, HSD also created a strategic priority for 2015 to develop a template and structure for buying groups, including creating a pricing plan for buying groups. (CX 2475-009; Sullivan, Tr. 4116-17; Meadows, Tr. 2602).

5. *Resolution of the Dental Gator Conflict, Klear Impakt, and Implementation of the 2015 Strategic Buying Group Plan.*

296. After the strategic priority was set in December 2014 to create a more "organized and consistent way to approach" buying groups more actively, Schein continued work to develop that template at the same time it was finding solutions with existing and new buying group partners and considered establishing a Schein-owned GPO. (Steck, Tr. 3739-41, 3754; Meadows, Tr. 2609-10; CX 2475-009 (listing "Strategic Priorities: 2015," and inaugurating a task force to "develop a template/structure for prospective GPOs.")).

297. A separate task force was established to develop the "HSD GPO response plan," led by John Chatham and Brian Brady. (RX 2097-001-02). 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 [Schein] will work on this year and it is priority one." (RX 2097-001).

298. 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." (CX 2762-002). 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. (CX 2762-003). A month later, Mr. Meadows sought to avoid duplication and potential conflict between the Mid-Market team and the separate task force led by Mr. Chatham and Mr. Brady. (CX 2372-001 ("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***.")).

299. "All throughout 2015," Schein was "setting [the] infrastructure up" for its buying group protocol, and it brought Brian Brady in to help with that effort. (Cavaretta, Tr. 5653-54, 5594; Sullivan, Tr. 4123-26).

300. Brian Brady noted in June 2015 that Mid-Market expected to "have several [buying groups] topping $1.5M in the next 6-12 mos." (CX 2133-001).

301. In an effort to ensure that Schein's buying group approach was consistent across divisions, Mr. Sullivan and Mr. Muller discussed what to do with Dental Gator. (RX 2097-004-05; Sullivan, Tr. 3991, 3994, 4344).

302. As Special Markets ran into problems with the pricing it could extend to Dental Gator because it was not a DSO, Mr. Muller proposed placing Dental Gator on a new pricing plan that was used for other Mid-Market customers. (RX 2097-005; Foley, Tr. 4697-98). Mr. Sullivan believed Mr. Muller's proposal "was a good compromise" and a way to resolve the internal conflict

between Special Markets and HSD. (CX 2370; CX 8025 (Sullivan, Dep. at 318-19); Meadows, Tr. 2566-67). Schein subsequently placed Dental Gator on a new pricing plan and Special Markets continued its relationship with the group. (Sullivan, Tr. 4096-97; Foley, Tr. 4697-98). There was also some discussion within HSD about transitioning the group to Schein's new buying group offering once it was formally created. (RX 2097-002).

303. At the time, some within HSD still had concerns related to Schein's offering to Dental Gator and the FSCs' perception that Schein was working against them by giving Dental Gator an advantage in the market that they may not have – namely, more aggressive pricing. (Meadows, Tr. 2574-75). Specifically, Jake Meadows was concerned that Schein would be "arming dental gator with a more aggressive offer to [the] average practice than [HSD's] FSCs" could offer, putting them at a competitive disadvantage against their own company. (CX 2370-001). Mr. Sullivan acknowledged the concerns, but noted that Mr. Muller was "trying." (CX 2372-003).

304. Senior leadership for Special Markets and HSD met in late November 2014 to discuss resolutions to the Dental Gator conflicts. (SF 290-95; CX 2365; CX 8025 (Sullivan, Dep. at 335-36); Meadows, Tr. 2563-65; CX 2032).

305. Schein ultimately reached a consensus on an ongoing plan for Dental Gator in January 2015: "continue to support [Dental Gator by] allowing them to use the G plan pricing going forward," which was the "same pricing HSD can offer groups of offices" with FSCs keeping full commission. (CX 2372-004; CX 2370-002; Meadows, Tr. 2572-74; *see also* Meadows, Tr. 2566-67 ("[A]t this time, 2015, the G plan was Henry Schein Dental's first attempt to build a private practice formulary.")).

306. Mr. Sullivan noted that, given Schein was working on its "GPO response plan," the new Dental Gator approach would need to be "grandfather[ed]" in or "transition[ed] … to our new plan once created." (CX 2372-001).

307. The fact that DSOs were entering 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." (RX 2097-001).

308. On January 28, 2015 – during the alleged conspiracy period – Mr. Sullivan wrote to his boss Jim Breslawski that he was going to "approve moving forward with [Mr. Muller's] proposal." for Dental Gator, and that doing so would mean Schein was "'in' on approving Buying Groups." (CX 2144-001; CX 2372; Meadows, Tr. 2568).

309. Jake Meadows "support[ed] the decision" and also suggested discussing whether the G plan should be "offered at a lower dollar level ($75K) and/or … creating a Private Practice formulary" because there was still a potential for conflicts with Schein's private practice customers (CX 2372-002; Meadows, Tr. 2574-75 ("The concern is that the FSCs would feel as if Dental Gator had an advantage in the market that they didn't have or that special markets group had an advantage in the market that they wouldn't have and that special markets and Dental Gator would be competing directly with the FSC and then ultimately lowering commission….")).

310. Mr. Meadows's recommendation ultimately came to fruition, as Schein built a private practice formulary that its FSCs could offer to private practice customers, as well as a buying group, or "BG," formulary. (Meadows, Tr. 2575-77).

311. While Schein continued its work on its new buying group protocol, it also continued to engage with buying groups in the field. Indeed, at the same time Schein was working to find a

resolution to the Dental Gator conflicts, it was also negotiating a new partnership with Klear Impakt. Discussions between Schein and Klear Impakt began in 2014. (R. Johnson, Tr. 5479, 5490; Titus, Tr. 5269). By the time Ms. Titus met with Dr. Richard Johnson and the Klear Impakt leadership in January 2015, Schein's strategic priority to develop a buying group template and structure was in place. (CX 2208-002; CX 2475-009; Steck, Tr. 3739-41; Meadows, Tr. 2601-02; Sullivan, Tr. 4116-18).

312. Following the evaluation protocol she had been developing since she started in Mid-Market, Ms. Titus collected information on Klear Impakt: who they were, what their value proposition was, who their members were, and whether they would offer exclusivity and compliance. (R. Johnson, Tr. 5493-94; Titus, Tr. 5269; RX 2062-003).

313. Ms. Titus's evaluation allowed her to quickly determine that Klear Impakt was one of the few groups that could rise to the top and fit Schein's criteria for engaging with buying groups. (CX 2208-002; Titus, Tr. 5270-71).

314. As it did with Dental Gator, Schein offered Klear Impakt a modified version of the G Plan. (CX 2392). Klear Impakt's August 17, 2015 agreement with Schein provided Klear Impakt members with a formulary price on "over [redacted] items most commonly used" plus [redacted] off on merchandise not on the formulary. (RX 2162; R. Johnson, Tr. 5501-02).

315. On August 26, 2015, Dave Steck met with zone general managers at Schein to discuss a number of topics, including Schein's strategic buying group plan. (RX 2402-002-03; Steck, Tr. 3750-51).

316. Mr. Steck summarized the discussion, noting: "We expect to 'launch' our buying group plan shortly after Labor Day" with "two offerings; one for groups that we want to work with, but are not cohesive…, and the other for 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." (RX 2402-003). FSC commission rates would be different for the two different offerings. (RX 2402-003).

317. As Mr. Steck explained at trial, this was "not a change" in whether Schein would do business with buying groups, but rather "a new tactic … in terms of how we were going to actually launch and go to market with it." (Steck, Tr. 3752; CX 8016 (Meadows, Dep. at 101 (explaining that Schein's approach "has always been case-by-case even today for buying groups" based on "their ability to help us grow our business, retain our business, and bring our mission to life")); *see also* Sullivan, Tr. 4125).

318. On September 4, 2015, "HSD senior management … gave … the green light to proceed" to implement the new standard buying group offer. (CX 0192-002) (observing that "Schein has rarely engaged with these groups, but times are changing," and Schein wanted to "begin to engage [them] in an organized and uniform way….").

319. Nine months after the strategic priority was set to develop a buying group plan and template, Brian Brady announced the plan in a September 9, 2015 email titled, "Henry Schein Dental & Existing Buying Groups." (CX 0192; Steck, Tr. 3752-54).

320. After "months" of working on Schein's "approach to existing buying groups and how we handle them when they come to us for engagement," HSD senior management held a "final meeting" and settled on a strategy to engage buying groups with "a set protocol in place for each group as they come to us (when we determine they are worth engaging with)." (CX 0192-002; Meadows, Tr. 2611-13; Sullivan, Tr. 4124-25).

321. The protocol formalized Schein's process of determining which buying groups were worth engaging with that had started with the more informal 2010 Guidance developed by Tim

Sullivan, Dave Steck, Randy Foley, and Hal Muller in early 2010. (CX 0192-002 (Schein "will analyze a variety of factors before engaging, including looking at a list of members to see who / who is not already purchasing from us."); Meadows, Tr. 2609-10, 2611-12 (it "was very important … to make sure that we're not positioning ourselves to cannibalize our business but focusing on new customers"); Steck, Tr. 3756-57 (explaining that "if we have a large number of customers that are already in the group, and the amount of business that we're going to gain by engaging with them is actually less than the amount of business we're going to further discount, it really doesn't make economic sense"); Sullivan, Tr. 4126).

322. Schein modified the existing G Plan, which was given to Dental Gator, to create the "BG12 and BG14" plans for use with buying groups. The new pricing plans were "[l]iterally the exact G plan just duplicated with same formulary items and 12 and 14[%] off non-formulary items, respectively." (CX 0192-002; Meadows, Tr. 2612; Steck, Tr. 3757-58; Sullivan, Tr. 4126).

323. The plan also required the buying group members to make a volume commitment – "at least $15K a year for example" – and the group as a whole to spend at least "$250K," to receive the discounts. (CX 0192-003).

324. The protocol also created a unified approach to administrative fees and rebates tied to compliance, as well as internal accounting processes so that Schein could track the group's purchases. (CX 0192-002-03; Steck, Tr. 3759-61 (explaining the rebate structure as designed to help Schein "grow our business" and "be sure that the buying group is delivering the volume that they promised us as part of the agreement"); Sullivan, Tr. 4126-27). 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." (CX 0192-002).

325. Schein planned to routinely monitor purchases from a buying group's members and their compliance with volume commitments. (CX 0192-003; Sullivan, Tr. 4126-27).

326. Schein ultimately implemented this plan. (Sullivan, Tr. 4127-28; Meadows, Tr. 2615 ("We ultimately created the BG plan, ultimately created a prime vendor agreement for buying groups, and ultimately created a minimum that members would have to spend.")).

327. In addition to formalizing a uniform approach, pricing plans, and contracts for buying groups after the December 2014 strategic priority, Schein also worked on developing its own buying group. (CX 2475-009; CX 0192-003; RX 2617; CX 2683; Steck, Tr. 3742-43; Sullivan, Tr. 4116-17, 4121-22; Meadows, Tr. 2603-04).

328. In early 2015, Schein was working on its own buying group offering called "Henry's Club." (RX 2097-001).

329. The goal of Henry's Club was to allow Schein to have a buying group-like program to offer its customers who wanted to join a buying group but did not want to pay the high fees associated with joining a group. (Sullivan, Tr. 4121-4122; Meadows, Tr. 2603-04).

330. Though Schein worked on its own buying group offering through most of 2015 (*see* CX 0192), it did not ultimately come to fruition, particularly because of legal hurdles from the Sunshine Act. (Sullivan, Tr. 4121-23; Meadows, Tr. 2603).

331. The work on Schein's buying group did not go to waste, however. Schein used what it built for its Henry's Club offering and "rolled that into our existing offering and our loyalty program." (Meadows, Tr. 2603-04).

332. As to Schein's protocol for evaluating and partnering with other buying groups, the next step was to put the structure in place that could be "duplicated throughout the country" and "roll[ed] … out to [the] entire field team." (CX 0192-002-03; Steck, Tr. 3762-63).

333. It soon became clear, however, that Mid-Market's resources were not sufficient to cover the national roll-out. (Cavaretta, Tr. 5653-54; Titus, Tr. 5274-75; *see also* Steck, Tr. 3763).

6. *Schein's Decision to Devote Dedicated Resources to Buying Groups with the Creation of the Alternative Purchasing Channel in 2016.*

334. The massive effort that HSD undertook to develop Schein's formal buying group strategy beginning in late 2013 eventually led to Schein creating a dedicated division within HSD to evaluate and engage in business with buying groups, known as the Alternative Purchasing Channel ("APC"). (Titus, Tr. 5275; Steck, Tr. 3764; Cavaretta, Tr. 5535, 5653-54).

335. In January 2016, Schein began internal discussions about whether Mid-Market would continue to "be responsible for BGs" in the future. (CX 2280-001).

336. Because Mid-Market did not have the proper resources to devote to the buying group space, Schein created the APC. (Titus, Tr. 5274-75; Steck, Tr. 3763; Cavaretta, Tr. 5653-54). Darci Wingard was hired to run the APC division within HSD. (Cavaretta, Tr. 5654; Steck, Tr. 3765).

337. Ms. Wingard fosters and manages current buying group relationships, engages in discovery to find new potential buying group relationships, vets buying group proposals, and creates formularies and prime vendor agreements for buying groups. (CX 8009 (Wingard, Dep. at 42); RX 2249-001). Ms. Wingard is also responsible for the "launch, marketing creation and then the on-boarding process" for buying groups. (CX 8009 (Wingard, Dep. at 42)).

338. The APC was developed to further formalize Schein's processes for evaluating and conducting due diligence on a buying group to ensure that the group is a good business partner and can drive incremental sales volume to Schein. (Steck, Tr. 3763; CX 8020 (Brady, Dep. at 146); CX 8010 (Titus, Dep. at 75)).

339. The APC is primarily focused on buying groups and has allowed Schein to accelerate its communications and enhance its offering to buying groups. (Cavaretta, Tr. 5654).

340. Since forming the new division, the APC has formalized new buying group relationships with Mastermind and Teeth Tomorrow, among others, and has nurtured the buying group relationships that Schein began during and before the alleged conspiracy period, such as Klear Impakt and others. (CX 8009 (Wingard, Dep. at 175)).

341. Schein led the way in developing the buying group space, as evidenced through its efforts in its Mid-Market division and eventual creation of the APC. (Cavaretta, Tr. 5525 ("I feel proud and I want to look back and say that I was the leader of creating the mid-market space, I was the leader of creating the buying group space.")).

F. Schein's Buying Group Practices Differed Substantially from Patterson's and Benco's.

1. *Benco's No Buying Group Policy.*

342. Since 1996, Benco has had a policy not to work with buying groups of independent dentists. (Cohen, Tr. 780 ("[O]ur policy has been consistent, no middleman between us and our clients, … and therefore, we don't work with buying groups."), 999 (confirming the policy has been in place since 1996); CX 1112-046-48).

343. Benco's policy is still in place today. (Cohen, Tr. 693).

344. As part of its policy, Benco [redacted] (CX 1100-003; Cohen, Tr. 981).

345. Benco developed its no buying group or "no-middleman" policy independent of Schein. (Cohen, Tr. 692-93, 853).

346. Benco's no buying group policy differs substantially from Schein's practice of evaluating each buying group case-by-case, doing business with some and declining others.

(Sullivan, Tr. 4020, 4086-87; Meadows, Tr. 2467, 2578; Titus, Tr. 5192, 5232; Steck, Tr. 3709; Foley, Tr. 4523, 4646-48; Cavaretta, Tr. 5531, 5536).

2. *Patterson's No Buying Group Practice.*

347. During the alleged conspiracy period, buying groups or GPOs were not part of Patterson's strategy. (Misiak, Tr. 1394 ("[A]t a corporate level GPOs were not part of the strategy for the [Patterson] special markets group"); CX 3075). Instead, Patterson focused its efforts on building an infrastructure to compete with Schein in the DSO space, while continuing to compete for the business of private practice dentists. (Misiak, Tr. 1342 ("[O]ur strategy is focused on private practice and DSOs," not GPOs), 1424-25 ("Our largest competitor had been in [the DSO space] for twenty years."), 1464 ("Henry Schein had the largest percent of market share in this space, somewhere in the 90 percent market share of DSOs."), 1489-90; Guggenheim, Tr. 1782 (Patterson wanted to "create disruption in Henry Schein's business particularly because they were the dominant player"), 1863; McFadden, Tr. 2785-86).

348. Nevertheless, Patterson's trial witnesses testified that Patterson independently evaluated buying groups that approached Patterson. (Guggenheim, Tr. 1794-95, 1807; Misiak, Tr. 1352-53; Rogan, Tr. 3646-47, 3666; McFadden, Tr. 2704-06, 2725-26, 2806, 2846).

349. In practice, Patterson summarily rejected many groups based on the fact that they were buying groups or GPOs, which did not fit Patterson's strategy. (Guggenheim, Tr. 1573-75 ("And I think the evidence is clear we didn't really entertain these [GPOs]."); McFadden, Tr. 2685 ("I believe pretty much every inquiry I received from buying groups or GPOs and such, I always told them thank you, but no thanks. It's not a good business decision for us."); CX 0093-001 ("When I get these calls directly I politely say that I appreciate the opportunity, but currently we do [not] participate in group purchasing organizations."); Misiak, Tr. 1338-39 ("What was coming up

through this [Atlantic Dental Care] RFP was not part of our strategy….”); CX 3116-001 (“We have said no [to GPOs] at every turn, including to Delta dental.”); CX 3080-001 (regarding a group out of New Hampshire: “Typical approach of an upstart buying group. We pass on these as a matter of protecting [Patterson’s] business model.”); CX 3168-001 (“We don’t sell to buying groups. Let’s talk live.”); CX 3004-001 (“For now – I am electing to not participate with these [buying] groups – we have said no to several already….”); CX 0137-001 (“I again explained to [Dentistry Unchained] very nicely that we are not going to participate in a GPO type program at this point.”); CX 3045 (regarding Dr. Narducci’s GPO: “[D]oes he own all these offices – if not then he is a GPO – we don’t deal with GPO’s….”); CX 3010-001 (regarding Ascension Health GPO: “And yes, as of now we are not working with GPO’s.”)).

350. Unlike Schein, Patterson never developed or pursued a buying group strategy. (Guggenheim, Tr. 1602 (“The guidance has always been that while we give our branches and our general managers tremendous leeway to evaluate customers individually, the guidance has always been that we don’t do business with buying groups.”); Misiak, Tr. 1339, 1349 (“GPOs are not currently part of our plan.”), 1324 (“DSOs were in the strategic plan, GPOs were not….”), 1352-54 (“GPOs were not part of the strategy, so we would … [p]olitely turn them down and stay focused on the existing strategy.”), 1419, 1493, 1499; CX 3127-001 (“As a rule we are trying our best to steer clear of all buying groups.”)).

351. Mr. Rogan, Vice President and General Manager for North America at Patterson testified at trial that: “Even today” buying groups are “not an opportunity” Patterson is pursuing. (Rogan, Tr. 3605, 3609 (confirming that buying groups have never been part of Patterson’s core strategy); Misiak, Tr. 1500).

352. None of Patterson's trial witnesses could identify a specific buying group that Patterson worked with. (Guggenheim, Tr. 1568; Misiak, Tr. 1396; Rogan, Tr. 3468-69; McFadden, Tr. 2703-04).

353. Patterson's no buying group practice differs substantially from Schein's practice of evaluating each buying group, doing business with some and declining others. (Sullivan, Tr. 4020, 4086-87; Meadows, Tr. 2467-70; Titus, Tr. 5192, 5232; Steck, Tr. 3709; Foley, Tr. 4523, 4646-48; Cavaretta, Tr. 5531, 5536).

G. Schein's Conduct Was Consistent with Burkhart's, a Distributor Complaint Counsel Says Declined the Alleged Invitation to Collude.

354. According to Complaint Counsel, "Burkhart did what it was supposed to do" and "was not a part of the conspiracy." (Kahn, Tr. 20-21). It "did not agree to join and continued selling to buying groups." (CC Pretrial Br. at 36). The same is true of Schein – it continued to sell to buying groups throughout the alleged conspiracy.

355. Burkhart began working with buying groups in 2012, working with only two buying groups over the course of the alleged conspiracy period, and currently works with about six buying groups. (Reece, Tr. 4394, 4409, 4460, 4369-70). Similarly, Schein's leadership could not remember a time that Schein was not working with buying groups (*E.g.*, Sullivan, Tr. 4020; Foley, Tr. 4606), and the evidence discussed above indicates Schein has consistently worked with buying groups for even longer. (SF 159, 375-1335). In comparison to Burkhart's six buying groups, Schein worked with at least 25 buying groups during the alleged conspiracy. (SF 375-1335).

356. Both Burkhart and Schein expressed interest in doing business with Smile Source in 2012. (Reece, Tr. 4394-95; RX 2090; Sullivan, Tr. 4162).

357. Both Burkhart and Schein bid for Smile Source's business during the alleged conspiracy period – Burkhart in 2012 and Schein in 2014. (Reece, Tr. 4396-97; RX 2213; SF 1111-12, 1156-86).

358. Burkhart and Schein offered Smile Source members similar discounts during the alleged conspiracy period. (Maurer, Tr. 4942-43 ("Q. [D]id you consider this to be a competitive proposal by Henry Schein? A. Yes. It was similar to the deal we had in place with Burkhart."); CX 4105).

359. Both Burkhart and Schein currently work with Smile Source. (Reece, Tr. 4397-98, 4461; Steck, Tr. 3687; Sullivan, Tr. 4181).

360. Both Burkhart and Schein look for "stickiness" when evaluating potential buying group relationships. (Reece, Tr. 4456-58; Meadows, Tr. 2488, 2495, 2505-06, 2544-45; Sullivan, Tr. 4004).

361. Both Burkhart and Schein look at whether a buying group can deliver volume. (Reece, Tr. 4484-85; Meadows, Tr. 2490-92, 2500, 2559; Steck, Tr. 3729-30, 3748; Titus, Tr. 5218-19).

362. Both Burkhart and Schein recognize that not all buying groups are the same, not all will exhibit stickiness, not all can deliver volume, and some are likely to fail. (Reece, Tr. 4460, 4484, 4487-88; CX 0319 (Reece, IHT at 76 ("[T]hen there are other ones that are … a couple of guys that over cocktails decided they wanted to save money on supplies, so they formed a group of buddies"));Titus, Tr. 5270 ("Klearimpakt is a testimony that not all are created equal[.]" (quoting CX 2208)); Meadows, Tr. 2489 ("Not all buying groups could provide us with new customers….")).

363. Some of Burkhart's buying group relationships deteriorated over time, such as its relationship with Amerinet. (Reece, Tr. 4449-50). Similarly, Schein's relationship with the Dental Co-Op and Steadfast deteriorated over time. (SF 592-614, 1213-36).

364. Neither Schein nor Burkhart had a relationship with the Texas Dental Association regarding discounts to its members. (Reece, Tr. 4488-89; SF 1557-60).

365. In November 2013, Burkhart listed GPOs among its "key strategies." (CX 4214). Similarly, in December 2014, Schein listed its "GPO Strategy" as a "Strategic Priorit[y]." (CX 2475-009).

366. In 2014, neither Burkhart nor Schein had a formalized strategy for working with buying groups, but both were working on such a formalized strategy, including how to evaluate potential buying group opportunities. (CX 4247 (Dave Anderson at Burkhart recognizing "the importance of developing a strategy for working with GPOs," and asking for "some help in developing criteria to use for filtering these opportunities as they come up"); Reece, Tr. 4482-84; Meadows, Tr. 2591; CX 2352 (Jake Meadows: "I'd like to discuss GPO strategies at some point."); RX 2409 (September 24, 2014 agenda listing "buying groups … discussion around what our strategy should be"); Cavaretta, Tr. 5590 ("[W]e didn't really have a strategy. It was almost ad hoc.")).

367. Burkhart never contacted Benco, Patterson, or Schein to see if they were discounting to buying groups, never let them know what Burkhart's policy was, and never initiated a communication with a competitor about buying groups. (Reece, Tr. 4375, 4386). Likewise, Schein never contacted Benco or Patterson to see if they were discounting to buying groups, never let them know what Schein's policy was, and never initiated a communication with a competitor about buying groups. (SF 1396-93).

368. Both Schein and Burkhart, however, were contacted by Benco about buying groups. (Reece, Tr. 4375-81; SF 1396-578).

369. Neither Mr. Reece nor Mr. Sullivan reported those communications to their lawyers or anyone else in their respective companies. (Reece, Tr. 4486; Sullivan, Tr. 3952-54).

370. One thing the two did differently in response to Benco's communications, however, is that Mr. Sullivan told Benco they should not be talking about buying groups, while Mr. Reece did not. (Reece, Tr. 4486; Sullivan, Tr. 4206-07; SF 1330, 1492, 1509). Burkhart's Jeff Reece was contacted by Benco about buying groups on at least three occasions. (Reece, Tr. 4375, 4381, 4386)). Mr. Reece did not instruct Mr. Cohen to refrain from discussing such matters with him, and did not report the conversation. (Reece, Tr. 4486).

371. Benco's communications did not affect either Schein's or Burkhart's strategy with buying groups. (Reece, Tr. 4379-81, 4446, 4487; SF 1396-578).

372. Neither Burkhart nor Schein ever had a conversation with anyone at Patterson regarding buying groups. (Reece, Tr. 4490; SF 1579-84).

373. Neither Burkhart nor Schein has knowledge of Schein entering the agreement alleged by Complaint Counsel. (Reece, Tr. 4463, 4490; JF 89-96, 111).

374. In light of the facts, there are no meaningful differences between the actions of Schein and Burkhart with respect to buying groups, except that Schein (an alleged co-conspirator) actually did business with substantially more buying groups than did Burkhart (not alleged to be a conspirator).

III. AN INDEX OF SCHEIN'S BUYING GROUP DEALINGS.

375. Complaint Counsel defines buying groups as "organizations of independent dentists that seek to aggregate and leverage the collective purchasing power of separately-owned and

separately-managed dental practices in exchange for lower prices on dental products." (Complaint ¶ 3). As described below, Schein did business with dozens of such groups during the alleged conspiracy period.

376. Complaint Counsel also claims Respondents "were not willing to engage" in "a negotiation process" with buying groups. (Kahn, Tr. 24). The evidence as to Schein is to the contrary – Schein evaluated and negotiated with numerous buying groups throughout the relevant period.

A. Advantage Dental Group.

377. Advantage Dental is an insurance provider network with a separate buying group component and DSO component. (Foley, Tr. 4562-63; CX 0306 (Foley, IHT at 215-16)).

378. Advantage Dental offered membership in its buying group program to "dental practices that were independently owned without any equity ownership by Advantage Dental." (CX 8014 (Lauerman, Dep. at 42-43)).

379. Advantage Dental provides no "management services" to these "independently owned dental practices." (CX 8014 (Lauerman, Dep. at 44)).

380. Schein worked with Advantage Dental's buying group from at least 2009 to 2017. (RX 2668-001; CX 7101-140 (showing sales to Advantage Dental from 2009-2017)).

381. In addition to Advantage Dental's buying group, HSD also formed a relationship with the DSO component of Advantage Dental. (CX 8003 (Foley, Dep. at 4562-63)).

382. "[I]nitially, … both components of Advantage Dental fell under HSD, but when they needed some help on the software in creating rebates …, [Schein] moved … the DSO component … to Special Markets." (Foley, Tr. 4562-63).

383. Advantage Dental's buying group was a regionally-based buying group managed by the local Schein regional manager for the state of Washington. (RX 2638-001).

384. Schein began discussing a relationship with the Advantage Dental buying group as early as 2002. (RX 2752-001).

385. HSD provided discounted pricing to the Advantage Dental buying group through a volume purchase agreement which included various discounts on supplies. (Foley, Tr. 4699-700; RX 2638-001).

386. HSD also provided a 10% cash rebate back to the Advantage Dental buying group based on the volume of its member purchases. (RX 2502-001; RX 2638-001; RX 2639-001; RX 2668-001).

387. Around 2011, HSD needed assistance with its software offering to Advantage Dental and brought in Special Markets to help with related rebates. (Foley, Tr. 4563).

388. Around this time, HSD's relationship with Advantage Dental's DSO was transferred to Special Markets. (Foley, Tr. 4563). The Advantage Dental buying group remained with HSD. (Foley, Tr. 4563).

389. On August 1, 2011, Special Markets entered into a written agreement with Advantage Dental's DSO ("2011 Advantage Dental Agreement") effective through July 31, 2014. (RX 2291-001).

390. The agreement specified that the pricing offered to Advantage Dental's DSO could not be extended to the Advantage Dental buying group. (RX 2291-002; Foley, Tr. 4567-68). This was because Schein's vendor partners did not allow the rebates and pricing structures Schein offered to be extended outside of the DSO segment. (Foley, Tr. 4567-68; CX 8003 (Foley, Dep.

at 214, 246)). Moreover, these vendor partners only allowed chargebacks for business done with DSOs. (Foley, Tr. 4701; CX 8003 (Foley, Dep. at 246)).

391. Special Markets entered into a subsequent agreement with Advantage Dental's DSO effective August 1, 2014 through July 31, 2017 ("2014 Advantage Dental Agreement"). (RX 2274-002).

392. While the 2011 Advantage Dental Agreement and 2014 Advantage Dental Agreement did not cover the buying group, HSD nevertheless extended discounts and rebates to the Advantage Dental buying group. (Foley, Tr. 4567-68, 4699-700; RX 2502-001; RX 2638-001; RX 2639-001; RX 2668-001; RX 2751-001; RX 2752-001). [6]

393. As a group of independent dentists receiving discounts and rebates based on the group's collective purchases, the Advantage Dental buying group meets Complaint Counsel's definition of a buying group. (Complaint ¶ 3).

394. Schein's relationship with the Advantage Dental buying group is inconsistent with the alleged conspiracy. (Complaint ¶ 1).

B. Alpha Omega.

395. Alpha Omega is a dental fraternity composed of independent dentist members. (Steck, Tr. 3765-66).

396. As a group of independent dentists receiving a discount on dental supplies, Alpha Omega meets Complaint Counsel's definition of a buying group. (Complaint ¶ 3).

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[6] Complaint Counsel claims that the Advantage buying group arm is supplied by Darby, relying on a quick reply email from Mr. Foley drafted just 7 minutes after the original. (CX 2641). Mr. Foley testified that the inclusion of Advantage in the list of Darby buying groups was a "mistake." (Foley, Tr. 4565-66). Importantly, Darby produced its buying group contracts and Advantage Dental was not among them. (RX 3078-3085). Also, Complaint Counsel's expert, Dr. Marshall listed total annual sales from Schein to Advantage Dental of over [redacted] in 2014, of which [redacted] came from the buying group arm served by HSD, which Mr. Foley referred to as the "competition." (CX 2081-002; CX 7101-140 (Marshall Rebuttal Rpt., Figure 13, showing sales figures for Advantage Dental); Foley, Tr. 4564).

397. In the early 2000s, Schein began offering a rebate and a discount program to dentist members of Alpha Omega as a result of their membership in Alpha Omega and continues to do so today. (Steck, Tr. 3765; Meadows, Tr. 2843, 2650-51; Cavaretta, Tr. 5576; CX 2927-001 (showing Alpha Omega sales and rebates in 2012 and 2013); *see also* CX 7101-140 (identifying Alpha Omega sales in Schein's sales data from 2009 through 2016)).

398. Schein's relationship and sales to Alpha Omega are inconsistent with the alleged conspiracy. (Complaint ¶ 1).

C. Blue Chip Dental from Michigan.

399. Schein's Jake Meadows and his team considered partnering with Blue Chip Dental, a start-up buying group, around 2016. (CX 8016 (Meadows, Dep. at 65)).

400. After engaging with the founders, Mr. Meadows concluded that Blue Chip Dental would not be a good fit for Schein. (CX 8016 (Meadows, Dep. at 65)). Mr. Meadows had concerns about the organizational structure of the start-up group and that they were unable to provide information on how they would bring value to their members. (CX 8016 (Meadows, Dep. at 66)). Mr. Meadows ultimately concluded that it would not be a good business decision for Schein to partner with Blue Chip Dental. (CX 8016 (Meadows, Dep. at 66)).

401. Schein's evaluation of and decision not to do business with Blue Chip Dental further supports Schein's position that it continued to evaluate buying groups case-by-case based on each group's value proposition and ability to drive compliance, as it had done before and during the alleged conspiracy. (Titus, Tr. 5199-202, 5274; Meadows, Tr. 2495, 2506, 2544; Sullivan, Tr. 4088, 4098-99; Cavaretta, Tr. 5574-76; Foley, Tr. 4638-39, 4614-15).

D. Breakaway.

402. Joe Cavaretta, former Schein Vice President of Sales for the West and "now [P]resident of the company that owns Breakaway," testified he would "classify Breakaway as a buying group." (Cavaretta, Tr. 5599).

403. Breakaway is a buying group that also has some DSO and MSO-like characteristics. For instance, a few Breakaway offices are owned by the group's founder (DSO-like), some offices receive Breakaway's suite of nonclinical business support services (MSO-like), and other offices elect to receive discounts only (buying group). (CX 2190-003 (an internal Schein document listing Breakaway's "several divisions")).

404. As Dave Steck testified, there are groups "that do both" buying group and managed services. (Steck, Tr. 3745).

405. Breakaway's "smallest arm" is their owned offices, while the group's "largest arm" are its "support members, which [is] similar to … a buying group arm." (CX 8009 (Wingard, Dep. at 156)). Breakaway also has "affiliates and de novos," for which members can "sign a contract with Breakaway to help them expand and grow and actually build practices from the ground up." (CX 8009 (Wingard, Dep. at 156-57); *see also* RX 2645-001, RX 2646-001 (describing Breakaway's "several divisions"); RX 2647-002 (describing the "exclusive distributor partnership with Henry Schein"); Titus, Tr. 5331 (Breakaway's members included "individually owned practices")).

406. Schein's Randy Foley referred to Breakaway as the "anti-DSO," because the group's "whole premise … is that they assist dentists, private dentists, that are working with DSOs on how to break away from the DSO and go into practice by themselves." (Foley, Tr. 4634).

407. Breakaway offers independent dentists the option to utilize nothing but Breakaway's discounts ("handled much like a buying group"), or to take advantage of more comprehensive nonclinical business services as well. (CX 2190-003).

408. While Brian Brady emailed Hal Muller on June 30, 2015 that Ms. Titus told him Breakaway initially started as a "pure GPO model" but was no longer a "GPO" by June 2015, Mr. Brady testified that Breakaway was "a buying group," with "a couple different buckets" of members, some owned by the group's founder, and some independently owned (only some of which received management services from Breakaway). (CX 8020 (Brady, Dep. at 243-44); CX 2133-001, -003). Moreover, Ms. Titus does not recall telling Mr. Brady that Breakaway was not a "GPO." (Titus, Tr. 5238). Ms. Titus also testified that Mr. Brady's statement that Breakaway was not a "GPO" never came to be true – they continued to operate as a buying group. (Titus, Tr. 5238).

409. Moreover, while Mr. Cavaretta described Breakaway to Mr. Sullivan on August 18, 2015, as "a DSO/MSO combo" while Smile Source is "a flat out buying group," Mr. Cavaretta explained at trial that his statement reflected his understanding of Breakaway's make-up at the time, but that he later learned that Breakaway did in fact maintain a buying group component and was "really more of a buying group." (Cavaretta, Tr. 5633-34, 5655; (CX 2482-001)).

410. Schein considers and treats Breakaway as a buying group. (Meadows, Tr. 2484 ("I would consider [Breakaway] a buying group."); Steck, Tr. 3774; Foley, Tr. 4644 ("Breakaway is a buying group."); Titus, Tr. 5263 ("Breakaway is a buying group."); Cavaretta, Tr. 5599 ("I'd classify Breakaway as a buying group."); CX 2515-001 ("Please add Breakaway Dental, Denali Dental and Dental Gator to the GPO list.")).

411. Complaint Counsel claims Breakaway is not a buying group because it also has DSO and MSO-like components. (CC Pretrial Br. at 37). But the fact that Breakaway does more than just function as a discount-only buying group does not mean that it is not a buying group. (Cavaretta, Tr. 5599-600, 5655; Foley, Tr. 4634-35 ("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."); Titus, Tr. 5327, 5531, 5341). One of Breakaway's primary functions is to help independent dental offices leverage their buying power to obtain lower prices on dental products. (CX 2190-001, -003). To the extent there was any prior confusion about the nature of Breakaway, Mr. Cavaretta's testimony clarified and confirmed at trial that Breakaway is a buying group. (Cavaretta, Tr. 5599). Breakaway therefore meets Complaint Counsel's definition of a buying group. (Complaint ¶ 3).

412. Randy Foley testified that Schein's Special Markets formed a relationship with Breakaway in 2010 or 2011. (Foley, Tr. 4634; Cavaretta, Tr. 5600-01).

413. When Schein created the Mid-Market division in 2014, it transferred Breakaway from Special Markets to the Mid-Market division, under HSD. (Foley, Tr. 4635; Cavaretta, Tr. 5599; Titus, Tr. 5249, 5263). While Breakaway was a Special Markets customer, Special Markets extended discounts to Breakaway. (Foley, Tr. 4635). After Breakaway transferred to Mid-Market, it continued to receive discounts from HSD and actually received a greater discount than it was getting in Special Markets. (Titus, Tr. 5249, 5263, 5267-68; Foley, Tr. 4635 (HSD "added another 5 percent to an admin fee" for the group)).

414. In 2014, Kathleen Titus, the "new director for [Schein's] Mid-Market emerging group practice," wanted to learn more about Breakaway so she "could understand their needs more thoroughly." (Titus, Tr. 5249).

415. At the time Ms. Titus started to "collect information," she "didn't know very much about Breakaway other than they were a buying group." (Titus, Tr. 5264).

416. Ms. Titus took it upon herself to "develop a relationship with Breakaway" and learn more about them – she was not instructed to do so by her boss Joe Cavaretta or anyone else at Schein. (Titus, Tr. 5264-65, 5288).

417. Ms. Titus confirmed that the group's founder, Dr. Leune, had a majority share in eight locations while the "rest [were] solo providers" that made their own purchasing decisions. (CX 2077-003-04; Titus, Tr. 5340).

418. At the time, "Breakaway had an extremely large national footprint. They were doing business with private practice dentists, and those dentists were building practices throughout the United States." (Titus, Tr. 5266-67).

419. As Ms. Titus continued her due diligence, she reported on May 20, 2014 that the Breakaway relationship was creating some confusion with local Schein teams that needed to be resolved. (CX 2077-003 ("Breakaway Practice LLC is creating a lot of chatter and disruption across our entire org in multiple geographies…. My goal was to put a critical eye to the relationship and discover a way to live harmoniously with the 'deal' they have been (verbally) offered."); Titus, Tr. 5266-67)).

420. Breakaway's rapid growth created some logistical difficulties for Schein. (Titus, Tr. 5266). When a "new Breakaway [office] was opening in a location that had a distant geography

from the home office in San Antonio, Texas, there was no communication with the local [Schein] team that was required to engage with the practice." (Titus, Tr. 5266-67).

421. Ms. Titus also noted the lack of a formal agreement with Breakaway and the lack of exclusivity. (CX 2077-004 (noting that "Breakaway promotes a number of our competitors," and to her knowledge there had "been no discussion with Dr. Leune about making Schein an exclusive partner"); *see also* RX 2323-002 (informing Hal Muller and Randy Foley that Breakaway was receiving Special Markets pricing without a formal agreement, and asking if they wanted to continue under that arrangement)).

422. Ms. Titus's report sparked an internal conversation at Schein about Breakaway. (CX 2077-001-02). Hal Muller wrote that Breakaway "sounds like a cross between Comfort Dental and Smile Source," and Ms. Titus agreed saying, "I would say Smile Source is a reasonable facsimile." (CX 2077-001-02).

423. Ms. Titus asked for guidance on how to handle the relationship because "the Affiliates present as solo providers," but they were receiving Special Markets pricing, and Schein's FSCs had difficulty understanding how to deal with individual practices getting pricing and support from an entirely different division within Schein. (CX 2077-001).

424. Ms. Titus recognized that Breakaway was a good partner. She wanted to "work together to introduce more Henry Schein products and services into their environment" and to coordinate communication between the group and Schein's local sales teams across the country. (Titus, Tr. 5264-65, 5267; RX 2718-001 ("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." (emphasis added))).

425. The May 2014 email exchange within Schein reflects the challenges and internal conflicts that buying groups posed to Schein's divisions, and Schein's deliberate efforts to find solutions to those problems, by moving buying groups like Breakaway into Mid-Market, and investigating and rationally discussing the merits and difficulties of particular groups. (CX 2077-001-04).

426. Despite the challenges, Schein continued working with the Breakaway buying group and offered its members discounts throughout 2014. (RX 2114 (noting in February 2015 that Schein was adding new members for Breakaway); Titus, Tr. 5267-68; Foley, Tr. 4635).

427. In early 2015, Ms. Titus again began evaluating Schein's relationship with Breakaway to determine how Schein could help better meet the needs of Breakaway's members and grow the business. (RX 2114-001; Titus, Tr. 5264-65).

428. On April 16, 2015, Ms. Titus and Kip Rowland, a Schein Regional Account Manager, met with the Breakaway team in person. (RX 2660-001).

429. Ms. Rowland's notes of the meeting described Breakaway's "three divisions": a "Seminars" division offering seminars on building a new office and business matters; a "Virtual Services" division that covered "Front Office Tasks," "Insurance," "IT Support," "Search Engine Marketing," and more; and an "Affiliates" division of start-up dental offices funded with a $50,000 initial investment and put on a 5-year contract with Breakaway. (CX 2815-002).

430. Breakaway made all of its virtual services "a la carte," giving members the option to choose which services they wanted. (CX 2815-001-02).

431. Mr. Cavaretta and Tim Sullivan were forwarded Ms. Roland's notes on Schein's meeting with Breakaway. (CX 2815-001).

432. After meeting with Breakaway, Ms. Titus described Breakaway as much more than just a buying group. (CX 2240-001).

433. On April 20, 2015, Ms. Titus followed up with Breakaway and indicated that she was "blown away" by Breakaway and had immediately called Joe Cavaretta to describe the group's innovative model. (RX 2660-001). Ms. Titus also thanked Breakaway for its "sincere partnership up to now" and for the "the steady flow of business you drive to Henry Schein." (RX 2660-001).

434. On June 29, 2015, Schein entered a Prime Managed Group Dental Supplier Distributor Agreement with Breakaway's owned practices, as well as "a separate agreement" with the group's buying group arm of "individually owned practices." (Titus, Tr. 5331; RX 2348-001).

435. 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] (RX 2348-001). As such, Breakaway was prohibited from offering its discounts to dentists "without commitment to … the prime vendor agreement." (RX 2348-001). Breakaway's commitment was set at [redacted], and it received discounts of up to [redacted]. (RX 2348).

436. Brian Brady, Director of Group Practices in the Mid-Market Division, called the contract a "significant win" poised for \$10 to \$13 million of growth. (CX 2133-003). The contract was so significant that Mr. Muller asked whether Breakaway should be an Elite account in Special Markets rather than Mid-Market. (CX 2133-001). However, Breakaway stayed with Schein's

Mid-Market division and was eventually transferred to Schein's APC division because it was "more of a buying group" than a "Special Markets DSO customer." (Cavaretta, Tr. 5655; RX 2947 (Cavaretta, Dep. at 31-32)).

437. Schein's Mid-Market group nourished Schein's relationship with Breakaway and Schein continued working with Breakaway until it was purchased by Dental Whale in 2018. (Titus, Tr. 5265, 5268; RX 2947 (Cavaretta, Dep. at 31-32); Cavaretta, Tr. 5599-601; Foley, Tr. 4635).

438. Schein's sales and discounts to Breakaway, both during and after the alleged conspiracy, contradict Complaint Counsel's claims. (Complaint ¶ 1).

439. Patterson and Benco also viewed Breakaway as a buying group and knew Schein was doing business with Breakaway. (McFadden, Tr. 2847 (equating Breakaway to Smile Source); RX 0597-001 (internal Patterson email from April 13, 2016, indicates Patterson concluded Henry Schein "is treating [Breakaway] as a buying group"); (Ryan, Tr. 1207 ("[Breakaway is] a group of practice coaches… and as part of what they do they do a GPO within that."); CX 0010-001-02 (Benco email describing Breakaway as a "buying club" and "buying group")).

440. On January 15, 2015, Benco's Regional Manager for the Carolinas Region, Brad Bingaman, emailed Benco's Patrick Ryan to ask if he knew about Schein working with Breakaway. (CX 0010-002).

441. Despite being aware that Schein was working with Breakaway, Mr. Ryan never "reach[ed] out to anyone at Schein" regarding Breakaway. (Ryan, Tr. 1207-08).

442. Benco's Chuck Cohen also never discussed Breakaway with anyone at Schein. (Cohen, Tr. 914).

443. Benco's conduct after learning about Schein's relationship with Breakaway contradicts Complaint Counsel's conspiracy allegations. (Complaint ¶ 8).

444. In contrast to Schein's partnership with Breakaway, when approached by the group, Benco refused to work with Breakaway citing Benco's policy that "we don't work with GPOs." (Ryan, Tr. 1207).

445. The different approaches Schein and Benco took with respect to Breakaway is an example of non-parallel conduct and is inconsistent with Complaint Counsel's alleged conspiracy. (*See* Complaint ¶ 1).

E. Business Intelligence Group.

446. Complaint Counsel claims Schein declined to enter into an agreement with Business Intelligence Group ("B.I.G.") "as a result" of the alleged conspiracy. (RX 3087-004).

447. On February 1, 2011 – before any alleged agreement between the Respondents – HSD's Bret McCarroll inquired internally if there was any interest in "a marketing and consulting group called Business Intelligence Group that is interested in forming a buying group for dentists." (CX 0165-002-03).

448. According to Mr. McCarroll, B.I.G. ran marketing campaigns for over 150 dental clients. (CX 0165-002).

449. Mr. McCarroll described B.I.G.'s buying group concept as linked to its marketing campaigns. For example, if B.I.G. ran a "whitening campaign for $49.00 through Groupon…[,] [e]ach of the dental practices will need to get their [whitening] supplies from somewhere." (CX 0165-003).

450. As described by Mr. McCarroll, B.I.G.'s goal was not to enter into an agreement with Schein covering all of Schein's thousands of products and offerings, but rather "to supply the … product[s] for any campaign they run." (CX 0165-003).

451. Kathleen Titus, who at the time was the Western Zone Manager for Special Markets, responded "I can tell you … with authority that [B.I.G.] is not something [Special Markets] would be interested in[,]" explaining that, even though Special Markets had primary responsibility for buying groups at the time, "[t]he participants are Private Practice customers which rules [Special Markets] out." (CX 0165-002; Titus, Tr. 5335-36 ("[T]he characteristics of the customer described was more focused on interface with our field sales consultants and our regional managers, as well it was highly regionalized, so this would be a much better fit for our HSD division where those things could be assured.")).

452. Furthermore, Ms. Titus noted B.I.G.'s "targets [were] invariably going to be existing HSD customers," raising the risk that Schein would be cannibalizing its own business. (CX0165-002).

453. Despite the testimony from Schein witnesses that Special Markets had primary responsibility for buying groups prior to mid-2014, Complaint Counsel claims the opposite, relying on Ms. Titus's email regarding B.I.G. (CX 0165-002). However, this opportunity was referred to Special Markets by HSD Regional Manager Bret McCarroll in keeping with Special Markets primary responsibility. (CX0165-003). 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. (Titus, Tr. 5335-36).

454. Ms. Titus copied Joe Cavaretta to allow him the opportunity to evaluate whether B.I.G. might be a fit for Henry Schein Dental. Mr. Cavaretta responded – again, before the start of the

alleged conspiracy – that "[d]ealing with GPOs is incredibly risky on many fronts … margins will go down and commissions of course will follow…. This is the very abbreviated version and if you would like to talk live please let me know." (CX 0165-001-02; *see also* Sullivan, Tr. 3918-19).

455. Mr. Cavaretta explained in more detail at trial. The risks he was referring to in his February 1, 2011 email included the lack of compliance or a value proposition, as well as the risk of cannibalization given Schein's high market share. (Cavaretta, Tr. 5644-45).

456. In Mr. Cavaretta's mind, buying groups were not a part of the market that Schein was targeting at the time, in February 2011. (CX 0305 (Cavaretta, IHT at 134)).

457. Tim Sullivan was forwarded the email chain regarding B.I.G. (CX 2455).

458. As Mr. Sullivan testified, the email "highlights an internal challenge and conflict that we had" between divisions as to how to deal with and approach buying groups. (Sullivan, Tr. 3915-16 (Schein was "working to set some guidelines around who was going to approach groups, whether it was Special Markets or HSD" and if B.I.G. joined Special Markets, "then those private practices that are currently in HSD's P&L, those FSCs would move over to Special Markets, which creates internal challenges for us."), 3918).

459. B.I.G. tried again in May 2011, still before Complaint Counsel alleges the conspiracy began. Schein's Philip Toh spoke with the CEO of B.I.G., Alex Dastmalchi, long enough to draft a detailed summary of B.I.G.'s proposal. (RX 2311). Mr. Toh explained that B.I.G. wanted to "start to charge the dentists for … better pricing" on supplies and equipment so that B.I.G. could "make money on patients and the dentist." (RX 2311-002).

460. Hal Muller, head of Special Markets, which had primary responsibility for buying groups at the time, responded that it was a "nice write up[,]" but it was "[n]ot our type of account." (RX 2311-001).

461. As Ms. Titus did in February 2011, Mr. Muller advised to "pass this on to Dave Steck" so that HSD could evaluate the opportunity. (RX 2311).

462. Mr. Toh did pass the note on to Mr. Steck, and then on to Mr. Cavaretta, who said, "I'm willing to sign an[] NDA to learn more[,]" while also noting "[y]ou know where I stand on Co-ops and GPOs and to me this potentially sounds like the same thing but with a different spin." (CX 2686-001).

463. Mr. Toh introduced Mr. Cavaretta to B.I.G.'s CEO, Mr. Dastmalchi, by email, noting Mr. Cavaretta "would like to discuss potential opportunities with you." (RX 2664).

464. Mr. Cavaretta responded that he was "very interested in learning more about what [B.I.G. was] doing." (RX 2664-001).

465. There is no evidence that Schein ultimately entered into a relationship with B.I.G., but, in any event, Schein's interactions with B.I.G. are all before the alleged conspiracy period. (*See* Complaint ¶ 32).

466. Complaint Counsel presented no evidence that Schein's decision with respect to B.I.G. was unreasonable, against its unilateral interests, or in concert with Benco or Patterson. (*See* Marshall, Tr. 2987-88, 2990; CX 7100-211, n. 851).

467. Schein's interest in learning more about B.I.G. is inconsistent with the alleged conspiracy (Complaint ¶ 1).

F. California Dental Association – The Dentists' Service Company ("TDSC").

468. In June 2015, the California Dental Association ("CDA") formed a subsidiary named The Dentists' Service Company ("TDSC") to provide its California-licensed member dentists with services such as "marketing, practice advising, human resources, group purchasing, and assistance with forming group practices." (CX 2954-002; Steck, Tr. 3717).

469. Complaint Counsel claims Schein refused "to provide discounts to or otherwise compete for the business of" TDSC as a result of the alleged agreement. (RX 3087-004). The evidence does not support this claim.

470. Complaint Counsel's own expert, Dr. Marshall, did not list CDA or TDSC as a buying group that Schein "turned down." (CX 7100-209-13).

471. Before TDSC was created, Schein met with CDA representatives on at least two occasions in 2014 regarding the formation of TDSC and a potential buying group program for CDA members. (Steck, Tr. 3717-18, 3857-59; Sullivan, Tr. 4235-36).

472. In October 2014, Mr. Sullivan internally proposed providing the CDA with an offering similar to what Schein presented to Smile Source in 2014, including both business solutions and discounts on supplies. (RX 2338-002; Sullivan, Tr. 4236).

473. After learning of the TDSC launch in June 2015, Schein drafted a follow-up letter to Peter DuBois, Executive Director of the CDA, in which Schein offered to provide an administrative fee to the CDA, business solutions services, a TDSC sales and pricing plan, and a pricing formulary for TDSC members. (CX 2264-002; Steck, Tr. 3859-60).

474. Despite Schein's proposal, TDSC later issued a "Request for Proposal of Dental Supplies for CDA members" (RFP) on January 4, 2016. (RX 2131-001; RX 2132-007; RX 2227-003).

475. Schein submitted a response to the RFP on January 27, 2016 and thereafter met with the CDA to present its proposal on March 3, 2016. (Sullivan, Tr. 4236-37; Steck, Tr. 3725-26; RX 2234-001, -003-99; CX 2486-001).

476. On April 1, 2016, TDSC awarded Schein certain categories of products to sell in connection with TDSC's supply program and provided a proposed agreement. (RX 2246-001-03).

477. TDSC's proposed agreement was problematic for Schein as it would require Schein to limit its sales to CDA members (i.e., California dentists) to only certain categories of products for which it was the winning bidder. (Sullivan, Tr. 4237-38).

478. TDSC's proposal posed further problems in that it contemplated that customer orders would be placed directly with TDSC, not Schein. (Sullivan, Tr. 4237-38; RX 2927-001). Schein had not agreed to or even discussed allowing its customers' orders to be placed directly with the CDA. (Sullivan, Tr. 4237-38).

479. As Schein explained to TDSC at the time: "Our issues are with the membership enrollment and ordering process and removing the positive influence Henry Schein Dental has with customers. With our current market share in California, the TDSC and Henry Schein will become competitors using this process. We cannot encourage good HSD customers to join the TDSC plan without endangering the majority of our business with them." (RX 2608-002; CX 0305 (Cavaretta, IHT at 178-79); Cavaretta, Tr. 5608 (noting that Schein had over fifty percent market share in California)).

480. Despite its concerns, Schein nevertheless continued to negotiate with TDSC and alternatively offered to: (1) construct a Schein formulary that would mirror the TDSC formulary (including identical products and pricing); (2) offer the formulary to any customer who joins the TDSC plan; and (3) allow the "mutual" customers to place orders through the Schein system and Schein would still pay TDSC the 3% administrative fee. (RX 2608-002; Sullivan, Tr. 4237-38).

481. TDSC rejected Schein's alternative offer. (Sullivan, Tr. 4238).

482. Schein's negotiations, bids, proposals, and decision-making with regard to CDA had nothing to do with Benco or Patterson, but rather Schein's own business. (Sullivan, Tr. 4238-39; Steck, Tr. 3727).

483. There is no evidence of any communications between Schein, Benco, and/or Patterson regarding the CDA or TDSC. (Sullivan, Tr. 4238; CX 8023 (Guggenheim, Dep. at 407-08)).

484. Benco responded to the CDA and TDSC entirely differently than Schein: "We appreciate you considering us for this opportunity, however, Benco Dental, as a matter of policy, does not participate in GPOs." (RX 1065-002).

485. Patterson also responded to the CDA and TDSC entirely differently than Schein: "we cannot participate in this current RFP." (RX 0551-001).

486. Schein's willingness to do business with the CDA and TDSC, and its efforts to do so, differed substantially from Benco and Patterson and are inconsistent with the alleged conspiracy. (Complaint ¶ 1; RX 1065-002; RX 0551-001; RX 2234-001, -003-99).

G. Columbia University Medical Center.

487. In 2015, Schein worked with the Columbia University Dental School faculty to set up a buying group of independent dentists. (RX 2739-003; RX 2740-001 (listing Columbia faculty members); RX 2741-001).

488. Schein developed a "customized offering [for] the Faculty of Columbia" that included a "10% catalog discount" in exchange for a "$15,000 yearly merchandise commitment," a "12% catalog discount" for a "$36,000 yearly merchandise commitment," and a "15% catalog discount" for a "$75,000 yearly merchandise commitment." (RX 2741-001-02).

489. Schein also prepared promotional materials for the Columbia buying group listing "Benefits – for every Adjunct Faculty Member!" and an offering to place each adjunct faculty member "on a customized formulary for the group." (RX 2739-003).

490. Schein's promotional materials advertised "[m]any of our supplier partners are willing and anxious to work with Henry Schein and your group to organize continuing education events." (RX 2739-003).

491. Schein tracked interest from the Columbia professors, but found the dentists did not want to meet, or were "not interested" in the program. (RX 2740 (tab titled "People That Call In," column "AE")).

492. Schein's willingness and efforts to establish a buying group with the Columbia University Dental School Faculty is inconsistent with Complaint Counsel's alleged conspiracy. (Complaint ¶ 1; RX 2741-001-02).

H. Comfort Dental.

493. Comfort Dental describes itself as a dental franchise, with its locations independently owned and operated. (RX 2877).

494. Comfort Dental's members consist of private practices focused on pediatric dentistry. (Foley, Tr. 4632-33).

495. Comfort Dental is a "franchisee/franchisor-type buying group, similar to Smile Source." (Foley, Tr. 4632-33).

496. Comfort Dental has agreements with each of its members allowing them to operate as a franchisee. (Foley, Tr. 4633).

497. Comfort Dental advertises its offerings to members as including "economics [*sic*] of scale, prime locations, mass marketing, and overhead control." (RX 2877-001).

498. Comfort Dental's relationship with Schein began with HSD in the late 1990s, and the relationship remains in place today. (CX 2947 (Cavaretta, Dep. at 35); Foley, Tr. 4633; *see also* CX 7101-140 (identifying Comfort Dental's sales in Schein's sales data from 2009 through 2017)).

499. Comfort Dental was initially an HSD customer, but as they grew, they required more centralized support. (CX 2109-002; Foley, Tr. 4632-33).

500. Comfort Dental sent the business out to bid in April 2010, and Schein decided that "it would be best to have [Special Markets] respond." (CX 2109-002; Foley, Tr. 4632-33).

501. Schein won the business with an "aggressive" "new plan that was designed to save them nearly $1M in merchandise spend." (CX 2109-002; Foley, Tr. 4632-33). Comfort Dental eventually became one of Schein's largest buying groups, with over [redacted] in annual purchases by 2015. (*See* CX 7101-140 (Figure 13)).

502. Special Markets has provided discounts to Comfort Dental since at least 2012. (Foley, Tr. 4634).

503. In addition to providing discounts to Comfort Dental, Special Markets also paid Comfort Dental an administrative fee. (Foley, Tr. 4634).

504. Complaint Counsel points to internal Schein documents labeling Comfort Dental as an "Elite DSO." (CX 2021). Mr. Sullivan testified that while Mr. Porro, a zone manager, was "digging into this," Mr. Sullivan felt Comfort Dental exhibited "primarily buying group type attributes." (Sullivan, Tr. 3969). In any event, Schein's categorization of Comfort Dental for internal accounting purposes between divisions does not impact the actual nature and characteristics of Comfort Dental as a group of independent dentists. (*See* RX 2767-002 (explaining that the language Schein used to describe accounts was in part to delineate which groups "should be HSD" and which "should fall into [Special Markets]")). As Mr. Meadows testified at trial, a group that Complaint Counsel agrees is a buying group – Dental Gator – was also "rolled into the elite DSO" category within Schein. (Meadows, Tr. 2657).

505. A buying group with "500 offices moving to 1500 clearly fall into the elite-DSO model" even though "they are all individually owned" "like Comfort Dental." (CX 2119-001).

506. Mr. Muller explained that groups like this were "sophisticated buying group[s] – their goal is to help offices compete with the DSOs." (CX 2119-001).

507. Despite internal Schein documents labeling Comfort Dental as an "Elite DSO," Mr. Foley confirmed at trial that Comfort Dental is not a DSO, and instead is a "very anti DSO" group that "never attended any DSO meetings." (Foley, Tr. 4633). Mr. Foley consistently describes Comfort Dental's business model as "more of a GPO, Franchisor-Franchisee." (CX 2109-002).

508. Complaint Counsel also points to deposition testimony from some Schein witnesses suggesting that Comfort Dental might own some practices, but not all of their member practices. (CX 0311 (Sullivan, IHT at 331-32 ("[T]hey own some of their practices. They don't own all of them.")); CX 8033 (Cavaretta, Dep. at 36)). At most, this testimony from HSD executives indicates that at least some if not most Comfort Dental members are independent dental offices, which is not inconsistent with Complaint Counsel's definition of a buying group. (Complaint ¶ 3). Nevertheless, Special Markets managed the relationship, and as stated above, Special Markets confirmed that Comfort Dental is a buying group. (Foley, Tr. 4632-33).

509. More importantly, Comfort Dental itself asserts that "[a]ll of [its] locations are independently owned and operated." (RX 2877-001).

510. The weight of the evidence supports Schein's position that Comfort Dental, like Smile Source, meets Complaint Counsel's definition of a buying group. (Complaint ¶ 3).

511. Schein's relationship with Comfort Dental is inconsistent with the alleged conspiracy. (Complaint ¶ 1).

I. Corydon Palmer Dental Society.

512. Schein has done business with the Corydon Palmer Dental Society ("Corydon Palmer") since January 1, 2015. (CX 4092-001 (contract effective January 1, 2015); Baytosh, Tr. 1912).

513. The 2015 agreement between Schein and Corydon Palmer was renewed January 1, 2017 with a contract titled "Primary Vendor Agreement, Buying Group." (RX 2033-001; Baytosh, Tr. 1916-17).

514. Under both the 2015 and 2017 agreements, Schein agreed to pay Corydon Palmer a rebate calculated as a percentage on members' "total merchandise purchases" from Schein. (CX 4092-001; RX 2033-001).

515. The more Corydon Palmer members purchase from Schein, the greater the rebate. (Baytosh, Tr. 1913).

516. Corydon Palmer is the local component of the Ohio Dental Association, which is the state component of the American Dental Association. (Baytosh, Tr. 1876-78).

517. In order to be a member of Corydon Palmer, membership in all three (national, state, and local) is required. (Baytosh, Tr. 1878-79).

518. The majority of Corydon Palmer members are independent dentists. (Baytosh, Tr. 1898-99).

519. Corydon Palmer does not have any ownership interest in its member practices. (Baytosh, Tr. 1899).

520. Corydon Palmer represents about 230 dentists in three counties in the state of Ohio. (Baytosh, Tr. 1877, 1898-99).

521. Corydon Palmer's mission is to represent and promote its members' collective interests. (Baytosh, Tr. 1899; *see also* RX 2852 ("The mission of the Corydon Palmer Dental

Society is to collectively promote, educate and represent members of the dental society and thereby better serve the health of our community.”)).

522. In furthering its mission, Corydon Palmer incurs operating costs, which include putting on education programs and paying the executive director’s salary. (Baytosh, Tr. 1903-04).

523. One of the major sources of revenue to pay for those operating costs comes from members’ pockets in the form of membership dues. (Baytosh, Tr. 1904).

524. One aspect of Corydon Palmer’s mission to benefit its members is keeping membership dues low. (Baytosh, Tr. 1904).

525. As part of its mission, Corydon Palmer has entered into arrangements with a number of vendors to obtain rebates, discounts, or both. (Baytosh, Tr. 1900-03). These include Diagnostic Direct for gloves, Kettenbach for impression materials, and Henry Schein for its full range of merchandise. (Baytosh, Tr. 1900-03).

526. Corydon Palmer thus meets Complaint Counsel’s definition of a buying group as “independent dentists that seek to aggregate and leverage the collective purchasing power of separately-owned and separately-managed dental practices in exchange for lower prices on dental products.” (Complaint ¶ 3).

527. There are two general ways a vendor can offer a discount program: (1) through up-front discounts on the purchase price of supplies; and (2) through rebates that are paid back after the fact. (Baytosh, Tr. 1901).

528. In November 2014, Dr. Joseph Baytosh, who was President of the Corydon Palmer Society, began negotiations with Schein on behalf of the Corydon Palmer members. (Baytosh, Tr. 1879-82, 1900, 1906).

529. Dr. Baytosh approached Mark Sirney – a regional manager at Schein – with an idea for "a buying club … as well as a rebate program." (Baytosh, Tr. 1883).

530. The rebate program was akin to a program Schein already had established with another local dental society in Ohio, the Stark County Dental Society, under which Schein would pay a rebate to the society based on a percentage of the members' total purchases from Schein. (Baytosh, Tr. 1883, 1890).

531. Dr. Baytosh sought to use the fact that Corydon Palmer had a large number of member dentists purchasing from Schein to obtain a rebate from Schein based on those collective purchases. (Baytosh, Tr. 1905-06).

532. The buying club idea would have provided up-front discounts, allowing "dentists to purchase supplies at a lower rate than they could by themselves." (Baytosh, Tr. 1883, 1906-07).

533. Schein's response was that a buying club was something that could be "put together" but "the logistics and the time that it would take to set it up would be pretty time consuming." (Baytosh, Tr. 1884, 1907).

534. Forming a buying club would have required studying member purchase history in order to create a custom formulary for the group. (Baytosh, Tr. 1907-08).

535. The rebate program, on the other hand, was something that could be "implement[ed] right away [to] give some kind of benefit to [the] society." (Baytosh, Tr. 1885).

536. Schein "offered both avenues" – the rebate program and the buying club program to Corydon Palmer. (Baytosh, Tr. 1910-11).

537. However, the ability to implement a program quickly was "appealing" to Dr. Baytosh, and he chose to pursue the rebate program over setting up a buying club. (Baytosh, Tr. 1907,

1909; *see also* CX 8030 (Baytosh, Dep. at 51 ("I really wanted to come back with something to our membership that we could put into place very quickly, and the rebate program met that."))).

538. After Corydon Palmer selected the rebate program, it never again inquired with Schein about setting up a buying club program. (Baytosh, Tr. 1910).

539. Dr. Baytosh did not have any interest in setting up an additional program with Schein beyond the rebate program. (CX 8030 (Baytosh, Dep. at 40-41)).

540. Schein did not reject the buying club idea or ever say no to it, and instead told Corydon Palmer that a buying club with up-front discounts could be implemented in the future. (Baytosh, Tr. 1911).

541. Schein listened to Corydon Palmer's needs and presented the society with a proposal that met those needs. (Baytosh, Tr. 1911-12).

542. While the rebate program did not provide a direct monetary benefit to member dentists in the form of a discount on supplies, the extra income to the society from the rebates helped "keep our dues down." (Baytosh, Tr. 1890-91).

543. Corydon Palmer's contracts with Schein do not restrict what Corydon Palmer can do with the rebates from Schein. (CX 4092-001; RX 2033-001-02; Baytosh, Tr. 1913).

544. Corydon Palmer decided to use the rebates to keep membership dues low rather than pass them on to member dentists. (Baytosh, Tr. 1903-04; *see also* CX 8030 (Baytosh, Dep. at 19, 29, 75 (rebate program was a benefit to members))).

545. Complaint Counsel argues that Corydon Palmer does not qualify as a buying group under its definition because Corydon Palmer did not negotiate direct discounts on supplies for its members. However, Schein considered Corydon Palmer to be a buying group. (CX 8020 (Brady,

Dep. at 210-12 (Schein's Senior Director of Sales for Special Markets listing "Corydon Palmer Dental Society Buying Group" as among the buying groups Schein partnered with))).

546. From Schein's perspective, its contracts with Corydon Palmer are in effect no different than a contract with a buying group that negotiated up-front discounts for its members or passes the rebates on to its members. (*See* CX 4092-001; RX 2033-001). By paying a rebate to Corydon Palmer, Schein sells dental supplies at a lower price to a group of independent dentists based on their collective purchases. (*See* CX 4092-001; RX 2033-001).

547. This further supports treatment of Corydon Palmer as a buying group under Complaint Counsel's definition. (Complaint ¶ 3). Henry Schein's conduct with respect to Corydon Palmer is inconsistent with Complaint Counsel's allegation that Schein refused to do business with or offer discounts to buying groups. (Complaint ¶ 1).

J. The Denali Group.

548. The Denali Group ("Denali") is a dental services company formed in January 2010 that serves independent dentists who are either starting, or relocating, a practice. (RX 2961 (Lowther, Dep. at 12-13, 15-16)).

549. Mr. Robert Lowther, owner and President of Denali, considers Denali to be a buying group. (RX 2961 (Lowther, Dep. at 117 ("I do consider us a buying group in the sense that we've leveraged all the work that we do on a national basis for our clients with the equipment providers, specifically Schein, so that we can leverage the overall buying capacity or power, if you will, of our overall client base."), 126 ("We wanted to leverage the fact that although our dentists are independent practitioners, why not leverage their buying power as a group through Denali."))).

550. Denali provides a number of services to its clients, including negotiating and managing its clients' purchases of large equipment. (RX 2961 (Lowther, Dep. at 15, 24-27); RX 2848-001; RX 2849-001).

551. Denali also provides clients with other physical consulting, dental practice management consulting, marketing, and a la carte services. (RX 2849-001).

552. Denali's clients generally pay a flat fee per project for every new office start. (RX 2961 (Lowther, Dep. at 22)).

553. Mr. Lowther testified that Denali's "job is to negotiate the very best pricing and for goods and services for our client as we can." (RX 2961 (Lowther, Dep. at 102, 120 ("I would say that we do, quite effectively, utilize our group buying power to the benefit of our – our clients."))).

554. After Denali was formed in 2010, it negotiated discounted equipment formulary pricing with Schein for Denali clients nationwide. (RX 2961 (Lowther, Dep. at 53, 83-84, 88 ("For the major overall pricing structures, yes, we had a significant ballpark of [Schein] discounts that we would see on behalf of our clients."), 159-60; CX 4193-001 [redacted]).

555. [redacted]. (CX 4191; RX 2961 (Lowther, Dep. at 106)).

556. With its expansion, Denali reached out to Schein about entering into a "national relationship" to standardize pricing offered to Denali's clients nationwide that would provide them with "the same pricing access and service as [Schein's] large group practice." (CX 4191; RX 2961 (Lowther, Dep. at 106)).

557. Schein, in an effort to further align with Denali, designated Special Markets employee Steve Aaron as the primary point of contact to manage pricing for Denali's clients nationwide and

provided pricing to Denali customers that was similar to pricing offered to Schein's large group practices. (RX 2961 (Lowther, Dep. at 84, 106-07)).

558. Between 2013 and August 2016, Denali became a "single shop [Schein] referral" and was "absolutely" able to leverage volume for better pricing with Schein. (RX 2961 (Lowther, Dep. at 101-03)).[7]

559. After determining that approximately 95% of its clients were using Schein, Denali decided in August 2016 to partner exclusively with Schein to provide discounted equipment formularies for its clients. (RX 2961 (Lowther, Dep. at 53-54, 76-79)).

560. After that time, Denali "no longer offer[ed] as an a la carte stand-alone service competitively negotiating equipment because it's been our experience that in that process, Henry Schein has always been the one that really brought their A game." (RX 2961 (Lowther, Dep. at 41)). In addition, "most of the [Denali clients'] initial consumable orders do go to Schein just for pricing and convenience sake." (RX 2961 (Lowther, Dep. at 179)).

561. Denali advertises special pricing to its clients and "make[s] it very clear" that "the pricing our clients receives [*sic*] from Henry Schein at our referral is going to be better than what they would get walking in off the street." (RX 2961 (Lowther, Dep. at 45)).

562. Denali informs potential new clients that "[t]hey can save easily anywhere from 15 to 25,000 based on our equipment formulary on what we've established with special markets at Henry Schein." (RX 2961 (Lowther, Dep. at 45)).

[7] In August 2014, Ms. Titus wrote internally, discussing the Denali Group, that "PDCO is not on board for these type[s] of GPO relationships either." (CX 2220). As she testified, she was writing based on run-of-the-mill market intelligence – gained from her observations in the field that she was not running into Patterson in relation to buying groups. (Titus, Tr. 5234-35, 5284-85). Ms. Titus did not have any actual knowledge of what Patterson's policies were, is not aware of any communications between Patterson and Schein regarding buying groups, and Complaint Counsel has not introduced any communications between Patterson and Schein regarding buying groups. (Titus, Tr. 5234-35, 5284-85).

563. Additionally, Denali clients "don't have to pay a deposit on the equipment" and "don't have to come out of pocket until after it's installed, which save[s] the client money, saves them access interest charges on their loans." (RX 2961 (Lowther, Dep. at 49)).

564. Denali leverages the volume of its independent dentist clients' purchases to obtain competitive pricing from Schein. (RX 2961 (Lowther, Dep. at 91 ("It's being able to leverage that volume of [Denali is] going to do eight practices this year, right, and I'm going to tell my clients that this is the best place to get that equipment."), 107-08 ("We were trying to find a way to leverage Denali's work with Schein so that everybody understood that this is a Denali client …, to leverage our relationships with the individual practitioners as a leverage point with the equipment providers so that they could see that there is larger volume here."))).

565. Denali's clients get access to formulary pricing from Schein "simply by being a Denali client." (RX 2961 (Lowther, Dep. at 47)).

566. Well over 90 percent of Denali's clients go forward with the equipment formulary that Denali establishes with Schein. (RX 2961 (Lowther, Dep. at 60)).

567. Mr. Lowther testified that Complaint Counsel's alleged conspiracy "i[s] not true or correct." (RX 2961 (Lowther, Dep. at 11)).

568. Mr. Lowther further explained that the Denali Group's dealings with Schein, Patterson, and Benco, including "negotiating significantly lower pricing structures for large equipment purchases for new start practices for individual practitioners nationwide," are "exactly what the FTC says that they do not do." (RX 2961 (Lowther, Dep. at 11-12)).

569. As a group that leverages the volume of its independent dentist clients' purchases to obtain lower pricing through equipment formularies, Denali meets Complaint Counsel's definition of a buying group. (Complaint ¶ 3).

570. Complaint Counsel's buying group definition is applicable to groups like Denali that seek lower prices on equipment. (Complaint ¶¶ 3, 19 (specifically defining "dental products" to include supplies and equipment)).

571. Schein's relationship with Denali is inconsistent with the alleged conspiracy. (Complaint ¶ 1).

K. Dental Associates of Virginia

572. Debbie Foster, an East Central Zone Manager for Schein's Special Markets, testified that "Dental Associates is a buying group that was located in the northeast," and specifically in Virginia. (CX 8001 (Foster, Dep. at 178)).

573. In 2010, Ms. Foster (formerly "Torgersen") emailed her team to say she had "met with Jodi Rayford, [the] purchasing person at Dental Associates of VA," and that the account was in a "mess" because "certain dr's pulled away and several [had] formed smaller group practices." (CX 8001 (Foster, Dep. at 7); CX 2774-002).

574. Ms. Foster testified that the members of Dental Associates were comprised of independent dentists. (CX 8001 (Foster, Dep. at 179)).

575. Though Dental Associates "didn't do well financially … Henry Schein decided to keep on the members," by putting the individual members together "on a discount plan" sometime before 2015. (CX 8001 (Foster, Dep. at 168, 180)).

576. Schein offered discounts to Dental Associates' independent dentist members during the alleged conspiracy period. (CX 8001 (Foster, Dep. at 168, 180); CX 2776; CX 7101-140 (listing Dental Associates sales in Schein sales data)).

577. As a group of independent dentists receiving a discount on dental supplies, Dental Associates fits Complaint Counsel's definition of a buying group. (Complaint ¶ 3).

578. To the extent Complaint Counsel claims Dental Associates was not a buying group by citing to two internal Schein documents including Dental Associates in a list of top 50 DSO accounts, Schein's categorization of Dental Associates for internal accounting purposes between divisions does not impact the actual nature and characteristics of Dental Associates as a group of independent dentists. (CX 2775; CX 2776; CX 8001 (Foster, Dep. at 178-79); *see also* RX 2767 (explaining that the language Schein used to describe accounts was in part to delineate which groups "should be HSD" and which "should fall into [Special Markets]")). As Mr. Meadows testified at trial, a group that Complaint Counsel agrees is a buying group – Dental Gator – was also "rolled into the elite DSO" category within Schein. (Meadows, Tr. 2657).

579. Dental Associates is a buying group that Schein did business with during the alleged conspiracy. (CX 8001 (Foster, Dep. at 178-79); CX 2776; CX 7101-140).

580. Schein's discounts to Dental Associates are inconsistent with the alleged conspiracy. (Complaint ¶ 1).

L. The Dental Co-Op of Utah.

581. Complaint Counsel admits that the Dental Cooperative of Utah ("Dental Co-Op") is a buying group and that Schein did business with the Dental Co-Op. (RX 2956-004; RX 3087-004).

582. However, Complaint Counsel claims that Schein ended its long-standing relationship with the Dental Co-Op in 2014 as a result of the alleged conspiracy. (RX 3087-004). Specifically, Complaint Counsel's theory is that, "as a result of Schein executives instructing sales managers and sales personnel not to provide discounts to or compete for the business of Buying Groups, Schein in 2014 terminated agreements it had formed with Buying Groups before the alleged agreement with Benco and Patterson, including the Dental Cooperative (Nevada & Utah)…." (RX 3087-004).

583. The Dental Co-Op, originally formed in Utah, is a buying group that Schein began working with as early as 2007. (RX 2232-001; CX 8033 (Cavaretta, Dep. at 159); Cavaretta, Tr. 5601; RX 2604-002).

584. Schein's relationship with the Dental Co-Op was initially formed by Brian Peterson, the Schein Regional Manager for the Utah region. (RX 2947 (Cavaretta, Dep. at 69); RX 2232-001).

585. The original focus of the Dental Co-Op was on insurance support, offering help "negotiating rates with PPOs" and "creat[ing] private dental insurance options for small business[,]" while also offering discounted dental supplies. (CX 2505-001).

586. The Dental Co-Op eventually expanded into Nevada, Idaho, Arizona, New Mexico, and other states. (CX 2505-001; RX 2947 (Cavaretta, Dep. at 69-70); RX 2511-001).

587. When Joe Cavaretta first became aware of Schein's relationship with the Dental Co-Op in 2009, he viewed it as a mutually beneficial relationship. (Cavaretta, Tr. 5601; CX 8033 (Cavaretta, Dep. at 177-178)). At that time, Schein had a relatively low market share in the Utah region. (CX 8033 (Cavaretta, Dep. at 104, 177-178); CX 2750).

588. The Dental Co-Op introduced Schein, as its exclusive dealer, to its members, which enabled Schein to provide its Henry Schein Practice Analysis to the member offices to help drive incremental volume to Schein. (CX 8033 (Cavaretta, Dep. at 168-169, 177-178); Titus, Tr. 5337; CX 2750).

589. In return, Schein offered rebates to the Dental Co-Op and its members for their purchases, along with a discount program. (RX 2947 (Cavaretta, Dep. at 69); CX 8033 (Cavaretta, Dep. at 179); (CX 0305 (Cavaretta, IHT at 157); RX 2525-001; RX 2485-001).

590. Schein supported the Dental Co-Op as it expanded into other states, even though the program was not having the same success as it did in Utah. (CX 2750-001 (noting that the Dental Co-Op program did not work in Nevada where Schein already sold to a large portion of Las Vegas dentists and "[t]he doctors [Schein was] trying to win over [did not] think an 8% discount [was] a big discount."); CX 2646-004; RX 2511-001).

591. Schein's relationship with the Dental Co-Op became problematic for Schein in 2014, when Schein learned the Dental Co-Op had entered into competitive partnerships with manufacturers like P&G and Komet for the purchase of dental products directly from those manufacturers. (Titus, Tr. 5239-40; Sullivan, Tr. 4233-34; Cavaretta, Tr. 5602).

592. At that time, Schein had an exclusive relationship with Colgate (a manufacturer of toothbrushes, floss, paste, and other preventatives), meaning Schein did not sell competing P&G products. (Titus, Tr. 5236-37).

593. The Dental Co-Op's new partnership with P&G created a problem for Schein because the Dental Co-Op was canceling Schein's business done through Colgate and redirecting it directly to P&G. (Titus, Tr. 5237-39; Sullivan, Tr. 4233-34; Cavaretta, Tr. 5602; CX 0305 (Cavaretta, IHT at 158-59); CX 8010 (Titus, Dep. at 126)).

594. In May 2014, Francis Keefe, National Corporate Accounts Manager for Colgate, noticed that there was a significant drop in sales of Colgate to Dental Co-Op members and reached out to Schein to express Colgate's concerns over the Dental Co-Op's relationship with P&G. (Titus, Tr. 5237-38; CX 8010 (Titus, Dep. at 139-141); CX 2807-002-03; CX 2239-002-04 (noting that the Dental Co-Op was "eating up base business" as Colgate/Schein had recently lost two accounts to its competitor Proctor & Gamble, maker of Crest/Oral-B)).

595. Schein agreed that "the moment [the Co-Op] signed on with P&G direct and Komet" was "tantamount to throwing down the gauntlet with Schein and acting as a competitor." (CX 2239-002).

596. The Dental Co-Op's new partnerships amounted to a "breach of trust," as the original commitments made by the Dental Co-Op to be exclusive with Schein were no longer being honored. (Cavaretta, Tr. 5602; CX 0305 (Cavaretta, IHT at 105-06); Titus, Tr. 5239, 5337; CX 8010 (Titus, Dep. at 127-28 ("[T]here was a tacit understanding from the Henry Schein Dental folks that the Dental Co-op was only promoting Henry Schein.")); Sullivan, Tr. 4233-34).

597. Despite the concerns over the Dental Co-Op's new competitive partnerships, Jeff Harmon (Schein Regional Manager for Utah) and Joe Cavaretta asked Kathleen Titus to look into the Dental Co-Op to see if she could recreate the "win-win" relationship between Schein and the Dental Co-Op. (Titus, Tr. 5235-36, 5241; Cavaretta, Tr. 5602). No one at Schein instructed Ms. Titus to shut down Schein's relationship with the Dental Co-Op. (Titus, Tr. 5245).

598. In May 2014, Ms. Titus spoke with Andy Eberhardt, the Dental Co-Op's Chief Operating Officer, to discuss the Dental Co-Op and the new direction it was taking. (CX 2239-001-02 ("[Mr. Eberhardt] needed a wakeup call 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."); Titus, Tr. 5238-39, 5236).

599. Ms. Titus explained to Mr. Eberhardt that by signing with P&G and Komet, the Dental Co-Op created a business conflict for Schein, because the Dental Co-Op was now acting as a competitor to Schein. (CX 2239-002; Titus, Tr. 5239).

600. In talking with Mr. Eberhardt, Ms. Titus learned that the Dental Co-Op planned to fill its portfolio with Schein's direct competitors. (Titus, Tr. 5239).

601. While Mr. Eberhardt informed Ms. Titus that the Dental Co-Op had 400 members, those members only did $2 million in collective volume with Schein. (CX 2239-002; Titus, Tr. 5240). This sales volume caused further concern for Schein because the average private practice dentist spends approximately $35,000 per year on supplies, while Dental Co-Op members were only spending on average approximately $5,000 a year with Schein. (CX 2239-002; Titus, Tr. 5240). For these reasons, Schein questioned if the Dental Co-Op could "drive compliance" with its members. (CX 2239-002; Titus, Tr. 5240).

602. Rather than terminate its relationship with the group, however, Schein remained "very interested in exploring a healthy sustainable relationship," but one that would not include "shar[ing] the spotlight with competitors." (CX 2239-002).

603. Ms. Titus asked Mr. Eberhardt if he would be willing to return to an exclusive relationship with Schein. (CX 2239-002). Mr. Eberhardt offered to consider it. (CX 2239-002).

604. Ms. Titus planned to meet with Mr. Eberhardt later in the summer after he was back from a trip to discover if Schein could return to a "healthy relationship" with the Dental Co-Op. (CX 2239-002; Titus, Tr. 5241; CX 2807-001-02).

605. Then, in June 2014, Schein learned that P&G was promoting the Dental Co-Op at the New Mexico state dental meeting. (RX 2209-001-02).

606. Joe Cavaretta concluded that "Andy's goals are not aligned with ours. This is the danger of a Co-op … they want their brand front and center and when you help them build up a customer base they use it against you." (RX 2209-001).

607. Despite this, Schein was still not ready to end its relationship with the Dental Co-Op. (RX 2209-002-03).

608. However, Mr. Cavaretta wanted to set up a meeting internally to discuss an exit strategy with the Dental Co-Op, so that Schein would be prepared to walk away "if it comes to that." (RX 2209-002-03).

609. On June 16, 2014, Schein's Paul Hinsch brought the issue of P&G's direct relationship with the Dental Co-Op to the attention of Tim Sullivan. (CX 2467-001).

610. Prior to Mr. Hinsch raising the issue, Mr. Sullivan was not familiar with Schein's relationship with the Dental Co-Op. (Sullivan, Tr. 4232-33). Upon learning of Schein's relationship with the Dental Co-Op, Mr. Sullivan did not attempt to terminate Schein's relationship with the group. (Sullivan, Tr. 4233).

611. On July 2, 2014, Ms. Titus met Mr. Eberhardt for an in-person meeting. (Titus, Tr. 5222; CX 2807-001). At the meeting, Mr. Eberhardt informed Ms. Titus that, as alluded to in their conversation in May, he planned to add even more of Schein's competitors to the Dental Co-Op portfolio. (Titus, Tr. 5243).

612. In response, Ms. Titus proposed to Mr. Eberhardt that the Dental Co-Op sign an exclusive agreement with Schein, but his answer was a "definitive no." (Titus, Tr. 5243-44).

613. Ms. Titus debriefed Kevin Upchurch (General Manager for the Western Zone) and Mr. Harmon on her conversation with Mr. Eberhardt. She reported that the Dental Co-Op was not willing to be exclusive with Schein and instead was cannibalizing Schein's business. (Titus, Tr. 5245-46; CX 2211-003). Based on these facts, Ms. Titus recommended to Mr. Upchurch and Mr. Harmon that Schein end its relationship with the Dental Co-Op, but keep the door open for a future relationship. (Titus, Tr. 5244-45).

614. Mr. Upchurch agreed with Ms. Titus's recommendation and informed Mr. Cavaretta that Schein planned to no longer be a part of the Dental Co-Op due to the Dental Co-Op's newly formed relationships that were competing directly with Schein. (CX 2211-002-03).

615. In July 2014, Mr. Cavaretta determined that Schein's relationship with the Dental Co-Op was no longer beneficial and decided to end the formal arrangement with the Dental Co-Op. (Cavaretta, Tr. 5602-03; CX 2211).

616. Mr. Sullivan was not involved in Schein's decision to end its relationship with the Dental Co-Op. (Sullivan, Tr. 4234-35; Cavaretta, Tr. 5603).

617. On July 18, 2014, Mr. Cavaretta thought it was possible that the Dental Co-Op would form a relationship with either Patterson or Benco and wanted to ensure Schein had a plan to retain the Dental Co-Op members once ties were cut. (Cavaretta, Tr. 5605; CX 2211-001-02).

618. In an attempt to save Schein's business with the Dental Co-Op members, Schein planned to "grandfather current [Dental Co-Op] members on their existing VPA," which would provide these members with an 8%-10% rebate" going forward. (RX 2485-001; RX 2437-001; CX 2720-005 (listing 2011 VPAs including 6-10% rebate for Dental Co-Op members)).

619. Mr. Harmon delivered Schein's decision to Mr. Eberhardt in person, letting him know that although Schein had a long-standing relationship with the Dental Co-Op, the group's decision to add competitive partnerships with companies like P&G and Komet indicated the parties were "going down two different paths." (RX 2437-001-02).

620. Schein's decision included ending Schein's relationship with the Dental Co-Op in the other states in which Schein supported the group, including Nevada, Idaho, and Arizona. (RX 2947 (Cavaretta, Dep. at 71)).

621. On August 28, 2014, Mr. Eberhardt sent a letter to the Dental Co-Op's members informing them that "[a]fter a meaningful sixteen year partnership…," the Dental Co-Op would no longer be participating in a purchasing program with Schein effective September 30, 2014. (RX 2604-002). Mr. Eberhardt said that "much thought, deliberation, strategy and input went into this decision" and it was "in the best interest of Schein and the [Dental] Cooperative to part ways." (RX 2604-002). Mr. Eberhardt acknowledged the risks Schein took over the years to support the Dental Co-Op's efforts and protect independent dentistry, and thanked the local Schein reps that "consistently encouraged dentists to consider the benefits of the [Dental] Cooperative to help strengthen their practices." (RX 2604-002).

622. Shortly thereafter, Schein received positive feedback from its customers supporting Schein even though it was no longer aligned with the Dental Co-Op. (RX 2594-001).

623. After Schein's relationship with the Dental Co-Op ended, Schein continued to extend discounts to the members of the Dental Co-Op. (Titus, Tr. 5247).

624. Schein was able to retain its business with the members of the Dental Co-Op. (RX 2594-001).[8]

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[8] Complaint Counsel cites an email from Mr. 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" as evidence that Schein did not want to do business with "buying groups." (CX 2211-002). As Ms. Titus explained, however, that interpretation of the document makes no sense, as Schein was doing business with buying groups. (Titus, Tr. 5248). Instead, Mr. Upchurch was confused about the term "GPO." (CX 8010 (Titus, Dep. at 266-67)). In most cases, Schein personnel used the term "GPO" and "buying group" interchangeably. (Steck, Tr. 3741; Sullivan, Tr. 3901; CX 8010 (Titus, Dep. at 248)). 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. (CX 8010 (Titus, Dep. at 248, 267)). In dental markets, however, buying groups typically negotiate with distributors, who in turn negotiate with manufacturers. (SF 655-663, 591-94; *see also* RX2405.1 ("We have always contended that Schein is a GPO and negotiates the best prices for our customers ...")). The Dental Co-Op was morphing from a traditional dental buying group to the type of GPO that negotiates directly with manufacturers. (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. (CX 2227-004; CX 0311 (Sullivan, IHT at 118-122)). 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 the influence of Distribution." (CX 2227-004).

625. Schein's decision to end its relationship with the Dental Co-Op in 2014 was not a result of an alleged agreement with Benco and Patterson.[9] (Cavaretta, Tr. 5605; Titus, Tr. 5248-49). Complaint Counsel has not identified any interfirm communications between Schein and Patterson or Benco relating to the Dental Co-Op. (CX 6027).

626. Schein's decision to end its relationship with the Dental Co-Op in 2014 had nothing to do with the Dental Co-Op being a buying group. (Cavaretta, Tr. 5605; Titus, Tr. 5248-49).

627. Schein provided discounts to the members of the Dental Co-Op from at least 2007 through 2014. (RX 2947 (Cavaretta, Dep. at 68-69)).

628. Complaint Counsel's expert, Dr. Marshall, did not analyze whether Schein's relationship with the Dental Co-Op was profitable for Schein. (Marshall, Tr. 2969 [redacted]).

629. Dr. Marshall conceded that he cannot rule out that Schein ended its relationship with the Dental Co-Op because the Dental Co-Op rejected Schein's proposal to go exclusive. (Marshall, Tr. 2980).

630. Indicating the absence of any common understanding between Schein, on the one hand, and Benco or Patterson, on the other, as to buying groups, Mr. Upchurch, believed that Patterson and Benco "might also jump at the opportunity" to partner with the Dental Co-Op. (CX 0174).

631. Schein's relationship with the Dental Co-Op, Schein's desire and efforts to continue a mutually beneficial partnership with the Dental Co-Op, and Complaint Counsel's admission that

[9] Complaint Counsel cites to internal texts in which Pat Ryan informs Chuck Cohen that Schein had terminated the Dental Co-Op over three months earlier, but this is nothing more than an exchange of typical competitive intelligence and does not reflect any interfirm communications between Schein and Benco. (CXD 0009 (October 2014 texts reporting that "Schein just dumped the last GPO they had … [i]n Utah.… Indicating [that] they are not interested in state organization GPO."); Cohen, Tr. 909-10 (noting that his 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 slowly terminate buying groups over time.")).

Schein worked with the Dental Co-Op during the alleged conspiracy period, are all inconsistent with the alleged conspiracy. (Complaint ¶ 1).

632. The Dental Co-Op eventually formed a relationship with Darby, Schein's business affiliate. (CX 2211-002; RX 2232-001; Sullivan, Tr. 4171-72).

633. In March 2011, the Dental Co-Op's Arizona chapter reached out to Benco seeking a supply relationship. (CX 1039-01-02). A Benco Regional Manager discussed the opportunity with Pat Ryan, noting that it "would be a great opportunity to win some business from Schein. They certainly do it." (CX 1039-001). However, "per Chuck [Cohen]," Mr. Ryan agreed that Benco could not "pursue groups like this," noting, "No. Never. Ever. Amen." (CX 1039-001; 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."). Despite learning that Schein certainly does business with these groups, no one from Benco ever discussed the Dental Co-Op with anyone from Schein. (Cohen, Tr. 852-53; Ryan, Tr. 1245).

M. Dental Gator.

634. While Complaint Counsel asserts Schein "tried to shut down … Dental Gator" in furtherance of the alleged conspiracy, it nevertheless admits that Dental Gator is a buying group that Schein did business with during the alleged conspiracy period. (RX 3087-004; RX 2956-004).

635. In 2014, the owners of MB2 Dental Solutions ("MB2"), a large DSO, formed a buying group called Dental Gator. (Puckett, Tr. 2214-16, 2221).

636. Dental Gator was formed as a way for MB2 to identify target offices for potential acquisition. (Puckett, Tr. 2214-16, 2221; Foley, Tr. 4570-71). Through Dental Gator, MB2 hoped to establish relationships with those independent dental practices and eventually acquire them.

(CX 8006 (Puckett, Dep. at 40-41); RX 2838). Dental Gator, however, did not have any ownership interest in its members' offices. (CX 8006 (Puckett, Dep. at 69-70)).

637. Dental Gator marketed itself as "a group of independent Dental Office owners" who "combined each of their unique, valuable, and time-tested vendor relationships" to help reduce vendor costs and improve efficiency. (RX 2838).

638. Dental Gator sought to obtain better discounts on dental supplies for their members than they could otherwise secure on their own. (Puckett, Tr. 2220). Dental Gator also offered its members certain value-added services, such as advertising, information and technology, legal, lab, accounting, and billing, among others. (Puckett, Tr. 2221; CX 8006 (Puckett, Dep. at 46-47)).

639. Dental Gator charged up to $499/month for members to be a part of its buying group. (Puckett, Tr. 2304).

640. Dental Gator never had more than 27 members. (Puckett, Tr. 2219).

641. In early 2014, MB2 met with Schein and other distributors to discuss a request for proposal for MB2's business and also its plans for a buying group. (Puckett, Tr. 2227-28 ("We didn't call it Dental Gator at the time.")). During this initial meeting, MB2 informed Schein about its plan to use the newly-formed buying group as a way to procure dental offices for MB2. (Puckett, Tr. 2228; CX 0306 (Foley, IHT at 191)).

642. Because Schein had never heard about Dental Gator prior to this point, Schein asked MB2 "standard due diligence questions" to get a better understanding of the Dental Gator Group, such as what was Dental Gator's purpose, who was going to run the group, how would it be marketed, who would be eligible, and what the membership rate was. (Puckett, Tr. 2228-29).

643. During the early 2014 negotiations with MB2, Andrea Hight, Strategic Account Manager for Schein Special Markets, expressed some concerns about whether Dental Gator was

going to be set up only as a "pure buying group[]," meaning that it was "formed for the sole purpose of just saving money on supplies," rather than also offering value-added services. (Puckett, Tr. 2337-38; CX 8006 (Puckett, Dep. at 63-65); CX 8022 (Hight, Dep. at 161 ("the real issue was market[ing] that it was just a purchasing plan without management services"))). But she said that Schein "would work with groups that could offer more in terms of … value-added services." (Puckett, Tr. 2275).

644. While Schein was open to working with a buying group like Dental Gator, it needed more information about the group, such as what value-added services Dental Gator provided to its members. (Puckett, Tr. 2237-38; CX 8006 (Puckett, Dep. at 82-83)). MB2 assured Schein that Dental Gator offered more than just discounts by way of its value-added services. (CX 8006 (Puckett, Dep. at 82-83)).

645. Mr. Puckett, President of MB2 and Dental Gator owner, testified that Schein was satisfied with MB2's response regarding Dental Gator's offering and opened Dental Gator as a buying group. (Puckett, Tr. 2222; CX 8006 (Puckett, Dep. at 83)).

646. Schein won the MB2 RFP over both Patterson and Benco because it offered the most "aggressive pricing." (Puckett, Tr. 2263-64, 2309-11). On March 20, 2014, Schein and MB2 entered into a Prime Vendor Agreement ("2014 MB2 Agreement") that obligated MB2 to purchase [redacted] of their supplies from Schein, [redacted]. (CX 4001-002; Puckett, Tr. 2285-86). Dental Gator, however, made no such volume purchase commitments. (Puckett, Tr. 2287-88; CX 4001-002).

647. Under the 2014 MB2 Agreement, Schein provided a custom formulary and discounts on non-formulary items to the members of MB2's DSO (offices owned by MB2). (CX 4001-003).

648. According to the 2014 MB2 Agreement, "[d]ental practices which are not owned in whole or in part by MB2, must have a formal affiliate agreement in place with MB2." (CX 4001-002). This clause was included to ensure that DSO pricing would only apply to MB2 and would not be extended to a non-DSO, like Dental Gator. (Foley, Tr. 4574). This provision was important because the pricing that Special Markets negotiated on behalf of DSOs was proprietary with the manufacturer, Schein, and the DSO. (Foley, Tr. 4696-97). The provision did not preclude MB2 from operating a buying group or preclude Schein from offering discounts to that buying group. (CX 8022 (Hight, Dep. at 134; 161-62)). If MB2 wanted to operate a buying group, Schein could offer discounts to that group under a separate sales plan. (CX 8022 (Hight, Dep. at 134, 136, 161-62)).

649. Although the 2014 MB2 Agreement did not allow MB2 to extend its pricing to Dental Gator, MB2 extended its Schein pricing to Dental Gator members anyway. (CX 8022 (Hight, Dep. at 134)).

650. As a result, Dental Gator members were provided the same pricing from Schein that Schein gave to MB2. (Puckett, Tr. 2231, 2288-89; Foley, Tr. 4572). Special Markets also provided a rebate to Dental Gator for its member's purchases. (CX 4027-001).

651. During its negotiations with Schein, Dental Gator agreed not to advertise that it was merely a "pure buying group" that provided deep discounts to its members. (Puckett, Tr. 2237-38). Instead, Dental Gator agreed that it would advertise all of its value-added services that it provided to help dentists. (Puckett, Tr. 2241-42, 2246; CX 8005 (Muller, Dep. at 189)).

652. Nevertheless, in June 2014, Schein became aware that Dental Gator advertised that it could save Dental Gator members up to 60% on Schein supplies, which caused Schein concern. (Puckett, Tr. 2248; CX 8005 (Muller, Dep. at 189)). Mr. Puckett testified that such an

advertisement (which was put out by a third-party vendor) was a "false statement" and "misleading for sure," contrary to what Dental Gator had agreed to do with respect to marketing. (CX 8006 (Puckett, Dep. at 79-80 ("I don't think anyone … can save 60 percent – it is probably a false statement.")); Puckett, Tr. 2278; CX 4067).

653. On June 10, 2014, Ms. Hight had a conversation with Mr. Puckett, regarding both MB2's failure to comply with the 2014 MB2 Agreement and Dental Gator's advertising of the discounts provided by Schein. (CX 8022 (Hight, Dep. at 136); Puckett, Tr. 2247-48). Ms. Hight informed Mr. Puckett that the Dental Gator advertising was in "breach" of their contract and it needed to be fixed. (Puckett, Tr. 2247-48; RX 2283). Dental Gator attempted to rectify the advertising issue by taking its advertisement down. (Puckett, Tr. 2253-54). 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." (Puckett, Tr. 2279-80; *see also* CX 4016-001 (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 [*sic*] 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." (CX 4067-001).

654. Complaint Counsel cites Ms. Hight's June 10, 2014 email reporting that Dental Gator "assured me [that] they are shutting down the GPO aspect of what happened immediately." (CX 0247; *see also* CX 2425). At her deposition, Ms. Hight explained that she merely meant that Dental Gator had "to provide management services." (CX 8022 (Hight, Dep. at 161)). Mr. Puckett similarly testified that Dental Gator only agreed to stop marketing itself as a pure or price-only buying group, not to shut down. (Puckett, Tr. 2237-38). Ms. Hight did not ask Mr. Puckett to "shut down" the Dental Gator buying group. (Puckett, Tr. 2251; CX 8022 (Hight, Dep. at 191-

92)). Ms. Hight did not ask Mr. Puckett for proof that MB2 was acquiring ownership in the Dental Gator offices. (Puckett, Tr. 2251). Ms. Hight did not ask Mr. Puckett for assurances that Dental Gator would meet MSO criteria. (Puckett, Tr. 2251-52). Ms. Hight also did not ask Mr. Puckett for assurances that Dental Gator would "stay clear of anything remotely GPO in nature," nor did Ms. Hight say anything about Schein purportedly shutting down other buying groups. (Puckett, Tr. 2251-52; CX 8022 (Hight, Dep. at 191-92)).

655. In addition to marketing issues, Dental Gator caused conflicts with Schein's manufacturer partners. In the summer of 2014, a Patterson sales representative complained to manufacturers that Schein was extending its pricing for MB2 to Dental Gator offices. (CX 0306 (Foley, IHT. at 73-74); CX 2078). As a result, manufacturers asked Schein to stop extending its pricing for the MB2 DSO to Dental Gator. (CX 0306 (Foley, IHT at 74, 77); CX 8003 (Foley, Dep at 247)).

656. Dental Gator also caused internal conflicts at Schein between HSD and Special Markets. (CX 8005 (Muller, Dep. at 195, 217); Sullivan, Tr. 3991, 3997). Special Markets received complaints from HSD FSCs who were concerned that Dental Gator leading its advertisements with deep discounts from Schein, instead of value-added services, would result in reduced commissions. (CX 0306 (Foley, IHT at 193-96); CX 8003 (Foley, Dep. at 293-94, 303-05); CX 8005 (Muller, Dep. at 195)).

657. Despite these issues, HSD never pressured or asked Special Markets to shut down or dissolve Dental Gator. (CX 0306 (Foley, IHT at 198); CX 8003 (Foley, Dep. at 351, 418); CX 8022 (Hight, Dep. at 192)).

658. With respect to Mr. Sullivan's July 1, 2015 email which stated "[t]he Dec 'offsite' last year I left with a goal to see if we could get Hal to shut it down…," Mr. Sullivan clarified at trial

that he was talking specifically about Dental Gator using MB2's DSO pricing outside the scope of the MB2 contract. (Sullivan, Tr. 4255-56; CX 0246). Mr. Sullivan never had the goal to shut down Special Markets' relationship with Dental Gator. (Sullivan, Tr. 4255-56).

659. Moreover, Special Markets had its own concerns about Dental Gator because MB2 was operating outside of the 2014 MB2 Agreement by extending pricing only meant for DSO customers to Dental Gator, which led to the manufacturer complaints. (CX 8005 (Muller, Dep. at 187-88); CX 0306 (Foley, IHT at 74-77)).

660. As discussed above, HSD was in the midst of developing its Mid-Market strategy in 2014 and a formal offering to buying groups. Dental Gator highlighted the need for collaboration between HSD and Special Markets in order to develop a consistent buying group strategy and offering going forward. (SF 269-333).

661. Specifically, Mr. Sullivan wanted Special Markets to modify the pricing it offered to Dental Gator to be more in line with what HSD was developing for its buying group offering, which is "ultimately what happened." (Sullivan, Tr. 4255; CX 2370).

662. Special Markets and HSD resolved their internal conflicts, and Special Markets continued its relationship with Dental Gator. (Sullivan, Tr. 4096-97; CX 8003 (Foley, Dep. at 418); CX 8022 (Hight, Dep. at 192); CX 2144).

663. In February 2015, due to certain manufacturers refusing to extend chargebacks to Dental Gator members, Special Markets created a new Dental Gator sales plan that was separate from MB2. (CX 0306 (Foley, IHT at 74-77); CX 8005 (Muller, Dep. at 183-84, 187-88); CX 2641; CX 8022 (Hight, Dep. at 192)). Special Markets grandfathered all existing Dental Gator members and maintained their current pricing, which was the same DSO-pricing that MB2 members were receiving. (Foley, Tr. 4697-98; Puckett, Tr. 2289-90). Schein set new Dental Gator

members up on formulary pricing with discounts that were "competitive" for independent dentists. (Puckett, Tr. 2294, 2296; Foley, Tr. 4698; CX 4026-001 (the new Schein sales plan "is still competitive for an independent dentist")).

664. In the month after the new plan was set up with Dental Gator, Schein's merchandise sales to Dental Gator members increased. (Puckett, Tr. 2293; CX 4011; CX 4021).

665. After Schein created the new sales plan, Dental Gator considered working with another distributor and sought other bids. (Puckett, Tr. 2260, 2265). Despite Complaint Counsel's claims that the new sales plan pricing was an effort by Schein "to terminate Dental Gator" or "stop this GPO", Mr. Puckett maintained that Schein was making no such effort. (Puckett, Tr. 2270 ("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."); CX 2370; *see also* CX 8016 (Meadows Dep. at 226-230)). To the contrary, the pricing Schein offered to Dental Gator was "more aggressive," and Dental Gator decided to continue its relationship with Schein. (CX 2370-001; Puckett, Tr. 2297; Sullivan, Tr. 4098).

666. In January 2015, prior to Schein's creation of the new Dental Gator sales plan, the owners of MB2 had already decided that it would no longer fund Dental Gator. (Puckett, Tr. 2299 ("we just saw that it wasn't the genius idea that we thought or it wasn't executing properly")). At that time, Dental Gator's growth had slowed and the owners could not justify injecting personal equity to try to take the group to the next level. (Puckett, Tr. 2299; CX 8006 (Puckett, Dep. at 93-94)).

667. There were various market factors and issues internal to Dental Gator that slowed Dental Gator's growth, which had nothing to do with Schein. (Puckett, Tr. 2306 (Q. Mr. Puckett,

is it fair to say that there are 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? A. Yes."), 2298 ("[membership] had started to slow before the Schein price change for new Dental Gator customers.")). For example, the competition from other buying groups, which increased over time, impacted Dental Gator's growth. (Puckett, Tr. 2303-04). Moreover, Dental Gator also received complaints from its members that its membership fee was too high to justify the savings or value to them. (Puckett, Tr. 2304-05).

668. Additionally, the owners of MB2 observed that the level of communication and overall performance by Patrick Gill, the President of Dental Gator, had drastically declined in 2015 as compared to 2014. (Puckett, Tr. 2301; CX 8006 (Puckett, Dep. at 43-44)). With respect to performance, Mr. Puckett testified that he felt that Mr. Gill had checked out of his responsibilities and "stopped working as hard" at Dental Gator in 2015. (Puckett, Tr. 2301).

669. Dental Gator realized, prior to the change in pricing, that it had either built a bad business model or did not have the right people employed, as it was offering Dental Gator to dentists for free, but still could not get people to sign up for the program. (CX 8006 (Puckett, Dep. at 92-93, 157); Puckett, Tr. 2298-302).

670. Mr. Gill eventually left Dental Gator at the end of 2015. (Puckett, Tr. 2302). After Mr. Gill left, Dental Gator did not make any additional efforts to market its buying group program. (Puckett, Tr. 2302).

671. For reasons having nothing to do with Schein, Dental Gator ultimately dissolved in 2018. (Puckett, Tr. 2303-06, 2218-19).

672. Schein never told MB2 that it could not operate its Dental Gator buying group. (Foley, Tr. 4698-99).

673. Schein provided discounts to the members of Dental Gator during the alleged conspiracy. (Puckett, Tr. 2231, 2288-89; 2293-94; Foley, Tr. 4572).

674. Schein did not have any type of discussion with anyone at Benco or Patterson about Dental Gator. (Cohen, Tr. 913; Rogan, Tr. 3657; Ryan, Tr. 1247; CX 8022 (Hight, Dep. at 190-92); CX 8003 (Foley, Dep. at 418)).

675. Schein's relationship with Dental Gator and Complaint Counsel's admission that Schein worked with the Dental Gator during the alleged conspiracy period are inconsistent with the alleged conspiracy. (Complaint ¶ 1).

N. Dental Partners of Georgia.

676. Dental Partners of Georgia is a group of private dentists that focus on pediatric dentistry through Georgia's Medicaid program. (Foley, Tr. 4610-11).

677. Dental Partners of Georgia describes itself as "an Independent Provider Association which consists of a network of providers, solo and group practitioners, in a region or community who agree to participate in an association that will contract with managed care plans and vendors for the benefit of each of the IPA members." (RX 2880-001).

678. Schein considers and treats Dental Partners of Georgia as a buying group. (Foley, Tr. 4611; Meadows, Tr. 2482; CX 0306 (Foley, IHT at 220-21); CX 309 (Muller, IHT at 200); CX 2282-001).

679. Through its Special Markets division, Schein has had a longstanding relationship with the Dental Partners of Georgia buying group since at least 2009. (Foley, Tr. 4603-04, 4619). Dental Partners of Georgia was brought to the attention of Special Markets by HSD in 2009. (Foley, Tr. 4610-12).

680. In May 2012, Schein began to memorialize its relationship with Dental Partners of Georgia in a prime vendor agreement. (RX 2543 (signatures dated May 24, 2012, August 29, 2012, and September 4, 2012); Foley, Tr. 4611-12; *see also* CX 7101-140 (identifying sales to Dental Partners of Georgia in Schein's sales data from 2012 through 2015)). The terms of the prime vendor agreement executed in 2012 were in effect as early as 2009. (Foley, Tr. 4612).

681. Under the agreement, Schein created a formulary for the Dental Partners of Georgia with "reduced pricing on over 7,500 popular items," and offered discounts of up to 18% on items not on the formulary. (RX 2543-001; Foley, Tr. 4618-19).

682. The agreement attaches a list of private dentists who are members of Dental Partners of Georgia. (RX 2543-005; Foley, Tr. 1612-13).

683. While the agreement states that "Dental Partners of Georgia owns and/or manages dental offices under various names," Mr. Foley, who negotiated the agreement with Dental Partners of Georgia, confirmed at trial that they do not own or formally manage their member offices. (RX 2543; Foley, Tr. 4613-14).

684. In addition to negotiating the partnership with Schein on behalf of its members, Dental Partners of Georgia helps negotiate rates with the Georgia Medicaid plan on behalf of its members, vets software application programs for its members, and provides continuing education. (Foley, Tr. 4614).

685. These services were not offered by all of the buying groups Schein encountered and were part of Schein's consideration in deciding to continue the relationship with Dental Partners of Georgia, as well as the group's representation that it would promote Schein to its members to drive compliance. (Foley, Tr. 4614-16 ("Q. Did the services provided by Dental Partners of Georgia to their members play any role in your evaluation of whether to do business with the

buying group? A. Yes… Well, a relationship is mutually rewarding if the buying group offers sticky – stickiness… also being able to drive compliance … [and] you know, promote us."); CX 2543-002).

686. As Mr. Foley explained at trial, "If they could have their members purchase at least 80 percent from Henry Schein and not other vendors, we can then in turn provide these high discounts that we're offering as well as … a custom formulary." (Foley, Tr. 4617; RX 2543 (committing members to purchase "at least 80% of [their] dental merchandise from" Schein)).

687. Schein provided discounts to members of the Dental Partners of Georgia buying group from 2009 until at least 2016. (Foley, Tr. 4619).

688. As a group of independent dentists receiving discounts based on the group's collective purchases, the Dental Partners of Georgia meets Complaint Counsel's definition of buying group. (Complaint ¶ 3).

689. Schein's partnership with Dental Partners of Georgia is inconsistent with the alleged conspiracy. (Complaint ¶ 1).

O. Dentistry Unchained.

690. Complaint Counsel does not dispute that Dentistry Unchained is a buying group. (RX 2956-004).

691. Schein also considered Dentistry Unchained a buying group. (Titus, Tr. 5271-72 ("It's a buying group.")).

692. Dentistry Unchained first approached Schein in May 2015 about rolling out a buying group with various vendors, including one for dental supplies. (RX 2115-006; Titus, Tr. 5272).

693. Rudy Wolf, Schein's Regional Manager in Denver, reported that he asked what Dentistry Unchained was "doing to help [members] be more efficient, productive, and

profitabl[e]," though he had "a feeling we will be giving additional discounts to customers already doing business with HSD…." (RX 2115-004).

694. Still, Mr. Cavaretta's response was to try to "schedule a face to face" with Dentistry Unchained. (RX 2115-003).

695. Mr. Titus explained that "[t]he key is … drawing up an agreement that is 100% exclusive." (RX 2115-002).

696. Dentistry Unchained advised "that we need to see that Henry Schein is intentional about moving forward." (RX 2115-006).

697. Schein sent Dentistry Unchained a non-binding letter of intent in July 2015, noting it "is pleased to present this non-binding letter of intent to discuss, evaluate and negotiate a potential business transaction" for an exclusive thirty-day negotiation period. (RX 2229-002).

698. In following conversations with Dentistry Unchained, Schein sought to determine, among other things, "how … they compare to the endless sea of other 'buying groups'," and thought there might be a "fit" for Schein working with the group. (RX 2334-001-02).

699. By September 2015, negotiations were continuing and had progressed enough for Dentistry Unchained to provide Schein with a member list, data, and survey responses to compare to Schein's own database. (RX 2597-002).

700. As Schein reviewed the member list, data, and survey responses, Dentistry Unchained wrote it was "very excited to officially be working with … Henry Schein! … We are looking forward to a partnership that helps to grow not only our respective businesses, but supports and strengthens the future of independent dental practice." (RX 2597-001).

701. Schein's preliminary audit of Dentistry Unchained's membership data indicated "a lot of opportunity," but the analysis would take time. (CX 2716-001).

702. While Schein continued to negotiate with Dentistry Unchained (with a focus on the proposed exclusivity term), unbeknownst to Schein, Patterson and Benco were also negotiating a possible partnership with the group. (CX 8037 (Ryan, Dep. at 313); CX 8004 (McFadden, Dep. at 150-51))

703. Schein continued to negotiate with the group through February 2016, and even went so far as to do a "beta test" to understand whether the partnership would result in more business for Schein if it was the group's "primary dental partner." (RX 3090-001; Cavaretta, Tr. 5611-12).

704. In April 2016, Dentistry Unchained sent to Schein a mockup of the new Dentistry Unchained website, which listed Patterson products and caused Mr. Cavaretta to reevaluate the prospects of a partnership: "I don't think we are close to launching any longer and I'm actually closer to walking now." (RX 2457-001).

705. Ms. Titus explained that "As we were learning more about Dentistry Unchained and our negotiations moved along, exclusivity and compliance were a very big part of what the discussions were.... Unfortunately, towards the end of the negotiations, we made a discovery that was extremely disturbing and we felt was a breach of trust. Dentistry Unchained launched a website in which they were featuring, prominently featuring, our competitor …." (Titus, Tr. 5272-73; *see also* Cavaretta, Tr. 5611-12).

706. After Dentistry Unchained refused to remove the competitive information from its website, Schein discontinued the negotiations. (Titus, Tr. 5273).

707. After Schein declined to continue with Dentistry Unchained, Dentistry Unchained informed Schein that they were seeking to sell their business. (CX 2717-001).

708. Mr. Cavaretta forwarded Dentistry Unchained's note to Mr. Sullivan and Mr. Steck, reminding them that it was an "opportunity[y] we vetted out for a full year and decided not to work

with them.… Looks like we made the right choice. This is just to help you guys understand we do take our time with all of these opportunities." (CX 2717-001).

709. Schein's year-long efforts with respect to Dentistry Unchained, including its "several visits to their location" is inconsistent with the alleged agreement not to do business with buying groups at all. (Complaint ¶ 1; *see also* Cavaretta, Tr. 5611-12).

710. Schein's decision not to pursue a partnership with Dentistry Unchained was made after the alleged conspiracy and is thus inconsistent with Complaint Counsel's contention that after "April of 2015 ... respondents started dealing with buying groups." (Kahn, Tr. 19; *see also* Kahn, Tr. 54).

711. Rather, Schein's approach to Dentistry Unchained is consistent with its approach before and after the alleged conspiracy: careful consideration and evaluation of the opportunity with a focus on compliance and exclusivity. (Titus, Tr. 5199-203, 5274; Meadows, Tr. 2495, 2506, 2544; Sullivan, Tr. 4088, 4098-99; Cavaretta, Tr. 5574-76; Foley, Tr. 4638-39, 4614-15).

712. Schein's decision regarding Dentistry Unchained was unilateral. There are no interfirm communications regarding Dentistry Unchained. (Ryan, Tr. 1257; Titus, Tr. 5195).

713. Complaint Counsel cites to CX 0012, a May 2015 internal Benco email in which Pat Ryan writes to Chuck Cohen regarding Dentistry Unchained, "I already KNOW that Patterson and Schein have said NO" as evidence reflecting an agreement among Schein, Patterson, and Benco. (CC Pretrial Br. at 25-27; CX 0012-001).

714. The evidence shows, however, that Mr. Ryan was mistaken. Schein continued negotiations with Dentistry Unchained into 2016, and Dentistry Unchained was featuring Patterson products on its website in 2016. (RX 2457-001; RX 2334-001-002; RX 2115-006; Titus, Tr. 5272-73).

715. At trial, Mr. Ryan conceded that he never spoke with anyone at Schein or Patterson about Dentistry Unchained. (Ryan, Tr. 1209).

716. Mr. Ryan's email was just speculation "from my experience [that] we usually got approached after, after Schein and Patterson." (Ryan, Tr. 1209-10). Mr. Ryan was not aware of Schein's negotiations with Dentistry Unchained, had no idea whether his May 2015 email to Mr. Cohen was true, and was just speculating. (Ryan, Tr. 1254-55).

P. Dentists for a Better Huntington.

717. Complaint Counsel concedes Dentists for a Better Huntington is a buying group. (RX 2956-004).

718. Schein also considers and treats Dentists for a Better Huntington as a buying group. (CX 8020 (Brady, Dep. at 258-59)).

719. Schein has worked with the Dentists for a Better Huntington buying group since at least 2009. (CX 2724-021 (2009 agreement); *see also* CX 6602-003 ("This Agreement terminates that certain Partnership Support Program document, dated 2009.")).

720. Schein provided both discounts and rebates to the Dentists for a Better Huntington buying group. (CX 2724-021). Schein's 2009 Partnership Support Program for "the Dentists for Better Huntington group" provided "aggregate rebates that will be donated quarterly to the group," and a "10% discount on ALL orders." (CX 2724-021).

721. On November 4, 2011, Chuck Cohen and Pat Ryan became aware that Schein was working with the Dentists for a Better Huntington buying group. (CX 1047-002 (Dentists for a Better Huntington has "an arrangement with Schein to rebate 10% quarterly on merchandise purchases."); Ryan, Tr. 1246). Unlike Schein, Benco declined to work with Dentists for a Better

Huntington because it was a "buying club" that "aggregates the combined volume of unaffiliated practices to leverage pricing." (CX 1047-001).

722. Despite being aware that Schein was working with Dentists for a Better Huntington, neither Chuck Cohen or Pat Ryan contacted anyone at Schein regarding Dentists for a Better Huntington. (Ryan, Tr. 1246; Cohen, Tr. 914).

723. Schein executed a new Prime Vendor Agreement with Dentists for a Better Huntington on January 1, 2017. (CX 6602-003).

724. Schein's 2017 agreement with Dentists for a Better Huntington provides members with a certain discount on all orders. (CX 6602-003).

725. Schein's relationship with and sales to Dentists for a Better Huntington from at least 2009 to the present are inconsistent with the alleged conspiracy. (Complaint ¶ 1).

Q. Direct Dental Sales.

726. Direct Dental Sales was a GPO start-up that formed around January 2016. Dr. Jim Corcoran established the group and claimed to have access to a network of 98,000 dentists. (RX 0553-001).

727. The Direct Dental Sales model was unique, and the Schein sales team asked Nancy Lanis, Henry Schein's Chief Compliance Counsel, for guidance. (CX 2166-010).

728. Schein engaged in discussions with Dr. Corcoran for several months (March-June 2016). (CX 2166-001, -010).

729. Jake Meadows made the final decision to not do business with Direct Dental Sales. (CX 8016 (Meadows, Dep. at 63)).

730. Mr. Meadows said there were two primary reasons for his decision. (CX 8016 (Meadows, Dep. at 64-65)). One was, from a marketing perspective, their name, Direct Dental

Sales, is attractive in the dental market space, but counter to Schein's business model. (CX 8016 (Meadows, Dep. at 64-65)). The second was that Direct Dental Sales planned to start dispatching a sales team to Boston and target the entire dental market, which would in effect compete with Schein and possibly create customer conflicts. (CX 8016 (Meadows, Dep. at 65)).

731. Schein's careful evaluation of and decision not to do business with Direct Dental Sales after the alleged conspiracy ended supports Schein's position that it continued to evaluate buying groups case-by-case based on each group's value proposition and ability to drive compliance, as it had done before and during the alleged conspiracy (Titus, Tr. 5199-202, 5274; Meadows, Tr. 2495, 2506, 2544; Sullivan, Tr. 4088, 4098-99; Cavaretta, Tr. 5574-76; Foley, Tr. 4638-39, 4614-15).

R. Intermountain Dental Associates.

732. Intermountain Dental Associates ("IDA") describes itself as "an association of independent dental practitioners established in 2006." (RX 2844).

733. IDA's website notes that IDA owns or is affiliated with 17 general practices and 2 specialty practices. (RX 2845).

734. IDA markets member offerings of various business, consulting, and management services to its members. (RX 2844; RX 2845).

735. IDA describes its "business services" as providing "access to all supplies and/or services at […] discounted negotiated rates" from specific suppliers, including Schein. (RX 2846-001).

736. IDA has a DSO arm and a buying group arm of independent dentists in which IDA "DOES NOT have any ownership." (CX 2153-002-03).

737. Schein Special Markets formed a relationship with the DSO arm of IDA (its owned offices) in as early as 2009. (Foley, Tr. 4642; CX 0306 (Foley, IHT at 100)).

738. Special Markets subsequently formalized its relationship with the DSO arm of the IDA by entering into a dental supply agreement. (RX 2320).

739. IDA then reached out to Schein in 2010 to create a buying group comprised of non-owned "affiliate" offices, and inquired about the possibility of Schein offering discounts to the IDA buying group. (Foley, Tr. 4642-43; CX 2153-003).

740. Expressly referencing the 2010 Guidance, Mr. Foley instructed his team to investigate whether IDA would have "complete control" over their members' purchasing decisions. (CX 2153; Foley, Tr. 4642-45).

741. Mr. Foley testified that this evaluation was consistent with the 2010 Guidance, that if a buying group could drive compliance then it "would be a good fit for Schein." (Foley, Tr. 4646).

742. After confirming that the IDA buying group could drive compliance, Mr. Foley approved offering discounts to IDA's buying group. (Foley, Tr. 4646).

743. As Mr. Cavaretta explained in January 2012 (after the start of the alleged conspiracy), while "[i]t is dangerously close … [to] a GPO[,]" the "difference here is that they will force any customer to purchase from Schein…." (CX 0168-001). On that basis, Schein continued to do business with IDA.

744. The pricing Special Markets extended to the IDA buying group was the same pricing it provided to the DSO, which included a custom formulary for IDA members, as well as discounts of up to 20% off non-formulary items. (Foley, Tr. 4646; RX 2320).

745. Special Markets continued to offer these discounts to the IDA buying group through at least December 2016. (Foley, Tr. 4646-47).

746. IDA has no ownership interest in its "affiliate" offices, which are comprised of independent dental practitioners. (RX 2844; Foley, Tr. 4642; Cavaretta, Tr. 5652; CX 0306 (Foley, IHT at 222-23)).

747. As a group of independent dentists receiving discounts based on the group's collective purchases, IDA's buying group arm meets Complaint Counsel's definition of a buying group. (Complaint ¶ 3).

748. Schein's relationship with the IDA buying group is inconsistent with the alleged conspiracy. (Complaint ¶ 1).

S. Florida Dental Association.

749. Complaint Counsel admits that the Florida Dental Association ("FDA") is a buying group. (RX 2956-004).

750. Complaint Counsel contends that Schein refused "to provide discounts to or otherwise compete for the business of [the Florida Dental Association]" as the result of the alleged agreement with Benco and Patterson. (RX 2956-005-06). The evidence, however, indicates that Schein did compete for the business of FDA's buying group and offered it discounts, but that the FDA chose a different supplier instead. (CX 0310 (Steck, IHT at 133-34); RX 2466-001).

751. In June 2012, the FDA approached Schein about partnering with its buying group. (CX 0201-001; RX 2466-001; CX 0310 (Steck, IHT at 131)).

752. Schein was interested, and had several discussions with the FDA about their new program. (CX 0201-001; CX 0310 (Steck, IHT at 133 ("[W]e were interested or we wouldn't have been talking to them."))).

753. While Schein was interested, it had concerns about the FDA's inability "to commit volume for their members or give [Schein] any kind of minimum purchase levels," and was

skeptical that FDA members working with other distributors would switch to Schein. (CX 0310 (Steck, IHT at 133); CX 8031 (Steck, Dep. at 57-58 ("we didn't believe that they would automatically buy more for [*sic*] us just because we made some kind of agreement with them."))).

754. Despite these concerns, Schein prepared a "value-added" offer that included seminars for members and increased discounts to members who made purchase commitments. (CX 0310 (Steck, IHT at 133-34 ("we offered that if a customer signed up on a plan we would normally offer a $25,000 customer that they could get that same plan with a $15,000 commitment. So we gave them a reduced commitment to get the pricing, but it still required a commitment."))).

755. However, the FDA declined Schein's offer and decided to work with Darby as their "supplier partner" instead. (RX 2466-001; CX 0310 (Steck, IHT at 134)).

756. Schein's efforts and offer to work with the FDA demonstrate Schein's willingness to engage with new buying groups, and is inconsistent with Complaint Counsel's alleged conspiracy. (Complaint ¶ 1).

T. Floss Dental.

757. Floss Dental is a DSO based in Dallas, Texas that entered into a contract with Schein sometime before January 29, 2015. (Puckett, Tr. 2205; CX 2372-001 ("I already did something with Floss Dental")).

758. In February 2015, Schein discovered that Floss Dental had an "'affiliation program' which is their version of [the] Dental Gator [buying group]." (CX 2084).

759. That Floss Dental had a Dental Gator-like program was likely due to the fact that Mr. Puckett, "[t]he main guy at Gator/MB2 used to be with Floss." (CX 2084; Puckett, Tr. 2205 ("I was there I would say roughly 18 months … [as the] VP of finance and general counsel.")).

760. Therefore, as of February 2015, "Floss Dental was a small group of fully owned offices, but also they had members that were individual or independent practices that were part of their group. That part of their group was a buying group." (Titus, Tr. 5212).

761. In May 2014 Schein was still trying to address how to respond to Floss Dental's decision to "mimic MB2" in a manner that "can develop our policy." (RX 2105; CX 2084).

762. By that point in 2014, Ms. Titus and Mr. Cavaretta had been working on a document that could be used to "evaluate more efficiently and create more parity on those relationships with buying groups that made … good business sense for us." (Titus, Tr. 5213; RX 2105).

763. That guidance helped Schein develop a program with Floss Dental that allowed its buying group members to "have reduced Schein pricing on the G plan," contingent on those practices purchasing 80% of their supplies from Schein. (RX 2105; CX 2084-001).

764. Soon after, an "upset" Dental Gator complained to Schein that the "BG of Floss Dental" had been given a more favorable agreement than they had received. (CX 2088-001).

U. Integrity Dental Buyers Group / Georgia Dental Association.

765. Complaint Counsel alleges that "as result of an agreement with Respondents," Schein decided "not to provide discounts to or otherwise compete for" the business of Integrity Dental Buyers Group ("IDBG"). (RX 3087-004).

766. The idea for IDBG was first conceived in 2015, and it was officially launched in December 2016. (CX 8011 (Capaldo, Dep. at 12-13), CX 0320 (Capaldo, IHT at 34)).

767. Between Schein, Patterson, and Benco, only Schein met with IDGB and evaluated IDGB's program. (CX 0320 (Capaldo IHT at 78-80, 94 ("Q. And then did you ever speak with anyone at Patterson regarding that R.F.P.? A. There was -- their rep approached me at the annual meeting in I want to say 2015.… He called me sometime later … And then I got a call saying that

they had changed their mind."), 29 ("Benco …They didn't try to negotiate. They did not involve themselves at all."))).

768. Schein became aware of the IDGB's program in July 2015, three months after the Complaint Counsel asserts the alleged conspiracy ended. (RX 2143-001, -003; Kahn, Tr. 19; *see also* Kahn, Tr. 54 ("for all intents and purposes, the conspiracy was impossible to maintain much long past that point" after April 2015)).

769. Upon learning that IDGB was planning to issue an Request for Proposal (RFP) to distributors, Mr. Jake Meadows, Schein's Eastern Area Director at the time, emailed Jim Breslawski, the President of Henry Schein Inc., and Tim Sullivan, the President of Henry Schein Dental, that he had no knowledge of IDGB sending an RFP to Schein and the he would "dig in here and reach out and introduce myself to Frank [Capaldo, IDBG's Executive Director]." (RX 2143-001).

770. No one instructed Mr. Meadows not to compete for IDGB's business. (RX 2143-001). Rather, Mr. Breslawski replied, "Thanks Jake" and inquired into what sort of discounts IDGB was seeking: "[d]o we know how they define 35% discount? What is the benchmark? 35% off what?" (RX 2143-001).

771. Mr. Capaldo, testified that the first person from Schein he spoke to was Michael Porro, Schein's Zone Manager for the Atlantic Coast, and that Mr. Porro "reached out to him." (CX 0320 (Capaldo, IHT. at 77-79)).

772. Mr. Porro followed his call with an in-person visit to Mr. Capaldo to discuss IDBG. (CX 0320 (Capaldo, IHT. at 80-81)).

773. Mr. Capaldo testified that Mr. Porro conveyed that Schein "wanted to work with" IDBG. (CX 0320 (Capaldo, IHT. at 81-82)).

774. In September 2015, Schein received a draft of IDGB's "summary of the key terms and conditions … of a proposed relationship." (RX 2433-001, -003).

775. Schein noticed several issues with the proposal, such as how IDBG intends to "maintain no less than 300 Purchasing Members," and concerns about IDGB's demand restrictions on which dentists Schein could call on in Georgia. (RX 2433-004).

776. Unlike other buying groups that Schein was in discussions with at the time, such as CDA/TDSC and Smile Source, IDBG's model was not a "comprehensive program" and contained "[n]o incentives other than the discounts" that Schein would offer. (RX 2150-001; CX 8011 (Capaldo, Dep. at 31)).

777. In January 2016, Schein and IDGB discussed the issues with IDGB's model on a conference call, but further negotiations stalled. (CX 0320 (Capaldo, IHT at 82-84); CX 8016 (Meadows, Dep. at 260-62); CX 2037-003).

778. In February 2016, Schein informed Mr. Capaldo that it was "not prepared to move into a formal binding partnership," but that they "welcome future updates and discussion down the road…." (CX 2397-001).

779. In August 2016, with the creation of Schein's Alternate Purchasing Channel, Ms. Darci Wingard, who was responsible for "prospecting and managing BGs" at the time, contacted Mr. Capaldo for an "exploratory call." (CX 0299-004; *see also* Titus, Tr. 5274-75).

780. Ms. Wingard, after several calls with Mr. Capaldo, continued to have concerns about IDBG because they appeared "very unorganized," "they were going to be working with multiple manufacturer partners or distribution partners," which "completely … muddies the message of driving any type of compliance through members." (CX 0320 (Capaldo, ITH at 89); CX 8009 (Wingard, Dep. at 222-23)).

781. Ultimately, Ms. Wingard came to the same conclusion that Schein reached earlier in the year, and did not pursue a relationship with IDBG because "after our discussions I did not feel that this was a partnership that made great business sense to me." (CX 8009 (Wingard, Dep. at 224)).

782. Schein's efforts with respect to IDBG, including in-person meetings, phone calls, evaluation of the terms of a proposed partnership, and following up with IDGB to see if it fit within Schein's APC offering are inconsistent with the alleged agreement not to do business with or compete for buying groups at all. (Complaint ¶ 1; *see also* RX 2433-001-02, CX 0320 (Capaldo, ITH at 80-82, 89), CX 8009 (Wingard, Dep. at 222-23); CX 0299-004).

783. Schein's decision not to pursue a partnership with IDBG was made after the alleged conspiracy, and is thus inconsistent with Complaint Counsel's contention that after "April of 2015 … respondents started dealing with buying groups." (Kahn, Tr. 19, 54).

784. Rather, Schein's approach to IDBG is consistent with its approach to buying groups before and after the alleged conspiracy: careful consideration and evaluation of the opportunity with a focus on compliance, exclusivity, and value. (CX 8009 (Wingard, Dep. at 222-23), Titus, Tr. 5199-02, 5274; Meadows, Tr. 2495, 2506, 2544; Sullivan, Tr. 4088, 4098-99; Cavaretta, Tr. 5574-76; Foley, Tr. 4638-39, 4614-15).

785. Schein's decision regarding IDBG was unilateral. There are no interfirm communications regarding IDBG.

V. Khyber Pass.

786. Schein's Brian Brady testified about entering a relationship with a buying group called Khyber Pass sometime between 2009 and 2012, while he was a regional manager in California. (CX 8020 (Brady, Dep. at 68-71, 84, 86)).

787. The relationship began when a dentist invited Mr. Brady and a group of other dentists to dinner at an Afghan restaurant in San Diego called Khyber Pass. (CX 8020 (Brady, Dep. at 68-71)).

788. As Mr. Brady described it, at this dinner, "the doctor started chiming his glass, quieted everyone down, and he says, we are forming a buying group." (CX 8020 (Brady, Dep. at 69)).

789. The dentists then asked Mr. Brady for "30 percent off supplies." (CX 8020 (Brady, Dep. at 69-70, 84-85)).

790. Mr. Brady asked if the group would "do anything else aside from trying to leverage better pricing," and the group members mentioned "study clubs" and education. (CX 8020 (Brady, Dep. at 69-70)).

791. Mr. Brady asked if they would "commit all of [their] business," and the group said yes. (CX 8020 (Brady, Dep. at 69-70)).

792. Mr. Brady told the group he would work with them, but 30% was "too high." (CX 8020 (Brady, Dep. at 70-71)).

793. Mr. Brady then entered into a verbal agreement with the group and authorized a 15-18% discount off of catalog price for the group's member dentists. (CX 8020 (Brady, Dep. at 71-72, 84-85)).

794. The group decided to call themselves Khyber Pass, after the restaurant where Mr. Brady first met with the group. (CX 8020 (Brady, Dep. at 71)).

795. Mr. Brady informed his boss at the time, Joe Cavaretta, about Schein's relationship with Khyber Pass and Mr. Cavaretta did not have any issues with the relationship. (CX 8020 (Brady, Dep. at 71, 81)).

796. Mr. Brady monitored compliance with the agreement by tracking what the members spent "every quarter" and on occasion following up with the members about their purchasing commitment. (CX 8020 (Brady, Dep. at 71)).

797. All the Khyber Pass members "had separate accounts, so they had separate field sales consultants, and [each FSC was] responsible for the individual accounts." (CX 8020 (Brady, Dep. at 84)).

798. Khyber Pass leveraged the collective buying power of its member dentists to negotiate a discount, which Schein offered. (CX 8020 (Brady, Dep. at 68-71)).

799. Therefore, Khyber Pass meets Complaint Counsel's definition of a buying group. (Complaint ¶ 3).

800. Mr. Brady testified that Schein's relationship with the group continued at least through his tenure as a regional manager, which ended in January 2015. (CX 8020 (Brady, Dep. at 16-17, 68-71, 88)).

801. Schein's discount offer and relationship with the buying group Khyber Pass are inconsistent with the alleged conspiracy. (Complaint ¶ 1).

W. Klear Impakt.

802. As Dr. Richard Johnson, one of the founders and owners of Klear Impakt described it, Klear Impakt is "a buying and networking group with the sole purpose to keep private practice dentists strong and independent." (R. Johnson, Tr. 5478-79). Klear Impakt is a buying group made up of independent dentists. (R. Johnson, Tr. 5479).

803. By design, Klear Impakt offers its members much more than just discounts on supplies. (R. Johnson, Tr. 5482). For example, it offers "a patient experience class, a phone training class, leadership training, financial training, marketing, discounts," and advice regarding "acquisition,

merger, [and] expansion." (R. Johnson, Tr. 5482-83; *see also* CX 4109-004 ("Klear Impakt Solutions Summary: Business/Practice Efficiency; Front Office Training; Financing; Human Resources; Marketing; Business Management; Education & Professional Development; Member Integration"); R. Johnson, Tr. 5484-88 (describing the Klear Impakt Solutions)).

804. There is no fee or charge to be a member of Klear Impakt. (R. Johnson, Tr. 5488-89).

805. Dr. Johnson and his partners designed Klear Impakt to include services and benefits beyond just discounts to fill the gap left by dental school. (R. Johnson, Tr. 5483-84). Dental school teaches dentists how to treat a patient but not how to run an office. (R. Johnson, Tr. 5483-84).

806. Schein considers Klear Impakt to be a buying group. (Titus, Tr. 5268 ("Klear Impakt is a buying group."); Sullivan, Tr. 4128).

807. Schein has been Klear Impakt's distributor partner since August 2015. (R. Johnson, Tr. 5479, 5505; Titus, Tr. 5324-25; Sullivan, Tr. 4128).

808. Complaint Counsel admits that Klear Impakt is a buying group and that it entered into a contract with Schein during the alleged conspiracy period. (RX 2959-004)

809. Complaint Counsel asserts that Schein's business with Klear Impakt does not count because "Tim Sullivan was not aware of Schein's relationship with Klear Impakt." (RX 2959-004, -006). First, whether or not Tim Sullivan was aware of Schein's relationship with Klear Impakt has no bearing on whether Schein did business with Klear Impakt, or that fact's implications for Complaint Counsel's allegations against Schein. Second, the evidence does not support Complaint Counsel's contention.

810. Complaint Counsel relies on CX 2392 for its assertion that Mr. Sullivan did not know about Klear Impakt. On November 3, 2015, Mr. Sullivan emailed Jake Meadows asking "Did we just recently add Klear Impact? Who are they, where, etc.?" (CX 2392-002).

811. The context of Mr. Sullivan's email to Mr. Meadows was a budget meeting dealing with the question of how to budget for buying groups. (Sullivan, Tr. 4128-29).

812. Mr. Sullivan had not budgeted for additional buying groups for the year, and Mr. Meadows slid him a note saying Klear Impakt should be included. (Sullivan, Tr. 4128-30).

813. Mr. Sullivan testified that "[W]hen he slid me the note, I didn't know what the plans were for Klear Impakt." (Sullivan, Tr. 3981-82).

814. In responding to Mr. Sullivan's question, Mr. Meadows copied Mr. Cavaretta, who reminded Mr. Sullivan that "We did discuss this group over the summer and agreed that we were safe using the G Plan," which was a pricing plan for buying groups. (CX 2392-001; Sullivan, Tr. 4130; *see also* Sullivan, Tr. 4128; CX 2519-001 (Mr. Cavaretta: "A lot going on and I think they forget what we talk about.")).

815. Schein began discussing a buying group partnership with Klear Impakt "sometime in 2014." (R. Johnson, Tr. 5479-80, 5490; Titus, Tr. 5269).

816. Several phone calls later, Dr. Johnson and his partners had an in-person meeting with Kathleen Titus and Nicole Lena from Henry Schein on January 21, 2015. (R. Johnson, Tr. 5492-93; CX 2208-002).

817. The January 2015 meeting between Schein and Klear Impakt lasted for three or four hours, and the two sides discussed "who we were each individually and then what we are as a group, as far as Klear Impakt, what our value proposition [is] and what we're offering." (R. Johnson, Tr. 5493-94).

818. As Ms. Titus described it, her "first order of business was to collect information on who they were, their scope of membership, who those members were, what their vision and their mission [was], whether they were aligned in their values and their integrity that they would serve our brand well and we would serve theirs well, whether they could offer us exclusivity, whether they could promote our business solutions portfolio which included education and nonclinical business services, and whether they could comply, their members would comply, with an agreement with Henry Schein as a prime vendor." (Titus, Tr. 5269).

819. Klear Impakt made a point to make sure Schein "knew we weren't the same as … every other buying group, that we weren't just a discount company." (R. Johnson, Tr. 5494).

820. The message apparently got through. As Ms. Titus testified, "I knew that they fit our criteria or strategy for engaging with buying groups that would present a healthy relationship for all the stakeholders and would grow the Henry Schein business." (Titus, Tr. 5270-71).

821. Ms. Titus informed the Klear Impakt team that she would "move this up the line" and "will be attending a senior management meeting next week." (CX 2208-002; R. Johnson, Tr. 5495 ("[S]he is going to explain to her superiors and bosses about who and what we are and hopefully promote our company.")).

822. Ms. Titus came away from the meeting with Klear Impakt with a strong desire to work with the group. (CX 2208-002 ("[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.")).

823. On January 22, 2015, Ms. Titus emailed Brian Brady and Joe Cavaretta, both of whom had oversight over the Mid-Market division at the time, about wanting to explore a relationship with Klear Impakt, which she described as "different" and "impressive." (CX 2208-001 ("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)."); CX 8020 (Brady, Dep. at 10); Cavaretta, Tr. 5583).

824. A few weeks later, Ms. Titus followed up after she reviewed Klear Impakt with Schein senior management. (CX 2208-001; RX 2062-003). She reported that she "gave a very strong recommendation that we move forward with discussions and provided viable scenarios for a partnership with Klearimpakt…. Key components are those I discussed with your team; exclusivity, compliance (within reason), opportunity to work with your members on full Henry Schein portfolio." (RX 2062-003.)

825. Ms. Titus advised Dr. Johnson as to next steps: reviewing the proposal with the executive committee, which was meeting in two weeks. (RX 2062-003).

826. Dr. Johnson felt "everything still look[ed] very positive as far as creating a partnership," and was comfortable with giving Schein the time it needed to review the proposal because, "we understand that [it] does not take days, that sometimes it will take months, to get things approved." (R. Johnson, Tr. 5496-97).

827. As part of the approval process, Schein visited Dr. Johnson and the Klear Impakt team again in Reno, Nevada to discuss Klear Impakt's business and services in more detail. (R. Johnson, Tr. 5498-99).

828. Dr. Johnson also met with Kathleen, Titus, Nicole Lena, and Joe Cavaretta at the California Dental Academy so that the Klear Impakt team could meet Mr. Cavaretta personally. Mr. Cavaretta reacted "very positive[ly]." (R. Johnson, Tr. 5499).

829. At no time in Dr. Johnson's interactions and negotiations with Schein from 2014 and into 2015 was there an indication that Schein had a policy not to do business with buying groups. (R. Johnson, Tr. 5493-99 ("Nothing stuck out to us that they were not going to work with us; otherwise, they would have been wasting their time or our time.")).

830. Ms. Titus worked with Klear Impact to develop "marketing pieces showcasing HS…working with the partners for several months to carefully craft a program that serves Schein's best interest." (CX 2223-001).

831. Nor did Ms. Titus receive any internal instruction at Schein not to do business with or end negotiations with Klear Impakt. (Titus, Tr. 5271).

832. Klear Impakt's negotiations with Schein culminated in an agreement dated August 17, 2015 that provided Klear Impakt members with a formulary price on "over [redacted] items most commonly used" plus [redacted] off on merchandise not on the formulary. (RX 2162-001; R. Johnson, Tr. 5501-02).

833. Schein also agreed to pay Klear Impakt a [redacted] based on its members' collective purchase volume. (RX 2162-002).

834. For their part, Klear Impakt members who sign up for the Schein discounts "agree to purchase a minimum of [redacted] of their supplies from Henry Schein." (RX 2162-001; R. Johnson, Tr. 5501-02, 5514-15, 5518).

835. When Klear Impakt members enroll for the Schein discount, they sign a form that indicates, "The above named Member agrees to purchase a minimum of 70 percent of their supplies in a FISCAL Year from Henry Schein Dental." (RX 2222-001; R. Johnson, Tr. 5503-04).

836. The members' 70 percent commitment benefits Schein by "hopefully … increas[ing] their overall business," and it benefits Klear Impakt by increasing its administrative fee. (R. Johnson, Tr. 5518).

837. Klear Impakt and Schein renewed their agreement in 2016.[10] (RX 0602-001). [redacted] (RX 0602-001-02; R. Johnson, Tr. 5520-23).

838. Schein's meetings with and positive reaction to Klear Impakt in late 2014, early 2015, and through the present are inconsistent with the alleged conspiracy not to do business with buying groups. (*See* R. Johnson, Tr. 5506; Complaint ¶ 1; *see also* Cohen, Tr. 914 (Benco has never had any discussions with anyone at Schein about Klear Impakt)).

[10] In late 2015, Schein and Klear Impakt briefly "hit the pause button … for new enrollees," but Schein never stopped doing business with or offering discounts to Klear Impakt. (CX 2226-001-02; R. Johnson, Tr. 5505).

X. Kois Buyers Group.

839. Complaint Counsel claims the Respondents' decisions with respect to the Kois Buyers Group were "in lock step by affirmatively turning down the buying groups or failing to meaningfully respond." (CC Pretrial Br. at 37). The evidence does not support that claim.

840. Mr. Cohen received competitive intelligence that Schein and Patterson were both negotiating with Kois. (CX 1074; Cohen, Tr. 912-913).

841. Mr. Sullivan never spoke with Mr. Cohen or anyone else at Benco about the Kois Buyers Group, nor did he speak with Mr. Guggenheim or anyone at Patterson about the Kois Buyers Group. (Sullivan, Tr. 4230, 4282).

842. Mr. Cohen confirmed that he never communicated with Mr. Sullivan or anyone at Schein about the Kois Buyers Group. (Cohen, Tr. 715).

843. The Kois Buyers Group was an outgrowth of the Kois Center, a curriculum-based, graduate-level "private teaching center for practicing dentists" founded by Dr. John Kois Sr. in 1994 in Seattle, Washington. (Kois Sr., Tr. 163-64). Dr. Kois has been the director of the Kois Center since its inception. (Kois Sr., Tr. 163-64).

844. Dr. Kois has been practicing dentistry since 1977 and opened his own private practice in Tacoma, Washington in 1985. (Kois Sr., Tr. 161-63, 168-69). Dr. Kois has always utilized Burkhart as his primary and favored supplier. (Kois Sr., Tr. 168-69, 171-73 ("I trust Burkhart. That's the company I work with.")).

845. In addition to his private practice, the curriculum at the Kois Center is "completely taught" by Dr. Kois and involves "many fields in dentistry from treatment planning, occlusion, restoration of teeth and implants." (Kois Sr., Tr. 164). Each course runs from 7:00am to 6:00pm

for three-to-five days. (Kois Sr., Tr. 164). A three-day course costs around $5,000, while a five-day course costs around $10,000. (Kois Sr., Tr. 233-34).

846. To be eligible to join the Kois Buyers Group, a dentist must first take at least one of the courses at the Kois Center. (Kois Sr., Tr. 235; Kois Jr., Tr. 317-18).

847. Any dentist who takes a Kois Center course is deemed to be a member of "the tribe." (Kois Sr., Tr. 165, 234). Since the inception of the Kois Center, approximately 4,000 dentists have taken a course there, with approximately 900 completing the full curriculum. (Kois Sr., Tr. 165).

848. The current CEO of the Kois Center, John Kois Jr., estimated that more students came from Washington than any other state, given that the center was located in Washington. (CX 0321 (Kois Jr., IHT at 27)).

1. *Qadeer Ahmed and Equalizer ProServices.*

849. By August 2014, Dr. Kois Sr. began working with a Canadian-based consultant named Qadeer Ahmed, through Mr. Ahmed's company called Equalizer ProServices (d/b/a ProCare Dental Services), to create a buying group. (Kois Sr., Tr. 188-89; CX 0116-002). Mr. Ahmed had also partnered with a Canadian dentist named Bobby Chagger. (RX 2197-001; Guggenheim, Tr. 1669-70).

850. Dr. Kois had no personal knowledge of Mr. Ahmed's background at the time he began working with him. (Kois Sr., Tr. 216, 219). Dr. Kois did not meet with Mr. Ahmed in person and did not know how many people ProCare employed. (Kois Sr., Tr. 215, 244). To Dr. Kois' knowledge, neither Mr. Ahmed nor ProCare had any experience in the dental industry. (Kois Sr., Tr. 217, 244-45). Mr. Ahmed used a hotmail email address for his business communications, and apparently worked out of his home in Canada. (RX 0377-00001; Reece, Tr. 4495; *see also* RXD

0211). Nonetheless, Dr. Kois agreed to pay Mr. Ahmed 50% of membership fees that were collected for the buying group. (Kois Sr., Tr. 242).

851. Complaint Counsel did not call Mr. Ahmed to testify at trial.

852. Dr. Kois advertised ProCare Dental Services to his students as a company "led by people who get big things done in business…. Their 'hit list' includes multi-billion dollar 'wins' in retail (Wal-Mart, Home Depot, Loblaws, Metro, Best Buy), media (Sony Music, CanWest), distribution (Ingram, Globelle, OfficeMax) and technology. They are involved right now in a billion-dollar project with the largest financial company in the world." (RX 2113-003). Dr. Kois never verified that any of this information about ProCare was correct. (Kois Sr., Tr. 216).

853. Dr. Kois told Burkhart: "I am starting a membership program for the Kois Center, however, it is not managed by me. It is managed by ProCare Services and the person to contact is Mr. Qadeer Ahmed. Please contact him directly." (CX 4284-001).

854. Mr. Ahmed composed an email for Dr. Kois to send to the "tribe" announcing the launch of the "Kois Tribal Membership Program." (CX 0290-002; Kois Sr., Tr. 205). Dr. Kois sent the email on October 8, 2014. (CX 0290-002). The email laid out the costs to join the buying group: an initial deposit of between $398 and $998 depending on spending levels, and monthly fees between $199 and $499 per month (or $2,388 and $5,988 per year), also depending on spending levels. (CX 0290-003; Kois Sr., Tr. 239). These membership dues did not include the $5,000 to $10,000 in tuition costs at the Kois Center that were required for "tribe" membership and buying group eligibility. (Kois Sr., Tr. 233-34; Kois Jr., Tr. 319). The email invited Tribe members to immediately sign-up and that they would get their discount "code" within about "3 calendar weeks." (CX 0290-003-04).

855. The October 8, 2014 email then said: "We will pick one distribution partner from between Patterson Dental, Henry Schein and smaller distributors. We have confirmed prices from manufacturers AND distributors IF we can work together." (CX 0290-003 (emphasis in original)). However, the only distributor at that time to have had any discussions about the buying group with Mr. Ahmed was Patterson, and no distributor or manufacturer had "confirmed prices." (CX 0116-002 (On August 17, 2014, Patterson Branch Manager Marc Beaudet wrote to Paul Guggenheim, "I had two phone conversations with [Kois Buyers Group] so far.")).

856. Indeed, Dr. Kois recognized that at this time in October 2014, "the buyers['] club didn't even exist, so that many companies would not want to take a risk on engaging with something that isn't going to even turn out to be anything." (CX 8007 (Kois Sr., Dep. at 37-38)).

2. *Mr. Ahmed's Proposal Was Unrealistic and Contrary to How the Kois Buyers Group Actually Worked.*

857. Mr. Ahmed created a proposal to send to distributors. (*See* RX 0377; RX 2197).

858. Though the buying group was Dr. Kois' "vision," he did not have any input on the proposal and did not review it. (Kois Sr., Tr. 255).

859. The Kois proposal noted that the Kois Buyers Group is "not a standard buying group." "Normal buying groups," the proposal continued, "ask distributors to lose margin % … [but] do not allow the distributor to recover the margin % which is lost." (RX 2197-004).

860. The Kois proposal claimed that it was "profoundly different" from other buying groups in that it promised to "compensate the distributor for the margin % sacrificed." (RX 2197-004). It claimed the ability to do this by promising to transfer members' patient revenues to the distributor, such as by sharing revenues on "services which the distributor does NOT" provide. (RX 2197-004).

861. Under the Kois proposal, "[t]he distributor DEFERS margin % on products currently sold (dental supplies) to receive greater immediate volume. The distributor RECOVERS margin % from PATIENT ACQUISITION AND VALUE-ADDED PRODUCTS not offered today." (RX 2197-004 (emphasis in original)).

862. The proposal then calculated "deferral and immediate gains" "[b]ased on a pilot (1,700 dentists)." (RX 2197-004). The proposal thus assumed that every single one of the 1,700 dentists in the "tribe" would immediately join the buying group, with an "additional 1,000 dentists" joining in "Phase 2." (RX 2197-005, -007).

863. Mr. Sullivan's reaction to these representations in the Kois proposal was that they were "big" numbers, and not realistic. (Sullivan, Tr. 4223).

864. By contrast, Heartland Dental, the largest DSO in the country, had only 850 offices. (Rogan, Tr. 3646-47).

865. One year into its existence, the Kois Buyers Group only had approximately 174 members, barely ten percent of the originally promised 1,700. (Kois Jr., Tr. 317).

866. After three years, the Kois Buyers Group had 515 members, less than one third of the originally promised 1,700. (CX 0321 (Kois Jr., IHT at 27)).

867. The Kois proposal also stated, in bold and red letters, that Kois "will pursue manufacturers on our own." (RX 2197-008). This was a "red flag" for Schein. (Sullivan, Tr. 4224 ("Not only was it in red ink, but it was also one of those red flags for us. Again, we do not want anyone between us and our customers, nor do we want anyone between us and our manufacturing partners.")).

868. In a slide titled "Detailed Economics," the Kois proposal purported to calculate the "immediate" gains to Schein. (RX 2197-008). The proposal noted that Schein had an

approximately 32% market share among the 1,700 "tribe" members, and conceded that, under the proposal, Schein would lose "$709k per month" as to its existing business. (RX 2197-008). It then theorized that Schein would immediately gain the remaining 68% of the business, giving Schein a 100% market share and a net gain of "$842k per month." (RX 2197-008).

869. The Kois proposal did not explain how it would ensure 100% purchasing compliance among 1,700 members. To the contrary, both Dr. Kois and Mr. Kois testified that the Kois Buyers Group could not guarantee purchasing compliance. (*See, e.g.*, CX 0321 (Kois Jr., IHT at 97 ("Q. So does Kois Buyers Group guarantee any level of purchases for any particular vendor? A. No."))). It is a point of "pride" to Dr. Kois that members can purchase from any supplier rather than just "who we have alliances with." (CX 8007 (Kois Sr., Dep. at 160)). Mr. Kois actually "encourage[s]" members to "find the lowest price anywhere since there's no exclusivity as part of the buying group. I tell them – if a member tells me they found a cheaper price somewhere else[,] I tell them they should buy it there." (CX 8008 (Kois Jr., Dep. at 13)).

870. Complaint Counsel's expert, Dr. Marshall, noted that "in four of the five studies where I'm looking at a distributor supplying a buying group, I have seen nothing that would indicate that the distributor picks up 100 percent of the business." (CX 8040 (Marshall, Dep. at 223)). Dr. Marshall found that, in 2015, only about [redacted] of Kois Tribe members joined the buying group. (CX 7100-062, -151 (noting that only [redacted] of the "over 2,000 dentists" joined the group). [redacted]. (CX 7100-153 (showing Burkhart's purchases of only [redacted] out of over [redacted] among Burkhart-purchasing-Kois members)). Consequently, Burkhart only had a [redacted] share of Kois Tribe Members through the buying group. (CX 7100-062, -151, -153).

871. Some Kois Buyers Group members do not purchase from Burkhart at all. (CX 8008 (Kois Jr., Dep. at 128 ("We have members that don't spend with Burkhart and are still members, my assumption is they buy from somewhere other than Burkhart."))). [redacted] (Reece, Tr. 4481).

3. *Mr. Ahmed First Reached Out to Patterson But Lied About His Contacts with Manufacturers.*

872. Patterson was the first distributor that Mr. Ahmed approached with his Kois proposal on September 22, 2014. (RX 0377).

873. Patterson was "very suspicious about all the assertions" in Mr. Ahmed's proposal. (Guggenheim, Tr. 1825).

874. On September 22, 2014, Mr. Ahmed asked for a meeting "if required" and pushed Patterson to "get something done this week." (RX 0377-00002).

875. On October 13, 2014, Mr. Ahmed informed Dr. Kois that "Guggenheim has already declined." (CX 8007 (Kois Sr., Dep. at 47)).

4. *After Patterson Declined, Kois Engaged with Benco and Burkhart.*

876. At trial, Dr. Kois testified on direct that the Kois Buyers Group only reached out to Burkhart after being turned down by Schein, Patterson, and Benco. (Kois Sr., Tr. 190). However, as discussed below, this is directly contradicted by contemporaneous documents, which Dr. Kois admitted on cross. (Kois, Sr., Tr. 250-55; CX 4284; RX 0377; RX 2197).

877. On October 17, 2014, Burkhart's Dave Anderson emailed Dr. Kois about the Kois Buyers Group after learning about the group from Burkhart customers. (Kois Sr., Tr. 253-54; Reece, Tr. 4432-33; CX4284-001).

878. The next day, Dr. Kois told Burkhart to contact Mr. Ahmed. (Kois Sr., Tr. 254; Reece, Tr. 4433).

879. Burkhart reached out to Mr. Ahmed by email on October 20, 2014 (CX 4286), and Mr. Anderson talked with Mr. Ahmed by phone on October 21, 2014. (CX 4289).

880. Mr. Ahmed provided Burkhart with his Kois proposal on October 21, 2014. (CX 4126; Reece, Tr. 4473).

881. That same day – October 21, 2014 – Dr. Kois emailed Chuck Cohen of Benco, explaining that he "ha[d] been approached by a company to organize our members for group purchase opportunities" and referred to Mr. Cohen to Mr. Ahmed. (RX 1039-001).

882. Mr. Cohen responded to Dr. Kois later that day, telling him that an opportunity that "involve[d] an outside company like Equalizer Pro Services or anyone else" was not appealing because "they'll just take a cut of the savings." (RX 1039-001). Mr. Cohen said he was "going to politely give Qadeer our standards answer of: 'thanks, but we don't do buying groups.'" (RX 1039-001). Mr. Cohen suggested that Benco and Dr. Kois discuss "buying club options … in early 2015." (RX 1039-001).

883. On October 26, 2014, Mr. Cohen informed Mr. Ahmed that Benco would decline to do business with the buying group, noting "our policy is that we don't support, or work with, buying groups…." (CX 1240-001).

884. Meanwhile, Burkhart met with Mr. Ahmed on October 22, 2014 and informed Dr. Kois that it was "very interested in participation," intended to submit a proposal, and scheduled a conference call for October 23 to discuss further with Dr. Kois. (CX 4282-001; CX 4292-001).

885. [redacted] (CX 4288-002). [redacted]

[redacted] (CX 4288-003; Reece, Tr. 4479).

886. Burkhart pursued a relationship with the Kois Buyers Group in part because like Burkhart, the Kois Center was based in Washington. (Reece, Tr. 4451 ("[I]t was logical within our market….")).

887. "[A]t first," Burkhart was not "very positive to Qadeer," so Dr. Kois had to "rel[y] more on [his] personal relationship and reputation…." (CX 8007 (Kois Sr., Dep. at 68)). "The reason that [Burkhart] entered into the relationship [with the Kois Buyers Group] was based solely on Dr. John Kois and his reputation with Burkhart …." (Reece, Tr. 4495).

888. Though Mr. Ahmed was responsible for reaching out to distributors, Dr. Kois had ultimate authority to sign-off on any agreement. (Kois Sr., Tr. 189).

889. On October 30, 2014, Mr. Ahmed told Burkhart that it had reached an agreement with the Kois Buyers Group as to the path forward. (CX 4251 ("I spoke to John [Kois Sr.] at 5:30 am – we have agreement on the approach we're going to take together….")). Dr. Kois testified that this was "around the right time" that he made the decision to choose Burkhart. (Kois Sr., Tr. 302-03).

890. Dr. Kois chose Burkhart because of his longstanding association with the company: "In the end, because of my relationship with the company, which at that point was about thirty years, I really trusted the company, and they actually showed the most interest, so we decided to work with Burkhart." (Kois Sr., Tr. 191).

891. Dr. Kois "was actually very reluctant to move away from doing business with Burkhart," because he had "dealt with Burkhart for so many years" and "had such a strong personal relationship" with Burkhart. (CX 8007 (Kois Sr., Dep. at 162-163)). Dr. Kois chose Burkhart

because of his "long history" with the company and a trust that was based on 30 years of experience with them. (Kois Sr., Tr. 191; CX 8007 (Kois Sr., Dep. at 119)).

892. Given his 30-year relationship with Burkhart, it would have been "very difficult" to choose a different supplier for his buying group. (Kois Sr., Tr. 231-32). The idea of starting a buying group that would partner with anyone but Burkhart was "not appealing" to him. (CX 8007 (Kois Sr., Dep. at 163)).

5. *Schein Negotiated with Mr. Ahmed, but Dr. Kois Chose Burkhart Before Schein Could Make a Decision.*

893. Schein was the last distributor to receive the Kois proposal – on October 22, 2014. (Kois Sr., Tr. 255; RX 2197-001).

894. Complaint Counsel cites to an earlier email in September 2014 in which Mr. Sullivan reacted to Dr. Kois's introductory email to his "tribe." (CX 2469; Sullivan, Tr. 3938). Mr. Sullivan wrote, "I forwarded to a few internally for discussion also. I still believe this is slippery slope and have yet to see a successful one in dental and don't plan to take the lead role. Watching closely." (CX 2469-002). This is consistent with Schein's longstanding approach to and view of buying groups. (SF 159-82; *see also* Sullivan, Tr. 3997-98; 4085).

895. After receiving the Kois proposal on October 22, Mr. Sullivan informed Dr. Chagger that he would find time for them "to speak in the next week or so. I look forward to catching up with you and learning more about your group." (RX 2424-003). Mr. Sullivan's assistant then asked Dr. Chagger about his availability on October 30 or October 31. (RX 2424-002).

896. Dr. Chagger replied that he "would like to schedule a webex this week as time is of the essence." (RX 2424-002). Mr. Sullivan accommodated, and spoke with Dr. Chagger and Mr. Ahmed the following day on October 23. (RX 2602-006).

897. After the discussion, Mr. Sullivan followed up, noting "[w]e are very interested in learning more about this initiative as it certainly seems very unique to anything we've heard thus far. I need a little bit of time to do some homework and will follow up next week on thoughts regarding next steps." (RX 2602-006).

898. This response to Kois is inconsistent with Complaint Counsel's allegation that Schein had a policy or agreement not to do business with buying groups. (Complaint ¶ 1). If Schein had such a policy or agreement, and was following it, it would have simply declined the Kois proposal. Instead, its executives spent the time and resources to discuss the proposal with Mr. Ahmed and evaluate it. (RX 2424; RX 2602).

899. Schein held an internal meeting on October 27, 2014 to discuss the buying group's proposition. (RX 2602-005). The same day, Mr. Sullivan emailed Mr. Ahmed asking for time to consider options and to meet in person: "I highly doubt I'll be able to coordinate such a broader meeting for a deep dive with this same group again in the next 24-48 hours. I am hopeful you can buy us a little more time considering we were invited to this discussion so late in the game … it feels like 'right vs. fast' may be the best approach. I also believe a face to face meeting with you and Dr. Kois would be of great value to everyone." (RX 2602-005).

900. Mr. Sullivan's desire to take a "right vs. fast" approach and meet Dr. Kois and Mr. Ahmed in person is inconsistent with Complaint Counsel's allegation that Schein had a policy or agreement not to do business with buying groups. (Complaint ¶ 1).

901. Mr. Sullivan explained at trial that, "I'm basically saying to him we're not saying no. There are some things that we have been talking about that actually sound like there's some potentially opportunity here. It's a large group. If we could figure some things out, it's potentially

a large opportunity, but we need time to analyze this, and I am not going to rush into an agreement with them." (Sullivan, Tr. 4225-4226).

902. Mr. Ahmed replied that he was happy to spend "serious time" discussing "extended aspects of the program," including with Dr. Kois, but only "after we get a basic initial deal done that gives you an 'out' if we don't deliver on the rest in a timely fashion." (RX 2602-004).

903. Still, Mr. Sullivan responded later that day, noting, "The good news is that our interest continues to remain high. The challenge is that this appears to be quite complicated in structure and modeling and have many more questions than we do answers at this time." (RX 2602-004).

904. Mr. Sullivan's representation that Schein's "interest continues to remain high" is inconsistent with Complaint Counsel's allegation that Schein had a policy or agreement not to do business with buying groups. (Complaint ¶ 1).

905. Mr. Sullivan then asked for an outline of the "basic initial deal" that Mr. Ahmed sought and promised to "quickly turn around our thoughts on next steps." (RX 2602-004). This too is inconsistent with Complaint Counsel's allegation that Schein had a policy or agreement not to do business with buying groups.

906. The following day, October 28, 2014, Mr. Ahmed sent a proposal, which did little more than repeat the points in his original presentation, and asked to "wrap this up in the next few days." (RX 2602-003). He offered to "spend the time to share our detailed plans with your team, and understand where you want to take your business[,]" only "*after* you give us the supply deal…." (RX 2602-003; Kois Sr., Tr. 263-64; RX 2197).

907. Mr. Ahmed wrote "I can visit you 48 hours after we launch the supply deal," but did not otherwise agree to Mr. Sullivan's suggestion of a "face to face meeting." (RX 2602-003, 005).

908. To Mr. Sullivan, "That's not how you enter a contract. That's not how you enter a partnership." (Sullivan, Tr. 4227; *see also* Sullivan, Tr. 4228).

909. Mr. Sullivan responded: "I appreciate the 'get r done' approach, but it's not a style/approach that I am comfortable working in. I can't get married with a 'no big deal, we can always divorce later' mentality. We do not enter partnerships lightly and ONLY commit if we see long term mutual value. I can't put out a public 'go to market' strategy that includes a special pricing program (ie. appearance of Buying Group only) for a targeted group of customers that doesn't include 'the rest of the story'. If that means we are out of your consideration then I respect your decision and hope that we can stay connected along the way for future consideration. However, if we can slow down and really understand your model better that you believe is going to change dentistry, then we believe it's worth rolling up sleeves and getting to know each other better…. This will take some time to put together thoughtfully and diligently." (RX 2602-002; Kois Sr., Tr. 265).

910. Mr. Sullivan's response in 2014 (in the middle of the alleged conspiracy) – Schein's desire to proceed "thoughtfully and diligently" and to understand the Kois model – is inconsistent with Complaint Counsel's allegation that Schein had a policy or agreement not to do business with buying groups. (Complaint ¶ 1).

911. Mr. Ahmed responded that "[i]f we believe the process is moving to an intelligent and rapid conclusion, we'll stay engaged." (RX 2602-001).

912. Dr. Kois was copied on these negotiations between Schein and Mr. Ahmed, but he did not pay attention to them. (Kois Sr., Tr. 261, 266-67). Still, Dr. Kois understood at the time that

Schein's interest in partnering with the buying group was "high." (Kois Sr., Tr. 261-62; CX 8007 (Kois Sr., Dep. at 152)).[11]

913. But just two days later, on October 30, 2014, Mr. Ahmed told Burkhart that Dr. Kois had reached an agreement as to the path forward with Burkhart. (CX 4251-001; Kois Sr., Tr. 265-66). Dr. Kois made that decision before he had any understanding of whether Schein would sign a deal with him. (CX 8007 (Kois Sr., Dep. at 167-68)).

914. Meanwhile, Schein continued to evaluate the Kois proposal internally with "the entire senior management team," and did not notify Mr. Ahmed of its decision to decline until November 3, 2014, four days *after* Dr. Kois had already agreed to move forward with Burkhart. (CX 4310-001). Schein's decision was "based largely on not having enough time to do our due diligence and the current dental market conditions." (CX 4310-001; Sullivan, Tr. 4230 ("[T]here was no way for us to do it in the time frame they were looking for.")).

915. For Mr. Sullivan, a big concern with the Kois proposal was commitment. "There was no commitment to whoever they chose as their dealer of choice, that they would actually then make their purchases." (Sullivan, Tr. 4223).

916. As he testified at deposition, when Dr. Kois selected Burkhart, he had not yet heard back from Schein "with any certainty." (CX 8007 (Kois Sr., Dep. at 168)).[12]

917. Dr. Kois Sr. never met with Mr. Sullivan and never took part in a meeting with Schein about the Kois proposal. (Kois Sr., Tr. 259, 260-61).

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[11] Complaint Counsel elicited testimony from Dr. Kois that he "did not hear anyone was interested other than Burkhart" without showing Dr. Kois the email exchange with Schein. Once Dr. Kois' recollection was refreshed, he agreed that Schein's interest was "high." (*Compare* Kois Sr., Tr. 267 *with* Kois Sr., Tr. 261-62).

[12] Complaint Counsel elicited contradictory testimony from Dr. Kois that it was not until Mr. Ahmed "was not able to work with any other companies" that "we reached out to Burkhart." (Kois Sr., Tr. 190). After looking at the chronology of documents, Dr. Kois later corrected this. (Kois Sr., Tr. 190; *compare* Kois Sr., Tr. 250-51 *with* Kois Sr., Tr. 255).

918. This is in contrast to the negotiations with Burkhart, where Dr. Kois did participate personally. (Kois Sr., Tr. 261).

919. Mr. Ahmed had nothing to do with Burkhart's decision to partner with Kois, it "was based solely on Dr. John Kois…." (Reece, Tr. 4495-96).

6. *Though the Kois Buyers Group Got Off to a Slow Start Under Mr. Ahmed's Leadership, Mr. Kois Jr. Turned It Around and Never Approached Schein Again.*

920. The Kois Buyers Group signed an agreement with Burkhart on November 14, 2014. (Kois Sr., Tr. 265-66).

921. At that time, Mr. Ahmed ran and managed the Kois Buyers Group. (Kois Jr., Tr. 311).

922. The Kois Buyers Group under Mr. Ahmed was not popular. (CX 8007 (Kois Sr., Dep. at 74-75)). It lacked direction, clarity, and structure. (CX 8008 (Kois Jr., Dep. at 119, 121)).

923. After one year, Kois Buyers Group "was not doing very well" and the "perception of our members was not great." (Kois Sr., Tr. 223). Adoption of the buying group was "very slow," leading to a "very small number" of participants. (CX 8007 (Kois Sr., Dep. at 81)).

924. The membership fees were initially "way too expensive" for members. (Kois Sr., Tr. 239). The Kois Buyers Group charged between $2,400 and $6,000 per year (Kois Sr., Tr. 239), on top of the $5,000-to-$10,000 in tuition costs that were required to gain eligibility for group membership. (Kois Sr., Tr. 233-34; Kois Jr., Tr. 319).

925. Though Mr. Ahmed's proposal to Schein and Patterson had assumed that the buying group would immediately gain 1,700 members, only about 170 members (or 10% of the proposal) had signed up as of March 2015. (CX 8007 (Kois Sr., Dep. at 124); Kois Jr., Tr. 317).

926. John Kois Jr. took over management of the buying group from Mr. Ahmed in October of 2015. (Kois Jr., Tr. 361). Even then, "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…." (Kois Jr., Tr. 363).

927. Though the Kois Buyers Group has advertised a 15% discount, Mr. Kois admitted there were "credibility concerns" with that claim because individual dentists could obtain higher discounts from Burkhart or other suppliers. (Kois Jr., Tr. 360-61).

928. Mr. Kois implemented numerous changes to the buying group's operations. Among other things, he created a website, handed out fliers to students, sent out newsletters and updated the group's social media presence. (Kois Jr., Tr. 363-64).

929. Mr. Kois also drastically reduced the cost of membership to \$299 per year. (Kois Jr., Tr. 364-65; Kois Sr., Tr. 240-41). When the pricing structure was reduced, "all the people that had paid the high fees" were given "membership for how many years that would work out to be when you look at the total number – the amount of dollars they contributed from the beginning. So if they contributed the \$900, they were given a three-year membership." (Kois Sr., Tr. 239-41). [redacted] (CX 4228; Reece, Tr. 4480).

930. Mr. Ahmed had retained 50% of the initial membership fees, but he did not return any of it to the Kois Buyers Group. (Kois Sr., Tr. 242).

931. Mr. Kois also began to "add additional vendors that were manufacturers that sold direct to the dental practices." (Kois Jr., Tr. 363).

932. One of the manufacturers that Mr. Kois reached out to was 3M. (Kois Jr., Tr. 368). But 3M told Mr. Kois that it was not interested, because "members already purchase[d] from 3M" and "any discounts would erode profits." (Kois Jr., Tr. 368-69).

933. Another manufacturer, Ultradent, told Mr. Kois that they had a policy of not working with buying groups. (Kois Jr., Tr. 369). Ultradent explained that "they had been a part of a buyers group in the past and they didn't have favorable results." (CX 8008 (Kois Jr., Dep. at 56)).

934. One manufacturer that did accept Mr. Kois' invitation was Brasseler, which currently provides discounts for Kois Buyers Group members ranging from 40 to 60%. (Kois Jr., Tr. 369-70; CX 8008 (Kois Jr., Dep. at 161-62)). Brasseler is wholly owned by Henry Schein. (Kois Jr., Tr. 370; CX 8008 (Kois Jr., Dep. at 161-62).

935. Despite making numerous changes to the buying group, Mr. Kois never sought to change suppliers. He did not reach out to Schein when he negotiated renewed agreements with Burkhart in 2016 and 2018. (Kois Jr., Tr. 340-41, 362-63). Mr. Kois likewise did not reach out to Patterson when the Kois Buyers Group was negotiating renewals with Burkhart. (Kois Jr., Tr. 382-83).

936. Mr. Kois believes the buying group was not impacted at all by the decision not to work with Schein, Benco or Patterson. (Kois Jr., Tr. 366). And Dr. Kois believes that the buying group has been a success and a different supply company would not have made a difference. (Kois Sr., Tr. 226; CX 8007 (Kois Sr., Dep. at 89-90 ("I don't think a different supply company would make any difference."))).

Y. Long Island Dental Forum.

937. Complaint Counsel's expert, Dr. Marshall lists the Long Island Dental Forum as a buying group under Complaint Counsel's definition. (CX 7101-032-33, 137-40).

938. Schein also considers and treats the Long Island Dental Forum as a buying group. (Cavaretta, Tr. 5577; CX 8033 (Cavaretta, Dep. at 159-60); CX 8020 (Brady, Dep. at 212)).

939. The Long Island Dental Forum is a "study club" created by Dr. Alan Farber and comprised of independent dentists. (RX 2947 (Cavaretta, Dep. at 23-24); *see also* RX 2263-005-06 (listing dentist members for 2015-16)).

940. Schein entered into a relationship with the Long Island Dental Forum by at least 2006. (Cavaretta, Tr. 5577).

941. Joe Cavaretta, the Schein Regional Manager for Long Island at the time, was responsible for opening the Long Island Dental Forum buying group within Schein. (Cavaretta, Tr. 5576-78). While Mr. Cavaretta was engaging in negotiations with the Long Island Dental Forum, he called Dave Steck about the opportunity and Mr. Steck agreed it was a good opportunity that Schein should pursue. (Cavaretta, Tr. 5577-78 ("When … I was engaging in conversations with Dr. Farber I did call Dave Steck and let him know about the opportunity, talked it over, and he said, Yeah, let's do it.")).

942. A 2006 letter from Mr. Cavaretta to Dr. Alan Farber outlined the "terms of [Schein's] agreement" with the Long Island Dental Forum. (CX 2724-017; Cavaretta, Tr. 5576-77).

943. Schein's letter agreement lists benefits for "each new member" of the Long Island Dental Forum, including "5% off of catalog," membership in the Privileges Program "as long as they commit to do at least 12k in business," a "fee analysis" for each member who is also a Privileges customer, a "3% cash back" rebate to the Long Island Dental Forum, and other technical support and technology benefits. (CX 2724-017).

944. Schein's letter agreement to the Long Island Dental Forum also indicated the Long Island Dental Forum will "persuade members to make SSD [Sullivan Schein Dental] their primary source for merchandise and equipment," and "promot[e] [Schein] as their exclusive supplier." (CX 2724-018).

945. Dr. Alan Farber signed an additional agreement with Schein on December 9, 2015. (RX 2263-002).

946. Schein continues to do business with the Long Island Dental Forum and provide its member dentists discounts. (Cavaretta, Tr. 5578; *see also* CX 7101-140 (identifying Long Island Dental Forum sales in Schein sales data from 2009 to 2017)).

947. As a group of independent dentists receiving a discount on dental supplies, the Long Island Dental Forum meets Complaint Counsel's definition of a buying group. (Complaint ¶ 3).

948. Schein did business with the Long Island Dental Forum buying group during the alleged conspiracy. (Cavaretta, Tr. 5578). The fact that Schein's business with Long Island Dental Forum continued uninterrupted from 2006 to the present is also inconsistent with Complaint Counsel's allegation that Schein ended its existing relationships with buying groups as part of the alleged conspiracy.

949. Schein's sales and relationship with the Long Island Dental Forum are inconsistent with the alleged conspiracy. (Complaint ¶ 1).

Z. Mastermind Group.

950. The Mastermind Group is a "buying group composed on independent private practice dentists." (RX 2947 (Cavaretta, Dep. at 66-67)).

951. The Mastermind Group also goes by the names "Elite Dental Success Institute, LLC" and "Elite Practice Mastermind Group." (CX 2718 ("[T]he Dental Success Institute and the Mastermind Group are one of the same. DSI runs the Mastermind group.")).

952. Darci Wingard was primarily responsible for Schein's relationship with the Mastermind Group. (RX 2947 (Cavaretta, Dep. at 67)).

953. Ms. Wingard testified that the Mastermind group provides members with "heavy consulting and analytics for practice growth needs." (CX 8009 (Wingard, Dep. at 207)).

954. These consulting services allow Mastermind to drive sales to Schein: "they look at practice numbers. They look at inventory. There's a lot of things through the analytics that they look through. They say 'We're working with Schein to help with overhead. You should buy within formulary.'" (CX 8009 (Wingard, Dep. at 208)).

955. Joe Cavaretta referred to the group as one of the "five or six" buying groups that "have a model that … is somewhat sustainable." (Cavaretta, Tr. 5570).

956. Ms. Wingard brought the group to Schein due to the group's consulting services and "because their vision was aligned directly with ours of helping these independent practices thrive and grow their businesses." (CX 8009 (Wingard, Dep. at 209)).

957. As of June 2018, Mastermind Group had 85 members. (CX 8009 (Wingard, Dep. at 209)).

958. Schein signed a three-year agreement with the Mastermind Group in August 2017. (RX 2695-001).

959. Schein's business with the Mastermind Group is consistent with its approach towards buying groups before, during, and after the alleged conspiracy period: it assessed buying group opportunities on a case-by-case basis and did business with them where it made sense. (SF 159-82, 317).

960. Schein's agreement with Mastermind allows Mastermind members to purchase through a custom formulary and also buy non-formulary products at discounts between [redacted] off of catalog price. (RX 2695-001).

961. As a group of independent dentists seeking discounts on dental supplies, the Mastermind Group is a buying group within the definition of the Complaint. (Complaint ¶ 3).

962. Schein also pays Mastermind an "administrative fee" of [redacted] on all purchases above a baseline of [redacted]. (RX 2695-001).

AA. Mari's List.

963. Mari's List is a buying group with between 150 and 200 members that was created and operated by Mari Dunn in San Antonio, Texas. (CX 2179-001). The group is non-exclusive and prides itself on partnering with as many vendors as possible. (CX 2179-001). Members pay an initial $500 to join and then $1000 per year. (CX 2179-001).

964. Around July 2016, Darci Wingard had a few calls with Ms. Dunn to understand her model and investigate whether Mari's List might be a potential partner for Schein. (CX 8009 (Wingard, Dep. at 226-27)).

965. Ms. Dunn asked Schein to put together a promotion for Mari's List members for a sterilizer unit. (CX 8009 (Wingard, Dep. at 228-29)).

966. Ms. Wingard worked with others at Schein to get the promotion program launched for Mari's List. (CX 8009 (Wingard, Dep. at 228)).

967. Schein put together a limited-time offering for the requested product, but the offering was not as successful as planned, and Schein has not worked on any subsequent offerings for Mari's List since. (CX 8009 (Wingard, Dep. at 228-29)).

968. Schein's experience with respect to Mari's List, including its offering a promotion program, is inconsistent with the alleged agreement not to do business with buying groups at all. It is consistent with Schein's approach towards buying groups before, during, and after the alleged

conspiracy period: it assessed buying group opportunities on a case-by-case basis and did business with them where it made sense. (Complaint ¶ 1; *see also* CX 8009 (Wingard, Dep. at 228)).

BB. MeritDent.

969. Schein considered and treated MeritDent as a buying group. (Cavaretta, Tr. 5578, 5651; Sullivan, Tr. 4243-44).

970. When MeritDent first approached Schein in late 2011, Schein was skeptical. (Sullivan, Tr. 4242-43; Cavaretta, Tr. 5580-81). As Mr. Cavaretta, the Western Zone Manager for Schein at the time, explained, Schein's "value proposition" was "helping doctors grow their practice … organically with [Schein's] current offerings." (Cavaretta, Tr. 5578, 5580). Buying groups were not a natural fit in that strategy, as Schein had concerns about whether the buying group could actually "grow [Schein's] business." (Cavaretta, Tr. 5580 (explaining that buying groups were not Schein's "major growth strategy" in late 2011); Sullivan, Tr. 4242; CX 2458-001 ("As you can imagine, 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.")).

971. MeritDent did not "fall into the [Special Markets] world" because it could "not guarantee that all of their business will come to Schein…." (CX 2458-001).

972. Still, MeritDent was reviewed and approved by the leadership of Henry Schein Dental. (Cavaretta, Tr. 5579, 5581-82; Sullivan, Tr. 4241-42; CX 2458-001). Joe Cavaretta, Tim Sullivan, Dave Steck, and John Chatham met in December 2011 to discuss the MeritDent opportunity, including what "was going on in Vegas at the time," where Schein had "60 percent market share" but "the economy [had] really hit … hard." (Cavaretta, Tr. 5579, 5581-82; Sullivan, Tr. 4241-42; CX 2458-001).

973. On December 22, 2011, the *day after* Complaint Counsel alleges Schein no longer did business with buying groups (CC Pretrial Br. at 18 (citing CX 2062)), Mr. Cavaretta outlined a proposal to do business with MeritDent buying group. (CX 2458-001; Cavaretta, Tr. 5582; Sullivan, Tr. 4243).

974. After meeting with MeritDent "several times," Schein and MeritDent reached an agreement on a program that was (1) designed to "meet [MeritDent's] needs"; (2) "priced competitively"; and (3) included additional services such as Schein's practice analysis tool and educational pieces. (Cavaretta, Tr. 5581-82; Sullivan, Tr. 4243).

975. Schein and MeritDent entered into a purchasing agreement on February 7, 2012. (RX 2393-005; Cavaretta, Tr. 5582, 5649).

976. The agreement provided a "pricing program" that "will provide a savings of 15-20% off of HSD cat[a]log." (RX 2393-005; *see also* Marshall, Tr. 3006 [redacted]).

977. The agreement also provided for a $5,000 rebate to MeritDent "for every 100 customers that are purchasing 15k or more from Henry Schein," as well as free dental practice analysis service that "on average shows more than $150,000 per year in opportunity for a dental practice", Schein-sponsored events specifically for MeritDent members, and other benefits to members. (RX 2393-005; Sullivan, Tr. 4244-45).

978. By 2013, MeritDent was unable to deliver additional sales volume for Schein. (RX 2393-004 (By 2014, MeritDent only had "35 accounts over the $15,000 minimum threshold" and "purchases for the entire group fell in 2013 from the 2012 levels.")).

979. Despite this, Schein continued to work with MeritDent through at least April 2015, with the "hope we can reach a level with membership [that] would benefit both" parties. (Cavaretta, Tr. 5582; RX 2393-001, 004).

980. Complaint Counsel's expert, Dr. Marshall, concedes that MeritDent is a buying group and that he did not do any analysis of Merit Dent to determine whether "signing up Merit Dent actually delivered any incremental volume to Schein." (CX 7100-213 (listing MeritDent as a supposedly boycotted buying group); Marshall, Tr. 3002). However, Dr. Marshall failed to cite Schein's proposal to MeritDent, and he was unaware of the actual agreement that Schein entered into with MeritDent on February 7, 2012. (Marshall, Tr. 2998; SF 973-776). With respect to the discount that Schein offered to MeritDent, Dr. Marshall admitted it was a [redacted] and exceeded the discounts available to a majority of Schein's independent dentists. (Marshall, Tr. 3006; CX 7101-067 (showing that only [redacted] of customers receive discounts greater than [redacted])).

981. Schein's partnership with MeritDent is inconsistent with the alleged conspiracy. (Complaint ¶ 1).

CC. Nevada Dental Cooperative.

982. Complaint Counsel concedes that the Nevada Dental Cooperative ("Nevada Cooperative) is a buying group. (RX 2956-004 ("Complaint Counsel is aware of the following Buying Groups that have existed or that attempted to form: … Dental Cooperative (Nevada & Utah)."); *see also* RX 2947 (Cavaretta, Dep. at 72)).

983. The Nevada Cooperative was part of the Utah Dental Co-Op. (RX 2599; CX 0272; Mason, Tr. 2330).

984. In 2011, the Utah Cooperative began soliciting membership in Nevada. (RX 2947 (Cavaretta, Dep. at 71)).

985. At first, in January 2011 (before the start of the alleged conspiracy), Mr. Cavaretta thought Schein should "stay away for now" after Ms. Titus voiced her concern over cannibalization of Schein's existing business: "We give them special pricing in Utah and they turn around and present themselves to our top, and I mean very large private practice accounts and study clubs, to either reduce our current margins or the business goes to Darby here in Vegas." (CX 2811-001-02).

986. Nevertheless, in September 2011, Mr. Cavaretta negotiated an "exclusive" contract to cover the Cooperative's expansion in Nevada. (CX 2720-002, -005); RX 2947 (Cavaretta, Dep. at 72 ("I helped it expand into Nevada."))).

987. Andrew Eberhardt, Vice President of the Dental Co-Op, thanked Mr. Cavaretta "for your support and patience with our efforts in Las Vegas." (CX 2720-002).

988. Schein's agreement with the Nevada Cooperative offered qualifying Cooperative members a rebate of 6%, 8%, or 10% based on the member's quarterly supply purchases, a waiver of annual service fees, a 15% discount on equipment purchases and technical service, free practice analysis, additional business solutions workshops at no charge, and other benefits. (CX 2720-005-06).

989. As part of the agreement, the Nevada Cooperative received a 2% quarterly rebate on new volume from group members. (CX 2720-005).

990. The Nevada Cooperative agreed to "support and endorse this program to all members," and Schein in turn agreed to "support and endorse the Dental Cooperative of Nevada." (CX 2720-006).

991. Mr. Eberhardt told Schein that he "believe[d] our exclusive agreement with Henry Schein WILL bring incremental growth to your company and help our organization grow with the support of you and your good FSCs." (CX 2720-002).

992. Within a year, however, Mr. Cavaretta observed that the Nevada Cooperative was "not working very well." (RX 2490-001).

993. In March 2013, Mr. Cavaretta wrote that the "program has not worked in Vegas because [a] We have a large portion of market share [b] The doctors that we are trying to win over don't think an 8% discount is a big discount [and] [c] The doctors don't see the value in what the Co-op is doing." (CX 2750-001).

994. In the last two quarters of 2013, the Nevada Cooperative earned a total rebate of $12.38, an amount too small for Schein to even write a check. (RX 2384 -002 (the "sales growth [was] not as [Schein] expected," and "the rebate for the group is too minimal to process")).

995. Schein's agreement with the Nevada Cooperative was up for review in 2014, but Schein was not sure if it would "even be updated since it does not seem to have the sales or growth that would enforce the rebate." (RX 2384-003).

996. In June 2014, Mr. Eberhardt wrote to Schein asking why he "did not receive a rebate check from the Nevada region for Q4 2013 [or] Q1 2014." (CX 2646-005).

997. Karoline Heytens, a Schein Field Program Coordinator, forwarded Mr. Eberhardt's email internally to Mr. Cavaretta and Steve Perkins, noting "Last we all talked, it was decided that this agreement would need to be reviewed since it has not brought sales in. The rebate is based on growth, not just the sales. [T]he rebate, if any, would be very minimal …. [F]or Q1 … the rebate would be $61." (CX 2646-004).

998. In July 2014, Ms. Heytens reported that the Nevada Cooperative only had 11 members, and a few did not even meet the minimum purchase requirement of $3,750 per quarter. (CX 2646-002).

999. In Q2 2014, the Nevada Cooperative actually showed negative growth. (CX 2646-002).

1000. Complaint Counsel's expert, Dr. Marshall, did not analyze whether Schein's relationship with the Nevada Dental Cooperative, or the Dental Co-Op generally, was profitable for Schein. (Marshall, Tr. 2969 [redacted]).

1001. As discussed previously, Schein ultimately discontinued its relationship with the Dental Co-Op, including the Nevada Cooperative. (SF 591-620).

DD. New Mexico Dental Co-Op.

1002. Complaint Counsel claims that "[a]s a result" of the alleged agreement, "Schein did not enter into" an agreement with the New Mexico Dental Cooperative. (RX 3087-004). The evidence does not support this claim.

1003. Complaint Counsel identifies communications between Benco and Patterson executives regarding the New Mexico Dental Co-Op, but does not claim that Mr. Sullivan or any other Schein executives ever communicated with anyone at Benco or Patterson regarding the New Mexico Dental Co-Op. (CC Pretrial Br. at 21-23).

1004. Mr. Cohen did not have any discussions with Mr. Sullivan about the New Mexico Dental Co-Op, nor did he forward any of the emails he received from Mr. Guggenheim about buying groups or the New Mexico Dental Co-Op to anyone at Schein. (Cohen, Tr. 845, 848).

1005. Similarly, Mr. Guggenheim never communicated with Mr. Sullivan or anyone at Schein about the New Mexico Dental Co-Op. (Guggenheim, Tr. 1855-56).

1006. When Dr. Mason, along with two other dentists, first had the idea for a New Mexico Dental Co-Op in early 2013, they reached out to Patterson as their first choice for a distributor partner. (Mason, Tr. 2331, 2333, 2335, 2339).

1007. Dr. Mason had a relationship with Patterson and primarily purchased from Patterson for his private practice. (Mason, Tr. 2335).

1008. In a February 4, 2013 email to manufacturers of dental supplies and equipment, Dr. Mason represented that they were "in the process of starting a dental Cooperative" and had "partnered with Patterson Dental…." (CX 0090-004; Mason, Tr. 2338-39, 2340).

1009. Dr. Mason's email to manufacturers invited them to a meeting on March 13, 2013 at the Patterson Dental Branch. (CX 0090-004).

1010. A representative for one manufacturer – Midmark – forwarded Dr. Mason's email to Schein's regional manager, Brandon Bergman, who forwarded it to Stewart Hanely at Benco. (CX 1215-001). Complaint Counsel did not call Mr. Bergman or Mr. Hanley as witnesses, and has not claimed that Mr. Bergman's email was in furtherance of the alleged conspiracy. As noted below, Mr. Bergman was actually part of Schein's efforts to partner with the New Mexico Dental Co-Op after it joined the Utah Dental Co-Op. (*See* RX 2462-001).

1011. In February 2013, Dr. Mason believed they "had worked out a deal with Patterson." (Mason, Tr. 2340-41, 2343-44).

1012. It was not until February 20, 2013 that Dr. Mason reached out to a Schein representative – Rick Dolk – to discuss the dental cooperative idea. (Mason, Tr. 2393; RX 2400; *see also* Mason, Tr. 2368 (in February 2013, there still was no entity called the New Mexico Dental Cooperative)).

1013. Dr. Mason explained his idea for a cooperative in an email to Mr. Dolk: "[W]e are effectively looking to see if we can better the manufacture[r] specials." (RX 2400-001; *see also*

Mason, Tr. 2393-95 (it was the "manufacturer level we're trying to reach")). The idea was to get the manufacturers to do something with their prices. (Mason, Tr. 2395).

1014. Dr. Mason was clear with Mr. Dolk as to what the cooperative would *not* do. "We are not looking to remove customers from schein, patterson or benco," and "we are not moving dentist[s] from one distributor to another or trying to set the price of the distributor." (RX 2400-001; Mason, Tr. 2394-95 ("So what you told Schein was the customers were not going to move from one distributor to another or not move from one distributor to Schein; correct? A. Correct.")).

1015. Dr. Mason told Mr. Dolk that he had already "spoken with Patterson … to see what type of information or ideas they would have to assist our efforts[,]" and simply invited Schein to offer its ideas well. (RX 2400; Mason, Tr. 2395-96).

1016. Dr. Mason did not offer an exclusive relationship with Schein, or even making Schein a preferred vendor for the group. (Mason, Tr. 2396-97).

1017. Two days after his email to Mr. Dolk, Dr. Mason wrote to his Patterson contacts and informed them that he had selected it as the exclusive distributor for 3M products. (CX 3339 ("[A]ll 3m products will need to be purchased through a single distributor. I have chosen Patterson at this time if that works for patterson.")).

1018. Effectively, Dr. Mason's proposal to Mr. Dolk was for Schein to simply pass through lower prices from manufacturers in exchange for no benefit whatsoever in the form of additional customers or business. (RX 2400-001; Mason, Tr. 2394-97).

1019. It was this proposal that Mr. Dolk declined. (Mason, Tr. 2397 (referring to RX 2400-001)).

1020. But that wasn't the end of the relationship between Dr. Mason's group and Schein. Dr. Mason's group became a chapter of the Utah Dental Co-Op, and "Schein was part of that process." (Mason, Tr. 2397, 2399).

1021. On July 30, 2013, a Schein FSC wrote to Dr. Mason and his partner: "We look forward to hosting your next co-op meeting at our Henry Schein Center… [W]e will share how Henry Schein is best positioned to help your group and at the same time, we will be 'all ears' to hear more about what your group's needs are so that we can understand fully how to help you…. Thank you for opening the door for us to explore how we can become partners with your dental co-op." (RX 2462-002-03; Mason, Tr. 2401-02; *see also* RX 2463 (noting the meeting would be held at "a new meeting facility" because the space at Schein was not large enough)).

1022. Henry Schein's regional manager, Brandon Bergman, also wrote to Dr. Mason and his partner, reiterating that "[t]he Henry Schein team looks forward to the possibility of partnering with you and we are interested in learning more about your goals." (RX 2462-001; Mason, Tr. 2403).

1023. Schein did in fact partner with the New Mexico chapter of the Utah Dental Co-Op through Schein's agreement with the Utah Dental Co-Op. (Mason, Tr. 2402, 2405).

1024. As Dr. 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." (Mason, Tr. 2404-05). The New Mexico chapter of the Dental Co-Op received supplies from Schein through Schein's master agreement with the Dental Co-Op. (Mason, Tr. 2391, 2399-2400; RX 2462).

1025. The evidence thus refutes Complaint Counsel's allegation that Schein boycotted the New Mexico Dental Co-Op as part of an alleged agreement with Patterson and Benco. (RX 3087-004).

EE. OrthoSynetics.

1026. OrthoSynetics is a buying group comprised of individual private practice orthodontists. (Foley, Tr. 4627; CX 0309 (Muller, IHT at 202); CX 8009 (Wingard, Dep. at 92)).

1027. OrthoSynetics advertises tailor-made service packages for its clients that include "comprehensive consulting, marketing, collections, procurement, and financial analysis" with the main goal of driving practice growth. (RX 2799).

1028. Schein considers OrthoSynetics a buying group. (Foley, Tr. 4622, 4627-28).

1029. Through its Special Markets division, Schein has offered discounts to and maintained a longstanding relationship with OrthoSynetics since at least 2009. (Foley, Tr. 4620).

1030. OrthoSynetics was transferred to Schein's APC division in 2018. (CX 8009 (Wingard, Dep. at 91)).

1031. Schein and OrthoSynetics established a formalized relationship through memorialized agreements that cover the span of the relationship. (Foley, Tr. 4625-26).

1032. In 2014, Schein entered into a formal agreement with OrthoSynetics effective January 1, 2014 through December 31, 2016. (RX 2276-002; Foley, Tr. 4625). Under the agreement, Schein created a formulary for OrthoSynetics with discounts of greater than [redacted] on approximately [redacted] items and also offered discounts of up to [redacted] on items not on the formulary, as well as growth rebates. (RX 2276-002; Foley, Tr. 4628). The agreement also provided that OrthoSynetics would contractually commit [redacted] of its member's volume to Schein. (RX 2276-002; Foley, Tr. 4628).

1033. Schein offered OrthoSynetics a similar formulary and pricing prior to the 2014 agreement. (Foley, Tr. 4629).

1034. The agreement states that "OrthoSynetics is a company that manages, owns or is under contract to provide services to specific dental offices," and Mr. Foley, who negotiated the agreement with OrthoSynetics, confirmed at trial that OrthoSynetics does not own or formally manage its member's offices. (RX 2276-002; Foley, Tr. 4625, 4627).

1035. OrthoSynetics offers many value added services to its members. (Foley, Tr. 4621). These services were part of Schein's consideration in deciding to partner with OrthoSynetics, as well as the group's ability to provide "stickiness" with Schein in order to drive compliance. (Foley, Tr. 4622-23).

1036. As a group of independent dentists receiving discounts based on the group's collective purchases, OrthoSynetics meets Complaint Counsel's definition of a buying group. (Complaint ¶ 3).

1037. Schein's partnership with OrthoSynetics is inconsistent with the alleged conspiracy. (Complaint ¶ 1).

FF. Newport News Buying Group.

1038. In November 2013, Dr. Ross Epstein looked into starting a new buying group to be called the Newport News Buying Group. (CX 8000 (Porro, Dep. at 248-49); RX 2157-001).

1039. On November 4, 2013, Michael Porro, Schein's Zone Manager for the Atlantic Zone at the time, emailed Schein Regional Manager Bobby Anderson, about a potential meeting with Dr. Epstein regarding the "newport news buying group." (RX 2157-001).

1040. Mr. Porro wrote "[a]ny chance we can meet with the leader of this group on Nov. 21? … Would be good if we could." (RX 2157-001).

1041. Mr. Porro recalled meeting with Dr. Epstein "once, maybe twice person to person in his office." (CX 8000 (Porro, Dep. at 248)).

1042. Rather than reject the group outright, Schein "[was] excited about the possibility" of Dr. Epstein's group and opted to do some diligence. (CX 8000 (Porro, Dep. at 249)).

1043. Schein continued discussing the possibility of a Newport News group into January 2014. (CX 8000 (Porro, Dep. at 245-46)).

1044. However, Mr. Porro testified that Dr. Epstein's group eventually "fell through" after the group "halted the progression … and joined in the ADC." (CX 8000 (Porro, Dep. at 248-49)).

1045. Schein's experience with the Newport News Buying Group demonstrates Schein's willingness to engage with new buying groups and is inconsistent with Complaint Counsel's alleged conspiracy. (Complaint ¶ 1).

GG. Pacific Group Management Services.

1046. Complaint Counsel claims Mr. Sullivan "personally directed his colleagues to 'shut down' or refuse to bid on" a buying group called Pacific Group Management Services ("PGMS"). (CC Pretrial Br. at 19-20). The evidence does not support this claim.

1047. PGMS, a "consulting group, with a twist," first approached Schein as a start-up buying group with approximately ten members around June 2014. (Titus, Tr. 5216-5217; CX 2809-003; CX 2250-002-04).

1048. PGMS is located in California, where Schein has well over 50-percent market share, which causes a risk of cannibalization. (Cavaretta, Tr. 5608).

1049. PGMS was brought to Kathleen Titus's attention by a Schein equipment sales specialist working with one of the principals of PGMS. (Titus, Tr. 5217).

1050. One of PGMS's owners had a full-service dental lab with in-house lava milling and cadcam technology. (CX 2250-004).

1051. Ms. Titus, in her role as Director of the Western United States for the Mid-Market Division, carefully evaluated PGMS to see if a relationship between the two would be a good fit for both parties. (Titus, Tr. 5217-18).

1052. At the time PGMS approached Schein, Schein was working on developing its strategy on determining what constituted a healthy buying group relationship. (Titus, Tr. 5220). Ms. Titus used the opportunity to start "to establish some real policies that will guide us well into the future." (CX 2219; CX 2809 (Mr. Cavaretta concurred that the questions "should be standard" for all buying group evaluations.)).

1053. On June 2, 2014, Ms. Titus sent PGMS "10 critical questions necessary to evaluate a partnership[,]" designed to understand the nature of the group's business model, and their capacity to drive compliance, deliver incremental volume, and minimize cannibalization. (CX 2809-003-04).

1054. Ms. Titus's ten questions served as a starting point to conduct due diligence on PGMS to determine if it was a group that Schein would be open to partnering with. The questions subsequently became a standard inquiry when Schein evaluated a buying group. (Titus, Tr. 5218-20, 5222; CX 2809-001).

1055. Ms. Titus forwarded her questions and PGMS's answers to Joe Cavaretta who responded that Ms. Titus's questions "should be standard" for all buying group evaluations. (CX 2809-001, -002).

1056. Mr. Cavaretta responded that Schein needed to "make sure we have ou[r] systems and offering down cold and the team understanding how to present." (CX 2809-002).

1057. Mr. Cavaretta wanted to ensure that Schein's offering to buying groups was aligned with Schein's mission and, in the interest of being fair to all buying groups, that any discount and sales plans offered to a buying group was the same across the board. (Titus, Tr. 5221; Cavaretta, Tr. 5606; 5575).

1058. On June 12, 2014, Ms. Titus asked Joe Cavaretta if she should set up a call with PGMS. (CX 2809-002). Mr. Cavaretta approved. (Titus, Tr. 5220).

1059. On June 26, 2014, Ms. Titus and Brian Brady met in-person with PGMS. (CX 2215-001; Titus, Tr. 5222).

1060. After the meeting, Ms. Titus believed that PGMS presented a potentially solid business opportunity and initially thought that Schein should move forward with a proposal to the group. (CX 2215; CX 2250-005 ("consensus of the team [was] to move forward with a proposal."); Titus, Tr. 5222). Ms. Titus then developed a proposal that she hoped could "serve as the foundation" for policy on how to do business with these types of entities. (CX 2250-004; CX2251-002 (Offering supplies discount from 20%)).

1061. However, Ms. Titus was concerned about the small number of PGMS members and whether PGMS would be able to drive compliance to Schein. (Titus, Tr. 5222).

1062. Mr. Brady and Mr. Cavaretta shared the same concerns, because PGMS told Schein at the meeting that it can "only 'lead the horses', but 'not make them drink.'" (CX 2250-001; Titus, Tr. 5223-5224; Cavaretta, Tr. 5607-08). As Mr. Brady explained, "[l]et'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['] respective VPA's [now go to] 20% off...? My experience in the past is … [d]octors 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…." (CX 2250-003).

1063. PGMS's inability to guarantee compliance was highlighted by the fact that Dr. Luque, a key leader of PGMS, would not agree to do business with Schein even if Schein agreed to partner with PGMS. (Titus, Tr. 5224-25; Cavaretta, Tr. 5607 (Dr. Luque "was a customer of Patterson and he had just done an equipment deal with Patterson."); CX 2250-003). As Mr. Brady explained, "[m]y impression of this group was that 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 was "inclined to not work exclusively with Schein…." (CX 2250-003; RX 2228-001 (noting concerns about lack of guarantees of "gaining incremental business"); Cavaretta, Tr. 5607-08)).

1064. This was a red flag to Schein because "if the leader of the organization was unwilling to vote with his dollars, how could he influence his member group to do the very same." (Titus, Tr. 5224-25; Cavaretta, Tr. 5607-08).

1065. Ultimately, PGMS "[could not] guarantee that its members will purchase from Schein" and therefore were lacking the key element of compliance. (CX 2251-002; CX 8010 (Titus, Dep. at 245-46)).

1066. Moreover, PGMS did not have a value-add proposition and was only looking for aggressive pricing from Schein. (Cavaretta, Tr. 5608).

1067. As a result, Schein ran the risk of pouring resources into PGMS without any guaranteed return on investment in the form of PGMS helping Schein grow its business. (Titus, Tr. 5224; Cavaretta, Tr. 5608).

1068. During a discussion of the types of groups in the Mid-Market space Schein was fielding inquiries from, Mr. Cavaretta discussed the PGMS opportunity with Tim Sullivan. (Cavaretta, Tr. 5608-09; Sullivan, Tr. 3983-84).

1069. Mr. Cavaretta told Mr. Sullivan that he did not think that Schein should partner with PGMS because there was no alignment, PGMS could not enforce compliance, and PGMS did not have a value proposition. (Cavaretta, Tr. 5609).

1070. Mr. Cavaretta asked Mr. Sullivan what he thought and Mr. Sullivan told him "whatever you want to do we do." (Cavaretta, Tr. 5609).

1071. After engaging in negotiations with PGMS, Schein ultimately declined to partner with the group. (Titus, Tr. 5225; Cavaretta, Tr. 5609-5610).

1072. Mr. Cavaretta, not Mr. Sullivan, ultimately made the decision not to partner with PGMS. (Cavaretta, Tr. 5609-5610).

1073. Complaint Counsel points to emails that Ms. Titus later wrote, in which she expressed her belief that the decision not to move forward with PGMS originated with Mr. Sullivan. (CC Pretrial Br. at 19-20 (citing CX 2235-001 ("We 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, GPO's are not good for Schein."), and CX 2219-001 ("I [spoke with] Joe today about the agreement. Tim was not in favor of it."))). As Ms. Titus testified, however, she "never spoke to Tim [Sullivan]" personally about PGMS nor was she told that Mr. Sullivan did not want to work with PGMS. (Titus, Tr. 5227-29, 5315-16 (Mr. Sullivan "was not telling us not to proceed but that he had concerns….")). Ms. Titus also testified that Mr. Cavaretta's words "[were] more measured," and that no one ever told her that Schein could not work with buying groups. (Titus, Tr. 5192-93, 5227-28).

1074. Schein decided not to partner with PGMS because "they weren't in alignment, they weren't promising any type of compliance which would help grow the business, there was no value proposition, and it was just pretty much risk for Henry Schein's business." (Cavaretta, Tr. 5608).

1075. Although PGMS was willing to be "exclusive" with Schein, if PGMS could not deliver sales to Schein, "it was an empty promise and there was no return on investment." (Titus, Tr. 5226; CX 2215-001; CX 8025 (Sullivan, Dep. at 243-44)).

1076. Schein's decision not to partner with PGMS had nothing to do with any purported agreement with Benco or Patterson. (Titus, Tr. 5228; Cavaretta, Tr. 5610).

1077. Schein's decision not to partner with PGMS had nothing to do with PGMS being a buying group. (Cavaretta, Tr. 5610).

HH. PEARL Network.

1078. In early December 2011, Schein declined to do business with a buying group called the PEARL Network consisting of dentists affiliated with NYU. (*See* CX 2456-001).

1079. Expressing concerns of cannibalization, Henry Schein Inc.'s Steve Kess, Vice President of Global Professional Relations, explained that, given "[t]he brand and market position of HSD and HSM … [w]ith almost 40 % market share," contracting with a "national" GPO "could be a disaster to our pricing and [gross profit] structure." (CX 2456-002).

1080. Consistent with Schein's skepticism towards buying groups and the 2010 Guidance, 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***." (CX 2456-001 (emphasis added)).

1081. "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." (CX 2456-001).

II. Pugh Dental Alliance.

1082. Shortly after Randy Foley started in Schein's Special Markets division in 2009, he set up a partnership with a buying group called Pugh Dental Alliance. (Foley, Tr. 4522, 4605).

1083. The Pugh Dental Alliance was a buying group comprised of female dentists in Southeast Florida. (Foley, Tr. 4657, 4662; Steck, Tr. 3766).

1084. The Pugh Dental Alliance was created by Jody Pugh, the husband of a dentist and had a number of friends who were also female dentists. (Foley, Tr. 4662).

1085. The members of Pugh Dental Alliance consisted of private practice female dentists. ((Foley, Tr. 4657; CX 2529-004 ("These are private practice offices….")).

1086. Schein provided discounts to the group under a formulary plan, as well as "a 'start up' equipment formulary with Midmark." (Foley, Tr. 4666-67; CX 2529-004).

1087. Shortly after the buying group opened, however, it started causing "friction" with Schein's local FSCs, who thought the buying group relationship would take accounts away from the FSCs and cause their commission to be reduced. (Foley, Tr. 4639, 4661-66; Steck, Tr. 3766-70; CX 2529-004-05).

1088. The Pugh Dental Alliance did not have much success and Mr. Pugh decided to discontinue adding new members to the buying group. (CX 2529-012).

1089. However, the relationship between Schein and the Pugh Dental Alliance was not severed. Instead, the current members continued to operate as a buying group. (Foley, Tr. 4666).

Instead, Schein agreed to keep the formulary discount plan in place for Pugh Dental Alliance members and it continued to operate as a buying group. (Foley, Tr. 4666; CX 2529-012).

1090. As a group of independent dentists receiving discounts based on the group's collective purchases, Pugh Dental Alliance meets Complaint Counsel's definition of buying group. (Complaint ¶ 3).

1091. Complaint Counsel's expert, Dr. Marshall, analyzed Schein's sales data and identified sales to the Pugh Dental Alliance from 2010 through 2014. (CX 7101-141).

1092. Schein's partnership and discounted sales to the Pugh Dental Alliance is inconsistent with the alleged conspiracy. (Complaint ¶ 1).

JJ. Schulman Group.

1093. Complaint Counsel concedes that the Schulman Group is a buying group. (RX 2956-004).

1094. Complaint Counsel's expert, Dr. Marshall, also considers the Schulman Group to be a buying group. (CX 7100-209, 212). Dr. Marshall listed the Schulman Group as a buying group that was allegedly boycotted by Respondents. (CX 7100-209, -212). However, Dr. Marshall does not cite to any Schein related documents to support his theory that Schein boycotted the group. Instead, at trial, Dr. Marshall testified that he did not do a profitability analysis on the Schulman Group and did not know if Schein had done business with the group. (Marshall, Tr. 3007-08).

1095. In April 2013, Schein developed a "Group Partnership Program" for the Schulman Group. (RX 2256-001 ("Henry Schein Dental is excited to present this partnership program to the Schulman Group. This program is designed to offer saving and value in many areas that are important to your practice."); CX 8000 (Porro, Dep. at 153-54); CX 2047-002).

1096. Schein's Group Partnership Program with the Schulman Group included a "Special Discount Program … on 2,000 of the most common products an Orthodontist purchases" plus a $500 service coupon, $1,000 off certain equipment or technology purchases, discounts, and a rebate opportunity. (RX 2256-001; CX 8000 (Porro, Dep. at 151)).

1097. Schulman Group members agreed to a "minimum $15k" merchandise goal for the year. (RX 2256-001).

1098. On April 19, 2013, Michael Porro, Schein's Atlantic Coast Zone General manager at the time, distributed the partnership program documentation to the Schein sales reps that had customers in the Schulman Group. (CX 2047-002-03; CX 8000 (Porro, Dep. at 150)).

1099. Mr. Porro described the Schulman Group as a group "of over 175 high level/volume orthodontic practices across the country," noting "[m]ost of the members of the group do very little business with Henry Schein so this can be a nice opportunity." (CX 2047-002).

1100. Mr. Sullivan was informed about the Schulman group and wanted more details from Mr. Porro about what Schein was offering to the Schulman Group. (CX 2047-001 ("[A] buying group program without any advance discussion about it? [W]hat are the details?")).

1101. Mr. Sullivan testified that he was not necessarily surprised to learn Mr. Porro had entered into a buying group program without discussion with Mr. Sullivan, but it was something HSD management "would like to be aware of." (Sullivan, Tr. 3999-4000; *see also* CX 8000 (Porro, Dep. at 153-54 ("Mr. Sullivan's concern is "not knowing the full picture."))). After becoming aware of the details of Schein's offer to the Schulman Group, Mr. Sullivan told Mr. Porro that "[a]ll sounds good…." (CX 2047-001).

1102. In the middle of the alleged conspiracy – August 2014 – Benco became aware that Henry Schein was offering a discount program to the Schulman Group when 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." (CX 1104-002). Benco did not reach out to anyone at Schein or take "any action to try to stop [Schein] from working with … the Schulman Group." (Ryan, Tr. 1252-53 (Mr. Ryan did not take "any action to stop [Schein] from working with … the Schulman Group"); *see also* Cohen, Tr. 913-14).

1103. Benco's approach to the Schulman Group was the opposite of Schein's. (CX 1206-001). Unlike Schein, Benco declined to do business with the Schulman Group because it was a buying group. (CX 1206-001; CX 1104-001). Pat Ryan, Benco's Director of Sales at the time, 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." (CX 1206-001; CX 1104-001).

1104. This is contrary to Complaint Counsel's allegation that "Benco began enforcing the agreement against Schein each time they suspected that Schein was cheating by discounting to a buying group." (Kahn, Tr. 42; *see also* CC Pretrial Br. at 14; Complaint ¶ 8).

KK. Smile Source.

1105. Complaint Counsel claims that the Respondents' conspiracy is evident from their interactions with Smile Source. (Complaint ¶ 35; CC Pretrial Br. at 13-21). Respondents' dealings, however, were consistent with unilateral action, and that such conduct does not itself raise, or contribute to, an inference of a conspiracy.

1. *Smile Source Changed Strategic Direction, Hired a New President, and Fired Schein in Favor of Burkhart.*

1106. In early 2011, Smile Source was small, with just 15 members [redacted]. (Goldsmith, Tr. 2088, 2103; CX 0238-001). [redacted] (Goldsmith, Tr. 2072-73; CX 2299-001).

[redacted] (Goldsmith, Tr. 2073).

1107. As part of this plan, they hired a new President, Dr. Andrew Goldsmith, in August 2011. (Goldsmith, Tr. 1934; CX 2299-001). Prior to becoming President, Dr. Goldsmith was practicing dentistry full-time, had no leadership position in Smile Source, and no experience running a franchisor, buying group, or a DSO. (Goldsmith, Tr. 2040-41). Dr. Goldsmith was in that position for approximately one year, after which he was demoted to Vice President and Chief Dental Officer. (Goldsmith, Tr. 2041-43; Maurer, Tr. 4938). Dr. Goldsmith parted ways with Smile Source at the end of 2014, a little over two years after first joining Smile Source, [redacted] (Maurer, Tr. 4956-58; Goldsmith, Tr. 2041-43; RX 0290-00017).

1108. Smile Source decided to switch distributors from Schein to Burkhart for a variety of reasons, none of which give rise to an inference that Schein was acting in furtherance of any alleged conspiracy to not do business with, or offer discounts to, buying groups. (RX 2090-001-02; RX 2619-001; Goldsmith, Tr. 2082, 2093-95, 2104-05; Sullivan, Tr. 4144-45).

1109. Shortly after joining Smile Source, Dr. Goldsmith started to reach out to other distributors in an effort to replace Schein as Smile Source's primary distributor. (Goldsmith, Tr. 2083-84; CX 1116-002). In an email dated September 26, 2011, Dr. Goldsmith wrote to a Benco corporate email address (institutions@Benco.com), to "see what sort of relationship could be established with Benco." (CX 1116-002; *see also* CX 1138-003 (Sept. 30, 2011 Goldsmith email to Benco's Pat Ryan stating that "[w]e need a new distribut[or] that … we can grow with and build a long term relationship with.")).

1110. Benco declined Dr. Goldsmith's overtures. (CX 1138-001 ("Benco does not participate in group purchasing organizations."); Cohen, Tr. 863; Ryan, Tr. 1131).

1111. Dr. Goldsmith also reached out to Burkhart, and in January 2012, decided to switch from Schein to Burkhart. (Goldsmith, Tr. 1947-48, 2082).

1112. [redacted] (Goldsmith, Tr. 2082, 2093-95, 2104-05; RX 2090-001-02). [redacted] (Goldsmith, Tr. 1990-91; 2094-95 [redacted]; *see also* CX 8039 (Goldsmith, Dep. at 90) (same); RX 2083-001 [redacted]).

1113. [redacted] (Goldsmith, Tr. 1990-91). [redacted] (Goldsmith, Tr. 2003-04). Accordingly, while Smile Source may have preferred a nationwide distributor, it was not an important enough factor to prevent Smile Source from terminating its relationship with Schein. (*See* Goldsmith, Tr. 2005-06, 2082).

1114. Despite this, Dr. Marshall testified that it was Schein who "terminate[d] its relationship with Smile Source" claiming Schein had substantially increased prices to Smile Source at the end of the relationship. (Marshall, Tr. 2936-37, 3125). But, the evidence does not support Dr. Marshall, and shows the opposite – that Smile Source "fire[d]" Schein. (CX 0199-003). As Dr. Goldsmith testified, [redacted] (Goldsmith, Tr. 2037).

1115. Following Smile Source's decision to terminate Schein, [redacted] (RX 2090-002-03). [redacted] (Goldsmith, Tr. 2101).

1116. Upon receiving Dr. Abram's email (after it had been forwarded to Schein's Tim Sullivan), Dr. Goldsmith and Smile Source's Director of Business Development Todd Nickerson [redacted] (RX 2090-001-02; RX 2619-001).

1117. Dr. Goldsmith wrote [redacted] (RX 2090-001-02).

1118. Dr. Goldsmith further noted that [redacted] (RX 2090-002). At trial, while Dr. Goldsmith [redacted] (Goldsmith, Tr. 2102-05).

1119. Dr. Goldsmith finished by writing [redacted] (RX 2090-002).

1120. Mr. Nickerson similarly [redacted] (Goldsmith, Tr. 2018; RX 2619-001 (explaining that "our relationship with [Mr. Sullivan] made this even a harder decision than it already was," that he was "appreciative of everything that Henry [Schein] has done," and that the decision to go with Burkhart was because it was "a better fit for us at this time due to our size.")). [redacted]. (Goldsmith, Tr. 2105-06).

1121. Complaint Counsel nonetheless asserts that Schein induced Smile Source to terminate its relationship with Schein as part of the alleged conspiracy with Benco. (CC Pretrial Br. at 13-21). Complaint Counsel, however, cites no communications between Schein and Benco or between Schein and Patterson concerning Smile Source during this time frame, let alone any internal Schein documents in which such an elaborate ruse was concocted. Complaint Counsel also cites to no evidence that Schein was somehow prevented from terminating its relationship with Smile Source if that is the course of action it wanted to take. (*See, e.g.*, RX2547-05 ("Either party shall have the right to cancel this agreement at any time.").

2. *The Evidence Does Not Support Complaint Counsel's Contention that Schein Induced Smile Source to Terminate Schein in January 2012.*

a. Dr. Goldsmith's Testimony is Not Credible.

1122. Complaint Counsel relies on the testimony of Dr. Goldsmith for their contention that Schein induced Smile Source to Terminate Schein in January 2012. (CC Pretrial Br. at 17, 20). Dr. Goldsmith, however, is not a credible witness on that point, and the credible evidence is to the contrary.

1123. Dr. Goldsmith's emails with Benco raise credibility concerns. The email communications between Dr. Goldsmith and Benco contain a number of misstatements or embellishments by Dr. Goldsmith that detract from his credibility as a witness. For example, Dr. Goldsmith wrote that Smile Source "currently [had] 40 practices." (CX 1116-002; CX 1138-003 (repeating same representation)). In fact, Smile Source had 28 members. (*See* Goldsmith, Tr. 2088 [redacted]; CX 4232-007 (identifying 28 members)).

1124. In his response to follow-up questions from Benco's Mr. Ryan about whether "Smile Source [can] control and direct … who the offices purchase from," Mr. Goldsmith states that Smile Source "direct[s] the formulary and the products … and dictate[s] what vendors to use." (CX 1138-001-02; *see also* Goldsmith 1968-69 [redacted]). That was false. In fact, Smile Source [redacted] (Goldsmith, Tr. 2054-55, 2092 [redacted]; RX 0290-0024 ("We do not have specifications you must follow or designated suppliers or approved suppliers you must use for goods, services or real estate.")).

1125. At the time of Dr. Goldsmith's September 26, 2011 email to Benco, [redacted] (Goldsmith, Tr. 2079). [redacted] (Goldsmith, Tr. 2079). At his deposition, Dr. Goldsmith stated that the meeting was an introductory meeting, and that "[n]othing of substance" was discussed. (CX 8039 (Goldsmith, Dep. at 16)). [redacted] (Goldsmith, Tr. 2079).

1126. There is no evidence, such as contemporaneous documents, corroborating Dr. Goldsmith's new account of the meeting with Mr. Chatham. Because supplier discounts are an important aspect of Smile Source's business model, it would be reasonable to expect extended internal communications at both companies and between the two if Schein had announced a change in discount structures.

1127. Even if the Court was inclined to give some credence to Dr. Goldsmith's testimony about his meeting with Mr. Chatham, it has no impact on the Court's findings as to Smile Source's decision to change suppliers.

1128. [redacted] (Goldsmith, Tr. 1947-48, 2082). [redacted] (Goldsmith, Tr. 2037 [redacted]).

b. *The Evidence Does Not Support Complaint Counsel's Contention of "Price Creep"*

1129. Dr. Goldsmith testified that Smile Source chose to terminate Schein for two reasons: [redacted]. (Goldsmith, Tr. 1982-83). Complaint Counsel has not introduced evidence to show that Schein increased prices, reduced discounts, or reduced services to Smile Source members, let alone that it did so in an effort to induce Smile Source to terminate its relationship with Schein.

1130. To the contrary, the evidence shows that Schein maintained a consistent discount for Smile Source members from 2010 until Smile Source terminated the relationship 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.

Notes: Products include consumables only. Analysis includes only purchases from active Smile Source members.

(Carlton, Tr. 5380-81; RX 2832-058 (Table 3)).

1131. [redacted]

[redacted] (Marshall, Tr. 3142-43; CX 7100-182). [redacted] (Marshall, Tr. 3144-45; CX 7100-168).

1132. While Dr. Goldsmith testified that [redacted] neither Dr. Goldsmith nor Complaint Counsel introduced these analyses into evidence. (Goldsmith, Tr. 2110, 2114-17). Nor did they produce any documents to corroborate Dr. Goldsmith's testimony [redacted] (Goldsmith, Tr. 2116-17). To the extent such analyses were performed, there is no evidence explaining how these analyses were constructed, describing the quality or comprehensiveness of the data used in conducting the analyses, or showing the magnitude or the alleged price creep. (Goldsmith, Tr. 2116-17). As such, testimony concerning Dr. Goldsmith's [redacted] and his testimony concerning [redacted] was introduced over Schein's objection and only for the limited purpose of showing how Dr. Goldsmith became aware of the issue and not for the truth of the matter asserted (i.e., whether Schein's prices actually increased). (Goldsmith, Tr. 1979-81). Even if evidence of Dr. Goldsmith's invoice analysis were admissible for the purpose of showing Smile Source's motivation in terminating Schein, there is no evidence that the analysis occurred before Dr. Goldsmith started looking for a replacement distributors. (Goldsmith, 1947-48, 2082). Dr. Goldsmith testified he could not recall any [redacted] (Goldsmith, Tr. 2114-15 (confirming accuracy of deposition admission, CX 8039 (Goldsmith, Dep. at 60))).

1133. [redacted] (Goldsmith, Tr. 2109-10). That transition, however, occurred in January 2011, approximately eight months before Dr. Goldsmith was hired. (Sullivan, Tr. 3925; Goldsmith, Tr. 1934; CX 2299-001). [redacted] (Goldsmith, Tr. 2110). As noted above, the evidence does not support the conclusion that Schein changed Smile Source's discounts when the account transitioned to HSD or thereafter.

1134. [redacted] (Goldsmith, Tr. 1987-89). Dr. Goldsmith's trial testimony, however, was inconsistent with his deposition testimony. [redacted] (Goldsmith, Tr. 2115-16 (confirming accuracy of deposition admission, CX 8039 (Goldsmith, Dep. at 170))).

1135. The documentary evidence also does not support the allegation that Smile Source raised systematic pricing concerns with Schein. In fact, Complaint Counsel introduced only one document reflecting a single dispute with one new Smile Source member in Hawaii that had not been properly set up in Schein's pricing systems. (CX 2571-002). [redacted] (Goldsmith, Tr. 2118; CX 2571-001-02).

1136. [redacted] (Goldsmith, Tr. 2118; *see also* Goldsmith, Tr. 2122 [redacted]; CX 8039 (Goldsmith, Dep. at 173).

1137. Regardless of Complaint Counsel's unsupported allegation that Schein reduced the level of discounts to Smile Source in 2011, it is undisputed that Schein continued to give discounts to Smile Source members pursuant to the terms of the agreement up through the date Smile Source terminated Schein. (Goldsmith, Tr. 2117; Carlton, Tr. 5379-80; RX 2832-058 (Carlton analysis showing steady average discounts off of catalog prices)). As such, Schein's conduct is inconsistent with the allegations that Schein agreed with Benco at this time to refuse to give discounts to buying groups, or induced Smile Source to terminate it by reducing the discounts offered.

c. The Evidence Does Not Support Complaint Counsel's Contention that Schein Reduced Service Levels to Smile Source.

1138. The evidence also does not support the allegation that Schein reduced service levels or FSC support to Smile Source, either because of any alleged agreement with Patterson or Benco or otherwise. [redacted] (Goldsmith, Tr. 2123).

1139. [redacted]

(Goldsmith, Tr. 2129). FSCs are paid based on gross margins. (Meadows, Tr. 2521). Because larger discounts mean lower gross margins, larger discounts also mean reduced FSC commissions. (Goldsmith, Tr. 2129 [redacted] Meadows, Tr. 2549).

1140. [redacted] (Goldsmith, Tr. 2123 [redacted]; *see also* Goldsmith, Tr. 2128-29; RX 2004-002 ("I think the main problem is [that] the [Burkhart] sales rep is treating the Smile Source accounts as a loss to her.")). [redacted] (Goldsmith, Tr. 2129).

d. After-the-Fact Emails Do Not Support Complaint Counsel's Contention that Schein Induced Smile Source to Terminate the Relationship.

1141. Complaint Counsel asserts that an inference can be drawn from a February 2, 2012 email in which Mr. Sullivan directs his team to continue seeking business from Smile Source members following the termination. (CX 0199-001; *see also* Kahn, Tr. 40 (citing CX 0199 to show that "Schein changed its conduct," and asserting that "at that time Schein had instituted what the government calls a no-buying group policy.")). In that email, Mr. Sullivan expresses concerns that the team had taken so long to compile the list of Smile Source members, given that Smile Source had "fire[d]" Schein three weeks earlier. (CX 0199-003).

1142. After receiving an email discussing difficulties in compiling the data, Mr. Sullivan wrote that he is "really interested to see how and what we can do to retain these customers and judge how effective their buying group model is. Let's really take this serious[ly] and get after it.

I'm really less concerned about actual revenues, although very important too, rather more about what we can do to KILL their buying group model[.]" (CX 0199-001 (emphasis in original)).

1143. Nothing in this email suggests any agreement between Schein and Benco. Instead, it reflects the legitimate desire to compete for business that may be at risk as a result of Smile Source's decision to contract with Burkhart. (Sullivan, Tr. 3932-33, 3935-37, 4144-46). Mr. Sullivan testified that, "when Smile Source terminated us … I definitely wanted to kill – you know, go after … Smile Source's model, and the customers that they were now attempting to switch to someone else." (Sullivan, Tr. 3932-33. 3935-37, 4144-46 ("We wanted to keep the business.")). Smile Source did not have any control over its members' purchasing – a fact they tout in their franchise agreement – so the loss of the Smile Source contract meant nothing in terms of Schein's ability to separately compete for the dentist, the "ultimate customer." (Sullivan, Tr. 3935; Goldsmith, Tr. 2054-55, 2092; RX 0290). There is no reason to doubt Mr. Sullivan's testimony, as it comports with the text of the email and Schein's actions.

1144. Contrary to Complaint Counsel's assertion, Mr. Sullivan's email reflects an executive trying to motivate his team to compete to retain business that was at risk due to Smile Source's decision to switch to Burkhart. (Sullivan, Tr. 3932-33, 3935-37, 4144-46). It does not reflect any special animus towards buying groups generally, does not reflect any "change in Schein's buying group posture," and does not support an inference of a conspiracy to boycott buying groups. (CX 2113-001; CX 0199; Kahn, Tr. 40; Sullivan, Tr. 3832-33).

1145. Complaint Counsel cites to after-the-fact documents by individuals who lack personal knowledge of the Smile Source relationship. (CX 0238; CX 2349; CX 2107). For example, in CX 0238 Mr. Foley speculated that Smile Source "dumped Schein" because HSD did "not give Smile Source the love that [Special Markets] provided." (CX 0238-001). Mr. Foley testified, however, that he had no involvement with Smile Source at the time. (Foley, Tr. 4590 ("after Smile Source was out of Special Markets and in HSD, it was no longer of my concern."), 4672 ("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. Mr. Meadows testified that he had no personal knowledge of Smile Source at the time. (Meadows, Tr. 2453). These emails were not authored by a person with personal knowledge of the Smile Source relationship at the time of the termination and are not entitled to any weight. (Foley, Tr. 4727-28; Sullivan, Tr. 4144-45).

e. The Respondents' Conduct Towards Smile Source Was Non-Parallel and Does Not Support an Inference of a Conspiracy.

1146. [redacted] (Goldsmith, Tr. 2009-14, 2134-39). The evidence shows that Respondents' conduct in dealing with Smile Source during this time was inconsistent with a conspiracy among the Respondents.

i. Patterson Said No.

1147. On September 30, 2013, Dr. Goldsmith sent an email to Patterson to explore "possibilities for a partnership" since it was "growing rapidly" and Burkhart did "not have a national footprint." (CX 3277-001-02). Following that inquiry, Dr. Goldsmith met with Patterson's head of Special Markets Neal McFadden at an ADA meeting on October 9, 2013, and again with Mr. McFadden and Patterson's Vice President of Sales, Dave Misiak at Patterson's headquarters in November 2013. (CX 3278-001; McFadden, Tr. 2717; Misiak, Tr. 1401-02).

1148. On November 20, 2013, Mr. Misiak informed Smile Source that it was "not interested" in pursuing a relationship with Smile Source. (CX 0147-001; Misiak, Tr. 1402).

ii. Benco Said No.

1149. The record evidence conflicts as to whether Smile Source reached out to Benco in the fall of 2013, but it clearly did so in early 2014. (Ryan, Tr. 1188-89; Cohen, Tr. 784-85, 787-88; RX 1022-002). Regardless of whether there was one or two approaches by Benco in this time frame, the evidence does not support an inference of an agreement between among the Respondents.

1150. While the record does not contain any communication between Smile Source and Benco in 2013, Dr. Goldsmith testified that he [redacted] (Goldsmith, Tr. 2009). In fact, Dr. Goldsmith had reached out to Benco a "second time" on July 25, 2012. (CX 1220-001; Ryan, Tr. 1183-84). Any communication in the fall of 2013 would have been a third time.

1151. Nonetheless, while Mr. Ryan testified that the third contact occurred in February 2014, documents suggest that there may have been an earlier communication. (Ryan, Tr. 1118-19). A January 27, 2014 internal Benco email from Mr. Ryan to Mr. Cohen notes that Mr. Ryan had already "[t]alked to [Smile Source] three times." (CX 1162-001 (January 27, 2014 email from Ryan noting that he has already "blown these guys off three times.")).

1152. In late January 2014, Smile Source again attempted to secure a deal with Benco. Specifically, on January 26, 2014, at Smile Source's request, Mike O'Neil, a former executive at Dentsply (a large dental manufacturer) sent emails to Chuck Cohen and other Benco employees to facilitate discussions about a possible distribution agreement. (CX 1163-001-02; CX 1162-001-02).

1153. Mr. Cohen responded the same day that, while he would meet with Smile Source, "they should know going in that we do NOT work with, or recognize, buying groups." (CX 1163-002).

1154. At Mr. O'Neil's urging, Mr. Cohen and Mr. Ryan met with Smile Source's President Trevor Maurer at the ADA Chicago Mid-Winter meeting in February 2014 and delivered the same message. (CX 1163-001; RX 1022-001-02; Ryan, Tr. 1188-89; Cohen, Tr. 784-85, 787-88).

1155. There is no evidence of any communications between Schein and Benco concerning Smile Source in January or February of 2014. (Cohen, Tr. 779; Ryan, Tr. 1252). Rather, the evidence shows that Benco made a unilateral decision to not enter into a distribution agreement with Smile Source based on its own company policy, consistent with the approach it previously and consistently communicated to Smile Source since 2011. (Cohen, Tr. 780-81, 783-84).

iii. Schein Said Yes.

1156. At the same time that Smile Source was reaching out to Patterson and Benco, Smile Source also reached out to Schein. Schein's response to Smile Source was markedly different from Patterson's and Benco's, and is inconsistent with the alleged conspiracy. (Goldsmith, Tr. 2139; *compare* RX 2328-001 *with* CX 0147-001 *and* CX 1163-002).

1157. On October 28, 2013, Dr. Goldsmith sent an email to Mr. Sullivan seeking to set up a meeting at an upcoming trade show to "discuss some possibilities for … renewing our partnership." (CX 2580-001). Mr. Sullivan agreed to meet, and he and Schein's Mr. Chatham met Dr. Goldsmith at the ADA meeting the following week. (CX 2580-001; RX 2328-001-02; Goldsmith, Tr. 2014, 2137; Sullivan, Tr. 4165-66).

1158. Dr. Goldsmith described the meeting as [redacted] (Goldsmith, Tr. 2014). [redacted]

[redacted] (Goldsmith, Tr. 2138).

1159. A month later, on November 20, 2013, Dr. Goldsmith followed up with Mr. Sullivan asking whether Mr. Sullivan could "foresee any possibility of doing business together," and again suggested a brief meeting at another trade show. (RX 2328-002).

1160. Mr. Sullivan immediately responded, saying that "Yes, 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." (RX 2328-001; Goldsmith, Tr. 2014-18; Sullivan, Tr. 4167-68).

1161. [redacted]. (Goldsmith, Tr. 2139). Indeed, the very same day that Mr. Sullivan said "Yes, absolutely would like to discuss further," Patterson said it was "not interested." (*Compare* RX 2328-001 *with* CX 0147-001). This is another instance of non-parallel conduct among the Respondents, and conduct by Schein that is inconsistent with the alleged conspiracy.

1162. On January 22, 2014, Mr. Sullivan and Mr. Chatham met with Smile Source's then and current President Trevor Maurer; its Chief Dental Officer Dr. Goldsmith, and VP of Vendor Relations Dr. John McCall to discuss the possibility of working together. (CX 2587-001; Sullivan, Tr. 4167-68; Maurer, Tr. 4940-41). Mr. Sullivan described the meeting as a "very positive." (Sullivan, Tr. 4168).

1163. On February 19, 2014, Dave Steck circulated a draft of Schein's Smile Source proposal to HSD and Special Markets for input. (CX 2462-001). A month later, Mr. Steck circulated a revised version of what Schein planned to offer Smile Source. (RX 2419-001). Mr. Steck recognized that Smile Source would want a "higher discount," but believed that this was a "good negotiating place for us to begin." (RX 2419-001; Sullivan, Tr. 4170). Shortly thereafter, Schein presented an initial "Partnership Proposal" to Smile Source. (CX 4105-001-11; Sullivan, Tr. 4170). The proposal was "competitive" expressly designed to form a "win-win" partnership by offering a "clear economic benefit to Smile Source Members … beyond what they could individually realize." (CX 4105-002; Maurer, Tr. 4942). Schein offered to assign a "trained and certified" FSC to each member. (CX 4105-003). And 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, 10% discount on technical service, and a 5% discount on business solutions, practice management software licenses, and CAD-CAM supplies or fees. (CX 4105-009). Schein also offered an additional 2% rebate if certain volume and other conditions were met. (CX 4105-009).

1164. Smile Source rejected Schein's offer in favor of continuing its partnership with Burkhart and entering into a new contract with Darby, Schein's business affiliate. (Steck, Tr. 3794; Sullivan, Tr. 4171-73 ("Q. So they decided to go with – probably to go with a company that you own 45 percent of. A. Correct."); Goldsmith, Tr. 2156-57; CX 2591-002; Maurer, Tr. 4942-43, 4945).

1165. John Chatham, HSD Vice President, reported: "Guys, [I] 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." (CX 2591-002).

1166. Instead of giving up, Schein attempted to "sweeten the pot" by increasing its proposed discounts by 2% on branded products and 4% on private label products. (Steck, Tr. 3795; CX 2591-001-02 ("I think (as you and I discussed) we should increase the discount to 9/18 as our best and final offer.")). This increased Schein's originally proposed discount from 7/14 to 9/18. (Steck, Tr. 3795; CX 2591-001-02). Schein's new offer to Smile Source was superior to Schein's top VPA which is typically reserved for customers with at least $75,000 in volume. (Steck, Tr. 3795-97; CX 2828-001).

1167. Despite this, Smile Source turned down the offer. (Steck, Tr. 3795-96; CX 2828-001). [redacted] (RX 3079-001).

1168. Demonstrating a complete lack of common understanding with Benco and Patterson, Schein's internal notes on the Smile Source proposal indicate that Schein believed it might be competing against Benco and Patterson for the Smile Source business in 2014. (CX 2536-011).

1169. Schein's proposal to Smile Source is inconsistent with the alleged agreement to "refuse to offer discounted prices or otherwise negotiate with buying groups." (Complaint ¶ 1).

1170. Complaint Counsel's expert, Dr. Marshall, agrees that Schein's 2014 bid for Smile Source was an example of non-parallel conduct between Schein, Patterson, and Benco. (Marshall, Tr. 2954-55, 2958). Complaint Counsel acknowledges this inconsistency and attempts to explain Schein's 2014 proposal to Smile Source as an instance of cheating on the agreement. (Kahn, Tr. 61 ("Schein will also claim that they submitted a bid to Smile Source in 2014; … [w]ell, as with all price-fixing conspiracies, there's an incentive to cheat …."); RXD 0017).

1171. As noted, Complaint Counsel's assertion that Schein's conduct constitutes "cheating" improperly presupposes the existence of a conspiracy. Moreover, Complaint Counsel has not presented evidence that would tend to suggest Schein's 2014 bid constituted cheating.

Specifically, there is no evidence that Patterson or Benco sought to enforce the alleged agreement or punish Schein's alleged "cheating." (SF 1156-71). In any event, regardless of how the conduct is characterized, it is clearly different from the other Respondents and inconsistent with the alleged conspiracy.

1172. Complaint Counsel also elicited testimony from Dr. Goldsmith and its expert, Dr. Marshall, suggesting that Schein's bid was not a serious or meaningful offer. (Marshall, Tr. 2954-55 ("They submitted a nonserious bid."); Goldsmith, Tr. 2020 (characterizing the offer as a [redacted])).

1173. The evidence does not support that conclusion that Schein's offer was not serious or meaningful. (Maurer, Tr. 4942-43). Mr. Foley, who had previously worked with Smile Source in Special Markets, testified at trial that Dave Steck reached out to him for help on pricing to make sure the proposal was "aggressive enough" to win the Smile Source bid. (Foley, Tr. 4654-55 (noting that HSD's 2014 proposal to Smile Source looked "like a winnable proposition" and that it "was even more aggressive than what [Special Markets] once had offered in 2010). Nor does the evidence suggest that Schein engaged (or had any motive to engage) in an elaborate ruse of submitting a bid it did not want to win in order to avoid simply turning Smile Source down as the other Respondents had. Complaint Counsel further fails to explain why Schein would devote so many resources to creating and negotiating a "fake bid."

1174. Dr. Goldsmith's testimony that he was [redacted] by Schein's offer is contradicted by the evidence. (Goldsmith, Tr. 2029). First, he testified that he [redacted] (Goldsmith, Tr. 2158, 2160). Second, he said that [redacted]

[redacted] (Goldsmith, Tr. 2160).

1175. Instead, Schein's bid to Smile Source was submitted in good faith. Schein believed that its offer to Smile Source was "compelling," "aggressive" and a "good effort" and was disappointed that it didn't win the business. (CX 2130-001 (Tim 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 GPOs going forward"); CX 2683-001 (Mr. Sullivan noting that "[w]e made a very aggressive and inclusive proposal to them that many of their execs liked…."); CX 2591-002; Sullivan, Tr. 4173-74; Steck, Tr. 3783-94; RX 2338-003 ("even though [Smile Source] didn't ultimately sign with us … yet")).

1176. The evidence shows that Schein's proposal offered discounts greater than those typically available to independent dentists who did not make volume commitments. (Steck, Tr. 3782-90). Schein's Vice President David Steck, who prepared the Smile Source proposal, explained that the merchandise discounts of 7% on branded products, and 14% on private label products was typically only available to independent dentists who purchased at least $35,000 of products from Schein and an improvement over Schein's second-highest Standard VPA. (Steck, Tr. 3791-93, 3849-50; CX 2508-011; CX 2828). In addition, Schein's proposal included discounts of equipment and other products and services, as well as an additional 2% rebate for purchasing at least $35,000 in supplies and meeting other qualifying conditions. (Steck, Tr. 3782-87, 3793-94).

1177. [redacted]

(CX 7101-066-67 (Table 7)).

1178. Smile Source's President, Trevor Maurer, also testified that Schein's offer was comparable or "similar" to the pricing it was receiving from Burkhart. (Maurer, Tr. 4942-43 ("Q. And did you consider this to be a competitive proposal by Henry Schein? A. Yes. It was similar to the deal we had in place with Burkhart.")). Indeed, Schein's offer is objectively similar to Burkhart's deal with Smile Source, and Complaint Counsel failed to show otherwise. (CX 4105 (Schein: supplies: 7-14%, plus 2% volume rebate; equipment, 10% plus 2% volume rebate); RX 2043 ([redacted]). Mr. Maurer testified that the reason that Smile Source did not switch to Schein was "just loyalty [to] Burkhart." (Maurer, Tr. 4945).

1179. Neither Dr. Marshall, nor Dr. Goldsmith compared the pricing that Schein offered to the pricing that Burkhart offered. (Goldsmith, Tr. 2153-54; CX 8039 (Goldsmith, Dep. at 142, 243); CX 8040 (Marshall, Dep. at 240-41)). In fact, Dr. Goldsmith conceded that he did no [redacted] and [redacted] (Goldsmith, Tr. 2153-54).

1180. Schein considered using its Smile Source offer "as a template … for GPOs going forward." (CX 2508-001).

1181. Even after its 2014 bid was rejected, Schein never wavered in its interest in Smile Source. On August 17, 2015, Mr. Maurer reached out to Tim Sullivan asking him if he was interested in catching up soon and Mr. Sullivan replied that he would "love to connect again." (RX 2444-001-02; Sullivan, Tr. 4173). Two months later, Mr. Sullivan and Joe Cavaretta went to meet with Mr. Maurer at Smile Source's headquarters. (CX 2606-001; CX 2605). At the meeting, Mr.

Maurer explained that Smile Source had grown its membership to "360 members" and "claim[ed] to have over 85% compliance" from its members on purchasing supplies. (CX 2606-001-02).

1182. After the meeting, Mr. Sullivan believed that Smile Source had "reached [a] tipping point and will gain momentum" in the future, and he was interested in working out a deal with Smile Source. (CX 2606-003; Sullivan, Tr. 4177). In late November, Mr. Sullivan met with Mr. Maurer again, this time at the Greater New York dental meeting. (RX 2116-002; Sullivan, Tr. 4176-77). At this point, Schein began working on a proposal to Smile Source based on the "new formulary pricing" program that had just been developed for the "Buying Group pricing model." (CX 2606-004; RX 2116-001-02).

1183. [redacted] (RX 2092-001).

1184. [redacted] (RX 2092-001).

1185. Mr. Sullivan [redacted] was confident Mr. Maurer would like Schein's offer, but agreed that [redacted] Schein would be "ready when you are." (RX 2092-001; RX 2152-001 (noting that Schein expected to connect with Smile Source in April)). On August 30, 2016, Schein met with Smile Source at Smile Source's corporate headquarters. (RX 2160).

1186. [redacted] (CX 4099-001).

LL. Stark County Dental Society.

1187. The Stark County Dental Society ("Stark County") is a state dental society with close to 300-350 member dentists. (Baytosh, Tr. 1885).

1188. Stark County does not have ownership in its member's practices. (RX 2947 (Cavaretta, Dep. at 79-80); *see also* RX 2253-002-04 (listing dentist members)).

1189. Schein has been working with Stark County since at least 2004. (CX 2724-024).

1190. Complaint Counsel's expert, Dr. Marshall, identified sales Schein made to Stark County members in Schein's sales data from 2009 through the present. (CX 7101-141).

1191. Schein signed a formal agreement with Stark County on February 17, 2015. (RX 2253-001 (noting "since 2004")).

1192. An unsigned agreement titled "2013-2014 Terms of Agreement Stark County Dental Society and Henry Schein Dental" lists terms nearly identical to those found in the 2015-2017 contract. (*Compare* RX 2253-001 *with* RX 2517-001).

1193. Both the unsigned 2013-2014 agreement and the signed 2015-2017 agreement between Schein and Stark County provide for a rebate calculated as a percentage of members' "total merchandise purchases." (RX 2253-001; RX 2517-001). The more the members of Stark County purchase from Schein, the greater the rebate. (RX 2253-001; RX 2517-001).

1194. Schein used its agreement with the Stark County Dental Society as a model for its agreement with Corydon Palmer. (Baytosh, Tr. 1885).

1195. Stark County is not restricted with what it can do with the rebates from Schein under either agreement. (RX 2253-001; RX 2517-001).

1196. To the extent Complaint Counsel argues that Stark County Dental Society does not qualify as a buying group under its definition because Stark County did not negotiate direct discounts on supplies for its members, such theory is flawed as Schein pays the Stark County Dental Society a rebate and therefore is offering its products and services at a lower price to the group based on the independent dentists' collective purchases. (*See* RX 2253-001; RX 2517-001)

1197. Schein considers and treats Stark County as a buying group. (CX 2724-002 (including Stark County among "4 buying group rebates that are processed each quarter"); *see also* RX 2947 (Cavaretta, Dep. at 79 ("I would classify them as … an [Alternative Purchasing Channel] … more towards a buying group.")); CX 8020 (Brady, Dep at 212)).

1198. Henry Schein's conduct with respect to Stark County is inconsistent with Complaint Counsel's alleged conspiracy. (Complaint ¶ 1).

MM. Steadfast.

1199. Steadfast Medical ("Steadfast") is a buying group of independent dentists specializing in oral surgery that markets its ability "to deliver anything an oral surgery practice might need efficiently and LESS EXPENSIVELY." (RX 2885-001; Foley, Tr. 4676).

1200. Complaint Counsel admits that Steadfast is a buying group and that Schein did business with Steadfast during the alleged conspiracy period. (RX 2937-006; RX 3087-004).

1201. However, Complaint Counsel argues that Schein terminated Steadfast in 2014 as a result of an alleged agreement with Benco and Patterson, and that the decision to do so was against Schein's unilateral self-interest. (RX 3087-004; CC Pretrial Br. at 20, 45). The evidence does not support Complaint Counsel's argument.

1202. By 2011, Special Markets – under the direction of Mr. Foley – had entered into a relationship with Steadfast. (Foley, Tr. 4676, 4681; CX 0306 (Foley, IHT at 91)).

1203. At that time, Special Markets created a sales plan for Steadfast that included discounts to Steadfast's members. (Foley, Tr. 4681; CX 0306 (Foley, IHT at 91)).

1204. Special Markets opened up Steadfast as a buying group partner because the group indicated it could drive compliance to Schein and also offered value-added services, like helping its members open new offices. (Foley, Tr. 4677-78; CX 8003 (Foley, Dep. at 145-146)).

1205. After opening Steadfast, however, Special Markets did not pay close attention to the group because it was a smaller than other Special Markets accounts. (CX 0306 (Foley, IHT at 141)).

1206. Schein continued to offer discounts to Steadfast's members through 2014. (Foley, Tr. 4681).

1207. In early 2014, Schein transferred Steadfast from Special Markets to Mid-Market. (Titus, Tr. 5249; Cavaretta, Tr. 5595; CX 8010 (Titus, Dep. at 83)).

1208. With the transfer to Mid-Market, Steadfast fell under Kathleen Titus's responsibility. (CX 8010 (Titus, Dep. at 83)). Ms. Titus became responsible for "making sure that [Schein was] serving [Steadfast] appropriately." (CX 8010 (Titus, Dep. at 76, 83)).

1209. In March 2014, as Special Markets was undergoing "some [reorganizational] changes", a Schein telesales rep in Reno, Nevada discovered in March of 2014 that no FSCs had been assigned to Steadfast members and forwarded this information on to Ms. Titus. (CX 0171-001-02). Ms. Titus did some fact-finding on Steadfast to learn more about the group so that Schein could help grow its business. (Titus, Tr. 5249-50 (Q: Did anyone at Schein specifically instruct you to look into the Steadfast Medical buying group relationship? A. Absolutely not."); CX 8010 (Titus, Dep. at 94)).

1210. No one at Schein specifically instructed Ms. Titus to evaluate Steadfast. (Titus, Tr. 5249-50; Foley, Tr. 4681; Cavaretta, Tr. 5532-34).

1211. As part of the discovery process, Ms. Titus exchanged phone calls and emails with Steadfast staff to learn more about the group. (CX 8010 (Titus, Dep. at 72, 75)).

1212. Ms. Titus discovered that Steadfast was acting as a "procurement" agent by redirecting Schein orders to its competitors. (CX 8010 (Titus, Dep. at 67, 72); Cavaretta, Tr. 5595, Foley, Tr. 4676-77).

1213. Ms. Titus learned the group would take Schein orders and "break up the order and send items that were cheaper with company A or company B" to those distributors, leaving Schein with the remainder. (CX 2207-001; CX 8010 (Titus, Dep. at 73-74); Titus, Tr. 5298-99).

1214. Steadfast thus sought to "circumvent [Schein's] interaction with the client, and attempt[ed] to prevent [Schein] from selling directly….." (CX 2207-001).

1215. Steadfast's diversion of Schein orders to competitors was a "big issue" for Schein. (Cavaretta, Tr. 5595).

1216. Steadfast redirected sales that could have gone to Schein and interfered with Schein's full-service distribution model by discouraging Schein from assigning FSCs to Steadfast accounts. (Titus, Tr. 5252-53; CX 8010 (Titus, Dep. at 74, 90-91); CX 2207-001).

1217. The way Steadfast was operating was not in line with Schein's core practice care model. (Titus, Tr. 5252-53).

1218. Although Schein had done approximately $150,000 in sales with Steadfast in 2013, Ms. Titus uncovered that the actual percentage of business that Schein was doing with individual Steadfast customers had declined by about 50% from the prior year. (CX 0171-001; Titus, Tr. 5250-51 (Schein's sales to Steadfast had dropped by "nearly half")).

1219. Ms. Titus looked at the sales Schein had made to a group of existing Schein customers prior to them joining Steadfast and compared it to the amount of sales Schein had made once they had joined and determined that Schein's business was down almost 50% with these customers. (Titus, Tr. 5251-52). As Ms. Titus reported: "[Steadfast is] 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 that 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%." (CX 0255-001; Titus, Tr. 5252-54, 57).

1220. Despite this decline in business, Ms. Titus wanted to start a dialogue with Steadfast's executive to see if they could come to "an agreement of a win-win for both stakeholders." (Titus, Tr. 5254-56 (because "all our customers are precious to us, … I took on the 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.")).

1221. On April 22, 2014, Ms. Titus reached out to Jon Staples, the CEO of Steadfast, regarding setting up an in-person meeting with Schein to see "if there [was] a way to create a better collaboration that provide[d] prosperity to all the stakeholders." (RX 2201-003; Titus, Tr. 5255-56).

1222. Despite learning that Steadfast was "reallocating [Schein's] business to other suppliers[,]" Ms. Titus was open to continuing the relationship with Steadfast and attempted to salvage the relationship with the group by finding "common ground" that "makes financial/business sense for all stake holders." (Titus, Tr. 5258-59; RX 2201-001-02).

1223. Ms. Titus told Mr. 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 fledg[l]ing relationship until both parties agree that our goals are counter to each other."

(RX 2201-002).

1224. Despite repeated attempts, however, Ms. Titus was unable to arrange a meeting with Steadfast, and eventually Jon Staples stopped responding. (Titus, Tr. 5259; CX 8010 (Titus, Dep. at 75); Foley, Tr. 4679-80; CX 0255 (reporting that Jon Staples has gone "radio silent"). For this reason, a meeting between Steadfast and Schein never occurred. (Titus, Tr. 5259).

1225. When it became clear Steadfast was not going to engage in negotiations with Schein, Ms. Titus recommended that Schein cease doing business with Steadfast due to the fact that Steadfast was: (1) redirecting business to competitors; (2) not offering any value added services; (3) not allowing Schein to engage with Steadfast customers; and (4) not willing to compromise or negotiate with Schein to find a win-win solution. (Titus, Tr. 5252-53, 5259).

1226. Ms. Titus's recommendation had nothing to do with Benco or Patterson. (Titus, Tr. 5194).

1227. Ms. Titus relayed her findings on Steadfast to Mr. Foley and sought his approval to stop doing business with the group. (CX 0255; Foley, Tr. 4679-4680).

1228. Ms. Titus needed Mr. Foley's approval because even though Steadfast was being transferred to Mid-Market, Mr. Foley retained "budgetary control" during the transition. (Foley, Tr. 4680).

1229. Mr. Foley recognized that the original relationship with Steadfast had "gone south," as Steadfast was no longer following Schein's basic guideline of driving compliance, Steadfast was refusing to meet with Schein after "repeated attempts," and Ms. Titus demonstrated that Schein was "losing revenue" on Steadfast. (Foley, Tr. 4677-78).

1230. As a result, on behalf of Special Markets, Mr. Foley ultimately gave Ms. Titus the green light to end Schein's relationship with Steadfast. (Foley, Tr. 4680).

1231. Mr. Cavaretta also approved the decision to terminate Steadfast on behalf of Mid-Market. (Cavaretta, Tr. 5595-5596).

1232. Tim Sullivan did not have any input in the decision to terminate Steadfast. (Cavaretta, Tr. 5596).

1233. On June 10, 2014, Ms. Titus emailed Mr. Staples that Schein would no longer "support the fulfillment of Steadfast Medical supply orders." (CX 2216-002).

1234. Ms. Titus wrote that Schein's business practices were intended to grow business and to work collaboratively, but Steadfast's model, which guaranteed neither exclusivity nor compliance, ran counter to that goal. (Titus, Tr. 5260-5261).

1235. Ms. Titus was disappointed, but remained hopeful that Schein and Steadfast could revisit a mutually beneficial relationship at a later date. (Titus, Tr. 5261-62; CX 2216-002 ("If at some future date you are interested in exploring an exclusive relationship with Henry Schein, we would welcome revisiting a mutually beneficial partnership.")).

1236. Mr. Staples never followed-up about a new partnership. (Titus, Tr. 5262).

1237. Steadfast was diverting business away from Schein, and refused to renegotiate. Therefore, Schein's decision to cease business with Steadfast was in its unilateral self-interest. (*See* Sullivan, Tr. 4087; Cavaretta, Tr. 5572-74; Titus, Tr. 5202-04).

1238. Moreover, Schein's decision to end its relationship with Steadfast had "absolutely" nothing to do with a purported agreement with Benco and Patterson. As Ms. Titus testified, her "job was to work on behalf of Henry Schein and do what was good for our company and our constituency." (Titus, Tr. 5194-95; Foley, Tr. 4680-81; Cavaretta, Tr. 5595-96).

1239. Complaint Counsel did not present any evidence that Schein's decision with respect to Steadfast was anything other than unilateral or in Schein's self-interest. Complaint Counsel's expert, Dr. Marshall, did not render the opinion that Schein terminated its relationship with Steadfast because of the alleged conspiracy. (Marshall, Tr. 2978). Complaint Counsel does not identify any communications between Schein and Benco or Patterson concerning Steadfast. (CX 6027; *see also* Cohen Tr. 914; Ryan, Tr. 1258). Dr. Marshall did not do an empirical analysis of Steadfast at all. (Marshall, Tr. 2971).

1240. In fact, the evidence indicates that Schein's business improved after terminating its partnership with Steadfast. After Schein terminated its relationship with Steadfast, Schein undertook efforts to retain the business of Steadfast's members. (Titus, Tr. 5262-63; CX 2241-002).

1241. Schein did not lose the business it was doing with the members of Steadfast and instead was able to grow the business. (Cavaretta, Tr. 5597-98).

1242. Schein's relationship with Steadfast, its desire and efforts to find a mutually beneficial partnership with Steadfast, and Complaint Counsel's admission that Schein worked with Steadfast during the alleged conspiracy period, are inconsistent with the alleged conspiracy. (Complaint ¶ 1).

NN. Sunrise Dental

1243. Sunrise Dental was a buying group consisting of 49 "independently owned" offices. (CX 2955-002).

1244. In March 2012, HSD Zone Manager Jake Meadows entered into negotiations with Sunrise Dental for a "package of a Formulary with decent pricing, a service deal, [and] a discount for items not on the Formulary." (CX 2955-002).

1245. Mr. Meadows noted that most of the members were buying from Patterson or Burkhart Dental, so there was an opportunity for incremental sales. (CX 2955-001).

1246. Mr. Meadows sought approval to form a relationship with Sunrise Dental from HSD's Vice President Dave Steck. (Meadows, Tr. 2501-02; CX 2955-001).

1247. Mr. Steck's approval was necessary to manage the conflict between Special Markets and HSD, since, at the time, only Special Markets had contract writing authority to create specialized formularies. (CX 2955-001; Meadows, Tr. 2472-75; 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.").

1248. Mr. Steck responded to Mr. Meadows saying "No problem … we will work this out." (CX 2955-001).

1249. Mr. Steck gave his approval and "told [Mr. Meadows] to pursue [Sunrise Dental] because, honestly, it's an area of the country where we have low market share, and I felt there was a good upside there." (Steck, Tr. 3773-74).

OO. Teeth Tomorrow.

1250. Teeth Tomorrow is a "franchise model" group of private practice dentists. (CX 8009 (Wingard, Dep. at 203-04)).

1251. Teeth Tomorrow has "a buying group component." (CX 8009 (Wingard, Dep. at 204)).

1252. Members of Teeth Tomorrow's buying group are primarily independent dentists. (RX 2947 (Cavaretta, Dep. at 84)).

1253. Teeth Tomorrow describes its network as "independently owned dental practices operated by individually licensed dentists that offer Teeth Tomorrow® branded products." (RX 2886-001).

1254. Teeth Tomorrow offers value-added services to its membership through its "educational arm that teaches best practices on certain clinical needs through full mouth restoration." (CX 8009 (Wingard, Dep. at 204)).

1255. When Schein evaluated Teeth Tomorrow, Schein's Jake Meadows "did preliminary meetings with … the two executives that represented Teeth Tomorrow and got into a lot of detail." (CX 8016 (Meadows, Dep. at 281)).

1256. Schein and Teeth Tomorrow entered into a three year agreement on May 15, 2017. (RX 2684-001, -003-04).

1257. Under that agreement, Schein offers a formulary "custom-priced" for Teeth Tomorrow members and additional discounts on non-formulary products, including a [redacted] discount off of catalog price for dental merchandise, [redacted] off of catalog for "films, amalgams, anesthetic and alloy," [redacted] off of catalog for "small equipment and hand pieces," and [redacted] off of catalog price for office supplies. (RX 2684-001).

1258. The agreement also gives Teeth Tomorrow members "[redacted] off local repair and large equipment rental rates," an "[redacted] extended labor warranty for all capital equipment purchased through HSI," and other Schein services. (RX 2684-002).

1259. Schein's agreement with Teeth Tomorrow also requires Schein to provide "a dedicated field team to visit and assist the Group's practices and to meet and schedule business review meetings." (RX 2684-001).

1260. Ms. Wingard testified Teeth Tomorrow was able to "drive compliance" and influence their members to purchase from Schein. (CX 8009 (Wingard, Dep. at 205)).

1261. As a group of independent dentists seeking discounts on dental supplies, Teeth Tomorrow is a buying group within the definition of the Complaint. (Complaint ¶ 3).

1262. Schein's relationship with Teeth Tomorrow is consistent with Schein's approach to buying groups before and during the alleged conspiracy period: looking for groups that could drive compliance and add value. (Foley, Tr. 4614-16, 4621-23; Titus, Tr. 5201-02; Cavaretta, Tr. 5574-76; *see also* Sullivan, Tr. 4088; RX 2062-003). Accordingly, Schein's relationship with Teeth Tomorrow is inconsistent with Complaint Counsel's alleged conspiracy. (Complaint, ¶ 1)

PP. Tralongo.

1263. Tralongo is a buying group based out of Atlanta, Georgia comprised of private practice dentists. (CX 0306 (Foley, IHT at 225); Foley, Tr. 4568, 4712-13; Meadows, Tr. 2484).

1264. Tralongo provides its members lower cost supplies by leveraging "buying power for lease and major purchase negotiations." (RX 2917-001).

1265. Tralongo also advises its independently-owned members on how to acquire dental offices and provides other services to its members such as "financial management, marketing, human resource management, and ongoing education." (RX 2916-001; Foley, Tr. 4716).

1266. Tralongo has both a small DSO and buying group component to its business. (Foley, Tr. 4590, 4712; RX 2947 (Cavaretta, Dep. at 85-86)).

1267. Special Markets entered into a software and equipment agreement with Tralongo's buying group in 2015. (Foley, Tr. 4593).

1268. Special Markets engaged in discussions with Tralongo's buying group about a potential partnership on three occasions. (Foley, Tr. 4712).

1269. Schein first began discussions with Tralongo about a potential partnership with its buying group in 2011. (Foley, Tr. 4568, 4712-13).

1270. At that time, Special Markets submitted a bid to Tralongo for its buying group business. (Foley, Tr. 4568, 4712-13).

1271. However, Schein did not win the bid, and Tralongo ultimately partnered with Darby. (Foley, Tr. 4713).

1272. Around 2014, Tralongo approached Special Markets about submitting a second bid for its buying group business. (Foley, Tr. 4568, 4713).

1273. Mr. Foley again engaged in discussions with Tralongo in 2014. (Foley, Tr. 4713).

1274. After vetting the group, Special Markets declined to submit a second bid to Tralongo. (Foley, Tr. 4568-69).

1275. Special Markets declined to submit a new bid because Tralongo was not agreeable to offering Schein's software, equipment or services to its members, in addition to supplies. (Foley, Tr. 4568-69, 4713-14). Special Markets felt that there was thus no "stickiness," and Tralongo was focused only on obtaining low pricing to compete with Darby. (Foley, Tr. 4568-69, 4713). For all of these reasons, Schein did not see any advantage to working with Tralongo at that time. (Foley, Tr. 4713-14).

1276. Schein's decision in 2014 not to move forward with a second bid for Tralongo's buying group had nothing to do with Tralongo being a buying group. (Foley, Tr. 4714).

1277. Schein's decision in 2014 not to move forward with a second bid for Tralongo's buying group had nothing to do with Benco or Patterson. (Foley, Tr. 4715).

1278. In October 2015, Mr. Foley wrote internally, "Schein, PDCO and Benco all refused to bid on [Tralongo's] business when they entered the GPO/Buying Group world…." (CX 2094). Mr. Foley testified that he "had no direct knowledge" of whether PDCO or Benco bid on Tralongo. (Foley, Tr. 4595). Rather, he was just reporting market intelligence based on the fact that he had "never run into them at any buying group opportunities." (Foley, Tr. 4595). There is no evidence that Mr. Foley or anyone at Schein ever discussed Tralongo with anyone at Patterson or Benco. (Foley, Tr. 4714-15).

1279. In 2015, Tralongo became open to using Schein for software and equipment and re-approached Schein about a potential partnership. (Foley, Tr. 4717-18).

1280. Schein entered into an agreement with Tralongo to provide software and equipment services to Tralongo's buying group members in October 2015. (Foley, Tr. 4593, 4718-20).

1281. In 2016, Schein submitted a bid for the merchandise side of Tralongo's buying group. (Foley, Tr. 4718-4720).

1282. Schein's relationship with Tralongo was eventually transferred from Special Markets to Schein's APC division. (RX 2497 (Cavaretta, Dep. at 88)).

1283. Shortly thereafter, Tralongo was acquired by Dental Whale. (RX 2947 (Cavaretta, Dep. at 86)).

1284. As a group of independent dentists receiving discounts based on the group's collective purchases, Tralongo's buying group arm meets Complaint Counsel's definition of a buying group. (Complaint ¶ 3).

1285. Complaint Counsel does not identify Tralongo as a Buying Group that Schein did not enter into an agreement with as a result of the alleged conspiracy. (RX 3087-004).

QQ. Unified Smiles.

1286. Unified Smiles was founded by Mr. and Ms. Knysz, the former owners of Great Expressions Dental Centers, a successful DSO, and a long-time Schein partner. (RX 2174; Foley, Tr. 4543).

1287. On December 8, 2011, Jan Knysz, the former owner of Great Expressions, reached out to Schein. Ms. Knysz "had moved on" and was "in the process of developing" a new entity, called Unified Smiles. (CX 2062-004-05).

1288. Four days later, on December 12, 2011, Mr. Foley met with Ms. Kynsz to discuss this new project. (CX 2062). The Unified Smiles group "did not [even] exist" when Mr. Foley met with Ms. Kynsz – it "had zero customers." (Foley, Tr. 4684-86, 4689, 4543).

1289. Ms. Kynsz asked Mr. Foley to "meet in confidence" in the basement of the Great Expressions Dental Center, because she did not want to "get anyone at [Great Expressions] stirred up." (Foley, Tr. 4684; CX 2062-002).

1290. Ms. Kynsz did not want Great Expressions to know that Schein was meeting with her, which made Mr. Foley uncomfortable. (Foley, Tr. 4684-85).

1291. Ms. Knysz presented Mr. Foley with a copy of Great Expressions' "proprietary pricing" it received from Schein, and demanded the same pricing for Unified Smiles. But Great

Expressions received its pricing by reason of being Schein's fifth largest corporate customer. Unified Smiles had "no customers whatsoever." (Foley, Tr. 4543-46; 4684-87).

1292. Mr. Foley 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. (CX 2062-003-04).

1293. Mr. Foley discovered that Unified Smiles would be a price-only buying group, with no demonstrable mechanism of compliance. (CX 2062-001; 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.")).

1294. After this meeting, Mr. Foley tried to communicate to Ms. Kynsz that Schein could not extend her DSO pricing if she was not operating as a DSO. (Foley, Tr. 4687-88). Unified Smiles also did not have the "$5M + of business" like Great Expressions did that would allow Schein to "negotiate[] pricing from our vendor/suppliers based on … proven volume." (CX 2062-001).

1295. As Mr. Foley explained to Ms. Kynsz, absent "some 'ownership'" of the individual locations, Schein would consider Unified Smiles to be a "buying group" and it could not extend DSO pricing to her. (CX 2062-001).

1296. Without compliance, Schein could not negotiate "chargebacks" with manufacturers, and extending Unified Smiles DSO pricing would "lead to cannibalization" and "friction" with "EXISTING customers." (CX 2062-001; Foley, Tr. 4543-46, 4688)).

1297. In accordance with the 2010 Guidance developed with Mr. Sullivan, Mr. Muller, and Mr. Steck (SF 208-10), Mr. Foley explained that in order to get DSO pricing, Schein would consider the extent to which Unified Smiles could act as an "owner/partner" for its individual practices and further elaborated "we are not talking about 100% ownership." (CX 2062-001-02).

1298. Mr. Foley in fact offered discounted pricing to the not yet formed Unified Smiles group, but Ms. Kynsz was adamant about receiving the Great Expressions pricing. (Foley, Tr. 4692; CX 2062).

1299. On December 21, 2011, Mr. Foley individually made the decision to turn down Ms. Kynsz and Unified Smiles, and he communicated this to Ms. Kynsz via email. (Foley, Tr. 4692-93; CX 2062).

1300. Mr. Foley told Ms. Knysz that Schein "no longer participates in Buying Groups." (CX 2062-001). Mr. Foley acknowledged this portion of his email was "poorly worded." (Foley, Tr. 4691). Special Markets was still participating with buying groups at the time, and the 2010 Guidance allowed for buying groups that, unlike Unified Smiles, could drive compliance. (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." (Foley, Tr. 4684-85, 4691).

1301. At trial, Mr. Foley confirmed that he was the sole decision maker with respect to Unified Smiles. (Foley, Tr. 4692-94; CX 2062).

1302. Prior to making his decision, Mr. Foley did not discuss turning down Unified Smiles with anyone at Schein. (Foley, Tr. 4694). Mr. Foley's direct supervisor, Hal Muller was made aware of Mr. Foley's decision, after Mr. Foley notified Unified Smiles. (CX 2063).

1303. Mr. Foley never spoke with Mr. Sullivan about Unified Smiles. (Foley, Tr. 4694).

1304. Mr. Foley never spoke with anyone at Benco or Patterson about Unified Smiles. (Foley, Tr. 4696).

1305. Neither Ms. Kynsz nor anyone else from Unified Smiles ever responded to the December 21, 2011 email. (Foley, Tr. 4694).

1306. On January 5, 2012 – a few weeks after Schein had declined to extend Unified Smiles DSO pricing – Unified Smiles announced the group's launch. (CX 1145).

1307. Complaint Counsel's expert, Dr. Marshall, did not conduct a profitability study of Unified Smiles. (*See* CX 7100; CX 7101; Marshall, Tr. 2986-87).

1308. Thus, the evidence indicates that Schein declined to do business with Unified Smiles for unilateral and legitimate reasons. It did not coordinate with Benco or Patterson on its response to Unified Smiles (SF 1286-304), and it considered the risk of cannibalization as well as Unified Smiles' ability or inability to move volume towards Schein. As Mr. Foley testified, Schein did offer Unified Smiles discounts, just not the steep discounts it offered to large DSOs that had a proven record of driving volume. (Foley, Tr. 4543-44). The evidence supports Schein's deliberate, unilateral, and rational approach to buying groups, not an agreement to boycott them.

RR. Universal Dental Alliance ("Dental Alliance").

1309. Complaint Counsel contends that "Schein did not enter into agreements with Buying Groups between 2011 and 2015, including … Dental Alliance." (RX 3087-004).

1310. "Dental Alliance" refers to Universal Dental Alliance, a Raleigh-based buying group and Schein customer. (*See, e.g.,* RX 2350-002-09 (listing Raleigh address and 7% discount for group's members); Steck, Tr. 3770-71; Sullivan, Tr. 4239-41).

1311. Dental Alliance describes itself as "a group purchasing organization (GPO) that focuses exclusively on the dental and oral surgery industries. [Its] sole function is to leverage the buying power of our members for discounted pricing on supplies, equipment, and increased customer services." (RX 2350-001).

1312. Dental Alliance is incorporated in Raleigh, North Carolina. (RX 2350-002).

1313. In 2011, Ryan Steck, a Regional Manager for Schein in Raleigh, North Carolina, proposed "an arrangement" for Universal Dental Alliance members where members could get "a 7% discount for a business pledge of $25,000-$30,000." (RX 2612-017; Steck, Tr. 3771-72).

1314. Ryan Steck discussed the Dental Alliance opportunity with Dave Steck, Vice President and General Manager for Schein, and the two formulated a proposal for the buying group, which would provide members with a "straight 7% discount." (RX 2612-016; Steck, Tr. 3771-72).

1315. To incent 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. (RX 2612-016-17; Steck, Tr. 3772-73 (testifying offer was meant "to financially incentivize the buying group to focus on incremental sales and not on Henry Schein customers," to help Schein "grow the business, not just continue to farm the business" it already had.)).

1316. Schein proposed setting up two discount codes for Dental Alliance members. (Steck, Tr. 3772-73). Both "would give the end user a straight 7% discount," but one code would apply to current Schein customers who purchased "$20,000 or more in merchandise in [the] prior 12 months." (RX 2612-016). The other code "would be for non-HSD customer[s] … (defined as less than 20K annually in merchandise)." (RX 2612-016).

1317. Dave Steck explained the offer this way: "the second [discount code] is for incremental business to Henry Schein. So we are rebating a group on a higher rate than we would on business we already had." (Steck, Tr. 3772-73).

1318. The offer was designed "to financially incentivize the buying group to focus on incremental sales and not on Henry Schein customers," to help Schein "grow the business, not just continue to farm the business" it already had. (Steck, Tr. 3773).

1319. In or around July 2011, Schein entered a three-year contract with Dental Alliance that would automatically renew on June 30, 2014. (RX 2350-005 (unsigned copy of 2011 contract); Sullivan, Tr. 4241 (confirming RX 2350 represents the contract Schein signed with the Dental Alliance in 2011); *see also* RX 3076-015 (confirming contract renewal date of 6/30/2014)).

1320. Schein's 2011 contract with Dental Alliance met the terms Schein proposed including, "at minimum 7% discount from catalog (list) price for Universal Dental Alliance members," a 3% quarterly rebate (paid to the group) for sales to new customers, and a 1.5% rebate (paid to the group) for sales to existing customers. (RX 2350-004, -009).

1321. 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 this Agreement." (RX 2350-003; *see also* Steck, Tr. 3772 (Schein asked Dental Alliance's "members to individually commit to volume … in order to get the 7 percent discount.")).

1322. The Dental Alliance contract was automatically renewed on June 30, 2014, and Schein continued to do business with them. (RX 3076-015; RX 2612-005 (December 15, 2014 email noting that Schein was "negotiating a new contract"); RX 2612-001 (April 30, 2015 email showing quarterly rebates for Q1 2015)).

1323. Schein's 2011 contract with Dental Alliance directly contradicts Complaint Counsel's allegation that Schein boycotted Dental Alliance. (RX 3087-004).

1324. Schein's 2011 agreement with Dental Alliance also provided "either party may terminate this Agreement upon 60 days prior written notice." (RX 2350-005-06).

1325. On October 20, 2011, Tim Sullivan learned Schein was working with Dental Alliance. (Sullivan, Tr. 4241; Steck, Tr. 3771-72; RX 2349-001-02 (Mr. Sullivan: "What is this?" Paul Hinsch, Schein Vice President of Merchandise Marketing: "A buying group." Mr. Sullivan: "We've got to undertake this.")). Mr. Sullivan did not take any action to terminate Schein's relationship with Dental Alliance. (Sullivan, Tr. 4240).

1326. Mr. Sullivan's conduct directly contradicts Complaint Counsel's allegation that Mr. Sullivan and other top Schein executives refused "to provide discounts to or otherwise contract with buying groups." (Complaint ¶ 8).

1327. Mr. Sullivan never communicated with Chuck Cohen about Dental Alliance other than receiving an unsolicited text message from Chuck Cohen on March 26, 2013 to which Mr. Sullivan did not respond. (Sullivan, Tr. 4197; CX 0196-008).

1328. When Mr. Sullivan received the text message, he thought Chuck Cohen was referring to a different group, Atlantic Dental Care, which Complaint Counsel does not contend is a buying group. (Sullivan, Tr. 4198).

1329. After receiving the unsolicited text message from Mr. Cohen, Mr. Sullivan called Mr. Cohen the next day to "be very clear with him that … Chuck … cannot be sending information on what Benco's doing with customers." (Sullivan, Tr. 4197-98).

1330. While Mr. Cohen does not recall Mr. Sullivan making this point, Mr. Sullivan's testimony is corroborated by Mr. Sullivan's later internal email about the Texas Dental Association, instructing members of his team that "Agree that we should NOT be having these discussions w[ith] Benco. Chuck has not contacted me nor would he on such a topic." (Cohen, Tr. 559; RX 2362; Sullivan, Tr. 4207-08 (Mr. Sullivan was confident Mr. Cohen would not contact him about the TDA because "I was very clear that, Chuck, you and I should not and cannot be talking about this type of stuff.")).

1331. Mr. Sullivan "never talked with anyone" about Mr. Cohen's text message about Universal Dental Alliance. (Sullivan, Tr. 4200-01).

1332. At no point during the alleged conspiracy period or thereafter did Mr. Sullivan take any action "to kill" Schein's partnership with Dental Alliance, and never terminated the contract. (Sullivan, Tr. 4240).

1333. Schein continued working with Dental Alliance and paying it rebates through at least April 2015. (RX 2612-001-09 (listing quarterly rebates for Universal Dental Alliance from 2011 into 2015); RX 2613-001 (listing sales to group members for January through March 2015)).

1334. Benco rejected Universal Dental Alliance in 2012 because it was a buying group, and knew Schein was offering Dental Alliance a 7% discount. (Cohen, Tr. 557-58; CX 0061-001).

1335. Schein's sales to and continued relationship with Universal Dental Alliance during the alleged conspiracy contradicts Complaint Counsel's conspiracy allegations. (Complaint ¶ 1).

IV. THE EVIDENCE REFUTES COMPLAINT COUNSEL'S CLAIM THAT SCHEIN CHANGED ITS PRACTICES AT THE START OR AFTER THE END OF THE ALLEGED CONSPIRACY.

1336. Complaint Counsel claims its alleged conspiracy is supported by evidence that Schein "abruptly" and "radically" changed its behavior towards buying groups, first in December 2011 and again in April 2015. (CC Pretrial Br. at 18; Kahn, Tr. 19; SF 1339, 1392, 1636). The evidence does not support this claim.

1337. Mr. Cavaretta, who worked closely with Mr. Sullivan through the relevant period, testified that he noticed no change in Mr. Sullivan's behavior regarding buying groups from 2011 through 2015. (Cavaretta, Tr. 5530). As discussed below, the documentary and testimonial evidence supports Mr. Cavaretta's observation.

A. The Evidence Does Not Support the Claim that Schein Changed Its Practices at the Start of the Alleged Conspiracy.

1338. In its Complaint, Complaint Counsel alleged that "Schein had historically worked with some Buying Groups, but began pursuing an anti-Buying Group strategy" following alleged but unidentified "frequent inter-firm communications between Benco's Managing Director Chuck Cohen and Schein's President Tim Sullivan prior to July 2012." (Complaint ¶ 33). Complaint Counsel also alleges that after July 2012, "Sullivan and other top Schein executives began instructing its sales force to avoid selling to Buying Groups." (Complaint ¶ 34).

1339. In its pretrial brief, Complaint Counsel was more precise: "By December 2011, Schein's practice of working with buying groups had changed." Complaint Counsel called this a "radical change," claiming "Schein abruptly altered its prior pro-buying group position to match Benco's no-buying group policy." (CC Pretrial Br. at 12-13, 18, 48; *see also* Kahn, Tr. 34 ("[B]y late 2011, Schein had changed its buying group strategy. It no longer participated in buying groups."); Kahn, Tr. 26).

1340. The evidence does not support these alleged changes in behavior by Schein.

1341. Complaint Counsel's suggestion that Schein developed a new internal policy in 2011 to not do business with buying groups is directly contradicted by sworn testimony. (RX 2941 (Sullivan, Dep. at 512) ("Q. Does Henry Schein have any policy against doing business with price-only buying groups? A. No. Q. Does Henry Schein have any policy whatsoever regarding doing business with buying groups? A. Other than we will do business with buying groups."); Titus, Tr. 5193 ("Q. Are you aware of any policy at Henry Schein, either in Special Markets or Henry Schein Dental, not to work with buying groups? A. No, I have not because that policy did not exist.");

Steck, Tr. 3709 ("Are you aware of any policy that says Schein should not do business with buying groups? A. I am not."); Meadows, Tr. 2470 ("We didn't have a policy not to do business with buying groups."); Sullivan, Tr. 3997-98 ("Henry Schein Dental always had an interest in buying groups that involved private practice members in some form or capacity. A. We worked with several, yes.")).

1342. Contrary to Complaint Counsel's claim that Schein had a "pro-buying group position" before the alleged conspiracy, its internal characterizations and evaluations of buying groups has long been one of skepticism, well before 2011. (*See, e.g.*, RX 2405-001 (2002: "[W]e have held a pretty firm line on saying No to virtually all of them…. [T]his type of GPO would kill the margins for both manufacturers and distributors.… [T]here would be no increased volume and just lower costs…. In my opinion we need to stop this effort"); CX 2296-001 (2010: "I do not support us opening Buying Clubs."); CX 2503 (2010: I do not believe in selling to Buying Groups – and we have closed some down already…."); CX 2451 (2010 "[N]ot interested in GPOs. The risk is much greater if we do sign th[a]n if we don't."); CX 2153 (2010: "[O]n Buying Groups—and the fact that we need to let these groups know when they call us; that they need to … have complete control of purchasing policy that would force the distributor purchases to Schein."); CX 2111 (2010: "We also determined at the beginning of the year (Dave, Tim, Randy and myself) that we would entertain organizations that could force compliance."); CX 2113 (2010: "neither of us support concept of buying groups…. [T]he risk to overall HIS … for margin erosion").

1343. Indeed, as discussed above, before 2011, Schein evaluated buying groups on a case-by-case basis, doing business with some (*e.g.*, Dental Co-Op, Smile Source) but not others (*e.g.*, CF Dental Group) depending on the group's characteristics. (*See, e.g.*, RX 2713; CX 2296).

1344. Schein behaved in the same manner after 2011, evaluated buying groups on a case-by-case basis, doing business with some (*e.g.*, MeritDent, Schulman Group) and not others (*e.g.*, PGMS, Dentistry Unchained) depending on the group's characteristics. (SF 690-716, 969-81, 1047-67, 1093-104; *see also, e.g.*, RX 2256; CX 2809).

1345. Complaint Counsel relies on a single email from December 21, 2011 for its allegation that Schein had "abruptly" switched to a "no-buying group policy" by that date. (CC Pretrial Br. at 12, 18 (citing CX 2062); RXD 0031 (CC Opening, Slide 13 (same))). The email is from Randy Foley, who was the Director of Sales for Special Markets at the time, to a potential customer. It is not an announcement of a change in company policy, nor did Mr. Foley have the authority to announce overall corporate policy. He was not in charge of the Special Markets division, and he had no authority over Schein's HSD division. Further, Mr. Foley's testimony at trial (regarding his own email), directly undermines Complaint Counsel's allegation. (Foley, Tr. 4690-91). CX 2062, on its face, cannot support the weight Complaint Counsel would give it. (*See also* Foley, Tr. 4658-59, 4690 (denying that Schein had changed its approach to buying groups)).

1346. The evidence of Schein's behavior before and after December 21, 2011 also supports the Court's finding. Complaint Counsel's position is belied by the fact that the day after Mr. Foley's email, Mr. Cavaretta outlined a proposal to do business with the buying group MeritDent after discussing with HSD leadership. (Cavaretta, Tr. 5579, 5581-82; Sullivan, Tr. 4241-42; CX 2458).

1347. Less than two months after Mr. Foley's email, Schein had entered into a purchasing agreement with MeritDent buying group. (RX 2393-005; Cavaretta, Tr. 5582, 5649).

1348. And six months after Mr. Foley's December 21, 2011 email, Mr. Foley memorialized Schein's partnership with Dental Partners of Georgia in a written agreement. (SF 680-90).

1349. Complaint Counsel also claims Smile Source's decision to switch from Schein to Burkhart in 2012 was in furtherance of the conspiracy and indicative of a change in behavior. (Kahn, Tr. 40-42). Complaint Counsel argues that a comparison of Mr. Sullivan's emails about Smile Source in 2010 (CX 2113) and 2012 (CX 0199) makes Schein's change in conduct "particularly obvious." (Kahn, Tr. 40). Again, the evidence does not support Complaint Counsel's position.

1350. As discussed above, CX 2113 was written at a time in 2010 that Schein's partnership with Smile Source was creating conflicts with Schein's sales representatives in the field. (SF 1350). Mr. Sullivan's 2010 email states that neither he nor Hal Muller "support [the] concept of buying groups." (CX 2113). This refutes Complaint Counsel's assertion that Schein had a "pro-buying group position" before the alleged conspiracy started in December 2011.

1351. Despite Mr. Sullivan's and Mr. Muller's skepticism of buying groups, the two decided in 2010 that Smile Source was a buying group worth retaining, noting "we need time with them to create a win-win-plan going forward." (CX 2113). Mr. Sullivan said the same thing about the Kois group in 2014. (SF 898-900, 909-10; RX 2062-002; Sullivan, Tr. 4228-30). The evidence thus indicates that Schein employed a consistent and careful approach to buying groups, looking for groups that offered win-win possibilities throughout the entire period. Complaint Counsel's alleged abrupt change in behavior does not appear in the record.

1352. Mr. Sullivan's 2012 email is consistent with Schein's pre-2012 behavior. (*See* SF 189-221). CX 0199 was written after Smile Source had decided to end its partnership with Schein. (SF 1122). Consistent with Mr. Sullivan's 2010 non-support for the "concept of buying groups," Mr. Sullivan wrote in 2012, when Schein was trying to retain the business of Smile Source members despite its decision to switch to Burkhart, that he is "really interested to see how and what we can do to retain these customers and judge how effective their buying group model is. Let's really take this serious and get after it. I'm really less concerned about actual revenues, although very important too, rather more about what we can do to KILL the[ir] buying group model!" (CX 0199-001; Sullivan, Tr. 4146).

1353. As Mr. Sullivan explained, "when Smile Source terminated us … I definitely wanted to kill – you know, go after … Smile Source's model, and the customers that they were now attempting to switch to someone else." (Sullivan, Tr. 3932-33, 3935-37 ("We wanted to keep the business.")). Mr. Sullivan's skepticism of the buying group model is inconsistent with Complaint Counsel's alleged change in behavior, as is Mr. Sullivan's desire to keep the business of Smile Source members.

1354. In fact, every time an opportunity to do business with Smile Source arose, Schein was interested. (CX 2899-001 (Feb. 2011: Tim Sullivan is "very excited about our future together"); RX 2090-001 [redacted]; CX 2580 (Oct. 2013: Tim Sullivan "would enjoy catching up with you … [and] learning more"); RX 2328-001 (Nov. 2013: Tim Sullivan "absolutely would like to discuss further"); CX 2588-001 (Feb. 2014: Schein is "excited about the opportunity and will move the process along as fast as possible"); RX 2444-001 (Aug. 2015: Tim Sullivan would "love to connect again"); CX 2607 (Jan. 2016: Tim Sullivan would "like to find a date in the coming weeks that you could visit us … [so] [w]e can walk you through our proposal…."); CX 2612-001 (Dec. 2016: Tim Sullivan "hope[s] and expect[s] that some day we will partner again…."); RX 2091-001 [redacted]).

Schein's interactions with Smile Source are indicative of Schein's unilateral, consistent approach to buying groups, not Complaint Counsel's alleged change in conduct.

1355. The evidence does not support a conclusion that Schein drastically or abruptly changed its behavior with regard to buying groups in December 2011 or any time in 2012. Schein expressed skepticism towards buying groups before and after 2011. Schein signed up a buying group immediately after Complaint Counsel claims the conspiracy began. And Schein continued to do business with existing and new buying groups throughout the alleged conspiracy period.

B. The Evidence Does Not Support Complaint Counsel's Claim that Schein Executives Instructed Employees Not to Do Business with Buying Groups.

1356. Complaint Counsel claims that as a result of the alleged conspiracy, beginning sometime in 2011 or 2012 "Sullivan and other top Schein executives began instructing its sales force to avoid selling to Buying Groups." (Complaint ¶ 34; RX 3087-004 ("[B]eginning in 2011 and lasting into 2015, Schein executives began instructing sales managers and sales personnel not to provide discounts to or compete for the business of Buying Groups …."); CC Pretrial Br. at 18-19 ("[F]ollowing communications with Benco in 2011, Sullivan and other Schein executives directed the salesforce to refuse buying groups."); Kahn, Tr. 42 ("By 2012, Schein's executives started instructing its employees not to do business with buying groups.")).

1357. The evidence is to the contrary.

1. *Every Schein Trial Witness Denied Any Instructions to Not Do Business with Buying Groups.*

1358. The only Schein executives that Complaint Counsel has identified by name in connection with its allegations related to instructing employees are Tim Sullivan, Joe Cavaretta, Jake Meadows, and Randy Foley (Complaint ¶ 34 ("Sullivan and other top Schein executives began instructing its sales force to avoid selling to Buying Groups."); CC Pretrial Br. at 18-19 (citing CX 2458, CX 2234, CX 2358 and CX 0176)).

1359. Every Schein witness who testified at trial denied giving and/or receiving any instructions to not do business with buying groups. (Sullivan, Tr. 4019-20; Cavaretta, Tr. 5531-34, 5592; Meadows, Tr. 2580, 2578, 2594-95; Foley, Tr. 4602; Steck, Tr. 3709-10; Titus, Tr. 5193, 5247-48).

1360. Every Schein trial witness confirmed that Mr. Sullivan, President of HSD, never instructed them to not do business with buying groups. (Cavaretta, Tr. 5530-34, 5592; Meadows, Tr. 2468, 2578, 2594-95; Foley, Tr. 4602; Steck, Tr. 3709-10; Titus, Tr. 5193, 5248).

1361. No Schein witness who testified at trial ever heard of any instruction from Mr. Sullivan not to do business with buying groups. (Cavaretta, Tr. 5530-34; Meadows, Tr. 2468; Foley, Tr. 4602; Steck, Tr. 3709-10; Titus, Tr. 5193).

1362. Mr. Sullivan testified that he never instructed Schein's sales force to avoid selling to buying groups and is not aware of anybody at Schein ever giving such instructions. (Sullivan, Tr. 4019-20).

1363. Further, Mr. Sullivan never implemented any policy at Schein to not do business with or to not give discounts to buying groups. (Sullivan, Tr. 4086-87).

1364. Schein did provide discounts to or compete for the business of new buying groups for Mr. Sullivan's "entire 21 years at Schein." (Sullivan, Tr. 4020-21).

1365. Even Complaint Counsel asked Mr. Sullivan to confirm that "Schein has done business with buying groups in the past and does business with buying groups today," to which he responded: "That's correct." (Sullivan, Tr. 3912).

1366. Mr. Cavaretta, one of Schein's top sales executives in the Western Area, testified that in his 18 years at Schein he never instructed the sales force to avoid selling to buying groups. (Cavaretta, Tr. 5532-33).

1367. Mr. Cavaretta is not aware of any other executives at Schein giving an instruction to avoid selling to buying groups, and he was never given any such instruction. (Cavaretta, Tr. 5533).

1368. In fact, Mr. Sullivan specifically directed Mr. Cavaretta to come up with a strategy to work with buying groups during the alleged conspiracy. (Cavaretta, Tr. 5530-31).

1369. Further, Mr. Cavaretta never instructed anyone to not offer discounts to or not compete for the business of new buying groups. (Cavaretta, Tr. 5532-33).

1370. Similarly, Mr. Cavaretta is not aware of any other executives at Schein giving instructions to not offer discounts to or to not compete for the business of new buying groups, and he was never given any such instructions. (Cavaretta, Tr. 5533).

1371. Mr. Cavaretta characterized Complaint Counsel's allegation that Schein instructed its sales force to reject buying groups as "false." (Cavaretta, Tr. 5534-35).

1372. Contrary to the Complaint's allegations, Mr. Cavaretta explained that Schein "did business with buying groups and we were also putting a strategy together for buying groups so we could grow with them." (Cavaretta, Tr. 5532, 5535; Complaint ¶ 34).

1373. Mr. Cavaretta testified that he "spent a lot of days and hours and, quite frankly, years putting a structure together" for the Mid-Market and buying group space. (Cavaretta, Tr. 5535).

1374. Schein never stopped working with buying groups during Mr. Cavaretta's 18-year tenure at HSD. (Cavaretta, Tr. 5536).

1375. Mr. Meadows, one of Schein's top sales executives in the Eastern Area, never received any direction from Mr. Sullivan, Mr. Steck, Mr. Chatham, Mr. Breslawski, Mr. Bergman or anybody else at Henry Schein not do business with buying groups. (Meadows, Tr. 2578, 2580, 2620-21).

1376. In writing to an FSC that regional managers "made a decision that is against what Tim Sullivan has directed us to do in regards to supporting Buying groups[,]" Mr. Meadows meant only that HSD "regional managers, FSCs and zone managers were not supposed to be gathering or presenting offers to buying groups or building offers for buying groups" at that time, because Special Markets had primary responsibility for buying groups and established buying group formularies. (Meadows, Tr. 2474-76, 2636-38; CX 0170).

1377. Mr. Meadows clarified that he "never got direction from Tim Sullivan not to do business with buying groups." (Meadows, Tr. 2476, 2594-95, 2620).

1378. Mr. Meadows did not provide any instruction to Schein's sales force to not do business with buying groups. (Meadows, Tr. 2596-97).

1379. Mr. Foley, former Director and later VP of Sales for Special Markets, testified that he has never been instructed to not do business with buying groups, and similarly did not instruct others to not do business with buying groups. (Foley, Tr. 4601-02, 4652).

1380. Mr. Foley clarified that there was never any corporate decision not to participate in all buying groups and both Special Markets and HSD provided discounts to buying groups the entire time he was employed by Schein. (Foley, Tr. 4603, 4606, 4728-29).

1381. Ms. Titus, Director of Mid-Market, Western United States, confirmed that none of her superiors during her 24 years at Henry Schein – including Jake Meadows, Brian Brady, Joe Cavaretta, Randy Foley, and Hal Muller – ever instructed her to not do business with buying groups. (Titus, Tr. 5192-93).

1382. Rather, Ms. Titus testified that in June 2014, Mr. Cavaretta told her that Schein needed to have a more formal offering with respect to buying groups and asked that she "build th[at] portfolio." (Titus, Tr. 5221).

1383. In sum, no one at Schein ever instructed Ms. Titus to not do business with buying groups. (Titus, Tr. 5193).

1384. Ms. Titus commented at trial that Complaint Counsel's allegations were "personally diminishing … because [she] spent so much of [her] career at Henry Schein working with buying groups." (Titus, Tr. 5192).

1385. The evidence does not support Complaint Counsel's allegation in the Complaint that Mr. Sullivan and other Schein executives instructed Schein's sales force not to do business with buying groups. (Complaint ¶ 34).

2. *HSD's Regional Sales Teams Had the Authority to Do Business with Buying Groups.*

1386. HSD's regional managers had the authority to discount to and do business with buying groups locally. (Sullivan, Tr. 3920). HSD's regional managers have, in fact, entered into such buying group agreements. (Cavaretta, Tr. 5576-78; RX 2232-001; CX 2263; RX 2638; Steck, Tr. 3837-38; CX 8020 (Brady, Dep. at 75-76)).

1387. Even after primary responsibility for buying groups shifted from Special Markets to Mid-Market, Tim Sullivan did not have the final say about whether HSD would do business with a buying group. (Sullivan, Tr. 4113). Others within HSD or Mid-Market had the authority to decide whether or not to partner with a buying group. (Sullivan, Tr. 4113).

1388. When approached by local HSD sales teams regarding buying group opportunities, Mr. Sullivan may give his opinion, but "it would be up to … them," to make a decision. (Sullivan, Tr. 4113-14; Cavaretta, Tr. 5609 (With respect to PGMS buying group, Mr. Cavaretta stated: "Tim is an empowering leader, and he said … whatever you want to do we do.")).

1389. There were occasions when Mr. Sullivan gave his opinion that HSD should not work with a buying group, but HSD proceeded to work with the buying group anyway. (Sullivan, Tr.

4114). Similarly, though Mr. Sullivan thought the ADC buying group "smell[ed] bad[,]" the HSD local team (including Michael Porro and Bobby Anderson) made the decision to "go for it" and bid on ADC. (Sullivan, Tr. 4212-13).

1390. There are other HSD buying group decisions that Mr. Sullivan had no role in whatsoever. (Cavaretta, Tr. 5595-96 (Steadfast Medical), 5602-03 (Dental Co-Op of Utah)).

1391. The fact that HSD's regional sales teams had the authority to do business with buying groups – and did so – is inconsistent with the alleged instructions given by Mr. Sullivan and other Schein executives, as described in the Complaint. (Complaint ¶¶ 1, 34).

C. The Evidence Does Not Support the Claim that Schein Changed its Practices at the End of the Alleged Conspiracy Period.

1392. Complaint Counsel argues that Schein made another "radical course change[]" and "began competing for buying groups after the conspiracy ended" "in April of 2015." (CC Pretrial Br. at 49-50; Kahn, Tr. 19, 54). In support, Complaint Counsel argues that "by late 2015 … Schein entered into a number of buying group arrangements," pointing specifically to Schein's 2017 agreement with Smile Source and a 2017 internal Benco text messages noting "Schein recognizing 5-10 GPOs." "Smile Source for sure." (CC Pretrial Br. at 50; Kahn, Tr. 54-55 (citing CX 1527)).

1393. Contrary to Complaint Counsel's assertion of a "radical course change," however, the evidence already discussed shows Schein has always done business with at least "five to ten" buying groups starting well before the end of the alleged conspiracy period, including Alpha Omega, Long Island Dental Forum, the Dental Co-Op, Dental Partners of Georgia, OrthoSynetics, Smile Source, Comfort Dental, Advantage Dental Group, the Denali Group, Dentists for a Better Huntington, Khyber Pass, Dental Associates of Virginia, Intermountain Dental Associates, Universal Dental Alliance, Nevada Dental Cooperative, Steadfast Medical, MeritDent, the

Schulman Group, Dental Gator, Klear Impakt, Stark County Dental Society, Corydon Palmer Dental Society, Tralongo, Breakaway, and others. (SF 377-1335).

1394. Schein's agreement with Smile Source in 2017 was nothing new. Indeed, Schein had tried to win Smile Source's business in 2012 and 2014, the beginning and middle of the alleged conspiracy. (RX 2213; Steck, Tr. 3789). And, as Smile Source's President Trevor Maurer wrote in 2017, [redacted] (RX 2091). The fact that Schein failed to win Smile Source's business in 2014 and it took three years to finally consummate a deal is consistent with Schein's unilateral approach to buying groups, not with Complaint Counsel's alleged conspiracy.

1395. The evidence does not support Complaint Counsel's contention that Schein suddenly started saying "yes" to buying groups after 2015. Just as it had done in the years before 2015, the evidence shows that Schein continued to evaluate each buying group on a case-by-case basis after the alleged conspiracy period, saying yes to some and no to others. For example, after over a year of discussions and negotiations with IDGB, Schein ultimately decided in 2016 that the partnership did not make business sense. (SF 774-78). Similarly, Schein decided not to further pursue partnerships with TDSC and Dentistry Unchained after over a year of negotiations after the alleged conspiracy period. (SF 468-86). Accordingly, this Court finds that, rather than beginning to compete for buying groups anew in 2015, Schein continued competing for buying groups as it had in the years before 2015.

V. THE COMMUNICATIONS CITED BY COMPLAINT COUNSEL DO NOT EVIDENCE AN AGREEMENT.

A. The Interfirm Communications Cited by Complaint Counsel Do Not Support the Allegation that Schein Joined a Conspiracy in 2011 or Anytime Thereafter.

1396. Complaint Counsel's "allegations are based on direct competitor communications…. 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; *see also* Kahn, Tr. 65 ("This case comes down to competitors communicating with each other directly about a refusal to discount to buying groups … followed by a joint refusal to discount to buying groups.")).

1397. Further, Complaint Counsel made clear during the trial that the "basis of our case comes down to the nature of the relationship and the communications between Chuck Cohen, Tim Sullivan, and Paul Guggenheim," and that other communications – such as isolated, unsolicited communications between other employees – "[are] not the basis of our case." (Kahn, Tr. 4759).

1. *Alleged Schein-Benco Communications.*

1398. Mr. Cohen cannot recall ever hearing from Schein how it felt about buying groups. (Cohen, Tr. 848).

a. Non-Buying Group Communications Are Not Evidence of a Conspiracy.

1399. Complaint Counsel cites to communications between Schein and Benco unrelated to buying groups in support of their alleged conspiracy. (*See, e.g.*, CX 6027-023 ("Tim: You asked me to let you know re Anne Cox. We are hiring her, starts next week. Thanks. Cfc"); CX 6027-027 (A-dec divorces Benco); CX 6027-042 ("Thanks for Amazon change."); CX 6027-010 ("BTW, I love the way that the Sullivan Foundation/DTAF joint scholarship has turned out…. Thank you for helping to set the standard."); CX 6027-039 ("Ok. I've got Badgers. You've got Harvard. For a beer. 👍"); CX 6027-021 ("Must have had great snow day yesterday!! We had to leave early for airport to get out ahead of it!!"); CX 6027-019 ("Just wrapped up. They boo'd me off the stage. Threw fruit. Ornery crowd. I'm sure you'll do great!!")). Such communications, however, are not probative of a conspiracy not to do business with buying groups, but rather are innocuous communications related to hiring issues, manufacturers, Amazon, charities, sports, niceties, and jokes.

1400. Notably, Complaint Counsel did not identify any communications between Schein and Benco relating to buying groups at the time the alleged conspiracy began in December 2011. (CX 6027-003-18). Instead, at trial, Complaint Counsel introduced two December 2011 emails sent by Mr. Cohen – one to Mr. Sullivan and a second to Mr. Guggenheim – about Procter & Gamble. (Guggenheim, Tr. 1547; Sullivan, Tr. 3890-93; Cohen, Tr. 488; CX 2422, CX 1049, CX 3067.)

1401. Procter & Gamble is a manufacturer; not a buying group. (Sullivan, Tr. 3891; Guggenheim, Tr. 1692 ("They're a manufacturer … [N]ot a buying group, no.")). The emails had "nothing to do with buying groups." (Guggenheim, Tr. 1692; Cohen, Tr. 833; Sullivan, 4262). Complaint Counsel argues these communications evidence a pattern and practice probative of the alleged buying group conspiracy, but legitimate interfirm communications about manufacturer issues cannot support the alleged conspiracy regarding buying groups, or an inference that Respondents communicated about buying groups at this time.

1402. Complaint Counsel introduced an exchange of calls between Mr. Cohen and Mr. Sullivan on January 8, 2013. (CX 6027-026-27). The testimony at trial established that these calls were also about a manufacturer issue: A-dec's announcement of its "divorce" from Benco. (Cohen, Tr. 770-71 ("January of 2013 was when A-dec and Benco announced that we were getting divorced."); Sullivan, Tr. 4081-82; *see also* RX 2756 ("Chuck and I finally hooked up today after a few days of failed attempts … Chuck would not make changes Adec requested so they terminated.”)).

1403. “A-dec is a dental equipment company. It stands for Austin Dental Equipment Company out of Oregon. And it is considered to be the top-of-the-line dental chair and dental unit and dental light and cabinetry.” (McFadden, Tr. 2752).

1404. The loss of A-dec was “traumatic” to Benco and flattened Benco’s expansion and growth. (Cohen, Tr. 665-667).

1405. In January 2013, Schein and Benco had been discussing the sale of Benco to Schein. (Sullivan, Tr. 4081 (“We were surprised to hear that Adec cut off Benco, and [were] actually in the midst of discussions with them about a merger.”)).

1406. Benco’s loss of A-dec was “a big deal to -- a potential impact to [the] deal” with Schein. (Sullivan, Tr. 4081; *see also* RX 2756).

1407. The evidence thus indicates that the January 2013 calls stemmed from Schein-Benco merger talks and concern over Benco losing a major vendor. (Sullivan, Tr. 4081, RX 2756). There is no indication that buying groups were discussed or mentioned on the calls. (Sullivan, Tr. 4081, Cohen, Tr. 770-71). The calls thus cannot support Complaint Counsel’s allegations.

1408. Complaint Counsel introduced a series of communications between Mr. Cohen and Mr. Sullivan on March 16, 2010 as evidence of an alleged buying group conspiracy. (CX 6027-001-02; Sullivan, Tr. 4073-76). The March 16, 2010 communications occurred more than a year before Complaint Counsel claims the alleged conspiracy began.

1409. Moreover, the March 16, 2010 communications had nothing to do with buying groups, but rather an issue with KaVo’s new handset program. (Sullivan, Tr. 4074-76; CX 2452)

1410. Benco and Schein had distributor agreements with KaVo. (CX 8025 (Sullivan, Dep. at 353-54)). KaVo was offering sample handsets, but "[t]he problem was with their keeping them, it wasn't like they would then choose the dealer that they want this to be billed through. They were billing the customers directly, which goes against [the distributor] agreement with them." (Sullivan, Tr. 4074-75).

1411. There is no evidence that the March 16, 2010 communications had anything to do with buying groups, and they predated the alleged conspiracy by more than a year. They thus cannot support Complaint Counsel's claims. (Sullivan, Tr. 4261-62). Nor can an inference be made from such communications. The fact that Mr. Sullivan and Mr. Cohen communicated about legitimate business issues provides no support to Complaint Counsel's allegation that Schein later agreed to behave in a certain way with regard to buying groups at Benco's behest.

1412. Complaint Counsel also introduced a series of communications from Mr. Cohen to Mr. Guggenheim and Mr. Sullivan that related to end-user data that distributors provide to manufacturers. On June 12, 2013, Mr. Cohen sent Mr. Sullivan an email regarding formalizing the industry practice of supplying end-user data to suppliers such as Dentsply, 3M, Hu Friedy, and Ivoclar. (CX 2337). On June 12, 2013, Mr. Cohen sent Mr. Guggenheim a similar email regarding formalizing the industry practice of supplying end-user data to suppliers such as Dentsply, 3M, Hu Friedy, and Ivoclar. (CX 1055). Mr. Cohen's emails reflect his concern that "manufacturers receive data feeds from [distributors] about sales of their products to end users" without restrictions. (CX 8023 (Guggenheim, Dep. at 81-82); CX 2337; CX 1055).

1413. Mr. Sullivan did not reply to Mr. Cohen's email or ever discuss the issue with Mr. Cohen. (Sullivan, Tr. 4080).

1414. Mr. Guggenheim told Mr. Cohen that Patterson had already formalized their end-user data sharing in their vendor agreements. (CX 1055; CX 3071; CX 3222; CX 6027-031).

1415. The communications concerning end-user data sharing with suppliers have nothing to do with buying groups. (Sullivan, Tr. 4262). They are not evidence of the alleged buying group conspiracy; nor can they support an inference of such a conspiracy, particularly as Mr. Sullivan never responded to Mr. Cohen's inquiries. Instead, he forwarded it internally to legal counsel at Schein. (Sullivan, Tr. 4079-80).

1416. Complaint Counsel introduced a December 2013 task list entry by Mr. Cohen and an April 16, 2014 telephone call between Mr. Sullivan and Mr. Cohen regarding Amazon. (CX 0065; Cohen, Tr. 834; CX 6027-039-42; Sullivan, Tr. 4015, 4246-47 ("A. You'll see a couple texts later about, you know, thanks for the Amazon change … So at that time, he had called me about -- he thought he saw Henry Schein products on Amazon. We don't sell to Amazon.")).

1417. Amazon is not a buying group. Mr. Cohen testified that Amazon is not a buying group. (Cohen, Tr. 834; RX 2952 (Maurer, Dep. at 127)). Communications about Amazon do not support Complaint Counsel's alleged buying group conspiracy, or an inference of such a conspiracy.

1418. Complaint Counsel introduced communications related to charitable work and organizations. (Cohen, Tr. 773-774; Sullivan, Tr. 4280; CX 6027-010 ("the Sullivan Foundation/DTAF joint scholarship"); CX 6027-012 ("DTAF fund"); CX 6027-043 ("family foundation")). Communications related to charity work are not evidence of an alleged buying group conspiracy, nor do they support an inference of one.

1419. Similarly, banter about sports and jokes cannot support Complaint Counsel's alleged conspiracy, or an inference of it. (CX 6027-038 ("Good pick, #2 seed. They'll have to get past Creighton & McDermott, will be tough."); CX 6027-007 ("I'm going to Yankee Stadium for game

5 tomorrow nite. Go Yanks!"); CX 6027-043 ("Weekend lacrosse tourny here at St. Thomas academy…"); CX 6027-027 ("Problem with this joke is if Stan says 'Great!' It's a risk…"); CX 6027-051 ("Teasing and jokes are always welcome!! :-)")).

b. Unified Smiles.

1420. Complaint Counsel cites an unsolicited text message from Mr. Cohen to Mr. Sullivan on January 12, 2012 and a follow-up call on January 13, 2012 as evidence that "Benco [e]nforced [an] [a]greement [w]ith Schein" and "monitored and continually confronted Schein on suspicions of cheating." (Kahn, Tr. 43; RXD 0101 (CC Opening, Slide 17); CC Pretrial Br. at 14-15; CX 2347; CX 1118).

1421. There is no record of what was discussed on this call. (Kahn, Tr. 43; CC Pretrial Br. at 14-15; Cohen, Tr. 747; Sullivan, Tr. 4218-19, 4272-73).

1422. Neither Mr. Sullivan nor Mr. Cohen testified that their January 13, 2012 call was about Unified Smiles. (Cohen, Tr. 747; Sullivan, Tr. 4218-19, 4272-73). Rather, both Mr. Cohen and Mr. Sullivan testified that they discussed employment issues in California relating to certain employees recruited by Benco. (Cohen, Tr. 747; Sullivan, Tr. 4218-19).

1423. Complaint Counsel 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. (CX 1051; Cohen, Tr. 512-515, 878-82; CX 0006). There is no evidence, however, of "any connection between [his] revision of the LG policy and [his] call with Mr. Sullivan." (Cohen, Tr. 877). In that regard, Mr. Cohen denied sharing Benco's buying group policy with Mr. Sullivan. (Cohen, Tr. 747-48, 877-78).

1424. Complaint Counsel also argues that an inference can be made that Unified Smiles was discussed on the January 13, 2012 call from an internal Benco document. (CX 2062). There is no support for such an inference, not only because the testimony is to the contrary, but also because the sequence of events does not support it.

1425. Unified Smiles approached Benco and Schein demanding DSO-level discounted pricing. (CX 2062; CX 1145; Foley Tr. 4687-88).

1426. For Schein, Mr. Foley had the authority to approve or disapprove Unified Smiles. (Foley, Tr. 4692-93; CX 2062). As discussed in more detail above, Mr. Foley independently made the decision to turn down Unified Smiles for DSO pricing (though he offered lower discounts) based on its inability to guarantee purchasing volume like a DSO, and the threat of cannibalization posed by Unified Smiles. (SF 1286-308). Mr. Foley communicated this to Unified Smiles' Ms. Knysz via email on December 21, 2011. (Foley, Tr. 4691-93; CX 2062). Mr. Foley never communicated with anyone at Benco or Patterson regarding Unified Smiles. (Foley, Tr. 4696).

1427. On January 5, 2012 – a few weeks after Schein declined to extend Unified Smiles DSO pricing – Unified Smiles announced the group's launch via a letter. (CX 1145).

1428. On January 11, 2012, a local Benco representative forwarded the letter to Benco's Pat Ryan, adding that Schein was likely involved. (CX 1144).

1429. Mr. Ryan responded, "We've already spoken to them and turned them down," and forwarded the letter to Chuck Cohen, also noting, "For Timmy conversation." (CX 1144; CX 1052). Though Schein and Benco had already each independently declined to do business with Unified Smiles, Complaint Counsel contends Mr. Ryan's proposed conversation regarding Unified Smiles took place on January 13, 2012. (Kahn, Tr. 42-43 (CC Opening, Slide 16); CC Pretrial Br. at 14-15). The evidence does not support that contention.

1430. In late October, 2011, Benco recruited four or five Schein employees from the Fresno, CA area. (Sullivan, Tr. 4270-72). This was especially problematic for Schein because it was effectively a "group hiring event" and there were other "idiosyncrasies of California employment law." (Sullivan, Tr. 4270). Benco and Schein had entered into a competitive hiring agreement in 1998 as part of an agreement settling litigation with each other over non-compete issues relating to the hiring of each other's sales reps. (Cohen, Tr. 639-40). This required Mr. Cohen and Mr. Sullivan to talk every few years to renegotiate the agreement, as well as periodically throughout the year as issues came up relating to certain employees or employee groups. (Cohen, Tr. 735-37).

1431. These specific issues caused Mr. Sullivan and Mr. Cohen to have several discussions over several months. (Sullivan, Tr. 4270-71). Indeed, Mr. Cohen knew that Mr. Sullivan was "hot" about Benco's recruitment of Schein's reps around this time due to texts Mr. Sullivan had sent Mr. Cohen about the issue. (Cohen, Tr. 747, 750-51).

1432. Benco's Pat Ryan was involved and aware of these discussions between Mr. Cohen and Mr. Sullivan concerning these issues. (Ryan, Tr. 1174-76).

1433. When Mr. Ryan received the January 11, 2012 email from the local representative providing the Unified Smiles launch letter, he was aware that Mr. Cohen and Mr. Sullivan would be having a conversation concerning the Fresno recruits in the coming days. (Ryan, Tr. 1176).

1434. On January 12, 2012, Mr. Cohen texted Mr. Sullivan to set up a call, and the two spoke the next day. (CX 2347; CX 6027-018-19).

1435. On January 13, 2012, Mr. Cohen called Mr. Sullivan at 9:03 am, and the two spoke for 11 minutes and 34 seconds. (CX 1118; CX 6027-019; Cohen, Tr. 747-48).

1436. Mr. Cohen's review of employment records refreshed his recollection concerning the substance of the January 13, 2012 phone call. (CX 1118; Cohen, Tr. 741-42).

1437. Mr. Cohen "can say with confidence that Tim and [he] were discussing some employee issues that started in – with the movement of reps – some reps in California and resulted in a renegotiation of the competitive hiring agreement." (Cohen, Tr. 741-42, 746-47).

1438. Mr. Cohen also testified that he did not know what Schein's "policies or practices were with respect to buying groups" at this time and doesn't recall Mr. Sullivan sharing anything about Unified Smiles on the call. (Cohen, Tr. 870, 873-74).

1439. The context around the January 13, 2012 phone call supports Mr. Cohen's testimony. The morning before the call, at 7:39 am, Mr. Cohen spoke for 23 minutes with his attorney, Joe Dougherty, who was handling the employment matters for Benco. (CX 1118; Cohen, Tr. 747-49). Immediately after the call with Mr. Sullivan, Mr. Cohen again spoke to Mr. Dougherty. (CX 1118; Cohen, Tr. 748-49).

1440. Mr. Sullivan does not recall the details of the January 13, 2012 call, but he is certain Unified Smiles was not discussed. Based on the text messages around the time of the call, he believes they discussed Kent Hayes (a Fresno recruit) and employment related issues. (Sullivan, Tr. 4218-20).

1441. The evidence presented at trial and context around the January 13, 2012 phone call conclusively demonstrate that the phone call concerned hiring issues. There is no support for Complaint Counsel's suggestion that the conversation reflects the existence of an agreement regarding Unified Smiles or any other buying group.

c. Smile Source

1442. The record does not support a finding that Benco and Schein reached any agreement concerning their respective responses to Smile Source.

i. The September 26, 2011 Internal Benco Email Relating to Smile Source.

1443. Complaint Counsel asserted that "Benco [d]iscovered Schein's [b]uying [g]roup [a]rrangement in 2011," citing the September 26, 2011 email from Dr. Goldsmith to Benco. (Kahn, Tr. 33; RXD 0006 (citing CX 1116)). Complaint Counsel asserts that this was "an example" of Benco starting to "learn about various relationships with buying groups that Schein had." (Kahn, Tr. 33). Complaint Counsel has not cited any earlier "example." Nor has it identified any communications between Schein and Benco relating to buying groups prior to September 2011. As such, there is no basis for an inference that the alleged conspiracy started earlier.

1444. The September 26, 2011 email also does not provide a basis for the start of the alleged conspiracy. CX 1116 is an internal Benco email, prompted by an inquiry from Smile Source about entering into a distribution agreement with Benco. It does not reflect any agreement or communication between Schein and Benco. Complaint Counsel has also failed to show any communication between Schein and Benco related to buying groups in this time frame. Both Mr. Cohen and Mr. Sullivan denied having any conversation about Smile Source, and the log of interfirm communications does not show any relevant communications between them at this time. (Cohen, Tr. 856-58, 862; Sullivan, Tr. 4252-53, 4281-82). CX 6027 shows there were no communications between Mr. Cohen and Mr. Sullivan from September 26, 2011 to October 6, 2011, and the October 6, 2011 communications are wholly innocuous texts about sports, inside jokes, trade association meetings, and the like. (CX 6027-006-08).

1445. Schein was doing business with, and continued to do business with, Smile Source following the September 26, 2011 email. (Sullivan, Tr. 4181-82; Goldsmith, Tr. 1947). Benco, in contrast, declined Smile Source's invitation. (Ryan, Tr. 1182-83). Upon learning that there was "no central ownership or bill paying," Mr. Cohen concluded that Smile Source was a "GPO," and instructed Mr. Ryan to "[p]lease pass" on the opportunity. (CX 0004-001). Mr. Ryan then told Smile Source that its "structure meets [Benco's] definition of GPO, and Benco does not participate in group purchasing organizations." (CX 1138-001).

1446. The evidence is inconsistent with the allegation that any conspiracy had begun by September 2011.

ii. The July 25, 2012 Email Relating to Smile Source.

1447. The Complaint alleges that the conspiracy between Schein and Benco supposedly started no later than "July 2012," referencing an *internal* Benco email dated July 25, 2012. (Complaint ¶ 35 (referencing CX 0018)). At trial, Complaint Counsel modified its theory, claiming that the same internal communication 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." (Kahn, Tr. 42-44; RXD 0101 (CC Opening, Slide 17)).

1448. CX 0018 does not demonstrate an agreement between Schein and Benco relating to Smile Source or buying groups generally. The email begins with an inquiry from Smile Source's Dr. Goldsmith to a Benco email address, which was later forwarded to Pat Ryan, Benco's head of Special Markets. Dr. Goldsmith informed Mr. Ryan that "one of [Smile Source's] members … has selected [Benco] as the distributor for [Smile Source's] east coast operations," and requested that Benco provide "pricing and service options." (CX 0018-002).

1449. [redacted] (Goldsmith, Tr. 2129-30). To the extent Benco had been "selected" as the distributor for Smile Source's East Coast operations, such selection was made without Benco's knowledge or consent. (Goldsmith, Tr. 2131-32; Cohen 861; Ryan, Tr. 1053). In response to Dr. Goldsmith's email, Benco reiterated the same position it had on September 30, 2011 (*see* CX 1138), prior to the alleged start of the conspiracy, that "Benco Dental does not recognize GPOs as a single customer." (CX 0018-001).

1450. Mr. Ryan then forwarded his response to his boss, Mr. Cohen, saying "tell your buddy Tim to knock this shit off."[13] (CX 0018-001). Mr. Ryan testified this was just a "flippant" remark. (Ryan, Tr. 1065-1066, 1191-92). Mr. Cohen responded to Mr. Ryan's email, asking him to "[p]lease resend this e-mail without your comment on top so that I can print & send to Tim with a note." (CX 0018-001).

1451. 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. (CX 1147-01 (forwarding same email string, dated one minute later, noting that "[h]e was quick to tell me he's a 'franchise', not a GPO, although without ownership stake, for all practical purposes, what's the difference?")). Mr. Cohen then responded to the question noting that he "agree[d]." (CX 1251).

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. Mr. Cohen testified that he did not recall receiving a clean email from Mr. Ryan, printing out any version of this email, writing a note on a printed out version of the email, giving such a note to an assistant to mail, or himself mailing a note to Mr. Sullivan. (Cohen, Tr. 885-86). Mr. Sullivan also denied receiving any note from Mr. Cohen about Smile Source or buying groups generally. (Sullivan, Tr. 4252-53).[14] Mr. Ryan also testified that he was unaware of any such communication occurring. (Ryan, Tr. 1248-49).

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[13] Mr. Ryan's comment was based on a mis-reading of Mr. Goldsmith's underlying email. Mr. 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 0018-002 (emphasis added)). In fact, Smile Source had terminated its agreement Schein over seven months prior, and was not currently working with Schein. (Goldsmith, Tr. 1947, 2082).

[14] The Complaint alleges that, "[a] ***few days after*** this exchange" on July 25, 2012, "Ryan rejected Smile Source." (Complaint ¶ 35). The evidence, however, shows that Mr. Ryan rejected Smile Source on July 25, 2012 ***before*** the

1453. There are no after-the-fact internal documents purporting to memorialize any alleged communication between Mr. Cohen and Mr. Sullivan about Smile Source. Complaint Counsel failed to introduce evidence of any response by Mr. Sullivan to the supposed note. 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." (CX 2580). Further, the communications log prepared by Complaint Counsel does not reflect any text or telephone communication between Mr. Sullivan and Mr. Cohen between July 25, 2012 and January 2, 2013. (CX 6027-025-26). Complaint Counsel also failed to introduce any evidence of any change in conduct by either Schein or Benco that could reasonably be tied to any such communication in July 2012.

1454. 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, that Benco attempted to "enforce" any pre-existing agreement with Schein, or that Schein reached or re-affirmed any such agreement.

iii. The October 1, 2013 Call from Mr. Ryan to Mr. Foley.

1455. The Complaint alleges that, "[o]n October 1, 2013, Benco's Mr. Ryan called his counterpart at Schein, Mr. Foley … and informed [him] that Benco would not bid" on Smile Source. (Complaint ¶ 57).

1456. Mr. Foley reported this conversation to his superior, Hal Muller, on October 9, 2013. (CX 0243; Foley, Tr. 4586, 4588).

exchange between Mr. Cohen and Mr. Ryan. (CX 0018). Thus, the evidence does not support any inference that Benco's response to Smile Source was dependent upon any communications or agreement with Schein.

1457. Mr. Foley's summary to Mr. Muller did not relay Benco's plans as to whether it would bid on Smile Source; it merely says that Benco was "anti-Buying Group" and that "Smile Source recently reached out to them." (CX 0243-001).

1458. Even if Mr. Foley's email supported an inference that Benco turned Smile Source down in 2013, it does not support an inference that the rejection occurred *after* the call with Mr. Foley. Thus, the Complaint's use of the future subjunctive "*would*," implying that the decision was made after the call with Mr. Foley, is pure speculation.

1459. Complaint Counsel argues that an inference should be drawn from the fact that the call with Mr. Foley lasted 18 minutes. Nothing in the length of the call suggests the subject matter of the call, let alone that Schein and Benco reached any agreement concerning Smile Source or buying groups.

1460. Mr. Foley testified that he did not recall the call taking that long, and that the call likely began with pleasantries and small talk. (Foley, Tr. 4585-86).

1461. Mr. Foley testified that he did not tell Mr. Ryan anything about Schein's approach or strategy regarding buying groups. (Foley, Tr. 4579-80). Mr. Foley also did not disclose any information about Schein's plans with respect to Smile Source, or whether Schein was going to bid. (Foley, Tr. 4579-80).

1462. The evidence does not support an inference that Mr. Foley reached any agreement with Mr. Ryan about Smile Source. Mr. Foley's email to Mr. Muller stated that during the call he was "being careful not to cross any boundaries, like collusion." (CX 0243; Foley, Tr. 4705 ("I didn't share any information about Schein or Schein's policies"), 4579 ("I know I did not share any information about Schein or make any return comment about what Schein would do….")).

1463. Mr. Foley only took the call because he believed it to be an attempt to recruit him. (Foley Tr. 4576).

1464. In addition, by this point, Mr. Foley had no responsibility for Smile Source, since (i) the account had been transferred to HSD three years prior, and (ii) this post-dates the creation of Mid-Market, after which primary responsibility for buying groups had shifted to HSD. (Foley, Tr. 4579, 4608 (Mr. Foley "had no responsibility for bidding on Smile Source, [so] I had nothing to share and wouldn't share anything…"); Steck, Tr. 3689; RX 2714).

1465. In fact, on November 20, 2013, less than two months after this communication between Benco's Mr. Ryan and Schein's Mr. Foley, Tim Sullivan told Mr. Goldsmith of Smile Source directly: "[y]es, we absolutely would like to discuss further" and noted that they would "need more than a few minutes together on a convention floor." (RX 2328-001).

1466. As noted below, in contrast to Benco, Schein did seek to negotiate a deal with Smile Source in 2014. Thus, Schein's conduct was not consistent with a conspiracy. (CX 2508; Steck, Tr. 3782; Foley, Tr. 4654; Sullivan, Tr. 4167-70).

d. Atlantic Dental Care ("ADC").

1467. The Complaint alleges that, "[i]n late February 2013, pursuant to the agreement, each of the Respondents refused to submit a bid for a customer called Atlantic Dental Care …, as each of the Distributors believed it to be a Buying Group." (Complaint, ¶ 42).

1468. Complaint Counsel asserts that Respondents' conduct relating to the buying group Atlantic Dental Care ("ADC") demonstrates the existence of an agreement among Respondents to boycott buying groups. (CC Pretrial Br. at 27-32). The evidence does not support that allegation.

i. ADC Issued an RFP in Early 2013.

1469. Complaint Counsel did not introduce any evidence that Schein or Benco refused to submit a bid for ADC in late February 2013, nor did Complaint Counsel present any communications among Respondents in late February 2013 concerning ADC.

1470. Schein did not receive ADC's RFP until March 22, 2013, and then it timely submitted a proposal by the RFP's April 8, 2013 deadline (extended from April 5, 2013). (CX 2019; CX 2021; Sullivan, Tr. 4213).[15]

1471. Benco timely submitted a proposal to the RFP, and was ultimately awarded the contract. (Cohen, Tr. 724; Ryan, Tr. 1095, 1202).

1472. As to Patterson, the record shows that ADC sent Patterson a draft of the RFP in late February 2013, and that Patterson unilaterally decided not to bid for the business. Specifically, on or around February 27, 2013, ADC sent Patterson a copy of a draft RFP that ADC intended to send out. (CX 0092). The same day, Patterson decided not to submit a bid because Patterson does not "currently … participate with group purchasing organizations." (CX 0093).

1473. Complaint Counsel did not introduce any evidence that Patterson communicated with Schein or Benco about its decision not to submit a bid for ADC. (*See* CX 6027).

1474. Complaint Counsel, nonetheless, asserts than an inference can be drawn that Patterson acted in furtherance of a conspiracy because, in explaining his reasons for not wanting to bid for

[15] The record shows that Michael Porro, a Zone General Manager, received an inquiry about a VA Beach Buying Group on February 22, 2013. (CX 2007). Complaint Counsel did not show that this is the same group as ADC, and it appears to be run by different individuals. (*Compare* CX 2007 (Dr. Quigg, and Mr. Holbert) *with* CX 2019 (Messrs. Hosek and Damsey) *and* CX 0020 (listing individuals associated with ADC, which does *not* include either Dr. Quigg or Mr. Holbert)). Even if it were the same entity, however, the Schein FSC and Regional Manager concluded that, offering a discount to the group "could cannibalize our current sales at very reduced margins" and that it "cuts out the FSC." (CX 2007). Mr. Porro agreed with the recommendation from the field that it "was not … worth pursuing," but he noted he "would love to put together a special program for them…." (CX 2007; CX 2021). Such conduct is consistent with unilateral decision-making. Moreover, Complaint Counsel did not show that Schein actually declined to do business with ADC in late February 2013, and its receipt of the RFP on March 22, 2013 is inconsistent with such an allegation. (*See* CX 2019).

ADC, Patterson's Dave Misiak noted that Patterson's "[two] largest competitors stay out of these as well," but that he remained "concerned that Schein and Benco sneak into these co-op bids and deny it." (Complaint ¶ 43 (citing CX 0092 and CX 0093)).[16]

1475. The inference is not warranted. Mr. Misiak's communication is consistent with lawful, interdependent behavior, and is inconsistent with a conspiracy. The reference to the actions of Schein and Patterson is simply an observation about competitors' conduct gleaned from normal competitive intelligence. Mr. Misiak credibly testified that his remark merely reflected his *opinion* based on his experience. (Misiak, Tr. 1357).

1476. Further, Mr. Misiak's view that Schein "stay[s] out" of buying group relationships is inaccurate, and contradicted by evidence in Patterson's own files. (CX 0093; Misiak, Tr. 1314-15, 1327; CX 3117; CX 0087).

1477. Moreover, Complaint Counsel has not identified any communications between Patterson and Schein from which such knowledge was supposedly gleaned. As for Mr. Misiak's concern about Schein or Benco "sneaking" into a buying group relationship, such a comment simply reflects the fact that, in a concentrated market, competitors might try to take advantage of a business opportunity while hoping that other competitors do not catch on and follow suit. The absence of a communication between Patterson and Schein or Benco about ADC seeking to allay Mr. Misiak's concern undermines any inference of a conspiracy.

1478. The preponderance of the evidence does not support the conclusion that Schein, Patterson, and Benco conspired to refuse to submit a bid on ADC in late February 2013. The

[16] The Complaint also cites an internal Benco text message between Mr. Cohen and Don Taylor about the New Mexico Dental Co-Op, in which Mr. Cohen references a note he sent Patterson's Mr. Guggenheim. (Complaint ¶ 41 (citing CX 0057-006)). Mr. Cohen testified that the note referred to in the text message is the same email he had sent Mr. Guggenheim on February 8, 2013. (Cohen, Tr. 539).

evidence also does not support the conclusion that Patterson made its decision based on the earlier exchange between Patterson and Mr. Cohen about the New Mexico Dental Co-Op.

1479. In any event, evidence of communications between Benco and Patterson about the New Mexico Dental Co-Op or ADC does not implicate Schein.

ii. Schein and Benco's Proposals to ADC in April 2013 Are Not Evidence of an Agreement.

1480. The Complaint alleges that following Patterson's decision not to bid for ADC, "Benco, Schein, and Patterson executives then began communicating about whether ADC was, in fact, a [b]uying [g]roup." (Complaint ¶ 44).

1481. Complaint Counsel has not identified any communication between Schein and Patterson about ADC. Complaint Counsel has also failed to identify any communication between Patterson and Benco prior to Benco's submission of a bid in April 2013 about whether ADC was a buying group. The communications about ADC that Complaint Counsel has identified do not show the existence of an agreement among the Respondents, and do not support any inference that Schein was involved in any such agreement.

iii. Communications Between Benco and Schein Relating to ADC Are Not Evidence of an Agreement.

1482. On March 25, 2013, Mr. Cohen received an internal email from Mr. Ryan, attaching an article about ADC's recent securities offering and noting that he could not "figure out if [ADC] is a buying group or not." (CX 0020; Ryan, Tr. 1203).

1483. Following that discussion, Mr. Cohen sent an unsolicited text message to Mr. Sullivan at 3:13 pm on March 25, 2013, asking if Mr. Sullivan was "[a]vailable to talk." (CX 6027-027; CX 0196-001; Sullivan, Tr. 4187-88).

1484. In his text message, Mr. Cohen did not indicate the subject matter he wished to talk about, and Mr. Sullivan testified that he did not know what Mr. Cohen wanted to talk about. (CX 6027-027; Sullivan, Tr. 4187-88; Cohen, Tr. 889).

1485. Mr. Sullivan responded to Mr. Cohen's text message that he was available at 5:00 pm eastern, and he called Mr. Cohen at that time. (CX 6027-027; CX 0196-002).

1486. Call records show that the call lasted 8 minutes and 35 seconds, but the records do not reveal the content of the call. (CX 6027-027). Both Mr. Cohen and Mr. Sullivan testified about the call.

1487. Mr. Cohen testified that he did not have a specific recollection of what was said on the March 25, 2013 call. But, based on his review of the documents before and after the call, he believes he called to find out if Mr. Sullivan had any information about ADC, since he could not determine whether it was a buying group. (Cohen, Tr. 553 ("Q. Can you think of any business reason why you and Mr. Sullivan were talking about Atlantic Dental Care? A. Gathering market intelligence."), 721 ("[I]t was to find out if Tim had any information about Atlantic Dental Care.")).

1488. Mr. Cohen denied having reached any agreement with Mr. Sullivan about ADC, or discussing Benco's no buying group policy on that call. (Cohen, Tr. 899 ("we did not reach any agreement"), 877-78 ("Q. Did you share this policy with Mr. Sullivan on that call? A. I did not. Q. Did you ever send this policy to Mr. Sullivan? A. I did not."). Mr. Sullivan corroborated this testimony. (Sullivan, Tr. 3944 ("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."), 3946, 4189).

1489. Mr. Cohen also stated he does not recall Mr. Sullivan revealing any information about Schein's policies, plans, or practices concerning ADC or buying groups generally. (Cohen, Tr. 899).

1490. Mr. Sullivan testified that he did not tell Mr. Cohen Schein's "philosophy about buying groups during this call." (Sullivan, Tr. 4190).

1491. Mr. Sullivan testified that Mr. Cohen asked about ADC on the March 25, 2013 call, that Mr. Sullivan did not know anything about ADC at the time of the call, that he informed Mr. Cohen that they should not be talking about specific customers, and that he tried to change the subject. (Sullivan, Tr. 3946; CX 8025 (Sullivan, Dep. at 344-45, 401-03) (Mr. Sullivan "shut [] down" the conversation and switched the topic to joking about Mr. Cohen recruiting Mr. Sullivan)).

1492. Mr. Sullivan testified "[Mr. Cohen] started talking about Atlantic Dental Care… 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 is not a discussion that you and I should be having' … and I cut off discussion with him on that topic." (Sullivan, Tr. 3946).

1493. Mr. Sullivan also denied reaching any agreement with Mr. Cohen, and did not disclose any information to Mr. Cohen, about ADC or any buying group. (Cohen, Tr. 968-69; Sullivan, Tr. 4289-90).

1494. Immediately following the call, at 4:09 pm on March 25, 2013, Mr. Sullivan sent Mr. Cohen a text stating, "Yes, I am good with the terms we discussed and I look forward to joining Team Benco! Ps. Want to confirm that the Benco tooth logo will include a picture of me. :)" (CX 6027-027).

1495. Both Mr. Sullivan and Mr. Cohen testified that Mr. Sullivan's text message referred to a long-running joke between the two about who was going to work for whom in the event that ongoing merger discussions came to fruition. (Cohen, Tr. 554-55, 897-98; Sullivan, Tr. 3955-56, 4189-90).

1496. Regarding the ongoing merger discussions between Schein and Benco, a few days earlier Mr. Cohen and his brother had finalized arrangements to meet with Schein's CEO, Stanley Bergman, and its head of Business Development, Mark Mlotek, to explore M&A opportunities the following Monday, April 1, 2013, in New York. (Cohen, Tr. 892-95; Sullivan, Tr. 4186-87; CX 1476; CX 1486).

1497. Mr. Sullivan testified that the ongoing merger discussions between Schein and Benco impacted his interactions with Mr. Cohen. He wanted to be cordial and treat Mr. Cohen with respect because they might be working for one another if a merger went through. (Sullivan, Tr. 4260-61).

1498. Mr. Sullivan's and Mr. Cohen's joke about who would work for whom is consistent with a discussion on the March 25, 2013 call about this upcoming meeting, as are follow-up texts between Mr. Cohen and Mr. Sullivan that continued the joke. (CX 6027-027; *see also* Cohen Tr. 894-95).

1499. Later that evening on March 25, 2013, Mr. Cohen forwarded a link to an article reporting on ADC's financing. (CX 6027-028; CX 6501).

1500. In response, Mr. Sullivan simply wrote, "[t]hanks for the follow up on that article. Unusual." (CX 6027-028). Mr. Sullivan did not provide any information about ADC. Nor did Mr. Sullivan reveal Schein's plans for ADC. (CX 6027-028; Sullivan, Tr. 4194; Cohen, Tr. 899).

1501. The preponderance of the evidence thus does not support the allegation that Schein and Benco reached any agreement concerning ADC or buying groups on the March 25, 2013 call. Even if ADC had been discussed on that call, there is no evidence that any agreement was reached; that Schein revealed confidential or competitively sensitive information about its policies, plans, or practices; or that Schein reached an understand with Benco concerning ADC.[17]

1502. Two days later, on March 27, 2013, Mr. Cohen sent Mr. Sullivan another unsolicited text, saying that he "[d]id some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all practices. So it's not a buying group, it's a big group. We're going to bid. Thanks." (CX 6027-029).

1503. The first part of Mr. Cohen's text message – whether ADC is or is not a buying group – is not competitively sensitive information; it simply reflects market research that Benco had performed. (CX 6027-029).

1504. The last sentence of Mr. Cohen's text message – that Benco is going to bid – did reveal Benco's plans. However, it does not evince a pre-existing agreement between the two companies not to do business with buying groups. The text does not reference any pre-existing agreement – or any agreement at all – and does not discuss any information about Schein's plans, policies, or practices. (CX 6027-028-29).[18]

[17] Complaint Counsel elicited testimony that Mr. Sullivan did not report Mr. Cohen's call to the Schein legal department. (Sullivan, Tr. 3953-55, 4194-96). Of course, the antitrust laws do not impose the obligation on a person to report suspected wrongdoing by another person; it simply prevents agreements in restraint of trade. By admonishing Mr. Cohen, changing the subject, and refraining from providing assurances or competitively sensitive information to Mr. Cohen, Mr. Sullivan complied with the antitrust laws. Indeed, Complaint Counsel asserts that Benco sought to engage Burkhart in similar communications, but that Burkhart similarly declined the invitation. (Complaint ¶¶ 53-59; Reece, Tr. 4486-87). Like Mr. Sullivan, however, Burkhart did not report the communications to the Burkhart legal department. (Reece, Tr. 4486). Burkhart simply refrained from reaching agreement. (Reece, Tr. 4486-87).

[18] Complaint Counsel also cites a text message Mr. Cohen sent on March 26, 2013 about a different buying group, the Dental Alliance. (CX 6027-028 ("They apparently get 7% off of catalog pricing [from Schein] just for joining…. [They] contacted me about a year ago and asked if Benco was interested. Told him he was out of his tree."; "Could be a rumor, sometimes stories go around.")). Mr. Sullivan testified that he did not recognize, when he received this text, that it was unrelated to ADC. (Sullivan, Tr. 4198). Rather, Mr. Sullivan attempted to call Mr. Cohen to reiterate,

1505. While Complaint Counsel asserts that Mr. Cohen's March 27, 2013 text message can be interpreted as an effort to seek clarity as to the application of a pre-existing agreement to ADC, such an assertion would require the fact-finder to first assume the existence of a conspiracy. The Court declines to make such an assumption.

1506. The Complaint also alleges that "Cohen and Sullivan [later] exchanged additional text messages and phone calls, culminating in a 5.5 minute phone call on April 3, 2013," and that "[f]ollowing these communications, both Schein and Benco changed course and submitted a bid for ADC." (Complaint ¶ 47; *see also* CX 6027-028-29). Complaint Counsel asserts that such communications support an inference that Schein and Benco reached an unlawful agreement. They do not.

1507. Mr. Sullivan placed a phone call to Mr. Cohen *before* receiving Mr. Cohen's text message that said Benco had determined ADC was not a buying group and that it was going to bid for the business. (CX 6027-028).

1508. Mr. Sullivan's April 3, 2013 call was the first time Mr. Sullivan and Mr. Cohen actually connected after playing phone tag. (CX 6027-028). As such, the evidence does not support an inference that the purpose of the April 3, 2013 call was to express assent to Benco's plan to bid for ADC.

1509. Rather, Mr. Sullivan credibly testified that he called Mr. Cohen after receiving a text message from Mr. Cohen about a different buying group, the Dental Alliance, to more strongly admonish Mr. Cohen not to discuss specific customers or business strategies. (Sullivan, Tr. 3963

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in stronger terms, that he should not be discussing specific customers with him. (Sullivan, Tr. 3966; 4198-99). After playing phone tag for some period, Mr. Sullivan delivered this message on April 3, 2017. (Sullivan, Tr. 3963-66; 4205-07; CX 6027-028-29). As for Dental Alliance, the evidence shows that Schein began doing business with Dental Alliance in 2011 and continued to do so through at least the end of 2014. (RX 2349; Sullivan, Tr. 4239-40; Steck, Tr. 3770-71; RX 3076; RX 2753; RX 2612-001-09; RX 2613-001). Thus, Mr. Cohen's March 26, 2013 text message did not result in any change in conduct.

("I was -- to remind him again, more sternly, that he should not be contacting me about this, which I told him on the first phone call about it."), 3966, 4197-99, 4205-06; *see also* CX 8025 (Sullivan, Dep. at 409-11)).

1510. Mr. Sullivan recalled his admonishment to Mr. Cohen in an October 16, 2013 email stating: "Chuck has not contacted me nor would he on such a topic." (RX 2362; Sullivan, Tr. 4207-08).

1511. The record evidence does not indicate any further communications between Mr. Cohen and Mr. Sullivan about any customer or any buying group following the April 3, 2013 call. (*See* CX 6027-030-57).

1512. Complaint Counsel also failed to show that Schein and Benco *changed course* and submitted a bid for ADC following the April 3, 2013 call. Mr. Cohen's March 27, 2013 text message states that Benco was going to submit a bid. It was a declarative statement, and Mr. Cohen neither asked for Mr. Sullivan's assent nor suggested that Benco's decision was contingent on Mr. Sullivan's views. Thus, Benco cannot be said to have changed course following the April 3, 2013 call.

1513. Schein also did not change course following the April 3, 2013 call. Schein received the ADC RFP on March 22, 2013. (CX 2019-002). The Schein Regional Manager, Bobby Anderson, forwarded the RFP to Zone Manager Michael Porro, asking whether "we want to quote." (CX 2019-002). There is no evidence that this email was forwarded to Mr. Sullivan, and no evidence of any communication between Mr. Sullivan and Mr. Porro or other Schein employees about ADC following the March 25, 2013 call between Mr. Cohen and Mr. Sullivan.

1514. On March 29, 2013, Mr. Anderson followed up with Mr. Porro, asking for Mr. Porro's thoughts on ADC. (CX 2051). Mr. Porro responded that Mr. Sullivan had "heard of this group" and that he had also talked to the Area Directors, Jake Meadows and Joe Caveretta. Mr. Porro explained that his "[f]irst thought" was there is "more harm bidding vs[.] not bidding at all," and that "[o]thers like this have popped up in [the] country and we passed and survived." (CX 2051). But he also said that he was nonetheless going to reach out to ADC to find out more. (CX 2051).

1515. This exchange between Mr. Porro and Mr. Anderson occurred *after* Mr. Cohen's March 27, 2013 text, and after Mr. Sullivan spoke with Mr. Porro. (CX 6027-028-29). Schein's view that ADC likely presented "more harm bidding vs[.] not bidding at all" reflects the absence of any agreement between Schein and Benco about how to respond to ADC's RFP.

1516. On March 31, 2013, Mr. Porro reported on his conversation with ADC. ADC represented that "'[it is] not a co-op or a buying group,'" as it has "1 corporate structure" and is a "unified group of mature practices." (CX 0198-013-14).

1517. Mr. Porro concluded that "[i]t does appear that this is more than a buying group," as all 53 offices are "financially tied together in some fashion" and that, as a result, "[p]assing on a bid now has more risk." (CX 0198-014).

1518. Mr. Porro's email also notes that he believed that "Benco, a decent player in the market and always hungry, will put in a bid." (CX 0198-013). By this point, Mr. Cohen had already told Mr. Sullivan that Benco intended to bid. Mr. Sullivan, however, testified that he did not relay this information to Mr. Porro, and believed that Mr. Porro's comment was based on general market intelligence from the field. (Sullivan, Tr. 4200-01; *see also* CX 0198-010 (email from Regional Manager Bobby Anderson noting that "Benco is currently going in with a 15% discount to all [Schein] customers" and has "created problems in accounts that have dealt with [Schein] for years.")). Regardless of the source of Mr. Porro's belief about Benco's bidding intentions, such information just reflected competitive intelligence, not an agreement between Schein and Benco.

Indeed, while Mr. Cohen testified that he probably should not have revealed his intention to bid for ADC, Mr. Cohen confirmed there was no mutual exchange of information, no agreement, and no *quid pro quo*. (Cohen, Tr. 723-24, 899, 968-69).

1519. Mr. Sullivan responded to Mr. Porro's email saying he "think[s] we should take a shot at this" but should "include full value and not just bid price." (CX 0198-012).

1520. After further discussions with the team and receiving additional information from ADC, however, Mr. Sullivan wrote on April 5, 2013 that "[t]his smells bad," and that he was returning to the view that Schein has "as much to lose for winning the bid as we do for losing (or not bidding)." (CX 2021-006).

1521. This was two days after the April 3, 2013 call between Mr. Sullivan and Mr. Cohen, during which Complaint Counsel *alleges* that "Schein and Benco changed course and submitted a bid for ADC." (Complaint ¶ 47). Mr. Sullivan's skepticism about bidding for ADC on April 5, 2013 is inconsistent with any allegation that Mr. Sullivan and Mr. Cohen reached an agreement on bidding for ADC, or that Schein changed course as a result of the April 3, 2013 communication with Benco.

1522. The preponderance of the evidence relating to ADC does not, by itself or in conjunction with other evidence, support the conclusion that Schein reached an agreement with Benco to not do business with, or offer discounts to, buying groups.

1523. Complaint Counsel asserts that the communications between Mr. Cohen and Mr. Sullivan in March and April 2013 were an attempt to seek clarity concerning the application of a pre-existing agreement to boycott buying groups. The preponderance of the evidence does not support the conclusion that Schein and Benco had reached any such agreement prior to the ADC communications. (SF 1467-537). A contrary finding would require the Court to improperly assume the existence of the conspiracy, and then to interpret the ADC evidence in light of such an assumption.

1524. The evidence also does not support an inference that Mr. Sullivan and Mr. Cohen reached an agreement during the March 25, 2013 or April 3, 2013 phone calls.[19] Rather, the evidence shows that Mr. Cohen inquired about ADC and that Mr. Sullivan revealed no information about Schein's policies, practices, or plans relating to ADC or buying groups generally.

1525. At most, the evidence suggests that Benco revealed information about its plans concerning ADC. Even if the evidence were to support an inference that Benco sought to invite collusion (which it does not, given the denials of both Mr. Sullivan and Mr. Cohen), the evidence does not support the further inference that Schein accepted any such invitation.

1526. Accordingly, the evidence does not support an inference of a conspiracy among Respondents.

1527. Moreover, the ADC evidence, taken as a whole and considered in light of all the record evidence, does not tend to exclude the possibility that Schein acted unilaterally prior to these communications. In fact, the evidence indicates that Schein unilaterally evaluated the ADC opportunity and submitted a bid in light of that evaluation.

1528. On April 4, 2013, Mr. Porro circulated a draft of the ADC proposal to Mr. Sullivan, Mr. Steck, Mr. Anderson, Mr. Steck, and Mr. Chatham. (CX 2021-013-16).

1529. After receiving feedback from Special Markets, Mr. Porro inquired how ADC was going to drive compliance to purchase from Schein. (CX 2021-008, -012).

[19] Complaint Counsel does not allege that Schein and Benco reached an agreement for the first time on the March 25, 2013 or April 3, 2013 calls. Such an allegation would be inconsistent with their theory of the case that (i) Schein and Benco entered into the alleged conspiracy in 2011, and (ii) Patterson joined a single, unitary ongoing conspiracy on February 8, 2013. Accordingly, there is no need to reach the question of whether Schein and Benco first reached an agreement in early 2013. For completeness, however, as noted above, there is insufficient evidence to support an inference of such an agreement.

1530. ADC represented to Schein that the group was united and would "all buy from one supplier provided [they] can get the pricing incentive to do so." (CX 2021-007).

1531. Schein's understanding was that ADC did not have an ownership interest in the practices, but the practices were instead unified via contractual arrangement. (CX 8000 (Porro, Dep. at 208-14)).

1532. After learning this information, Schein and Special Markets continued to discuss the ADC opportunity internally, and renewed doubts arose as to its benefit. (CX 8000 (Porro, Dep. at 209-210)).

1533. Mr. Sullivan thought "[t]his smells bad" and that Schein had "as much to lose for winning the bid as [it does] for losing (or not bidding)." (CX 2021-006).

1534. Special Markets' Mr. Muller also expressed his concerns that partnering with ADC would result in a similar negative reaction from FSCs as had Schein's prior relationship with Smile Source. (CX 2021-006).

1535. Despite Mr. Sullivan's skepticism of the ADC opportunity, he was "overruled" by his local management team, who decided to submit a bid to ADC using a modified, precursor to the "G" plan. (CX 2021-014; Sulllivan, Tr. 4213; CX 8000 (Porro, Dep. at 179, 193-94, 209); CX 2020-004 (granting Schein the right to terminate if group "turns out to be purely a buying group," defined as "pooling individual volume *purely* to obtain lower prices from suppliers" (emphasis added)); Foley, Tr. 4722-23 (describing a call in which Tim Sullivan "gave the green light to the local team to move forward with a bid")).

1536. The proposal included a formulary that offered discounts on a variety of products and a 10% discount on products outside of the formulary, along with other valued added services. (CX 2021-026).

1537. Ultimately, ADC was only concerned about the pricing it could offer its members, as ADC turned Schein's proposal down and decided to partner with Benco. (CX 0094).

iv. Communications Between Benco and Patterson Relating to ADC.

1538. In its Opening, Complaint Counsel asserted that "Patterson Enforced [the] Agreement Against Benco," citing a June 16, 2013 email from Mr. Guggenheim to Mr. Cohen asking Mr. Cohen if he "could … shed some light" on the "supply agreement" Benco signed with ADC, and "wondering if [Benco's] position on buying groups" had changed. (CX 0062-002).

1539. Mr. Cohen responded to Mr. Guggenheim's email noting that Benco still does not "recognize buying groups," but that ADC "meets [Benco's] criteria for a large group practice," since, among other things, the practices have "legally <u>merged</u> together." (CX 0062-001).

1540. The email does not reference Schein, and therefore, it does not support an inference that Schein participated in any agreement with Patterson or Benco.

e. Universal Dental Alliance ("Dental Alliance")

1541. Complaint Counsel cites two unsolicited text messages that Mr. Cohen sent on March 26, 2013 to Mr. Sullivan about a buying group called Universal Dental Alliance (which Mr. Cohen referred to as the Dental Alliance). (CC Pretrial Br. at 15-16; CX 2670; CX 6504). Complaint Counsel claims Mr. Cohen's texts were an effort to enforce the alleged agreement.

1542. Dental Alliance was a North Carolina-based, self-described "group purchasing organization" focused on "the dental and oral surgery industries." (RX 2350).

1543. As described above, Schein began doing business with Dental Alliance in July 2011 and continued to do so through at least 2015. (SF 1313-22, 1333; RX 2349; Sullivan, Tr. 4239-41; RX 2350-002-09; Steck, Tr. 3770-71; RX 3076-015; RX 2612; RX 2753).

1544. Mr. Sullivan was included on the internal email chain explaining the buying group, and he expressed his approval to his team: "[w]e've got to undertake this." (RX 2349).

1545. In his March 2013 text message, Mr. Cohen wrote: "They [Dental Alliance] apparently get 7% off of catalog [from Schein] just for joining…. [They] contacted me about a year ago and asked if Benco was interested. Told him he was out of his tree." Mr. Cohen added in a follow-up text message: "Could be a rumor, sometimes stories go around." (CX 6027-028; CX 2670; Cohen, Tr. 557-58).

1546. When Mr. Sullivan received the text messages, he thought they related to ADC. (Sullivan, Tr. 4198).

1547. Mr. Sullivan did not respond to the text messages; instead, he attempted to call Mr. Cohen to reiterate, in stronger terms, that he should not be discussing specific customers with him. (Sullivan, Tr. 4197-98; CX 6027-028-29). After playing phone tag with Mr. Cohen, Mr. Sullivan was able to deliver a "much stronger message" on April 3, 2013. (Sullivan, Tr. 4205-06; CX 6027-029).

1548. The Universal Dental Alliance evidence does not support Complaint Counsel's theory, and Mr. Cohen's unsolicited text message in many ways contradicts Complaint Counsel's theory.

1549. Mr. Sullivan knew about Schein's relationship with this buying group as early as October 20, 2011, and potentially earlier. (RX 2349).

1550. Mr. Cohen's text messages confirm that Schein and Benco made different, independent business decisions as to buying groups during the alleged conspiracy period and did not coordinate when making such decisions. Schein said yes to Universal Dental Alliance in 2011, and Benco said no in 2012. (RX 2612-013-14; Steck, Tr. 3770-71; Ryan, Tr. 1172 (Benco's Mr. Ryan "[r]eiterated our policy and told them that there was no way for us to work together in the way they wanted to.")).

1551. Mr. Sullivan testified that he "never spoke to [Mr. Cohen] about Dental Alliance," that the two text messages (*see* CX 6027-028 (citing CX 2670 and CX 6504)) were the only communications he ever received from Mr. Cohen about this group, that he never responded to the text messages, and that he never called Mr. Cohen about this group. (CX 0311 (Sullivan, IHT at 307-08); RX 2941 (Sullivan, Dep. at 475-77)).

1552. Nothing in Mr. Cohen's text messages is indicative of an agreement with Schein or an effort to enforce an agreement with Schein by trying to stop Schein from doing business with Universal Dental Alliance. Schein continued doing business with Universal Dental Alliance, Mr. Cohen did not share any competitively sensitive information, and Mr. Sullivan did not respond.

f. The September 16, 2013 Internal Benco Email re Burkhart

1553. Complaint Counsel relies on an *internal* September 16, 2013 Benco email as evidence of the alleged conspiracy.

1554. 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 NOT GET IT!" (CX 0023). Upon receiving this report, Benco's Pat Ryan suggest to Chuck Cohen that "*maybe* what you should do is make sure you tell Tim and Paul to hold their positions as we are." (CX 0023 (emphasis added)).

1555. But Mr. Cohen denied having had any discussions with Mr. Sullivan about buying groups in response to or otherwise following this email. (Cohen, Tr. 901-02). Moreover, Complaint Counsel's log of communications does not reflect any such communications. (CX 6027).

g. Communications Regarding the Texas Dental Association ("TDA") Are Not Evidence of a Conspiracy Regarding Buying Groups.

1556. While Complaint Counsel does "not allege a group boycott of the [TDA] trade show," they allege "inter-firm communications" about the TDA "are evidence of [Respondents'] conscious commitment to coordinate their response to the threat of Buying Groups." (Kahn, Tr. 52; Complaint ¶ 74).

i. Each Respondent Made a Unilateral Decision Regarding the 2014 TDA Trade Show.

1557. In September 2013, the TDA entered into an agreement with SourceOne, an operator of a website that offered discounts on dental supplies. (CX 9024 (Osio, Dep. at 365-66, 378-79)). Pursuant to that agreement, SourceOne agreed to operate a website under the name TDAPerks Supplies, and the TDA agreed to endorse or promote this website to its members. (CX 9024 (Osio, Dep. at 378-79)). Neither SourceOne, nor the TDA, were the actual sellers of the supplies that members purchased through the TDAPerks Supplies portal. Rather, SourceOne had one or more traditional distributors who shipped the products to customers. (CX 9024 (Osio, Dep. at 403-04, 428-29)).

1558. Between December 2013 and March of 2014, Schein sought to engage the TDA in discussions concerning the TDAPerks Supplies Program, and the fact that the TDA was no longer a neutral platform based on its endorsement of one of Schein's competitors. (Cavaretta, Tr. 5614-15; RX 0194; RX 0211). Internal Schein documents suggest that Schein executives were becoming frustrated with the TDA's lack of responsiveness. (Cavaretta, Tr. 5614-15 ("after six to eight months of trying to get a meeting with them, we finally got the meeting in April"); RX 0211). Accordingly, Schein discussed that, if the TDA continued to refuse to meet with Schein or continued to endorse SourceOne, that it would not attend the TDA show in 2014. (RX 2361).

1559. On April 3, 2014, Schein's Dean Kyle and Joe Caveretta met with representatives of the TDA. (Cavaretta, Tr. 5614-15; RX 2361). They requested that the TDA switch partners from SourceOne to Schein. (RX 2361 ("Proposed we work together instead of against each other"). They also told the TDA that, if it continued to endorse SourceOne, Schein would not attend the TDA show in 2014. (RX 2361).

1560. The TDA informed Schein that it intended to continue its partnership with SourceOne, and on April 8, 2014, the TDA removed Schein from the public floorplan of the 2014 TDA tradeshow. (RX 0232).

1561. On April 9, 2014, Benco informed the TDA that it was not going to attend the TDA tradeshow in 2014. (CX 0303 (McElaney, IHT at 142, 145, 149)). Benco made this decision unilaterally. (CX 0303 (McElaney, IHT at 144 ("it wasn't worth the costs anymore … and the convention was no longer a level playing field"))).

1562. After the TDA announced the TDAPerks Supplies program, Patterson had discussions with TDA management. (CX 3378). Patterson decided not to attend the TDA's meeting and in response, on November 6, 2013 the TDA "released the reserve status on the Patterson Dental booth space and … assigned [it] to other vendors." (RX 0166; CX 9024 (Osio, Dep. at 481-82 ("[T]hey never even got a booth."))).

1563. The evidence shows that Patterson made its decision unilaterally. (CX 0316 (Misiak, IHT at 300-02 (Mr. Edens, a Patterson regional president, decided to withdraw because the "TDA decided to compete with Patterson, made some slanderous comments about Patterson and the pricing structures, and we had a growing concern about supporting a competitor and making strategic investments, which is what a trade show booth is").[20] There is no evidence of any communication between Patterson and either Benco or Schein concerning Patterson's decision not to attend the TDA trade show.

ii. The October 2013 Fernandez-Showgren Call is Not Evidence of an Agreement.

1564. On October 15, 2013, Benco's Texas Regional Manager, Ron Fernandez, called Schein's Texas Regional Manager, Glenn Showgren, to discuss the TDA. (RX 2362-002; RX 1126 (Fernandez, Dep. at 72-73)). Neither Mr. Showgren nor Mr. Fernandez were called to testify at trial, and no testimony was elicited at trial concerning this call or the document summarizing it.

1565. There is no evidence that Mr. Showgren solicited the call from Mr. Fernandez. Mr. Showgren relayed the contents of the unsolicited call internally at Schein, and appropriately noted the potential for antitrust concerns. (RX 2362-002). Specifically, the document states that "Benco [is] considering suspending all activities with the TDA including pulling out of the state show." (RX 2362-002). It further says that "Chuck Cohen will be reaching out, or has reached out to, Tim Sullivan to see if HSD would do the same thing." The email concludes by stating that Mr. Showgren "laid out ground rules that [he] will NOT discuss a pricing response and any action would have to be cleared by [Schein's] Legal Team before communicating with the TDA." (RX 2362-002).

1566. RX 2362 does not reflect any agreement by Schein to not attend the TDA trade show. The document also does not show that Schein disclosed any confidential information about its business plans or strategies with respect to TDA attendance.

[20] All evidence of interfirm communication presented by Complaint Counsel to support their conspiracy claim is three to seven months *after* Patterson declined to present at the TDA meeting. (CX 0101 (April 22, 2014); CX 1062 (April 16, 2014); CX 0157 (January 14, 2014), CX 6027-036 ((line 298) January 6, 2014)).

1567. Complaint Counsel did not introduce any evidence that Mr. Showgren had any further communications with Mr. Fernandez following Mr. Fernandez's October 15, 2013 call.

1568. Mr. Showgren's summary of the call was forwarded to Mr. Sullivan. Mr. Sullivan reiterated the concern that Mr. Showgren expressed, opening his reply with: "Agree that we should NOT be having these discussions [with] Benco. Chuck has not contacted me nor would he on such a topic." (RX 2362-001). This shows that Mr. Sullivan was aware of antitrust concerns relating to competitor communications and that he took appropriate steps to ensure that he and his team complied with the antitrust laws. (RX 2362-001; Sullivan, Tr. 4207-08, 4340-41). This evidence weighs against any inference that Schein entered into any agreement with Benco or Patterson to restrain trade.

1569. Complaint Counsel has not introduced any evidence of a call between Mr. Cohen and Mr. Sullivan concerning the TDA. Both Mr. Sullivan and Mr. Cohen denied that any such call occurred. (Sullivan, Tr. 4246-47, 4250, 4285; CX 8015 (Cohen, Dep. at 364-65)). The call and text message log prepared by Complaint Counsel also does not show any such communication. (CX 6027).

1570. The Complaint, referencing a December 11, 2013 text message, alleges that "Benco's Texas regional manager stated" that he has "been talking to the directors of Schein and Patterson" and that "[w]e are going to be taking a stand together against them." (Complaint ¶ 71). Complaint Counsel did not introduce that text message into evidence or call Mr. Ron Fernandez, the author of that text message, to testify at trial.

1571. Complaint Counsel did not introduce any communications log or other evidence to corroborate the existence of such communications with "the directors of Schein and Patterson." (Complaint ¶ 71). There is no evidence that any person at Schein or Patterson with responsibility for or involvement in deciding whether to attend the TDA trade show had discussions with Mr. Fernandez, and there is no evidence concerning the substance of such communications, if they occurred. (RX 1126 (Fernandez, Dep. at 318 ("No" agreement with Schein or Patterson "take a stand together against them"))). Accordingly, the record evidence cannot establish that Respondents entered into an agreement to boycott the TDA trade show.

iii. The January 2014 Misiak-Steck Call Is Not Evidence of an Agreement.

1572. Two months after Patterson made its decision not to attend the 2014 TDA show, Patterson Senior Vice President David Misiak called Schein's Vice President Dave Steck on January 6, 2014 to ask whether Schein intended to attend the TDA show in May 2014. (CX 6027-036; Steck, Tr. 3697, 3701; *see also* Misiak, Tr. 1410-11).

1573. Mr. Misiak and Mr. Steck both testified about this communication. Mr. Steck denied reaching any agreement or understanding concerning whether to attend the TDA trade show, and Mr. Misiak had no recollection of the call. (Steck, Tr. 3715; Misiak, Tr. 1410-11).

1574. Mr. Misiak testified "I think we made our decision months before that … I don't remember having a conversation about TDA or TDA Perks with Dave." (CX 0316 (Misiak, IHT at 307); CX 8038 (Misiak, Dep. at 283 ("I do not recall talking to him about attendance at the TDA trade show.")); Misiak, Tr. 1411 ("Q. What did you speak with Mr. Steck about on this call? A. I don't recall")).

1575. Mr. Steck testified that he received an unsolicited call from Mr. Misiak, and that he informed Mr. Misiak that Schein had not yet made its decision about whether to attend. (Steck, Tr. 3701-02, 3710, 3822-23). Mr. Steck testified that he told Mr. Misiak as a matter of courtesy that he would let him know once Schein had made its decision. (Steck, Tr. 3702, 3704). Mr.

Steck, however, never followed up with Mr. Misiak, and never informed Mr. Misiak of Schein's decision. (Steck, Tr. 3716).

1576. At the time Mr. Misiak called Mr. Steck, Schein had not, in fact, made a decision about whether to attend the TDA show. (Cavaretta, Tr. 5617 (Mr. Steck was not "involved in any way regarding whether or not Schein was going to attend the TDA trade show in 2014"); Steck, Tr. 3702). Mr. Steck testified, and internal Schein documents confirm, that Schein was planning to attend the TDA show in 2014, but that it would consider not going to the show in 2015 if the TDA continued to support SourceOne. (RX 0195 ("I definitely think we will need to take another look @ this in May and decide whether we attend in 2015."); CX 0205 ("If they don't stop this will be our last year attending the TDA."); Steck, Tr. 3711-12).

iv. Cohen's April 2014 Email Is Not Evidence of an Agreement.

1577. Complaint Counsel introduced evidence of an April 16, 2014 email that Mr. Cohen sent to Mr. Sullivan and Mr. Guggenheim. This email is dated after Respondents had each publicly announced their intentions not to attend the TDA show. (CX 1062). The email simply passes along an article that the TDA sent to its members approximately six months prior, in November 2013, discussing the TDA Perks Supplies program. It does not mention the TDA tradeshow or Respondents' plans concerning attendance at the show. The email reflects a lawful exchange of public information, and is not suggestive of a conspiracy to boycott the TDA. (Sullivan, Tr. 4245-46; Guggenheim, Tr. 1693-94; Cohen, Tr. 831).

1578. Taken as a whole, Complaint Counsel has not introduced sufficient evidence to show that Respondents entered into an agreement to not attend the Texas Dental Association trade show.

2. *There Are No Communications Between Patterson and Schein Regarding Buying Groups.*

1579. Complaint Counsel alleges that Schein, Patterson, and Benco "entered into an agreement to refuse to provide discounts to or compete for the business of Buying Groups … [and that] [t]hrough a series of inter-firm communications, top executives at Benco, Schein, and Patterson entered into, ensured compliance with, and monitored the agreement." (Complaint ¶ 31). Yet Complaint Counsel fails to put forth any evidence whatsoever of communications between Patterson and Schein regarding buying groups.

1580. Every Schein witness to testify at trial confirmed that they have never communicated with anyone at Patterson concerning buying groups nor that they have heard of anyone at Schein having any communications with anyone at Patterson concerning buying groups. (Sullivan, Tr. 4254 ("Q. Did you ever speak with Paul Guggenheim or anyone else at Patterson about buying groups? A. No."); Meadows, Tr. 2467, 2623 ("Q. Have you ever communicated with anyone at Patterson or Benco about buying groups? A. Not at all."); Steck, Tr. 3831 ("Q. And more generally, are you aware of any conversations that anyone at Schein, including yourself, had with Patterson concerning the subject of buying groups? A. I'm not aware."); Cavaretta, Tr. 5567-68 ("Q. But while at Schein did you ever communicate with anyone at Patterson about buying groups or GPOs? A. Absolutely not. Q. Has anyone at Schein ever told you about a communication they had with someone at Patterson about buying groups or GPOs? A. No."); Foley, Tr. 4731 ("Q. Have you ever had any communications whatsoever with anyone from Patterson about buying groups or GPOs? A. No."); Titus, Tr. 5284 ("Q. And you're not aware of any communications between anyone at Patterson and anyone at Schein regarding buying groups? A. None whatsoever.")).

1581. Every Patterson witness to testify at trial confirmed that they have never communicated with anyone at Schein concerning buying groups nor that they have heard of anyone at Patterson having any communications with anyone at Schein concerning buying groups. (Guggenheim, Tr. 1708 ("Q. Have you ever talked to Mr. Sullivan of Schein about buying groups in any way? A. Never. Q. Just so we're clear, have you ever e-mailed or texted or in any way communicated with Mr. Sullivan of Schein about buying groups? A. Absolutely not. Q. What about anyone else at Schein? A. Nope."); McFadden, Tr. 2836 ("Q. Have you ever had a conversation with anyone at my client, Henry Schein, about buying groups? A. No."); Misiak, Tr. 1504-05 ("Q. How about Henry Schein in general? Have you ever spoken with anyone at Henry Schein about buying groups? A. No."); Rogan, Tr. 3571 ("Q. Any living, breathing human being who ever worked at Schein, have you ever talked to anyone, communicated in any fashion with anyone at Schein about buying groups? A. No.").

1582. Patterson executives received competitive intelligence that Schein was working with buying groups, but none of them contacted anyone at Schein concerning this activity or about buying groups generally. (Guggenheim, Tr. 1855-56, 1862; McFadden, Tr. 2836, 2841, 2709, 2714-15; CX 0161; Misiak, Tr. 1327, 1505; Rogan, Tr. 3652-57, 3659-61).

1583. Complaint Counsel's Interrogatory Response cites no communications between Patterson and Schein regarding buying groups. (RX 2958).

1584. Complaint Counsel's sole example of interfirm communication between Patterson and Schein is a single phone call and subsequent email from January 2014. (CX 6027-036; CX 0112). This call and email relate solely to the 2014 Texas Dental Association meeting and in no way relate to buying groups. (CX 6027-036; CX 0112; Steck, Tr. 3703, 3712-13, 3822, 3829-31).

B. Internal Communications at Patterson and Benco Are Not Evidence of a Conspiracy.

1585. Complaint Counsel claims that internal communications from certain executives at Patterson and Benco are evidence of the alleged conspiracy. (CC Pretrial Br. at 25-27). Specifically, Complaint Counsel claims that statements from Patterson and Benco executives that Schein purportedly was not competing for buying group customers is "direct evidence of a conspiracy." (CC Pretrial Br. at 25). As noted below, it is not, as there is no evidence showing that Patterson and Benco witnesses had any personal knowledge of Schein's dealings with buying groups, and Patterson and Benco were in fact mistaken as to Schein's strategies.

1586. Every Benco and Patterson witness who has testified in this case denied ever speaking to anyone at Schein regarding Schein's policy relating to buying groups. (Guggenheim, Tr. 1855-56; Misiak, Tr. 1503-04; Rogan, Tr. 3571; McFadden, Tr. 2836-37; Cohen, Tr. 845, 848; Ryan, Tr. 1243; CX 8027 (Anderson, Dep. at 159-61); CX 8013 (Fruehauf, Dep. at 194-96); CX 8015 (Cohen, Dep. at 489-90); CX 8037 (Ryan, Dep. at 400-01); CX 8023 (Guggenheim, Dep. at 398-400); CX 8002 (Nease, Dep. at 133-35); CX 8028 (Lepley, Dep. at 110-11)).

1587. Complaint Counsel supports its allegations by citing internal correspondence sent by Dave Misiak (Patterson), Tim Rogan (Patterson), Pat Ryan (Benco), and Neal McFadden (Patterson). (CC Pre-Trial Br. at 25-27). Each testified that any statements regarding Schein's alleged approach to buying groups were either based on normal-course market intelligence or pure speculation. (Misiak, Tr. 1364, 1504-05, 1507-08; Rogan, Tr. 3571, 3655, 3657; CX 8017 (Rogan, Dep. at 72-73); Ryan, Tr. 1209-10, 1212-13, 1239-40; 1255-56; McFadden, Tr. 2837; CX 8004 (McFadden, Dep. at 46-47)).

1588. Mr. Misiak, former Vice President of Sales for Patterson, confirmed that his statement that "[o]ur [two] largest competitors stay out of these as well" (*see* CX 0093) was merely his guess or speculation about what Schein was doing with respect to buying groups based on competitive market information. (Misiak, Tr. 1297-98, 1364, 1507-08). Mr. Misiak also confirmed that he has no personal knowledge of Schein's practice or strategy relating to buying groups. (Misiak, 1504-05).

1589. Mr. Rogan, Vice President and General Manager for Patterson, confirmed that he had never spoken to anyone at Schein in any fashion about buying groups. (Rogan, Tr. 3420-21, 3571, 3655, 3657). Instead, any comment made by Mr. Rogan regarding Schein's purported approach to buying groups was based on market intelligence and nothing else. (CX 8017 (Rogan, Dep. at 72-73)). However, Mr. Rogan testified that on several occasions that it was reported to him that Schein was in fact working with buying groups. (Rogan, 3654-55; 3657; 3660-61).

1590. Mr. Guggenheim, the former President and CEO for Patterson, testified that during his tenure it was reported to him that Schein worked with buying groups. (Guggenheim, Tr. 1856-57). In fact, Mr. Guggenheim testified that Schein was an "innovator" and that he always "believed … that Henry Schein worked with buying groups." (Guggenheim, Tr. 1856).

1591. Pat Ryan, Director of Benco's Strategic Markets, testified that any comment he made regarding Schein's approach to buying groups was based on market intelligence and was mere speculation. (Ryan, Tr. 1114-16, 1206, 1209-10, 1212-13, 1255-56). However, like other witnesses, Mr. Ryan testified that on several occasions it was reported to him that Schein was in fact working with buying groups. (Ryan, Tr. 1245-48, 1250-53). Mr. Ryan confirmed that he did not, and does not, have any personal knowledge of Schein's position on buying groups. (Ryan, Tr. 1205-06, 1239-40, 1255-56).

1592. Based on information he received from local Patterson branches that Schein was participating with buying groups, Mr. McFadden's "impression" was actually that Schein was in the buying group space. (McFadden, Tr. 2841; CX 8004 (McFadden, Dep. at 46-47); CX 0161). At trial, Mr. McFadden, former President of Patterson Strategic Accounts, testified that he has no personal knowledge of Schein's strategy relating to buying groups. (McFadden, Tr. 2670, 2836-37).

1593. There is no evidence to support Complaint Counsel's allegation that internal communications at Patterson and Benco regarding Schein's purported approach to buying groups are evidence of the alleged conspiracy.

VI. THE ECONOMIC EVIDENCE REFUTES ANY CONSPIRACY INFERENCE.

A. Summary of the Expert Opinion Evidence.

1594. The economic evidence, taken as a whole and in conjunction with the factual evidence, does not support an inference that Respondents conspired to boycott buying groups. For reasons set forth below, most of the economic evidence presented by Complaint Counsel's expert, Dr. Marshall, is unreliable or inadmissible. To the extent such evidence is admissible, it is not persuasive evidence of a conspiracy.

1595. Four economists testified in this matter. Dr. Robert C. 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. (Marshall, Tr. 2902-03, 2912, 2946, 3123).

1596. The reliability of Dr. Marshall's opinions was challenged by each of Respondents' experts: Dr. Dennis W. Carlton, on behalf of Schein; Dr. Timothy Wu, on behalf of Patterson; and Dr. John Johnson, on behalf of Benco.

1597. Dr. Carlton concluded that that Dr. Marshall's opinions were unreliable, and that Schein's conduct was consistent with unilateral behavior. (Carlton, Tr. 5359-62; 5377-80; 5382-86). Dr. Carlton provided four primary reasons to support his conclusions.

1598. One: 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. (Carlton, Tr. 5359-60).

1599. Two: Dr. Carlton concluded that Dr. Marshall's conclusion that the evidence reveals a "structural break" – or change in Schein's behavior – at the beginning and end of the alleged conspiracy was flawed. Instead, the evidence showed that Schein did business with buying groups, and had roughly similar sales to such groups, before, during, and after the alleged conspiracy. (Carlton, Tr. 5361, 5372-74, 5377). Dr. Carlton also demonstrated that the evidence did not support Dr. Marshall's claim that Schein induced Smile Source to terminate its relationship with Schein in January of 2012 by reducing discounts, since discount levels stayed constant throughout the two years leading up to the termination. (Carlton, Tr. 5379-82).

1600. Three: 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. (Carlton, Tr. 5361-62, 5382-84).

1601. Four: Dr. Carlton explained that Dr. Marshall's profitability analysis was not capable of reliably demonstrating that Schein acted contrary to its unilateral self-interest. (Carlton, Tr. 5362, 5384, 5386-90). Dr. Carlton explained that, in addition to relying on factual assumptions relating to Schein's dealings with Smile Source and the Kois Buyers Group that are contrary to the record evidence, Dr. Marshall's profitability analysis was flawed because (i) Dr. Marshall did not do a profitability analysis for each of the alleged boycotted buying groups or demonstrate that the same results would follow if such an analysis had been performed, (Marshall, Tr. 2986-87); (ii) Dr. Marshall's analysis was conducted on an *ex post*, rather than *ex ante* basis, and thus, it assumes perfect foresight concerning how a buying group would perform, (RX 2832-049, n. 142); and (iii) Dr. Marshall failed to analyze the but-for world, or "counterfactual" world, meaning that Dr. Marshall did not analyze either the discounts Schein would have needed to offer to win the buying group's business, or the degree of cannibalization that would have occurred, had Schein won. (Carlton, Tr. 5380-81, 5386-90, 5391, 5393-94, 5466).

1602. Dr. Carlton's criticisms of Dr. Marshall are well-founded, and Dr. Marshall's opinions are not entitled to significant weight.

1603. The economic evidence, considered as a whole, does not give rise to an inference that Schein participated in a conspiracy.

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

1604. In order to infer a conspiracy from economic evidence, there must be evidence of parallel conduct. As Dr. Marshall agreed, "[i]t's important when you're trying to determine whether there is a conspiracy first to have parallel conduct and then to determine whether that parallel conduct can be explained by unilateral behavior or whether it is a result of collusive behavior[.]" (Marshall, Tr. 2952-53).

1605. To show parallel conduct, Complaint Counsel must show that all three Respondents acted in accordance with the alleged conspiracy – that is, failed to do business with, or offer discounts to, buying groups during the period of the alleged conspiracy. (CoL 10). Since it is undisputed that neither Patterson nor Benco did business with buying groups during the relevant period, the question of whether Respondents engaged in parallel or non-parallel behavior turns on whether Schein did business with buying groups.

1606. The totality of the evidence does not support the conclusion that Respondents engaged in parallel conduct. This conclusion is driven in large part by the extensive record evidence already discussed showing that Schein did business with or actively negotiated in good faith with many buying groups during the relevant period. (SF 377-1335).

1. *Complaint Counsel Failed to Present Evidence of Parallel Conduct.*

1607. Complaint Counsel did not present any economic evidence showing that Respondents engaged in parallel conduct. In contrast, Schein presented evidence affirmatively showing a lack of parallel conduct.

1608. Dr. Marshall failed to make a specific finding, or render the specific opinion, that Schein, Patterson, and Benco engaged in parallel conduct. During his direct testimony, Dr. Marshall did not mention the concept of parallel conduct.[21] (Marshall, Tr. 2855-945). Nor did he conduct any quantitative or data-driven analysis to determine whether the Respondents engaged in parallel conduct. Rather, Dr. Marshall first *assumed* that Respondents each engaged in "parallel conduct with respect to buying groups," and then, based on that assumption, addressed whether the assumed parallel conduct was "driven by something other than non-competitive oligopoly behavior." (CX 7100-203).

[21] In his report, Dr. Marshall stated that the "idea regarding parallel conduct in this matter would be the Respondents submitting seemingly high bids for the business of buying groups, say discounts of 1% or 2% relative to what they charged individual dentists." (CX 7100-121). Dr. Marshall, however, did not find any such parallel conduct in his report, and he testified at trial that there was no "economic evidence of parallel conduct with respect to the submission of high bids." (Marshall, Tr. 2953-54).

2. *Schein's Sales Data Affirmatively Shows Lack of Parallel Conduct.*

1609. The record evidence shows non-parallel conduct among the Respondents with respect to their dealings with buying groups.

1610. Both Dr. Carlton and Dr. Marshall quantified Schein's annual sales to buying group members from 2010 through 2017. (Marshall, Tr. 2860 ("I'm using data that was provided by the distributors, the respondents in this matter…. [T]hese are volumes of data because it includes the transactions with every dentist in the country throughout a number of years."); Carlton, Tr. 5358-59, 5363 ("I had access to Schein's sales data, so I used that in my analysis.")).

1611. This analysis shows that Schein sold to buying groups "before the alleged conspiracy, during the alleged conspiracy, and after the alleged conspiracy." (Carlton, Tr. 5368-69; CX 7101-140-41; RX 2832-022). Thus, Dr. Carlton found that Complaint Counsel's allegation that Schein participated in a conspiracy not to do business with buying groups is "not consistent with [Schein's] sales data." (Carlton, Tr. 5364).

1612. The data does not show any break in Schein's sales to buying groups at the start of the alleged conspiracy period in 2011 or 2012, or any reduction to zero. (Carlton, Tr. 5373-74; *see* RX 2832-022). Similarly, there is not a large increase in Schein's sales to buying groups at the end of the alleged conspiracy period in 2015 or 2016. (Carlton, Tr. 5376-79; *see* RX 2832-022 (explaining that the observed increase in 2017 is primarily due to Klear Impakt and Smile Source)).

1613. And because this analysis shows that Schein's conduct differed from that of Patterson's and Benco's, it constitutes evidence of non-parallel behavior.

1614. Dr. Carlton analyzed Schein's sales data for a number of entities that, at the time he prepared his report, were under consideration as potentially subject to the agreement alleged by Complaint Counsel. (Carlton, Tr. 5366-69; RX 2832-022).

1615. Dr. Carlton grouped these entities into four categories, depending on whether (i) Complaint Counsel had agreed that such entities were buying groups subject to the alleged agreement; (ii) Schein's witnesses had testified during deposition that such entities were buying groups of independent dentists; (iii) the entities' own website represented that its membership included independent dentists; and (iv) a select number of entities that did not fall within the prior three categories. (Carlton, Tr. 5366-67; RX 2832-020-21).

1616. Dr. Carlton then reported the following results based on this categorization. (*See* RX 2832-022 (highlighting added)):

Table 1
Schein Sales to Buying Groups ($M)

Buying Group	2009	2010	2011	2012	2013	2014	2015	2016	2017
Groups that Schein/FTC Identify as Independent	$14.0	$14.8	$13.6	$14.2	$13.2	$12.1	$11.4	$11.0	$15.6
Groups Website Identifies Independent	$6.7	$7 1	$8.1	$10.1	$12.0	$13.5	$15.7	$14.2	$14.2
Total Buying Groups of Independent Dentists	***$20.7***	***$21.9***	***$21.7***	***$24.4***	***$25.2***	***$25.5***	***$27.1***	***$25.2***	***$29.8***
Other Buying Groups	$16.2	$24.4	$38.5	$40.0	$45.9	$54.9	$70.1	$84.7	$97.8
Total Buying Groups	***$36.9***	***$46.3***	***$60.2***	***$64.3***	***$71.2***	***$80.4***	***$97.2***	***$109.9***	***$127.6***

Source: See Appendix E

1617. Dr. Carlton made clear, in his report and during his testimony, that he was not making any factual finding concerning whether a listed entity was a buying group for purposes of the alleged conspiracy. (Carlton, Tr. 5366; 5430-31; RX 2832-020-22). Neither did he "offer[] an opinion about … which entities are buying groups and which are not." (Marshall, Tr. 2945, 2962-64). Rather, Dr. Carlton stated that he left that determination to the fact-finder, and instead simply reported results derived from the sales data.

1618. Dr. Carlton also made clear that his analysis of the sales data was conservative for two reasons. *First*, it is not possible to search Schein's data in a way that would identify all sales to all buying groups with whom Schein did business. (Carlton, Tr. 5371; RX 2832-021, n.65). *Second*, Dr. Carlton noted he included entities in the "other" category that, based on the record evidence at trial or otherwise, may fit the definition of a buying group of independent dentists. (Carlton, Tr. 5369-70, 5372).

1619. At trial, Complaint Counsel questioned whether certain entities should have been included in this analysis. Complaint Counsel, however, failed to demonstrate that any of the buying groups Dr. Carlton included in his analysis should have been excluded from the analysis.

1620. Specifically, at trial, Complaint Counsel asked Dr. Carlton about a number of buying groups. *First*, Complaint Counsel asked about Ciraden. Complaint Counsel asked whether Ciraden should be included because "Ciraden's management disbanded in approximately 2011." (Carlton, Tr. 5440). This, however, is consistent with Dr. Carlton's sales analysis, which attributes [redacted]. (*See* CX 7101-140-41 (Marshall's "Corrected" Dr. Carlton Table 1)).

1621. *Second*, Complaint Counsel questioned whether Mastermind, Teeth Tomorrow, and Klear Impakt should be included, since the contracts were entered into after the end of the alleged conspiracy. (Carlton, Tr. 5442, 5451). But Dr. Carlton's analysis does not attribute any sales to these entities prior to the start of the buying group relationship, and thus, it does not call into question Dr. Carlton's sales analysis. (*See* CX 7101-140-41 (Marshall's "Corrected" Dr. Carlton Table 1)).

1622. *Third*, Complaint Counsel questioned whether Comfort Dental should be included if "indeed Comfort Dental were a DSO." (Carlton, Tr. 5446). As discussed above, Comfort Dental is a franchise, like Smile Source, whose members consist of independent dentists, and therefore, it was properly considered a buying group. (*See* SF 43-46, 54-56 493-97).

1623. *Fourth*, Complaint Counsel claimed that Dr. Carlton's analysis was flawed as to Steadfast Medical because Dr. Carlton's analysis showed that Steadfast sales started in 2011, even though a single, ordinary course business document suggested that there may have been about $5,000 of sales in 2010. (Carlton, Tr. 5453; CX 2667; *see also* CXD 0054). Complaint Counsel did not introduce any evidence to corroborate CX 2667, or to demonstrate its reliability. Moreover, Complaint Counsel did not show that Dr. Carlton failed to accurately report results from the sales data. In any event, the $5,000 in sales is *de minimis*, and would not change any of Dr. Carlton's conclusion (Carlton, Tr. 5457-58).

1624. More generally, as Dr. Carlton testified, Complaint Counsel has not shown that the addition or removal of any buying groups would alter the conclusion that Schein did business with buying groups before, during, and after the alleged conspiracy period. (Carlton, Tr. 5457-58; RX 2966 (Carlton, Dep. at 159-70)).

1625. As Dr. Carlton testified, "however you describe it, there's no question Schein is selling to these FTC buying groups." (Carlton, Tr. 5364-65, 5372 ("[T]he numbers are different, but they make exactly the same point. Schein is discounting before the alleged conspiracy period, during the alleged conspiracy period, and after the alleged conspiracy period….")).

1626. Dr. Carlton further noted that, during his deposition, Complaint Counsel introduced a revised version of his sales analysis that excluded groups the FTC did not consider relevant. (*See* RX 3091). Dr. Carlton explained in his deposition and at trial that this revised chart confirms that, even under Complaint Counsel's view of which entities should be counted, Schein did do business with buying groups during the relevant period, and that there was no structural break before or after the alleged conspiracy. (Carlton, Tr. 5457-58; RX 2966 (Carlton, Dep. at 159-70)).

1627. Regardless of Dr. Carlton's categorization, Dr. Marshall also calculated Schein's sales separately for each buying group reflected in Dr. Carlton's report. (CX 7101-140-41). This chart enables the calculation of Schein's sales to any of the entities referenced (though it is limited to the groups Dr. Carlton included in his analysis and does not include Schein's sales to a number of buying groups, such as the Schulman Group or MeritDent). Based on Dr. Marshall's chart, Schein's sales to the referenced buying groups were as follows: [redacted]

[redacted]

1628. As this chart shows, Schein made over [redacted] in sales to buying groups during the relevant period, averaging almost [redacted] per year. Between 2009 and 2016, sales increased at a relatively stable rate of about [redacted] per year. (CX 7101-140-41).[22]

1629. As the foregoing shows, Schein did do business with buying groups during the alleged conspiracy period. Such evidence reflects non-parallel conduct on Schein's part, and is inconsistent with the allegation that "Benco, Schein, and Patterson conspired to refuse to offer discounted prices or otherwise negotiate with buying groups seeking to obtain supply agreements on behalf of groups of solo practitioners or small group dental practices ('independent dentists')." (Complaint ¶ 1).

3. ***Complaint Counsel Cannot Ignore Non-Parallel Conduct by Restricting the Alleged Boycott to "New" Buying Groups.***

1630. Despite the lack of parallel conduct with respect to buying groups generally, Complaint Counsel appears to argue that the alleged conspiracy was limited to "new" buying groups. (*See* Complaint ¶ 34 ("As a result [of the alleged conspiracy], Schein refused to provide discounts to or compete for the business of new Buying Groups."), ¶ 40 ("As a result [of the alleged conspiracy], Patterson refused to provide discounts to or compete for the business of new Buying Groups.")).

1631. As an initial matter, Complaint Counsel did not introduce any evidence to show that Respondents' alleged agreement excluded legacy or existing buying groups. Complaint Counsel has not identified any communication drawing this distinction. Rather, the distinction between legacy and new buying groups appears to be a *post-hoc* effort to fit the facts to the data. Moreover,

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[22] As discussed below, much of the increase in 2017 (and to a lesser extent in 2016) is attributable to three buying groups: Breakaway Dental, Klear Impakt, and Smile Source. The sales data for Breakaway Dental is inaccurate, as it reflects that Schein began doing business with Breakaway in 2015, when it actually began as a Special Markets customer prior to 2014. (SF 412). Similarly, while the Klear Impakt sales began in late 2015, negotiations started in late 2014. (SF 807). And, while Schein entered into an agreement with Smile Source in 2017, Schein remained willing to work with Smile Source since 2012, including making a specific proposal in 2014. (SF 1106-45, 1156- 86).

this attempt to limit the alleged agreement to "new" buying groups creates additional logical and factual inconsistencies. For example, Complaint Counsel also alleges that Schein terminated Steadfast and the Dental Co-Op during the alleged conspiracy, but such termination would be unnecessary if the alleged agreement grandfathered legacy buying groups. (CC Pretrial Br. at 20). Complaint Counsel also specifically claims that Smile Source, an existing, legacy buying group, was subject to the alleged conspiracy. (RX 3087-004).

1632. But even if Complaint Counsel limited the scope of the alleged conspiracy to "new" buying groups, the evidence still shows a lack of parallel conduct. The sales date reflected above (SF 1627) shows that Schein *started* doing business with Universal Dental Alliance, Steadfast, Dental Partners of Georgia, Dental Gator, and Corydon Palmer during the alleged conspiracy period. (CX 7101-140-41; *see also* SF 512-47, 634-90, 676-89, 1199-242, 1309-35). In addition, record evidence shows that Schein also started doing business with MeritDent, the Schulman Group, and Floss Dental during the alleged conspiracy period. (SF 757-64, 969-81, 1093-104). The evidence also shows that Schein started negotiations with Klear Impakt and Smile Source during the alleged conspiracy period, even though the ultimate agreements were executed later.

1633. Such evidence refutes Complaint Counsel's contention that Respondents engaged in parallel conduct with respect to new buying groups, and is therefore inconsistent with an inference that Schein conspired to refuse to do business with "new" buying groups.

4. *Complaint Counsel Cannot Explain Away Non-Parallel Conduct by Characterizing It as "Cheating."*

1634. During cross-examination, Dr. Marshall conceded that there was evidence of non-parallel conduct. (Marshall, Tr. 2954-55, 2967-68, 2970). While Dr. Marshall claimed that such evidence could be explained away as "cheating," he conceded that such an explanation would require him to first *assume* the existence of a conspiracy. This assumption was made clear in testimony:

> "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 nonparallel 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…."

(Marshall, Tr. 2958-60 (emphasis added)).

1635. Because Dr. Marshall assumed the existence of a conspiracy, and because there is no evidence that Schein sought to keep its buying group business secret, Dr. Marshall's opinion that the evidence of non-parallel conduct can be explained away as "cheating" is not reliable.

C. Complaint Counsel Failed to Present Reliable Economic Evidence of a Structural Break.

1636. Complaint Counsel asserts that an inference of a conspiracy is appropriate because the evidence reflects so-called structural breaks, or changes in Respondents' conduct that coincide with the alleged conspiracy period. (Marshall, Tr. 2888-91; CX 7100-190-93, 196). As discussed, the record evidence does not support that contention. (SF 1336-1395, 1627-29).

1. *The Sales Data Refute the Existence of a Structural Break.*

1637. Dr. Marshall did not conduct any analysis of the sales data to determine whether a change, if any, in Respondents' sales to buying groups coincided with the start or end of the alleged conspiracy. (Marshall, Tr. 2947-48).

1638. Such an analysis is necessary for an *economist* (as opposed to the fact-finder) to render an opinion about the existence or non-existence of a structural break. As Benco's expert witness Dr. Johnson testified, to determine whether there is a structural break, an economist would analyze the data to determine whether there was a statistically significant difference in the magnitude of sales to buying groups during the conspiracy relative to before or after the alleged conspiracy. (J. Johnson, Tr. 4858-59).

1639. Dr. Marshall did not do this analysis. Dr. Marshall conceded that he was not "offering an opinion about a start date or an end date for the conspiracy," but rather was merely evaluating whether the "date range of 2011 to 2015" that Complaint Counsel "gave [him]" was a "reasonable date range." (Marshall, Tr. 2889).

1640. To the contrary, Dr. Marshall's structural break analysis is entirely based on his interpretation of emails and testimony, and again assumes the existence of a conspiracy. Though Dr. Marshall claimed that this approach did not "begin with an assumption of a conspiracy in this case" and that he "did not begin with a presumption of conspiracy," (*see* Marshall, Tr. 2889-90), by taking the start and end dates of the conspiracy from Complaint Counsel as given, he did in fact start out with an assumption of a conspiracy and then proceed to *interpret* the evidence in light of that assumption.

1641. Because Dr. Marshall's approach presupposes the existence of a conspiracy, it is not reliable evidence of whether there was, in fact, a conspiracy. It might be proper for an expert witness to take a hypothesis – that the conspiracy dates are as alleged – and *test* whether the evidence is inconsistent with that hypothesis. If the evidence is inconsistent with the hypothesis, then logic dictates that the hypothesis is false. But the opposite is not true. If the evidence is consistent with the hypothesis, then logic can only go as far as dictating that the hypothesis *may* or *may not* be true. As such, a structural break analysis that – like Dr. Marshall's – *assumes* the start and end date of the conspiracy can only disprove the existence of a conspiracy; it cannot prove it.

1642. Dr. Carlton's quantitative analysis demonstrated that the evidence is, in fact, inconsistent with the hypothesis of a structural break at the start or end of the alleged conspiracy. Dr. Carlton analyzed the sales data and concluded that it was inconsistent with any structural break. Dr. Carlton testified that he analyzed Schein's sales data and that, regardless of how entities are categorized, Schein did business with buying groups before, during, and after the alleged conspiracy. (Carlton, Tr. 5368-69, 5373-76; *see also* RX 2832-022 (Table 1); SF 183-88, 1625-29). Dr. Carlton also found that there was no material difference in the amount of Schein's sales between these periods. (Carlton, Tr. 5373-74; 5376-79; RX 2832-022). To the extent there was some difference, Dr. Carlton noted that sales increased after the start of the alleged conspiracy, refuting the notion of a structural break or a conspiracy not to do business with buying groups. (Carlton, Tr. 5368-69, 5373-74).

2. *Dr. Marshall's Three Schein Anecdotes Are Not Structural Breaks.*

1643. To support his structural break opinion, Dr. Marshall relied on three anecdotes involving Schein, namely, (i) Schein's rejection of Unified Smiles on December 21, 2011, (ii) the termination of the Schein-Smile Source relationship in January 2012, and (iii) Schein's agreement with Smile Source in 2017. (Marshall, Tr. 2890-91).

1644. As noted, the evidence surrounding these anecdotes does not indicate any drastic change in behavior by Schein that could support the finding of a structural break. (SF 1336-95). Dr. Marshall's attempt to review selected portions of the documentary and testimonial record in order to draw conclusions about changes in Schein's behavior usurps the fact-finder's role, and is not a reliable economic opinion.

1645. As an initial matter, Dr. Marshall did not examine whether there was a change in the *frequency* with which Schein agreed or declined to do business with a buying group around the start or end dates of the alleged conspiracy. Dr. Marshall did not evaluate all the instances prior to the start of the alleged conspiracy, or after the end of the alleged conspiracy, where Schein declined to do business with a buying group. (Marshall, Tr. 2949-50 (agreeing that he "[does not] know one way or the other whether Schein said no to buying groups prior to Unified Smiles")).

1646. Similarly, Dr. Marshall did not evaluate the instances in which Schein agreed to do business with a buying group during the alleged conspiracy. (*See, e.g.*, Marshall, Tr. 2966-67, 2969). Without consideration of Schein's approaches to *all* buying groups during the three periods under consideration (before, during, and after the alleged conspiracy), it is not possible for Dr. Marshall to draw reliable conclusions about whether Schein changed its behavior during these time periods.

1647. In addition, Dr. Marshall's assumptions concerning the facts relating to the three structural break anecdotes is not consistent with the record evidence. (*See* SF 1286-308 (Unified Smiles), 1105-186 (Smile Source)).

1648. With respect to Unified Smiles, the evidence establishes that Schein's Mr. Foley informed Unified Smiles on December 21, 2011 that Schein was unwilling to enter into an agreement in the form Unified Smiles proposed. (CX 2062; Foley, Tr. 4687-88, 4692). As discussed above, the evidence demonstrates that this decision was made unilaterally by Mr. Foley, and was not the result of any alleged agreement or communication between Schein and Benco. (SF 1286-308). While Dr. Marshall claims that the email's use of the phrase "no longer" implies a change (at some unspecified time), such an opinion falls outside the scope of Dr. Marshall's expertise. (CX 7100-190). Moreover, the isolated use of the phrase "no longer" in a single email is insufficient, by itself, to deem Schein's dealings with Unified Smiles a "structural break."

1649. With respect to Smile Source's decision in 2012 to terminate Schein, the evidence does not support Dr. Marshall's factual assumption that Schein tried to induce Smile Source to terminate the relationship. Moreover, the evidence shows that any change in Schein's dealings with Smile Source occurred in January 2011 (following the decision made in 2010 to transfer the Smile Source account from Special Markets to HSD (*see* SF 223-36), and thus, any such change on Schein's part occurred prior to the start of the alleged conspiracy.

1650. Dr. Marshall relies on his Fisher price index for his claim that [redacted]. (CX 7100-181-82 (Figure 84)). But a Fisher price index does not show that Schein decreased its discounts or otherwise changed its pricing behavior towards Smile Source in 2011. (Marshall, Tr. 3143-48 [redacted]

[redacted]).

1651. Dr. Marshall's Fisher price index fails to account for changes in cost of goods. Dr. Marshall's Fisher price index also fails to account for general changes in market prices. (Marshall Tr. 3144). [redacted] (*Compare* CX 7100-168 *with* CX 7100-182; *see also* Marshall, Tr. 3143-46).

1652. Dr. Carlton showed that the discounts Schein offered to Smile Source remained constant between 2010 and Smile Source's termination of Schein in 2012. (RX 2382-058 (Table 3); Carlton Tr. 5379-80). Dr. Marshall did not claim that Dr. Carlton's analysis was incorrect. (Marshall, Tr. 3149; *see also* Marshall, Tr. 3149 [redacted]).

1653. As such, Dr. Marshall's Fisher price index cannot support a finding that Schein increased prices, or reduced discounts, in an effort to induce Smile Source to terminate its relationship with Schein. Similarly, Dr. Marshall failed to provide any economic evidence demonstrating that Schein changed its behavior with respect to Smile Source at the start of the alleged conspiracy. (SF 1129-37).

1654. With respect to Smile Source's decision in 2017 to re-engage Schein as a designated distributor, the evidence shows that Schein had offered to supply Smile Source in 2014, and that Schein was consistently willing to do business with Smile Source throughout the relevant period. (SF 1156-86).

1655. Following Smile Source's decision to reject Schein's partnership proposal in 2014, Smile Source did not seek to re-start negotiations until late 2015, which ultimately resulted in reaching an agreement in 2017. (SF 1156-86).

1656. Because Schein was always willing to do business with Smile Source, there is no basis for concluding that Schein changed its behavior in 2017. (SF 1106-21, 1156-86).

D. Basic Industry Characteristics Do Not Justify a Conspiracy Inference.

1657. Dr. Marshall testified that the "market structure" is "conducive to collusion." (Marshall, Tr. 2913-16). Specifically, he asserted that factors such as market shares or concentration, barriers to entry, and bargaining power of customers and suppliers provides a "sensible framework to use … when trying to understand collusive behavior." (Marshall, Tr. 2913-14).

1658. However, Dr. Marshall's opinion is incapable of distinguishing between lawful oligopolistic coordination and unlawful agreement. As Dr. Carlton testified, the same factors that Dr. Marshall believes makes the market conducive to collusion also makes the market conducive to lawful oligopolistic behavior. (Carlton, Tr. 5363-64).

1659. Dr. Marshall has failed to present any economic evidence that shows that Respondents conduct cannot be explained by lawful oligopolistic interdependence.

E. Complaint Counsel Failed to Show that Schein Acted Against Self-Interest.

1660. Complaint Counsel asserts that a conspiracy can be inferred based on Dr. Marshall's opinion that Respondents acted contrary to their unilateral self-interest. (CC Pretrial Br. 52-53).

Dr. Marshall bases his self-interest opinion on his profitability analyses of Smile Source and the Kois Buyers Group. (Marshall, Tr. 2986-87). Dr. Marshall's profitability analyses are not reliable or persuasive.

1661. In sum, Dr. Marshall's opinion that Respondents acted contrary to their unilateral self-interest is flawed for at least the following reasons:

- ***Dr. Marshall's Profitability Analysis Is Infected by False Positives, Incorrectly Finding Acts Against Self-Interest Outside of the Alleged Conspiracy Period***. Dr. Marshall's profitability analysis is incapable of distinguishing between unilateral and conspiratorial conduct, since his analysis shows that Patterson acted contrary to its self-interest prior to its alleged participation in the conspiracy, and that Benco acted contrary to its self-interest after the end of the alleged conspiracy. Such false positives render Dr. Marshall's analysis unreliable.

- ***The Profitability Analysis Is Incapable of Distinguishing Between Oligopolistic Interdependence and Conspiracy***. Dr. Marshall's analysis fails to show that Respondents' respective approaches to buying groups could not arise naturally, as a result of oligopolistic interdependence. Rather, his model *assumes* that all interdependence strategies – such as "wait-and-see" – would fail, even though he admits that it is possible that such strategies could explain Respondents' reluctance to bid on certain buying groups.

- ***The Profitability Analysis Shows that the Alleged Conspiracy Is Ineffective and Irrational***. Dr. Marshall's profitability analysis shows that the alleged conspiracy would be irrational for the Respondents because they collectively lose money in any region in which there is a competing distributor. Since Dr. Marshall's own analysis shows that there are other distributors in virtually all regions, the alleged conspiracy would not be in any Respondents' interest. The inability to identify situations where the alleged conspiracy would make economic sense and where it wouldn't renders the analysis unreliable.

- ***The Profitability Analysis Is Limited to Just Two Non-Representative Buying Groups.*** Dr. Marshall's analysis is limited to the Kois Buyers Group and Smile Source. But the evidence shows that there are significant differences among buying groups. As such, Dr. Marshall's analysis cannot be relied on to draw inferences about other buying groups. Nor is it reasonable to rely on this analysis to draw inferences about whether each Respondent's buying group policies or practices were contrary to its unilateral self-interest.

- ***The Profitability Analysis Is Premised on Incorrect Factual Assumptions Concerning Schein's Dealings with the Kois Buyers Group and Smile Source.*** Dr. Marshall's conclusions that Schein acted contrary to its self-interest in its dealings with the Kois Buyers Group and Smile Source are premised on the incorrect factual assumptions that: (i) Schein did not engage in good-faith negotiations with Kois to supply the Kois Buyers Group; (ii) Schein terminated Smile Source, or induced Smile Source to terminate Schein, in 2012; and (iii) Schein submitted a sham bid to Smile Source in 2014. Since none of these assertions are factually accurate, the assumption that Schein acted contrary to its self-interest is unreliable.

- ***The Profitability Analysis Fails to Account for Factors Relevant to the Decision to Partner with Buying Groups.*** Dr. Marshall's profitability analysis only accounts for the sales and margins among customers that actually purchased from Burkhart or Atlanta Dental. It does not account for other factors that would be relevant to Respondents' decisions about whether to partner with a buying group, such as the many conflicts that buying group relationships create, including conflicts involving (i) HSD and Special Markets, (ii) FSCs, (iii) non-member dentists, (iv) DSOs, and (v) manufacturers.

- ***The Profitability Analysis Fails to Analyze the But-For World.*** Dr. Marshall does not analyze the sales or profits that Respondents would have earned had they entered into contracts with Smile Source or the Kois Buyers Group during the alleged relevant period. The failure to analyze the but-for world renders his analysis unreliable.

- ***The Profitability Analysis Fails to Show that Schein's Decisions Were Unprofitable.*** The Kois and Smile Source analyses do not show that Schein lost money by not winning those contracts. The analyses are based on 20-20 hindsight, including material changes in the buying group's businesses that could not be reasonably anticipated at the time of contracting. The analyses also show that Schein's dealings with Smile Source in 2012 and 2017 were ***not*** profitable, and were not likely to be profitable despite Smile Source's growth. The 2013 Atlanta Dental Smile Source analysis is unreliable because Dr. Marshall used gerrymandered numbers for Schein's 2012 pre-contract margins.

1. *Dr. Marshall's Profitability Analysis Is Unreliable Because It Finds Acts Against Self-Interest Outside the Alleged Conspiracy Period.*

1662. Dr. Marshall's profitability analysis is not reliable or persuasive because it is incapable of distinguishing between conspiratorial and non-conspiratorial conduct. Specifically, his analysis, if believed, would imply that Respondents acted contrary to their self-interest during periods outside the alleged conspiracy.

1663. Dr. Marshall's profitability analysis of Smile Source in 2012 reflects a period prior to Patterson's participation in the alleged conspiracy. (CX 7100-165; Complaint ¶ 6; CC Pretrial Br. at 21).

1664. Dr. Marshall's profitability analysis, however, shows that [redacted] by allowing Burkhart to win the contract, plus some uncalculated amount it would have earned had it won the Smile Source contract. (CX 7100-165; Marshall, Tr. 3100). From this, Dr. Marshall concludes that [redacted] (CX 7100-165-66; Marshall, Tr. 3101-02).

1665. Because Dr. Marshall purports to show that Patterson acted contrary to its self-interest prior to its participation in the alleged conspiracy, the profitability analysis is unreliable and incapable of distinguishing between conspiratorial conduct and non-conspiratorial conduct. Specifically, Dr. Marshall's analysis generates false positives.

1666. At trial, Dr. Marshall sought to rehabilitate his analysis by claiming that he assumed a conspiracy start date of 2011 for the "three respondents." (Marshall, Tr. 2947). But because this is not the actual start date Complaint Counsel alleges, his model is not probative. More importantly, Dr. Marshall cannot cure the failings in his model simply by assuming a different start date.

1667. Putting aside Dr. Marshall's attempt to assume a 2011 start date for Patterson's participation in the alleged conspiracy, Dr. Marshall cannot explain why his analysis would show that Patterson acted contrary to its self-interest prior to its participation in the alleged conspiracy. (Marshall, Tr. 3102). For example, Dr. Marshall testified as follows:

[redacted]

[redacted]

(Marshall, Tr. 3102).[23]

1668. Dr. Marshall's analysis also shows false positives at the end of the alleged conspiracy period. Dr. Marshall performed a single, post-conspiracy analysis, involving Smile Source's decision to contract with Schein in 2017. (CX 7100-182-86). Dr. Marshall, however, found that [redacted] (CX 7100-184, (Figure 87)). Benco, however, did not bid for the contract. From this, Dr. Marshall concluded that Benco acted contrary to its self-interest, even after the alleged conspiracy ended. (CX 7100-186).

1669. At trial, Dr. Marshall tried to explain away this apparent inconsistency by pointing to Benco's agreement with Elite Dental as a reason why Benco did not bid for the Smile Source business in 2017. (Marshall, Tr. 3119-21). But Dr. Marshall's explanation demonstrates that his profitability analysis cannot distinguish between acts contrary to a firm's self-interest and acts consistent with a firm's self-interest.

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[23] While Dr. Marshall claimed at trial that he used a common date range of 2011 through 2015 for all Respondents, his own report quotes the Complaint's allegation that "Patterson joined the agreement to refuse to provide discounts to or otherwise compete for Buying Groups no later than February 2013." (CX 7100-009-10, n.2).

2. *Dr. Marshall's Profitability Analysis Fails to Distinguish Between Oligopolistic Interdependence and Conspiracy.*

1670. Dr. Marshall concedes that his profitability analysis cannot explain why a Respondent "did or did not bid on buying groups." (Marshall, Tr. 2877).

1671. As Dr. Marshall explained, "[m]utually recognized interdependence is well-known in our business as to reasons that there may be parallel conduct." (Marshall, Tr. 2951).

1672. As Dr. Carlton explained, however, Dr. Marshall's profitability analysis is incapable of distinguishing between parallel conduct that arises as a result of lawful oligopolistic interdependence and collusion. (Carlton, Tr. 5383-84).

1673. Dr. Marshall similarly admitted that there is a "possibility, that … the respondents in this matter would have … reasoned their way to not bidding for buying groups." (Marshall, Tr. 2878, 2952; *see also* Marshall, Tr. 2883 ("Q: Could respondents have reached the outcome of not bidding on buying groups through strategic interdependence rather than collusion? A. Well, it's a possibility that that could occur….")).

1674. One of the common strategies used in industries characterized by oligopolistic interdependence is "wait-and-see," in which each firm waits for another firm to be the first mover. Such a strategy is especially effective if (i) there is sufficient market transparency to detect when a rival has engaged in the conduct, and (ii) there are limited "first mover advantages" from the conduct such that second mover remains able to compete.

1675. The record evidence shows that Schein considered such factors in deciding whether to actively court buying group business. (SF 159-82; *see also* CX 2113 ("the risk to overall HSI (due to having 40% share in market) for margin erosion, image, as well as other competitors then following suit and huge price war breaks out."); CX 0189-002 ("HS should not be first to cooperate with GPOs, but also don't want to be last.")). Such documents reflect a recognition of oligopolistic interdependence, and provide a compelling non-collusive explanation for Schein's decisions about how to engage with various buying groups.

3. *Dr. Marshall's Profitability Analysis Implies that the Alleged Conspiracy Is Irrational and Ineffective.*

1676. Dr. Marshall's profitability analyses are further flawed because they do not show that Respondents had an incentive to conspire.

1677. In his report, Dr. Marshall states that "[i]t was in each Respondent's unilateral economic self-interest to discount to buying groups.... However, it was in Respondents' collective interest to prevent the formation and growth of buying groups." (CX 7100-011). Dr. Marshall however, did no analysis to show that it was in Respondents' collective interest to prevent the formation and growth of buying groups.

1678. In fact, Dr. Marshall's profitability analysis shows that the alleged conspiracy was ***not*** in Respondents' collective interest, at least where there were one or more other distributors that the buying group could choose to supply its members. (Marshall, Tr. 3131-33 (the alleged conspiracy is [redacted] (emphasis added))).

1679. Dr. Marshall's Kois profitability analysis shows that [redacted] (*See* CX 7100-156 (Figure 60)). This shows the alleged conspiracy was contrary to the Respondents' collective interests as to the Kois Buyers Group.

1680. Dr. Marshall's 2012 Smile Source profitability analysis shows [redacted] (CX 7100-166). The Respondents collective [redacted] (*See* CX

7100-165-66 (Figure 69)). This shows the alleged conspiracy was contrary to the Respondents' collective interests as to Smile Source in 2012.

1681. Dr. Marshall's 2014 Smile Source profitability analysis shows that [redacted] (*See* CX 7100-173 (Figure 76)). This shows the alleged conspiracy was contrary to the Respondents' collective interests as to Smile Source in 2014.

1682. Dr. Marshall also demonstrated that there ***are*** full-service dealers other than the Respondents in every local market in which Respondents did business. (CX 7101-142-43 (Figure 16 (showing full-service distributor shares by state))). Indeed, in [redacted] of the 50 states, full-service distributors other than Respondents have [redacted]. (CX 7101-142-43). [redacted] (CX 7101-142-43).

1683. Neither Dr. Marshall nor Complaint Counsel showed that regional full-service distributors were insufficient to meet the needs of all or most buying groups.

1684. Dr. Marshall and Complaint Counsel's claim that offering an across-the-board discount to all of a buying group's members delivers incremental volume *assumes* that the FSC-driven process is not working efficiently. (*See* Wu, Tr. 5185-86). Yet Complaint Counsel offers no evidence to show the FSC-driven pricing process was working inefficiently.

1685. Dr. Marshall has also failed to include the effects on Respondents in instances where non-full-service distributors, such as Darby, either could or did contract with the buying group. In that regard, Dr. Marshall conceded that Darby was a competitor for buying group contracts during the alleged conspiracy period. (*See* CX 8040 (Marshall, Dep. at 52-53)). Despite this fact, Dr.

Marshall did not do a profitability analysis for any buying group that chose to use Darby. (CX 8040 (Marshall, Dep. at 53)).

1686. Because Dr. Marshall has not shown that other sources of supply were not available to buying groups, Dr. Marshall has not shown that Respondents collectively profited by not competing for a particular buying group.

1687. As such, Dr. Marshall does not provide any economic support for the claim that Respondents had a motive to conspire.

1688. In addition, because Dr. Marshall's profitability analysis suggests that the alleged conspiracy was irrational, the model does not comport with Complaint Counsel's claims. This casts doubt on the credibility and persuasiveness of Dr. Marshall's analysis.

4. *Dr. Marshall's Profitability Analysis Is Limited to Smile Source and Kois, and Has No Bearing on Other Buying Group Conduct.*

1689. Dr. Marshall empirically studied only two buying groups: Smile Source and the Kois Buyers Group. He did not do any analysis of any other buying group. (Marshall, Tr. 2973 [redacted]).

1690. For example, Dr. Marshall did not do a profitability analysis of Steadfast or the Dental Co-Op, both of which Schein terminated after they refused to agree to exclusivity with Schein. (Marshall, Tr. 2971, 2970, 2980; SF 603-24, 1220-36). Dr. Marshall also did no analysis of any of the buying groups (other than Smile Source and the Kois Buyers Group) listed in paragraph 491 of his initial report, which purports to list his understanding of buying groups with whom at least one Respondent declined to do business. (Marshall, Tr. 2986; CX 7100-209-13 (¶ 491))

1691. The record evidence shows buying groups differ from each other in many material respects, including: (i) the number of members the buying group has; (ii) the commitments that the buying group makes to the distributor; (ii) the commitments that the members make to the buying group; (iii) the shares of each distributor prior to the formation of the buying group, in the relevant market and among actual or potential buying group members; (iv) the ability of the buying group to influence or change its members purchasing practices; (v) the margins that the distributor earns before and after entering into a contract with the buying group; (vi) the nature of the services that the buying group provides in addition to offering discounted supplies; and (v) the ability of the buying group to credibly demonstrate that it will provide enough incremental sales to offset any cannibalization or reduced margins that the distributor may earn on existing customers. (*See, e.g.*, SF 35-119, JF 56-62).

1692. As Dr. Carlton testified, because each buying group is different, conclusions about the profitability of dealing with one buying group cannot apply to any other buying group. (Carlton, Tr. 5387-90).

1693. Dr. Marshall conceded that he was [redacted] (Marshall, Tr. 3002-03).

1694. Indeed, Dr. Marshall conceded that the [redacted] (Marshall, Tr. 3003 (emphasis added)).

1695. As such, if there were any reliable conclusions or inferences available from Dr. Marshall's profitability analysis (which, as explained, there are not), they would be exclusively limited to Smile Source and the Kois Buyers Group. Dr. Marshall's profitability analysis is neither reliable nor probative evidence concerning whether Schein acted contrary to its self-interest with respect to buying groups generally, or with respect to any specific buying group other than Smile Source and the Kois Buyers Group.

5. *Dr. Marshall's Profitability Analysis Is Based on Incorrect Factual Assumptions about Schein's Dealings with Smile Source and the Kois Buyers Group.*

1696. Dr. Marshall concluded that Schein acted contrary to its self-interest with respect to its dealings with Smile Source and the Kois Buyers Group. Dr. Marshall's analysis is flawed, however, because the evidence does not establish that Schein failed to compete for, or otherwise acted irrationally or contrary to its self-interest, with respect to Smile Source or the Kois Buyers Group. (SF 839-936, 1106-86).

a. *The Evidence Does Not Support Dr. Marshall's Assumption that Schein Induced Smile Source to Terminate Schein in 2012.*

1697. Dr. Marshall testified that he "looked at the Schein termination of the Smile Source relationship in 2012" and "the question there was, was it profitable for Schein to terminate that relationship in 2012…." (Marshall, Tr. 2873; *see also* Marshall, Tr. 2869 ("As a matter of fact … Schein had terminated their relationship with Smile Source.")).

1698. As discussed above, however, the evidence shows that Smile Source terminated Schein in 2012, not the other way around. (SF 1106-20).

1699. On cross-examination, Dr. Marshall attempted to rehabilitate his 2012 Smile Source analysis by claiming that [redacted] with Schein. (Marshall, Tr. 3140-41). But as discussed above, the evidence refutes this too. (*See* SF 1122-86).

1700. Notably, when asked whether his analysis of acts against self-interest would still hold if he was "wrong" about his factual assumptions concerning the reasons for the termination of the

Smile Source contract, Dr. Marshall refused to answer the question, but rather simply insisted that, as an economist, he can never be wrong:

> [redacted] [redacted]
>
> [redacted] [redacted]
>
> [redacted] [redacted]
>
> [redacted] [redacted]

(Marshall, Tr. 3140-41(emphasis added)).

1701. Because Dr. Marshall's 2012 Smile Source analysis is based on unsupported factual assumptions that are inconsistent with the record evidence, his analysis does not show that Schein acted contrary to its self-interest.

b. *The Evidence Does Not Support Dr. Marshall's Assumption that Schein Submitted a Fake Bid to Smile Source in 2014.*

1702. Dr. Marshall testified that his 2014 Smile Source profitability analysis shows that Schein acted against self-interest by allegedly submitting "an insincere attempt to win the business." (Marshall, Tr. 2959).

1703. For reasons previously explained, however, Dr. Marshall's assumption that Schein submitted an insincere, fake, or sham bid is inconsistent with the evidence in the record. (SF 1156-67). Moreover, Complaint Counsel does not cite any evidence suggesting a conspiracy where Schein alone would submit fake bids. (Marshall, Tr. 2957-59).

1704. As such, Dr. Marshall's 2014 Smile Source analysis does not show that Schein acted contrary to its self-interest. There is no basis to find – in the record or in Dr. Marshall's opinions – that Schein desired (or would desire) to submit a fake bid.

c. *The Evidence Does Not Support Dr. Marshall's Assumption that Schein Boycotted Smile Source Prior to 2017.*

1705. Dr. Marshall also claims that his profitability analysis of Schein's contract with Smile Source in 2017 demonstrates that Schein acted contrary to its self-interest during the relevant period. In making this inference, Dr. Marshall assumes that Schein was not interested in doing business with, and did not compete for, Smile Source's business during the relevant period. This assumption is unsupported by the evidence. (SF 1156-1186).

1706. As support for this assumption, Dr. Marshall again relies on his (incorrect) understanding that Schein terminated the relationship with Smile Source in 2012, and that it submitted an insincere bid for the Smile Source business in 2014. As just discussed, however, Dr. Marshall's factual assumptions concerning Smile Source in 2012 and 2014 conflict with the weight of the record evidence. As such, these episodes do not support Dr. Marshall's assumption that Schein was not interested in doing business with Smile Source during the relevant period.

1707. Dr. Marshall also claims that he can infer that Schein was not interested in doing business with Smile Source during the relevant period because [redacted] (CX 7100-198, -208). However, the fact that Schein and Smile Source ultimately reached a different deal in 2017 than what Schein initially offered in 2014 does not suggest that Schein refused to do business with, or was not interested in doing business with, Smile Source during the relevant period.

1708. Because Dr. Marshall's 2017 profitability analysis is premised on the unsupported assumption that Schein refused to do business with Smile Source during the relevant period, that analysis is not probative of the question of whether Schein acted contrary to its self-interest during the relevant period.

d. *The Evidence Does Not Support Dr. Marshall's Assumption that Schein Boycotted the Kois Buyers Group.*

1709. Dr. Marshall testified that Schein acted contrary to its self-interest by not competing for the Kois Buyers Group contract in late 2014.

1710. The evidence, however, shows that Schein actively engaged in discussions with the Kois buying group. (SF 893-919). The evidence further shows that Schein acted reasonably during the negotiation process. Because Schein acted reasonably in its dealings with the Kois Buyers Group, it did not act contrary to its self-interest. (SF 893-919).

1711. The finding that Schein acted reasonably – and not contrary to its self-interest – is not undermined by Dr. Marshall's *post-hoc* profitability analysis of the Kois buying group. While that analysis purports to show that Burkhart made money (and Schein lost money) as a result of Dr. Kois awarding the contract to Burkhart, it does not show that Schein failed to act in good faith in negotiating with Kois to supply the Kois buying group. Under Dr. Marshall's logic, every time a firm loses a potentially profitable bid, the firm acted against self-interest. That cannot be the case.

1712. As such, Dr. Marshall's 2014 Kois profitability analysis is not probative of the question of whether Schein acted contrary to its self-interest during the relevant period.

6. *Dr. Marshall's Profitability Analysis Fails to Account for Salient Factors Affecting Whether to Partner with Buying Groups.*

1713. Dr. Marshall's profitability analysis depends primarily on the margins and market shares (among certain buying group members) of the Respondents, Burkhart, and/or Atlanta Dental before and after select contracting events by the Kois Buyers Group or Smile Source. From this analysis, Dr. Marshall concludes that Respondents acted contrary to their self-interest between 2011 and 2015.

1714. Dr. Marshall's analysis, however, fails to account for other factors that a distributor would reasonably consider in deciding whether to do business with a buying group. As described above, Schein considered numerous factors, such as a buying group's membership base (and impact of cannibalization), risk of conflicts between Schein's FSCs or between divisions, ability to commit purchasing volume, ability to influence the purchasing behavior of its members, willingness to sign an exclusive contract, value-added services that could lend stickiness and complement Schein's brand, and others. (SF 159-82, 189-341). These factors are not captured by Dr. Marshall's analysis.

7. *Dr. Marshall Failed to Analyze the But-For World.*

1715. In determining whether a firm acted contrary to its self-interest as a result of a conspiracy, it is necessary to compare the profits the firm actually earned with the profits it would have earned in the absence of the conspiracy. (Carlton, Tr. 5390-91; RX 2832-051). That is, it is necessary to compare profits earned in the actual world to the profits the firm would earn in the but-for world. (Carlton, Tr. 5390-91; RX 2832-051).

1716. In this case, to properly analyze the but-for world, it is necessary to compare the profits that a Respondent would have earned by doing business with a buying group to the profits it would have earned by not doing business with a buying group. (Carlton, Tr. 5390-91).

1717. Dr. Marshall did not analyze the but-for world, or what he calls the "counterfactual." (*See*, *e.g.*, Marshall, Tr. 3026, 3056 [redacted]; Carlton, Tr. 5394-95).

1718. The inability of Dr. Marshall's approach to illuminate the but-for world was illustrated by RXD 0014-029: [redacted]

[redacted]

[redacted] (Marshall, Tr. 3055-56).

1719. Dr. Marshall's trial testimony also showed that differences in market share, cannibalization rates, and compliance can have a significant impact on the analysis, and failure to perform a but-for analysis that takes these factors into account can present a misleading picture. (Marshall, Tr. 2926-27, 2986-87, 3003, 3034, 3136-37).

1720. For example, at trial, Dr. Marshall was presented with a hypothetical in which [redacted] (Marshall, Tr. 3031-68). This was illustrated in RXD 0014-037. [redacted]

[redacted]

[redacted] (RXD 0014-037).

1721. As described below, the flaw in Dr. Marshall's approach was also demonstrated by Dr. Marshall's own analysis.

8. *Dr. Marshall's Profitability Analysis Shows that Schein Did Not Profit by Doing Business with Smile Source.*

a. *Dr. Marshall's Profitability Analysis Shows that Schein Benefited from Smile Source's Termination in 2012.*

1722. Dr. Marshall claims that Schein acted against its self-interest because Schein would have earned more had it not been terminated by Smile Source in 2012. Dr. Marshall's own analysis, however, shows that Schein's profits increased for existing Smile Source members at the time of termination.

1723. [redacted] (Goldsmith, Tr. 2088-89; *see also* CX 7100-067).

1724. Dr. Marshall performed an analysis of Schein's sales and profits to these [redacted] before and after termination. That analysis, which Dr. Marshall prepared and included in his backup materials, shows that Schein retained most of the [redacted] and [redacted] *after* it was terminated by Smile Source. (RX 3058; Marshall, Tr. 3073, 3076; *see also* RXD 0014-039).

1725. Dr. Marshall contends that, despite this analysis, Schein lost profits as a result of the termination because Smile Source experienced substantial growth after termination. (Marshall, Tr. 3076-78 [redacted], 3079-80). But the conclusion that Schein made more money without a Smile Source contract holds even if one assumes that Smile Source continued to grow, and that Schein's shares and margins would have remained at pre-termination levels. Dr. Marshall's conclusion is flawed for three reasons.

1726. *First*, Dr. Marshall's does not present any analysis to show what Schein's sales or margins would have been had it *continued* to supply Smile Source. Without an estimate of Schein's sales and margins had it continued to serve Smile Source, Dr. Marshall's conclusion – that continuing to serve Smile Source would have been incrementally profitable – is not reliable.

1727. *Second*, the fact that Smile Source was poised to grow does not mean that Schein would have earned additional profits. [redacted] (Marshall, Tr. 3096-98; RXD 0014-40).

1728. *Third*, Dr. Marshall improperly relies on Smile Source's *ex post* experience, rather than Schein's *ex ante* expectations. Thus, even if Smile Source's growth could have reversed the unprofitability of Schein's relationship with Smile Source, Dr. Marshall would need to show that, prior to termination, Schein should have reasonably expected Smile Source to experience the kind of growth that it actually did in subsequent years. Dr. Marshall has made no such showing. Dr. Goldsmith testified that such an assumption would not have been reasonable at the time. (Goldsmith, Tr. 1995 ([redacted]); Marshall, Tr. 3076-80). Schein had been serving Smile Source for approximately four years prior to termination, and yet Smile Source had only attracted [redacted]. (Goldsmith, Tr. 2088-89). There is no evidence in the record that Schein expected Smile Source to grow to over [redacted] members by [redacted], as reflected in Dr. Marshall's analysis. (CX 7100-067; *see also* Marshall, Tr. 3076-80).

1729. Dr. Marshall attempts to save his analysis by looking at the profits Schein "lost" as a result of Burkhart winning the Smile Source contract. Specifically, he looks at a different set of customers than the [redacted] members when Schein had the contract: the [redacted] customers that ultimately purchased from Burkhart at some point between [redacted] (CX 7100-162). Dr. Marshall notes that [redacted] (CX 7100-165). But this analysis does not account for Schein's reasonable *ex ante* expectations as to the [redacted] members it was serving at the time, the reduced margins that Schein would have had to offer, or the cannibalization that Schein would have experienced among future potential Smile Source members, had it continued to serve Smile Source. It is thus not reliable.

b. *Dr. Marshall's Profitability Analysis Shows that Schein Did Not Profit from the 2017 Smile Source Contract.*

1730. Dr. Marshall also claims that Schein acted against self-interest during the alleged conspiracy period because Schein entered into a contract with Smile Source after the alleged conspiracy period, and that the relationship was profitable for Schein. (CX 7100-184-85). That analysis is flawed for at least three reasons.

1731. *First*, as noted above, the analysis depends on the assumption that Schein was not interested in contracting with Smile Source prior to 2017. The record evidence shows the opposite. (SF 1105-14, 1156-85).

1732. *Second*, as Dr. Marshall admitted on cross-examination, his 2017 analysis failed to include rebates and administrative fees, which should have been included. (Marshall, Tr. 3121-22). If fees and rebates are included, the analysis shows that Schein lost over [redacted] in 2017 as a result of supplying Smile Source. (Marshall, Tr. 3121-22 [redacted]. As such, the 2017 Smile Source contract was not incrementally profitable for Schein.

1733. [redacted] (Marshall, Tr. 3121-22). But this assumes that Patterson or Benco would have won the Smile Source contract during the relevant period. Schein was the only Respondent actively engaged in discussions with Smile Source, as both Patterson and Benco repeatedly turned Smile Source down. (SF 1147-55). As such, there is no basis for the assumption that Schein would have expected Patterson or Benco to win the Smile Source business in 2017.

1734. *Third*, Dr. Marshall errs by assuming that the circumstances in 2017 were the same as the circumstances during the alleged conspiracy period. It is undisputed, however, that Smile Source continued to grow, and was significantly larger by 2017 than it had been in prior years. (Maurer, Tr. 4981-82). There is thus no reliable basis to draw inferences from Dr. Marshall's 2017 analysis applicable to the alleged conspiracy period.

1735. For these reasons, Dr. Marshall's 2017 Smile Source analysis is not reliable or persuasive evidence that Schein acted contrary to its self-interest during the alleged conspiracy period.

c. *Dr. Marshall's 2013 Profitability Analysis Is Flawed Because It Uses Gerrymandered Numbers for the Atlantic Dental Analysis.*

1736. Dr. Marshall also claims that Schein acted contrary to its self-interest in 2014 because it lost sales to Atlanta Dental in Atlanta among the [redacted] Smile Source customers that purchased from Atlanta Dental. (CX 7100-169-75). Dr. Marshall's analysis, however, does not show that Schein acted contrary to its self-interest for at least three reasons.

1737. *First*, Smile Source did not issue an RFP or otherwise seek to have Schein supply customers in the Atlanta, Georgia region. As such, any analysis of that region is incapable of demonstrating whether a nationwide contract with Smile Source would have been profitable for Schein in 2014.

1738. *Second,* the 2014 Atlanta Dental analysis only reflects [redacted] customers, and thus, it is plagued by a small sample size. Extrapolating from these [redacted] customers to all Smile Source customers nationwide is pure speculation. (CX 7100-170).

1739. *Third*, Dr. Marshall's analysis is flawed because he uses gerrymandered numbers. Specifically, Dr. Marshall's Atlanta Dental analysis purports to compare shares and margins from [redacted], to the sales and margins between [redacted]. (CX 7100-173). In fact, however, rather than use Schein's 2012 margins in his analysis, he replaced it with Schein's 2011 margins. (CX 7100-172, n. 662, -173; Marshall, Tr. 3112-13). And he used 2012 margins for all other distributors. (CX 7100-172, n.662, -173); Marshall, Tr. 3113-14). Dr. Marshall in effect compares apples and oranges, further rendering his analysis unreliable.

1740. Had Dr. Marshall used Schein's actual 2012 margins, Schein *earned* [redacted], rather than *lost* [redacted], as a result of Smile Source's decision to contract with Atlanta Dental. (Marshall, Tr. 3114-15; *see also* RXD 0014-42). [redacted]

1741. While Dr. Marshall claims that the 2012 margins are an "outlier," he did no investigation as to the reason for Schein's 2012 margins. The data, for example, shows that Schein had substantially higher sales in 2012 than in 2011, as would be expected from a large reduction in price. (*See* RXD 0014-042; Marshall, Tr. 3113-15). Mix-and-matching the higher sales figures in 2012 with the higher prices for 2011 is plainly improper.

9. *Dr. Marshall's 2014 Kois Analysis Is Not Reliable Evidence of Acts Against Self-Interest.*

a. *Dr. Marshall's Kois Analysis Fails to Analyze the Offer the Kois Buyers Group Actually Presented.*

1742. In his initial report, Dr. Marshall presented an analysis of the Kois Buyers Group, concluding that Respondents acted contrary to their self-interest by not bidding for the Kois Buyers Group. Dr. Marshall, however, did not analyze the offer that the Kois group actually presented to Patterson and Schein, and testified that he "would have to spend some time" to evaluate it. (CX 8040 (Marshall, Dep. at 209-10, 222-23)).

1743. As Dr. Marshall did not analyze the actual offer that Schein and Patterson evaluated at the time, his opinions as to the Kois Buyers Group are unreliable.

b. *Dr. Marshall's Washington State Kois Analysis Is Meaningless Because the Kois RFP Was National, and Burkhart's Share in Washington Is Far Below Schein's National Share.*

1744. In his reply report, Dr. Marshall presented a new analysis of distributors' profits among Kois members in Washington State. (CX 7101-052-53, 142 (Figure 14)). As an initial matter, that analysis is inadmissible because it was not presented in Dr. Marshall's initial report, and Respondents' experts did not have a chance to testify in response to it. (CX 7101-001; *see also* March 14, 2018 Scheduling Order).

1745. Even if it were considered, however, the analysis does not show that Schein acted contrary to its self-interest for at least five reasons.

1746. *First*, as a factual matter, the evidence does not support Dr. Marshall's assumption that Schein did not enter into good-faith negotiations with the Kois Buyers Group to supply Kois members, or that it acted unreasonably during such negotiations. (*See* SF 893-919).

1747. *Second*, the Kois Buyers Group did not seek a contract limited to Washington State members; rather, the Kois Buyers Group was seeking a nationwide contract. (*See* RX 2197-007

(Kois proposal to Schein)). Since the contracting decision was nationwide, any profitability analysis must also be nationwide.

1748. *Third*, Dr. Marshall did not do any analysis of *Schein's* profitability had it won the Kois contract. Rather, as with Dr. Marshall's nationwide analysis, Dr. Marshall only looked at Schein's losses among customers that switched to Burkhart, failing to account for both the cannibalization rate and reduced margins that Schein would have experienced had it won the contract. (Marshall, Tr. 3024-27).

1749. *Fourth*, Schein had substantially higher market shares nationwide than Burkhart had, even in Washington State. Increased market share typically implies that there is less benefit, or a greater loss, associated with supplying a buying group. (Marshall, Tr. 3028-29 [redacted]). As such, the Burkhart Washington State analysis is not probative of Schein's profits in supplying the Kois Buyers Group or any other buying group.

1750. In response, Dr. Marshall argued his analysis was probative because Burkhart and Schein "have essentially equivalent shares" in Washington. (Marshall, Tr. 2874). While Schein and Burkhart each had about [redacted] share in Washington State, that analysis is misleading. Schein's share nationwide was [redacted]. (CX 7101-142-43 (Figure 16)). Dr. Marshall's Washington State analysis assumes that Schein would act like a regional distributor with [redacted] market share in Washington only, when in reality Schein was a nationwide distributor with [redacted] market share. Dr. Marshall's Washington State analysis does not speak to the profitability of a distributor with nationwide shares similar to Schein's. (CX 7101-142-43 (Figure 16)).

1751. Similarly, while Dr. Marshall's Washington State profitability analysis states that Burkhart had a pre-contract share among Kois members of [redacted] (*see* CX 7101-142 (Figure 14)), that number is ***not*** Burkhart's share in the relevant market or the share Burkhart had among all potential Kois members. Rather, Dr. Marshall only looks at the subset of potential Kois members that actually purchased from Burkhart, thus inflating the pre-contract market shares. (Marshall, Tr. 3024). As such, the fact that Burkhart's [redacted] in the Washington State profitability analysis is [redacted] is not indicative of the profitability that a firm with an approximately 40% market share nationwide would experience. (CX 7101-142 (Figure 14); *see also* Marshall, Tr. 3030).

1752. *Fifth*, Dr. Marshall's Washington State profitability analysis, even if credited, only shows that it *may* be profitable to do business with a buying group, depending on a distributors' sales and shares. As such, the analysis is fully consistent with Schein's approach to buying groups, which is to evaluate them on a case-by-case basis.

F. Dr. Marshall Has Not Shown Anticompetitive Effects.

1753. Because the evidence does not establish that Respondents engaged in a conspiracy, there is no need to address anticompetitive effects. (*See* CoL 96).

1754. Nonetheless, Complaint Counsel has failed to establish that the alleged conduct had anticompetitive effects. Complaint Counsel relies on the testimony of its expert, Dr. Marshall for the conclusion that Respondents' conduct caused anticompetitive effects. (CC Pretrial Br. at 58).

1755. Dr. Marshall offers two bases for his opinion that Respondents conduct resulted in anticompetitive effects. *First*, Dr. Marshall cites to his pricing and profitability analyses of the

Smile Source and Kois buying groups. *Second*, he identifies a list of 36 additional buying groups (or 38 including Smile Source and the Kois Buyers Group) that "approached Schein, Patterson, and/***or*** Benco" and were "turned down" by at least one Respondent. (CX 7100-209-13 (emphasis added)).

1756. Neither the analysis of the Kois Buyers Group and Smile Source, nor the analysis of remaining 36 buying groups, supports a finding of anticompetitive effects in any relevant market.

1. *Dr. Marshall's Pricing and Profitability Analysis for Smile Source and the Kois Buyers Group Does Not Constitute Reliable Evidence of Anticompetitive Effects.*

1757. Dr. Marshall relies on his analysis of the Smile Source and Kois buying groups for his opinion that the Respondents' alleged conduct was "anticompetitive." (CX 7100-208). Specifically, he cites to (i) Smile Source's termination of Schein in 2012; (ii) Smile Source's decision to contract with Atlanta Dental in 2013; (iii) Smile Source's decision to contract with Schein in 2017; and (iv) Dr, Kois' decision to contract with Burkhart in 2014. None of these four pricing and profitability analyses establish anticompetitive effects, for at least the following three reasons.

1758. *First*, none of the pricing or profitability analyses account for the fees that buying group members must pay to the buying group. With respect to Smile Source, Dr. Marshall made no attempt to account for any portion of the royalties that Smile Source members pay to Smile Source that could be avoided if they chose to purchase from Schein outside of a buying group. (CX 7100-208).

1759. With respect to the Kois Buyers Group, Dr. Marshall's profitability analyses similarly report prices and profits without regard to the fee that Kois members must pay to the Kois group. (CX 7100-208). While Dr. Marshall states that Kois members saved money if they purchased through Burkhart, Dr. Marshall only included the fees after Mr. Kois reduced the membership fee from approximately $6,000 per year to $299 in October 2015. (CX 7100-062, 158; SF 924-29). Dr. Marshall did not find that Kois members would have benefited from joining the Kois Buyers Group based on the membership terms of the buying group at the time Dr. Kois chose to contract with Burkhart instead of Schein. (Marshall, Tr. 3025-27).

1760. *Second,* none of the pricing and profitability analyses show how prices or profitability were affected *in the relevant market* or even among all buying group members. Each analysis simply compares prices or profits for a single distributor before and after the buying group made a vendor selection. (Marshall, Tr. 3002-03; 3243-44). Such an analysis does not show how net prices to a single dentist may have changed (since dentists may purchase from more than one supplier), let alone how average prices among all relevant dentists within a specific geography or group have changed. (Marshall, Tr. 3136-37).

1761. *Third*, Dr. Marshall's pricing analysis does not control for other factors that may affect changes in his price indices, such as changes in mix of goods (to the extent not accounted for in his indices) or changes in the cost of goods sold.

2. ***Dr. Marshall's Listing of 36 Additional "Turned Down" Buying Groups Does Not Constitute Reliable Evidence of Anticompetitive Effects.***

1762. Dr. Marshall has not shown any anticompetitive effect as to the remaining 36 entities (other than the Kois Buyers Group and Smile Source) listed in paragraph 491 of his initial report. Dr. Marshall claimed that for each group, one or more of the Respondents considered it to be a buying group of independent dentists, and the group may have "approached Schein, Patterson, and/***or*** Benco, and were turned down" between 2011 and 2015. (CX 7100-209-13; Marshall, Tr. 2974-75, 2986, 2894-95, 2902). According to Dr. Marshall, this "almost certainly implies that buying groups were encumbered in terms of being able to get a supplier, and if they did, it would come at an elevated price from lack of bidding pressure." (CX 7100-209-13; Marshall, Tr. 2895). This listing of buying groups in paragraph 491 is irrelevant, inadmissible, and unpersuasive.

1763. As an initial matter, Complaint Counsel may not use an expert to establish facts. As such, Dr. Marshall's testimony does not establish that the entities listed in paragraph 491 are buying groups, that Respondents declined to do business with such entities, or that any refusals to do business with such entities were the result of a conspiracy. Without such evidence, there is no basis for concluding that Respondents conduct caused any anticompetitive effects with respect to these groups.[24]

1764. At least 23 groups out of Dr. Marshall's list of "38 buying groups" that were "turned down" by one or more Respondents are listed without a single Schein-related piece of evidence cited in support. (CX 7100-203-06, n.834, 837-850, 853-861, 866-869; Marshall, Tr. 3007).

1765. Indeed, eight groups on Dr. Marshall's list are not even buying groups at all according to Complaint Counsel. (*Compare* RX 2956-004 *and* RX 3087, *with* CX 7100-209-13).

1766. In the end, Dr. Marshall's competitive effects opinion assumes the conclusion. With respect to the 36 remaining groups allegedly turned down, Dr. Marshall assumes, but does not establish, that the groups' members suffered anticompetitive harm. He conducted no quantitative analysis for these groups; instead, he merely equated the act of turning down a buying group with an anticompetitive effect. (Marshall, Tr. 2987).

[24] Dr. Marshall cites this list solely for the purpose of demonstrating anticompetitive effects, and not to prove (i) the existence of a conspiracy; (ii) the existence of parallel conduct; (iii) any act against self-interest; or (iv) causation between the alleged agreement and impact on any buying group. The Court declines to consider Dr. Marshall's opinion for such purposes, as it goes beyond Dr. Marshall's expert report, and would require Dr. Marshall to impermissibly make factual findings concerning Respondents' conduct or dealings with such groups.

1767. Dr. Marshall's assumption that each of the "turned down" buying groups suffered anticompetitive effects is flawed for four reasons.

1768. *First*, Dr. Marshall assumes that, in the but-for world, the buying group would not have been turned down. But neither Dr. Marshall nor Complaint Counsel established that any of these 36 buying groups presented an attractive or profitable business opportunity for any Respondent. (Marshall, Tr. 2987 [redacted]).

1769. *Second*, Dr. Marshall has not shown that each of the 36 buying groups was unable to contract with another full-service or on-line distributor. Indeed, both Smile Source and the Kois Buyers Group – the only two buying groups Dr. Marshall analyzed – were able to negotiate contracts with at least one alternative supplier. To the extent that a buying group is able to contract with another distributor, the likelihood of anticompetitive effects would be eliminated.

1770. *Third*, because Dr. Marshall did no quantitative analysis with respect to any of these 36 groups, he has not shown that their *members* paid higher prices than they otherwise would have but for the alleged conspiracy. (Marshall, Tr. 3388 ("I haven't done a specific data analysis with regard to the other 36.")).

1771. *Fourth*, even if one were to assume that some members may not have received the same discounts as they would have had at least one Respondent contracted with the buying group, Dr. Marshall did no analysis to show that prices generally within any relevant market were higher than they would have been but for the alleged conduct.

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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2019, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed documents that is available for review by the parties and the adjudicator.

April 11, 2019

By: *\/s/* Owen T. Masters

Notice of Electronic Service

I hereby certify that on April 17, 2019, I filed an electronic copy of the foregoing Henry Schein's Proposed Findings of Fact, with:

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I hereby certify that on April 17, 2019, I served via E-Service an electronic copy of the foregoing Henry Schein's Proposed Findings of Fact, upon:

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