

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



ORIGINAL

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

DOCKET NO. 9379

PUBLIC

RESPONDENT PATTERSON'S PROPOSED FINDINGS OF FACT

RECORD REFERENCES

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

CX# — Complaint Counsel Exhibit

RX# — Respondent Exhibit

CXD# — Complaint Counsel Demonstrative Exhibit

RXD# — Respondent Demonstrative Exhibit

Name of Witness, Tr. xx — Trial Testimony

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

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

JSLF ¶ x — Joint Stipulations of Law and Fact

Compl. ¶ x — Complaint Counsel’s Complaint filed February 14, 2018

CC Opp. to MTD at x — Complaint Counsel’s Opposition to Patterson’s Motion to Dismiss

CC’s Pre-Trial Br. at x – Complaint Counsel’s Pretrial Brief

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PATTERSON’S PROPOSED FINDINGS OF FACT

I. The Parties and The Dental Distribution Industry

1. Patterson Dental (“Patterson”) has been in the dental business for more than 140 years. (CX5035 at 2). It is a distributor of dental supplies and equipment, a developer and manufacturer of software, and a provider of technical services and training. (Misiak, Tr. 1444; CX0314 (Guggenheim, IHT at 10); CX8027 (Anderson, Dep. at 55)).

2. Patterson’s parent company, Patterson Companies, trades on the NASDAQ under the symbol PDCO. (CX5033 at 10). It had gross profits of about \$1.19 billion on about \$3.6 billion in revenue in FY2013, \$1.2 billion gross profit on about \$4.06 billion in revenue in FY 2014, and about \$1.24 billion gross profit out of \$4.4 billion in revenue in FY2015. (CX5033 at 47). Patterson Dental’s sales were about \$2.4 billion in FY2013. (CX5031 at 4).

3. The U.S. dental products distribution industry is “highly competitive” and “extremely fragmented,” with at least 15 full-service distributors (including Respondents) operating on a regional level, hundreds of local distributors, mail-order and online companies, and some manufacturers sell directly to end users. (CX5033 at 18). Patterson’s largest, full-service competitor is Henry Schein. (CX5033 at 18). Benco is a smaller full-service competitor. (Cohen, Tr. 430).

4. Patterson Dental carries more than 100,000 individual SKUs for dental products, selling consumable products like x-ray film, impression materials, and gloves, along with dental equipment like x-ray machines, dental chairs, and diagnostic equipment. (CX5033 at 11, 14–15). Patterson Dental also offers a full range of related services, such as equipment installation, maintenance and repair, dental office design, and equipment financing. (CX5033 at 11).

5. The dental supply distribution industry is characterized by oligopoly. (RX2832 at 49; *see also* CX7101 at 12, 26).

II. Patterson Competed Tooth-And-Nail With Schein And Benco Before, During, And After The Alleged Conspiracy.

a. Patterson’s Decentralized Salesforce Of Autonomous Reps Used Its Nearly Unfettered Pricing And Sales Discretion To Compete Every Day.

6. Patterson’s value proposition is that it offers a full-service suite of products, services, and equipment at a competitive price point. (CX0316 (Misiak, IHT at 56–57 (“Q. . . . Why would you say Patterson customers choose Patterson over Schein or Benco? A. Because we’re best. Q. And why are you best? A. So I think some of it is dependent on the -- the rep and their ability to build a relationship and talk about the programs and the value of working with Patterson, and the -- yes, it’s somewhat about products, but they need products to run their dental practice. It’s about technical support and our ability to deliver technical support, keep the practice up and running. It’s our ability to install and service equipment and technology at a really high level and train staff. We do that really well. It is about our technology advisors and helping keep the staff efficient and running when they have staff turnover, and training and helping new folks. And it’s about helping them with their business and helping them grow. I think the -- the technology center and our support that we can do remotely and with our service techs is a big differentiator. And then it’s about being competitive with the reps and making sure that the reps are in front of the customers, delivering that value proposition to the customers. And with that, I think we have a good story.”)); CX8013 (Fruehauf, Dep. at 107 (“[T]he value-add strategy is you’re going to choose to partner with Patterson because we offer more value to the customer for the -- for a similar price point than our major competitors do. So, you know, could it be service, could it be technology implementation, could it be training, could it be business growth, marketing, what can we do in conjunction with a fair price to maintain you as a customer.”))).

7. Patterson has more than 70 local branches, which serve tens of thousands of dentists across the country in a purposefully decentralized structure. (CX5033 at 11; Misiak, Tr. 1300). Patterson employs more than 1,300 salespeople, service representatives, and equipment specialists, organized in geographic regions. (CX5033 at 11; Misiak, Tr. 1300 (“So Patterson is a fairly decentralized organization with branches in the field and the local community, approximately 70 branches. Each one of those branches have what’s called a branch or general manager it’s called today. The general manager has, depending on the size of the branch, anywhere between 15 and -- in a larger branch in a city like here in D.C. or Baltimore, is the branch, it would have a hundred employees. That would include the sales reps, the customer service department, technical service functions.”); Misiak, Tr. 1395 (“A. As I said earlier, Patterson is very decentralized, and lots of branches have a great sense of entrepreneurial spirit and autonomy and will do business and make agreements with different customers, . . .”); Misiak, Tr. 1426–27 (“A. So in the branches there are -- were approximately 1200 salespeople in 2012, a thousand territory reps. The other 200 were specialists. These folks were calling on the private practice day to day, building relationships, introducing loyalty, and helping private practice grow.”); Misiak, Tr. 1446 (“[W]hen you think about private practice in a community, a private dental practice, being decentralized shows up as a strength. You’ve got localized relationships. You’ve got local reps, a manager who understands the local market and can really connect with that private practice.”); Guggenheim, Tr. 1726 (“I think the philosophy of the organization going back to the early days was we always wanted to place all the resources and decisions as close as possible to the customer, so that meant that each branch -- the thinking is every market is a little different. Customers in San Diego aren’t the same as the customers in Fargo, and it’s important to have local relationships, which include management relationships and decision-making as best possible in each local market. So we

encouraged that sort of entrepreneurial-ship in the branches, so allowed them to focus on, you know, serving customers, within a framework. I mean, they're obviously, you know, expected to adhere to the ethics and the policies and procedures, operating responsibilities, but, you know, we certainly give them a lot of independent decision-making.")).

8. Patterson's business is "extremely high-touch," and it has "personal relationship[s] with most all of [its] clients." (Guggenheim, Tr. 1728).

9. Patterson's territory representatives have broad discretion over which dentists they supply and what prices and discounts they offer. Patterson's management did not dictate the prices that Patterson's territory representatives offered to customers. (Guggenheim, Tr. 1543 ("[O]ur branches, which are our local offices, operate pretty independently and decentralized, and if there's an opportunity to, you know, approach a market, they can make that choice independently."); Misiak, Tr. 1450 ("Q. Did you, Mr. Misiak, did you dictate the prices that all your region managers and branch managers and territory reps sold your products at? A. No. We -- the organization has an incredible amount of autonomy at the rep level. The reps are changing prices each and every day to compete at the individual SKU level.")).

10. One pricing tool Patterson used to compete in the marketplace and "gain market share from [its] competitors" during Complaint Counsel's alleged conspiracy period was manual "overrides," where territory reps changed the price of the products for their customers in Patterson's computer system. (Misiak, Tr. 1471). Patterson territory reps could go in and change the price of items for their customers at the point of sale "with complete autonomy." (Misiak, Tr. 1471). Patterson's former President, David Misiak, estimated that territory reps changed the price of items for customers via manual "overrides" "many times in the day" and "thousands of times in a week." (Misiak, Tr. 1471).

11. Patterson territory representatives could manually set “any price that they want” for any given item for a specific sale. (CX8017 (Rogan, Dep. at 210) [REDACTED]

[REDACTED].
Territory reps “have complete discretion to override any price at point of sale.” (Guggenheim, Tr. 1731); (Misiak, Tr. 1471–72) (“Q. So they can lower price anytime they want in a specific sale? A. Correct.”).

12. All of Patterson’s 750 sales representatives had “no limits” to their pricing autonomy—they could price “all the way down to cost” on any given sale. (Rogan, Tr. 3618; *see also* (Rogan, Tr. 3617 (“Q. Among your 750 sales reps, who has the authority to do the price overrides? A. They all do. Q. How low can they go? A. They can go all the way down to cost.”); (Misiak, Tr. 1451–52) (The reps have an amazing amount of autonomy to be aggressive and entrepreneurial and compete on price. Q. When you say “an amazing amount of autonomy,” what sort of autonomy? Were there any limits? A. There were no limits. Q. So on a given sale, they could price at cost. A. They could.”); (Guggenheim, Tr. 1729) (territory reps “can override any price in our system any day for any order so long as they stay above the wholesale cost of the product”)).

13. Patterson representatives did not need to ask for permission to override a price down to cost. (Guggenheim, Tr. 1729 (“So on a given sale like that they could change any price to anything as long as it’s above the cost of the product. We give them full discretion all the way down to whatever the product costs. They can’t go below the product cost, but they can override any price in our system any day for any order so long as they stay above the wholesale cost of the product. Q. Do they have to ask your permission? A. Nope. Q. Do they have to ask Mr. Misiak’s permission? A. No.”)).

14. There were thousands of price overrides per week. (Misiak, Tr. 1471). Of the roughly 45,000 packages Patterson ships per day, “many of those shipments have [the manual price override] discounts on them.” (Misiak, Tr. 1452). There are “hundreds, probably thousands of overrides a day,” “lowering prices.” (Guggenheim, Tr. 1730).

15. During Complaint Counsel’s alleged conspiracy period, Patterson’s discounts increased both on an overall percentage basis and as a percentage of sales. (CX3241 at 2). Patterson’s margins on merchandise also declined during Complaint Counsel’s alleged conspiracy period. (CX3241 at 2).

16. Patterson representatives were also able to discount technical service, offer free support for software, and give clients additional loyalty program points, which were all decisions “made each and every day to compete.” (CX8038 (Misiak, Dep. at 218)).

b. Price Class Change forms are used extensively to support Patterson’s daily competition with Benco and Schein.

17. Patterson customers were classified in one of four price classes—91, 92, 93, and 94—corresponding to the purchasing volume committed to by the customer as well as the customer’s volume potential. (Misiak, Tr. 1450).

18. Changes in these price classes were another tool available to Patterson territory representatives to “win business away” from competitors. (Guggenheim, Tr. 1734–35 (“Q. Is this a tool that you and others in the organization used, these lower prices in the price class change requests, to go win business away from your competitors? A. Absolutely.”)).

19. If a Patterson territory representative wants to provide a customer with a blanket discount on all future purchases, he can fill 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. (Misiak, Tr. 1452–53 (“The other form of discount is a price class change, which you’ve

referenced. And that's where the rep would submit a form or send an e-mail to get a standard percent off of everything the customer bought from them, so to say Dr. Jones gets 10 percent off of everything, not 10 percent off of the item, because the rep made a manual adjustment in their software. Q. So it's beyond just the specific purchase order. A. Correct. Q. And it's just going forward that dentists will get a discount on all their purchases. A. Going forward."); Misiak, Tr. 1589-90 ("A. Yeah. We've -- so our market is very price-competitive, and we get thousands of price class change forms that come in. Essentially what happens is a sales rep, which we have today a hundred or so, goes into a dental office, works with a customer. Oftentimes we have a competitor that comes in there, and so they'll want to make a modification to pricing to be competitive. It might be to win business. Oftentimes it's to defend business. And these price class change forms come in where reps generally say, I want to offer additional discount to this customer. And they'll define what price class they want to have the customer on and then how much additional discount they want to do off that price class. Sometimes it's individual product discounts. Discounts can vary quite a bit on how they want to discount to the office. We get tens of thousands of these over time.")).

20. These blanket discounts "happen automatically," allowing the customer to "place the order" instead of the sales rep manually going in and changing the price. (Guggenheim, Tr. 1731-32 ("So the reps, you know, while they have complete discretion to override any price at point of sale, the -- today, more and more customers want to do their own ordering, and so a price class change is a function where we go in and we set the pricing within our system so that change in price will happen automatically, and therefore a customer could place an order."))).

21. Once a price class change request is approved and implemented, the discounted pricing stays in place "at least for the next year." (Guggenheim, Tr. 1732).

22. Price class changes are typically *on top of* the manual overrides that sales representatives can do for individual products. (Guggenheim, Tr. 1747, 1750).

23. Patterson territory representatives frequently requested and received blanket discounts for their customers. (Rogan, Tr. 3621 (“how common, in your experience, were these blanket requests by your 750 sales folks to lower prices for a given customer? Was that a rare event or a common event? A. It’s a constant event.”); *see also* Guggenheim, Tr. 1747 (“Now, Mr. Guggenheim, how often did you and your region managers see these price class change requests by your territory reps to lower prices? A. Oh, very often. Hundreds of times. These come up all the time. Constantly. Q. More than once a day? A. What’s that? Q. More than once a day? A. Oh, yeah. A lot more than once a day.”))).

24. For instance, on April 28, 2014, Patterson’s Tim Rogan received an email from his assistant, Jenny McNamara, asking for help reviewing the 500 requests she had received over the course of one day. (RX737 at 5130).

25. In April 2014—the middle of the alleged conspiracy period (Compl. ¶ 36 (alleging Patterson joined the conspiracy in February 2013); Kahn, Tr. 19 (alleging the conspiracy ended in April 2015; *see also* RXD0204 at 1 (“Patterson Joined The Alleged Conspiracy in February 2013”); RXD0205 at 1 (“The Alleged Conspiracy Ended in April 2015”))—Patterson representatives submitted 1,480 price class change requests. (RX0568 at 2).

26. During the 2014 calendar year, Patterson representatives submitted roughly 8,000 price class change requests. (Guggenheim, Tr. 1749–50 (“Q. And then it says “Number of Requests. And is this Mr. Lepley’s tally -- A. It is. Q. -- that he sent you of all the requests to lower prices that your sales reps sent up through the chain of command? A. It is. Q. Hundreds every month? A. Correct. Q. A couple months here, April of 2014, it’s almost 1,500 across the

country; is that right? A. That's correct. Q. So if we just do a little back-of-the-envelope math, so January and February of 2014, it looks like roughly a thousand in those two months, add in March, 1,500, does that look about right? A. Yeah. Q. And then if we add in April, we're up to 3,000 in the first four months of 2014, these lower price requests? A. Right. Q. And we add, May, June, July, August, looks like roughly 8,000 requests by your sales team to lower prices in this formal price class change request approval process; is that right? A. It is. 8,000 in what period of time? Q. 2014."); *see also* RX0568 at 2).

27. During the 2015 calendar year, Patterson representatives again submitted "a little more than 8,000" requests. (Guggenheim, Tr. 1750 ("Q. And then if we look at 2015, you got 1,500 in January roughly, 1,200 in March, 1,200 in April. It's about another 8,000 requests and approvals in 2015 to lower prices, too. A. Yeah. It looks a little more than 8,000, but yeah. Q. Okay. And this is on top of these overrides or individual purchase order lower prices; is that right? A. Correct."); *see also* RX0568 at 2).

28. In January 2015—almost two years after Patterson allegedly joined the conspiracy (Compl. ¶ 36 (alleging Patterson joined the conspiracy in February 2013)—Patterson representatives submitted 1,482 price class change requests. (RX0568 at 2).

29. Likewise, in April 2015—the month the alleged conspiracy supposedly ended (Kahn, Tr. 19; *see also* RXD0205 at 1 ("The Alleged Conspiracy Ended in April 2015"))—Patterson representatives submitted 1,213 price class change requests. (RX0568 at 2).

30. There are 54 or so boxes of price class change forms "full of thousands of forms of price class changes" admitted into evidence in this case. (Misiak, Tr. 1475; 1484; RX0737; *see also* Misiak Tr. 1473 ("JUDGE CHAPPELL: "That would fill would you say the Marianas

Trench?"); RXD0202 at 1–3 (picture of David Misiak with the 54 boxes of price class change forms)).

31. Patterson’s branches and regional management almost always approve the blanket discounts sought in the price class change forms. (Misiak, Tr. 1489–90 (“Did you ever -- in your time as vice president of sales, do you remember ever disapproving one of these thousands and thousands of requests for discounts? A. I do not recall not approving a discount request. Q. Why did you -- why did you approve all these discount requests? A. Because we wanted to compete and we wanted to win the business. Price is an element of competing.”); (Guggenheim, Tr. 1747 (“I don’t recall ever disapproving them. . . . We want to get after the business, so I’m not aware of anyone disapproving these.”); (McFadden, Tr. 2759 (“JUDGE CHAPPELL: Before you get there, did you get those requests and did you ever deny one? THE WITNESS: I approved probably 99.5 percent of them. Very rarely would I question one, but I would question them. But most of the time, we were in such a competitive situation that the explanation would come up, I need to do this because of XYZ, because Benco or Atlanta Dental are doing this and I need to compete, so I allowed them to do it. JUDGE CHAPPELL: So you deferred or trusted your people in the field. THE WITNESS: I did.”)). McFadden thought, when he approved (RX0737-02779), “it didn’t take long to scan that and say, wow, this makes business sense, this is all incremental business. And every dollar that, you know, we could take from our competitor was a good dollar, so that’s why I approved it so quickly.” (McFadden, Tr. 2768).

32. These discount requests were often approved within minutes. *See, e.g.*, (RX0737-02779 (discount to “leverage[e] against Schein” approved within 1 minute on March 4, 2013); RX0737-02771 (discount to compete with Benco approved within 2 minutes on February 25,

2013); RX0737-02794 (discount to pick up an account from Schein approved within 2 minutes on April 16, 2013)).

33. Many of the price class change forms in evidence post-date Patterson’s alleged February 2013 entry into the purported agreement with Benco and Schein. Examples are:

- a. On February 15, 2013, Mark Webb, Patterson’s Southwest Region Manager, approved a price class change request for an account that Patterson “wrestled back from Schein.” (RX0060 at 1).
- b. On February 18, 2013, Dan Reinhardt, Patterson’s Mountain West Region Manager, approved a price class change request for an account Patterson was “competing with Schein to win.” (RX0061 at 1).
- c. On February 27, 2013, Reinhardt approved a request for an account “switch[ing] all her business” from Benco. (RX0219 at 1).
- d. On April 24, 2013, Neal McFadden approved a request for an account that was “currently using Schein exclusively” but Patterson “match[ed] Schein’s discount to gain a share of the business.” (RX0081 at 1).
- e. On May 28, 2013, McFadden approved a request asking for “an aggressive discount in an attempt to get their business” from Schein and Benco. (RX0089 at 1).
- f. On June 5, 2013, Clint Edens, Patterson’s South Central Region Manager, approved a request for an account that was “a new win from Schein.” (RX0091 at 1).
- g. On June 19, 2013, Anthony Fruehauf, Patterson’s then-Regional Manager for the Southeastern United States, approved a request for an account it was

competing with Benco over. The representative wrote, “*I just want to kick . . . Benco in the mouth with and finally kick them out the door.*” (RX0094 at 1 (emphasis added)).

- h. On September 17, 2013, Dick Ruder, Patterson’s Ohio Valley Region Manager, approved a request for a sales representative who “flipped [a] 30-year Schein customer.” (RX0121 at 1).
- i. On October 16, 2013, Anthony Fruehauf approved a request for a territory representative who was “battling Benco” over an account. (RX0134 at 1).
- j. On January 16, 2014, Dan Reinhardt approved a request for an account who was “going to switch 100% to Schein, but we won.” (RX0204 at 1).
- k. On February 12, 2014, Anthony Fruehauf approved a request where the territory representative had won over a Schein customer. (RX0214 at 1). The representative wrote, “Schein Takeaway.” (RX0214 at 1).
- l. On February 28, 2014, Dick Ruder approved a “price class change to take [an account] from Schein.” (RX0220 at 1).
- m. On April 7, 2014, Clint Edens approved a request for a “former Schein customer, converted to 100% Patterson.” (RX0231 at 1).
- n. On April 16, 2014, Dan Reinhardt approved a request for an “\$80,000-a-year Schein customer that converted to Patterson.” (Misiak, Tr. 1487; *see also* (RX0246 at 1)).
- o. On April 24, 2014, Clint Edens approved a request to “prevent Dr. Roddy from switching to Benco and to grow his Patterson business.” (RX0251 at 1).

- p. On April 30, 2014, Rick Cacciatore, Patterson’s North Central Region Manager, approved a request “to price compete with Benco and gain more of [the account’s] business.” (RX0254 at 1).
- q. On June 2, 2014, Dave Misiak approved a request for two new accounts that [REDACTED] (RX0737-04225; *see also* (Misiak, Tr. 1480)).
- r. Given the sheer volume of price class change requests, Misiak’s assistant, Bobbi Galloway, had Misiak’s authorization to approve price class change forms herself. (Misiak, Tr. 1482).
- s. For instance, on June 13, 2014, Galloway approved an “aggressive” discount for an account with four locations “ALL take from Schein.” (RX0279 at 1).
- t. On August 26, 2014, Misiak approved a price class change request for an account Patterson wanted back from Schein. (RX0737-02824 [REDACTED] [REDACTED] [REDACTED] Misiak, Tr. 1481 (“So this is the Sacramento branch manager sending a price class change for business that we had, but Schein had taken it, and we were going to get it back if we could offer this discount, so it was approved.”)).
- u. Price class change requests were even approved in the middle of the night. For example, one approval was time-stamped 1:06 a.m. (RX0737-02824). Misiak granted this late-night approval because he “wanted to keep the business moving.” (Misiak, Tr. 1481–82).

- v. On August 28, 2014, Patterson's Clint Edens approved a request for a "customer switching business from Schein to Patterson." (RX0335 at 1).
- w. On October 8, 2014, Edens approved a request for a "multi-location practice won from Schein." (RX0362 at 1).
- x. On December 5, 2014, Edens approved a request for a "merchandise clinic converted from Schein." (RX0386 at 1).
- y. On December 18, 2014, Fruehauf approved a price class change and discount request that stated, "Gunna try and steal this one from my friend Greg Jones at Benco!" (RX0399 at 1).
- z. On February 3, 2015, Edens approved a request for "a new Advantage account pickup from Schein." (RX0414 at 1).
- aa. On March 2, 2015, Reinhardt approved a request for a Benco account where the sales representative had written, "trying to move this quickly (as usual) as not to give Benco the chance to rebut[] if they get wind of the change." (RX0421 at 1).

34. All the above price class change requests referencing competition with Schein and Benco were made and approved during the period from February 2013 to April 2015 in which Patterson is alleged to have participated in a conspiracy with Schein and Benco. (Compl. ¶ 36; Kahn, Tr. 19; *see also* RXD0204 at 1 ("Patterson Joined The Alleged Conspiracy in February 2013"); RXD0205 at 1 ("The Alleged Conspiracy Ended in April 2015")).

35. Complaint Counsel has argued there are no price class change forms showing Patterson competing with Schein and Benco over buying groups. (CC Opp. to MTD at 20).

36. Dental buying groups do not actually “buy” dental supplies (or anything at all); the customers are the buying group’s members. (Cohen, Tr. 684 (“Q. So in the Kois buyers club, who’s the customer? A. The customer is the individual dentists. The members of the Tribe.”); Sullivan, Tr. 4105 (“A. We partner with buying groups. Our customer is the dentist. Our customer is their member. I don’t view the group as our customer.”); Sullivan, Tr. 4330–31 (“Q. None of your customers are actually buying groups, right? A. Correct. As stated earlier, that we view the groups as partners. The customer is the dentist.”); Sullivan, Tr. 4328–29 (“[B]uying groups don’t actually buy dental supplies, do they? A. They do not. Q. It’s kind of a misnomer to call them buying groups, right? A. I hadn’t thought of it that way. It’s a -- that’s correct. Q. They kind of negotiate, but the member dentists are all independently owned, right? A. That’s correct. Q. So they’re the ones who actually buy, the private practice dentists. Is that fair? A. That’s fair.”)).

37. Patterson competed fiercely for individual members of buying groups. Examples include:

- a. August 29, 2013: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (RX0737-01360-62).
- b. December 1, 2014: [REDACTED]
[REDACTED] (RX0737-02250-63).
- c. August 1, 2015: [REDACTED]
[REDACTED]
[REDACTED] (RX0737-02578-80).

- d. January 14, 2016: [REDACTED]
[REDACTED] (CX0152-001).
- e. January 22, 2016: “This is a \$70-\$80k incremental opportunity to recapture business we have lost to Darby via Synergy Group.” (RX737-04807-10).
- f. March 4, 2106: “Ginger has been working with Special Markets on getting Narducci back.” (RX737-21619-41)
- g. March 15, 2016: [REDACTED]
[REDACTED]
[REDACTED] (CX0153-001).
- h. May 4, 2016: “Dr. Chace was buying from FDA Supplies but Chip sold him on the Patterson value-model.” (RX737-88633-40).
- i. May 11, 2016: [REDACTED]
[REDACTED]
[REDACTED] (CX0154-001-02).

38. From July 2008 to May 2015, Patterson’s sales at list price fell from 77% to 54%. (CX3241 at 2; Rogan, Tr. 3628).

39. From July 2008 to May 2015, Patterson’s sales that were discounted rose from 8% to 28%. (CX3241 at 2; Rogan, Tr. 3626–27).

c. The Record Contains Voluminous, Unrebutted Testimony of Fierce, Brutal, Day-In And Day-Out Competition Between Patterson, Schein And Benco.

40. There was extensive testimony that the dental industry is very competitive. (*See, e.g.,* McFadden, Tr. 2781 (“You could place every dentist in the United States in our largest stadium, and then you could surround it with 2,000-plus sales reps all fighting for a limited amount of dollars. It’s a very competitive industry. And these reps start every day with no money, they eat

what they kill, so as their leader, I wanted to support them and keep them in a good frame. And I loved the fact that they were aggressive and going after incremental business.”); CX8004 (McFadden, Dep. at 99 [REDACTED]; Misiak, Tr. 1396 (“And it’s a highly competitive market in which they’re, you know, doing this business and trying to take accounts back and forth and competing on price each and every day to the tune of changing price at the SKU level probably thousands of times a day, tens of thousands of times over the whole course of the portfolio over the career with dentists.”); CX8017 (Rogan, Dep. at 26 (“I mean, this is a very -- very tough market to compete in, and so we’re always trying to grind our way to gain market share”)); CX0317 (Rogan, IHT at 96 [REDACTED]; CX8013 (Fruehauf, Dep. at 43 [REDACTED]

1. Every Patterson witness testified to Patterson’s persistent competition.

41. Paul Guggenheim described competition with Schein and Benco as a “battle.” (Guggenheim Tr. 1757 (“Q. The next couple paragraphs here talk about Schein and Benco. Maybe you can just tell us in your own words, what are you communicating as a management team with these paragraphs about Schein and Benco? A. That the business is extremely competitive. It’s a battle.”); *see also* Guggenheim, Tr. 2748 (“[W]e competed hardcore against Henry Schein and Benco on a daily basis); Guggenheim, Tr. 1751–52 (“A. Yeah, it’s an extremely aggressive business. There’s a lot of competition, and we’re trying to win customers out there, and this is -- obviously, for every customer price is a concern, so we’re trying to adjust to it. Q. Trying to win

business from your many competitors? A. Correct. Q. Schein? A. Correct. Q. Benco? A. Correct.”); Guggenheim Tr., 1863 (“Q. So if Henry Schein is the successful partner with these buying groups, they don’t just have free and clear about now working with this independent dentist; is that right? A. Absolutely right. Q. You’re still going to fight for those individual dentists’ business? A. Aggressively.”)).

42. Dave Misiak viewed Patterson’s competition with Benco and Schein as “hand-to-hand combat.” (CX8038 (Misiak, Dep. at 133 (“It’s hand-to-hand combat. You want to understand what your largest competitors are doing so you can formulate competitive ideas to go compete and get the business.”); *see also* Misiak, Tr. 1499–1500 (“Q. Mr. Misiak, as the vice president of sales in that position from 2010 to 2015 or ‘16, did you and your organization compete to win private dentist business all the time? A. Each and every day.”); CX8038 (Misiak, Dep. at 215 (“But that being said, hand-to-hand combat, the reps would compete on the street and adjust pricing.”))).

43. Neal McFadden saw Schein as Patterson’s “fiercest competitor.” (McFadden, Tr. 2689 (“In 2008, after the recession, the vast majority of Patterson’s business is solo practitioners or small partnerships, and that business was flat or slightly down. And being a publicly traded company, we needed to find growth opportunities. And our fiercest competitor, Henry Schein, was growing double digits in the special markets space, and we felt it would be an opportunity for us to go and compete against them in this space and try to take some of their business.”); CX8004 (McFadden Dep. at 189 (“Q. Do you compete for business against Henry Schein? A. Yes. Q. And by compete I mean when you were working at Patterson. A. Yes. Q. When you were working at Patterson, when given the opportunity, would you try to take business away from Schein? A. Yes.”)).

44. Tim Rogan also described Schein and Benco as Patterson's "fiercest competitors." (CX0317 (Rogan, IHT at 123 ("Q. Would you say Henry Schein is one of Patterson's competitors? A. Yeah, they're our biggest competitor. Q. In what sense are they your biggest competitor? A. Well, they're the largest . . . and we compete head-to-head with them everyday. Q. How about Benco Dental? A. . . . But they're the number two, but much smaller than Henry Schein or Patterson. But, again, we're fierce competitors of them.")); *see also* Rogan, Tr. 3601 ("Q. Mr. Rogan, it was a core part of your strategy in the fall of 2012 for the upcoming year, 2013, was to go out and beat your competitors in the marketplace for private practice customers? A. Without a doubt. That's the share gain, taking it directly from our competitors. Q. And that would include Schein? A. Yes. Q. Benco? A. Yes."); CX8017 (Rogan, Dep. at 72 ("Look, we -- every single day we have a thousand people out there going head to head with these two companies and all the other ones we referenced earlier, every single day.")); CX0317 (Rogan, IHT at 97 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
CX0317 (Rogan, IHT at 221 ("All of our competitors are constantly going in and undercutting, you know, or trying to talk to our customers to compete with us; right?")))).

45. Scott Anderson described competition with Schein as "a thousand on our side and a thousand on their side going at it in the field." (CX8027 (Anderson, Dep. at 135 ("Obviously, every day we have, you know, a thousand on our side and a thousand on their side going at it in the field.")); *see also* (CX8027 (Anderson, Dep. at 159)) ("I've competed personally as a sales rep in San Francisco against both Henry Schein at the time as a catalog company and Sullivan Dental before they merged together. I've competed with them as a branch manager in both San Francisco and -- San Francisco and Minnesota for sales in those marketplaces every day. I've also competed

for sales rep and sales reps and hired sales people from Henry Schein while I was a manager. And then as I moved into upper management, helped drive the strategy to create what we felt would be winning solutions for customers to win business from Henry Schein in the marketplace.”).

46. Anthony Fruehauf heard of Patterson customers considering shifting business to a competitor “almost daily.” (CX8013 (Fruehauf, Dep. at 27 (“Q. When you were a -- or in any of your roles with Patterson, would you hear of – ever hear of a situation where a Patterson dentist was considering shifting his or her primary business to one of your competitors? A. Probably almost daily. It’s a very competitive market. Q. Do you take any steps in an attempt to retain such a customer? A. Absolutely.”)); (CX8013 (Fruehauf, Dep. at 193 (“Q. And do you compete for business against Schein? A. Every day. Q. And when given the opportunity, do you try to take business away from Schein? A. Absolutely.”)).

47. Devon Nease tried to take Schein’s business while employed at Patterson. (CX8002 (Nease, Dep. at 128 (“Q. While you were at Patterson, did you compete for the business against Schein? A. Absolutely. Q. When given the opportunity, did you try to take business away from Schein? A. Yes. Q. Did you ever not try to take business away from Schein? A. No.”)).

2. All Benco Witnesses Testified To Patterson’s Sustained Competition.

48. Chuck Cohen described competition with Patterson and Schein as “aggressive,” “vigorous,” and “fierce.” (Cohen, Tr. 662 (“Q. And is it fair to say that Benco has always aggressively competed on price with Schein and Patterson? A. We always aggressively compete on everything. Price is one element of that. Yes. Q. And value is another; correct? A. Value is another.”)); CX8015 (Cohen, Dep. at 326 (“We compete with them vigorously and fiercely every day in the market.”)); *see also* Cohen, Tr. 937 (“I believe that we compete every day in the streets in every office trying to win customers from large competitors and small competitors”); Cohen, Tr. 939 (“Q. All right. And you get -- periodically, internally at Benco, you get reports or

contacted by people in that 400-salesperson team, and they say, I'm fighting with Patterson over dentist X or dentist Y. That happens; right? A. Yes. Q. In fact, it happens pretty regularly; right? A. Yes. Q. In fact, it happened throughout 2013 and 2014 and 2015; right? A. Yes."); CX8015 (Cohen, Dep. at 287)) ("Q. Benco wins customers from Schein and Patterson, correct? A. Every day, we hope."). Contemporaneous documents also show Mr. Cohen's desire to compete with Patterson. (*See, e.g.*, RX0064 at 1 (Cohen wrote in a February 22, 2013 email, "We need Patterson to have a LONG, SLOW DECLINE.") (caps in original)).

49. Patrick Ryan described competition with Patterson as "constant" and "robust." (Ryan, Tr. 1267 ("Q. How would you describe the nature of competition between Benco and Patterson? A. Robust. Constant."); *see also* CX8037 (Ryan, Dep. at 388) ("So is it fair to say from your understanding that Patterson and Benco competed vigorously over the years during your time at Benco? A. Yes."); Ryan, Tr. 1266 ("Q. So you compete with Patterson for customers? A. Yes. Q. Has that been the case for throughout your 25-year tenure at Benco? A. Yes. Q. You -- Benco takes customers away from Patterson; right? A. Yes. Q. Patterson takes customers away from you? A. Yes."); Ryan, Tr. 1267 ("The only time I didn't compete with Patterson is the five years [1980-1985] I worked for them."); CX8037 (Ryan, Dep. at 390) ("Q. Competition between Patterson and Benco has not waned in any way during your time at Benco. Is that right? A. No.").

50. In fact, in February 2014, in the middle of their alleged price fixing conspiracy (Compl. ¶ 36. (alleging Patterson joined a conspiracy in February 2013); Kahn, Tr. 19 (alleging the conspiracy ended in April 2015); *see also* RXD0204 at 1 ("Patterson Joined The Alleged Conspiracy in February 2013"); RXD0205 at 1 ("The Alleged Conspiracy Ended in April 2015")), Benco considered *suing* Patterson for *restraint of trade* in a dispute over an exclusive arrangement for CEREC technology. (CX1060 at 2 [REDACTED])

[REDACTED] (emphasis added); Cohen, Tr. 952–53 (“Q. And the last sentence there, you say that you were so upset internally that you were considering filing a lawsuit against my client, which you considered the best opportunity to deliver a blow to Patterson. Do I have that right? A. Yes.”)).

3. All Schein Witnesses Testified To Fierce Competition With Patterson.

51. Tim Sullivan saw competition between Patterson and Schein as “fierce.” (Sullivan, Tr. 4027) (“Q. A lot of competition between you and Patterson over the years? A. Fierce competition between the two, yes.”); Sullivan, Tr. 4065 (“First, let’s talk about Patterson. Does Henry Schein compete with Patterson? A. Yes. Q. Has that ever not been the case? A. No. Q. How would you describe the level of competition between Henry Schein and Patterson? A. As fierce as can be.”); RX2941 (Sullivan, Dep. at 528) (“Q. Could you give me an intensity rating as to the intensity of your competition with Patterson? A. I’ve stated in the past we are fierce competitors with Patterson.”); *see also* RX2941 (Sullivan, Dep. at 527) (“So we meet with customers often to try to win the business, whether it’s Patterson, Benco, Burkhart, Darby, online, whatever. We are competing every day in every segment of the customer segmentation on our overall value.”); RX2941 (Sullivan, Dep. at 522) (“I’m not sure what Patterson does, but we know that they’re going to compete hard for the business, whether we sign a group or not, just as we compete hard for the business with those customers who are members of the group if we decide to sign up or not.”).

52. Dave Steck described Schein, Patterson, and Benco’s price competition as “all day every day.” CX0310 (Steck, IHT at 56) (“Q. Would you say that Schein, Patterson, and Benco ever try to outbid each other on price in order to gain business? A. All day every day.”).

53. Randy Foley testified that Schein competes with Patterson “every day” and that each company takes customers away from the other. (Foley, Tr. 4733–34 (“Q. I believe you testified during your deposition that you competed with Patterson every day. Correct? A. That is correct. Q. And Schein competed for and took away customers from Patterson; correct, sir? A. That is correct.”); *see also* CX8003 (Foley, Dep. at 419 (“Q. How frequently did you compete against Benco and Patterson for business? A. All the time. Every day.”)); CX8003 (Foley, Dep. at 384–85 (“Q. And while you were at Schein, you competed with Patterson for customers? A. Yes. Q. And was competition for customers between Schein and Patterson intense? A. Yes. . . . Q. When given the opportunity, Schein took customers away from Patterson? Right? A. Yes. Q. That was your job, correct? A. Yes. Q. Was there ever a point that Schein did not compete against Patterson for customers? A. No.”))).

54. Joseph Cavaretta testified that there was “fierce competition every day” between Patterson and Schein. (Cavaretta, Tr. 5536–37 (“Q. How would you describe the relationship between Patterson and Henry Schein? A. The industry is small, so it’s cordial, but it was -- it was fierce competition every day.”)). Examples of “fierce competition” between Patterson and Schein included “[r]ecruiting each other’s reps” and “on a regular basis” walking into dental offices “trying to win the business over and take the business from Patterson.” (Cavaretta Tr. 5536-37 (“Q. Can you give examples of what you mean by that? A. Sure. Recruiting each other’s reps. Schein, fortunately, was more successful at that point than Patterson, so we were recruiting the reps on a regular basis. Every day walking into an office, if an office was owned and it was usually based by merchandise of who owned that office or not, and you’re constantly trying to win the business over and take the business from Patterson. Putting in other programs specifically to take

the business. Equipment, technology, software. Every day we were competing against Patterson.”)).

55. Jake Meadows said that Patterson’s fierce competition never abated. (Meadows, Tr. 2623) (“Q. Has the fierce competition you mentioned between Patterson and Schein ever abated at any time that you’ve worked at Schein? A. Never. Q. And that includes the period from 2013 to 2015? A. That’s correct.”).

56. For example, on November 25, 2013, Mr. Meadows was forwarded an email in which Schein Dental’s Director of Sales reported that “lately the field has been complaining about PDCO undercutting our price.” (RX0178 at 1; Meadows, Tr. 2625 (“Q. Okay. So is RX 0178 an example of Patterson’s fierce competition with Schein? A. Yes.”)).

57. Patterson also competed with Schein over staff. (Meadows, Tr. 2625 (“Q. So was your competition with Patterson -- it wasn’t just over customers; it was also over staff? A. Yes.”)). Meadows identified RX0396 as an example of this competition. (Meadows, Tr. 2625 (“Q. And is this an example of that? A. Yes.”)). RX0396 shows that, on December 18, 2014, Mr. Meadows received an internal Schein email with information about Patterson’s discount for two large customers from a former Patterson salesperson who had joined Schein, seeking authorization to offer a competitive Schein discount. (RX0396 at 1; Meadows, Tr. 2626) (“A. He’s detailing how we were competing against Patterson. Q. Is this some sort of a request for approval of a rate that he thinks could compete with Patterson’s rate? A. Yes. Q. Okay. So this document, RX 0396, is this also an example of Patterson’s fierce competition with Schein? A. Yes.”).

58. In 2014, Schein even created a new tier commission rate to fend off competition from Patterson over a segment of customers that included buying groups. (Meadows, Tr. 263132 (“Q. Was it a purpose of the creation of Tier 2 to fend off competition from Patterson? . . . THE

WITNESS: Yes. To keep our team competitive in the space. Q. And Tier 2 again, as it was defined, could include buying groups; is that right? A. Yes, it could. Q. And the reason that Patterson needed to be fended off was because it was hungry -- A. That's correct. Q. -- for customers? I'm sorry. A. That's correct. Q. And this was in late 2014? A. Yes. Q. So is CX 2024 an example of the fierce competition that Patterson and Schein had? A. Yes.”)).

59. Kathleen Titus saw Patterson as “a nemesis.” (Titus, 5286–87 (“Q. Is it fair to say that throughout your career at Henry Schein that Patterson was consistently a vigorous competitor of Henry Schein? A. It was a vigorous competitor, and I would look at them as a nemesis. They were the largest and they were the ones we worried about.”)).

4. Third Parties Also Testified About Patterson’s Fierce Competition With Schein and Benco.

60. Dr. John Kois Sr., founder of the Kois Buyers Group, believes that Patterson “has all always acted very competitively in the marketplace.” (Kois Sr., Tr. 223–24). In his 40 years in the dental industry (Kois Sr., Tr. 202), Dr. Kois has not known Patterson, Schein, and Benco to behave as anything other than fierce competitors.” (CX8007 (Kois Sr., Dep. at 134)).

61. John Kois Jr. likewise could not “think of any examples where Patterson, Schein and Benco did not try to take customers from each other and/or from Burkhart and Kois Tribal Management.” (CX8008 (Kois Jr., Dep. at 116)).

62. Robert Lowther (Denali) has never known Patterson, Benco, or Schein “to behave in a way that is not competitive.” (RX2961 (Lowther, Dep. at 193)).

63. Justin Puckett (MB2 and Dental Gator) testified that Patterson and Schein submitted competing bids to win MB2’s business in 2014. (Puckett, Tr. 2309–10 (“Q. You testified on direct that in 2014 Patterson submitted a bid in response to an RFP that you issued. Do you recall that? A. Yes. Q. And did you consider that to be a legitimate, strong bid by Patterson

to gain that business? A. Yes. Q. At the time, Henry Schein had the business? A. Yes. Q. If Patterson had been successful with that bid, it would have taken business away from Henry Schein? A. Yes. Q. After that unsuccessful bid by Patterson in 2014, did Patterson continue to attempt to get business from MB2? A. Yes. Q. And how did they do that? A. They call a lot. They try to take us to dinner, meet them at conferences, et cetera.”)).

64. Complaint Counsel did not introduce any evidence at trial rebutting the evidence in the record—including Patterson’s approach to pricing allowing manual price overrides in the field, extensive price competition from testimony of all Schein, Patterson and Benco witnesses, and the evidence of expansive price competition from the price class change forms—showing that there was “fierce” competition between Patterson, Benco and Patterson in the sale dental supplies throughout Complaint Counsel’s alleged conspiracy period.

d. Patterson Invaded Schein’s And Benco’s Group Practice Business Right In The Middle Of Their Supposed Conspiracy To Boycott A Type Of Group Practice.

1. In Focusing On Its Historic Customer Base Of Solo Dentists, Patterson Fell Behind Schein’s And Benco’s Corporate Dentistry Business.

65. For most of its history, Patterson had a narrow “strike zone” for its target customers of private practices. (McFadden, Tr. 2789; Rogan, Tr. 3598 (“[W]e are going to be laser focused on Patterson’s strike zone, which—well a big part of it was private practice, and why for years—why we didn’t start that strategic account business for years and years and years, because we didn’t believe it was in our strike zone.”)).

66. Patterson’s decentralized sales force focused almost exclusively on solo and small practices, with only a few offices located within a single branch’s territory. (CX8004 (McFadden, Dep. at 49 (“Historically, our organization was -- was led by an executive leadership team that wanted us to be experts in dealing with solo practitioners and small groups, meaning one to three

locations. We were an extremely decentralized organization. Very territory rep sensitive. The corporate office worked for our territory reps. And before 2008, Patterson had absolutely no reason to deviate from that strategy.”)).

67. Even today, solo and small practices account for the vast majority of Patterson’s customer base and of the 200,000 dentists industry-wide. (Misiak, Tr. 1425–26 (“Well, private practice today represents somewhere around 70 percent of the total market, and I would say it was probably closer to 75 or 80 in 2013, so clearly this is the largest segment of the market.”)).

68. Prior to mid-to-late 2013, Patterson had essentially ignored the “group practice” segment of the dental market, including Dental Service Organizations or “DSOs.” (CX8004 (McFadden, Dep. at 48–49)).

69. DSOs are characterized by single ownership with a procurement operation that made purchasing decisions. (Misiak, Tr. 1311). Patterson’s decentralized structure made it difficult for Patterson to address this segment because DSOs preferred centralized ordering and service. (CX8004 (McFadden, Dep. at 53–54 (“DSOs wanted to make one phone call to the corporate office to get all of these things done and to have us dispatch the service technicians centrally and for us to handle their account centrally and for them to have one Patterson experience and not multiple Patterson experiences.”))).

70. The 2008-09 financial crisis led to a sharp decline in demand for dental equipment and supplies, as patient visits fell. (CX8004 (McFadden, Dep. at 49–50) (“And in 2008 and 2009, we all know that we entered into the Great Recession and the economy hit the dental world very hard. Dentistry became extremely discretionary. And a publicly held organization where we need growth, the solo practice market and the small group market was growing flat, if not slightly down.”)).

71. 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, leaving them free to focus on patient care. (RX0043 at 29 (“Industry proponents add that a number of practicing dentists and recent dental school graduates join a Dentist Practice Management company to maximize their professional potential by focusing exclusively on patient dental care. Additional benefits noted for the dentist include...Economies-of-scale – greater buying power and lower administrative costs that enable dentists to provide services that patients value and can afford.”); RX0572 at slide 39 (“Corporate dental practices have grown significantly, while sole proprietorships have declined in share across ~154,000 U.S. practices.”)).

72. These DSOs became the fastest-growing segment of the industry, growing at double-digit rates. (McFadden, Tr. 2689 (“In 2008, after the recession, the vast majority of Patterson’s business is solo practitioners or small partnerships, and that business was flat or slightly down. And being a publicly traded company, we needed to find growth opportunities. And our fiercest competitor, Henry Schein, was growing double digits in the special markets space, and we felt it would be an opportunity for us to go and compete against them in this space and try to take some of their business.”); RX0572 at slide 40 (“Corporates with at least 500 employees are fastest growing type of dental practice.”)).

73. By 2013, Schein and Benco accounted for the majority of DSO sales (75–85% and 15%, respectively), with Patterson being a minor participant. (Foley, Tr. 4637; Cohen, Tr. 807; CX3014 at 5 (Patterson Special Markets Business Plan) (“There are primarily two major competitors in the Special Markets space: Henry Schein and Benco.”); McFadden, Tr. 2690; CX8004 (McFadden, Dep. at 48–49. (“Q. Schein and Benco had the vast majority of business in

the Special Markets space when you assumed your position; correct? A. Correct. Q. And at that time, Patterson was – is it fair to say that Patterson was better known as a -- as a -- as the major distributor who had historically ignored the Special Markets space? A. Yes.”)).

2. Patterson Invested Heavily To Study The DSO Segment, Develop A Plan, And Build A New Infrastructure, Ultimately Launching Patterson Special Markets To Compete With Henry Schein For DSOs.

74. In late Summer 2012, Patterson hired an experienced consulting firm, Strategic Business Solutions, LLC, to evaluate and make recommendations on the DSO opportunity. (CX8004 (McFadden, Dep. at 50 (Patterson “commissioned a report by Michele Perpich to do a research on the market and [Paul Guggenheim] went to the board of directors to get permission to invest in people and structure and to widen our strike zone to focus on dental service organizations.”))).

75. The lead consultant, Michele Perpich, painstakingly analyzed industry data, purchasing trends, company records, and public information about Patterson’s rivals, and interviewed more than a dozen executives from Patterson, the leading DSOs and their private equity owners, and additional industry experts. (Guggenheim, Tr. 1582–83 (“Q. And so if I show you the Michele Perpich report, would that help refresh your recollection on the timing of that? A. Michele took several months, four or five months, so you’d have to back up from -- generally, yes, this -- that probably was an output of this....Q. All right. And so just going back to the business review plan and the SWOT analysis, following this SWOT analysis in 2012, Patterson hired a consulting firm to evaluate the DSO market; is that fair to say? A. Yes. Q. And the purpose of that evaluation process was to figure out whether Patterson should build out the infrastructure to penetrate the DSO market; is that right? A. Yes.”)).

76. In Fall 2012, Perpich provided Patterson’s management with her 99-page report and recommendation that the company develop a plan to enter the DSO space. (RX0043 at 1–99

(Perpich Report); (Guggenheim, Tr. 1582) (Q. Is that the Perpich report? A. Yeah. It's one -- it's a document from the -- there's a lot of documents, but this is one of the documents there. Q. And do you see the date on that is October 2012? A. I don't see -- oh. Oh, yeah, October 23, 2012, right."); (RX0043 at 13 ("Active Dental Practice Management Market Segment participation results in 2020 revenue increase of 17.3 percent and additional operating income and dollar contribution of 13.8 percent for the Patterson Dental Business Unit.")).

77. The report mapped out a five-year plan requiring millions of dollars in investment over the next 3-5 years—to build out a “Special Markets” sales and service organization to handle the centralized purchasing and other demands of corporate DSOs, and to create the required IT infrastructure and design software to allow state-of-the-art centralized purchasing, delivery, and service and support. (Guggenheim, Tr. 1777–78 (“I see, Mr. Guggenheim, that the total expenses go from roughly 1.8 million up to 7.8 million between 2012 and 2013 in this and then increasing from there to 13 million and from there to 22, and so on. Was this a multi- -- to get into the DSO piece of the market, which Schein had already been in for a while, was this a multimillion-dollar investment that Patterson was contemplating? A. Absolutely. Q. And was this going to take more than a couple of months? A. Oh, absolutely.....Q. Was Ms. Perpich telling you all that you had five years of work ahead of you and multimillion-dollar expenses to crack into this DSO segment of the industry? A. Yes, she was.”); RX0043 at 95)).

78. Patterson's executive team obtained the approval of its board of directors to make this investment in early Spring 2013. (CX8023 (Guggenheim, Tr. 174 (“Q. After this management retreat in November of 2012, did you, as the president of Patterson Dental, propose to the Patterson Companies management and the board of directors that you transform the business, fix these gaps and invade the DSO segment? A. I did. Q. And did you have to have formal board approval for

Patterson Companies to do that? A. I believe we -- Scott wanted formal board approval. He wanted the board to -- Q. All right. And that occurred a few months after this management meeting in November of 2012? A. Right.”); (RX0069 at 3 (“Market Priorities: Build out national account business platform”)).

79. Patterson made the decision to enter the DSO market in early 2013 and launched Patterson Special Markets in September 2013. (RX0118 at 1 (“Please see attached an important announcement from the new Patterson Special Market division”)). At this point Patterson widened its strike zone to address DSOs. (McFadden, Tr. 2789–90). Both actions were taken shortly after Complaint Counsel alleges Patterson joined the conspiracy. (Compl. ¶ 36; *see also* RXD0204 at 1 (“Patterson Joined The Alleged Conspiracy in February 2013”)).

80. This strategic decision is evidenced in Patterson’s internal strategy plans, in which Patterson identified only two business segments to focus on: (1) private practice and (2) large groups (i.e., DSOs). (RX0046 at 17–20 (“Dental Market #1 – Private Practice” and “Dental Market #2 – Large Group”); Misiak, Tr. 1468–69 (“Q. I don’t see a slide in here on the dental business for another dental market, number three, for buying groups or GPOs. Do I have that right? A. That’s correct. Q. Were they not part of your strategy back in the fall of 2012? A. They were not part of the strategy in 2012. Q. And why is that? A. Well, we had done the research and tried to make an educated decision for the business based on where the growth was and where we thought we could impact the -- for shareholder value the bottom line for the organization and grow the business profitably, and that was in private practice and DSOs. Q. Just those two segments. A. Correct.)).

81. A key part of this strategy was to take DSO business from Schein, the dominant DSO player. (Rogan, Tr. 3603–04; McFadden, Tr. 2689 (“And our fiercest competitor, Henry

Schein, was growing double digits in the special markets space, and we felt it would be an opportunity for us to go and compete against them in this space and try to take some of their business.”)).

82. A strategic goal of Patterson’s in entering the DSO market was “disruption of HSIC [i.e., Henry Schein].” (RX0046 at 20; Rogan, Tr. 3603).

83. Starting in 2013, Patterson invested massively in personnel, software and IT upgrades, and other infrastructure changes to catch up in the DSO segment. (CX0315 (McFadden, IHT at 52 (“2013, we are new to special markets. We don’t know what we don’t know. And systematically our computer systems being able to do things out of the norm is not even feasible in 2013. It took most of 2014 to build our IT infrastructure to be able to accommodate winning a DSO, so let alone going off on other tangents.”)); CX8027 (Anderson, Dep. at 67 (“At the same time, we were making massive investments in a new IT infrastructure that would help us be more flexible business different types of business models which currently we were not. And at this very same time we were making a major foray into competing in a space that we were underdeveloped. So to me this is a thought-provoker on how do we position ourselves.”))).

84. 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. (CX8004 (McFadden, Dep. at 103 (“In June of 2013, when you received this e-mail, you were just becoming head of Special Markets? Is that -- is that the timing? A. That is the timing. I was still living here in South Carolina. I would have been in a -- doing kind of learning my new job but wrapping up my old job. I was in my transition period.”)); CX0315 (McFadden, IHT at 274 (“And you were

just moving to the Saint Paul, Minnesota area and taking on your responsibilities in building out the special markets division? A. Yes.))).

85. Patterson’s work to build the capability to handle centralized demands of corporate DSOs, was monumental, expensive, and risky: historic “decentralization,” built to serve local dentists, had long “precluded it from setting up a single point of contact at the corporate office,” and it “had to literally figure out a way to become centralized with [its] antiquated IT systems,” like “putting a square peg into a round hole.” (CX8004 (McFadden, Dep at 51–52 (“We were, and have been historically, a very decentralized organization. All of our systems revolve around our local branches, whereas Henry Schein, for existence -- for example, is a centralized organization that learned to be decentralized, we were a decentralized organization trying to learn to be centralized. Our systems precluded us from setting up a single point of contact at the corporate office and -- and selling that way, so we had to literally figure out a way to become centralized with our antiquated IT systems. So it was putting a square peg into a round hole.”))).

86. 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 “laser focused” on corporate DSOs that owned at least 15 practices and purchased more than \$600,000 in equipment and supplies annually. (CX8023 (Guggenheim, Dep. at 175–76, 191 (“And so I went to the board in 2012 or ‘13, got a commitment from the board, we had very clear directions on growth in that category, and my concern was that Neal was not focusing on what his objective was when he began looking at other parts of the business. One of those items would have been GPOs. And I directed Neal to specifically stay on task with his focus, which was to drive the DSO space group, the group practice space, specifically the large group practice space, which is what he -- what he did, but he would

occasionally have these approach and I would direct him -- it wasn't that I was directing, you know, so much that we weren't going to focus -- or address those. It was that we were going to focus on DSOs....In an effort to keep Mr. McFadden laser focused on the commitment that we had made to the board and the market that he was commissioned to approach, at times I would tell him other markets that I didn't want him focusing in on, one of those was the GPOs.”)).

87. McFadden was instructed that smaller DSOs, community health centers, “buying groups,” and solo practices were distractions that Patterson Special Markets should leave in the capable hands of its regions, branches, and 1,600+ territory representatives and equipment specialists. (CX8004 (McFadden, Dep. at 71–72 (“Q. How did Mr. Guggenheim convey his desire to you that you should be focusing on DSOs? A. He would tell me directly to keep my focus and not get distracted with the noise from the field and requests from the field. He wanted me to be focused on getting a win in the DSO space. Q. What kind of noise from the field was he referring to? A. Almost immediately when we launched Patterson Special Markets, the word Special Markets and our definition connotes more than just dental service organizations. It was really anything outside of the solo world and the small group space....But from a centralized standpoint, Paul made it abundantly clear, Neal, you are to focus on dental service organizations and pass these on to other people. You are to focus on these.”))).

88. There was a lot of pressure to get DSO sales and for McFadden to stay focused on DSOs. (McFadden, Tr. 2705) (“Paul [Guggenheim] was putting a lot of pressure on us to get some sales because he had put his neck out on the line with the board of directors to build this organization.”); (McFadden, Tr. 2713) (“[Guggenheim] would always tell me to stay focused on the dental service organizations, building out our special markets, trying to get a win and get some revenue to get the pressure off of all of us.”).

89. McFadden was inundated and overwhelmed during Patterson Special Markets' early months, including with various requests from the field to look at various groups. (McFadden, Tr. 2812). This was because a centralized special markets group was new to Patterson and caused uncertainty in the field as to what it would address. (McFadden, Tr. 2698 (“[T]here was a lot of ambiguity and uncertainty from the field, meaning our sales team and branch managers, so we felt it important to put something together as a definition to let our team know what we were doing” in Special Markets.)).

90. Patterson Special Markets' express mission in 2013–14 was to focus on only the biggest DSOs. (RX0119 at 1 (“Effective immediately, current dental corporations with 15 or more owner operated/affiliated locations and a minimum of \$600,000 in potential merchandise will qualify.”)).

91. On September 4, 2013, Patterson announced its special markets division internally to the Patterson Sales Force. (CX0158 at 1). The announcement defined the types of accounts Special Markets would handle. (CX0158 at 1). Patterson specified internally that “this definition will not include group purchasing organizations (GPOs).” (CX0158 at 1). GPOs were excluded from the definition of Special Markets to ensure that McFadden would focus on DSOs. (Guggenheim, Tr. 1640).

92. Patterson's decision to exclude GPOs from the definition of Special Markets—and for Special Markets to focus on DSOs—was an “independent decision.” (Guggenheim, Tr. 1807). Patterson's management believed that it made business sense for Special Markets to not address “GPOs” and instead focus the division on the market segment it was created for. (Misiak, Tr. 1427–28).

- e. **Patterson Special Markets Went After The Most Attractive Corporate DSOs, Which Were, At That Point, Schein's Customers.**

93. The first year of Patterson Special Markets was largely spent building out the centralized systems needed to compete for DSO business. (McFadden, Tr. 2782–85).

94. Patterson hired a key Schein Special Market’s sales rep, Rhonda Durante, as part of its build out its Special Markets division. (McFadden, Tr. 2797). Schein understood that Patterson hired Durante to compete with, and take business from, Schein Special Markets. (Steck, Tr. 3810–11). Patterson took DSO business from Henry Schein after hiring Durante. (McFadden, Tr. 2797).

95. Schein responded to Patterson’s competition over DSOs by lowering prices to retain them. (Steck, Tr. 3809–10; RX0481 at 1 (“Good News – we just fought off Patterson coming at us on this \$1.5M Medicaid group in the Carolinas. Bad news – it probably cost us \$120k in profit to do it.”)).

96. Patterson’s efforts eventually succeeded. In January 2015, Patterson won the Mortenson DSO account away Schein after making a very aggressive bid. (Guggenheim, Tr. 1790–91 (“Q. All right. Well, this account -- let’s look at number 4 here, Mortenson. Mortenson 110 ordering starts February 2, 2015 for all locations. Tell me what that’s a reference to. What is Mortenson? A. Mortenson was a large DSO headquartered in I believe Kentucky. They had -- I think “110” references at that time how many offices maybe they had? And so they were committing to transition their business away from Henry Schein and move it to Patterson.); (RX0359 at 1; Steck, Tr. 3807–09)). Former Schein Sales rep Rhonda Durante assisted in winning the Mortenson business. (McFadden, Tr. 2797) (“Rhonda helped us bring that one over the line”).

97. The Mortenson account was worth about \$5 million per year. (Foley, Tr. 4734–35 (“Q. Patterson competed for and took away business from Mortenson Dental; correct? A. That

is correct. Q. And Mortenson Dental is another large DSO; right? A. Yes. They were doing about \$5 million a year with us when Patterson took it away.”)).

98. Likewise, in late 2016, Patterson won the Heartland Dental DSO business away from Schein. (Misiak, Tr. 1467 (“Q. What’s Heartland Dental? A. So Heartland -- Heartland Dental is the largest DSO in North America, probably the world, as I think about DSOs. And Heartland has approximately 860 offices and is considered by many to be I would say the crown jewel of the DSO space....And it was our largest competitor’s largest account. Needless to say, we went after that right out of the gate when we introduced this new business unit and won that business.”); Guggenheim, Tr. 1791–93 (“Heartland Dental is the largest DSO in the country, headquartered in Effingham, Illinois. They’re the largest DSO, headquartered in Effingham, probably 800-and-some offices around the country. And that’s an organization that a couple years ago we won the bid in an RFP from them and transitioned that business from Henry Schein to Patterson....This is a very long, arduous request for bid, proposal, sales cycles that sometimes take years to consummate. The switching disruption for the client is significant to move the business over, and so this takes a lot of work, lots of pricing negotiations, lots of service negotiations. These are very complex transitions.”); CX8004 (McFadden, Dep. at 171) (“We had just won the Heartland Dental contract October 1st of 2016.”)).

99. The Heartland Dental account was worth \$30 million per year or more. (Foley, Tr. 4733) (“Q. And so Patterson competed for and took away your largest customer, Heartland Dental? A. That is correct. Q. And that was a large DSO customer; right? A. I’m sorry. Q. Heartland was a large DSO -- is a large DSO customer? A. It was our largest DSO customer. Q. I think you said it’s about \$30 million a year? A. A little bit more at that time. Yes.”)).

100. An April 2016 email shows that a DSO called ImmediaDent moved its business from Patterson to Schein and then back to Patterson, resulting in \$2 million loss of business for Schein. (RX0596 at 1 (“ImmediaDent came to us and back to PDCO due to Saturday service hours in certain regions.”); CX8001 (Foster, Dep. at 159) (“Q. So ImmediaDent was a customer that Schein and Patterson competed for vigorously? A. Yes.”)).

101. Patterson’s conduct with respect to aggressively attempting to and succeeding in taking large DSO accounts away from Schein is inconsistent with Complaint Counsel’s alleged conspiracy. (Compl. at ¶ 1).

f. Buying Groups in Late 2013 Were Not Attractive Customers For Patterson Special Markets.

102. In recent years, a small percentage of solo dentists began affiliating themselves to form “buying groups.” (RX0572 at slide 21).

103. There is confusion in the record over the definition of “a buying group.”

104. Complaint Counsel defines buying groups as “organizations of independent dentists that seek to aggregate and leverage the collective purchasing power of separately-owned and separately-managed dental practices in exchange for lower prices on dental products. Buying Groups are also referred to as ‘group purchasing organizations,’ ‘GPOs,’ ‘buying clubs,’ and ‘buying cooperatives.’” (Compl. at ¶ 3).

105. Yet Complaint Counsel did not establish that prominent buying groups discussed in this case meet this definition. (See ¶¶ 106-11, *infra*).

106. The Kois Buyers Group, for instance, described itself to Patterson as “not a standard BUYING GROUP” and as “profoundly different” in its presentations to Patterson and Schein. (RX0377 at 3; RX2197 at 3). No fact witness contradicted these statements that the Kois Buyers

Group, at the time it approached Patterson, was “not a standard BUYING GROUP,” and was “profoundly different” from buying groups. (RX0377 at 3; RX2197 at 3).

107. Similarly, though Complaint Counsel labels Smile Source a buying group. (Compl. ¶ 35), Smile Source views itself as a “franchise DSO,” not a buying group (Maurer, Tr. 2046).

108. Both Smile Source witnesses who testified at trial said that Smile Source is *not* a buying group. (Goldsmith, Tr. 1949 (“Judge Chappell: Did you consider Smile Source or do you consider Smile Source to be a buying group or a -- what is it, GPO? . . . A: I do not consider it to be that. Judge Chappell: Either of those. A: Correct.”); Maurer, Tr. 4969 (“Mr. Maurer, if I heard your testimony right, Smile Source is not a buying group. Is that right? A. Correct.”).

109. Rather, Smile Source is a franchisor. (Goldsmith, Tr. 2040–41 (“Q. And you consider Smile Source to be a franchisor; is that right? A. That is correct.”); Goldsmith, Tr. 2046 (“I’ve called myself or I called Smile Source a franchise.”)). That is, individual dental practices sign franchise agreements with Smile Source that allow members to work together, with each getting a designated, exclusive territory. (Goldsmith, Tr. 2046 (“We utilized a franchise agreement in order to allow our members to work together. Q. Now, each member actually gets a designated territory; isn’t that right? A. That is correct. Q. And Smile Source agrees not to authorize any other Smile Source franchisee within that designated territory. A. That is correct.”); Maurer, Tr. 4970 (“We are a franchise group.”).

110. No fact witness contradicted these statements that Smile Source was a franchisor, not a “buying group.”

111. The lack of a common, understood meaning of “buying groups” would make it difficult to maintain a conspiracy not to sell to “buying groups.” As Patterson’s Neal McFadden

testified, “buying groups were not all created equally. And they were like a jar of jellybeans. They each tasted differently.” (CX8004 (McFadden, Dep. at 119–20)).

112. Unlike corporate DSOs, “buying groups” typically do not create a separate corporate entity and do not have common ownership; each member dentist continues to own and run his or her own practice. (CX8004 (McFadden, Dep. at 97) (“The buying groups, on the other hand, have multiple bill-tos and multiple ship-tos. There is no ownership structure at all involved. And, therefore, they would try to tell us that, yes, we can guarantee compliance, yes, they will do what we say, but there were no guarantees. We could provide the pricing, but there was no volume guarantees.”)).

113. 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. (CX8004 (McFadden, Dep. at 138) (“The GPOs typically wanted to get their 3 to 5 percent, and that is really all we thought they cared about, and getting membership to get 3 to 5 percent so they could get paid. There was still no guarantee at a local level that this solo practitioner, who happened to be doing business with Benco Dental or Schein Dental, would buy those products from Patterson now. And the GPOs could not and would not -- would not guarantee that, or could not guarantee that because they didn’t have any ownership or any authority to tell them exactly what to do.”); *see, e.g.*, CX8007 (Kois Sr., Dep. at 139) (“Q. Because the Kois Buying Group has no buying power; is that right? A. That’s correct. Q. And the Kois Buying Group members have no commitment to buy anything, right? A. That’s correct. Q. They don’t have any commitment to buy anything in

any volume? A. Correct. Q. Or to buy exclusively from any distributor or supplier? A. Correct. Q. And the Kois Buying Group members can deal directly with distributors or suppliers? A. Correct.”)).

114. Unlike corporate DSOs, “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; 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. (CX8013 (Fruehauf, Dep. at 63–65) (Generally, it would be, okay, they want us to provide them an extremely low price in writing that could be sent anywhere and everywhere, but not guarantee me any business. So just from a pure business aspect, I don’t -- I can’t make sense of that, because the limited dealings I’ve had has been with them saying our customers in the buying group are going to have the decision to make, you know, who they do business with, we’re not going to make them do business with Patterson.”)).

115. 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. (CX8004 (McFadden, Dep. at 97–98) (“We could provide the pricing, but there was no volume guarantees. I could not go to the manufacturer and get a deviated discount structure, a netted-down discount structure that would give us a chargeback to mitigate that loss. The manufacturers were not recognizing buying groups so, therefore, we could not even begin to give them pricing because we could not get the right cost to make it worth our while. But, once again, they could never guarantee compliance to ordering from Patterson or any volume guarantees.”)).

116. “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. (CX8013 (Fruehauf, Dep. at 59–60) (“Q. Is that because you thought the – your relationship with your best customers would be harmed in some way if they learned that this buying group had been able to get a better deal than they were getting from Patterson? A. Speaking specifically for the way I viewed it, yes.”)).

117. Working with buying groups also meant Patterson risked “cannibalizing” existing business without gaining enough new business to offset the loss. (Rogan, Tr. 3547–48) (“Cannibalization, obviously if you are going to -- it’s a perfect example on Smile Source. If we were going to bring them on with these individual discounts and let’s say their members were -- and we did, we ran the math -- and I believe their members were already spending \$3 million with Patterson. So right off the bat, if they don’t bring any other customers to us and we give those customers a better deal, we have just slashed a bunch of our prices. We’ve cannibalized some of our business.”).

g. Patterson Was Skeptical About The Value Of Doing Business With Buying Groups Before, During, And After The Alleged Conspiracy Period.

118. Patterson viewed “buying groups” skeptically and did not generally sell to them long before February 2013. (CX8004 (McFadden, Dep. at 37) (“Q. And do you recall when it became a topic of discussion? A. Right about the same time that we were receiving the requests from the State of Florida, which could have been around 2011 and 2012. Q. Do you remember anything about substance of those conversations about buying groups that you had with your branch managers? A. Other than what I previously mentioned regarding culture of our organization being extremely territory rep centric, that Patterson built their entire company around

supporting our territory reps, that we felt as though this was such a radical change in the dental industry that we could not get our heads around how it could coexist within our culture of supporting independent sales reps and also treating all of our clients the same.”)).

119. Patterson salespeople repeatedly met with and evaluated “buying groups,” but declined to sign contracts with them, for years before Complaint Counsel alleges it joined the alleged conspiracy. (RX0401 at 1 (Patterson did not bid on MMCAP in 2009 because “it’s a GPO” and the requirements for working with the group included a fee: “every month by the 15th we had to send them a check for 1% of total sales they purchased from Patterson”); RX0029 at 1–2 (March 2012) (Patterson declined to bid on the Florida Dental Association’s group purchasing organization for a second time, after having “spoke[n] with [the] FDA President” several months prior; Mr. McFadden told his superiors, “This stuff scares me. I’m gonna tell him thanks but no thanks.” Patterson’s Scott Anderson chimed in that Patterson’s “advantage program is in essence a GPO for the independent dentist.”); (Misiak, Tr. 1469 (“Q. Were you focused on buying groups or GPOs before 2012? A. We were not.”); Misiak, Tr. 1493 (“Q. So back in 2012, the spring of 2012, group purchasing organizations, buying groups, were not part of your core strategy at Patterson Dental? A. They were not.”); Misiak Tr., 1499 (“Q. Mr. Misiak, were buying groups a part of your core strategy at Patterson Dental back in 2009? A. They were not. Q. Why not? A. It didn’t make the strategic initiative board for execution in 2009.”)); CX3010 at 1 (September 2013 email: “In the past we have not done business with GPOs” because they cannot commit to buy certain, set volumes of equipment and supplies on behalf of their members and “we don’t have the resources or the systems to manage them properly.”); CX8004 (McFadden, Dep. at 76–77 (“In my career of 21-plus years at Patterson, I cannot remember us dealing with one single buying group.”); CX8017 (Rogan, Dep. at 68 (Patterson “had always said no” to “buying groups.”))).

120. Tim Rogan testified that there was no discussion of pursuing buying group business in the fall of 2012 because it would have been “a distraction” and “even today . . . it’s not an opportunity” Patterson is pursuing. (Rogan, Tr. 3605).

121. Buying groups usually were 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—in short, Patterson did not see buying groups’ proposals as a “two-way agreement.” Misiak, Tr. 1469 (“A. Yeah. We did not see it as a well-organized space that could deliver the volume commitments. Q. And that goes back years before this? A. My entire career at Patterson. Q. So going back 22 years. A. Correct.”); Guggenheim, Tr. 1768–69 (“[T]hey might have contracts that they sign, but the difference being they’re not committing to a purchase volume. There’s no real control that they have on whether or not an independent practice would comply with that contract, so they’re offering a hope or a goal number that they think they may be able to deliver, but in practice, they don’t have any way to mandate or control those purchases. Q. Well, Mr. Guggenheim, you’ve been in business for 40 years in the dental industry. Why can’t you just do business on a hope and a goal? A. Because that’s not how business works. We have to -- if we’re going to offer incentives to customers and whether that’s pricing or service incentives, we have to know that the agreement that’s being made is a two-way agreement. Q. Otherwise, you’re lowering price, but you’re not getting anything in return? A. Exactly.”); Guggenheim, Tr. 1844 (“In the case of buying groups, you know, the question we always have is can they mandate the purchases, do they have any influence other than just a we hope that we’ll do this number, and that’s usually our assessment, is that’s what they come down to.”); Rogan, Tr. 3478 (“[W]e should at least be able to tell the market -- tell the sales force why we don’t think buying groups made sense to Patterson. And the reason I said that is that

they can't commit to the spend and they don't reduce Patterson's cost, so we have to continue servicing them at a high level for a low margin."); CX8038 (Misiak, Dep. at 137–138 (“If I thought buying groups could organize and deliver volume commitments, absolutely, that would be a competitive advantage I would be thinking about. But I never believed that.”))).

122. Patterson saw most buying groups as middlemen who were in it to take a cut or commission, also known as a “vig,” or “taste.” (CX3114 at 1) (“Some of these type of relationships are on a GPO (group purchasing organization) basis where a % sales are given to the referring company. . . . this type of relationship has not been a good fit or need for our dental business.”); Misiak, Tr. 1498 (“And I reply that basically these type of relationships, GPO I call out, where the percentage of the sales are given to the referring company, others simply pay the insurance company directly for the name of the sponsorship. These are some things I'd learned about them in the -- in the business.”); Guggenheim, Tr. 1574 (“Problems that start there with that's a third party basically taking a -- what we would consider a fee to sell his negotiations with us, that's a concern because that puts somebody in between us and our customer.”); Guggenheim, Tr. 1602 (“We don't like third parties in between us and our customers.”); Guggenheim, Tr. 1574 (“They were concerned about a few things here. Number one, individuals who would organize these groups and take a -- what we call a vig or a fee that we felt was inappropriate because the -- there were individuals who were basically selling their ability to align a group, and we didn't think that was appropriate.”); Guggenheim, Tr. 1802 (“This is, you know, an example of what I described before was common, would be common that consultants or other folks in this business would attempt to leverage their relationships with customers to create a buying group and give them an incentive by selling their business.”); Mar. 14, 2018 Scheduling Hr'g Tr. 13 (“JUDGE

CHAPPELL: Okay. And don't they take a taste? . . . JUDGE CHAPPELL: You don't want to concede middle man? MS. KAHN: They can be viewed as a middle man.")).

123. Patterson was generally not interested in working with middlemen requiring Patterson pay vigs or kickbacks; it saw these as unethical. (Guggenheim, Tr. 1574 ("The second concern would be that could be ethical issues as we see it. We often have folks like this approach us saying -- for instance, consultants, saying, I have 30 customers -- I have 30 clients of mine, and they do whatever I tell them to do, so what I'd like to do is I'd like to recommend that they buy a product from you, and if they buy that product from you, you'll pay me a fee. That's an ethics issue. And that's oftentimes what we see in these types of situations."); Guggenheim, Tr. 1802 ("A. A vig is like a kickback, which is something that ethically at our company we are very firm that that's not acceptable. We don't participate with that kind of stuff, so we don't buy business through third parties like this. But it's common that these sorts of things surface. Q. Did you ever suspect that some of these buying groups that were approaching you that were representing people that they said were in buying groups, they were looking for a vig, a kickback? A. Right. They were looking for -- that's oftentimes what's at the core of these.")).

124. Patterson was also concerned about how discounting to buying groups would be viewed by its bread and butter customer base of loyal independent dentists. (Guggenheim, Tr. 1574-75 ("The second part was it felt wrong for us to sell to noncustomers or small customers at prices that were substantially lower than we were selling to our best customers. That's -- we felt there was a bit of an ethics here issue here."); Guggenheim, Tr. 1657 (The next issue for us is the pricing fairness in our market. This would then allow noncustomers who don't buy anything from us to potentially receive a lower price than customers that buy tens or even hundreds of thousands of dollars from us. We have an issue with that. We like to control how we implement pricing

strategies in our markets, so that's where we talk about our business model. Those are the larger concerns that we have.")).

125. Patterson's David Misiak wrote, in 2009, that GPO relationships "have not been a good fit or need for [Patterson's] dental business." (CX3114 at 1).

126. Patterson chose not to bid on an entity in 2009 because "it's a GPO." (RX0401 at 1).

127. David Misiak advised Neal McFadden in 2012, "Your response is right," in response to McFadden saying that he would say "thanks but no thanks" to a "buying group." (CX0159 at 1).

128. Patterson's Shelley Beckler wrote, in December 2013, that "[i]n the past we have **not** done business with GPO's [sic] just because we don't have the resources or systems to manage them properly." (CX3010 at 1 (bolding in original, italics added)).

129. Patterson's Neal McFadden wrote, in May 2015, "We *currently* have little appetite to deal with buying groups as we feel they compete directly with our branches and reps." (RX0451 at 1 (emphasis added)).

h. Unlike Patterson *Special Markets*, Patterson *Dental's* Decentralized Salesforce Considered Buying Group Opportunities As They Came.

130. Patterson's regions, branches, and 750+ territory representatives were always free to consider "buying groups" and regularly met with them between 2013 and 2015, heard their proposals, and evaluated whether to seek an appointment as their endorsed distributor. (Guggenheim, Tr. 1795 ("Q. [D]id you meet with buying groups throughout this period 2013, 2014, 2015? A. We did. Q. Well, why? I mean, I thought you had an agreement with Chuck Cohen because he sent you an e-mail. Why did you waste your time? . . . A. We would meet with folks. . . Our evaluations would be whether or not they controlled the purchasing that they were

representing, so we would always keep an open mind and evaluate that and determine each of these on their face as to whether or not they made sense for the business.”); CX8023 (Guggenheim, Dep. at 185) (Patterson “had a nuanced position on ‘buying groups’ to evaluate them individually in each market based on whether or not they made sense.”); Misiak, Tr. 1395 (“A. As I said earlier, Patterson is very decentralized, and lots of branches have a great sense of entrepreneurial spirit and autonomy and will do business and make agreements with different customers, and so there’s a possibility that we do business with GPOs.”)).

131. When, during the alleged conspiracy period, Patterson territory representatives asked Patterson executives about “buying groups,” the executives’ response was always the same: to explore the opportunity on its individual merits, to see if made it sense for Patterson. (CX8017 (Rogan, Dep. at 60 (“[P]eople were asking me about buying groups right from the day I got the job up until today they ask me about them and we take a look at them and see if it makes sense for us to do business.”))).

132. In September 2014, Neal McFadden, the head of Patterson 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: “This is a buying group. *So, if the branch wants to pay the \$5000 and attend they [are] more than welcome to. But we will not be attending as a special markets group.*” (RX0348 at 1 (emphasis added); McFadden, Tr. 2819–20 (“Q. When you got this request from Brandy, who you didn’t know, asking for money at a sponsorship event for Tralongo Management, did you consider that a great opportunity for your special markets DSO-focused organization you were building? A. No, it wasn’t. Q. Is this another one of the outlandish buying group requests

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

133. In May 2015, McFadden again declined an invitation to go beyond his Special Markets corporate DSO mandate—but he again made it clear that Patterson's local (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 at 1 (emphasis added)). Patterson's Maine branch manager responded, "Thanks for the insight Neal—we will handle at the Branch level." (RX0451 at 1). May 2015 was a month after the alleged conspiracy ended. (Kahn, Tr. 19). Also in May 2015, Patterson's Kristin Sammarco, an Operations Specialist in Patterson Special Markets, informed a Patterson account specialist, Shelley Beckler, that at the time, Special Markets was "not working directly with GPOs. The local facilities are working with the branches," also explaining that "*we continue to allow the branches to work with these accounts.*" (RX0454 at 1 (emphasis added)).

134. Patterson management also evaluated "buying groups" on a case by case basis. *See* (Guggenheim, Tr. 1843 ("Q. Why did you and Mr. Misiak and others at Patterson -- why did you spend your time exploring these various buying group opportunities that were popping up? A. Well, we wanted to sort of understand each in each case, what the organization was about. The primary questions we had again related to did they have control of the buying habits of these dentists. That would have had us evaluate them differently. Each of these have nuances, so we want to make sure that we fully understand them and have a good handle on what they're presenting."); CX8017 (Rogan, Dep. 97 ("Q. You said that you were evaluating whether -- you were evaluating buying groups and whether to sell to buying groups. Was that true in 2013? A. It was true in 2013, it's true today. We evaluate any customer that buys dental stuff to see if it makes

sense for Patterson to do business with it.”)); CX0314 (Guggenheim, IHT at 246 (“Well, we’re still evaluating these things, you know, for the value to the business. So each one of these is unique and different. And so generally we’re continuing to look at these things *since this point in time and going forward till today.*”))).

135. In late 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—with its infrastructure built on servicing entities with central points of contact—might be better positioned to evaluate them, rather than leaving them to a single local territory representative. (CX8023 (Guggenheim, Dep. at 154–55); CX0312 (Fields, IHT at 29–30)).

136. By Fall of 2015, Patterson was considering an internal position dedicated in part to “GPO Management.” (RX0530 at 1) (October 2015 calendar invitation for a meeting between Guggenheim and Wesley Fields about his new position as of November)).

137. At the time, Patterson also hired McKinsey & Company to analyze its group practice strategy, and McKinsey’s December 2015 report concluded that Patterson was rightly focused on DSOs but should also keep an eye on “buying groups” to see whether they might continue to grow their membership, centralize their purchases, and become attractive customers. (Rogan, Tr. 3906-07; RX0572 at slide 54).

138. 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). (Misiak, Tr. 1320 (“Q. Did someone do due diligence or analysis before Patterson decided to bid on Smile Source? A. In approximately 2015, we deployed a business development director -- his name is Wes Fields -- to gather information from the field and from the industry

about different GPO-type organizations.”); CX0312 (Fields, IHT at 8 (Fields started November 1, 2015); CX0312 (Fields, IHT at 29–30 (“Through evaluation, if there was a GPO that was able to deliver a solid business proposition to us, that would get good business that would fit with us, within our ethics and our type -- our style of doing business, then we would certainly be interested in doing that, working through them. Q. So your directive was that if you were able to find a GPO that was able to deliver a solid business proposition, that you would work with that GPO? A. Yes.”)).

139. Patterson evaluated Smile Source several times over the course of the years. (*See infra* ¶¶ 141, 160).

140. Patterson received an inquiry from Smile Source in Fall 2011, prior to the commencement of the alleged conspiracy, which Patterson did not investigate. (CX3176 at 1 (“Introduction to Dr. John Wallitschek – I Smiles, Smile Source”)).

141. Patterson evaluated Smile Source in November 2013, when multiple Patterson executives, including Mr. McFadden, the head of Special Markets, and David Misiak, Vice President of Sales, met with Smile Source’s Andrew Goldsmith. (Goldsmith, Tr. 2172–73 (“Q. So at that point you had met with three high-level executives at Patterson; fair? A. Yes. Q. And at the meeting with Mr. Misiak and Mr. McFadden at Patterson’s headquarters in Minnesota, you testified that you gave a presentation on what Smile Source did; correct? A. Yes.”); Goldsmith, Tr. 2174–75 (“Q. So you had the meeting with the two executives from Patterson in Minnesota, and you testified that it was -- it was collegial; correct? A. Yes. Q. They were friendly? A. Yes. Q. They were professional? A. Yes. Q. They heard you out? A. Yes.”); RX0177 at 1–3 (correspondence between Misiak and Goldsmith); Misiak, Tr. 1398 (“Q. Did you ever communicate with anyone from Smile Source? A. Via e-mail, I believe I -- I communicated with

Smile Source, and there was a meeting at the Patterson corporate office as well that I participated in.”)).

142. McFadden’s “early impression [of Smile Source] . . . was not a very good impression at all.” (CX8004 (McFadden, Dep. at 120)). He was concerned that, because Smile Source at that time was working with Burkhart, Smile Source members ordering from Burkhart might not want to switch that business to Patterson. (CX0315 (McFadden, IHT at 209–10 (“A. Because the dental industry is a very fragmented industry. The dentists become very loyal with their dealers. And so just because Smile Source says we have decided that we want to do business with Patterson, doesn’t necessarily mean that Burkhart client is going to switch all their business to Patterson.”))).

143. At the beginning of 2013, Smile Source had only 58 franchises signed up. (CX8019 (Moody, Dep. at 36–37)).

144. In 2013, Smile Source’s Andrew Goldsmith met with Patterson’s Neal McFadden at an industry meeting. (Goldsmith, Tr. 2010). Goldsmith told McFadden about Smile Source, and McFadden said “You know, I’d like to hear more. It sounds like you may qualify to be . . . in our group.” (Goldsmith, Tr. 2010). McFadden “was eager to explore more options,” Goldsmith said. (Goldsmith, Tr. 2011).

145. McFadden “at least showed some interest and then facilitated a meeting between [Goldsmith] and Dave Misiak at Patterson.” (Goldsmith, Tr. 2010–11).

146. Goldsmith, McFadden, and Misiak met in late 2013 at Patterson’s headquarters in Minneapolis. (Goldsmith, Tr. 2012).

147. At Goldsmith’s meeting with Patterson, McFadden and Misiak were friendly, professional, and listened to what Goldsmith had to say. (Goldsmith, Tr. 2174 (“Q. So you had

the meeting with the two executives from Patterson in Minnesota, and you testified that it was -- it was collegial; correct? A. Yes. Q. They were friendly? A. Yes. Q. They were professional? A. Yes. Q. They heard you out? A. Yes.”)).

148. At this point, Smile Source was working with Burkhart as a distributor and was looking to add a second distributor outside of Burkhart’s service region. (Goldsmith, Tr. 2173).

149. Smile Source’s Andrew Goldsmith also did not offer Patterson the opportunity to replace Burkhart as its distributor partner—rather, Patterson was to supplement Burkhart. (Goldsmith, Tr. 2173 (“Q. So it’s fair that at the meeting you were not looking to replace Burkhart, you were in fact looking to add Patterson to service members outside of the Burkhart region; correct? A. Yes.”); Goldsmith, Tr. 2174 (“Q. Okay. But it was your intent for Patterson to come in and offer discounts to these handful of members outside of Burkhart’s region; fair? A. Yes.”)).

150. A few days after this meeting, on November 20, 2013, Misiak wrote Goldsmith, “Thanks for stopping in to see us and following up. Your organization and story is impressive. We are currently not interested but will keep the strategy and Smile Source on the ‘idea board’ and get back to you should things change.” (CX3117 at 1).

151. Andrew Goldsmith, Smile Source’s former Chief Dental Officer, acknowledged that Patterson’s decisions with respect to Smile Source in November 2013 were not in parallel with Schein or Benco. (Goldsmith, Tr. 2175–77).

152. Patterson’s decision not to bid on Smile Source’s business in November 2013 was an independent business decision, due in part to Patterson’s skepticism that Smile Source could add value at that time. (McFadden, Tr. 2178–19) (“Q. What was the result of the meeting with Dr. Goldsmith? A. He didn’t make a very good first impression. There was no reason for us to choose to do business with him after we met together. I don’t think he represented Smile Source

very well.”); Tr. 2830–31 (“Q. And I think you said you sort of had an unfavorable opinion coming out of the meeting with Mr. Goldsmith; is that right? A. That’s right. . . . Q. Coming out of that meeting, did you say, That’s an opportunity we should pursue right now? A. No.”); *see also* CX3117).

153. On December 31, 2013, a Patterson’s Corporate Collections Manager emailed McFadden and Misiak that every individual doctor listed on Smile Source’s website that she looked up was already a Patterson customer. (CX0148 at 1 (“[W]hen I went to SmileSources website, it looks like each location is under the individual doctor’s name. I checked out some of the names, mainly out of Texas and Denver, and we do conduct business with all that I looked up.”)).

154. By the end of 2013, Smile Source still had only roughly 145 locations. (Maurer, Tr. 4978).

155. Dr. Goldsmith was terminated by Smile Source in late 2014 for performance issues. (Maurer, Tr. 4957). Trevor Maurer testified to negative incidents Goldsmith had with vendors, including [REDACTED], and [REDACTED] (Maurer, Tr. 4958–59).

156. Trevor Maurer took over Dr. Goldsmith’s responsibilities after his termination. (Maurer, Tr. 4938) (“Q. And when did you become president? A. Mid-’13. . . . Q. And what was Dr. Goldsmith’s role at Smile Source when you joined? A. So right prior to my arrival he was president, and when I joined, he was demoted to chief dental officer.”).

157. Between 2013 and 2017, Smile Source grew from just 145 franchises at the end of 2013, to over 500 by February 2017. Trevor Maurer wrote to Schein’s Mark Mlotek in February 2017:

[REDACTED]

(RX2091 at 1 (emphasis added)).

158. Thus, according to Maurer, Smile Source had achieved growth to over 500 franchises nationwide without a relationship with a national, full-service dealer. (RX2091 at 1).

159. Also, according to Maurer, *Smile Source* chose when to seek a national partner. (RX2091 at 1 [REDACTED])

160. In late 2016, Smile Source noticed that Patterson had won the business of Heartland Dental, the largest DSO in the nation. (Maurer, Tr. 4984). Smile Source had also noticed that Patterson was “not really in the group dentistry space prior to that.” (Maurer, Tr. 4985). Patterson’s deal with Heartland caused Smile Source to think that Patterson might be interested in engaging with Smile Source. (Maurer, Tr. 4985).

161. Patterson bid on Smile Source’s business in early 2017, concluding that it was “the most formulated of the buying groups,” and presented a “very competitive bid,” in part because Smile Source “took cost out of the structure” for Patterson by providing certain services its members. (Misiak, Tr. 1323-24 (“Q. So why did you and Tim Rogan decide to bid on Smile Source? A. I think what we talked about was it seemed to be the most well-formulated in its ideas and brand, and we had some e-mails that had come in that were specific around the organization. We’d met with the folks and thought it would be a good opportunity to look into the business further. But “hope” was a good word. Hope is not a strategy.”); Rogan, Tr. 1542–43 (“Because

Smile Source has a whole marketing type of wing, so they were going to do a bunch of things that we didn't need to do. So it made sense for us to discount to them a little bit because we were saving a bunch of money on the other end. So it ended up -- it was going to be a more profitable deal than if we had just gone directly to the dentists."); Rogan, Tr. 3545 ("Smile Source eventually started adding a bunch of marketing services. They started providing a bunch of things that Patterson actually provides, but we weren't going to have to provide those, and those things are expensive. So they took cost out of the structure. So by 2017 -- and when I looked at their model, looked at what they were providing, what we wouldn't have to provide, the price we were going to charge, it made business sense. Because of the value they were going to provide that we didn't have to provide, this was going to be a profitable deal for us, and up until this point, we hadn't seen that with any other buying groups."); Rogan, Tr. 3586 ("A. Yes, so they help dental offices market. They help them with clinical education, so they are more proficient/efficient. They help them attract new patients. Just several things that we actually could do as well, so things we weren't going to have to do. So they were going to offer a lot of -- they offer a lot of things that Patterson can offer, so if we offered them to the dentist, we wouldn't need Smile Source, but if Smile Source is already offering them and they already have the relationship with the client and we don't have to offer them, then our cost structure goes down, so we are able to lower our price as well. So we could sell to them at a lower price and actually have the same amount of profit."); RX2952 (Maurer, Dep. at 54-55 [REDACTED])

[REDACTED]

[REDACTED]

[REDACTED] CX0317 (Rogan, IHT at 176-77 ("Q. Have you -- or has Patterson spent much time doing analysis of the value

that buying groups or GPOs provide to the customers? A. Well, every customer is different, so we take a look at each one. Some of them we've spent more time on than others. You know, a recent one I've spent a lot of time on because we only -- you know, we -- Well, we were going to do business with them but didn't win the contract. Q. And which one was that? A. A company called Smile Source. So we spent a lot of time with them. It turns out they provide a lot of value to their clients, and so it was interesting to us because it was value we weren't going to have to provide, we were going to lower our price, but we were -- also the cost structure was going to go down, and they were going to be able to commit to the volume. . . . So I went and presented to them and gave them our full show, everything about what we could do and the value we would provide, and -- and we were beaten.”)).

162. In 2017, Smile Source has its own office, a board room, and management team in the range of a hundred employees, all working to provide services for its members. (Rogan, Tr. 3587–88 (“Q. So Smile Source was a fully fledged entity with an office, with a management team, and a board room, and a hundred employees providing services to the members of Smile Source. Do I have that right? . . . A: Yes.” Q. Can you think of another buying group – during your entire tenure with the company, 25 years, can you think of any other buying group that’s ever been brought to your attention that had its own office with a board room and a management team and somewhere in the range of a hundred employees, all working to provide services for their members? A. I do not. Q. Is that why you engaged with Smile Source and not other buying groups? A. Yes.”)).

163. One reason Patterson revisited working with Smile Source in 2017 was that manufacturers vouched for Smile Source. (Misiak, Tr. 1319 (“We’d gotten some feedback from manufacturers that their ideas were well-formulated.”)).

164. Patterson’ decision to pursue Smile Source’s business in early 2017 was also informed by Smile Source’s professionalism. (Rogan, Tr. 3549 (“[S]ome of the manufacturers were saying, ‘Hey, this is more than just a bunch of dentists getting together for a better deal. They have actually got some meat to this, and they can maybe bring the spend. They were providing a lot of value to the dentists. You should take a look at this.’ And we did, we took a deep look, and they were right. This was more than just a group of people trying to get a better deal.”); Rogan, Tr. 3583–84 (“Q. Did they actually have offices where they were hosting you? A. Smile Source? Yes, they do. They have an office building in Houston. Q. What did they -- you mean they had employees? Smile Source has employees? A. They have a whole floor of employees doing all the -- everything from membership to all those marketing services I talked about earlier to answering phones to -- tons of stuff.”).

165. Smile Source then hosted a bid process for distributors, and Schein and Patterson both submitted competing bids in early 2017, and Smile Source chose Schein. (Maurer, Tr. 4985–86).

166. But Smile Source rejected Patterson in favor of Schein. (Rogan, Tr. 3556 (“Q. Going back to the 2017 Patterson bid on Smile Source, did Patterson win that bid? A. We did not. Q. Who won the bid? A. Henry Schein.”)).

i. After Evaluating Individual Buying Groups, Patterson Usually Decided Not To Work With Them—Especially When They Were Dishonest Or Incoherent.

167. Patterson was sometimes approached by dentists or organizations it had never heard of, whose proposals and aspirations to form buying groups were vague or seemed like a “diatribe” and did not make business sense to Patterson. (CX3064 at 1 (June 2011; Guggenheim responds to Misiak asking “Know this guy?” regarding George Lennon: “never heard of him”); Guggenheim, Tr. 1798 (“A. Yeah, I was referring to the sort of the story he articulated down below here, which

obviously is apparent here: Dental sales specialist with Kodak, Danaher, northwest region manager covering ten states. I thought it was odd that I'd never heard of him if that was the case, so that seemed strange... A. So I just represented kind of a diatribe that seemed odd, and I said it looks like it's going to be an interesting meeting. Q. Was this an attractive customer to you? A. No."); CX3176 at 1 (October 2011; Patterson's Steve Sinclair asks Rogan regarding I Smiles: "Have any of you ever heard of this organization? Any experience with them?"; Rogan forwards to Guggenheim and Misiak: "Here is another one."); CX3021 at 1 (July 2013, Nexus Dentistry) ("It looks like a consultant has formed a merchandise buying group, but he denied that when I asked."); Guggenheim, Tr. 1805 ("Do you know whether Mr. Kianor Shah at Nexus Dentistry had a vast client base? . . . A. Knew nothing about him.")).

168. In 2014, Patterson was approached by a group run *by a veterinarian* who was promoting an upstart buying group (for dental supplies for humans), and that arrangement did not make sense to Patterson. (CX3080; Guggenheim, Tr. 1656-57 ("I think there might be -- this is somebody who's organized a group to buy together. In this case, they're a vet, so I take that to be a veterinarian versus a veteran. But that's -- that was pretty consistently what we would see, is third parties that would want to sell their, you know, ability to roll up a pricing opportunity, and they were something we had historically never -- never been interested in, so what I was telling him here was just another one of the upstart buying groups and we pass on these.")).

169. Also in 2014, a Patterson customer, Dr. George Lennon, approached Patterson Special Markets about an opportunity to work with a group practice, and Patterson invested significant time and effort exploring a potential partnership with Dr. Lennon's group. (CX3419 at 2 (Lennon: "I'm also aware of the time that Patterson spent on this project in terms of man-hours spent with the price quote and talking to manufacturers to gain better pricing for your special

markets accounts, so I know your intentions were honest with me.”); Guggenheim, Tr. 1809 (“Q. So someone, Neal and his team, spent a fair amount of time on this, and the guy is acknowledging that; is that fair? A. That’s fair.”)).

170. After conducting its due diligence, Patterson chose not to pursue a business relationship with Mr. Lennon’s group because the group was looking for a “vig” and had misrepresented itself as a Community Health Center when it was really a buying group . (CX3419 (McFadden: “I am respectfully declining your offer to participate further in your RFP.”); Guggenheim, Tr. 1810 (“A. [F]undamentally here these people represented themselves as CHC and came in to Shelly to get a bid, and it wasn’t till the end of it after all that that they identified themselves that they were actually a GPO and that there was this 3 percent vig they were looking for . . . “)).

171. Patterson evaluated and turned down a number of other buying groups during the conspiracy for valid business reasons. In July 2013, Patterson turned down Nexus Dentistry, a group that claimed to be “looking for a supplier that could serve our vast client base,” but that in fact had eight practices signed up. (McFadden, Tr. 2809 (“Tell me what your reaction was after talking with this guy. A. Yeah. I sent Paul an e-mail basically summarizing that he currently has eight practices signed on in California, so he doesn’t have a vast number, as he stated. He’s not a DSO. As Scott said, looks like he’s a consultant and he’s forming a merchandise buying group. But when I asked him and probed that, he was very elusive.”)). In February 2014, it turned down Catapult because it wanted a “vig,” which Patterson considered unethical. (Guggenheim, Tr. 1802, 1813–14). In March 2014, Patterson turned down United Orthodontic Buying Group because the group wanted to buy only one item, one x-ray machine. (McFadden, Tr. 2813 (“Q. Was this one of the outlandish things that got dropped in your lap with regard to a buying

group? A. It's one. This was just one item, one x-ray. That's not what I was built for. We were trying to go after millions of dollars of merchandise business, not one rogue x-ray.”; RX0227 at 1). In April 2014, it turned down the Dental Purchasing Group because the doctor who reached out to Patterson was a veterinarian. (CX3080 at 1; Guggenheim, Tr. 1656–57). In September 2014, it turned down Dr. Steven Sebastian because “he doesn't even have a company and he doesn't even have any clients, and yet he's wanting us to open him up, so it doesn't make any sense.” (McFadden, Tr. 2814–17).

172. When Patterson was approached by Kois in 2014, Patterson engaged with the group, but determined that the group's proposal was unrealistic because the fledgling Kois Buyers Group falsely suggested the group had more than 1,000 members and agreements with four major vendors to provide its members with significant discounts.¹ (CX0116; CX3170; CX3171; CX3331; CX3172; *see also* RX0336 at 1 (Sybron Dental: “Tim, I talked with our Special Markets Team in Canada and they have not heard of this group and have no record of offering them any pricing on equipment.”); RXD0223 at 1 (Ivoclar Vivadent: “Tim, I checked with our Canadian sales manager. He does not recognize this group's name at all.”); RXD0224 at 1 (Dentsply: “Tim, I inquired with the director of marketing and they don't know anything about this.”); Guggenheim, Tr. 1676–77 (“But I remember the numbers that they were proposing in that WebEx meeting seemed completely unrealistic to me. That was my recollection of that. I was -- they were proposing just, you know, tens of thousands -- a lot of customers were going to be involved and it would -- just didn't seem realistic to me.”); Guggenheim, Tr. 1825 (“Q. When you saw this from this guy qadeerahmed@hotmail.com who says 1500-plus dentists, did you think there's a great opportunity for the company? A. Oh. No, I did not think that. Q. Did you think that might not be

¹ For a detailed discussion of Patterson's due diligence with respect to Kois, see ¶¶ 561–633.

believable? A. Yeah. I was very suspicious about all the assertions in this e-mail. Q. What about that part where he says “Manufacturers Committed”? A. Very suspicious about that, didn’t seem right.”); Guggenheim, Tr. 1826 (“A. Well, he -- this Qadeer was making an assertion that he had commitment from the four largest manufacturers in the industry. I was questioning that. You know, it didn’t seem like the way that they would operate, so I asked him to investigate it and confirm if that’s true. Q. Did it sound believable to you? A. It sounded farfetched.”)).

173. Despite Patterson’s skepticism, Mr. Guggenheim still “had the phone conversation to hear [the Kois representative] out before making the final decision that Patterson did not see the Kois Buyers Group as an opportunity for Patterson. (Guggenheim, Tr. 1829 (“Q. Did you ultimately, after listening to the WebEx, decide on your own, internal to Patterson, this Qadeer Ahmed at Hotmail.com with a line in the water who’s telling us he has commitments from manufacturers that they don’t know anything about, that’s not a good opportunity? A. That’s what I determined and, you know, based on the fact that he misrepresented some of the manufacturers. I still had the phone conversation to hear him out. After the phone conversation, I was -- confirmed myself that there was not an opportunity here.”)).

j. Occasionally, Though, Patterson Dental Salespeople Worked With Buying Groups.

174. Patterson did work with “buying groups” during Complaint Counsel’s alleged conspiracy period. When a “buying group” presented different characteristics—for example, by committing to buy a set volume of equipment or merchandise or a structure that would lower Patterson’s costs—Patterson considered pursuing its endorsement and selling to its members, as it did with Orthosynetics. (McFadden, Tr. 2728 (“Orthosynetics is a quasi-buying group that focus[es] on orthodontics”); CX8004 (McFadden, Dep. at 119–20 “A. Well, what I learned later on, for lack of a better expression, buying groups were not all created equally. And they were like

a jar of jellybeans. They each tasted differently. And we dealt with a group called Orthosynetics, where we sold them technology. We thought that was not going to interfere with our territory reps. And we had our manufacturer partner's back that they would help us participate in that, and it makes sense to do that."); CX3081 at 1 (Patterson's Special Markets Director to McFadden: "Neal, can we arrange a call with Michael and Paul to discuss Orthosynetics? Historically, at Patterson's direction we have not included buying groups as part of special markets."; McFadden forwards to Guggenheim: "Paul, Rhonda deals heavily with Orthosynetics. There are three big groups that she deals with that are affiliated with them. I realize that we're not going to be doing business with buying groups but this is a specialty group."); RX0333 at 1 ("Orthosynetics pays all the bills of their offices. They're not a buying club per se.") *see also* CX0149 (industry publication describing Smile Source as "[a] lot like OrthoSynetics").

175. As of 2014, Patterson had been selling to Jackson Health Systems, a "buying group" per Complaint Counsel's own definition, for "over 10 years." When Patterson executives expressed some hesitancy regarding Jackson Health, the local branch manager responded that he was not asking for their opinions or for permission to continue to do business with Jackson Health, but rather was simply sending the vendor application "up to corporate to read before [he was going to] sign on behalf of the company . . . , that's all." (RX0271 at 1 (Rogan to Carles: "This is a GPO. They are taking 2% off the top. This is a very slippery slope."); CX0317 (Rogan, IHT at 254 ("Sitting here today, it sounds like we've had a longstanding relationship with this customer and this is just a formality, that we need the contract updated after a couple of years, so maybe the slope isn't as slippery as I thought it could be. And so he was just moving some paperwork along, and he's just reminding me of a 10-year relationship is not a big deal, so I'm saying "okay" to

that.”))). Patterson continued doing business with Jackson Health throughout Complaint Counsel’s alleged conspiracy period.

k. Patterson Did Not View Buying Groups As A Threat During The Alleged Conspiracy.

176. Complaint Counsel contends that two internal SWOT (“Strengths, Weaknesses, Opportunities, Threats”) PowerPoint slides from 2012 and 2014 demonstrate that Patterson viewed buying groups as a threat during the alleged conspiracy. (CC’s Pre-Trial Br. at 41–42 (citing CX3286-026 and CX3283-010)).

177. CX3286 is an internal Patterson PowerPoint slide from 2012 listing “[e]xpansion of national buying groups, group practices, [and] institutions” as “External Threats.” (CX3286-026).

178. Patterson’s Guggenheim testified at trial that the “threat” listed on the 2012 slide was that Patterson would miss out on potential business opportunities with classes of potential customers. (Guggenheim, Tr. 1588-81) (“Q. And why were those things a threat to Patterson? A. I think the discussion here is around our concentration and focus. In the case of group practices, for instance, we were underpenetrated, so that was a threat. Presumably if that were to become 60 percent of the business, we would be un- --improperly positioned for that opportunity. Buying groups obviously, you know, sort of the same thing. It wasn’t an area -- it wasn’t something we were focusing on, so that was something that we were watching, institutions. Infrastructure for -- institutions had complexities around infrastructure and contracts and things that we were not focused on at that time particularly or well-structured for. Q. So were these entities identified as threats because Patterson wasn’t positioned to penetrate those segments? A. In -- yeah. Yeah. I mean, that was not a -- we were under- -- it’s a little different in each case. Each one of these has

a little different nuance to it. So yeah, we weren't positioned. I guess you can say that summarizes but not specific."); *see also* CX3286 at 1).

179. CX3283 is an internal Patterson PowerPoint slide from 2014 listing "[e]mergence of GPOs and our competitors [sic] willingness to negotiate with these groups" under "S.W.O.T. Threats.")). (CX3283 at 10).

180. The threat listed on the 2014 slide suggests the absence of an agreement, as it identifies as a "threat" "competitors' willingness" to work with "buying groups" during the time Patterson was supposed colluding with those competitors not to work with "buying groups." (CX3283 at 10).

181. Meanwhile, other evidence shows Patterson did not consider "buying groups" to be a serious threat. Patterson's Neal McFadden and Anthony Fruehauf testified that "buying groups" were not worth their time. McFadden testified that "we determined that buying groups, they don't have any influence or they cannot mandate their clients' purchase, there was not really any upside from a business perspective that we could see by pursuing buying groups." (McFadden, Tr. 2673–74). Fruehauf said in his deposition that "buying groups" were a "small part" of his region and that offering an extra discount to the few Patterson customers participating in buying groups would risk angering Patterson's other, better customers. (CX8013 (Fruehauf, Dep. at 58–59)).

182. Likewise, in September 2013—right at the peak of the alleged conspiracy—Patterson's David Misiak wrote an internal Patterson email stating, "I would not currently classify these as a big threat to the business but the GPO noise has been pretty loud from the field." (CX0145 at 1) (emphasis added).

III. Every Fact Witness Either Outright Denied That Patterson Participated In An Agreement Or Had No Knowledge Of It Doing So.

183. Complaint Counsel listed the following individuals in a sworn interrogatory as being “person[s] with knowledge” of Patterson’s participation in the alleged conspiracy: Chuck (Charles) Cohen, Rick Cohen, Paul Jackson, Michael McElaney, Patrick Ryan, Timothy Sullivan, Kathleen Titus, Andrea Hight, Brian Brady, Hal Muller, Randall Foley, Debbie Foster, James Breslawski, Dave Steck, Michael Porro, Jake Meadows, Joseph Cavaretta, Scott Anderson, Paul Guggenheim, Dr. Brenton Mason, Neal McFadden, Dave Misiak, Devon Nease, Tim Rogan, Dr. Joseph Baytosh, Francis (“Frank”) J. Capaldo, Dr. Andrew Goldsmith, John C. Kois, Jr., Dr. John C. Kois, Sr., Trevor Maurer, Jeffrey Reece, Justin Puckett, Mark Rowe, Brian Evans, Randall McLemore, Mark Mlotek, Glenn Showgren, Darci Wingard, Wesley Fields, and Anthony Fruehauf. (RX2958 at 9–12).

184. Every individual listed above who testified in this case² denied before this Court, under penalty of perjury, any knowledge of Patterson participating in the alleged conspiracy. (RX2958 at 9–12; *see infra* Section III(a) (listing a selection of their denials). Indeed, several witnesses testified that Complaint Counsel’s interrogatory response was false. (Foley, Tr. 4735–36) (“Q. That’s false; right, sir? A. That is correct.”); (Titus, Tr. 5279–80) (“That is not true.” . . . “That is not a true statement.”); (Cavaretta, Tr. 5621–22) (“That would be false.”); (Cavaretta, Tr. 5623) (“Q. So the statement in the document is false. A. False, correct.”) (Reece, Tr. 4490–91) (“Q. It’s true that it’s a lie? A. It’s true that I do not have awareness of an agreement specific to group purchasing organizations.”); (Maurer, Tr. 4989–90) (“Q. So this is false. Fair? A. I guess so.”).

185. Patterson’s Requests for Admission 11 and 12 asked Complaint Counsel to admit, respectively, that “no witness has admitted to having personal knowledge of an agreement between

² All witnesses listed testified except for Rick Cohen, Glenn Showgren, and Randall McLemore.

Respondents not to do business with Buying Groups,” and that “no witness currently or formerly employed by Respondents has admitted to the existence of an agreement between Respondents not to business with Buying Groups.” (RX2944 at 9–10).

186. Complaint Counsel denied both requests. (RX2944 at 9–10).

187. There was no evidence in the record at the time Complaint Counsel completed this sworn response that any witness had admitted to having personal knowledge of Patterson participating in a conspiracy with Schein and Benco not to do business with buying groups.³

188. There is no evidence in the final record that any witness has admitted to having personal knowledge of Patterson participating in a conspiracy with Schein and Benco not to do business with buying groups. (*Contra* RX2944 at 9–10).

189. Complaint Counsel’s denials of Patterson’s Requests for Admission 11 and 12, under penalty of perjury, were false. (RX2944 at 9–10).

a. Trial Witnesses All Denied Knowledge Of Patterson Participating In A Conspiracy.⁴

190. Dr. John Kois, Sr., founder and director of the Kois Center and founder of the Kois Buyers Group, had no knowledge of an alleged conspiracy between Patterson and Schein or Benco. (Kois, Sr., Tr. 223 (“Q. Dr. Kois, I have a couple of questions just based on your 40 years of experience as a dentist in the industry. First, just so we’re clear on the record, you’ve been in the industry a long time. You have no firsthand knowledge of any conspiracy between my client Patterson and anyone from Schein or Benco; correct? A. That’s correct.”)).

³ Patterson understands and has endeavored to abide by this Court’s Order that “All proposed findings of fact shall be supported by specific references to the evidentiary record.” (Feb. 21, 2019 Order on Post-Trial Briefs). But where a proposed finding of fact involves the absence of evidence in the record supporting a given point, Patterson cannot usually cite the record.

⁴ Trial witnesses are listed in order of testimony.

191. John Kois, Jr., currently CEO of the Kois Center and Manager of the Kois Buyers Group, also had no personal knowledge of any agreement between Patterson, Schein, and Benco to not do business with buying groups. (CX8008 (Kois Jr., Dep. at 117 (“Q. And you don’t have any personal knowledge of the existence of any such agreement, do you? A. Any what kind of agreement? Q. Any agreement between Patterson, Schein and Benco to not do business with buying groups? A. I have no knowledge of that.”))).

192. Chuck Cohen, Managing Director of Benco, repeatedly denied forming an agreement of any kind with Patterson relating to buying groups. (*See, e.g.*, Cohen, Tr. 705 (“Q. Did you ever form or seek to form any agreement with Patterson or Schein on buying groups? A. No.”); CX8015 (Cohen, Dep. at 484 (“Q. Mr. Cohen, did you ever reach an agreement with Paul Guggenheim to not deal with buying groups? A. I did not. Q. Did you ever reach an agreement with anyone at Patterson not to provide discounts or deal with buying groups? A. No. Q. Are you aware of any agreement between anyone at Benco and anyone at Patterson to refuse to deal with or provide discounts to buying groups? A. No. Q. Did you ever reach an agreement with Mr. Guggenheim of any kind with respect to buying groups? A. No.”)); CX0301 (Cohen, IHT at 385 (“Q. Do you feel that you reached, at any time, an agreement with Schein and Patterson with respect to whether to sell to buying groups? A. No.”)); *see also* Cohen, Tr. 920-921).

193. Patrick Ryan, Benco’s former Director of Sales and Strategic Markets and current Director of Equipment Research and Development, denied that Benco had any agreement with Patterson relating to buying groups. (Ryan, Tr. 1269 (“Q. Mr. Ryan, did Benco have – to your knowledge, did Benco have an agreement of any kind with my client Patterson regarding buying groups? A. Not to my knowledge. Q. So their allegations are false; correct, sir? A. Yes.”); CX8037 (Ryan, Dep. at 391–92 (“Q. Did you reach any agreement with anyone at Patterson not to compete

over anything? A. No. . . . Q. Are you aware of any agreement between Benco and Patterson not to compete for buying groups? A. No, I'm not.”))). Ryan testified that Complaint Counsel’s allegation that Benco and Patterson formed an agreement to refuse to provide discounts to or otherwise compete for Buying Groups was “false.” (Ryan, Tr. 1269).

194. Dave Misiak, Patterson’s former North American President, denied Patterson’s involvement in an agreement with Schein or Benco to boycott buying groups. (Misiak, Tr. 1502 (Q. “This document up here is the agreement that the FTC and complaint counsel allege that we had. It says, ‘Benco, Schein and Patterson agreed not to provide discounts to, or otherwise contract with, buying groups of independent dentists.’ Do you have any knowledge of such an agreement with my client Henry Schein? A. Absolutely not. . . . Q. Do you have any knowledge of such an agreement with Benco? A. I do not.”); CX8038 (Misiak, Dep. at 314–15 (“Q. Did you ever reach or make any agreement with anyone at Benco about whether to do business with buying groups? A. I did not. Q. Did you ever reach or make any agreement with anyone at Henry Schein about whether to do business with buying groups? A. I did not. Q. Did you ever reach any agreement with anyone at Benco about whether to offer discounts to buying groups? A. I did not. Q. Did you ever reach or make any agreement with anyone at Henry Schein about whether to offer discounts to buying groups? A. I did not.”))). Mr. Misiak was not employed by Patterson at the time of his trial or deposition testimony. (Misiak, Tr. 1291; 1297) (Mr. Misiak left Patterson in May 2018); (CX8038 (Misiak, Dep. at 22)) (same, deposition dated July 25, 2018); *see also* Misiak, Tr. 1502; 1505; 1508-09).

195. Paul Guggenheim, former President and CEO of Patterson, denied that he agreed with Chuck Cohen to not sell to buying groups. (Guggenheim, Tr. 1707 (“Q. At any time, in any venue, did you commit to Mr. Cohen that Patterson would not sell or discount to any buying group?

A. I have never committed that to anybody outside our organization. Q. Did you agree with Mr. Cohen that you wouldn't sell to buying groups? A. No.”); Guggenheim, Tr. 1870 (“Q. . . . [D]id you believe that you formed any agreement between Patterson and Benco not to do business with buying groups? A. Absolutely not. Q. And by this ten-second response, did you intend to form any such agreement? A. No.”); *see also* CX8023 (Guggenheim, Dep. at 394 (“Q. Did you ever reach an agreement with anyone at Benco about whether to do business with buying groups? A. No. Q. Did you ever reach an agreement with anyone at Benco about whether to offer discounts to buying groups? A. No.”)); CX8023 (Guggenheim, Dep. at 395 (“Q. Did you ever reach any agreement with Benco about the New Mexico Dental Cooperative? A. Nope. Q. Did you ever reach any agreement with Benco about Atlantic Dental Care? A. No.”)); *see also* Guggenheim, Tr. 1707, 1853, 1862, 1870, 1872).

196. Dr. Joseph Baytosh, a practicing dentist and member of the Corydon Palmer Dental Society, had no personal knowledge of an agreement between Benco, Schein, and Patterson not to do business with buying groups. (Baytosh, Tr. 1898 (“Q. Do you have any knowledge of an agreement between Schein, Benco and Patterson not to do business with buying groups? A. No. Q. Other than in this case, have you ever heard of such an agreement? A. Not to my knowledge.”)); CX8030 (Baytosh, Dep. at 68 (“Q. Are you aware that the FTC is alleging in this case that Patterson, Schein, and Benco entered into an agreement in 2013 not to do business with buying groups? A. I’ve read the – that information, yes. Q. Do you have any knowledge of such an agreement? A. No, I do not.”))).

197. Dr. Andrew Goldsmith, a practicing dentist and former President and Chief Dental Officer at Smile Source, had no knowledge of an agreement relating to buying groups between Patterson and Benco. (Goldsmith, Tr. 2175 (“Q. And by the way, during the meeting, did they

stop the meeting and say, Hey, I have to call Chuck Cohen at Benco to see if we can do this because we have an agreement? A. No. Q. Nobody ever said that. A. No.”)).

198. Justin Puckett, President of MB2 Dental Solutions and co-founder of Dental Gator, had no personal knowledge of an agreement between Patterson, Benco, and Schein to not offer discounts to buying groups. (Puckett, Tr. 2268–69 (“Q. Do you have any personal knowledge of any agreement between Schein, Benco and Patterson not to offer discounts or otherwise negotiate with buying groups? . . . A. I do not.”)).

199. Dr. Brenton Mason, a practicing dentist and co-founder of the New Mexico Dental Cooperative,⁵ had no knowledge of any agreement between Patterson, Benco, and Schein. (Mason, Tr. 2390–91 (“Q. So before we get started, do you have any knowledge of any agreement between Schein, Patterson, and Benco not to offer discounts to or do business with buying groups? A. No, I do not.”)); CX8035 (Mason, Dep. at 69–70 (“Q. Dr. Mason, you don’t have any direct knowledge supporting an allegation that Benco, Schein and Patterson conspired to refuse to offer discounted prices or otherwise negotiate with buying groups; do you? A. No, I do not. Q. You don’t have any direct knowledge that would support the allegation that Benco, Schein and Patterson executives agreed not to provide discounts to or otherwise contract with buying groups? A. I do not. Q. You don’t have any direct knowledge to support an allegation that Benco, Schein and Patterson entered into an agreement to refuse to provide discounts to or compete for the business of buying groups? A. I do not.”))).

200. Jake Meadows, Schein’s former Vice President of Sales for the Eastern Area and current Vice President of Sales of Special Markets, had no knowledge of an agreement between

⁵ The New Mexico Dental Cooperative was never formed. (CX8035 (Mason Dep. 101:17–20 (“That concept never even came to fruition because we never opened the New Mexico Dental Co-Op. We joined another state.”))).

Patterson, Benco, and Schein. (Meadows, Tr. 2467 (“Q. Complaint counsel didn’t ask you this, but this is their allegation in the case: Benco, Schein and Patterson agreed not to provide discounts to, or otherwise contract with, buying groups of independent dentists. Do you know anything about such an agreement? A. I do not. Q. Have you ever heard of such an agreement? A. Never heard of it.”); (CX8016 (Meadows, Dep. at 268 (“Q. So have you personally ever reached any kind of agreement or understanding with anyone from Benco or Patterson about buying groups, GPOs, or any other type of customer? A. No. . . . Q. The FTC alleges in this case that Henry Schein had an agreement with Benco and Patterson to not do business with buying groups or offer them discounts. Do you have any personal knowledge of such an agreement? A. No. Q. Would such an agreement be consistent or inconsistent with your knowledge of the business practices of Henry Schein Dental? A. Very inconsistent.”)))).

201. Neal McFadden, President of the Special Markets Division at Patterson, repeatedly denied the existence of an agreement between Patterson and Benco or Schein relating to buying groups. (McFadden, Tr. 2738 (“Q. Was there any kind of agreement that you were referring to about not doing business with -- or not working with GPOs? A. We never had any agreement, any signed agreement, that we would not work with GPOs. It was always a business decision.”)); (McFadden, Tr. 2740 (“Q. Did you personally, Neal McFadden, at any time in your 21 years with Patterson, did you strike an agreement with somebody from Benco or somebody from Schein that you would not sell or discount to buying groups? Did you do that, sir? A. I did not.”); (CX8004 (McFadden, Dep. at 192–93 (“Q. On paragraph 7, it says, Rather than respond to the threat of buying groups independently, the distributors entered into an agreement to force all this threat through collective coordinated action. Do you have any such agreements involving Schein? A. I do not. Q. Okay. In paragraph 8 it reads, Benco, Schein and Patterson executives agreed not to

provide discounts to or otherwise contract with buying groups. Do you know of any such agreements involving any Schein executives? A. I do not.”); CX8004 (McFadden, Dep. at 112 (“Q. Do you remember what your reaction was to hearing about the investigation? A. Yes. Q. And what was that reaction? A. It was unbelievable. Q. Because -- unbelievable -- why unbelievable? A. Because *we are in such a highly competitive marketplace that it seems outlandish that Patterson Dental would get with Henry Schein and Benco to conspire and agree upon anything.*”) (emphasis added)); *see also* (McFadden, Tr. 2737–38; 2740; 2742; 2781).

202. Tim Rogan, Patterson’s former Vice President of Marketing and Merchandise and current Vice President and General Manager for North America, also denied the existence of an agreement between Patterson and Benco or Schein relating to buying groups. (Rogan, Tr. 3651 (“Q. Did you, Tim Rogan, ever make any agreement with anyone at Benco about buying groups? A. No. Q. And are you aware of anyone else at Patterson ever making any kind of agreement with Benco on buying groups? A. No.”); Rogan, Tr. 3652 (“Q. . . . So this is the agreement that the FTC alleges Benco, Schein, and Patterson entered into, and I’ll just read it. It says: ‘The FTC alleges that Benco, Schein, and Patterson agreed not to provide discounts to, or otherwise contract with, buying groups of independent dentists.’ Do you see that? A. Yes. Q. Have you ever reached such an agreement with Schein or Benco? A. No. Q. Do you have any knowledge whatsoever about such an alleged agreement? A. No. Q. Have you ever heard of such an alleged agreement? A. No.”); Rogan, Tr. 3571–72 (“Q. Did someone at Patterson tell you that they had reached an agreement with Benco or Schein about buying groups? A. No.”); CX8017 (Rogan, Dep. at 257–58 (“Q. Okay. And do you know of any such agreements referenced in paragraph 7 involving Schein? A. I do not. . . . Q. Okay. And do you know of any such agreements referenced in paragraph 8 involving Schein executives? A. I do not. . . . Q. Okay. Do you know of anyone

at Patterson coordinating their conduct with Schein regarding any customer segment? A. I do not.”); CX8017 (Rogan, Dep. at 261 (“Q. Are you aware of any agreement between Benco and Patterson regarding GPOs? A. No. Q. Are you aware of any agreement between Benco and Patterson regarding buying groups? A. No.”); *see also* (Rogan, Tr. 3571–3572, 3575, 3651–3652).

203. Dave Steck, Vice President and General Manager of Schein Dental, also knew nothing of an agreement between Patterson and Schein relating to buying groups. (Steck, Tr. 3831 (“Q. Do you have any knowledge of any agreement involving Patterson concerning not selling to buying groups? A. I have no knowledge. Q. From your perspective, has there ever been any such agreement? A. Not -- no. Q. And did anyone ever tell you that there was any such agreement? A. No. Q. And did you ever have any reason to believe, Mr. Steck, that there was any such agreement? A. Did not.”); CX8031 (Steck, Dep. at 145–46 (“Q. The FTC alleges in this case that Henry Schein had an agreement with Patterson and Benco to not do business with or give discounts to buying groups. Do you understand that? Q. Do you understand they make that allegation? A. Yes. Q. Do you have any personal knowledge of any such agreement or understanding? A. No. No, I do not. Q. Would such an agreement be contrary to your understanding of Henry Schein’s business practices as it relates to buying groups? A. It would be contrary, yes.”); *see also* Steck, Tr. 3831).

204. Tim Sullivan, President of Schein Dental, denied the existence of any agreement between Schein and Patterson to refuse to provide discounts to or otherwise compete for Buying Groups, and was offended by Complaint Counsel’s allegations. (Sullivan, Tr. 4020–21 (“January will be my 30th year with the company, the combined Sullivan/Sullivan Schein/Henry Schein. My father started the company in 1980. He was 50 years old, two kids in college, three in high school. It took guts to do what he did. He was an amazing human being. I joined when we were a \$28 million privately held company. I was part of the company going through the IPOs. My father

and I led the discussions with Schein to merge in 1997. I helped build and lead this organization to the company that we are today. And I'm most proud of, through all that, as representing the Sullivan name. When I see Sullivan in the dental industry, I don't think of Tim Sullivan. I think of Bob Sullivan. And when I read that, I don't know if people understand the consequences of being falsely accused, the impact it has on family, our team members, customers who know what our brand stands for. There are consequences to falsely accusing people of things we know we didn't do."); Sullivan, Tr. 4257 ("Q. Never had any kind of agreement with any of your competitors about buying groups? A. Never."); RX2941 (Sullivan, Dep. at 466 ("Q. The next paragraph says, 'Patterson joined the agreement to refuse to provide discounts to or otherwise compete for Buying Groups no later than February 2013.' Do you have any knowledge of that? A. No."); RX2941 (Sullivan, Dep. at 528-29 ("Q. In your mind, as the person running Henry Schein Dental, did you ever believe that you entered into any type of agreement with Patterson concerning any aspect of dealing with buying groups? A. No."); *see also* Sullivan, Tr. 4021; 4230-4231; 4257; 4294-4301; 4303-4304).

205. Jeffrey Reece, Vice President of Sales and Marketing at Burkhart, had no knowledge of an agreement between Patterson, Benco, and Schein relating to buying groups. (Reece, Tr. 4463-64 ("Q. . . . On the screen is the agreement -- you don't have this in your binder, sir, but on the screen is the agreement that the FTC alleges in this case that Schein was a participant in, and it says, "Benco, Schein, and Patterson agreed not to provide discounts to, or otherwise contract with, buying groups of independent dentists." Do you see that? A. I do. Q. Do you have any personal knowledge about whether Schein has ever entered into such an agreement? A. I do not. Q. Do you have any personal knowledge of anything that could be characterized as this agreement here? A. I do not."); CX8021 (Reece, Dep. at 117-18 ("Q. Do you have any direct or

personal knowledge that would support the knowledge that Benco, Schein and Patterson conspired to refuse to offer discounted prices or otherwise negotiate with buying groups? A. No. Q. Do you have any direct or personal knowledge that would support the allegation that Benco, Schein and Patterson executives agreed not to provide discounts to or otherwise contract with buying groups? A. No.”))).

206. Randy Foley, Schein’s former Vice President of Sales for Special Markets, repeatedly denied the existence of an agreement between Patterson, Benco, and Schein relating to buying groups. (Foley, Tr. 4599–4600 (“Q. Mr. Foley, I want you to take a look at this. RX 5 is the agreement that complaint counsel alleges in this case. Okay? A. Yes. Q. And it states, “Benco, Schein and Patterson agreed not to provide discounts to, or otherwise contract with, buying groups of independent dentists.” Do you see that? A. Yes. Q. Mr. Foley, are you aware of any such agreement between Benco, Schein and Patterson not to provide discounts to or otherwise contract with buying groups of independent dentists? A. No. . . . Q. You’ve never heard of such an agreement. A. Never.”); Foley, Tr. 4600–01 (“Q. And to be clear, you’re not aware of any such agreement involving Schein Special Markets; correct? A. Correct. Q. And you’re not aware of any such agreement involving Henry Schein Dental; is that correct? A. That is correct.”); CX8003 (Foley, Dep. at 381–82 (“Mr. Foley, did you ever enter an agreement with anyone at Patterson to refuse to deal with buying groups? A. No. Q. Are you aware of anyone at Schein entering an agreement with Patterson to refuse to deal with buying groups? A. No. Q. Did you ever enter into an agreement with anyone from Patterson regarding any customers? A. No. Q. Are you aware of anyone at Schein entering into an agreement, arrangement, or understanding of any kind with someone from Patterson regarding any customer? A. No.”)); *see also* Foley, Tr. 4600 (“Q. Mr. Foley, what is your reaction to the allegations here in RX 5? A. I was surprised

when I saw that, because I'd been working with buying groups from the day I started with Special Markets until the day I retired. Q. And I believe you've already testified that would be from 2009 all the way to 2016. Is that right? A. That is correct.”).

207. Trevor Maurer, President and CEO of Smile Source, had no knowledge of the facts underlying a conspiracy involving Patterson. (Maurer, Tr. 4990 (“[T]hey said the following persons have knowledge of the facts underlying their conspiracy allegation against my client Patterson. . . . And if we go to the next page, at about the bottom of the list they listed you, Trevor Maurer. Do you see that? A. I do. Q. But you don't actually have that knowledge, do you, sir? A. That's correct. Q. So this is false. Fair? A. I guess so. Q. And did they ask your permission to put this false answer with your name on it in their interrogatory answer? A. I don't know how to answer that, but nobody asked me my permission to put something false in a document, no.”); Maurer, Tr. 4987–88 (“Q. Mr. Maurer, do you have any firsthand knowledge of any Patterson employee ever communicating with anyone from Schein about not selling to buying groups? A. I do not. Q. Do you have any firsthand knowledge of any Patterson witness ever communicating with anyone from Schein about not discounting to buying groups? A. I do not. Q. Do you have any firsthand knowledge of any witness -- employee of Patterson ever communicating with anyone from Benco about not selling to or discounting to buying groups? A. I do not.”); RX2952 (Maurer, Dep. at 69 (“Q. Do you have any direct knowledge supporting the allegation in that FTC complaint that Benco, Schein, and Patterson conspired to refuse to offer discounted prices or otherwise negotiate with buying groups? A. No. Q. Do you have any direct knowledge supporting the allegation in the FTC complaint that Benco, Schein, and Patterson executives agreed not to provide discounts to or otherwise contract with buying groups? A. No. Q. Do you have any direct knowledge supporting the allegation made in the FTC complaint that Benco, Schein, and Patterson

entered into an agreement to refuse to provide discounts to or compete for the business of buying groups for their core customer base of independent dentists? A. No.”))).

208. Kathleen Titus, Schein’s current Director of Group Practice and former Zone Manager for Special Markets, denied the existence of any agreement between Schein and Patterson, and felt personally diminished by Complaint Counsel’s allegations. (Titus, Tr. 5280 (“[T]here was no conspiracy.”); Titus, Tr. 5192 (“Q. Ms. Titus, are you aware of any agreement between Benco, Schein and Patterson not to provide discounts to or otherwise contract with buying groups of independent dentists? A. Absolutely not, because no agreement existed, and I know that because it was my job to work with buying groups over the last twenty-plus years. In fact, *I find it personally diminishing because I spent so much of my career at Henry Schein working with buying groups.*”) (emphasis added); CX8010 (Titus, Dep. at 249 (“Q. The FTC alleges in its complaint that’s filed in this action that Henry Schein, Patterson and Benco had an agreement to not do business with buying groups. Do you have any knowledge of such an agreement? A. I do not.”); *see also* Titus, Tr. 5192, 5280-5281).

209. Titus further testified that Complaint Counsel’s sworn response to Schein’s Interrogatory 11, naming her as a Schein executive or employee who had “referred to and/or enforced Schein’s policy not to provide discounts to or compete for the business of Buying Groups” (RX2957 at 12–13), was false. (Titus, Tr. 5280 (“And you see the part that he just highlighted at the beginning of that sentence, ‘Other Schein executives and employees also referred to and/or enforced Schein’s policy not to provide discounts to or compete for the business of Buying Groups, including’ -- and your name is listed, Kathleen Titus. Is that a true statement? A. That is not a true statement. Q. Have you ever referred to or enforced a conspiracy involving Patterson? A. No, I have not, and there was no conspiracy.”))).

210. Joseph Cavaretta, Schein's current VP of Sales for the Eastern Area and former VP of Sales and Area Manager for the Western Area, was not aware of and did not enter into an agreement relating to buying groups with Patterson. (Cavaretta, Tr. 5529–30 (“Q. They allege that Benco, Schein and Patterson agreed not to provide discounts to, or otherwise contract with, buying groups of independent dentists. Do you see that? A. I do. Q. Do you know anything about such an alleged agreement? A. I do not. . . . Q. Did you ever come to such an alleged agreement with Paul Guggenheim at Patterson? A. No. Q. Did you ever come to such an alleged agreement with anyone at Patterson? A. No. Q. Are you aware of any agreement between Benco, Schein and Patterson not to do business with buying groups? A. I'm not. . . . Q. Are you aware of any agreement or understanding of any way between Benco, Schein and Patterson not to offer discounts to buying groups? A. No, I'm not.”); CX8033 (Cavaretta, Dep. at 255–56 (“Q. The FTC alleges in this case that Henry Schein had an agreement with Benco and Patterson to not do business with buying groups or offer them discounts. Do you have any knowledge of such an agreement? A. No. . . . Q. Would such an agreement, if it existed, be contrary to your understanding of Henry Schein's business practices? A. Yes.”); *see also* Cavaretta, Tr. 5622-5623).

211. Richard Johnson, co-founder and consultant with Klear Impakt, did not know anything about the alleged agreement and had never heard of it. (R. Johnson, Tr. 5505–06 (“Q. They allege that Benco, Schein and Patterson agreed not to provide discounts to, or otherwise contract with, buying groups of independent dentists. Do you see that? A. Yes. Q. Do you know anything about such an alleged agreement? A. I don't know anything about that agreement. Q. Have you heard of any agreement like this? A. No, I have not.”); (R. Johnson, Tr. 5507–08 (“Q. Do you have any firsthand personal knowledge regarding my client Patterson entering into an agreement with either Benco or Schein to refuse to deal with buying groups? A. No. Q. And do

you have any firsthand knowledge of Patterson entering into an agreement not to discount to buying groups? A. No.”); CX8029 (Johnson, Dep. at 148 (“Q. Do you have any direct knowledge that would support the allegation that Benco, Schein, and Patterson conspired to refuse to offer discounted prices or otherwise negotiate with dental buying groups? A. No. Q. Do you have any direct knowledge supporting the allegation that Benco, Schein, and Patterson executives agreed not to provide discounts to or otherwise contract with buying groups composed of independent dentists? A. No.”)).

b. Non-Trial Witnesses Also Denied The Conspiracy.

212. Michael Porro, Schein’s former Zone Manager and current Director of Technology for Sales in the East, was not aware of and did not enter into any agreement between Patterson and Schein not to do business with buying groups. (CX8000 (Porro, Dep. at 287 (“Q. Are you aware of any agreement between Schein and Patterson not to do business with buying groups? A. No. . . . Q. And again, you certainly didn’t reach any agreement with anyone at Patterson not to do business with buying groups? A. I have not.”))).

213. Debbie Foster, Schein’s former Director of Sales for Special Markets and current Regional Account Manager, testified that she was not aware of and did not enter into any agreement between Patterson and Schein not to do business with buying groups. (CX8001 (Foster, Dep. at 164–65 (“Q. Are you aware of any agreement between Schein and Patterson not to do business with buying groups? A. No. . . . Q. And you certainly did not reach any agreement with anyone at Patterson not to do business with buying groups? A. No.”))).

214. Devon Nease, Patterson’s former Branch Manager in the Chesapeake Region, was not aware of any agreement between Patterson, Schein, or Benco. (CX8002 (Nease, Dep. at 127 (“Q. Are you aware of any agreement between Benco and Patterson not to do business with so-called buying groups? A. No, sir.”); CX8002 (Nease, Dep. at 137 (“Q. Mr. Nease, do you know

of any such agreements referenced in paragraph 8 involving any Schein executives? A. No. . . . Q. Do you know of anyone at Patterson coordinating their conduct with Schein regarding any customer segment? A. No.”)). Nease was not employed by Patterson at the time of his deposition. (CX8002 (Nease, Dep. at 15–16 (Nease left Patterson in August 2014))).

215. Hal Muller, President of Schein Special Markets, denied entering into an agreement or having knowledge of an agreement between Patterson, Benco, and Schein regarding buying groups. (CX8005 (Muller, Dep. at 223 (“Q. Do you have any knowledge of the allegation made by the FTC that there’s an agreement between Patterson, Benco and Henry Schein regarding buying groups? A. No.”))).

216. Darci Wingard, the former Manager of Group Strategy and Development and current Director of Alternative Purchasing at Schein, had no knowledge of whether Patterson partners with buying groups. (CX8009 (Wingard, Dep. at 233 (“Q. Okay. Do you have an understanding of whether Patterson partners with buying groups? A. Yeah, I wouldn’t -- I wouldn’t know that. Q. You don’t have any understanding? A. I don’t.”))).

217. Frank Capaldo, Executive Director and CEO of the Georgia Dental Association and CEO of Integrity Dental Buyers Group, had no personal knowledge of an agreement between Patterson, Benco, and Schein to not do business with buying groups. (CX8011 (Capaldo, Dep. at 33–34 (“Q. And are you aware that the FTC is alleging that Patterson, Schein and Benco entered into an agreement in 2013 not to do business with buying groups? A. Generally, yes. Q. Have you read the complaint in this case? A. I have. Q. You have no personal knowledge of any such agreement, do you, sir? A. I do not.”))).

218. James Breslawski, President of Schein, denied the existence of any agreement between Patterson, Schein, and Benco and testified that such an agreement would be contrary to

Schein's business practices of working with buying groups. (CX8012 (Breslawski, Dep. at 242) ("Q. The FTC alleges in this action that Henry Schein had an agreement with Patterson and Benco to not do business with buying groups. Do you have any knowledge of such an agreement? A. I do not. Q. Would such an agreement be contrary to Henry Schein's business practices about working with buying groups? A. It would."))).

219. Anthony Fruehauf, Patterson's former Regional Manager for the Southeastern United States and current Regional President for Raleigh-Durham, North Carolina Area, denied the existence of any agreement related to buying groups. (CX8013 (Fruehauf, Dep. at 195–96 ("Q. The Complaint in this case alleges that rather than respond to the threat of buying groups independently, the distributors, that is, Schein, Patterson and Benco entered into an agreement to force all this threat through collective coordinated action. Do you know of any such agreements involving Schein? A. I do not. Q. The Complaint in this matter also alleges that Benco, Schein and Patterson executives agreed not to provide discounts to or otherwise contract with buying groups. Do you know of any such agreements involving any Schein executive? A. I do not."); *see also* CX8013 (Fruehauf, Dep. at 191 ("I feel strongly that . . . Patterson and our major competitors fight each other every day tooth and nail and . . . there's . . . absolutely, in my opinion, no merit to the fact that we would ever get involved with our competitors that we don't like very much to form some kind of group to fix pricing. That's just not – it's just impossible in my mind."))).

220. Michelle Lauerman, Advantage Dental's former Dental Services Advisor and current Director of Network and Patient Ambassador, had no personal knowledge of any agreement between Patterson and Benco or Schein relating to buying groups. (CX8014 (Lauerman, Dep. at 184–85 ("Q. Earlier I asked you whether you had any personal knowledge of anything that supported the allegations as you understood them and you said no. I'm asking you

does Advantage Dental have any information other than the testimony that you've provided today, that Advantage Dental believes supports or is consistent with the allegations made in the complaint as you understand them? A. I have nothing to offer. I do not know of anything.”)).

221. Tracy Moody, executive of Vision Source which is the parent of Smile Source, who retired from the business in December 2012 had no knowledge of Patterson conspiring or agreeing to refuse to discount to buying groups or Patterson executives agreeing with Schein or Benco executives not to deal with buying groups. (CX8019 (Moody, Dep. at 14 (“Q. And when did you retire? A. End of 2012.”); CX8019 (Moody, Dep. at 40–41 (“Q. Do you have any direct knowledge that would support the allegation that Benco, Schein, and Patterson conspired to refuse to offer discounted prices or otherwise negotiate with buying groups? A. No. Q. Do you have any direct knowledge relating to an allegation that Benco, Schein, and Patterson executives agreed not to provide discounts to or otherwise contract with buying groups composed of independent dentists? A. No. . . . Q. Do you have any knowledge that Benco, Schein, and Patterson entered into an agreement to refuse to provide discounts to or compete for the business of buying groups? A. No.”))).

222. Brian Brady, Schein's former National Director of Group Practices and current Senior Director of Sales, had no knowledge of an agreement with Patterson. (CX8020 (Brady, Dep. at 318–19 (“Q. And it's fair to say you've never reached an agreement or understanding with anyone at Patterson about buying groups or GPOs? A. Correct. Q. The FTC alleges in this case that Henry Schein had an agreement with Patterson and Benco to not do business or not offer discounts to buying groups or GPOs. Do you have any knowledge of such an agreement? A. No. Q. Would you say that such an alleged agreement would be contrary to your understanding of Henry Schein's business principles? A. Yes.”))).

223. Andrea Hight, Schein's former National Director of Community Health, former Director of Group Practices, and current Area Sales Manager, denied the existence of an agreement between Patterson, Schein, and Benco not to do business with buying groups. (CX8022 (Hight, Dep. at 192–93 (“Q. The FTC alleges in its complaint filed in this action that Henry Schein, Patterson, and Benco had an agreement to not do business with buying groups. Do you have any knowledge of any such agreement? I have no knowledge at all of any such agreement.”))).

224. Scott Anderson, Patterson's former President and CEO and current Special Advisor, repeatedly denied the existence of an agreement at his deposition. (CX8027 (Anderson, Dep. at 161–63 (“Q. Are you aware that the FTC in this case has alleged that Patterson, Schein and Benco entered into an agreement to forestall the threat of buying groups through collective coordinated action? A. Yes. Q. Do you know of any such agreements involving Schein? A. No. Q. Are you aware that the FTC in this Complaint has alleged that Benco, Schein and Patterson executives agreed not to provide discounts to or otherwise contract with buying groups? A. No. Q. Do you know of any such agreements involving any Schein executives? A. No.”))).

225. Joseph Lepley, Patterson's Director of Strategic Pricing, denied the existence of any agreement between Patterson, Benco or Schein relating to buying groups. (CX8028 (Lepley, Dep. at 111–13 (“Q. The Complaint in this matter reads, ‘Rather than respond to the threat of buying groups independently, the distributors entered into an agreement to forestall this threat through collective, coordinated action.’ Do you know of any such agreements regarding Schein? A. I do not have any knowledge of such agreements. Q. The Complaint in this matter also reads, ‘Benco, Schein and Patterson executives agreed not to provide discounts to or otherwise contract with buying groups.’ Q. Do you know of any such agreements involving any Schein executives? A. I do not have any knowledge of such things.”))).

226. Mitchell Goldman, the CEO of Mid-Atlantic Dental Partners, has no knowledge of any agreement between Patterson, Benco, or Schein not to do business with any customer segment. (RX2953 (Goldman, Dep. at 153 (“Q. I have just one question for you: Do you have any knowledge of any agreements between Patterson, Schein, or Benco not to do business with anyone? A. No.”))).

227. Ryan Dew, Senior Director of Business Operations at Brasseler, had no personal knowledge of a conspiracy or agreement between Patterson, Benco, or Schein not to do business with buying groups. (RX2955 (Dew, Dep. at 179–80 (“Q. And do you have any direct or personal knowledge that Benco, Schein and Patterson entered into any agreements to refuse to provide discounts to or compete for the business of buying groups? A. I do not.”))).

228. Robert Lowther, owner and President of The Denali Group, testified that the FTC’s allegations regarding an agreement between Patterson, Schein, and Benco are “not true.” (RX2961 (Lowther, Dep. at 11 (“From my understanding of what the complaint is alleging, it’s not true or correct based on – on what actually happens in our relationship. . .What the Denali Group does is exactly what - - with Henry Schein, Patterson, and Benco in the past is exactly what the FTC says they do not do.”)); *see also* RX2961 (Lowther, Dep. at 193–94 (“A. It’s my understanding that there was an alleged -- that the allegation was that there was an agreement between Benco, Patterson, and Schein not to offer discount pricing to individual practitioner buying groups. Q. Okay. Do you have any personal knowledge of such an agreement? A. I do not. That has not been our company’s experience with that.”))).

229. Wesley Fields, Patterson’s current Director of Business Development and former General Manager of the Louisville, Kentucky branch, testified that Paul Guggenheim never told him about an agreement between Patterson and Benco or Schein relating to buying groups.

(CX0312 (Fields, IHT at 104–05 (“Q. Did Paul Guggenheim ever tell you about any agreement that Patterson had with Benco or Schein relating to GPOs or buying groups? A. No. Q. Mr. Guggenheim never mentioned any agreement that Patterson had with regard to Schein or Benco? A. No.”))).

230. Mark Mlotek, Schein’s Executive Vice President and Chief Strategic Officer, testified at his investigational hearing that Schein has never had any agreements with Patterson relating to anything. (CX0308 (Mlotek, IHT at 183 (“Q. Has Schein ever entered into any agreement, acquisition or joint venture agreement with Patterson? A. No.”))).

231. Brian Evans, Benco’s Director of Sales for the West, testified that it would “surprise him” if executives from Benco and Patterson had coordinated with one another to not work with buying groups. (RX1121 (Evans, Class Action Dep. at 279 (“Q. Would it surprise you if executives from Benco and Patterson had coordinated with one another to ban working with buying groups?. . . A. Yes.”))).

232. All party witnesses flatly denied the existence of a conspiracy. (*See supra* Section III).

233. Third party witnesses also testified that they had no knowledge of a conspiracy. (*See supra* Section III).

IV. All But Three Of Patterson’s Communications With Benco And Schein In The Record On Their Face Have Nothing To Do With Buying Groups.

234. Complaint Counsel’s sworn response to Patterson’s Interrogatory Number 7 lists 112 documents that Complaint Counsel claims support the allegation that Patterson joined the conspiracy in February 2013. (RX2934 at 15–18).

235. 35 of the documents Complaint Counsel identified in response to Patterson’s Interrogatory Number 7 are dated from 2011—two years before Patterson allegedly joined the

conspiracy: 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); CX3392 (September 2011); CX1355 (September 2011); CX3393 (September 2011); CX3394 (September 2011); CX3191 (September 2011); CX3397 (October 2011); CX1358 (October 2011); CX3398 (October 2011); CX3399 (October 2011); CX3457 (November 2011); CX3458 (November 2011); CX3400 (December 2011); CX1362 (December 2011); CX3401 (December 2011); CX3402 (December 2011); CX3403 (December 2011); CX1363 (December 2011); CX3404 (December 2011); CX3405 (December 2011); CX1049 (December 2011); CX1050 (December 2011); CX3067 (December 2011); CX1465 (December 2011); CX3406 (December 2011) (hereinafter, the “35 Documents”).

236. None of the 35 Documents has anything to do with buying groups. (CX3383 (Benco employee asked to tone down his comments about Patterson and recall of Kerr products); CX3384 (same); CX3385 (same); CX3386 (discussing barcoding project); CX3387 (same); CX3388 (discussing re-skinning service vans with Oral Healthcare advertisements); CX3389 (same); CX3390 (same); CX3454 (same); CX3391 (discussing disaster relief efforts); CX1354 (scheduling discussion); CX3392 (same); CX1355 (inquiring into Cohen’s wellbeing after tropical storm); CX3393 (same); CX3394 (same); CX3191 (discussing branch ordering issue); CX3397 (Cohen and Guggenheim discussing upcoming visit); CX1358 (same); CX3398 (same); CX3399 (same); CX3457 (congratulating Guggenheim’s wife for receiving award); CX3458 (same); CX3400 (discussing visit); CX1362 (same); CX3401 (same); CX3402 (Cohen requesting Guggenheim’s address to send note); CX3403 (same); CX1363 (discussing ProDrive inventory and P&G’s new product packaging); CX3404 (same); CX3405 (same); CX1049 (same); CX1050

(same); CX3067 (same); CX1465 (same); CX3406 (same); CX1465 (same) (hereinafter, the “35 Documents”).

237. One of the 35 Documents (CX1049) does not even include any reference to Patterson. (CX1049 at 1–2 (December 2011 email chain between Chuck Cohen and Tim Sullivan)).

238. One of the 35 Documents, CX3386, is an email chain dated May 11-12, 2011 between Rick Cohen, Tim Sullivan, Scott Anderson, and Paul Guggenheim regarding a barcoding project. (CX3386 at 1–2).

239. When asked about CX3386 at trial, Sullivan testified that Rick Cohen came up with the barcoding project as way to create an industry-wide set of barcodes that all three distributors could use for goods received from manufacturers. (Sullivan, Tr. 4311).

240. The goals of the project were to decrease costs, increase efficiencies, and, in turn, better serve customers. (Sullivan, Tr. 4311).

241. The barcoding project was not a “secret code” for a conspiracy about buying groups and had nothing to do with buying groups. (Sullivan, Tr. 4311).

242. Sullivan further testified that it would be false to assert that CX3386 was evidence of a conspiracy between Schein and Patterson about buying groups. (Sullivan, Tr. 4312).

243. CX3383 is a May 26, 2011 email from Rick Cohen to Paul Guggenheim, Tim Sullivan, and Gary Price (of the Dental Trade Alliance) suggesting that Schein, Patterson, and Benco re-skin their service vans with “Oral Healthcare Can’t Wait” advertisements. (CX3383 at 1).

244. Tim Sullivan explained at trial that re-skinning the service vans was Rick Cohen’s idea of a way to educate people about the importance of oral health. (Sullivan, Tr. 4313–14).

Sullivan testified that only 50 percent of the population is covered by insurance, which means only 50 percent of people go to the dentist. (Sullivan, Tr. 4313–14). The ad campaign was an idea to raise awareness of the importance of oral health and, in turn, drive patient traffic. (Sullivan, Tr. 4313–14).

245. Sullivan testified that it would be false to claim that CX3388 was evidence of a conspiracy between Schein and Patterson relating to buying groups. (Sullivan, Tr. 4314).

246. One of the 35 Documents, CX3389, is Mr. Sullivan’s May 26, 2011 response to CX3388, in which Mr. Sullivan writes that he “like[s] the idea” of re-skinning service vans and is “confident [they] could make [it] happen.” (CX3389 at 1; Sullivan, Tr. 4313–14).

247. One of the 35 Documents, CX3390, is Mr. Rick Cohen’s May 26, 2011 response to CX3389, in which he clarifies that his proposal is only to re-skin “new vans” and not to “relabel old vans.” (CX3390 at 1).

248. One of the 35 Documents, CX3391, is an email chain spanning May 26-29, 2011, discussing both the re-skinning project as well as the possibility of Patterson, Schein, and Benco coordinating their disaster relief efforts in Alabama and Missouri. (CX3391 at 1–3).

249. Tim Sullivan testified at trial that CX3389, CX3390, and CX3391 are not “some kind of secret code for a buying group conspiracy,” but rather were about “trying to think of some way to help people.” (Sullivan, Tr. 4316 (“Q. And if we go to the first page of this one again, do you see there’s an email from you up at the top, an email from you in May of 2011, saying, ‘Guys, what are your thoughts on some type of DTA collaborative effort for disaster relief areas, such as Alabama and Joppa, Missouri?’ Those were places that had been hit by hurricanes and floods? A. Yep. Q. Now, Mr. Sullivan, this isn’t some kind of secret code for a buying group conspiracy, is

it? A. No. Q. This was you all trying to think of some way to help people, right? A. That's right.”).

250. It was false for Complaint Counsel to assert under penalty of perjury that CX3389, CX3390, or CX3391 are evidence of Patterson's participation in a buying group conspiracy. (Sullivan, Tr. 4316) (“Q. It would be false for someone to take these . . . documents and assert, under penalty of perjury, that they were evidence of a buying group conspiracy, wouldn't it? A. Yes, it would.”).

251. The remaining 11 documents pre-dating 2013 from Complaint Counsel's responses to Patterson's Interrogatory Number 7 (RX2934 at 15–18), are dated from 2012—the year before Patterson allegedly joined the conspiracy (Compl. ¶ 36): CX1366 (March 2012); CX3408 (March 2012); CX3409 (March 2012); CX1367 (March 2012); CX3410 (March 2012); CX1311 (August 2012); CX1477 (August 2012); CX1478 (August 2012); CX1480 (August 2012); CX1310 (August 2012); CX1481 (August 2012) (the “11 Documents”).

252. The 11 Documents, on their face, do not mention buying groups or have anything to do with buying groups. CX1366 (discussing sexual harassment training); CX3408 (same); CX3409 (same); CX1367 (same); CX3410 (same); CX1311 (inquiring about receipt of previous email); CX1477 (scheduling meeting); CX1478 (same); CX1480 (same); CX1310 (same); CX1481 (scheduling lunch).

253. Two of the 11 Documents also do not have a Patterson employee on the email chain. (See CX1310 and CX1311 (August 2012 emails between Mark Mlotek and Rick Cohen)).

254. When asked about some of these 11 Documents at trial, witnesses testified they were unrelated to Patterson's alleged involvement in a conspiracy. (See, e.g., Sullivan, Tr. 4316–18 (“Q. [CX1366] doesn't have anything to do with a buying group conspiracy, does it, sir? A. It

does not. Q. It would be false for the Government to assert, under penalty of perjury, that this is evidence of a buying group conspiracy, right? A. Correct. . . . Q. Even though they listed [CX3480] under penalty of perjury as evidence of a conspiracy, it was false to do that, correct, sir? A. Yes, sir.”)).

255. Another 32 documents listed in Complaint Counsel’s original (RX2934) and amended (RX2960) responses to Patterson’s Interrogatory No. 7 (RX2934 at 15–18) are dated after February 2013: CX6424; CX6426, CX6428, CX6430; CX6433; CX6436; CX6439; CX6441; CX0065; CX6443; CX6446; CX6447; CX6450; CX6452; CX6453; CX6458; CX6460; CX6461; CX6463; CX6466; CX6468; CX1349; CX3415; CX3416; CX6470; CX6472; CX3417; CX6474; CX1401; CX6477; CX6479; and CX6481 (the “32 Documents”).

256. Of the 32 Documents, 26 are text messages with personal chatter between Scott Anderson and Tim Sullivan relating to topics such as sports, family, holidays, vacations, and a colleague’s passing. (*See, e.g.*, CX6424 (discussing sports); CX6428 (wishing a happy new year); CX6468 (discussing colleague’s passing); CX6472 (discussing vacations); CX6481 (discussing son’s college plans)).

257. These 26 text messages are, on their face, unrelated to buying groups or any alleged conspiracy related to buying groups: CX6424 (discussing sports); CX6426 (discussing sports); CX6428 (wishing a happy new year); CX6430 (discussing sports); CX6433 (same); CX6436 (same); CX6439 (same); CX6441 (same); CX6443 (same); CX6446 (same); CX6447 (same); CX6450 (same); CX6452 (same); CX6453 (same); CX6458 (same); CX6460 (same); CX6461 (same); CX6463 (same); CX6466 (same); CX6468 (discussing colleague’s passing); CX6470 (discussing sports); CX6472 (discussing vacations); CX6474 (discussing sports); CX6477 (same); CX6479 (same); CX6481 (discussing son’s college plans).

258. Mr. Sullivan was “shocked” to see that the government listed these text messages as evidence of a conspiracy relating to buying groups between Schein and Patterson. (Sullivan, Tr. 4303–04) (“Q. Now, Mr. Sullivan, do you believe that all those texts that we just looked at that were about the Badgers and the Packers and the Vikings and The Players Golf Tournament, would you believe that all of those texts are listed here in the Government’s interrogatory answer as evidence of a conspiracy related to buying groups between Schein and Patterson? A. I’m shocked to see this.”); Sullivan, Tr. 4304 (“Q. Now, can you think of any reason why someone might falsely say that a bunch of texts about college basketball and college football might be related to a buying group conspiracy? A. To paint a picture that doesn’t exist.”)).

259. Complaint Counsel acknowledged at the close of its case-in-chief that the text messages between Anderson and Sullivan listed in its sworn interrogatory response (RX2934 at 15–18) were not “the basis” of Complaint Counsel’s case. (Foley, Tr. 4759) (“MS. KAHN: With respect to the communications between Scott Anderson and Tim Sullivan, that is not the basis of our case. . . . And so to the extent that he is quoting text messages between Scott Anderson and Tim Sullivan, that is not the core of our case.”). Complaint Counsel did not amend its interrogatory responses to remove these text messages.

260. The 7 remaining documents dated after February 2013 are emails scheduling lunch or addressing business topics that have nothing to do with buying groups. CX0065 (Chuck Cohen calendar entry to discuss Amazon response marked completed); CX1349 (Chuck Cohen and Paul Guggenheim scheduling lunch); CX3415 (same); CX3416 (same); CX3417 (Guggenheim sending Cohen a link to Yahoo Finance article about Patterson launching a website dedicated to dental supply integrity); CX1401 (Guggenheim left voicemail for Cohen checking in and asking for a return call) (the “7 Documents”).

261. Of these documents, Complaint Counsel only asked trial witnesses about CX0065. CX0065 is a calendar entry from Chuck Cohen's files to discuss "Amazon response."

262. When asked about CX0065 at trial, Cohen testified that Amazon is not a buying group and he never reached out to Patterson or Schein about Amazon. (Cohen, Tr. 834 ("Q. Is Amazon a buying group? A. No. Q. Did you ever reach out to Schein or Patterson about Amazon? A. No.")).

263. Five of the 32 documents dated after February 2013 are from after April 2015—the month when the alleged conspiracy ended (Kahn, Tr. 19); *see also* RXD0205 at 1 ("The Alleged Conspiracy Ended in April 2015"). CX6474 (May 2015); CX1401 (May 2015); CX6477 (November 2015); CX6479 (November 2015); CX6481 (November 2015).

264. The various participants on these interfirm communications had legitimate personal and business topics to discuss, including trade association meetings and activities, potential arm's length business transactions between companies, and potential acquisition or merger opportunities. (*See, e.g.*, CX8027 (Anderson, Dep. at 130–31 (Anderson and Sullivan attended DTA board meetings together during the 2012 to 2016 period)); CX8027 (Anderson, Dep. at 130 (executives from Patterson, Schein, and Benco all attended large dental conventions, such as the ADA, New York meeting, and Chicago meeting, during the 2012 to 2016 period)); RX0202 at 1–4 (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 at 1–2 (Patterson and Benco employees attended a CRET annual meeting in 2014); (CX8025 (Sullivan, Dep. at 373–74 (Cohen and Sullivan had in-person meetings in 2013 to 2015 to discuss Schein potentially acquiring Benco))).

265. The Cohen and Guggenheim families have known each other “for decades” and grew up in the dental industry together. (Cohen, Tr. 919) (“Q. Your families have known each other for decades, as I understand it? A. Yes.”); (Guggenheim, Tr. 1545–46) (“Q. And how long have you known Chuck Cohen? A. 40-50 years. Q. Did you guys grow up in the dental industry together? A. We did. Q. And so you knew Chuck Cohen even before you were running Guggenheim Dental. A. Yeah. I knew him from trade meetings and different, you know, social events that we would all be at.”).

266. None of the communications discussed in paragraphs 234 - 463, *supra*, of these findings constitute probative evidence supporting the claim of Patterson participating in the conspiracy alleged.

V. The Three Remaining Communications Involving Patterson Do Not Show Patterson’s Participation In An Agreement To Boycott Buying Groups.

a. The February 8, 2013 Emails Regarding the New Mexico Dental Cooperative Did Not Form An Agreement.

267. On February 8, 2013, Patterson Dental’s President, Paul Guggenheim, received an unsolicited mail from Benco’s President Chuck Cohen about “some noise” Cohen had picked up from public information that a fledgling entity called the New Mexico Dental Cooperative would be hosting a meeting in Patterson’s Albuquerque office. (Guggenheim, Tr. 1699; CX0090 at 1; *see also* RXD0215 at 1 (New Mexico Dental Cooperative Timeline)).

268. Cohen volunteered in the email that Benco had a long-standing policy of not selling to “buying groups.” (CX0090 at 1 (“FYI: Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups (though we do work with corporate accounts) and our team understands that policy.”); Cohen, Tr. 679 (“a policy that’s been in place since 1996”)).

269. Cohen's email did not ask Guggenheim to do anything. (Cohen, Tr. 705 ("Q. Did you write that e-mail to Mr. Guggenheim for the purpose of forming any agreement? A. No."); Cohen, Tr. 714 ("Q. Did you ask Mr. Guggenheim to do anything? A. No.")).

270. Cohen did not expect to hear anything from Guggenheim in response to his email. (CX0057 at 6 [REDACTED] Cohen, Tr. 714 ("Q. Did you expect him to do anything? A. No.")).

271. Cohen never followed up with Guggenheim about the email. (Cohen, Tr. 714 ("Did you ever follow up with him? A. I did not.")).

272. Guggenheim, who received hundreds of emails a day in his role as President of Patterson Dental, dashed off a quick, 10, or 15-second response to Cohen. (Guggenheim, Tr. 1705-06) ("A. Well, I get hundreds of e-mails a day, so I -- and my day during the time of being president was largely absorbed with meetings and meetings and meetings. That morning -- I looked at my calendar -- I was at my son's eighth grade school conference. I got back. I read the e-mail. I went into meetings. And so I would typically on a given day be responding to 20-30 e-mails quickly. If you'll look at my e-mails, you'll see I don't write long e-mails. This is a typical e-mail. So I banged out a quick response, probably took me 10-15 seconds, fired it off to Chuck and moved on to the next e-mail."); *see also* RXD0217 at 1).

273. Guggenheim's response, sent on the afternoon of February 8, stated, "Thanks for the heads up. Ill investigate the situation. We feel the same about these." (CX0090 at 1).

274. Guggenheim's response did not commit him to take any action with respect to buying groups. (Guggenheim, Tr. 1707 ("Did you commit in any way to Mr. Cohen in this e-mail that Patterson was not going to discount to buying groups? A. Absolutely not. Q. Did you commit in any way to do anything going forward with regard to buying groups? A. Never.")).

275. Though Guggenheim wrote “I’ll investigate the situation” in his email to Cohen (CX0090 at 1), Guggenheim did not in fact do any investigation at Patterson after sending the email. (Guggenheim, Tr. 1703–04 (“Q. . . . [S]o you said to Mr. Cohen, I’ll investigate it, but do I have it right that you did not do an investigation? A. Correct.”); Guggenheim, Tr. 1703 (“Did you -- did you call up the Pinkerton’s detective society and conduct an investigation Mr. Guggenheim? A. No. It’s common language I would use for something like this, yeah, I’ll look into it, I’ll investigate it.”)).

276. Guggenheim’s statement, “We feel the same about these” and “I’ll investigate” (CX0090 at 1), was “just a cordial response in an eight-second email that [he] didn’t really think that much about,” to the effect of “yeah, I feel the same way.” (Guggenheim, Tr. 1612; *see also* RXD0217 at 1). Neither Guggenheim nor Cohen viewed this email exchange as an agreement to do anything; the brief email exchange did not constitute an agreement to refuse to provide discounts to or otherwise compete for Buying Groups. (Guggenheim, Tr. 1707; Cohen Tr., 714).

277. Guggenheim forwarded Cohen’s email—but not Guggenheim’s response—to David Misiak and Tim Rogan, but he did not ask them to do anything, and they did not recall doing anything. (Guggenheim, Tr. 1607 (“Q. And you sent this e-mail to Mr. Misiak and Mr. Rogan because they were your direct reports? A. Correct. Q. And you thought the information would be relevant to them? A. I forward lots and -- whenever I see something come across my e-mail, I forward a lot of e-mails, so yeah, it’s informational.”); CX0316 (Misiak, IHT at 235 (“Q. Okay. What did you do after you received this e-mail? . . . A: I don’t -- I don’t remember doing anything specific to this e-mail.”)); Rogan, Tr. 3576–77 (“Q. Was there any instruction from Mr. Guggenheim, ‘Tim, you’re the head of merchandise and marketing, I need you to do the following’? Did he instruct you to do anything when he sent this email to you? A. No. Q. Was

there anything that you did after you received this email? A. No, not that I recall. No. Q. It relates to a New Mexico Dental Cooperative. Did you call up the New Mexico Dental Cooperative? A. No. Q. Do you even know what the New Mexico Dental Cooperative is? A. I don't.”))).

278. There is no evidence that anyone at Patterson's corporate office (in Minnesota) took any action or gave any instruction to Patterson's New Mexico sales team regarding NMDC during the *weekend* between February 8 (the date of the Cohen/Guggenheim email (CX0090)) and February 11, 2013 (the date the sales team told NMDC it would not participate) (Mason, Tr. 2355). (Guggenheim, Tr. 1703 (“Q. Did you call Mr. Misiak or Mr. Rogan and say, Get to the bottom of this, I need to know what's going on there? A. No. Q. Did you call Mr. Reinhardt in the southwest, the region manager, and say, Mr. Reinhardt, what's going on with this situation, I need an investigation? A. I don't recall contacting anybody. Q. Did you call the branch manager or any territory rep in Albuquerque and ask them what's going on there? A. No. No recollection of that. Q. All right. Now, did you -- so you said to Mr. Cohen, I'll investigate it, but do I have it right that you did not do an investigation? A. Correct.”); *see also* CX4090; Mason, Tr. 2388 (“Q. You have no reason to doubt that this was Mr. Reinhardt's decision, do you? A. No, I don't.”); RXD0215 at 1 (New Mexico Dental Cooperative Timeline)).

279. Dr. Brenton Mason had engaged in discussions in early 2013 with local New Mexico Patterson sales personnel Jeff Katt and Scott Belcheff about working together on the yet to be formed New Mexico Dental Cooperative (“NMDC”). (Mason, Tr. 2339).

280. Dr. Mason does not recall the substance of any of his discussions with Katt or Belcheff about establishing the NMDC. (Mason, Tr. 2365–66. Mason cannot provide a chronology of any conversations with Patterson. (Mason, Tr. 2369).

281. At the time of Mason's talks with Patterson, NMDC did not yet actually exist. (Mason, Tr. 2367–68 (“At that point in time of the meeting of February 11, there was not a full entity. We were still in the research discovery and trying to put it together.”); Mason, Tr. 2368 (“Q. But back in January and February of 2013, there was no entity the New Mexico Dental Cooperative. A. That is correct.”)). Mason was merely in the research and development stage. (Mason, Tr. 2368).

282. Mason thought NMDC would be a dental cooperative, which he believes to be “a very different animal” from a buying group. (Mason, Tr. 2364–65 (“I take it that you have a view that a dental cooperative is a very different animal from a buying group, so am I correct? A. I do believe that. Q. Now, what you've been talking about is a dental cooperative, not a buying group. A. Correct.”)).

283. On February 4, 2013, NMDC's Brenton Mason sent a New Mexico industry-wide email blast to dental manufacturers setting a meeting for March 13, 2013 at Patterson's Albuquerque branch office. (CX0090 at 4). He wrote “We have partnered with Patterson.” (CX0090-04; Mason, Tr. 2340 (“At that point we felt we had worked out a deal with Patterson, so we were being – negotiating.”)). This is the e mail Cohen forwarded to Guggenheim.

284. Dr Mason cannot recall any specific conversation that supports the statement in CX0090 that NMDC “had partnered with Patterson.” (Mason, Tr. 2374–76).

285. No later than February 5, 2013 Mason and Patterson's branch manager had set up a meeting for February 11, 2013 with Regional Manager Dan Reinhardt. (CX3333 at 2, February 5, 2013 email from Belcheff (“I also want to confirm our dinner for Monday with Dan.”); Mason, Tr. 2379). This meeting was set up before Cohen's February 8, 2013 communication to Guggenheim.

286. On February 7, 2013 Scott Belcheff sent Mason an e mail that states: “We need to cancel this meeting.” (CX4090 at 2; Mason, Tr. 2380; *see also* RXD0215 at 1 (New Mexico Dental Cooperative Timeline)). CX4090 predates Cohen’s communication to Guggenheim.

287. Mason’s February 4 email caused “quite a stir.” (Mason, Tr. 2376 (“Q. You would agree with me that the e-mail you sent out on February 4 to a number of manufacturers and some distributors and others in New Mexico entitled New Mexico Dental Cooperative Purchasing created quite a stir. A. Yes, it did.”)).

288. Patterson’s sales people in New Mexico, Scott Belcheff and Dan Reinhardt, were getting calls from manufacturers confused by Mason’s February 4, 2013 email. (CX4090 at 1; Mason, Tr. 2386 (“Q. And you don’t have any reason to dispute that Mr. Belcheff and Mr. Reinhardt were getting calls from manufacturers. A. No.”); Mason, Tr. 2385 (“It is my understanding at this point that my previous e-mail confused the dental manufacturing world.”)).

289. Dr. Mason interpreted Patterson’s *February 7, 2013* email to indicate that Patterson was pulling back and walking back from its discussions with NMDC because of Mason’s February 4, 2013 email to manufacturers. (Mason, Tr. 2352 (“[T]here was some pullback by Scott Belcheff after I sent the big e-mail to the manufacturers.”); Mason, Tr. 2381 (“A. I -- not necessarily just this one paragraph, but yes, I did see the walk-back from what we originally were discussing. Q. And you just used the term “walk-back.” A. Yeah. Q. You saw this February 7 e-mail as being a walking back of what you had a feeling of what Patterson was willing to do. A. That’s correct.”)).

290. Patterson’s February 7, 2013 email, signaling to Mason that Patterson was walking back its arrangement with NMDC and stating that the March 13 meeting scheduled in Mason’s February 4 email had to be cancelled (CX4090 at 1; Mason, Tr. 2352; Mason, Tr. 2381), was sent

before Paul Guggenheim and Chuck Cohen's February 8, 2013 correspondence (CX0090 at 1; *see also* RXD0215 at 1 (New Mexico Dental Cooperative Timeline)).

291. Dr Mason, and his partners Dr Chapman and Dr Montoya, met with the local Patterson sales people, Katt and Belcheff, and Dan Reinhardt, the Region manager, on February 11, 2013 in Albuquerque, New Mexico. (Mason, Tr. 2386–87).

292. The only thing that Mason recalls of the March 11 meeting is that “we were given the message by Mr. Reinhardt that they were not going to be participating.” (Mason, Tr. 2387–88).

293. Mason testified that he had no reason to doubt this was Reinhardt's decision. (Mason, Tr. 2386).

294. After the February 11 meeting, Dr Mason's partner Dr. Montoya spoke with the Utah Dental Cooperative and Mason's group became the New Mexico branch of the Utah Dental Cooperative. (Mason, Tr. 2361–62).

295. Schein was the dental distributor working with the Utah Dental Cooperative. (Mason, Tr. 2362:4-8) Mason and the New Mexico branch did business with Schein through the Utah Dental Coop. (Mason, Tr. 2391).

296. There is no evidence showing that anyone at Patterson's corporate office (in Minnesota) gave any instruction to Patterson's New Mexico sales team regarding NMDC during the *weekend* between February 8 (the date of the Cohen/Guggenheim email (CX0090)) and February 11, 2013 (the date the sales team told NMDC it would not participate) (Mason, Tr. 2355). (Mason, Tr. 2388 (“Q. You have no reason to doubt that this was Mr. Reinhardt's decision, do you? A. No, I don't.”)).

297. There is insufficient evidence to find that Cohen's February 8, 2013 email had any impact on local Patterson management's decision with respect to the yet unformed "New Mexico dental Cooperative."

298. The February 8, 2013 communication from Cohen to Guggenheim, and Guggenheim's response, is not probative evidence of Patterson's participation in the conspiracy alleged.

b. The June 6, 2013 Email Regarding Atlantic Dental Cooperative Was Not Enforcement Of A Conspiracy.

299. On June 6, 2013, Guggenheim sent an email to Cohen concerning Atlantic Dental Care. (CX0062 at 2). He wrote that email on top of the February 8, 2013 email from Cohen. (CX0062 at 2).

300. Guggenheim's email asked, "Reflecting back on our conversation earlier this year, could you shed some light on your business agreement with Atlantic Dental Care? I understand they are a group of 55 dentists in and around Chesapeake Va. being led by a practice management consultant that your team has signed a supply agreement with. I'm wondering if your position on buying groups is still as you articulated back in February? Let me know your thoughts....Sometimes these things grow legs without our awareness." (CX0062 at 2).

301. Guggenheim sent the email to gain business intelligence. (CX0314 (Guggenheim, IHT at 299, 300-03)). He did this because he had been approached by the Patterson local branch manager, Devon Nease, at the end of May 2013 concerning Benco winning the ADC bid. (Guggenheim, Tr. 1622; CX0094 at 1). Guggenheim's purpose was to see what he "could learn in terms of field intelligence about what we might be missing here." (CX0314 (Guggenheim, IHT at 285)). Guggenheim was attempting to gain information that would better allow Nease to

compete for this business. (CX0314 (Guggenheim, IHT at 287) (“I wanted to see what intelligence I could find out to help Devon get back in there and compete.”).

302. Cohen responded to Guggenheim with an explanation of why ADC was a large group practice, not a buying group. (CX0062 at 1).

303. Guggenheim then responded. (CX3301 at 1) (“Sounds good Chuck. Just wanted to clarify where you guys stand.”).

304. Both Guggenheim and Cohen deny that this email constituted enforcement of an agreement not to work with buying groups. (Guggenheim, Tr. (“Q. And again, just so the record is crystal clear on this, by this e-mail, did you believe that you were enforcing any agreement between Patterson and Benco not to do business with buying groups? A. Absolutely not. Q. And by this e-mail, did you intend to enforce any such agreement? A. No.”); Cohen, Tr. 918–19 (“Q. Is there a secret code that you and Mr. Guggenheim worked out where one of these terms means enforce or enforcement? A. No. Q. Was there ever -- when you were a kid, did you ever use lemon juice to create invisible ink and then you put it over a candle or something and it appears? Did you ever do when you were a kid? A. Yes. Q. Is there -- was there lemon juice with a secret code that’s invisible to the rest of us that has ‘enforce’ or ‘enforcement’ in there? A. No. Q. I mean, you’d pretty much have to make that up if you were interpreting this to contain the word “enforce” or “enforcement,” wouldn’t you, sir? A. The answer is no, and Paul ran at that point a much larger operation than Benco did. I’m not in the business of telling him how to run his business. It would not be something I would say even in jest. Q. All right. And just so we’re clear, you’d pretty much have to make it up to think that this e-mail thread between you and Mr. Guggenheim somehow had the word “enforce” or “enforcement” in it, wouldn’t you? A. I would think so.”)).

305. Guggenheim testified that his June 2013 email was not related to any buying group conspiracy. (Guggenheim, Tr. 1696 (“Q. And that’s it, you asked two questions; is that right? A. Right. Q. Did you tell him about your bid or not to bid or Atlantic Dental Care? A. I did not. Q. Did you commit to him about anything you and your company were going to do with regard to Atlantic Dental Care going forward? A. Never. Q. Did you commit to him anything you or Patterson Dental were going to do with regard to any buying group going forward? A. Absolutely not.”)).

306. Guggenheim did not change Patterson’s business strategy following the June 2013 email exchange with Cohen. (Guggenheim, Tr. 1697 (“Q. After that, did you change the company’s strategy? A. No.”)).

307. And Patterson never changed its strategy with respect to ADC. (Nease, Dep. at 68–69 (“Q. When you learned that Benco responded to and won the bid proposal, were you concerned about losing sales to Benco? A. Not a lot. Q. Why not? A. We felt we had really good relationships with our offices, and that our plan moving forward was to, you know, continue doing what we’ve always done, and in the Chesapeake area, you know, we had a pretty strong following.”)).

308. Complaint Counsel alleges that, due to the June 2013 email between Guggenheim and Cohen, Patterson “ultimately competed for ADC’s business despite previously notifying ADC that it would not submit a bid.” Compl. ¶ 50.

309. But there is no evidence in the record that the ADC business was available for bid in June 2013, because Benco had *already won* ADC’s business in *May* 2013. (CX0094 at 1; *see also* RXD0214 at 1 (Atlantic Dental Care Timeline)).

310. Indeed, Benco's having *already won* ADC's business was the reason for Guggenheim's June 2013 email. (CX0094 at 1; *see also* RXD0214 at 1 (Atlantic Dental Care Timeline)).

311. Also, Patterson had already decided not to bid for the ADC business months earlier, in February 2013, and instead continued to compete for the business of ADC's individual members as Patterson always had. (CX0092 at 1 (February 27, 2013 email from Patterson's Misiak to Guggenheim discussing "stay[ing] out of" the Atlantic Dental Care RFP process)); CX8002 (Nease, Dep. at 51) ("[ADC] announced to the practices that there had been a bid process and that the successful company had been awarded the business, but we didn't necessarily lose the business. We kept doing business with . . . most of our customers."); *see also* RXD0214 at 1 (Atlantic Dental Care Timeline)).

312. Schein had bid against Benco for ADC's business in April 2013, well before June 2013. (CX2021 at 1 (April 8, 2013 Schein bid for ADC business); *see also* RXD0214 at 1 (Atlantic Dental Care Timeline)).

313. Cohen and Sullivan had some communication concerning ADC in March 2013. (Cohen, Tr. 543-546; Sullivan, Tr. 3945-3946, 3956-3958; CX0058 at 1 (Cohen March 25, 2013 calendar entry to call Sullivan); CX6027 at 27 (Cohen's phone records showing text messages between Cohen and Sullivan in March 2013 and a call between Cohen and Sullivan on March 25, 2013 lasting for 8 minutes and 35 seconds)). There is no evidence in the record that Patterson had any knowledge of those communications or of their substance.

314. The record shows Patterson competed at the individual member level for the business of members of ADC. *See supra* ¶ 311. This was Patterson's approach in February 2013

at the time of Misiak's correspondence with Fruehauf, in the period up to June 6, 2013 and after June 6, 2013.

c. Patterson's January 2014 Call And Email Regarding The 2014 TDA Meeting Was About A Decision Patterson Had Already Made Having Nothing To Do With Buying Groups.

315. Patterson's decision not to attend the TDA meeting was based upon the TDA becoming a competitor through the TDA Perks Supplies program which as announced in October 2013 and by disparaging Patterson for alleged price gouging. (Rogan, Tr. 3563-64 ("Patterson made the decision not to attend for several reasons, and one was the competition to Patterson. So we were supporting our competitor at that point, and that doesn't make any business sense, but there were several other reasons. They wrote some egregious articles about distribution that were grossly inaccurate to convince their members that we were charging more than appropriate for those services that we provide, and I can't even remember the other reasons, but there were several reasons. But one of them, the one you're asking, so the answer is, yes, that was one of many reasons."); CX0316 (Misiak, IHT at 300 ("Q. Following the creation of the TDA buying group, Patterson decided to withdraw from the TDA annual trade show; is that right? A. Right. Q. And what's your understanding of why Patterson withdrew? A. Well, I think based on the information that I've seen both from the TDA Perks program and heard from Clint Edens, my regional president, the TDA decided to compete with Patterson, made some slanderous comments about Patterson and the pricing structures, and we had a growing concern about supporting a competitor and making strategic investments, which is what a trade show booth is."))).

316. Complaint Counsel does not allege that Patterson and Schein and/or Benco boycotted the 2014 TDA Meeting. (Kahn, Tr. 52 ("We do not allege a boycott of the trade show."); *see also* RXD0213 at 1).

317. On January 6, 2014, Patterson's David Misiak had a telephone conversation with Schein's Dave Steck in which Misiak informed Steck that Patterson would not be attending the 2014 TDA meeting. (Steck, Tr. 3822) ("[T]he only discussion you ever had with anyone at Patterson about the TDA meeting was that January 6th phone call with Mr. Misiak, correct? A. Correct. Q. And the sole topic of that call with Mr. Misiak was attendance at the TDA annual meeting. A. Yes. Q. Okay. And in that call, Mr. Misiak told you that Patterson had already told the TDA that Patterson would not be attending the 2014 annual meeting. A. He did.")).

318. Patterson had already decided, about two weeks before Misiak's conversation with Steck, not to attend the TDA meeting. (CX3378 at 4).

319. Misiak did not ask Schein to pull out of the TDA meeting. (Steck, Tr. 3822–23 ("In that call, Mr. Misiak did not encourage you or Schein to take any action concerning the TDA or the meeting of the TDA. A. He did not.")).

320. Steck responded to Misiak merely to be polite. (Steck, Tr. 3823 ("Okay. So you had the call with Mr. Misiak on January 6th, and then several weeks later, I understand you wanted to get back to Mr. Misiak. A. Yeah. I felt it was a matter of courtesy.")).

321. At the time of the January 6, 2013 call, Schein had not decided whether it would attend the 2014 TDA meeting. (Steck, Tr. 3822–23 ("Q. And as you testified yesterday, as of the time of that call, Schein had not made the decision as to what it was going to do with respect to attendance. A. We had not.")).

322. Steck emailed Misiak several weeks later to let him know that he would call him back. (Steck, Tr. 3828–29) ("On January 21st at 5:23 p.m., you write back to Mr. Misiak, and you say, 'I'll be calling you to let you know about our decision on the matter we recently discussed in the next couple of days.' Right? A. That's what it says, yes. Q. You don't provide any more

information than what I just read in that email, correct? A. No.”); *see also* (CX0112 at 1) (“I’ll be calling you to let you know about our decision on the matter we recently discussed in the next couple of days.”).

323. Prior to sending the email contained in CX0112 to Misiak, Steck inquired of Schein’s Joe Cavaretta what Schein’s plans were. (Steck, Tr. 2823, 2825, 2828). Cavaretta told Steck that Schein would have a meeting with the TDA “at the TDA most likely the day before or the first day...If they don’t stop this will be our last year attending the TDA.” (Steck, Tr. 3826–28; CX0205 at 1). Steck did not share any of this knowledge concerning Schein’s planned approach to the TDA with Misiak in his January 21 email or at any point afterwards. (Steck, Tr. 3828–29; CX0112).

324. Steck testified that he never communicated with Misiak about TDA attendance after sending that email. (Steck, Tr. 3828–29 (“Q. So you don’t tell Mr. Steck -- Mr. Misiak what you had learned from Mr. Cavaretta about Schein planning to have a meeting with the TDA at the annual meeting. A. I did not. Q. And you don’t tell Mr. Misiak that it was Schein’s intention to attend the 2014 annual meeting to have that discussion with the TDA, but that if it didn’t go well, that Schein would not attend in the future? A. I did not.... Q. And you never wrote to Mr. Misiak again concerning Schein’s plans with the TDA, did you? A. No. Q. And you never had a conversation with Mr. Misiak again about Schein’s plans with respect to the 2014 TDA annual meeting. A. I did not. Q. And you never had a discussion or any communication with anybody at Patterson -- A. No. Q. -- about -- sorry, I need to ask the whole question. You never had any discussion or conversation with anyone at Patterson about Schein’s plans for the 2014 TDA annual meeting. A. No, I did not.”)).

325. Misiak likewise never had a follow-up conversation with Steck. (Misiak, Tr. 1509–10 (“Q. Did Mr. Steck ever follow up with you after you received this e-mail? A. Not to my recollection. Q. Then your e-mail exchange with Mr. Rogan, Mr. Rogan says, ‘That sucks. You should call him. ‘Thought I could trust you’ type of conversation.’ Do you see that? A. I do. Q. Did you ever call Mr. Steck and have a ‘thought I could trust you’ type of conversation? A. I did not.”)).

326. Moreover, Steck did not make the decision as to whether Schein would attend the 2014 TDA meeting. (Cavaretta, Tr. 5617) (“Q. All right. Was Dave Steck involved in any way regarding whether or not Schein was going to attend the TDA trade show in 2014? A. No.”). Cavaretta made the decision that Schein would not attend and testified that the decision had nothing to do with what Patterson or Benco was doing. (Cavaretta, Tr. 5617) (“Q. Did your discussions or your decisions about whether or not you would go to the TDA trade show in 2014 have anything to do with what your competitors were going to do? A. No.”)).

327. Cavaretta also testified that he had no discussions with Patterson or Benco about the TDA meeting or the TDA Perks Supplies program and that he “did not care one bit” about what they were doing. (Cavaretta, Tr. 5618) (“Q. Did you ever have discussions with any of your competitors about the TDA trade show or the TDA Perks Supplies program? A. No, I did not. Q. Did you have any interest in what they were doing? A. I didn’t care one bit.”)).

328. Misiak and Steck’s communications on January 6 and January 24 had nothing to do with “buying groups.” (Steck, Tr. 3380 (“Q. From your perspective, did the call with Mr. Misiak have anything to do with the general topic of buying groups? A. No.”)).

329. Misiak and Steck’s January 6 and 24 communications do not support the claim that Patterson entered into a conspiracy with Schein and or Benco to not deal with buying groups.

330. No other communications in the record between Patterson and Schein are alleged to concern buying groups.

331. There is no evidence in the record that Patterson had knowledge of any communications between Benco and Schein concerning buying groups. (Sullivan, Tr. 4292 (“Q. See, here’s the first thing I wrote here [on RXD0225], “Documents introduced by the Government that show that Tim Sullivan and/or Schein communicated with Patterson about buying groups.” Do you see that? A. I see it. Q. But it’s blank. A. It is. Q. There were no documents introduced during the Government’s case in chief, during your exam, three hours or so, not a single document showing that you or anyone at Schein ever communicated with anyone at Patterson about buying groups, right? A. Correct. Q. Then I had page 2 of my demonstrative. Can we switch to that? See, this one was all the questions and answers. I had my reading glasses there, I was ready to take notes, but they didn’t ask you a single question and you didn’t give a single answer suggesting that you or anyone at Schein ever communicated with anyone at Patterson about buying groups, right? A. Correct. . . . Q. And as a result, that exhibit that I prepared while I was sitting on the edge of my seat yesterday, waiting for all the evidence to come pouring in, was blank, right? An absence of evidence, correct? A. Correct.”); *see also* RXD0225 at 1-2).

332. The absence of communications between Schein and Patterson regarding buying groups is strong evidence that Patterson did not enter into a conspiracy with its chief rival not to sell to buying groups.

VI. Other Internal Communications Involving Patterson Are Either Irrelevant Or Been Explained By Uncontested Witness Testimony, Or Both.

333. Aside from documents referenced in Part V, *supra*, Complaint Counsel contends that the following documents support its allegation that Patterson participated in the conspiracy

alleged in the Complaint: CX0012, CX0011, CX0057, CX1278, CX3300, CX3332, CX0106, CX0093, CX0164, CX0179, CX2106, CX2220.

CX0012

334. CX0012 is a May 18–19, 2015 email chain between Chuck Cohen and Patrick Ryan regarding Dentistry Unchained, in which Ryan wrote:

The best part about calling these guys is I already KNOW that Patterson and Schein have said NO. So I get something like this.....”We really wanted to give you this opportunity first” or “We can really help Benco grow” It amuses me to a certain point. (CX0012 at 1).

335. Complaint Counsel cited this email in Paragraph 63 of the Complaint as a “contemporaneous document[]” “confirming the existence of a conscious commitment to a common scheme.” (Compl. ¶¶ 61, 63).

336. Complaint Counsel has asserted that the alleged conspiracy in this case ended in April 2015, when, due to Benco’s April 9, 2015 settlement agreement with the State of Texas, the alleged conspiracy became “difficult, if not impossible, to maintain.” (Kahn, Tr. 19; *see also* RXD0205 at 1 (“The Alleged Conspiracy Ended in April 2015”)).

337. CX0012 is dated more than a month after the alleged April 9, 2015 end of the conspiracy. (Kahn, Tr. 19).

338. Dentistry Unchained *did not exist* before April 2015. (Marshall, Tr. 3273–74) (“Do you see this is a history of Dentistry Unchained? I pulled it off the web. It didn’t take me very long to find it. And if we go to the next page, we see right here, about a third of the way down, “The organization started in April 2015.” Do you see that? A. I see that.); *see also* (RXD0212 at 1) (Dentistry Unchained History Website).

339. Ryan testified that when he wrote, “I already KNOW that Patterson and Schein have said NO,” he meant that, because Benco is smaller than Patterson and Schein, it would only

be pitched after Patterson and Schein had passed. (Ryan, Tr. 1209–10 (“Q. So what was the basis for your writing that? A. Just from my experience, we usually got approached after, after Schein and Patterson.”); (CX8037) (Ryan, Dep. at 315 (“[I]f they’re coming to us, the most likely scenario is they’ve already been to Schein and Patterson.”); (CX0304) (Ryan, IHT at 170–71 (“Q: How did you know that Patterson and Schein had said no to this buying group? A. I didn’t. It’s actually kind of a joke. It -- in our -- in my experience, typically as the third-largest player, we get approached third. And it’s usually -- as I go on to say there, it usually starts with a -- with a -- you know, “we can really help Benco grow” kind of thing. Q. And why do you think it is that you get approached third? A. Well, I think our two competitors are larger, and I think they would get the call first. Q. Is the -- I guess I’m trying to read between the lines a little bit, but are you saying that this buying group is only coming to you because Schein and Patterson had turned them down? A. That’s the joke, yes.”)).

340. No witness testified contrary to Patrick Ryan regarding CX0012.

341. Ryan’s testimony about how “it usually starts with a . . . ‘we can really help Benco grow’ kind of thing,” (CX0304 (Ryan, IHT at 170–71)), is consistent with Ryan’s statement in the email that he expected to hear something like “We really wanted to give you this opportunity *first*.” (Ryan, Tr. 1210 (“I would hear some variation of, you know, we wanted to give you guys this opportunity first and we can really help Benco grow and stuff like that, and in my experience, it’s -- that’s usually a sign that others have been talked to first.”)).

342. When he wrote the email, Ryan had “no idea” what Patterson and Schein had done with respect to Dentistry Unchained. (Ryan, Tr. 1255–56 (“Q. And then you go on to say, “Neither Schein nor Patterson do either.” Do you see that? A. Yes. Q. You were just speculating, weren’t you, sir? A. Yes.”)).

343. There is no evidence in the record that Benco and Patterson communicated about Dentistry Unchained.

344. There is no evidence in the record that Patterson had interacted with Dentistry Unchained before Ryan's May 19, 2015 email (CX0012).

345. There is no evidence in the record that Patterson had declined to work with Dentistry Unchained before Ryan's May 19, 2015 email (CX0012).

346. Dentistry Unchained first approached Patterson at the end of July 2015. (CX3006 at 1).

347. The first record evidence of Patterson interacting with Dentistry Unchained is from Monday or Tuesday, July 27 or 28, 2015—more than two months after Ryan's email. (CX3006 at 1 ("I had a 40 minute phone call with . . . Dentistry Unchained *on Monday, July 28.*")).⁶

348. Late-July 2015 is more than two months after the alleged April 9, 2015 end of the alleged conspiracy. (Kahn, Tr. 19).

349. Because Patterson's first communications with Dentistry Unchained did not occur until more than two months after the alleged conspiracy ended, and because Dentistry Unchained did not exist during the alleged conspiracy period, there is no evidence that Patterson may have sold supplies or equipment to the Dentistry Unchained but for the alleged conspiracy.

350. Patterson declined to work with Dentistry Unchained after its late-July 2015 approach, writing in an internal email that a "GPO arrangement" can be a "slippery slope." (CX3006 at 1).

351. Then, on January 26, 2016, a Patterson territory manager wrote in an internal, Patterson email that he had met with a Dentistry Unchained representative, and that he had "again

⁶ July 28, 2015, was a Tuesday.

explained to her very nicely that *we are not going to participate in a GPO-type program at this point.*” (CX0137 at 1 (emphasis added)).

352. Patterson’s decision not to work with Dentistry Unchained is consistent with its case by case assessment of buying groups (*see supra* ¶ 130), and with its historic skepticism concerning the value of dealing with buying groups (*see supra* ¶ 118).

353. CX0012 does not support Patterson’s participation in the alleged conspiracy.

CX0011

354. CX0011 is an email chain that includes a July 13, 2015 email from Patrick Ryan to other Benco employees in which he responded to an email about a nascent “buying group” by stating, in relevant part

We don’t allow LG pricing unless there is common ownership. Neither Schein nor Patterson do either. (CX0011 at 3).

355. Complaint Counsel cited this email in Paragraph 64 of the Complaint as a “contemporaneous document[.]” “confirming the existence of a conscious commitment to a common scheme.” (Compl. ¶¶ 61, 64).

356. CX0011 is dated more than three months after the alleged conspiracy ended on April 9, 2015. (Kahn, Tr. 19).

357. Ryan testified that he was speculating based on his market experience when he wrote “Neither Schein nor Patterson do either,” and he had “no idea” what their policies were. (Ryan, Tr. 1127–28 (“Q. And there, you’re telling the sales rep that Schein and Patterson don’t allow group pricing for buying groups either? A. In my experience. That’s been my -- that was my experience at the time.”); Ryan, Tr. 1114 (“ “[T]heir positions’ refers to Tim Sullivan’s position and Paul Guggenheim’s position? A. I had no knowledge of what their actual positions were. Q. What did you mean when you wrote ‘their positions’? A. Only that what I could see from the

marketplace that it didn't appear that anyone was working with buying groups."); (CX8037 (Ryan, Dep. at 325–26 (“Q. And then you said: ‘Neither Schein nor Patterson do either.’ Do you see that? A. Yes. Q. What’s that referring to? A. It -- it refers to what I saw sometimes in the marketplace, that Schein and Patterson turned GPOs away, like Synergy.”)); CX0304 (Ryan, Dep. at 165–66 (“Q. Okay. And how did you know that Schein and Patterson also do not allow LG pricing unless there is common ownership? A. I don’t know that as a fact. I think what I was referring to there is just what we had seen in the marketplace. Q. And what -- what were you seeing in the marketplace? A. That I had -- I hadn’t personally seen a lot of activity in the GPO market with Schein and Patterson.”))).

358. No witness testified contrary to Patrick Ryan about CX0011.

359. The only example Ryan knew of Patterson’s practices was Patterson turning down Synergy Dental Partners in 2011. (CX8037) (Ryan, Dep. at 326 (“Q. Any other buying groups that you’re aware of Schein and Patterson turning away? A. Not that I’m aware of. I know Synergy, ‘cause they told me.”)); (CX1133 at 1 (Ryan Aug. 18, 2011 email regarding Synergy, stating “BTW, this group approached every full service dealer, including us . . . and were turned down”)).

360. Patterson is not alleged to have joined the alleged conspiracy until early 2013. (RX2958 at 10 (Complaint Counsel’s Supplemental Response to Patterson’s Interrogatory Four) (“Patterson joined the agreement in February 2013.”)).

361. Thus, when Ryan wrote in July 2015 in CX0011, more than three months *after* the alleged conspiracy ceased, he was writing of Patterson’s practices from before August 18, 2011 (Kahn, Tr. 19), more than a year *before* Patterson allegedly joined the alleged Benco-Schein

conspiracy (RX2958 at 10 (Complaint Counsel’s Supplemental Response to Patterson’s Interrogatory Four) (“Patterson joined the agreement in February 2013.”)).

362. Complaint Counsel did not take testimony from any Synergy employee in this case.

363. CX0011 does not support Patterson’s participation in the alleged conspiracy.

364. Rather, CX0011 is evidence *against* the existence of a conspiracy, in that it shows Ryan was unaware of the alleged conspiracy’s end in April 2015. (Kahn, Tr. 19; *see also* RXD0205 at 1 (“The Alleged Conspiracy Ended in April 2015”)).

CX0057

365. CX0057 is a collection of text messages taken from Chuck Cohen’s cell phone.

366. The only messages from CX0057 that Complaint Counsel cited at trial as relating to Patterson are a pair of messages between Benco’s Don Taylor and Benco’s Chuck Cohen. (Kahn, Tr. 46).

367. Taylor wrote Cohen the following.

[REDACTED]
(CX0057 at 6).

Cohen responded to Taylor with the following.

[REDACTED]
(CX0057 at 6).

368. There is no evidence in the record that any Patterson employee participated in or viewed this exchange.

369. Cohen testified that his statement, “Don’t want to call because it might be construed as price fixing,” meant that he had been concerned that a phone call with a competitor regarding a customer, with no written record of what was said, could have been interpreted inappropriately. (Cohen, Tr. 539–540 (“I’m concerned that a call might be taken out of context or might be

interpreted inappropriately, and I'm always concerned about price-fixing."); (CX0301 (Cohen, IHT at 255–56 (“A. I think I mean what it says. I don’t want to call because someone might construe it as price-fixing, and I don’t do price-fixing. Q. Someone might construe what as price-fixing? A. A conversation about customer relationships, things like that, calls get taken out of context. That’s not -- I mean, I was pretty clear in my e-mail to Paul about what I was letting him know about, and I didn’t feel the need to call, nor did I feel that I was going to get any response, nor do I need a response.”))).

370. No fact witness testified contrary to Chuck Cohen about CX0057.

371. Complaint Counsel did not take testimony from Don Taylor in this case. Thus, there is no evidence in the record as to Taylor’s intent in sending his initial message to Cohen, or as to Taylor’s understanding of Cohen’s response to him.

372. CX0057 does not support Patterson’s participation in the alleged conspiracy.

CX1278

373. CX1278 is a collection of text messages collected from the cell phone of Benco’s Ron Fernandez.

374. Complaint Counsel did not reference CX1278 at all during trial.

375. Ron Fernandez was not deposed in this case.

376. Ron Fernandez did not testify at trial.

377. On December 11, 2013, Benco’s Ron Fernandez texted Benco’s Barrett Spencer,

I have been talking to the directors of Schein and Patterson. We are going to be taking a stand together against them. (CX1278 at 5).

378. CX1278 does not reference “buying groups.”

379. CX1278 relates to attendance at the 2014 TDA annual meeting. (CX1278 at 5). Complaint Counsel does not allege an illegal boycott of the TDA as part of its case. (Kahn, Tr. 52 (“We do not allege a boycott of the trade show.”); *see also* RXD0213 at 1).

380. CX1278 does not support Patterson’s participation in the alleged conspiracy.

CX3300, CX3332

381. CX3300 is a July 21, 2014 email exchange between Benco’s Mike Wade and Patterson’s Arizona Branch Manager, Chad Bushman, initiated by Wade, regarding the Arizona Dental Association (or AzDA) (CX3300 at 1–2). CX3332 is the same July 21, 2014 email exchange as CX3300, except that it includes Wade’s reply to Bushman’s response to Wade’s original email. (CX3332 at 1–2).

382. Complaint Counsel did not reference CX3300 or CX3332 during trial, did not depose Wade or Bushman, and neither Wade nor Bushman testified at trial.

383. Complaint Counsel did not present any evidence about the AzDA during trial.

384. CX3300 and CX3332 do not reference “buying groups” but only address attendance at the 2015 AzDA trade show.

385. There is no evidence of any communications between Patterson and Schein concerning attendance at the 2015 AzDA trade show.

386. CX3300 and CX3332 do not support Patterson’s participation in the alleged conspiracy.

CX0106

387. CX0106 is an August 4, 2013 email from Tim Rogan responding to Neal McFadden, who had asked:

I know in the past we have said no

Is it worth it to explore GPOBut???????? . . . (CX0106 at 1).

388. Rogan responded to McFadden:

We don't need GPO's in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry. (CX0106 at 1).

389. No Benco and Schein employees are included in either email.

390. Rogan's statement "We don't need GPOs in the dental business," was his personal opinion at the time based on the fact that GPOs "don't provide any value, they don't help, they don't do anything. They don't provide access to customers. . . . [A]ll they want is a better deal, but they don't provide any value to the customer" (Rogan, Tr. 3572-73).

391. Rogan had developed and held this opinion on his own throughout his entire career at Patterson, without regard for any communications between Chuck Cohen and Paul Guggenheim. (Rogan, Tr. 3573 ("Q. Did you form that opinion because Mr. Guggenheim forwarded an email to you from Mr. Cohen earlier that summer? A. No.")).

392. Rogan's testimony about the origins of his opinions about buying groups is consistent with his testimony in his investigational hearing. (CX0317 (Rogan, IHT at 238 ("So we don't need the buying groups in the dental business because all they do is aggregate -- try to aggregate to try to get a better deal, but not helping out any of the value. So they don't bring any value to the client, so -- which means they don't bring new value to us. We don't -- we don't need them. That's all I was trying to make a point to him on.)))).

393. The entity at issue in CX0106 was a medical GPO, not a dental one. (CX8017 (Rogan, Dep. at 68 ("Well, when I look at -- when I read this, this actually now is talking about Patterson Medical, it's talking about the University of Miami, it's talking about the Western North Carolina health network, not dental network, and they are under the GPO premier, so that's an actual medical GPO.)))).

394. A medical GPO aggregates product, warehouses product, and ships product to the end user. (CX8017 (Rogan, Dep. at 68 (“[W]e’re talking about a true group purchasing organization from the medical side, which would be aggregator of product, would warehouse the product, would ship the product to the end user.”))).

395. Patterson already has those capabilities. (CX8017 (Rogan, Dep. at 68–69 (“That’s something that Patterson does. . . . We don’t need somebody to come in and aggregate our product and warehouse it when we already do a very good job at it.”))).

396. Thus, Rogan said that GPOs were not needed in the dental business. (CX8017 (Rogan, Dep. at 69 (“And so this e-mail is referencing Neal asking about it again and I’m saying we -- you know, he said in the past we’ve said no, in the past we’ve said no, and that’s all I’m clarifying to him, clearly saying we don’t need -- we don’t need these people. They don’t help add any value in the dental industry.”))).

397. As to Rogan’s statement “Schein, Benco, and Patterson have always said no,” Rogan testified at trial that it was his opinion, not a fact. (Rogan, Tr. 3573–74). Rogan further testified that his opinion was not based on any email from Chuck Cohen forwarded by Paul Guggenheim, but from his years in the dental industry. (Rogan, Tr. 3574).

398. Rogan’s statement “Schein, Benco, and Patterson have always said no,” was based entirely on Rogan’s experience competing “head to head every day.” (CX8017 (Rogan, Dep. at 73 (“Q. Is there any other basis for your knowledge about whether Schein saw value in the GPO space? A. No not -- only from competing with them from head to head. Q. Same question for Benco. Is there any basis for your statement that Benco had always said no? A. No, just competing head to head with them every day.”)); (CX0317 (Rogan, IHT at 239 (“I have no idea if Schein or Benco have policies. What I’m saying here is that to the best of my knowledge they hadn’t worked

with any buying groups, so there's no reason for us to work with a buying group when we don't think it's a good idea."))).

399. Regarding the statement, "I believe it is our duty to uphold this and protect this great industry," Rogan really did believe that the dental industry was a good industry and that Patterson's role was not simply to sell cheap dental supplies, but to supply broader value to its customers. (Rogan, Tr. 3574–75 ("Well, it's a good industry where everybody -- the dentist makes a good living, the distributor makes a good living, and the manufacturers make a good living, and we are a value -- you know, a value company. So Neal had a tendency to want to chase after anything that came his way, any consumer that wanted to buy dental supplies, and you can't be the -- provide all the value that Patterson does and then -- but sell cheap dental supplies. You have got to figure out what you're going to do. So it was basically me leaning on a colleague saying that you have got to remember that you work for, you know, the Nordstrom's of the dental industry. We provide the value, and you should uphold that as a senior leader of the organization. . . . Q. Was that secret code that you put in this email to reference some kind of conspiracy that Patterson had with Benco or Schein? A. Absolutely not.")).

400. Neal McFadden confirmed Rogan's testimony about the dental industry really being great. (McFadden, Tr. 2710–11 ("Q. What did you understand this e-mail to mean when you received it? A. That Tim Rogan has a big love for Patterson Dental, he loves the dental industry, it's the only job he's ever had, and he's very emotional about upholding and protecting the great industry, so I don't know why he said what he said, but I believe I interpret the tone to be Tim's emotion.")). McFadden offered the same testimony at his investigational hearing. (CX0315 (McFadden, IHT at 175 ("A. He has passion and love for Patterson Dental. Q. Why

do you understand him to mean that he has love and passion for Patterson Dental by that statement?
A. Because he's only worked for Patterson Dental in this great industry."))).

401. Rogan testified that as to the word "our," in "our duty," he was referring not to Patterson but to Neil McFadden's role as a senior Patterson employee, responsible for maintaining Patterson's value proposition. (CX0317 (McFadden, IHT at 246 ("I'm writing this to Neil, so reminding him he's a leader of the organization, and he needs to remember talking about value at a fair price is what we do. So I'm trying to remind him that it's his duty to do that."))).

402. No witness testified contrary to Tim Rogan or Neal McFadden about CX0106.

403. CX0106 does not support Patterson's participation in the alleged conspiracy.

CX0093

404. CX0093 is a February 27, 2013 email exchange between Anthony Fruehauf, then Patterson's Mid-Atlantic Regional Manager, and his then-boss, David Misiak, about Atlantic Dental Care ("ADC"). (CX8013 (Fruehauf, Dep. at 16)).

405. Complaint Counsel has characterized CX0093 as an instruction from Misiak to his sales team not to work with ADC. (Compl. ¶ 43).

406. In CX0093, Fruehauf emailed Misiak a request for proposal from a "GPO in Chesapeake," Atlantic Dental Care (or ADC). (CX0093 at 1). Fruehauf relayed concerns he had discussed with Devon Nease, Patterson's Chesapeake Manager (and Fruehauf's direct report), about the precedent of discounting to groups like the "GPO in Chesapeake," and sought Misiak's guidance. (CX0093 at 1 ("I have had numerous discussions with Devon [Nease] about our position and what it could mean if we set a precedent of offering lower prices to groups such as this. . . . If you can think of any guidance I can offer it would be appreciated."); (CX8002 (Nease, Dep. at 16, 20 (Nease, Patterson's Chesapeake Manager, reported to Fruehauf))).

407. When Fruehauf sent this email, he had been concerned about the risk that, by working with ADC, Patterson would endanger its relationships with its other customers in the region. (CX8002 (Nease, Dep. at 103–04) (“Q. The next point down says, “Potential new GPO losses.” What is he referring to there? A. He’s trying to figure out if there will be additional Atlantic Dental Care offices, causing a loss of business to the Chesapeake branch.”))).

408. At the time he wrote Misiak, Fruehauf’s *existing* position had *already* been that he would “steer clear” of ADC, and Misiak had simply “agreed with it.” (CX8013 (Fruehauf, Dep. at 114 (“As I discussed to him my position, I think he agreed with it, which was, you know, I have a greater risk with the other 250, 300 offices in Chesapeake if I do bid on it.”))).

409. No witness testified contrary to Fruehauf or Nease regarding the meaning of CX0093.

410. Misiak’s response, that “when I get these calls directly I politely say that I appreciate the opportunity but currently we do [not] participate with group purchasing organizations,” is similar to an email he sent in March of 2012. (CX0159 at 1). There, Patterson’s Neal McFadden emailed Misiak reporting of a new GPO in Florida and writing “I get these more often than I like. This stuff scares me. I’m gonna tell him thanks but no thanks. Your thoughts?” (CX0159 at 1). Misiak responded, “Your response is right.” (CX0159 at 1).

411. Patterson is not alleged to have been in a conspiracy with Schein and Benco not to work with “buying groups” in 2012. (Kahn, Tr. 19 (claiming that the alleged conspiracy ended in April 2015); *see also* RXD0205 at 1 (“The Alleged Conspiracy Ended in April 2015”)).

412. Misiak’s statement, “Adding value is the absolute key” (CX0093 at 1), is consistent with Patterson trial witnesses who testified that their reticence towards certain “buying groups” was based on a concern of no added value in exchange for a discount. (*See, e.g.*, Misiak, Tr. 1462

(“What would our value proposition be because we didn’t want it to only be price.”); Guggenheim, Tr. 1715–16 (“We just didn’t see that they were adding value”); Rogan, Tr. 3468 (“[H]istorically, the way we understood them is they bring no value to us. They can’t aggregate their spend, and they just try and lower our price, but they still want the white-glove service. It doesn’t make business sense for how our model is set up.”)).

413. At the end of his response to Fruehauf, Misiak wrote, “Confidential and not for discussion . . .our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me.” (CX0093 at 1).

414. The point of this statement was to collect market intelligence about competitors’ practices. (Misiak, Tr. 1363 (“Well, to reference something that was said recently, part of my role as president of the company is to understand the business environment -- as president of the dental business, I think it was important for me to understand the market, the climate, the environment, the customers and the competition, so I’m asking, if they heard something, to let me know.”); Misiak, Tr. 1364–65 (“A. I’m asking, if you hear differently and have specific proof, to send that to me. Q. Did you want Mr. Fruehauf to tell you if he heard that Schein or Benco were selling to GPOs? A. I’m referencing our two largest competitors and then, if he has specific proof, to send that, so I would say yes.”)).

415. No witness testified contrary to Misiak regarding CX0093.

416. There is no evidence in the record that Misiak’s statement to Fruehauf concerning ADC was based in any manner upon Chuck Cohen’s communications to Guggenheim. (CX0090 at 1).

417. CX0093 does not support Patterson’s participation in the alleged conspiracy.

CX0164

418. CX0164 includes a series of text messages from Patterson's Neal McFadden to a former Patterson employee, David McIntosh. (McFadden, Tr. 2736).

419. Among these is one message, dated June 12, 2014, in which McFadden writes McIntosh:

Dave, yes I did get a place in St. Paul Minnesota.

I will check with my calendar and get back with you.

I just want to get some clarity. Is choice one a GPO or are you all actually acquiring practices? The reason I'm asking is we've signed an agreement that we won't work with GPO's. Just wondering thank you (CX0164 at 2).

420. The record contains no agreement signed by Patterson not to work with GPOs.

421. Complaint Counsel is not alleging that Patterson signed a written agreement not to work with GPOs. (Kahn, Tr. 48).

422. CX0164 does not mention Schein or Benco.

423. David McIntosh was a former Patterson employee who McFadden had terminated McIntosh from Patterson in late 2012 or early 2013. (McFadden, Tr. 2737; CX0315 (McFadden, IHT at 235)).

424. After his termination from Patterson, McIntosh "bounced around" doing "odd jobs" within the dental industry. (McFadden, Tr. 2736; CX0315 (McFadden, IHT at 236)).

425. In June 2014, McIntosh reached out to McFadden wanting him to do business with an entity called Choice One. (McFadden, Tr. 2737, 2741; CX0315 (McFadden, IHT at 236). In June 2014, McFadden thought Choice One might be a GPO. (McFadden, Tr. 2742).

426. McFadden lied in his response to McIntosh in claiming there was "a signed agreement not to work with GPOs." (McFadden, Tr. 2737-38 ("I'll have to say, just like I've said in my deposition, this was not my finest hour right here. I was not being honest with Dave, that

we do not have a signed agreement. There was never a signed agreement.”); CX8004 (McFadden, Dep. at 110–11 (Q. And I believe your testimony was that you were embarrassed but you were lying to Mr. McIntosh when you wrote this; is that correct? A. That is true. Q. And is that still your testimony? A. That is. Q. Which part of the message is a lie? A. The fact that we have a signed agreement.”)). McFadden further explain this at his investigational hearing. (CX0315 (McFadden, IHT at 238–39 (“A. I’m embarrassed to say that I lied to Dave here. If I could go back and choose my words differently, I would, but I did it with the intent of shutting him down, of getting clarity around if this is not a bona fide DSO, don’t bother me with it because yes, we have a verbal agreement. Paul was very specific that at this particular time that I was supposed to only focus on dental service organizations and not waste my time and be distracted with other things that came my way; buying groups, study clubs, and things like that. So I’m embarrassed to say that I wasn’t truthful with Dave, but Dave will wear you out.”))).

427. McFadden did not care for McIntosh and saw him as a “pest.” (McFadden Tr. 2742; *see also* McFadden Tr. 2738 (“[G]etting a call from David [McIntosh] is like getting a call from a telemarketer.”)).

428. McFadden thought that, if he claimed Patterson did not work with GPOs, it might end the conversation with McIntosh. (McFadden, Tr. 2737–38, 2742).

429. McFadden saw himself as having a verbal agreement with Paul Guggenheim that McFadden, as the head of Patterson’s new Special Markets division, was to focus on DSOs, not GPOs. (CX0315 (McFadden, IHT at 238–39 (“[Y]es, we have a verbal agreement. Paul was very specific that at this particular time that I was supposed to only focus on dental service organizations and not waste my time and be distracted with other things that came my way; buying groups, study clubs, and things like that.”)); CX0315 (McFadden, IHT at 240 (“[H]ad I go back in time, I would

have just been truthful and say, “Paul has told me to focus on DSOs.”); (CX3075 at 2 (September 4, 2013 memorandum announcing the formation of Patterson Special Markets and defining its target customers)).

430. McFadden thus responded untruthfully to McIntosh because he did not care for McIntosh and wanted to shut down the conversation. (McFadden, Tr. 2737–38 (“Dave had a personality where he would not take no for an answer. And this was the type of person that when I’d get a text and a request like this, I just want to get rid of it and shut it down because he’s got a personality that we just clash. So bad choice of words on my part, but I just wanted to end the conversation.”); CX0315 (McFadden, IHT at 238–39 (“I did it with the intent of shutting him down, . . . I’m embarrassed to say that I wasn’t truthful with Dave, but Dave will wear you out.”)).

431. Complaint Counsel did not take testimony from David McIntosh in this case.

432. No witness testified contrary to McFadden regarding CX0164.

433. CX0164 does not support Patterson’s participation in the alleged conspiracy.

CX0179

434. CX0179 is a December 16, 2013 internal Schein email chain involving Dave Steck, Tim Sullivan, Dean Kyle, and Joe Cavaretta.

435. Complaint Counsel has not explained how it believes CX0179 relates to its allegations against Patterson.

436. Complaint Counsel did not reference CX0179 during trial.

437. Complaint Counsel did not reference CX0179 their pretrial brief.

438. CX0179 relates to Patterson’s non-attendance at the 2014 TDA meeting. Dean Kyle forwarding an email regarding TDA Perks to Joe Cavaretta, stating:

TDA Perks program just made the leap into capital gear. We do need to meet with them to discuss. FYI Patterson pulled out of Convention. I firmly believe they made the move expecting us to follow suit. (CX0179 at 2).

439. The only reference in CX0179 to Patterson is Kyle's statement that Patterson had pulled out of the 2014 TDA Convention, and that Kyle firmly believed Patterson expected Schein to follow suit. (CX0179 at 2).

440. Kyle had not actually known Patterson's expectations at the time he wrote the email in (CX0179 at 2), but had instead been relying on his intuition based on 40 years in the dental industry (CX0307 (Kyle, IHT at 299–305)).

441. CX0179 does not mention or relate to policies concerning buying groups.

442. Complaint Counsel does not allege a group boycott of the TDA Meeting in this case. (Kahn, Tr. 52; *see also* RXD0213 at 1).

443. CX0179 does not support Patterson's participation in the alleged conspiracy.

CX2106

444. CX2106 is a March 5, 2014 email chain that includes a back-and-forth between Schein's Randy Foley and Chad Thompson of Heartland Dental, a DSO and one of Schein's biggest customers at that time. (Foley, Tr. 4708).

445. The chain begins with Thompson asking Foley whether he had heard of the TDA offering a discount program and whether it was working with Schein:

Hey Randy,

Have you heard about the Texas Dental Association offering supplies to members at discount prices? Are they working through Schein on this?

Just wondering. (CX2106 at 2-3).

446. Foley then responds with a pasted message that he says is "the scoop" from Schein's local branch manager:

No, they had reached out in the past but we never did anything with them. They have subsequently developed a relationship with other entities and are selling supplies under the “TDA PERKS” banner. While they don’t have many of the major players they have an extensive # of products our clients can purchase. (CX2106 at 2).

447. Thompson then replies:

Interesting, we heard Patterson was boycotting their TDA annual meeting because of this so I thought Schein must have worked with them on it. (CX2106 at 1).

448. Foley writes back a final time:

Thanks. The good thing here is that PDCO, Benco, and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott. (CX2106 at 1).

449. The only testimony Complaint Counsel adduced during trial regarding CX2016 that pertained to Patterson was Randy Foley’s testimony that “PDCO” stood for Patterson. (Foley, Tr. 4595).

450. Foley did not discuss the TDA with anyone at Patterson. (Foley, Tr. 4709 (“Q. Mr. Foley, did you ever discuss the TDA with anyone at Patterson? A. No.”)). Foley had no personal knowledge of Patterson’s practices and was merely speculating based on Thompson’s email claiming it was already boycotting the TDA annual meeting. (Foley, Tr. 4710–12).

451. Complaint Counsel does not allege a group boycott of the TDA Meeting in this case. (Kahn, Tr. 52; *see also* RXD0213 at 1).

452. CX2106 does not support Patterson’s participation in the alleged conspiracy.

CX2220

453. Complaint Counsel did not reference CX2220 during its case-in-chief at trial.

454. CX2220 is an internal Schein email exchange regarding the Denali Group.

455. The only reference to Patterson in CX2220 is at the end of an August 29, 2014 email from Schein's Kathleen Titus to Schein's Kristi Tomlinson-Edstrom, in which Titus writes about the Denali Group:

Thanks, Kristi. I do remember them now. They are a consulting group, meaning they sell a suite of services to solo providers. I don't have any direct experience, but most of these groups are attempting to bring their client list to Schein (or others) to secure discounted pricing on supplies/equip. They look at this as adding another high profile benefit to their portfolio offering. They also like to take an "Admin" or "Marketing" fee on the collective volume of their clients. This model is prevalent, but very unhealthy for distribution. They erode our margin on business we may already have. They compete with us on Business Solution sales. They are yet another layer between us and our customer. They are not loyal. I could give you a dozen reasons, but you get the point. If it makes you feel better, PDCO is not on board for these type of GPO relationships either. (CX2220 at 1).

456. Regarding Titus's statement, "PDCO is not on board for these type of GPO relationships either," Titus testified that she had no personal knowledge as to whether Patterson was on board for GPO relationships as of her email. (Titus, Tr. 5234; *see also* CX8010 (Titus, Dep. at 177 (she had "no idea if Patterson is going after the GPO relationships. I had no intimate knowledge")))).

457. Titus's statement about Patterson had been based on her not having run into Patterson as a competitor during Schein's interactions with GPOs. (Titus, Tr. 5234 ("[T]his statement was more of a market observation just looking at the dental landscape, being involved in the marketplace, being very focused on developing buying groups myself. And frankly, my comment was speaking to an FSC. In context, I was trying to get her to refocus and keep doing what she was doing. Q. And just to be clear, did you ever have any communications with anyone from Patterson about GPO relationships? A. Absolutely not."); CX8010 (Titus, Dep. at 176 ("So I'm generally stating that I am not seeing Patterson in there as our competitor.")))).

458. No witness testified contrary to Titus regarding CX2220.

459. CX2220 does not support Patterson’s participation in the alleged conspiracy.

Other

460. CX0092 is a February 27, 2013 internal Patterson email from Misiak to Guggenheim, stating in part: “I’ve coached [Regional Manager] on how to stay out of this [the Atlantic Dental Care RFP process] with grace. *I’m concerned that Schein and Benco sneak into these co-op bids and deny it. . . .*” (emphasis added).

461. Misiak denied that the email had anything to do with an agreement not to work with buying groups. (Misiak, Tr. 1508-09) (“Q. Were you concerned that my client was violating some agreement that it had with Patterson to not work with buying groups? A. Absolutely not.”)).

462. Instead, Misiak testified that his email reflected a desire for business intelligence. (Misiak Tr. 1369) (“Q. What was the concern in your mind? A. Part of my job again is just to understand what the competition is doing, the business environment.”)).

463. No witness testified contrary to Misiak regarding CX0092.

VII. There Is No Evidence That Patterson Boycotted Any “Buying Group.”

a. Patterson Did Not Boycott Entities That Allegedly Sought To Work With Patterson In 2013.

464. Complaint Counsel contends that the following entities are “buying groups” that “continued to seek supply contracts with Patterson” in 2013: Smile Source, the Dental Cooperative of Utah, the New Mexico Dental Cooperative. (RX2958 at 7–9 (Supplemental Response to Interrogatory 3)).

Smile Source

465. Both Smile Source witnesses who testified at trial said that Smile Source is *not* a buying group. (Goldsmith, Tr. 1949 (“Judge Chappell: Did you consider Smile Source or do you consider Smile Source to be a buying group or a -- what is it, GPO? . . . A: I do not consider it to

be that. Judge Chappell: Either of those. A: Correct.”); Maurer, Tr. 4969 (“Mr. Maurer, if I heard your testimony right, Smile Source is not a buying group. Is that right? A. Correct.”). It is a franchise DSO. (Goldsmith, Tr. 2046) (“Q. Okay. Now, Smile Source considers itself a franchise DSO; right? A. Of sorts, yes. Q. You’ve called yourself a franchise DSO before to others in the industry? A. I’ve called myself or I called Smile Source a franchise.”)).

466. There is no evidence that any other entity listed in Complaint Counsel’s Supplemental Response to Patterson’s Interrogatory Three is a franchisor. (RX2958 at 7–9 (Supplemental Response to Interrogatory 3)).

467. Smile Source had its own office, a board room, and a management team in the range of a hundred employees. (*See supra* ¶ 162).

468. There is no evidence that any other entity listed in Complaint Counsel’s Supplemental Response to Patterson’s Interrogatory Three has its own office, a board room, and a management team in the range of a hundred employees. (RX2958 at 7–9 (Supplemental Response to Interrogatory 3)).

469. Schein worked with Smile Source until January 2012, when *Smile Source terminated Schein*. (Goldsmith Tr. 2037 (“We made the decision.”)).

470. Schein repeatedly attempted to gain back its contract with Smile Source during the period of the alleged conspiracy, making a proposal to Smile Source in 2014 and continuing to pursue Smile Source until 2017. (Maurer, Tr. 4942–46; CX4105 tab 5; RX2444 at 1).

471. Schein expressed an interest in working with Smile Source on the very same day Patterson declined to do so in 2013. (*Compare* CX3117 at 1 (November 20, 2013 Patterson exchange with Smile Source), *with* RX2328 at 1 (November 20, 2013 Schein email to Smile Source stating, “we absolutely would like to discuss further.”)).

472. Patterson bid on Smile Source in early 2017, but lost to Schein. (Rogan, Tr. 3540.) (“Q. And at the meeting in early 2017, you and Mr. McFadden and Mr. Hobbs presented a proposal to Smile Source? A. We did. Q. And the purpose was to try to get Smile Source’s business? A. That’s correct.”).

473. Benco rejected Smile Source in 2011 (CX0004 at 1).

474. And Benco’s Chuck Cohen, in February 2014 (the middle of the alleged agreement to boycott “buying groups” including Smile Source), met with Smile Source and wrote contemporaneously, [REDACTED]

[REDACTED] (CX1060 at 1).

475. Andy Goldsmith, Smile Source’s former Chief Dental Officer, testified that each Respondent responded differently to Smile Source during the alleged conspiracy period. (Goldsmith, Tr. 2177 (“Q. So three different respondents, three different responses; correct? A. Yes.”)). Complaint Counsel’s expert, Dr. Marshall, acknowledged that Respondents’ conduct towards Smile Source was not parallel. (Marshall, Tr. 2954) (“Q. Now let’s go to your rebuttal report. It’s CX 7101. And let’s go to page 50. And you say here that “The Respondents are not alleged to have submitted and lost bids for potentially profitable business. They are alleged to have refused to provide bids at all.” Do you see that? A. Yes. Q. Okay. Now, you understand that Schein actually submitted a bid for Smile Source in 2014; right? A. I do. That’s in my report. Q. Okay. So if Schein did submit a bid and it lost the bid, at least with respect to Smile Source, it did not refuse to submit a bid to Smile Source in 2014; right? A. Yes. That’s discussed in my report.”)).

476. The Respondents’ dealings with Smile Source are inconsistent with Complaint Counsel’s allegation of a conspiracy to refuse to deal with buying groups, and particularly

inconsistent with the allegation that “[a]fter the start of the conspiracy, the Distributors coordinated their conduct with respect to this customer segment.” (Compl. ¶ 9).

Dental Cooperative of Utah

477. There is no evidence that the Dental Cooperative of Utah interacted with Patterson in 2013 or thereafter.

478. There is no evidence that Patterson refused to deal with the Dental Cooperative of Utah or took any actions concerning the Dental Cooperative of Utah based upon the alleged conspiracy.

479. Schein had “a long term legacy relationship” with the Dental Cooperative of Utah (Titus, Tr. 2535).

480. Schein worked with the Dental Cooperative of Utah from at least 2009 until July 2014. (Cavaretta, Tr. 5601; CX2211 at 1).

481. There is no evidence in the record that the Dental Cooperative of Utah continued seeking supply contracts with Patterson in 2013, as alleged. (RX2958 at 7–9 (Supplemental Response to Interrogatory 3)).

b. There Is No Evidence That Certain Entities Would Have Purchased from Patterson But For A Conspiracy.

482. Complaint Counsel contends in sworn discovery responses that the following entities are “buying groups” that “may have bought dental equipment or supplies from Patterson but for the alleged conspiracy:” “Catapult Group, Dental Cooperative (Nevada and Utah), Dental Gator, Dentistry Unchained, Direct Dental, Florida Dental Society, Hampton Roads Dental Partners, Integrity Dental Buyers’ Group, Klear Impakt, Kois Buyers Group, New Mexico Dental Cooperative, Schulman Group, Steadfast Medical, Synergy Dental Partners, The Dentists’ Service Co., Unified Smiles, and UOBG.” (RX2958 at 7–9 (Supplemental Response to Interrogatory 3)).

Complaint Counsel failed to put any evidence in the record that these entities “may have bought dental equipment or supplies from Patterson but for the alleged conspiracy.”

483. “Buying groups” do not buy anything. (Maurer, Tr. 4970 (“Q. And you don’t buy dental equipment, do I got that right? A. Right. And you don’t buy dental supplies? A. Correct.”); Sullivan, Tr. 4328 (buying groups “do not” actually buy dental supplies; the private practice dentists do); *see also, e.g.*, Sullivan, Tr. 4105 (same); Sullivan, Tr. 4330–31 (same); Cohen, Tr. 684 (same); Rogan, Tr. 3588 (same)).

Catapult Group

484. Complaint Counsel did not ask any witness at trial about the Catapult Group.

485. On February 12, 2014, Lou Graham, a Patterson customer, emailed Patterson’s David Misiak about meeting regarding the Catapult Group. (CX3287 at 2).

486. Misiak forwarded Graham’s email to Patterson’s Paul Guggenheim, Tim Rogan, Rick Cacciatore, and Rex Plamann, stating:

All, I will respond to Dr Graham, bcc each of you, with a polite pass on this request. . . . (CX3287 at 1).

487. Guggenheim asked, “What exactly is he proposing?” (CX3287 at 1).

488. Misiak responded, “A co op buying group that we pay Catapult (him) and he provided CE.” (CX3287 at 1).

489. Complaint Counsel did not ask any witness at trial about CX3287.

490. Patterson’s Paul Guggenheim testified, however, that what Dr. Graham was requesting from Patterson was a “vig,” or “kickback.” (Guggenheim, Tr. 1813–14).

491. Patterson was generally not interested in paying “vigs” or “kickbacks.” (Guggenheim, Tr. 1802 (“A. A vig is like a kickback, which is something that ethically at our

company we are very firm that that's not acceptable. We don't participate with that kind of stuff, so we don't buy business through third parties like this.")).

492. Thus, the Catapult Group was "not at all" a great opportunity for Patterson. (Guggenheim, Tr. 1814).

493. Complaint Counsel's expert, Dr. Marshall, had no idea what proposal Catapult made to Patterson and whether it was coherent. (Marshall, Tr. 3265 ("I don't know if it was a coherent proposal I don't have knowledge of the proposal that was put forward.")).

494. There is no communication in the record in which Misiak, or anyone else at Patterson, communicates to the Catapult Group that Patterson was declining to work with it.

495. There is also no evidence in the record of Patterson communicating with Benco or Schein about the Catapult Group.

496. Thus, there is no evidence that Patterson would have worked with the Catapult Group but for the alleged conspiracy.

497. Patterson's dealings with what has been called the Catapult Group do not support Patterson's participation in the alleged conspiracy.

Dental Gator

498. MB2 Dental Solutions ("MB2") is a DSO headquartered in Texas. (Pucket, Tr. 2201-02).

499. As of November 2018, MB2 had been a Schein customer for "coming up on 11 years." (Puckett, Tr. 2210)

500. In early 2014, MB2 sent a request for proposal to Schein, Patterson, and Benco. (Puckett, Tr. 2271).

501. Dental Gator told Patterson, Schein, and Benco in early 2014 that its purpose was to grow MB2's base of ownership by identifying new practices that MB2 could acquire. (Puckett, Tr. 2272–73 (“Q. And what did you tell Schein about MB2's plans for Dental Gator? A. We told them that we wanted to create this group, we, being MB2, wanted to create this group, being Dental Gator, in order to try to eventually acquire practices that were not for sale on the dental broker market in order to grow MB2's -- you know, our -- basically grow our business with new owners, new affiliated offices. Q. Did MB2 also tell that same thing to Benco in early 2014? A. Yes, ma'am. Q. Did MB2 also tell that same thing to Patterson in early 2014? A. Yes, ma'am. Q. So is it fair to say that the primary purpose of the Dental Gator buying group was to serve as an acquisition tool for MB2 Dental? A. Yes, ma'am.”)).

502. Schein, Patterson, and Benco all responded to MB2's request for proposal. (Puckett, Tr. 2271 (“Q. And did all three respond to the request for proposal? A. Yes, ma'am.”)).

503. Patterson submitted a bid that, if successful, would have taken business away from Schein. (Puckett, Tr. 2309)

504. MB2 chose Schein over Patterson and Benco. (Puckett, Tr. 2271, 2309).

505. Patterson continued to pursue MB2's business in competition with Schein after this, through calls, dinners, and meetings at conferences. (Puckett, Tr. 2309–10 (“After that unsuccessful bid by Patterson in 2014, did Patterson continue to attempt to get business from MB2? A. Yes. Q. And how did they do that? A. They call a lot. They try to take us to dinner, meet them at conferences, et cetera.”)).

506. MB2 currently works with Schein and Patterson. (Puckett, Tr. 2209).

507. Dental Gator was created by MB2 in early 2014. (Puckett, Tr. 2201–02, 2218).

508. Though MB2 considered Dental Gator to be a “buying group” (Puckett, Tr. 2215–16), it distinguishes a “buying group” as different from a “buying club,” in that the latter is solely characterized by the question, “do you save money on supplies and things you purchase.” (Puckett, Tr. 2273).

509. Dental Gator believes it is not a “buying club” because “it tried to do more than that,” such as providing legal, compliance, marketing, dental laboratories, postage, staples, and other services and benefits to its members. (Puckett, Tr. 2273).

510. Puckett did not testify that Dental Gator ever approached Patterson or that Patterson ever refused to deal with Dental Gator. No such evidence exists in the record.

511. There is no evidence in the record that Patterson and Benco or Schein communicated about Dental Gator.

512. Nothing in the record of Patterson’s dealings with MB2 or in Mr Puckett’s testimony supports Patterson’s participation in the alleged conspiracy.

Dentistry Unchained

513. Dentistry Unchained *did not exist* before April 2015. (Marshall, Tr. 3273-74) (“Do you see this is a history of Dentistry Unchained? I pulled it off the web. It didn’t take me very long to find it. And if we go to the next page, we see right here, about a third of the way down, “The organization started in April 2015.” Do you see that? A. I see that.); *see also* (RXD0212 at 1) (Dentistry Unchained History Website).

514. The conspiracy is alleged to have ended in April 2015. (Kahn, Tr. 19; *see also* RXD0205 at 1 (“The Alleged Conspiracy Ended in April 2015”)).

515. The government’s own expert was not even aware until trial that Dentistry Unchained was not in existence during the alleged conspiracy period. (Marshall, Tr. 3273 (“Q.

Did you realize, when you included Dentistry Unchained in here, that they weren't even in existence during the period from February 2013 to April 2015 when my client was alleged to have entered and exited the conspiracy? A. No."); Marshall, Tr. 3274 ("Q. You just stuck it in paragraph 491 even though it was after the conspiracy was over; right? A. Yeah. By what's being said here, I understand what you're saying. Yes."); *see also* RXD0212 at 1).

516. The first record evidence of Patterson interacting with Dentistry Unchained is from Monday or Tuesday, July 27 or 28, 2015—more than two months after the end of the alleged conspiracy. CX3006 at 1 ("I had a 40 minute phone call with . . . Dentistry Unchained *on Monday, July 28.*").⁷

517. There is also no evidence in the record of Patterson communicating with Benco or Schein about Dentistry Unchained.

518. Because Patterson's first communications with Dentistry Unchained did not occur until more than two months after the alleged conspiracy ended, and because Dentistry Unchained did not exist during the alleged conspiracy period, there is no evidence that Patterson may have sold supplies or equipment to the Dentistry Unchained but for the alleged conspiracy.

Direct Dental

519. Complaint Counsel has alleged that the alleged conspiracy period ended in April 2015. (Kahn, Tr. 19; *see also* RXD0205 at 1 ("The Alleged Conspiracy Ended in April 2015")).

520. The only document in the record relating to Direct Dental is CX0016, a *November 2015* Benco email chain.

521. CX0016 does not reference Patterson.

⁷ July 28, 2015 was a Tuesday.

522. There is no other testimony or evidence in the record regarding Patterson and Direct Dental.

523. There is also no evidence in the record of Patterson communicating with Benco or Schein about Direct Dental.

524. Thus, there is no evidence that Patterson may have sold supplies or equipment to Direct Dental but for the alleged conspiracy.

Florida Dental Society

525. No entity called the “Florida Dental Society” appears in the record.

526. Patterson assumes that, in its Supplemental Response to Interrogatory 3, Complaint Counsel was instead referring to the Florida Dental Association (“FDA”).

527. There is one Patterson-related document in the record regarding the Florida Dental Association. (CX0084).

528. In CX0084, on March 8, 2012, a third party writes Patterson’s Neal McFadden about a new “dental supply discount program exclusively for FDA members,” expressly described as a “GPO.” (CX0084 at 1).

529. McFadden forwarded the email to his supervisor, David Misiak, writing:

I get these more often than I like. This stuff scares me. I’m gonna tell him thanks but no thanks. Your thoughts? (CX0084 at 1).

530. Misiak responded:

Your response is right. (CX0084 at 1).

531. This exchange occurred nearly *a year before* Complaint Counsel has alleged that Patterson first entered a conspiracy with Benco and Schein. (Compl. ¶ 36 (alleging Patterson joined a conspiracy in February 2013) *see also* RXD0204 at 1 (“Patterson Joined The Alleged Conspiracy in February 2013”)).

532. There is also no evidence in the record of Patterson communicating with Benco or Schein about the Florida Dental Association.

533. Thus, there is no evidence that Patterson may have sold supplies or equipment to the Florida Dental Association but for the alleged conspiracy.

Hampton Roads Dental Partners

534. Complaint Counsel did not present any evidence at trial regarding Hampton Roads Dental Partners or its relevance to Patterson.

535. The sole references to Hampton Roads Dental Partners in the record that relate to Patterson are from the deposition of Patterson's Anthony Fruehauf. (CX8013 (Fruehauf, Dep. at 18); CX8013 (Fruehauf, Dep. at 187)).

536. Fruehauf was asked at his deposition about CX3039, an email from Patterson's Matt Smith to Fruehauf *dated September 8, 2015*. (CX8013 (Fruehauf, Dep. at 187)).

537. Complaint Counsel has alleged that the alleged conspiracy period ended about *five months before* Smith's email (CX3039 at 1), in *April 2015*. (Kahn, Tr. 19; *see also* RXD0205 at 1 ("The Alleged Conspiracy Ended in April 2015")).

538. Complaint Counsel has presented no evidence that the Hampton Roads Dental Group existed before the April 2015 end of the alleged conspiracy. (Kahn, Tr. 19; *see also* RXD0205 at 1 ("The Alleged Conspiracy Ended in April 2015")).

539. In CX3039, Matt Smith emailed Fruehauf regarding Hampton Roads Dental, which Smith described as a "new buying group in Chesapeake." (CX3039 at 1).

540. Fruehauf agreed at his deposition that Hampton Roads was a buying group. (CX8013 (Fruehauf, Dep. at 187–88)).

541. Smith's September 8, 2015 email to Fruehauf explained that Hampton Roads was not requiring any purchasing commitment from its members. (CX3039 at 1 ("So, they are not requiring their members to do anything as far as buy from one source.")).

542. Still, Smith explained, Hampton Roads had some "high value" Patterson clients signed up, so Smith responded with a proposal "to keep our sheep from wandering." (CX3039 at 1).

543. Smith said that the proposal gave Hampton Roads "something formal so they can't say we did nothing." (CX3039 at 1).

544. Smith's response did not represent any discount from what Hampton Roads members would have gotten from Patterson individually. (CX8013 (Fruehauf, Dep. at 188) ("Q. So he sent an offer, but it didn't represent any discount over what those dentists might have gotten from Patterson Dental if they had come to you individually? A. That's correct.))).

545. Fruehauf did not believe that Hampton Roads ever materially came together as a buying group. (CX8013 (Fruehauf, Dep. at 188) ("I don't believe Hampton Roads ever materially came together as a buying group.))).

546. There is also no evidence in the record of Patterson communicating with Benco or Schein about Hampton Roads.

547. Thus, there is no evidence that Patterson may have sold supplies or equipment to Hampton Roads Dental Partners but for the alleged conspiracy.

Integrity Dental Buyers' Group

548. Complaint Counsel did not present any evidence at trial regarding Integrity Dental Buyers' Group ("IDBG") or its relevance to Complaint Counsel's allegations against Patterson.

549. The Integrity Dental Buyers' Group did not even come into existence until July 2015, three months after the alleged conspiracy ended. (CX8011 (Capaldo, Dep. at 11–12); Kahn, Tr. 19 (alleging that the purported conspiracy ended in *April 2015*); *see also* RXD0205 at 1 (“The Alleged Conspiracy Ended in April 2015”)).

550. Thus, there is no evidence that Patterson may have sold supplies or equipment to IDBG but for the alleged conspiracy.

551. Indeed, because IDBG did not exist even until three months after the alleged conspiracy ended, the claim that IDBG may have done business with Patterson but for the conspiracy is physically impossible.

552. IDBG reached out to Patterson in September 2015, four months after the conspiracy ended (Kahn, Tr. 19), and Patterson politely declined. (CX3031 at 1) (“After careful consideration Patterson Dental has made the decision not to response to the RFP at this time.”)).

553. Benco also declined working with IDBG in September 2015. (CX1037 at 1) (“Benco will respectfully decline to respond.”)).

554. Schein never formally rejected IDBG at all. (CX0320 (Capaldo, IHT at 84) (“A. No. [Schein] actually never came out and said they didn’t want to work with us. They just never did anything other than continue to lead us down the garden path, never actually say anything but, you know, keep saying that they were supportive of us.”)).

555. IDBG reached out to Patterson again in early 2016, many months after the conspiracy allegedly ended. (CX8011 (Capaldo, Dep. at 27) (“Q. And Premier reached out to Patterson on Georgia Dental’s behalf in early 2016; is that right? A. Premier told us that they reached out to all of the suppliers including Schein, Patterson, Benco, Atlanta Dental, Dentsply.

Those were companies they told us they were already doing business with on the medical side.”); Kahn, Tr. 19)).

556. Then, in *March 2016*, about a year after the conspiracy allegedly ended (Kahn, Tr. 19), Patterson’s Neal McFadden internally forwarded an Integrity Dental Buyers’ Group request for bids reminder, writing “This is the Georgia dental Association GPO. FYI I believe we’re gonna pass on this one.” (CX0133 at 1).

Klear Impakt

557. Complaint Counsel did not present any evidence at trial regarding Klear Impakt’s relevance to Complaint Counsel’s allegations against Patterson.

558. There is no evidence that Patterson and Klear Impakt had any interactions before April 2015, when the alleged conspiracy ended. (Kahn, Tr. 19; *see also* RXD0205 at 1 (“The Alleged Conspiracy Ended in April 2015”)).

559. There is also no evidence of Patterson communicating with Benco or Schein about Klear Impakt.

560. Thus, there is no evidence that Klear Impakt may have purchased supplies or equipment from Patterson but for the alleged conspiracy. (*See* RX2958 at 9 (Complaint Counsel’s Supplemental Response to Patterson’s Interrogatory Three).

Kois Buyers Group

561. Dr. John Kois is a dentist who runs a dental practice with locations in Seattle and Tacoma, Washington. (Kois Sr., Tr. 161).

562. Dr. Kois has worked with Burkhart as his supplier for his personal practice since he started his practice in 1985. (Kois Sr., Tr. 169).

563. Dr. Kois also runs a continuing dental education school in Seattle called the Kois Center. (Kois Sr., Tr. 163–64).

564. Around 2014, Dr. Kois was introduced by one of his students to a Canadian national named Qadeer Ahmed, who ran a company variously called “ProCare Dental Services” or “Equalizer ProServices.” (CX8007 (Kois Sr., Dep. at 30–31, 33); RX0377 at 1).

565. Ahmed gave Dr. Kois the idea to set up the Kois Buyers Group. (CX8007 (Kois Sr., Dep. at 30)).

566. Ahmed told Dr. Kois that he had set up business deals with companies like Walmart, Best Buy, and Sony. (Kois Sr., Tr. 213–14; CX8007 (Kois Sr., Dep. at 59–60)).

567. Dr. Kois, however, was “not able to substantiate anything” about Ahmed’s claimed business history. (Kois Sr., Tr. 217).

568. Dr. Kois did not, for instance, contact any of the companies Ahmed claimed to have worked with (like Walmart), to verify Ahmed’s claimed experience. (Kois Sr., Tr. 216–17).

569. ProCare’s claimed address was [REDACTED]. (CX1032 at 1).

570. This is the building located at [REDACTED] (Reece, Tr. 4494 (“Q. So this is the office of ProCare Services, the billion dollar company that does billion dollar deals with Walmart and big companies like that. Have you ever been here? A. I have not. Q. Okay. Does that look like a professional office to you? A. It does not.”); CX1032 at 1; *see also* RXD0211 at 4).⁸

⁸ The Court may take judicial notice of a Google Maps image, especially one whose accuracy has gone unchallenged. Fed. R. Evid. 201 (judicial notice is appropriate for facts that are “not subject to reasonable dispute”); *Pahls v. Thomas*, 718 F.3d 1210, 1216 n.1 (10th Cir. 2013) (“We take judicial notice of a Google map and satellite image as a ‘source[] whose accuracy cannot reasonably be questioned.’”) (quoting *United States v. Perea-Rey*, 680 F.3d 1179, 1182 n.1 (9th Cir. 2012)).



571. Burkhart’s Jeffrey Reece, who would eventually work with Ahmed and the Kois Buyers Group, acknowledged that the home at this address did not look like a professional office. (Reece, Tr. 4495 (“So this is the office of ProCare Services, the billion dollar company that does billion dollar deals with Walmart and big companies like that. Have you ever been here? A. I have not. Q. Okay. Does that look like a professional office to you? A. It does not.”)).

572. Ahmed used a personal Hotmail account in business emails with Patterson. (CX0115 at 2).

573. Dr. Kois did not know of any experience Ahmed or ProCare had with setting up buying groups or arranging distribution in the medical industry. (Kois Sr., Tr. 217–18).

574. Dr. Kois also did not know of Ahmed having any experience in the dental industry. (Kois Sr., Tr. 217 (“Q. Did Mr. Ahmed and ProCare Dental Services -- did they have any experience in the dental industry? A. To my knowledge, no.”)).

575. Dr. Kois also did not know of ProCare having had any specific employees other than Ahmed. (Kois Sr., Tr. 214–15 (“Q. You say here in the second sentence that ProCare, which I guess is Mr. Ahmed, is led by people. Were there other people that you were -- A. I assumed there were other people in his company, that’s correct. Q. Had you met any of them? A. I have not met them. Q. Do you know that there were other people, sir? A. I think he mentioned somebody by the name of Bobby. There were people that were involved in his company, but I don’t know them. Q. How many employees did he have? A. I don’t know.”)).

576. Dr. Kois also did not personally meet with Ahmed until long after they began working together. (Kois Sr., Tr. 216 (“Q. All right. Had you -- at this time when you sent out the e-mail he drafted for you, had you -- had you met him face to face? A. I did not. At that time.”); CX8007 (Kois Sr., Dep. at 33 (“Q. Do you remember the approximate year that you met Qadeer Ahmed? A. Actually, I didn’t meet him until he lectured at one of our symposiums, which was the first time I ever met him, and I believe that was 2015 or 2016, I don’t recall the actual date.”))).

577. Dr. Kois entrusted Ahmed with handling all negotiations with potential dental distributors for the Kois Buyers Group and has no knowledge what Ahmed said to Patterson. (Kois Sr., Tr. 188 (“Q. What did you ask Mr. Ahmed to do for the Kois Center? A. To reach out to the companies and make contacts and see who might be interested in working with us.”); Kois Sr., Tr. 219 (“Q. I understand that you tasked Mr. Ahmed to reach out to the distributors, my client, Patterson Companies; is that fair? A. Yes. Q. You were not firsthand involved in those reach-out efforts; he did that on his own. Fair? A. Fair. Q. You don’t know what he said to Patterson

Companies; is that fair? A. Fair.”); CX8007 (Kois Sr., Dep. at 35 (“[H]e did all the initiation of the contact and all the negotiation. I had nothing to do with any of that, so I don’t actually know what the conversations were that he had with any of the companies.”))).

578. On August 14, 2014, Ahmed, using his personal Hotmail account, emailed Patterson’s Marc Beaudet under the subject line “Top 4 Dental Manufacturers Committed.” (CX0116 at 2).

579. Ahmed’s August 14 email to Patterson stated, in part, “I’m writing to advise that we have verbal confirmation of discount [sic] in the range required (10%-20%) from the following major 4 manufacturers,” listing (1) “3M (Canada/US),” (2) “Ivoclar Vivadent,” “(3) “Kerr Corporation,” and (4) “DENTSPLY.” (CX0116 at 2).

580. On August 17, Patterson’s Beaudet forwarded Ahmed’s email to Patterson’s Paul Guggenheim. (CX0116 at 2).

581. Guggenheim forwarded Beaudet’s email to Patterson’s Tim Rogan, asking him to “see what the 4 vendors mentioned below are doing with this.” (CX0116 at 1).

582. Rogan, who was responsible for Patterson’s dealings with these four manufacturers, then contacted the manufacturers. (Rogan Tr. 3635–37; CX3171 (contacting 3M); CX3172 at 1 (contacting Ivoclar); CX3170 (contacting Kerr); CX3331 (contacting Dentsply)).

583. None of the manufacturers had heard of Ahmed or the Kois Buyers Group. (Rogan Tr. 3656 (“Q. . . . Mr. Guggenheim had asked you on the 17th, August 17th, 2014, ‘Can you see what the 4 vendors mentioned below are doing with this?’ And we just saw that you checked with them and they had never heard of this guy, qadeerahmed@hotmail. Is that fair? A. Yes.”); Rogan Tr. 3639–3644 (discussing responses from Ivoclar (CX0116 at 1) (“They don’t know these people.”), Kerr (RX0336 at 1) (“[N]ot heard of this group and have no record of offering them any

pricing.”), and Dentsply (RXD0224 at 1) (“I inquired with the director of marketing and they don’t know anything about this.”)).

584. In other words, Rogan learned that Ahmed was “using a fabricated story” in the hopes of getting Patterson to work with him. (Rogan Tr. 3646–47 (“They were basically telling a story, a fabricated story, trying to get some of the manufacturers to recognize them and to give them the discounts. They also point out at the end that they talk about all these 450 and then 1251 offices, and our largest -- the largest DSO in the country, in the United States right now is Heartland Dental, and they have 850 offices, and they’re -- everybody knows who they are. So if somebody had 1200 offices, we would know who they are. Q. So were you pointing that out to Mr. Guggenheim as a way of saying I’m skeptical of this? A. Yes. Q. And the “line in the water” part and “he wants someone to bite,” what were you indicating with that? A. Indicating that he’s saying that we’ve got the four biggest manufacturers on board, we have got 200 dentists on board, he’s saying that, but clearly nobody’s been able to prove that that’s true. So a line in the water is he’s using a fabricated story to try and get somebody to commit to recognize him as a -- in recognizing him or his group or whatever it is as a buying group or GPO. Q. So you say to Mr. Guggenheim, “I’d tell Marc to be careful here.” Were you concerned that maybe your Toronto branch manager didn’t understand exactly how incoherent a proposal this was from qadeer@hotmail.com? A. Correct.”)).

585. Rogan responded to Guggenheim, advising him that he had just spoken with senior Ivoclar executives who did not know of Ahmed or the Kois Buyers Group. (CX0116 at 1 (“I just spoke with Sarah Anders, Senior VP North America, from Ivoclar, and she spoke with her Canadian Director. They don’t know these people so the statement about a verbal is wrong.”)).

586. About a month later, on or around September 24, 2014, Ahmed, using the company name Equalizer ProServices, transmitted a PowerPoint presentation to Patterson entitled “Dental Program, Invitation to Patterson.” (RX0377 at 1).

587. In his presentations to Patterson and Schein, Ahmed described the Kois Buyers Group as “not a standard BUYING GROUP.” (RX0377 at slide 3; RX2197 at slide 3). “We are profoundly different,” Ahmed wrote. (RX0377 at slide 3; RX2197 at slide 3).

588. In both presentations, Ahmed described Phase 1 of the plan as “Begin pilot program with approximately 1,700 dentists (in the U.S. and Canada), and Phase 2 as “add[ing] an additional 1,000 dentists.” (RX0377 at slide 6; RX2197 at slide 6).

589. Patterson’s Tim Rogan testified that Ahmed’s claims of more than 1,000 dentists were unrealistic, explaining that even the largest DSO in the country, Heartland Dental, has only 850 dentists’ offices. (Rogan Tr. 3646–47 (“They also point out at the end that they talk about all these 450 and then 1251 offices, and our largest -- the largest DSO in the country, in the United States right now is Heartland Dental, and they have 850 offices, and they’re -- everybody knows who they are. So if somebody had 1200 offices, we would know who they are.”)).

590. Patterson’s Paul Guggenheim likewise remembered participating in a WebEx meeting with Ahmed, and that Ahmed proposed numbers that “seemed completely unrealistic.” (Guggenheim Tr. 1676–77).

591. In reality, at the time of its outreach to Patterson, the Kois Buyers Group “didn’t even exist” and had zero members. (CX8007 (Kois Sr., Dep. at 38, 135–36)).

592. Complaint Counsel presented no witness with first-hand knowledge of Patterson’s response to Ahmed or the Kois Buyers Group. (CX8007 (Kois Dep. at 145 (“Q. You don’t recall Patterson giving any response to this; is that right? A. I have no knowledge of working specifically

with any of the companies. I didn't deal with them at all. Q. And you don't even know what, if any, response they gave to this pitch? A. I do not. Other than what might have been in an e-mail, I was not personally involved. Q. Right. In terms of what you personally remember yourself? A. Yeah, I don't know. I don't know. I don't remember anything about that. I'm not -- yeah, I have no information about that."))).

593. Dr. Kois believed that distributors including Patterson turned down the Kois Buyers Club because it was too small, with no members or ability to negotiate with any manufacturers. (CX8007 (Kois Sr., Dep. at 37–38 (“Q. Do you know why the -- all three, Benco, Schein and Patterson said they had no interest in the Kois Buyers Club or group? . . . A: It was my feeling, or my understanding, that it was because we were too small. And at the time the buyers club didn't even exist, so that many companies would not want to take a risk on engaging with something that isn't going to even turn out to be anything. So we didn't have the ability to negotiate with any of the companies."))).

594. John Kois Jr., who later came to run the Kois Buyers Group, also thought that Patterson was not interested in working with the Kois Buyers Group because, “[a]t the time there were no members, so there wasn't anything to offer them.” (CC0321 (Kois Jr., IHT at 157).

595. As to Schein, Qadeer Ahmed transmitted a “proposal” on October 28, 2014, to Tim Sullivan, again from his personal Hotmail account. (RX2602 at 2).

596. Describing his proposal to Sullivan, Ahmed wrote, “Essentially it says ‘give us the same deal every other distributor has already offered in writing and we’ll set them aside and work exclusively with you.’” (RD2602 at 2).

597. This statement was false; Ahmed at this point had only spoken with Schein, Patterson, and Benco, and there is no evidence he received written offers from any of them. (Kois

Sr., Tr. 250 (Ahmed spoke first only with Schein, Patterson, and Benco)). Indeed, Complaint Counsel has claimed that “all three Respondents turned down the Kois Buyers Group.” (CC’s Pre-Trial Br. at 37).

598. Ahmed’s proposal to Schein also mentioned that he had built “more than a few multi-billion dollar companies.” (RX2602 at 3). There is no evidence in the record that this claim is true.

599. Ahmed proposed, “After you give us the supply deal, we’ll spend the time to share our detailed plans with your team, . . .” (RX2602 at 3). Ahmed said, “If we don’t deliver, kill the deal.” (RX2602 at 3).

600. Sullivan responded, “I appreciate the ‘get r done’ approach, but it’s not a style/approach that I am comfortable working in. I can’t get married with a ‘no big deal, we can always divorce later’ mentality. . . .” (RX2602 at 2). Sullivan suggested, “if we can slow down and really understand your model better that you believe is going to change dentistry, then we believe it’s worth rolling up our sleeves and getting to know each other better. (RX2602 at 2). Sullivan asked that Ahmed speak with Schein’s John Chatham to “figure out the best next steps,” writing, “This will take some time to put together thoughtfully and diligently.” (RX2602 at 2).

601. Ahmed responded to Sullivan, in part, “We have offers on the table and paid members expecting a result.” (RX2602 at 1).

602. This statement was false; Ahmed again at this point had only spoken with Schein, Patterson, and Benco, and there is no evidence he received written offers from any of them. (Kois Sr., Tr. 250 (Ahmed spoke first only with Schein, Patterson, and Benco). And again, Complaint Counsel has claimed that “all three Respondents turned down the Kois Buyers Group.” (CC’s Pre-

Trial Br. at 37). Finally, the Kois Buyers Group “didn’t even exist” at this time and had no “paid” members. (CX8007 (Kois Sr., Dep. at 38, 135–36)).

603. Complaint Counsel presented no witness with personal knowledge that Schein ultimately turned down Kois. Rather, Kois Sr., testified that he had not heard back from Schein at the time he selected Burkhardt. (CX8007 (Kois Sr., Dep. at 167–68)).

604. Meanwhile, after Ahmed reached out to Benco’s Chuck Cohen, Cohen in turn contacted Dr. Kois suggesting they work together without Ahmed or his companies. (RX1040 at 2–3 (“John... Confidentially, we’re currently looking at buying club options, and should have some ideas to discuss sometime in early 2015. That said, whatever we do, I don’t think that we’ll need to involve an outside company like Equalizer Pro Services or anyone else, they’ll just take a cut of the savings. So, with your permission, I’m going to politely give Qadeer our standard answer of: ‘thanks but we don’t do buying groups.’ And then I’ll make a note to reconnect on this issue sometime in early 2015.”)).

605. Dr. Kois forwarded Cohen’s email to Ahmed. (RX1040 at 2).

606. Ahmed responded to Dr. Kois, in part, “Appreciate the intelligence, we’ll proceed with people who want to make a difference and make money, too.” (RX1040 at 2).

607. Cohen then wrote to Ahmed, “At Benco, our policy is that we don’t support, or work with, buying groups, so we’ll decline your request.” (RX1042 at 2).

608. Ahmed wrote in response, in part, “It is not a buying group in the sense that you would be familiar with the term [t]hat’s why other distributors are pretty intrigued by what we are doing.” (RX1042 at 2).

609. Again, at this point, the only “other distributors” Ahmed had spoken with were Patterson and Schein. (Kois Sr., Tr. 250 (Ahmed spoke first only with Schein, Patterson, and Benco)).

610. Cohen responded to Ahmed, “Ok, you have my attention. Please help me understand how your plan for a buying group is different.” (RX1042 at 1).

611. Ahmed responded to Cohen, in part, “Between my first note to you and your reply, we have introduced our plan and have received, or are about to receive, written offers from various parties. I believe in respecting those offers and submitting them to the Kois students for consideration before pursuing a new relationship, . . .” (RX1042 at 1).

612. This statement was false; Ahmed again at this point had only spoken with Schein, Patterson, and Benco, and there is no evidence he received written offers from any of them. (Kois Sr., Tr. 250 (Ahmed spoke first only with Schein, Patterson, and Benco)).

613. Cohen interpreted Ahmed’s response as saying, “we really don’t need you,” and to be “ending the conversation with Benco.” (Cohen, Tr. 796–97).

614. Thus, the Kois Buyers Group turned down Benco in 2014. (RX1042 at 1). Indeed, in forwarding Ahmed and Cohen’s exchange to Lin Kahn in 2016, Ahmed wrote “This all reminded me why *we avoided these guys.*” (RX1040 at 1 (emphasis added)).

615. Under Ahmed’s stewardship, the Kois Buyers Group initially charged members between \$199 and \$499 monthly. (Kois Sr., Tr. 239).

616. This was “way too expensive,” and the Kois Buyers Group was unsuccessful in recruiting members. (Kois Sr., Tr. 239).

617. Thus, Dr. Kois terminated Ahmed, replacing him with Dr. Kois’s son, John Kois Jr., in October 2015. (Kois Jr., Tr. 222 (Johnny took over in “October of 2015”); Kois Sr., Tr. 223

(“Q. Just so we’re clear, when you say you separated then because the buying group wasn’t doing that well, did you terminate Mr. Ahmed? A. Yes.”)).

618. John Kois Jr. testified that, when he was brought into the Kois Buyers Group, it lacked direction, clarity, and structure. (CX8008 (Kois Jr., Dep. at 119 (Q. And you stepped into manage Kois Tribal Management in 2015; is that right? A. Yes. Q. And the reason you were brought in was because at the time the buying group lacked direction and clarity, right? A. And structure.”))).

619. After taking over the Kois Buyers Group, John Kois Jr. had no contact with Patterson. (Kois Jr., Tr. 383 (“Q. And you didn’t reach out to my client, Patterson Companies, again? A. Correct.”)).

620. After taking over the Kois Buyers Group, John Kois Jr. cut the membership rate to \$299 per year. (Kois Sr., Tr. 241).

621. The Kois Buyers Group also fully reimbursed all members who had joined before this reduction and who had paid the higher rate. (Kois Sr., Tr. 240–41).

622. The Kois Buyers Group made these reimbursements even though it had split the proceeds of its membership fees evenly with Ahmed. (Kois Sr., Tr. 242).

623. The Kois Buyers Group’s reimbursements, in other words, included reimbursements of money that had gone to Ahmed. (Kois Sr., Tr. 242).

624. Ahmed has never covered the cost of these reimbursements the Kois Buyers Group paid. (Kois Sr., Tr. 242 (“JUDGE CHAPPELL: When you went to 299 a year and when he was gone, did you get money back from him? A: We did not. JUDGE CHAPPELL: Was that something that made you happy? A: No.”)).

625. Ultimately, in late 2014, the Kois Buyers Group signed a contract with Burkhart as its distributor. (Kois Sr., Tr. 191). At this point, when Kois selected Burkhart, Schein was still expressing interest in Kois. (Kois Sr., Tr. 266 (“So when Schein was expressing its desire to slow down and proceed thoughtfully and diligently, you made the decision to go forward with Burkhart; is that correct? A. Evidently so.”)).

626. Burkhart initially did not respond positively to Ahmed and only signed with the Kois Buyers Group after Dr. Kois personally reached out on the strength of his relationship with Burkhart. (CX8007 (Kois Sr., Dep. at 68 (“Q. . . . you said you asked Burkhart to be the distributor and what did – how did they respond? A. So at first they actually weren’t very positive to Qadeer. They basically just responded on my behalf because of the relationship I had with the company, so it turned out that in the end we didn’t use any of Qadeer’s expertise. We relied more on my personal relationship and reputation that I built my whole life in practice and teaching.”))).

627. Burkhart’s Jeffrey Reece entered into the agreement with the Kois Buyers Group entirely on the strength of his relationship with Dr. Kois, knowing nothing about Qadeer Ahmed, including whether he was a con artist. (Reece, Tr. 4495–96 (“Q. . . . So it had nothing to do with Qadeer, and it had everything to do with John Kois, who had a respected reputation in the industry, correct? A. That’s correct. Q. Qadeer could have been a con artist for all you know, right? A. I guess that’s true. I -- what I would say is that I never thought that Dr. Kois would partner with a con artist and -- Q. But you don’t know, do you, sir? A. No, sir, I don’t.”)).

628. Both Dr. Kois and Johnny Kois testified that the Kois Buyers Group had not suffered any harm from not working with a distributor like Patterson. (CX8007 (Kois Sr., Dep. at 89 (“Q. Do you think if a national full service distributor was a partner instead of Burkhart you’d have more members today? A. At this point, I don’t think so.”)); CX8008 (Kois Jr. Dep. at 134–

35 (“Q. And not working with Schein and Patterson or Benco has not impacted the success of your buying group in any way; is that right? A. Not that I can tell.”)) (objections omitted).

Schulman Group

629. There is no evidence of any interaction between the Schulman Group and Patterson during the alleged conspiracy.

630. Complaint Counsel presented no evidence at trial of any interaction between the Schulman Group and Patterson.

631. There is also no evidence that Patterson communicated with Benco or Schein about the Schulman Group.

632. Thus, there is no evidence that the Schulman Group would have worked with Patterson but for the alleged conspiracy.

633. Schein, however, did work with the Schulman Group between February 8, 2013 and April 2015. (CX1104 at 2).

Steadfast Medical

634. Complaint Counsel presented no evidence at trial of any interaction between Steadfast Medical and Patterson.

635. Complaint Counsel did not ask any Patterson witness about Steadfast Medical during trial, or during any deposition, or during any investigational hearing.

636. Steadfast Medical does not appear in anywhere in the record in connection with Patterson except for a March 2013 Patterson spreadsheet listing “Patterson Group Practices.” (RX0072 (listing Steadfast in Sales Data tab, Row 230)).

637. This spreadsheet shows that, between 2004 and February 2013, Patterson sold anywhere between \$0 and \$3,904 each year to Steadfast Medical or its component practices. (RX0072 at Sales Data tab, Row 230).

638. There is no evidence that Patterson's sales relationship with Steadfast changed after February 2013, when Patterson allegedly joined a conspiracy. (RX2958 at 10 (Complaint Counsel's Supplemental Response to Patterson's Interrogatory Four) ("Patterson joined the agreement in February 2013.")).

639. There is also no evidence that Patterson communicated with Benco or Schein about Steadfast Medical.

640. Thus, there is no evidence that Patterson may have sold supplies or equipment to the Steadfast Medical but for the alleged conspiracy.

Synergy Dental Partners

641. There is no evidence of any interaction between Synergy and Patterson during the alleged conspiracy.

642. There is, however, evidence that Synergy and Patterson interacted about a year and a half *before* Patterson allegedly joined the alleged conspiracy. Benco's Patrick Ryan reported internally on August 18, 2011, that all full-service distributors had declined to work with Synergy. (CX1133 at 1).

643. Patrick Ryan testified at trial that Synergy itself had reported to him, ahead of his August 18, 2011 email, that Patterson had turned it down. (Ryan, Tr. 1171 ("Q. If we look at the e-mail, CX 1133, the very top e-mail, you were writing to various others at Benco. And there's a reference there to 'they came to Wilkes-Barre to see me, and were turned down.' Do you see that? A. Yes. Q. During that meeting that you had with them in person in Wilkes-Barre, did they tell

you anything about Henry Schein? A. Yes. Q. What did they say? A. They said that they -- that Schein had turned them away. Q. And during that meeting in Wilkes-Barre, did they tell you anything about Patterson? A. The same, that they had spoken to Patterson and they were turned down.”)).

644. Complaint Counsel alleges that Patterson joined the alleged conspiracy in February 2013. (RX2958 at 10 (Complaint Counsel’s Supplemental Response to Patterson’s Interrogatory Four) (“Patterson joined the agreement in February 2013.”)).

645. February 2013 is about a year-and-a-half after August 18, 2011. Thus, Patterson turned down Synergy Dental Partners about a year-and-a-half before Patterson allegedly joined the alleged conspiracy. (CX1133 at 1).

646. Thus, there is no evidence that Patterson may have sold supplies or equipment to the Steadfast Medical but for the alleged conspiracy.

The Dentists’ Service Co.

647. Complaint Counsel presented no evidence at trial of any interaction between Patterson and The Dentists’ Service Company (or “TDSC”) between February 8, 2013 and April 2015—the period of Patterson’s alleged participation in an alleged conspiracy. (RX2958 at 10 (Complaint Counsel’s Supplemental Response to Patterson’s Interrogatory Four) (“Patterson joined the agreement in February 2013.”); Kahn, Tr. 19 (alleging the conspiracy ended in April 2015); *see also* RXD0205 at 1 (“The Alleged Conspiracy Ended in April 2015”)).

648. Indeed, there is no evidence in the record that TDSC existed between February 8, 2013 and April 2015.

649. The first document in the record connecting Patterson with TDSC is dated November 13, 2015. (CX0126 at 1).

650. November 13, 2015 is about eight months after Complaint Counsel claims the alleged conspiracy ended. Kahn, Tr. 19 (alleging the conspiracy ended in April 2015); *see also* RXD0205 at 1 (“The Alleged Conspiracy Ended in April 2015”).

651. On November 15, 2015, TDSC’s Knut Meyer wrote to Patterson’s Wesley Fields stating that TDSC was interested in partnering with Patterson. (CX0126 at 1).

652. Meyer’s November 13, 2015 email described TDSC as “a new subsidiary” of the California Dental Association. (CX0126 at 1).

653. Meyer’s November 13, 2015 email also referenced a 16-week promotion period for the TDSC program. (CX0126 at 1).

654. Thus, this promotion period would have begun in July 2015, which is also several months after the April 2015 alleged end of the alleged conspiracy. (Kahn, Tr. 19 (alleging the conspiracy ended in April 2015); *see also* RXD0205 at 1 (“The Alleged Conspiracy Ended in April 2015”).

655. There is also no evidence that Patterson communicated with Benco or Schein about TDSC.

656. Thus, there is no evidence that Patterson may have sold supplies or equipment to TDSC but for the alleged conspiracy.

Unified Smiles

657. Complaint Counsel presented no evidence at trial of any interaction between Patterson and Unified Smiles.

658. There is no evidence in the record of any interaction between Patterson and Unified Smiles.

659. There is also no evidence that Patterson communicated with Benco or Schein about Unified Smiles.

660. Thus, there is no evidence that Patterson may have sold supplies or equipment to Unified Smiles but for the alleged conspiracy.

UOBG

661. There was no trial testimony about UOBG.

662. There is no deposition or investigational hearing testimony in the record about UOBG.

663. There is no evidence in the record of any interaction between UOBG and Patterson before April 2015, when the alleged conspiracy allegedly ended. (Kahn, Tr. 19; *see also* RXD0205 at 1 (“The Alleged Conspiracy Ended in April 2015”)).

664. The record does include an internal Patterson email chain regarding UOBG, dated May 20, 2015. (*See* RX0451 at 1–2).

665. May 20, 2015 is after the alleged April 2015 end of the conspiracy. (Kahn, Tr. 19; *see also* RXD0205 at 1 (“The Alleged Conspiracy Ended in April 2015”)).

666. RX0451 begins with a May 20, 2015 email from Lawrence Schmidt, a Patterson employee in Maine, in which he wrote Amy Barriage, another Patterson employee, in part “I was told by a staff person with Vermette Ortho that they are a member of a buying group (UOBG) and should be getting special pricing. . . . Any idea what kind of discounting I should use?” (RX0451 at 2).

667. Amy Barlage added Neal McFadden to the chain and responded, “Larry, I am looking into this and will get back to you.” (RX0451 at 2).

668. McFadden responded and added David Misiak to the chain: “*We currently have little appetite to deal with the buying groups as we feel they compete directly with the branches and reps. With that being said, I will follow Dave Misiak’s lead here. We have said no may times in order to remain pure in our intent and consistent across the company. If the local branch wants to do something here that’s fine by me but I cannot work with our manufacturers on securing special pricing for a buying group that has no ownership in their clients. I hope this adds a bit of clarity.*” (RX0451 at 1 (emphasis added)).

669. Michael Cormier, Patterson’s Maine Branch Manager, then responded to McFadden, “Thanks for the insight Neal – we will handle it at the Branch level.” (RX0451 at 1).

670. There is also no evidence that Patterson communicated with Benco or Schein about UOBG.

671. Thus, there is no evidence that Patterson may have sold supplies or equipment to UOBG but for the alleged conspiracy.

VIII. Dr. Marshall’s Conspiracy Opinion

a. Dr. Marshall’s Conspiracy Opinions Are Based On His Adoption Of Complaint Counsel’s Readings Of Documents And Testimony, Ignoring Contrary Evidence.

672. Dr. Marshall does not offer an opinion on the start or end of the alleged conspiracy. (Marshall, Tr. 2889 (“A. Well, the Federal Trade Commission gave me a date range of 2011 to 2015, and I’m not offering an opinion about a start date or an end date for the conspiracy, but I am making a statement about is this a reasonable date range.”); Marshall, Tr. 2947 (“Q. You’re not offering any economic opinion to pin a precise date as to the start of the alleged conspiracy? A. That’s correct. That was not part of my charge.”); Marshall, Tr. 2948 (“Q. But you’re not offering any opinion as to the precise end date of the alleged conspiracy; is that right? A. That is correct.”)).

673. Dr. Marshall relied on Complaint Counsel’s alleged conspiracy period from 2011 to 2015. (Marshall, Tr. 2889 (“A. Well, the Federal Trade Commission gave me a date range of 2011 to 2015 . . . “); Marshall, Tr. 2890 (“I found the date range to be reasonable that the FTC had provided to me.”); Marshall, Tr. 2947 (“Q. Now, with respect to the start dates of the alleged conspiracy, you took those dates from the complaint counsel; is that right? A. They gave me a date range of 2011 to 2015, and I did a reasonableness check.”); Marshall, Tr. 2948 (“Q. Okay. Now, with respect to the end date of the alleged conspiracy, you also took that from complaint counsel? A. I -- I -- they gave me the date range of 2011 to 2015, and again, I did a reasonableness check.”)).

674. Dr. Marshall did not offer an opinion as to when Patterson entered into the alleged agreement with Benco and Schein. (Marshall, Tr. 2947-48 (“Q. So you’re not offering any opinion as to when Patterson entered into any conspiracy with Benco or with Schein. A. I’m looking at the dates of 2011 to 2015 and saying that those date ranges which were given to me were reasonable. Q. Okay. A. So I’m not offering an opinion.”); Marshall, Tr. 3109-10 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

675. Dr. Marshall conceded that what the authors of the documents or participants of any conversations “meant [in any e-mail or phone call] is up to them.” (Marshall, Tr. 2946 (“Q. And you’re not interpreting what the parties meant by any e-mail or phone call, anything along

those lines; right? A. I'm looking at the economic content of that information certainly. Q. My question was, you're not offering any – you're not -- you're not interpreting what the parties themselves meant in any e-mail or phone call; is that right? A. No. I don't know what -- what they meant is up to them. Yes.”)).

676. Yet even as he acknowledged that interpretations of documents are up to the trier of fact, he testified that his status as an economist makes his interpretations of documents correct. (Marshall, Tr. 3141 [REDACTED]

677. Dr. Marshall's opinion that Patterson participated in a conspiracy with Benco and Schein relating to buying groups from 2013 to 2015 relies on his interpretation of a handful of interfirm communications (Marshall, Tr. 3291 (“Q. Correct. That's your section on interfirm communications; right? Section V.A. A. Yeah. That's V.A, yes. All right. And just so we're clear, this is the evidence of interfirm communications that led you to conclude why Patterson acted contrary to its self-interest as you determine from your section V.D study; right? A. I'm looking at the economic content of these communications to make a determination as to why firms did -- acted against their unilateral self-interest, and this is leading me to the conclusion of coordinated action.”)), specifically:

- CX0090 – February 8, 2013, email exchange between from Mr. Cohen and Mr. Guggenheim re: New Mexico Dental Cooperative purchasing (CX7100 at 124).
- CX0062 (cited in CX7100 as CX3108) – June 6-8, 2013 email exchange, also between Cohen and Guggenheim, re: New Mexico Dental Cooperative purchasing (CX7100 at 125).
- CX6027 – phone records showing single January 6, 2014 phone call between Mr. Steck and Mr. Misiak regarding the TDA (CX7100 at 125–26).

678. Dr. Marshall conceded at trial that CX0090 does not reference any agreement to take any concerted action. (Marshall, Tr. 3307-08 (“Q. You know, I’ve read that e-mail. We’ve all been here in the courtroom while you were not. That e-mail does not say, essentially, What are you doing? I thought we weren’t bidding for buying groups. In fact, it doesn’t say that at all, does it, sir? A. Well, that’s how I read the economic content of the e-mail transmissions. Q. Fair enough. But the words in English aren’t on that e-mail, are they, sir? A. I didn’t understand your question. Q. The words in English on that e-mail do not say, essentially, “What are you doing? I thought we weren’t bidding for buying groups,” do they, sir? A. I don’t think I was quoting from an e-mail, no.”)).

679. Dr. Marshall also conceded at trial that CX0090 contains no explicit reference to any future concerted action; Marshall instead “presumed,” based on the “economic evidence,” “that he’s [Mr. Guggenheim] going to have a follow-up with people in his organization.” (Marshall, Tr. 3310 (“A. Well, he’s saying, “Thanks for the heads up. I’ll investigate the situation. We feel the same way about these,” referring to buying groups. That suggests that he’s going to have a follow-up with people in his organization.”); Marshall, Tr. 3311 (“A. I’m presuming that the head of Patterson, Mr. Guggenheim, who says, “Thanks for the heads up. I’ll investigate the situation. We feel the same way about these,” namely buying groups, implies that there’s going to be such communication”); Marshall, Tr. 3322 (“Yeah. I’m looking at the economic evidence here.”); Marshall, Tr. 3322 (“I would presume that the senior manager of a company is managing his people, so that’s where I am with that.”)).

680. This Court explained during trial that, “when it comes to experts, if they are incorrect in the facts that they rely on, that can be a fatal problem.” (Judge Chappell, Tr. 5376).

681. Dr. Marshall acknowledged that feelings and commitments are different things. (Marshall, Tr. 3323–24 (“Q. All right. Got it. Now, you would agree with me that the word “feel” is a different word than the word “commit.” A. That’s not the same word.”)); *see also* RXD0216 (definition of “feel” vs. definition of “commit”).

682. Though Dr. Marshall presumed that Guggenheim would issue a communication to his team with instructions on what action to take towards buying groups—especially about the New Mexico Dental Cooperative at issue in Cohen and Guggenheim’s emails—after the February 8, 2013 email, Dr. Marshall could not “put [his] finger on such a communication.” (Marshall, Tr. 3311 (“Q. But sitting here right now with your report in front of you, you can’t find anything that shows that Mr. Guggenheim talked to anybody in the New Mexico branch of Patterson about the New Mexico Dental Cooperative after getting this e-mail from Mr. Cohen; correct? A. . . . I’m not right now able to put my finger on such a communication in response to your question.”); Marshall, Tr. 3312 (“Q. I’m asking you, after spending two and a half-plus million dollars preparing your opinion in this case, if you can point to a single shred of evidence supporting your opinion that Mr. Guggenheim ever spoke with anyone in the Patterson New Mexico branch about the New Mexico Dental Cooperative after getting an e-mail from Mr. Cohen on February 8, 2013. A. Again, not at this time I can’t put my hands directly on it.”)).

683. Dr. Marshall did not know who any of the individuals involved in the Albuquerque decision even *were*, or what any of them had said or done. (Marshall, Tr. 3315–20 (“I don’t know -- I’d have to refresh my memory on who all the parties are here. So you’re telling me Scott Belcheff works for Patterson. I see that. And then he’s sending this to a Dr. Mason. I’m not certain who Dr. Mason is, so I’d have to get my legs underneath me about that, too.”)).

684. Dr. Marshall conceded there is no evidence that any recipient of CX0090 ever communicated with Patterson’s New Mexico managers before Patterson decided to cancel the meeting Patterson was planning to host at its offices and not to work with the New Mexico Dental Cooperative. (Marshall, Tr. 3322 (“A. Well, you’re making -- okay. I don’t have direct or indirect evidence that Mr. -- after Mr. Cohen and Mr. Patterson, the two senior decision makers of these firms, had a conversation about not doing business with the New Mexico Dental Cooperative that that was directly or indirectly communicated to people on the ground in New Mexico.”); Marshall, Tr. 3323 (“A. Right now, I have nothing to point to that would say Mr. Guggenheim made a transmission directly to the managers in New Mexico, if that’s what you’re asking. I don’t have that. At this time.”)).

685. Dr. Marshall acknowledged that CX0062 (the June 2013 email exchange between Guggenheim and Cohen regarding Atlantic Dental Care) was sent after the Atlantic Dental Care bid had already been awarded to Benco. (Marshall, Tr. 3305-06 (“Q. The only interfirm communication that you have related to Patterson and Benco and Atlantic Dental Care was after, three weeks after, the bid had already been awarded; correct? A. Right.”)). Dr. Marshall *presumed*, in Court, that the email was saying “essentially, What are you doing? I thought we weren’t bidding for buying groups. Then Cohen is responding, We decided it’s not a buying group.” (Marshall, Tr. 3307). But he then conceded that this was just the “economic content” of the emails—the actual content said no such thing. (Marshall, Tr. 3307).

686. Yet, again based on the “economic content” of the email, Dr. Marshall presumed that CX0062 said something that the words on the page did not say: “essentially, What are you doing? I thought we weren’t bidding for buying groups.” (Marshall, Tr. 3307-8).

687. Dr. Marshall did not identify the TDA or TDA Perks Supplies as a “buying group.” (Marshall, Tr. 3293-94 (“Q. It’s nowhere -- neither one of these entities, Texas Dental Association or TDA Perks Supplies, are listed in your paragraph 491 of the buying groups that you say Patterson, Schein or Benco were approached by in one or another company turned down; right? A. Yes. Q. And in fact -- A. It’s not in paragraph 491. Q. Right.”)). Dr. Marshall seemed to think that Misiak and Steck were discussing whether to serve as a distributor for the TDA (which is not the case) and not whether to attend a TDA trade show (which is the case). (Marshall, Tr. 3399–3301). He apparently did not know that Source One Dental already was the TDA’s distributor as of Misiak and Steck’s communication—he thought Source One was a buying group. (Marshall, Tr. 3399–3301). He also did not realize that Complaint Counsel is not alleging a boycott of the TDA. (Marshall, Tr. 3299, 3302).

688. Dr. Marshall saw no direct evidence that the TDA or TDA Perks Supplies ever sought to work with Patterson. (Marshall, Tr. 3298-99 (“Q. No document or piece of testimony in your report, cited in your report, suggests that TDA Perks Supplies or TDA approached Schein or Benco and tried to buy from them either. Correct? A. I think your question is is there anything that directly states that, and I don’t see anything that directly states that.”)).

689. Dr. Marshall reached his opinion that Patterson’s communications regarding the New Mexico Dental Cooperative, the Atlanta Dental cooperative, or the Texas Dental Association were evidence of a conspiracy without analyzing any data regarding these three entities. (Marshall, Tr. 3203-04 (“Q. Now, those three that you say there are or may be some interfirm communications between my client Patterson and Schein or Benco, you didn’t study the purchases of the New Mexico Dental Cooperative members over here in your section V.D, did you? A. No. Q. Nor the Atlanta [sic] Dental cooperative members, you didn’t study them in your V.D either.

A. No. Q. Or members of the Texas Dental Association, you didn't study their purchases over here in your section V.D either, did you, sir? A. No.”)).

690. Dr. Marshall conceded that he has called it a “tragedy” “to read about firms that were fined huge amounts for engaging in nominally anticompetitive actions that had no chance of being successful.” (Marshall, Tr. 3327). “How,” he previously asked, “could a competent manager believe that substantial gains in profits are available for the price of a lunch and one hour of conversation?” (Marshall, Tr. 3327). “Successful explicit collusion requires planning, investments in administration, clear thinking, and hard work.” (Marshall, Tr. 3327); *see also* RXD0218 at 1).

691. Dr. Marshall opined that Guggenheim’s February 8, 2013 email represented a structural break for Patterson. (CX7100 at 193–94).

692. Dr. Marshall also opined that he observed a “structural break” in Patterson’s conduct because Patterson pursued the business of Smile Source in 2017, whereas Patterson had declined to do business with Smile Source in 2013. (CX7100 at 198; Marshall, Tr. 2893 (“Q. Did you have anything to say about Patterson and structural breaks, Dr. Marshall? A. One other observation is that in 2016–17 Patterson pursues the business of Smile Source and attempts to win that business.”)).

693. Aside from Patterson’s pursuing Smile Source in 2017, almost 2 years after the alleged conspiracy (Kahn, Tr. 19 (conspiracy ended in April 2015); *see also* RXD0205 at 1 (“The Alleged Conspiracy Ended in April 2015”)), Dr. Marshall observed no other evidence of a structural break in Patterson’s conduct after the alleged conspiracy.

694. Dr. Marshall testified that members of buying groups often buy from distributors other than the one a buying group partners with. (Marshall, Tr. 3018 [REDACTED])

[REDACTED]

[REDACTED]

[REDACTED]

695. Dr. Marshall conceded that parallel conduct can occur in an industry, without collusive behavior, as “common reactions to common factors.” (Marshall, Tr. 2952–53 (“Q. It’s important when you’re trying to determine whether there is a conspiracy first to have parallel conduct and then to determine whether that parallel conduct can be explained by unilateral behavior or whether it is a result of collusive behavior; is that right? A. Sure. There’s barometric pressures in any industry which can lead to parallel conduct.”); Marshall, Tr. 2951–52 (“Q. Parallel conduct can occur in some cases because there might be common reactions to common factors that affect supply and demand; right? A. Mutually recognized interdependence is well-known in our business as to reasons that there may be parallel conduct. Q. And I think you’ve testified on direct that it’s possible that -- it’s possible that the respondents would have reasoned their way to not bidding for buying groups; right? A. That’s a possibility that I have to look at as I’m looking at the unilateral incentive to bid evidence as I move on in my analysis.”); *see also* RXD0210 at 1).

696. Dr. Marshall conceded that not all buying groups present profitable opportunities, for example due to a “cannibalization effect.” (Marshall, Tr. 3002–03 [REDACTED]

[REDACTED]

[REDACTED]

697. Dr. Marshall defined cannibalization in this context as follows: “A dental distributor already has a set of dentists, customers, who are buying from them at a price, and when it becomes the distributor for that buying group, those dentists who are already buying from that distributor who sign up for the buying group are going to get lower prices than they were paying

before, so they – the distributor is already selling to them some amount. They sign up for the buying group that that distributor is willing to supply, and those customers, the prices for them are just dropping. So that’s an unprofit- -- that’s -- part of the calculation is unprofitable. That’s what I’m referring to as cannibalization.” (Marshall, Tr. 3280–81).

698. Dr. Marshall also testified that members of buying groups often buy from distributors other than the one a buying group partners with. (Marshall, Tr. 3018 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

699. Though he listed CX0148 on his list of materials considered (CX7100 at 243), Dr. Marshall did not consider the fact that it shows that, on or about December 31, 2013, a Patterson employee reported to Patterson’s David Misiak and Neal McFadden that Patterson already does business with “all [Smile Source members] that [she] looked up.” (Marshall, Tr. 3283 (“Q. . . . did you see anything, did you review any deposition transcripts or documents in the case, during your 14 months of studying things, that suggested that my client thought Smile Source, after meeting with Mr. Goldsmith, might just be cannibalizing its existing customers? . . . A. I don’t recall anything from the 2013 time frame.”); Marshall, Tr. 3284 (“Q. This document you did not consider as part of preparing your \$2.5 million-plus opinion in this case. A. Well, I don’t recall this right now.”)).

700. Instead, Dr. Marshall opined that [REDACTED]
[REDACTED] after Smile Source approached Patterson in late 2013. (CX7100 at 198).

701. Dr. Marshall did not study how many Smile Source customers were already customers of Patterson when Smile Source approached Patterson in December 2013 during the alleged conspiracy. (Marshall, Tr. 3282 (“Q. So you don’t recall studying how many Smile Source members were already existing Patterson customers in this time period; correct? A. That’s correct.”); Marshall, Tr. 3288 (“Q. You didn’t study how many members of Smile Source in December 2013 were already Patterson customers and how much they were buying from Patterson; correct? A. Well, not -- not directly as you’re suggesting, but I did again study what was going on with Patterson through the Burkhart-Smile Source study and also the Atlanta Dental-Smile Source study.”)).

702. Paragraph 491 of Dr. Marshall’s report lists 38 groups that at least one Respondent determined to be a buying group and at least one Respondent turned down. (CX7100 at —209-13; (Marshall, Tr. 2986 [REDACTED]
[REDACTED]
[REDACTED].

703. But at least one of the 38 groups listed in paragraph 491 of Dr. Marshall’s report—Dental Gator—did not meet these criteria. (CX7100 at 213; Marshall, Tr. 2992–93 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

704. Dr. Marshall was also unaware that another buying group he included in his report's paragraph 491, Dentistry Unchained, was not in existence during the alleged conspiracy period. (Marshall, Tr. 3273 ("Q. Did you realize, when you included Dentistry Unchained in here, that they weren't even in existence during the period from February 2013 to April 2015 when my client was alleged to have entered and exited the conspiracy? A. No."); Marshall, Tr. 3274 ("Q. You just stuck it in paragraph 491 even though it was after the conspiracy was over; right? A. Yeah. By what's being said here, I understand what you're saying. Yes."); *see also* RXD0212 at 1).

705. Dr. Marshall's Paragraph 491 also does not list the Dental Cooperative of Utah, even though Complaint Counsel has alleged that it was a "buying group" that "continued to seek supply contracts with Patterson" in 2013. (RX2958 at 7-9 (Supplemental Response to Interrogatory 3)).

706. Dr. Marshall's Paragraph 491 also does not list Hampton Roads Dental Partners, Integrity Dental Buyers' Group, KlearImpakt, Steadfast Medical, The Dental Service Company, or UOBG, even though Complaint Counsel has alleged that all of these were "buying groups" that may have bought dental equipment or supplies from Patterson but for the alleged conspiracy." (RX2958 at 7-9 (Supplemental Response to Interrogatory 3)).

707. Dr. Marshall's Paragraph 491, in listing the Florida Dental Association and citing CX0084 in support (CX7100 at 210 n.838), also fails to note that CX0084 is dated March 8, 2012, about a year *before* Patterson allegedly joined a conspiracy. (RX2958 at 10 (Complaint Counsel's Supplemental Response to Patterson's Interrogatory Four) ("Patterson joined the agreement in February 2013.")).

708. Dr. Marshall's Paragraph 491, in listing Synergy Dental Partners and citing CX1133 in support (CX7100 at 212 n.861), also fails to note that CX1133 (stating that Synergy had "approached every full service dealer . . . and were turned down) is dated August 18, 2011, about a year-and-a-half *before* Patterson allegedly joined a conspiracy. (RX2958 at 10 (Complaint Counsel's Supplemental Response to Patterson's Interrogatory Four) ("Patterson joined the agreement in February 2013.")).

709. Dr. Marshall testified that it is rational for distributors to turn down "incoherent," "irrational," or "irresponsible" business proposals from buying groups. (Marshall, Tr. 3259 ("[I]f a distributor is talking to someone who they think is interacting with them in an irrational or irresponsible way, it would make sense not to do business with such a person."); Marshall, Tr. 3259 ("If there was, however, some kind of incoherent management at one of these firms, I could understand them turning away that business, that that would not be irrational to me."); *see also* RXD0219 at 1).

710. But when questioned about specific buying groups from his list of 38 in paragraph 491, Dr. Marshall did not know whether any of them presented a coherent proposal to Patterson, including:

- **Dr. Stephen Sebastian's Buying Club**, (Marshall, Tr. 3263 ("Q. Can you tell me what sort of coherent proposal he made to my client Patterson Companies and when before you put him in this paragraph 491? A. No. Everything that I've conveyed is in the footnote in 845 as best as I recall. Q. So you don't know sitting here today if he made a coherent proposal to my client Patterson Companies. A. No. All the information again is in the footnote. Q. So the answer to my question is no, you don't know if he made a coherent proposal to my client Patterson Companies. A. That's correct, I don't know that."));
- **Nexus Dentistry**, (Marshall, Tr. 3264–65 ("Q. I'm asking, as to my client Patterson Companies, did Nexus Dentistry approach my client Patterson Companies? A. I don't know that. Q. So you can't tell me today sitting here

that Nexus Dentistry made a coherent business proposal to my client Patterson Companies; correct? A. Correct, I can't say that.");

- **Catapult**, (Marshall, Tr. 3265 (“Q. What about Catapult, number 16? Can you tell us if they made a coherent business proposal to my client Patterson Companies? A. The footnote here is 849. It’s a Patterson document, which is: “I will respond to Dr. Graham...with a polite pass on this request.” I don’t know that he made a coherent proposal.”));
- **Dental Purchasing Group**, (Marshall, Tr. 3267 (“Q. Can you tell me anything about the proposal Dental Purchasing Group, LLC made to my client Patterson Companies at all? A. Yeah. I did not review a proposal specifically put forward by Dental Purchasing Group.”; Marshall, Tr. 3271 (“Q. I just asked you, can you sitting here today, after all the study you’ve done of the industry, tell us that this vet, veterinarian, [Dental Purchasing Group] made a coherent proposal to my client? A. I didn’t review the proposal that was made to your client.”)); and
- **Stratus Dental**, (Marshall, Tr. 3274–75 (“What can you tell me about whether Stratus Dental made a coherent proposal to my client Patterson, Dr. Marshall? . . . So I don’t see anything here about the nature of the proposal that was made. . . . Q. So you can’t tell me they made a coherent proposal to my client Patterson; right? A. Not -- no, I can’t, not from the footnote. I don’t have knowledge of that. Q. And you can’t tell me when they made a proposal, if they made a proposal, to my client, can you? A. Yeah. I don’t see that revealed in the footnote, and I don’t have recollection of that.”).

711. Dr. Marshall testified at trial that he did not review transcript testimony to determine what it meant when Mr. McFadden wrote “this doctor is a vet” in response to receiving a proposal from the Dental Purchasing Group. (Marshall, Tr. 3269–70 (“Q. All right. Did you review any transcript of the testimony of these three witnesses in the case: Neal McFadden, who was president of Special Markets; Paul Guggenheim, who was president of Patterson Dental; and Dave Misiak, who was vice president of sales? Did you review their testimony in the trial? A. I’m -- I think I’ve looked at some of their testimony, but I don’t recall this, of anything in reference to this. Q. All right. So you don’t remember the part where they discussed this last sentence here in Mr. McFadden’s e-mail which says, “This doctor is a vet not a dentist.” Do you see that part? A.

I see that, yeah. Q. Yeah. Did you review the testimony about what that means? A. No, I didn't review the testimony about what that means.")).

712. Dr. Marshall did not know that the individual starting the Dental Purchasing Group buying group, which is listed in his paragraph 491, was a veterinarian. (Marshall, Tr. 3270 ("Q. Do you, Dr. Marshall, do you know if this dentist, this doctor who left this voice mail about the Dental Purchasing Group, do you know if he's a veterinarian? A. I don't know that. Q. So you don't know if he was proposing to start a dental buying group to brush dogs' teeth or fill cavities in cats or something like that; right? A. I -- I don't know what this statement means. They're -- the statement you've highlighted here that said he was a vet and not a dentist.")).

b. Dr. Marshall's Reliance On Kois And Smile Source, Without Showing They Are Representative Of Buying Groups At Large, Is Misplaced.

713. Dr. Marshall did not perform profitability analyses for 36 out of the 38 groups he opines were turned down by at least one Respondent during the alleged conspiracy period. (Marshall, Tr. 2987 [REDACTED])

[REDACTED]

[REDACTED]

[REDACTED]

714. The only buying groups that Dr. Marshall studied were Kois and Smile Source. (Marshall, Tr. 2972-73 [REDACTED])

[REDACTED]

[REDACTED]

715. Dr. Marshall conceded that he did not cite a single piece of evidence showing that Patterson communicated with anyone from Schein or Benco about either Kois or Smile Source. (Marshall, Tr. 3202-03 ("Q. And so paragraph 315 does not say anything or cite anything showing

that anybody from Patterson ever talked to anybody from Schein or Benco about either Kois or Smile Source, the only two buying groups you studied in V.D of your report correct? A. I -- that's correct.")).

716. Dr. Marshall testified that Kois and Smile Source were highly representative of other buying groups. (Marshall, Tr. 3245 ("In response to one of the government's questions, you said Kois and Smile Source were highly representative of other buying groups; right? A. In the sense that I just gave you, yes, they're representative. Q. Highly, that's what you said, highly representative; correct? A. Well, I don't recall "highly," but I'm fine with that, yes."))

717. Dr. Marshall acknowledged that there was no statistical evidence that Kois and Smile Source were representative of other buying groups. (Marshall, Tr. 3243-44 ("Q. . . . did you do any statistical analysis in your report to show that Kois and Smile Source were statistically represented -- representative of other buying groups in the country? A. There's no statistical representation of that.")).

718. Dr. Marshall concluded that Kois was highly representative of buying groups despite listing, among materials he relied upon that contradicted his opinion, a Kois Buyers Group presentation calling the Kois Buyers Group "profoundly different" from buying groups and "not a standard BUYING GROUP" (CX7100 at 261 (listing CX4060); (Marshall, Tr. 3255 ("Q. And you relied upon this document in forming your opinion that Kois was highly representative even though Qadeer told my client they're profoundly different and not a standard buying group; right? A. Yeah.")). Dr. Marshall's report does not acknowledge this statement by Kois or attempt to reconcile it with Marshall's conclusion that Kois was highly representative of buying groups. (Marshall, Tr. 3245).

719. And Dr. Marshall concluded Smile Source was highly representative of buying groups even as he listed, among materials he relied upon, Smile Source's Trevor Maurer's testimony that Smile Source was *not* a buying group. (Maurer, Tr. 4969 ("Mr. Maurer, if I heard your testimony right, Smile Source is not a buying group. Is that right? A. Correct."); CX0322 (Maurer, IHT at 86 ("Q. Do you consider Smile Source to be a buying group? A. No.")). Dr. Marshall's report does not acknowledge this testimony by Maurer or attempt to reconcile it with Marshall's conclusion that Smile Source was highly representative of buying groups. (Marshall, Tr. 3245).

720. Dr. Marshall also could not demonstrate which buying groups listed in paragraph 491 of his report (CX7100 at 209–13), were similar to Kois or Smile Source. (Marshall, Tr. 3246–47 ("Q. What -- well, in paragraph 491 of your report you list a whole bunch of other buying groups. Which ones of those have an educational center that's been in existence for twenty-plus years, that employs 15 people full-time, that's conducted thousands of training for dentists over a period of 30 to 55 hours for each of the courses? Which ones? A. I don't have knowledge of that."); Marshall, Tr. 3256 ("Q. Any dentist who wants to join the Smile Source buying group, they actually have to sign a contract and become a franchisee for several years; right? A. Right. But as a member of the buying group they're free to use the distributor for Smile Source or any other distributor. Q. Understood. Q. Now, is there any other buying group as part of your paragraph 491 in your report where you list other buying groups, any of those also require members to sign a contract to become franchisees for several years? A. I don't know that.")).

721. Patterson's expert, Dr. Lawrence Wu, testified that it did not make economic sense for Dr. Marshall to conclude that if it was profitable for certain distributors to work with "two buying groups" (Kois and Smile Source) that one can infer that it would have also been profitable

for Patterson to do so, because the undisputed evidence shows that buying groups were very different from one another. Dr. Wu also opined that in his economic opinion—and as Dr. Marshall acknowledged—Smile Source and Kois were organized very differently from other buying groups and thus not “representative” of other buying groups. (Wu, Tr. 5037 (“Given how different buying groups are, I do not see how it makes economic sense to infer that if it was profitable to work with two buying groups that we could infer that it also would have been profitable for Patterson to work with buying groups.”); Wu, Tr. 5039 (“So Dr. Marshall looked at two buying groups. He wants the court to infer that if it was profitable to work with two buying groups, it would have been profitable for Patterson to work with all buying groups. But that only makes sense if those two buying groups are representative of other buying groups, the other 38 buying groups mentioned in Dr. Marshall’s report. The facts show that buying groups are very different from each other.”); Wu, Tr. 5040 (“And I believe Dr. Marshall also admits that buying groups are very different from each other.”); Wu, Tr. 5040-41 (“They differ in how they’re organized. Some buying groups are very loose collections of dentists. Some are more formally organized. Some buying groups provide services to their members; some buying groups don’t provide any services at all. Some buying groups have many members; some have no members at all. . . . I believe Dr. Marshall testified that he doesn’t know of any other buying group that is organized like Smile Source, and I think he said the same about Kois. He doesn’t know of another buying group that’s organized like Kois.”)).

722. Dr. Marshall acknowledged that although Qadeer Ahmed was Kois’s appointed representative that was solely responsible for Kois’s reach-out to Patterson, Dr. Marshall did not know how many employees Qadeer Ahmed’s company, ProCare Services, had aside from Ahmed. (Marshall, Tr. 3249–50 (“Q. How many employees does ProService have? A. I don’t recall that. Q. Well, does it have any employees, other than Qadeer at Hotmail.com? A. I don’t know.”)).

723. Dr. Marshall did not know where Qadeer Ahmed was located when he (Ahmed) reached out to Patterson on behalf of the Kois group. (Marshall, Tr. 3251 (“Q. Where is this guy qadeerahmed@hotmail.com -- where is he located? A. I don’t have a recollection of that.”)).

724. Dr. Marshall did not know if Qadeer Ahmed was a dentist or had any experience in the dental distribution market. (Marshall, Tr. 3250 (“Q. All right. And this Qadeer Ahmed, did he -- was he a dentist? A. I don’t know that. Q. Well, was he -- was he -- had he been in the dental distribution market? Did he have any experience? A. I don’t know that.”)).

725. Dr. Marshall did not know if Qadeer Ahmed knew anyone at Patterson (Marshall, Tr. 3251 (“Q. Well, did he know people at Patterson? Do you know that? A. I don’t know that.”)).

726. Dr. Marshall did not know if Qadeer Ahmed was well-respected in the dental industry or anything about Qadeer Ahmed’s background. (Marshall, Tr. 3251 (“Q. Qadeerahmed@hotmail.com, is he well-respected in the dental industry? A. I don’t have knowledge of that.”); Marshall, Tr. 3253 (“Q. Did he have any experience, this qadeerahmed@hotmail.com, on the Wall Street in New York? A. I don’t know that background of Mr. Ahmed.”)).

727. Dr. Marshall did not know if Qadeer Ahmed had any experience working with buying groups in an industry other than the dental industry. (Marshall, Tr. 3251 (“Had qadeerahmed@hotmail.com -- had he worked for buying groups in a different industry maybe, like medical? A. I don’t have knowledge of that.”)).

728. Indeed, even though Qadeer Ahmed was the Kois Buyers Group’s sole point of contact with Patterson (Kois Sr., Tr. 219 (“Q. I understand that you tasked Mr. Ahmed to reach out to the distributors, my client, Patterson Companies; is that fair? A. Yes. Q. You were not firsthand involved in those reach-out efforts; he did that on his own. Fair? A. Fair. Q. You don’t

know what he said to Patterson Companies; is that fair? A. Fair.”); (CX8007 (Kois Sr., Dep. at 35 (“[H]e did all the initiation of the contact and all the negotiation. I had nothing to do with any of that, so I don’t actually know what the conversations were that he had with any of the companies.”))), Dr. Marshall did not even know *who Qadeer Ahmed was* when he (Dr. Marshall) was deposed. (CX8041 (Marshall, Dep. at 429 (“Who’s Qadeer Ahmed? A. I’d have to review who Qadeer Ahmed was.”))).

729. Dr. Marshall conceded that Patterson’s reasons for not working with Kois were rational. (Marshall, Tr. 3258-59 (“Q. . . . Now, you would agree with me, Dr. Marshall, that it would be a perfectly legitimate unilateral decision for a company like my client, Patterson, not to want to do business with a buying group whose representative had sort of an incoherent proposal; right? A. Well, as I said in deposition, if -- if a distributor is talking to someone who they think is interacting with them in an irrational or irresponsible way, it would make sense not to do business with such a person.”))).

730. Dr. Marshall agreed that any business faced with a similar proposal would be rational in walking away. (Marshall, Tr. 3260 (“And just hypothetically, like if a guy from a Hotmail account who was not a dentist, who’s not in the dental distribution business, did not have a reputation and had never worked for a buying group, if he sent you a proposal that said he had 1,700 members when he actually had none, that might be a good example of an incoherent approach; correct? A. I think it would be the beginning of a conversation between the two parties as to what exactly he had in mind. It seems like a standard marketing document. But I understand that if the conclusion is it’s incoherent management, I can understand someone walking away from that.”))).

731. Patterson’s expert, Dr. Wu, testified that it was economically improper for Dr. Marshall to base his conclusion that Patterson acted against its unilateral self-interest solely on “after the fact” profitability calculations of *other* distributors dealings with Kois when there was unambiguous record evidence that Kois’s appointed representative, Qadeer Amed, made material misrepresentations to Patterson. Dr. Wu testified that, instead, Dr. Marshall should have considered “what Patterson knew and expected at the time it was considering working with that buying group.” (Wu, Tr. 5058 (“When Kois approached Patterson in 2013, it was approached by a fellow named Qadeer Ahmed. I believe Mr. Ahmed was claiming that Kois had 1700 members when it really had zero members. I believe Mr. Ahmed also made other claims which Patterson could not verify. But this is exactly the situation that we want to think about. When we want to think about whether it’s profitable for Patterson to work with Kois, it’s not just a calculation that we can make after the fact by looking at Kois and Burkhart. We have to consider what Patterson knew and expected at the time it was considering working with that buying group.”)).

c. Dr. Marshall’s Case Studies Are Unreliable.

1. Dr. Marshall Studied Only A Fraction Of A Fraction Of Dentists.

732. Dr. Marshall performed five case studies – contained in Section V.D of Dr. Marshall’s Report. (CX7100 at 150–190):

- **Case Study 1:** Section V.D.1. of CX7100 – “Analysis of Burkhart & Kois Buyers Group Profitability”, covering 2014Q4-2016Q4
- **Case Study 2:** Section V.D.2 of CX7100 – “Analysis of Burkhart & Smile Source profitability”, covering 2012-2016
- **Case Study 3:** Section V.D.3 of CX7100 – “Analysis of Atlanta Dental Supply & Smile Source profitability”, covering 2013-2016
- **Case Study 4:** Section V.D.4(a) of CX7100 – “Analysis of Schein & Smile Source profitability”; “end of the relationship with Smile Source in 2012”

- **Case Study 5:** Section V.D.4(b) of CX7100 – Analysis of Schein & Smile Source profitability; “start of a new relationship with Smile Source in 2017”

733. Dr. Marshall studied “a small fraction” of dentists – three-tenths of 1 percent or three one-thousandths of independent dentists. (Marshall, Tr. 3219 (Q. 621 dentists out of the 200,000 or so across the country, that’s the basis for your section V.D.1, 2 and 3 opinion; right? A. Those are the dentists that were relevant to study. Yes. Q. 621 out of 200,000; correct? A. Okay. I don’t know if -- I’m not good with the addition, but 621 sounds approximately right, yes. Q. And 621 out of 200,000 is -- it’s a small fraction. A. A small fraction, yes. Uh-huh.”); Marshall, Tr. 3220 (“Q. That’s the basis for your opinion in section V.D.1, 2 and 3 about my client; right? A. For the first three studies would be three one-thousandths of the independent dentists. Q. Three one-thousandths is the same as three-tenths of 1 percent? A. I think so, yes.); *see also* RXD0206A at 1).

734. Dr. Marshall could not show that his studies of a total of 621 dentists is statistically significant. (Marshall, Tr. 3220-21 (“Q. I didn’t see -- I didn’t see a statistical study in your report anywhere that shows that .003, the dentists you studied, that they’re a statistically significant portion of the dentists, the 200,000 dentists across the country. Am I right? A. No. I’ve not done a statistical study of whether that’s a -- what -- so the proportion of dentists in the country, there’s only about 5 percent of dentists who are in buying groups at this time, so it’s a larger percentage of dentists who are in buying groups, if that’s helpful.”)).

735. Dr. Marshall studied the purchases of 323, 250, and 39 dentists in his case studies V.D.1, 2, and 3 respectively. (CX7100 at 151; CX7100 at 162; CX7100 at 170; Marshall, Tr. 3219 (“Q. And as part of your study, the basis for your section V.D.1, 2, and 3, you study 323, 250 and 39; right? A. I’m sorry. Those are the numbers that we just discussed, yes.”)).

736. Dr. Marshall studied a fraction of a fraction of dentists in his Case Study 1 – 0.0015 of independent dentists. (Marshall, Tr. 3221-22 (“Q. So in your V.D.1 analysis you conclude, based on -- well, it’s less than .003 because it’s only 323 of the 200,000 dentists across the country; right? A. That would be -- it would be then I think 323 divided by 200,000. Q. Yeah. So that’s, you know, half as much, which I guess that would be .0015; is that fair? A. Approximately. Yeah. Yes.”)).

737. Dr. Marshall opined that Patterson acted contrary to its unilateral interest based on studying a fraction of that fraction, i.e., 0.0015, of independent dentists. (Marshall, Tr. 3223 (“Q. So you’re inferring that Patterson Companies acted contrary to its unilateral economic self-interest because, when you studied .0015 of the dentists in section V.D.1, Patterson missed out on \$855,000 in profit over a two-year period; right? A. Yes.”)).

738. Dr. Marshall also studied a fraction of a fraction of dentists in his Case Study 2 – less than 0.0015 of independent dentists in his Case Study 1. (Marshall, Tr. 3229-30 (“Q. But what I want to do is first establish, that’s the 250 dentists you studied in your V.D.2 analysis. A. Right. Q. And so that’s again .0015 of all the dentists in the country, that’s what you studied; right? A. Are you asking me what 250 divided by 200,000 is? Is that the question? Q. Yep. A. I don’t know that. I mean, if you’re representing it to be .0015, that might be correct, yes. It sounds about right. Q. Yeah. I -- I actually rounded up. It was actually a little bit smaller than that, but it’s .0001. Let’s just say that. A. Okay.”)).

739. Dr. Marshall opined that Patterson acted contrary to its unilateral interest based on studying a fraction of a fraction, i.e., less than 0.0015, of independent dentists in his Case Study 2. (Marshall, Tr. 3231) (“Q. So your basis in section V.D.2 for your opinion that my client acted contrary to its self-interest is based on .0001 of the dentists, and for those dentists you say my

client lost roughly half of the \$2.5 million-plus you billed to the government for your opinion so far; right? A. Yeah. Your -- Patterson lost about half of \$2.5 million by not securing the business of Smile Source when Burkhart did. Q. And that's over a five-year period; right? A. I'm just checking here to see the date range here. It appears to be 2012 to 2016, yes. Q. 2013, 2014, 2015, five years; right? A. Yes.”).

740. Dr. Marshall studied a fraction of a fraction of dentists in Case Study 3 – 0.000001 of independent dentists. (Marshall, Tr. 3233–34) (“Q. So just to set the facts right, in section V.D.3 you studied 39 dentists out of 200,000 across the country, and that's .000001 of all the dentists out there; right? A. Yeah. I'm losing that calculation, so I don't know. We'd have to bring that back up and do that again. Q. All right. But rather than do that, you just agree, it's a really, really small portion of all the dentists that are out there; right? A. Yeah. 323 dentists is a small proportion of 200,000 dentists. Q. I'm not on 323. We already did that. I'm on the 39. A. Yeah. 39 is a small proportion of 200,000 dentists.”).

741. Dr. Marshall admitted that he did not cite to a single academic, peer reviewed study endorsing the methodology of his roughly 40-page, 79 paragraph analysis he performed in Section V.D. of CX7100, in which he studied only a fraction of a fraction of dentists. (Marshall, Tr. 3241) (“Q. I don't see a single academic, peer-reviewed study that you cited in there endorsing the type of analysis you did of .0003 dentists and .0003 or 4 lost profits. Am I right? No academic study cited there? A. I don't know. I don't think so. I mean, I studied every dentist that was available to study in terms of these buying groups.”).

2. Dr. Marshall's Case Studies Speak To Irrelevant Time Periods.

742. Dr. Marshall acknowledged that his Case Study 4 relates to Schein and Smile Source's relationship one year *prior* to when Patterson allegedly joined a conspiracy and “does not speak to February 2013” when Patterson allegedly acted contrary to its self-interest. (Marshall,

Tr. 3211 “Q. It has nothing to do, Dr. Marshall, nothing to do with whether Patterson acted contrary to its self-interest starting in February 2013, does it? A. It doesn’t speak to February 2013.”).

743. Dr. Marshall testified that his Case Study 5 relates to Schein and Smile Source’s relationship two years after the alleged conspiracy and “all it’s showing is the unilateral incentive to bid given the competitive landscape at that time” in 2017, after the alleged conspiracy. (Marshall, Tr. 3213 (“Q. All right. So your study section V.D.4.2 relates to Schein’s sales to Smile Source in 2017; correct? A. Yes. Q. Two years after the conspiracy was over; right? A. Correct. Demonstrating the unilateral incentive to bid at that time, yes. Q. All right. And you’re not telling the court that somehow your study of the Schein-Smile Source sales in 2017, two years after the conspiracy was over, shed light on whether Patterson participated in a conspiracy two years earlier, are you? A. All it -- I’m sorry. All it’s showing is the unilateral incentive to bid given the competitive landscape at that time where both Burkhart and Atlanta Dental were supplying Smile Source and Patterson was pursuing the business.”).

744. Dr. Marshall testified that his Case Study 5 speaks to “a different competitive landscape” than the other case studies in his report. (Marshall, Tr. 2875-76 [REDACTED])

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

745. Dr. Marshall’s Case Studies 1, 2, and 3, do not show that Patterson’s conduct during the alleged conspiracy was any different than Patterson’s conduct in the but-for world. (Marshall,

Tr. 3240-41 (“Q. So your analysis if we take out the period that my client allegedly conspired, February 2013 to April 2015, if we take that out, your analysis shows in the but-for world the exact same action supposedly contrary to self-interest by Patterson Companies in the period before and in the period after; correct? A. Yeah. The studies are indicating that it’s in the unilateral self-interest to pursue the business of buying groups. Q. Conspiracy or no conspiracy; right? A. The studies are showing the unilateral self-interest -- the unilateral incentive to bid for the business of buying groups, and it’s showing also that there’s a loss incurred by not securing the business of buying groups.”)).

746. Patterson’s expert, Dr. Wu, concluded that Dr. Marshall’s decision to base his inference on a study of only three distributors—Burkhart, Schein, and Atlanta Dental—was economically improper. Dr. Wu found that Dr. Marshall’s inference that it would have been profitable for Patterson to work with buying groups based on a study of only these three distributors did not make “economic sense” because the records shows that the economics of those distributors did not “line up with the economics of Patterson.” (Wu, Tr. 5038 (“Dr. Marshall examines not just two buying groups but three distributors and their agreements with those two buying groups. Dr. Marshall concludes that if it was profitable for those three distributors to work with buying groups, then it also would be profitable for Patterson to work with those buying groups. But Dr. Marshall has not shown that the economics of those three distributors line up with the economics of Patterson, so I don’t think it makes economic sense to conclude that we can infer that it also would have been profitable for Patterson to work with buying groups.”); Wu, Tr. 5046 (“But Dr. Marshall has not shown that the economics for those three distributors are similar to the economics of Patterson. That’s what you need if you want to assume, if you want to make that leap, that it

also would have been profitable for Patterson. And when I look at it, I think Patterson's economics are completely different.")).

747. Dr. Wu further concluded that Dr. Marshall's inferences with respect to Patterson were economically improper because he ignored evidence in the record regarding the costs, risks and uncertainties that Patterson faced during the alleged conspiracy period. (Wu, Tr. 5038-39 ("in Dr. Marshall's calculations that it would be profitable to work with buying groups he ignores the costs, risks and uncertainties that Patterson faced during the conspiracy period. If we want to understand why a company did what it did at some point in the past, we really need to understand what factors affected that company's thinking at that time. It's Dr. Marshall ignoring those factors that make it -- make his conclusions unreasonable."); *see also* RXD229 at 1 (same); Wu, Tr. 5056 ("And it was far from clear for Patterson whether or not working with that buying group would be a profitable opportunity. And by "profitable opportunity" the uncertainty is not only whether a buying group would generate incremental revenues. There was also uncertainty about what costs Patterson would have to incur to serve that buying group and whether Patterson would have any cost savings by working with a buying group.")).

3. Dr. Marshall's Calculation Of Patterson's "Loss" From Not Working With Buying Groups Yields An Infinitesimally Small Number That Would Not Have Been Material To Patterson.

748. Dr. Marshall inferred that Patterson acted contrary to its economic self-interest in Case Study 1 because Patterson lost a tiny fraction, i.e., 0.0004 or four ten thousandths, of the company's gross profits over two years by not selling to Kois. (Marshall, Tr. 3228 ("Your \$855,000 in lost profits from the .0015 of the dentists lower couple years there; right? A. I see the calculation. Yes. Q. Four one-hundredths of 1 percent? A. Yeah. It looks like four ten-thousandths, yeah. Uh-huh. Q. Which is the same as four one-hundredths of 1 percent. A. Right."); *see also* RXD0207 at 1 ("Burkhart & Kois Profitability").

749. Patterson's expert, Dr. Wu, testified that it was improper as a matter of economics for Dr. Marshall to infer that Patterson contrary to its unilateral interest by simply foregoing \$855,000 in purported profits, which represented a "tiny, tiny fraction of Patterson's overall revenue." (Wu, Tr. 5050 ("Q. So, Dr. Wu, I think you just testified that 855,000 was a tiny, tiny fraction of Patterson's overall revenue? A. Yes. Q. And why is that significant? A. That's significant because now we can understand why it is that Burkhart and Atlanta Dental might find it a much more profitable opportunity to go after Kois than Patterson, so it's not quite right to infer that just because we see Burkhart going after Kois that we also should have seen Patterson going after Kois."); Wu, Tr. 5055 ("Dr. Marshall has not shown that the economics for the distributors he studies is similar to the economics of Patterson.")).

750. Dr. Marshall inferred that Patterson acted contrary to its economic self-interest in Case Study 2 because Patterson lost a tiny fraction, i.e., 0.0003 or three one hundredths of one percent, of the company's gross profits over five years. (Marshall, Tr. 3231 ("Q. So your basis in section V.D.2 for your opinion that my client acted contrary to its self-interest is based on .0001 of the dentists, and for those dentists you say my client lost roughly half of the \$2.5 million-plus you billed to the government for your opinion so far; right? A. Yeah. Your -- Patterson lost about half of \$2.5 million by not securing the business of Smile Source when Burkhart did. Q. And that's over a five-year period; right? . . . A. Yes."); Marshall, Tr. 3232-33 ("Q. So I took your half of what you billed down here in the blacked-out part, and I divided it by the 4.4 billion, so your V.D.2 study of the .0001 of the dentists, you're concluding my client acted contrary to its self-interest because it lost .0003 of its gross profit those years. A. Yes. It was contrary to Patterson's unilateral self-interest to forgo half of \$2.5 million in profits."); *see also* RXD0208 at 1 ("Burkhart and Smile Source Profitability").

751. Dr. Marshall concluded that Patterson acted contrary to its economic self-interest in Case Study 3 based on his assumption that Patterson lost an even smaller fraction, i.e., 0.00008, of the company's gross profits over four years by not selling to Smile Source. (Marshall, Tr. 3236-38 ("Q. All right. Now, you see, Dr. Marshall, I divided the few hundred thousand dollars in profit you say my client missed out on by not selling to Smile Source when Atlanta Dental sold them and then I divided by the company's gross profit over those years, and it's .00008. Do you see that? . . . A. Well, I see all that, yeah. . . . Q. That's the basis for your section V.D.3 opinion that my client acted contrary to its economic self-interest; right? A. That Patterson incurred a loss when Atlanta Dental won the business of Smile Source, that was the loss that Patterson incurred on the dentists who bought from Atlanta Dental, the 39 dentists, as a consequence of Atlanta Dental winning the contract, yes."); *see also* RXD209 at 1 ("Atlanta Dental & Smile Source Profitability").

752. The testimony of Dr. Marshall was excluded by a court when he testified for the government in a case involving an antitrust conspiracy. (Marshall Tr. 3180 ("Q. I didn't ask you for an interpretation. I'm just going through the facts of what happened the last time you testified in a courtroom on behalf of the government in an antitrust case. The defendants moved to exclude your opinion as unreliable, in part, because it was contrary to prior court rulings. Do you see that? A. Yeah. The part "contrary to this Court's prior rulings," yes, I see that. Q. And then if we go to the next page, another criticism that the defendants used as a basis for asking the judge to throw your testimony out, this paragraph here that says "Finally." Do you see this? It says "Dr. Marshall's opinions don't 'fit' the evidence in this case." Do you see that? A. I do. Q. So the last time you testified – because that's the last time you testified in a courtroom on behalf of the government in an antitrust case; right? A. Yes. That's the only time I've been in a courtroom, is

those two episodes for this case, 2011 and 2014, prior to this. Q. All right. So the defendants moved to exclude your testimony, and that's what the judge did; right? A. Yeah. He excluded the testimony four months after the jury verdict. Yes."); Marshall, Tr. 3186 ("Judge Trenga said, "Having now considered that testimony based on all the evidence in the case, the Court concludes that Dr. Marshall's testimony should have been excluded under Daubert." That's the ruling in the case the last time you testified on behalf of the government in a courtroom in an antitrust case; right? A. Yeah, I recall his decision. Yes. Q. And that's what he did, he excluded your opinion entirely; right? A. Right. After there had been this jury verdict, he excluded it. I'm sorry."); *see also* RXD0220 at 1-2 (summary of Dr. Marshall's prior expert courtroom experience); RXD0221 at 1-27 (Memorandum in Support of Defendants' Motion *In Limine* to Exclude Dr. Robert C. Marshall's Testimony and Expert Reports, *U.S. ex rel. Bunk v. Birkart Globistics GmbH & Co.*, Case No. 1:02-cv-01168-AJT-TRJ (2014); RXD0222 at 18 (*U.S. ex rel. Bunk v. Birkart Globistics GmbH & Co.*, 89 F.Supp.3d 778 (2014)).

753. Dr. Marshall's firm has been paid \$2.5 million for work on this case. (Marshall, Tr. 2858 ("JUDGE CHAPPELL: What's the total amount you've billed the U.S. government for your work in this case? And it includes you or anyone helping you. THE WITNESS: The firm of Bates White, Your Honor -- that's the only way I'd be able to answer this -- is 2.5 million.")).

754. Dr. Wu concluded that Dr. Marshall's opinion with respect to Patterson was "not economically reliable." (Wu, Tr. 5036-37 ("Q. Dr. Wu, did you find Dr. Marshall's conclusions to be economically reliable? A. My conclusions are that Dr. Marshall's conclusions are not economically reliable."); RXD228 at 1 (same)).

IX. Complaint Counsel Presented No Evidence Of Potential Recurrence.

755. There is no evidence that Patterson has discussed buying groups with Benco or Schein since Paul Guggenheim's June 2013 email correspondence with Chuck Cohen. (CX0062 at 1).

756. Complaint Counsel has asserted that the alleged conspiracy in this case ended in April 2015, when, due to Benco's April 9, 2015 settlement agreement with the State of Texas, the alleged conspiracy became "difficult, if not impossible, to maintain." (Kahn, Tr. 19; *see also* RXD0205 at 1 ("The Alleged Conspiracy Ended in April 2015")).

757. Complaint Counsel asserts that "respondents started dealing with buying groups after [April 2015]." (Kahn, Tr. 19; *see also* RXD0205 at 1 ("The Alleged Conspiracy Ended in April 2015")); CC's Pretrial Brief at 50 ("[A]ll three Respondents began competing for buying groups after the conspiracy ended.")). Specifically, for Patterson, Complaint Counsel asserts that, "in 2016, Patterson's stance changed; it began to pursue buying groups." (CC Mot. for Sum. Decision Opp. at 12).

758. Complaint Counsel's expert, Dr. Robert Marshall, testified that the date range given to him by Complaint Counsel (2011 to 2015) was "reasonable." (Marshall, Tr. 2889-90).

759. Patterson competed with Schein for Smile Source's business about *two years* later, in 2017, losing to Schein. (McFadden, Tr. 2733-35; Meadows, Tr. 2652-53; *see also* CC's Pretrial Brief at 50 n.284).

760. Patterson hired a business development director, Wesley Fields, in late 2015 with the instruction to explore working with buying groups. (Misiak, Tr. 1320 ("A. In approximately 2015, we deployed a business development director -- his name is Wes Fields -- to gather information from the field and from the industry about different GPO-type organizations."));

Guggenheim, Tr. 1654 (“Q. So part of his job in terms of what you told him to do was to explore buying groups. A. That was included in the scope of his business development role. Correct.”)).

761. Patterson also entered into contracts with two buying groups, Dr. Levin and Lake Harbor, in May 2018. (CX8028 (Lepley, Dep. at 37–39)).

762. Schein has worked with buying groups since 2015, including relationships that were entered into prior to 2015. (Foley, Tr. 4591 (Tralongo); Foley, Tr. 4620 (Orthosynetics); Foley, Tr. 4646–47 (IDA Buying Group); CX8005 (Muller, Dep. at 233–234 (Advantage Dental, Commonwealth Purchasing Group, Dental Gator, Dental Partners of Georgia, MMCAP)); *see also* RXD0030 at 1 (demonstrative listing buying groups Schein works with)).

763. Benco has been doing business through Elite Dental Alliance, a GPO it created, since 2016. (Cohen, Tr. 823–24).

764. Because all three Respondents now work with buying groups (*see supra* ¶¶ 760–63), it is unlikely that Patterson could today reach an agreement with Benco and Schein to refuse to discount to buying groups.

Dated: April 17, 2019

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

Dated: April 17, 2019

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Notice of Electronic Service

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

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