PUBLIC

ORIGINAL

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

In the Matter of	)
BENCO DENTAL SUPPLY CO., **a corporation,**	)
HENRY SCHEIN, INC., **a corporation, and**	)
PATTERSON COMPANIES, INC., **a corporation.**	)

DOCKET NO. 9379

RESPONDENT PATTERSON'S POST-HEARING BRIEF

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

JFFL – Respondents' Joint Proposed Findings of Fact and Conclusions of Law

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

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INTRODUCTION

The crucible of trial exposed Complaint Counsel's case against Patterson for what it was: a house of cards built on only ***two*** cards that were so weak the entire edifice crumbled under close examination.

Overwhelming evidence demonstrated that Patterson acted independently and pro-competitively before, during, and after the 2013–15 period. The company's historic focus was on the solo dentists and small practices that constitute the vast majority of the nation's customers for dental equipment and supplies. That segment was "Dental Market #1" in Patterson's strategic plans and the cornerstone of its business. Significant evidence showed that Patterson was "extremely aggressive," "vigorous," and "fierce" in winning that business from Benco, Schein, and its many other rivals, dentist-by-dentist, practice-by-practice. FOF ¶ 48. The company engaged in daily "hand-to-hand combat," with "a thousand on our side and a thousand on their side going at it in the field." FOF ¶ 42.

The evidence at trial included a single exhibit of reported price concessions that contained more than 8,000 pages and filled more than 50 boxes—enough to fill the "Marianas Trench" in the Court's words—that unequivocally proved Patterson's efforts to "grind [its] way to market share" and "steal" customers from Benco, Schein, and its many other rivals. FOF ¶ 40. Patterson Dental's President, Paul Guggenheim, testified the company literally provided hundreds and hundreds of blanket price class change discounts every single month—and in some months, more than 1,400—throughout 2013, 2014, and 2015, and innumerable price overrides with lower prices on specific purchase orders. FOF ¶ 27. As a Patterson rep aptly put it in describing the company's competitive efforts during the supposed conspiracy, "I just want to kick . . . Benco in the mouth and finally kick them out the door." FOF ¶ 33(g).

In Spring 2013, right smack at the start of the alleged conspiracy, Patterson also *expanded* its competitive efforts, as its board approved a confidential, expensive and risky plan to invade "Dental Market #2," the fastest-growing segment of the market, corporate Dental Services Organizations ("DSOs"). FOF ¶ 80. Corporate DSOs, often backed by private equity investments, grew rapidly following the 2008–09 economic downturn as they bought dental practices and centralized their purchasing and other back-office decisions. FOF ¶¶ 69–71. That meant they left the dentists free to treat their patients, while the corporate office made the business decisions, including commitments to buy centrally set volumes of dental equipment and supplies from their selected distributor. FOF ¶¶ 71–72. The corporate DSO segment had long been dominated by Schein (with 75-85%) and Benco (10-15%) when Patterson decided to add it to its core focus in 2013. FOF ¶ 73. Over the next few years, Patterson "widened its strike zone," and spent millions of dollars to "transform" its business, creating a new and centralized Special Markets division to tackle Schein and Benco in their corporate DSO stronghold. FOF ¶¶ 74, 77, 78, 79, 83. The "laser-focused," multi-year effort worked. FOF ¶ 84, 86, 96–100. By early 2015, Patterson Special Markets won its first big corporate DSO (Mortenson Dental) away from Schein. FOF ¶¶ 96, 97. In 2016, Patterson won the largest DSO in the country (Heartland Dental) from Schein. FOF ¶¶ 98, 99.

Patterson did not have a "Dental Market #3." FOF ¶ 80. "Buying groups" were never part of its core strategic focus, FOF ¶¶ 118–19, and the company was always skeptical that these loose affiliations of dentists, who could not commit their members to buy from any particular distributor or to buy in any particular volume, were worthwhile customers. FOF ¶¶ 119–20. Nonetheless, the company acted exactly the same before, during, and after the alleged 2013–15 conspiracy: it

evaluated each buying group opportunity one-by-one and made its own, independent decision about whether to seek that group's endorsement. FOF ¶¶ 118–20, 125–29, 171.

When it made sense to Patterson, it obtained buying group endorsement, as with OrthoSynetics and Jackson Health in 2014–15. FOF ¶¶ 174–75. But more often, it made no sense to Patterson, and Patterson decided not to pursue the opportunity either because the buying group itself was just a start-up idea, with no track record at all; or because its proposals were "outlandish" or "incoherent," like the veterinarian who left a cold-call voicemail expressing interest in setting up a dental buying group for humans[1]; or because the buying group refused to commit that its members would buy anything at all from Patterson, as was almost always the case[2]; or because its members were already Patterson customers (and Patterson would thus simply be cannibalizing its own business); or because—as was often the case—it demanded a "vig," a "kickback," a "taste." FOF ¶¶ 122–23. The evidence at trial showed that Patterson skeptically evaluated each buying group and made its own decision long *before* it allegedly joined the Benco-Schein conspiracy in February 2013, *during* the purported conspiracy period, and long *after* Complaint Counsel concedes the alleged conspiracy ended in April 2015.

Every single witness at trial flatly denied Complaint Counsel's claim that Patterson agreed with Benco or Schein to refuse to sell or discount to buying groups. All four Patterson witnesses testified to the company's independent decision-making with each and every buying group it evaluated, and together those witnesses provided dozens and dozens of sworn denials that they agreed with anyone from Benco or Schein about any buying group: Paul Guggenheim ("I have never committed that to anybody." "No." "I do not." "No." "No." "No." "Absolutely not." "Nope."

[1] FOF ¶¶ 168, 171.

[2] FOF ¶¶ 114–15.

"Absolutely not." "No." "Absolutely not." "No.")[3]; David Misiak ("Absolutely not." "I do not." "No." "No." "I have not." "Absolutely not.")[4]; Neal McFadden ("We do not have a signed agreement." "There was never a signed agreement." "We never had any agreement, any signed agreement, that we would not work with GPOs." "I did not." "No." "No.")[5]; Tim Rogan ("No." "No." "No." "No." "Absolutely not." "No." "No.").[6]

The nine Benco and Schein witnesses corroborated Patterson's "fierce" independent and competitive conduct during the alleged conspiracy period, adding several dozen additional sworn denials that they ever discussed or agreed-upon any buying group activities with anyone from Patterson. FOF ¶¶ 192, 193, 194, 200, 203, 204, 206, 208, 210. Indeed, the sum total of evidence of Patterson–Schein communications about buying groups was, in fact, nothing: the complete and total "absence of evidence," according to Schein's chief executive officer; two utterly blank pieces of paper, one depicting the complete lack of documentary evidence and one depicting the total lack of testimonial evidence. FOF ¶ 331.

In addition to these myriad denials and this absence of evidence, a number of witnesses testified that Complaint Counsel's sworn-under-penalty-of-perjury "conspiracy" evidence—dozens of emails, texts, and phone records that were innocuous on their face, and concerned topics like Packers-Vikings and Badgers-Gophers games, professional golf tournament results, charitable disaster relief efforts, sexual harassment policies, kids' lacrosse games and the passing of industry colleagues—was simply "false," "a lie," "shock[ing]," "not true," "not a true statement." FOF ¶ 184.

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[3] FOF ¶¶ 195 (Guggenheim, Tr. 1707; 1853; 1862; 1870; 1872, *respectively*).

[4] FOF ¶¶ 194 (Misiak, Tr. 1502; 1505; 1508-09, *respectively*).

[5] FOF ¶¶ 201 (McFadden, Tr. 2737-2738; 2740; 2742; 2781, *respectively*).

[6] FOF ¶¶ 202 (Rogan, Tr. 3571-3572; 3575; 3651-3652, *respectively*).

In the face of this mountain of evidence of Patterson's independent and pro-competitive decisions, these numerous sworn denials that Patterson agreed not to sell or discount to buying groups, and these trumped-up and downright "false" documents, Complaint Counsel offered a grand total of ***two*** communications between Benco and Patterson regarding buying groups (and, again, zero—the complete "absence of evidence"—between Patterson and Schein). The first was an out-of-the-blue email from Benco's Chuck Cohen's to Patterson's Paul Guggenheim dated February 8, 2013. FOF ¶ 267. Cohen forwarded Guggenheim an email blast that a dentist in Albuquerque, New Mexico, sent to a host of dental equipment and supplies vendors about an upcoming meeting at Patterson's offices to discuss an idea he and two fellow dentists had of starting a buying group they called the New Mexico Dental Cooperative ("NMDC"). FOF ¶ 267. Cohen also disclosed that Benco had a pre-existing policy that Benco had set, without any input from Patterson, obviously, that it did not work with buying groups. FOF ¶ 268.

Cohen's February 8, 2013 email did not ask Guggenheim to do anything, let alone commit to anything, and Cohen testified he did not expect Guggenheim to respond. Guggenheim testified he did not know anything about the NMDC, but simply and quickly responded in a "10-second email," "Thanks for the heads up. I'll investigate the situation. We feel the same about these." FOF ¶ 273. Guggenheim did not investigate the situation, however; he never talked to anyone at Patterson's Albuquerque branch about it, and never got back to Cohen. FOF ¶ 275. Both men testified at trial that the email exchange contained no secret code, no invisible "lemon juice" ink, and was not an agreement to do anything. FOF ¶¶ 269, 274, 304. Guggenheim specifically testified that he gave his 10-second email very little thought: his throwaway comment, "We feel the same way about these," was not a commitment of any kind. FOF ¶¶ 272, 274, 276.

At trial, Complaint Counsel's own expert witness, Dr. Robert Marshall, conceded that a "feeling" was ***not*** a "commitment" or an "agreement." "That's not the same word. . . . The word 'feel' and the word 'commit' have different definitions." FOF ¶ 681. He also conceded that Guggenheim's 10-second throwaway email was not credibly interpreted as a blueprint for a conspiracy; indeed, Dr. Marshall wrote a book saying it was a "tragedy" when companies were accused of participating in cartels based on "one hour of conversation over lunch" because "actual collusion requires planning, investments in coordination, clear thinking and hard work"—all of which took much more time and effort than a one-hour lunch, let alone a 10-second email. FOF ¶ 690.

Finally, Dr. Marshall conceded the record contained evidence—which he had ignored—that Patterson's Albuquerque branch manager decided not to proceed with the New Mexico Dental Cooperative on his own, with no input from Mr. Guggenheim and no knowledge of Chuck Cohen's email. "I don't have direct evidence of a transmission from Mr. Guggenheim to them." FOF ¶¶ 682–84. "I don't have direct or indirect evidence that . . . that was directly communicated to people on the ground in New Mexico." FOF ¶¶ 682–84. Instead, Dr. Marshall testified, he simply fabricated it out of thin air: "***I would presume***" it occurred, despite the complete absence of evidence in the record. It was simply a presumption that he made up in his own head: "I have nothing to point to that would say Mr. Guggenheim made a transmission directly to the managers in New Mexico, if that's what you're asking. I don't have that." FOF ¶¶ 682–84. This Court explained during trial that, "when it comes to experts, if they are incorrect in the facts that they rely on, that can be a fatal problem." FOF ¶ 680 (Judge Chappell, Tr. 5376). Dr. Marshall's made-up fact that Paul Guggenheim had "a follow-up with people in his organization" is a fatal problem. FOF ¶ 679 (Marshall, Tr. 3310).

The only remaining inter-firm communication involving Patterson that Complaint Counsel introduced, and Dr. Marshall relied upon, was similarly not evidence of any agreement or commitment to refuse to sell or discount to buying groups, according to the author and its recipient. FOF ¶ 685. Instead, it was an email Paul Guggenheim sent to Chuck Cohen in June 2013, months ***after*** Patterson had decided on its own not to bid for a newly-formed entity called Atlantic Dental Care ("ADC"), weeks ***after*** Benco decided to bid for ADC, weeks ***after*** Schein decided to bid for ADC, and weeks ***after*** ADC awarded its endorsement to Benco. FOF ¶ 685.

Dr. Marshall conceded the email was chronologically ***after*** all those events, and obviously did not affect each company's decision, or ADC's award of its endorsement to Benco, at all. FOF ¶ 685. He also conceded that the facts actually proved that Benco and Patterson viewed ADC in very different ways (and, thus, had no agreement): Patterson did not bid for ADC, but Benco did, and won; Patterson thought ADC was a buying group, but Benco thought it was a corporate DSO, not a buying group. FOF ¶¶ 302, 309, 311.

Dr. Marshall cannot salvage Complaint Counsel's case by opining that Patterson somehow acted "contrary to its economic self-interest" in his view. That opinion was the same kind of junk science that led a district court to exclude his opinion, under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 51 (1993), in the only other case he testified in court, for the government, in an antitrust case. FOF ¶ 752. Here, as there, his "contrary to self-interest" opinion was utterly unreliable and did not fit the facts of the case.

First, he conceded his opinion was not based on a single academic, peer-reviewed study endorsing his methodology. FOF ¶ 741. *Second*, he did not study the only buying groups that were the subject of any Patterson communication with Benco (NMDC and ADC) and, instead, studied two buying groups that no one from Patterson ever discussed with anyone from Benco or

Schein (Kois and Smile Source). FOF ¶¶ 689, 714–15. *Third*, he conceded that Patterson had its own legitimate and independent reasons for not doing business with Kois, a start-up with no track record and an unknown and inexperienced representative (qadeerahmed@hotmail.com) who grossly over-puffed its purported membership and flat-out lied about his relationships with the four leading dental equipment manufacturers when they did not know him or Kois at all, and with Smile Source, a nascent buying group whose few dozen members were already Patterson customers and thus could only cannibalize sales it already had and could make no commitment to greater volume—or, more precisely, any volume at all. FOF ¶ 729.

Fourth, Dr. Marshall conceded that Kois and Smile Source were not representative of any other buying group in the country: "There's no statistical representation of that." FOF ¶¶ 717–20. Instead, they were "profoundly different," "NOT a standard buying group," and "unique." FOF ¶¶ 106, 718. *Fifth*, Dr. Marshall conceded that two of his five "case studies" of Kois and Smile Source could not on their face indicate anything about Patterson's conduct *during* the alleged conspiracy because those studies concerned events *before* Patterson allegedly joined the conspiracy in February 2013 and *after* Complaint Counsel conceded the conspiracy ended in April 2015. FOF ¶¶ 742–44. *Sixth*, Dr. Marshall's remaining three case studies were based on only the tiniest fraction of a fraction of data. He only studied the purchases of roughly .003 of the 200,000 dentists in the country—and for that tiniest of fractions, he found that Patterson, a company with more than $5 billion in revenue and $2.5 billion in gross profits, supposedly acted contrary to its self-interest because it missed out on an infinitesimally small additional profit—somewhere in the range of .00008 to .0004 of its annual gross profit—if it had done business with Kois or Smile Source. FOF ¶¶ 735–38. Of course, not a single case in the 100-plus-year history of the antitrust laws has found a conspiracy on such flimsy data. On the contrary, as the Supreme Court has

explained, "Firms do not expand without limit and none of them enters every market that an outsider might regard as profitable, or even a small portion of such markets," and the Justice Department has noted that "[d]rawing inferences from what a business fails to do is a problematic exercise. . . . Even the most vigorous rivals will end up not competing in some respects."[7]

Accordingly, this Court must rule in Patterson's favor and against Complaint Counsel's case.

THE FACT RECORD

Patterson Dental has been distributing dental equipment (like X-ray machines) and consumable supplies (like gloves) for over 140 years. FOF ¶ 1. Its parent company, Patterson Companies, trades publicly on the NASDAQ (symbol, PDCO), and made about $3.6 billion in gross profit between fiscal years 2013 and 2015. FOF ¶ 2. Patterson Dental is a full-service distributor, meaning that it offers a full complement of products and services to its customers, the majority of whom are independent, solo practices. FOF ¶¶ 6, 65–67. Patterson's business is "extremely high-touch," and it has "personal relationship[s] with most all of [its] clients." FOF ¶ 8. To build and keep those personal relationships, Patterson employs a small army of sales and service reps and equipment specialists in local branches all over the country in a highly decentralized structure. FOF ¶ 7. Patterson's local branches operate autonomously, with local reps having unfettered decision-making authority over sales and pricing. FOF ¶ 9. These reps employ a variety of tools to win business from Patterson's competitors, including its archrival, Schein, and their smaller competitor, Benco.

[7] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 (2007) (citing Areeda & Hovenkamp ¶ 307d, at 155 (Supp. 2006)); *Brief for the United States as Amicus Curiae Supporting Petitioners* at 21, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (No. 05-1126), 2006 WL 2482696, at *21.

I. Patterson Competed Fiercely With Schein And Benco For Dentists' Business At All Times.

The record is overloaded with evidence, "enough to fill the Marianas Trench," documenting Patterson's daily competition with Schein and Benco during their alleged collusion. FOF ¶ 30. Not only could Patterson's local reps discount any product to down to cost at the point of sale without approval from management, they could offer a customer a permanent, blanket discount by seeking to lower their price class from one discount level to another, thereby lowering the customer's price for all future purchases. FOF ¶¶ 12–13. These price class change requests were "constant," with hundreds or thousands made each month, and they were granted almost automatically. FOF ¶¶ 20, 23, 26.

Fifty-four boxes of price class change forms show that, throughout the time Patterson was supposedly colluding with Benco and Schein, its reps were regularly getting approvals to offer blanket concessions to win business away from them:

February 15, 2013:	"wrestled back from Schein."
February 18, 2013:	"Competing with Schein to win."
February 27, 2013:	"switch[ing] all her business [from Benco]."
April 24, 2013:	"match[ed] Schein's discount to gain a share of the business."
May 28, 2013:	"aggressive discount in an attempt to get their business [from Schein and Benco]."
June 5, 2013:	"a new win from Schein."
June 19, 2013:	"I just want to kick . . . Benco in the mouth with and finally kick them out the door."
September 17, 2013:	"flipped [a] 30-year Schein customer."
October 16, 2013:	"battling Benco"
January 16, 2014:	"going to switch 100% to Schein, but we won."
February 12, 2014:	"Schein takeaway."

February 28, 2014:	"price class change to take from Schein."
April 7, 2014:	"former Schein customer, converted to 100% Patterson."
April 16, 2014:	"$80,000-a-year Schein customer that converted to Patterson."
April 24, 2014:	"prevent Dr. Roddy from switching to Benco and to grow his Patterson Business."
April 30, 2014:	"to price compete with Benco and gain more of [the account's] business."
June 2, 2014:	"moving much of their ordering away from Schein."
June 13, 2014:	"ALL take from Schein."
August 26, 2014:	"Attached is a group practice that we have a chance to get back. We had all the business prior to 2011, but Schein has had it since then"
August 28, 2014:	"customer switching business from Schein to Patterson."
October 8, 2014:	"multi-location practice won from Schein."
December 5, 2014:	"converted from Schein."
December 18, 2014:	"Gunna try and steal this one from my friend Greg Jones at Benco!"
February 3, 2015:	"a new Advantage account pickup from Schein."
March 2, 2015:	"trying to move this quickly (as usual) as not to give Benco the chance to rebut[] if they get wind of the change."[8]

Complaint Counsel has noted in prior briefing that no price class change forms show Patterson competing with Schein and Benco over buying groups. FOF ¶ 35. That's because buying groups do not actually "buy" anything. The member dentists do the buying on their own, at their discretion. FOF ¶¶ 483. As Schein's Tim Sullivan explained,

> Q. . . . [B]uying groups don't actually buy dental supplies, do they?
>
> A. They do not.

[8] FOF ¶ 33.

Q. It's kind of a misnomer to call them buying groups, right?

A. I hadn't thought of it that way. It's a -- that's correct.

Q. They kind of negotiate, but the member dentists are all independently owned, right?

A. That's correct.

Q. So they're the ones who actually buy, the private practice dentists. Is that fair?

A. That's fair."[9]

Patterson therefore competed fiercely for individual dentist members of buying groups.

August 29, 2013: [redacted] FOF ¶¶ 37(a).

December 1, 2014: [redacted] FOF ¶¶ 37(b).

August 1, 2015: [redacted] FOF ¶¶ 37(c).

January 14, 2016: [redacted] FOF ¶¶ 37(d).

January 22, 2016: "This is a $70-$80k incremental opportunity to recapture business we have lost to Darby via Synergy Group." FOF ¶¶ 37(e).

March 4, 2016: "Ginger has been working with Special Markets on getting Narducci back." FOF ¶¶ 37(f).

March 15, 2016: [redacted] FOF ¶¶ 37(g).

May 4, 2016: "Dr. Chace was buying from FDA Supplies but Chip sold him on the Patterson value-model." FOF ¶¶ 37(h).

[9] FOF ¶ 36.

May 11, 2016: [redacted] FOF ¶¶ 37(i).

[redacted] Neal McFadden testified, [redacted] FOF ¶ 40. So, to "grind [its] way to gain market share," Patterson "competed hardcore against Henry Schein and Benco on a daily basis." FOF ¶ 40. Guggenheim's successor, David Misiak, saw competition with Benco and Schein as "hand-to-hand combat." FOF ¶ 42. Tim Rogan, Vice President of Marketing and Merchandise, testified that "every single day we have a thousand people out there going head to head with these two companies." FOF ¶ 44. Schein and Benco witnesses said the same about Patterson. On February 22, 2013—just two weeks after Benco and Patterson allegedly formed an agreement together—Benco's Chuck Cohen wrote about Patterson: "We need Patterson to have a LONG, SLOW DECLINE." FOF ¶ 48. Cohen testified that he was getting reports of Benco reps fighting for business with Patterson throughout 2013, 2014, and 2015. FOF ¶ 48. Schein witnesses, meanwhile, described Patterson as a "nemesis" that competed fiercely at all times, including over Schein's tier of customers that included buying groups. FOF ¶ 59. "[Patterson was] the largest and they were the ones we worried about," Schein's Kathleen Titus testified. FOF ¶ 59.

II. Patterson Invaded Schein's And Benco's Corporate DSO Stronghold During The Alleged Conspiracy.

Patterson's bread-and-butter customer has always been the solo dental practitioner. FOF ¶¶ 65–67 (RX0046 at 17–20 (November 2012 Patterson Strategic Plan defining only two dental markets "private practice" and "large group"); (CX3068 at 3 (February 2012 Patterson Strategic Plan: "Our current customer base [is] comprise[d] primarily of sole practitioners.")). And Patterson's strategy of focusing exclusively on solo shops served it well until the 2008–09 Financial Crisis. FOF ¶¶ 70–72. As patient visits fell, solo dentists pared their supply and

equipment orders. FOF ¶¶ 70–71. Market pressures drove them in increasing numbers to the security of corporate practices known as Dental Service Organizations or DSOs. FOF ¶¶ 71–72. These DSOs are corporations that own the dental practices and do all the buying for the individual dentists. FOF ¶ 69. DSOs' centralized, high-volume ordering did not fit well with Patterson's decentralized sales structure. FOF ¶ 69. Patterson therefore "essentially ignored" DSOs as Schein and Benco cornered the segment. FOF ¶ 68.

In the late summer of 2012, Patterson hired an experienced consulting firm, Strategic Business Solutions, LLC, to evaluate and make recommendations on the DSO opportunity. FOF ¶ 74. The lead consultant, Michelle Perpich, painstakingly analyzed industry data, purchasing trends, company records, and public information about Patterson's rivals, and interviewed more than a dozen executives from Patterson, the leading DSOs and their private equity owners, and additional industry experts. FOF ¶ 75. In Fall 2012, she provided Patterson's management with her 99-page report and recommendation that Patterson could win some of the DSO market away from Schein and Benco. FOF ¶ 76. But, to get there, Patterson would have to invest $2.2 million initially to build out a "Special Markets" sales and service organization—along with the necessary IT infrastructure to handle the centralized purchasing and other demands of corporate DSOs. FOF ¶ 77.

Patterson's executive team obtained the approval of its board of directors to make this significant investment in early Spring 2013. FOF ¶ 78. Neal McFadden, the company's Southeast regional manager, moved to the corporate headquarters outside Minneapolis in June 2013 to lead the newly-formed "Patterson Special Markets" organization and began to hire and train a sales and support team. FOF ¶ 84. Patterson Special Markets launched in September 2013 with a directive

to compete for the most promising corporate DSOs: ones with at least 15 practices and more than $600k in annual purchasing. FOF ¶¶ 79, 86.

Patterson's then-president, Paul Guggenheim, directed the new head of Special Markets, Neal McFadden, that he needed to be "laser focused" on this class of customer—the ones Patterson's executives had committed to pursue before Patterson's board, the ones Patterson needed to attract to justify the huge, risky investment it had made. FOF ¶ 86. "Paul was putting a lot of pressure on us to get some sales because he had put his neck out on the line with the board of directors to build this organization," McFadden testified. FOF ¶ 88. "[Guggenheim] would always tell me to stay focused on the dental service organizations, building out our special markets, trying to get a win and get some revenue to get the pressure off of all of us," he said. FOF ¶ 88.

Eventually Patterson's Special Markets investment started paying off, as it won one large account after another from Schein. In January 2015, Patterson won Mortenson, a large DSO with about $5 million in annual purchases, away from Schein. FOF ¶¶ 96–97. And then in late 2016, Patterson won Heartland Dental from Schein. FOF ¶¶ 98–99. Heartland is the largest DSO in the country, with about $30 million in annual purchases. FOF ¶¶ 98–99.

III. Unlike Patterson *Special Markets*, Patterson *Dental* Met With, Evaluated, And Made Its Own Independent Decisions On Buying Groups As They Came.

Unlike corporate DSOs, Patterson did not view loosely-affiliated "buying groups" as attractive opportunities. FOF ¶¶ 119–124 (Misiak, Tr. 1469 ("Q. Were you focused on buying groups or GPOs before 2012? A. We were not."); Misiak, Tr. 1493 ("Q. So back in 2012, the spring of 2012, group purchasing organizations, buying groups, were not part of your core strategy at Patterson Dental? A. They were not.")). There was no "number three" business segment for Patterson (besides private practice and DSOs), Misiak testified. FOF ¶ 80 (Misiak, Tr. 1468–69).

Buying groups, unlike corporate DSOs, typically do not create a separate corporate entity with common ownership over individual practices; each member dentist continues to own their own practice and do their own purchasing. FOF ¶ 112. Buying groups therefore do not purchase anything, commit to purchasing anything, or commit their members to purchase anything. FOF ¶¶ 113–14. Nor do their members make any voluntary purchases centrally—all purchasing decisions are still made by the local dentists who can buy from any distributor they like. FOF ¶¶ 113–14. Still, buying groups ask distributors like Patterson to provide their members with discounts based on the possibility that those members *might* purchase enough volume of (discounted) supplies and equipment from the distributor to justify the discount. FOF ¶ 114. In exchange, many buying groups seek what they euphemistically call a "commission" but in reality is a "vig" or "kickback," which Patterson felt was unethical. FOF ¶ 122–23.

Still, Patterson evaluated every group on its merits and occasionally said yes to what it thought were buying groups, such as with Jackson Health and OrthoSynetics, or its 2017 bid for Smile Source, which by then appeared to be "the most formulated of buying groups," with more than 500 members. FOF ¶¶ 161, 174–75. Patterson's Neal McFadden repeatedly wrote that, while Special Markets would not be working with a buying group, Patterson's local branch could do as it liked. He wrote, in September 2014, "This is a buying group. *So, if the branch wants to pay the $5000 and attend they [are] more than welcome to*. But we will not be attending *as a special markets group*." FOF ¶¶ 132 (McFadden, Tr. 2819–20 ("Q. When you got this request from Brandy, who you didn't know, asking for money at a sponsorship event for Tralongo Management, did you consider that a great opportunity for your special markets DSO-focused organization you were building? A. No, it wasn't. Q. Is this another one of the outlandish buying group requests

that came in? A. Yes. So I just turned right around and told the branch, if they want to do it, they're more than happy to do it, but I'm not going to do it.")).

Then McFadden wrote in 2015, "*If the local branch wants to do something here then that's fine by me*, but I cannot work with our manufacturers on securing special pricing for a 'buying group' that has no ownership in their clients." FOF ¶ 133. Patterson's Maine branch manager responded, "Thanks for the insight Neal—*we will handle at the Branch level*." FOF ¶ 133. Also, in May 2015, an Operations Specialist in Patterson Special Markets informed a Patterson account specialist that, at the time, Special Markets was "not working directly with GPOs. The local facilities are working with the branches," also explaining that "we *continue* to allow the branches to work with these accounts." FOF ¶ 133. Finally, when in 2014 a local branch informed Patterson's Tim Rogan that he planned to continue working with Jackson Health, Rogan responded "This is a GPO. They are taking 2% off the top. This is a very slippery slope." FOF ¶ 175. The local manager went ahead and signed the agreement anyway. FOF ¶ 175 (RX0271 at 1 ("I sent it up to corporate to read before I sign on behalf of the company . . . that's all.")).

Long before Patterson allegedly entered a conspiracy in February 2013, it was evaluating and rejecting buying groups. Neal McFadden testified that, in his 21 years at Patterson, he could not recall it dealing with a buying group. FOF ¶ 201. And David Misiak explained that buying groups' inability to commit to purchasing had never made them attractive in his 22-year career. FOF ¶ 121 (Misiak, Tr. 1469 ("A. Yeah. We did not see it as a well-organized space that could deliver the volume commitments. Q. And that goes back years before this? A. My entire career at Patterson. Q. So going back 22 years. A. Correct.")).

Their testimony is corroborated by contemporaneous, pre-conspiracy documents. Misiak chose not to bid on an entity in 2009 because "it's a GPO." FOF ¶ 119. Misiak advised McFadden

in 2012, "Your response is right," when McFadden wrote that he planned to say "thanks but no thanks" to a "buying group." FOF ¶ 410. Patterson's Shelley Beckler—not alleged to be part of the alleged conspiracy—wrote in December 2013, "In the past we have **not** done business with GPO's [sic] just because we don't have the resources or systems to manage them properly." FOF ¶¶ 119, 128 (bolding in original).

To be sure, during the alleged conspiracy period, Patterson evaluated and turned down a number of buying groups. But in each case Patterson had its reasons. In July 2013, Patterson turned down Nexus Dentistry, a group that claimed to be "looking for a supplier that could serve our vast client base," but that in fact had eight practices signed up. FOF ¶ 171 (CX3021 at 1; McFadden, Tr. 2809 ("Tell me what your reaction was after talking with this guy. A. Yeah. I sent Paul an e-mail basically summarizing that he currently has eight practices signed on in California, so he doesn't have a vast number, as he stated. He's not a DSO. As Scott said, looks like he's a consultant and he's forming a merchandise buying group. But when I asked him and probed that, he was very elusive."). In February 2014, it turned down Catapult because it wanted a "vig," which Patterson considered unethical. FOF ¶¶ 490–92. Also in February 2014, it turned down NAIDS because its founder, Dr. George Lennon, was looking for a "vig" and had misrepresented his group as a Community Health Center. FOF ¶¶ 169–70. In March 2014, Patterson turned down United Orthodontic Buying Group because the group wanted to buy only one item, one x-ray machine. FOF ¶ 171 (McFadden, Tr. 2813 ("Q. Was this one of the outlandish things that got dropped in your lap with regard to a buying group? A. It's one. This was just one item, one x-ray. That's not what I was built for. We were trying to go after millions of dollars of merchandise business, not one rogue x-ray."; RX0227 at 1). In April 2014, it turned down the Dental Purchasing Group because the doctor who reached out to Patterson was a veterinarian. FOF ¶¶ 168, 171. In

September 2014, it turned down Dr. Steven Sebastian because "he doesn't even have a company and he doesn't even have any clients, and yet he's wanting us to open him up, so it doesn't make any sense." FOF ¶ 171.

Likewise, after the alleged April 2015 end of the conspiracy, Patterson continued evaluating and saying no thanks to buying groups except Smile Source, which is a franchise DSO, not a buying group, and which by 2017 had transformed its business and proven its ability to drive purchasing volume. FOF ¶¶ 74, 77, 78, 79, 83. Patterson wrote about Dentistry Unchained, in *July* 2015, that a "GPO arrangement" can be a "slippery slope." FOF ¶ 175. Then, in January *2016*, nearly a year after the alleged conspiracy should have been over, a Patterson employee wrote that he had met with a Dentistry Unchained representative and that he had "again explained to her very nicely that *we are not going to participate in a GPO-type program at this point.*" FOF ¶ 351. Two months later, Patterson wrote about another buying group, "This is the Georgia dental Association GPO. FYI I believe we're gonna pass on this one." FOF ¶ 556. All of this is indistinguishable from Patterson's conduct during the alleged conspiracy.

Complaint Counsel listed in sworn discovery responses every buying group that, they allege, either "continued to seek supply contracts with Patterson in 2013" or may have bought from Patterson if not for the alleged conspiracy. The list included the Kois Buyers Group, Smile Source, the New Mexico Dental Cooperative, the Catapult Group, Dental Gator, Dental Cooperative (Nevada and Utah), Dentistry Unchained, Direct Dental, Florida Dental Society, Hampton Roads Dental Partners, Integrity Dental Buyers' Group, Klear Impakt, Schulman Group, Steadfast Medical, Synergy Dental Partners, The Dentists' Service Co., Unified Smiles, and UOBG. FOF ¶¶ 464, 482. The record did not support this allegation.

It contained no evidence that Patterson interacted at all during the alleged conspiracy period with the Dental Cooperative of Utah, Direct Dental, Hampton Roads Dental Partners, or with Unified Smiles. FOF ¶¶ 477, 522, 536–38, 658. It also contained no evidence that Patterson interacted during the alleged conspiracy with Synergy Dental Partners, the Florida Dental Association,[10] and Steadfast.[11] FOF ¶¶ 527–31, 634, 641. Patterson's only interaction with all three groups, including any declination to work with the groups, was *before* the alleged conspiracy. FOF ¶¶ 527–31, 636–38, 642.

The record also contained no evidence that Patterson interacted with Dentistry Unchained, UOBG, The Dentists Service Company ("TDSC"), or the Integrity Dental Buyers' Group during its alleged participation in a conspiracy. FOF ¶¶ 513, 516, 548, 663. Dentistry Unchained did not even exist until April 2015, when the alleged conspiracy allegedly ended. FOF ¶¶ 513–14. No documents connect Patterson with UOBG until May 2015, when Neal McFadden wrote internally, "We *currently* have little appetite to deal with the buying groups as we feel they compete directly with the branches and reps. With that being said, I will follow Dave Misiak's lead here. We have said no may times in order to remain pure in our intent and consistent across the company. *If the local branch wants to do something here that's fine* by me . . . ." FOF ¶¶ 668. It is unclear when TDSC came into existence, but the first document connecting it with Patterson is from November 15, 2015, about *eight months after* the alleged conspiracy allegedly ended. FOF ¶¶ 648–50. Finally, the Integrity Dental Buyers' Group did not exist until at least September 2015, FOF ¶ 549, and in *March 2016,* about a year after the alleged conspiracy allegedly ended, Patterson's Neal

[10] There is no entity in the record called the "Florida Dental Society." FOF ¶ 525.

[11] The record shows that Patterson worked with Steadfast from at least 2004 to February 2013 (the end of the spreadsheet), and there is no evidence Patterson stopped after February 2013. FOF ¶¶ 636–38.

McFadden did internally forward an Integrity Dental Buyers' Group request for bids reminder, writing: "This is the Georgia dental Association GPO. FYI I believe we're gonna pass on this one." FOF ¶¶ 556.

That leaves the New Mexico Dental Cooperative ("NMDC"), Smile Source, the Catapult Group, Dental Gator, and Kois. As explained above, the evidence was that Patterson was already pulling back from NMDC before its alleged February 8, 2013 entry in to the alleged conspiracy, and the only evidence was that Patterson's local New Mexico branch made the cancellation decision on its own, without consulting (over the weekend) with Paul Guggenheim or executives in Minnesota. FOF ¶¶ 289–93. There is no evidence that the February 8, 2013 email had an effect on Patterson's branch-level independent decision with respect to NMDC. FOF ¶ 278. Also, further mooting the issue, NMDC did not consider itself a buying group. FOF ¶ 282.

As to Smile Source, both Smile Source witnesses testified at trial that Smile Source was not a buying group. FOF ¶¶ 465. It had its own office, board room, and management team of a hundred employees. FOF ¶ 162. Still, in early 2013, Smile Source had only 58 signed members. FOF ¶ 143. So Patterson decided, after meeting with Smile Source, to keep it "on the 'idea board'" for the future but decline for the time being. FOF ¶ 150. Patterson also looked up listed Smile Source members and all were already Patterson customers, meaning that Patterson risked cannibalizing its own members by further discounting from prices they were already willingly paying Patterson. FOF ¶ 699 (Rogan, Tr. 3547–48) ("Cannibalization, obviously if you are going to -- it's a perfect example on Smile Source. If we were going to bring them on with these individual discounts and let's say their members were -- and we did, we ran the math -- and I believe their members were already spending $3 million with Patterson. So right off the bat, if

they don't bring any other customers to us and we give those customers a better deal, we have just slashed a bunch of our prices. We've cannibalized some of our business.").

Benco had the same reaction to Smile Source as Patterson after meeting in February 2014 (the middle of the alleged agreement to boycott "buying groups" including Smile Source), writing contemporaneously, [redacted] FOF ¶ 474. Schein, meanwhile, worked with Smile Source up until January 2012, when *Smile Source terminated Schein*. FOF ¶ 469. In its years without a national, full service dealer, Smile Source thrived, growing to more than 500 franchises nationwide. FOF ¶ 158. Schein lobbied to win its business back for years, telling Smile Source "we absolutely would like to discuss further" *on the very same day* Patterson declined to bid on Smile Source (November 20, 2013), and eventually winning Smile Source's business in 2017, over Patterson. FOF ¶ 471.

Dental Gator, meanwhile, was a marketing scheme of MB2—a Texas DSO looking to acquire more practices. FOF ¶ 501. Patterson responded to MB2's 2014 request for proposal, as did Schein and Benco, and MB2 chose Schein. FOF ¶ 502. Still, Patterson continued to pursue MB2's business and works with MB2 today. FOF ¶¶ 505–06. There is no evidence that Dental Gator approached Patterson or that Patterson refused to deal with Dental Gator during the alleged conspiracy. FOF ¶ 510, 512. Also, though MB2 considers Dental Gator a "buying group," it distinguishes the term from a "buying club," in that the latter is characterized solely by discounts whereas Dental Gator "tried to do more than that," such as providing legal, compliance, marketing, dental laboratories, postage, staples, and other services and benefits to its members. FOF ¶ 508. Thus, it is unclear whether Dental Gator fits Complaint Counsel's definition of a "buying group." FOF ¶ 509.

Finally, Patterson did not work with the Kois Buyers Group after confirming that its appointed representative, Qadeer Ahmed, was lying. FOF ¶¶ 578–85. Ahmed approached Patterson claiming to have verbal commitments from major manufacturers and more than a thousand members in his group, which turned out to be blatant lies. FOF ¶¶ 578–85, 589, 591. Patterson was suspicious, so it called the manufacturers (who were long-time Patterson suppliers), and none had ever heard of Ahmed; indeed, they confirmed that what Ahmed had represented to Patterson was untrue. FOF ¶ 172.[12] Ahmed never testified in this case.

IV. Every Fact Witness Flatly Denied That Patterson Colluded With Schein Or Benco.

Not one witness testified that they had any knowledge of Patterson participating in a conspiracy, even as Complaint Counsel claimed in sworn discovery responses that *40* individuals had such knowledge. FOF ¶¶ 183, 188. Rather, everyone who testified flatly denied any knowledge of Patterson participating in a conspiracy. FOF ¶¶ 184, 190–211.[13] Many, like Schein's Tim Sullivan, Joe Cavaretta, and Kathleen Titus went further and said that Complaint Counsel's sworn interrogatory responses about them were flat-out false. FOF ¶ 184, 204. Tim Sullivan testified that he was "shocked to see" the government would make such claims in sworn interrogatory responses. FOF ¶ 258. Third-party witnesses likewise confirmed that Complaint

[12] Schein and Benco were also treated to a series of lies from Ahmed. He wrote to Schein that his proposal "says 'give us the same deal every other distributor has already offered in writing and we'll set them aside and work exclusively with you.'" FOF ¶ 596. He also wrote to Schein, "We have offers on the table and paid members expecting a result." FOF ¶ 601. Ahmed also told Benco's Chuck Cohen that Kois had received "written offers from various parties." FOF ¶ 611. All of this was false. The Kois Buyers Group had no offers in writing or members as of these statements. FOF ¶¶ 597, 602. Nevertheless, Ahmed rejected Benco after it tried to deal directly with Dr. Kois. FOF ¶¶ 611, 614. And Schein was interested in Kois but not Ahmed's high-pressure sales tactics. FOF ¶ 600.

[13] Complaint Counsel also denied in sworn discovery responses that "no witness currently or formerly employed by Respondents has admitted to the existence of an agreement between Respondents not to do business with Buying Groups." FOF ¶¶ 185–86. There was no basis in the record then, and there is none now, for this sworn denial. FOF ¶¶ 187–89.

Counsel's sworn interrogatory responses regarding their knowledge of Patterson's involvement in any purported conspiracy were "false," and noted that "nobody asked me my permission to put something false in a document." FOF ¶ 207.

Every single Respondent witness called at trial denied Complaint Counsel's allegations.[14]

Patterson Witnesses:

- **Paul Guggenheim** ("I have never committed that to anybody." "No." "I do not." "No." "No." "No." "Absolutely not." "Nope." "Absolutely not." "No." "Absolutely not." "No.").[15]
- **David Misiak** ("Absolutely not." "I do not." "No." "No." "I have not." "Absolutely not.").[16]
- **Neal McFadden** ("We do not have a signed agreement." "There was never a signed agreement." "We never had any agreement, any signed agreement, that we would not work with GPOs." "I did not." "No." "No.").[17]
- **Tim Rogan** ("No." "No." "No." "No." "Absolutely not." "No." "No.").[18]

Benco Witnesses:

- **Chuck Cohen** ("No." "No." "No." "I did not." "No.").[19]
- **Patrick Ryan** ("Not to my knowledge.").[20]

Schein Witnesses:

- **Tim Sullivan** ("I don't know if people understand the consequences of being falsely accused . . . There are consequences to falsely accusing people of things we know we didn't do." "Absolutely not." "Never." "No." "No." "No." "No." "No." No." "Nope."

[14] Every Respondent witness deposed in this case also denied knowledge of a conspiracy. FOF ¶¶ 212–233.

[15] FOF ¶ 195 (Guggenheim, Tr. 1707; 1853; 1862; 1870; 1872, *respectively*).

[16] FOF ¶ 194 (Misiak, Tr. 1502; 1505; 1508-09, *respectively*).

[17] FOF ¶ 201 (McFadden, Tr. 2737-2738; 2740; 2742; 2781, *respectively*).

[18] FOF ¶ 202 (Rogan, Tr. 3571-3572; 3575; 3651-3652, *respectively*).

[19] FOF ¶ 192 (Cohen, Tr. 705; 920-921, *respectively*).

[20] FOF ¶ 193 (Ryan, Tr. 1269, *respectively*).

"No." "I'm shocked to see [Complaint Counsel listing Sullivan-Anderson texts as evidence of a conspiracy]."). [21]

- **Kathleen Titus** ("Absolutely not, because no agreement existed . . . I find [Complaint Counsel's allegations] personally diminishing because I spent so much of my career at Henry Schein working with buying groups." "[T]here was no conspiracy." "I would not [testify that CX2220 shows Patterson participating in a conspiracy]."). [22]

- **Jake Meadows** ("I do not." "Never heard of it."). [23]

- **Dave Steck** ("I have no knowledge." "No." "No." No.") [24]

- **Randy Foley** ("No." "No." "Never." "I was surprised when I saw [the allegations] because I'd been working with buying groups from the day I started with Special Markets until the day I retired."). [25]

- **Cavaretta** ("I have absolutely no knowledge of that." "I have no knowledge of the alleged agreement in this case."). [26]

Complaint Counsel did not mark a single document suggesting anyone from Patterson ever communicated with anyone from Schein about refusing to sell or discount to any buying group. Patterson confirmed the absence of such evidence at the end of Schein's Tim Sullivan's testimony:

> Q. See, here's the first thing I wrote here [on RDX225], "Documents introduced by the Government that show that Tim Sullivan and/or Schein communicated with Patterson about buying groups." Do you see that?
>
> A. I see it.
>
> Q. But it's blank.
>
> A. It is.
>
> Q. There were no documents introduced during the Government's case in chief, during your exam, three hours or so, not a single document showing

[21] FOF ¶ 204 (Sullivan, Tr. 4021; 4230-4231; 4257; 4294-4301; 4303-4304, *respectively*).

[22] FOF ¶ 208 (Titus, Tr. 5192; 5280-5281, *respectively*).

[23] FOF ¶ 200 (Meadows, Tr. 2467).

[24] FOF ¶ 203 (Steck, Tr. 3831).

[25] FOF ¶ 206 (Foley, Tr. 4599-4600).

[26] FOF ¶ 210 (Cavaretta, Tr. 5622-5623).

> that you or anyone at Schein ever communicated with anyone at Patterson about buying groups, right?
>
> A. Correct.
>
> Q. Then I had page 2 of my demonstrative. Can we switch to that? See, this one was all the questions and answers. I had my reading glasses there, I was ready to take notes, but they didn't ask you a single question and you didn't give a single answer suggesting that you or anyone at Schein ever communicated with anyone at Patterson about buying groups, right?
>
> A. Correct.
>
> . . . .
>
> Q. And as a result, that exhibit that I prepared while I was sitting on the edge of my seat yesterday, waiting for all the evidence to come pouring in, was blank, right? An absence of evidence, correct?
>
> A. Correct. [27]

V. Only *Two* Communications Have Anything To Do With Buying Groups.

Complaint Counsel did not introduce a single document showing anyone from Patterson ever communicated with anyone from Schein about buying groups, and only *two* documents between Benco and Patterson.

First, on February 8, 2013, Cohen emailed Guggenheim out of the blue, forwarding an industry-wide email blast that a dentist in New Mexico had sent about a meeting he expected Patterson to host for a group he wanted to form, the New Mexico Dental Cooperative ("NMDC"). FOF ¶ 267. Cohen told Guggenheim that Benco had a long-standing policy of not selling to "buying groups." FOF ¶ 268. Cohen did not ask Guggenheim to do or commit to anything; he did not even expect a response. FOF ¶¶ 269–70. Guggenheim, sitting in his Minnesota office, dashed off a 10-second response: "Thanks for the heads up. Ill investigate the situation. We feel the same about these." FOF ¶ 272. But Guggenheim did not investigate the situation or talk to anyone in Patterson's Albuquerque branch about the email he had just received from Cohen. FOF

[27] FOF ¶ 331.

¶ 275. Guggenheim testified that this was a quick, cordial response to one of hundreds of emails he received daily in his role as President, and that he took no action regarding buying groups in response to Cohen's email. FOF ¶¶ 272, 275, 276. Guggenheim forwarded Cohen's email but not his own response to David Misiak and Tim Rogan, but he did not ask them to do anything and they did not recall doing anything in response. FOF ¶ 277. And Guggenheim's statement, "we feel the same about these," was on its face not a commitment to do anything. FOF ¶¶ 274, 276. Nor did Cohen see it as one. FOF ¶ 276.

Second, the other communication with Benco was a June 6, 2013 email from Guggenheim to Cohen. FOF ¶¶ 299. Guggenheim asked whether Benco still had the same policy in light of Benco's having bid on the business of Atlantic Dental Care ("ADC"), winning it over Schein. FOF ¶¶ 300. Patterson, meanwhile, had *already* decided not to bid for ADC months earlier, in February 2013, and to instead continue to go after individual member dentists. FOF ¶ 311 (CX0092 (February 27, 2013 email from Patterson's Misiak to Guggenheim discussing "stay[ing] out of" the Atlantic Dental Care RFP process)). Thus, Guggenheim's email came well *after* Patterson, Benco, and Schein made *different* decisions about ADC. And Benco's response was that it viewed ADC as a DSO, whereas Patterson viewed it *differently*, as a buying group. FOF ¶¶ 300–302. Cohen denied having seen Guggenheim's email as enforcing anything, and there is no evidence as to what, exactly, Patterson could have done to enforce an agreement had there been one. FOF ¶ 304.

The February 8 and June 6, 2013 emails between Cohen and Guggenheim are the only interfirm communications in this case about buying groups that involve Patterson.[28] Complaint

[28] Complaint Counsel conceded it is not alleging a boycott of the Texas Dental Association. FOF ¶ 316.

Counsel nonetheless listed over a hundred documents in its response to an interrogatory as supporting the allegation that Patterson joined the alleged conspiracy in February 2013. FOF ¶ 234. Thirty-five are dated from *2011*, two years before Patterson allegedly joined the alleged conspiracy, and none have anything to do with buying groups. FOF ¶ 235. One of those does not even mention Patterson. FOF ¶ 237. Others are about a barcoding project. FOF ¶ 236. Others are about promoting oral healthcare. FOF ¶ 236. Others are about disaster relief efforts. FOF ¶ 236. One congratulates Paul Guggenheim's wife on an award she received. FOF ¶ 236. Eleven listed documents are dated from *2012*, a year before Patterson allegedly joined the alleged conspiracy, and again none have anything to do with buying groups. FOF ¶ 251. The most common topic was sexual harassment training. FOF ¶ 252. Of the 32 listed documents that are at least dated after February 2013, when Patterson was alleged to have joined the conspiracy, none have anything to do with buying groups. FOF ¶¶ 255–57, 260. Most are text messages about sports, family, holidays, vacations, and a colleague's death. FOF ¶¶ 256–57.

VI. Dr. Marshall's $2.5 Million-Plus Conspiracy Opinion Is Junk Science.

A. Dr. Marshall's $2.5 Million-Plus Interpretation Of Documents Rested On One Conceded Assumption After Another.

Dr. Marshall conceded at trial that Paul Guggenheim's "ten-second" response to an unsolicited February 8, 2013 email from Chuck Cohen on its face did not include any commitment to take concerted action regarding buying groups. FOF ¶¶ 678–79. Dr. Marshall also conceded that a "feeling" is different from a "commitment" or an "agreement." FOF ¶ 681. He even conceded that he has called it a "tragedy" "to read about firms that were fined huge amounts for engaging in nominally anticompetitive actions that had no chance of being successful." FOF ¶ 690. "How," he previously asked, "could a competent manager believe that substantial gains in profits are available for the price of a lunch and one hour of conversation?" FOF ¶ 690.

"Successful explicit collusion requires planning, investments in administration, clear thinking, and hard work." FOF ¶¶ 690 (Marshall, Tr. 3327). Yet, Dr. Marshall presumed that Guggenheim's ten-second response to Cohen's email was evidence of collusion. FOF ¶¶ 676–77, 691.

Dr. Marshall likewise conceded that he could not point to any *actual evidence*, "direct or indirect," that anyone at Patterson's corporate office (in Minnesota) took any action or gave any instruction to Patterson's New Mexico sales team regarding NMDC during the *weekend* between February 8 (the date of the Cohen/Guggenheim email) and February 11, 2013 (the date the sales team told NMDC it would not participate). FOF ¶¶ 684. Nor did he know who any of the individuals involved in the Albuquerque decision even *were*, or what any of them had said or done. FOF ¶¶ 683. Yet Dr. Marshall "*presume[d]*" that the February 8, 2013 email between Chuck Cohen and Paul Guggenheim (in Minnesota) *must* have caused Patterson's *Albuquerque* branch to cancel a meeting it was to host with the New Mexico Dental Cooperative, based on what Dr. Marshall claimed was the "economic evidence" of the communication. FOF ¶¶ 679.

Dr. Marshall also conceded that Guggenheim and Cohen's June 6, 2013 emails were sent well *after* Patterson, Benco, and Schein had already made different decisions on Atlantic Dental Care ("ADC"), based on having different views of what ADC was, and after Benco had already won its business. FOF ¶¶ 685, 300–302. Yet, again based on the "economic content" of the email, Dr. Marshall presumed that it said something that the words on the page did not say: "essentially, What are you doing? I thought we weren't bidding for buying groups." FOF ¶ 686.

B. Dr. Marshall's $2.5 Million-Plus Opinion That Patterson Acted Against Its Self-Interest Also Relied On Presumptions And Insufficient Data.

Dr. Marshall acknowledged that his opinion that Patterson acted against its self-interest with respect to *two* entities was not backed by a single academic, peer-reviewed study. FOF ¶ 741. He also conceded that he did not study NMDC or ADC, the entities that were the subject of the

interfirm communications discussed above. FOF ¶ 713. Instead, Dr. Marshall performed profitability analyses for the Kois Buyers Group and Smile Source, two groups for which he conceded that, under the facts at the time, it would have been rational for Patterson to turn down.

Dr. Marshall conceded that it would be rational for distributors to turn down "incoherent," "irrational," or "irresponsible" business proposals from buying groups. FOF ¶ 709. Yet, at trial, Dr. Marshall conceded he was unfamiliar with the nature of Kois's approach to Patterson, to say the least. Though Qadeer Ahmed was Patterson's only point of contact during the exchange, Dr. Marshall did not know who Ahmed was, what his background was, what companies he ran, what country he lived in, what his reputation and experience in the dental industry was, and, most importantly, what lies he had told Patterson. FOF ¶¶ 722–27. Yet, Dr. Marshall's economics told him, Patterson had behaved irrationally in passing up on the Kois "opportunity."

Indeed Dr. Marshall could not say whether *any* questioned buying group had presented a coherent, rational, or responsible proposal to Patterson. He had no idea whether Dr. Stephen Sebastian's Buying Club, Nexus Dentistry, Catapult, Dental Purchasing Group, and Stratus Dental had made coherent proposals to Patterson. FOF ¶ 716. Nor had he considered the possibility that, when Neal McFadden wrote "this doctor is a vet" in response to receiving a proposal from the Dental Purchasing Group, the doctor who was starting that group really was a *veterinarian*. FOF ¶ 711. Dr. Marshall also testified that not all buying groups present profitable opportunities, for example due to a "cannibalization effect." FOF ¶¶ 696–97. Yet, even though he listed among materials relied upon a Patterson document stating that an employee had looked up a batch of Smile Source employees and every one was already a Patterson customer, he concluded that Patterson acted against its self-interest in declining to bid on Smile Source in 2013. FOF ¶¶ 696, 699.

Though Kois and Smile Source were only two of 38 groups Dr. Marshall opined were turned down by at least one Respondent during the alleged conspiracy, he calls them "highly representative" of the remaining 36. FOF ¶ 716. Yet he conceded that he never provided any analysis of the other 36 groups establishing how Kois and Smile Source were "highly representative" of them. FOF ¶ 716. "There's no statistical representation of that," he testified. FOF ¶ 717. And he conceded that Kois and Smile Source had made statements to the contrary on documents he had relied upon. For example, he listed, among materials he relied upon, a Kois Buyers Group presentation that called the Kois Buyers Group "profoundly different" from buying groups and "not a standard BUYING GROUP." FOF ¶ 718. And he listed, among materials he relied upon, Smile Source's Trevor Maurer's testimony that Smile Source was *not* a buying group. FOF ¶ 719. It is unclear how Dr. Marshall determined these statements by witnesses with personal knowledge were wrong and he was right.

As to Dr. Marshall's case studies analyzing Kois and Smile Source, he conceded that Case Study 4 relates to Schein and Smile Source's relationship one year *prior* to when Patterson allegedly joined a conspiracy and "does not speak to February 2013," when Patterson allegedly acted contrary to its self-interest. FOF ¶ 742. And he conceded that his Case Study 5 "speaks to a different competition landscape," as it relates to Schein and Smile Source's relationship two years *after* the alleged conspiracy and "all it's showing is the unilateral incentive to bid given the competitive landscape at that time" (i.e., in 2017, two years after the alleged conspiracy). FOF ¶¶ 743–44.

Dr. Marshall also conceded that his remaining Case Studies 1, 2, and 3 studied only three-tenths of 1 percent or three one-thousandths of independent dentists. FOF ¶ 733. He also conceded he could not prove such a sample was statistically significant. FOF ¶ 734. Moreover, in his Case

Studies 1 and 2, Dr. Marshall studied only 0.0015 of independent dentists; from this he concluded that Patterson acted contrary to its unilateral interest. FOF ¶¶ 736, 738. Dr. Marshall's Case Study 3 fares even worse; he studied only 0.000001 of independent dentists. FOF ¶ 740.

From these tiny fractions, Dr. Marshall determined that Patterson missed out on a teensy tiny fraction of its annual profits: in Case Study 1, just 0.0004, or four one-hundredths of one percent, of the company's gross profits over two years; in Case Study 2, just 0.0003, or three one-hundredths of one percent, of the company's gross profits over five years; in Case Study 3, just 0.00008, or eight one-thousandths of one percent, of the company's gross profits over four years. FOF ¶¶ 748, 750, 757. This, alone, was Dr. Marshall's basis for finding that Patterson acted against its economic self-interest.

VII. There Is No Evidence Of Potential Recurrence.

Patterson's last correspondence in the record with Benco or Schein referring to buying groups was in *June 2013*. And the alleged conspiracy in this case is alleged to have ended more than four years ago, on April 9, 2015. FOF ¶ 336. Patterson is today indisputably working with buying groups, as are Schein and Benco. FOF ¶¶ 757–63. Thus, even if Patterson did partake in a buying group conspiracy between 2013 and 2015, which it did not, Complaint Counsel did not present any evidence of potential recurrence.

ARGUMENT

Complaint Counsel bears the burden to prove by a preponderance of the evidence that Patterson was a party to the alleged agreement. *Steadman v. SEC*, 450 U.S. 91, 102 (1981). "The existence of an agreement is '[t]he very essence of a section 1 claim.'" *See In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 356 (3d Cir. 2004) (quoting *Alvord-Polk, Inc. v. Schumacher & Co.*,

37 F.3d 996, 999 (3d Cir.1994)).[29] And the agreement must *precede* the alleged unlawful conduct. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). "The Sherman Act speaks in terms of a 'contract,' 'combination' or 'conspiracy,' but courts have interpreted this language to require 'some form of concerted action.'" *Flat Glass* 385 F.3d at 356–57 (quoting *Alvord–Polk*, 37 F.3d at 999 & n.1); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984). "Concerted action" is "[a]n action that has been planned, arranged, and agreed on by parties acting together to further some scheme or cause, so that all involved are liable for the actions of one another." Black's Law Dictionary (10th Ed. 2014).

"The crucial question" in determining conspiracy "is whether the challenged anticompetitive conduct stem[s] from independent decision or from an agreement." *Twombly*, 550 U.S. at 553 (internal quotation marks omitted). An "agreement" is "a unity of purpose or a common design and understanding, or a meeting of minds" as to the alleged unlawful arrangement at issue. *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). In other words, the evidence must show a "conscious commitment to a common scheme designed to achieve an unlawful objective," while "tend[ing] to exclude the possibility that the manufacturer and nondetermined distributors were acting independently." *Monsanto*, 465 U.S. at 764. And Complaint Counsel must make this showing as to each specific Respondent to establish that Respondent's liability. *United States v. Gypsum Co.*, 438 U.S. 422, 463 (1978) ("Liability [can] only be predicated on the knowing involvement of each defendant, considered individually, in the

[29] Proof of an illegal agreement under FTC Act Section 5 is identical to proof of an illegal agreement under Sherman Act Section 1. *California Dental Ass'n v. FTC*, 526 U.S. 756, 762 & n.3 (1999) (Section 5 of the FTC Act "overlaps the scope of § 1 of the Sherman Act"); *FTC v. Cement Institute*, 333 U.S. 683, 691–92 (1948) ("[S]oon after its creation the Commission began to interpret the prohibitions of § 5 as including those restraints of trade which also were outlawed by the Sherman Act, and that this Court has consistently approved that interpretation of the Act.").

conspiracy charged."); *see also Kleen Products LLC v. Int'l Paper*, 276 F. Supp. 3d 811, 821 (N.D. Ill. 2017), *aff'd sub nom. Kleen Products LLC v. Georgia-Pac. LLC*, 910 F.3d 927 (7th Cir. 2018).

Complaint Counsel needed to meet its burden using direct or circumstantial evidence. *In re McWane, Inc.*, 155 F.T.C. 903, 2013 WL 8364918 at *223 (May 1, 2013) (Initial Decision); *In the Matter of Mcwane, Inc., A Corp., & Star Pipe Prod., Ltd. A Ltd. P'ship.*, 2014-1 Trade Cas. (CCH) ¶ 78670, 2014 WL 556261, at *2 (MSNET Jan. 30, 2014) (conspiracy claims dismissed by the full Commission); *Erie Cty., Ohio v. Morton Salt, Inc.*, 702 F.3d 860, 867-68 (6th Cir. 2012) ("An agreement, either tacit or express, may ultimately be proven either by direct evidence of communications between the defendants or by circumstantial evidence of conduct that, in the context, negates the likelihood of independent action and raises an inference of coordination."). But Complaint Counsel did neither. Complaint Counsel presented no direct evidence, and its only circumstantial evidence consists of *its own* interpretations of documents, which are not evidence, and which the relevant witnesses refute.

Against this is vast, unrebutted evidence in Patterson's favor: A "Marianas Trench" full of contemporaneous documents and sworn witness statements demonstrating that Patterson acted independently and pro-competitively at all times, granting thousands of price concessions to win business from its many rivals, all to the benefit of the end customer. A risky, expensive decision to invade Schein and Benco's corporate DSO stronghold in the middle of their alleged collusion. A record of consistently meeting with and evaluating individual buying groups before declining most on their merits. An avalanche of sworn, unrebutted witness denials and testimony that Complaint Counsel's allegations were false.

Patterson's conduct—cutting prices, winning customers from competitors, and independently evaluating potential customers—is consistent with what the Supreme Court has

called the "very essence" of legitimate, unilateral conduct under the antitrust laws. *Brooke Grp., Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993). Patterson's decision not to work with most buying groups was sensible given its focus on traditional, solo dentists and, more recently, its investment in pursuing corporate DSOs. Patterson was not eager to cut prices for loosely affiliated groups that could make no purchasing commitments, that appeared to be made up of existing Patterson customers, or that made incoherent or dishonest proposals to Patterson. Patterson had no "number three" segment and, under antitrust law, it was not required to start one. *See Twombly*, 550 U.S. 568–69 ("Firms do not expand without limit and none of them enters every market that an outside observer might regard as profitable, or even a small portion of such markets." (quoting Areeda & Hovenkamp ¶ 307d, at 155 (Supp. 2006) (alteration omitted)). Patterson's conduct was both procompetitive and in its own self-interest, and Complaint Counsel has not and cannot point to any evidence in the record to refute this.

I. The Evidence Is In Patterson's Favor.

A. Complaint Counsel's Conspiracy Theory Built On *Two* Emails Requires A "Daisy Chain Of Assumptions" And Strained Inferences.[30]

"Direct evidence in a Section 1 conspiracy must be evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted." *In re Baby Food Antitrust Litigation*, 166 F.3d 112, 118 (3rd Cir. 1999) (ruling that plaintiffs did not make out a case of direct evidence when evidence required the court to draw on inferences and showed only an exchange of information among defendants). "Put differently, direct evidence of conspiracy, if credited, removes any ambiguities that might otherwise exist with respect to whether the parallel

[30] *See McWane*, 2013 WL 8364918, at (306–07) ("Complaint Counsel's daisy chain of assumptions fails to support or justify an evidentiary inference of any unlawful agreement involving [Respondent], and the multilayered inference is rejected.").

conduct in question is the result of independent or concerted action." *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 324 n.23 (3d Cir. 2010). It is "evidence tantamount to an acknowledgement of guilt," whereas circumstantial evidence "is *everything* else including ambiguous statements." *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 662 (7th Cir. 2002) (emphasis in original).

Types of direct evidence include a written agreement, a recorded oral agreement, documented references to an agreement, or an admission of the agreement's existence by a party to the agreement. *See Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 226 (3d Cir. 2011) (document explicitly manifesting the existence of the agreement in question); *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013) (recorded phone call of agreement to fix prices); *Cosmetic Gallery, Inc. v. Schoeneman Corp.*, 495 F.3d 46, 52 (3d Cir. 2007) (memorandum detailing discussions from a meeting of a group of alleged conspirators); *Anderson News, L.L.C. v. Am. Media, Inc.*, 899 F.3d 87, 103 (2d Cir. 2018) (admission by defendant).

Here, Complaint Counsel produced no written agreement, no recorded oral agreement, no documented references to an agreement, and no admission of an agreement's existence by an alleged party to the agreement. There are simply no documents, and no testimony, expressly including an agreement involving Patterson "not to provide discounts to or otherwise contract with Buying Groups." Complaint ¶ 8. This includes the *two* documents—Chuck Cohen's February 8 and June 6, 2013 correspondence with Paul Guggenheim—which Complaint Counsel has claimed are direct evidence and relies on for its entire case against Patterson. FOF ¶¶ 267–310.

Guggenheim's February 8, 2013 response to Cohen contains no explicit discussion of any "concerted action" to be taken towards buying groups. FOF ¶¶ 267–77; *see also* FOF ¶¶ 678 (Dr.

Marshall conceding this). Specifically, Guggenheim's statement in response to Cohen, "we feel the same way about these," does not expressly reference any future, concerted action to be taken. Rather, Guggenheim's statement, "we feel the same about these" shared Patterson's *existing* feeling or policy. And the sharing of an *existing* feeling or policy is not direct evidence of an illegal agreement under Section 1. *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1033–34 (8th Cir. 2000). The only action discussed in Guggenheim's February 8, 2013 response is his statement, "I'll investigate." FOF ¶¶ 273–276. "I'll investigate" is not an explicit, unambiguous statement of agreement not to discount to dental buying groups. "*I'll* investigate" (emphasis added) also is not a statement of *concerted* action. Thus, Guggenheim's February 8, 2013 email is not direct evidence of Patterson's participation in an agreement not to discount to dental buying groups.

Guggenheim's June 2013 email exchange with Chuck Cohen contains no reference to any past agreement to take any concerted action, nor does it contain any commitment to take any future concerted action. FOF ¶¶ 299–305. *See Alvord-Polk*, 37 F.3d at 999. Thus, it is not direct evidence of Patterson's participation in an agreement not to discount to dental buying groups. This email was also sent months *after* Patterson had decided on its own not to bid for ADC's business (and instead continue to go after its individual members), and weeks *after* ADC had already awarded its business to Benco (*after* Schein had also decided to bid on the business). FOF ¶ 685. Dr. Marshall even concedes the email was sent *after* all these events, and obviously could not have affected each company's decision. FOF ¶¶ 685, 300–302. After-the-fact discussions of decisions already made do not violate antitrust laws. *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1033–34 (8th Cir. 2000).

Nor, of course, is any *internal* Patterson, Benco, or Schein document direct evidence—such a document will require an inference unless it expressly references the alleged agreement, which none do in this case. FOF ¶¶ 333–463. And, in any event, the relevant witnesses do not support Complaint Counsel's readings of any internal document. FOF ¶¶ 333–463. Thus, because all these internal statements require one or more inferences, they are not direct evidence. *McWane*, 155 F.T.C. 903, 2013 WL8364918, at *223 (2013) ("Direct evidence in a Section 1 conspiracy must be evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted.") (quoting *Baby Food*, 166 F.3d at 118).

B. There Is An Avalanche Of Direct Evidence From Every Fact Witness That Patterson Did Not Join A Conspiracy.

Unlike the pair of emails discussed above, sworn testimony from Respondents' employees that they did not make, know of, or participate in any agreement *is* direct evidence. This Court explained in *McWane* that sworn testimony denying an alleged agreement is "direct evidence contrary to the asserted [agreement] and is entitled to weight." *McWane*, 2013 WL 8364918, at *267 (Initial Decision). Especially where sworn testimony is uncontradicted, as it is here, Complaint Counsel "cannot make [its] case just by asking the [fact finder] to disbelieve the defendant's witnesses." *McWane*, 2013 WL 8364918, at *267 (Initial Decision) (citing *High Fructose*, 295 F.3d at 655 (alteration in original)); *Benton v. Blair*, 228 F.2d 55, 61 (5th Cir. 1955) (reversing judgment and remanding and holding that "it was clearly error for the district court to reject the uncontradicted, unimpeached and not inherently improbable or suspicious testimony").

It is of no matter that witnesses are (or were at one time) employed by Patterson or another Respondent. As the Supreme Court has explained, a court "is not at liberty to disregard the testimony of a witness on the ground that he is an employee of the defendant, in the absence of conflicting proof or of circumstances justifying countervailing inferences or suggesting doubt as

to the truth of his statement, unless the evidence be of such a nature as fairly to be open to challenge as suspicious or inherently improbable." *Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209, 214 (1931) (reversing judgment entered after trial). And as this Court explained in rejecting Complaint Counsel's urging that witness denials were "self-serving" in *McWane*, "mere disbelief [does] not rise to the level of positive proof of agreement." 2013 WL 8364918 at *253 (quoting *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309, 1313 (3d Cir. 1975)). Indeed, Complaint Counsel's mere disbelief is not evidence at all.

Here, Complaint Counsel must convince this Court to disbelieve every allegedly knowledgeable witness to prevail. To be clear, every single witness alleged to have knowledge of the alleged agreement in this case has denied it. FOF ¶¶ 183–233. Complaint Counsel cannot overcome these sworn denials by restating unsupported contentions about what they think two documents mean; they must produce significant contradictory evidence, and they have none. *See City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 130 (D.D.C. 2006) ("Facing the sworn denial of the existence of conspiracy, it [is] up to plaintiff to produce significant probative evidence").

In *Moundridge*, 18 municipalities brought a Section 1 case against a series of energy companies, alleging among other things an agreement to artificially inflate the price of natural gas. The defendants denied this under oath, testifying, as here, that they made their price and output decisions independently. 429 F. Supp. 2d at 132. The plaintiffs responded with evidence that the defendants had an opportunity to conspire (during a series of industry meetings) and pointed to internal documents that, they argued, suggested a conspiracy. *Id.; City of Moundridge v. Exxon*, 409 F. App'x 362, 364 (D.C. Cir. 2011). The district court rejected this argument, noting that the plaintiffs had not showed that the defendants had lied in their sworn statements. *Moundridge*, 429

F. Supp. 2d at 134. The D.C. Circuit affirmed, holding that the plaintiffs' "few scattered communications" and other evidence fell "far short" of creating a genuine issue of material fact. *Moundridge*, 409 F. App'x at 364.

Likewise, in *Williamson*, the Eleventh Circuit affirmed summary judgment in favor of the defendants despite 11 consecutive parallel price increases announced by every defendant, numerous alleged price "signals" between the defendants suggesting a desire to end a price war (and its subsequent end), and an expert's opinion that it all amounted to a conspiracy. *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1305 (11th Cir. 2003). The Court found that the plaintiffs' evidence was insufficient to overcome defendants' sworn denials and it would be improper to permit the jury "to engage in speculation" in the face of defendants' denials. *Id.* at 1305; *see also Blomkest*, 203 F.3d at 1033, 1037 (affirming summary judgment despite evidence that defendants engaged in "a high level of interfirm communications," including evidence plaintiffs argued demonstrated that the defendants "signaled pricing intentions to each other," because the evidence was insufficient to overcome defendants' denials and was "far too ambiguous to defeat summary judgment"); *Lamb's Patio Theatre, Inc. v. Universal Film Exchanges, Inc.*, 582 F.2d 1068, 1070 (7th Cir. 1978) (affirming summary judgment because plaintiff had only "its bald allegation of conspiracy to refute the sworn affidavit denying a conspiracy"); *American Key Corp. v. Cumberland Associates*, 579 F. Supp. 1245, 1259 (N.D. Ga. 1983) (affirming summary judgment because each of the defendants submitted "sworn affidavits denying the existence of any contract, combination or conspiracy" and plaintiff failed to "come forward with significant probative evidence supporting its allegations of a conspiracy").

Moreover, both *Moundridge* and *Williamson Oil* were in the context of *summary judgment*, where all inferences are drawn in the non-movant's favor. *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 255 (1986) ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."). Here, of course, Complaint Counsel bears the burden. And every witness they named as having knowledge of Patterson's participation in the alleged conspiracy denied it under oath. FOF ¶¶ 183–233. This includes *37* total witnesses who testified. FOF ¶¶ 183–233. There is no basis to say that all these witnesses lied under oath. Nor is there a basis to say that Paul Guggenheim, David Misiak, Tim Rogan, Neal McFadden, Tim Sullivan, Kathleen Titus, Joseph Cavaretta, Dave Steck, Randy Foley, Chuck Cohen, or Patrick Ryan—all of whom sat before the Court at trial and swore under oath that the conspiracy allegation was false—all committed perjury. But that is what this Court must find, logically, to find in Complaint Counsel's favor here: that the courtroom was a mass crime scene, with every single one of these witnesses coming in and lying under oath before the Court.

II. Complaint Counsel Failed To Proffer Evidence That "Tends To Rule Out The Possibility Of Independent Act."

Complaint Counsel failed to proffer evidence sufficient to meet its burden of proving that Patterson joined an agreement between Benco and Schein to refuse to deal with buying groups. While Complaint Counsel may attempt to meet its burden through circumstantial evidence, "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). "[M]istaken inferences in [antitrust] cases … are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Id.* at 594. For that reason, the "circumstantial evidence of a conspiracy, when considered as a whole, must tend to rule out the possibility of independent action." *In re McWane, Inc.*, FTC Dkt. No. 9351, 2012 WL 5375161, at *6 (Aug. 9, 2012) (*citing Matsushita*, 475 U.S. at 764). This consideration must be carefully made in an oligopolistic setting, as "[o]ligopolies pose a special problem under § 1 because rational, independent actions

taken by oligopolists can be nearly indistinguishable from [concerted action]. This problem is the result of 'interdependence,' which occurs because 'any rational decision [in an oligopoly] must take into account the anticipated reaction of other firms." *Valspar Corp. v. E.I. Du Pont De Nemours and Co.*, 873 F.3d 185, 191 (3d Cir. 2017) (quoting *Flat Glass*, 385 F.3d at 359).

Courts apply a three-step process to determine whether the circumstantial evidence proves an agreement. "First, the court must determine whether the plaintiff has established a pattern of parallel behavior. Second, it must decide whether the plaintiff has demonstrated the existence of one or more plus factors that 'tends to exclude the possibility that the alleged conspirators acted independently. . . . Third, if the first two steps are satisfied, the defendants may rebut the inference of collusion by presenting evidence" that negates the inference "that they entered into a … conspiracy." *Williamson Oil*, 346 F.3d at 1301.

A. Patterson's Conduct Was Not Parallel To Benco And Schein.

Complaint Counsel's circumstantial case fails at Step One. Patterson's conduct was not parallel with Schein and Benco. To establish parallel action, a plaintiff must show "proof that defendants took identical actions within a time period suggestive of prearrangement." *Anderson News*, 899 F.3d at 104. "Parallel price fixing must be so unusual that in the absence of an advance agreement, no reasonable firm would have engaged in it." *Baby Food*, 166 F.3d at 135; *see also Twombly*, 550 U.S. at 556 n.4. In other words, "alleged parallel behavior must be the kind 'that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties.'" *Id*. (quoting 6 Areeda & Hovenkamp ¶ 1425, at 167–185).

Here, there is none of that—no identical actions, and certainly none so unusual that they could not have resulted from independent action. The record showed that each Respondent viewed buying groups differently. Patterson viewed them skeptically and rarely worked with them, Schein

worked with them often, and Benco never did. FOF ¶ 118; JFFL ¶ 119. Complaint Counsel has cited, as evidence of Patterson's alleged parallel conduct, Patterson's responses to the Kois Buyers Group, Smile Source, and the Georgia Dental Association. (CC's Pre-Trial Br. at 37). But Patterson's response to the Kois Buyers Group was different from Schein and Benco. FOF ¶¶ 592, 603, 614. Patterson passed on Kois after discovering that Kois's appointed representative, Qadeer Ahmed, was lying. FOF ¶¶ 172, 578–585. Benco tried to work directly with Dr. John Kois and did not want to work with Ahmed, and Dr. Kois told Ahmed this, after which *he* turned down Benco. FOF ¶¶ 604–614. Schein, meanwhile, was interested in Kois but did not like Ahmed's high-pressure tactics. FOF ¶¶ 600, 603, 625. According to Dr. Kois, Schein was *still* interested at the time he ultimately selected Burkhart as a distributor. FOF ¶ 625. There is nothing parallel about this story except that no one liked Qadeer Ahmed and he lied to everyone. FOF ¶¶ 578–5, 600–02, 604, 611, 612.

Patterson's response to Smile Source in 2013 was also different from Schein and Benco. FOF ¶ 475 (Goldsmith, Tr. 2177 ("Q. So three different respondents, three different responses; correct? A. Yes.")). Patterson met with Smile Source, listened to its proposal, and ultimately decided it was not interested at that time but would keep "the strategy and Smile Source on the 'idea board' and get back to [it] should things change." FOF ¶¶ 144–150. Schein also met with Smile Source in 2013 and later invited Smile Source to a second, larger meeting at Schein's headquarters, before ultimately making a proposal to Smile Source, which *Smile Source* rejected. FOF ¶¶ 469–71, 475. Finally, Benco rejected Smile Source in 2011, though it met with Smile Source in 2014 and wrote afterwards, [redacted] FOF ¶ 474. Smile Source's own witness acknowledged at trial that he received "three different responses" from the

Respondents. FOF ¶ 475. The only parallel conduct in this story was parallel *interest in* Smile Source.

Finally, to the extent Patterson acted in parallel regarding the Georgia Dental Association ("GDA"), that weighs against a conspiracy, as Patterson and Benco declined to work with the GDA in *September 2015*, months *after* the alleged conspiracy allegedly ended. FOF ¶¶ 552–553. Patterson continued rejecting GDA well into 2016. FOF ¶¶ 555–56. Indeed, the GDA's Chief Executive Officer testified that its buying group was not even in existence during Complaint Counsel's alleged conspiracy period. FOF ¶ 549.

"Without parallel [conduct, plaintiff's] case collapses." *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc.*, 176 F.3d 1055, 1072 (8th Cir. 1999), *superseded by Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan,* 203 F.3d 1028, 1033–34 (8th Cir. 2000); *see also Anderson News*, 899 F.3d at 106-12 ("Without 'parallel acts' to be reviewed 'in conjunction with' the circumstantial evidence, evidence supporting the presence of certain plus factors . . . can provide little support for a finding of unlawful conspiracy."); *Id*. at 105 (finding no conspiracy where "[m]any defendants . . . undertook independent efforts to negotiate with" the allegedly boycotted plaintiff); *Valspar Corp.*, 873 F.3d at 196 n.7 ("We are mindful that a 'failed attempt to fix prices' is illegal . . . , but it is likewise significant that the alleged conspirators behaved contrary to the existence of a conspiracy.") (internal citation omitted); *Burtch,* 662 F.3d at 228 (evidence that one defendant is "declining all orders" while another is "extending [credit to] at least some" "fall[s] far short of demonstrating parallel behavior"); *McWane,* 2012 WL 5375161, at *286 ("Complaint Counsel's proof [of parallel conduct] . . . is weak at best, and fails to outweigh other competent and reliable evidence summarized herein[.]"). Thus, Complaint Counsel's circumstantial case fails at the parallel conduct phase.

B. No Plus Factor Supports Complaint Counsel's Case.

Because conscious parallelism is "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market" as with a conspiracy, a plaintiff relying on a claim of conscious parallelism must supplement its claim with "plus factors" that "tend[] to exclude the possibility" that the defendant acted independently of its competitors. *Matsushita*, 475 U.S. at 588; *Flat Glass*, 385 F.3d at 360; *Burtch*, 662 F.3d at 227 (quoting *Twombly*, 550 U.S. at 554); *see also Southway Theatres v. Georgia Theatre Co.*, 672 F.2d 485, 494 (5th Cir. 1982) (The "basic rule" is "that the inference of a conspiracy is always unreasonable when it is based solely on parallel behavior that can be explained as the result of the independent business judgment of the defendants.").

The requirement of plus factor evidence "tends to ensure that courts punish 'concerted action' – an actual agreement – instead of the 'unilateral, independent conduct of competitors.'" *Flat Glass*, 385 F.3d at 360 (citing *Baby Food*, 166 F.3d at 122); *see also InterVest Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 159–60 (3d Cir. 2003) (plaintiff relying on circumstantial evidence must meet heightened burden of proof). Still, "the mere presence of one or more of these 'plus factors' does not necessarily mandate the conclusion that there was an illegal conspiracy between the parties, for the court may still conclude, based upon the evidence before it, that the defendants acted independently of one another, and not in violation of antitrust laws." *Baby Food*, 166 F.3d at 122 (quoting *Balaklaw v. Lovell*, 822 F. Supp. 892 (N.D.N.Y.1993)).

Complaint Counsel's asserted plus factors in this case are: (i) a sudden, unexplained change in a defendant's conduct; (ii) noncompetitive actions against the defendant's economic self-interest (iii) a motive to conspire; and (iv) hallmarks of a conspiracy including unexplained communications between competitors. (CC's Pre-trial Brief at 40–48). Complaint Counsel did not establish any of them.

i. Change In Conduct: There Was None.

For a change in conduct to support an inference of a conspiracy, it must have been "radical" or "abrupt." *Toys "R" Us, Inc. v. F.T.C.*, 221 F.3d 928, 935 (7th Cir. 2000) (toy manufacturers' abrupt shift from dealing with warehouse clubs to refusing to work with them in conjunction with executive testimony about the refusal to work supported an inference of conspiracy); *see also In re Domestic Drywall Antitrust Litigation*, 163 F. Supp. 3d 175, 255–56 (E.D. Pa. 2016) (defendants' decision to eliminate job quotes when they were a common industry feature was a "radical" and "abrupt" change supporting an inference of conspiracy).

Conversely, when conduct is consistent before, during, and after an alleged conspiracy, it weighs against an inference of a conspiracy. *White v. R.M. Packer Co.*, 635 F.3d 571, 581 (1st Cir. 2011) ("[P]ricing behaviors do not function as 'plus factors' when they are stable over time, because that factual context undermines any inference that the pricing behavior represents a sudden shift marking the *beginning* of a price-fixing conspiracy."); *see also In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 410 (3d Cir. 2015) (finding no abrupt shift in behavior that could support a reasonable inference of a conspiracy where defendants' conduct at issue was "consistent with how [an] industry has historically operated" and continued after the alleged conspiracy); *see also Kleen Prod.*, 276 F. Supp. 3d at 826 (finding that "the Court could not detect in Defendants' fifteen price announcements any notable break with their prior practice. . . [and the] dearth of support on this point seriously weakens the inference of conspiracy."); *Cosmetic Gallery*, 495 F.3d at 54 (affirming summary judgment where defendant's decision not to sell to plaintiff had been made prior to any alleged agreement, explaining that, "[e]ven if the action of not selling to [plaintiff] were parallel among distributors, [plaintiff's] own evidence asserts and demonstrates [defendant] had determined not to sell to [plaintiff] from the outset, before any of the alleged acts took place.").

Complaint Counsel produced no evidence that Patterson made any "radical" or "abrupt" changes in this case. The evidence showed instead that Patterson's position on buying groups was always the same: skeptical, but willing to listen.

Pre-Conspiracy Conduct

Trial produced a series of documents fundamentally incompatible with Complaint Counsel's timeline of this case. They showed that, far from changing its position on buying groups after Paul Guggenheim received a random email from Chuck Cohen on February 8, 2013, Patterson was always skeptical of buying groups.

In 2009, about four years before Patterson allegedly changed its conduct towards buying groups, Patterson's David Misiak told local sales managers that GPO relationships "ha[ve] not been a good fit or need for [Patterson's] dental business." FOF ¶ 122. Also in 2009, also about four years before Patterson allegedly changed its position on buying groups, Patterson chose not to bid on an entity because "it's a GPO." FOF ¶ 126.

In March 2012, just under a year before Patterson allegedly changed its position on buying groups, Neal McFadden forwarded David Misiak an email from the Florida Dental Association seeking Patterson's interest in a "buying group" it was forming. FOF ¶ 528. McFadden told Misiak that he was going to say "thanks but no thanks." FOF ¶ 529. Misiak responded, "Your response is right." FOF ¶ 530. This exchange is nearly identical to one Misiak had on February 27, 2013, except that the latter was sent during the alleged conspiracy and is therefore held up by Complaint Counsel as key inculpatory evidence, while the former is ignored. FOF ¶¶ 404–10.

In December 2013, after Patterson had allegedly changed its conduct towards buying groups, Shelley Beckler, a Patterson territory representative *not* alleged to have knowledge of the alleged conspiracy, wrote "*[i]n the past* we have **not** done business with GPO's [sic] just because we don't have the resources or the systems to manage them properly." FOF ¶ 128.

These emails are substantively identical to those Complaint Counsel cites as evidence against Patterson. Except that the dates for these emails do not fit. Because they are circumstantial evidence refuting Complaint Counsel's case, they turn change-in-conduct into a "minus factor."

Witnesses at trial testified as well that Patterson's buying group stance never changed. Neal McFadden testified that, in his 21 years at Patterson, he could not recall it dealing with a buying group. FOF ¶ 201. He said buying groups became a topic of discussion around when he was receiving requests from the state of Florida (*see* the March 2012 email above), and that, because "Patterson built their entire company around supporting our territory reps," they "felt as though this was such a radical change in the dental industry that we could not get our heads around how it could coexist within our culture of supporting independent sales reps and also treating all of our clients the same." FOF ¶ 118. And David Misiak explained that buying groups' attributes (no ability to commit to purchase in any volume) had never made them attractive in his 22-year career. FOF ¶ 121 (Misiak, Tr. 1469 ("A. Yeah. We did not see it as a well-organized space that could deliver the volume commitments. Q. And that goes back years before this? A. My entire career at Patterson. Q. So going back 22 years. A. Correct.")). Unless these witnesses were lying under oath, this testimony further refutes Complaint Counsel's case. It makes change-in-conduct a bigger minus factor.

Complaint Counsel have alleged two changes in Patterson's conduct towards buying groups. First, they claim that prior to February 8, 2013, Patterson was "still evaluating" buying groups. (CC Pre-Trial Br. at 23 ("At the time of Guggenheim and Cohen's email exchange regarding NMDC, Patterson was still evaluating the value of doing business with buying groups.")). But this claim is based on a misquotation of Paul Guggenheim's investigational hearing transcript, where he was speaking *in the present tense*. FOF ¶ 134 (CX0314

(Guggenheim, IHT at 246 ("Well, we're still evaluating these things, you know, for the value to the business. So each one of these is unique and different. And so generally we're continuing to look at these things *since this point in time and going forward till today*.") (emphasis added)). Complaint Counsel's reliance on misquoted testimony makes this an even bigger minus factor.

Second, Complaint Counsel claims that Patterson chose to cancel its meeting with NMDC after Cohen's February 8, 2013 email. But as explained above, that is not what the evidence showed. Rather, NMDC's Brenton Mason testified that Patterson started pulling back from the deal after he sent an industry-wide email blast on February 4, and that the pullback was apparent by *February 7*. FOF ¶¶ 283, 287–89. And there is no evidence that anyone at Patterson's corporate office (in Minnesota) instructed Patterson's local sales team (in *Albuquerque*) over the *weekend* between February 8 (the date of the Cohen/Guggenheim email) and February 11, 2013 (the date the sales team told NMDC it would not participate) to shut down NMDC. FOF ¶ 296. Mason had no reason to believe the cancellation decision was not made by the local team. FOF ¶¶ 292, 293, 296. Dr. Marshall did "presume" that an instruction was given, but he could not "put [his] finger" on evidence showing it was. FOF ¶ 682. Because that evidence does not exist. FOF ¶ 684. Complaint Counsel's inference that Guggenheim's email caused New Mexico's cancellation is therefore unsupported and certainly no more likely than New Mexico having made its decision independently, as the record suggests. *McWane*, 2012 WL 5375161, at *279 ("Complaint Counsel's inference . . . is unsupported and is no more likely than the inference of a legitimate effort to interject a national view on discounting decisions. Thus, the evidence fails to support Complaint Counsel's requested inference.").

During-Conspiracy Conduct

Patterson's conduct towards ADC in 2013 does not support this plus factor either. Complaint Counsel alleges that, due to a June 2013 email between Paul Guggenheim and Chuck Cohen confirming that ADC was not a "buying group," Patterson "ultimately competed for ADC's business despite previously notifying ADC that it would not submit a bid." FOF ¶ 308. But there is no evidence of this claimed competition. FOF ¶ 309. The claim is nonsensical because Benco had *already won* ADC's business, and Patterson and Schein had already made their own decisions (not to bid, and to bid, respectively) by the point of the email. FOF ¶ 309–32. Nonsensical allegations with no evidentiary support make this an even bigger minus factor.

Post-Conspiracy Conduct

Complaint Counsel's post-conspiracy change-in-conduct theory is incomprehensible. It claims that, "*in 2016*, Patterson's stance changed; it *began* to pursue buying groups." FOF ¶ 757. Yet it also claims the conspiracy ended in *April 2015*. FOF ¶ 756. The only way both claims could be true is if it took Patterson *eight months* after the conspiracy ended to change a position that was supposedly caused by the conspiracy.

The uncommon nonsense gets curiouser. Complaint Counsel has cited Patterson's supposed bid on Dentistry Unchained as an example of Patterson's post-conspiracy change-in-conduct. CC Mot. for Sum. Decision Opp. at 12. But *Dentistry Unchained did not exist* during the alleged conspiracy. FOF ¶ 338. Patterson did interact with Dentistry Unchained after the alleged conspiracy, though. FOF ¶¶ 346–351. In *July 2015* it wrote in an internal email that a "GPO arrangement" can be a "slippery slope," and in *January 2016* it wrote that it had explained to Dentistry Unchained that "we are not going to participate in a GPO-type program at this point." FOF ¶ 351. Dentistry Unchained could be its own minus factor.

Complaint Counsel's primary post-conspiracy change in conduct evidence, Patterson's choice to bid on a single entity (Smile Source) almost two years after the alleged conspiracy allegedly ended, misunderstands the change-in-conduct plus factor. FOF ¶¶ 692, 759. A choice to bid on a *single entity, two years* after an alleged conspiracy is nether "abrupt" nor "radical"—it's a minimally probative anecdote. *See Toys "R" Us*, 221 F.3d at 935; *Domestic Drywall*, 163 F. Supp. 3d at 255–56. It is especially meaningless in the context of Patterson's continued, documented skepticism towards buying groups during those two years—evidence that negates any claim of abrupt, radical change. In addition to its emails about Dentistry Unchained well after the conspiracy, Patterson's Neal McFadden also wrote more than a month after the alleged conspiracy, "We *currently* have little appetite to deal with buying groups as we feel they compete directly with the branches and reps." FOF ¶ 668. And about a *year* later, in March 2016, McFadden internally forwarded the Integrity Dental Buyers' Group's bid request reminder, writing, "This is the Georgia dental Association GPO. FYI I believe we're gonna pass on this one." FOF ¶ 556. The strained inferences required to see the 2017 Smile Source decision as an abrupt, radical change make for a minus factor. *McWane*, 2013 WL 8364918, at *330 ("The strained inferences required to accept this argument are rejected.").

ii. Actions Against Self-Interest: There Were None.

To prove that Patterson acted against its economic self-interest, Complaint Counsel must present "evidence of conduct that would be irrational assuming that the defendant operated in a competitive market." *Flat Glass*, 385 F.3d at 360–61. "[N]o inference of a conspiracy can be drawn" when there is an "independent business justification for the defendant's behavior." *Blomkest*, 203 F.3d at 1037; *see also InterVest*, 340 F.3d at 166 (insufficient evidence to infer conspiracy where each alleged co-conspirator viewed plaintiff as a threat to its business and

defendants independently "simply chose not to partner with a new company with unproven technology").

Courts are reluctant to second-guess a company's business judgment about whether to pursue new opportunities. *See Twombly*, 550 U.S. at 568–69 ("Firms do not expand without limit and none of them enters every market that an outside observer might regard as profitable, or even a small portion of such markets." (quoting Areeda & Hovenkamp ¶ 307d, at 155 (Supp. 2006) (alteration omitted)); *Baby Food*, 166 F.3d at 127 (the court was "unwilling to question [defendant's] business judgment" where "the evidence reflect[ed] [defendant's] strategic planning as to whether and when to pursue particular business opportunities"). Second-guessing a company's *inaction* is particularly problematic, as the government explained in its brief in *Twombly*. *See* Brief for the United States as Amicus Curiae, Department of Justice, *Bell Atl. Corp. v. Twombly*, 2006 WL 2482696 at *21 ("Parallel inaction is even less suggestive of illicit agreement. In particular, 'parallel decisions by business firms not to enter new markets create no such inference.' Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 307d, at 155 (Supp. 2006). . . . Thus, drawing inferences from what a business fails to do is a problematic exercise; one can analyze the harms and benefit of an action as a discrete matter, but the number of territories a business does not enter or products it does not offer is virtually infinite. Even the most vigorous rivals will end up not competing in some respects.").

Patterson's choice in 2013 to have its new Special Markets division focus only on the most promising DSOs, and not on GPOs, was rational and in Patterson's interest. After having nearly ceded the DSO segment to Schein and Benco, Patterson invested millions to catch up, creating a new business infrastructure to handle DSOs' high-volume, centralized ordering. FOF ¶¶ 68, 69, 77, 79, 83. Because GPOs do not order product centrally, or at all, Patterson Special Markets's

central ordering capabilities made no sense for them. FOF ¶¶ 113, 483. Nor were GPOs as attractive a business opportunity as DSOs, and it was in Patterson's interest to ensure that its Special Markets initiative remained focused on the most lucrative opportunities, to justify its investment. FOF ¶¶ 86, 92, 112–14.

Still, Patterson *Dental* evaluated each buying group opportunity on its merits—it met with buying groups, listened to their proposals, and made individual, rational decisions about whether these proposals made business sense for Patterson. FOF ¶¶ 130, 131, 134, 167, 171. Usually, they did not: the groups typically could not deliver volume commitments or presented incoherent, dishonest, or outlandish proposals. FOF ¶¶ 132, 167, 171. Thus, Patterson chose to hold off on Smile Source when every Smile Source member appeared to already be a Patterson customer. FOF ¶¶ 152–53. And it chose to steer clear of the Kois Buyers Group after discovering Qadeer Ahmed's dishonesty. FOF ¶¶ 584, 589, 593. It is incomprehensible that Complaint Counsel, representing the Federal Trade Commission, continue to claim that Patterson acted against its interest in failing to engage with a known liar. Patterson's rational choices make this a big minus factor.

iii. Motive To Conspire: Patterson Did Not Have One.

Evidence of a motive to conspire is a "background" plus factor that cannot establish a conspiracy on its own. *Blomkest*, 203 F.3d at 1043. Thus, motive is neither necessary nor sufficient to prove the existence of an agreement. *Id.* Where alleged co-conspirators "had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." *Matsushita*, 475 U.S. at 596-97. Care must therefore be taken with the motive plus factor, as evidence suggestive of motive may simply indicate that defendants operate in an oligopolistic market—it may simply reflect the legally insufficient fact that market behavior is interdependent and characterized by conscious parallelism. *See, e.g.*, *Baby Food*, 166 F.3d at 122 ("[C]onspiratorial

motivation is ambiguous because it 'can describe mere interdependent behavior . . . Thus, no conspiracy should be inferred from ambiguous evidence or from mere parallelism when defendants' conduct can be explained by independent business reasons.'"); *see also* 6 Areeda & Hovenkamp, Antitrust Law ¶ 1434c1, at 245 (2d ed. 2003) ("'[C]onspiratorial motivation' and 'acts against self-interest' often do no more than restate interdependence.").

Here, the record shows that Patterson did not view buying groups as a threat during the alleged conspiracy and thus did not have a motive to conspire about them with its archrivals. FOF ¶¶ 176–82. Particularly given buying groups' minimal market presence at the time, Patterson would have stood to gain little by departing from its daily competition with Schein and Benco to collude over a non-material customer segment, especially given that Patterson competed for individual member dentists of buying groups. FOF ¶¶ 37, 40, 120, 162. David Misiak wrote of "buying groups" in September 2013—right at the peak of the alleged conspiracy—"I *would not* currently classify these as a big *threat* to the business." FOF ¶ 182.

Complaint Counsel's evidence consists of two SWOT ("Strengths, Weaknesses, Opportunities, Threats") PowerPoint slides from 2012 and 2014. FOF ¶ 178. But the "threat" listed on the 2012 slide was that Patterson would *miss out* on potential business opportunities with classes of potential customers including "national buying groups," "group practices," and "institutions." (CX3286-026 (listing as "external threats" "Expansion of national buying groups, group practices, institutions"); Guggenheim, Tr. 1580–81 (confirming this)). And the threat listed on the 2014 slide suggests the absence of an agreement, as it identifies as a "threat" "competitors' willingness" to work with "buying groups" during the time Patterson was supposedly colluding with those competitors not to work with "buying groups." FOF ¶ 180.

Because Patterson's conduct towards buying groups is consistent with other, equally plausible explanations supported in the record (evaluating them individually and rejecting most as unattractive), FOF ¶¶ 130, 167, 171, the motive plus factor is unsupported.

iv. Traditional Hallmarks Of Conspiracy Are Not Present.

Even when motive and noncompetitive behavior are present, a plaintiff also must present substantial evidence of "customary indications of traditional conspiracy," which "tend[] to exclude the possibility" that the defendant acted independently of its competitors. *Matsushita*, 475 U.S. at 588; *Flat Glass*, 385 F.3d at 360. "Evidence implying a traditional conspiracy" consists of "non-economic evidence 'that there was an actual, manifest agreement not to compete,'" which may include "'proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown.'" *Flat Glass*, 385 F.3d at 360-61 (quoting *High Fructose*, 295 F.3d at 661; 6 Areeda & Hovenkamp, ¶ 1434b); *see also Matsushita*, 475 U.S. at 588; 6 Areeda & Hovenkamp, supra, ¶ 1416, at 103 (referring generally to "an overt act more consistent with some pre-arrangement for common action than with independently arrived-at decisions").

Here, Complaint Counsel has cited evidence of "unexplained communications" and "friendliness" between Respondents as plus factor evidence. (CC's Pretrial Br. at 43–45). But every listed communication involving Patterson is explained, and no witness explanation is contradicted. Complaint Counsel's mere disbelief of every relevant witness is not plus factor evidence.

III. Dr. Marshall's Conclusions Deserve No Weight.

Expert testimony must be relevant (sufficiently tied to the facts of the case) and reliable. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993); Fed. R. Evid. 702. In determining whether expert testimony is sufficiently reliable, courts must determine whether it applies "the

same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). "[A]n opinion [may] be excluded not because it is necessarily incorrect, but because it is not sufficiently reliable and . . . too likely to lead the factfinder to an erroneous conclusion." *In re TMI Litig.*, 193 F.3d 613, 666 (3d Cir. 1999), *amended*, 199 F.3d 158 (3d Cir. 2000).

For this reason, the one time before this case when Dr. Marshall testified before a court, for the government, in an alleged antitrust conspiracy, his opinion was excluded. FOF ¶ 752. Judge Trenga excluded Dr. Marshall's conspiracy opinion as inadmissible because Marshall cherry-picked his information and ignored contrary evidence, such that it was "not at all clear whether Dr. Marshall used the most appropriate data" and "[o]ther aspects of [his] model also raise[d] substantial doubts as to its reliability." *U.S. ex rel. Bunk v. Birkart Globistics GmbH & Co.*, 89 F. Supp. 3d 778, 803–04 (E.D. Va. 2014), *vacated and remanded on unrelated grounds*, 842 F.3d 261 (4th Cir. 2016).

Dr. Marshall's $2.5 million-plus opinion in this case is equally unreliable.

A. Dr. Marshall's Analysis Of Hidden "Economic Content" In Patterson And Benco's Two Communications Is Neither Relevant Nor Reliable.

Experts cannot substitute their own assumptions for real-world facts. *See, e.g.*, *TMI*, 193 F.3d at 683; *see also In re Class 8 Transmission Indirect Purchaser Antitrust Litig.*, Fed. App'x 135, 140 (3d Cir. 2017) (district court "properly considered" "real world factors surrounding the complicated market" rather than just the expert's characterization of the market (quotation omitted)); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056-57 (8th Cir. 2000) (expert excluded for failure to "incorporate all aspects of the economic reality" and "ignor[ing] inconvenient evidence"). Experts also cannot "merely recite what is on the face of documents produced during discovery" and "merely interpret defendants' statements." *Anderson News*, 899

F.3d at 112. But Dr. Marshall did both. Though he drafted an extremely lengthy (and costly) report, Dr. Marshall substituted his assumptions for the facts, about which he was surprisingly uninformed.

Dr. Marshall's opinion that Patterson colluded with Benco and Schein relating to buying groups from 2013 to 2015 relied entirely on his interpretation of Patterson and Benco's February and June 2013 emails. FOF ¶ 677.[31] Dr. Marshall interpreted Paul Guggenheim's February 8, 2013 10-second throwaway response to an unsolicited email from Chuck Cohen to be evidence of Patterson's collusion. FOF ¶¶ 676–77, 691. Yet, Dr. Marshall conceded at trial that the February 8, 2013 communication did not include *any* commitment to take *any* concerted action. FOF ¶¶ 678–79. He acknowledged that feelings and commitments are different things. FOF ¶ 681 (RXD0216; Marshall, Tr. 3324 ("A. The word 'feel' and the word 'commit' have different definitions. Yes."). And he conceded there is no evidence that, after the February 8 email, any Patterson executive (in Minnesota) instructed Patterson's New Mexico team to cancel a meeting. FOF ¶¶ 682–84. He had no "direct or indirect evidence" that Cohen and Guggenheim's conversation "was directly or indirectly communicated to the people on the ground in New Mexico." FOF ¶¶ 684. He also had no idea who was involved in the New Mexico transaction or what they had said or done. FOF ¶¶ 683.

"I'm looking at the economic evidence here," Dr. Marshall testified. FOF ¶¶ 679. And from that economic evidence, he said, "I would presume that the senior manager of a company is managing his people, so that's where I am with that." FOF ¶ 679. In other words, Dr. Marshall

[31] The third interfirm communication—between Patterson and Schein—relates to attendance of the Texas Dental Association (TDA) meeting. Dr. Marshall did not list TDAPerks, the TDA's discount dental supplies program, as a buying group and he did not realize that Complaint Counsel is not alleging a boycott of the TDA. FOF ¶ 687.

just made it up. He did so even as he acknowledged past writings in which he called it a "tragedy" to read about "firms that were fined huge amounts for engaging in nominally anti-competitive actions that had no chance of being successful" because they discussed over "a lunch and one hour of conversation." FOF ¶ 690. Real collusion, he explained, "[r]equires planning, investments in administration, clear thinking, and hard work." FOF ¶ 690. All impossible in a ten-second email.

Similarly, even though he relied on Cohen and Guggenheim's June 2013 email exchange about Atlantic Dental Care to support his conspiracy opinion, Dr. Marshall acknowledged that it was sent *after* Patterson decided not to bid on the Atlantic Dental Care business, *after* both Benco and Schein did bid, and *after* the bid had already been awarded to Benco (FOF ¶ 685)—hardly the required *preceding* agreement that is necessary to establish an antitrust violation. *Twombly*, 550 U.S. at 557. Despite acknowledging these facts, Dr. Marshall *presumed*, in Court, that the email was saying "essentially, What are you doing? I thought we weren't bidding for buying groups. Then Cohen is responding, We decided it's not a buying group." FOF ¶ 685. But he then conceded that this again was the "economic content" of the emails—the actual content said no such thing. FOF ¶ 685.

There is nothing scientific about any of this. For expert testimony to be sufficiently reliable as to be admissible "it must be based on the methods and procedures of science rather than subjective belief or speculation." *TMI*, 193 F.3d at 670 (affirming exclusion of an expert's testimony based on what the expert described as "an assumption. . . . not an unreasonable one."). "[W]hen it comes to experts, if they are incorrect in the facts that they rely on, that can be a fatal problem." FOF ¶ 680. Reading documents and making up facts about them is not a method and procedure of science. It cannot be subjected to peer review, and the potential for error is self-evident. It therefore deserves no weight.

B. Dr. Marshall's Opinion That Patterson Acted Contrary To Its Economic Interest Is Contradicted By Record Evidence—And His Own Testimony—And Rests On Only The Tiniest Sliver Of Data.

Dr. Marshall's $2.5 million plus analysis was not based on a single academic, peer-reviewed study endorsing his methodology. FOF ¶ 741. And it focused on neither of the groups relevant to the two interfirm emails in this case involving Patterson (NMDC and ADC), nor 36 out of the 38 groups he opines were turned down by at least one Respondent during the alleged conspiracy period. FOF ¶ 713. Instead Dr. Marshall focused on two groups Patterson never discussed with Benco or Schein: Kois and Smile Source. FOF ¶¶ 714–15. That is reasoning by anecdote, which is improper for an expert. *Newell Rubbermaid Inc. v. Raymond Corp.*, 676 F.3d 521, 528 (6th Cir. 2012) (affirming district court's decision to exclude expert opinion based on "anecdotal evidence, improper extrapolation, failure to consider other possible causes, and, significantly, a lack of testing."); *see also, e.g., Va. Vermiculite, Ltd. v. W.R. Grace & Co.—Conn. & The Historic Green Springs, Inc.*, 98 F. Supp. 2d 729, 740 (W.D. Va. 2000) (excluding expert report because "[d]eriving analyses in the antitrust field from anecdotal evidence . . . is a basis for manifest error").

Dr. Marshall conceded that Patterson would have been rational to walk away from a buying group that made an incoherent proposal. FOF ¶¶ 729–30. Yet he did not know whether any group in question, including Kois and Smile Source, made a coherent presentation to Patterson. Indeed he concluded Patterson acted irrationally with respect to Kois while knowing nothing of Kois's approach to Patterson. He knew nothing of Qadeer Ahmed's company's size, background, experience, home country, or reputation in the dental industry. FOF ¶¶ 703–27. Indeed, even though Qadeer Ahmed was the Kois Buyers Group's sole point of contact with Patterson, Dr. Marshall did not even know *who Qadeer Ahmed was* when he (Dr. Marshall) was deposed. FOF ¶ 728. And Dr. Marshall had to concede at both his deposition and at trial that Patterson's reasons

for not working with Kois were rational—Ahmed presented an incoherent, dishonest proposal to Patterson, and Patterson found him out. FOF ¶¶ 729.

As to Smile Source, though Dr. Marshall acknowledged that cannibalization was a legitimate concern when evaluating a buying group, he failed to note that, when Smile Source originally approached Patterson in late 2013, a Patterson employee reported to Patterson's executives that Patterson already does business with "all [Smile Source members] that [she] looked up." FOF ¶¶ 696, 699.

Dr. Marshall also testified Kois and Smile Source were "highly representative" of buying groups generally (FOF ¶ 716), but this, too, was simply made up. For example, Dr. Marshall listed, among materials he relied upon, a Kois Buyers Group presentation calling the Kois Buyers Group "profoundly different" from buying groups and "not a standard BUYING GROUP." FOF ¶ 718. And he listed, among materials he relied upon, Smile Source's Trevor Maurer's testimony that Smile Source was *not* a buying group. FOF ¶ 719. How did Dr. Marshall know that these witnesses with personal knowledge were wrong and he was right?

Dr. Marshall's analyses also did not fit the timeline of this case. One of Dr. Marshall's five case studies addressed a time period one year *prior* to when Patterson allegedly joined a conspiracy, and another covered the time period two years *after* the alleged conspiracy supposedly ended. Dr. Marshall's remaining three case studies, the only ones that even address time during the alleged conspiracy period, included time in the benchmark periods. Courts have held that "[w]hen constructing a benchmark statistic, the regression analyst may not 'cherry-pick' the time frame or data points so as to make her ultimate conclusion stronger." *Reed Const. Data Inc. v. McGraw-Hill Cos.*, 49 F. Supp. 3d 385, 400 (S.D.N.Y. 2014). "Rather, some passably scientific analysis must undergird the selection of the frame of reference." *Id.*; *see also In re Mushroom*

Direct Purchaser Antitrust Litig., No. 06-0620, 2015 WL 5775600, at *7 (E.D. Pa. Aug. 5, 2015) (benchmark analysis was admissible because expert provided "sufficient rationale" and "sufficient factual basis" for it).

Finally, Dr. Marshall's remaining three case studies were based on only the tiniest fraction of a fraction of data—hardly sufficient for an econometric analysis. "The validity of a survey's results is undermined if the sample is not representative of the population that it purports to represent *or is not selected in a sufficiently random manner*." *Floorgraphics, Inc. v. News Am. Mktg. In-Store Servs., Inc.*, 546 F. Supp. 2d 155, 179 (D.N.J. 2008) (quoting *United Parcel Serv., Inc. v. U.S. Postal Serv.*, 184 F.3d 827, 840 n. 14 (D.C. Cir. 1999)). Courts have thus held insufficient under *Daubert* and Rule 702 analyses, like Dr. Marshall's analysis here, that represent nothing more than a "compartmentalized view" based on a "modicum of data not fully representative" of sales at issue. *In re Class 8 Transmission Indirect Purchaser Antitrust Litig.*, 140 F. Supp. 3d 339, 353-56 (D. Del. 2015) ("In no way does an analysis of one percent compel the conclusion that plaintiffs can proffer sufficient common evidence to prove the alleged overcharges were passed through to indirect purchasers."), *aff'd in relevant part*, 659 F. App'x 135, 141 (3d Cir. 2017).

In opining that Patterson acted contrary to its self-interest in not doing business with buying groups, Dr. Marshall studied only "a small fraction" of dentists – three-tenths of 1 percent or three one-thousandths of independent dentists. FOF ¶ 733. In his Case Studies 1 and 2, Dr. Marshall studied only 0.0015 of independent dentists and in Case Study 3, he studied only 0.000001 of independent dentists. FOF ¶¶ 736, 738, 740. Yet from this tiny sample, Dr. Marshall opined that Patterson acted contrary to its unilateral interest in passing up on another, similarly tiny fraction of the company's gross profit if it had done business with Kois and Smile Source—anywhere from

eight one-thousandths to three one-hundredths of one percent over several years. FOF ¶¶ 737, 739, 748, 750, 751

IV. There Is No Basis For Injunctive Relief.

Injunctive relief under Section 5 of the FTC Act is appropriate only where there is a cognizable danger (as opposed to a "mere possibility") of recurrent violation. *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953) ("The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility. . ."); *see also TRW, Inc. v. F.T.C.*, 647 F.2d 942, 954 (9th Cir. 1981); *Borg-Warner Corp. v. F.T.C.*, 746 F.2d 108, 110 (2d Cir. 1984). Complaint Counsel bears the burden to show such a cognizable danger. *TRW*, 647 F.2d at 954 (setting aside Commission order when the company was no longer infringing at the time of the Commission's order and complaint counsel failed to prove a "cognizable danger of recurrent violation"); *see also Borg-Warner*, 746 F.2d at 110 (reversing Commission order when the alleged infringing conduct had terminated before the order was issued and nothing in the record suggested a possibility of recurrence); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559–60 (2011) ("plaintiffs no longer employed [by Wal-Mart] lack standing to seek injunctive or declaratory relief against its employment practices"); *City of L.A. v. Lyons*, 461 U.S. 95, 105 (1983) (past injury at hands of police did not entitle plaintiff to enjoin future police practices).

Here, the record contains no evidence that the alleged agreement not to work with buying groups could recur. Rather, Complaint Counsel claims that Patterson's alleged unlawful conduct ended *four years ago*, and that all three Respondents including Patterson are now dealing with buying groups. FOF ¶¶ 756–63. Indeed, Patterson's last interfirm communication discussing buying groups was on June 6, 2013. FOF ¶¶ 299–300, 755. The record likewise shows that Patterson, Schein, and Benco today work with buying groups. FOF ¶¶ 757–63. Such a record

does not support a finding of a "cognizable danger" that the challenged conduct could reoccur. *W. T. Grant*, 345 U.S. at 633. Thus, there is no basis for injunctive relief against Patterson.

CONCLUSION

Collusion, Dr. Marshall testified and previously wrote, "requires planning, investment in administration, clear thinking, and hard work." FOF ¶ 690. If so, then an offhand, ten-second courtesy response to an unsolicited email does not a conspiracy make. Not when held against universal, uncontested witness denials. Not when held against enough evidence of Patterson's fierce, daily competition against its supposed co-conspirators to fill the Marianas Trench. Not held against the absence of evidence that Patterson ever acted in parallel with Schein and Benco during the alleged conspiracy. Not when held against uncontradicted evidence that Patterson's policies towards buying groups never changed. Not when held against Patterson's rational choice not to work with a discovered liar. Judgment should be entered for Patterson.

Dated: April 17, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2019 I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

Dated: April 17, 2019

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Notice of Electronic Service

I hereby certify that on April 17, 2019, I filed an electronic copy of the foregoing 2019-04-17 Patterson Post-Hearing Brief [PUBLIC], 2019-04-17 Patterson Proposed Findings of Fact [PUBLIC], with:

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