

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



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

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RESPONDENT PATTERSON'S PRE-TRIAL BRIEF

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INTRODUCTION

This case is a textbook example of the kind of havoc wreaked on corporate America by “regulatory hubris” and a federal agency run amok—at an enormous expense to a U.S. company that’s been in business, fighting it out against its rivals, for more than a century.¹ The evidence at trial will show that Respondent Patterson Companies acted independently and pro-competitively before, during, and after it supposedly joined the Benco-Schein conspiracy in February 2013. Indeed, the basic facts are found in contemporaneous documents and are entirely undisputed:

- Patterson provided individual dentists with thousands and thousands of price concessions throughout 2013, 2014, and 2015, when the alleged conspiracy ended. These solo dentists, one-or two-dentist practices, were the vast majority of the 200,000 dentists nationwide (roughly 75-80%), and Patterson’s competitive efforts to win their business were relentless: it engaged in ██████████ with Benco, Schein, and its many other competitors ██████████ constantly ██████████ to ██████████
- Patterson also attacked the next largest segment of the customer base, the corporate Dental Service Organizations, right during the 2013-15 period. Corporate DSOs started to grow rapidly following the 2008-09 financial crises by buying local dental practices, hiring their dentists, and committing that their dentist-employees would buy set volumes of dental equipment and supplies from a single distributor. By the mid-2010s, those corporate DSOs employed 10-15% of all dentists. Historically, Patterson’s sales and service operations had been decentralized in order to focus on building the company’s business one dentist at a time. But, in 2013, the company started to make enormous investments in time, money, new personnel, and new IT and other infrastructure to transform its business and create a new centralized sales and service organization, Patterson Special Markets, designed to appeal to corporate DSOs. Schein had long dominated the corporate DSO segment with roughly 75-85% of those customers, and Benco had the vast majority of the remainder (10-15%). Starting in 2013, Patterson invaded the stronghold of Schein

¹ Today, there is an overwhelming consensus that markets and other distributed social learning mechanisms are much better at solving the vast majority of problems. And even the most interventionist regulators often talk about preferring market mechanisms and ‘light touch’ regulation. Yet, despite the lip service paid, regulators still too often instinctually react to apparent problems by proposing top-down solutions. This instinct is the opposite of regulatory humility. And to be more effective regulators, we must suppress this instinct.” Maureen K. Ohlhausen, *Three Regulatory Principles to Promote Innovation* (March 2, 2015), available at https://www.ftc.gov/system/files/documents/public_statements/627591/150302ppiregreform.pdf

and Benco and after building its capabilities, it won significant corporate DSO accounts—who committed that they would buy specific quantities of equipment and supplies from Patterson—in 2014 and 2015, culminating in winning the single largest DSO account [REDACTED] from Schein in 2016.

- A very small percentage of all solo dentists (roughly 5%) were members of so-called “buying groups.” “Buying groups” were very loose affiliations of completely independent and separately owned dentists who each remained free to run their own businesses—and buy from any distributor they wanted to—as they saw fit. And, it is undisputed, Patterson always competed for their business as solo dentists whether they were members of “buying groups” or not. “Buying groups” as “buying groups,” however, were different. First, they were not all the same: [REDACTED] RX 3019 (McFadden Dep. 119:24-120:23). Often, they were just starting up and had very few members and no real business plan at all. Occasionally, they were a few years old and had cobbled together a member-list of a few dozen dentists. A very few “buying groups” were more established and had a few hundred members. The only common feature of all of these “buying groups,” however, was that they were entirely unlike corporate DSOs: no matter how many or (more often) how few members the “buying group” had, all “buying groups” were entirely unwilling and unable to commit to buying a set volume of equipment or supplies from their preferred distributor because each member-dentist retained complete control over its business and thus could buy from any distributor it wanted, regardless of which distributor the “buying group” selected as its endorsed distributor. Before, during, and after the alleged 2013-15 conspiracy, Patterson’s 800+ sales force treated each “buying group” the same: it always competed for the business of their members, and it engaged with the “buying groups” and evaluated them one-by-one. When it made sense for Patterson to do business with the “buying group,” as with OrthoSynetics and Jackson Health Systems in 2014, it did. When it did not make sense to Patterson, as in October 2014 when a representative for the fledgling Kois Buyers Group falsely suggested [REDACTED]—two assertions Patterson determined were blatantly inaccurate—Patterson did not.

That evidence of Patterson’s independent and pro-competitive decision-making with regard to all solo dentists and small practices, corporate DSOs, and with “buying groups” will be established at trial with numerous contemporaneous documents and with sworn testimony from every Patterson witness in the courtroom. Moreover, every fact witness in this case from Patterson, Schein, and Benco will also flatly deny that Patterson agreed with Benco or with Schein to boycott or refuse to discount buying groups.

These facts will all be undisputed at trial. Complaint Counsel will essentially concede that Patterson competed “tooth and nail” for 100% of all dentists—all of the solos and small practices, whether members of “buying groups” or not, and the corporate DSOs—but they will ask this Court to believe that despite that vicious competition, Patterson, Schein, and Benco put aside their cudgels, held hands, and refused to compete for the endorsement of the on “buying groups” whose members accounted for roughly 5% of all dentists (though, again, competing for the business of the dentists themselves who were always free to buy from Patterson or the many other distributors).

To overcome that mountain of evidence of Patterson’s independent and pro-competitive conduct and all of the sworn denials, Complaint Counsel must provide “*significant probative evidence*” of a conspiracy. “Facing the sworn denial of the existence of conspiracy, it [is] up to plaintiff to produce *significant probative evidence* by affidavit or deposition that conspiracy existed if summary judgment [is] to be avoided.” See *City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 130 (D.D.C. 2006) (emphasis added) (citation omitted), *aff’d* 409 F. App’x 362 (D.C. Cir. 2011).

So what will Complaint Counsel offer at trial? Complaint Counsel and its expert identified roughly 40 “buying groups”—but it will not present any evidence of any communications between anyone from Patterson and anyone from Benco or Schein for the vast majority of those. Instead, Complaint Counsel’s case boils down to two communications between Benco and Patterson in 2013—and the sleight-of-hand opinion of its paid expert witness, Dr. Marshall.

Complaint Counsel offers a strained interpretation of an unsolicited email Benco’s CEO sent Patterson’s CEO out of the blue on February 8, 2013 about a public report he had received that Patterson’s Albuquerque branch was hosting a meeting in its offices for a handful of dentists in a nascent group calling itself the New Mexico Dental Cooperative. Mr. Guggenheim responded

that he did not know anything about it—and the evidence will show that Patterson’s local branch manager had actually decided on his own not to host the meeting the day *before* Mr. Cohen’s email and without any involvement by Mr. Guggenheim. Mr. Cohen did tell Mr. Guggenheim that Benco had long had a policy against selling to “buying groups”—a policy it had obviously decided on its own long before his email—but he did not ask Mr. Guggenheim whether Patterson had a policy toward “buying groups.” He certainly did not ask for Patterson to “agree” or commit not to sell or discount buying groups going forward. And Mr. Guggenheim made no such commitment. Instead, his response was non-committal and he simply said “we feel the same way.”

The second email in June 2013 concerned the Atlantic Dental Cooperative (“ADC”)—and, likewise, fails to show an agreement or commitment on its face. ADC was another relatively new and small “buying group” and Patterson had decided back in February 2013 that it was not interested in being selected as ADC’s endorsed distributor. Instead, it decided to continue to compete for the business of ADC’s individual members who would remain free to buy from Patterson or anyone else regardless of who ADC selected. Benco did the opposite: it bid for ADC’s endorsement in May 2013. Schein also did the opposite of Patterson: it, too, bid for ADC’s endorsement in May in 2013. ADC selected Benco to be its endorsed distributor in mid-May 2013. Months *after* Patterson made its own decision not to bid, and weeks *after* Benco and Schein each decided to do the opposite and bid, and weeks *after* ADC awarded the business to Benco, Mr. Guggenheim emailed Mr. Cohen and asked him if Benco considered ADC a “buying group” or not. The email obviously had no impact on the decision Patterson made months earlier, or on Benco and Schein’s different decisions weeks earlier, or on ADC’s award of the business to Benco. Instead, all it shows is the obvious fact that Patterson and Benco had *different* views of ADC: Patterson considered them to be a “buying group,” while Benco did not.

To be sure, Complaint Counsel will mark other exhibits at trial—but those exhibits do not come close to the kind of “*significant probative evidence*” necessary to overcome the mountain of evidence of Patterson’s independent and pro-competitive conduct and the myriad sworn denials.

Moundridge, 429 F. Supp. at 130. For example:

- Complaint Counsel’s Pre-Trial Brief selectively quotes a few internal documents from Patterson or Benco or Schein that simply reflect the varied beliefs of each company’s employees about whether their rivals might or might not sell to “buying groups.” Those documents are not evidence of a conspiracy. They are, at most, reports of seemingly-parallel conduct (and, more often, simply speculation)—and the authors of those documents will flatly deny that they reflect any Patterson involvement in the alleged Benco-Schein conspiracy.
- Complaint Counsel may cite exhibits that pre-date Patterson’s alleged 2013 participation in the conspiracy by a year or more, but those are obviously not evidence that Patterson joined the alleged Benco-Schein conspiracy in February 2013
- Complaint Counsel may cite documents that on their face do not concern “buying groups” or even the business of distributing dental supplies at all and, instead, address college and professional football, golf, family developments, and the like, but those are obviously not evidence of a conspiracy.
- Complaint Counsel may cite documents that contain no substance at all, but are simply records that one phone number called another for a few minutes or that a Patterson person attended an industry conference or a trade association at the same time. Those documents, too, fail as a matter of law to prove a conspiracy.

Complaint Counsel will not introduce a single document showing any communication in 2013 or any time afterwards between Patterson and Schein that concern whether either company should bid or provide a discount to any “buying groups.” Instead, they point only to an exchange surrounding attendance at the Texas Dental Association annual meeting in Spring 2014. In the fourth quarter of 2013, Patterson’s Region Manager for Texas decided not to pay to attend the TDA meeting the following Spring—because the TDA was creating its TDAPerksSupplies discount program and had taken out full-page advertisements bashing distributors like Patterson. There is no evidence Patterson and Schein discussed not selling or discounting to

TDAPerksSupplies and, in fact, TDAPerksSupplies never approached Patterson and, instead, contracted with an internet-based distributor. Instead, the communication was only about attending the TDA meeting. Patterson’s Texas Region made the independent decision not to attend the TDA Spring meeting almost *four months prior* to Schein or Benco made their attendance decisions. Complaint Counsel points only to a January 2014 communication between Patterson and Schein about TDA attendance, that is dated long *after* Patterson had already made its own decision. And all it says is that [REDACTED]

Simply put, Complaint Counsel’s evidence is highly speculative and its “daisy chain of assumptions fail to support or justify an evidentiary inference of any unlawful agreement” involving Patterson.²

ALLEGATIONS

Complaint Counsel alleges that in February 2013 Patterson joined the alleged Benco-Schein conspiracy to [REDACTED] and that the conspiracy ended at some unspecified time in 2015. (CC’s Pre-Trial Br. at 8-9.) Complaint Counsel’s expert similarly testified that he [REDACTED]

² *In the Matter of McWane, Inc. & Star Pipe Prod., Ltd.*, 155 F.T.C. 903, 2013 WL 8364918, at *258 (2013) (rejecting conspiracy counts where the record contained over 500 uncontradicted sworn denials and a host of other evidence disproving the claims); conspiracy claims dismissed by the full Commission, *In the Matter of McWane, Inc., A Corp., & Star Pipe Prod., Ltd.*, 2014-1 Trade Cas. (CCH) ¶ 78670, 2014 WL 556261 at *1 (F.T.C. Jan. 30, 2014).

RX 2963 (Marshall Dep. Vol. 1, 319:12–13);³ *see also id.* (76:20–24: [REDACTED]
[REDACTED]); (307:12-13: [REDACTED]). The Administrative Complaint (“Complaint”) contains the following counts against Patterson:⁴

Counts I-III: Patterson unreasonably restrained trade and engaged in an unfair method of competition in violation of Section Five of the FTC Act by conspiring with Schein and Benco not to provide discounts to or otherwise compete for the business of Buying Groups of independent dentists. Complaint Counsel has plead this same conduct under three alternative standards: as a *per se* violation,⁵ an inherently suspect violation, and a truncated rule of reason analysis respectively. (Compl. ¶¶81, 84, 87; CC’s Pre-Trial Br. at 8-9.)

FACTUAL BACKGROUND

Patterson has been distributing dental equipment (*e.g.*, X-Ray and CAD/CAM machines, digital radiography sensors, and integrated operatory treatment centers), and consumable supplies (gloves, cotton rolls, rinse cups, disposable syringes) for over 140 years.⁶ Its product catalog includes more than 100,000 SKUs.⁷ Patterson employs more than 1,600 territory representatives and equipment specialists, organized in eight geographic regions at the time of the alleged

³ The deposition transcripts from Day 1 and Day 2 of Dr. Marshall’s October 1 and 2, 2018, deposition referred to throughout this brief are rough transcripts available at the time of this filing. They are referred to by the final transcripts’ reserved RX numbers, RX2963 and RX964.

⁴ The Administrative Complaint alleges a fourth, invitation to collude count solely against Benco.

⁵ Cases where the alleged conduct *per se* violates the antitrust laws are typically litigated by the Department of Justice. Mar. 14, 2018 Scheduling Hr’g Tr. 9:24 – 10:5: (“MS. KAHN: Your Honor, this case is about a conspiracy among Respondents to fix prices by agreeing not to discount to a particular customer segment. JUDGE CHAPPELL: Price fixing. MS. KAHN: Yes, Your Honor. JUDGE CHAPPELL: We don’t see a lot of those around here.”).

⁶ *See* <https://www.pattersoncompanies.com/who-we-are/default.aspx#section=history>.

⁷ *See* <https://www.pattersoncompanies.com/who-we-serve/default.aspx#section=dental>.

conspiracy and more than 70 local branches, who serve tens of thousands of dentists across the country.⁸ Each member of that small army in each locality has broad discretion over which dentists they supply and what prices—and discounts—they offer. RX3042 (Lepley Dep. 18:3–17).

The evidence will show that [REDACTED] RX3032 (Rogan Dep. 210:3). Their sales discretion is unfettered: [REDACTED]

[REDACTED] RX3048 (Lepley 30(b)(6) Dep. 90:8–91:7, 92:4–6). In addition, if the territory representative wants to provide the dentist with a blanket discount on *all* future purchases, he or she simply fills out a short “price class change” form explaining why and how much of a blanket discount is necessary and requesting branch and regional management approval—which is virtually always granted, as discussed below. RX3042 (Lepley Dep. 24:14–21; 27:24–28:9; 30:4–24); *see e.g.*, RX0060.

For most of its 140-year history, Patterson’s decentralized sales force focused almost exclusively on solo and small practices, such as clinics or schools, with only a few offices located within a single branch’s territory. RX3019 (McFadden Dep. 49:7–21). Even today, those solo and small practices account for the vast majority of Patterson’s customer base, and they also constitute the vast majority (~80–85%) of the 200,000 dentists industry-wide. RX0572, slide 21.

After the financial crisis of 2008-09, corporate dental practices, known as DSOs, started to grow rapidly, and today employ 10–15% of all dentists. RX0572, slide 39. Those corporate DSOs buy local practices across myriad locales (and thus own them and employ the dentists) and

⁸ *See id.*; RX3019 (McFadden Dep. 65:3–67:9; 72:8–20).

centralize the purchases and back-office functions of their dozens (or even hundreds) of branches, freeing their employee-dentists to focus on patient care.⁹ Patterson’s historically decentralized sales and service operations did not allow it to meet the demands of those corporate customers for single-point, centralized purchasing and delivery, a shortcoming Schein and Benco exploited: by 2012, Schein accounted for roughly 75% of corporate DSO sales, and Benco had the bulk of the rest. RX0043-00057. Starting in 2013, however, Patterson invested massively in personnel, software and IT upgrades, and other infrastructure changes to catch up in the DSO segment. RX2982 (McFadden I.H. 52:2–7); RX3041 (Anderson Dep. 67:7–11).

In recent years, a small percentage of solo dentists (<5% of the 200,000 total) have loosely affiliated themselves to form (or consider forming) “buying groups.” RX0572, slide 49. Unlike corporate DSOs, these “buying groups” typically do *not* create a separate corporate entity and do *not* have common ownership. Instead, each member dentist continues to own and run his or her own practice. RX3019 (McFadden Dep. 97:6–25; 138:5–22); RX3032 (Rogan Dep. 220:10–221:8). As a result, “buying groups” provide no centralized purchasing or other services, and purchasing decisions remain with each of the member dentists—who often have strong individual preferences about the products they buy, and, in particular, which distributor they want to provide them with service and support—and they are free to buy from their preferred distributor regardless of which distributor(s) the “buying group” endorses. RX3019 (McFadden Dep. 138:5–22).

Unlike corporate DSOs, the “buying groups” thus do not (and cannot) make any commitment on behalf of their member dentists to buy a set volume of any equipment or supplies;

⁹ See RX3019 (McFadden Dep. 97:6–17); http://www.oralhealthworkforce.org/wpcontent/uploads/2017/09/OHWRC_Trends_in_Dental_Service_Organization_Model_2017.pdf.

they simply ask distributors for bigger discounts for their members than for other dentists who are not in their buying group and say they will promote that distributor's products to their members. RX3028 (Fruehauf Dep. 63:24–65:23); RX3038 (Guggenheim Dep. 270:20–271:5). Because the “buying group” makes no volume commitment, the distributor cannot generally secure better pricing from *its* equipment and merchandise suppliers to justify the lower prices demanded. RX3019 (McFadden Dep. 97:18–98:12). And “buying groups” pose another obvious risk: if a distributor accedes to their demands and provides significantly lower prices to the members of the “buying group” than to its other, non-member customers, the distributor risks aggravating—and losing—its much-larger pool of non-member dentists. RX3028 (Fruehauf Dep. 58:17–59:17). For these reasons, Patterson historically viewed “buying groups” skeptically and did not generally sell to them, long before Complaint Counsel alleges Patterson joined the alleged Benco-Schein conspiracy in February 2013 and certainly *was not* “still evaluating the value of doing business with buying groups” at the time as Complaint Counsel would have this Court believe. RX3032 (Rogan Dep. 108:5–16); RX3019 (McFadden Dep. 28:3–7); RX3038 (Guggenheim Dep. 150:6–151:6); RX3042 (Lepley Dep. 89:16–90:2) (CC’s Pre-Trial Br. at 23).

I. The Evidence Will Show A Waterfall Of Pro-Competitive, Independent Decision-Making Throughout The Alleged Conspiracy Period

Overwhelming evidence will show at trial that Patterson was brutally competing with Benco and Schein throughout the time it was allegedly conspiring with them over a tiny fraction of the market. Patterson’s strategic planning documents will highlight its desire to beat its competitors: it planned to “grow share,” “take competitor share,” “enter new markets/specialties,” “build out [its] national account business platform,” and “grow sundries faster than [the] market.” *See e.g.*, RX0069-00003 (strategic plan for 2013 board meeting); RX0031-00009 (2013 strategic review); *see also* RX0084 (strategic direction for 2014 to 2017); RX306 (2015-18 strategic plan).

To take share from its competitors, Patterson cut prices and offered discounts every day in every region, branch, and local territory. Patterson Companies' CEO, Scott Anderson, testified that Patterson cut prices to compete for customers [REDACTED] RX3041 (Anderson Dep. 110:3–4). Patterson Dental's President from May 2010 to 2015, Paul Guggenheim, described his organization's efforts as [REDACTED] RX3038 (Guggenheim Dep. 397:3–7). The company was “aggressively at battle” and in “hand to hand combat” with Schein and Benco and its many other competitors “day in and day out.” RX3038 (Guggenheim Dep. 397:3–7). Guggenheim's successor, David Misiak, testified that reps would regularly [REDACTED] [REDACTED] RX3050 (Misiak Dep. 214:13–15). Vice President of Marketing and Merchandise, Tim Rogan, and other executives and regional managers likewise testified that the company was “always” attempting to “grind our way to gain market share,” and clashed “with all of our competition day in and day out.” RX3032 (Rogan Dep. 26:9–10); RX3042 (Lepley Dep. 86:11–12). [REDACTED] RX3028 (Fruehauf Dep. 43:17–19).

The wide discretion wielded by Patterson's 800+ territory sales representatives resulted in an extraordinary number of discounts. Because Patterson's 800+ sales reps had unfettered discretion to lower the price on any specific sale, the sheer volume of those price concessions is practically uncountable. RX3042 (Lepley Dep. 90:8–93:16). But, in addition to that, the reps also obtained written approval for thousands and thousands of “price class change” requests that lowered the prices for every purchase the dentist made going forward: *the evidence will contain more than 8,000 approvals for “blanket” price reductions* to win or keep business from Schein, Benco, and other competitors during the 2013-16 period. *See* RX0737.

A small sample of those price concessions to solo dentists and clinics, community health centers, schools and similar small one- or two-office customers demonstrates just how brutal

Patterson's competitive efforts were throughout this period. In 2013, for example, sales reps reported: "just wrestled back from Schein;" "competing with Schein to win;" "switch all her business . . . [from] Benco;" "matching Schein's discount to gain a share of the business;" "aggressive discount in an attempt to get their business;" "new win from Schein;" "I just want to kick . . . Benco in the mouth . . . and finally kick them out the door;" "flipped 30-year Schein customer;" "battling benco." See RX0060 (February 14, 2013); RX0214 (February 12, 2014); RX0061 (February 18, 2013); RX0219 (February 27, 2013); RX0081 (April 24, 2013); RX0089 (May 28, 2013); RX0091 (June 5, 2013); RX0094 (June 9, 2013); RX0121 (September 17, 2013); and RX0134 (October 16, 2013), *respectively*.

Patterson's efforts to beat Schein, Benco, and its other competitors continued throughout 2014: [REDACTED] "Schein Takeaway;" "They were going to switch to 100% to Schein, but we won;" "take from Schein;" "converted them" from Schein; [REDACTED] [REDACTED] "to prevent Dr. Roddy from switching to Benco and to grow his Patterson business;" "to price compete with Benco and gain more of their business;" "4 locations...ALL taken from Schein;" [REDACTED] "won from Schein;" "gunna try and steal this one from my friend Greg Jones at Benco!;" [REDACTED] See RX0204 (January 15, 2014); RX0220 (February 28, 2014); RX0231 (April 7, 2014); RX0246 (April 16, 2014); RX0251 (April 24, 2014); RX0254 (April 30, 2014); RX0279 (June 13, 2014); RX0335 (August 28, 2014); RX0362 (October 8, 2014); RX0399 (December 18, 2014); and RX0386 (December 11, 2014), *respectively*.

Patterson's daily price competition continued throughout 2015 and 2016: "pickup from Schein;" "picking up all of her sundries business . . . trying to move quickly (as usual) as not to give Benco the chance;" "switching their business from Schein to Patterson;" "switching their

business from Schein;” [REDACTED] “brought the Dr back over” from Benco; “switching all of their business from Schein;” “\$30K Benco takeaway;” “one last big order with Schein . . . I said No Way!” [REDACTED]

[REDACTED] [REDACTED] “converting relationship” from Schein, “keeping Schein out.” See RX0414 (February 4, 2015); RX0421 (March 2, 2015); RX0434 (April 20, 2015); RX0447 (May 11, 2015); RX0492 (August 21, 2015); RX0503 (September 18, 2015); RX0506 (October 8, 2015); RX0528 (November 13, 2015); RX0607 (May 12, 2016); and RX0608 (May 12, 2016), respectively.

II. Starting In 2013, Patterson Invested Heavily To Build The Capabilities To Invade Schein And Benco’s Stronghold In Corporate DSOs

The 2008-09 financial crisis led to a sharp decline in demand for dental equipment and supplies, as patient visits fell. RX3019 (McFadden Dep. 49:22–50:5); RX0572, slide 12. Industry experts did not predict a recovery any time soon, and instead forecast that solo practitioner demand was likely be no-growth for years. RX0572, slide 39. The decline led many solo dentists to abandon the chore of running their own practices and, instead, to sell their practices to corporate DSOs that provided the security and centralized purchasing and services of a larger organization and left them free to focus on patient care. RX3019 (McFadden Dep. 51:6–17). These DSOs were the fastest-growing segment of the industry, growing at double-digit rates. RX0043-00018.

Patterson thus decided to “widen its strike zone” and target corporate DSOs, even though this “Special Markets” segment was dominated by Schein, with roughly 75% of corporate customers, and Benco, with roughly 10-15%. RX0043-00057. In late Summer 2012, Patterson hired an experienced consulting firm, [REDACTED] to evaluate and make recommendations on the DSO opportunity. RX3019 (McFadden Dep. 50:18–25); RX0043. The

lead consultant, [REDACTED] 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. RX0043-00032-39. In Fall 2012, she provided Patterson’s management with her 75-page report and recommendation, that the company consider a plan to invade Benco and Schein’s stronghold. RX0043.

The report mapped out a [REDACTED]

[REDACTED]. RX0043-00086, 95-96. Patterson’s executive team obtained the approval of its board of directors to make this significant investment in early Spring 2013. RX3038 (Guggenheim Dep. 174:14–23); RX0069-00003 [REDACTED]. 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. RX3019 (McFadden 6-21-2018 FTC Dep. 52:13–53:9; 103:9–17). Patterson Special Markets launched in September 2013. RX0118.

Patterson’s work to build the capability to handle centralized demands of corporate DSOs, was monumental, expensive, and risky: historic [REDACTED] built to serve local dentists, had long [REDACTED] and it “[REDACTED] like [REDACTED] RX3019 (McFadden Dep 51:25–52:11). So, to safeguard

Patterson’s investment—and to meet internal commitments made to the board of directors to secure the green light for the new business segment—management told McFadden and Patterson Special Markets to be [REDACTED]

[REDACTED]. RX3038

(Guggenheim Dep. 175:14–23; 191:12–19). [REDACTED]

[REDACTED]. RX3019 (McFadden Dep. 65:3–67:9; 72:8–20). Patterson Special Market’s express mission in 2013–14 was to focus on only the biggest DSOs. RX0119 (announcing the formation of Patterson Special Markets and defining its mission).¹⁰

III. Patterson Regions, Branches, And Territory Representatives Always Independently Evaluated “Buying Groups,” But Rarely Found Them Attractive Customers

In contrast to corporate DSOs, loosely-affiliated “buying groups” were generally not attractive customers to Patterson because they were not under common ownership, had no corporate entity, did not commit to any volume of purchases, and left each member free to buy from any distributor it wanted. RX3019 (McFadden Dep. 81:12–83:16). Patterson generally saw little value in being endorsed by these groups, and the evidence will show Patterson repeatedly

¹⁰ Complaint Counsel misrepresents this document in its Pre-Trial Brief. It asserts that

[REDACTED] (CC’s Pre-Trial Br. at 24.) But the memorandum in question addresses only the class of customers that Patterson’s Special Markets division was created specifically to focus on—the decision whether to engage with a particular “buying group” was still in the sole purview of the regional and branch managers as it always had been. *See, e.g.*, RX0451 ([REDACTED])

meeting with and evaluating “buying groups,” but declining to sign a contract with them, for years *before* Complaint Counsel alleges it joined the alleged Benco-Schein conspiracy. RX0401 ([REDACTED]); RX0020 (August 2011: “no”); RX0029 (March 2012). Patterson executives testified, [REDACTED] [REDACTED]” RX3019 (McFadden Dep. 76:25–77:3). Patterson [REDACTED] RX3032 (Rogan Dep. 68:7–9). There was thus no [REDACTED] as Complaint Counsel alleges. (CC’s Pre-Trial Br. at 48-49, 50.)

For example, already in 2009 Patterson decided not to bid for the business of the dental business of the Minnesota Multistate Contracting Alliance for Pharmacy (“MMCAP”), a GPO that spanned multiple states and included entities such as the Oklahoma Department of Corrections. According to Patterson’s [REDACTED], a territory representative, and, later, member of the Special Markets team, [REDACTED]

[REDACTED] RX0401. Several years later [REDACTED] reported that Patterson had not done business with “buying groups” throughout its history, and explained why: [REDACTED] [REDACTED] because they cannot commit to buy certain, set volumes of equipment and supplies on behalf of their members and [REDACTED] [REDACTED] RX0188.

In March 2012—nearly a year *before* Patterson allegedly joined the alleged Benco-Schein conspiracy—Patterson’s Neal McFadden forwarded David Misiak an email from the Florida Dental Association seeking Patterson’s interest in a new buying group it was forming. RX0029.

McFadden wrote “I get these more often than I like. This stuff scares me. I’m gonna tell him thanks but no thanks. Your thoughts?” *Id.* Misiak responded: [REDACTED] *Id.*

Misiak’s March 2012 email is virtually indistinguishable from one he sent a year later that sits at the center of Complaint Counsel’s case. In late February 2013, a Patterson territory manager was negotiating with a “buying group” and forwarded an internal discussion regarding its request for proposals to Misiak, his supervisor. RX0066. Misiak told the manager that *his* personal response when approached by a “buying group” was to [REDACTED]. *Id.*¹¹ This is the same thing Misiak was saying in 2012, *before* Patterson allegedly joined a conspiracy. “Buying groups” were simply less attractive as customers than corporate DSOs:

[REDACTED]

Still, the evidence will show that Patterson regions, branches, and 800+ territory representatives were always free to consider “buying groups” and regularly met with them in the 2013–16 period, heard their proposals, and evaluated whether to seek an appointment as their endorsed distributor. Patterson’s President, Paul Guggenheim, explained that the company “had a

¹¹ Misiak testified that [REDACTED] RX2983 (Misiak I.H. 102:7–9). Misiak further explained that he [REDACTED], showing Misiak’s uncertainty and his desire to make sure his intelligence was accurate. RX3050 (Misiak Dep. 136:22–137:1). Misiak said [REDACTED]. RX3050 (Misiak Dep. 137:24–138:3).

¹² RX3019 (McFadden Dep. 96:23–98:12).

nuanced position on ‘buying groups’ to evaluate them individually in each market based on whether or not they made sense.” RX3038 (Guggenheim Dep. 185:14–17); *see also id.* 134:13–19 (Patterson had no company policy with respect to buying groups when it received Cohen’s February 8, 2013 email). The Vice President of Marketing, Mr. Rogan, reiterated that Patterson territory representatives occasionally asked about “buying groups,” and the company’s response was always the same: [REDACTED]

[REDACTED] RX3032 (Rogan Dep. 13:25–14:2, 60:19–24). [REDACTED]
[REDACTED]

RX3032 (Rogan Dep. 97:3–12).

For example, Patterson initially evaluated SmileSource when Mr. McFadden, the head of Special Markets, met with Mr. Goldsmith in November 2013. RX0177. Mr. McFadden’s [REDACTED]
[REDACTED] RX3019 (McFadden Dep. 120:12–19).
McFadden did not believe that SmileSource would have the influence to drive business to Patterson since the buying group was already working with Burkhart—Patterson’s concern was that SmileSource members would not switch over to Patterson given how dentists become loyal to their dealers. RX2982 (McFadden I.H. 209:22–210:17).

In September 2014, Mr. McFadden, the head of Special Markets, declined to attend a convention hosted by a “buying group” in Georgia because of his organization’s focus on corporate DSOs, but he noted that Patterson’s local branch would be welcome to attend: [REDACTED]

[REDACTED]
[REDACTED] RX0348. In May 2015, Mr. McFadden again declined an invitation to go beyond his Special Markets corporate DSO mandate—but he made it clear that Patterson’s Maine branch was free to do so: “*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.” RX0451 (emphasis added). Patterson’s Maine branch manager responded, “[REDACTED]” [REDACTED] RX0451. McFadden noted that [REDACTED] [REDACTED] RX0454 (emphasis added). Patterson’s approach to “buying groups”—to evaluate them one-by-one—was thus consistent throughout its history. Try as it might to spin “proof” to the contrary, Complaint Counsel will not be able to establish an inference that Patterson “significantly shifted [its] conduct in a manner that is consistent with an agreement.” (CC’s Pre-Trial Br. At 48.)

When Patterson determined that a “buying group” had very, very few members or that it had flat-out misrepresented the number of its members or that it had falsely claimed it had sophisticated equipment manufacturers as partners, or when it simply asked for an enormous discount for its members with no commitment to buy anything, let alone sufficient volumes to justify such large discounts, Patterson saw only risk to its relationships with its other customers and was not interested at all.

For example, Equalizer ProServices (the predecessor to the Kois Buyers Group promoted by Qadeer Ahmed) seemed simply [REDACTED] to Patterson. RX3038 (Guggenheim Dep. 157:10–158:24); RX0328. In 2014, Patterson met with, but did not ultimately pursue, this Canadian buying group that claimed thousands of members scattered across multiple countries, numerous Canadian provinces and all 48 lower U.S. states. *Id.*; RX0328. While Equalizer ProServices claimed they had commitments from four vendors, Rogan reported to Guggenheim after checking with one of the vendors, Ivoclar, that Ivoclar responded [REDACTED] [REDACTED] RX0328. Later, as Guggenheim testified, [REDACTED]

membership was not realistic or practically possible to service. RX3038 (Guggenheim Dep. 272:13–19) ([REDACTED]).

Since many of the “buying groups” that contacted Patterson had those unattractive characteristics, it was often skeptical given these presented unwise business cases. *See, e.g.*, RX3050 (Misiak Dep. 137:24–138:3); RX3038 (Guggenheim Dep. 188:18–189:5) (small buying groups—[REDACTED]—would [REDACTED] and were obviously unattractive customers); RX3038 (Guggenheim Dep. 224:14–227:17) ([REDACTED]); RX3028 (Fruehauf Dep. 58:17–59:14) ([REDACTED]); RX3028 (Fruehauf Dep. 65:6–23) ([REDACTED]). After all, as Complaint Counsel’s expert, Dr. Marshall, conceded, [REDACTED] RX 2963 (Marshall Dep. Vol. 1, 95:21-24).

But, when a “buying group” presented different characteristics—for example, by committing to buy a set volume of equipment or merchandise—Patterson considered pursuing its endorsement and selling to its members. For example, Patterson’s branches sold to both

OrthoSynetics and Jackson Health in 2014 and afterwards.¹³ See RX0304; RX0333; RX3019 (McFadden Dep. 120:4–5) (OrthoSynetics); see also RX0271 (Jackson Health). In fact, Patterson had been selling to Jackson Health for [REDACTED] at that point. RX0271. Reminded by Tim Rogan that Jackson Health was a GPO, the South Florida branch manager, [REDACTED], [REDACTED]

[REDACTED]

[REDACTED]

Id.

In 2015, as the company started to see some “buying groups,” like Smile Source, sign up a hundred or more members across multiple locales, it weighed whether Patterson Special Markets might be better positioned to evaluate them, rather than leaving them to a single local territory representative.¹⁴ RX3038 (Guggenheim Dep. 154:9–155:4); RX2980 (Fields I.H. 29:5–30:4). By

¹³ In its Opposition to Patterson’s Motion for Summary Decision, Complaint Counsel seizes on favorable language from an internal discussion at Patterson as to whether OrthoSynetics fit the precise definition of a “buying group.” CC SOF ¶68. But it is clear from the discussion that Patterson thought it was close enough to a buying group that Patterson’s “historical” feelings towards buying groups might need to be revisited. Patterson Motion for Summary Decision at 13. Similarly, Complaint Counsel’s treatment of Jackson Health badly misses the point: it does not matter what *Complaint Counsel* thinks Jackson Health is based on Jackson Health’s website. CC SOF ¶ 69. What matters is what *Patterson* thought it was, and contemporaneous documents show that Patterson thought it was a “buying group” and worked with it anyways. Patterson Motion for Summary Decision at 13.

¹⁴ Complaint Counsel suggests that Patterson only changed course because of the FTC’s investigation into the three dental distributors beginning in July 2015. CC’s Opp. to Patterson’s MSD at 12. No evidence supports this suggestion. Complaint Counsel fails to take into account that the FTC’s August 2015 hold letter issued to Patterson did not mention “buying groups.” No document suggests the investigation was related to “buying groups.” Patterson could not have been “on notice” to supposedly change its course as a result of the FTC’s investigation. *Six months later,* [REDACTED]

[REDACTED] By that time, according to the Complaint and Complaint Counsel’s expert, Dr. Marshall, the conspiracy had ended. Compl. ¶10; RX 2963 (Marshall Dep. Vol. 1, 307:12-13: “[REDACTED]”; 76:20–24: [REDACTED]; 319:12–13: “[REDACTED]”).

Fall of 2015, Patterson was considering an internal position dedicated in part to [REDACTED] [REDACTED] RX0530 (October 2015 calendar invitation for a meeting between Guggenheim and Fields about his new position as of November). At the time, Patterson also hired [REDACTED] [REDACTED] to analyze its strategy with regard to DSOs and buying groups; [REDACTED] December 2015 report concluded that Patterson [REDACTED]

[REDACTED] RX0572, slide 54. In November 2015, Patterson appointed Wesley Fields as Director of Business Development in its corporate office and instructed him to evaluate larger “buying groups” within Special Markets (and still left regions and branches free to handle smaller “buying groups” as they saw fit). RX2980 (Fields I.H. 8:7-16; 29:5–30:4). All of this was done before Complaint Counsel and its expert alleged the conspiracy ended. Compl. ¶10 (“The agreement continued at least into 2015.”); RX 2963 (Marshall Dep. Vol. 1, 307:12-13: [REDACTED] 76:20–24: [REDACTED]

And Patterson moved forward with a large buying group in 2016, Smile Source, concluding that it was [REDACTED] and presented a [REDACTED] but Smile Source rejected Patterson in favor of Schein. RX2952 (Mauer Dep. 54:3–55:1); RX3050 (Misiak Dep. 154:23–156:2); RX3042 (Lepley Dep. 37:3–16); RX3019 (McFadden Dep. 120:11-23); RX2983 (Rogan I.H. 176:15–25; 397:16–399:19).

IV. Every Witness Denies That Patterson Agreed With Benco or Schein To Boycott “Buying Groups”

Every current and former Patterson employee in this case flatly denied participating in the alleged Benco-Schein conspiracy to boycott “buying groups.” Patterson Companies CEO Anderson, (“No”); Patterson Dental President Guggenheim (“No”); his successor, Misiak (“I do

not.” “[I]t’s meritless”); Vice President of Marketing and Merchandise, Rogan (“No.” “I do not.”); McFadden, head of Patterson Special Markets (“I do not.” “Outlandish.”); Lepley (as corporate designee), Director of Strategic Pricing (“I do not”); Fruehauf, southeast regional manager (“impossible”); Nease, branch manager (“I am not.” “No.”). RX3041 (Anderson Dep. 161:23–162:12); RX3038 (Guggenheim Dep. 400:24–401:11); RX3050 (Misiak Dep. 315:21–316:2); RX2983 (Misiak I.H. Tr. 10:8–16); RX3032 (Rogan Dep. 261:17–19; 257:20–22); RX3048 (Lepley 30(b)(6) Dep. 111:23–11:12); RX3028 (Fruehauf Dep. 191:10–15); RX3017 (Nease Dep. 127:19–22; 134:24–135:2), *respectively*.

Benco witnesses, too, denied any boycott agreement with Patterson: Chuck Cohen, Managing Director (“No.”), Patrick Ryan, Director of Sales, Strategic Markets (“No”). RX3030 (Cohen Dep. 484:5–10); RX3049 (Ryan Dep. 392:10–16).

Every Schein witness, likewise, denied that Patterson conspired: James Breslawski, President, (“I do not.”), Tim Sullivan, President, (“No.” “No.”), David Steck, Vice President of Sales (“No.”), Brian Brady, Senior Director of Sales (“No.”), Joseph Cavaretta, Vice President of Sales, Western Area (“No.”), Jake Meadows, Vice President of Sales, Eastern Area (“No.”), Hal Muller, President of Special Markets (“No.”), Randy Foley, Vice President of Sales, Special Markets (“No.”), Debbie Foster, Director of Sales, Special Markets (“No.”), Andrea Hight, Director of Group Practice (“no”), Kathleen Titus, Director of Group Practice (“I do not.”), Michael Porro, Zone Manager (“No.”), Darci Wingard, Director of Alternative Purchasing Chanel (“I don’t”). RX3027 (Breslawski Dep. 242:13–22); RX3040 (Sullivan Dep. 466:15–20; 528:24–529:5); RX3045 (Steck Dep. 145:19–146:15); RX3035 (Brady Dep. 318:13–319:2); RX3046 (Cavaretta Dep. 255:10–17); RX3031 (Meadows Dep. 268:23–269:12); RX3020 (Muller Dep. 223:12–16); RX3018 (Foley Dep. 381:19–22); RX2939 (Foster Dep. 164:6–11); RX3037 (Hight

Dep. 192:25–193:6); RX3025 (Titus Dep. 249:12–18); RX3016 (Porro Dep. 387:13–17); RX3024 (Wingard Dep. 233:11–19), *respectively*.

V. Patterson Did Not Agree To Boycott “Buying Groups” In Response To Benco’s Unsolicited February 2013 Email Or At Any Other Time

While Complaint Counsel lists numerous documents that, they claim, support their allegation that Patterson joined the alleged Benco-Schein conspiracy in February 2013, virtually all those documents *on their face* have nothing to do with buying groups or the allegations in this case. In the end, Complaint Counsel lists only a grand total of two email threads—one in February 2013 and another on June 2013—between Benco and Patterson and zero communications regarding buying groups between Schein and Patterson.¹⁵

First, roughly 50 of Complaint Counsel’s documents *pre-date* 2013—often, by several years—and thus are not evidence that Patterson joined an alleged conspiracy in February 2013—the date chosen by Complaint Counsel and echoed by its expert Dr. Marshall. This includes 13 Documents dated in the year before Patterson supposedly joined the Benco-Schein conspiracy.¹⁶

¹⁵ Additionally, Complaint Counsel cites a single document in support of its allegation that Benco, as the ringleader, viewed itself as the ██████ insinuating that Schein and Patterson would not need to communicate directly to effectuate the alleged conspiracy. CC’s Pre-Trial Br. at 11; Mar. 14, 2018 Scheduling Hr’g Tr. 29:14–16. But Complaint Counsel grossly rips this document out of context—the reference to ██████ has nothing whatsoever to do with buying groups. In fact, the email does not address buying groups at all; rather it discusses (internally) Amazon’s entry as an online distributor, something entirely unrelated to Complaint Counsel’s allegations.

¹⁶ *See, e.g.*, CX1384 (January 2012); CX1366 (March 2012); CX3408 (March 2012); CX3409 (March 2012); CX3410 (March 2012); CX1477 (August 2012); CX1311 (August 2012); CX1478 (August 2012); CX1479 (August 2012); CX1480 (August 2012); CX1310 (August 2012); CX1481 (August 2012). This also includes another 37 that are dated at least two years before Patterson allegedly joined the Benco-Schein conspiracy, *e.g.*, CX3383 (April 2011); CX3384 (May 2011); CX3385 (May 2011); CX3386 (May 2011); CX3387 (May 2011); CX3388 (May 2011); CX3389 (May 2011); CX3390 (May 2011); CX3454 (May 2011); CX3391 (May 2011); CX1354 (September 2011); CX1355 (September 2011); CX1391

Second, more than 25 of the documents dated after February 2013 are unambiguously unrelated to “buying groups” or any other business topic, and are simply personal chatter about family matters, holidays, a colleague’s passing, social gatherings, excess inventory, and sports. CX6481 (discussing son’s college plans); CX6472 (discussing family vacations); CX6428 (wishing a happy new year); CX6468 (sending condolences after colleague’s passing); CX1349 (scheduling lunch); *see* CX6424; CX6426; CX6430; CX6433; CX6436; CX6439; CX6441; CX6443; CX6446; CX6447; CX6450; CX6452; CX6453; CX6458; CX6460; CX6461; CX6463; CX6466; CX6470; CX6474; CX6477; CX6479.

Third, five post-February 2013 documents do address business topics—but those topics (like vendors asking to use end-user data and Patterson’s launch of a website dedicated to dental supply chain integrity) have nothing to do with “buying groups.” CX3070 (Cohen urging Guggenheim to include “poison pill” clause in agreements for customer purchase data); *see also* CX1054 (discussing same); CX1055 (discussing same); CX3222 (discussing same); CX3417 ([REDACTED] [REDACTED]).

Fourth, seven of these documents contain non-substantive calendar invites, lunch reminders, or bare-bones phone records of (almost always very, very brief) phone calls or

(September 2011); CX3392 (September 2011); CX3393 (September 2011); CX3394 (September 2011); CX3395 (September 2011); CX1358 (October 2011); CX1382 (October 2011); CX3397 (October 2011); CX3398 (October 2011); CX3399 (October 2011); CX3457 (November 2011); CX1362 (December 2011); CX1363 (December 2011); CX1049 (December 2011); CX1050 (December 2011); CX1465 (December 2011); CX3400 (December 2011); CX3401 (December 2011); CX3402 (December 2011); CX3403 (December 2011); CX3404 (December 2011); CX3405 (December 2011); CX3406 (December 2011); CX3067 (December 2011); CX3491 (December 2011).

voicemails.¹⁷ *See e.g.*, CX3415, CX3416 and CX1349 (Cohen and Guggenheim scheduling lunch in New York); CX0065 (Cohen calendar entry to discuss “Amazon response”); CX1401 (voicemail from Guggenheim checking in and asking Cohen for return call); CX1395 (Cohen call logs contain very brief calls with Schein employees in 2014 and 2015: 44 seconds (Don Hobbs); 3 minutes and 20 seconds (Don Hobbs); 4 minutes and 59 seconds (Tim Sullivan). They contain no narrative at all, let alone anything connecting them to “buying groups,” and the various participants had legitimate personal and business topics to discuss during this period, including trade association meetings and activities, potential arm’s length business transactions between the companies, and even potential acquisition or merger opportunities. *See e.g.*, RX3041 (Anderson Dep. 130:23–131:21) (Anderson and Sullivan attended DTA board meetings together during the 2012 to 2016 period); RX3041 (Anderson Dep. 130:5–15 (executives from Patterson, Schein, and Benco attended large dental conventions, such as the ADA, New York meeting, and Chicago meeting, during the 2012 to 2016 period)); RX0202 (PSA, a sales organization representing manufacturers in the dental market, hosted a dinner in early 2014 for Patterson, Schein, and Benco’s management and equipment teams); RX0294 (Patterson and Benco employees attended

¹⁷ Complaint Counsel’s Summary Exhibit contains numerous additional bare bones phone records of phone calls and non-substantive text messages about topics such as sports, scheduling meals, and family vacations. CX6027. But Complaint Counsel’s Summary Witness, Mr. Yasser Dandashly, has little understanding of the exhibit itself and was barely involved in its creation. He testified that the decision [REDACTED] in the Summary Exhibit was [REDACTED] at the Federal Trade Commission. Exhibit 1 (Dandashly Dep. 19:4–13) (Exhibit 1 will be added as a trial exhibit shortly as RX3090). In fact, Mr. Dandashly himself only has a [REDACTED] of where the underlying information came from. *Id.* at 13:16–20. And to prepare the exhibit, he received a summary spreadsheet from another FTC investigator that he then [REDACTED] from and [REDACTED] *Id.* at 19:4 – 20:12.

a CRET annual meeting in 2014); RX3040 373:17–374:23 (Cohen and Sullivan had in-person meetings in 2013 to 2015 to discuss Schein potentially acquiring Benco).

What is left are two email exchanges in 2013 showing an actual communication between Benco and Patterson about two nascent buying cooperatives (the New Mexico Dental Cooperative) and one entity (Atlantic Dental Cooperative) that may or may not have been a buying group. And note: there are none between Patterson and Schein.

On February 8, 2013, Benco’s Chuck Cohen sent an unsolicited email to Patterson’s Paul Guggenheim. Cohen told Guggenheim that he had received public information that Patterson’s local branch in Albuquerque, New Mexico was hosting an upcoming meeting for three local dentists who were trying to organize other dentists to form a “buying group” that they planned to call the New Mexico Dental Cooperative. The fledgling group had very few members at the time. Cohen also volunteered Guggenheim that Benco’s longstanding (and, thus, *independently decided* and pre-existing) policy was not to sell to “buying groups.” CX0057, page 6. Cohen did not ask Guggenheim to do anything, let alone ask Patterson to commit that it would never sell to “buying groups.” CX3412.

Guggenheim’s short response likewise said nothing about any commitment not to sell to the New Mexico Dental Cooperative, let alone to “buying groups” broadly. Instead, he said he did not know anything about the New Mexico Dental Cooperative but would look into it. He noted that Patterson people “feel the same way” about “buying groups,” expressing the view Patterson *already* held and had independently decided years earlier. RX2981 (Guggenheim I.H. 240:7–243:15; 243:16–18; 244:8–12; 244:19–22). It is undisputed that Guggenheim did not look into the situation and never got back to Cohen. RX2981 (Guggenheim I.H. 240:9–14) (“I meant that I’m not going to have any further conversation with him. . . . I was intending not to open the door for

a dialogue back and forth. I just was saying, okay, thanks. I'll look into it. End of subject.”). It is also undisputed that Mr. Cohen did not ask for or expect a response. CX0056 (Cohen wrote in a contemporaneous text message to a Benco colleague: [REDACTED]).

Patterson’s local branch manager, [REDACTED], had already told the New Mexico dentists *the day before*—on February 7th—that Patterson was canceling its willingness to host their meeting in Patterson’s conference room for his own reasons. RX0056 (same as CX4090).¹⁸ Mr. Cohen and Mr. Guggenheim never discussed the New Mexico Dental Cooperative again, and the email exchange had no impact on the New Mexico Dental Cooperative. Instead, Guggenheim testified that [REDACTED]

[REDACTED] RX2981 (Guggenheim I.H. 255:13–256:21). Indeed, he only forwarded Cohen’s email to two people, Misiak and Rogan, and

¹⁸ Complaint Counsel states that [REDACTED]

[REDACTED] (CC’s Pre-Trial Br. at 23.) This is misleading. In fact, there was no bid to NMDC—it had not even been formed, and was not formed until the group joined the Utah Dental Cooperative *after* the February email Complaint Counsel seizes on. RX3047 (Mason Dep. Tr. 63:2 – 64:7 (explaining that NMDC joined the Utah Cooperative between February 2013 and July 2013); 33:22–34:3 ([REDACTED]); 34:20–35:10 (“[REDACTED]

[REDACTED]). Complaint Counsel also ignores the precise date and direct language of the document they cite for support of their position; Patterson’s Belcheff tells Dr. Mason on February 7, 2013—the *day before* the supposed conspiratorial communication between Cohen and Guggenheim—that [REDACTED]

[REDACTED] CX4090. Mr. Belcheff then met with Dr. Mason separately and independently decided not to proceed with the New Mexico Dental Cooperative’s bid. There is no evidence that Guggenheim or Rogan had any input into Mr. Belcheff’s decision.

he did that without any comment at all: he did not draw any particular attention at any aspect of Cohen's email, let alone to Cohen's statement about Benco's policy with regard to "buying groups," nor did he instruct Misiak or Rogan to tell the 800+ territory sales reps to boycott "buying groups." CX0091; RX3050 (Misiak Dep. 80:84:4); RX2984 (Rogan I.H. 257:3-7) ([REDACTED]); RX3032 (Rogan Dep. 50:19-21; 53:7-12, 53:24-54:3). Rogan and Misiak were unsure what to even make of Cohen's email. RX3050 (Misiak Dep. 99:22-100:7) (testifying that he did not know what Guggenheim meant when he forwarded his email); RX3032 (Rogan Dep. 53:14-16) (same). And, as shown above in Section III, Patterson continued to meet with, engage with, and evaluate each "buying group" one-by-one throughout 2013-16.

The only other communication between Benco and Patterson that Complaint Counsel relies on as supporting its claim that Patterson joined the alleged Benco-Schein conspiracy is a June 2013 email exchange that occurred roughly *two weeks after* the buying group ADC had already awarded Benco its business. The exchange was *four months after* Patterson decided on its own not to bid for ADC's business and roughly *three weeks after* Schein and Benco had each decided to bid for ADC's business. Again, it shows no conspiracy at all. Instead, it shows that Benco and Patterson acted *differently* (Patterson did not seek ADC's endorsement, while Benco apparently, did) and had *different* views about whether Atlantic Dental Cooperative ("ADC") was a "buying group" or a DSO. CX3301.

In early 2013, Patterson's Chesapeake branch manager was approached by ADC, a fledgling "group" of some sort with a few dozen dentist-members. RX3017 (Nease Dep. 31:24-32:11). After meeting with the group's head, Dr. Fernandez, by February 27, 2013, Patterson had decided not to bid to be ADC's preferred supplier, but rather to continue to sell and service each

member dentist directly. CX0093; RX3028 (Fruehauf Dep. 114:7–115:6). Many ADC members were existing Patterson customers already receiving discounts, but ADC asked for a significant additional discount for its members, far below what Patterson charged those and other local Patterson dentists. RX3017 (Nease Dep. 47:12–15); RX3028 (Fruehauf Dep. 101:19–102:22). Patterson was skeptical of this proposal—ADC would not commit to a set volume, each dentist was free to buy from whoever it wanted, and the cost of handling and delivering product and service to each of the separate practices was exactly the same as serving the individual practices. RX0067. Additionally, Patterson’s branch manager and territory representative were concerned it might aggravate their other customers in the region. RX3028 (Fruehauf Dep. 113:12–114:3); RX3050 (Misiak Dep. 104:5–17).

No evidence supports Complaint Counsel’s assertion that Patterson changed its approach to ADC in June 2013. RX2036 ¶ 50. Guggenheim did attempt to gather additional market intelligence relating to ADC in June 2013, after being contacted by Chesapeake branch manager Devon Nease. But this was only *after* Schein and Benco had both already bid on the ADC business and *after* ADC had already awarded the business to Benco. Thus this communication had no impact at all on Patterson’s decision to not bid for ADC’s business—a decision it had already made back in February 2013. And the only informatio Guggenheim gathered was that Patterson had a *different* view of ADC than Benco did. Specifically, Guggenheim asked whether Benco’s policy against selling “buying groups” was still in place and did Benco consider ADC a “buying group?” CX0095. Cohen replied that ADC owned each member’s practice and was thus a corporate DSO, *not* a “buying group,” and that Benco’s longstanding policy was still in place. CX3301. Neither Guggenheim nor Cohen asked the other to boycott ADC or take any action at all—and, in fact, the parties *had different conclusions* about whether ADC was a “buying group.” Benco thought no,

Patterson thought yes. RX3038 (Guggenheim Dep. 418:18–419:1). As a result, each company acted *differently*: Patterson continued to compete for ADC business at the member level, just as it always had prior to the June communication.¹⁹ RX3017 (Nease Dep. 48:10–23). This exchange, and Patterson and Benco’s February email exchange, were the only two communications between the two companies discussing buying groups.

There are no communications between Patterson and Schein related to “buying groups” in 2013, and every Schein and Patterson witness has sworn under oath they did not agree to boycott “buying groups.” *See e.g.*, RX3041 (Anderson Dep. 160:10–23); RX3038 (Guggenheim Dep. 398:4–400:9); RX3050 (Misiak Dep. 314:24–316:2); RX3032 (Rogan Dep. 254:2–25); RX3019 (McFadden Dep. 189:13–191:15, 192:5–25, 193:2–15); RX3042 (Lepley Dep. 110:4–111:4); RX3028 (Fruehauf Dep. 194:6–195:17). Indeed, Complaint Counsel’s Interrogatory Response and its Pre-Trial Brief cite no communications between Patterson and Schein regarding the New Mexico Dental Cooperative, ADC, Kois, Smile Source or any other “buying groups” in 2013. *See* RX2958.

¹⁹ Complaint Counsel again ignores testimony contrary to its story. They assert that [REDACTED] suggesting Guggenheim was looking to [REDACTED] Benco. (CC’s Pre-Trial Br. at 32.) They fail to acknowledge Devon Nease’s testimony, who was the branch manager for the region and dealt directly with ADC’s Dr. Fernandez. Nease testified that after Benco won the ADC bid, Patterson continued competing for the individual dentists as usual. Mr. Nease was not concerned about losing the ADC business because Patterson [REDACTED] through sales to individual dentist members of ADC. RX3017 (Nease Dep. 48:10–22). And Patterson did just that. RX3017 (Nease Dep. 84:14–85:2). Additionally, Complaint Counsel’s snippet citation takes significant liberties; in the same investigational hearing cited by Complaint Counsel, Guggenheim also testified in context: [REDACTED] [REDACTED] CX0314 (Guggenheim I.H. at 304:12 – 305:2) (emphasis added).

Instead, Complaint Counsel cites a handful of ambiguous emails in late 2013, a single phone call and subsequent email between Patterson and Schein from January 2014 which, on its face, relates only to Schein’s decision—made on its own—about whether it was going to attend the Texas Dental Association (“TDA”) meeting in May 2014. CX2839; RX0206. But the entire discussion of the TDA has no relevance to Complaint Counsels’ claim of a conspiracy concerning buying groups as plead in the Complaint. No one from TDAPerksSupplies, a discount program of the Texas Dental Association, approached Patterson about doing business—the state dental association was content with an internet distributor, SourceOne. At most, the conduct Complaint Counsel takes issue with regarding the TDA, is Patterson’s unilateral decision not to pay for a booth or floor space and not to attend before the TDA annual meeting. And by the time of the January email cited to by Complaint Counsel, Patterson had already made its own decision *the month prior* not to attend the May 2014 TDA meeting. RX0146; RX0199; RX0208.

Patterson’s conduct concerning the TDA annual meeting was independent from that of Schein and/or Benco.²⁰ Patterson did not send in its deposit to reserve exhibit space in October

²⁰ Complaint Counsel’s Pre-Trial Brief asserts in one sentence that “Schein, Patterson and Benco engaged in a similar pattern of inter firm communications concerning the AzDA in July 2014.” (Brief at 34) But Patterson had exactly one communication with Benco concerning the AzDA meeting in July 2014 and none with Schein. Patterson’s sole communication was an e-mail response from a Patterson branch manager, Chad Bushman, to an e-mail received from Mike Wade, a Benco branch manager. On July 21, 2014 Wade informed Bushman that the AzDA had established a discount program. Bushman responded: [REDACTED]

[REDACTED] CX3332. Nowhere in this e-mail does Bushman agree to anything—he simply states his current position on whether Patterson would attend. Bushman then investigated the situation and a month later informed the AzDA that Patterson would not attend the Arizona meeting, which was held in April 2015. There are no communications between Patterson and either Schein or Benco over the ensuing eight months before the AzDA meeting.

2013—Schein and Benco did. RX0161. Patterson met with the TDA on December 18, 2013—Schein did not meet with the TDA until April 3, 2014 and Benco never met with the TDA. Patterson made its decision not to attend on December 18, 2013—this decision was made independently and *four months prior* to Schein or Benco. Schein decided not to attend on April 8, 2014. RX2154; RX0232. And Benco decided not to attend the meeting on April 9, 2014. RX0235. Patterson had no advance notice of these decisions.²¹ RX0238.

Patterson’s decision not to attend the TDA meeting was based upon the TDA essentially becoming a direct competitor by entering into an agreement with an online distributor, SourceOne Dental, to offer dental supplies to TDA members under the name TDAPerksSupplies.²² RX2983, (Misiak I.H. at 300:11-20; 302:3-5.) The TDA actively promoted and marketed this TDAPerksSupplies program to its members, making unsupported and false claims that this program would save TDA members more than 35% on supplies. RX0171; RX0172; RX0125;

²¹ Complaint Counsel makes a point of an April 16, 2014 e-mail from Cohen to Guggenheim and Sullivan sending a November 2013 TDA Journal article, six months after it had been published and read by Patterson. RX0243. In no way does this e-mail demonstrate any agreement concerning the TDA—it occurred almost four months after Patterson made its decision not to attend the TDA meeting and over a week after Schein, and then Benco made their own decisions. Moreover Guggenheim’s note to others at Patterson indicates his lack of knowledge of Benco’s position on the TDA. He writes: [REDACTED] RX0244.

²² This reaction was entirely consistent with how Patterson reacted to other state associations positioning themselves as Patterson competitors. *See, e.g.*, RX0044 (October 2012 internal email regarding the Missouri and Michigan Dental Associations selling gloves to its members; Patterson’s Mike Smurr, the Director of Marketing, Merchandise, remarked: [REDACTED] [REDACTED]); RX0017 (May 2011 internal email regarding the California Dental Association selling gloves to its members; Patterson’s Director of Business Development, Robert Foss remarked: [REDACTED] [REDACTED]).

RX0128. For years, Patterson had supported the TDA through attendance at its Annual Meeting, providing speakers and other substantial monetary support for the TDA. RX0191, at p 3; RX0198-00004.

After learning of TDAPerksSupplies in early October, Patterson immediately questioned whether it made sense to continue to attend the TDA annual meeting given the TDA had now become a direct competitor. RX0125; RX0128. Patterson's consistent view was that [REDACTED] [REDACTED] RX0148. Attending the TDA meeting made no more sense to Patterson than paying money to exhibit at a Schein sales conference. Patterson's decision not to attend was made at the local level by Region Manager Clint Edens. RX2983 (Misiak IH at 299:19-300:6.) In late October 2013 Edens declined to send in a deposit for Patterson's exhibit space at the May 2014 TDA meeting because he was upset that the TDA had set up TDAPerksSupplies and was defaming Patterson. RX0161; RX0243; RX3050 (Misiak Dep. 266:16-19); RX2984 (Rogan I.H. 296:25-297:2); RX0184; RX0181. By November 6, 2014 the TDA had released Patterson's exhibit space and reassigned it. RX0166. At that time Edens attempted to set a meeting with the TDA to discuss TDAPerksSupplies. RX0161. When the TDA was not receptive to Patterson's concerns at a December 18, 2013 meeting, Patterson informed the TDA on that date it would not attend the 2014 TDA meeting. RX 0198-00004.

Neither Rogan or Misiak had any discussion with Schein or Benco prior to this decision. RX2983 (Misiak I.H. 302:18-25); RX3032 (Rogan Dep. at 259:8-260:12; 262:18-25). Complaint Counsel points to a single communication between Schein's David Steck and Patterson's David Misiak in January 2014 in its overreaching assertion that "Schein and Patterson communicated about a coordinated response to TDA Perks." (CC's Pre-Trial Br. at 33.) But the evidence does not support this inference. Steck simply told Misiak that Schein still had not made its decision

regarding whether to attend, but he would let Misiak know *after* Schein decided. But he never did. CX0112; RX 2978 (Steck I.H. at 177:11-18; 181:15-20). And as late as April 2014 Guggenheim thought that Benco might be attending the TDA meeting. RX0244 (April 2014 email from Guggenheim to Anderson and Misiak: “I wonder if [Chuck’s] buying a booth at the TDA!”). Patterson did not learn of Schein or Benco’s final plans regarding the TDA meeting until *almost four months after* Patterson made its unilateral decision not to attend. RX0238 (internal April 2014 Patterson email in which Edens is told that Benco is pulling out of the TDA meeting); RX0237 (April 2014 email in which Edens is told Schein announced they were pulling out of the TDA).

VI. Complaint Counsel’s Expert, Dr. Marshall, Presents No Evidence that Patterson Agreed to Boycott Any of the “Buying Groups” Identified By Complaint Counsel

The opinion of Complaint Counsel’s expert, Dr. Marshall, who was hired before the FTC even filed the Complaint in this matter, is premised on an unreliable [REDACTED] RX2963 (Marshall Deposition Vol. 1, 43:6–9). Dr. Marshall opines that [REDACTED]

[REDACTED]

[REDACTED] RX2037 (Marshall Report at ¶¶ 12; 316-21; 361 (Figure 60)). The latter, obviously, is not about Patterson’s conduct at all and even if he is right (and he is not, as we will show at trial) the fact that an industry may be susceptible to a conspiracy does not mean that a conspiracy occurred, nor that a specific company like Patterson was a participant in that conspiracy when a mountain of evidence shows it behaved unilaterally.

That leaves the first two bases for Dr. Marshall’s report, and here is his “shell game.” Dr. Marshall identified 40 buying groups in his report, but he acknowledges that only two were the

subject of any communication between anyone from Patterson and anyone from Benco: the February 2013 emails regarding the New Mexico Dental Cooperative meeting scheduled for Patterson's Albuquerque office and the June 2013 communication—months *after* Patterson did not bid for the ADC business and weeks *after* Benco and Schein did, and weeks *after* ADC awarded the business to Benco—showing that Patterson and Benco had different views of whether ADC was a “buying group” or not. RX2964 (Marshall Deposition Vol. 2, 34:12–20).

Now, Dr. Marshall could have used those two examples in his Section V “lost profits” analysis, but he chose not to study either of those “buying groups” purchase histories to determine whether Patterson supposedly lost incremental revenue and profit by not bidding for their business. RX2037 (Marshall Report, at 143-144 (examining only Kois Buyers Group and SmileSource)). Instead, he performed his Section V analysis on two *entirely different* “buying groups,” Kois and Smile Source, that he admitted were *not* the subject of any communications at all between Patterson and Benco or Schein. And he conceded that he chose them even though he knew they were not representative of any other “buying group” in the country: Kois was “not a standard buying group,” and was “profoundly different” from a “normal buying group;” Smile Source was unique because its members were formal franchisees. He could not identify any other “buying group” in the country with a franchise system. Odd choices, and *entirely unrepresentative*, for sure.

What did Dr. Marshall analyze with respect to these two very different “buying groups,” Kois and Smile Source? Five case studies to determine if Patterson acted contrary to its self-interest by not bidding to be a Kois or Smile Source distributor. But, by Dr. Marshall's own admission, one of his case studies was conducted in the year *prior* to Patterson allegedly joining the conspiracy and another study measured supposed lost profits in the 2016 period *after* the

conspiracy ended. RX2964 (Marshall Dep. Vol. 2 70:5–12; 76:13–19). Obviously, neither of those can constitute reliable evidence that Patterson acted contrary to its self-interest during the alleged 2013-15 conspiracy period.

So, what’s left of Dr. Marshall’s “shell game” case studies of two “profoundly different” buying groups that were never the subject of any discussions between Patterson and Benco or Schein? Not much. He admitted his remaining three case studies measured purchases by only 621 dentists out of the roughly 200,000 dentists across the country—0.003 (or three one-thousandths of the total dentists)—hardly a statistically-robust sampling size. RX2964 (Marshall Deposition Vol. 2, 78:13–23).

And for that 0.003 of all dentists, what did his case studies show? That Patterson lost an infinitesimally small amount of incremental revenue and profit by not bidding for their business, something in the range of 0.0001 (or, one-ten thousandths) of its revenue and profit during those years. *Id.* at 106-107. That is an entirely unreliable basis for opining that Patterson acted contrary to its self-interest by not bidding to be a distributor to Kois and Smile Source. If that were the standard, every business in the country would be acting contrary to its self-interest daily.

ARGUMENT

A plaintiff alleging a violation of Section 1 “must present evidence ‘that tends to exclude the possibility’ that the alleged conspirators acted independently.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)).²³ It must prove that the alleged agreement *preceded* the alleged

²³ An agreement under FTC Act Section 5 requires the same proof as an agreement under Sherman Act Section 1. *See, e.g., California Dental Ass’n v. FTC*, 526 U.S. 756, 762 & n.3 (1999) (explaining that 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

wrongful conduct; that the defendants agreed *in advance* upon “a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful agreement.” *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). Thus, the central question in this case is whether Patterson’s decisions regarding “buying groups” in 2013-15 “stem[] from independent decision or from an agreement” *preceding* those decisions. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007).

The evidence will prove the former and disprove the latter. Thousands of pages of contemporaneous evidence will show that Patterson fiercely competed with Benco and Schein throughout their alleged conspiracy, investing millions of dollars to invade their stronghold of corporate DSOs, and that it had no reason to simultaneously join them in an agreement over (at most) 5% of the market; that Patterson evaluated each “buying group” opportunity as it came, on its own, and made its own decisions; and that not a single witness supports Complaint Counsel’s interpretations of the handful of documents that are the sum of its case.²⁴

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.”).

²⁴ Complaint Counsel pleads its allegations under three alternative standards: *per se* illegality, the intermediate category of restraint that is allegedly “inherently suspect,” and a truncated rule of reason standard respectively. Complaint Counsel’s allegations fail under all three standards and this Court should analyze the allegations under a full rule of reason standard because where, as here, “the evidence consists of mere exchanges of information the presumption [of pernicious effect without redeeming virtue] vanishes. . . . Exchanges of information are not considered a *per se* violation because ‘such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive.’ Therefore, such exchanges of information are evaluated under a rule of reason analysis.” *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999) (citing *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978)).

I. Undisputed Evidence Will Demonstrate That Patterson Made Thousands Of Independent Decisions To Discount, Invade Corporate DSOs, And Meet With, Evaluate, And, At Times, Sell To “Buying Groups”

The existence of “positive and unequivocal evidence that the defendants engaged in unilateral, aggressive competition” indicates a lack of collusion, even when industry conditions were favorable for collusion. *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 136–38 (3d Cir. 1999). In *Baby Food*, the Third Circuit affirmed a grant of summary judgment where food sellers brought a price fixing claim against manufacturers of baby food. The plaintiff’s evidence included competitive activity reports assembled by a defendant containing sales information gleaned from competitors’ sales representatives, extensive exchanges of price information between defendants’ sales representatives, confidential price planning documents that had ended up in the hands of competitors, and other internal documents acknowledging advance knowledge of competitor pricing plans and the existence of a “truce” between competitors. *Id.* 118-20. The district court found that this evidence “portrayed nothing more than intense efforts on the part of three large and strong competing companies in the baby food industry to ascertain . . . what their competitors would be doing with regard to pricing.” *Id.* at 124. The Third Circuit affirmed, citing “evidence of strong, intensive competition and hardly a scintilla of evidence of concerted, collusive conduct.” *Id.* at 137.

Here, thousands of contemporaneous Patterson documents and myriad sworn statements from every Patterson witness demonstrate that the company acted independently and pro-competitively and day-in and day-out, cut its prices, invaded Schein and Benco’s stronghold of corporate DSOs, and met with and evaluated whether to sell to ‘buying groups’—and sold to them when it made sense to Patterson, and did not, when it did not. *See supra* pp. 22-24. Patterson granted thousands of price concessions to win away business from Schein and Benco and invested

millions of dollars to invade their stranglehold on the DSO market, all to the benefit of the end customer. *See supra* pp. 11-13.

It is black letter law that conduct that is “as consistent with permissible [activity] as with illegal conspiracy does not, standing alone, support an inference of an antitrust conspiracy.” *Matsushita*, 475 U.S. at 588. Patterson’s conduct—cutting prices, taking customers from competitors, and independently evaluating “buying groups”—is inconsistent with collusion and consistent with what the Supreme Court has held is the “very essence” of legitimate unilateral conduct under the antitrust laws. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993). Patterson’s decision to not work with most “buying groups” was sensible and rational given its strong, unilateral interest in maintaining its relationships with the individual dental practices that were its mainstay. As its witnesses explained exhaustively, Patterson was not eager to cut prices for loosely affiliated groups that could not commit to buying anything in any volume, that had no single buyers or agreed-upon formularies of available products to work with, and that would insinuate themselves into Patterson’s critical relationships with independent dental practices. *See supra* pp. 15-16. Additionally, Patterson wanted its Special Market division [REDACTED] on pursuing DSO business. RX3038 (Guggenheim Dep. 175:14–23; 191:12–19). Any distraction—such as time spent evaluating entities unable to commit to buying anything—could have risked millions in capital being spent to pursue the corporate segment in competition with rivals like Schein. *Id.* Yet Patterson’s localized, autonomous branches were welcome to work with buying groups, and some did. *See supra* pp. 20-21. Such a course of conduct, amid constant, intense competition, does not support an inference of conspiracy. *See Baby Food*, 166 F.3d at 127, 137.

II. Complaint Counsel Cannot Prove “Conspiracy” As A Matter of Law: Its Few Emails Will Not Show That Patterson Joined Any Alleged Benco-Schein Conspiracy In February 2013 Or Afterwards

To be illegal under Section 5, an agreement must *precede* the alleged wrongful conduct, whether that alleged conduct is charging the same price or refusing to sell. *Twombly*, 550 U.S. at 557 (“[W]hen allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a *preceding* agreement, not merely parallel conduct that could just as well be independent action.”) (emphasis added).²⁵ Complaint Counsel thus bears the burden of showing facts demonstrating that defendants agreed *in advance* upon “a unity of purpose or common design and understanding, or a meeting of minds in an unlawful arrangement.” *American Tobacco*, 328 U.S. at 810. “*Subsequent* price verification,” the Eighth Circuit explained in *Blomkest*, “cannot support a [price fixing] conspiracy.” *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1034 (8th Cir. 2000) (emphasis in original).

Blomkest involved an alleged agreement between producers of potash to increase prices. *Id.* at 1031. The plaintiff presented evidence that the defendants had engaged about *three dozen* after-the-fact “price verification calls,” discussing the prices each had charged on recently-*completed* sales, around the times that parallel pricing occurred. *Id.* at 1033–34. Because the communications only concerned completed sales, not future market prices, the evidence was insufficient to show that the verifications had caused future price increases. *Id.* The court ruled that this evidence did not tend to exclude the possibility of independent action for the price

²⁵ An agreement under FTC Act Section 5 requires the same proof as an agreement under Sherman Act Section 1. *See, e.g., California Dental*, 526 U.S. at 762 & n.3 (explaining that Section 5 of the FTC Act “overlaps the scope of § 1 of the Sherman Act”); *Cement Institute*, 333 U.S. at 691–92 (“[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.”).

increases in question. *Id.* at 1033. The court explained that a case theory based on communications about past actions “assumes a conspiracy first, then sets out to ‘prove’ it.” *Id.*

That is exactly the problem here. Just as in *Blomkest*, the three communications Complaint Counsel points to relate to *decisions already made*. Except that instead of three dozen interfirm pricing discussions as in *Blomkest*, here there are *three*—and none related to pricing. When Benco’s Chuck Cohen emailed Patterson’s Paul Guggenheim in February 2013 about Benco’s “buying group” policies, he was describing policies that had already existed for more than a decade.²⁶ And the information in no way affected Patterson’s decision regarding the TDA—Patterson had already let the fledgling group know it would not host its meeting at the Patterson office after all *the day before* Cohen’s email. Guggenheim’s response, “we feel the same about these,” on its face also described an *existing* feeling at Patterson.²⁷ These emails do not mention future action, request future action, or commit to future action. Just as in *Blomkest*, there is no more reason to infer that Patterson’s subsequent declination of any “buying group”—consistent with its previous conduct of evaluating these one by one—had anything at all to do with Guggenheim’s single email than the *pre-existing* feelings that email described.

The same is true for Cohen and Guggenheim’s June 2013 brief correspondence over whether the entity ADC was a “buying group” or a DSO. Just like the pricing verification calls in *Blomkest*, it came several months *after* Benco and Patterson had each decided *independently* whether to pursue ADC’s business—and *after* Benco had already won the business. Though again, unlike *Blomkest*, here the communications again did not discuss pricing at all. Also, unlike

²⁶ Chuck Cohen FTC Dep. 281:16-20.

²⁷ *See, e.g.*, RX0029.

Blomkest (which involved parallel pricing), here the parties behaved differently and disagreed with each other: Benco had won ADC's business and Patterson had declined to pursue it.²⁸ There was no discussion of boycotting anyone and no commitment to boycott anyone in the future.

Finally, in late 2013 Patterson's Region Manager for Texas decided not to pay to attend the Spring 2014 meeting of the Texas Dental Association ("TDA") because the TDA was creating its TDAPerksSupplies program and had taken out full-page advertisements bashing all distributors. After Patterson made its decision, Schein told Patterson it was still debating whether to attend—and it decided three months later, on its own, not to attend.²⁹ Patterson did not find out about Schein's or Benco's decisions until they were announced publicly months later.³⁰ This is at most "follow-the-leader" conduct, which is insufficient to establish a violation of Section 1. *See Twombly*, 550 U.S. at 566 ("[I]f alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a § 1 violation against almost any group of competing businesses would be a sure thing."); *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 53 (7th Cir. 1992) ("One does not need an agreement to bring about this kind of follow-

²⁸ CX0095; CX3301; RX0067, pgs. -81 and -83; CX 0093; RX3028 (Fruehauf Dep. 114:7–115:6); CX3439; RX3017 (Nease Dep. 31:24–32:11, 47:12–15); RX3028 (Fruehauf Dep. 101:19–102:22, 113:12–114:3); RX3050 (Misiak Dep. 104:5–17); CX0096.

²⁹ CX2839; RX0206; RX0146; RX0199; RX0208; RX0243; RX3050 (Misiak Dep. 266:16–19); RX2984 (Rogan I.H. 296:25–297:2); RX0198; RX0184; RX0181; CX0112; RX0244 (April 2014 email from Guggenheim to Anderson and Misiak: [REDACTED]); RX0238 (internal April 2014 Patterson email in which Edens is told that Benco is pulling out of the TDA meeting); RX0237 (April 2014 email in which Edens is told Schein announced they were pulling out of the TDA).

³⁰ RX0244 (April 2014 email from Guggenheim to Anderson and Misiak: "I wonder if [Chuck's] buying a booth at the TDA!"); RX0238 (internal April 2014 Patterson email in which Edens is told that Benco is pulling out of the TDA meeting); RX0237 (April 2014 email in which Edens is told Schein announced they were pulling out of the TDA).

the-leader effect in a concentrated industry.”) (quoting *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 484 (1st Cir. 1988)).

Complaint Counsel’s entire case centers on these few documents, but witnesses have explained in detail that Complaint Counsel’s interpretations of the documents are wrong. “Facing the sworn denial of the existence of conspiracy, it [is] up to plaintiff to produce significant probative evidence *by affidavit or deposition* that conspiracy existed if summary judgment [is] to be avoided.” *Moundridge*, 429 F. Supp. 2d at 130 (emphasis added) (citation omitted). 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 testified there, as here, that they made their price and output decisions *independently*. 429 F. Supp. 2d at 132. The plaintiffs responded with evidence of parallel behavior, an opportunity to conspire (during a series of industry meetings), and pointed to internal documents that, they argued, suggested a conspiracy. *Id.*; *Moundridge*, 409 F. App’x at 364. Specifically, the plaintiffs claimed that the parties had jointly agreed to seek an industry report that would justify a higher rate, and then participated in the report’s drafting. *City of Moundridge, Appellants v. Exxon Mobil Corp., et al.*, Appellees, No. 09-7153, 2010 WL 5675803, at *8, 12 (C.A.D.C. Dec. 20, 2010),. The district court rejected the plaintiffs’ argument, holding that this evidence was consistent with unilateral conduct and did not amount to evidence of a conscious commitment to a common unlawful scheme, nor that 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. 409 F. App’x at 364.

In *Williamson*, the Eleventh Circuit likewise 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), regular sharing of very detailed sales information broken down by company, and an expert’s opinion that it all amounted to a conspiracy. 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. *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1305 (11th Cir. 2003).

Here, too, it would be improper to speculate that Complaint Counsel’s documents mean something other than what the relevant witnesses say they mean. The evidence will contain hundreds of sworn denials of any agreement with Schein and Benco not to discount to “buying groups.” *See supra* pp. 22-24. Every witness asked—from Patterson and the other respondents—either affirmatively denied the existence of such an agreement or testified that they knew nothing of Patterson participating in one.³¹ Complaint Counsel’s “mere disbelief” of every witness in this case is not evidence. *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1014 (3d Cir. 1994).

³¹ RX3041 (Anderson Dep. 161:23–162:12); RX3038 (Guggenheim Dep. 400:24–401:11); RX3050 (Misiak Dep. 315:21–316:2); RX2983 (Misiak I.H. 10:8–16); RX3032 (Rogan Dep. 261:17–19; 257:20–22); RX3048 (Lepley 30(b)(6) Dep. 111:23–11:12); RX3028 (Fruehauf Dep. 191:10–15); RX3017 (Nease Dep. 127:19–22; 134:24–135:2); RX3027 (Breslawski Dep. 242:13–22); RX3040 (Sullivan Dep. 466:15–20; 528:24–529:5); RX3045 (Steck Dep. 145:19–146:15); RX3035 (Brady Dep. 318:13–319:2); RX3046 (Cavaretta Dep. 255:10–17); RX3031 (Meadows Dep. 268:23–269:12); RX3020 (Muller Dep. 223:12–16); RX3018 (Foley Dep. 381:19–22); RX2939 (Foster Dep. 164:6–11); RX3037 (Hight Dep. 192:25–193:6); RX3025 (Titus Dep. 249:12–18); RX3016 (Porro Dep. 387:13–17); RX3024 (Wingard Dep. 233:11–19); RX3030 (Cohen Dep. 484:5–10); RX3049 (Ryan Dep. 392:10–16).

REMEDY

The proposed remedies are moot or otherwise flawed as a matter of law. The evidence at trial will show that the proposed remedy as stated in the Notice of Contemplated Relief is unwarranted and moot as a matter of law. Patterson (1) never agreed with Benco or Schein to boycott “buying groups,” and (2) always evaluated “buying groups” on their merits and occasionally worked with them, including two buying groups in 2014 and a large buying group in 2016. Additionally, Complaint Counsel’s expert concedes the alleged conspiracy ended in 2015 and there is no indication any alleged conspiracy would recur. RX 2963 (Marshall Dep. 319:12–13: [REDACTED]; 307:12-13: [REDACTED]). *See e.g., United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953) (holding that when the alleged conduct at issue has ceased, the moving party must show some “cognizable danger”—not simply a “mere possibility”—of recurrence to obtain injunctive relief); *Walsh v. United States Dep’t of Veterans Affairs*, 400 F.3d 535, 537 (7th Cir. 2005) (upholding a finding of mootness when the opposing party only argued that there was a “theoretical possibility” of a repeat violation). Thus, the burden is on Complaint Counsel to show that there is a “cognizable danger” of a recurrence of the alleged conspiracy; burden that they have not and cannot meet.

Moreover, Patterson does business with buying groups today, including Lake Harbor and Dr. Levin. RX3042 (Lepley Dep. 37:3–38:23), and there is no suggestion that Patterson intends to stop doing business with buying groups. Accordingly, any claim by Complaint Counsel about likelihood of recurrence would be a theoretical possibility, which is not a sufficient basis for an injunction pursuant to *United States v. W. T. Grant Co.* and its progeny.

CONCLUSION

For the foregoing reasons, Complaint Counsel will be unable to establish that Patterson violated Section Five of the FTC Act as alleged in the Complaint. This Court should deny the relief sought by the Notice of Contemplated Relief.

Dated: October 9, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2018, I filed the foregoing public 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.

October 16, 2018

By: /s/ Andrew T. George

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Notice of Electronic Service

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