

Complaint

IN THE MATTER OF

**BENCO DENTAL SUPPLY COMPANY,
HENRY SCHEIN, INC.,
AND
PATTERSON COMPANIES, INC.**

COMPLAINT AND INITIAL DECISION IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket No. 9379; File No. 151 0190

Complaint, February 12, 2018 – Initial Decision, October 7, 2019 – Order, November 7, 2019

This case addresses an alleged agreement between Benco Dental Supply Company (“Benco”), Henry Schein, Inc. (“Schein”), and Patterson Companies, Inc. The complaint alleges that the respondents violated Section 5 of the Federal Trade Commission Act by agreeing to refuse to offer discounted prices or otherwise negotiate with buying groups seeking to obtain supply agreements on behalf of groups of solo practitioners or small group dental practices. In the Initial Decision, the Administrative Law Judge found that Benco and Patterson conspired to refuse to discount to or otherwise compete for the business of buying groups, but that Complaint Counsel failed to meet its burden of proving a conspiracy involving Schein. Although the Administrative Law Judge also found that the respondents had ceased the illegal activity, he issued an Order to cease and desist. With no party appealing the Initial Decision, the Order became final pursuant to Rule 3.51(a).

Participants

For the *Commission*: *Karen V. Goff, Lin W. Kahn, Ronnie Solomon, and John Wiegand.*

For the *Respondents*: *Tim Muris, Sidley Austin LLP; Colin R. Kass, Proskauer; John P. McDonald, Locke Lord LLP; Roxann Henry, Morrison Foerster; James J. Long, Briggs and Morgan; Craig Waldman, Jones Day; and Kenneth Racowski, Buchanan Ingersoll & Rooney.*

**COMPLAINT
(REDACTED PUBLIC VERSION)**

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that Respondents, Benco Dental Supply Company (“Benco”), Henry Schein, Inc. (“Schein”), and Patterson Companies, Inc. (“Patterson”) (collectively “the Distributors” or “Respondents”), have violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

Nature of the Case

1. This action arises out of a conspiracy among the country’s only national full-service distributors of dental products. Benco, Schein, and Patterson conspired to refuse to offer discounted prices or otherwise negotiate with buying groups seeking to obtain supply agreements

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on behalf of groups of solo practitioners or small group dental practices (“independent dentists”). This conspiracy sought to prevent price competition for the business of independent dentists purchasing through buying groups, and the erosion of prices charged to such independent dentists if buying groups became more prevalent. By entering into a horizontal agreement to restrain price competition, Respondents have engaged in a *per se* violation of Section 5 of the Federal Trade Commission Act. Respondents’ conduct is unlawful, whether treated as a *per se* violation or otherwise.

2. Respondents Benco, Schein, and Patterson collectively control approximately 85% of the sale of all dental products and services made through distributors in the United States, and approximately 61% of the sale of dental products and services through all sales channels. They are competitors of one another. Respondents sell dental supplies and equipment to, among other buyers, a fragmented customer base of independent dentists.

3. Buying Groups are 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”). Buying Groups are also referred to as “group purchasing organizations,” “GPOs,” “buying clubs,” and “buying cooperatives.” Historically, Buying Groups were not common in the dental products industry. In recent years, however, Buying Groups have begun to grow due to mounting competitive pressures on independent dentists from corporate dental practices and declining insurance reimbursement rates.

4. In contrast to the historically fragmented customer base of independent dentists, Buying Groups create buyers that are larger, more sophisticated, and more powerful. Buying Groups are distinct from other large purchasers of dental products, such as corporate dental practices and community health centers, because Buying Groups offer independent dentists the opportunity to seek lower prices and other buying efficiencies without having to become part of a larger dental practice, corporate dental provider, or other entity.

5. The Distributors feared that Buying Groups would drive down prices and threaten their profit margins, and they sought to prevent independent dentists from obtaining greater bargaining power through Buying Groups. They also recognized that group purchasing organizations had led to lower prices and profit margins for distributors in the medical supplies industry, and they feared the same fate for the dental products industry.

6. While the Distributors saw Buying Groups as a threat to the industry’s long term profit margins, they each nonetheless had unilateral incentives to provide discounts to and contract with Buying Groups. Buying Groups offer a distributor the opportunity to gain new customers and/or sales from competitors by offering discounts. A Buying Group could otherwise turn to another national, full-service distributor for their members’ needs if one distributor refuses to work with the Buying Group.

7. Rather than respond to the threat of Buying Groups independently, the Distributors entered into an agreement to forestall this threat through collective, coordinated action.

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8. Benco, Schein, and Patterson executives agreed not to provide discounts to or otherwise contract with Buying Groups composed of independent dentists (the “agreement”). The agreement sought to prevent the falling of prices charged by the Distributors to independent dentists. Senior executives of Benco, Schein, and Patterson entered into, ensured compliance with, and monitored the agreement through a series of private inter-firm communications. They also reaffirmed their conscious commitment to concerted action on various occasions.

9. Prior to the conspiracy, each Distributor decided independently whether, and to what extent, to compete for business from Buying Groups by offering discounts to their members. After the start of the conspiracy, the Distributors coordinated their conduct with respect to this customer segment. Each Distributor informed its sales force not to provide discounts to or compete for the business of Buying Groups.

10. The agreement continued at least into 2015. By agreeing not to compete for Buying Group business, the Distributors denied Buying Groups discounted prices or access to products and services offered by national full-service distribution companies, and thereby deprived independent dentists of the benefits of Buying Groups, including lower prices. The agreement eliminated one form of price competition among the Distributors, restricted output to Buying Groups, and interfered with the setting of prices by free market forces.

11. In late 2013, Benco attempted to expand the conspiracy by inviting Burkhart Dental Supply (“Burkhart”), a regional distributor, to join the agreement. Burkhart is the fourth largest full-service distributor in the country.

12. Respondents’ conduct has illegally restrained competition for the sale of dental products in the relevant markets.

Respondents

13. Respondent Benco Dental Supply Company is a private, for-profit corporation organized, existing, and doing business under the laws of the State of Delaware, with its principal place of business at 295 Centerpoint Boulevard, Pittston, Pennsylvania 18640. Benco is a full-service, national distributor that sells dental supplies, equipment, and services to dental practitioners throughout the United States. Benco is the third largest distributor of dental supplies and equipment in the United States.

14. Respondent Henry Schein, Inc. is a publicly traded corporation organized, existing, and doing business under the laws of the State of Delaware, with its principal place of business at 135 Duryea Road, Melville, New York 11747. Schein is a full-service, national distributor that sells dental supplies, equipment, and services to dental practitioners throughout the United States. Schein is the largest distributor of dental supplies and equipment in the United States.

15. Respondent Patterson Companies, Inc. is a publicly traded corporation organized, existing, and doing business under the laws of the State of Minnesota, with its principal place of business at 1031 Mendota Heights Road, St. Paul, Minnesota 55120. Patterson is a full-service,

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national distributor that sells dental supplies, equipment, and services to dental practitioners throughout the United States. After Schein, Patterson is the next largest distributor of dental supplies and equipment in the United States.

Jurisdiction

16. At all times relevant, Respondents Benco, Schein, and Patterson have each been, and are each now, corporations as “corporation” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

17. At all times relevant, the acts and practices of Respondents Benco, Schein, and Patterson, including the acts and practices alleged in this complaint, are in or affect commerce in the United States, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44. Respondents sell, or offer for sale, their products and services throughout the United States.

Overview of the Dental Products Industry

18. There are approximately 196,000 dentists currently practicing in the United States. Dentists require a broad range of products in the course of treating patients and operating a dental practice. A general practitioner can purchase hundreds of distinct products, or stock keeping units (“SKUs”), in a single month.

19. Dental products can be divided into two broad categories: (1) consumable supplies, often called “consumables” or “merchandise,” (2) and equipment. Consumables include products such as, but not limited to, bibs, gloves, composites, cements, impression material, and sterilization and prevention products. Equipment includes products such as, but not limited to, x-ray machines, dental chairs, compressors, and lights. The cost of dental products is a substantial component of the expenditures of independent dental practices.

20. The market for dental products in the United States is approximately \$10 billion annually. Dentists can purchase dental products and services through three channels: (1) full-service distributors, such as Benco, Schein, and Patterson; (2) mail-order or internet distributors; and (3) direct-selling manufacturers.

21. The vast majority of all dental products are sold by dental product distributors. Distributors allow dentists to centralize all of their purchases through one entity, offering an efficient way to obtain a wide range of products through centralized warehousing, delivery, and billing.

The Relevant Market

22. Where, as here, Respondents have engaged in a *per se* violation of 15 U.S.C. § 45, no allegations with respect to the relevant product market, geographic market, or market power are required.

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23. To the extent such allegations may otherwise be necessary, the relevant product market for purposes of this action is the full line of dental products and services sold through full-service distributors to independent dentists.

24. No reasonable substitute exists for the products and services offered by full-service distributors to independent dentists. Full-service distributors offer a comprehensive selection of products, with thousands of SKUs across all major product categories. They also offer value-added services to customers through their sales and service teams, including equipment installation and repair, sales representative support, and business and practice-management solutions.

25. Mail-order and internet distributors are not an adequate substitute for full-service distributors to independent dentists. While some mail-order and internet distributors offer a comprehensive selection of products, none of them provides the breadth of additional services available through full-service distributors. Mail-order and internet distributors typically do not employ sales and service teams as part of their standard business model, nor do they offer other business and practice-management solutions.

26. Manufacturers are also not an adequate substitute for full-service distributors. Manufacturers that sell directly to dentists represent a small percentage of the total sale of dental products in this country. Direct-selling manufacturers do not offer a full array of dental products and cannot provide the convenience of “one-stop-shopping” available through distributors. Typically, direct-selling manufacturers sell niche and specialty products. Therefore, even if a dental practice were inclined to purchase only directly from manufacturers, it would be unable to access the comprehensive selection of products available from full-service distributors and some mail-order and internet distributors.

27. The relevant geographic markets are no larger than the United States, and regional geographic markets contained therein.

28. With the exception of Buying Groups whose members purchase products throughout the United States, competition among full-service distributors for the sale of dental products and services to independent dentists occurs regionally. Independent dentists typically cannot store and manage large quantities of supplies in-house, and rely on frequent, small quantity orders. Moreover, independent dentists require prompt equipment servicing because delays in service affect dentists’ ability to see patients. The need for prompt product delivery and same-day servicing to the customer’s office or member location(s) typically limits the scope of regional markets.

29. Independent dentists who are members of Buying Groups that span a broad geographic area require a distributor with a dispersed network of distribution centers and field sales representatives to provide prompt product delivery and same-day servicing to each, or nearly each, Buying Group member location.

30. Respondents are the only full-service distributors that compete nationally for independent dentists. Collectively, Benco, Schein, and Patterson control more than 85% of all

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full-service distributor sales of dental products and services nationwide. With sales and service centers interspersed throughout the nation, they are also the largest, or the only, full-service distributors in many regional areas. Respondents collectively have substantial market power in all, or most, of the relevant markets, however defined.

**Benco, Schein, and Patterson Conspired to Prevent Price Erosion
Due to the Rise of Buying Groups**

31. The Distributors 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. Through a series of inter-firm communications, top executives at Benco, Schein, and Patterson entered into, ensured compliance with, and monitored the agreement. They also reaffirmed their conscious commitment to concerted action on various occasions. In addition to the communications set forth below, the Distributors' executives had ample opportunity to communicate with each other about the agreement.

A. Evidence of the Distributors' Agreement and Benco's Invitation to Burkhart

32. Benco and Schein entered into an agreement to refuse to provide discounts to or compete for Buying Groups no later than July 2012.

33. Historically, Benco had a policy of refusing to sell or provide discounts to Buying Groups. Schein had historically worked with some Buying Groups, but began pursuing an anti-Buying Group strategy. This change followed frequent inter-firm communications between Benco's [REDACTED] and Schein's [REDACTED] prior to July 2012.

34. [REDACTED] and other top Schein executives began instructing its sales force to avoid selling to Buying Groups. As a result, Schein refused to provide discounts to or compete for the business of new Buying Groups.

35. In July 2012, Benco suspected that Schein was offering discounts to a Buying Group named [REDACTED]. On July 25, 2012, [REDACTED] contacted Benco for a dental supply agreement and informed Benco that it had purchased products from Schein and worked directly with [REDACTED]. [REDACTED], a Benco executive who oversaw its Buying Group policy, forwarded [REDACTED]'s email inquiry to [REDACTED], stating: "Better tell your buddy [REDACTED] to knock this shit off." [REDACTED] responded: "Please resend this e-mail without your comment on top so that I can print & send to [REDACTED] with a note. The good news is: perhaps they're looking to us because Schein told them NO. That works for me." A few days after this exchange, [REDACTED] rejected [REDACTED].

36. Patterson joined the agreement to refuse to provide discounts to or otherwise compete for Buying Groups no later than February 2013.

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37. In February 2013, Benco suspected that Patterson was offering discounts to a Buying Group in New Mexico. On February 8, 2013, [REDACTED] emailed Patterson's [REDACTED]:

"Just wanted to let you know about some noise I've picked up from New Mexico. 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."

38. Historically, Patterson did not have the same policy as Benco, and Patterson executives had not instructed its sales force to refuse to recognize, work with, or offer discounts to Buying Groups.

39. On February 8, 2013, upon receiving [REDACTED]'s email, [REDACTED] forwarded [REDACTED]'s email to two other Patterson executives: then-[REDACTED], and [REDACTED]. [REDACTED] responded to [REDACTED]'s email later that day: "Thanks for the heads up. I'll investigate the situation. We feel the same way about these."

40. Like Benco and Schein, top Patterson executives began instructing its sales force to avoid selling to Buying Groups no later than February 2013. As a result, Patterson refused to provide discounts to or compete for the business of new Buying Groups.

41. On February 26, 2013, in response to an inquiry from a Benco regional manager about the [REDACTED] Buying Group, [REDACTED] stated: "I just sent [REDACTED] a note about it. [REDACTED]"

42. In late February 2013, pursuant to the agreement, each of the Respondents refused to submit a bid for a customer called [REDACTED], as each of the Distributors believed it to be a Buying Group.

43. In a February 27, 2013 e-mail, Patterson's [REDACTED] instructed his sales team to reject [REDACTED], stating that both Benco and Schein were also rejecting Buying Groups: "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." [REDACTED] also stated in an email to [REDACTED] on February 27, 2013: "I'm concerned that Schein and Benco sneak into these co-op bids and deny it."

44. Benco, Schein, and Patterson executives then began communicating about whether [REDACTED] was, in fact, a Buying Group.

45. First, on March 25, 2013, [REDACTED] called [REDACTED], at [REDACTED]'s request. During the call, which lasted approximately 8.5 minutes, the executives discussed [REDACTED], and [REDACTED] informed [REDACTED] that Benco would not bid on [REDACTED]. Following the call, [REDACTED] and [REDACTED] continued exchanging text messages about [REDACTED] and whether it qualified as a Buying Group. On

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March 27, 2013, █████ informed █████ by text message that Benco had determined █████ was not a Buying Group, but a corporate dental practice, and that Benco would bid for █████'s business:

“█████: Did some additional research on the █████ deal, seems like they have actually merged ownership of all the practices. So it's not a buying group, it's a big group. We're going to bid. Thanks.”

46. The following day, on March 26, 2013, █████ contacted a Benco sales representative to seek information about a Buying Group called █████, to which Benco suspected Schein was offering discounts. The Benco sales representative provided █████ details about the purported relationship between Schein and █████. Later that day, █████ copied this information into a text message to █████, and commented: “As per my guy in Raleigh: . . . Could be a rumor, sometimes stories go around. Thanks.” In the same text message, █████ also reaffirmed Benco's commitment that it would not work with this Buying Group.

47. █████ and █████ exchanged additional text messages and phone calls, culminating in a 5.5 minute phone call on April 3, 2013. Following these communications, both Schein and Benco changed course and submitted a bid for █████. Benco won the █████ contract around May 2013.

48. █████ and █████ also communicated about whether █████ was a Buying Group. On June 6, 2013, after learning that Benco won █████'s business, █████ emailed █████, replying to the email thread in which █████ previously invited Patterson to join the agreement in February 2013. █████ asked █████ for more information about Benco's agreement with █████:

“Reflecting back on our conversation earlier this year, could you shed some light on your business agreement with █████
█████? . . . I'm wondering if your position on buying groups is still as you articulated back in February? . . . Sometimes these things grow legs without our awareness!”

49. On June 8, 2013, █████ responded to █████ that █████ was a corporate dental practice, not a Buying Group, and that Benco's position on Buying Groups had not changed. █████ assured █████ that Benco's bid was consistent with the agreement. █████ promised █████ that Benco will “continue monitoring the process to ensure that █████ delivers on their commitment to us.” █████ offered to discuss the issue further. █████ replied to █████ on June 10, 2013: “Sounds good █████. Just want to clarify where you guys stand.”

50. Following this exchange, █████ informed Patterson's sales team to change course and pursue █████'s business. Patterson ultimately competed for █████'s business despite previously notifying █████ that it would not submit a bid.

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51. Throughout 2013, Buying Groups continued to seek supply contracts with Patterson. On August 2, 2013, a new Patterson executive asked [REDACTED] (Patterson [REDACTED]) and [REDACTED] (Patterson [REDACTED]): “Is it worth it to explore GPO?????? . . . I used to get 1 [request] per month . . .” [REDACTED] responded: “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.”

52. On September 4, 2013, when Patterson announced the creation of its Special Markets Division—a division devoted to handling large accounts—it announced internally in a memorandum to regional and branch managers that it would exclude Buying Groups as a potential customer opportunity.

53. In or around September 2013, Benco learned that Burkhart had entered into a supply agreement with a Buying Group. Upon learning this news, Benco attempted to persuade Burkhart to stop discounting to Buying Groups.

54. On September 13, 2013, Benco’s [REDACTED], called Burkhart’s Vice President of Sales, Jeff Reece. During this phone call, [REDACTED] expressed Benco’s concerns about Burkhart’s decision to sell to Buying Groups. [REDACTED] told Reece that Buying Groups were a threat to the dental industry.

55. On September 16, 2013, [REDACTED] reported his conversation with Reece to [REDACTED] and [REDACTED]: “I spoke with Jeff Reece at length late Friday about buying groups. JEFF DOES NOT GET IT!!!! . . . I will be meeting with Jeff at the ADA [American Dental Association] meeting to continue the discussion.”

56. In response to [REDACTED]’s email on September 16, 2013, [REDACTED] asked [REDACTED] to reach out to Schein and Patterson: “[REDACTED] - - maybe what you should do is make sure you tell [REDACTED] and [REDACTED] to hold their positions as we are.”

57. On October 1, 2013, Benco’s [REDACTED] called his counterpart at Schein, [REDACTED]. During this call, [REDACTED] reaffirmed Benco’s commitment against Buying Groups and informed [REDACTED] that Benco would not bid on the Buying Group [REDACTED]. Neither distributor bid on [REDACTED] in 2013.

58. On October 9, 2013, [REDACTED] informed his superior of this communication with Benco:

“Next time we talk remind me to tell you about my conversation with [REDACTED] at SM Benco. They’re anti Buying Group and [REDACTED] recently reached out to them. I’m being careful not to cross any boundaries, like collusion.”

59. At the Dental Trade Alliance (“DTA”) annual meeting in Ponte Vedra Beach, Florida in October 2013, Benco again attempted to persuade Burkhart to stop discounting to Buying Groups. [REDACTED] told Reece that Burkhart’s decision to sell to Buying Groups was not

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acceptable, and expressed concern and disappointment at Burkhart's Buying Group strategy. ██████ attempted to convince Reece that Burkhart should stop selling to Buying Groups. Burkhart continued to sell to Buying Groups after these communications.

60. In January 2014, Benco's ██████ and ██████ discussed the Buying Group ██████. ██████ wrote: "Very familiar [with ██████]. Talked to them three times. Nothing is different. ██████ at Schein and I talked specifically about them. Buh-bye."

61. In 2014 and 2015, contemporaneous documents from the Distributors' executives continued to confirm the existence of a conscious commitment to a common scheme.

62. For example, in June 2014, a Patterson executive wrote in a text message: "[W]e've signed an agreement that we won't work with GPO's."

63. In May 2015, Benco's ██████ rejected a Buying Group and commented in an internal email: "The best part about calling these [buying groups] is I already KNOW that Patterson and Schein have said NO."

64. In June 2015, Benco's ██████ informed a Benco sales representative: "We don't allow [volume discount] pricing unless there is common ownership. Neither Schein nor Patterson do either."

65. Through these and other inter-firm and intra-firm communications, the Distributors exchanged mutual assurances, reached a meeting of the minds, ensured compliance with, and monitored the agreement that no Distributor would provide discounts to or compete for the business of Buying Groups.

66. As a result of the agreement, Benco, Schein, and Patterson lost customers and sales to small, fringe distributors that did offer discounts to Buying Groups.

B. The Distributors Communicated about State Dental Association Buying Groups

67. The Distributors continued their pattern of private, inter-firm communications about Buying Groups when they learned that the Texas and Arizona Dental Associations were creating statewide Buying Groups.

68. The Texas Dental Association ("TDA") and Arizona Dental Association ("AZDA") are state dental associations with member dentists across the states of Texas and Arizona, respectively.

69. In October 2013, TDA launched a buying program for its members called "TDA Perks Supplies" (the "TDA Buying Group"), supplied by SourceOne Dental, an online dental distributor. The TDA Buying Group offered discounted supplies to its members.

70. The Distributors viewed the TDA Buying Group as another threat from a Buying Group.

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71. Shortly after TDA announced the TDA Buying Group, employees at Benco, Schein, and Patterson engaged in repeated inter-firm communications to apprise each other of their intended response to this new Buying Group. The Distributors discussed collectively withdrawing from the TDA's 2014 annual trade show ("TDA Trade Show"). These communications spanned several months, including, but not limited to, the following:

- a. In October 2013, at [REDACTED]'s direction, Benco's Texas regional manager called a Schein Texas regional manager to inform him that Benco was considering pulling out of the TDA Trade Show. According to a summary of the call, the Benco regional manager stated: "[REDACTED] will be reaching out to . . . [REDACTED] to see if [Schein] would do the same thing." Benco's regional manager, at [REDACTED]'s direction, also communicated with Patterson's regional manager to discuss withdrawing from the TDA Trade Show.
- b. On December 11, 2013, Benco's Texas regional manager stated the following in regards to the TDA Buying Group: "I have been talking to the directors of Schein and Patterson. We are going to be taking a stand together against them." Also in December 2013, a Schein regional manager in Texas visited a Patterson branch manager, who informed him that Patterson would not be attending the TDA Trade Show. Schein's zone manager passed this information along to his boss, stating: "FYI Patterson pulled out of [the TDA] Convention. I firmly believe they made the move expecting us to follow suit."
- c. On January 6, 2014, Schein's [REDACTED], and Patterson's [REDACTED], communicated by phone regarding TDA. [REDACTED] and [REDACTED] spoke for 14 minutes. On January 21, 2014, [REDACTED] sent [REDACTED] a follow-up email with the subject, "Texas," and stated, "I'll be calling you to let you know about our decision on the matter we recently discussed in the next couple of days."
- d. On April 16, 2014, Benco's [REDACTED] emailed Schein's [REDACTED] and Patterson's [REDACTED] about the TDA Buying Group. [REDACTED] forwarded an article about the Buying Group, and stated: "Thought you'd be interested in this 'essay' from our friends at the TDA."

72. Benco, Schein, and Patterson each informed the TDA that they would not attend the 2014 TDA Trade Show. Benco, Schein, and Patterson did not attend the 2014 TDA Trade Show.

73. Benco, Schein, and Patterson similarly discussed withdrawing from the AZDA annual trade show in response to AZDA's creation of a Buying Group in July 2014. On July 21, 2014, Benco's Arizona regional manager emailed a Patterson branch manager in Arizona about the AZDA Buying Group, and stated: "I know that Patterson, Schein and Benco boycotted the Texas Dental Association meeting this year after the TDA did the same thing and wanted to see

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if we could create the same message here in [Arizona].” Following inter-firm communications in the summer of 2014, all three distributors withdrew from the AZDA Western Regional Conference (“AZDA Trade Show”).

74. The Distributors’ inter-firm communications and subsequent withdrawal from the TDA and AZDA Trade Shows are evidence of their conscious commitment to coordinate their response to the threat of Buying Groups.

Anticompetitive Effects of the Agreement

75. Respondents’ conduct as alleged herein has had the purpose, capacity, tendency, and effect of restraining competition unreasonably and injuring customers and others in the following ways, among others:

- a. Unreasonably restraining price competition in the sale of dental products in the United States;
- b. Distorting prices and undermining the ability of independent dentists to obtain lower prices and discounts for dental products;
- c. Depriving independent dentists of the benefits of vigorous price and service competition among full-service, national distributors of dental products;
- d. Unreasonably reducing output of dental products to Buying Groups of independent dentists in the United States;
- e. Eliminating or reducing the competitive bidding process among the Distributors for sales to Buying Groups of independent dentists in the United States;

76. As a horizontal agreement that has restrained price competition, the agreement is *per se* unlawful. To the extent the agreement is not a *per se* violation of Section 5 of the FTC Act, the agreement is an inherently suspect violation thereof or is subject to a truncated rule of reason analysis.

Lack of Procompetitive Efficiencies

77. Respondents’ acts and practices as alleged have not been, and are not, reasonably necessary for or reasonably related to any efficiency-enhancing objectives.

78. There are no legitimate procompetitive efficiencies that justify Respondents’ conduct as alleged, or that outweigh the anticompetitive effects of that conduct.

79. Any legitimate objectives of Respondents’ conduct as alleged were achievable through significantly less restrictive means.

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**FIRST VIOLATION ALLEGED:
RESTRAINT OF TRADE: CONSPIRACY (*PER SE* VIOLATION)**

80. The allegations of Paragraphs 1 through 21 and Paragraphs 31 through 74 above are re-alleged as if fully set forth herein.

81. Respondents conspired not to provide discounts to or otherwise compete for the business of Buying Groups of independent dentists. Their concerted action unreasonably restrained trade and constituted an unfair method of competition in or affecting commerce in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

82. Respondents' concerted action is a *per se* violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

**SECOND VIOLATION ALLEGED:
RESTRAINT OF TRADE: CONSPIRACY
(INHERENTLY SUSPECT VIOLATION)**

83. The allegations of Paragraphs 1 through 79 above are re-alleged as if fully set forth herein.

84. Respondents conspired not to provide discounts to or otherwise compete for the business of Buying Groups of independent dentists. Their concerted action unreasonably restrained trade and constituted an unfair method of competition in or affecting commerce in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

85. Respondents' concerted action is an inherently suspect violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

**THIRD VIOLATION ALLEGED:
RESTRAINT OF TRADE: CONSPIRACY
(TRUNCATED RULE OF REASON)**

86. The allegations of Paragraphs 1 through 79 above are re-alleged as if fully set forth herein.

87. Respondents conspired not to provide discounts to or otherwise compete for the business of Buying Groups of independent dentists. Their concerted action unreasonably restrained trade and constituted an unfair method of competition in or affecting commerce in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

88. Respondents' concerted action is a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, that is subject to a truncated rule of reason analysis.

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**FOURTH VIOLATION ALLEGED:
UNFAIR METHODS OF COMPETITION: INVITATION TO COLLUDE**

89. The allegations of Paragraphs 1 through 66 and 75 through 79 above are re-alleged as if fully set forth herein.

90. Respondent Benco invited a competitor to collude in a joint agreement to refuse to provide discounts to or otherwise compete for the business of Buying Groups of independent dentists. Respondent Benco's actions constituted unfair methods of competition in or affecting commerce in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

Notice

Notice is hereby given to the Respondents that the sixteenth day of October is hereby fixed as the date, and 10:00 a.m. as the time, and the Federal Trade Commission offices, 600 Pennsylvania Avenue, NW, Washington D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings of fact and conclusions of law under § 3.46 of the Federal Trade Commission Rules of Practice.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint, and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after an answer is filed by Respondents. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at

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the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington DC 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within five days of receiving the answer of Respondents, to make certain initial disclosures without awaiting a formal discovery request.

Notice of Contemplated Relief

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that Respondents have violated or are violating Section 5 of the FTC Act, as amended, as alleged in the complaint, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate ("Order"), including, but not limited to:

1. Ordering Respondents to cease and desist from the conduct alleged in the Complaint, and to take all such measures as are appropriate to correct or remedy, or to prevent the recurrence of, the anticompetitive practices engaged in by Respondents.
2. Prohibiting Respondents from conspiring or agreeing with each other, any competitor, or any person, to refuse to provide discounts to or compete for the business of any Customer, and from soliciting any Respondent, competitor, or any person to enter into any such conspiracy or agreement to refuse to provide discounts to or compete for the business of any Customer. The term "Customer," as used herein, is any purchaser of dental products and services, including but not limited to any dentist, dental practice, regardless of size, ownership or corporate structure, or any group purchasing organizations composed of dentists or dental practices, including but not limited to Buying Groups.
3. Prohibiting Respondents from punishing or threatening to punish any Customer, potential Customer, trade association, manufacturer, or any other person or business who wants to conduct business with any other Customer.
4. Requiring that each Respondent establish an antitrust compliance program.
5. Requiring, for a period of time, that Respondents document all communications with any competitor, including by identifying the persons involved, the nature of the communication, and its duration, and that Respondents submit such documentation to the Commission.
6. Requiring that each Respondent's compliance with the Order shall be monitored at its expense by an independent monitor, for a term to be determined by the Commission.
7. Ordering each Respondent to submit at least one report to the Commission sixty days after issuance of the Order, annual reports for a period of time, and other

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reports as required, describing how the Respondent has complied, is complying, and will comply with any Order.

8. An Order term of fifteen years. The Order would terminate fifteen years from the date it becomes final.
9. Any other relief appropriate to correct or remedy the anticompetitive effects in their incipency of any or all of the conduct alleged in the Complaint.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twelfth day of February, 2018, issues its complaint against Respondents.

By the Commission.

INITIAL DECISION**I. INTRODUCTION****A. Summary of the Case**

This action, issued by the Federal Trade Commission (“FTC” or “Commission”) on February 12, 2018, involves an alleged illegal agreement concerning the sale of dental supply products to dental practices in the United States. The Complaint alleges that Respondents Benco Dental Supply Company (“Benco”), Henry Schein, Inc. (“Schein”), and Patterson Companies, Inc. (“Patterson”) conspired to “refuse to offer discounted prices or otherwise negotiate with” organizations of independent dentists referred to in the Complaint as buying groups (“buying groups”). Complaint ¶ 1. *See also* Complaint ¶¶ 32, 36 (alleging an agreement to “refuse to provide discounts to or compete for” buying groups). The Complaint further alleges that this agreement violates Section 5 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45, as either a *per se* violation (First Violation), an “inherently suspect” violation (Second Violation), or a violation under a truncated rule of reason (Third Violation). Complaint ¶¶ 80-88. An additional count (Fourth Violation) charges Benco with inviting a competitor to collude in an agreement to refuse to provide discounts to or otherwise compete for the business of buying groups, and that this conduct of Benco constitutes an unfair method of competition in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. Complaint ¶¶ 53-55, 59, 89-90.

On March 6, 2018, each Respondent filed an Answer. Benco averred in its Answer that “[s]ince at least 1996, Benco has had a policy that it does not recognize as a single customer groups of independent dentists that lack a common or majority owner, regardless of what the group calls itself, because such groups provide no economic value to Benco.” Benco Answer at 3 (Preliminary Statement). Benco denied any conspiracy with Schein or Patterson. Benco

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Answer ¶¶ 32, 36, 80-88. Benco also denied that it attempted to persuade anyone to participate in any conspiracy to refuse to provide discounts or otherwise compete for buying groups. Benco Answer ¶¶ 53-55, 59, 89-90.

In its Answer, Schein averred in a general response that Schein has a long history of doing business with buying groups and has never had “any policy – formal or informal – against doing business with buying groups.” Schein Answer at 1. Schein further averred that Schein has consistently made independent decisions about whether to work with particular buying groups, “as with any other customer, and has engaged with buying groups when it made economic sense to do so.” *Id.* at 2. Schein denied any conspiracy, and specifically asserted that Schein “continually competed for the business of buying groups, and provided discounts to such groups for well over a decade.” Schein Answer ¶ 31. *See also* Schein Answer ¶¶ 32-36, 80-88.

Patterson’s Answer denied all material allegations of the Complaint. *See, e.g.*, Patterson Answer ¶¶ 1, 36, 80-88. Patterson denied entering into an agreement with Benco and Schein and asserts that, at all times, it decided independently as to how to respond to inquiries from buying groups. Patterson Answer ¶¶ 9, 65-66.

On September 14, 2018, Patterson filed a motion for summary decision, which was referred to the Commission for a ruling pursuant to Commission Rule 3.22(a). 16 C.F.R. § 3.22(a).¹ The Commission denied Patterson’s motion in an opinion and order issued November 26, 2018. *In re Benco Dental Supply Co.*, 2018 FTC LEXIS 185 (Nov. 26, 2018).

On December 20, 2018, Patterson filed a motion to dismiss at the close of the evidence offered in support of the Complaint, pursuant to Rule 3.22(a). 16 C.F.R. § 3.22(a). That motion was denied by an Order issued February 22, 2019, which held that Patterson failed to demonstrate that the evidence presented at trial was insufficient as a matter of law and stated that the issues raised by the motion, to the extent they are material to the “issues of fact, law, or discretion presented on the record” (16 C.F.R. § 3.51(c)), and are properly briefed by the parties in their post-hearing briefs, would be addressed in the Initial Decision.

¹ The Commission amended Rule 3.22 of its Rules of Practice in 2009 to allow “the Commission to decide legal questions and articulate applicable law when the parties raise purely legal issues.” Proposed rule amendments; request for public comment, 73 Fed. Reg. 58,832, 58,836 (Oct. 7, 2008). “[C]ommenters (including the [Section of Antitrust Law of the American Bar Association (‘Section’)], criticized the [Commission’s] proposed Rule change as unfairly invading the province of the independent ALJ and compromising the Commission’s dual roles as prosecutor and adjudicator.” Interim final rules with request for comment, 74 Fed. Reg. 1804, 1809 (Jan. 13, 2009). “For example, the Section argued that the proposed changes . . . could raise concerns about the impartiality and fairness of the Part 3 proceeding by permitting the Commission to adjudicate dispositive issues, including motions to dismiss challenging the facial sufficiency of a complaint, shortly after the Commission has voted out the complaint finding that it has ‘reason to believe’ there was a law violation, without the benefit of an opinion by an independent ALJ.” *Id.* A joint comment from former FTC Chairman Robert Pitofsky and Michael N. Sohn “similarly argued that the proposed rules, including Rule 3.22, would arguably infringe on the fairness of the Part 3 proceeding if the Commission more frequently ‘invades what has heretofore been the province of an independent ALJ.’” *Id.* Dismissing these objections, the Commission amended its Rules of Practice to give to itself the authority to decide “[m]otions to dismiss filed before the evidentiary hearing, motions to strike, and motions for summary decision[.]” 16 C.F.R. § 3.22(a).

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The evidentiary hearing in this matter began on October 16, 2018 and was completed on February 15, 2019. Thereafter, the parties submitted post-trial briefs, proposed findings of fact, and replies to each other's briefs and proposed findings of fact.²

Upon full consideration of the entire record, and as more fully explained below, Complaint Counsel has demonstrated that Respondents Benco and Patterson conspired to refuse to offer discounted prices or otherwise compete for the business of buying groups and that such an agreement is a *per se* violation of Section 5 of the FTC Act. Accordingly, Benco and Patterson are liable for the First Violation alleged in the Complaint. Given this holding, it is unnecessary to determine whether the conspiracy between Benco and Patterson is also a violation under the alternative legal theories set forth in Second and Third Violations alleged in the Complaint.

The evidence fails to prove a conspiracy involving Schein, and the Complaint is DISMISSED as to Schein. The evidence further fails to prove that Benco invited its competitor Burkhart Dental Supply Company, Inc. ("Burkhart") to collude in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, as argued by Complaint Counsel. The Fourth Violation alleged in the Complaint is therefore DISMISSED.

An appropriate remedial Order is entered herewith.

B. Summary of Evidence Presented

The record in this matter consists of the testimony of a total of 65 witnesses, presented live or by deposition, and over 5,070 exhibits admitted into evidence. This Initial Decision is based on a consideration of the whole record relevant to the issues and addresses the material issues of fact and law. The briefs and proposed findings of fact and conclusions of law, and the replies thereto, submitted by Complaint Counsel and each Respondent, and all contentions and arguments therein were thoroughly reviewed and considered.

The relevant facts and inferences to be drawn from the facts were highly disputed. The Commission has held that an Administrative Law Judge ("ALJ") is not required to discuss the testimony of each witness or all exhibits that are presented during the administrative adjudication. *In re Amrep Corp.*, 102 F.T.C. 1362, 1670, 1983 FTC LEXIS 17, at *566-67 (Nov. 2, 1983). Accordingly, the Analysis (section II) need not, and does not, mention each Finding of Fact, explain the bases for each Finding of Fact, or explain the bases for accepting or rejecting

² Rule 3.51(a) of the Commission's Rules of Practice states that "[t]he Administrative Law Judge shall file an initial decision within 70 days after the filing of the last filed initial or reply proposed findings of fact, conclusions of law and order" 16 C.F.R. § 3.51(a). The last reply to proposed findings and conclusions and reply briefs were filed on June 6, 2019. Absent an order pursuant to Rule 3.51, the *in camera* version of Initial Decision was to be filed on or before August 15, 2019. Based on the voluminous and complex record in this matter, an Order was issued finding good cause for extending the time period for filing the Initial Decision by 30 days. Rule 3.51(a) also provides that the Commission may further extend this time period for good cause. Pursuant to this rule, a request was made to the Commission for a further extension and by Order issued September 12, 2019, the Commission further extended the deadline for issuance of the *in camera* version of the Initial Decision to October 18, 2019.

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each proposed finding of fact submitted by the parties. Proposed findings of fact submitted by the parties, including proposed factual inferences, that were not accepted in this Initial Decision were rejected, because they were not adequately supported by the evidence or because they were not dispositive or material to the determination of the merits of the case. Similarly, legal contentions and arguments of the parties that are not addressed in this Initial Decision were rejected, because they lacked adequate support in fact or law, were not material, or were otherwise lacking in merit.³ In addition, all expert opinion evidence submitted in this case has been fully reviewed and considered. Except as expressly relied on or adopted in this Initial Decision, such opinions have been rejected, as either unreliable, unsupported by the facts, or unnecessary to the findings and conclusions herein.

Under Commission Rule 3.51(c)(1), “[a]n initial decision shall be based on a consideration of the whole record relevant to the issues decided, and shall be supported by reliable and probative evidence.” 16 C.F.R. § 3.51(c)(1); *see In re Chicago Bridge & Iron Co.*, 138 F.T.C. 1024, 2005 FTC LEXIS 215, at **8 n.23 (Jan. 6, 2005), *aff’d*, *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 n.5 (5th Cir. 2008). Under the Administrative Procedure Act (“APA”), an ALJ may not issue an order “except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.” 5 U.S.C. § 556(d). All findings of fact in this Initial Decision are supported by reliable, probative, and substantial evidence. Citations to specific numbered findings of fact in this Initial Decision are designated by “F.”⁴

³ Ruling upon a decision of the Interstate Commerce Commission, and interpreting language in the Administrative Procedure Act (“APA”) that is almost identical to language in Commission Rule 3.51(c)(1), the United States Supreme Court held that “[b]y the express terms of [that Act], the Commission is not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are ‘material.’” *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173, 193-94 (1959). *Accord Stauffer Labs., Inc. v. FTC*, 343 F.2d 75, 82 (9th Cir. 1965). *See also Borek Motor Sales, Inc. v. NLRB*, 425 F.2d 677, 681 (7th Cir. 1970) (holding that it is adequate for the Board to indicate that it had considered each of the company’s exceptions, even if only some of the exceptions were discussed, and stating that “[m]ore than that is not demanded by the [APA] and would place a severe burden upon the agency”). Issues of fact or law that do not affect the result in a case are not fairly deemed “material,” for purposes of Section 557(c)(3)(A) of the APA, 5 U.S.C. § 557(c)(3)(A), or Rule 3.51(c)(1) of the Commission’s Rules of Practice, 16 C.F.R. § 3.51(c)(1), notwithstanding that there may be allegations or evidence presented on such issues.

⁴ References to the record are abbreviated as follows:

CX – Complaint Counsel’s Exhibit
 RX – Respondents’ Exhibit
 JX – Joint Exhibit
 Tr. – Transcript of testimony before the ALJ
 Dep. – Transcript of Deposition
 IHT – Transcript of Investigational Hearing
 CCB – Complaint Counsel’s Post-Trial Brief
 CCRB – Complaint Counsel’s Post-Trial Reply Brief
 CCFF – Complaint Counsel’s Proposed Findings of Fact
 CCRBB – Complaint Counsel’s Reply to Benco’s Brief
 CCRSB – Complaint Counsel’s Reply to Schein’s Brief
 CCRPB – Complaint Counsel’s Reply to Patterson’s Brief

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The parties' burdens of proof are governed by Federal Trade Commission Rule 3.43(a), Section 556(d) of the APA, and case law. Pursuant to Commission Rule 3.43(a), "[c]ounsel representing the Commission . . . shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto." 16 C.F.R. § 3.43(a). Under the APA, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d). The APA, "which is applicable to administrative adjudicatory proceedings unless otherwise provided by statute, establishes ' . . . the traditional preponderance-of-the evidence standard.'" *In re Rambus Inc.*, 2006 FTC LEXIS 101, at *45 (Aug. 20, 2006) (quoting *Steadman v. SEC*, 450 U.S. 91, 95-102 (1981)), *rev'd on other grounds*, 522 F.3d 456 (D.C. Cir. 2008). See *In re Automotive Breakthrough Sciences, Inc.*, 1998 FTC LEXIS 112, at *37 n.45 (Sept. 9, 1998) (holding that each finding must be supported by a preponderance of the evidence in the record); *In re Adventist Health System/West*, 1994 FTC LEXIS 54, at *28 (Apr. 1, 1994) ("Each element of the case must be established by a preponderance of the evidence . . .").

Pursuant to Commission Rule 3.45(b), several orders were issued in this case granting *in camera* treatment to material, after finding, in accordance with the Rule, that its public disclosure would likely result in a clearly defined, serious injury to the entity requesting *in camera* treatment or that the material constituted "sensitive personal information," as that term is defined in Commission Rule 3.45(b). In addition, when the parties sought to elicit testimony at trial that revealed information that had been granted *in camera* treatment, the hearing went into an *in camera* session. Commission Rule 3.45(a) allows the ALJ "to grant *in camera* treatment for information at the time it is offered into evidence subject to a later determination by the [administrative] law judge or the Commission that public disclosure is required in the interests of facilitating public understanding of their subsequent decisions." *In re Bristol-Myers Co.*, 90 F.T.C. 455, 1977 FTC LEXIS 25, at *6 (Nov. 11, 1977). As the Commission later reaffirmed in another leading case on *in camera* treatment, since "in some instances the ALJ or Commission cannot know that a certain piece of information may be critical to the public understanding of agency action until the Initial Decision or the Opinion of the Commission is issued, the

CCRBFF – Complaint Counsel's Reply to Benco's Proposed Findings of Fact
 CCRSFF – Complaint Counsel's Reply to Schein's Proposed Findings of Fact
 CCRPFF – Complaint Counsel's Reply to Patterson's Proposed Findings of Fact
 CCRRJFF – Complaint Counsel's Reply to Respondents' Joint Proposed Findings of Fact
 BB – Benco's Post-Trial Brief
 BRB – Benco's Post-Trial Reply Brief
 BFF – Benco's Proposed Findings of Fact
 BRCCFF – Benco's Reply to Complaint Counsel's Proposed Findings of Fact
 SB – Schein's Post-Trial Brief
 SRB – Schein's Post-Trial Reply Brief
 SFF – Schein's Proposed Findings of Fact
 SRCCFF – Schein's Reply to Complaint Counsel's Proposed Findings of Fact
 PB – Patterson's Post-Trial Brief
 PRB – Patterson's Post-Trial Reply Brief
 PFF – Patterson's Proposed Findings of Fact
 PRCCFF – Patterson's Reply to Complaint Counsel's Proposed Findings of Fact
 RJFF – Respondents' Joint Proposed Findings of Fact
 RRCCFF – Respondents' Reply to Complaint Counsel's Proposed Findings of Fact

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Commission and the ALJs retain the power to reassess prior *in camera* rulings at the time of publication of decisions.” *In re General Foods Corp.*, 95 F.T.C. 352, 1980 FTC LEXIS 99, at *12 n.7 (March 10, 1980). Thus, in instances where a document or trial testimony had been given *in camera* treatment, but the portion of the material cited to in this Initial Decision does not in fact merit *in camera* treatment, such material is disclosed in the public version of this Initial Decision, pursuant to Commission Rule 3.45(a). 16 C.F.R. § 3.45(a) (the ALJ “may disclose such *in camera* material to the extent necessary for the proper disposition of the proceeding”). Where *in camera* information is used in this Initial Decision, it is indicated in bold font and braces (“{ }”) in the *in camera* version and is redacted from the public version of this Initial Decision, in accordance with Commission Rule 3.45(e). 16 C.F.R. § 3.45(e).

II. ANALYSIS

A. Background Facts

This case involves the sale of dental supply products to dental practices in the United States. Dental products include dental supplies, dental equipment, technology, and other items used in the provision of dental services by a dentist or dental practice. F. 53. Dental supplies are sometimes referred to as sundries or merchandise, and include items such as gloves, hand instruments, face masks, toothbrushes, anesthetic solutions, composites, amalgams, bonding agents, and bibs. F. 53. Dental equipment includes imaging devices, compressors, dental chairs, stools, lights, microscopes, hand-pieces, lasers, delivery systems, monitor mounts, workstations, cabinetry, CAD/CAM (computer-aided design and computer-aided manufacturing) systems, film or x-ray processors, cameras, sterilizers, autoclaves, and sensors. F. 53.

The vast majority of dentists are independent dentists or private practices. F. 55. In the 1990s, dentists began consolidating multiple offices into group practices managed by common ownership, which resulted in a business model that is known as a dental support (or service) organization (“DSO”). F. 58. In most cases, DSOs consist of large group practices that have multiple locations combined under a single ownership structure and are part of a corporation. F. 59. DSOs provide all of the non-clinical aspects of running a dental office that independent dentists have to do on their own. F. 60. DSOs handle procurement of dental supplies through a single administrative and logistical point of contact to select products and quantities, negotiate pricing, and manage delivery, returns, and payments for numerous offices. F. 61. DSOs are able to commit to certain volumes of purchases for all of their owned, managed, or affiliated practices. F. 64.

In the mid-1990s, some independent dentists began to join buying groups. F. 95. Buying groups arose largely in response to “corporate dentistry.” F. 80. During the relevant time period in this case,⁵ the terms “buying group,” “group purchasing organization” or “GPO,” and “cooperative” or “co-op” were all used in reference to buying groups. F. 78. As discussed in more detail below, there are varying structures and varying characteristics of buying groups. F.

⁵ For purposes of this Initial Decision, unless otherwise specified, the phrase “relevant time period” shall refer to the time period of 2010 through 2017.

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82, 84-91. Buying groups have an objective of negotiating lower prices for dental products on behalf of independent dentists by aggregating their purchasing power. F. 77. Buying groups try to leverage purchasing power of a group to try to get savings on purchases of dental supplies while allowing dentists to remain independent. F. 93. Buying groups, as entities, do not typically purchase supplies for their members themselves. Rather, with a buying group, purchase orders are placed by each individual member, and distributors ship to the individual member. F. 94. Some buying groups offer more to their members than discounts on purchases of dental supplies, including education, training, negotiating with insurance companies, and providing financial and marketing services. F. 85-87, 90-91. The number of buying groups in the dental industry has increased over the last decade. F. 96.

The Respondents, Benco, Schein, and Patterson, are full-service distributors that sell consumable dental supplies and equipment to dentists and dental practices throughout the United States. F. 3, 14, 27.⁶ Benco, a family-owned company, is the third largest dental distributor in the United States. F. 1, 3. Schein, a public company, is the largest dental distributor in the United States. F. 12, 18. Patterson, a public company, is the second largest dental distributor in the United States. F. 25, 28. Benco, Schein, and Patterson identify each other as their primary or largest competitors and compete against each other in various ways, including price. F. 44-48.

Benco, Schein, and Patterson have a combined market share of over 80% of the sale of dental supplies and equipment made through distributors in the United States. F. 50. The dental supply distribution industry has been characterized as an oligopoly.⁷ F. 49. *See also In re Benco Dental Supply Co.*, 2018 FTC LEXIS 185, at *3, *38 (describing the sale of all dental products and services made through distributors in the United States as “an oligopolistic market”).

B. Overview of Applicable Law

1. The FTC Act

The Complaint alleges that Respondents “conspired not to provide discounts to or otherwise compete for the business of [b]uying [g]roups of independent dentists” and that Respondents’ “concerted action unreasonably restrained trade and constituted an unfair method of competition in or affecting commerce in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.” Complaint ¶¶ 81, 84, 87. In addition, the Complaint alleges that Respondent Benco “invited a competitor to collude in a joint agreement to refuse to provide discounts to or

6 Full-service distributors address all of the needs of dental practices, providing consumables, durables, and installation and repair services. F. 39. The term “full-service distributor” typically refers to a distributor that employs field sales representatives and equipment repair specialists, and that offers for sale the majority of dental products, services, and technology used by a dental practice or dental business. F. 41.

7 The term “oligopoly” means few sellers. VI Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1410c at 71 (3d ed. 2010) (hereafter, “Areeda”). An oligopoly has been further defined as “an ‘economic condition where only a few companies sell substantially similar or standardized products.’” *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1031 n.3 (8th Cir. 2000) (quoting Black’s Law Dictionary 1086 (6th ed. 1990)); *see also* Areeda, ¶ 404a at 9 (“An oligopoly market is one in which a few relatively large sellers account for the bulk of the output.”).

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otherwise compete for the business of [b]uying [g]roups of independent dentists” in violation of Section 5 of the FTC Act. Complaint ¶ 90.⁸

Section 5(a)(2) of the FTC Act gives the Commission jurisdiction “to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce” 15 U.S.C. § 45(a)(2); *Kaiser Aluminum & Chem. Corp. v. FTC*, 652 F.2d 1324, 1327 n.2 (7th Cir. 1981). Benco, Schein, and Patterson each sell, or offer for sale, their products and services throughout the United States. F. 10, 23, 37. Benco, Schein, and Patterson are each corporations and engage in activities in or affecting commerce, within the meaning of Section 4 of the FTC Act, 15 U.S.C. § 44. F. 11, 24, 38. Thus, the Commission has jurisdiction over each Respondent and the subject matter of this proceeding, pursuant to Section 5 of the FTC Act.

The FTC Act’s prohibition of unfair methods of competition encompasses violations of Section 1 of the Sherman Act. *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 762 & n.3 (1999). “[T]he analysis under § 5 of the FTC Act is the same . . . as it would be under § 1 of the Sherman Act.” *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 32 (D.C. Cir. 2005); *see also FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 451-52 (1986). Accordingly, Sherman Act jurisprudence is appropriately relied upon in determining whether challenged conduct violates Section 5 of the FTC Act. *Cal. Dental Ass’n*, 526 U.S. at 762 n.3; *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 824 (6th Cir. 2011).

2. Proving an agreement

Section 1 of the Sherman Act prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States” 15 U.S.C. § 1. “The existence of an agreement is ‘the very essence of a section 1 claim.’” *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 356 (3d Cir. 2004) (quoting *Alvord-Polk, Inc. v. Shumacher & Co.*, 37 F.3d 996, 999 (3d Cir. 1994)). *See also White v. R.M. Packer Co.*, 635 F.3d 571, 575 (1st Cir. 2011) (“The statute ‘does not require sellers to compete; it just forbids their agreeing or conspiring not to compete.’”) (citations omitted).

To prove an agreement, the evidence must demonstrate that the alleged conspirators “had a conscious commitment to a common scheme designed to achieve an unlawful objective.” *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980)). Put another way, the evidence must prove “a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.” *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) (quoting *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)). The term “agreement,” “necessarily impl[ies] mutual consent.” *Esco Corp. v. United States*, 340 F.2d 1000, 1007-08 (9th Cir. 1965).

A finding of an agreement may be based on “proof that the defendants got together and exchanged assurances of common action” *Flat Glass*, 385 F.3d at 361. In *Gainesville Utilities Dep’t v. Florida Power & Light Co.*, letters exchanged between top executives expressly

⁸ The invitation to collude allegation is addressed in section II.G.

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referenced their refusal to serve customers in certain geographic areas, which the court determined to “border on a blatant agreement to divide the market.” 573 F.2d 292, 297-301 (5th Cir. 1978).

Moreover, an agreement need not be express to violate the Sherman Act. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1948). It has been held that an agreement can be inferred from proof that, “knowing that concerted action was contemplated and invited,” the defendants “gave their adherence to the scheme and participated in it.” *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226-27 (1939); *Paramount Pictures*, 334 U.S. at 142. See also *Monsanto*, 465 U.S. at 764 n.9 (“The concept of ‘a meeting of the minds’ or ‘a common scheme’ in a distributor-termination case includes more than a showing that the distributor conformed to the suggested price. It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer.”). In *United States v. Foley*, the Fourth Circuit affirmed a criminal price fixing conviction, where the evidence proved that a defendant informed other defendants at a dinner meeting among them that his firm would charge a certain commission rate; the other defendants, aware that their cooperation was essential, “expressed an intention or gave the impression that his firm would adopt a similar change”; and thereafter, each defendant raised its commission rates on some listings. 598 F.2d 1323, 1332 (4th Cir. 1979). It has also been held that a defendant’s consent to an unlawful scheme proposed by another can be inferred in part from evidence that the defendant “confronted others about cheating” on the agreement “or reassured others” that the defendant was “abiding by the agreement.” *United States v. Beaver*, 515 F.3d 730, 738 (7th Cir. 2008); see also *Foley*, 598 F.2d at 1332 (upholding a jury verdict in part based on testimony that after a dinner meeting, the defendants sought to hold each other to the agreement).

An agreement may be demonstrated by direct or circumstantial evidence. *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 689 (S.D.N.Y. 2013), *aff’d*, 791 F.3d 290 (2d Cir. 2015); *In re McWane, Inc.*, 155 F.T.C. 903, 2013 WL 8364918 at *223 (May 1, 2003) (Initial Decision); *Erie County Ohio v. Morton Salt, Inc.*, 702 F.3d 860, 867-68 (6th Cir. 2012) (“An agreement, either tacit or express, may ultimately be proven either by direct evidence of communications between the defendants or by circumstantial evidence of conduct that, in the context, negates the likelihood of independent action and raises an inference of coordination.”). In fact, “it is only in rare cases that a plaintiff can establish the existence of a conspiracy by showing an explicit agreement; most conspiracies are inferred from the behavior of the alleged conspirators . . . and from other circumstantial evidence” *City of Tuscaloosa v. Harcros Chems.*, 158 F.3d 548, 569 (11th Cir. 1998) (citation omitted). “The crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (quotation marks and brackets omitted) (quoting *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954)).

To determine whether an antitrust conspiracy exists, courts must consider the “totality of the evidence.” *Apple*, 952 F. Supp. 2d at 689. “The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.” *Cont’l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962); see also

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id. (stating that the duty of the factfinder is “to look at the whole picture and not merely at the individual figures in it”). “[C]ircumstantial evidence of a conspiracy, when considered as a whole, must tend to rule out the possibility of independent action.” *In re McWane, Inc.*, 2012 WL 5375161, at *6 (Aug. 9, 2012).

This requirement, however, “[does] not mean that the plaintiff must disprove all nonconspiratorial explanations for the defendants’ conduct”; rather, the evidence need only be sufficient “to allow a reasonable fact finder to infer that the conspiratorial explanation is more likely than not.” *In re Publ’n Paper Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012) (quoting Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law* § 14.03(b), at 14-25 (4th ed. 2011)); accord *Matsushita*, 475 U.S. at 588 (requiring that “the inference of conspiracy is reasonable in light of the competing inferences of independent action”); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655-56 (7th Cir. 2002).

United States v. Apple, Inc., 791 F.3d 290, 315-16 (2d Cir. 2015).

Where an inference of conspiracy is equally consistent with an inference of independent conduct, “the evidence of conspiracy would not preponderate.” *Re/Max Int’l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1009 (6th Cir. 1999). Thus, the inference of a conspiracy “must be more probable than the inference of independent action” in order to find a conspiracy. *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1488 n.14 (D.C. Cir. 1984). See also *Anderson News, L.L.C. v. Am. Media, Inc.*, 899 F.3d 87, 98 (2d Cir. 2018) (“[I]f the evidence is in equipoise, then . . . judgment must be granted against the plaintiff.”). At all times, “the ultimate burden of persuading the factfinder that a conspiracy exists is on the plaintiff.” *Kreuzer*, 735 F.2d at 1488.

3. Parallel conduct and plus factors

Respondents argue that Complaint Counsel does not have direct evidence of an agreement and that in order to prove a conspiracy through circumstantial evidence, Complaint Counsel must demonstrate both parallel conduct and “plus factors.” See, e.g., BB at 8-9; SB at 85-86; PB at 41-42. Respondents rely principally on *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1301 (11th Cir. 2003). Complaint Counsel argues that its case is “not centered on parallel conduct” and that proof of parallel conduct and plus factors is required only if a plaintiff’s case is “based upon parallel conduct.” CCRB at 26-27. Complaint Counsel contends that it relies on what it characterizes as direct evidence of competitor communications and contemporaneous documents to demonstrate the alleged agreement. *Id.* Complaint Counsel argues that, therefore, *Williamson Oil* does not apply and that Complaint Counsel need not prove parallel conduct and plus factors. *Id.*

Although “parallel action – proof that defendants took identical actions within a time period suggestive of prearrangement” is a “powerful form of circumstantial evidence,” *Anderson News*, 899 F.3d at 104, a plaintiff need not prove parallel conduct to prove an agreement based

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on circumstantial evidence. *Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130, 159 (N.D.N.Y. 2010). *See also Cason-Merenda v. Detroit Medical Center*, 862 F. Supp. 2d 603, 627-28 (E.D. Mich. 2012) (“[W]hile evidence of parallel conduct provides one means by which a plaintiff in a § 1 case may make a circumstantial showing of concerted activity, the case law establishes no hierarchy of the sorts of circumstantial evidence a plaintiff must produce to withstand summary judgment. Rather, circumstantial evidence of any sort will do, provided that it demonstrates ‘business behavior which evidences a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement.’”).

Where a case *is* based on parallel conduct, however, proof of “plus factors” is necessary to serve as “proxies for direct evidence of an agreement.” *Flat Glass*, 385 F.3d at 360.⁹ This is because parallel conduct, while constituting some circumstantial evidence of an agreement, can also be “just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.” *Twombly*, 550 U.S. at 554. *Williamson Oil* “fashioned a test under which price fixing plaintiffs must demonstrate the existence of ‘plus factors’ that remove their evidence from the realm of equipoise and render that evidence more probative of conspiracy than of conscious parallelism.” *Williamson Oil*, 346 F.3d at 1301. *See also Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977) (“[P]roof of consciously parallel business behavior is circumstantial evidence from which an agreement, tacit or express, can be inferred but . . . such evidence, without more, is insufficient unless circumstances under which it occurred make the inference of rational, independent choice less attractive than that of concerted action.”).

Proof of parallel conduct and plus factors is one way to seek to prove an unlawful agreement. *See, e.g., In re McWane*, 2013 WL 8364918, at *237 (Complaint Counsel in that case argued that an alleged agreement to raise and stabilize prices was demonstrated by parallel curtailing of discounts, which required proof of plus factors). However, Respondents do not cite a case holding that the only way to infer an agreement from circumstantial evidence is through proof of parallel conduct and plus factors. As the cases cited in section II.B.2 clearly suggest, courts look to the totality of the evidence to determine whether it is more likely than not that the alleged conspirators had a meeting of the minds on an unlawful objective, or a conscious commitment to a common scheme. Accordingly, Respondents’ argument that the only circumstantial evidence that can prove an agreement consists of parallel conduct and specified “plus factors” is unsupported and is rejected.

4. Complaint Counsel’s conspiracy theory

Complaint Counsel’s theory of the case is that Benco, Schein, and Patterson (the “Distributors”) viewed buying groups as a threat; that Benco adopted a policy in the mid-1990s that prohibited discounting to, or doing business with, buying groups; that, as the smallest of the

⁹ There is no exhaustive list of plus factors. *Flat Glass*, 385 F.3d at 360. Such evidence is generally grouped into three categories: “(1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) ‘evidence implying a traditional conspiracy.’” *Id.* (citations omitted).

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Distributors, Benco feared that its policy would be futile if Patterson and Schein started to discount to buying groups; and that Benco communicated with Patterson and Schein to “ensure that Patterson and Schein agreed to the same” policy of not dealing with buying groups. CCB at 2. Complaint Counsel further argues that a concerted refusal to discount to buying groups amounts to an agreement to limit discounting and/or an agreement to boycott buying groups, both of which Complaint Counsel contends are illegal *per se*. CCB at 4.

More specifically, Complaint Counsel argues that Benco orchestrated separate agreements to refuse to deal with buying groups with Patterson and with Schein through exchanges of assurances between high-ranking executives. Complaint Counsel further contends that Patterson and Schein each complied with a no buying group policy after communicating with Benco and the parties to the agreement monitored each other’s behavior and confronted one another over perceived deviations. CCB at 2. The Analysis first addresses Benco’s asserted no buying group policy, in section II.C. The Analysis then addresses Benco’s alleged agreement with Patterson in section II.D and Benco’s alleged agreement with Schein in section II.E.

Complaint Counsel further contends that the evidence shows a single overarching conspiracy among Benco, Schein, and Patterson. CCB at 2, 57. The evidence as to the alleged overarching conspiracy is analyzed in section II.E.5.

C. Benco’s No Buying Group Policy

Benco asserts that it has always had a policy against dealing with buying groups, which it views as “middlemen” that demand lower prices without providing anything in return. BB at 1-2. Benco further asserts that there is no evidence that Benco asked Schein, Patterson, or any other entity to take any action, or to refrain from taking action, with regard to doing business with buying groups and that there is no evidence that Benco, Schein, or Patterson ever reached any agreement that Respondents would or should adopt the same policy. BB at 2.

Benco is a family-owned dental distribution company and the smallest of the three Distributors. F. 1, 3. Its managing director, Chuck Cohen, oversees Benco’s business strategy, including its strategy for growth, development, and expansion. F. 9, 101. Benco’s Patrick Ryan has held many positions with Benco, sometimes concurrently, including director of sales, director of Special Markets, and director of business development. F. 102.

Starting in the mid-1990s, Benco instituted a policy of not recognizing or selling to buying groups. F. 104. Benco defines buying groups as “a group of otherwise unrelated dental practices that attempts to use their combined volume in order to leverage price.” F. 104. In 1996, Cohen made the decision to articulate and implement Benco’s policy of not doing business with buying groups. F. 106. During the relevant time period, when Benco received requests to do business from buying groups, the requests were routed to Ryan who determined whether an organization was a buying group. F. 107-108. Cohen and Ryan were the decision makers for determining whether to apply Benco’s no buying group policy to particular organizations. F. 109. Ryan enforced Benco’s policy with respect to buying groups. F. 110.

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Benco's no buying group policy was a blanket rule that applied to all buying groups, regardless of the characteristics of the particular group. F. 111 (Statement of Cohen: "Benco does NOT currently recognize as a single customer . . . Any kind of GPO whether they provide additional services or not."); F. 111 (Testimony of Ryan: "Q. And it is fair to say that once you found out a group was a buying group, the answer was no from Benco, meaning no, Benco wouldn't work with them? A. Correct. We would tell them what our policy is and move on."). *See also* F. 112-113, 115. Cohen was "adamantly against" and "extremely opposed" to buying groups and felt strongly about Benco's no buying group policy. F. 113. So, too, was Ryan. *E.g.*, F. 138 ("We absolutely positively do NOT participate in GPOs. NO if ands or buts."); F. 587 (Ryan had a "strong opinion" about buying groups); F. 114 (Ryan believed that all distributors should feel the way Benco did about buying groups.).

Benco's no buying group policy was "always communicated" to the sales team, as well as "up and down the company." F. 112. *See also* F. 112 (email from Benco's Chuck Cohen to Patterson's Paul Guggenheim, stating: "Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups . . . and our team understands that policy."). Ryan instructed his sales team to turn down buying groups, even when the sales team inquired about or expressed an interest in competing for buying group business. For example, Ryan forwarded a March 24, 2011 email from his sales team regarding a buying group to Cohen and other Benco employees and wrote: "We all know the answer here, right? Not no, hell no." F. 116. In another example, in an August 27, 2013 email to a regional manager and other Benco employees, Ryan wrote: "Group Purchasing Organizations. They aggregate the purchase volume of unrelated entities in order to leverage price. We do not recognize them. GPOs are why [the] medical [supply business] works at the margins they do." F. 117.

Benco does not dispute that it had a policy against doing business with buying groups. *E.g.*, BB at 1 ("[C]onsistent with its longstanding policy, Benco refused to do business with buying groups as a single customer before, during and after the alleged conspiracy."); *see also* Benco Answer at 1. Pursuant to that policy, from 2011 through 2015, Benco refused to discount to, sell to, or recognize numerous groups because they were buying groups. *E.g.*, Synergy Dental Partners (F. 130); Nexus Dental (F. 131); Smile Source (F. 132); Dr. David Carter (F. 133); Unified Smiles (F. 134); XYZ Dental (F. 135); DDS Group (F. 136); WheelSpoke LLC (F. 137); Erie Family Dental Equipment (F. 138); American Academy of Cosmetic Dentistry (F. 139); Dental Visits LLC (F. 140); Kois Buyers Group (F. 141); Dental Purchasing Group (F. 142); Insight Sourcing Group (F. 143); Schulman Group (F. 144); and Dentistry Unchained (F. 145).

Analyzed next is whether Benco obtained the agreement of Patterson and Schein that Patterson and Schein would adopt the same policy, and thereby collectively refuse to deal with buying groups.

D. Alleged Agreement Between Benco and Patterson

Complaint Counsel charges that Benco and Patterson exchanged assurances that each company would refuse to discount to or compete for the business of buying groups, and that this exchange, followed by a confrontation by Patterson about deviating from the agreement and a

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reassurance of compliance by Benco, proves that Benco and Patterson had an agreement. CCB at 17-19, 21-22. Complaint Counsel also charges that after the exchange of assurances, the conduct of Benco and Patterson demonstrated compliance with an agreement. CCB at 19-20, 23-25. The “exchange” evidence is addressed first, followed by the “conduct” evidence.

1. Alleged exchange of assurances as proof of agreement

a. Positions of the parties

Complaint Counsel asserts that Benco and Patterson formed an illegal agreement when, through certain email communications, Chuck Cohen and Paul Guggenheim, senior executives of Benco and Patterson, respectively, exchanged assurances that each company would refuse to discount to or compete for the business of buying groups. CCB at 2. Complaint Counsel relies on an email exchange between Cohen and Guggenheim to prove an exchange of assurances and a subsequent email exchange, through which Guggenheim confronted Cohen and Cohen reassured Guggenheim, and argues that these email exchanges prove that Benco and Patterson entered into a *per se* unlawful agreement to refuse to provide discounts to or otherwise compete for the business of buying groups. CCB at 2. Benco and Patterson both assert that the two email exchanges relied upon by Complaint Counsel are not evidence of an agreement between Benco and Patterson. BB at 24-26, 30-31; PB at 26-28, 36-37.

The first email exchange is on February 8, 2013 between Chuck Cohen and Paul Guggenheim, regarding buying groups and the New Mexico Dental Cooperative (“NMDC”) (“February 2013 email exchange”). Complaint Counsel asserts that through this email exchange, Cohen assured Guggenheim that Benco had a policy of not doing business with buying groups and that Guggenheim responded with his own assurance that Patterson feels the same way about buying groups. CCB at 42-43. “As a direct result of this exchange,” Complaint Counsel asserts, “Cohen understood Patterson would follow the same policy as Benco.” CCB at 43. Benco asserts that the February 2013 email exchange shows at most that Benco disclosed to Patterson what Benco considered to be public knowledge; that Cohen did not write the February 8, 2013 email for the purpose of forming any agreement with Guggenheim about buying groups; that the email did not ask Patterson to do anything; that Cohen did not expect Guggenheim to do anything in response to the email; and that Cohen never followed up with Guggenheim after sending the email. BB at 25-26. Patterson asserts that Cohen’s email to Guggenheim was “out of the blue” and did not ask Guggenheim to commit to anything; that Guggenheim did not make a commitment of any kind; and that Guggenheim did not take any action as a result. PB at 26-27.

The second email exchange is on June 6 and 8, 2013 between Paul Guggenheim and Chuck Cohen regarding buying groups and Atlantic Dental Care (“ADC”) (“June 2013 email exchange”). Complaint Counsel asserts that through this email exchange, Guggenheim confronted Cohen about Benco’s doing business with ADC, an entity that Patterson believed to be a buying group, and Cohen reassured Guggenheim that Benco was complying with their agreement. CCB at 51-52. Benco asserts that because Benco had already won the ADC contract, Cohen saw no harm in sharing Benco’s approach to ADC with Patterson and that the

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exchange does not constitute enforcement of an agreement not to work with buying groups. BB at 30-31. Patterson asserts that Guggenheim's June 2013 email exchange with Cohen contains no reference to any past agreement to take any concerted action, nor does it contain any commitment to take any future concerted action, and thus is not direct evidence of Patterson's participation in an agreement not to deal with buying groups. PB at 37.

b. Exchange of assurances

In analyzing these two email exchanges, it is significant that they were between the co-chief executive officer and co-owner of Benco, Chuck Cohen (F. 9), and the president of Patterson Dental, Paul Guggenheim (F. 36).¹⁰ The Cohen and Guggenheim families have known each other “for decades” and grew up in the dental industry together. F. 659. Cohen has communicated with Guggenheim through various means including phone calls, text messages, emails, and in-person meetings over the past ten years. F. 660. Cohen has contacted Guggenheim about various dental industry issues that he wanted Guggenheim to look into. F. 661.¹¹ As managing director of Benco, Cohen made the decision to articulate and implement Benco's policy of not doing business with buying groups. F. 106. As president of Patterson Dental, Guggenheim was responsible for managing the business and strategy and had input into what types of customers with whom Patterson could do business. F. 663. Communications between senior level officials with the authority to determine which customers their companies will choose to do business with present a “far different situation” than communications about pricing or market conditions between low-level salesmen. *In re Polyurethane Foam Antitrust Litig.*, 152 F. Supp. 3d 968, 983 (N.D. Ohio 2015) (holding that, in contrast to discussions between low-level salesmen, secret discussions among upper-level executives with pricing authority “may support an inference” of a price-fixing conspiracy); *see also Flat Glass*, 385 F.3d at 368-69 (holding that information exchanges among high-level executives with pricing authority supported inference of a conspiracy).

i. The February 8, 2013 email exchange between Cohen and Guggenheim**(a) Patterson's interactions with NMDC**

On February 8, 2013, Chuck Cohen sent an email to Paul Guggenheim writing:

Just wanted to let you know about some noise I've picked up from New Mexico. FYI: Our policy at Benco is that we do not recognize, work with,

¹⁰ Unless context indicates otherwise, the term “Patterson,” as used in this Initial Decision, includes Patterson Dental, a business unit of Patterson. F. 25-26.

¹¹ Complaint Counsel asserts that in 2011, Cohen asked Guggenheim and Tim Sullivan, president of the Henry Schein Dental division of Schein (F. 19, 21), “to put up a united front” against a manufacturer by having their respective marketing teams protest a product pricing and that in 2013, Cohen asked Guggenheim and Sullivan to adopt a clause in their manufacturer contracts to prevent manufacturers from competing directly against distributors. CCB at 8. Evidence on communications regarding suppliers' actions is not probative of an exchange of assurances regarding buying groups.

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or offer discounts to buying groups (though we do work with corporate accounts) and our team understands that policy.

F. 684.

Paul Guggenheim responded to Chuck Cohen on February 8, 2013, writing:

Thanks for the heads up. I'll investigate the situation. We feel the same way about these.

F. 698.

To put this exchange in context, a review of the circumstances leading to this email exchange is required. In late 2012 or early 2013, a dentist, Dr. Brenton Mason, began the process of starting a dental cooperative, the New Mexico Dental Cooperative ("NMDC"). F. 664. Dr. Mason's objective with NMDC was to serve independent dental practices (dentists who owned fewer than five practices) by negotiating discount pricing with vendors of dental consumables and equipment. F. 665. In early 2013, Dr. Mason engaged in discussions with local New Mexico Patterson sales personnel Jeff Katt and Scott Belcheff about working together with NMDC. F. 666. At the time of Dr. Mason's talks with Patterson's employees, NMDC did not yet exist. F. 667.

On February 4, 2013, Dr. Mason sent an email titled "New Mexico Dental Cooperative purchasing" to a number of manufacturers and some distributors. F. 668 ("Dr. Mason's February 4 email"). Dr. Mason's February 4 email stated that NMDC had "partnered with Patterson Dental" and invited dental manufacturers and representatives to a vendors' meeting at Patterson's branch office in Albuquerque, New Mexico to be held on March 13, 2013. F. 668. At the time Dr. Mason sent his February 4 email, Dr. Mason believed that, although NMDC and Patterson still needed to work out some details of pricing, NMDC had a partnership with Patterson. F. 669.

No later than February 5, 2013, Dr. Mason and Belcheff, Patterson's branch manager, set up a meeting between NMDC and Patterson with Patterson's regional manager, Dan Reinhardt, for Monday, February 11, 2013. F. 671.

In an email sent on February 7, 2013, Belcheff of Patterson wrote to Dr. Mason: "We need to cancel" the March 13, 2013 meeting with manufacturers (announced by Dr. Mason in his February 4 email). F. 672. Belcheff explained the reasons for cancelling the March 13 meeting, including that Dr. Mason's February 4 email had greatly confused the dental community; Dr. Mason's February 4 email invited manufacturers that Patterson does not do business with, and, in some cases were direct competitors of Patterson; and that there was confusion on Belcheff's part (Belcheff thought the March 13 meeting would be an invitation to vendors such as credit card and banking services companies, rather than the dental manufacturers' group that had been invited to the March 13 meeting). F. 673. However, Patterson's Belcheff's February 7 email to Dr. Mason also stated:

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This has the opportunity to be huge and is moving fast and I want to make sure we are doing this right from the beginning. Our dinner Monday night [February 11, 2013] will help with this and also help us get guidelines in place. . . . I am hoping Patterson can be a partner you trust and that will always do the right thing for you.

F. 674.

In a follow-up email to Dr. Mason later that same day, Patterson's Belcheff also wrote: "I will not reach out with the manufacturer reps until after we meet on Monday [February 11]. This way we can discuss this in person. I definitely want to keep this moving forward." F. 675.

As of February 7, 2013, Dr. Mason believed that NMDC had an agreement with Patterson and that the guidelines of the deal would be worked out at the dinner meeting with Patterson's Dan Reinhardt on February 11, 2013. F. 678.

On February 11, 2013, Dr. Mason and his partners had a dinner meeting with Patterson's sales representative, Jeff Katt, Patterson's Albuquerque branch manager, Scott Belcheff, and Patterson's regional manager, Dan Reinhardt. F. 679. At this February 11 meeting, Reinhardt informed Dr. Mason that Patterson would not work with NMDC. F. 679.¹² Dr. Mason could not recall details of what occurred at the February 11 meeting other than the statement by Reinhardt that Patterson was not going to participate in the co-op and Dr. Mason could not recall any reasons Reinhardt gave for that decision. F. 680. There is no testimony in the record from any of the Patterson representatives who attended the February 11 meeting.

(b) Benco's communication regarding NMDC and buying groups

One of the manufacturer recipients of Dr. Mason's February 4 email forwarded it to two people, one of whom forwarded it to a Benco employee. F. 682. Dr. Mason's February 4 email was then forwarded within Benco to a Benco regional manager, Dan Taylor, who forwarded it to Chuck Cohen, requesting "feedback and coaching." F. 682. In reply, Cohen sent an email on February 8, 2013 to Taylor as follows:

We don't recognize buying groups . . . I'll reach out to my counterpart at Patterson to let him know what's going on in NM.

F. 683.

Chuck Cohen, co-chief executive officer and co-owner of Benco, then forwarded Dr. Mason's February 4 email to Paul Guggenheim, president of Patterson Dental, writing:

Just wanted to let you know about some noise I've picked up from New Mexico. FYI: Our policy at Benco is that we do not recognize, work with,

¹² Following Patterson's decision not to work with NMDC, Dr. Mason's group became the New Mexico branch of the Dental Cooperative of Utah and did business with Schein. F. 681.

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or offer discounts to buying groups (though we do work with corporate accounts) and our team understands that policy.

F. 684.

Cohen explained that his rationale for forwarding Dr. Mason's February 4 email to Guggenheim was that Cohen "wanted to let [Guggenheim] know about a situation in New Mexico that he might not have heard was taking place in one of their locations." F. 686. Cohen also explained that he shared the information that Benco had heard about Patterson's interactions with NMDC with Guggenheim because Cohen hoped that Guggenheim would also share similar information with him. F. 687 ("I like to give information to get information. I like to be useful [to Guggenheim]. If the shoe was on the other foot, I would have liked to have known the same information. . . . I like to maintain good relationships with my competitors."). Thus, Cohen testified that in sending this communication to Guggenheim, he was seeking to establish a quid pro quo exchange of information with his competitor.

Benco did not persuasively explain why Cohen shared Benco's policy against dealing with buying groups with Patterson. BRCCFF 483. Cohen testified only that, "It seemed to be germane to the topic, but no special reason." F. 688. Although Benco's policy of not selling to buying groups had been in place since 1996 (F. 106) and Cohen testified that he believed that Benco's policy was not confidential (Cohen, Tr. 714), Guggenheim was unaware of Benco's policy against dealing with buying groups until he received Cohen's February 8, 2013 email. F. 691. Cohen could not identify any business reason for sharing with the executive of Patterson that Benco had a policy that it would not be doing business with buying groups. F. 689. If Benco's policy was actually a matter of public knowledge, it would have been unnecessary to communicate this policy to Guggenheim, thus undercutting Benco's stated reason for telling this to Patterson.

Even if Benco's no buying group policy was a matter of public knowledge, Benco errs in suggesting that an exchange of publicly known information cannot evidence a meeting of the minds. In *United States v. FMC Corporation*, the court found a horizontal agreement to refuse to recognize a certain city for the purpose of quoting delivered prices to customers in the area, even though the information exchanged by the competitors "was a matter of public knowledge." 306 F. Supp. 1106, 1150 (E.D. Penn. 1969). The court rejected the defendant's argument that it informed competitors of its refusal to recognize the city, "not to exchange assurances of joint conduct," but simply to share information. *Id.* The court reasoned that the public nature of the information was indicative of an agreement because "it should have been unnecessary to communicate an obvious fact" and found that the competitor communications showed that "[w]hat was important was for [the defendant] to receive assurances that [its] competitors would not recognize [the city], and for each of them to recognize that others likewise would not recognize [the city]." *Id.*

"[I]t is axiomatic that the typical conspiracy is rarely evidenced by explicit agreements, but must always be proved by inferences that may be drawn from the behavior of the alleged conspirators." *ES Dev., Inc. v. RWM Enterprises, Inc.*, 939 F.2d 547, 553 (8th Cir. 1991)

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(internal quotations omitted). “[I]f a plaintiff relies on ambiguous evidence to prove its claim, the existence of a conspiracy must be a reasonable inference that the jury could draw from that evidence; it need not be the sole inference.” *Apple*, 952 F. Supp. 2d at 697 (citations omitted). *But see In re McWane, Inc.*, 2014 WL 556261, at *62 (Jan. 30, 2014) (Wright dissenting) (opining that “[t]he most plausible inference to draw from these particular facts . . . strongly counsels against” finding exclusionary conduct). The most credible inference to draw from these particular facts is that Cohen provided Guggenheim with his assurance that Benco would not bid for the business of buying groups in the hope of obtaining Guggenheim’s assurance that Patterson would not do so either. Courts have held that evidence of competitors communicating about strategic, non-public information that could be used to compete against each other supports finding an agreement. *E.g., Fleischman*, 728 F. Supp. 2d at 162 (competitor exchange of information that could have been used to compete against each other absent a conspiracy was “persuasive evidence” of a conspiracy); *Polyurethane Foam Antitrust Litig.*, 152 F. Supp. 3d at 991 (“A jury could reasonably conclude that Defendants shared such information with each other because there existed a common understanding of how the information would be used – not to compete, but to collude.”).

**(c) Patterson’s communication regarding NMDC
and buying groups**

Approximately 20 minutes after receiving Cohen’s February 8, 2013 email regarding Benco’s no buying group policy, Guggenheim forwarded it to Dave Misiak and Tim Rogan. F. 693. In February 2013, Misiak was Patterson’s vice president of sales, in charge of Patterson’s United States sales organization (F. 696), and Rogan was Patterson’s vice president of marketing, in charge of Patterson’s pricing department. F. 697. Both had responsibilities at that time for evaluating opportunities to do business with buying groups. F. 695. Guggenheim said he forwarded the email to them for “informational purposes,” and did so without writing any text of his own in the body of the email that he forwarded to Misiak and Rogan. F. 694.

A few hours after Guggenheim received the February 8, 2013 email from Cohen alerting him to Patterson’s involvement with NMDC and informing him of Benco’s no buying group policy, Guggenheim responded to Cohen:

Thanks for the heads up. I’ll investigate the situation. We feel the same way about these.

F. 698.

Patterson tries to downplay this communication based on Guggenheim’s testimony that this was just a quick, cordial response to one of hundreds of emails he received daily in his role as president. PB at 27 (citing Guggenheim, Tr. 1612). Patterson does not otherwise explain Guggenheim’s reason for this communication. *See* PFF 272-76. The evidence shows that, upon receiving Cohen’s email describing Benco’s no buying group policy, Guggenheim did not reply immediately. Rather, he forwarded it to two sales executives. Then, two hours later, Guggenheim replied to Cohen, which tends to undermine the argument that Guggenheim’s response was just a quick response without much thought put into it.

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In writing to Cohen: “We feel the same way about these,” Guggenheim confirmed at trial that his response meant that Patterson felt the same way as Benco did about buying groups. F. 699. Cohen confirmed that he interpreted Guggenheim’s email to convey that Patterson’s position was similar to Benco’s policy of not dealing with buying groups. F. 700 (Cohen testified: “Q. What did you think Mr. Guggenheim’s position was on GPOs at the time of this e-mail? A. I thought – it goes back to the e-mail exchange that we had several months before in the context of the New Mexico cooperative, and he said, ‘We feel the same way about these.’ Q. So did you think that his policy was similar to yours? A. That’s the way I interpreted that sentence. Yes.”).

Guggenheim could not identify any business rationale for his February 8, 2013 communication to Cohen. F. 701. Sharing Patterson’s position with respect to buying groups, which conveys its future bidding strategy, supports a finding that this communication was an exchange of assurances. *See Gainesville*, 573 F.2d at 301 (finding that communications between executives were probative of conspiracy where “there was no reason for communicating with a competitor about the refusal” to serve certain customers); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 450 (9th Cir. 1990) (holding that the mutual disclosure of sensitive price information supported a finding of “common understanding” among firms sharing this information). The February 2013 email exchange – between Cohen: “Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups . . . and our team understands that policy” and Guggenheim: “We feel the same way about these” – is persuasive proof of an exchange of assurances of a common course of action.

With respect to the information provided by Cohen that a dental cooperative in New Mexico had announced to manufacturers that it had “partnered with Patterson,” Guggenheim said to Cohen: “Thanks for the heads up. I’ll investigate the situation.” F. 698. Patterson asserts that Guggenheim did not investigate the situation, never talked to anyone at Patterson’s Albuquerque branch about NMDC, and never got back to Cohen. PB at 5. At trial, Guggenheim testified that he could not recall whether he investigated the NMDC situation. F. 705. In his deposition, Guggenheim testified, “It’s possible that I called [Patterson’s New Mexico branch manager] and looked into it, but I don’t remember that specifically.” F. 705.

Guggenheim also denied asking Misiak or Rogan to do anything in relation to the forwarded February 8, 2013 email from Cohen (F. 702), and Misiak and Rogan both testified that they did not recall doing anything specific in response to receiving the February 8, 2013 email from Cohen to Guggenheim, which had been forwarded to them by Guggenheim. F. 703-704. Rogan additionally testified that he did not receive any instructions from Guggenheim in connection with the forwarded email. F. 704. On February 11, 2013, Patterson’s New Mexico regional manager terminated Patterson’s discussions with NMDC. F. 679.

“All evidence, including direct evidence, can sometimes require a factfinder to draw inferences to reach a particular conclusion, though ‘perhaps on average circumstantial evidence requires a longer chain of inferences.’” *In re Publ’n Paper Antitrust Litig.*, 690 F.3d 51, 64 (2d Cir. 2012) (citation omitted); *accord Apple*, 952 F. Supp. 2d at 689. The most credible inference

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to draw from the facts here – that: Patterson’s branch manager believed a partnership with NMDC had the “opportunity to be huge” and expressed his desire to keep “moving forward” with NMDC as of February 7, 2013; Cohen and Guggenheim exchanged emails regarding NMDC on February 8, 2013; Guggenheim forwarded Cohen’s February 8, 2013 email to his top sales executives on February 8, 2013; and Patterson’s regional manager terminated discussions with NMDC about working with NMDC three days later, on February 11, 2013 – is that Patterson’s sudden termination of discussions with NMDC was attributable to a direction from Guggenheim, Misiak, and/or Rogan. This conduct by Patterson, in terminating its discussions with NMDC after an exchange of assurances between Guggenheim and Cohen, evidences action taken in conformance with the course of action suggested by Benco to refuse to deal with buying groups, which implies an agreement. *See Paramount Pictures*, 334 U.S. at 142 (“It is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated and that the defendants conformed to the arrangement.”); *Interstate Circuit*, 306 U.S. at 226.

ii. The June 2013 email exchange between Guggenheim and Cohen

(a) Patterson’s interactions with ADC

In mid-February 2013, Atlantic Dental Care (“ADC”) approached Devon Nease of Patterson’s Chesapeake, Virginia branch office, and provided Patterson with a request for proposal (“RFP”). F. 706. Nease sent an email to Anthony Fruehauf, Patterson’s Mid-Atlantic regional manager, and forwarded ADC’s bid proposal. F. 709. Fruehauf then forwarded ADC’s proposal to Misiak, Patterson’s vice president of sales, with the following message:

I have attached an RFP that the GPO in Chesapeake will be sending out. 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. Devon is on board and understands our position. His concern was more of how he would be judged if we lost a big chunk of business.

F. 710.

In response to this email from Fruehauf, Misiak wrote in a February 27, 2013 email:

These co-op situations can be very challenging so stay connected. You may have to help [the Patterson branch manager] at the meeting communicate our position verbally to the reps. . . . When I get these calls directly I politely say that I appreciate the opportunity, but currently we do

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[not]¹³ participate with group purchasing organizations. Continue to help Devon [Nease] stay out of this with grace¹⁴

F. 715. Misiak admitted that his February 27, 2013 email to Fruehauf directed his sales team not to bid for ADC's business. F. 719 ("Q. Is it fair to say that you told Anthony [Fruehauf] to not submit a bid for ADC? A. I think, yeah, that's what I say in this email."). Misiak also sent an email to Guggenheim on February 27, 2013 attaching the RFP from ADC stating, "I've coached Anthony [Fruehauf] on how to stay out of this with grace." F. 711. According to Patterson, citing Misiak's February 27, 2013 email to Guggenheim, Patterson decided not to bid for the ADC business in February 2013. F. 720.

On May 31, 2013, Nease, Patterson's local branch manager, informed Guggenheim that "Benco recently responded to and won a bid proposal with a buying group called Atlantic Dental Care." F. 721. As of May 31, 2013, Patterson viewed ADC as a buying group. F. 722.

(b) Patterson's communication regarding ADC and buying groups

After learning from Nease that Benco had bid for and won ADC's business, Guggenheim located the February 8, 2013 email he had received from Cohen in which Cohen conveyed Benco's no buying group policy. F. 723. Guggenheim then forwarded that email to Cohen on June 6, 2013 and asked Cohen to confirm that Benco's "position on buying groups [was] still as [Cohen] articulated back in February." F. 724-725. Guggenheim's June 6, 2013 email to Cohen stated:

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.

F. 725. Guggenheim also sent his June 6, 2013 email to Cohen as a blind copy to Misiak, Rogan, and Nease. F. 726.

At trial, Guggenheim explained that he viewed Benco's bidding on and doing business with ADC as a deviation from what Cohen had told him on February 8, 2013 was Benco's policy of not doing business with buying groups. F. 727. ("[A]fter Devon [Nease] brought this up to me, I went back and looked at what he said in that e-mail, and I just was wondering if his – it seemed inconsistent with what he told me at that time."). The most credible inferences to draw

13 Where Misiak wrote that "currently we *do* participate with group purchasing organizations," he meant to write "currently we do *not* participate with group purchasing organizations." F. 717 (emphasis added).

14 Where Misiak wrote "stay out of this with grace," "this" referred to the GPO. F. 717.

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from these particular facts are that Guggenheim was confronting Cohen with what Patterson perceived to be a deviation from Benco's no buying group policy and that Guggenheim was seeking reassurance that Benco was complying with a prior agreement between Benco and Patterson that neither would sell to buying groups.

Patterson does not offer any credible explanation for why Guggenheim pulled up a four-month old email relating to NMDC to ask Cohen a question about Benco's business dealings with ADC. *See* PB at 7, 27, 37; PRCCFF 568; *see also* PFF at 301, 305. Instead, Patterson states that Guggenheim's June 6, 2013 email to Cohen was sent months after Patterson had decided on its own not to bid for ADC, weeks after Benco decided to bid for ADC, and weeks after ADC awarded the bid to Benco. PB at 37. Because of this timing, Patterson asserts, the June 2013 email exchange could not have affected each company's decision with respect to ADC. PB at 37 (citing *Blomkest Fertilizer*, 203 F.3d at 1033-34). *Blomkest* was a conscious parallelism case where plaintiffs attempted to prove plus factors through inter-firm communications of price verifications on completed sales. The court held that based on the facts of the industry, after-the-fact price verifications bore no relationship to future market prices and lacked any causal link to defendants' parallel pricing, rendering insufficient evidence to infer an agreement. 203 F.3d at 1033-34. By contrast, in this case, this communication is asking about Benco's no buying group policy, which impacts Benco's future bidding strategy.

Regardless of whether the June 2013 email exchange affected either company's decision with respect to ADC, Guggenheim's email to Cohen is evidence of Patterson confronting Benco over what Patterson perceived to be Benco's deviating from Cohen's prior assurance that Benco would not sell to buying groups. Evidence of competitors communicating with one another about deviations from prior assurances is probative of a conspiracy. *Foley*, 598 F.2d at 1332-33 (finding evidence of competitors calling each other about failure to adopt a higher commission as probative of a conspiracy to raise commission rate); *United States v. Maloof*, 205 F.3d 819, 830-31 (5th Cir. 2000) (finding that the defendant orchestrated an antitrust price-fixing conspiracy by, *inter alia*, informing his competitor when "sales representatives from other companies deviated from the agreed upon pricing"). Logically, such confrontations occur *after* the supposed deviating conduct has occurred.

Guggenheim's June 6, 2013 email to Cohen is also evidence of Patterson seeking and obtaining reassurance from Cohen that Benco still has a no buying group policy. As discussed below, this, too, is probative of a conspiracy.

(c) Benco's communication regarding ADC and buying groups

Cohen replied to Guggenheim's June 6, 2013 email two days later, reaffirming that Benco had a no buying group policy. F. 728. In a June 8, 2013 email, Cohen wrote to Guggenheim: "As we've discussed, we don't recognize buying groups." F. 729. Cohen then explained that Benco had determined that ADC was not a buying group and provided the reasons for that determination. F. 729-730. Cohen also informed Guggenheim: "[W]e're going to continue monitoring the process to ensure that ADC delivers on their commitment to us. Happy to discuss in more detail, if you'd like." F. 729.

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Like Patterson, Benco argues that there is no evidence of any communication between Benco and Patterson regarding ADC before Benco bid for and won ADC's business and that because Benco had already won the ADC contract, Cohen saw no harm in sharing Benco's thinking regarding the ownership structure of ADC. BB at 30-31. For the reasons discussed above, the argument with respect to the timing of the disclosure is not persuasive.

Benco also argues that Guggenheim was simply trying "to gain information that would better allow [Patterson] to compete for this business." BB at 30-31. It is not credible that Guggenheim would contact his competitor, finding and responding to a four month-old email describing Benco's no buying group policy, and ask specifically about that policy, if Guggenheim was simply seeking information about ADC's structure. Furthermore, other than to demonstrate Benco's adherence to Cohen's prior assurances, it is not clear why Cohen would feel the need to respond to Guggenheim's inquiry, and to explain Benco's conduct by telling Guggenheim that Benco had determined that ADC was not a buying group. Cohen's detailed response to Guggenheim, listing multiple reasons for Benco's determination that ADC was not a buying group¹⁵ in order to explain Benco's conduct, supports the inference that Cohen felt obligated to explain a perceived shift in Benco's policy to Guggenheim and to assure Guggenheim that Benco was acting in compliance with the original assurance Cohen had provided. *See Twombly*, 550 U.S. at 556 n.4 (noting that "conduct that indicates . . . restricted freedom of action and sense of obligation" is "generally associate[d] with agreement") (citation and original brackets omitted).

In addition, Cohen acknowledged that he believed that Guggenheim was asking Cohen if Benco still had a no buying group policy, and whether Benco's doing business with ADC was consistent with that policy. F. 731. If Patterson were acting independently, there would have been no need to check with Benco about whether ADC was a buying group. Instead, this inquiry from Patterson is more consistent with a request for reassurance that Benco was abiding by Cohen's prior assurance that Benco does not deal with buying groups. In response, Cohen provided that reassurance to Guggenheim. F. 729 ("As we've discussed, we don't recognize buying groups.").

Courts have found evidence of requests for assurance and the provision of reassurances probative of a conspiracy. *E.g., Beaver*, 515 F.3d at 738 (holding that evidence of competitors confronting one another about cheating, or reassuring each other that they were abiding by the agreement, was evidence of assent to the conspiracy, even if no one explicitly expressed agreement or assent); *FMC Corp.*, 306 F. Supp. at 1150 (finding persuasive evidence of a conspiracy that "[t]hese exchanges of assurances continued after the initial [agreement]"). In the instant case, the June 2013 email exchanges constitute evidence of a confrontation about perceived cheating followed by reassurance of conduct, which removes the ambiguity as to whether the February 2013 exchange of assurances formed an agreement.

¹⁵ The detailed reasons Benco provided to Patterson included that ADC had a total of 32 practices; the 32 practices had "legally merged together"; the merged entity was "owned by the former practice owners"; ADC was in the "process of rebranding all the offices Atlantic Dental Care"; and the company had a board of directors "made up of some of the stakeholders that makes the decisions." F. 730.

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(d) Patterson's response

On June 10, 2013, Guggenheim responded to Cohen's June 8, 2013 email, stating: "Sounds good Chuck. Just wanted to clarify where you guys stand." F. 733. Guggenheim then forwarded his June 2013 email exchange with Cohen to his boss, Scott Anderson, chief executive officer ("CEO") of Patterson Companies, and to Patterson's sales executive Neal McFadden, one of the individuals in Patterson who evaluated opportunities to do business with buying groups. F. 736. Furthermore, Guggenheim forwarded Cohen's June 8, 2013 email explaining Cohen's rationale for bidding on ADC to Nease, the branch manager for the region where ADC was located, to which Nease replied in part, "How do you feel about this?" F. 734. Guggenheim replied, "I guess that does create a different situation as they would logically buy as one entity. It's a little grey but I guess he has a point." F. 735.

After learning from Benco that ADC was not a buying group, the evidence shows that Guggenheim directed Patterson's then-branch manager in the relevant region to "aggressively get after [ADC's] business and compete." F. 737.

c. Summary of exchange of assurances

Benco and Patterson proffered no credible reasons for why their senior executives shared their views on buying groups with a top competitor, a factor probative of conspiracy. *See, e.g., Gainesville*, 573 F.2d at 301 (finding a conspiracy where "there was no reason for communicating with a competitor about the refusal" to serve certain customers). In the context of the totality of the circumstances – including Patterson's abrupt decision to discontinue its discussions with NMDC; Patterson's decision to refrain from bidding on ADC when Patterson thought ADC was a buying group and Benco's decision to bid on ADC after determining it was not a buying group; and Patterson's conduct of not doing business with buying groups (discussed below) following the email exchange – the most credible inferences to draw are that Cohen contacted Guggenheim in the hope of obtaining Guggenheim's assurance that Patterson would not bid for the business of buying groups, an assurance that Cohen elicited by offering his own assurance on Benco's behalf, and an assurance that Guggenheim provided; and that Guggenheim later sought Cohen's reassurance that Benco was complying with an agreement not to bid for the business of buying groups, an assurance which Benco provided.

"[E]ven direct evidence in antitrust cases 'can sometimes require a factfinder to draw inferences to reach a particular conclusion.'" *Apple*, 952 F. Supp. 2d at 689 (citation omitted). Based on the evidence of the exchange of assurances and the inferences that have been drawn from this evidence, Complaint Counsel has met its burden of demonstrating that it is more likely than not that Benco and Patterson entered into an agreement to refuse to deal with buying groups.

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2. Alleged compliance with a policy of not dealing with buying groups**a. Positions of the parties**

In addition to relying upon the exchange of assurances to establish an agreement, Complaint Counsel argues that evidence that competitors followed conduct “suggested or outlined by a competitor in the presence of other competitors,” proves the existence of a Section 1 agreement. CCB at 41-42 (citing *Gainesville*, 573 F.2d at 300-01; *United States v. Champion Int’l Corp.*, 557 F.2d 1270, 1273 (9th Cir. 1977); *Foley*, 598 F.2d at 1331-32; *Esco*, 340 F.2d at 1007-08). Specifically, Complaint Counsel asserts that “[h]istorically, Patterson did not have the same policy as Benco,” but that after Cohen informed Guggenheim of Benco’s no buying group policy in February 2013, Patterson adopted the same policy and, consistent with this policy, Patterson instructed its employees not to discount to buying groups and rejected a number of buying groups. Complaint ¶¶ 38, 40; CCB at 25, 44-45.

Patterson asserts that long before Patterson allegedly entered a conspiracy in February 2013, it had been evaluating and rejecting buying groups. PB at 17. Patterson also asserts that, although Patterson did not have an explicit no buying group policy, Patterson was always skeptical of working with buying groups and that it turned them down before, during, and after the alleged conspiracy period. PB at 2-3, 18. In addition, Patterson asserts, during the alleged conspiracy period, Patterson did do business with a few groups thought to be buying groups and also did evaluate other buying groups, but turned them down for legitimate reasons. PB at 18.

As analyzed below, Patterson’s conduct in dealing with buying group opportunities during the alleged conspiracy period supports the finding that Patterson refused to deal with buying groups by rejecting them summarily without evaluation, reflecting a near blanket refusal to consider buying groups. This evidence further supports a finding of an agreement between Benco and Patterson.

b. Conduct

Prior to February 2013, the alleged start of the conspiracy between Benco and Patterson, the evidence shows that Patterson did not have a company policy with respect to buying groups or a uniform way of dealing with buying groups. F. 738-739. Instead, decisions as to whether to do business with buying groups were made at the branch level, without guidance from Patterson’s corporate office. F. 738.

The evidence also shows that prior to February 2013, Patterson viewed buying groups with skepticism. F. 741. For instance, in a March 8, 2012 email, Neal McFadden, then Patterson’s Southeast regional manager, reported to David Misiak, then Patterson’s vice president of sales, that the Florida Dental Association (“FDA”) would be establishing a group purchasing organization and had approached McFadden about a dental supply discount program for FDA members. F. 742. McFadden wrote, “This stuff scares me. I’m gonna tell him thanks but no thanks.” F. 742. Misiak responded to McFadden, “Your response is right.” F. 742. Moreover, Patterson’s internal strategy plans in November 2012 identified two business segments on which to focus: private practice and large groups (i.e., DSOs), and did not identify

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buying groups as a segment to target. F. 740. Other examples indicating that Patterson viewed buying groups with skepticism before the start of the alleged conspiracy are set forth in F. 741-742.

While there are a few instances where Patterson refused to do business with buying groups prior to February 2013 (F. 742), there are also a few instances where Patterson did do business with buying groups prior to February 2013. F. 743. *See also* F. 743 (deposition testimony of Paul Guggenheim, “my gut would tell me, yeah, we’ve probably done business with buying groups and that’s probably been done in branches, you know, for many years”). Even if Patterson had refused to deal with buying groups before February 2013, an agreement to adhere to a pre-existing course of action nonetheless constitutes an agreement. *See, e.g., United States v. North Dakota Hosp. Ass’n*, 640 F. Supp. 1028, 1036-37 (D.N.D. 1986) (an agreement among rival hospitals to adhere to their existing policies against discounting to Indian Health Services was a Section 1 violation); *see also Champion Int’l Corp.*, 557 F.2d at 1273 (A bidding pattern among defendants that “developed by ‘normal economic forces’” was condemned as part of an illegal agreement after defendants discussed their preferred auctions and had an understanding about bidding, with the court noting: “defendants did not leave the exchange of this information to chance.”).

In February 2013, as analyzed above, Patterson had been pursuing doing business with NMDC, but three days after the exchange of assurances between Guggenheim and Cohen, Patterson withdrew from dealing with NMDC. This change in conduct strengthens the inference of an unlawful agreement. *See B&R Supermarket, Inc. v. Visa, Inc.*, 2016 U.S. Dist. LEXIS 136204, at *24 (N.D. Cal. Sept. 30, 2016) (Defendants’ coordinated, rather than staggered, roll-out of term regarding chargebacks was deemed a “deviation from prior rollouts [which] points a finger of plausible suspicion, and tends to show that the lock-step rollout in the United States flowed from conspiracy, not parallel conduct.”); *In re Domestic Drywall Antitrust Litig.*, 163 F. Supp. 3d 175, 255-56 (E.D. Pa. 2016) (finding the defendants’ decision to eliminate job quotes, a feature in the drywall industry for decades, was a shift in behavior sufficient to qualify as “traditional conspiracy evidence” pointing towards an agreement).

Also strengthening the inference of an unlawful agreement is evidence that following the February 2013 exchange, Patterson instructed its sales force to avoid dealing with buying groups. *See* F. 744-752. Complaint Counsel cites numerous Patterson documents dated between February 2013 and January 2015 containing statements that Complaint Counsel asserts show either instructions to employees to refuse to deal with buying groups or a general policy against buying groups. *See, e.g.,* CCB at 20, 24-25. Each of the documents cited by Complaint Counsel as containing statements evidencing an internal policy at Patterson to avoid buying groups, including asserted instructions to employees in this regard, has been carefully considered. Full consideration has also been given to the contextual and explanatory evidence proffered by Patterson. Considering this evidence as a whole, Patterson has failed to persuasively explain away the statements upon which Complaint Counsel relies. Some of the statements are clearly suggestive of an instruction to avoid buying groups. *E.g.,* F. 715 (February 27, 2013 email from Misiak to a regional manager: “[W]e do [not] participate with group purchasing organizations.”); F. 745 (August 2, 2013 email from Rogan to McFadden: “We don’t need GPO’s in the dental

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business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry.”); F. 747 (September 3, 2013 email from Misiak to CEO Scott Anderson and Paul Guggenheim, describing the guidance he gave to Patterson sales representatives: “We have said no at every turn. . . . My guidance has been to politely say no [to buying groups] and w[ea]ther the storm with these.”); F. 751 (November 20, 2013 email from Rogan to Patterson’s manager of marketing communications: “We don’t sell to buying groups. Let’s talk live.”); F. 752 (July 26, 2015 email from a territory manager: “I wanted to make sure that GPO’s are not something we as a company are choosing to partner with at this point. I know Dave [Misiak] has been clear about this in the past and I wanted to verify that this still is the case.”). These directions issued from Patterson executives clearly suggest that, following the February 2013 exchange between Guggenheim and Cohen, Patterson instructed its employees not to do business with buying groups, which supports an inference that Patterson adopted a policy of not dealing with buying groups.

The evidence also supports the conclusion that after February 2013, Patterson categorically refused to do business with buying groups, which further supports the inference that Patterson adopted and maintained a no buying group policy after the February 2013 exchange between Guggenheim and Cohen. *See* F. 761-780. In its post-trial brief, Patterson acknowledges that Patterson’s Special Markets division did not do business with buying groups, but asserts that, on the branch level, Patterson Dental evaluated buying group opportunities and made independent decisions on whether to do business with buying groups. PB at 15. To evaluate this assertion requires some unraveling of the distinction between Special Markets and Patterson Dental.

In the fall of 2012, a consulting firm hired by Patterson provided Patterson’s management with a 99-page report and recommendation for how to win some of the DSO market away from Schein and Benco. F. 753. Patterson’s executive team obtained the approval of its board of directors and made a significant investment in early spring 2013 to build out a “Special Markets” sales and service organization. F. 754. Neal McFadden, then Patterson’s Southeast regional manager, moved to the corporate headquarters outside Minneapolis, Minnesota in June 2013 to lead the newly-formed “Patterson Special Markets” organization and began to hire and train a sales and support team. F. 755.

Patterson issued a memorandum officially announcing the June 2013 formation of the Special Markets division, which defined the Special Markets division as serving dental corporations with at least 15 practices and more than \$600,000 in annual purchasing. F. 757. Patterson’s announcement of its Special Markets definition explicitly stated: “This definition will not include group purchasing organizations (‘GPOs’).” F. 758.

Consistent with that directive, McFadden confirmed: “pretty much every inquiry I received from buying groups or GPOs and such, I always told them thank you, but no thanks.” F. 772. *See also* F. 763 (May 19, 2014 email from McFadden to a Patterson Special Markets specialist: “For now – I am electing to not participate with these [buying] groups – we have said no to several already.”); F. 764 (June 12, 2014 text from McFadden to a former Patterson employee requesting a potential partnership with Patterson on behalf of a group of dental offices:

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“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.”¹⁶ In 2014, Patterson’s Special Markets division received between 10 and 25 requests from buying groups but did not do business with any of those groups. F. 771. The evidence shows clearly that Patterson Special Markets did not deal with buying groups.

Patterson asserts that, although the Special Markets division did not do business with buying groups, the local branches of Patterson Dental were free to do so. As support for this proposition, Patterson cites to an email that McFadden, head of Special Markets, wrote in September 2014 (F. 767), when McFadden declined to attend a convention hosted by a buying group in Georgia: “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.” PB at 16-17. As another example, Patterson cites to an email that McFadden wrote in May 2015 (F. 770): “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.” PB at 17. Patterson’s Maine branch manager responded, “Thanks for the insight Neal – we will handle at the Branch level.” F. 770. However, these examples, one of which indicates only that McFadden did not prohibit a local branch from attending a sponsorship event, are not evidence that the local branches did in fact do business with buying groups.

Indeed, Patterson did not provide persuasive evidence of local branches actually doing business with buying groups. Patterson cites to three examples where it said yes to what it thought were buying groups. PB at 16-17 (referencing Jackson Health, Orthosynetics, and Patterson’s 2017 bid for Smile Source). With respect to Jackson Health, Patterson relies upon a May 29, 2014 email that shows Tim Rogan, vice president of marketing, commenting: “This is a GPO. They are taking 2% off the top. This is a very slippery slope.” F. 777. Patterson’s brief omits mention of Rogan being corrected by the branch manager, Alain Carles: “this is not a GPO, this is the Jack[s]on Health system that owns and manages several hospitals in the area,” (F. 778), as well as Carles’ next-day email on the same email chain: “The Branch has been selling to the Jackson system of hospitals and clinics for over 10 years . . . I sent it up to corporate to read before I sign on behalf of the company. . . .” F. 777.

Patterson also points to Orthosynetics as an example of it doing business with buying groups. One of the documents on which Patterson relies (PFF 174) suggests that Orthosynetics was not a buying group. F. 766 (September 11, 2014 email from McFadden: “Orthosynetics pays all the bills of their offices. They’re not a buying club per se.”). *See also* F. 766 (McFadden writing 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.”). With respect Patterson’s 2017 bid for Smile Source (F. 794), actions taken in 2017 are not probative of whether Patterson’s local

¹⁶ The record does not include any such signed agreement (*see* F. 765) and Complaint Counsel does not claim that there is any signed agreement. CCB at 25 n.210.

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branches evaluated buying group opportunities during the alleged conspiracy period (which is alleged to have begun to unravel after April 2015).¹⁷

Patterson also argues that it evaluated and turned down a number of buying groups, but that, in each case, Patterson had reasons to do so. PB at 18-19 (referencing Nexus Dentistry, NAIDS, United Orthodontic Buying Group, Dental Purchasing Group, and Dr. Steven Sebastian). In most of the provided examples, Patterson's explanations are not supported by the contemporaneous documents.

For instance, Patterson states that it turned down United Orthodontic Buying Group ("UOBG") in March 2014 because the buying group sought to buy only one x-ray machine (PB at 18), but the cited document fails to support this assertion. Instead, the document suggests that this was not a buying group requesting a discount or seeking a partnership with Patterson, but an existing independent dentist customer inquiring whether Patterson had access to UOBG discounts for a Sirona x-ray machine. F. 775.

In addition, some of the examples do not show that Patterson evaluated the individual buying group opportunity; rather they tend to show that Patterson turned down the opportunity to work with buying groups without inquiry. For example, Patterson asserts that it rejected the Dental Purchasing Group in April 2014 because the individual who contacted it was a veterinarian. PB at 18. The contemporaneous document indicates that Patterson rejected the request not because it objected to the veterinarian at issue, but, as Guggenheim wrote: "Typical approach of an upstart buying group. We pass on these as a matter of protecting our business model." F. 776. There is also no evidence that Patterson evaluated Dr. Sebastian's buying group rather than rejecting it out of hand. Patterson's contemporaneous documents do not indicate that Patterson rejected Dr. Sebastian because he did not yet have clients; rather, the documents show that Patterson rejected Dr. Sebastian because Patterson did not work with buying groups. F. 779.

With respect to the Catapult Group and to NAIDS, Patterson asserts that it turned these down because they wanted a "vig." PB at 18.¹⁸ The request from Dr. Lou Graham of Catapult was forwarded by Misiak to Patterson's Guggenheim, Rogan, and others, stating: "All, I will respond to Dr. Graham, bcc each of you, with a polite pass on this request. . . ." F. 774. Guggenheim asked Misiak, "What exactly is he proposing?" F. 774. Misiak responded, "A co-op buying group that we pay Catapult (him) and he provided CE [continuing education]." F. 774. The request from NAIDS came from its founder Dr. George Lennon and was evaluated by the Special Markets division. F. 762. Neal McFadden approved his staff member to evaluate the bid when he thought that Dr. Lennon represented the Community Health Center. F. 762. As soon as McFadden realized that Dr. Lennon represented a GPO representing the Community Health Center and would be getting 3% of sales, McFadden declined to work with Dr. Lennon. F. 762 ("At the advice of our legal department and our executive leadership team I am respectfully declining your offer to participate further in your RFP."). In an email to Guggenheim, McFadden noted that he declined NAIDS' offer because historically Patterson has never done business with buying groups. F. 762. Misiak's response to the Catapult Group and

¹⁷ See n.19.

¹⁸ A "vig," short for "vigorish," is a fee or commission paid to the buying group. Guggenheim, Tr. 1574.

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McFadden's response to NAIDS indicate that Patterson did not evaluate these buying group opportunities, but rather, rejected them as a matter of course.

With respect to the Kois Buyers Group, Patterson asserts that it did not work with this buying group after determining that its representative was lying. PB at 23. While there is evidence that Patterson had good reasons for rejecting the Kois Buyers Group (F. 884-896), there is also evidence that Guggenheim "killed" the idea of working with the Kois Buyers Group before Patterson actually evaluated the written proposal from the Kois Buyers Group. F. 890. *See also* F. 884-889, 892. With respect to Smile Source, Patterson asserts that it met with Smile Source in 2013, but decided not to bid on its business because of skepticism that Smile Source could add value at that time, as well as a negative impression of Smile Source's representative and concern that Patterson would be cannibalizing its existing business. PRB at 11. The evidence shows that Patterson did evaluate doing business with Smile Source in 2013, but decided not to bid for Smile Source. F. 819-823; F. 824 ("[W]e have said no to [S]mile [S]ource. They are [a] buying club.").

Even if Patterson had business reasons for refusing to deal with individual buying groups, this does not outweigh the evidence of the exchange of assurances. Courts have upheld findings of unlawful agreements, despite business justifications for the underlying conduct, where the totality of the evidence established an agreement. *United States v. General Motors Corp.*, 384 U.S. 127, 142 (1966) ("It is of no consequence, for purposes of determining whether there has been a combination or conspiracy under § 1 of the Sherman Act, that each party acted in its own lawful interest."); *Apple*, 791 F.3d at 317-18 ("[T]he fact that Apple's conduct was in its own economic interest in no way undermines the inference that it entered an agreement to raise ebook prices."); *Bond Crown & Cork Co. v. FTC*, 176 F.2d 974, 979 (4th Cir. 1949) (Innocent explanations must not be considered alone, and must be taken together with the entire record.). Thus, here, the assertion that Patterson had business reasons for not discounting to buying groups does not outweigh the evidence proving the existence of an agreement.

Lastly, Patterson argues that after April 2015, when Complaint Counsel contends that the alleged conspiracy began to break down,¹⁹ Patterson continued evaluating and rejecting buying group opportunities, except as to Smile Source, and that this conduct is indistinguishable from Patterson's conduct during the alleged conspiracy. PB at 19. Complaint Counsel asserts that, by November 2015, Patterson began analyzing buying groups as a target market in its annual planning process, hired a consultant to analyze the buying group market, and by January 2016

19 Complaint Counsel states that it does "not allege that the conspiracy came to a hard stop in April 2015." CCRB at 115. Rather, Complaint Counsel argues that the agreement between Respondents began to "fall apart" after April 2015, when Benco entered into a settlement with the state of Texas. CCB at 37-38. Specifically, in April 2015, Benco settled an antitrust investigation into its refusal to attend the 2014 TDA annual meeting by entering into an Agreed Final Judgment and Stipulated Injunction with the state of Texas. F. 966. The Final Judgment required Benco to log and submit to the state of Texas any communications between or among any of Benco's "officers, directors, or sales employees" and, with certain exceptions, "any person employed by or associated with another dental supply distributor" "relating in whole or in part to the distribution or sale of dental supplies in the United States." F. 967. Complaint Counsel asserts that, as a result, the alleged conspiracy became difficult to maintain. CCB at 65; CCRB at 40.

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hired a director of business development whose responsibilities included buying groups. CCB at 65-66.

Patterson cites to its dealings with Dentistry Unchained and the Georgia Dental Association as evidence that its conduct did not change after April 2015. With respect to Dentistry Unchained, Patterson evaluated working with the group, but wrote in an internal email in late July 2015 that a “GPO arrangement” can be a “slippery slope.” F. 787. A Patterson territory manager met with a Dentistry Unchained representative in January 2016 and “again explained to her very nicely that we are not going to participate in a GPO-type program at this point.” F. 788. However, in early March 2016, Patterson changed course and decided to work with Dentistry Unchained. F. 790. Neal McFadden acknowledged this change. F. 790 (“I will take responsibility – we must start stretching – This seems to be the only way for now to insert ourselves into the mix with these GPO’s or quasi.”). With respect to the Georgia Dental Association, McFadden wrote to Wesley Fields, director of business development, on March 21, 2016, “This is the Georgia Dental Association GPO. FYI I believe we’re gonna pass on this one.” F. 791. However, on March 22, 2016, McFadden wrote to Fields, in reference to the Georgia Dental Association, “This is the GPO I met with. Yes, they are intriguing - - I do think it’s worth an opportunity to meet with them and listen. I hate the industry moving this way BUT we need to learn and see if there is a way we can coexist.” F. 792. Fields responded, “Thanks Neal. I completely agree that I think we need to continue exploring this market” F. 793. Thus, even the examples relied upon by Patterson to argue that, after April 2015, it continued evaluating and saying no thanks to buying groups, just as it had done during the alleged conspiracy period, actually show that Patterson’s approach to buying groups did change after April 2015.

Furthermore, by November 2015, Patterson began analyzing buying groups as a target market in its planning process (F. 782), hired a consultant to analyze the buying group market (F. 783), and by January 2016 hired a director of business development, Wesley Fields, whose responsibilities included buying groups. F. 786. In 2017, Patterson submitted a bid to Smile Source (F. 794) and in May 2018, Patterson entered into agreements with two other buying groups. F. 795. Patterson’s more recent willingness to work with buying groups differs markedly from its refusal to do so during the alleged conspiracy period.

Moreover, Patterson’s argument that it rejected some buying groups after the alleged conspiracy period – consistent with its conduct during the alleged conspiracy period – is unavailing. The offense of conspiracy consists of a conscious commitment to a common scheme during the alleged conspiracy period. *See Monsanto*, 465 U.S. at 764. Patterson’s conduct outside the alleged conspiracy period does not tip the balance of the evidence during the alleged conspiracy period that shows a conscious commitment to a collective refusal.

c. Summary of compliance with a no buying group policy

Conspiracies are almost always proven through inferences that may fairly be drawn from the behavior of the alleged conspirators. *Apple*, 952 F. Supp. 2d at 689; *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 183 (2d Cir. 2012). Further, “any conformance to an agreed or

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contemplated pattern of conduct will warrant an inference of conspiracy.” *Esco*, 340 F.2d at 1008. In this case, although Patterson presented business reasons for not wanting to deal with buying groups, the evidence shows that Patterson summarily rejected them without evaluation, resulting in a near blanket refusal to deal with buying groups, which further supports an inference of an agreement with Benco not to deal with buying groups.

3. Denials

Both Benco and Patterson assert that every fact witness flatly denied Complaint Counsel’s claim that Patterson and Benco agreed to refuse to sell or discount to buying groups. BB at 7; PB at 3-4, 23-26. Relying principally on *In re McWane*, 2013 WL 8364918 (Initial Decision), Benco and Patterson argue that sworn denials of the existence of an agreement by those alleged to have personal knowledge of the agreement is direct evidence that there was no agreement. BB at 7; PB at 38.

This case is distinguishable from *McWane*. Here, unlike *McWane*, the evidence proves that Cohen and Guggenheim’s communications involved an exchange of assurances about their positions on buying groups, confrontation about deviations, and solicitation and receipt of reassurances, all of which strongly support the inference of an agreement. In *McWane*, by contrast, there was no evidence about the content of the communications between the company’s executives. 2013 WL 8364918, at *265 (“[T]here is no evidence showing what [the employees of the respondents] discussed . . .”). It was only after finding an absence of evidence showing an agreement that the *McWane* decision stated that witnesses’ denials “[f]urther weigh[ed] against a finding of an agreement . . .” 2013 WL 8364918, at *267.

Witness denials of an agreement are properly given little weight when other evidence shows an agreement. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395-96 (1948) (“On cross-examination most of the witnesses denied that they had acted in concert Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact”); *FTC v. Qualcomm, Inc.*, 2019 WL 2206013, at *7 (N.D. Cal. May 21, 2019) (“The Court finds Qualcomm’s internal, contemporaneous documents more persuasive than Qualcomm’s trial testimony prepared specifically for this antitrust litigation.”). Courts have regularly found the existence of an agreement despite the defendants’ denials of any agreement. *See, e.g., In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002) (overturning summary judgment where the plaintiff offered evidence of an agreement and noting that a reasonable trier of fact need not accept testimony “which is self-serving, uncorroborated, implausible . . . , and inconsistent with the overall evidence of conspiracy”); *Champion Int’l Corp.*, 557 F.2d at 1273 (upholding the trial court’s finding of an agreement to eliminate competitive bidding for timber even though the defendants asserted that the meetings were innocent); *Vitagraph, Inc. v. Perelman*, 95 F.2d 142, 146 (3d Cir. 1936) (upholding the district court’s conspiracy finding even though the defendants’ executive and manager witnesses testified “that there was no conspiracy or concerted action between the defendants”). Here, the denials of Benco and Patterson are given little weight and do not offset other compelling evidence in this case “of a planned common course of action or understanding.” *Advertising Specialty Nat’l Ass’n v. FTC*,

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238 F.2d 108, 116-17 (1st Cir. 1956) (upholding the Commission's findings of an agreement where witnesses denied that an agreement took place and offered a different interpretation of the documentary evidence in the record).

4. Conclusion regarding a Benco and Patterson agreement

“As Judge Posner notes, evidence that is ‘susceptible of differing interpretations’ is not ‘devoid of probative value’ . . . and it is the role of the jury to determine ‘whether, when the evidence is considered as a whole, it is more likely that the defendants had conspired to fix prices than that they had not conspired to fix prices.’” *In re Ethylene Propylene Diene Monomer Antitrust Litig.*, 681 F. Supp. 2d 141, 168 (D. Conn. 2009) (quoting *High Fructose Corn Syrup*, 295 F.3d at 655-56). The February 2013 and June 2013 emails constitute evidence of exchanges of assurances and a confrontation about perceived cheating followed by reassurance, which supports finding an agreement between Benco and Patterson. Patterson's conduct following the February 2013 exchange of assurances, in effectively adopting a blanket policy of summarily refusing to deal with buying groups, without evaluation, further supports a finding of an agreement between Benco and Patterson. Based on the totality of the record, Complaint Counsel has met its burden of showing that it is more likely than not that Benco and Patterson entered into an agreement to refuse to provide discounts to or otherwise compete for the business of buying groups of independent dentists.

E. Alleged Agreement Between Benco and Schein

Complaint Counsel claims that Schein and Benco entered into an agreement in 2011 through an exchange of assurances that both companies would refuse to do business with buying groups.²⁰ Complaint Counsel further argues that after the exchange of assurances, Schein's conduct demonstrated compliance with the agreement. In addition, Complaint Counsel asserts, based on certain alleged communications in 2012 and 2013, Benco confronted Schein for purportedly deviating from the agreement and reassured Schein that Benco was complying with the agreement.

First, the Analysis will address whether the evidence proves Complaint Counsel's assertion that Benco's Chuck Cohen and Tim Sullivan, president of the Henry Schein Dental division of Schein (“HSD”), exchanged assurances that Benco and Schein both would refuse to do business with buying groups. Second, the Analysis will address evidence regarding Schein's conduct with respect to buying groups and assess whether Complaint Counsel has proven its claim that Schein implemented a no buying group policy during the alleged conspiracy period. Third, the Analysis will examine the 2012 and 2013 communications upon which Complaint

²⁰ Complaint Counsel does not assert a firm start date to the alleged agreement between Benco and Schein. Although the Complaint refers to Benco and Schein forming an agreement no later than July 2012 (Complaint ¶ 32), at trial, Complaint Counsel modified that allegation to assert that the conspiracy between Benco and Schein began at some unspecified time in 2011. (Kahn, Tr. 19 (“We allege that Schein and Benco entered into the conspiracy in the year 2011, and that's the start of the conspiracy between Schein and Benco.”); *see also* Kahn, Tr. 33 (“the agreement started between Benco and Schein in 2011”); Complaint Counsel's pre-trial brief at 12 (“Benco and Schein entered into an agreement to refuse buying group customers in 2011”).

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Counsel relies as proof of Benco confronting Schein about deviating from the alleged agreement and Benco reassuring Schein of Benco's compliance with the alleged agreement. Fourth, the Analysis will assess additional evidence that Complaint Counsel contends shows Schein's involvement in an alleged "overarching" conspiracy with Benco and Patterson.

1. Alleged exchange of assurances as proof of agreement

According to Complaint Counsel, Schein and Benco formed an agreement in 2011 based on an alleged exchange of assurances. Specifically, Complaint Counsel asserts that Benco's co-owner and chief executive officer Chuck Cohen communicated Benco's no buying group policy to HSD president Tim Sullivan, and that Cohen "gained the understanding" through communications with Sullivan that Schein would also refuse to discount to buying groups. CCB at 25-26. Benco and Schein respond that there is no proof of any communications between Benco and Schein regarding buying groups in 2011. BB at 14-16; SRB at 22-23.

Complaint Counsel does not cite to any communications between Schein and Benco relating to buying groups during or before 2011, when the agreement was allegedly formed. Complaint Counsel cites to the existence of phone calls between Cohen and Sullivan in 2011 (*see* CCFF 348, citing CX6027 at 003-04, 012, 016-17),²¹ but Complaint Counsel did not introduce any evidence as to the content of these phone calls and their content will not be presumed. *See McWane*, 2013 WL 8364918, at *265.²² At most, these communications are probative of an opportunity to conspire. *Id.* However, as held in *McWane*, communications between competitors do not permit an inference of an agreement unless "those communications rise to the level of an agreement, tacit or otherwise." *Id.* (quoting *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 126 (3d Cir. 1999)). *See also Blomkest Fertilizer*, 203 F.3d at 1036 (holding that opportunity to conspire is not necessarily probative evidence of conspiracy). The 2011 text messages cited by Complaint Counsel (CCFF 349-50, citing CX6027 at 003-18) do not relate in any way to buying groups and are innocuous on their face, addressing topics such as sports, the Schein-Benco hiring agreement (*see* F. 563), and charity work. F. 572 (citing *e.g.*, CX6027 at 007 line 91 (Cohen to Sullivan, 10/6/2011: "I'm going to Yankee Stadium for game 5 tomorrow nite. Go Yanks!")); CX6027 at 010 line 108 (Cohen to Sullivan, 10/10/2011: "BTW, I love the way that the Sullivan Foundation/DTAF joint scholarship has turned out. Well done. I'm going to talk with my dad about doing something similar."); CX6027 at 014 line 132 (Cohen

21 Many of these calls lasted mere seconds, as Complaint Counsel's proposed findings acknowledge. *See, e.g.*, CCFF 327-29, 331-34, 337-38, 340-41, 343.

22 By way of background, Tim Sullivan of Schein and Chuck Cohen of Benco have known each other professionally for many years. F. 561. In 1998, Benco and Schein settled litigation between the two companies over non-compete issues relating to the hiring of each other's sales representatives. The settlement included an agreement regarding hiring of each other's employees (the "hiring agreement"). This required Cohen and Sullivan to talk every few years to renegotiate the agreement, and to communicate periodically throughout the year as issues came up relating to certain employees or employee groups. F. 563. For example, in or around the fall of 2011, Benco recruited four or five Schein employees from the Fresno, California area, which raised issues under the hiring agreement between Benco and Schein and caused Sullivan and Cohen to have several discussions over several months. F. 566.

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to Sullivan, 11/2/2011: “Tim: Assume our conversation today only covers TRs/FSCs with books of business. Guys who get fired, equipment specialists, service techs, etc. are still covered by the current Global Agreement terms. Your understanding also?”).

To support a finding that Cohen communicated Benco’s no buying group policy to Sullivan, Complaint Counsel relies on testimony from Cohen as follows:

Q. You did communicate Benco’s no-buying group policy to Mr. Sullivan; correct?

A. I believe I did. Yes.

(Cohen, Tr. 501). However, Complaint Counsel does not point to any evidence that this asserted communication occurred in 2011, as part of an alleged exchange of assurances with Sullivan. Cohen testified that the only communication he had with Sullivan relating to a buying group occurred in 2013, two years after Complaint Counsel alleges the conspiracy began. (Cohen, Tr. 844).²³

Moreover, Sullivan consistently testified that Cohen never at any time shared with him that Benco had a no buying group policy, contradicting Cohen. (Sullivan, Tr. 3944 (“Q. Did Chuck Cohen ever share with you that Benco had a no buying group policy? A. He did not.”); 4259 (“Q. Did you ever learn from Mr. Cohen or otherwise that Benco had any policy on buying groups? A. No. Q. Have you ever heard that Benco did not work with buying groups? A. No.”); CX0311 (Sullivan, IHT at 269 (“I’ve never had that discussion with Chuck about our strategy, their strategy on buying groups.”); 271 (“Q. Mr. Cohen never shared with you that Benco had a policy of not selling or offering discounts to buying groups? A. That’s correct.”); CX8025 (Sullivan, Dep. at 344-46 (“I have not had a discussion about – with Chuck Cohen or anyone at Benco about their strategy on buying groups or ours [N]ever, to my knowledge, did [Mr. Cohen] call me to talk about buying groups in general and the strategy therein.”; Sullivan had no recollection of Mr. Cohen telling him “that Benco had a no-buying-group policy” or “that Benco doesn’t work with buying groups”)). In addition, Complaint Counsel does not cite to any documentary or other evidence corroborating Cohen’s testimony. Complaint Counsel provides no persuasive reason to credit Cohen’s testimony over Sullivan’s. Given the contradictory evidence, Complaint Counsel has failed to prove that it is more likely than not that Cohen communicated Benco’s buying group policy to Sullivan. *See* 16 C.F.R. § 3.43(a) (stating that “the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto”).

Complaint Counsel’s contention that Benco “gained the understanding” from communications from Schein in 2011 that Schein would implement a policy against recognizing buying groups is also unsupported. Complaint Counsel quotes testimony from an investigational hearing transcript of Cohen, regarding his understanding two years later, in 2013:

²³ Additional information and analysis regarding the 2013 communication is set forth in section II.E.4.

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Q. . . . And what did you understand Mr. Sullivan's position was on buying groups at the time of this [September 16, 2013] e-mail?

A. Well, if we go back to the last wrath of text messages, I think that the policy that Henry Schein had was that they do not recognize GPOs.

CCB at 26, CCFF 676, citing CX0301 (Cohen, IHT at 310). Apart from the temporal disconnect, Complaint Counsel also fails to identify what "wrath of text messages" formed the basis for Cohen's belief in 2013. The only text message from Sullivan to Cohen identified by Complaint Counsel that potentially pertains to buying groups is Sullivan's March 26, 2013 reply to a text from Cohen transmitting a link to a press release posted on the website of an entity called Atlantic Dental Care, in which Sullivan stated, "Thanks Unusual." *See* F. 651. This text message, which occurred years after the alleged exchange of assurances in 2011, did not disclose anything regarding Schein's policies.

In addition, there is substantial, consistent testimony that Schein did not, at any time, disclose its policies or practices regarding buying groups to Benco. *See, e.g.*, Cohen, Tr. 845 ("Q. And Mr. Sullivan never told you what Schein's policy was with respect to buying groups. A. No. Q. In fact, you do not know what Schein's policy is with respect to doing business with buying groups . . . ? A. I do not."); Cohen, Tr. 848 (No one from Schein told him "how [Schein] feels about buying groups"); CX8015 (Cohen, Dep. at 489-90 ("I don't recall ever hearing from anyone at Schein what Schein's policy was on buying groups.")); CX0301 (Cohen, IHT at 225 ("Q. Do you recall any communications with Mr. Sullivan that gave you the impression that Schein does not sell to GPOs? A. No specific communications around that.")); CX0311 (Sullivan, IHT at 269 ("I've never had that discussion with Chuck about our strategy" on buying groups)); CX8025 (Sullivan, Dep. at 344-46 ("I have not had a discussion about – with Chuck Cohen or anyone at Benco about their strategy on buying groups or ours")). *See also* Foley, Tr. 4703 ("Q. Mr. Foley, did you tell Mr. Ryan anything, on that October 1, 2013 phone call, related to Schein's views on buying groups? A. No. Not at all. Q. Did you ever tell Mr. Ryan about Schein's approach or strategy about buying groups? A. No.").

Complaint Counsel further argues that Benco was aware of Schein working with buying groups in 2011 but that, "following communications between the companies," Benco "understood" Schein was no longer dealing with buying groups "between 2012 and 2015." CCB at 26. As noted above, Complaint Counsel's evidence as to these communications is weak at best, but in any event, whatever Benco's "understanding" was about Schein's policies or practices regarding buying groups during the alleged conspiracy period, the cited evidence does not show that Benco's "understanding" came from any communication by Schein. For example, Complaint Counsel cites testimony from Cohen that, in July 2012, Cohen believed Schein was no longer working with Smile Source (CCFF 674, citing Cohen, Tr. 525). However, Cohen also testified that any understanding he had regarding Schein no longer working with Smile Source would have come from having "heard it from the individuals and customers Word on the street. You know, it's a small business. There's no secrets." (CX0301 (Cohen, IHT at 216-17)). Cohen further testified that he could not say whether Schein was or was not dealing with buying groups as a general matter, and that he had no knowledge of Schein's overall policy. (Cohen, Tr.

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523, 525). Similarly, Complaint Counsel cites testimony from Cohen that Benco “understood” it was not competing against Schein (or Patterson) for buying groups in 2013; however, Cohen testified that this “understanding” was based on the fact that Benco had a longstanding policy not to recognize or offer discounts to buying groups and was not competing with anyone for buying groups. (Cohen, Tr. 569-70; CX0301 (Cohen, IHT at 296)).

Based on the foregoing, Complaint Counsel has not met its burden of proving that Benco and Schein exchanged assurances in 2011 that both would refuse to discount to buying groups. As noted above, the evidence as to whether Cohen ever disclosed Benco’s no buying group policy to Sullivan is conflicting, at best, and the evidence fails to prove that Cohen and Sullivan communicated their policies or practices as to buying groups to each other in 2011, which is when Complaint Counsel contends the alleged common understanding between Schein and Benco was reached. In this regard, the case against Schein is considerably weaker than that against Patterson, in which the evidence included an email from Cohen to Guggenheim expressly stating Benco’s policy and Guggenheim’s response indicating agreement. *See* section II.D.1.

The Analysis next turns to Schein’s conduct regarding buying groups during the alleged conspiracy period.

2. Alleged compliance with Benco’s policy as proof of agreement

a. Positions of the parties

Complaint Counsel argues that, even if Schein did not communicate an assurance to Benco that Schein would refuse to deal with buying groups, it is enough to show that Benco’s Cohen provided assurances to Schein’s Sullivan of Benco’s no buying group policy, and that thereafter Schein “adopted the same policy.” CCB at 44-45; *see also* CCB at 26 (“Schein complied with the agreement internally”). *See, e.g., Interstate Circuit*, 306 U.S. at 226 (“It was enough [to support finding an agreement] that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it.”); *Foley*, 598 F.2d at 1332 (affirming sufficiency of evidence of conspiracy where, *inter alia*, one competitor announced a course of action, and other competitors “expressed an intention or gave the impression” that they would do the same); *Esco*, 340 F.2d at 1008 (stating that “conformance to an agreed or contemplated pattern of conduct” supports “an inference of conspiracy”).

Specifically, Complaint Counsel asserts that prior to 2011, Schein favored working with buying groups, and worked with them, but that after receiving assurances from Benco as to Benco’s no buying group policy, Schein changed its prior practice in late 2011 and, like Benco, adopted and enforced a “blanket policy” of “categorically” rejecting buying groups. Complaint Counsel argues that, through this conduct, Schein was demonstrating its assent to go along with Benco’s policy and to comply with it. CCB at 15, 26-29; *see also* CCRB at 135-36, 157-58. Complaint Counsel’s argument emphasizes the role of Sullivan, contending that Sullivan’s attitudes about buying groups changed in 2011, from being “in favor of [Schein] working with buying groups” “as of late 2010 and early 2011” to thereafter being against Schein working with buying groups and instructing employees to avoid doing business with buying groups. CCB at 26-29.

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Benco argues that it made the unilateral decision to implement its no buying group policy in 1996, long before the alleged conspiracy, and that each Respondent acted with respect to buying groups in accordance with each company's individual self-interest. BB at 31-33. Schein contends that the evidence fails to show it had a policy of refusing to deal with buying groups. Schein acknowledges a "deep-seated" skepticism as to the value of buying group business for Schein, but argues that notwithstanding this skepticism, Schein evaluated buying group opportunities for risks and potential benefits, partnered with some buying groups and rejected others, and at all times made its decisions independently, based on Schein's unilateral business interests. SB at 1-2. Schein further argues that Schein had developed guidance for evaluating buying group opportunities in 2010, prior to the alleged start of the conspiracy in 2011, and continued to evolve its strategic approach to buying groups during the alleged conspiracy period, all of which Schein argues is inconsistent with an alleged agreement to boycott buying groups. SB at 2-4.

b. Schein's approach to buying groups prior to late 2011

i. Background

Schein's dental business consists of two separate divisions: Henry Schein Dental ("HSD") and Henry Schein Special Markets ("Special Markets"). F. 152. The two divisions collaborate with each other on certain matters, but otherwise operate independently. That is, neither division reports to the other. F. 152. Moreover, each division operates pursuant to its own profit and loss statements and budgets. F. 154.

HSD, headed by Tim Sullivan, is the larger of Schein's two divisions. F. 156, 158. Schein's dental field sales force, referred to as field service consultants, or FSCs, falls under HSD. F. 159. FSCs are trained to assist dental offices with products, clinical techniques, and practice management solutions, and typically visit their customers about every two weeks to discuss new products and take orders for anything the office may need. F. 161-162.

Schein's Special Markets division, headed by Hal Muller during the relevant time period, primarily serves customers other than independent dentists, such as federal and state government purchasers, dental schools, community health centers ("CHCs"), other institutions, and dental support organizations ("DSOs"). F. 166-167. Special Markets has expertise in negotiating with central procurement agents, developing specialized formularies,²⁴ negotiating customer-specific discounts from manufacturers, and working with central entities to drive compliance with volume provisions, requirements, and/or expectations. F. 172. Because Special Markets specializes in servicing large clients, it does not need to provide the same types of individualized services and support that FSCs provide to individual dentists, such as visiting the dentist's office every two weeks. F. 170. Thus, Special Markets' costs are lower than HSD's costs, which include the commissions HSD pays to FSCs. F. 171.

²⁴ A formulary is a focused group of products derived from Schein's total offerings ("say five or six thousand products" out of a hundred thousand) that Schein would "heavily discount . . . on a pricing list." F. 173.

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In addition to DSOs and other centralized purchasers, Special Markets worked with buying groups. F. 174. Entities that are called “buying groups” are not all the same, and take many forms. F. 76. Broadly speaking, a buying group is a group of independent dentists that seeks to leverage price by offering larger volume. F. 77, 93. Within that broad category, however, there are varying characteristics. F. 76, 82.

Some buying groups are based on a loose affiliation. As Jeff Reece of Burkhart, a regional distributor, stated: “It just seems like it’s a couple of guys that over cocktails decided they wanted to save money on supplies, so they formed a group of buddies.” F. 84 (also citing Justin Puckett, a founder of Dental Gator, (some buying groups are “just four dentists at a bar saying let’s get together and order cheaper toothbrushes”)). Some buying groups offer more to their members than discounts on purchases of dental supplies, such as business and insurance services, education, training, and financial and marketing services. F. 85-87. Some buying groups are set up as a franchise system, such as Smile Source, under which members sign a franchise agreement that allows the member to use the buying group’s name and participate in purchasing, education, marketing, and any other programs the buying group offers in accordance with the terms of the agreement. F. 90, 797. Some dental consulting firms – firms that provide independent dentists with business and marketing consulting services – have sought to add a discounted purchasing component. F. 91. Some DSOs have created buying group affiliates, the members of which are independent dentist offices. F. 89.

Given Special Markets’ expertise, Special Markets typically worked with buying groups that were centrally managed, had broad geographic reach, or required customer formularies. F. 175. When it appeared that a buying group customer was weak in maintaining some kind of centralized control or functionality and needed more care at the individual office level, that customer would be serviced by HSD instead of Special Markets. F. 175.

During the time period relevant to this case, both HSD and Special Markets had at least some involvement or responsibility for Schein’s buying group relationships, though primary responsibility shifted during the relevant time period. F. 176. Prior to mid-2014, when Schein created its Mid-Market group within HSD, primary responsibility for buying groups rested with Special Markets, but the HSD field sales force had some responsibilities for doing “due diligence” with respect to buying group opportunities. F. 177-178. Although Sullivan was typically involved in internal discussions as to whether HSD should work with a buying group, he did not necessarily make the final decision with respect to a buying group. F. 157. Sullivan is not presently, and never was, the sole decision-maker for HSD or Schein. F. 156.

ii. Internal conflicts presented by working with buying groups

As collections of independent dentists, buying groups are unlike the independent solo and small group practices served by HSD, and are also unlike the DSOs served by Special Markets, which created particular issues for Schein as a company. F. 209. *See generally* F. 198-211. For example, providing discounts for membership in a buying group can negatively impact FSCs, who are paid a commission based on gross profit from a particular customer. F. 203, 205. Some

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Schein FSCs see buying groups as competition because buying groups were signing up dentists that would otherwise be FSC customers and FSCs were concerned about reduced commission or elimination of their jobs. F. 204. As a Schein vice president of sales explained, if a buying group negotiates an extra 10% discount and signs up an independent dentist customer of Schein, the FSC's commission declines by one-third. This reduction in commission is a disincentive to FSCs to continue to call on that customer and drive increased business. F. 206. *See also* F. 207 (lower compensation to FSCs impacts Schein's ability to retain good FSCs). In addition, HSD and Special Markets compete for sales credit to hit quotas and budgets. F. 210. If Special Markets signs up a buying group whose members were existing HSD customers, HSD loses the sales credit as to those customers. F. 210.

Conflicts arose between HSD and Special Markets as buying groups emerged, which impacted Schein's ability to settle on a consistent strategy with respect to buying groups. As Sullivan explained:

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

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

F. 211.

Schein also identified certain economic risks and potential economic benefits in partnering with buying groups. F. 181. *See generally* F. 182-202. One of the most glaring risks for Schein of working with a buying group is the risk of cannibalization. F. 198. Cannibalization occurs when a distributor offers discounts to a buying group, but those discounts are going to existing customers that the distributor already had. F. 198, 201. The risk of cannibalization is higher for Schein than for other distributors because Schein is the largest distributor in the United States. F. 200. Still, Schein recognizes that some buying groups might be able to present an economic benefit if they are able to bring new customers that could not otherwise be obtained by offering discounts to the individual members. F. 182.

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Schein believes that buying groups that can provide a commitment to purchase from a particular distributor, referred to within Schein as “compliance,” might be able to present an economic benefit to a distributor like Schein, but that without such a commitment, buying group members can “cherry-pick” and “basically only pick the items that were cheapest on the formulary” instead of giving Schein “all their business.” F. 187. Schein views compliance as one of the fundamental issues with buying groups. F. 190. Schein also found that it was a challenge for some groups to maintain members, referred to within Schein as “stickiness,” if the group does not offer any value-added services (“value proposition”) for the members in exchange for the membership fee, beyond price discounts, such as camaraderie, education, or other services that help a buying group retain and influence its membership. F. 193-194, 197. Furthermore, from Schein’s perspective, it is economically beneficial to have exclusivity with the buying group, meaning the willingness of the group to contract with Schein as the only sponsored distributor for the group. F. 185-186. Also, Schein believes that a buying group that is organized only around obtaining supplies at a discount (a “price-only” or “pure” buying group) can present Schein “as a price-only brand or a fulfillment house only and push aside the value that we create with our [sales representatives] and our service,” which Schein believes devalues Schein’s brand. F. 208.

iii. Skepticism and partnering with buying groups

The evidence shows that, for years prior to 2011, Schein executives, including Sullivan, were skeptical about the value buying groups could bring to Schein and to the individual dentist members. F. 179, 247-253. For example, on April 2, 2002, Hal Muller, then vice president of corporate development, wrote to Schein executives Stanley Bergman and Jim Breslawski regarding a buying group called IFS, “[W]e have held a pretty firm line on saying NO to virtually all of them. . . . [T]his type of GPO would kill the margins for both manufacturers and distributors. . . . [T]here would be no increased volume and just lower costs.” F. 247. On December 10, 2009, Henry Schein Dental vice president Dave Steck questioned Schein’s relationship with the buying group Pugh Dental Alliance, stating that it sounded “like a buying group situation, which [Schein] normally stay[s] away from.” F. 249. Sullivan also expressed his concerns about Pugh Dental Alliance in a January 6, 2010 email to Breslawski and Muller, stating, “I do not support us opening Buying Clubs.” F. 250. On March 11, 2010, Sullivan confirmed a decision not to bid on a new buying group, Synergy Dental, even though HSD “may lose the business” of the dentist members, stating he was “not interested in GPOs. The risk is much greater if we do sign th[a]n if we don’t.” F. 252. The foregoing evidence is contrary to Complaint Counsel’s contention that Schein and/or Sullivan’s attitudes about buying groups were generally favorable before 2011.

Notwithstanding Schein’s skepticism, the company choose to work with buying groups where it made business sense to Schein. F. 180. Schein’s buying group customers in the years up to and including 2011 included Long Island Dental Forum (F. 454-455); the Dental Co-Op of Utah (F. 350-352); Smile Source (F. 826-828); Dentists for a Better Huntington (F. 417); Comfort Dental (F. 342-345); Advantage Dental (F. 309-312); Universal Dental Alliance (F. 547-549, 554); Steadfast (F. 504-505); and Breakaway (F. 320-326). Schein also declined to do business with some buying groups during this time period, such as Synergy Dental Partners (F.

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252) and the PEARL Network (F. 263). Schein looked primarily at whether a buying group could “enforce a certain amount of compliance and . . . affect and influence behavior of” the members to drive purchases to Schein. F. 189, 191 (Schein looked for “mechanisms in place where [the group was] able to communicate and educate their members on why it was important that they were buying from the dealer that was supporting the buying group.”). A promise of exclusivity, while important, is “an empty promise” without compliance. F. 192. “Stickiness” was important to Schein because, in its assessment, a buying group that offers its members nothing more than price discounts cannot guarantee that the members will shift their purchases to the group’s designated distributor, because dentists typically do not make purchasing decisions solely on the basis of price. F. 194.

iv. 2010 Guidance

In 2009, Randy Foley, former vice president of Special Markets at Henry Schein, opened an account for the Pugh Dental Alliance. F. 212. Shortly after this account was opened with Schein Special Markets, it began causing “friction” with Schein’s local FSCs, who thought the buying group’s relationship with Special Markets would take accounts away from the FSCs. F. 212. On January 5, 2010, Scott Schenker, the local FSC where Pugh Dental Alliance members were located, wrote to Jim Breslawski, president of Henry Schein, who oversaw both HSD and Schein Special Markets, that the Pugh Dental Alliance “sales person informed [his] account [that] they could join the alliance for \$2,000/yr, eliminate their FSC[,] and save as much as 20% on their supply bills and continue to order from” Henry Schein. F. 213. Schenker noted that the members “are mostly [Henry Schein] customers with various FSCs [including] quite a few more of [his] own customers. . . . This is a potentially cancerous situation. . . . It’s absolutely absurd that I should be put in a situation that I’m competing with my own company.” F. 213.

Hal Muller, president of Schein Special Markets, responded in an email on January 6, 2010 that Special Markets justified its aggressive discounts by cutting FSC support. At “that pricing level,” Muller wrote, “we usually ask our field sales consultants to visit less often as obviously profits have been cut.” Muller also wrote that “[w]e really don’t have a lot of time for this infighting . . . however we need to be open to some of these people that are doing creative approaches to the market – and find the right way to deal with them . . .” F. 214. Tim Sullivan, president of HSD, responded, “I do not support us opening Buying Clubs.” F. 214. Breslawski instructed Sullivan and Muller to work out the conflicts between the two divisions. F. 215.

In early 2010, the leadership of HSD (Sullivan and Steck) and the leadership of Special Markets (Muller and Foley) got together to discuss the conflicts and issues. F. 215. At that meeting, Sullivan, Steck, Muller, and Foley agreed to a set of general guidelines for doing business with buying groups. F. 216. It was decided that if a buying group could “drive compliance,” or “force” purchases to Schein through control over purchasing policy, then the group “could be a good opportunity for Schein.” F. 217.

c. Asserted change in Sullivan’s attitude about buying groups

Complaint Counsel’s theory rests on the assertion that there was a change of conduct at Schein in late 2011 from working with buying groups to categorically rejecting them, according

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to Complaint Counsel, to conform with Benco's no buying group policy. To support this claim, Complaint Counsel first contends that Sullivan changed his attitude toward buying groups beginning in late 2011, from being generally in favor of Schein working with buying groups to being against it. This argument is unpersuasive. As shown above, Sullivan and other Schein executives expressed skepticism about buying groups for years prior to 2011, notwithstanding choosing to work with some buying groups.

Complaint Counsel relies principally on a September 2010 internal email regarding Smile Source, in which Sullivan stated that he did not "want to lose SS [Smile Source] as an account. They are \$1 million and growing." F. 254. The September 2010 internal email regarding Smile Source arose from a complaint from the same FSC who had complained about the Pugh Dental Alliance, Scott Schenker. F. 829. Schenker complained that Smile Source, a customer of the Schein Special Markets division since 2008, was attempting to recruit customers of HSD, which caused an internal conflict between the two Schein divisions. F. 826-829.

Muller recommended "continu[ing] the relationship with Smile Source," explaining to Sullivan and others at Schein that Smile Source, a franchised buying group (F. 90, 797), "is much more than a buying group," explaining that Smile Source is providing "management services for dental offices for a percentage of revenue or actual fees for each admin function" and "expects more [than] just purchases." F. 830. Muller further noted that doing business with Smile Source was consistent with the 2010 guidance that Schein would entertain buying groups that could "force compliance." F. 830.

Sullivan responded that he did not agree with Muller's position, and Sullivan and Muller met in an attempt to resolve the conflict. F. 831-832. On September 15, 2010, Sullivan reported the results of that meeting to Henry Schein president, Jim Breslawski. F. 832. Sullivan reported that he and Muller agreed that "neither of us support the concept of buying groups. Whereas it may benefit SM [Special Markets] to some extent," there is "risk to overall HSI [Henry Schein, Inc.] (due to having 40% share in market) for margin erosion, image, as well as other competitors then following suit and [a] huge price war breaks out." F. 832. Sullivan further reported that neither Muller nor Sullivan "want[s] to lose SS [Smile Source] as an account. They are \$1 million and growing." Still, Sullivan was willing to test the theory, stating: "I am inclined to 'allow' this account to join [HSD] (not that it's up to me/us) and see what happens. After all, [the field service consultant] and HSD (per Hal Muller) only get about 30% of this account[']s business today. So, if theory works we would get 100% at lower margins, but all parties win in overall GP \$'s [gross profit dollars]." F. 832. The Smile Source account was thereafter transferred to HSD. F. 834. In short, this document does not demonstrate that Sullivan was generally in favor of Schein working with buying groups in 2010, as argued by Complaint Counsel.²⁵

²⁵ Complaint Counsel also cites to a letter from Sullivan to Smile Source on February 23, 2011, where he told the customer that he was "very excited about our future together and the business model you have created." (CX2899 at 001). When viewed in the context of Sullivan's skepticism but willingness to test the theory of Smile Source's business model, Sullivan's language is more logically interpreted as an effort at good customer relations and does not otherwise carry significant weight.

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d. Alleged adoption of blanket policy to categorically reject buying groups beginning in late 2011**i. Schein statements**

Complaint Counsel's contention that Schein changed its conduct with respect to doing business with buying groups beginning in late 2011 is based principally on statements in documents that, according to Complaint Counsel, prove that Schein had a policy against dealing with buying groups and/or that Sullivan and other executives instructed employees to avoid buying groups. CCB at 27-29 and CCFF section X.B. For example, Complaint Counsel cites to a December 7, 2011 internal email in which Sullivan stated that buying groups were a "slippery slope" and that Sullivan was "still of the position that we do NOT want to lead" in getting buying groups started in the dental industry. F. 263. Sullivan's use of the word, "still" in describing his position regarding buying groups contradicts the inference that Sullivan was expressing a change of position.

Complaint Counsel also relies on a December 21, 2011 email from Randy Foley, director of sales for Schein's Special Markets division, to a Schein customer, in which he declined to work with the customer's planned buying group and told the potential customer that, "unless you have some 'ownership' of your practices Henry Schein considers your business model as a Buying Group, and we no longer participate in Buying Groups." F. 258. This was a communication with a customer and not an internal document, and must be viewed in that context. On December 8, 2011, Janet Knysz, a former owner of Great Expressions Dental Centers, a successful DSO and a long-time Schein partner, was in the process of developing a new entity, to be called Unified Smiles, and reached out to Schein. F. 539-540. Knysz represented that Unified Smiles would "administer operations the same way as [Great Expressions had] with all purchases running through [its] corporate office." F. 540. On December 12, 2011, Foley met with Knysz to discuss the planned group. Unified Smiles was not yet in existence and Knysz had not enrolled any members for the buying group at the time she approached Schein. F. 541. Knysz wanted the same pricing for Unified Smiles as Great Expressions received from Schein. Great Expressions' pricing was due to its being Schein's fifth largest corporate customer. F. 542. Foley tried to communicate to Knysz that Schein could not extend DSO pricing to her if she was not operating as a DSO, which requires some minimal ownership. Unified Smiles also did not have the "\$5 [million] + of business" that Great Expressions had, which would allow Schein to "negotiate[] pricing from our vendor/suppliers based on . . . proven volume." F. 543. Foley had offered discounted pricing of 5 or 10% as a starting point, but Knysz was "adamant" about receiving the Great Expressions pricing. F. 543.

It is in the above context that Foley wrote to Knysz declining the opportunity, stating: "Unfortunately, unless you have some 'ownership' of your practices Henry Schein considers your business model as a Buying Group, and we no longer participate in Buying Groups." F. 545. Foley further explained to Knysz that without a minimum volume, Schein could not negotiate "chargebacks" with manufacturers, and that extending DSO pricing to Unified Smiles, as Knysz requested, would "lead to cannibalization" and "friction" with "EXISTING customers." F. 545.

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Foley referred to his statement that Schein no longer participated with buying groups as “poorly worded” and a way to avoid providing the group’s sponsor, the former owner of a large Schein DSO customer, a nuanced explanation of the business reasons for declining the opportunity. F. 259. Foley further maintained that the statement that Schein no longer participated with buying groups was inaccurate because Special Markets was participating in buying groups. F. 259. Indeed, the evidence shows that Schein provided a proposal to the buying group MeritDent on December 22, 2011, the day after Foley’s statement to Unified Smiles, and entered into an agreement with MeritDent on February 7, 2012. F. 466-467. Furthermore, Foley had the authority to vet and turn down business opportunities, and made the decision to turn down Knysz without discussing it first with Sullivan or anyone else at Schein. F. 260, 544. Complaint Counsel does not point to any document or testimony to the contrary.

In summary, Complaint Counsel assigns undue probative weight to Foley’s statement to Knysz that Schein “no longer participated” in buying groups. While on the surface, Foley’s statement appears significant, in context and fully explained, it carries little weight on the question of whether Schein adopted a no buying group policy in late 2011, pursuant to an alleged agreement between Schein and Benco.

Complaint Counsel cites to a number of additional documents dated between 2011 and 2014 containing statements of Schein personnel that Complaint Counsel asserts show either instructions to refuse to deal with buying groups or a general policy not to do business with buying groups. *See, e.g.*, CCB at 28-29. Each of the documents cited by Complaint Counsel has been carefully considered, along with contextual and explanatory evidence proffered by Schein. *See* section III.E of the Findings of Fact. *See also* section III.F. Schein fails to persuasively explain away all the statements in the documents upon which Complaint Counsel relies. Although, as shown below, other substantial probative evidence, including Schein’s conduct with respect to buying groups, belies the notion that Schein had a blanket policy to categorically refuse to do business with buying groups, as argued by Complaint Counsel, some of Schein’s statements are suggestive of a policy of avoiding buying groups. *See, e.g.*, F. 275 (Foley writing to his direct report on February 20, 2012 regarding buying groups that when “existing Schein customers enroll, it simply erodes margins. . . . [E]xisting customers come to Schein and say, ‘I don’t want to join their group but I want their pricing’ (per Tim Sullivan). So, this is a corporate decision, not to participate in these”); F. 281 (April 10, 2012 email to a Schein regional manager from a Schein zone manager inquiring about setting up a buying group for a dentists’ study club, stating, “Neither HSD or Special Markets will participate in buying groups of any kind. They just erode our margins and rarely bring any new business to the table”); F. 285 (May 29, 2013 email from a Schein zone manager stating, “We try to avoid buying groups at all costs and therefore don’t really recognize them”); F. 296 (October 25, 2014 email from the eastern area sales director for HSD to a Schein regional manager stating, “I’ve received a few FSC phone calls over the last few weeks regarding group purchasing organizations (GPO). Just for clarity, we are NOT participating in any GPOs regardless of what they promise to bring us”).

As to Complaint Counsel’s claim that Sullivan instructed employees to refuse to deal with buying groups, it must be noted that Schein witnesses consistently denied that employees were instructed not to do business with buying groups. F. 307. Still, some of the documents

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upon which Complaint Counsel relies indicate that some Schein employees understood that Sullivan and/or Schein in general viewed buying groups with disfavor. *See, e.g.*, F. 273 (February 2, 2012 email from Sullivan to Steck, Foley, and others, “I’m really less concerned about the actual revenues, although very important too, rather more about what we can do to KILL the buying group model!!”); F. 284 (July 17, 2012 email from a Schein zone manager to a Schein FSC, stating, “I have to tell you Ron and Dan made a decision that is against what Tim Sullivan has directed us to do in regards to supporting Buying groups. We do not want our customers organizing and creating what are known as GPOs[. I]t takes the value away from the distributor”); F. 287 (July 17, 2014 email from a Schein zone manager stating, “I think the meta msg is officially, GPO’s are not good for Schein”); F. 289 (July 18, 2014 email from a Schein zone manager stating, “from Tim S, HSD does not want to enter the GPO world”); F. 295 (October 8, 2014 email from a Schein regional manager stating, “It is my understanding that this violates our policy as we do not engage with GPOs”).

However, substantial probative evidence conflicts with the assertion that Schein had a blanket policy to categorically refuse to do business with buying groups during the alleged conspiracy period, as argued by Complaint Counsel. As to some of the statements upon which Complaint Counsel relies, Schein explains that, when using the term “buying group” or “GPO,” Schein meant those buying groups that only sought a discount arrangement from Schein and did not have any ability to drive compliance with volume expectations, i.e., a “price-only” buying group. SB at 15-16. *See* F. 276 (Foley typically used the term “buying group” when meaning a price-only type of buying group), 286, 294. Complaint Counsel contends that the qualifier, “price-only,” is not used in Schein documents. CCRB at 147-50. However, there are documents in which Schein uses certain qualifiers in referring to buying groups, such as “much more than” a buying group, with reference to Smile Source, or “nothing more” than a buying group, with reference to Greenville Smiles. F. 295, 830. Other qualifiers include “classic” buying group, in reference to the Florida Dental Association. F. 269. *See also* F. 411 (referring to Dental Gator as “not a pure buying group - they have 12 services they offer”); F. 908 (“straight out GPO”). The use of such qualifiers tends to corroborate Schein witness testimony that use of the terms “buying group” or “GPO” was not always meant to refer categorically to all types of buying groups. In addition, Justin Puckett, one of the founders of the buying group Dental Gator, a Schein customer (F. 379), testified that in negotiations with Schein, Schein expressed a desire to work with “certain types of” buying groups but not “pure buying groups” that do not offer anything other than discounts, such as value-added services to members, and whose members have no true affiliation with each other. F. 387-388. This tends to support an inference that Schein’s approach to buying group opportunities was selective, rather than categorical.

Furthermore, as explained below, and more importantly, Schein’s conduct during the relevant time period also conflicts with the conclusion that Schein had a blanket policy to categorically refuse to do business with buying groups during the alleged conspiracy period.

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ii. Schein's business with buying groups during the alleged conspiracy period

As set forth in detail in section III.F of the Findings of Fact, Schein did not cease discounting to or negotiating with buying groups in or after 2011 and Schein entered into new buying group relationships during the alleged conspiracy period. Such evidence is contrary to the inference that Schein adopted or maintained a no buying group policy, similar to Benco's, during the alleged conspiracy period.

Throughout the relevant time period, Schein continued its relationships with most of the buying groups that predated the alleged conspiracy period, including Advantage Dental (F. 312); Breakaway (F. 326-331); Comfort Dental (F. 345); Dentists for a Better Huntington (F. 417-419); Long Island Dental Forum (F. 457-460); and Universal Dental Alliance (F. 554-557).²⁶ In addition, Schein entered into new buying group relationships during the alleged conspiracy period, including Intermountain Dental Associates (F. 271-272); Klear Impakt (F. 426-446);²⁷ MeritDent (F. 462-470); the Schulman Group (F. 497-500); and Dental Gator (F. 379-389). In addition, Schein continued discounting to buying groups after April 2015, when, according to Complaint Counsel, the alleged conspiracy began to break down.²⁸ *E.g.*, F. 317, 335, 345, 419, 446, 460, 557. Schein also entered into new buying group agreements after the time that Complaint Counsel contends the alleged conspiracy began to break down, including with Smile Source, Mastermind, and Teeth Tomorrow. F. 246, 527-532, 860.

It is also significant that, in late 2013 and early 2014, during the alleged conspiracy period, Schein had meetings and discussions with the buying group Smile Source, which had left Schein in January 2012 and signed with Burkhart, another distributor. F. 838, 841-847. These discussions culminated in Schein submitting a "partnership proposal" to Smile Source on March

26 Complaint Counsel argues that Schein terminated two of its legacy buying groups in 2014, the Dental Co-Op of Utah and Steadfast, allegedly to comply with a no buying group policy. CCB at 29. On the issue of whether Schein enforced a blanket policy not to do business with buying groups during the alleged conspiracy period, there is no logical reason to assign more probative weight to Schein's rejecting or terminating some buying groups than to Schein's adding or maintaining other buying groups. In any event, the circumstances under which Schein ended those buying group partnerships, which are detailed in sections III.F.4 and III.F.17 of the Findings of Fact, fail to prove that these groups were terminated because they were buying groups or because of any agreement with Benco. The greater weight of the evidence supports the conclusion that the relationships ended for independent business reasons.

27 Complaint Counsel contends that Schein's agreement with Klear Impakt post-dates the alleged conspiracy period because a contract was not entered into until August 2015. CCRSFF 802-838. However, the evidence shows that negotiations began in 2014, and continued into 2015. F. 430-439. Schein and Klear Impakt entered into an agreement on August 17, 2015, which was renewed in 2016. F. 442, 446.

28 As noted previously (n.19), Complaint Counsel does not assert a specific "conspiracy period," including any firm start or end date to the alleged conspiracy. Rather, Complaint Counsel asserts that the agreement with Schein commenced at some unspecified point in 2011, that Benco's agreement with Patterson began in early 2013, and that, after Benco settled an antitrust investigation with the state of Texas in April 2015, which required Benco to log its communications with other distributors, the conspiracy became difficult to maintain and began to fall apart. CCB at 37-38; CCRB at 142 n.932.

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19, 2014. F. 848-849. Smile Source ultimately decided to stay with Burkhart. F. 853-854. Schein's effort to win Smile Source's business in 2014, during the alleged conspiracy period, stands in marked contrast to the conduct of Benco and Patterson. F. 845. Smile Source's Trevor Mauer contacted Benco's Chuck Cohen on January 30, 2014 seeking a meeting. F. 816. At the subsequent meeting in February 2014, Benco advised Mauer of Benco's no buying group policy and that Benco would not do business with Smile Source. F. 817-818. Patterson also declined to submit a bid for Smile Source in late 2013. F. 824 ("[W]e have said no to [S]mile [S]ource. They are [a] buying club."). Also, Schein engaged in discussions, meetings, and/or negotiations with other buying groups, which did not culminate in a partnership, including the Kois Buyers Group (F. 861, 900-921)²⁹ and Pacific Group Management Services ("PGMS") (F. 471-491).³⁰

Schein's business dealings with buying groups, summarized above, is inconsistent with a no buying group policy and contrary to a conclusion that Schein had a meeting of the minds with Benco that Schein would refuse to deal with buying groups, or that Schein had a conscious commitment to refuse to deal with buying groups.

Schein's business dealings with buying groups during the alleged conspiracy period cannot be summarily dismissed as "cheating," or "imperfect compliance," as Complaint Counsel contends (CCB at 99-101), which requires improperly presuming a prior agreement. *McWane*, 2013 WL 8364918, at *255 (rejecting the government's argument that alleged co-conspirators used an information exchange to "detect cheating" on an agreement, stating that "under Complaint Counsel's argument, it must first be assumed that there was, in fact, an agreement," which cannot "be presumed"); *Blomkest Fertilizer*, 203 F.3d at 1033 ("a litigant may not proceed by first assuming a conspiracy and then explaining the evidence accordingly"). Regardless of whether the government has the legal burden of demonstrating perfect compliance with an alleged agreement in order to prevail, Complaint Counsel still has the burden of proving that the alleged agreement existed. *McWane*, 2013 WL 8364918, at *280.

Nor is it dispositive, as Complaint Counsel contends, whether or not Sullivan expressly approved pursuing or contracting with a given buying group. Sullivan is not presently, and never was, the sole decision-maker for HSD or Schein, nor was Sullivan necessarily the final decision-maker with respect to whether Schein would do business with a buying group. F. 156-157. *See also* F. 373, 487, 544.

29 The evidence fails to prove Complaint Counsel's contention that Schein rejected the Kois Buyers Group as part of a blanket approach to rejecting all buying groups. As detailed in section III.J.2.f of the Findings of Fact, Schein circulated the proposal from the Kois Buyers Group and discussed the proposal internally and with the buying group's representative, Qadeer Ahmed. Although Schein was interested, it was clearly skeptical of Ahmed's representations about the group and concerned about Ahmed's insistence that Schein sign on quickly without detailed discussions. F. 904-914. Schein continued discussions with Ahmed, but Dr. Kois selected Burkhart as its distributor while discussions with Schein were pending. F. 915-919.

30 Complaint Counsel contends that Tim Sullivan personally "shot down" a contract with PGMS. As detailed in section III.F.13 of the Findings of Fact, Cavaretta, not Sullivan, made the decision not to partner with PGMS, which was based on the group's inability to assure that member offices would buy from Schein. F. 482-491.

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iii. Development of a buying group policy

The evidence also proves that Schein was working independently to develop a buying group policy, before and during the alleged conspiracy period, which is also contrary to a conclusion that Schein had a conscious commitment, due to an agreement with Benco, to adopt and maintain a blanket no buying group policy in conformance with Benco's policy.

Schein began its efforts to develop a buying group approach before 2011 with the 2010 guidelines, which, as explained above, focused on identifying buying groups that had the ability to control purchasing or otherwise "drive compliance" with volume expectations. F. 216-217. Schein continued its efforts during the alleged conspiracy period, with an attempt to develop a buying group policy in late 2013, in connection with developing its Mid-Market division, although the effort failed because there were higher competing priorities. F. 218-223. Then, in 2014, Sullivan tasked Cavaretta, in his role as Western area director for HSD, with developing a strategy on working with buying groups. F. 229. Kathleen Titus and Andrea Hight, as directors for the Mid-Market division, had the task of developing a "cogent" list of "criteria" for those meeting with buying groups so that all buying groups could be evaluated by the same "yardstick." F. 232. In June 2014, Titus developed a set of standard, "due diligence" questions for groups that approached Schein, including how many members the group had, what services it offered its members, if the group could drive compliance, and whether the group was willing to be exclusive. F. 233. On October 3, 2014, HSD had an internal meeting to discuss Mid-Market and "GPO/MSO³¹ strategy" with Sullivan. According to Cavaretta, who attended the meeting, Sullivan did not express any anti-buying group views or direct him to stop efforts to develop a buying group strategy. F. 236.

Moreover, at the end of 2014, HSD created a strategic priority for 2015 to develop a template and structure for dealing with buying groups, including creating a pricing plan for buying groups, and in January 2015, months prior to April 2015, when Complaint Counsel alleges the conspiracy began to break down, a team was established within Schein to develop an "HSD GPO response plan." F. 239-240. That plan was announced in September 2015. F. 241. Among other things, the buying group plan created designated buying group pricing, derived from a Special Markets formulary for group offices; required members to make certain volume commitments in exchange for discounts; and, in order to disincentivize cannibalization, limited payment of administrative fees or rebates to "incremental sales from the group, above and beyond" the members' then-current spending. F. 241-244. In 2016, Schein created a dedicated division within HSD to evaluate and engage in business with buying groups, known as the Alternative Purchasing Channel ("APC"). F. 245. The APC division formalized new buying group relationships with Mastermind and Teeth Tomorrow, among others. F. 246.

The foregoing unilateral and independent conduct of Schein in developing its own buying group policy is contrary to a conclusion that Schein had a meeting of the minds with Benco that

31 Management service organizations ("MSOs") contract with dental practices to provide management services in exchange for a fee. F. 70. Some MSOs provide management services and control purchasing and other business decisions, but not all do. F. 71-73.

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Schein would categorically reject buying groups, or had any conscious commitment to maintain such a policy.

e. Summary

Although there are statements in Schein documents that could be interpreted as describing a policy not to do business with buying groups, similar to Benco's policy, Schein's conduct with respect to buying groups before, during, and after the alleged conspiracy period conflicts with a conclusion that such a policy existed. Moreover, Schein witnesses consistently denied that employees were instructed not to do business with buying groups.

Based on the totality of the evidence on this issue, Complaint Counsel has failed to demonstrate that it is more likely than not that Schein adopted and enforced a no buying group policy during the alleged conspiracy period.

The Analysis now examines the evidence of communications involving Schein and Benco during the alleged conspiracy period.

3. Alleged confrontation communications

Complaint Counsel points to certain communications involving Benco and Schein in 2012 and 2013 that, according to Complaint Counsel, show Benco "confronted" Schein when it received market intelligence indicating that Schein was discounting to buying groups, which Complaint Counsel argues is evidence of Benco enforcing an understanding that Schein had agreed not to do business with buying groups. CCB at 29-32, 48-51. Complaint Counsel acknowledges that as to each of the asserted communications, "Benco reached out to Schein" CCB at 25. The facts relating to the asserted communications are addressed in detail in section III.G.2-5 of the Findings of Fact and are summarized below.

a. The January 13, 2012 phone call from Cohen to Sullivan allegedly about Unified Smiles

On January 11, 2012, Benco's Patrick Ryan received an email from Michael Paquette, a Benco territory representative, stating that a dentist had told Paquette that he thought Schein "would be" participating in Unified Smiles, a buying group. F. 573. Ryan forwarded the email to Chuck Cohen, and in reference to Tim Sullivan, wrote, "For Timmy conversation." F. 576. On January 12, 2012, Cohen texted Sullivan asking if Sullivan was available the following day to speak on the phone "for a few minutes." Sullivan responded with his availability the following morning. F. 577. On January 13, 2012, Cohen wrote to Ryan that Cohen was "Talking this AM..." with Sullivan. F. 578. On January 13, 2012, Cohen called Sullivan. The call lasted approximately 11 minutes. F. 579.

By way of background, as noted in section II.E.1 n.22, during the relevant time period, Benco and Schein were parties to a hiring agreement, which arose from a settlement of litigation between the two companies over non-compete issues relating to the hiring of each other's sales representatives. F. 563. The hiring agreement required Cohen and Sullivan to communicate

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periodically when issues came up relating to certain employees or employee groups. F. 563. For example, in or around the fall of 2011, Benco recruited four or five Schein employees from the Fresno, California area, which raised issues under the hiring agreement between Benco and Schein and caused Sullivan and Cohen to have several discussions over several months. F. 566.

Cohen testified that he had no independent recollection of the call to Sullivan on January 11, 2012, but that, based on his review of his phone records showing Cohen's calls to Benco's attorney before and after Cohen's phone call to Sullivan (*see* F. 580), Cohen believed the call to Sullivan was regarding Benco's hiring of a group of Schein employees from Fresno, California. (Cohen, Tr. 741-43, 972-74). However, Cohen's explanation does not preclude the inference that the call also included a communication about Unified Smiles. Sullivan testified that he did not recall the specifics of the conversation, but that he did not talk about Unified Smiles with Cohen. (Sullivan, Tr. 4218).

Based on the foregoing, it would not be unreasonable to infer that Cohen intended to talk to Sullivan about Unified Smiles; however, in light of the conflicting testimony and the absence of any contemporaneous documents, it would require speculation to make any conclusion about the substance of the call.

b. The Alleged July 25, 2012 note from Cohen to Sullivan regarding Smile Source

Complaint Counsel asserts that Chuck Cohen sent a note to Sullivan in July 2012 regarding Schein doing business with the buying group Smile Source. CCB at 29-31. The evidence shows that, on July 25, 2012, Benco's Ryan received an email from the leader of Smile Source, expressing an interest in exploring a relationship with Benco and noting that "[i]n the past," Smile Source worked with Schein Special Markets and Tim Sullivan of Schein. F. 583. Ryan declined Smile Source's overture on the basis that Smile Source was a group purchasing organization and "Benco does not recognize GPOs as a single customer." F. 584.

Shortly after responding to the Smile Source email, Ryan forwarded it to Chuck Cohen, and wrote, "Better tell your buddy Tim to knock this shit off." F. 585. Cohen understood that Ryan was asking Cohen to contact Sullivan about Smile Source and acknowledged that the email implied that Cohen was to tell Sullivan to stop recognizing Smile Source as a customer. F. 588. Cohen responded to Ryan's email: "Please resend his e-mail without your comment on top so that I can print & send to Tim with a note. The good news is: perhaps they're looking to us because Schein told them NO. That works for me." F. 589. The record does not include a resent email from Ryan to Cohen with no comment from Ryan on top. F. 591.

Cohen admitted sending Sullivan notes from time to time by regular United States mail and that he planned to print and send a copy of the email to Sullivan with a note. F. 590, 592. However, Cohen did not recall doing any of these things with respect to Ryan's email about Smile Source. F. 592. Sullivan acknowledged having received some personal notes from Cohen over the years, but denied ever receiving any notes from Cohen about buying groups, or speaking with Cohen or anyone else at Benco about Smile Source. F. 594. Cohen also denied ever telling Sullivan to stop doing business with Smile Source. F. 593. The record does not include any

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notes to Sullivan from Cohen regarding Smile Source or any other buying group or any evidence of any response by Sullivan to alleged notes. F. 594.

Based on the foregoing, the evidence fails to prove that this communication from Cohen to Sullivan regarding Smile Source occurred.

c. The March 26, 2013 text message from Cohen to Sullivan regarding Dental Alliance

On March 25, 2013, Cohen reached out to a Benco sales representative, Jamie Kasinski, to ask him for the name of the buying group in his area that worked with Schein. F. 595. On March 26, 2013, Kasinski responded to Cohen and informed him that Schein was selling to Dental Alliance. F. 596. Shortly after receiving Kasinski's email, Cohen copied and pasted Kasinski's message into a text message to Sullivan, which read, "As per my guy in Raleigh: 'Dental alliance. They apparently get 7% off of catalog pricing just for joining. Dr. Ben Koren is the dentist involved. A guy named Sam contacted me about a year ago and asked if Benco was interested. Told him he was out of his tree.'" F. 597. Cohen then immediately sent a second text message to Sullivan, stating: "Could be a rumor, sometimes stories go around. Thanks." F. 598. Complaint Counsel argues that it makes no sense, absent a prior agreement, that Cohen would reach out to Sullivan with information about Schein's business dealings.

Sullivan did not send a text message back to Cohen in response to Cohen's March 26, 2013 text messages to Sullivan. F. 601. On the morning of March 27, 2013, Sullivan attempted to call Cohen and, after playing phone tag for a few days, Sullivan and Cohen spoke by telephone on April 3, 2013. F. 601. As explained in detail in section II.E.4 regarding Sullivan's response to a March 25, 2013 unsolicited phone call from Cohen that referenced Atlantic Dental Care, Sullivan credibly testified that he twice strongly rebuffed Cohen's attempt to talk to Sullivan about Benco's or Schein's customers. Whatever Cohen's motivations in texting Sullivan about Dental Alliance, Sullivan's rebuffing of Cohen's outreach weighs against a finding that there was a meeting of the minds between Schein and Benco with respect to a refusal to deal with buying groups.³²

d. The October 1, 2013 phone call from Ryan to Foley

On September 24, 2013, Benco's Patrick Ryan, then director of Special Markets for Benco, received an email from Brian Evans, Benco's director of sales for Benco's west district, asking if Ryan had heard of Smile Source and notifying Ryan that dental manufacturer partners of Benco were "giving discounts to members of this group when making purchases." F. 602. Ryan replied, asking "Who are [the] vendor partners and is it going through [Schein]?" Evans replied that his understanding was that the manufacturers were Adec and Midmark, but that he had no proof. Evans' reply did not answer Ryan's question regarding Schein. F. 602.

³² Schein entered a three-year contract with Dental Alliance in or around July 2011, which was renewed on June 30, 2014. F. 554, 557. There is no assertion that Sullivan or Schein took any action to try to terminate this buying group relationship in response to Cohen's text. In fact, Sullivan learned of the contract with Dental Alliance on October 20, 2011 and at no time thereafter did Sullivan take any action to try to terminate Schein's relationship with Dental Alliance. F. 558.

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On October 1, 2013, Ryan called Randy Foley, Schein's vice president of sales for Special Markets. The call lasted 18 minutes. F. 603. Although Ryan testified that his purpose in calling Foley that day was to gain competitive intelligence about manufacturer discounts and denied discussing Smile Source with Foley (Ryan, Tr. 1225-27), in a January 27, 2014 email to Cohen, Ryan referenced having "talked specifically about" Smile Source with Foley. F. 614. Schein's Foley testified that he recalled that part of the call pertained to Smile Source, which fact Foley memorialized in a report of the call to Hal Muller on October 9, 2013, addressed more fully below. F. 604, 606-608, 610-611. Based on the foregoing, it is more likely than not that part of Ryan's call to Foley on October 1, 2013 pertained to Smile Source.

Foley testified that he had never received a call from anyone at Benco before the October 1, 2013 call from Ryan and that he answered the call thinking it was an attempt to recruit Foley to work for Benco. F. 604. During the call, Ryan informed Foley that Benco would not bid on Smile Source, and based on that information, Foley "got the impression" that Benco was "anti-buying group." F. 606. Foley also got the "sense" from Ryan on the October 1, 2013 call that Ryan was attempting to gain information as to whether, if Smile Source came up for bid, Schein would be bidding. F. 607. Foley did not make any comment about what Schein would do and did not share any information about Schein or Schein's policies or positions on buying groups. F. 607-609. Indeed, Foley had no responsibility for or knowledge of Schein's relationship with Smile Source in 2013 and had nothing to share with Ryan about Smile Source. F. 605.

Moreover, Foley credibly testified that when Ryan told Foley on the October 1, 2013 call that Benco was not going to bid on Smile Source, Foley told Ryan that he would not share any company information and that the call needed to end. F. 608. Foley ended the call at that point. F. 608. In addition, on October 9, 2013, Foley memorialized the call from Ryan, reporting to Hal Muller: "Next time we talk remind me to tell you about my conversation with Pat Ryan at SM [Special Markets] Benco. They're anti Buying Group and Smile Source recently reached out to them. I'm being careful not to cross any boundaries, like collusion." F. 611. Foley's testimony that he told Ryan he would not share any information and that he ended the call is consistent with Foley's statement in his October 9, 2013 email to Muller that Foley did not "cross any boundaries" with Ryan.

Whatever Benco's Ryan's motivations may have been in reaching out to Schein's Foley on October 1, 2013, Foley's rebuffing of Ryan's outreach and refusal to share information regarding Schein's intentions regarding Smile Source weigh against a finding that there was any exchange of information about Smile Source or any meeting of the minds between Schein and Benco that Schein would refuse to deal with buying groups. In addition, the evidence shows that Smile Source approached Schein about potentially working together on October 28, 2013. F. 841. Schein immediately expressed its interest to Smile Source and agreed to meet, and, after multiple meetings between Schein and Smile Source, Schein submitted a proposal to Smile Source in March 2014. F. 841-848. Benco refused to bid on Smile Source when Smile Source approached Benco during this same period. F. 816-818. This is also inconsistent with a conclusion that Schein agreed with Benco not to do business with buying groups.

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e. Summary

The evidence demonstrates that Benco made unsolicited contacts to Schein that related to buying groups. Schein rebuffed the outreach, however, and the evidence fails to show that in these contacts, Schein provided Benco with any information concerning Schein's policies or strategies regarding buying groups.

Furthermore, the evidence shows that Schein did not alter its conduct in response to Benco's outreach and that Schein engaged in conduct that is contrary to the conclusion that Schein had an agreement with Benco not to do business with buying groups. A few weeks after Cohen's January 25, 2012 call to Sullivan, which call was ostensibly to confront Sullivan about Schein's deviating from the alleged agreement by potentially working with the buying group Unified Smiles, on February 7, 2012, Schein entered into an agreement with the buying group MeritDent. Similarly, notwithstanding the call from Benco's Ryan to Schein's Foley on October 1, 2013 addressing Smile Source, Schein pursued Smile Source's business. In contrast to the proof regarding an agreement between Benco and Patterson, the evidence as to Schein fails to prove that Benco's contacts took place in the context of a previous exchange of assurances between Schein and Benco. Under these circumstances, the fact that the contacts appeared not to affect Schein's conduct cannot be ignored.

It is also relevant that the evidence shows that Benco received competitive intelligence that Schein was working with buying groups during the alleged conspiracy period in addition to Smile Source, including Breakaway, Dental Gator, Dentists for a Better Huntington, the Dental Co-Op, and the Schulman Group. F. 308, 336, 501. Complaint Counsel does not cite to any evidence that Benco contacted Schein about these buying groups, which also weighs against a conclusion that Benco's contacts about other groups constitute proof of confrontation for deviating from an alleged agreement.

Based on the foregoing, it would be speculative to conclude that Benco was contacting Schein in order to confront Schein for violating prior assurances that Schein would refuse to deal with buying groups, which improperly requires presuming that such assurances had been given. *McWane*, 2013 WL 8364918, at *241; *Blomkest Fertilizer*, 203 F.3d at 1033. If speculating, it is at least as likely that Benco was contacting Schein in order to attempt to persuade Schein not to do business with buying groups, which appears to have been unsuccessful.³³

The Analysis next turns to communications from Cohen to Sullivan regarding Atlantic Dental Care, which Complaint Counsel argues constitute evidence of Cohen reassuring Sullivan of Benco's adherence to the alleged agreement to refuse to deal with buying groups.

³³ Complaint Counsel does not argue that the communications from Benco to Schein constitute an invitation to collude. Complaint Counsel's argument that Benco engaged in an invitation to collude in violation of Section 5 of the FTC Act is based upon communications Benco made to Burkhart. CCB at 101-06. These arguments are addressed in II.G.

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4. Alleged reassurance communication by Benco

Complaint Counsel contends that certain communications involving Benco's Cohen and Schein's Sullivan regarding Atlantic Dental Care ("ADC") should be interpreted as Cohen reassuring Sullivan that Benco was not deviating from the alleged agreement not to deal with buying groups. CCB at 33-35. *See also* CCB at 55-57. These communications are detailed in section III.G.6 of the Findings of Fact and summarized below.

a. The March 25, 2013 phone call regarding ADC

On March 22, 2013, Benco received a request for proposal from ADC. F. 618. Patrick Ryan of Benco was confused by ADC's ownership structure because it was a collection of 35 to 50 independent dental practices that had merged to form a single entity. F. 621. Benco had not before seen an ownership structure like that of ADC. F. 621. On the afternoon of March 25, 2013, Ryan emailed Cohen with the subject line, "buying group?" Ryan attached an article about ADC's recent securities offering and wrote, "We need to speak about this quickly. I can't figure out if [ADC] is a buying group or not." F. 620. Cohen's calendar included a task reminder for March 25, 2013 with the subject line, "Call Tim Sullivan re: Buying Groups." F. 623.

On the afternoon of March 25, 2013, after Cohen received Ryan's email regarding ADC, Cohen sent an unsolicited text message to Sullivan, asking if Sullivan was "[a]vailable to talk." F. 643. Cohen acknowledged that his purpose in calling Sullivan was to obtain any facts or knowledge that Sullivan might have about ADC. F. 645. Cohen further acknowledged that his purpose in seeking this information was to help Benco determine whether or not ADC was a buying group, for purposes of determining if Benco would bid on ADC, or apply its no buying group policy to ADC. F. 645.

Cohen's March 25, 2013 text message to Sullivan did not indicate the subject matter Cohen wished to talk about, and Sullivan did not know what Cohen wanted to talk about. F. 644. At the time of the March 25, 2013 text message and subsequent call, Benco and Schein were having ongoing merger discussions. F. 642. Specifically, on or about March 20, 2013, Chuck Cohen and his brother Rick Cohen finalized arrangements to meet on April 1, 2013, in New York, New York, with Schein's CEO, Stanley Bergman, and its head of business development, Mark Mlotek, to explore merger and acquisition and joint venture opportunities. F. 642. When Sullivan replied to Cohen that he was in meetings until 5:00 p.m., Cohen texted Sullivan requesting that Sullivan call his cell phone when he was free, and Sullivan did so. F. 643. The call lasted approximately 8 minutes. F. 643.

Cohen testified that he did not recall the specifics of what was said on the call. (Cohen, Tr. 721). As Sullivan recalled the conversation, Cohen asked Sullivan what he knew about ADC. Sullivan credibly testified that, in response, Sullivan advised Cohen that he did not know anything about ADC, told Cohen that they should not be talking about specific customers, and tried to change the subject. F. 646. As Sullivan explained, "[Cohen] asked if I knew what they were, and I told him I did not. Then he started to tell me more about them, and I immediately stopped him, and I said, 'Chuck, this is not a discussion that you and I should be having,'

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something like that. I don't know the exact words, but I cut off the discussion with him on that topic." F. 646. Sullivan transitioned the discussion to the previously scheduled April 1, 2013 meeting between Benco and executives from Henry Schein, Inc. and joked about Sullivan going to work for Cohen at Benco. F. 648. Cohen did not mention Benco's policies or buying groups in general on the March 25, 2013 call. F. 647.

A few minutes after the conclusion of the March 25, 2013 call, Sullivan sent Cohen a text message stating: "Hi Chuck. Thanks for the call. Yes, I am good with the terms we discussed and I look forward to joining Team Benco! PS. Want to confirm that the Benco tooth logo will include a picture of me. :)." F. 649. Cohen joked back, "Problem with this joke is if Stan [Bergman] says 'Great!' It's a risk...." F. 649. Sullivan's text message referred to a long-running joke between Sullivan and Cohen about who was going to work for whom in the event that ongoing merger discussions came to fruition (F. 650), and is consistent with Sullivan's testimony that he and Cohen discussed the upcoming merger meeting on the March 25, 2013 call.

b. Cohen's follow up to the March 25, 2013 phone call

On the evening of March 25, 2013, and again on the afternoon of March 27, 2013, Cohen texted Sullivan with additional information about ADC. F. 651, 653. On March 25, 2013, Cohen texted: "Here's a link to the press release we discussed" and included a link to ADC's website. F. 651. Sullivan texted back in pertinent part: "Thanks for the follow up on that article. Unusual." F. 651. On the afternoon of March 27, 2013, Cohen texted Sullivan: "Tim: Did some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all the practices. So it's not a buying group, it's a big group. We're going to bid. Thanks." F. 653. Cohen's text messages of March 25, 2013 and March 27, 2013 were unsolicited. Sullivan had not asked for any follow-up from Cohen. F. 655.

Cohen acknowledged that, at least in the short term, it might have been against Benco's interest to disclose its plan to bid on ADC to Sullivan, who was a competitor, but Cohen believed that in the long term it was important to "maintain credibility" with Sullivan. F. 656. Cohen acknowledged one possible reason for his disclosure of Benco's intent to bid on ADC was that he had previously told Sullivan that Benco was not planning to bid on ADC, and Cohen did not want Sullivan to think Cohen had been untruthful. F. 656.

On the morning of March 27, 2013, Sullivan tried to call Cohen without success. F. 652. After trading attempts to reach each other by telephone for a few days, Sullivan and Cohen spoke by telephone on April 3, 2013. F. 657-658. Sullivan explained the reasons for his call to Cohen:

Because I wanted to be very clear with him that I don't care what they're doing, I don't want to know what they're doing, and this is not what we should be – as I said to you when we first spoke about this [on March 25, 2013] and maybe I wasn't firm enough on that call, but, Chuck, you cannot be sending information on what Benco's doing with customers, something to that effect. I don't know the – that was in my mind as I was

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making this phone call, and ultimately, when we did connect live, that was the gist of the message.

F. 658.

Complaint Counsel contends that Sullivan's testimony that he rebuffed Cohen's outreach regarding ADC should be rejected as not credible. *See, e.g.*, CCRB at 138-39; CCRSFF 1491. Complaint Counsel first asserts that Sullivan's testimony is inconsistent with his conduct in joking with Cohen and thanking Cohen for following up with the press release regarding ADC. However, in interpreting Sullivan's words, context is important. The evidence shows that during the years 2011 through 2015, Benco was a potential acquisition target for Henry Schein Dental, and a meeting between Schein and Benco was scheduled for April 1, 2013. F. 641. It is reasonable to infer that this possible merger influenced the way Sullivan interacted with Cohen. Sullivan wanted to be cordial and treat Cohen with respect because Sullivan might be working for Cohen, or vice versa, if a merger occurred. F. 641.

Complaint Counsel further asserts that Sullivan's trial testimony is contrary to his testimony at the investigational hearing in this case, at which Sullivan indicated he did not know why he tried to call Cohen on March 27, 2013. CX0311 (Sullivan, IHT at 306). However, Sullivan clearly testified at the investigational hearing that when Cohen raised ADC, "I immediately said that, Chuck, I don't know why you're telling me this; this is not something you and I should be talking about. And I don't know who they are; I've not met them;" CX0311 (Sullivan, IHT at 261). Sullivan's trial testimony was also consistent with his deposition testimony. CX8025 (Sullivan, Dep. at 344-45, 401-03) (testifying that he "shut [] down" the conversation and switched the topic).

Finally, Complaint Counsel asserts that Cohen's testimony contradicted that of Sullivan. Cohen testified that he could not recall the specifics of the call (Cohen, Tr. 721), which is not the equivalent of denying or contradicting Sullivan's recollections.

Complaint Counsel's arguments for rejecting Sullivan's testimony are not persuasive. Sullivan's testimony describing his reaction to Cohen's outreach regarding ADC and the reasons therefor was credible and convincing.

c. Summary

The evidence proves that Cohen made unsolicited contacts with Sullivan regarding Atlantic Dental Care, which Sullivan rebuffed. The evidence fails to prove that Sullivan provided Cohen with any information about Schein's strategies or approach to buying groups in general or regarding ADC or any other potential customer.

The evidence also proves that Cohen disclosed competitively sensitive information concerning Benco's bidding plans for ADC. Cohen's conduct in providing a competitor with information on Benco's competitive plans can be probative of conspiracy, as an action against self-interest. *See, e.g., In re Petroleum Prods. Antitrust Litig.*, 906 F.2d at 450 (holding that disclosure of "sensitive price information might be considered contrary to a firm's self-interest"

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and supports a finding of “common understanding” among firms sharing this information). However, in contrast to Patterson, who solicited Benco to justify Benco’s bidding on ADC, which Patterson believed to be a buying group, the evidence here does not show that Sullivan solicited any information from Benco regarding ADC, or otherwise sought assurances from Benco regarding Benco’s plans for ADC. Moreover, Complaint Counsel does not point to any evidence that Sullivan provided any information about ADC to Cohen, or about Schein’s intentions toward ADC. Rather, Sullivan cut off the conversation. Thus, there was no “exchange” of information between Sullivan and Cohen, as Complaint Counsel argues. *See, e.g.*, CCRB at 138.

Furthermore, in contrast to the evidence concerning Benco and Patterson, the evidence regarding Benco and Schein fails to prove that Cohen and Sullivan exchanged any assurances about their policies or strategies regarding buying groups in the first place, which undermines any inference that the contact concerning ADC constituted a reassurance. To conclude that Cohen’s communications to Sullivan about ADC constituted a reassurance, under the facts presented, would require improperly assuming that such prior assurances had been given.

Based on the foregoing, the evidence fails to prove that Sullivan and Cohen exchanged information about ADC or that Cohen’s disclosure of information about ADC constituted a reassurance of Benco’s compliance with a no buying group agreement with Schein.

5. Other evidence allegedly demonstrating Schein’s involvement in a conspiracy

a. Introduction

As explained above in section II.D, the evidence proves Complaint Counsel’s assertions that: Benco and Patterson, through their respective executives, Chuck Cohen and Paul Guggenheim, exchanged assurances in February 2013 that they would collectively refuse to discount to or otherwise deal with buying groups; after this exchange of assurances, Patterson effectively adopted a blanket policy of summarily refusing to deal with buying groups, without evaluation; in June 2013, Patterson sought reassurance from Benco that it was not deviating from its prior assurances by doing business with Atlantic Dental Care; Benco provided reassurance to Patterson that Benco was not doing business with buying groups; and Patterson changed its position after April 2015, and began evaluating doing business with buying groups in or around November 2015. Based on this proof, Complaint Counsel has met its burden of proving that Benco and Patterson had an agreement to refuse to discount to or otherwise deal with buying groups.

Complaint Counsel’s similar assertions as to Schein, in contrast, have not been proven. As explained in section II.E.1-2, the evidence fails to prove that Cohen and Sullivan exchanged assurances that Benco and Schein would collectively refuse to discount to or otherwise deal with buying groups, or that Schein adopted or implemented a blanket policy of categorically refusing to deal with buying groups in compliance with Benco’s no buying group policy. Under these circumstances, Complaint Counsel’s requested inferences – that Benco’s 2012 and 2013 communications to Schein constituted confrontation about Schein’s deviating from a prior

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agreement and/or Benco's reassurance to Schein of Benco's compliance with a prior agreement – are unpersuasive and unjustified. Moreover, proof that Benco's communications to Schein were unsolicited and rebuffed by Schein; that Schein did business with buying groups before, during, and after the alleged conspiracy period; and that Schein worked internally to develop a strategy for doing business with buying groups, all weigh against an inference that there was a meeting of the minds between Benco and Schein. Based on the foregoing evidence, Complaint Counsel has failed to prove that Schein agreed with Benco to collectively refuse to discount to or otherwise deal with buying groups.

Complaint Counsel contends that additional, circumstantial evidence demonstrates that Benco obtained both Schein's and Patterson's agreement to collectively refuse to deal with buying groups, which allegedly resulted in an "overarching" agreement involving all three Respondents. CCB at 42. *See also* CCB at 57.³⁴ Complaint Counsel relies on proffered evidence of parallel conduct and "plus factors"; internal documents allegedly referencing an agreement; and certain communications relating to Respondents' attendance at the 2014 annual meeting of the Texas Dental Association ("TDA"). CCB at 42, 53-54, 57-67. This proffered additional evidence need not be analyzed for purposes of the case against Benco and Patterson because such proof would only further confirm the finding of an agreement between Benco and Patterson and would not change the result in this case as to Benco and Patterson. Accordingly, the Analysis addresses the additional evidence for its probative value as to the alleged involvement of Schein in an agreement with Benco or in an overarching agreement involving Benco and Patterson.

b. Parallel conduct

Complaint Counsel contends that its case "does not rest merely on parallel conduct" and that "the evidence goes beyond parallel conduct" (CCB at 61-62, 64), but Complaint Counsel's brief does not clearly identify what parallel conduct evidence Complaint Counsel does rely on. In its brief, Complaint Counsel argues that Schein adopted the same no buying group policy as Benco, to support a finding of Schein's agreement with Benco, although Complaint Counsel does not expressly frame this as "parallel conduct."³⁵ In its reply brief, Complaint Counsel

34 As Complaint Counsel explains its legal theory, Complaint Counsel does not allege "a hub-and-spoke conspiracy, [which would require showing] that Patterson and Schein were aware of each other's participation in the agreement. . . . [H]ere, the allegations involve purely horizontal competitors, which courts distinguish from hub-and-spoke agreements. . . . [T]here is no requirement that Complaint Counsel show that all co-conspirators communicated with, or were aware of the participation of the others. To prove an overarching agreement among horizontal competitors, courts look at whether separate agreements can be 'connected together' to show a common design or purpose. . . . Complaint Counsel therefore need not prove communications between Schein and Patterson, or show that each was aware of the other's participation, to show an overarching conspiracy." CCRB at 190-91.

35 Complaint Counsel alludes to "parallel communications" among the Respondents as to ADC. CCB at 60. The evidence fails to prove this assertion. As explained in section II.D.1.b.ii, the evidence shows that, after an exchange of assurances between Guggenheim of Patterson and Cohen of Benco, Guggenheim contacted Cohen when he learned Benco had entered into an agreement with ADC, specifically referencing Benco's no buying group policy and requesting an explanation. Cohen responded with specific reassurances. This reflects a mutual communication, in the context of a prior exchange of assurances. As to Schein, in contrast, Cohen's outreach to Sullivan with respect to ADC was unsolicited, Sullivan rebuffed Cohen, and the evidence fails to show that Sullivan requested any

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argues that Schein’s “policy of categorically rejecting buying groups shows parallel conduct” with Benco and Patterson. CCRB 136; *see also id.* (“Schein, like Benco and Patterson, categorically rejected buying groups throughout the conspiracy”); CCRB 137 (“Schein, just like Benco and Patterson, implemented a categorical no buying group policy”); CCRB 207 (Respondents all “enforced a categorical rejection” of buying groups). The evidence fails to support this proposition.

As explained in section II.C, Benco’s no buying group policy was a blanket rule covering all groups of unrelated dental practices, regardless of the characteristics of any particular group, such as whether a group provided additional services. Similarly, as explained in section II.D.2, after an exchange of assurances between Benco’s Cohen and Patterson’s Guggenheim, Patterson adopted a policy of categorically refusing to do business with buying groups, comparable to Benco’s policy. In contrast to the foregoing, as explained in section II.E.1-2, the evidence fails to prove that Schein exchanged assurances with Benco or that Schein had a policy during the alleged conspiracy period of categorically refusing to deal with buying groups. The evidence shows that during the alleged conspiracy period, Schein continued discounting to most of its pre-existing buying group partnerships, although it terminated two of them; and Schein accepted some new relationships with buying groups, but rejected some others, all of which is evidence of a selective approach to buying groups that is dissimilar to the conduct of both Benco and Patterson.

As specific examples of non-parallel conduct during Schein’s alleged participation in the conspiracy, Schein partnered with the buying groups Breakaway (*see* F. 320-335, 340) and the Schulman Group (F. 497-500), while Benco rejected these groups because they “don’t work with GPOs.” F. 339, 502. Schein bid for the business of the Smile Source buying group in early 2014, during Schein’s alleged agreement with Benco, but Benco, in contrast, refused to do business with Smile Source based on Benco’s no buying group policy. F. 816-818, 841-849. Unlike Schein, Patterson declined to bid on Smile Source in late 2013, noting “we have said no to [S]mile [S]ource. They are [a] buying club.” F. 824. Also, while Patterson, after exchanging assurances with Benco, ended its negotiations with the New Mexico Dental Co-Operative (F. 678-679, 684, 698), Schein partnered with the New Mexico chapter of the Dental Co-Op through Schein’s agreement with the Dental Co-Op of Utah. F. 359.

Complaint Counsel further argues that Sullivan, like Cohen of Benco and Guggenheim of Patterson, instructed Schein’s sales force to refuse to deal with buying groups “categorically,” and that Schein rejected buying groups and terminated existing buying groups during the alleged conspiracy period as a result. CCRB at 206-07; *see also* CCRB at 27-32. As set forth in section II.E.2.d.i of the Analysis and detailed in the Findings of Fact (section III.E), the evidence upon which Complaint Counsel relies to show that Sullivan and Schein executives instructed employees to “categorically” refuse to deal with buying groups is not unambiguous or as compelling as Complaint Counsel asserts. At best, the documents indicate that some Schein employees understood that Sullivan and/or Schein in general viewed buying groups with disfavor. Schein witnesses consistently denied that employees were instructed not to do business

reassurances from Cohen. The evidence also fails to prove a prior exchange of assurances between Cohen and Sullivan, as explained in section II.E.1.

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with buying groups. F. 307. Furthermore, as explained above and in section II.E.d.ii of the Analysis, the evidence fails to show that Schein categorically rejected buying groups during the alleged conspiracy period, or that Schein's termination of certain pre-existing buying group partnerships was in furtherance of such a categorical instruction or policy, rather than based on independent business reasons. *See also* section III.F of the Findings of Fact. To the extent that Complaint Counsel relies on asserted instructions to employees as circumstantial evidence of an intention to categorically refuse to deal with buying groups, the argument is unpersuasive. "It will not be presumed that intentions resulted in corresponding conduct." *McWane*, 2013 WL 8364918, at *239.

Based on the foregoing, the greater weight of the evidence is against a finding that Schein acted in parallel with Benco and Patterson in refusing to deal with buying groups. Regardless of whether Complaint Counsel has the burden of proving parallel conduct in order to prevail as a matter of law, parallel conduct, i.e., "proof that defendants took identical actions within a time period suggestive of prearrangement," is a "powerful form of circumstantial evidence." *Anderson News*, 899 F.3d at 104. The lack of such persuasive proof in this regard clearly undermines the weight of Complaint Counsel's case against Schein. *Id.* at 105 (finding no evidence of parallel conduct where "[m]any defendants . . . undertook independent efforts to negotiate with" the allegedly boycotted plaintiff); *McWane*, 2013 WL 8364918, at *266 (finding that the lack of parallel curtailment of discounting contributed to a conclusion that the totality of evidence failed to prove an agreement to curtail discounting).

c. Plus factors

"Plus factors" are relied on to support an inference that demonstrated parallel conduct is more likely the result of an agreement, than the result of independent conduct or conscious parallelism. *E.g.*, *Williamson Oil*, 346 F.3d at 1301 (explaining that the existence of plus factors removes "evidence from the realm of equipoise and render[s] that evidence more probative of conspiracy than of conscious parallelism"); *Flat Glass*, 385 F.3d at 360 (stating that the existence of plus factors "tends to ensure that courts punish 'concerted action' – an actual agreement – instead of the 'unilateral, independent conduct of competitors'"). In this case, given that the evidence fails to prove that Schein acted in parallel with Benco and Patterson to categorically refuse to deal with buying groups, assessing plus factors to explain such alleged parallel conduct is arguably illogical. Nevertheless, Complaint Counsel's assertions as to plus factors are addressed below for the sake of completeness.

Although there is no exhaustive list of plus factors, plus factors are generally grouped into three categories: "(1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) 'evidence implying a traditional conspiracy.'" *Flat Glass*, 385 F.3d at 360 (citations omitted). For plus factors in this case, Complaint Counsel contends that the evidence proves actions against interest, change of conduct, and what Complaint Counsel refers to as "additional plus factors" of motive, inter-firm communications and opportunity to communicate, and an industry that is conducive to collusion. CCB at 61-67.

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The dental supply distribution industry is an oligopoly, which is a market structure that is characterized by a small number of relatively large firms that dominate the industry. F. 49. Because the factors of motive and actions contrary to interest often only restate the phenomenon of interdependence among oligopolists, evidence implying a traditional conspiracy, i.e., evidence “indicating an ‘actual, manifest agreement,’ is the key to a proper determination.” *McWane*, 2013 WL 8364918, at *245 (citing *High Fructose Corn Syrup*, 295 F.3d at 661; *Flat Glass*, 385 F.3d at 361). Furthermore, even where there is proof of parallel conduct and one or more plus factors, this does not mandate a finding of an unlawful agreement. “[T]he court may still conclude, based upon the evidence before it, that the defendants acted independently of one another, and not in violation of antitrust laws.” *Baby Food*, 166 F.3d at 122 (quoting *Balaklaw v. Lovell*, 822 F. Supp. 892 (N.D.N.Y. 1993)).

i. Actions against unilateral interest

Actions against unilateral interest by an alleged participant in a conspiracy means “conduct that would be irrational assuming that the defendant operated in a competitive market.” *Flat Glass*, 385 F.3d at 360-61. Put another way, in order to constitute actions against interest, and therefore be probative of an agreement, the parallel conduct at issue “must be so unusual that in the absence of an advance agreement, no reasonable firm would have engaged in it.” *Baby Food*, 166 F.3d at 135. In this case, the alleged parallel conduct at issue is a concerted refusal to deal with buying groups.

Complaint Counsel argues, based on expert opinion, that refusing to deal with buying groups was inconsistent with each Respondents’ unilateral economic interest because buying groups are a “profitable sales opportunity.” CCB at 63-64.³⁶ This opinion of the government’s proffered economic expert witness, Dr. Robert Marshall, is based on the factual conclusion that Schein, Benco, and Patterson each “refuse[d] to submit bids for buying group business from 2011 to 2015,” which Dr. Marshall describes as the “baseline” for his identification of plus factors. (CX7100 (Marshall Expert Report at 121-22); *see also id* at 151 (Schein, Patterson, and Benco’s conduct of “not bidding for buying group business was inconsistent” with unilateral self-interest); CCRB at 188-89 (“Dr. Marshall analyzed whether it was in Respondents’ unilateral self-interest to implement a *blanket* refusal to deal with buying groups”) (emphasis in original).³⁷ As described above, the evidence fails to prove that Schein ever had a

36 Dr. Marshall performed five analyses, referred to as profitability analyses, that used purchase data to draw conclusions about the potential profitability of buying groups for dental supply distributors in general. Two of the profitability analyses extrapolated from data on purchases from Burkhart by members of Smile Source and the Kois Buyers Group. CX7100 (Marshall Expert Report at 150-69). The three other profitability analyses performed by Dr. Marshall extrapolated from data on purchases by Smile Source members from Schein (two analyses) and from Atlanta Dental, which is identified in the report as a full-service regional distributor. CX7100 (Marshall Expert Report at 169-86).

37 Relying on Dr. Marshall’s opinion, Complaint Counsel argues that Schein forewent ██████████ in profits by not supplying the Kois Buyers Group. CCB at 63; CX7100 (Marshall Expert Report at 156). Dr. Marshall’s assumptions that Schein refused to bid on the Kois Buyers Group and on Smile Source ignores proof that (1) Schein worked to negotiate with the Kois Buyers Group, but Dr. Kois decided to go with Burkhart before discussions with Schein were completed (F. 914-919); and (2) Smile Source left Schein in 2012 and Schein subsequently tried to regain this business. F. 838, 841-854.

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policy of categorically refusing to deal with buying groups or acted in parallel with Benco and Patterson in this regard. Therefore, an expert opinion that it was against Schein's unilateral interest to have such a policy is not premised on the facts of this case and is properly rejected for this reason. *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) (“[A]n expert opinion [that] is not supported by sufficient facts . . . cannot support a jury’s verdict.”); *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1053 n.13 (8th Cir. 1999). Furthermore, Dr. Marshall did not contend that every buying group is a profitable opportunity, including because of the risk of cannibalization. F. 202. This tends to support the business rationality of Schein’s selective approach to partnering with buying groups.

Complaint Counsel further argues that Benco’s Cohen acted against Benco’s unilateral interest in March 2013 by disclosing Benco’s decision to bid on ADC to Schein’s Sullivan. CCB at 62 (*See* F. 653 (March 27, 2013 “. . . it’s not a buying group, it’s a big group. We’re going to bid”). Schein responds that Cohen’s text was an unsolicited, declarative statement; that Sullivan did not respond to Cohen’s text; and that the evidence fails to show that Schein discussed any information about Schein’s plans, policies, or practices. SRCCFF 1068. The facts support Schein’s contentions rather than the argument of Complaint Counsel. *See* Findings of Fact, III.G.6. Whatever Cohen’s unsolicited sharing of competitively sensitive information says about Cohen or Benco, it is not convincing evidence against Schein.

ii. Change of conduct

Complaint Counsel contends that Schein changed its conduct in late 2011 by adopting a no buying group policy, and began dealing with buying groups again after April 2015, when, according to Complaint Counsel, the alleged conspiracy began to break down. CCB at 64-65.³⁸ This contention has been previously rejected. As explained in section II.E.1-2, the evidence fails to prove Complaint Counsel’s contention that Schein adopted a no buying group policy in late 2011, or abandoned that policy beginning in April 2015. Schein continued discounting to most of its pre-existing buying group customers and entered into new buying group relationships throughout and after the alleged conspiracy period. *See* section II.F of the Findings of Fact.³⁹

Complaint Counsel points out that Schein entered into a partnership with Smile Source in 2017, as evidence of Schein’s change of conduct. As shown in section II.E.2.d.ii, although Smile Source left Schein for Burkhart in 2012, Schein tried to regain the business beginning in late 2013, including by submitting a bid for Smile Source in 2014. F. 838, 841-852. Although Schein lost that bid, it pursued Smile Source again beginning in 2015 and ultimately succeeded in regaining the business in March 2017. F. 853-860. As Trevor Maurer of Smile Source wrote to Schein in February 2017, Schein “was head and shoulders above the rest in my opinion,

38 Complaint Counsel disclaims that it is relying on Dr. Marshall’s opinion regarding “observed structural breaks” in Respondents’ approach to or dealings with buying groups to establish the plus factor of change of conduct and states that its assertion is “based on the factual record.” CCRB at 181-82.

39 Complaint Counsel asserts that Schein also changed its conduct in its instructions to employees, stating: “Prior to 2011, Sullivan never instructed Schein’s sales force not to work with buying groups.” CCRB at 222. However, Complaint Counsel cites no evidence to support that assertion.

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specifically because of Tim Sullivan. I've been 'meeting' with Tim about this deal for 3 years, and he made some great moves to make it happen." F. 859. Thus, the evidence on Schein's interactions with Smile Source does not support a finding that Schein changed its conduct.

iii. Alleged additional plus factors

Complaint Counsel contends that Benco and Schein had the opportunity to conspire, asserting that Sullivan and Cohen "regularly" communicated via telephone calls and text messages between 2011 and 2015 and that Sullivan, Cohen, and Guggenheim regularly attended trade shows. CCB at 67. However, opportunity evidence is not necessarily probative of conspiracy. *Blomkest Fertilizer*, 203 F.3d at 1036. "[I]t remains the plaintiff's burden to prove that the defendant succumbed to temptation and conspired. It is not enough to point out the temptation and ask that the defendants bear the onerous, if not impossible, burden of proving the negative – that no conspiracy occurred." *McWane*, 2013 WL 8364918, at *265 (quoting *Areeda*, ¶ 1417b at 115). Furthermore, in the instant case, the evidence shows some legitimate reasons for Sullivan and Cohen to communicate during the relevant time period, including to discuss hiring issues and a potential merger between Benco and Sullivan. F. 563, 566, 570, 641-642. In addition, Complaint Counsel asserts that only a handful of the communications between Benco and Schein related to buying groups, and the evidence fails to show that Schein exchanged any assurances with Benco, or that Schein disclosed Schein's policies or practices regarding buying groups. Under these circumstances, evidence of opportunity to conspire adds little, if anything, to the inquiry.

Complaint Counsel next argues that Schein had a motive to conspire with its competitors to collectively refuse to deal with buying groups, asserting that Schein feared that competition for buying groups would lead to a price war and drive down margins. CCB at 66; CCRB at 215-16. For example, Complaint Counsel cites to a 2010 internal email from Sullivan to Breslawski regarding Smile Source, in which Sullivan stated that while buying groups can benefit Schein, they presented several risks, only one of which was "other competitors then following suit" resulting in a "huge price war." CCFF 197; F. 254. The inference that fear of a "price war" was a primary or significant factor in Schein's decision-making regarding buying groups is unpersuasive. The evidence shows that Schein identified both opportunities and risks associated with working with buying groups. *See* F. 179-211. Moreover, to the extent Schein documents show concern about a "price war," this is consistent with oligopolistic interdependence. *See McWane*, 2013 WL 8364918, at *245 (noting that motive, like actions contrary to interest, may only restate the phenomenon of interdependence among oligopolists); *Flat Glass*, 385 F.3d at 360 (citing *Areeda*, ¶ 1434c1, at 245 ("'Conspiratorial motivation' and 'acts against self-interest' often do no more than restate interdependence.")).

Complaint Counsel further relies on documents in which Schein referred to doing business with buying groups as a "slippery slope." For example, on December 7, 2011, Sullivan wrote in an internal email, referring to buying groups, "I am still of position that we do NOT want to lead in getting this initiative started in dental. I think that it is a very slippery slope." CCFF 709; F. 263. A competitor's consciousness of the effect of its behavior on other competitors is consistent with oligopoly or conscious parallelism. *See McWane*, 2013 WL

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8364918, at *267 (noting that “follow the leader” behavior in an oligopoly “is not illegal”). Consistent with the applicable burden of proof, conduct that is “equally consistent with collusion as with lawful competition . . . cannot represent a plus factor.” *Williamson Oil*, 346 F.3d at 1313.

Finally, Complaint Counsel asserts Schein, Benco, and Patterson have a high collective market share in the dental supply industry and therefore the industry is “conducive to collusion.” CCB at 67; CCRB at 182-83; *see* CX7100 (Marshall Expert Report at 011, 114-15 (¶¶ 12, 290-95). However, a market that is characterized by a small number of relatively large firms that dominate the industry is the very definition of an oligopoly. F. 49. To accept Complaint Counsel’s argument would “in effect, foist a nefarious motive upon” Schein merely because it “conduct[s] its business within an oligopoly market.” *McWane*, 2013 WL 8364918, at *247. Here, as in *McWane*, motive based on the nature of the market is not persuasive evidence of collusion.

Based on the foregoing, the evidence fails to prove that plus factors support an inference of an unlawful agreement involving Schein.

d. Documentary evidence allegedly referencing agreement among Benco, Schein, and Patterson

Complaint Counsel cites to documents of Benco, Schein, and Patterson containing statements that Complaint Counsel argues prove a common understanding of, or a conscious commitment to, a collective refusal to do business with buying groups. CCB at 46-47, 53-54.

As shown below, as to most of the statements upon which Complaint Counsel relies, the author expresses beliefs about existing or past marketplace behavior, which is observable without resort to conspiracy, particularly in an oligopolistic market such as the dental supply industry. *See Benco*, 2018 FTC LEXIS 185, at *38 (“In an oligopolistic market such as this one, it is plausible that Benco, Schein, and Patterson would find it in their individual interests to watch each other ‘like hawks,’ . . .”). Moreover, the evidence does not establish that the expressed beliefs about Schein’s approach to buying groups were based on any actual knowledge.

For example, on February 23, 2013, on an internal Benco message board, Patrick Ryan wrote with regard to buying groups, “so far, all of the major dental companies have said, ‘NO’, and that’s the stance we will continue to take.” F. 119. Complaint Counsel does not point to any testimony that Ryan’s use of the word “we,” in the phrase “that’s the stance we will continue to take,” referred to anyone other than Benco or its employees. Further, Ryan disclaimed any personal knowledge of any other dental companies’ position on buying groups and testified that his statement was based on what he had “seen in the field” and his “sense from market intel.” F. 120. Ryan acknowledged that, with regard to Schein, his statement was “pure speculation.” F. 120. *See also* F. 129 (Benco’s Ryan writing in a July 13, 2015 email, that neither Benco, Schein, nor Patterson allows large group pricing “unless there is common ownership” and testifying that he “had no knowledge of what their position actually was. I only know what I can see in the street”).

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Complaint Counsel also cites to a May 19, 2015 email from Benco's Ryan, regarding an inquiry from the buying group Dentistry Unchained, in which Ryan stated, "I already KNOW that Patterson and Schein have said NO." F. 124. However, Ryan persuasively explained that, as the "third player" in the market, Benco is "typically" approached third, after Schein and Patterson. F. 125. Furthermore, Ryan's assertion that Schein and Patterson had both already declined Dentistry Unchained was incorrect. F. 126.

Similarly, on August 2, 2013, Tim Rogan, vice president of marketing for Patterson, wrote in an email exchange with Neal McFadden, head of Special Markets for Patterson, "Schein, Benco, and Patterson have always said no [to buying groups]. I believe it is our duty to uphold this and protect this great industry. My two cents" F. 745. Rogan explained that his statement that "Schein, Benco, and Patterson have always said no" was his opinion ("[m]y two cents . . ."), based on his experience in the dental industry. F. 746. In addition, Rogan explained that in referencing "our duty," Rogan was referring only to the senior leadership of Patterson. F. 746. Moreover, Rogan admitted that, based on the market intelligence forwarded by McFadden in the same email chain, which indicated Schein was working with a buying group, Schein was taking a different approach than saying "no" to buying groups. F. 746.

In another example, Randy Foley of Schein stated in an October 28, 2015 email regarding Tralongo, a company whose business Schein had declined to bid for in 2014 (F. 535-536): "Schein, PDCO [Patterson] and Benco all refused to bid on [Tralongo's] business when they entered the GPO/Buying Group world." F. 537. Foley explained that he "had no direct knowledge" of whether Patterson or Benco had bid on Tralongo and that he was reporting market intelligence based on the fact that he had "never run into them at any buying group opportunities." F. 538. Foley denied ever discussing Tralongo with anyone at Patterson or Benco. F. 538.

Complaint Counsel analogizes the foregoing statements to the case of *B&R Supermarket*, which alleged a conspiracy among major credit card networks and banks to shift liability for fraudulent charges from card-issuing banks to merchants who failed to upgrade to EMV chip technology by a designated date. 2016 U.S. Dist. LEXIS 136204, at *5-6. The court in *B&R Supermarket* denied the defendants' motion to dismiss in part based on the allegation that one company executive had stated to attendees at a "fraud summit" that "the card brands are not going to delay the liability shift date." *Id.* at *13, 20. The court held that the executive's statement was probative of conspiracy because the executive "could not speak so confidently on behalf of *all* networks save and except for her knowledge of collusion" *Id.* at *20 (emphasis in original). Confidently predicting what your competitors are going to do in the future is readily distinguishable from statements in the instant case that express beliefs about what competitors are presently doing, or have done in the past, which can be attributable to ordinary information gathering or mere speculation.

Complaint Counsel also relies on a statement on March 5, 2014 by Schein's Foley to Chad Thompson of Heartland, a large DSO customer of Schein, that Patterson, Benco, and Schein "are on the same page" regarding buying groups. F. 961. On the surface, while the statement is vague, it could be inferred that Foley had some knowledge regarding Benco's and

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Patterson's approach to buying groups. However, Foley disclaimed any personal knowledge supporting his statement about Patterson, Benco, and Schein being "on the same page." F. 962. Furthermore, although Foley had earlier gotten the "impression" from Benco's Ryan, based on Ryan's October 1, 2013 call to Foley that Benco was "anti-buying group," Foley promptly ended that call after Ryan spoke of Benco's plans not to bid on Smile Source. F. 606-608. In addition, there is no evidence of any conversation between Foley and anyone at Patterson regarding buying groups, and, as set forth in section II.E.1, the evidence fails to prove an exchange of assurances between Benco and Schein that they would collectively refuse to deal with buying groups.

Complaint Counsel further relies on two statements made by Patterson's vice president of sales Dave Misiak in two emails on February 27, 2013. In one email, Misiak instructed Patterson's Mid-Atlantic regional manager to decline a request for proposal from ADC, which Patterson believed to be a buying group, stating in part: **"Confidential and not for discussion . . . our 2 largest competitors stay out of [buying groups] as well. If you hear differently and have specific proof please send that to me."** F. 715 (bold and ellipses in original). In an email the same day to Guggenheim regarding the ADC request for proposal, Misiak said that he was "concerned that Schein and Benco sneak into these [buying group] bids and deny it." F. 711. Misiak's reference to Patterson's competitors' practices as "confidential and not for discussion" and requesting "proof" of Benco or Schein dealing with buying groups is suggestive of the type of secretiveness and monitoring that can be consistent with conspiracy, as is Misiak's use of terms "sneak" and "deny." However, Misiak acknowledged that his statement that Schein "staying out of" buying groups was speculation. F. 718. Misiak denied any personal knowledge of Schein's strategy or practice regarding buying groups. F. 718. In addition, as Misiak persuasively testified, competitors do sometimes act covertly in meeting with customers and do sometimes try to hide attempts to steal customers (F. 713), which is consistent with normal competition. Furthermore, with the exception of a communication relating to attendance at the Texas Dental Association annual meeting discussed below, Complaint Counsel does not identify any communications between Schein and Patterson.

Finally, Complaint Counsel cites to a statement by Patterson's head of Special Markets, Neal McFadden in a June 12, 2014 email to a former Patterson employee, Dave McIntosh, rejecting McIntosh's request for a potential partnership between Patterson and a group of dental offices with which the former employee was working and stating "we've signed an agreement that we won't work with GPOs." CCB at 47, 54. *See* F. 764. Complaint Counsel concedes it is unaware of any such signed agreement. CCB at 25 n. 210. Moreover, McFadden persuasively testified that he said this to McIntosh, who McFadden had terminated in late 2012 or early 2013, in order to shut down the exchange. F. 765.

In summary, none of the documents upon which Complaint Counsel relies is dispositive regarding the issue of Schein's involvement in a conspiracy with Patterson and Benco and none of the documents implies a conscious commitment by Schein as to any future conduct with respect to buying groups.

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e. Communications surrounding the 2014 TDA annual meeting

Complaint Counsel asserts that executives from Benco, Schein, and Patterson “communicated with [one] another about their anticipated response to the TDA [Texas Dental Association] buying group,” which Complaint Counsel argues is evidence of a conspiracy among Benco, Schein, and Patterson. CCB at 61. Respondents assert that their attendance at the spring TDA meeting is not relevant to an alleged agreement to refuse to deal with buying groups and that each distributor independently decided not to attend the 2014 TDA annual meeting. PRB at 20-22; SB at 97-98.

The evidence shows that in September 2013, the Texas Dental Association (“TDA”) entered into an agreement with SourceOne Dental Supply (“SourceOne”), which ran an online marketplace that offered discounts on dental supplies. F. 941. Pursuant to that agreement, SourceOne agreed to operate a website under the name TDA Perks Supplies, and the TDA agreed to endorse or promote this website. F. 941. In October 2013, the TDA launched a discount program as a benefit for its dentist members, which it called TDA Perks Supplies. F. 942. As described by Donovan Osio, the general manager of TDA Financial Services, Inc. (a for-profit subsidiary of the TDA): “TDA Perks Supplies is a white label marketing name⁴⁰ that we put together . . . with SourceOne Dental in order to market SourceOne Dental.” F. 943. Neither SourceOne Dental, nor the TDA, was the actual seller of the supplies that TDA members purchase through the TDA Perks Supplies portal. Rather, SourceOne had one or more distributors who shipped products to customers. F. 944.

The TDA holds a meeting for its members annually. The TDA’s members are customers of dental suppliers. F. 939. To attend the TDA’s annual meetings and set up an exhibit booth at the convention requires payment by the attendee. F. 940. Benco, Schein, and Patterson each viewed the TDA as becoming a competitor through the TDA Perks Supplies program. F. 945, 947, 950. There was also concern that the TDA had been telling member dentists that dental distributors were overcharging. F. 946, 950.

On October 14, 2013, Benco’s Texas regional manager, Ron Fernandez, at Cohen’s direction, called Schein’s Texas regional manager, Glenn Showgren. F. 952-953. According to Showgren’s October 15, 2013 internal email memorializing the call, Fernandez stated that “Chuck Cohen will be reaching out to, or has reached [out] to, Tim Sullivan to see if HSD” (Henry Schein Dental) would “pull out of the state show.” F. 954. Schein’s Showgren further stated that he “laid out ground rules” with Benco’s Fernandez that he “will NOT discuss a pricing response and any action would have to be cleared by my Legal Team before communicating with the TDA.” F. 954. Sullivan replied to Showgren’s email, “Agree that we should NOT be having these discussions w/Benco. Chuck has not contacted me nor would he on such a topic. . . .” F. 955. In addition, in late 2013, in furtherance of Cohen’s instruction, Benco’s Fernandez communicated with Patterson’s John Hyden by telephone, and Hyden told Fernandez that Patterson would not be attending the 2014 TDA Annual Meeting. F. 956.

40 White labeling means that a company has rebranded another company’s product or service in order to offer it to customers as their own.

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On December 18, 2013, Patterson informed the TDA that Patterson would not be attending the TDA annual meeting scheduled for May 2014, stating “it was hard for [Patterson] to support the meeting, if they were going to be in direct competition” with the TDA. F. 946. On April 3, 2014, Schein’s Dean Kyle and Joe Cavaretta met with representatives of the TDA and proposed that Schein and the TDA “work together instead of against each other” and requested that the TDA switch partners from SourceOne to Schein. F. 948. Schein also communicated to the TDA that, if the TDA continued to endorse SourceOne, Schein would not attend the TDA show in 2014. F. 948. On April 8, 2014, Schein learned that the TDA had removed Schein from the public floorplan of the 2014 TDA trade show and that the TDA had sold Schein’s booth space. F. 949. On April 9, 2014, Benco informed the TDA that it was not going to attend the TDA trade show in 2014. Benco’s vice president of sales, Mike McElaney, explained that “it wasn’t worth the costs anymore . . . and the convention was no longer a level playing field.” F. 951.

It should be noted that there is no allegation in this case of an illegal boycott of the TDA or the 2014 TDA meeting. To support its claim that communications by Benco, Schein, and Patterson about attending the 2014 TDA meeting is evidence of a conspiracy regarding buying groups, Complaint Counsel relies on an April 16, 2014 email sent by Benco’s Cohen jointly to Schein’s Sullivan and Patterson’s Guggenheim, forwarding a November 2013 Texas Dental Journal article promoting the TDA Perks program. CCB at 61. Benco’s transmitting a six-month old publically available article, after each company had already withdrawn from the 2014 TDA meeting, is not persuasive evidence of a conspiracy to refuse to deal with buying groups.

Complaint Counsel also cites to an exchange in January 2014 between Patterson’s vice president of sales Dave Misiak and Schein’s vice president and general manager Dave Steck regarding attendance at the 2014 TDA annual meeting. CCB at 61. The evidence shows that on January 6, 2014, Misiak called Steck and told Steck that Patterson had decided not to attend the 2014 TDA meeting. F. 957. Steck told Misiak that Schein had not made a decision on attending the 2014 TDA. F. 957. Although this case does not allege any coordinated boycott of the 2014 TDA meeting by Respondents, Complaint Counsel maintains the evidence is relevant because, according to Complaint Counsel, after the January 6, 2014 call, Steck “acknowledged a commitment to respond” to Misiak about Schein’s plans, which Complaint Counsel argues is consistent with a conspiracy regarding buying groups. In support of this assertion, Complaint Counsel cites to a January 21, 2014 email from Schein’s Steck to Patterson’s Misiak stating that he would be calling Misiak to let him know of Schein’s decision, and an internal email the same day in which Steck wrote, “Guys, I have to get back to PDCO [Patterson] on whether or not we are attending the TDA.” F. 958. Complaint Counsel’s argument overreaches and is unpersuasive. Steck explained that he felt it a matter of courtesy to get back to Misiak once Schein made its decision. F. 959. Moreover, Steck never did inform Misiak of Schein’s decision with regard to attendance at the 2014 TDA meeting. F. 960.

Based on the foregoing, assuming *arguendo* that the communications regarding attendance at the 2014 TDA meeting were, indirectly, communications about the TDA Perks discount program, the connection between the communications regarding attendance at the 2014

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TDA meeting and an alleged conspiracy to refuse to do business with buying groups is far too tenuous to be worthy of any significant probative weight.

6. Conclusion as to Schein

Having fully reviewed and considered the totality of the evidence, the arguments of the parties, and the applicable law, and for all the reasons set forth herein, the evidence, viewed as a whole, fails to persuasively demonstrate that Schein conspired with Benco, or with Benco and Patterson, to refuse to discount to or otherwise negotiate with buying groups, as alleged in the Complaint. Although there are some statements in some documents that could be interpreted as consistent with Complaint Counsel's conspiracy theory, and Benco's apparent willingness to reach out to Schein raises concerns, the evidence as a whole does not hold up under reasonable scrutiny. The burden of proof includes not just the burden of production, but the risk of non-persuasion. Jacob A. Stein; Glenn A. Mitchell; Basil J. Mezines, 4 Administrative Law § 24.01 (2019). Ultimately, the evidence upon which Complaint Counsel relies is not sufficiently persuasive and does not provide sufficient weight to meet Complaint Counsel's burden of proving that an agreement involving Schein is more likely than not. *See Kreuzer*, 735 F.2d at 1488 n.14 (noting that an inference of conspiracy must be more likely than an inference of independent action).

Accordingly, the Complaint is DISMISSED as to Schein.

F. The Agreement Between Benco and Patterson is a *Per Se* Violation of the Antitrust Laws

To sustain a claim under Section 1 of the Sherman Act, the evidence must prove that (1) "there was a contract, combination, or conspiracy – or, more simply, an agreement"; and, if so, (2) "the contract, combination, or conspiracy 'unreasonably restrained trade in the relevant market.'" *Realcomp*, 635 F.3d at 824 (citation omitted). As held in II.D, Complaint Counsel has shown that there was an agreement between Benco and Patterson to refuse to offer discounted prices or otherwise negotiate with buying groups. As held below, that agreement unreasonably restrained trade in the full-service dental distribution market in the United States.

"[A] restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be '*per se*' unreasonable, or because it violates what has come to be known as the 'Rule of Reason.'" *Ind. Fed'n of Dentists* ("*IFD*"), 476 U.S. at 457-58. Under the *per se* rule, "certain agreements or practices are so 'plainly anticompetitive,' . . . and so often 'lack . . . any redeeming virtue,' . . . that they are conclusively presumed illegal without further examination" *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 8 (1979) (internal citations omitted). Agreements subject to the *per se* rule include: price-fixing, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-24 (1940); market division, *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49 (1990) (per curiam); and certain group boycotts, *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 293-95 (1985), *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990). Courts have condemned as illegal *per se* a number of horizontal agreements affecting price, even if they did not directly fix prices. *See, e.g., Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (per

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curiam) (agreement to standardize credit terms offered to a purchaser); *Sugar Institute, Inc. v. United States*, 297 U.S. 553 (1936) (agreement to adhere to previously announced prices and terms of sale); *United States v. United Liquors Corp.*, 149 F. Supp. 609, 613 (W.D. Tenn. 1956), *aff'd*, 352 U.S. 991 (1957) (agreement to adopt common classifications of customers entitled to discounts, and standardize the percentage of functional discounts).

To establish a horizontal price-fixing agreement, a plaintiff need only demonstrate the existence of an agreement, combination, or conspiracy among actual competitors with the purpose or effect of “raising, depressing, fixing, pegging or stabilizing” the price of a commodity. *Socony-Vacuum*, 310 U.S. at 223. “[A]n agreement to eliminate discounts” is a type of agreement that “falls squarely within the traditional *per se* rule against price fixing.” *Catalano*, 446 U.S. at 648; *see also General Motors*, 384 U.S. at 145 (“Elimination, by joint collaborative action, of discounters from access to the market is a *per se* violation of the Act.”); *Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133, 1146 (9th Cir. 2003) (“Agreements not to offer discounts are *per se* violations of section 1.”).

As demonstrated in section II.D, the evidence proves that Benco and Patterson agreed to refuse to offer discounted prices to buying groups or otherwise negotiate with buying groups. Such a horizontal agreement to eliminate discounts is illegal *per se* (*Catalano*, 446 U.S. at 648; *Freeman*, 322 F.3d at 1146), as even Patterson’s expert witness acknowledged. RX2967 (Wu, Dep. at 277, 279) (“As an economist, if there is an agreement among competitors to, not to discount to customers, then I would view that as being anticompetitive.”).

In addition, “any agreement by a group of competitors to boycott a particular buyer or group of buyers is illegal *per se*.” *Federal Maritime Comm’n v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 250 (1968); *Kiefer-Stewart Co. v. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951) (“[T]he Sherman Act makes it an offense for [businessmen] to agree among themselves to stop selling to particular customers.”). In *Superior Court Trial Lawyers Association*, the Supreme Court held that an agreement by a group of lawyers to boycott their customers to hold out for higher fees was a *per se* unlawful boycott. There, the concerted refusal to serve an important customer was “unquestionably a ‘naked restraint’ on price and output” and illegal *per se*. *Superior Court Trial Lawyers Ass’n*, 493 U.S. at 422-23 (quoting *Nat’l Collegiate Athletic Ass’n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 110 (1984)). In the instant case, the agreement between Benco and Patterson to refuse to offer discounted prices to buying groups or otherwise negotiate with buying groups also constitutes a horizontal group boycott of a customer and is thus *per se* unlawful.

When “horizontal restraints involve agreements between competitors not to compete in some way, [the Supreme Court] concluded that it did not need to precisely define the relevant market to conclude that these agreements were anticompetitive.” *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2285 n.7 (2018) (citing *IFD*, 476 U.S. at 460-61; *Catalano*, 446 U.S. at 648-49). In *Indiana Federation of Dentists*, the Supreme Court explained, “the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition.” *IFD*, 476 U.S. at 460. The Supreme Court thus rejected respondents’ arguments that the Commission’s conclusions were erroneous

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as a matter of law, due to a lack of specific findings concerning the market definition, or lack of a finding that the policy resulted in a rise in costs to patients. *Id.* In this case, the Benco-Patterson agreement not to deal with buying groups is a horizontal agreement “not to compete in some way,” and therefore, it is not necessary “to precisely define the relevant market” to conclude that this agreement is anticompetitive. *American Express*, 138 S. Ct. at 2285 n.7. Accordingly, an analysis of the relevant product market, the relevant geographic market, or market power is not required. *Id.*; *IFD*, 476 U.S. at 459 (“no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement”).

The Complaint alleges three violations by Respondents under Section 5 of the FTC Act related to the alleged concerted scheme to refuse to negotiate with, or offer discounts to, buying groups. The First Violation alleges that the agreement is unlawful *per se*. Complaint ¶¶ 80-82. The Second Violation and the Third Violation refer to the same agreement as an “inherently suspect” violation (Complaint ¶¶ 83-85) and a violation of the truncated rule of reason (Complaint ¶¶ 86-88), respectively. Complaint Counsel argues that if the challenged agreement is not held to be unlawful *per se*, then the agreement should be found to be unlawful pursuant to an inherently suspect or truncated rule of reason analysis. CCB at 70.

Agreements that are unlawful *per se* are condemned without “inquiry as to the precise harm they have caused” without any “economic investigation . . . to determine at large whether a particular restraint has been unreasonable” *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958); *Denny’s Marina, Inc. v. Renfro Prods., Inc.*, 8 F.3d 1217, 1221 (7th Cir. 1993) (“As far back as 1940, it has been clear that horizontal price-fixing is illegal *per se* without requiring a showing of actual or likely impact on a market.”). Similarly, “[a] court need not then inquire whether the restraint’s authors actually possess the power to inflict public injury . . . , nor will the court accept argument that the restraint in the circumstances is justified by any procompetitive purpose or effect.” *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1362 (5th Cir. 1980) (internal citations omitted). Because the agreement between Benco and Patterson is a *per se* violation of the antitrust laws, it is not necessary to determine whether the agreement is also a violation under an inherently suspect analysis or truncated rule of reason analysis. Thus, this Initial Decision need not, and does not, determine whether the agreement is also unlawful under the alternative theories propounded by Complaint Counsel.

Accordingly, Benco and Patterson are liable for the First Violation alleged, a *per se* violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. In light of this holding on the First Violation, it is unnecessary to reach the Second and Third Violations alleged.⁴¹ The Analysis next turns to the Fourth Violation alleged.

⁴¹ See, e.g., *In re McWane, Inc.*, 2014 WL 556261, at *1 (Comm. Op.) (“In light of our conclusions on Counts 4 and 6, we find it unnecessary to reach Count 5 . . .”).

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G. Invitation to Collude**1. Summary of the charges and evidence**

The Complaint alleges a Fourth Violation against Respondent Benco only, based on an alleged invitation to collude. Complaint ¶¶ 89-90. Burkhart Dental Supply Company, Inc. (“Burkhart”) is a family-owned, full-service dental distributor and the fourth largest dental supplier in the United States. F. 970-972. The Complaint alleges that Benco invited Burkhart “to collude in a joint agreement to refuse to provide discounts to or otherwise compete for the business of [b]uying [g]roups of independent dentists.” Complaint ¶ 90. Specifically, Complaint Counsel asserts that through three communications, Benco told Burkhart that dealing with buying groups was not good for the dental supply industry and told Burkhart that it should not do business with buying groups. CCB at 101-03. Complaint Counsel contends: “Benco’s purpose in communicating with Burkhart was to bring Burkhart into the fold of the . . . agreement [between Benco, Schein, and Patterson].” CCB at 103. Complaint Counsel argues that Benco’s conduct with regard to Burkhart violates Section 5 of the FTC Act. Complaint ¶ 90; CCB at 103-06.

Benco responds that the evidence does not support a finding that Benco invited Burkhart to collude. BB at 56-58. In addition, Benco asserts, any evidence of an alleged invitation to collude in this matter does not meet the legal standard for application of Section 5 of the FTC Act. BB at 54-56, 58-59.

With respect to the first alleged communication from Benco to Burkhart, the evidence shows: on September 13, 2013, Benco’s vice president of sales, Mike McElaney, called his counterpart at Burkhart, Jeffrey Reece (F. 979); McElaney had just learned that Burkhart was entering into an agreement to supply a buying group and called Reece to “discuss some potential pitfalls” that may happen when dealing with buying groups (F. 981); and McElaney expressed his opinion to Reece that the group purchasing model is a threat to the dental industry. F. 984; *see also* F. 982.

Reece and McElaney testified to different recollections as to what else was conveyed during the September 13, 2013 telephone call. Reece testified that McElaney told Reece that “group purchasing organizations were not favorable to the dental industry and were not going to be good for Burkhart . . .” and that Burkhart needed to be careful with group purchasing organizations. F. 985. McElaney testified that he did not tell Reece that Benco had a policy against doing business with buying groups. F. 983.

At the time of the September 13, 2013 telephone call, Reece believed that Benco was doing business with buying groups. F. 986. For that reason, McElaney’s statement to Reece that Burkhart needed to be careful with group purchasing organizations came as a surprise to Reece and did not make sense to Reece. F. 986. Reece asked McElaney whether Benco was working with buying groups and McElaney did not answer. F. 987.

Following the September 13, 2013 telephone call, McElaney wrote in an email to Cohen and Ryan at Benco:

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I spoke with Jeff Reece at length late Friday about buying groups.
JEFF DOES NOT GET IT!!! . . . I will be meeting Jeff at the ADA
meeting [American Dental Association] to continue the discussion.

F. 989. Ryan responded to McElaney's email writing, "Maybe we should discuss with Lori as well." F. 991 (referring to Lori Burkhart, the owner of Burkhart). There is no evidence to suggest that anyone at Benco raised the issue of buying groups with Lori Burkhart.

With respect to the second alleged communication from Benco to Burkhart, Complaint Counsel contends that McElaney called Reece a second time, approximately three to four weeks after the September 13, 2013 telephone call, to discuss buying groups. CCB at 102. The evidence as to whether this telephone call occurred is conflicting. Although at trial Reece testified that McElaney made a second telephone call to Reece to discuss buying groups, at his investigational hearing Reece testified only to the September 13, 2013 telephone call and a conversation with McElaney, Ryan, and Cohen at the October 2013 Dental Trade Alliance annual meeting, addressed below. F. 992. McElaney testified that there was only one telephone conversation between McElaney and Reece relating to buying groups. F. 993. Based on the foregoing, the evidence fails to prove that it is more likely than not that McElaney made the alleged second telephone call to Reece.

With respect to the third alleged communication from Benco to Burkhart, Complaint Counsel asserts that at the October 2013 Dental Trade Alliance Annual Meeting in Florida ("DTA meeting"), McElaney introduced Reece to Cohen and Ryan of Benco, and that Benco "sought to encourage Burkhart to refrain from working with buying groups." CCB at 102. The evidence establishes that McElaney, Cohen, and Ryan did meet with Reece at the DTA meeting (F. 994-995), but the evidence of what was said at that meeting is conflicting.

Reece testified that Cohen told Reece that Cohen felt buying groups were not healthy for the dental supply industry, that buying groups could do damage to the dental supply industry, and that it was not in Burkhart's best interest to work with group purchasing organizations. F. 996. Reece further testified that he perceived that Cohen was trying to send a very clear message to him that working with buying groups "wasn't acceptable." F. 996.

While Benco admits that Cohen spoke to Reece at the DTA meeting, Cohen testified that he never had a conversation with Reece or anyone else at Burkhart about buying groups. F. 994, 998. McElaney testified that he did not recall having an in-person conversation with Reece about buying groups. F. 999. Ryan testified that he met Reece at the DTA meeting, but does not recall being part of a conversation with him about buying groups. F. 1000.

Reece also testified that he responded to what Cohen and McElaney told him at the DTA meeting by asking Cohen and McElaney if Benco was doing business with buying groups and Cohen and McElaney did not respond. F. 997 ("I kind of looked at them incredulously, saying, 'So what you are telling me is you are not working with these groups, right,' and they just tended to kind of overlook that and not acknowledge my challenge.").

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In summarizing the communications to him from Benco, Reece made two seemingly contradictory statements. First, when asked, “Over the course of those three conversations with Benco about buying groups, was there any suggestion of how Burkhart should conduct its business?” Reece testified: “No.” F. 1003. Second, when asked whether, in any of those conversations, Benco encouraged Burkhart not to do business with buying groups, Reece testified: “Benco had encouraged Burkhart not to engage in group purchasing organizations based on the fact that that was going to be detrimental to our business and certainly to the business in the dental industry for those that participated.” F. 1004.

Reece was never told by anyone at Benco that there was an agreement between Benco and any other company not to do business with buying groups and stated that he was not invited to join any such agreement. F. 1005. Burkhart did not change its policy or strategy with regard to working with buying groups after Reece’s communications with Benco. F. 1006.

2. Analysis

The Commission, in ruling on a motion for summary decision, has held that “an invitation to collude is ‘the quintessential example of the kind of conduct that should be . . . challenged as a violation of Section 5.’” *In re McWane, Inc.*, 2012 WL 5375161, at *17.⁴² “‘The term “invitation to collude” describes an improper communication from a firm to an actual or potential competitor that the firm is ready and willing to coordinate on price or output or other important terms of competition.’” *In re Delta*, 245 F. Supp. 3d 1343, 1371 (N.D. Ga. 2017) (quoting *In re Fortiline, LLC a N.C. Ltd. Liab. Co.*, File No. 151-0000, 2016 WL 4379041, at *11 (F.T.C. Aug. 9, 2016)). “The quintessential invitation to collude was discussed in *United States v. American Airlines, Inc.*, 743 F.2d 1114, 1116 (5th Cir. 1984), in which the president of an airline called the president of a competitor and said: ‘I have a suggestion for you. Raise your . . . fares twenty percent. I’ll raise mine the next morning. . . . You’ll make more money and I will too.’” *In re Delta*, 245 F. Supp. 3d at 1371.

The case of *Liu v. Amerco*, 677 F.3d 489 (1st Cir. 2012) is also instructive for evaluating a charge of invitation to collude. As stated in *Liu*, “section 5 of the FTC Act, 15 U.S.C. § 45(a)(1), embraces unilateral acts by one defendant, *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322, 86 S. Ct. 1501, 16 L. Ed. 2d 587 (1966); a proposal to engage in horizontal price fixing is dangerous merely because of its potential to cause harm to consumers if the invitation is accepted.” 677 F.3d at 494. In *Liu*, the court upheld a complaint alleging an unsuccessful attempt to fix prices as stating a violation of the Massachusetts unfair competition statute, which is substantially similar to Section 5 of the FTC Act. The allegations in that case were “express proposals to a competitor to raise prices, which are unambiguous”⁴³ *Liu*, 677 F.3d at 494-

42 The charge of invitation to collude was tried in *McWane*. Finding the evidence too ambiguous to prove the allegation, the Initial Decision dismissed the charge. *In re McWane, Inc.*, 2013 WL 8364918, at *298-303. Complaint Counsel did not appeal that dismissal and it was not reviewed by the Commission. *In re McWane, Inc.*, 2014 WL 556261, at *41. Accordingly, the Initial Decision’s dismissal of the charge “consequently became the Commission’s final decision.” *Id.*

43 The allegations in *Liu* included: U-Haul’s CEO issued an instruction to its regional managers to contact U-Haul’s competitor, Budget, to inform Budget of U-Haul’s recent conditional truck rate increase and to advise Budget that if

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95. “[S]anctions are not warranted for unaccepted invitations that are highly ambiguous.” Antitrust Law: An Analysis of Antitrust Principles and Their Application, Areeda and Hovenkamp (“Areeda”), ¶ 1419e4.

The core concept of an invitation to collude is that one company proposes to a second company that the two companies align some aspect of their business competition. Reece’s belief at the time that Benco did do business with buying groups and McElaney’s and Cohen’s failure to respond to Reece’s direct questions about whether Benco did business with buying groups, undercut the suggestion that Benco proposed to Burkhardt that Burkhardt align with Benco in refusing to do business with buying groups. Furthermore, Complaint Counsel’s contention that Benco was proposing that Burkhardt join a preexisting agreement between Benco and any other distributor is unsupported and unpersuasive. The evidence shows that Reece was never told by anyone at Benco that there was an agreement between Benco and any other company not to do business with buying groups and that Burkhardt was not invited to join any such joint agreement. F. 1005.

More importantly, the statements that can fairly be attributed to Benco, summarized above, do not constitute unambiguous statements soliciting Burkhardt to join Benco in refusing to deal with buying groups. There are enough conflicts between Reece’s testimony and that of the Benco witnesses and enough internal inconsistencies in Reece’s testimony to undermine the persuasive value of Reece’s testimony. “According to Areeda, highly ambiguous communications should not be actionable” as a solicitation to enter into an anticompetitive agreement. *In re McWane, Inc.*, 2013 WL 8364918, at *299 (citing Areeda, ¶ 1419e4).

3. Conclusion

Complaint Counsel carries the burden of proof on the violations alleged in the Complaint. 16 C.F.R. § 3.43(a). The evidence presented in support of the alleged invitation to collude is conflicting and ambiguous. Accordingly, the evidence fails to prove an invitation to collude in violation of Section 5 of the FTC Act. Therefore, the Fourth Violation is DISMISSED.

Budget did not follow, U-Haul’s rates would be reduced to their prior level; U-Haul’s CEO instructed local U-Haul dealers to communicate with their counterparts at competitors Budget and Penske to reinforce the message that U-Haul had raised its rates and urge that competitors’ rates should be raised to match the increased U-Haul rates; a U-Haul executive made telephone calls to representatives at three major Budget locations, in which the executive identified himself, advised those Budget representatives of U-Haul’s recent rate increases, and encouraged them to follow; and U-Haul held an earnings conference call, which U-Haul knew would be monitored by Budget representatives, and stated, among other things that: U-Haul had recently raised its rates and its competitors should do the same, Budget’s failure to match U-Haul’s higher rates was “unfortunate for the entire industry,” and U-Haul would wait a while longer for Budget to respond, “otherwise it will drop its rates.” *Liu*, 677 F.3d at 491-92 (citing 75 Fed. Reg. at 35034).

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H. Remedy**1. Introduction**

As held above, the evidence proves that Respondents Benco and Patterson entered into an agreement that unreasonably restrained trade, which is an unfair method of competition in violation of Section 5 of the FTC Act. 15 U.S.C. § 45. Section 5(b) of the FTC Act directs that, upon finding a violation, the Commission “shall issue” an order to “cease and desist from using such method of competition” 15 U.S.C. § 45(b).

Complaint Counsel submitted a proposed order with its Post-Trial Brief (“Proposed Order”). Neither Benco nor Patterson challenges any specific provision of the Proposed Order. Benco contends that the evidence fails to prove an unlawful agreement or other violation of the FTC Act, and that no order should issue. BB at 60; BRB at 50. This Initial Decision holds to the contrary. Patterson argues that, even if Patterson violated the FTC Act, no order should issue because the record shows that Patterson and Benco began working with buying groups in recent years and Complaint Counsel has failed to prove a “cognizable danger” that the violation will recur. PB at 62-63; PRB 75-77. Complaint Counsel responds that there has been no formal, voluntary cessation or affirmative nullification of the agreement and that, in any event, cessation of a prohibited practice is not a bar to entry of a cease and desist order. CCRB at 40. Complaint Counsel further argues that there is a danger of recurrence. CCRB at 104-05, 132-34.

2. Applicable legal principles

It is well established that once a violation of the antitrust laws has been shown, the Commission has wide discretion with respect to cease and desist orders. *FTC v. National Lead Co.*, 352 U.S. 419, 428 (1957); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946); *Rubbermaid, Inc. v. FTC*, 575 F.2d 1169, 1174 (6th Cir. 1978).

It is also settled that the “power to grant injunctive relief survives discontinuance of the illegal conduct.” *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953). Thus, voluntary cessation of an illegal practice, even where proven, does not by itself render the entry of a cease and desist order inappropriate. *ITT Cont’l Baking Co. v. FTC*, 532 F.2d 207, 222 n.22 (2d Cir. 1976); *Oregon-Washington Plywood Co. v. FTC*, 194 F.2d 48, 50 (9th Cir. 1952). “Although persuasive of a less harsh order than otherwise,” termination of illegal conduct, even if it occurs prior to the issuance of a complaint, “does not wholly absolve” a respondent. *Country Tweeds, Inc. v. FTC*, 326 F.2d 144, 148 (2d Cir. 1964).

Still, Complaint Counsel, as the moving party in this case, “must satisfy the court that relief is needed.” *See W. T. Grant*, 345 U.S. at 633. *See also* 5 U.S.C. § 556(d) (Under the APA, “the proponent of a rule or order has the burden of proof.”). Where challenged conduct has ceased, this burden includes demonstrating that “there exists some cognizable danger of recurrent violation, something more than the mere possibility” *W.T. Grant*, 345 U.S. at 633; *SCM Corp. v. FTC*, 565 F.2d 807, 812-13 (2d Cir. 1977) (remanding order and holding that the FTC has the burden of proving cognizable danger of recurrent violation). The propriety of an order in such case depends “on a consideration of all the surrounding facts and circumstances.”

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Oregon-Washington Plywood, 194 F.2d at 50. The court’s “discretion is necessarily broad” *W.T. Grant*, 345 U.S. at 633. The factors “relevant to the question whether to issue an order when a respondent professes to have ceased the complained-of activities [are]: the bona fides of the respondent’s expressed intent to comply with the law in the future; the effectiveness of the claimed discontinuance; and the character of the past violations.” *In re Int’l Association of Conference Interpreters*, 1997 FTC LEXIS 348, at *108 (Mar. 14, 1997). See also *In re Massachusetts Bd. of Registration in Optometry*, 1988 FTC LEXIS 159, at *153 (June 13, 1988) (citing *W. T. Grant*, 345 U.S. at 633).

3. Analysis

Applying the foregoing standards, the record in this case amply supports entry of a cease and desist order. “When defendants are shown to have . . . entered into a conspiracy violative of the antitrust laws, courts will not assume that it had been abandoned without clear proof. . . .” *Massachusetts Bd.*, 1988 FTC LEXIS 159, at *152 (quoting *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952)). In the instant case, although the evidence proves that Benco and Patterson started discounting to at least some buying groups beginning in 2015 and 2016 (see F. 146-151; F. 789-790, 794-795), it is not apparent from the record that the agreement between Benco and Patterson not to deal with buying groups has been permanently terminated. Given that Benco and Patterson denied the existence of any agreement, unsurprisingly, neither Benco nor Patterson asserts that it has terminated or abandoned such agreement.

In addition, it is not apparent that the alleged cessation of the Benco and Patterson agreement was voluntary. As previously noted, in April 2015, Benco settled an antitrust claim brought by the state of Texas and entered into a Stipulated Injunction that, among other things, required logging and furnishing inter-firm communications. F. 966-967. Patterson entered into a substantially similar Stipulated Injunction in 2018. F. 969. The likely deterrent impact of the logging requirements should not be discounted. Furthermore, to the extent that the logging requirements in the Stipulated Injunction contributed to the claimed discontinuance of the Benco-Patterson agreement, those logging requirements have now expired as to both Benco and Patterson (F. 967, 969). This removes a deterrent against improper inter-firm communications, and allows a return to the status quo pre-April 2015.

Furthermore, this Initial Decision has determined that the agreement between Benco and Patterson to refuse to deal with buying groups falls into the class of agreements that is “so ‘plainly anticompetitive,’” and unlikely to have “‘any redeeming virtue’” as to be unlawful *per se*. See section II.F (quoting *Broadcast Music*, 441 U.S. at 8). Thus, the character of the past violation also supports the entry of a cease and desist order.

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For all the foregoing reasons, a cease and desist order is appropriate in this case. Patterson does not cite any Section 5 decisions that support its position that an injunction on the record presented would be inappropriate.⁴⁴

4. The Order

Paragraph I of the Proposed Order sets forth applicable definitions. Paragraph II of the Proposed Order would prohibit Benco and Patterson from entering into or participating in any agreement with any other dental supply distributor relating to business with buying groups (II.A); from inducing or encouraging another distributor to enter into or participate in a prohibited agreement (II.B); from preventing or discouraging trade associations or manufacturers from doing business with buying groups (II.C); and from communicating buying group-related business information to a distributor (II.D). The Proposed Order would further require each company to maintain an antitrust compliance program (Paragraph III) and file specified compliance reports, including identification of inter-firm communications between or among certain personnel of Benco and Patterson (Paragraph IV). The Proposed Order also includes certain notification and verification requirements (Paragraphs V and VI). The terms under the Proposed Order would terminate in 15 years (Paragraph VII).

As noted above, neither Benco nor Patterson challenges any specific provision of the Proposed Order. Based on full consideration of the applicable legal authorities and the entire record in the case, the attached Order, to be entered herewith, adopts the provisions of Complaint Counsel's Proposed Order except that proposed Paragraph II.C will not be included in the Order. Paragraph II.C of the Proposed Order, which would prohibit "[p]reventing, discouraging, punishing, or threatening to punish any Association or Manufacturer that wants to join, sponsor, partner with, or conduct business with a Buying Group," addresses unilateral conduct, unrelated to any agreement, attempted agreement, or other conduct related to coordinating with competitors. This goes too far beyond the scope of the violations alleged in the Complaint and the violating conduct found to have occurred.

The Order accomplishes the remedial objectives of the FTC Act and is reasonably related to the proven violation. Moreover, the Order is sufficiently clear and precise. The Order also is necessary and appropriate to remedy the violation found to have occurred, and to prevent a recurrence.

⁴⁴ Patterson relies on a series of cases denying an injunction for violations of Section 8 of the Clayton Act, 15 U.S.C. § 19, which prohibits certain interlocking directorships between competing businesses. PB at 62-63 (citing *W.T. Grant*, 345 U.S. 629; *Borg-Warner Corp. v. FTC*, 746 F.2d 108, 110 (2d Cir. 1984); and *TRW, Inc. v. FTC*, 647 F.2d 942 (9th Cir. 1981)). In each of the foregoing cases, the directors at issue ceased being directors. Patterson's cases are not sufficiently analogous, legally or factually, to dictate the result in the instant case.

III. FINDINGS OF FACT**A. Respondents****1. Benco Dental Supply Company**

1. Benco Dental Supply Company (“Benco”) is a family-owned dental distribution company based in Pittston, Pennsylvania founded in 1930. (Cohen, Tr. 399, 617-19, 633; CX0301 (Cohen, IHT at 9-10); JX0003 at 002 (Joint Stipulations of Fact No. 9)).
2. Benco is a private, for-profit corporation duly formed and organized under the laws of the State of Delaware. (CX1112 at 010 (Answer of Benco ¶ 13)).
3. Benco is a full-service, national distributor (F. 39-41) that sells dental supplies, equipment, and services to dental practitioners throughout the United States. Benco is the third largest distributor of dental supplies and equipment in the United States. (CX1112 at 010 (Answer of Benco ¶ 13); JX0003 at 002 (Joint Stipulations of Fact Nos. 6, 9)).
4. Benco is the largest privately owned dental distributor in the United States. (Cohen, Tr. 409; JX0003 at 002 (Joint Stipulations of Fact Nos. 9)).
5. Benco carries a full line of products, offering thirty to forty thousand different products. (Cohen, Tr. 603).
6. Benco currently operates five distribution centers with distribution operations capable of delivery across the United States. (Cohen, Tr. 404, 408).
7. For the majority of Benco’s existence, it operated as a regional distributor, with its principal customer base in Pennsylvania, New York, Ohio, and Virginia. (Cohen, Tr. 619-21, 628-29).
8. Benco became a national full-service distributor in 2011. (Cohen, Tr. 410, 631-32; CX8015 (Cohen, Dep. at 47-48)). In 2016, Benco supplied dental practices across the United States. (Cohen, Tr. 409-10; BRCCFF 10).
9. Chuck Cohen is the managing director of Benco, a title he shares with his brother. That position is akin to a chief executive officer (“CEO”). He has been in that position since 1998. He is also a co-owner of Benco. (Cohen, Tr. 399-401).
10. Benco sells, or offers for sale, its products and services throughout the United States. (JX0001 at 001 (Joint Stipulations of Law and Facts)).
11. Benco is a corporation and engages in commerce in the United States as defined in 15 U.S.C. § 44. (JX0001 at 002 (Joint Stipulations of Law and Facts); CX1112 at 011 (Answer of Benco ¶ 17)).

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2. Henry Schein, Inc.

12. Henry Schein, Inc. (“Schein”) is a public company headquartered in Melville, New York, organized under the laws of the state of New York. (Sullivan, Tr. 3875; CX5021 at 012, 014 (Henry Schein, Inc. 2017 Annual Report); JX0003 at 002 (Joint Stipulations of Fact No. 10)).
13. Schein provides various services to its customers, including product education and training, equipment installation, equipment repair and maintenance, and an array of business solutions services. (CX5023; CX0311 (Sullivan, IHT at 26) (“I consider us a full-service distributor. We do basically anything and everything within the dental office and dental practice.”)).
14. Schein is a full-service, national distributor of dental products (F. 39-41) that sells dental supplies, equipment and services to dental practitioners in the United States. (JX0003 at 002 (Joint Stipulations of Fact Nos. 6, 10). Schein sells and distributes a full range of dental products, carrying over 200,000 stock keeping units (“SKUs”). (Sullivan, Tr. 4035; Meadows, Tr. 2474; CX5021 at 014 (Henry Schein, Inc. 2017 Annual Report)).
15. Schein operates five distribution centers in North America, enabling delivery across the United States. (Sullivan, Tr. 4040-41). In addition, Schein maintains four in-house equipment repair facilities. (RX2951 (Steck, Class Action 30(b)(6) Dep. at 14)). Schein employs between 800 and 825 field sales consultants (“FSCs”) that specialize in merchandise, between 155 and 160 sales representatives for equipment, and between 80 and 85 for technology. (Sullivan, Tr. 4036; RX2951 (Steck, Class Action 30(b)(6) Dep. at 37-38)).
16. Schein has several divisions, including dental, medical, and animal health divisions. (Sullivan, Tr. 3873-74).
17. Schein’s dental division is the largest part of the company, employing roughly 3,000 employees. Between 1,000 and 1,200 of these employees are sales representatives. (Sullivan, Tr. 3874).
18. Schein is currently the largest dental distributor in the United States. (Sullivan, Tr. 3876).
19. Schein operates through two separate divisions, Henry Schein Dental, or HSD, and Henry Schein Special Markets (“Special Markets”), as explained in detail in F. 152-178.
20. James Breslawski was the president of Henry Schein, Inc., which oversaw both Henry Schein Dental and Henry Schein Special Markets, from 2005 to the present. (Foley, Tr. 4516, 4519; CX8012 (Breslawski, Dep. at 39)).

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21. Tim Sullivan has held the titles of president (1997-1999, 2004-2018) or vice president (1999-2004) of Henry Schein Dental. (CX0311 (Sullivan, IHT at 11-12); Sullivan, Tr. 3867).
22. Hal Muller was president of Special Markets from 2008 to 2018. (CX0309 (Muller, IHT at 8); CX8005 (Muller, Dep. at 8)).
23. Schein sells, or offers for sale, its products and services throughout the United States. (JX0001 at 001 (Joint Stipulations of Jurisdiction, Law, and Fact)).
24. Schein is a corporation and engages in commerce in the United States as defined in 15 U.S.C. § 44. (CX2801 at 008 (Schein's Response to RFA ¶ 1); JX0001 at 002 (Joint Stipulations of Law and Facts); CX6026 at 005 (Answer of Schein ¶ 17)).

3. Patterson Companies, Inc.

25. Patterson Companies, Inc. ("Patterson") is a publicly traded corporation, organized, existing and doing business under the laws of the state of Minnesota, based in St. Paul, Minnesota. (CX3113 at 002-03 (Answer of Patterson ¶ 15); CX5035 at 009 (Patterson Companies 2017 Annual Report); JX0003 at 002 (Joint Stipulations of Fact No. 8)).
26. Patterson sells dental supplies and equipment through a business unit that Patterson refers to as Patterson Dental. (CX5035 at 011, 014-15 (Patterson Companies 2017 Annual Report)).
27. Patterson is a full-service, national distributor (F. 39-41) that sells dental supplies, equipment and services to dental practitioners in the United States. (Guggenheim Tr. 1532; CX3113 at 002-03 (Answer of Patterson ¶ 15); JX0003 at 002 (Joint Stipulations of Fact No. 8)).
28. Patterson is the second largest distributor of dental supplies and equipment in the United States. (Guggenheim, Tr. 1543).
29. Patterson sells and distributes a full range of dental products, carrying over 89,000 SKUs. (CX5035 at 015 (Patterson Companies 2017 Annual Report); *see also* Guggenheim, Tr. 1532; CX0317 (Rogan, IHT at 119)).
30. Patterson has more than 70 local branches in 40 states, which serve tens of thousands of dentists across the country. Patterson employs more than 1,300 salespeople, service representatives, and equipment specialists, organized in geographic regions. (CX5033 at 011 (Patterson Companies 2015 Annual Report); Misiak, Tr. 1300; CX5035 at 033 (Patterson Companies 2017 Annual Report)).
31. Patterson distributes dental products from nine fulfillment centers, located in California, Florida, Hawaii, Indiana, Iowa, Pennsylvania, South Carolina, Texas, and Washington. (CX5035 at 033 (Patterson Companies 2017 Annual Report)).

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32. Patterson buys dental products from manufacturers and sells those products to dentists with a mark-up. (Rogan, Tr. 3426).
33. At present, Patterson Companies operates in the dental products distribution market and the animal health products distribution market. (Guggenheim, Tr. 1531; CX5034 at 012 (Patterson Companies 2016 Annual Report)). From 2004 until 2015, Patterson Companies also operated a medical products distribution business. (Guggenheim, Tr. 1531-32).
34. Patterson promotes its ability to offer a full line of dental products to customers. (CX3365 at 006 (Patterson's Response to RFA ¶ 14)).
35. Patterson also offers a full range of related services, such as equipment installation, maintenance and repair, dental office design, and equipment financing. (CX5033 at 011 (Patterson Companies 2015 Annual Report)).
36. Paul Guggenheim was the president of Patterson Dental from May 2010 to May 2015 and CEO of Patterson Dental from May 2015 to May 2016. (Guggenheim, Tr. 1526-27).
37. Patterson sells, or offers for sale, its products and services throughout the United States. (JX0001 at 001 (Joint Stipulations of Law and Facts)).
38. Patterson is a corporation and engages in commerce in the United States as defined in 15 U.S.C. § 44. (JX0001 at 002 (Joint Stipulations of Law and Facts; CX3113 at 003 (Answer of Patterson ¶ 17))).

4. Full-service distributors

39. Full-service distributors address all of the needs of dental practices, providing consumables, durables, and installation and repair services. (Guggenheim, Tr. 1532-33; Sullivan, Tr. 3869-70; CX0311 (Sullivan, IHT at 45-46); CX8015 (Cohen, Dep. at 56-57); JX0003 at 002 (Joint Stipulations of Fact No. 5)).
40. Full-service distribution includes offering supplies and supply representatives, equipment, installation, service technicians, software, and other goods and services for running a dental office. (Mason, Tr. 2334-35; Sullivan, Tr. 3869-70; Rogan, Tr. 3553-54; CX0311 (Sullivan, IHT at 45-46); CX5005 at 006 (Form 10-K for Patterson Companies, 2017)).
41. The term full-service distributor typically refers to a distributor that employs field sales representatives and equipment repair specialists, and that offers for sale the majority of dental products, services, and technology used by a dental practice or dental business. (JX0003 at 002 (Joint Stipulations of Fact No. 5)).
42. Benco, Schein, and Patterson are each full-service distributors. (F. 3, 14, 27).

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43. Burkhart Dental Supply Company, Inc. (“Burkhart”) is a privately owned, regional full-service distributor based in Tacoma, Washington and is the fourth largest full-service distributor in the United States. (JX0003 at 002 (Joint Stipulations of Fact No. 7); Reece, Tr. 4363-64).
44. Benco identifies Schein and Patterson as its primary or largest competitors. (Cohen, Tr. 425; Ryan, Tr. 1019; CX0301 (Cohen, IHT at 42)).
45. Patterson identifies Schein and Benco as its primary or largest competitors. (Guggenheim, Tr. 1543, 1756; Rogan, Tr. 3510, 3601; McFadden, Tr. 2689, 2748).
46. Schein identifies Benco and Patterson as its primary or largest competitors. (Sullivan, Tr. 3877, 4065; Steck, Tr. 3804; Cavaretta, Tr. 5536, 5540; CX5021 at 015 (Henry Schein, Inc. 2017 Annual Report)).
47. Benco, Patterson, and Schein compete against each other in various ways, including on price. (Cohen, Tr. 662, 936-37; Sullivan, Tr. 3932; Ryan, Tr. 1241, 1266-67; Misiak, Tr. 1371, 1450; McFadden, Tr. 2748, 2758-59, 2780-81; Rogan, Tr. 3615, 3620; Steck, Tr. 3800-01; Titus, Tr. 5286-87; Cavaretta, Tr. 5536-37, 5540, 5548; Baytosh, Tr. 1905).
48. Benco, Patterson, and Schein offer discounts and lower price programs to attract new customers. (Goldsmith, Tr. 2026-27; Cohen, Tr. 465, 471-72, 645, 936-37; CX1084 at 003; Steck, Tr. 3806-07; Guggenheim, Tr. 1751-52; Misiak, Tr. 1450, 1489-90; McFadden, Tr. 2760, 2765, 2846; Rogan, Tr. 3615-17; CX8025 (Sullivan, Class 30b6 Dep. at 42-43)).
49. The dental supply distribution industry is an oligopoly, which is a market structure that is characterized by a small number of relatively large firms that dominate the industry. (RX2832 (Carlton Expert Report at 048-49); *see also* CX7101 (Marshall Rebuttal Expert Report at 012, 026-27)).
50. Benco, Schein, and Patterson have a combined market share of approximately 80% of the sale of all dental supplies and equipment made through distributors in the United States. (CX2742 at 032 (Henry Schein 2011-2013 Strategic Plan, in the United States, the “top three distributors have [a] combined market share of over 80% in the dental supplies and equipment market.”); CX3105 at 024 (McKinsey & Company, Dental business growth strategy project: U.S. market overview, December 2015)).

B. Dental Industry**1. Practice of dentistry**

51. As of 2017, there were approximately over 196,000 dentists practicing in the United States. (CX5005 at 006 (Form 10-K for Patterson Companies, 2017)).

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52. Dentists require a broad range of products in the course of treating patients and operating a dental practice. (Cohen, Tr. 403-04). A general practitioner can purchase hundreds of distinct products or SKUs in a single month. (CX3113 at 003 (Answer of Patterson ¶ 18)).
53. Dental products include dental supplies, dental equipment, technology, and other items used in the provision of dental services by a dentist or dental practice. Dental supplies are sometimes referred to as sundries or merchandise, and include items such as gloves, hand instruments, face masks, toothbrushes, anesthetic solutions, composites, amalgams, bonding agents, and bibs. Dental equipment includes imaging devices, compressors, dental chairs, stools, lights, microscopes, hand-pieces, lasers, delivery systems, monitor mounts, workstations, cabinetry, CAD/CAM (computer-aided design and computer-aided manufacturing) systems, film or x-ray processors, cameras, sterilizers, autoclaves, and sensors. (JX0003 at 001 (Joint Stipulations of Fact, Nos. 1-3); *see also* Kois, Sr., Tr. 167-68; CX1112 at 011-12 (Benco Answer ¶ 19); CX3113 at 003 (Answer of Patterson ¶ 19)).
54. Dental consumables are roughly 70% of the dental supply business in North America, while dental equipment is roughly 30%. (CX3288 at 004).

2. Independent dentists

55. The vast majority of dentists are independent dentists. (Misiak, Tr. 1425-26 (private practice today represents 70% of the total market and represented 75 to 80% of the market in 2013); Rogan, Tr. 3427, 3449 (historically, more than 90% of the dental business was private practice dentists; now about 75% are private practice); CX0303 (McElaney, IHT at 40); CX3105 at 042; RX0043 at 006).
56. Solo practitioners who own their dental practices or small group dental practices with one or a few locations are independent dentists. (Steck, Tr. 3676-78; Mason, Tr. 2324; Reece, Tr. 4364-65; CX0322 (Maurer, IHT at 13-14)).
57. Independent dentists are often referred to as “private practices.” (Sullivan, Tr. 3904; Rogan, Tr. 3427; CX8012 (Breslawski, Dep. at 20); CX0314 (Guggenheim, IHT at 59-60); CX8031 (Steck, Dep. at 22)).

3. Dental support (or service) organizations

58. In the 1990s, dentists began consolidating multiple offices into group practices managed by common ownership. (CX3285 at 029; RX2794). This consolidation resulted in a business model that is known as a Dental support (or service) organization (“DSO”). (Sullivan, Tr. 3902; CX8005 (Muller, Dep. at 103-04); Cohen, Tr. 804).
59. In most cases, DSOs consist of large group practices that have multiple locations combined under a single ownership structure and are part of a corporation. (Cohen, Tr. 411-12, 808; Foley, Tr. 4512; CX0310 (Steck, IHT at 125-26); CX0301 (Cohen, IHT at

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- 38-39); Guggenheim, Tr. 1539, 1687-88; Misiak, Tr. 1310, 1313-14; CX8021 (Reece, Dep. at 24); CX3105 at 042-49).
60. DSOs provide all of the non-clinical aspects of running a dental office that independent dentists have to do on their own, such as accounting, marketing, human resources, information technology, insurance reimbursement, patient payment collection, banking, payroll, operations, and procurement (including purchasing, supply, returns, and vendor management). (CX0315 (McFadden, IHT at 15); Puckett Tr. 2203; McFadden Tr. 2846-47).
61. DSOs handle all procurement through a single administrative and logistical point of contact to select products and quantities, negotiate pricing, and manage delivery, returns, and payments for numerous offices. (Puckett, Tr. 2205-06; Ryan, Tr. 1166; CX8033 (Cavaretta, Dep. at 42-45); CX8010 (Titus, Dep. at 26-27, 255-56); CX8005 (Muller, Dep. at 93-95)).
62. Large DSOs can have up to or more than 20 to 25 offices. (CX0314 (Guggenheim, IHT at 61); CX0306 (Foley, IHT at 15); CX0305 (Cavaretta, IHT at 25-26)).
63. Smaller DSOs can range from 3 to 20 locations. (CX0310 (Steck, IHT at 26); Sullivan, Tr. 3901-02).
64. DSOs are able to commit to certain volumes of purchases for all of their owned, managed, or affiliated practices. (Sullivan, Tr. 3902-03; Meadows, Tr. 2491-92 (“[I]f we sign a contract with a DSO, that DSO is entering into a contractual agreement that, according to the contract, would guarantee us the volume and that we would be the primary vendor in each one of that DSO’s locations.”), 2523-24; Puckett, Tr. 2201-06; Ryan, Tr. 1166; Cohen, Tr. 412-13; Foley, Tr. 4567-68; Guggenheim, Tr. 1767-68 (“[W]hen a DSO makes a commitment to buy from you, there’s a contractual agreement that’s generated, and they will represent their volume and what they’re intending to buy from you, and largely that’s directionally accurate.”); CX6599; RX2247; RX2295).
65. DSO contracts often include requirements that the DSO’s members purchase 70% or more of their supplies from a particular distributor. (CX0309 (Muller, IHT at 63); Sullivan Tr. 3903; Meadows, Tr. 2649; RX2247 at 006 (Dental One commits to “purchase 90% of its professional merchandise . . . from SCHEIN on a quarterly basis.”); RX2295 (MB2 contract listing an [REDACTED] commitment)).
66. Once DSOs contract with a particular distributor as the primary vendor, “[the] locations are instructed not to do business with” other distributors. (Meadows, Tr. 2493-94).
67. A DSO can “drive compliance” with DSO volume purchase commitments by advising offices of who the vendor partner is and the required purchase amount, and monitoring their compliance with those requirements. (CX8033 (Cavaretta, Dep. at 42-45)).

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68. DSOs typically do not need the hands-on education and consulting services offered by field sales representatives, which lowers a distributor's costs in serving them and, in turn, allows a distributor to offer DSOs formularies with reduced prices. (Meadows, Tr. 2523-24; CX8016 (Meadows, Dep. at 271-72); CX0309 (Muller, IHT at 59-60, 63)).
69. Because DSOs can commit to purchasing from a limited product formulary at set volumes, distributors can negotiate better pricing from manufacturers, passing on the savings to these customers. (CX0309 (Muller, IHT at 59-60); Meadows, Tr. 2491-92; Foley, Tr. 4687-88; *see also* Ryan, Tr. 1166 (explaining that DSOs can say "what we spend . . . will be delivered," which makes it easy to "base pricing" on such volume commitments)).

4. Management service organizations

70. Management service organizations ("MSOs") contract with dental practices to provide management services in exchange for a fee. MSOs "provide a platform with a suite of nonclinical business services that they offer to private practice dentists . . ." (Steck, Tr. 3687; Titus, Tr. 5327; Sullivan, Tr. 3902).
71. MSO services help the members manage their offices and the members pay the MSO for the management-type services provided. (CX8025 (Sullivan, Dep. at 234); CX8033 (Cavaretta, Dep. at 50-51)).
72. Some MSOs provide management services in exchange for an ownership interest in a dental practice, but in most cases there is no ownership by the MSO. (CX8033 (Cavaretta, Dep. at 50-51); CX0305 (Cavaretta, IHT at 18); *see also* CX8033 (Cavaretta, Dep. at 52-53 ("Some MSOs have the ability to drive the compliance, and it usually happens when they have equity in the practices. There's other MSOs that are just providing the services, and they let the independent – they let the doctor run the practice however they want without the procurement component of it."))).
73. Some MSOs control purchasing decisions, human resources decisions, and other business decisions of dental practices, but not all MSOs do. (Steck, Tr. 3687-88; Sullivan, Tr. 3902 (DSOs and MSOs control their members and contractually drive volume)).
74. Some DSOs may be referred to as MSOs, especially where there is limited or no equity ownership by the DSO in the individual locations. In such cases, control is exerted through a management services contract. (CX0311 (Sullivan, IHT at 209); CX0309 (Muller, IHT at 141)).
75. The term MSO is sometimes used interchangeably with DSO. (Foley, Tr. 4510; Titus, 5291-92; CX8025 (Sullivan, Dep. at 236-37) (sometimes no difference between an MSO and a DSO, a DSO may be more likely to own a practice while an MSO provides management services)).

5. Buying groups

76. Entities that are called “buying groups” are not all the same, and take many forms. (F. 77-78, 82-91).
77. A buying group is a group of independent dentists that seeks to leverage price by offering larger volume. (Sullivan, Tr. 3899 (buying group “mean[s] a group of customers that get together and form a group to negotiate with their larger volume”), 3941; Guggenheim, Tr. 1566 (a buying group is a collection of customers that work together to leverage buying power to secure pricing); Cohen, Tr. 432-33; Reece, Tr. 4365; CX0301 (Cohen, IHT at 106); CX8004 (McFadden, Dep. at 19-20 (“[A] buying group is a group of independent dentists that get together to form a group in order to get discounted dental supplies.”); CX2487 at 002 (as described by Schein: buying groups “seek to leverage their purchasing power” to extract lower prices); CX1156 at 001 (as described by Benco: “Group Purchasing Organizations. They aggregate the purchase volume of unrelated entities in order to leverage price.”)).
78. During the time period relevant to this case,⁴⁵ the terms “buying group,” “group purchasing organization” or “GPO” and “cooperative” or “co-op” were all used in reference to buying groups. (Foley, Tr. 4551 (Buying co-op is a buying group); Misiak, Tr. 1366-67 (the terms co-op, buying group, and GPO were used interchangeably); Ryan, Tr. 1022 (the term buying cooperative is interchangeable with the term buying group); Cohen, Tr. 437-38 (testifying that he thought buying group and GPO meant the same thing, and used the terms interchangeably, before his investigational hearing); Guggenheim, Tr. 1566-67 (in the dental industry, the terms GPO and buying groups are used synonymously); Steck, Tr. 3685; CX8021 (Reece, Dep. at 26)).
79. In the medical industry, a GPO is an entity that negotiates directly with manufacturers to obtain lower costs of products sold either directly or through distributors. The term has carried over into dental industry usage, although it is sometimes a misnomer. (Rogan, Tr. 3428-31; CX0311 (Sullivan, IHT at 114); CX0318 (Smurr, IHT at 28)).
80. Buying groups arose largely in response to “corporate dentistry.” (Goldsmith, Tr. 1935; Reece, Tr. 4415-16).
81. The number of buying groups in the dental industry has increased over the last five to ten years. (Sullivan, Tr. 3907-10; Cohen, Tr. 811-12).
82. Within the broad category of buying groups, there are varying characteristics. (Reece, Tr. 4367 (“[A] buying group is not a buying group is not a buying group. Each one kind of comes to us in a different way”); CX8004 (McFadden, Dep. at 119-20) (“[B]uying groups were not all created equally. And they were like a jar of jellybeans. They each tasted differently.”); Cavaretta, Tr. 5569).

⁴⁵ Unless otherwise specified, the phrases, “time period relevant to this case” or “relevant time period,” refer to the 2010 through 2017 time period.

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83. Dave Steck, Schein's vice president and general manager, described some of the "different structures" of buying groups in a 2015 presentation: "Annual Fee Based; Percent of Gross Based; 'Loose' and 'Binding' Commitments; Dental Associations, Study Clubs, etc." (CX2835 at 008; Steck, Tr. 3746-48 (some groups were "more desirable," such as "ones that could commit volume").
84. Some buying groups are based on a loose affiliation. As Jeff Reece of Burkhart, a regional distributor, stated: "It just seems like it's a couple of guys that over cocktails decided they wanted to save money on supplies, so they formed a group of buddies." (CX0319 (Reece, IHT at 76). *See also* Puckett, Tr. 2237-38 (Some buying groups are formed with members with no true affiliation with each other, "for example, just four dentists at a bar saying let's get together and order cheaper toothbrushes."); Rogan, Tr. 3432).
85. Some buying groups offer more to their members than discounts on purchases of dental supplies. (F. 86-87, 90-91).
86. A dental co-op provides benefits beyond negotiating a discount on purchases of dental supplies. As described by Dr. Brenton Mason, a founding member of the New Mexico chapter of the Dental Co-Op of Utah, "A dental cooperative is a group of individuals that collaborate for the entire business," including insurance negotiation, dental supplies, equipment, obtaining business insurance, and banking. (Mason, Tr. 2327-29, 2331 ("The buying group deals with . . . mostly the dental supplies and the dental equipment. The cooperative deals with the entire business.")).
87. A buying group's value-added services can include education, training, and financial and marketing services. (*See* CX4109 at 004; R. Johnson, Tr. 5482, 5484-88). For example, the buying group Klear Impakt offers its members, in addition to discounts on supplies, "streamlining and efficiency class[es] that would teach people the process of a patient walking through an office from beginning to end"; phone training classes; patient experience classes; financing assistance for patient procedures or office expansion or acquisition; hiring assistance through personality assessments; business coaches; marketing; business management; leadership training and coaching; and waiting room television programming. (R. Johnson, Tr. 5482, 5484-89; CX4109 at 004).
88. Value-added services and offerings given to members helps a buying group retain members. (Meadows, Tr. 2544-45 (referring to this as "stickiness"))).
89. Some DSOs have created buying group affiliates or arms, the members of which are independent dentist offices. (Puckett, Tr. 2214-15; *see also* CX2372 at 002 (noting "[m]any of the DSOs are starting to open 'affiliates' . . .")).
90. Some buying groups are set up as a franchise system. Under a franchise system, members sign a franchise agreement that allows the member to use the buying group's name and participate in purchasing, education, marketing, and any other programs the buying group offers in accordance with the terms of the agreement. (*See, e.g.*, RX0290 at

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00099-100; Goldsmith, Tr. 2046 (“We utilized a franchise agreement in order to allow our members to work together.”); Maurer, Tr. 4936 (“As a franchise, they get separate territories and they get a number of business service offerings from us.”)).

91. Some dental consulting firms – firms that provide independent dentists with business and marketing consulting services – have sought to add a discounted purchasing component. (CX0165).
92. Some independent dentists join buying groups to try to get savings on purchases of dental supplies. (Sullivan, Tr. 3907-08; Mason, Tr. 2332-33; CX0321 (Kois Jr., IHT at 19-22); RX2952 (Maurer, Dep. at 154) (dentists join buying groups for the discounts); CX0320 (Capaldo, IHT at 34) (Georgia Dental Association formed a buying group to save money on supplies for its members); Puckett, Tr. 2220 (Dental Gator buying group sought to secure greater discounts for independent dentists than the dentists could secure on their own)).
93. Buying groups try to leverage purchasing power of a group while allowing dentists to remain independent. (CX2487 at 002 (“buying groups seek to leverage their purchasing power”); Guggenheim, Tr. 1566 (buying groups are a collection of customers that work together to leverage buying power to secure potentially lower pricing and service incentives); Reece, Tr. 4415-16; Goldsmith, Tr. 1934-36; CX0322 (Maurer, IHT at 19-20) (Smile Source promotes independent dentistry by obtaining discounts on dental supplies and equipment for its members); CX8029 (R. Johnson, Dep. at 117) (Klear Impakt wants to grow to help independent dentists get discounts on supplies)).
94. Buying group purchase orders are placed by each individual member, and distributors ship to the individual member. (RX2928 (member “[p]urchases are made directly from the vendor”); Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65).
95. The concept of buying groups in the dental industry dates back to the mid-1990s. (Cohen, Tr. 444-45, 877, 998-99; Sullivan, Tr. 3912-13; CX2287 at 001).
96. The number of buying groups in the dental industry has increased over the last decade. (Sullivan, Tr. 3907-10; Cohen, Tr. 811-12; CX8025 (Sullivan, Dep. at 66-67)).

C. Benco’s Approach to Buying Groups**1. Organization of Benco**

97. Benco currently has approximately 1,500 employees. Its sales force is comprised of equipment specialists, service technicians, and territory representatives. (Cohen, Tr. 608, 612).
98. Benco has a hiring agreement in place with Schein. F. 563. Since 1998, Benco has hired over 120 sales representatives from Schein. (Cohen, Tr. 642).

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99. Benco started building a Strategic Markets business around 2004. Benco's Strategic Markets division includes any customer segment that goes beyond an independent dental practice, including DSOs, dental laboratories, institutions, such as prisons and the federal government, community health centers ("CHCs"), universities and schools. This Strategic Markets division was originally called Special Markets. In 2013 or 2014, its name was changed to Strategic Markets. (Cohen, Tr. 802-05; Ryan, Tr. 1154-55).
100. At the time Benco started building its Strategic Markets division, Benco had an internal conversation around the consolidation of dental practices and the growth of DSOs. Although Strategic Markets are a lower-margin market and require a different go-to-market strategy, Benco decided that it could not ignore that market. (Cohen, Tr. 804).
101. Chuck Cohen has been the managing director of Benco since 1998. Along with his brother, Rick Cohen, and Benco's management team, Chuck Cohen oversees Benco's business strategy, including its strategy for growth, development, and expansion. (Cohen, Tr. 399-401).
102. Patrick Ryan has held many positions with Benco, sometimes concurrently, including director of sales, director of Special Markets, and director of business development. (Ryan, Tr. 1012-16). While in these positions, Ryan reported directly to Chuck Cohen. (CX8037 (Ryan, Dep. at 23-24)).
103. As director of Special Markets (also known as Strategic Markets (F. 99)), Ryan was responsible for large groups such as DSOs, community health centers, and federal government customers. (Ryan, Tr. 1014). As director of sales, Ryan had responsibility for all regions, including 48 states, and had approximately 8 direct reports and 60 to 100 indirect reports, including territory representatives and equipment specialists. (Ryan, Tr. 1011-13).

2. Policy against working with buying groups

104. Starting in the mid-1990s, Benco had a policy of not recognizing or selling to buying groups. Benco defines buying groups as "a group of otherwise unrelated dental practices that attempts to use their combined volume in order to leverage price." (CX1146 at 001; Cohen, Tr. 444-45; Ryan, Tr. 1027-28).
105. Benco believes that buying groups demand lower prices without providing anything in return, and that it does not make business sense to sell to buying groups, which Benco viewed as middlemen. (Cohen, Tr. 444-45, 679, 685).
106. In 1996, Cohen made the decision to articulate and implement Benco's policy of not doing business with buying groups. (Cohen, Tr. 692-94).
107. When Benco receives requests to do business from buying groups, the requests are routed to Ryan. (Cohen, Tr. 810).

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108. Ryan is the individual at Benco responsible for determining whether an organization is a buying group. (Cohen, Tr. 717; Ryan, Tr. 1167).
109. Ryan and Cohen were the decision makers for determining whether to apply Benco's no buying group policy to particular organizations. (Cohen, Tr. 717-18).
110. As head of Benco's Special Markets division, Ryan enforced Benco's policy with respect to buying groups. (Ryan, Tr. 1025-26).
111. Benco's no buying group policy applied to all buying groups, regardless of the services the group provided. (CX1372 at 002 (Statement of Cohen: "Benco does NOT currently recognize as a single customer . . . Any kind of GPO whether they provide additional services or not.") (ellipses and capitalization in original); CX1120 at 001 (Statement of Cohen: "[W]e don't offer discounts to buying groups or similar groups of dentists"); Ryan, Tr. 1029 ("Q. And it is fair to say that once you found out a group was a buying group, the answer was no from Benco, meaning no, Benco wouldn't work with them? A. Correct. We would tell them what our policy is and move on.")).
112. Benco's no buying group policy was "always communicated" to the sales team, as well as "up and down the company." (Ryan, Tr. 1031-32; CX1146 (Ryan explaining the no buying group policy to regional managers); CX8037 (Ryan, Dep. at 46-50); *see also* CX0090 at 001 (Statement of Benco's Cohen to Patterson's Guggenheim: "Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups . . . and our team understands that policy.")).
113. Cohen was "adamantly against" and "extremely opposed" to buying groups and felt strongly about Benco's no buying group policy. (CX1234 at 001 (Statement of Don Taylor (Benco regional manager)): "Chuck Cohen is adamantly against buying groups. He will not let us participate because he doesn't think everyone should get the same price[.] It's one of the only times I have seen him really get fired up."); CX1040 at 001 (Statement of Mark Rowe (Benco director of sales)): "Chuck [Cohen] has always been extremely opposed to any hint of a buying group."); Ryan, Tr. 1031 (Cohen felt strongly about Benco's no buying group policy)).
114. Ryan believed that all distributors should feel the way Benco did about buying groups. (Ryan, Tr. 1116; CX8037 (Ryan, Dep. at 116-17)).
115. Ryan instructed his sales team to turn down buying groups, even when the sales team inquired about or expressed an interest in competing for buying group business. (CX1242 at 001-02; Ryan, Tr. 1042-43). On March 24, 2011, a Benco regional manager (Brian Evans) wrote regarding a buying group, "If we can, this would be a great opportunity to win some business from Schein." (CX1242 at 002). In response, Ryan wrote, "We do not participate in buying groups. Ever." (CX1242 at 001).

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116. On March 24, 2011, Ryan forwarded an email from his sales team regarding the Dental Cooperative buying group to Cohen and other Benco employees and wrote: “We all know the answer here, right? Not no, hell no.” (CX1038 at 001).
117. In an August 27, 2013 email to a Benco regional manager and other Benco employees, Ryan wrote: “Group Purchasing Organizations. They aggregate the purchase volume of unrelated entities in order to leverage price. We do not recognize them. GPOs are why medical works at the margins they do.” (CX1156 at 001).
118. In an August 14, 2014 conversation between Benco’s Ryan and another Benco employee, Ryan stated that Smile Source is “terrifying” and expressed concern about “full service guys get[ting] in” to serving buying groups. (CX0015 at 001 (Ryan: “They are terrifying If it’s just Darby,⁴⁶ I don’t care as much . . . but when the full service guys get in . . . Huber: Yeah, the last thing we want is reliable service for these groups.”) (ellipses in original); Ryan, Tr. 1043; CX0304 (Ryan, IHT at 190)).

3. Internal communications referencing buying groups

119. On February 23, 2013, on an internal Benco message board, Benco’s Ryan responded to a post inquiring about when multiple offices can be deemed a single customer. After explaining the conditions under which Benco would treat multiple offices as a single customer, Ryan stated that any entity that does not meet those conditions is “a ‘buying club’ or GPO. Benco does not recognize GPOs as a single customer. GPOs are what [ruined] the medical supply business and why they work on single digit margins. If this door is ever opened in dental, it’s all over for all of us. . . . [P]icture a day when every single customer of yours is in some kind of buying club and all margins are now 12% over cost and it’s a race to the bottom. It [doesn’t] catch on here, because so far, all of the major dental companies have said, ‘NO’, and that’s the stance we will continue to take.” (CX1149 at 002 (capitalization in original)).
120. Ryan disclaimed any personal knowledge of any other dental companies’ position on buying groups and explained that his statement in CX1149 (F. 119) regarding “all major dental companies” having said “NO” to buying groups was based on what he had “seen in the field” and his “sense from market intel.” Ryan acknowledged that his statement as to Schein was “pure speculation.” (Ryan, Tr. 1222, 1253).
121. On September 16, 2013, Ryan wrote in an email to Cohen in response to concern that Burkhart was selling to buying groups: “CHUCK – maybe what you should do is make sure you tell Tim [Sullivan] and Paul [Guggenheim] to hold their positions as we are[.]” (CX0023 at 001 (capitalization in original); Ryan, Tr. 1113-15; Cohen, Tr. 581-82).

46 Darby Dental Supply, LLC (“Darby”) is an online distributor of dental supplies that sells supplies and equipment (except larger equipment) and does not provide in-office services. (Ryan, Tr. 1046-47; Goldsmith, Tr. 1947; CX0310 (Steck, IHT at 60); CX0315 (McFadden, IHT at 72-73); CX0314 (Guggenheim, IHT at 52-54)).

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122. Cohen did not call Schein's Sullivan or Patterson's Guggenheim in response to Ryan's September 16, 2013 email (F. 121). (Cohen, Tr. 842-43; 901-04; CX6027 (communications log prepared by Complaint Counsel show no such communication)).
123. Ryan described his September 16, 2013 email (F. 121) as venting and had no knowledge of Cohen doing anything in response to the email. (Ryan, Tr. 1263).
124. On May 19, 2015, Benco's Ryan received an inquiry from Dentistry Unchained, a buying group that "want[ed] to use Benco." Ryan wrote in an email to Cohen: "The best part about calling these [buying groups] is I already KNOW that Patterson and Schein have said NO." (CX0012 at 001 (capitalization in original)).
125. Ryan explained that his statement in his May 19, 2015 email (F. 124) was based on his experience that "typically, when we [Benco] get approached . . . it's usually since we're the third player in the market[.] . . . [W]e're usually approached third." (Ryan, Tr. 1124-25, 1209-10).
126. Ryan's statement in his May 19, 2015 email (F. 124) that Schein had already said "NO" to Dentistry Unchained was wrong. Dentistry Unchained approached Schein in May 2015. (RX2115 at 006; Titus, Tr. 5272). Schein sent Dentistry Unchained a non-binding letter of intent in July 2015. Negotiations continued through April 2016. (RX2334 at 001; RX3090 at 001; RX2597 at 002). At that time, Dentistry Unchained sent to Schein a mockup of the new Dentistry Unchained website, which listed Patterson products and caused Schein's vice president of sales, Joe Cavaretta, to reevaluate the prospects of a partnership: "I don't think we are close to launching any longer and I'm actually closer to walking now." (RX2457 at 001). After Dentistry Unchained refused to remove the competitive information from its website, Schein discontinued the negotiations with Dentistry Unchained. (RX2229 at 002; Cavaretta, Tr. 5611-12; Titus, Tr. 5272-73).
127. Ryan's statement in his May 19, 2015 email (F. 124) that Patterson had already said "NO" to Dentistry Unchained was wrong. Dentistry Unchained approached Patterson in July 2015. (CX3006 at 001). On July 29, 2015, Bill Neal, a territory manager reported on his telephone call with representatives of Dentistry Unchained to Neal McFadden, writing: "a GPO arrangement" can be a "slippery slope." "I was honest with them that we have not elected to participate in these type of programs in the past." (CX3006 at 001-02).
128. On July 13, 2015, Ryan wrote an email to a Benco sales representative who was inquiring about doing business with a buying group, stating: "We don't allow LG [large group] pricing unless there is common ownership. Neither Schein nor Patterson do either." (Ryan, Tr. 1126-27; CX1185 at 002).
129. Regarding his statement in his July 13, 2015 email (F. 128), Ryan disclaimed any actual knowledge of Schein's or Patterson's positions regarding buying groups. (Ryan, Tr. 1114-15 ("Again, I had no knowledge of what their position actually was. I only know what I can see in the street.")).

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4. Refusal to work with buying groups

130. Benco did not bid for the buying group Synergy Dental Partners in 2011. (Ryan, Tr. 1131, 1170-71; CX1133 at 001 (Statement of Ryan: “this group approached every full service dealer, including us . . . and were turned down.”)).
131. Benco did not bid for Nexus Dental in 2011. (Ryan, Tr. 1032-33; CX1143 at 001 (Statement of Ryan: “While we realize the supplies are a small part of what you are doing, it still meets our definition of a buying group, as it aggregates the volume of completely unrelated practices, without any centralized services, in order to leverage price. We simply can’t open that door.”)).
132. Benco did not bid for Smile Source when it approached Benco in 2011, 2012, and 2014. (F. 808-818; CX1138 at 001 (Statement of Ryan to Smile Source in 2011: “Unfortunately, I don’t think we would be able to help you. Your structure meets our definition of GPO, and Benco does not participate in group purchasing organizations.”)).
133. Benco did not bid for a buying group being started by a dentist, Dr. David Carter, in 2012. (CX1197 at 001 (Statement of Ryan: “They are trying to start a buying group. Told them we don’t recognize buying groups.”)).
134. Benco did not bid for the buying group Unified Smiles in 2012. (Ryan, Tr. 1139; CX1144 at 001 (Statement of Ryan: “We’ve already spoken to them and turned them down.”)).
135. Benco did not bid for XYZ Dental in 2012. (CX1198 at 001 (Statement of Ryan: “In order for us to recognize a group of offices as a single customer, they must meet one of the following ownership definitions . . . If this group does not meet one of these ownership models, we would consider them a GPO or ‘buying club’ and Benco does not recognize these types of affiliations.”) (ellipses in original)).
136. Benco did not bid for the DDS Group in 2013. (CX1200 at 002 (Statement of Ryan: “This is clearly a buying group. What are we doing for them?”)).
137. Benco did not bid for WheelSpoke LLC in 2013. (CX1199 at 001 (Statement of Ryan: “Benco does not recognize ‘buying groups’ – Cannot open this account.”)).
138. Benco did not bid for Erie Family Dental Equipment in 2013. (CX1238 at 001 (Statement of Ryan: “We absolutely positively do NOT participate in GPOs. NO if ands or buts.”) (capitalization in original)).
139. Benco did not bid for the American Academy of Cosmetic Dentistry’s buying group in 2013. (CX1202 at 001 (Statement of Ryan: “Benco Dental does not participate in GPOs or buying groups.”)).

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140. Benco did not bid for Dental Visits LLC in 2014. (CX1226 at 001 (Statement of Ryan: “Benco has a firm policy of nonrecognition of GPOs as a single customer.”)).
141. Benco did not bid for the Kojs Buyers Group in 2014. (F. 898-899; CX1075 at 001 (Statement of Cohen: “I spoke with the gentleman who’s putting it together, and told him that we don’t work with buying clubs.”)).
142. Benco did not bid for the Dental Purchasing Group in 2014. (CX1228 at 001 (Statement of Ryan in response to a question from Dental Purchasing Group asking if Benco would do business with them: “No, thank you.”)).
143. Benco did not bid for the buying group Insight Sourcing Group in 2014. (Ryan, Tr. 1133; CX1205 at 001 (Statement of Ryan: “Be polite but tell them we don’t participate.”)).
144. Benco did not bid for Schulman Group in 2014. (CX1207 at 001 (Statement of Ryan: “Buying group. Don’t put anything in front of them.”); CX1206 at 001 (Statement of Brian Evans (Benco’s west director of sales)): “The Schulman Group is a buying group (of sorts) and we don’t participate in that business.”).
145. Benco did not bid for the buying group Dentistry Unchained in May 2015. (Ryan, Tr. 1123-24, 1131; CX0012).

5. Elite Dental Alliance

146. Sometime after June 2015, Benco partnered with Cain, Watters & Associates [“Cain Watters”], an accounting firm that works with dentists, to create the Elite Dental Alliance (“EDA”). (Cohen, Tr. 452-53).
147. Cohen’s notes from a meeting held on November 10 and 11, 2015 stated: “If Benco could start a good GPO it would be to their advantage over Schein and Patterson (Elite Dental Alliance).” Cohen’s notes also stated that while such groups have “never worked in the past,” this time, Benco would “co-own” the group. (CX1239 at 002).
148. EDA was formed as a joint venture between Benco and Cain Watters sometime after June 2015. (Cohen, Tr. 814). Benco has “veto power over vendors,” has “control over the rules for admitting members,” and receives 50% of the group’s profits. Every EDA member practice must make a minimum purchase commitment, which is factored into the discount they receive from Benco. (Cohen, Tr. 468, 816-17, 820-21; CX1282).
149. EDA is a jointly controlled (by Benco and Cain Watters) buying group. (Cohen, Tr. 448-49; CX0301 (Cohen, IHT at 107)).
150. EDA is the first buying group that Benco has worked with and provided with discounts. (Cohen, Tr. 449; CX8015 (Cohen, Dep. at 287, 300)).

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151. Benco made an exception to its no buying group policy to work with Cain Watters to develop EDA because of the unique features of EDA. (Cohen, Tr. 451, 819, 824).

D. Schein's Approach to Buying Groups**1. Organization of Schein**

152. Schein's dental business consists of two separate divisions: Henry Schein Dental ("HSD") and Henry Schein Special Markets ("Special Markets"). The two divisions collaborate with each other on certain matters, but otherwise operate independently. That is, neither division reports to the other. (Sullivan, Tr. 4091; Meadows, Tr. 2460, 2475; CX0309 (Muller, IHT at 12-13); CX8033 (Cavaretta, Dep. at 198)).
153. HSD and Special Markets have separate marketing, merchandising, and sales teams. (CX0309 (Muller, IHT at 13)).
154. HSD and Special Markets are two different divisions, with "two different P&Ls [profits and losses], two different budgets." (Sullivan, Tr. 4091).
155. The presidents of HSD and Special Markets report to Jim Breslawski, president of Henry Schein, who oversaw both Henry Schein Dental and Henry Schein Special Markets from 2005 to the present. (Foley, Tr. 4516, 4519; CX8012 (Breslawski, Dep. at 39); Sullivan, Tr. 3908, 4091).
156. In 1997, Schein acquired Sullivan Dental Products and placed Tim Sullivan in charge of HSD. (CX0311 (Sullivan, IHT at 11-12); RX2673 at 005). Sullivan is not presently, and never was, the sole decision-maker for HSD or Schein. (CX8025 (Sullivan, Dep. at 57-58)).
157. Although Sullivan was involved in internal discussions as to whether HSD should work with a buying group, he did not necessarily make the final decision with respect to a buying group. (Sullivan, Tr. 3919, 3998-99).

a. Henry Schein Dental

158. HSD is the larger of Schein's two divisions. (Sullivan, Tr. 3872-74 (there are "roughly 3000 team Schein members" in HSD, not including FSCs); CX0309 (Muller, IHT at 25-26 (Special Markets has "99 employees"))).
159. Schein's dental field sales force, including FSCs, falls within HSD. (Sullivan, Tr. 3871-72).
160. HSD sells supplies, equipment, and technology via its 800-plus FSCs, 100-plus telesales representatives, hundreds of equipment sales specialists, five distribution centers, and online portals. (RX2673; RX2930; CX5021; Sullivan, Tr. 3875, 4039-41).

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161. HSD seeks to provide “high-touch,” personalized service through FSCs. FSCs visit their customers about every two weeks to discuss new products and take orders for anything the office may need. (CX8001 (Foster, Dep. at 12, 36); Meadows, Tr. 2560; RX2673). FSCs also visit a customer’s office repeatedly each month to advise the practice owner on how he or she can be more efficient and profitable. (CX0311 (Sullivan, IHT at 26); Sullivan, Tr. 3869-70, 4039-40, 4058-60; Cavaretta, Tr. 5541-42, 5548; Steck, Tr. 3784-86; Meadows, Tr. 2525).
162. Schein’s FSCs are trained to assist dental offices with products, clinical techniques, and practice management solutions to improve an office’s “efficiency, productivity [and] profitability.” (RX2429 at 010-11; Steck, Tr. 3801; Cavaretta, Tr. 5548; Sullivan, Tr. 4036-37, 4058-60).
163. HSD’s pricing programs for individual practice dentists are called Volume Purchase Agreements (“VPAs”), which provide discounts to dentists who commit to purchasing a particular volume. (Meadows, Tr. 2554; Steck, Tr. 3797-98; Sullivan, Tr. 4064).
164. FSCs mostly focus on serving individual dental practitioners and small to mid-size purchasers, which are the customers who represent the traditional private practice model of dentistry. (Meadows, Tr. 2629; CX0305 (Cavaretta, IHT at 49-50); CX0311 (Sullivan, IHT at 21-22)).
165. Schein also provides many business consulting services at no cost to the dentist, which requires Schein to hire and train sales consultants. (RX2429 at 010-11 (Schein’s FSCs are trained to assist dental offices with products, clinical techniques, and practice management solutions to improve an office’s “efficiency, productivity [and] profitability”); Steck, Tr. 3801; Cavaretta, Tr. 5548; Sullivan, Tr. 4036-37, 4058-60).

b. Special Markets division

166. Schein’s Special Markets division, launched in 1995, primarily serves customers other than independent dentists, such as federal and state government purchasers, dental schools, community health centers, other institutions, and dental support organizations (DSOs). (CX0309 (Muller, IHT at 9); Foley, Tr. 4509; Sullivan, Tr. 4109-10; Steck, Tr. 3733; Titus, Tr. 5196; Foley, Tr. 4637; RX 2392).
167. Schein’s Special Markets division was led by its president, Hal Muller, from 2008 until early 2018. (Foley, Tr. 4516; Steck, Tr. 3807). Randy Foley was the vice president of sales for Schein Special Markets from 2013 until December 2016. (Foley, Tr. 4508).
168. Through its Special Markets division, Schein was one of the first distributors to pursue DSOs and other large group purchasers, such as federal government agencies and institutional customers. (CX0309 (Muller, IHT at 9, 15-16); Foley Tr. 4509; McFadden Tr. 2783-84).
169. DSO customers are Special Markets’ “bread and butter.” (Foley, Tr. 4637).

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170. Because Special Markets specializes in servicing large clients, it does not need to provide the same types of individualized services and support that FSCs provide to individual dentists, such as visiting the dentist's office every two weeks. (Sullivan Tr. 4093-94; CX8016 (Meadows, Dep. at 270-72); CX0309 (Muller, IHT at 20, 59-60)).
171. Although FSCs sometimes visit certain Special Markets accounts (and the equipment sales specialists served their equipment needs), Special Markets' costs are lower than HSD's costs, which include the commissions HSD pays to FSCs. (CX2024 (2015 FSC Compensation Plan, Henry Schein Dental, Slides 7-9); Foley, Tr. 4661; Meadows, Tr. 2521-23).
172. Special Markets has expertise in negotiating with central procurement agents, developing specialized formularies, negotiating customer-specific discounts from manufacturers, and working with central entities to drive compliance with volume provisions, requirements, and/or expectations. (CX8003 (Foley, Dep. at 27-28, 38-39, 109, 119, 342-43); CX0306 (Foley, IHT at 63, 69); CX8005 (Muller, Dep. at 63, 93-94); Steck, Tr. 3731).
173. A formulary is a focused group of products derived from Schein's total offerings ("say five or six thousand products" out of a hundred thousand) that Schein would "heavily discount . . . on a pricing list." (Meadows, Tr. 2474, 2477-80).
174. In addition to DSOs and other centralized purchasers, Special Markets worked with buying groups. (CX8005 (Muller, Dep. at 31); CX8003 (Foley, Dep. at 38-39)).
175. Given Special Markets' expertise (F. 172), Special Markets typically worked with buying groups that were centrally managed, had broad geographic reach or required customer formularies. When it appeared that a buying group customer was weak in maintaining some kind of centralized control or functionality and needed more care at the individual office level, that customer would be serviced by HSD instead of Special Markets. (CX8003 (Foley, Dep. at 38-39) (Special Markets was "very centralized in how [it] operated" and worked with buying groups that "had a strong central team" to work with. "In a world in which the buying group was kind of weak in maintaining some kind of centralized control or functionality and needed more care at the office level, we decided that those would be better serviced by HSD. It was on a per basis, you know, an analysis of a customer and as we learned more about the customer."), 109 (a buying group with a centralized team can "drive compliance"), 119 (if a buying group sets up a large centralized team, "it may work better that Special Markets run it centrally and work with the FSCs on it like it would a DSO . . . [b]ut if it's just to offer perhaps reduced pricing and services to its members, it may be better off in HSD), 342-43 ("Special Markets had a more – had more flexibility in the price and how it attached pricing plans to multiple sites associated with a similar group. It also had . . . a better way to create a central site and do reporting for all the sub-sites."); CX0306 (Foley, IHT at 63, 69); CX8005 (Muller, Dep. at 63, 94); Steck, Tr. 3731).
176. During the time period relevant to this case, both HSD and Special Markets had at least some involvement or responsibility for Schein's buying group relationships, though

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primary responsibility shifted during the relevant time period. (Sullivan, Tr. 4091-92, 4113; Meadows, Tr. 2616; Foley, Tr. 4523).⁴⁷

177. Prior to the creation of the Mid-Market group within HSD in mid-2014,⁴⁸ the HSD field sales force “had responsibilities for doing due diligence” with respect to buying group opportunities, “but generally the centralized contracting and the creation of formularies . . . fell to Special Markets.” (Meadows, Tr. 2481).
178. Prior to mid-2014, when Schein created its Mid-Market group (F. 177), primary responsibility for buying groups rested with Special Markets. (Sullivan, Tr. 3918, 4091, 4112-13; Steck, Tr. 3731-32, 3735-36; Cavaretta, Tr. 5588; Meadows, Tr. 2476; Titus, Tr. 5196-98; Foley, Tr. 4607-09).

2. Risks and benefits of buying groups for Schein

179. Sullivan described himself as having “always been . . . very skeptical” about the value that buying groups can bring both to Schein or the individual dentist members. (Sullivan, Tr. 4085, 4243, 4256).
180. Notwithstanding skepticism about the value of buying groups, Schein has worked with them when it made business sense. (Sullivan, Tr. 4085 (“I’ve seen some work, and we’ve taken a chance and we’ve engaged with some, and many we don’t see work.”); Cavaretta, Tr. 5568-70, 5574-76 (despite various challenges, “some buying groups did represent an opportunity where there was mutual growth”); Titus, Tr. 5199 (“Some are good and healthy business partners for Henry Schein and some are not so good, and it was my job to help to establish those that made sense and those that perhaps did not.”)).
181. Schein saw buying groups as offering potential economic benefits, but also as posing certain economic risks and the risk of internal conflicts for Schein. (F. 182-211).
182. Schein recognizes that some buying groups might be able to present an economic benefit to a distributor if they had the ability to bring new customers to the distributor that the distributor could not otherwise obtain by offering a discount to the individual members. (Meadows, Tr. 2487, 2489-90).
183. Joe Cavaretta, a Schein vice president of sales, views buying groups as challenging for a distributor to engage with because the group typically does not commit that the individual dentist members will increase their purchases from the distributor(s) with which the group contracts, and the group has no control over where the members buy. In addition, it is a challenge for some groups to maintain members, where the group is not offering any “value proposition” for the members in exchange for the membership fee, other than price discounts. (Cavaretta, Tr. 5568-69).

⁴⁷ Schein’s dealings with specific buying groups are detailed in section III.F.

⁴⁸ More details concerning Schein’s Mid-Market group within HSD are set forth in section III.D.4.b.

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184. In evaluating buying group opportunities, Schein looked for the characteristics of exclusivity, compliance, and stickiness, which terms are further explained in F. 185-194. (Meadows, Tr. 2495, 2506, 2544; Sullivan, Tr. 4088, 4098-99; Cavaretta, Tr. 5574-76; Titus, Tr. 5199-202; Foley, Tr. 4638-39, 4614-15).
185. Exclusivity refers to a buying group's willingness to work exclusively with Schein, which can be a benefit to the distributor. Absent a promise of exclusivity, customers will have other choices within the buying group. (Titus, Tr. 5201, 5236-37; Meadows, Tr. 2487-88, 2495; RX2941 (Sullivan, Dep. at 511-12) (describing exclusivity as "whatever group that [Schein] signed up with, they have exclusively said Henry Schein is the sponsor . . . [even though] their member[s] . . . can still purchase from wherever they choose"))).
186. From Schein's perspective, exclusivity is important because Schein must devote resources to supporting the buying group, understanding its culture, and helping the buying group "round out" its member offering. In order to justify expending these resources, Schein looks for "an opportunity to be exclusive with that buying group, so we wouldn't want to have them invite our competitors to share that same partnership." (Titus, Tr. 5201).
187. Buying groups that can provide a commitment to purchase from a particular distributor, referred to within Schein as "compliance," might be able to present an economic benefit to a distributor like Schein. Without such a commitment, buying group members can "cherry-pick" and "basically only pick the items that were cheapest on the formulary" instead of giving Schein "all their business." (Meadows, Tr. 2487-88, 2490-91).
188. From Schein's perspective, compliance refers to a commitment by the buying group membership to purchase from Schein. (Sullivan, Tr. 4088, 4100; Meadows, Tr. 2487-88; RX2941 (Sullivan, Dep. at 511-12) (describing compliance as the group's members' "understand[ing] who their dealer partner is, [and] they actually are complying with the terms . . . of the agreement that [Schein has]"))).
189. Schein looked for "[buying group] partners that could actually move the needle, meaning that they could enforce a certain amount of compliance and . . . affect and influence the behavior of those [buying group] customers to buy from Henry Schein." (Titus, Tr. 5201-02; *see also* Sullivan, Tr. 4088).
190. Schein views compliance as one of the fundamental issues with buying groups. (Sullivan, Tr. 4098; Cavaretta, Tr. 5660-61 (noting compliance remains an issue with Schein's current partnership with Smile Source)).
191. Schein looked for "mechanisms in place where [the group was] able to communicate and educate their members on why it was important that they were buying from the dealer that was supporting the buying group." (Cavaretta, Tr. 5574-76; Titus, Tr. 5207-08 ("[W]e were looking for somebody that could [have] influence with those dentists who buy from Henry Schein, and those dentists had to have a degree of credibility with their

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dentists. They had to be offering something more than just an opportunity to get a discount in order to have that credibility”).

192. As Schein’s Kathleen Titus explained at trial, “exclusivity and compliance go hand in hand. [Y]ou can promise exclusivity. However, if you don’t have compliance, it’s an empty promise” (Titus, Tr. 5201-02).
193. From Schein’s perspective, stickiness refers to value-added services and characteristics such as camaraderie, education, or other services that complement Schein’s value proposition and would help a buying group retain and influence its membership. In other words, it is a group’s “effectiveness with the members.” (Sullivan, Tr. 4004, 4088; Meadows, Tr. 2487-88, 2506, 2544-45; Cavaretta, Tr. 5568-69; Foley, Tr. 4621-22).
194. The characteristic of stickiness in a buying group is important to Schein because offering nothing more than price discounts cannot guarantee that dentists will shift their purchases to the designated buying group distributor. Dentists typically do not make purchasing decisions solely on the basis of price. (Meadows, Tr. 2506-07 (“dentists are very hard to win or they’re hard to change their behaviors”), 2508-09 (describing time investment related to learning new ordering logistics when switching distributors); Meadows, Tr. 2508 (“[B]ecause a customer’s behavior is so hard to change . . . I don’t believe that we would get the new customer growth that we would expect from that buying group if they were only price-focused.”); *see also* Kois Sr., Tr. 173-74, 176, 227).
195. Schein’s goal in doing business with a buying group would be to reach new customers. (Meadows, Tr. 2489). In Schein’s assessment, this generally took some combination of exclusivity, commitment, and stickiness. (Meadows, Tr. 2506).
196. Not all buying groups exhibit the characteristics of exclusivity, compliance, and stickiness. (Sullivan, Tr. 4088-90; Foley, Tr. 4614-16, 4618; Titus, Tr. 5202; Cavaretta, Tr. 5555, 5660-61; *see also* Reece, Tr. 4460).
197. In Schein’s experience, if “there is not an actual business structure in place, it usually leads to there’s no value proposition, there’s no compliance, and it’s just a loose group and from a business standpoint [it] makes very little sense for us to do business with [those buying groups].” (CX8033 (Cavaretta, Dep. at 133-34); *see also* Sullivan, Tr. 4090 (stating that many of the buying groups that Schein meets with “don’t have that stickiness, don’t have the compliance, don’t have other things that drive value for their members who are our customers, and it is only around price . . . [which] devalues our brand or what Henry Schein stands for”))).

3. Internal conflicts and risks for Schein

198. One of the “most glaring” risks for Schein of working with a buying group is the risk of cannibalization. Cannibalization occurs when a distributor offers discounts to a buying group, but those discounts are going “to existing customers that [the distributor] already had.” (Meadows, Tr. 2506-07).

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199. In evaluating a buying group opportunity, Schein will assess the makeup of a buying group's membership to evaluate the potential profitability and the risk of cannibalization. (Sullivan, Tr. 4088-89, 4126; Titus, Tr. 5208; Cavaretta, Tr. 5607-08, 5571-72; Meadows, Tr. 2489-90).
200. The risk of cannibalization is higher for Schein than for other distributors because Schein is the largest distributor in the United States. (Cavaretta, Tr. 5573-74, 5606-08; Sullivan, Tr. 4089).
201. Schein evaluates whether providing discounts on purchases through the buying group that are beyond those Schein would offer to individual dentists purchasing through their FSC might cannibalize Schein's sales to existing customers and thereby make discounting through the buying group potentially less profitable than not discounting to the buying group. (Meadows, Tr. 2489-90; Cavaretta, Tr. 5571-72).
202. As described by Complaint Counsel's expert witness, Dr. Clifton Marshall, the "cannibalization effect" occurs "when a firm reduces its price in supplying a buying group, [and] some of the . . . dentists they were selling to at high prices, they're now going to sell the exact same thing to them at lower prices and earn lower margins. . . . So there's a trade-off there that has to be evaluated" (Marshall, Tr. 2925-27). Dr. Marshall does not contend that "every single buying group was a profitable opportunity" and "recogniz[es] [that] this cannibalization effect is a big issue." As Dr. Marshall stated, "if the cannibalization effect is overwhelming everything, it makes no sense to do business with a buying group." (Marshall, Tr. 2972, 3002-03).
203. Buying groups can negatively impact a distributor's sales representatives because they are paid a commission based on gross profit from a particular customer. (Meadows, Tr. 2519 ("[I]f we discount a customer, the FSC makes less.")).
204. Some Schein FSCs see buying groups as "the enemy" and their competition because, like FSCs, buying groups were signing up dentists that would otherwise be FSC customers and FSCs were concerned that buying groups could "eliminate the FSC job or [impact] their commissions[.]" (CX2033 at 001; Meadows, Tr. 2532-34).
205. If Special Markets signed up a buying group and placed the buying group on a Special Markets formulary, HSD's FSCs who served the individual dentists who joined that buying group would experience more of a reduction in commission because the commission rate under Special Markets formularies is lower than Schein's standard commission rate. (Meadows, Tr. 2549).
206. As Jake Meadows, a Schein vice president of sales explained, if a buying group negotiates an extra 10% discount and signs up an independent dentist customer of Schein's, the FSC's commission declines by one-third. (Meadows, Tr. 2520-22). This reduction in commission "deincentivize[s]" FSCs to "continue to call on that customer." (Meadows, Tr. 2525-26). As one FSC wrote to Breslawski, the president of Schein, Inc.,

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in October 2010, if “the commission ... drops,” it “would not really give me any incentive to try and drive the business.” (CX2298 at 002).

207. Lower compensation to FSCs impacts Schein’s ability to retain good FSCs. (Meadows, Tr. 2528).
208. Schein believes that a buying group that is organized only around obtaining supplies at a discount (a “price-only” or “pure” buying group) can present Schein “as a price-only brand or a fulfillment house only and push aside the value that we create with our [sales representatives] and our service,” which Schein believes devalues Schein’s brand. (Meadows, Tr. 2560; Sullivan, Tr. 4085, 4090 (“[M]any of the groups . . . that we’ve met with, that don’t have that stickiness, don’t have the compliance, don’t have other things that drive value for their members who are our customers, and it is only around price, I believe that devalues our brand or what Henry Schein stands for.”); Cavaretta, Tr. 5544-45; Titus, Tr. 5199).
209. Because, as collections of independent dentists, buying groups were unlike the independent solo and small group practices served by HSD, and also unlike the DSOs served by Special Markets, buying groups presented particular considerations and issues for Schein as a company. (Meadows, Tr. 2491-95, 2549-50, 2630 (explaining the differences); Foley, Tr. 4688; Reece, Tr. 4462 (DSOs have “more structured organizational support”); CX8012 (Breslawski, Dep. at 20-22) (“DSOs distinguish themselves from Private Practice Dentists. . . . They feel sales consultants in many of those customers is not necessary. We have more of a corporate-to-corporate management program . . .”)).
210. HSD and Special Markets compete for sales credit to hit quotas and budgets. If Special Markets signs up a buying group whose members were existing HSD customers, HSD loses the sales credit as to those customers. (Meadows, Tr. 2551-53).
211. Conflicts arose between HSD and Special Markets as buying groups emerged, which impacted Schein’s ability to settle on a consistent strategy with respect to buying groups. As Sullivan explained:

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

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

(RX2941 (Sullivan, Dep. at 500-02)).

4. Evolution of Schein's approach to buying groups

a. 2010 guidance

212. Randy Foley, former vice president of Special Markets at Henry Schein, opened an account for the Pugh Dental Alliance in 2009. (Foley, Tr. 4522, 4605, 4662-63). Shortly after this account was opened with Schein Special Markets, it began causing "friction" with Schein's local FSCs, who thought the buying group relationship with Special Markets would take accounts away from the FSCs. (Foley, Tr. 4639, 4661-66; Steck, Tr. 3766-70; CX2529 at 004-05, 007 ("One of my larger accounts . . . contacted me last week to ask me if I ever heard of Pugh Dental Alliance. . . . It seems they were solicited . . . and were told if they joined the alliance . . . they could continue to buy from [Henry Schein] on the website The Dr inquired what would happen to his Schein rep. He was informed he would no longer be needed.")).
213. On January 5, 2010, Scott Schenker, the local FSC where Pugh Dental Alliance members were located, wrote an email to Breslawski, president of Henry Schein, who oversaw both HSD and Schein Special Markets (Foley, Tr. 4516, 4519; CX8012 (Breslawski, Dep. at 39)), to express a concern about Pugh Dental Alliance. Schenker stated that Pugh Dental Alliance "was opened through special markets," and that the Pugh Dental Alliance "sales person informed [his] account [that] they could join the alliance for \$2,000/yr, eliminate their FSC[,] and save as much as 20% on their supply bills and continue to order from" Henry Schein. Schenker noted that the members "are mostly [Henry Schein] customers with various FSCs [including] quite a few more of [his] own customers. . . . This is a potentially cancerous situation. . . . It's absolutely absurd that I should be put in a situation that I'm competing with my own company." (CX2296 at 002-03; Foley, Tr. 4516, 4519; CX8012 (Breslawski, Dep. at 39)).
214. In response to Schenker's January 5, 2010 email (F. 213), Muller, president of Schein Special Markets, explained to Breslawski in an email on January 6, 2010 that Special Markets justified its aggressive discounts by cutting FSC support. At "that pricing level," Muller wrote, "we usually ask our field sales consultants to visit less often as obviously profits have been cut." (CX2296 at 001). Muller also wrote that "[w]e really don't have a lot of time for this infighting . . . however we need to be open to some of these people that are doing creative approaches to the market – and find the right way to deal with them" (CX2529 at 009). Sullivan, president of HSD, responded, "I do not support us opening Buying Clubs." (CX2296 at 001).

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215. Breslawski instructed Sullivan and Muller to work out the conflicts between HSD and Special Markets created by the Pugh Dental Alliance partnership. (CX2529 at 011; CX2296 at 002). In early 2010, the leadership of HSD (Sullivan and Steck) and the leadership of Special Markets (Muller and Foley) got together to discuss these conflicts and issues. (Sullivan, Tr. 4098-99; Foley, Tr. 4638-41; CX2111 at 001).
216. At the meeting in early 2010 (F. 215), Sullivan, Steck, Muller, and Foley developed and agreed on a set of general guidelines for doing business with buying groups. (Sullivan, Tr. 4098-99; Foley, Tr. 4638-41; CX2111 at 001; CX2153).
217. Sullivan, Steck, Muller, and Foley agreed at the meeting in early 2010 (F. 215) that if a buying group “could drive compliance, then . . . they could be a good opportunity for Schein.” (The “2010 guidance”). (Foley, Tr. 4638-41; Sullivan, Tr. 4098-99; CX2111 (Muller: “We also determined at the beginning of the year . . . that we would entertain organizations that could force compliance.”)). It was decided that buying groups needed to have “complete control of purchasing policy that would force the distributor purchases to Schein.” (CX2153 at 002).

b. Development of buying group protocols and strategy

218. In 2014, Schein decided to create a new division within HSD, called Mid-Market, to allow Special Markets to focus primarily on large or “elite” DSOs⁴⁹ and allow HSD to serve other growing customer segments, including buying groups. (RX2392 at 002; Foley, Tr. 4607; Sullivan, Tr. 4106-07; *see also* Cavaretta, Tr. 5584-85). The elite DSO segment was growing and Special Markets did not have the resources to continue to properly serve all of its customers, including a growing customer segment consisting of buying groups. (Foley, Tr. 4608-09).
219. Schein began developing its strategy for the formation of the Mid-Market division in late 2013. (Cavaretta, Tr. 5583).
220. On December 9, 2013, HSD started a two-day offsite meeting attended by Schein executives Sullivan, Steck, Meadows, and Cavaretta, among others. (CX2461 at 001).
221. HSD typically holds offsite meetings once or twice a year outside of the HSD offices, which provides the opportunity for uninterrupted discussion about important action items. (Meadows, Tr. 2582; Sullivan, Tr. 4107).
222. At the December 2013 offsite meeting (F. 220), Sullivan presented on the topic of “how do we change our operating model to allow for investment in key priorities,” which included discussion on the impact of the growth of Corporate Accounts Group business and the growth of GPOs. (CX2461 at 005 (“GPOs are growing” and Schein needed to

⁴⁹ Elite account status included groups that were doing over \$1 million in sales or had ten or more practice locations. (RX2392 at 006).

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- “brainstorm[]” about how “to allow for [further] investment in [that space].”); Sullivan, Tr. 4107-08).
223. Although Schein had originally planned to address buying groups within the plan for the Mid-Market division, in early 2014, buying groups were not a key strategic priority. (Sullivan, Tr. 4110-12 (“It was a tactical thing we were going to address within this project, but it was not going to make the key priority list.”); Cavaretta, Tr. 5587).
224. After the creation of the Mid-Market division, the primary responsibility for buying groups transferred from Special Markets to Mid-Market within HSD. (Sullivan, Tr. 4112-13; Foley, Tr. 4608; Meadows, Tr. 2590; Cavaretta, Tr. 5586-87). Special Markets would now mainly serve “elite” accounts, such as elite DSOs, federal government accounts, and dental schools. (RX2392 at 006). Individual private practice dentists would continue to be served by HSD. (RX2392 at 006).
225. As a result of the creation of the Mid-Market division, some of the buying groups that previously were handled by Special Markets were transferred over to Mid-Market. (Foley, Tr. 4635). Breakaway, a Special Markets buying group, was transferred to Mid-Market in 2014. (Foley, Tr. 4635; Titus, Tr. 5249). Steadfast, another Special Markets buying group, was transferred to Mid-Market in 2014. (Titus, Tr. 5249).
226. In 2014, Kathleen Titus and Andrea Hight both transferred from the Special Markets division to work in the Mid-Market division of HSD. (Meadows, Tr. 2587-90; Sullivan, Tr. 4112-13; Foley, Tr. 4608-10; Cavaretta, Tr. 5586-88). Hight moved to the role of director of the central United States for Mid-Market because she was an expert on CHCs. (Foley, Tr. 4610; RX2392 at 005). Titus was transferred to the role of director of the western United States for Mid-Market because she was strong with large group practices or smaller DSOs. (Foley, Tr. 4610; Titus, Tr. 5198; RX2392 at 005).
227. After the creation of the Mid-Market division in 2014, Cavaretta became the western area director for HSD and had primary responsibility over the newly formed Mid-Market division and for buying groups specifically. (Cavaretta, Tr. 5540, 5587-89).
228. Cavaretta worked closely with Titus, Hight, and Meadows in developing the Mid-Market space. (Cavaretta, Tr. 5587-88).
229. In 2014, Sullivan tasked Cavaretta, in his role as western area director for HSD, with developing a strategy on working with buying groups. (Cavaretta, Tr. 5530-31). The Mid-Market team compiled questions to use when approached by buying groups. (CX8033 (Cavaretta, Dep. at 95-98)).
230. On May 8, 2014, Titus emailed Cavaretta that they needed “to develop our policy on these Dental Management Companies that have a GPO component” as they are “coming out of the woodwork and have a leg in both worlds.” (RX2385 at 001). On or about May 12, 2014, Titus and Cavaretta had a conversation regarding how buying groups are “not always healthy” for Schein’s business and how Schein needed to create a document to

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help determine when a buying group “relationship make[s] sense and when it does not.” (Titus, Tr. 5213, RX2105 at 001).

231. On June 10, 2014, Meadows wrote to Cavaretta: “I’d like to discuss GPO strate[gies] at some point.” Cavaretta responded, “We just have to keep sending to [Hight and Titus . . .] so they can review requests.” (CX2352 at 002; Meadows, Tr. 2591-92).
232. It was the job of Titus and Hight, as directors for the Mid-Market division, to start to develop a “cogent” list of “criteria” for those meeting with buying groups so that all buying groups could be evaluated by the same “yardstick.” (Titus, Tr. 5213-14; RX2105 at 001 (“Andrea [Hight] and I have agreed to in writing when these relationship[s] make sense and when it does not. Love you to contribute to this document. Just some brainstorming so we can develop our policy as we are not blindly empowering entities that are bad for SCHEIN.”) (capitalization in original)).
233. In June 2014, Titus developed a set of questions for groups that approached Schein, including how many members the group had, what services it offered its members, if the group could drive compliance, and whether the group was willing to be exclusive. (CX2809 at 005; Titus, Tr. 5219-20). At this time, Schein had not yet developed a standard offering for buying groups. (Titus, Tr. 5219-21; CX2809 at 002 (“[W]e need to make sure we have ou[r] systems and offering down cold and the team understand[s] how to present.”)).
234. The creation and implementation of the Mid-Market division was time-consuming and continued throughout 2014 and 2015. (Cavaretta, Tr. 5534-35, 5584-85).
235. With the creation of the Mid-Market division and certain buying groups being transferred over from Special Markets, HSD was receiving more inquiries from its FSCs and customers regarding buying groups and “from a resource standpoint[,] [was] becoming overwhelmed.” (Cavaretta, Tr. 5590).
236. On October 3, 2014, HSD had an internal meeting to discuss Mid-Market and “GPO/MSO strategy” with Sullivan. According to Cavaretta, who attended the meeting, Sullivan did not express any anti-buying group views or direct him to stop efforts to develop a buying group strategy. (RX2409 at 002; Cavaretta, Tr. 5589, 5591-92).
237. On October 21, 2014, Cavaretta stated that during a previous call among Cavaretta, Muller, Sullivan, Steck, and Foley, they “all agreed” that Special Markets and HSD needed “to be aligned on a strategy with existing [buying groups]” within Schein. (CX2761 at 002).
238. On November 24 and 25, 2014, HSD had an offsite meeting during which it discussed the need for collaboration with Special Markets on a “GPO/M[S]O strategy” so that both divisions would be better aligned on how to approach buying groups. (CX2475 at 006; Sullivan, Tr. 4115-16).

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239. At the November 24 and 25, 2014 offsite meeting (F. 238), HSD created a strategic priority for 2015 to develop a template and structure for dealing with buying groups, including creating a pricing plan for buying groups. (CX2475 at 009 (identifying as part of business development priority a “GPO Strategy” initiative, described as “Develop a template/structure for prospective GPO/MSO’s. Develop Own GPO?”); Sullivan, Tr. 4116-17; Meadows, Tr. 2602).
240. In January 2015, a team was established within Schein to develop the “HSD GPO response plan,” led by John Chatham, vice president of sales, and Brian Brady, national director of group practice. (RX2097 at 001-02). On January 29, 2015, Chatham told his team that developing a program for GPOs “is the most important program [Schein] will work on this year and it is priority one.” (RX2097 at 001).
241. Nine months after the strategic priority was set to develop a buying group plan, Brady announced the plan in a September 9, 2015 email with the subject line, “Henry Schein Dental & Existing Buying Groups.” (CX0192; Steck, Tr. 3752-54). Brady explained that after “months” of working on Schein’s “approach to existing buying groups and how we handle them when they come to us for engagement,” HSD senior management held a “final meeting” and settled on a strategy to engage buying groups with “a set protocol in place for each group as they come to us (when we determine they are worth engaging with). We will analyze a variety of factors before engaging, including looking at a list of members to see who/who is not already purchasing from [Schein].” (CX0192 at 002).
242. Schein’s 2015 buying group plan (F. 241) modified its existing “G Plan” discount plan, which was derived from a Special Markets formulary and used by HSD for groups of offices, to create the “BG12 and BG14” plans for use with buying groups. The new pricing plans were “[l]iterally the exact G plan just duplicated with [the] same formulary items and 12 and 14[%] off non-formulary items, respectively.” (CX0192 at 002; Meadows, Tr. 2612; Steck, Tr. 3757-58; Sullivan, Tr. 4126. *See also* Meadows, Tr. 2566-67 (“[T]he G plan was Henry Schein Dental’s first attempt to build a private practice formulary.”)).
243. The 2015 buying group plan (F. 241) required the buying group members to make a volume commitment – “at least \$15,000 a year, for example” – and the group as a whole to spend at least \$250,000 to receive the discounts. Schein planned to routinely monitor purchases from a buying group’s members and their compliance with volume commitments. (CX0192 at 003; Sullivan, Tr. 4126-27).
244. The 2015 buying group plan (F. 241) sought to disincentivize cannibalization by limiting the administrative fee, or rebate, to “incremental sales from the group above and beyond what the members are spending now.” (CX0192 at 002).
245. In 2016, Schein created a dedicated division within HSD to evaluate and engage in business with buying groups, known as the alternative purchasing channel division (“APC”). In March 2016, Darci Wingard was hired to run the APC division within HSD. (Titus, Tr. 5274-75; Steck, Tr. 3763-65; Cavaretta, Tr. 5535, 5653-54).

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246. The APC division (F. 245) has formalized new buying group relationships with Mastermind and Teeth Tomorrow, among others. (CX8009 (Wingard, Dep. at 175)).

E. Statements of Schein Allegedly Reflecting a No Buying Group Policy

247. On April 2, 2002, Muller wrote to Stanley Bergman, chairman and CEO of Henry Schein, Inc., Breslawski and others regarding a buying group called IFS: “[W]e have held a pretty firm line on saying NO to virtually all of them. . . . [T]his type of GPO would kill the margins for both manufacturers and distributors. . . . [T]here would be no increased volume and just lower costs. . . . In my opinion we need to stop this effort.” (RX2405).
248. On December 3, 2008, Cavaretta sent a proposal to Sullivan for the buying group Steadfast Medical, noting: “This sounds like a GPO to me, and I’m not sure if we want to get involved with them . . . I wanted to bounce this off the two of you before I just said no.” (RX2411).
249. On December 10, 2009, Steck asked Foley to “look into” an issue raised by a Schein FSC regarding Schein’s buying group customer the Pugh Dental Alliance because it sounded “like a buying group situation, which [Schein] normally stay[s] away from.” (CX2529 at 007).
250. In an email to Breslawski and Muller dated January 6, 2010 regarding the buying group Pugh Dental Alliance, Sullivan stated: “I do not support us opening Buying Clubs.” (CX2296 at 001).
251. In a February 12, 2010 email to Cavaretta and Foley regarding the CF dental group, Muller stated that he did “not believe in selling to Buying Groups.” (CX2503 at 001).
252. On March 11, 2010, Sullivan confirmed a decision not to bid on a new buying group, Synergy Dental Partners, even though HSD “may lose the business” of the dentist members, stating he was “not interested in GPOs. The risk is much greater if we do sign th[a]n if we don’t.” (CX2451 at 001).
253. In a September 4, 2010 email to Muller regarding Smile Source (F. 796-799), Sullivan stated his belief that Schein would lose margin to the group: “Yes, I believe we have opportunity to increase volume from other accounts that are not buying from us, but that’s the Buying Group formula that doesn’t work for HSD.” (CX2111 at 003).
254. On September 15, 2010, Sullivan wrote in an email to his boss, Breslawski, regarding whether responsibility for managing the Smile Source group should be transferred from the Special Markets division to the HSD division, that neither he nor Muller supported the concept of buying groups, explaining, “Whereas it may benefit SM to some extent, the risk to overall HSI (due to having 40% share in market) for margin erosion, image, as well as other competitors then following suit and huge price war breaks out.” Sullivan further stated that neither he nor Muller wanted “to lose [Smile Source] as an account. They are \$1 million and growing.” Sullivan was willing to allow the Smile Source

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account within HSD to test whether Smile Source's buying group model would enable Schein to increase its volume, notwithstanding lower margins, stating: "I am inclined to 'allow' this account to join (not that it[']s up to me/us) and see what happens. After all, Scott and HSD (per Hal) only get about 30% of this account's business today. So, if the theory works we would get 100% at lower margins, but all parties win in overall GP \$'s [gross profit dollars]." (CX2113 at 001; Sullivan Tr. 3921-24).

255. Sullivan was willing to test the theory of Smile Source's business model. (CX2113; Sullivan, Tr. 3924 ("Q. You were in favor because even though Schein would get lower margin, Schein would get more gross profit dollars. A. Again, I was in favor to test the model, test the theory.")).
256. In a July 17, 2011 internal email from Sullivan to Muller, Breslawski and others at Schein, in response to learning that Synergy Dental Partners, a buying group that Schein had declined to work with in March 2010, was working Darby as their distributor, Sullivan stated, "That's where they belong. I don't think you will ever see a full service dealer involved with GPOs." (CX0185).
257. In December 2011, Janet Knysz, a former owner of Great Expressions Dental Centers, a long-time Schein partner, was interested in creating a buying group called Unified Smiles. Facts regarding Unified Smiles and Knysz's communications with Schein leading up to Foley's December 21, 2011 email to Knysz (F. 258) are set forth in F. 539-545.
258. On December 21, 2011, Foley declined working with Knysz' planned group, Unified Smiles, stating, "Unfortunately, unless you have some 'ownership' of your practices Henry Schein considers your business model as a Buying Group, and we no longer participate in Buying Groups." (CX2062 at 001; Foley, Tr. 4545). Foley explained that without a minimum volume, Schein could not negotiate "chargebacks" with manufacturers, and extending DSO pricing to Unified Smiles, as Knysz requested (F. 542), would "lead to cannibalization" and "friction" with "EXISTING customers." (CX2062 at 001 (capitalization in original); Foley, Tr. 4543-46, 4688).
259. Foley described the statement in his email (F. 258) that "we no longer participate in Buying Groups" as "poorly worded." (Foley, Tr. 4691). Special Markets was still participating with buying groups at the time of his letter to Knysz, and Schein's 2010 guidance regarding buying groups (F. 216-217) allowed for buying groups that, unlike Unified Smiles, could drive compliance. (Foley, Tr. 4657, 4690-91). Foley believed that the decision not to work with Unified Smiles was consistent with the 2010 guidance. (Foley, Tr. 4688-89). Foley explained that rather than argue or give a nuanced explanation, Foley chose to end the discussions definitively. (Foley, Tr. 4684-85, 4687-88, 4691).
260. Foley did not discuss turning down Unified Smiles with Sullivan or anyone at Schein prior to making his decision. (Foley, Tr. 4694). Foley's direct supervisor, Muller, was made aware of Foley's decision, after Foley notified Unified Smiles. (CX2063 at 001).

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261. Foley forwarded his email to Unified Smiles (F. 258) to Rhonda Durante, a strategic account manager who reported directly to Foley, in order to keep her in the loop because she would be responsible for calling on the account if it was a DSO. (CX2062 at 001; Foley, Tr. 4542, 4547; CX0311 (Sullivan, IHT at 111)).
262. Foley did not speak with anyone at Benco or Patterson about Unified Smiles. (Foley, Tr. 4696).
263. In early December 2011, Schein declined to do business with a buying group called the PEARL Network, consisting of dentists affiliated with New York University. On December 7, 2011, Steve Kess, vice president of global professional relations for Schein, wrote that given “[t]he brand and market position of HSD [Henry Schein Dental] and HSM [Henry Schein Medical] . . . [w]ith almost 40% market share,” contracting with a “national” GPO “could be a disaster to our pricing and [gross profit] structure. Clearly [buying groups] will come [W]hen is the challenge as is whether HSI [Henry Schein Inc.] leads it or follows.” Kess forwarded his thoughts to Sullivan and Steck. Sullivan responded:

Very timely. [W]e have meeting next week to discuss Strategic Plan. [T]his topic is on agenda. I am still of [the] position that we do NOT want to lead in getting this initiative started in dental. I think that it is a very slippery slope. At the end of the day, we provide package discount “deals” to those [buying groups] that control buying. Simply being a “member” has historically provided little value or incentive to drive change in purchasing loyalty at the local GP practice level, yet causes all sorts of issues for those members and local area non-members who then expect the same.

(CX2456 at 001 (ellipses and capitalization in original); Sullivan, Tr. 3943-44).

264. On December 22, 2011, Cavaretta wrote regarding the MeritDent buying group:

I just met with Tim [Sullivan], Dave [Steck] and John [Chatham] about the MeritDent group. As you can imagine they feel the same as we do that we don’t want to be the first company to open the floodgates to the dangerous world of GPOs. Based on the fact that they will not guarantee that all of their business will come to Schein they will not fall into the CAG [Special Markets][⁵⁰] world either. This is what I propose we do and I would like your thoughts[.]

(RX2398).

⁵⁰ The term “CAG” is synonymous with Special Markets and is a term that is no longer used at Schein. (Steck, Tr. 3769).

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265. Cavaretta then outlined a proposal for MeritDent providing, among other things, discounts and a rebate based on the number of members that buy from Schein. Cavaretta further stated: “I know this is clearly not the huge discount they were looking for If not we will just have to take the docs that may leave us for a different company on a case by case basis.” (CX2458 at 001; Cavaretta, Tr. 5578-79).
266. Cavaretta’s recognition that Schein might lose the MeritDent buying group to a competitor, as shown in CX2458, is inconsistent with an inference that Schein was participating in a conspiracy with its competitors to collectively refuse to deal with buying groups. (F. 265).
267. Schein representatives met with MeritDent “several times.” After these meetings, Schein and MeritDent reached an agreement on a pricing program and additional Schein practice tools and educational offerings. Schein and MeritDent entered into a purchasing agreement on February 7, 2012. (Cavaretta, Tr. 5580-82, 5649; Sullivan, Tr. 4243-44; RX2393 at 004-05).
268. Schein’s providing a proposal to MeritDent on December 22, 2011, taking several meetings with MeritDent, and entering into a purchase agreement in February 2012 is inconsistent with an inference, based on Foley’s December 21, 2011 letter, that in late 2011 Schein began implementing a policy not to do business with buying groups. *See* F. 465-470.
269. Steck created an activity report for the dates of November 14 through December 30, 2011. (CX0201 at 001; CX0310 (Steck, IHT at 128-29) (document created in the 2011/2012 timeframe)). The activity report stated: “Have had two internal calls and one external call on partnering with the Florida Dental Association. This is the classic ‘buying group’ approach that we aren’t buying into.” (CX0201 at 001).
270. After talking with the Florida Dental Association (“FDA”), Schein was concerned that FDA was unwilling or unable “to commit volume for their members or give [Schein] any kind of minimum purchase levels that would allow . . . a reduced pricing arrangement.” Schein did not believe that FDA members would buy from Schein just because the association had an agreement with Schein. (CX0310 (Steck, IHT at 133); CX8031 (Steck, Dep. at 56-58) (“We didn’t believe that they would automatically buy more for [*sic*] us just because we made some kind of agreement with them.”)).
271. On January 26, 2012, Cavaretta wrote regarding an entity called Intermountain Dental Associates (“IDA”). IDA describes itself as “an association of independent dental practitioners established in 2006.” (RX2844). Cavaretta emailed the field sales consultant who reported through Cavaretta and Hight, who was responsible for IDA: “It is dangerously close but I told him we would not do business with a GPO. The difference here is that they will force any customer to purchase from Schein” which is a characteristic in common with Schein’s corporate or DSO accounts. (CX0168 at 001; Cavaretta, Tr. 5641).

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272. After confirming that the IDA buying group could drive compliance, Foley approved offering discounts to IDA's buying group. This was consistent with Schein's 2010 guidance (F. 216-217) that if a buying group could drive compliance then it "would be a good fit for Schein." (Foley, Tr. 4646).
273. On February 2, 2012, Sullivan wrote to Steck, Foley, and other Schein employees regarding Smile Source (F. 796-799), which had terminated its relationship with Schein in January 2012 and signed on with Burkhart (F. 838): "Let's really take this serious and get after it. I'm really less concerned about the actual revenues, although very important too, rather more about what we can do to KILL the buying group model!!" (CX0199 at 001 (capitalization in original); Sullivan, Tr. 3936-37; *see also* CX0238 at 001 ("Tim Sullivan is happy that we are less one more [buying group].")).
274. Sullivan explained regarding CX0199 (F. 273): "[W]hen Smile Source terminated us . . . I definitely wanted to kill – you know, go after . . . Smile Source's model, and the customers that they were now attempting to switch to someone else." Sullivan wanted to keep those customers' business with Schein. (Sullivan, Tr. 3932-33, 3935-37, 4143-46).
275. On February 20, 2012, Foley responded to an email from his direct report, Debbie Torgersen-Foster, then a zone manager, with the subject line "who is Pro ABC": "The issue here is that the BG [buying group] markets a reduced supply spend that then covers their 'marketing fee.' When existing Schein customers enroll, it simply erodes margins. When the BG markets their reduced spend, existing customers come to Schein and say, 'I don't want to join their group but I want their pricing' (per Tim Sullivan). So, this is a corporate decision, not to participate in these." (CX0238 at 001; Foley, Tr. 4553-56).
276. Foley explained that Sullivan had informed him that buying groups that are focused on price only could cannibalize sales and reduce margins and that Schein should work with buying groups that "can drive compliance, not just be focused on price." Foley explained that it was this price only type of buying group he was referring to when writing CX0238 (F. 275). (Foley, Tr. 4554-56; *see also* Foley, Tr. 4648-49, 4725 (testifying that he typically used the term "buying group" when meaning a price-only type of buying group)).
277. On February 21, 2012, Foley received a draft presentation from Torgersen-Foster, in which she identified definitions of DSO, buying group, and large practice group. In Torgersen-Foster's cover email, she stated that these definitions were derived from a "bunch of the emails and documents" given to her by Foley. (CX2065 at 001; Foley, Tr. 4557-58).
278. The draft presentation referenced in F. 277 proposed a definition of a buying group that neither Schein Special Markets nor Henry Schein dental "WOULD TAKE ON": "An organization or group [o]f dentists that get together to leverage better pricing from a distributor, share best practices and/or network – No centralized billing; dentists are individually paying their own bills – Dentists and support staff are not employed by one

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company or LLC – The lead person or entity is leasing equipment and supplies to the dentist[.]” (CX2065 at 002 (capitalization in original)).

279. The presentation referenced in F. 277 was prepared for meetings with local FSCs, but Torgersen-Foster was unaware if the presentation was ever used. (CX8001 (Foster, Dep. at 51-54)).
280. Torgersen-Foster explained that the phrase, “neither SM nor HSD would take on” in CX2065 (F. 278) meant that field-level Schein sales representatives that receive leads should not make the decision as to whether to deal with a buying group, but should instead pass these leads up to the regional managers for further evaluation. (CX8001 (Foster, Dep. at 58)).
281. On April 10, 2012, Torgersen-Foster received an email from Schein regional manager Troy Neil regarding “a group of 50 docs in a study club,” that was “interested in hearing what we might be able to do for them on creating a ‘buying group’ for this study club.” Torgersen-Foster responded: “Neither HSD or Special Markets will participate in buying groups of any kind. They just erode our margins and rarely bring any new business to the table.” (CX2003 at 001-02; Foley, Tr. 4561).
282. On June 8, 2012, Hight wrote to her boss, Foley, and Titus regarding a telephone call with Sunrise Dental: “I explained that we do not accommodate GPOs and what an SM [Special Markets] customer must look like. . . . They believe they want to be an SM customer and are restructuring to meet the definition.” Responding to Foley’s follow-up email in the same chain, Hight reported on June 21, 2012 that her meeting with Sunrise Dental “went really well. They are quite anxious and very willing to make themselves fit SM criteria. I have not budged of course on how a customer needs to be structured and [was] very adamant about no GPO type situation.” (CX2423 at 002-04).
283. Hight explained that in stating, “we do not accommodate GPOs” in CX2423 (F. 282), she was referring only to what her unit – the special markets DSO team – could do. (CX8022 (Hight, Dep. at 94-96)). In order to have a Prime Vendor Agreement with Special Markets that was dependent on sub-agreements negotiated with vendors, the customer was required to be a DSO. (CX8022 (Hight, Dep. at 98)).
284. On July 17, 2012, Meadows wrote to a Henry Schein field sales consultant: “I have to tell you Ron and Dan made a decision that is against what Tim Sullivan has directed us to do in regards to supporting Buying groups. We do not want our customers organizing and creating what are known as GPOs; it takes the value away from the distributor.” (CX0170 at 001; Meadows, Tr. 2424).
285. On May 29, 2013, Philip Toh, who worked in Schein Special Markets, asked Cavaretta for input on the fact that “Henry Schein Dental manages customers who are buying groups, not Special Markets. In reviewing our account data, it does not appear that we track them specifically.” Cavaretta responded, “We try to avoid buying groups at all

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- costs and therefore don't really recognize them." (CX2509 at 001; Cavaretta, Tr. 5639-40).
286. On December 20, 2013, Foley wrote to Francis Keefe, an accounts manager for Colgate, a dental product manufacturer, in response to Keefe's question about Schein's approach to buying groups such as Unified Smiles: "It's a buying group that we do not participate with, as with all buying groups." (CX2073 at 001; Foley, Tr. 4552). "It's" (in CX2073) referred to Unified Smiles. (Foley, Tr. 4552). Foley explained that he was referencing buying groups that are price only buying groups such as Unified Smiles. (Foley, Tr. 4725).
287. On July 17, 2014, Titus wrote to Glen Showgren, a Schein zone manager, and Kevin Upchurch, a Schein zone manager, attaching a copy of a proposed agreement with Pacific Group Management Services, Inc. (*see* F. 471-473, 485): "We had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. I created [a proposal] and sent to Joe [Cavaretta] for review. It went to Tim [Sullivan] and he shot it down. I think the meta msg is officially, GPO's are not good for Schein." (CX2235 at 001; Titus, Tr. 5310-11).
288. Titus had not spoken with Sullivan about PGMS prior to her statement in CX2235 (F. 287). In a discussion with Sullivan, Cavaretta recommended against going forward with PGMS and the decision whether or not to partner with PGMS was left to Cavaretta. (Titus, Tr. 5227-29, 5315-16; Cavaretta, Tr. 5608-10 (testifying that Cavaretta asked Sullivan what he thought and Sullivan told him "whatever you want to do we do.")). Sullivan did not "recall being the one that shot [PGMS] down." (CX8025 (Sullivan, Dep. at 225-26)).
289. On July 18, 2014, Upchurch, a zone manager, wrote to Cavaretta, Titus, and Jeff Harmon (Schein's regional manager for Utah) regarding the Dental Co-Op of Utah, that after Schein's relationship with the Co-Op ended (*see* F. 360-373): "They are probably going to align with a Darby over a PDCO [Patterson] but Benco might also jump at the opportunity. The Co-op is turning into a GPO (even if they don't think they are one now), [and] from what KT [Kathleen Titus] has observed in Texas, NM and from Tim S[ullivan], HSD does not want to enter the GPO world." (CX2211 at 002).
290. Titus explained that the Dental Co-Op was morphing from a traditional dental buying group into the type of GPO that negotiates directly with manufacturers, which is "tantamount to throwing down the gauntlet with Schein and acting as a competitor." (CX2239 at 001-02; Titus, Tr. 5236-39).
291. On September 8, 2014, Muller sent Sullivan and Breslawski a copy of a letter sent by Dr. John Kois (F. 861-862) to the members of the Kois "tribe" (F. 866) regarding his goal to form a membership group for the purpose of reducing costs. Sullivan responded that, "I still believe this is slippery slope and have yet to see a successful one in dental and don't plan to take the lead role. Watching closely." (CX2469 at 002; CX8025 (Sullivan, Dep. at 295)).

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292. Regarding his statement in CX2469 (F. 291), Sullivan explained that he did not want to take the lead role in proactively “putting something together with Kois if it was going to be a price-only” type buying group. Based on his reading of Dr. Kois’ letter (F. 291), it appeared to Sullivan that “the only thing they’d be looking for was a volume discount.” (CX8025 (Sullivan, Dep. at 295-97)).
293. On September 14, 2014, Foley wrote to Muller and Peter Jugoon (president of Schein dental in Canada) in response to Jugoon’s asking whether anyone had heard of Synergy Dental Partners: “I believe our local North Carolina team was entertaining the option for Schein to be a distributor for this group, but later decided against it. As with other buying groups we continue to say no (at least try to).” (CX2079 at 001; Foley, Tr. 4649-51).
294. Foley explained that this comment saying “no” to buying groups (F. 293) referred to buying groups, such as Synergy Dental Partners, that he believed could not “drive any type of compliance” and denied that he was trying to communicate any across-the-board policy not to do business with any buying groups. (Foley, Tr. 4650-52).
295. On October 8, 2014, Russ Baker, a Schein regional manager for one of the Southeastern states, wrote to Titus and Hight, and other Schein employees regarding Greenville Smiles: “I recently had a conversation with Kathleen [Titus] regarding this group and they are nothing more than a GPO. It is my understanding that this violates our policy as we do not engage with GPO’s.” (CX0260 at 002; Titus, Tr. 5319, 5339).
296. On October 25, 2014, Meadows, eastern area sales director for Henry Schein Dental, wrote to zone and general manager, Jeff Reichardt: “Do not forward. Quick note. I’ve received a few FSC phone calls over the last few weeks regarding group purchasing organizations (GPO). Just for clarity, we are NOT participating in any GPOs regardless of what they promise to bring us. We can discuss on Monday EA [eastern area] call.” (CX2354 at 001 (capitalization in original); Meadows, Tr. 2426-27).
297. Meadows explained that FSCs had been complaining to Schein management that they thought Schein’s business with buying groups was going to eliminate their roles or lower their commissions and that his statements in CX2354 (F. 296) were meant to “calm the troops.” (Meadows, Tr. 2465-66, 2595-98 (“I was trying to . . . calm everyone down [to make clear that] we are not out signing up buying groups to get rid of the FSC position.”); *see also* F. 203 (FSCs are paid on commission based on gross profit from a particular customer); F. 206 (FSC’s commission declines when customer discount increases). Meadows asked Reichardt to “not forward” his email on to the sales team and instead to wait and explain the situation over the phone so that the message would not be misinterpreted. (Meadows, Tr. 2597-98).
298. On November 5, 2014, Schein regional manager Bobby Anderson wrote an email to zone manager Michael Porro, copying Meadows, Steck, and Sullivan. The email addressed the fact that Atlantic Dental Care, which was being supplied by Benco (F. 625), was receiving lower prices directly from a major dental manufacturer, 3M, which was leaving

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- Schein at a “major disadvantage” because Schein does not get special pricing from 3M. Meadows responded that he had just had a meeting with 3M’s leadership and “discussed this issue” of 3M pricing. He also wrote: “We do not currently participate with GPOs nor do we want to, we will address these issues as they come up but it’s important to continue pointing the team towards business solutions and individual relationships.” (CX2358; Meadows, Tr. 2433-36).
299. On November 12, 2014, Schein regional manager Dave Jacklin wrote to Cavaretta that one of his FSCs had heard from a doctor that Dr. Kois (F. 861) was planning a “major announcement tomorrow regarding” Dr. Kois’ planned buying group. Jacklin asked, “Anyone hear anything from your end?” Cavaretta responded: “I haven’t heard anything but at this point we are not playing in the GPO space.” (CX2234 at 001-02; Cavaretta, Tr. 5592-93).
300. Cavaretta explained that at the time he wrote the email to Jacklin in November 2014, buying groups had not been a priority at Schein and that Schein was then in the process of developing a formalized strategy regarding buying groups; however, Cavaretta “didn’t go on and explain all the activity that was happening” to Jacklin, who was only a regional manager. (Cavaretta, Tr. 5589-91, 5593 (“[W]e didn’t really have a main strategy. It was almost ad hoc that every new [one] that would come in we would treat them like it was the first time we ever vetted out a buying group”); RX2409 (meeting agenda to include “constant requests by buying groups” and “what our strategy should be”)).
301. On January 7, 2015, Muller sent notes to his boss, Breslawski, and Sullivan with his “thoughts” for an upcoming Schein meeting on the topics of “Mid-Market & Buying Groups,” stating in part: “Buying Groups: Do we keep saying no? What do we do with Dental Gator, Smile Source, others?” (CX2141 at 001-02).
302. Sullivan stated in an email to Cavaretta dated July 1, 2015, that at “[t]he [December 2014] ‘offsite’ last year I left with a goal to see if we could get Hal [Muller] to shut [Dental Gator] down, but knew that could be a challenge due to the parent company being an [elite DSO] of ours in [Special Markets]. Are we keeping them in DSL⁵¹ because it’s good for the customer or it’s good for HSD?” (CX0246 at 001; Sullivan, Tr. 3996-97; CX0309 (Muller, IHT at 175-76)).
303. Dental Gator had been receiving DSO pricing through its parent, MB2, a large DSO customer of Schein Special Markets, which Schein viewed as contrary to the supplier agreement between Schein and MB2 (*see* F. 379-381, 389-392, 396-398). Regarding his statement about “shutting down” Dental Gator (F. 302), Sullivan explained that Dental Gator members were not entitled to receive MB2’s elite DSO pricing and that he wanted the practice stopped. (Sullivan, Tr. 4255-56). Schein provided Dental Gator with an alternative group discount pricing plan and did not take steps to “shut down” Dental Gator. (*See* F. 409-416).

51 “DSL” is an accounting acronym referring to sales by the Henry Schein Dental division sales, as opposed to “DSM,” which refers to sales by the Special Markets division. (Meadows, Tr. 2564; Steck, Tr. 3777-78).

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304. On November 3, 2015, Meadows wrote to Cavaretta that, at a meeting, Sullivan “was going off about how we do not have any buying group agreements and that we will not do them. Soap boxing about HSD and buying groups.” (CX0176 at 001; Meadows, Tr. 2441).
305. On November 3, 2015, Graham Stanley sent meeting notes from a November 2, 2015 planning meeting to Breslawski, Sullivan, Steck, Cavaretta, Meadows, and other Schein management via email, stating: “Tim clearly set out that HS should not be first to cooperate with GPOs, but also don’t want to be last.” (CX0189 at 002; Steck, Tr. 3843, 3979).
306. On May 10, 2016, Brady wrote an email to Steck with the subject line “4 existing buying groups being paid rebates.” Brady wrote that he had discovered four existing buying groups dating back to 2004 where rebates had been paid to practicing dentists that exceeded the 3% safe-harbor, and could violate the anti-kickback statutes. (CX2287). Brady was responsible for addressing this legal compliance issue. Referring to the rebates and legal compliance issue raised by Brady, Steck responded, “Thanks Brian . . . unfortunately, part of your job is cleaning up inherited ‘messes.’” (CX2287 at 001 (ellipses in original); CX8031 (Steck, Dep. at 127-29)).
307. Every Schein witness who testified at trial denied giving and/or receiving any instructions to not do business with buying groups. (Sullivan, Tr. 4019-20; Cavaretta, Tr. 5531-34, 5592; Meadows, Tr. 2580, 2578, 2594-95; Foley, Tr. 4602; Steck, Tr. 3709-10; Titus, Tr. 5193, 5247-48).

F. Schein’s Dealings with Buying Groups

308. Ryan, Benco’s director of sales, received competitive intelligence that Schein was working with buying groups during the alleged conspiracy period, including Smile Source, Dental Gator, Dentists for a Better Huntington, the Dental Co-Op, and the Schulman Group. (Ryan, Tr. 1245-53; CX1039; CX1047; CX1104; CX1116; CX1158).

1. Advantage Dental Group

309. Advantage Dental Group (“Advantage Dental”) is an insurance provider network with a separate buying group component and DSO component. (Foley, Tr. 4562-63; CX0306 (Foley, IHT at 215-16)).
310. Advantage Dental offered membership in its buying group program to “dental practices that were independently owned without any equity ownership by Advantage Dental.” (CX8014 (Lauerman, Dep. at 42-43)).
311. Advantage Dental provides no “management services” to these “independently owned dental practices.” (CX8014 (Lauerman, Dep. at 44)).

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312. Schein worked with Advantage Dental's buying group from at least 2009 to 2017. (CX8005 (Muller, Dep. at 238); RX2668 at 001).
313. In addition to Advantage Dental's buying group, HSD also formed a relationship with the DSO component of Advantage Dental. (Foley, Tr. 4562-63; CX8003 (Foley, Dep. at 245-46, 417-18)).
314. "[I]nitially, . . . both components of Advantage Dental fell under HSD, but when they needed some help on the software in creating rebates . . . , [Schein] moved . . . the DSO component . . . to Special Markets." (Foley, Tr. 4562-63).
315. On August 1, 2011, Special Markets entered into a written agreement with Advantage Dental's DSO ("2011 Advantage Dental Agreement") effective through July 31, 2014. (RX2291 at 001).
316. The 2011 Advantage Dental Agreement governing Special Markets' arrangement with Advantage Dental's DSO component specified that the pricing offered to Advantage Dental's DSO could not be extended to the Advantage Dental buying group. (RX2291 at 002; Foley, Tr. 4567-68). This was because Schein's vendor partners did not allow the rebates and pricing structures Schein offered to be extended outside of the DSO segment. (Foley, Tr. 4567-68; CX8003 (Foley, Dep. at 214, 246)). Moreover, these vendor partners only allowed chargebacks for business done with DSOs. (Foley, Tr. 4701; CX8003 (Foley, Dep. at 246)).
317. Special Markets entered into a subsequent agreement with Advantage Dental's DSO effective August 1, 2014 through July 31, 2017 ("2014 Advantage Dental Agreement"). (RX2274 at 002).
318. HSD provided discounted supply pricing to the Advantage Dental buying group. (Foley, Tr. 4699-4700; RX2638 at 001). HSD also provided a 10% cash rebate back to the Advantage Dental buying group based on the volume of its member purchases. (RX2502 at 001; RX2638 at 001; RX2639 at 001; RX2668 at 001).
319. While the 2011 Advantage Dental Agreement and 2014 Advantage Dental Agreement did not cover the buying group, HSD nevertheless extended discounts and rebates to the Advantage Dental buying group. (Foley, Tr. 4567-68, 4699-4700; RX2502 at 001; RX2638 at 001; RX2639 at 001; RX2668 at 001; RX2751 at 001; RX2752 at 001).

2. Breakaway Dental Practice

320. Breakaway Dental Practice ("Breakaway") is a buying group that has some DSO and MSO-like characteristics. A few Breakaway offices are owned by the group's founder (similar to a DSO), some offices receive Breakaway's suite of nonclinical business support services (similar to an MSO), and other offices elect to receive discounts only (similar to a buying group). (CX2190 at 003 (an internal Schein document listing

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- Breakaway's "several divisions"); Steck, Tr. 3745 (there are groups "that do both" buying group and managed services); Cavaretta, Tr. 5599).
321. Breakaway's "smallest arm" is their owned offices, while the group's "largest arm" is made up of its "support members, which [is] similar to . . . a buying group arm." (CX8009 (Wingard, Dep. at 156)). Breakaway also has affiliates as to which members can "sign a contract with Breakaway to help them expand and grow and actually build practices from the ground up." (CX8009 (Wingard, Dep. at 156-57); *see also* RX2645; RX2646 (describing Breakaway's "several divisions"))).
322. Breakaway's founder, Dr. Scott Leune, had a majority share in eight locations, while the "rest [were] solo providers." (CX2077 at 003-04; Titus, Tr. 5340).
323. Schein's Foley described Breakaway as the "anti-DSO," because the group's "whole premise, and hence the name Breakaway, is that they assist dentists, private dentists that are working at DSOs, on how to break away from the DSO and go into practice by themselves." (Foley, Tr. 4634).
324. Breakaway offers independent dentists the option to utilize nothing but Breakaway's discounts ("handled much like a buying group"), or to take advantage of more comprehensive nonclinical business services as well. (CX2190 at 003).
325. Joe Cavaretta, a former Schein vice president of sales, is currently president of the company that owns Breakaway. (Cavaretta, Tr. 5599).
326. Schein's Special Markets division formed a relationship with Breakaway in 2010 or 2011. (Foley, Tr. 4634-35; Cavaretta, Tr. 5600-01).
327. When Schein created the Mid-Market division within HSD in 2014 (F. 218, 225), it transferred Breakaway from Special Markets to the Mid-Market division, under HSD. (Foley, Tr. 4635; Cavaretta, Tr. 5599; Titus, Tr. 5249, 5263). When Breakaway was a Special Markets customer, Special Markets extended discounts to Breakaway. (Foley, Tr. 4635).
328. After Breakaway transferred to the Mid-Market division, it continued to receive discounts from HSD and receive discounts at a higher rate than it was getting in Special Markets. (Titus, Tr. 5249, 5263, 5267-68; Foley, Tr. 4635).
329. Breakaway stayed with Schein's Mid-Market division and was eventually transferred to Schein's alternative purchasing channel division, created in 2016 (F. 245), because Breakaway was "more of a buying group" than a "Special Markets DSO customer." (Cavaretta, Tr. 5655; RX2947 (Cavaretta, Dep. at 31-32)).
330. On May 9, 2014, Titus wrote to Foley and others, "There is no question; Breakaway's business model has a GPO component and we are supporting it. I would compare this to

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something like Smile Source. They cross over into multiple geographies and their target audience is the private practice dentist.” (RX2718 at 001).

331. Schein continued working with Breakaway and offered its members discounts throughout 2014. (RX2114 (noting in February 2015 that Schein was adding new members for Breakaway); Titus, Tr. 5267-68; Foley, Tr. 4635).
332. In early 2015, Titus evaluated Schein’s relationship with Breakaway to determine how Schein could grow its business with the group. Titus was not instructed to evaluate Breakaway by her boss, Cavaretta, or by anyone else at Schein. (Titus, Tr. 5264-65, 5288; RX2114 at 001 (noting that Schein was working on orders for two clinics opening with Breakaway)).
333. On April 16, 2015, Titus and Kip Rowland, a Schein regional account manager, met with the Breakaway team in person. After the meeting, Titus stated in an email to Cavaretta: “From the outside looking in, they look like a consulting firm, with a core group of owned offices with a GPO offer to ‘affiliate’ partners.” (CX2240 at 001).
334. On April 20, 2015, Titus sent an email to Breakaway following up on the April 16, 2015 meeting (F. 333), stating that she and Rowland had been “blown away” by the visit to Breakaway. She further told Breakaway that she had “immediately” called Cavaretta and provided him with a debrief on Breakaway’s model and wrote that Cavaretta was very enthusiastic about meeting with Breakaway. (RX2660).
335. On June 29, 2015, Schein entered a Prime Managed Group Dental Supplier Distributor Agreement with Breakaway’s owned practices. Schein crafted “a separate agreement” with the group’s buying group arm of “individually owned practices.” (Titus, Tr. 5331; RX2348 at 001).
336. Benco’s Ryan learned of the relationship between Schein and Breakaway in January 2015. On January 15, 2015, Benco’s regional manager for the Carolinas region, Brad Bingaman, received information from a Benco sales representative, Scott Weber, indicating that Schein had been providing discounts to dentists through the group. Bingaman forwarded the information to Benco’s Ryan. Ryan replied, “I haven’t seen [Schein] do any buying groups but maybe they’re changing.” Ryan did not reach out to Schein about Breakaway. (CX0010; Ryan, Tr. 1207-08).
337. Benco’s Cohen did not discuss Breakaway with anyone at Schein. (Cohen, Tr. 913- 14).
338. Benco’s Ryan did not reach out to Schein about Breakaway. (Ryan, Tr. 1208).
339. Benco did not pursue a relationship with Breakaway because they “don’t work with GPOs.” (Ryan, Tr. 1207).

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340. Schein's Mid-Market division continued working with Breakaway until Breakaway was purchased by Dental Whale in 2018. (Titus, Tr. 5265, 5268; RX2947 (Cavaretta, Dep. at 31-32); Cavaretta, Tr. 5599-601; Foley, Tr. 4635).
341. The difference in approaches of Schein and Benco toward Breakaway is inconsistent with an alleged agreement by Schein not to do business with buying groups. (*See* F. 326-340.)

3. Comfort Dental

342. Comfort Dental's members consist of private practices focused on pediatric dentistry. (Foley, Tr. 4632-33).
343. Comfort Dental is a "franchisee/franchisor-type buying group, similar to Smile Source." Comfort Dental has agreements with each of its members, allowing them to operate as a franchisee. (Foley, Tr. 4632-33).
344. Comfort Dental has an ownership stake in some but not all Comfort Dental offices. (CX0311 (Sullivan, IHT at 331-32) ("[T]hey own some of their practices. They don't own all of them."); RX2946 (Cavaretta, Dep. at 36) ("Q.: So Comfort Dental has some stake of ownership in the various practices that are part of Comfort Dental? A.: Yeah. I don't know how many, but there is ownership in some of them.")).
345. Comfort Dental's relationship with Schein began with HSD in the late 1990s, and the relationship remains in place today. (RX2947 (Cavaretta, Dep. at 35); Foley, Tr. 4633).
346. In a weekly report for Schein Special Markets for the two weeks ending April 16, 2010, Foley reported that he had been "trying to save HSD's largest customer, Comfort Dental (almost \$7 million in merchandise). Comfort [Dental] unexpectedly sent their business out for bid As their business model is more of a GPO, Franchisor-Franchisee, they do not fit" Special Markets' standard model. "At first it was decided to have HSD respond to their request and then it was decided that it would be best" to have Special Markets respond. Foley further reported: "Customer has been on the same pricing program for almost 10 years with no changes [Special Markets] proposed a new plan that will save them nearly \$1 million in merchandise spend [plus] increased royalty rebates" (CX2109 at 002; Foley, Tr. 4632-33).
347. Special Markets pays Comfort Dental an administrative fee. (Foley, Tr. 4634).
348. Special Markets has provided discounts to Comfort Dental since at least 2012. (Foley, Tr. 4634).
349. Due to the size of Comfort Dental, Special Markets placed Comfort Dental under its category for "elite DSOs" even though there were offices that were individually owned and operated franchises, similar to Smile Source. (CX2021 at 013; CX2119 at 001; Foley, Tr. 4633-34 ("Q. And just to be clear, was Comfort Dental a DSO? A. No.

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They're very anti DSO, as a matter of fact. I never could call them a DSO whenever I met with them."))).

4. The Dental Cooperative of Utah

350. The Dental Cooperative of Utah ("Dental Co-Op of Utah"), originally formed in Utah, is a buying group that Schein began working with as early as 2007. (RX2232 at 001; CX8033 (Cavaretta, Dep. at 159); Cavaretta, Tr. 5601; RX2604 at 002).
351. Schein provided discounts to the members of the Dental Co-Op of Utah from at least 2007 through 2014. (RX2947 (Cavaretta, Dep. at 68-69)).
352. The Dental Co-Op of Utah is an example of the co-op buying group model. Dr. Brenton Mason, who was a founding member of the New Mexico chapter of the Dental Co-Op of Utah, distinguished the co-op model from just a buying group: "The buying group deals with . . . mostly the dental supplies and the dental equipment. The cooperative deals with the entire business." (Mason, Tr. 2327-28, 2331; CX8035 (Mason, Dep. at 25-26)).
353. When Cavaretta first became aware of Schein's relationship with the Dental Co-Op of Utah in 2009, he viewed it as a mutually beneficial relationship. (Cavaretta, Tr. 5601; CX8033 (Cavaretta, Dep. at 176-78)).
354. As of July 2011, the Dental Co-Op's services to members included help "negotiating rates with PPOs" and "creat[ing] private dental insurance options for small business," as well as help in creating "a network of other professional[s] to help the local docs (lawyers, accountants, etc.) and help in getting "the best price on dental supplies based on the volume of their business." (CX2505 at 001).
355. The Dental Co-Op of Utah introduced Schein to its members and Schein provided its Henry Schein Practice Analysis to the member offices, to attempt to drive incremental volume to Schein. (CX8033 (Cavaretta, Dep. at 168-69, 177-79); Titus, Tr. 5337).
356. Schein offered rebates to the Dental Co-Op of Utah and its members for their purchases, along with a discount program. (RX2947 (Cavaretta, Dep. at 69); CX8033 (Cavaretta, Dep. at 179); CX0305 (Cavaretta, IHT at 157); RX2525 at 001; RX2485 at 001).
357. The Dental Co-Op of Utah eventually expanded into Nevada, Idaho, Arizona, New Mexico, and other states. (CX2505 at 001; RX2947 (Cavaretta, Dep. at 69-70); RX2511 at 001).
358. Schein supported the Dental Co-Op of Utah as it expanded into other states, although the program was not having the same success as it had in Utah. (CX2750 at 001 (noting that the Dental Co-Op program did not work in Nevada where Schein already sold to a large portion of Las Vegas dentists and "[t]he doctors [Schein was] trying to win over [did not] think an 8% discount [was] a big discount"); CX2646 at 004; RX2511 at 001).

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359. Schein partnered with the New Mexico chapter of the Dental Co-Op through Schein's agreement with the Dental Co-Op of Utah. (Mason, Tr. 2402-05).
360. In or around February 2014, Schein learned the Dental Co-Op had entered into partnerships with dental product manufacturers such as Procter & Gamble ("P&G") and Komet for the purchase of dental products directly from those manufacturers, which Schein viewed as competing with Schein. In particular, the Dental Co-Op's new partnership with P&G created a problem for Schein because the Dental Co-Op was canceling Schein's business done through Colgate and redirecting it directly to P&G. (CX2227 at 005; Titus, Tr. 5236-40; Sullivan, Tr. 4233-34; Cavaretta, Tr. 5601-02; CX0305 (Cavaretta, IHT at 158-59); CX8010 (Titus, Dep. at 126)).
361. In 2014, Schein had an exclusive relationship with Colgate (a manufacturer of toothbrushes, floss, toothpaste, and other preventatives), meaning Schein did not sell competing P&G products. (Titus, Tr. 5236-37).
362. On February 10, 2014, Titus wrote to Francis Keefe, national corporate accounts manager for Colgate: "The decision of HSD to treat them as a GPO is a legacy decision that I do not believe, if presented with the same circumstances today, HSD would have embraced." (CX2227 at 004; Titus, Tr. 5305-06).
363. In May 2014, Keefe noticed that there was a significant drop in sales of Colgate to the Dental Co-Op's members and reached out to Schein to express Colgate's concerns over the Dental Co-Op's relationship with P&G. (Titus, Tr. 5237-38; CX8010 (Titus, Dep. at 139-41); CX2807 at 002-03; CX2239 at 002-04 (noting that the Dental Co-Op was "eating up base business" as Colgate/Schein had recently lost two accounts to its competitor P&G, maker of Crest/Oral-B)).
364. Schein agreed that "the moment [the Dental Co-Op] signed on with P&G direct and Komet" was "tantamount to throwing down the gauntlet with Schein and acting as a competitor." (CX2239 at 001-02). Schein witnesses explained that the Dental Co-Op's partnerships with manufacturers for direct discounts amounted to a "breach of trust," as it was believed originally that the Dental Co-Op was supposed to be exclusive with Schein. (Cavaretta, Tr. 5602; CX0305 (Cavaretta, IHT at 105-06); Titus, Tr. 5239, 5337; CX8010 (Titus, Dep. at 127-28) ("[T]here was a tacit understanding from the Henry Schein Dental folks that the Dental Co-Op was only promoting Henry Schein."); Sullivan, Tr. 4233-34).
365. Harmon (Schein's regional manager for Utah) and Cavaretta asked Titus to look into the Dental Co-Op situation. Titus denied that she was instructed to "shut down" Schein's relationship with the Dental Co-Op of Utah. (Titus, Tr. 5245).
366. In May 2014, Titus spoke with Andy Eberhardt, the Dental Co-Op of Utah's CEO regarding the Dental Co-Op and the new direction it was taking in partnering with manufacturers for direct discounts. Titus explained to Eberhardt that by signing with P&G and Komet, the Dental Co-Op created a business conflict for Schein, because the Dental Co-Op was now acting as a competitor to Schein. (CX2239 at 001-02 ("I did

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have a call with Andy Eberhardt last Monday. . . . He needed a wakeup call and in my sweetest voice, I also told him that we were very interested in exploring a healthy sustainable relationship, but it would not be in our interest to share the spotlight with competitors.”); Titus, Tr. 5236-39).

367. In the May 2014 discussion between Titus of Schein and Eberhardt of the Dental Co-Op (F. 366), Titus expressed concern that although the Dental Co-Op had 400 members, those members only did \$2 million in collective volume with Schein, which, at approximately \$5,000 a year per member, was substantially lower than the average spend by a private practice dentist. Schein questioned whether the Dental Co-Op was able to “drive compliance” with its members. (CX2239 at 001-02; Titus, Tr. 5240 (average private practice dentist spends approximately \$35,000 per year on supplies, while Dental Co-Op members were spending on average approximately \$5,000 a year with Schein)).
368. In the May 2014 discussion between Titus of Schein and Eberhardt of the Dental Co-Op (F. 366), Titus asked Eberhardt if he would be willing to end “the P&G and Komet” arrangement and return to an exclusive relationship with Schein. Eberhardt offered to consider it. Titus recommended to her superiors that talks with the Dental Co-Op continue, but that absent a return to exclusivity, “it might be wise to start thinking about an exit strategy as Andy [Eberhardt] will surely be looking to bring more of our competitors into his portfolio” for members. (CX2239 at 002; Titus, Tr. 5241; CX2807 at 001-02).
369. In June 2014, Schein learned that P&G was promoting the Dental Co-Op at the New Mexico state dental meeting. Cavaretta responded that “Andy’s goals are not aligned with ours. This is the danger of a Co-op . . . they want their brand front and center and when you help them build up a customer base they use it against you. We need to discuss an exit strategy in Utah so we are prepared to walk away from this relationship if it comes to that.” (RX2209 at 001-02).
370. On June 16, 2014, Schein’s Paul Hinsch brought the issue of P&G’s direct relationship with the Dental Co-Op to the attention of Sullivan. (CX2467 at 002).
371. On July 2, 2014, Titus and Eberhardt had an in-person meeting. At the meeting, Eberhardt informed Titus that he planned to add more of Schein’s competitors to the Dental Co-Op portfolio. Titus proposed to Eberhardt that the Dental Co-Op sign an exclusive agreement with Schein, but his answer was a “definitive no.” (CX2807 at 001; Titus, Tr. 5242-43).
372. After the July 2, 2014 meeting (F. 371), Titus debriefed Upchurch (Schein general manager for the western zone) and Harmon (Schein regional manager for Utah), stating that the Dental Co-Op of Utah was not willing to be exclusive with Schein and was cannibalizing existing Schein business with co-op members. Titus recommended to Upchurch and Harmon that Schein end its relationship with the Dental Co-Op of Utah, but that Schein keep the door open for the future, given that it had been a long-term relationship. (Titus, Tr. 5244-46; CX2211 at 003).

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373. On July 17, 2014, Upchurch informed Cavaretta that Schein planned to end being a part of the Dental Co-Op. Cavaretta agreed with the recommendation and made the decision, without consulting Sullivan, to end the “formal arrangement” with the Dental Co-Op of Utah. (CX2211 at 002-03; Cavaretta, Tr. 5602-03. *See also* Sullivan, Tr. 4234-35 (testifying he was not involved in the decision regarding Dental Co-Op of Utah)).
374. On July 18, 2014, in response to the recommendation to end the relationship with the Dental Co-Op of Utah (F. 372-373), Cavaretta asked whether after the relationship ended with Schein, “PDCO [Patterson] or Benco will jump on?” (CX2211 at 002).
375. Cavaretta’s wondering whether Patterson or Benco would “jump on” the Dental Co-Op business if Schein ended its relationship with the group is inconsistent with the existence of a mutual agreement to refuse to deal with buying groups. (*See* F. 374).
376. On July 30, 2014, Cavaretta wrote to Dean Kyle that the Dental Co-Op of Utah was one of two “big GPO[s]” that Schein would be “shutting down.” Cavaretta explained that by “shutting down,” he meant that Schein was “walking away” from the business relationship. (CX0175 at 001; CX0305 (Cavaretta, IHT at 194)).
377. On August 28, 2014, Eberhardt sent a letter to the Dental Co-Op’s members informing them that “[a]fter a meaningful sixteen year partnership . . . ,” the Dental Co-Op would no longer be participating in a purchasing program with Schein effective September 30, 2014. (RX2604 at 002). Eberhardt said that “much thought, deliberation, strategy and input went into this decision” and it was “in the best interest of Schein and the [Dental] Cooperative to part ways.” (RX2604 at 002). Eberhardt acknowledged the risks Schein took over the years to support the Dental Co-Op’s efforts and protect independent dentistry, and thanked the local Schein representatives that “consistently encouraged dentists to consider the benefits of the [Dental] Cooperative to help strengthen their practices.” (RX2604 at 002).
378. Schein stopped doing business with the Dental Co-Op of Utah in 2014. Schein’s decision included ending Schein’s relationship with the Dental Co-Op in the other states in which Schein supported the group, including Nevada, Idaho, and Arizona. (Titus, Tr. 5304; CX2801 at 018 (Schein’s Response to RFA ¶ 31); RX2947 (Cavaretta, Dep. at 71)). The Dental Co-Op eventually formed a relationship with Darby. (CX2211 at 002; RX2232 at 001; Sullivan, Tr. 4171-72).

5. Dental Gator

379. Dental Gator was formed in 2014 by some of the owners of MB2 Dental Solutions (“MB2”), a large Special Markets DSO customer. Schein’s Special Markets division had formed a relationship with Dental Gator in March 2014, through its relationship with MB2. (Sullivan, Tr. 3987, 3990; Puckett, Tr. 2214-16, 2221).

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380. Dental Gator took on its first customer in March 2014. At its largest, Dental Gator had 27 members. By the end of 2017, there was only one customer. It formally closed in 2018. (Puckett, Tr. 2219, 2267).
381. MB2 is one of the top 50 customers for Schein Special Markets. It was considered an elite DSO and a very important DSO customer. (Foley, Tr. 4570; CX8005 (Muller, Dep. at 166)).
382. On October 21, 2014, Foley described MB2 and Dental Gator in an email to Sullivan, Muller, Cavaretta, and Steck:

Dental Gator is owned by our EDSO [elite DSO], MB2 Dental. MB2 is a \$2 million plus merchandise customer and recently became Dentrrix Enterprise's largest software purchaser. Similar to Heartland Dental, MB2 goes after offices by setting them up as "consulting practices" to win them eventually as MB2 owned offices. . . . In our prime vendor agreement we spelled out specific terms and restrictions about these consulting offices to prevent Dental Gator from being a typical GPO. . . .

(RX2294 at 001).

383. Dental Gator was formed as a way for MB2 to identify target offices for potential acquisition. (Puckett, Tr. 2214-16, 2221; Foley, Tr. 4570-71).
384. Dental Gator sought to obtain better discounts on dental supplies for its members than they could otherwise secure on their own. (Puckett, Tr. 2220). Dental Gator also offered its members certain value-added services, such as advertising, information and technology, legal, lab, accounting, and billing, among others. (Puckett, Tr. 2221; CX8006 (Puckett, Dep. at 46-47)).
385. Dental Gator charged up to \$499 per month for members to be a part of its buying group. (Puckett, Tr. 2304).
386. In early 2014, MB2 met with Schein and other distributors to discuss a request for proposal for MB2's business and also its plans for a buying group. (Puckett, Tr. 2227-28). During this initial meeting, MB2 informed Schein about its plan to use the newly formed buying group as a way to procure dental offices for MB2. (Puckett, Tr. 2228; CX0306 (Foley, IHT at 191)).
387. Schein asked MB2 what its president, Justin Puckett, who was also one of the founders of Dental Gator, referred to as "standard due diligence questions" to get a better understanding of the planned buying group. These included questions such as what the group's purpose was, who was going to run the group, how would it be marketed, who would be eligible, and what the membership rate was. (Puckett, Tr. 2201, 2214-19, 2228-29).

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388. In discussions with MB2, Schein's Hight expressed Schein's desire to work with "certain types of" buying groups but not "pure buying groups," which, Puckett described as groups "formed for the sole purpose of just saving money on supplies with no true affiliation with each other, for example, just four dentists at a bar saying let's get together and order cheaper toothbrushes." Hight told Puckett that Schein would "work with groups that could offer more in terms of . . . value-added services" to members. (Puckett, Tr. 2237-38, 2275; CX8006 (Puckett, Dep. at 63-65); CX8022 (Hight, Dep. at 161) ("the real issue was market[ing] that it was just a purchasing plan without management services")).
389. An agreement was reached between Schein and MB2 in 2014. Foley signed the 2014 Prime Dental Supplier and Equipment Agreement with MB2 on behalf of Schein ("2014 MB2 Agreement"). (CX4001 at 002-06; Foley, Tr. 4573-74).
390. Under the 2014 MB2 Agreement, Schein provided a custom formulary and discounts on non-formulary items to the members of MB2's DSO (offices owned by MB2). (CX4001 at 003).
391. The 2014 MB2 Agreement between MB2 and Schein did not allow MB2 to extend the discounts under the agreement to practices that were not owned by MB2. The agreement states: "[d]ental practices which are not owned in whole or in part by MB2, must have a formal affiliate agreement in place with MB2." (CX4001 at 002). This clause was included to ensure that DSO pricing would only apply to MB2 and would not be extended to a non-DSO entity, like Dental Gator. (Foley, Tr. 4574).
392. The custom formulary and discounts Special Markets negotiates on behalf of DSOs are proprietary with the manufacturer, Schein, and the DSO. (Foley, Tr. 4696-97).
393. The 2014 MB2 Agreement between MB2 and Schein provided that for MB2 and for any unowned associated entity, "MB2 . . . agrees that for all such offices, the primary relationship will comprise business management services and shall include the ability to require offices to comply with the purchasing commitment and payment terms of this agreement." (CX4001 at 002).
394. The 2014 MB2 Agreement between MB2 and Schein including a provision stating: "The benefits of the Prime Dental Supplier Agreement between MB2 and Schein shall not comprise the primary relationship with any non-owned dental entity. This agreement may not be used to grow any Group Purchasing Organization (GPO) type relationship which is defined as a relationship whose purpose is to generate revenue for the parent company by allowing others to benefit from the terms of the prime vendor relationship." (CX4001 at 002; Foley, Tr. 4574).
395. Schein did not want Dental Gator to advertise that Schein was "working with someone who is purely designed for" only the purpose of discount supply purchases. (CX8006 (Puckett, Dep. at 71-72)).

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396. If MB2 wanted to operate a buying group, Schein could offer discounts to that group under a separate sales plan. (CX8022 (Hight, Dep. at 134, 136, 161-62)).
397. Puckett, president of MB2 and one of the founders of Dental Gator, believed that Dental Gator and MB2 were “lumped into one contract.” (Puckett, Tr. 2231).
398. Although the 2014 MB2 Agreement did not allow MB2 to extend its pricing to Dental Gator, MB2 extended its Schein pricing to Dental Gator members anyway. (CX8022 (Hight, Dep. at 134)). This meant that Dental Gator members were being provided the same pricing from Schein that Schein gave to MB2. (Puckett, Tr. 2231, 2288-89; Foley, Tr. 4572). Special Markets also provided a rebate to Dental Gator for its member’s purchases. (CX4027).
399. In June 2014, Schein became aware that Dental Gator advertised that dentists that became members of Dental Gator could save up to 60% on Schein supplies, which caused Schein concern. (Puckett, Tr. 2247-48; CX8005 (Muller, Dep. at 189); CX8006 (Puckett, Dep. at 81) (“[T]he email said, hi, join Dental Gator, we will save you 60 percent off Schein products. You will be crazy not to join us.”)). Puckett referred to such an advertisement (which was put out by a third-party vendor) as contrary to what had been agreed to with Schein, “probably a false statement,” and “misleading for sure.” (CX8006 (Puckett, Dep. at 79-81); Puckett, Tr. 2278).
400. On June 10, 2014, Puckett and Hight had a conversation about the MB2 agreement and Dental Gator. (CX8022 (Hight, Dep. at 136); Puckett, Tr. 2247-48). Hight informed Puckett that the Dental Gator’s advertising was against what the parties had agreed to and that it needed to be stopped. (Puckett, Tr. 2247-48). As Puckett described Schein’s concern as conveyed to him, “I think the bluntness of the promising of straight discounts, not our other services, our value props was concerning.” (CX8006 (Puckett, Dep. at 80-81)).
401. Dental Gator agreed that, going forward, it “would market itself as a value-added partner of Schein, providing a broad spectrum of services to dentists.” (Puckett, Tr. 2279-80; *see also* CX4016 at 001 (updated Dental Gator website noting that “[o]ur members do see significant savings on variable cost, but our main goal is to help doctors grow their practice.”)). This satisfied Hight, who wrote that “[w]e really do look forward to seeing your great success continue and to be true partners with you to help make that happen.” (CX4067 at 001).
402. Dental Gator agreed that it would not advertise that it was “a strict buying group” whose “sole purpose [was] buying Henry Schein supplies to save money.” (Puckett, Tr. 2241-42).
403. Hight reported to Foley and Muller on June 10, 2014 that Dental Gator “assured me [that] they are shutting down the GPO aspect of what happened immediately.” (CX0247; *see also* CX2425).

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404. Dental Gator caused conflicts with Schein's manufacturer partners. In the summer of 2014, a Patterson sales representative complained to manufacturers that Schein was extending its pricing for MB2 to Dental Gator offices. (CX0306 (Foley, IHT. at 73-74); CX2078). As a result, manufacturers asked Schein to stop extending its pricing for the MB2 DSO to Dental Gator. (CX0306 (Foley, IHT at 74, 77); CX8003 (Foley, Dep at 247)).
405. The Dental Gator buying group caused internal conflicts at Schein between HSD and Special Markets. (CX8005 (Muller, Dep. at 195, 217); Sullivan, Tr. 3991, 3997).
406. Special Markets received complaints from HSD FSCs who were concerned that Dental Gator's leading its advertisements with deep discounts from Schein, instead of value-added services, would result in reduced commissions. (CX0306 (Foley, IHT at 193-96)).
407. Some within HSD had concerns related to Schein's discount offering to Dental Gator and the FSCs' perception that Schein was working against them by allowing Dental Gator to offer more aggressive discounts than HSD's FSCs could offer. (Meadows, Tr. 2574-75). Meadows, then a zone general manager at HSD, was concerned that Schein would be "arming dental gator with a more aggressive offer to [the] average practice than [HSD's] FSCs" could offer, putting them at a competitive disadvantage against their own company. This could result in reduced commissions for FSCs. (CX2370 at 001; CX0306 (Foley, IHT at 193)).
408. Senior leadership for Special Markets and HSD met in late November 2014 to discuss resolutions to the Dental Gator conflicts. (CX2365; CX8025 (Sullivan, Dep. at 335-36); Meadows, Tr. 2563-65; CX2032).
409. In January 2015, Muller, president of Special Markets, proposed placing Dental Gator on a new pricing plan that was used for HSD Mid-Market (F. 224-225) customers. (RX2097 at 005; Foley, Tr. 4697-98). Specifically, Muller proposed that Dental Gator receive "G plan pricing going forward," which was the "same pricing HSD can offer groups of offices" with FSCs keeping full commission. (RX2097 at 005; CX2370 at 002; Meadows, Tr. 2572-74; *see also* Meadows, Tr. 2566-67 ("[A]t this time, 2015, the G plan was Henry Schein Dental's first attempt to build a private practice formulary.")).
410. Sullivan believed Muller's proposal (F. 409) "was a good compromise" and a way to resolve the internal conflict over Dental Gator between Special Markets and HSD. (CX2370; CX8025 (Sullivan, Dep. at 318-19); Meadows, Tr. 2566-68). Meadows "support[ed] the decision" and also suggested discussing whether the G plan should be "offered at a lower dollar level (\$75,000) and/or . . . creating a Private Practice formulary" because there was still a potential for conflicts with Schein's private practice customers. (CX2372 at 002; Meadows, Tr. 2574-75).
411. On January 28, 2015, Muller wrote to Sullivan and Breslawski that Dental Gator was "not a pure buying group - they have 12 services they offer." Breslawski responded, "It is important that while accommodating [Dental Gator] for unique reasons here, we don't

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help open the floodgates on buying groups!” (CX0188 at 001). Breslawski explained that he was referring to “price-only groups that are not adding value,” which “do not align naturally with our value proposition.” (CX8012 (Breslawski, Dep. at 134-36, 138)).

412. In February 2015, Special Markets created a new Dental Gator sales plan that was separate from MB2. (CX0306 (Foley, IHT at 74-77); CX8005 (Muller, Dep. at 183-84, 187-88); CX2641; CX8022 (Hight, Dep. at 192)). Special Markets grandfathered all existing Dental Gator members and maintained their current pricing, which was the same DSO pricing that MB2 members were receiving. (Foley, Tr. 4697-98; Puckett, Tr. 2289-90). Schein provided new Dental Gator members with formulary pricing with discounts, which, while higher than MB2’s DSO pricing, was, in Dental Gator’s view, “still competitive for an independent dentist.” (Puckett, Tr. 2294, 2296; CX4026 at 001 (internal Dental Gator email from Patrick Gill stating that the new Schein sales plan “is still competitive for an independent dentist” and “I don’t think anyone is going to let me get MB2 pricing (Schein, Patterson, Benco, etc. . . .”)) (ellipses in original)).
413. The pricing for new Dental Gator members represented a 10 to 15% increase over the DSO pricing that “grandfathered” members got. (Puckett, Tr. 2257-59; CX4015).
414. Schein placed Dental Gator on a new pricing plan and Special Markets continued its relationship with the group. (Foley, Tr. 4697-98).
415. Patrick Gill, who had been president and CEO of Dental Gator, left Dental Gator at the end of 2015. (Puckett, Tr. 2224, 2302). After Gill left, Dental Gator did not make any additional efforts to market its buying group program. (Puckett, Tr. 2302).
416. Puckett of MB2, who was also a founder of Dental Gator, did not perceive that the price change from Schein for new Dental Gator members in February 2015 was an effort to terminate Dental Gator. Schein never asked MB2 to shut down Dental Gator. (Puckett, Tr. 2270-71).

6. Dentists for a Better Huntington

417. Schein has worked with the buying group Dentists for a Better Huntington since at least 2009. (CX2724 at 021 (2009 agreement); *see also* CX6602 at 003 (“This Agreement terminates that certain Partnership Support Program document, dated 2009.”)).
418. Schein provided both discounts and rebates to the Dentists for a Better Huntington buying group. (CX2724 at 021). Schein’s 2009 Partnership Support Program for the Dentists for Better Huntington group provided “aggregate rebates that will be donated quarterly to the group,” and a “10% discount on ALL orders.” (CX2724 at 021 (capitalization in original)).
419. Schein executed a new Prime Vendor Agreement with Dentists for a Better Huntington on January 1, 2017. (CX6602 at 003).

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7. Florida Dental Association

420. The Florida Dental Association (“FDA”) is a buying group. (RX2956 at 004 (Complaint Counsel’s Responses to Interrogatories)).
421. In late 2011 or 2012, FDA approached Schein about partnering with its buying group. (CX0201 at 001; RX2466 at 001; CX0310 (Steck, IHT at 131)).
422. Schein was interested and had several discussions with FDA about their new program. (CX0201 at 001; CX0310 (Steck, IHT at 133) (“[W]e were interested or we wouldn’t have been talking to them.”)).
423. Schein was concerned that FDA was unwilling or unable “to commit volume for their members or give [Schein] any kind of minimum purchase levels that would allow . . . a reduced pricing arrangement.” Although FDA contended they could bring Schein new customers, Schein did not believe that FDA members would buy from Schein just because the association had an agreement with Schein. (CX0310 (Steck, IHT at 133); CX8031 (Steck, Dep. at 56-58) (“[W]e didn’t believe that they would automatically buy more for us [*sic*] just because we made some kind of agreement with them.”)).
424. Schein offered FDA increased discounts to members who made purchase commitments and seminars for members around the state. (CX0310 (Steck, IHT at 133-34) (“[W]e offered that if a customer signed up on a plan we would normally offer a \$25,000 customer that they could get that same plan with a \$15,000 commitment. So we gave them a reduced commitment to get the pricing, but it still required a commitment . . .”)).
425. FDA chose to work with Darby as their “supplier partner.” (RX2466 at 001; CX0310 (Steck, IHT at 134)).

8. Klear Impakt

426. Klear Impakt, LLC (“Klear Impakt”) is a buying group made up of independent dentists. (R. Johnson, Tr. 5479).
427. Dr. Richard Johnson, one of the founders and owners of Klear Impakt, described the sole purpose of Klear Impakt as “to keep private practice dentists strong and independent.” (R. Johnson, Tr. 5478-79).
428. Klear Impakt offers its members services in addition to discounts on supplies, including “a patient experience class, a phone training class, leadership training, financial training, marketing, discounts,” and advice regarding “acquisition, merger, [and] expansion.” (R. Johnson, Tr. 5482-83; *see also* CX4109 at 004 (“Klear Impakt Solutions Summary: Business/Practice Efficiency; Front Office Training; Financing; Human Resources; Marketing; Business Management; Education & Professional Development; Member Integration”); R. Johnson, Tr. 5484-88).

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429. There is no fee or charge to be a member of Klear Impakt. (R. Johnson, Tr. 5488-89).
430. Schein began discussing a buying group partnership with Klear Impakt “sometime in 2014.” (R. Johnson, Tr. 5479-80, 5490; Titus, Tr. 5269). Dr. Johnson and Titus of Schein had “[s]everal phone calls . . . just trying to understanding each other, where we’re coming from, and see if it’s even worth our time to move forward. And then we thought it would be finally good to meet in person . . .” (R. Johnson, Tr. 5493).
431. Dr. Johnson and his partners had an in-person meeting with Titus and Nicole Lena of Henry Schein on January 21, 2015. The meeting lasted between three and four hours. They discussed “what [Klear Impakt is] as a group,” what it was offering its members, and what its “value proposition” is in terms of services to members, which Dr. Johnson described as the business skills and marketing services Klear Impakt provides. (R. Johnson, Tr. 5492-94; CX2208 at 002).
432. Titus explained that the “first order of business” at the January 21, 2015 meeting (F. 431) “was to collect information on” Klear Impakt, including “who they were, their scope of membership, who those members were, what their vision and their mission [was], whether they were aligned in their values and their integrity that they would serve our brand well and we would serve theirs well . . .” Titus sought to assess “whether they could offer us exclusivity, whether they could promote our business solutions portfolio which included education and nonclinical business services, and whether they could comply, their members would comply, with an agreement with Henry Schein as a prime vendor.” (Titus, Tr. 5269).
433. It was important to Dr. Johnson to present Klear Impakt’s value proposition at the January 21, 2015 meeting (F. 431-432) to make sure Schein “knew we weren’t the same as . . . every other buying group, that we weren’t just a discount company.” (R. Johnson, Tr. 5494).
434. Titus determined that Klear Impakt “fit [Schein’s] criteria or strategy for engaging with buying groups that would present a healthy relationship for all the stakeholders and would grow the Henry Schein business.” (Titus, Tr. 5270-71).
435. Titus liked what she heard at the January 21, 2015 meeting (F. 431) and told Dr. Johnson in a follow up email on January 22, 2015: “Working in the Special Markets space for 15 years, I’ve seen many iterations on the Member model. Klear Impakt is a testimony that not all are created equal.” Titus further wrote that she felt “very encouraged” that Schein’s “[s]enior leadership will want to continue the discussion.” (CX2208 at 002; Titus, Tr. 5270).
436. Titus informed Klear Impakt that she would “move this up the line” and would “be attending a senior management meeting next week.” (CX2208 at 002; R. Johnson, Tr. 5495 (“[S]he is going to explain to her superiors and bosses about who and what we are and hopefully promote our company.”)).

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437. On January 22, 2015, Titus emailed Brady and Cavaretta, both of whom at that time had oversight over the Mid-Market division (F. 227, Meadows, Tr. 2609), about wanting to explore a relationship with Klear Impakt, which she described as “different” and “impressive.” (CX2208 at 001 (“Guys . . . we need to talk about this one. Most of these are a dime a dozen . . . consultants that charge the dentists to vomit business 101, then use them to create additional revenue for themselves from the supplier. This one is different [given their facilities, training center, and academic affiliations]. To be clear, I’m not ALL IN, but it passes the first line muster of ‘need to explore.’ BTW, they actually proactively told me the following: (1) Exclusive [to] Schein, (2) Will promote our BS [Business Solutions] portfolio; (3) Members will be expected to comply w/Prime Vendor [Agreement] (with penalties for non-compliance.”) (capitalization and ellipses in original); CX8020 (Brady, Dep. at 10); Cavaretta, Tr. 5583).
438. On February 7, 2015, Titus reported back to Dr. Johnson by email that she had reviewed Klear Impakt “with [Schein] senior management.” Titus wrote that she “gave a very strong recommendation that we move forward with discussions and provided viable scenarios for a partnership with Klear Impakt” but that “there is an executive committee that will need to review our policy as it applies to new partnerships of this nature. Key components are those I discussed with your team; exclusivity, compliance (within reason), [and] opportunity to work with your members on full Henry Schein portfolio. . . . The executive committee meets in 2 weeks. I’m very encouraged Once we have the [executive committee] green light, it would then be up to us to come up with an agreement that makes sense for both parties.” (RX2062 at 003).
439. After the February 7, 2015 email (F. 438), Schein’s team visited Dr. Johnson and the Klear Impakt team a second time to discuss Klear Impakt’s business and services in more detail. (R. Johnson, Tr. 5498-99). Dr. Johnson also met with Schein representatives Titus, Lena, and Cavaretta at the California Dental Academy so that the Klear Impakt team could meet Cavaretta personally. Cavaretta reacted “very positive[ly].” (R. Johnson, Tr. 5499).
440. Dr. Johnson did not hear anything from Schein that gave him the impression that Schein had a policy not to do business with buying groups. (R. Johnson, Tr. 5499 (“Q.: So is there anything in these meetings, these e-mail exchanges we looked at, that indicated to you that Schein had a policy at this time in early 2015 not to do business with buying groups? A.: No. Nothing stuck out to us that they were not going to work with us; otherwise, they would have been wasting their time or our time.”)).
441. Titus did not receive any internal instruction at Schein not to do business with or end negotiations with Klear Impakt. (Titus, Tr. 5271).
442. Schein and Klear Impakt entered into an agreement on August 17, 2015 that provided Klear Impakt members with a formulary price on [REDACTED]. Schein also agreed to pay [REDACTED].

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Klear Impakt a [REDACTED] based on its members' collective purchase volume. (RX2162 at 001-02, *in camera*; R. Johnson, Tr. 5501-02, *in camera*).

443. Under Klear Impakt's agreement with Schein (F. 442), [REDACTED]
[REDACTED] (RX2162 at 001; R. Johnson, Tr. 5501-02, 5514-15, 5518).
444. Klear Impakt members are not obligated to participate in its discount program with Schein. In order to receive a discount from Schein through Klear Impakt, members must complete an enrollment form, which states in part: "The above named Member agrees to purchase a minimum of 70% of their supplies in a FISCAL Year from Henry Schein Dental." (RX2222 at 001; R. Johnson, Tr. 5503-04).
445. The 70% supply purchase commitment (F. 444) benefits Klear Impakt by increasing the amount it receives from Schein through the administrative fee. (R. Johnson, Tr. 5518-19).
446. Klear Impakt and Schein renewed their agreement in 2016. (RX0602 at 001). [REDACTED]
[REDACTED]
[REDACTED] (RX0602 at 001-02, *in camera*; R. Johnson, Tr. 5520-23, *in camera*).

9. Kois Buyers Group

447. Schein's conduct with respect to the Kois Buyers Group is set forth in F. 900-921.

10. Intermountain Dental Associates

448. Intermountain Dental Associates ("IDA") is a group that has a DSO arm (owned offices) and a buying group arm of independent dentists in which IDA does not have any ownership. (CX2153 at 002-03; Carvaretta, Tr. 5562).
449. Schein Special Markets formed a relationship with the DSO arm of IDA in as early as 2009. (Foley, Tr. 4642-43; CX0306 (Foley, IHT at 100); RX2320).
450. IDA reached out to Schein in May 2010 and inquired about the possibility of Schein offering discounts to the buying group arm of IDA, which would be comprised of IDA's non-owned "affiliate" offices. (Foley, Tr. 4642-43; CX2153 at 003).
451. In May 2010, Foley instructed his team to assess whether IDA would have complete control of the affiliate's purchasing policy, referencing that it had been decided in a meeting among Muller, Sullivan, and Steck that buying groups need to have "complete control of purchasing policy that would force the distributor purchases to Schein." (CX2153 at 002). Foley saw his instruction as applying the 2010 guidance (F. 216-217)

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that if a group can drive compliance, it “would be a good fit for Schein.” (Foley, Tr. 4645-46).

452. On January 26, 2012, Cavaretta wrote that while IDA was “dangerously close” to a “GPO,” “[t]he difference here is that they will force any customer to purchase from Schein” (CX0168 at 001; Cavaretta, Tr. 5641).
453. After confirming that the IDA buying group could drive compliance, Foley approved offering discounts to IDA’s buying group. The pricing that Special Markets extended to the IDA buying group was the same pricing it provided to the DSO, which included a custom formulary for IDA members, as well as discounts of up to 20% off non-formulary items. Schein continued doing business with the IDA buying group arm through at least December 2016. (Foley, Tr. 4646-47; RX2320).

11. Long Island Dental Forum

454. Schein began working with buying group Long Island Dental Forum in 2006. (Cavaretta, Tr. 5576-77; CX2895 at 013 (Schein’s Response to Interrog. No. 1)).
455. The Long Island Dental Forum was created by Dr. Alan Farber and is comprised of independent dentists. (RX2947 (Cavaretta, Dep. at 22-24); *see also* RX2263 at 006 (listing dentist members for 2015 through 2016)).
456. Cavaretta, the Schein regional manager for Long Island at the time, was responsible for opening the Long Island Dental Forum buying group within Schein. (Cavaretta, Tr. 5576-78). While Cavaretta was engaging in negotiations with the Long Island Dental Forum, he called Steck, Henry Schein Dental’s vice president and general manager, about the opportunity and Steck agreed it was a good opportunity that Schein should pursue. (Cavaretta, Tr. 5577-78 (“When . . . I was engaging in conversations with Dr. Farber, I did call Dave Steck and let him know about the opportunity, talked it over, and he said, Yeah, let’s do it.”)).
457. A 2006 letter from Cavaretta to Dr. Farber outlined the “terms of [Schein’s] agreement” with the Long Island Dental Forum. (CX2724 at 017-18; Cavaretta, Tr. 5576-77).
458. Schein’s letter agreement with the Long Island Dental Forum lists benefits for “each new member” of the Long Island Dental Forum, including “5% off of catalog,” membership in the Privileges Program “as long as they commit to do at least 12,000 in business,” a “fee analysis” for each member who is also a Privileges customer, a “3% cash back” rebate to the Long Island Dental Forum, and other technical support and technology benefits. (CX2724 at 017).
459. Schein’s letter agreement with the Long Island Dental Forum (F. 456-457) stated that the Long Island Dental Forum will “persuade members” to make Schein “their primary source for merchandise and equipment,” and “promot[e] [Schein] as their exclusive supplier.” (CX2724 at 017-18).

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460. Dr. Farber signed an additional agreement on behalf of the Long Island Dental Forum with Schein on December 9, 2015. (RX2263 at 002).
461. Schein continues to do business with the Long Island Dental Forum and provides its member dentists discounts. (Cavaretta, Tr. 5578; *see also* CX7101 at 140 (identifying Long Island Dental Forum sales in Schein sales data from 2009 to 2017)).

12. MeritDent

462. There is no factual dispute that MeritDent is a buying group. (CCFF 712; RRCCFF 712; CCRB at 155).
463. When MeritDent first approached Schein in late 2011, Schein was skeptical. (Sullivan, Tr. 4242-43; Cavaretta, Tr. 5580-81). As Cavaretta, the western zone manager for Schein at the time explained, Schein's "value proposition" was "helping doctors grow their practice . . . organically with [Schein's] current offerings." (Cavaretta, Tr. 5578, 5580). Buying groups were not a natural fit in that strategy, as Schein had concerns about whether the buying group could actually "grow [Schein's] business." (Cavaretta, Tr. 5580 (explaining that buying groups were not Schein's "major growth strategy" in late 2011); Sullivan, Tr. 4242; CX2458 at 001 ("As you can imagine they [senior HSD leadership] feel the same as we do that we don't want to be the first company to open the floodgates to the dangerous world of GPOs."))).
464. MeritDent did not "fall into the [Special Markets] world" because it could "not guarantee that all of their business will come to Schein" (CX2458).
465. Cavaretta, Sullivan, Steck, and Chatham met in December 2011 to discuss the MeritDent opportunity, including the fact that Schein had "60 percent market share" in the area where MeritDent was located, but that "the economy [had] really hit . . . hard." (Cavaretta, Tr. 5579-82; Sullivan, Tr. 4241-42; CX2458).
466. On December 22, 2011, Cavaretta outlined a proposal for the MeritDent buying group. (CX2458; Cavaretta, Tr. 5582; Sullivan, Tr. 4243).
467. Schein representatives met with MeritDent "several times." After these meetings, Schein and MeritDent reached an agreement on a pricing program and additional Schein practice tools and educational offerings. Schein and MeritDent entered into a purchasing agreement on February 7, 2012. (Cavaretta, Tr. 5580-82, 5649; Sullivan, Tr. 4243-44; RX2393 at 004-05).
468. Schein's agreement with MeritDent (F. 467) provided a "pricing program" that gave MeritDent members "a savings of 15-20% off of HSD cat[a]log" and a rebate to MeritDent based on the number of members meeting specified member purchase volumes. (RX2393 at 005; Sullivan, Tr. 4243-45).

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469. “[P]urchases for the entire group fell in 2013 from the 2012 levels.” By 2014, MeritDent only had “35 accounts” purchasing more than the purchase volumes referenced in the agreement with Schein. (RX2393 at 004).
470. Schein continued to work with MeritDent through at least April 2015, with the “hope we can reach a level with membership [that] would benefit both” parties. (Cavaretta, Tr. 5582; RX2393 at 001, 004).

13. Pacific Group Management Services, Inc.

471. Pacific Group Management Services, Inc. (“PGMS”) is a buying group. (Titus, Tr. 5310-11).
472. PGMS was brought to Titus’ attention by a Schein equipment sales specialist working with one of the principals of PGMS. (Titus, Tr. 5216-17).
473. PGMS approached Schein for a potential partnership in June 2014. (Titus, Tr. 5216-17).
474. Titus, in her role as director of the western United States for the Mid-Market division, evaluated the PGMS opportunity to see if a relationship between the two would be a good fit for both parties. (Titus, Tr. 5217-19).
475. At the time PGMS approached Schein in June 2014 (F. 473), Schein was working on developing “a strategy that we could work more effectively . . . [to] make a more discerning decision about what constituted a healthy relationship” with a buying group and “what didn’t.” (Titus, Tr. 5220).
476. Titus saw the process of evaluating the PGMS opportunity as “starting to establish some real policies that will guide us well into the future.” (CX2219 at 001). Titus formulated a set of questions for PGMS, which Cavaretta stated “should be standard” for all buying group evaluations. (CX2809 at 001).
477. On June 2, 2014, Titus sent PGMS “10 critical questions necessary to evaluate a partnership[,]” which were designed to understand the nature of the group’s business model, and their capacity to drive compliance, deliver incremental volume, and minimize cannibalization. (Titus, Tr. 5218-20; CX2809 at 003-04 (questions included: “Brief profile and history of PGMS,” “Portfolio of PGMS services,” “Can PGMS effect compliance of its members,” “How many members does PGMS represent,” “If it was the right offering, would [an] agreement be exclusive,” and “How would PGMS intend to market a distribution partnership to its members”)).
478. Titus referred to the list of questions referenced in F. 477 as a “discovery” or “due diligence” phase to determine whether there is a basis for moving forward with negotiations. (Titus, 5217-20).

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479. On June 12, 2014, Titus forwarded her list of questions and PGMS's answers to Cavaretta by email, writing: "[T]his is (yet another) potential hybrid-GPO partner, but only with a carefully crafted deal that guarantees compliance, exclusivity and the opportunity to market Schein business solutions. I sent them some tough questions thinking it would scare them off, but alas, they raised the stakes by moving to Dir of Ops." (CX2809 at 001-02).
480. On June 12, 2014, Cavaretta responded to Titus' email (F. 479) approving Titus' request to set up a call with PGMS and stating, "This is not going to stop and [is] another reason why we need to make sure we have ou[r] systems and offering down cold and the team understanding how to present." (CX2809 at 002; Titus, Tr. 5220).
481. On June 26, 2014, Titus and Brady met in person with PGMS. After the meeting, Titus believed that PGMS presented a "solid business opportunity," including because PGMS was willing to "agree to Schein exclusivity," and also noted, "They cannot guarantee compliance of all member offices, but believe they can strongly persuade I would like to move forward a 1 year agreement with an option to renew." (CX2215 at 001 (July 7, 2014 email); CX2250 at 004-05 (June 27, 2014 email) ("consensus of the team [was] to move forward with a proposal"); Titus, Tr. 5222).
482. On July 14, 2014, Brady expressed concerns about PGMS, because PGMS told Schein "a few times during the meeting" that it can "only 'lead the horses,' but 'not make them drink.'" (CX2250 at 001; Titus, Tr. 5222 (during the meeting PGMS was "very insecure about whether they could actually influence their members to buy from Schein or gain compliance"); Cavaretta, Tr. 5607-08). As Brady explained, "[l]et's say, for example, they have 50 [dentists] . . . , and half of those are buying customers from HSD (our Bay Area market share is 55% . . .) on VPAs [Volume Purchase Agreements] with an average discount of 5-10%. Will all of those doctors[] respective VPA's [now go to] 20% off . . . ? My experience in the past is . . . [d]octors already buying from us will want [the] more aggressive discount, and doctors who don't buy from us probably aren't going to switch if they have relationships elsewhere . . . especially when there is NO mandate to buy from Schein" (CX2250 at 003 (capitalization in original)).
483. PGMS is located in California, where Schein has over 50% market share, which causes a risk of cannibalization. (Cavaretta, Tr. 5607-08).
484. On July 14, 2014, Showgren stated, regarding moving forward with a proposal to PGMS, "It does come down to the agreement that we put in place and the enforceability that PGMS has with their accounts they sign up that requires them to purchase from Schein. I am good with KT [Kathleen Titus] pursuing a proposal but then before we finalize I want to see what guarantees they bring back that shows we would be gaining incremental business." Cavaretta responded that he agreed and that "[o]ur concerns are the same." (RX2228 at 001; Cavaretta, Tr. 5607-08).
485. In July 2014, Schein provided a proposal to PGMS. (CX2251 at 002).

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486. PGMS would not agree to guarantee that its members would purchase from Schein. (CX2251 at 002 (draft agreement stating, “Schein acknowledges that PGMS cannot guarantee that its members will purchase from Schein, however PGMS will use best efforts”); CX8010 (Titus, Dep. at 245-46)).
487. Cavaretta discussed the PGMS opportunity with Sullivan. Cavaretta told Sullivan that he did not think that Schein should partner with PGMS, including because PGMS could not enforce compliance. Sullivan left the decision whether or not to partner with PGMS to Cavaretta. (Cavaretta, Tr. 5608-10 (Cavaretta asked Sullivan what he thought and Sullivan told him, “whatever you want to do we do.”); Sullivan, Tr. 3983-84).
488. On July 16, 2014, Titus wrote to Showgren, Brady, Cavaretta, and Lena: “I s/w [spoke with] Joe [Cavaretta] today about the agreement. Tim [Sullivan] was not in favor of it. I get that. We all had similar reservations.” (CX2219 at 001; Titus, Tr. 5314-15).
489. On July 17, 2014, Titus wrote to Showgren and Upchurch, attaching a copy of a proposed PGMS agreement: “We had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. I created this and sent to Joe [Cavaretta] for review. It went to Tim [Sullivan] and he shot it down. I think the meta msg is officially, GPO’s are not good for Schein.” (CX2235 at 001; Titus, Tr. 5310-11).
490. Titus had not actually spoken with Sullivan when she made the statements regarding Sullivan in CX2235 (F. 488-489). (Titus, Tr. 5227-29, 5315-16).
491. Cavaretta, not Sullivan, ultimately made the decision not to partner with PGMS. (Cavaretta, Tr. 5609-10).

14. Pugh Dental Alliance

492. Pugh Dental Alliance is a buying group comprised of female private practice dentists in Southeast Florida. (Foley, Tr. 4657, 4662; Steck, Tr. 3766; CX2529 at 004).
493. Foley opened a Pugh Dental Alliance account shortly after he started in Schein’s Special Markets division in 2009. (Foley, Tr. 4522, 4605, 4662-63).
494. Schein provided discounts to members of Pugh Dental Alliance under a formulary plan, and Special Markets Equipment created “a ‘start up’ equipment formulary with Midmark.”⁵² (CX2529 at 002).
495. Pugh Dental Alliance did not have much success and the group’s leader decided to discontinue adding new members to the buying group. (CX2529 at 012).

⁵² Midmark Corporation is a manufacturer of dental equipment. (Cohen, Tr. 846. See also <https://www.midmark.com/dental/solutions>).

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496. Current members of Pugh Dental Alliance continue to operate as a buying group. Schein's formulary discount plan stayed in place for Pugh Dental Alliance members. (Foley, Tr. 4666; CX2529 at 012).

15. Schulman Group

497. In April 2013, Schein developed a "Group Partnership Program" for the Schulman Group. (RX2256 at 001 ("Henry Schein Dental is excited to present this partnership program to the Schulman Group. This program is designed to offer saving and value in many areas that are important to your practice."); CX8000 (Porro, Dep. at 153-54); CX2047 at 002).
498. Schein's Group Partnership Program with the Schulman Group included a "Special Discount Program . . . on 2,000 of the most common products an Orthodontist purchases" plus a \$500 service coupon, \$1,000 off certain equipment or technology purchases, discounts, and a rebate opportunity. (RX2256 at 001; CX8000 (Porro, Dep. at 151)).
499. The Schulman Group members agreed to a minimum \$15,000 merchandise goal for the year. (RX2256 at 001).
500. On April 19, 2013, Michael Porro, Schein's Atlantic Coast zone general manager at the time, distributed the partnership program documentation to the Schein sales representatives that had customers in the Schulman Group. Porro described the Schulman Group as a group "of over 175 high level/volume orthodontic practices across the country," noting "[m]ost of the members of the group do very little business with Henry Schein so this can be a nice opportunity." (CX2047 at 002-03; CX8000 (Porro, Dep. at 150)).
501. Benco became aware that Schein was offering a discount program to the Schulman Group in early August 2014, when a Benco sales representative reached out to senior Benco leadership "to see if we (Benco) [wanted to] offer a discount for the Schulman Group," stating that "I know Henry Schein does." (CX1104 at 002).
502. Benco declined to do business with the Schulman Group because it was a buying group. Evans, Benco's director of sales at the time, rejected the idea of offering a discount to the Schulman Group, noting that the "Schulman Group is a buying group . . . and we don't participate in that business," following an instruction from Ryan: "Buying group. Don't put anything in front of them." (CX1206 at 001; CX1104 at 001).

16. Smile Source

503. Schein's conduct with respect to Smile Source is set forth in F. 826-860.

17. Steadfast Medical

504. Steadfast Medical ("Steadfast") is a buying group. (RX2937 at 005-06; Foley, Tr. 4676).

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505. Special Markets, under the direction of Foley, entered into a relationship with Steadfast in approximately 2010. (CX0306 (Foley, IHT at 91); Foley, Tr. 4676, 4681).
506. Special Markets began its relationship with Steadfast because Foley believed the group was offering more than “price only” to its members, such as helping them open their offices, so that the group could “drive compliance” with purchases from Schein. (Foley, Tr. 4677-78; CX8003 (Foley, Dep. at 145-46)). Steadfast was smaller than other Special Markets accounts, and no one was specifically responsible for the account. (CX0306 (Foley, IHT at 140-41)).
507. Steadfast operated its buying group as a procurement service or agent for members. (Titus, Tr. 5298-99; Cavaretta, Tr. 5595 (Steadfast would “tak[e] . . . Henry Schein business, and then . . . farm[] it out to different dealers . . .”).
508. Special Markets created a sales plan for Steadfast that included discounts to Steadfast’s members. (Foley, Tr. 4681; CX0306 (Foley, IHT at 90-91)).
509. As a result of the creation of the Mid-Market division within HSD in mid-2014 (F. 224-226), Steadfast, which had been a Special Markets buying group, was transferred to Mid-Market in HSD in 2014. (Titus, Tr. 5249; Cavaretta, Tr. 5595; CX8010 (Titus, Dep. at 83)).
510. With the transfer to Mid-Market, Steadfast fell under Titus’ responsibility. (CX8010 (Titus, Dep. at 83)). Titus became responsible for “making sure that [Schein was] serving [Steadfast] appropriately.” (CX8010 (Titus, Dep. at 76, 83)).
511. Titus did some fact-finding on Steadfast to learn more about the group, as part of her job as the new director for the Mid-Market team, because she did not know anything about them. She was not specifically instructed by anyone at Schein to look into the group. (Titus, Tr. 5249-50 (“Q.: Did anyone at Schein specifically instruct you to look into the Steadfast Medical buying group relationship? A. Absolutely not.”); CX8010 (Titus, Dep. at 94); Foley, Tr. 4681; Cavaretta, Tr. 5532-34).
512. In March 2014, a Schein telesales representative in Reno, Nevada discovered that no FSCs had been assigned to Steadfast members and on March 25, 2014 forwarded this information on to Titus. (CX0171 at 001-02).
513. On March 25, 2014, Titus sent an email to Cavaretta and Randall McLemore, a regional manager for Texas, with the subject, “Buying group STEADFAST DENTAL, do we shut this down?” and wrote: “We need to discuss this. . . I’m still in discovery on their DNA (we think it’s a DSO called OMSP), but there is no question this is a buying group. They did \$150,000 last year. Rick H was asked repeatedly to deal with it, but nothing ever happened.” (CX0171 at 001 (capitalization and ellipses in original); Titus, Tr. 5301-02). Titus reported to Cavaretta at the time of this email. (Titus, Tr. 5300).

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514. Titus exchanged calls and emails with Steadfast's staff to learn more about the group. (CX8010 (Titus, Dep. at 72, 75)).
515. In April 2014, Titus reported to Cavaretta that she discovered that Steadfast was acting as a "procurement" agent for supplies and redirecting Schein supply orders to Schein's competitors. (CX2207 at 001; CX8010 (Titus, Dep. at 67, 72); Cavaretta, Tr. 5595; Foley, Tr. 4676-77). Titus explained that the group would take orders from members and "break up the order and send items that were cheaper with company A or company B" to those distributors, leaving Schein with the remainder. Titus characterized this conduct as "circumvent[ing]" Schein's interaction with the members and an "attempt to prevent [Schein] from selling directly" to the members. (CX2207 at 001; CX8010 (Titus, Dep. at 73-74); Titus, Tr. 5298-99).
516. Titus discovered that, although Schein had done approximately \$150,000 in sales with Steadfast as a whole in 2013, Schein's sales to individual Steadfast members had declined by nearly half from the prior year. Steadfast had about 30 members as of May 12, 2014. (CX0171 at 001; Titus, Tr. 5250-52; CX0255 at 003).
517. On April 22, 2014, Titus wrote to Jon Staples, the CEO of Steadfast, regarding what she had learned about Steadfast's declining sales and what appeared to be reallocation of orders and sought to set up a meeting to discuss the matter to "discover if there is [a] way to create a better collaboration that provides prosperity to all the stakeholders." (RX2201 at 003). Titus explained further to Staples on April 28, 2014:

As you know, virtually all of your members were set up as Henry Schein customers prior to them signing on for your procurement services. Unfortunately, our reporting shows that under Steadfast Medical, business for that same group of customers is trending down. We are very concerned about that and want to make sure we understand why. My guess is that Steadfast is reallocating that business to other suppliers. Certainly, you have every right to pursue your business model, however, it appears to be at our expense. To be clear, we are not against having GPO partnerships. Quite the contrary, we have a number of them in which all parties are in a position to win. I would like to think that is possible with Steadfast as well. I hope you understand[] our position, Jon, but in order to continue we need to find common ground that makes financial/business sense for all the stakeholders.

(RX2201 at 001-02).

518. On May 8, 2014, in an email to Cavaretta, Titus included Steadfast on a list of "hot topics" to discuss with Cavaretta, stating "I need to circle back with Randy [Foley] for approval to shut them down – We need to develop our policy on these Dental Management Companies that have a GPO component. They are coming out of the woodwork and have a leg in both worlds. Need a game plan." (RX2385 at 001; Titus, Tr. 5295).

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519. On May 8, 2014, Titus forwarded her email to Steadfast (F. 517) and an excel spreadsheet regarding Steadfast sales to Foley and Cavaretta, and wrote, “This is not a healthy relationship. I want to close it” (CX0255 at 004). Titus further explained later in the email chain, on May 12, 2014:

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

(CX0255 at 001 (capitalization in original); Titus, Tr. 5252-54, 5257).

520. Despite repeated attempts in early 2014, Titus was unable to arrange a meeting with Steadfast, and eventually Jon Staples of Steadfast stopped responding. (Titus, Tr. 5259; CX8010 (Titus, Dep. at 75); Foley, Tr. 4679-80; CX0255 at 001, 003 (Titus reporting that she had “no reply” from Staples and that he had gone “radio silent”)).
521. Titus sought Foley’s approval to stop doing business with the group. Titus needed Foley’s approval because even though Steadfast was being transferred to Mid-Market, Foley retained “budgetary control” during the transition away from Special Markets. On behalf of Special Markets, in 2014, Foley ultimately gave Titus his approval to end Schein’s relationship with Steadfast. (CX0255; Foley, Tr. 4678-80).
522. In addition to Foley, Cavaretta also approved the decision to terminate Steadfast on behalf of the Mid-Market division of HSD. (Cavaretta, Tr. 5595-96).
523. Cavaretta and Foley made the decision in 2014 to end Schein’s relationship with Steadfast without input from Sullivan. (Cavaretta, Tr. 5595-96; Foley, Tr. 4678-80).
524. On June 10, 2014, Titus wrote to Staples, CEO of Steadfast: “After examination of your GPO business model we have concluded that continuation of our current relationship is counter to our business practices. Unfortunately, it is my duty to inform you that effective this Friday; 06/13/14, Henry Schein will no longer support the fulfillment of Steadfast Medical supply orders. If at some future date you are interested in exploring an exclusive relationship with Henry Schein, we would welcome revisiting a mutually beneficial partnership.” (CX2216 at 002; Titus, Tr. 5260).
525. On June 10, 2014, Titus forwarded a copy of her email to Staples (F. 524) to Cavaretta and others within Schein, explaining: “[B]ottom line, Steadfast Medical is a double whammy; a GPO that is also a 100% procurement service. . . . [W]hen we examined their business practices, it became clear that they were cannibalizing existing business and reallocating HS orders to our competitors.” Titus explained that Steadfast’s buying group model, which did not guarantee either exclusivity or compliance, ran counter to Schein’s business goals. (CX2216 at 001-02; Titus, Tr. 5260-61).

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526. Cavaretta replied to Titus' June 10, 2014 email (F. 525): "GPO's are popping up like crazy so it is nice when we can shut one down and still keep the business from the individual customers. Nice Job!" (CX2216 at 001). Cavaretta explained that he was commending Titus for being able to maintain the business of individual Steadfast members even though Schein had determined to end the relationship with the group. (Cavaretta, Tr. 5596-98).

18. Teeth Tomorrow, LLC

527. Teeth Tomorrow, LLC ("Teeth Tomorrow") is a "franchise model" buying group of private practice dentists. (CX8009 (Wingard, Dep. at 203-04)).
528. Members of Teeth Tomorrow's buying group are primarily independent dentists. (RX2947 (Cavaretta, Dep. at 84)).
529. Teeth Tomorrow offers value-added services to its membership through its "educational arm that teaches best practices on certain clinical needs" (CX8009 (Wingard, Dep. at 204)).
530. Schein determined that Teeth Tomorrow was able to "drive compliance" because of the educational services Teeth Tomorrow provided and because the leadership's support and endorsement of Schein would influence members to purchase from Schein. (CX8009 (Wingard, Dep. at 205)).
531. Prior to deciding to work with Teeth Tomorrow, Schein's Meadows had meetings with the two executives that represented Teeth Tomorrow and obtained details about the group. (CX8016 (Meadows, Dep. at 280-81)).
532. Schein and Teeth Tomorrow entered into a three-year agreement on May 15, 2017. (RX2684 at 001, 003).

19. Tralongo

533. In either early 2011 or 2012, Schein bid on the Tralongo buying group. Schein did not win the bid and Tralongo partnered with Darby. (Foley, Tr. 4568, 4590-91, 4712-13).
534. In 2014, Tralongo reached out to Schein, and Foley discussed the opportunity with Tralongo by telephone. To Foley, it appeared that Tralongo was primarily interested in supply pricing, to compete with Darby's pricing. Schein decided not to make a second bid on Tralongo. (Foley, Tr. 4568-69, 4713-14).
535. On December 15, 2014, Foley wrote regarding Tralongo: "It's a buying group so we . . . did not bid on the business." (CX2697 at 001; CX2083 at 001 (Schein declined Tralongo at Foley's direction)).

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536. Foley explained that Tralongo “would not offer our software to their users, they did not want anything to do with our equipment, nor our service, we felt that it was a price-only and it wasn’t – there [were] no sticky points, advantages of working with them, so we said no.” (Foley, Tr. 4568-69).
537. On October 28, 2015, Schein’s Foley responded to an email from another Schein employee asking a question about a new dental office under the Tralongo buying group, stating in part: “Keep in mind that I and others have been in contact with Tralongo over the years. Schein, PDCO [Patterson] and Benco all refused to bid on their business when they [Tralongo] entered the GPO/Buying Group world” (CX2094 at 001; Foley, Tr. 4594-95).
538. Foley explained regarding his statement about Patterson and Benco refusing to bid in F. 537, that he “had no direct knowledge” of whether Patterson or Benco had bid on Tralongo and was reporting market intelligence based on the fact that he had “never run into them at any buying group opportunities.” (Foley, Tr. 4595). Foley denied ever discussing Tralongo with anyone at Patterson or Benco. (Foley, Tr. 4714-15).

20. Unified Smiles

539. In December 2011, Janet Knysz was interested in creating a buying group called Unified Smiles. (Foley, Tr. 4549). Knysz was a former owner of Great Expressions Dental Centers (“Great Expressions”), a successful DSO and a long-time Schein partner. (RX2174; Foley, Tr. 4543).
540. On December 8, 2011, Knysz, wrote to Schein that she had “moved on” from Great Expressions and was “in the process of developing” a new entity, called Unified Smiles. Knysz represented that Unified Smiles would “administer operations the same way as [Great Expressions had] with all purchases running through [its] corporate office.” (CX2062 at 003-05; Foley, Tr. 4545).
541. On December 12, 2011, Foley met with Knysz to discuss the planned group. Unified Smiles was not yet in existence and Knysz had not enrolled any members for the buying group at the time she approached Schein. (Foley, Tr. 4543, 4684-86, 4689; CX2062 at 002-03).
542. Knysz wanted the same pricing for Unified Smiles as Great Expressions received from Schein. Great Expressions’ pricing was due to its being Schein’s fifth largest corporate customer. (Foley, Tr. 4543-46, 4684-87).
543. Foley tried to communicate to Knysz that Schein could not provide her with DSO pricing if she was not operating as a DSO, which requires some minimal ownership. Foley had offered discounted pricing of 5 or 10% as a starting point, but Knysz was “adamant” about receiving the Great Expressions pricing. (Foley, Tr. 4687-88, 4692). Unified Smiles also did not have the “\$5 million + of business” like Great Expressions did that

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would allow Schein to “negotiate[] pricing from [its] vendor/suppliers based on . . . proven volume.” (CX2062 at 001-02; Foley, Tr. 4546-49).

544. Foley individually made the decision to turn down Knysz and Unified Smiles. Foley had the authority to vet and turn down business opportunities. (Foley, Tr. 4692-93).
545. On December 21, 2011, Foley declined working with Knysz’ planned group, Unified Smiles, stating, “Unfortunately, unless you have some ‘ownership’ of your practices Henry Schein considers your business model as a Buying Group, and we no longer participate in Buying Groups.” (CX2062 at 001; Foley, Tr. 4545). Foley explained in his email to Knysz that without a minimum volume, Schein could not negotiate “chargebacks” with manufacturers, and extending DSO pricing to Unified Smiles, as Knysz requested (F. 542), would “lead to cannibalization” and “friction” with “EXISTING customers.” (CX2062 at 001; Foley, Tr. 4543-46, 4688).
546. Unified Smiles announced the group’s launch on January 5, 2012. (CX1145 at 002).

21. Universal Dental Alliance

547. Universal Dental Alliance (also referred to as “Dental Alliance”) is a buying group based in Raleigh, North Carolina. (RX2350 at 002-09 (listing Raleigh address and 7% discount for group’s members); Steck, Tr. 3770-71; Sullivan, Tr. 4239-41).
548. Dental Alliance’s member supply agreement with Schein describes Dental Alliance as “a group purchasing organization (GPO) that focuses exclusively on the dental and oral surgery industries. [Its] sole function is to leverage the buying power of [its] members for discounted pricing on supplies, equipment, and increased customer services.” (RX2350 at 001).
549. In May 2011, a regional manager for Schein in Raleigh, North Carolina, proposed “an arrangement” for Universal Dental Alliance members where members could get “a 7% discount for a business pledge of \$25,000-\$30,000 or more.” (RX2612 at 017; Steck, Tr. 3771-72).
550. Steck, vice president and general manager for Schein, negotiated with Dental Alliance and formulated a proposal to provide members with a “straight 7% discount.” (RX2612 at 016; Steck, Tr. 3771-72).
551. Schein proposed setting up two discount codes for Dental Alliance members. Both codes “would give the end user a straight 7% discount,” but one code would apply to current Schein customers who purchased “\$20,000 or more in merchandise in [the] prior 12 months.” (RX2612 at 016). The other code “would be for non-HSD customer[s] . . . (defined as less than 20,000 annually in merchandise).” As Steck explained: “the second [discount code] is for incremental business to Henry Schein. So we are rebating a group on a higher rate than we would on business we already had.” (Steck, Tr. 3772-73; RX2612 at 016).

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552. Schein proposed to pay Dental Alliance administrative fees ranging from 1.5% to 3% based on whether the sales were incremental or cannibalistic. (RX2612 at 016-17; Steck, Tr. 3772-73).
553. The offer (F. 549-552) was designed “to financially incentivize the buying group to focus on incremental sales and not on Henry Schein customers,” to help Schein “grow the business, not just continue to farm the business” it already had. (Steck, Tr. 3773).
554. In or around July 2011, Schein entered a three-year contract with Dental Alliance that would automatically renew on June 30, 2014. (RX2350 at 005 (unsigned copy of 2011 contract); Sullivan, Tr. 4240-41 (confirming RX2350 represents the contract Schein signed with the Dental Alliance in 2011); *see also* RX3076 at 015 (confirming contract renewal date of 6/30/2014)).
555. Schein’s 2011 contract with Dental Alliance met the terms Schein proposed including, “at minimum 7% discount from catalog (list) price for Universal Dental Alliance members,” a 3% quarterly rebate (paid to the group) for sales to new customers, and a 1.5% rebate (paid to the group) for sales to existing customers. (RX2350 at 004, 009).
556. The agreement obligated the Dental Alliance to “ensure that each Group Member will utilize [Schein] for \$20,000 of dental supply business” in order to be “recognized as a beneficiary of this Agreement.” (RX2350 at 003; *see also* Steck, Tr. 3771-72 (Schein asked Dental Alliance’s “members to individually commit to volume . . . in order to get the 7 percent discount.”)).
557. The Dental Alliance contract was automatically renewed on June 30, 2014, and Schein continued to do business with them. (RX3076 at 015; RX2612 at 005 (December 15, 2014 email noting that Schein was “negotiating a new contract”); RX2612 at 001 (April 30, 2015 email showing quarterly rebates for 1st quarter 2015)).
558. Sullivan learned of the contract with Dental Alliance on October 20, 2011. At no time thereafter did Sullivan take any action to try to terminate Schein’s relationship with Dental Alliance. (Sullivan, Tr. 4239-40; Steck, Tr. 3771-72; RX2349 at 001-02).
559. Schein continued working with Dental Alliance and paying it rebates through at least April 2015. (RX2612 at 001-09 (listing quarterly rebates for Universal Dental Alliance from 2011 into 2015); RX2613 at 001 (listing sales to group members for January through March 2015)).
560. Benco rejected Universal Dental Alliance in 2012 because it was a buying group. Cohen was aware that Schein was working with Dental Alliance in 2013. (Cohen, Tr. 557-58; CX0061 at 001).

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G. Communications Between Benco and Schein**1. Overview**

561. Schein's Tim Sullivan and Benco's Chuck Cohen have known each other professionally for many years. (Cohen, Tr. 481-82; Sullivan, Tr. 3877).
562. Cohen has over the years communicated with Sullivan about the dental industry or issues with dental manufacturers through phone calls, text messages, emails, and in-person contact. (Cohen, Tr. 483-84).
563. In 1998, Benco and Schein settled litigation between the two companies over non-compete issues relating to the hiring of each other's sales representatives. The settlement included an agreement regarding hiring of each other's employees (the "hiring agreement"). (Cohen, Tr. 638-40). This required Cohen and Sullivan to talk every few years to renegotiate the agreement, and to communicate periodically throughout the year as issues came up relating to certain employees or employee groups. (Cohen, Tr. 735-37).
564. The hiring agreement between Benco and Schein (F. 563) terminated on March 31, 2016. (CX2450 at 001; Sullivan, Tr. 3893, 3920-21; Cohen, Tr. 646).
565. In 2011, Sullivan called Cohen approximately 16 times. (CX6027 at 003-04, 012, 016-17). Three of the calls are "0 sec" in duration, and another 10 calls are under 1 minute each. (CX6027 (0 Sec: rows 145, 153, 154; under 1 min: rows 35, 40, 50, 54, 56, 121, 143, 144, 147, 156)).
566. In or around the fall of 2011, Benco recruited four or five Schein employees from the Fresno, California area, which raised issues under the hiring agreement between Benco and Schein (F. 563) and caused Sullivan and Cohen to have several discussions over several months. (Sullivan, Tr. 4270-72).
567. On October 14, 2011 at 20:34 (UTC (universal coordinated time zone)),⁵³ Sullivan called Cohen. The call lasted 21 minutes and 30 seconds. (CX6027 at 012 (row 120)).
568. On November 4, 2011, Sullivan and Cohen exchanged emails to schedule a call to discuss Benco "routinely reach[ing] out to [Schein's] reps" through LinkedIn. (RX2010 at 001-02). On November 4, 2011 at 21:05 (UTC), Cohen called Sullivan. The call lasted 18 minutes and 41 seconds. (CX6027 at 016 (row 146)).
569. On November 8, 2011 at 23:45 (UTC), Sullivan called Cohen. The call lasted 5 minutes and 51 seconds. (CX6027 at 017 (row 155)). On November 9, 2011 at 00:44:15 (UTC), Sullivan called Cohen. The call lasted 1 minute and 16 seconds. (CX6027 at 017 (row 157)). Cohen believed, based on his review of prior and subsequent text messages

53 UTC is 4 hours ahead of Eastern daylight time and 5 hours ahead of Eastern standard time.

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(CX6027 at 017 lines 151 and 158), that the calls concerned Benco's hiring of former Schein employees in Fresno, California generally, and Schein employee Kent Hayes specifically. (Cohen, Tr. 765).

570. In January 2013, Schein and Benco had been discussing a merger between Benco and Schein. (Sullivan, Tr. 4081).
571. Between 2011 and 2015, Cohen and Sullivan exchanged 56 calls and 225 text messages. (CX6027 at 003-57). Complaint Counsel contends that certain phone calls from Benco to Schein that occurred in 2012 and 2013 related to buying groups. (CCB at 25 n.213; CCFF 679). Those calls are addressed in F. 573-582, 602-624, 641-648. Complaint Counsel further contends certain text messages that occurred in 2013 addressed buying groups. (CCB at 25 n.213; CCFF 679). Those text messages are addressed in F. 595-601, 651, 653-655.
572. The 2011 text messages cited by Complaint Counsel (CCFF 349-350, citing CX6027 at 003-018) do not on their face relate in any way to buying groups, instead addressing topics such as sports; the Schein-Benco hiring agreement (F. 563); and charity work. (*See, e.g.*, CX6027 at 007 line 91 (Cohen to Sullivan, 10/6/2011: "I'm going to Yankee Stadium for game 5 tomorrow nite. Go Yanks!"); CX6027 at 010 line 108 (Cohen to Sullivan, 10/10/2011: "BTW, I love the way that the Sullivan Foundation/DTAF joint scholarship has turned out. Well done. I'm going to talk with my dad about doing something similar."); CX6027 at 014 line 132 (Cohen to Sullivan 11/2/2011: "Tim: Assume our conversation today only covers TRs/FSCs with books of business. Guys who get fired, equipment specialists, service techs, etc. are still covered . . . Your understanding also?"))).

2. The January 13, 2012 phone call from Cohen to Sullivan allegedly about Unified Smiles

573. On January 11, 2012, Benco's Ryan received an email from Michael Paquette, a Benco territory representative, regarding the buying group Unified Smiles. Paquette asked whether Benco would participate in the buying group and stated that a doctor had told Paquette that he thought Schein "would be" participating in Unified Smiles. (CX1144; Ryan, Tr. 1061-62).
574. Ryan replied to Paquette's email (F. 573), "We've already spoken to them and turned them down." Ryan explained that he had previously spoken with Unified Smiles, "[r]eiterated [Benco's] policy and told them that there was no way for us to work together in the way they wanted to" because there was not any common ownership. (CX1144; Ryan, Tr. 1172).
575. Schein declined to do business with Unified Smiles weeks prior to Paquette's January 11, 2012 email to Ryan (F. 573), on December 22, 2011 (F. 545).

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576. Ryan forwarded Paquette's January 11, 2012 email (F. 573) to his boss, Cohen, and, referring to Tim Sullivan of Schein, wrote, "For Timmy conversation." (CX1052 at 001; Ryan, Tr. 1061-63; Cohen, Tr. 503).
577. On January 12, 2012, Cohen texted Sullivan asking if Sullivan was available the following day to speak on the phone "for a few minutes." Sullivan responded that he would be available the following morning at 8:00 a.m. central time. (CX2347 at 001-03 (January 12, 2012 text messages between Cohen and Sullivan); Cohen, Tr. 507-08).
578. On January 13, 2012, Cohen responded to Ryan's email (F. 576) and informed him that he was, "Talking this AM . . ." with Sullivan. (Cohen Tr. 503-04; CX1052 at 001 (ellipses in original); *see also* CX8015 (Cohen, Dep. at 216); CX8037 (Ryan, Dep. at 110)).
579. On January 13, 2012, Cohen called Sullivan. The call lasted 11 minutes and 34 seconds. (Cohen, Tr. 510-11; CX6027 at 019 (row 170)).
580. Prior to calling Sullivan on January 13, 2012, Cohen spoke for 23 minutes with his attorney, Joe Dougherty, who was handling employment matters for Benco. (CX1118; Cohen, Tr. 747-49). Immediately after the call with Sullivan, Cohen again spoke to Dougherty. (CX1118; Cohen, Tr. 748-49).
581. On January 13, 2012, prior to calling Sullivan, Cohen responded to an email from Ryan about a draft policy for Benco defining large group practices. Cohen revised the draft and told Ryan to post the document internally and further suggested it be discussed at an upcoming regional managers meeting "so that everyone understands the difference between" a buying group and a large group practice. (CX1051; Cohen 875-78).
582. Cohen disclaimed any connection between his January 13, 2012 response to Ryan's email regarding Benco's large group policy (F. 581) and Cohen's January 13, 2012 call to Sullivan. Cohen did not share Benco's large group policy with Sullivan on the call. (Cohen, Tr. 877-78).

3. The alleged July 25, 2012 note from Cohen to Sullivan regarding Smile Source

583. On July 25, 2012, an email from Dr. Andrew Goldsmith of Smile Source was forwarded within Benco to Ryan. Dr. Goldsmith wrote that he wanted to "explore a relationship" with Benco and informed Benco that "[i]n the past we [Smile Source] were in [the] Special Markets division of Henry Schein and worked directly with Tim Sullivan." (CX0018 at 001-02).
584. On July 25, 2012, after receiving Dr. Goldsmith's email (F. 583), Ryan informed Dr. Goldsmith that Benco would not work with Smile Source because it was a group purchasing organization and "Benco Dental does not recognize GPOs as a single customer." (CX0018 at 001).

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585. On July 25, 2012, minutes after Ryan sent his response to Dr. Goldsmith's email (F. 584), Ryan forwarded Dr. Goldsmith's email to Cohen, writing, "Better tell your buddy Tim to knock this shit off." (CX0018 at 001; Ryan, Tr. 1065).
586. Ryan described his statement in his July 25, 2012 email to Cohen referenced in F. 585 as "flippant," and a "generally frustrated statement." Ryan acknowledged that "in the context" of the email, to tell someone to "knock it off" meant to stop doing something, but that "[t]here's no way [Benco was] going to tell anybody what to do." (Ryan, Tr. 1065-66).
587. In his July 25, 2012 email (F. 585), Ryan referred to Schein's working with a buying group as "this shit" because he had a "strong opinion on GPOs." (Ryan, Tr. 1065-66).
588. Cohen understood that Ryan's July 25, 2012 email (F. 585) was asking Cohen to contact Sullivan about Smile Source and acknowledged that the email implied that Cohen was to tell Sullivan to stop recognizing Smile Source as a customer. (Cohen, Tr. 518-19).
589. Cohen responded to Ryan's July 25, 2012 email (F. 585) stating:
- Please resend his e-mail without your comment on top so that I can print & send to Tim with a note. The good news is: perhaps they're looking to us because Schein told them NO. That works for me.
- (CX0018 at 001 (capitalization in original)).
590. Cohen admitted sending Sullivan notes from time to time by regular United States mail. (Cohen, Tr. 526).
591. On July 25, 2012, shortly after receiving Cohen's request that Ryan resend his email without Ryan's "comment on top" (F. 589), Ryan resent the email to Cohen with a new comment on top stating that Dr. Goldsmith described Smile Source as a "'franchise,' not a GPO." Ryan did not recall resending his initial email (F. 585) with no comment on top. (CX1251; Ryan, Tr. 1193-94). The record does not include a resent email from Ryan to Cohen with no comment from Ryan on top.
592. Cohen admitted that, when he asked Ryan to resend his email without Ryan's comment (F. 585, 589), Cohen planned to print and send a copy of the email to Sullivan with a note. However, Cohen did not recall doing any of these things. (Cohen, Tr. 522, 885-86).
593. Cohen denied ever telling Sullivan to stop doing business with Smile Source. (Cohen, Tr. 885).
594. Sullivan acknowledged having received some personal notes from Cohen over the years, but denied ever receiving any notes from Cohen about buying groups, or speaking with

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Cohen or anyone else at Benco about Smile Source. (Sullivan, Tr. 4252-53). The record does not include any notes to Sullivan from Cohen regarding Smile Source.

4. The March 26, 2013 text message from Cohen to Sullivan regarding Dental Alliance

595. On March 25, 2013, Cohen reached out to a Benco sales representative, Jamie Kasinski, to ask him for the name of the buying group in his area that worked with Schein. (CX0061 at 001; Cohen, Tr. 556).

596. On March 26, 2013, Kasinski responded to Cohen and informed him that Schein was selling to Dental Alliance. (Cohen, Tr. 556-57; CX0061 at 001).

597. On March 26, 2013, shortly after receiving Kasinski's email (F. 596), Cohen copied and pasted Kasinski's message into a text message to Sullivan:

As per my guy in Raleigh: "Dental alliance. They apparently get 7% off of catalog pricing just for joining. Dr. Ben Koren is the dentist involved. A guy named Sam contacted me about a year ago and asked if Benco was interested. Told him he was out of his tree."

(CX6027 at 028 (row 245)).

598. On March 26, 2013, immediately after sending the text regarding Dental Alliance referenced in F. 597, Cohen sent Sullivan a second text message stating: "Could be a rumor, sometimes stories go around. Thanks." (Cohen, Tr. 557-58; CX6027 at 028 (row 246); CX0061 at 001; *see also* CX0196 at 008-09; Sullivan, Tr. 4196-97).

599. The two text messages from Cohen to Sullivan referenced in F. 597-598 are the only communications involving Benco and Schein regarding Dental Alliance. (RX2941 (Sullivan, Dep. at 476-77); Sullivan, Tr. 4197).

600. Schein began doing business with Dental Alliance in July 2011 and continued doing business with Dental Alliance through at least April 2015. Sullivan learned of Schein's contract with Dental Alliance on October 20, 2011. At no time thereafter did Sullivan take any action to try to terminate Schein's relationship with Dental Alliance. (F. 554, 557-559).

601. Sullivan did not send a text back to Cohen in response to Cohen's March 26, 2013 texts to Sullivan (F. 597-598). On the morning of March 27, 2013, Sullivan attempted to call Cohen without success. After playing phone tag for a few days, Sullivan and Cohen spoke by telephone on April 3, 2013. (CX6027 at 028-29; F. 652, 657). The facts regarding the April 3, 2013 call are set forth in F. 658.

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5. The October 1, 2013 phone call from Ryan to Foley

602. On September 24, 2013, Benco's Ryan received an email from Evans, Benco's director of sales for Benco's west district, asking if Ryan had heard of Smile Source and notifying him that dental manufacturer partners of Benco were "giving discounts to members of this group when making purchases." Ryan replied, "I know exactly who they are. We've had 2 run ins with them. Who are [the] vendor partners and is it going through [Schein]?" Evans replied that his understanding was that the manufacturers were Adec and Midmark, but he had no proof. Evans' reply did not answer Ryan's question regarding Schein. (CX1158; Ryan, Tr. 1098-99; CX8037 (Ryan, Dep. at 255)).
603. On October 1, 2013, Ryan, then-director of Special Markets for Benco, called Foley, Schein's vice president of sales for Special Markets ("the October 1, 2013 call"). The call lasted 18 minutes. Part of the call pertained to Smile Source. (CX6027 at 036 (row 290); CX0019; Foley, Tr. 4577-79, 4585).
604. Foley had never received a call from anyone at Benco before the October 1, 2013 call from Ryan. (CX0306 (Foley, IHT at 177)). Foley took the call thinking it was an attempt to recruit him to work for Benco. (Foley Tr. 4576).
605. Foley had no responsibility for or knowledge of Schein's relationship with Smile Source in 2013, and "had nothing to share" with Ryan about Smile Source. (Foley, Tr. 4579).
606. On the October 1, 2013 call, Ryan informed Foley that Benco would not bid on Smile Source. Based on that information, Foley "got the impression" that Benco was "anti-buying group." (Foley, Tr. 4579, 4583-84, 4589; CX0306 (Foley, IHT at 176, 183, 184-85); CX8003 (Foley, Dep. at 354-55) ("I received a call from Pat Ryan at Benco Dental . . . he basically was making a statement – it was around the Smile Source time – that they didn't like working with buying groups and [weren't] going to bid on it.")).
607. Although Foley got the "sense" from Ryan on the October 1, 2013 call that Ryan was wondering whether, if Smile Source came up for bid, Schein would be bidding, Foley did not make any comment about what Schein would do, and did not share any information about Schein or Schein's policies or positions on buying groups. (CX0306 (Foley, IHT at 182); Foley, Tr. 4705, 4579; Ryan, Tr. 1243).
608. When Ryan told Foley on the October 1, 2013 call that Benco was not going to bid on Smile Source, Foley told Ryan that he would not share any company information and that the call needed to end. Foley ended the call at that point. (Foley, Tr. 4579).
609. Foley did not disclose anything to Ryan related to Schein's approach, views, or strategies regarding buying groups in the October 1, 2013 call. (Foley, Tr. 4703).
610. Foley explained regarding the October 1, 2013 call from Ryan: "I know that I'm not allowed to discuss customers with a competitor. I don't know what his rules were. But the minute the customer came up – again, I thought they might be calling me to recruit

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me. . . . But when the conversation turned to what – where he was heading, I ended the call [I]f I talked for 18 minutes, I would assume we’re talking pleasantries or whatever and nothing about business, and then when it turned to Smile Source, I ended the call.” (Foley, Tr. 4585-86).

611. On October 9, 2013, responding to an email concerning Smile Source, Foley reported his October 1, 2013 call with Ryan to his boss, Muller. Foley wrote to Muller:

Next time we talk remind me to tell you about my conversation with Pat Ryan at SM Benco. They’re anti Buying Group and Smile Source recently reached out to them. I’m being careful not to cross any boundaries, like collusion.

(CX0243 at 001; Foley, Tr. 4588-89. *See also* CX0309 (Muller, IHT at 161) (“I think it’s a great sentence. He is telling me here that he didn’t share information or have any collusion-type discussions. . . . [W]e’re very careful about what we discuss”)).

612. Foley did not report the October 1, 2013 call from Ryan to anyone at Schein other than Muller. (Foley, Tr. 4588-89).
613. Foley’s summary to Muller regarding the October 1, 2013 call from Ryan did not relay Benco’s plans as to whether Benco would bid on Smile Source. (CX0243 at 001).
614. On January 27, 2014, Ryan, responding to an email from Cohen transmitting a link to the Smile Source website, wrote that he was “[v]ery familiar” with Smile Source, that he “[t]alked to them three times,” and “[n]othing is different.” Ryan further wrote that he and Foley “talked specifically about them. Buh-bye.” (CX0019).
615. Smile Source approached Schein about potentially working together on October 28, 2013. Schein immediately expressed its interest to Smile Source and agreed to meet, and, after multiple meetings between Schein and Smile Source, Schein submitted a proposal to Smile Source in March 2014. (CX2580; F. 841-849).
616. Benco declined to bid on Smile Source in 2014. (F. 816-818).
617. Patterson declined to bid on Smile Source in 2013. (F. 822, 824).

6. Communications regarding Atlantic Dental Care in 2013

a. Benco’s bid to Atlantic Dental Care

618. On March 22, 2013, Atlantic Dental Care, PLC (“ADC”) submitted a request for proposal (“RFP”) to Benco to supply dental supplies to ADC’s members at a discount. (CX0021 at 003-04).
619. On the morning of March 25, 2013, He Zhao, Benco regional manager for Virginia, forwarded the ADC RFP to Ryan, writing, “Attached is the opportunity I picked your

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brain about. They claim to not be a buying group. The bid deadline is 4/5. Please let me know if this is something I can pursue.” Ryan replied to Zhao in the early afternoon of March 25, 2013, “The fact that they created an LLC (it’s not a PLC) and put \$50,000 in it is meaningless. The practices are all still independently owned and operated, and the LLC has no ownership whatsoever of the practices (even the hard assets). We’re out.” (CX0021 at 002-03).

- 620. On the afternoon of March 25, 2013, Ryan, who at this time was director of Special Markets for Benco, emailed Cohen with the subject line “buying group?” Ryan attached an article about ADC’s recent securities offering and wrote, “We need to speak about this quickly. I can’t figure out if [ADC] is a buying group or not.” (CX0020 at 001; Cohen, Tr. 717-18; Ryan, Tr. 1203).
- 621. Benco was confused by ADC’s ownership structure because it was a collection of 35 to 50 independent dental practices that had merged to form a single entity. Benco had not before seen an ownership structure like that of ADC. (Cohen, Tr. 716-19).
- 622. Ryan’s job was to serve as the point of contact for groups approaching Benco and was the first person tasked with determining the ownership and control structure of a group. In situations where Ryan has been unable to determine the ownership or control structure of a group, Cohen would get involved to help Ryan reach a determination. In addition, Ryan would also ask for documentation and conduct independent research regarding the group. (Cohen, Tr. 717-18).
- 623. Cohen’s calendar included a task reminder for March 25, 2013 with the subject line, “Call Tim Sullivan re: Buying Groups.” The task entry shows a completion date of March 26, 2013. (CX0058 at 001; Cohen, Tr. 543).
- 624. On March 27, 2013, after speaking with outside counsel, Benco determined that ADC had common ownership and therefore was a single customer for purposes of Benco’s no buying group policy. Benco decided to bid on ADC. (Ryan, Tr. 1201-02, 1271-72; CX1417).
- 625. Benco won the bid for ADC in May 2013. (Cohen, Tr. 553; Ryan, Tr. 1095).

b. Schein’s bid to Atlantic Dental Care

- 626. On March 22, 2013, ADC sent an RFP to Bobby Anderson, a Schein regional manager in the area where ADC was located.⁵⁴ (RX2458 (“ADC RFP”)).
- 627. On March 25, 2013, Anderson forwarded the ADC RFP to Schein zone manager Michael Porro. Anderson provided the results of some research he had performed into the group, including a list of the dentists involved and the amount of merchandise these dentists had

⁵⁴ The ADC RFP to Schein was substantially the same as the ADC RFP sent to Benco. (*Compare* RX2458 at 001 with CX0021 at 003).

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purchased from Schein in the prior year. Anderson asked Porro, “Do we want to quote? What [are] the upside[s] & negatives?” (CX2019 at 001; RX2458).

628. On March 27, 2013, Sullivan called Porro, the Schein zone manager in charge of the area where ADC was located and spoke to him, to follow up on some previous discussions. (Sullivan, Tr. 3968-69, 4200).
629. Sullivan did not tell Porro about any text messages, call, or any communication by Cohen regarding ADC, and Porro was unaware of any such communication. Sullivan explained he did not talk with anyone about any discussion or text messages with Cohen because “I didn’t care, and I knew it was inappropriate for [Cohen] to be reaching out to me in that way. I was not about to share that with anyone else on my team.” (Sullivan, Tr. 4200-01; CX8000 (Porro, Dep. at 292)).
630. On March 29, 2013, Schein regional manager Anderson followed up with Schein zone manager Porro asking if Porro had any thoughts on ADC. (CX2051 at 002). Porro stated he planned to reach out to Landy Damsey of ADC that afternoon. He further wrote, “Tim S[ullivan] has heard of this group and I also talked to Joe [Cavaretta] and Jake [Meadows]. First thought is the[re] is more harm bidding vs not bidding at all. Others like this have popped up in [the] country and we passed and survived. But I want to make a connection with [Damsey].” (CX2051 at 001).
631. On March 31, 2013, Porro reported his conversation with ADC in an email to Sullivan and Steck. Porro reported that ADC represented to Schein that “[it is] not a co-op or a buying group,” as it has “1 corporate structure” and is a “unified group of mature practices.” (CX0198 at 013-14).
632. Porro concluded in his March 31, 2013 email (F. 631) that “[i]t does appear that this [ADC] is more than a buying group,” as all “53 offices are financially tied together in some fashion” and that, as a result, “[p]assing on a bid now has more risk. There is also risk if we bid and lose [] or win and take a huge hit on margins. If Benco is in, how low will they go? If we win the upside is the other business we don’t currently get.” (CX0198 at 013-14).
633. In Porro’s March 2013 conversation with ADC (F. 631), Damsey of ADC told Porro that ADC was going to other competitors and Porro communicated this to Sullivan. (CX8000 (Porro, Dep. at 217-18)).
634. In his March 31, 2013 email to Sullivan and Steck and others at Schein, reporting his conversation with ADC, Porro stated: “At first this looked like just a buying group which led me to initially believe we could do more harm if we bid vs. not submitting a bid. . . . I talked to Joe [Cavaretta] and Jake [Meadows] and we talked as well [with] Tim [Sullivan]. The thinking is that Benco, a decent player in the market and always hungry, will put in a bid.” (CX0198 at 013).

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635. On April 1, 2013, Sullivan replied to Porro's March 31, 2013 email (F. 631), "I think we should take a shot at this, but also believe we should include full value and not just bid price." (CX0198 at 012).
636. Between March 31, 2013 and April 3, 2013, Porro, Anderson, Sullivan, and Chatham conferred by email regarding various options for a proposal for ADC, including discounts, rebates, and minimum purchase requirements. (CX2021 at 017-18).
637. On April 4, 2013, Porro forwarded his planned offer to ADC to Sullivan, Steck, Anderson, and Chatham, as well as to Muller, president of Schein Special Markets. Sullivan responded in part, "Our first reaction to this [ADC] was it was simply a buying group and we were going to walk away. However, the more MP [Michael Porro] dug [i]nto this," the more ADC appeared to be more than simply a buying group, meaning a "price only" buying group. (CX2021 at 013-16; Sullivan Tr. 4209-10).
638. On April 4, 2013, after receiving feedback from Muller of Special Markets, Porro inquired of ADC how ADC was going to drive compliance to purchase from Schein. (CX2021 at 008, 012).
639. ADC responded to Porro's April 4, 2013 inquiry (F. 638) that the group was united and would "all buy from one supplier provided [they] can get the pricing incentive to do so." Sullivan and Porro responded to that information with skepticism (agreeing, "They all say this but it rarely happens"). Sullivan further commented on April 5, 2013, "Gut reaction . . . This smells bad. I think we have as much to lose for winning the bid as we do for losing (or not bidding)." (CX2021 at 006-07 (ellipses in original)).
640. Schein submitted a bid to ADC on April 8, 2013. (CX2021 at 001, 026-29).

c. Communications

641. During the years 2011 through 2015, Benco was a potential acquisition target for Henry Schein Dental, which impacted the way Schein's Sullivan interacted with Benco's Cohen. Sullivan wanted to be cordial and treat Cohen with respect because Sullivan might be working for Cohen, or vice versa, if a merger went through. (Sullivan, Tr. 4260-61).
642. At the time of the March 25, 2013 telephone call described in F. 646, Benco and Schein were having ongoing merger discussions. Specifically, on or about March 20, 2013, Chuck Cohen and his brother Rick Cohen finalized arrangements to meet on April 1, 2013, in New York, New York, with Schein's CEO, Stanley Bergman, and its head of business development, Mark Mlotek, to explore merger and acquisition and joint venture opportunities. (Cohen, Tr. 892-95; Sullivan, Tr. 4186-87; CX1476; CX1486).
643. On the afternoon of March 25, 2013, after Cohen received Ryan's email regarding ADC (F. 620), Cohen sent an unsolicited text message to Sullivan, asking if Sullivan was "[a]vailable to talk." When Sullivan replied he was in meetings till 5:00 p.m., Cohen

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- texted Sullivan requesting that Sullivan call his cell phone when he was free, and Sullivan did so. The call lasted approximately 8 minutes. (CX6027 at 027 (rows 237-40); CX0196 at 001-02; Sullivan, Tr. 4187-88).
644. Cohen's text messages to Sullivan of March 25, 2013 (F. 643) did not indicate the subject matter Cohen wished to talk about, and Sullivan did not know what Cohen wanted to talk about. (CX6027 at 027 (row 237); Sullivan, Tr. 4187-88; Cohen, Tr. 889).
645. Cohen acknowledged calling Sullivan on March 25, 2013 in order to obtain any facts or knowledge that Sullivan might have about ADC ("the March 25, 2013 call"). Cohen further acknowledged that his purpose in seeking this information was to help Benco determine whether or not ADC was a buying group, for purposes of determining if Benco would bid or apply its no buying group policy. (Cohen, Tr. 719-20).
646. In the March 25, 2013 call, Cohen asked Sullivan what he knew about ADC. In response, Sullivan advised Cohen that he did not know anything about ADC. When Cohen proceeded to talk more about ADC, Sullivan "immediately stopped him," and told Cohen that they should not be talking about specific customers, and sought to change the topic. (Sullivan, Tr. 3946 ("He asked if I knew what they were, and I told him I did not. Then he started to tell me more about them, and I immediately stopped him, and I said, 'Chuck, this is not a discussion that you and I should be having,' something like that. I don't know the exact words, but I cut off the discussion with him on that topic."), 3947-48 ("I told him I did not" know who ADC was "and then he started explaining more about them and a red flag went up."); CX8025 (Sullivan, Dep. at 344-45, 401-03) (Sullivan "shut [] down" the conversation and switched the topic to joking about Cohen recruiting Sullivan)).
647. Cohen did not mention Benco's policies or buying groups in general in the March 25, 2013 call. (Sullivan, Tr. 3953).
648. In the March 25, 2013 call, Sullivan transitioned the discussion to the previously scheduled April 1, 2013 meeting between Benco and executives from Henry Schein, Inc. (F. 642) and joked about Sullivan going to work for Cohen at Benco. (Sullivan, Tr. 3950-53).
649. A few minutes after the conclusion of the March 25, 2013 call referenced in F. 646, Sullivan sent Cohen a text message stating: "Hi Chuck. Thanks for the call. Yes, I am good with the terms we discussed and I look forward to joining Team Benco! PS. Want to confirm that the Benco tooth logo will include a picture of me. :)." Cohen joked back, "Problem with this joke is if Stan [Bergman] says 'Great!' It's a risk. . . ." (CX6027 at 027 (rows 241-42) (ellipses in original); Sullivan, Tr. 4193).
650. Sullivan's text message referenced in F. 649 referred to a long-running joke between Sullivan and Cohen about who was going to work for whom in the event that ongoing merger discussions came to fruition. (Cohen, Tr. 554-55, 897-98; Sullivan, Tr. 3955-56, 4189-90).

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651. On the evening of March 25, 2013, Cohen texted Sullivan: “Here’s a link to the press release we discussed” and included a link to ADC’s website. Sullivan texted back in pertinent part, “Thanks for the follow up on that article. Unusual.” (Cohen, Tr. 546; CX6027 at 028 (rows 243-44); Sullivan Tr. 3957).
652. On the morning of March 27, 2013, Sullivan attempted to call Cohen, but did not reach him. (CX0627 at 028 (row 247); Sullivan Tr. 3959).
653. On the afternoon of March 27, 2013, Cohen texted Sullivan: “Tim: Did some additional research on the Atlantic Care [ADC] deal, seems like they have actually merged ownership of all the practices. So it’s not a buying group, it’s a big group. We’re going to bid. Thanks.” (CX6027 at 029 (row 248); Cohen, Tr. 549; CX0196 at 010; *see also* Sullivan, Tr. 3959).
654. Sullivan did not believe Cohen’s statement that ADC was not a buying group. Sullivan understood ADC to be a buying group. (Sullivan, Tr. 4183).
655. Cohen’s text messages regarding ADC (F. 651, 653) were unsolicited. Sullivan had not asked for any follow-up from Cohen. (Cohen, Tr. 899-900).
656. Cohen acknowledged that, at least in the short term, it might have been against Benco’s interest to disclose its plan to bid on ADC to Sullivan (F. 653), who was a competitor, but Cohen believed that in the long-term it was important to “maintain credibility” with Sullivan. Cohen acknowledged one possible reason for his disclosure of Benco’s intent to bid on ADC was that he had previously told Sullivan that Benco was not planning to bid on ADC, and Cohen did not want Sullivan to think Cohen had been untruthful. (Cohen, Tr. 549, 551-52, 965; CX0301 (Cohen, IHT at 278-79)).
657. Late in the day on March 27, 2013, subsequent to receiving the text message from Cohen referenced in F. 653, Sullivan tried to call Cohen, without success. (CX0627 at 029 (row 250)). Cohen tried calling Sullivan back twice on March 28, 2013, without success. (CX0627 at 029 (rows 253-54)).
658. Sullivan and Cohen spoke by telephone on April 3, 2013. As Sullivan explained the reasons for his call to Cohen:

Because I wanted to be very clear with him that I don’t care what they’re doing, I don’t want to know what they’re doing, and this is not what we should be – as I said to you when we first spoke about this [on March 25, 2013 (F. 646)], and maybe I wasn’t firm enough on that call, but, Chuck, you cannot be sending information on what Benco’s doing with customers, something to that effect. I don’t know the – that was in my mind as I was making this phone call, and ultimately, when we did connect live, that was the gist of the message.

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(Sullivan, Tr. 4197-98; CX6027 at 028-29. *See also* Sullivan, Tr. 4205-06 (“So pretty quickly the phone call – I said I’ve been trying to get a hold of you because, as we spoke last week or, you know, a little while ago, you should not be sending me information on what you’re doing with customers. You’ve since sent me another couple of text messages that I felt were inappropriate and that, Chuck, just please do not send that type of information to me anymore. I was much more firm than I was the first time, still respectful coming off the [merger meeting between Schein and Benco] two days earlier, I knew he spent time with Stanley [Bergman] and Jimmy [Breslawski], figuring out are we going to do a deal or not, but a much stronger message than it was the first.”)).

H. Communications Between Benco and Patterson**1. Overview**

659. 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.”)).
660. Cohen has communicated with Guggenheim through various means including phone calls, text messages, emails, and in-person meetings over the past ten years. (Cohen Tr. 482-83; CX0301 (Cohen, IHT at 320-22)). Cohen’s and Guggenheim’s communications involved topics such as each other’s family, health, successes, and interests. (CX6027; Cohen, Tr. 778-79; CX0314 (Guggenheim, IHT at 326)). Cohen and Guggenheim have also communicated regarding Patterson’s potential acquisition of Benco. (CX0301 (Cohen, IHT at 320)).
661. Cohen has contacted Guggenheim about various dental industry issues that he wanted Guggenheim to look into. (Cohen, Tr. 484-89 (“Sometimes our mutual best interest is good for me.”); Guggenheim, Tr. 1546, 1547 (“Q. Is it fair to say that in the past Benco’s Chuck Cohen has contacted you about various dental issues that he wanted you to look into? A. Yeah, that’s fair to say.”)).
662. Between 2011 and 2015, Cohen and Guggenheim exchanged at least 18 calls and 31 text messages. Complaint Counsel does not claim that Cohen and Guggenheim discussed buying groups in any of these calls or text messages. (CX6027 at 005-06, 018, 022, 030-32, 035, 048-50, 052, 055-56; *see* CCB at 67).
663. As president of Patterson, Guggenheim was responsible for managing the business and strategy and had input into what types of customers Patterson could do business with. (CX8023 (Guggenheim Dep. at 28-29); CX0314 at 17 (Guggenheim IHT at 16-17)).

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2. Exchange regarding New Mexico Dental Cooperative and buying groups**a. Patterson's interactions with New Mexico Dental Cooperative**

664. In late 2012 or early 2013, Dr. Brenton Mason began the process of starting a dental cooperative, New Mexico Dental Cooperative ("NMDC"). (Mason, Tr. 2331, 2333-37, 2339).
665. The purpose of the New Mexico Dental Cooperative was to serve independent dental practices (dentists who owned fewer than five practices) by negotiating discount pricing with vendors of dental consumables and equipment. (Mason, Tr. 2331-33 (Mason's job was to "look into vendors to see if we could negotiate pricing for our sundries and equipment."))).
666. In early 2013, Dr. Mason engaged in discussions with local New Mexico Patterson sales personnel Jeff Katt and Patterson's Albuquerque branch manager, Scott Belcheff, about working together with NMDC. (Mason, Tr. 2344-45).
667. At the time of Dr. Mason's talks with Patterson's employees, in early 2013, NMDC did not yet exist. (Mason, Tr. 2367-68).
668. On February 4, 2013, Dr. Mason sent an email titled "New Mexico Dental Cooperative purchasing" to various dental product manufacturers stating that NMDC had "partnered with Patterson Dental" ("Dr. Mason's February 4 email"). Dr. Mason's February 4 email invited dental manufacturers and representatives to a vendors' meeting at Patterson's branch in Albuquerque, New Mexico on March 13, 2013 ("March 13 meeting"). (CX0090 at 004; Mason, Tr. 2340-41).
669. As of February 4, 2013, Dr. Mason believed NMDC "had worked out a deal with Patterson" (Mason, Tr. 2340-41). Dr. Mason believed that NMDC and Patterson "still needed to work out some details of pricing, but we had a deal that was considered – that we had a partner in this." (Mason, Tr. 2343-44; *see also* CX0090 at 004).
670. After Dr. Mason sent out his February 4 email, Patterson's sales people in New Mexico, Belcheff, and Dan Reinhardt (Patterson's regional manager) received calls from manufacturers confused by the email setting up a meeting with them. (CX4090 at 001-02; Mason, Tr. 2385-86).
671. No later than February 5, 2013, Dr. Mason and Belcheff had set up a meeting for Monday, February 11, 2013 with Patterson regional manager, Reinhardt. (CX3333 at 002; Mason, Tr. 2379).
672. On February 7, 2013, at 2:01 p.m., Patterson's Belcheff sent Dr. Mason an email informing Dr. Mason, "we need to cancel" the March 13, 2013 manufacturers' meeting referenced in Dr. Mason's February 4 email. (CX4090 at 001-02).

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673. In the February 7, 2013 2:01 p.m. email from Belcheff to Dr. Mason, Belcheff wrote that there was confusion on Belcheff's part in that Belcheff thought the March 13 meeting was to be a meeting for vendors such as credit card and banking service companies and did not understand that the entire dental manufacturers group were being invited to the meeting. Belcheff also told Dr. Mason that the February 4 email (F. 668) had greatly confused the dental community and had invited manufacturers that Patterson does not do business with, and, in some cases are direct competitors of Patterson. (CX4090 at 002; Mason, Tr. 2380).
674. In the February 7, 2013 2:01 p.m. email from Belcheff to Dr. Mason, Belcheff stated: "This has the opportunity to be huge and is moving fast and I want to make sure we are doing this right from the beginning. Our dinner Monday night [February 11] will help with this and also help us get guidelines in place. . . . I am hoping Patterson can be a partner you trust and that will always do the right thing for you." (CX4090 at 002).
675. Dr. Mason replied to Belcheff's February 7, 2013 2:01 p.m. email (F. 672-674): "Keep the meeting the same day, just put together all the information we need to make everyone happy. Thus we can keep moving forward." (CX4090 at 001).
676. Belcheff replied to Dr. Mason's February 7, 2013 email (F. 675) at 2:44 p.m.: "I will not reach out with the manufacturer reps until after we meet on Monday. This way we can discuss this in person. I definitely want to keep this moving forward." (CX4090 at 001).
677. Following these emails from Belcheff (F. 672-674, 676), Dr. Mason expected that Patterson and NMDC would "set up the guidelines of how we would proceed" during the February 11 dinner meeting. (Mason, Tr. 2350).
678. As of February 7, 2013, Dr. Mason believed that NMDC was still proceeding with an agreement with Patterson and that they would work out the guidelines with Reinhardt at the dinner meeting scheduled for February 11, 2013. (Mason, Tr. 2352-53 ("We had an agreement – we felt – I felt we had an agreement with Patterson Dental. I do feel that at – and I don't know the dates and the times, but there was some pullback by Scott Belcheff after I sent the big e-mail to the manufacturers.")).
679. On February 11, 2013, Dr. Mason and NMDC co-founders met with a Patterson sales representative, Katt, Patterson's Albuquerque branch manager, Belcheff, and Patterson's regional manager, Reinhardt, at a restaurant to discuss NMDC. (Mason, Tr. 2354). At that meeting, Reinhardt informed Dr. Mason that Patterson would not work with NMDC. (Mason, Tr. 2354-55, 2387-88).
680. Dr. Mason could not recall details of what occurred at the February 11, 2013 dinner meeting other than walking out of it, thinking that it was not what he expected. He could not recall any statement by anyone else at the meeting other than the statement by Reinhardt that Patterson was not going to participate in the co-op and could not recall any reasons Reinhardt gave for that decision. (CX8035 (Mason, Dep. at 54-55)).

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681. After the February 11, 2013 meeting, Dr. Mason's group became the New Mexico branch of the Dental Cooperative of Utah and did business with Schein through the Dental Co-Op of Utah (F. 357-359). (Mason, Tr. 2391).

b. The February 8, 2013 email from Cohen to Guggenheim regarding New Mexico Dental Cooperative and buying groups

682. One of the manufacturer recipients of Dr. Mason's February 4 email (F. 668) forwarded it to two people, one of whom forwarded it to a Benco employee. The email was then forwarded up the chain within Benco to a Benco regional manager, Dan Taylor. Taylor then forwarded Dr. Mason's February 4 email to Chuck Cohen, co-owner and co-CEO of Benco, requesting "feedback and coaching." (CX0090 at 002-03).

683. On February 8, 2013, in response to having received Dr. Mason's February 4 email from Taylor, Cohen replied to Taylor's email (F. 682) as follows:

We don't recognize buying groups I'll reach out to my counterpart at Patterson to let him know what's going on in NM.

(CX0055 at 001; Cohen, Tr. 528-30).

684. On February 8, 2013, five minutes after Cohen sent the email in F. 683 to Taylor, Cohen forwarded the email chain beginning with Dr. Mason's February 4 email to Paul Guggenheim, president of Patterson, writing:

Just wanted to let you know about some noise I've picked up from New Mexico. 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.

(CX0056 at 001; CX0090 at 001; CX0091 at 001; Cohen, Tr. 532, 534; Guggenheim, Tr. 1594).

685. Cohen "found it surprising" that Patterson had partnered with NMDC and thought it "would have been very unusual for Patterson to sell to buying groups" because he thought Patterson did not work with buying groups at the time in February 2013. (Cohen, Tr. 531-32; CX0301 (Cohen, IHT at 236) ("As far as I know, at the time of this e-mail, Patterson never sold to buying groups, never recognized buying groups.")).

686. Cohen's asserted rationale for forwarding the email chain (F. 682, 684) to Patterson's Guggenheim was that he "wanted to let [Guggenheim] know about a situation in New Mexico that he might not have heard was taking place in one of their locations." (Cohen, Tr. 712).

687. Cohen shared the information about Patterson's interactions with NMDC (F. 684) with Guggenheim because he hoped that Guggenheim would also share information with him.

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(Cohen, Tr. 712-13 (“I like to give information to get information. I like to be useful [to Guggenheim]. If the shoe was on the other foot, I would have liked to have known the same information. . . . I like to maintain good relationships with my competitors.”)).

688. Cohen could not recall why he included an FYI about Benco’s policy in his email to Guggenheim. (Cohen, Tr. 714 (“It seemed to be germane to the topic, but no special reason.”)).
689. Cohen could not identify any business reason for his February 2013 communication to Guggenheim about Benco’s no buying group policy. (CX0301 (Cohen, IHT at 243) (“Q. Can you think of any business reason for you to tell Mr. Guggenheim Benco’s no-GPO policy? A. I don’t think [there] is a business reason.”)).
690. Cohen’s February 8, 2013 email to Guggenheim regarding NMDC (F. 684) was the first time Guggenheim became aware of Benco’s no buying group policy. (Guggenheim, Tr. 1596; *see also* CX0314 (Guggenheim, IHT at 237, 238)).
691. As of February 8, 2013, Guggenheim did not believe that Benco’s policy of not selling to buying groups was public information. (Guggenheim, Tr. 1596-97 (“Q. Did you believe that Benco’s policy of not selling to buying groups was public information? A. No. I don’t – I didn’t think so.”); *see also* CX0314 (Guggenheim, IHT at 239)).
692. On February 26, 2013, Benco’s New Mexico regional manager Taylor contacted Cohen about whether Cohen had communicated with Patterson about NMDC, stating in a text message, “This buying club in Albuquerque is starting to grow legs. Curious if you were able to connect with your Patterson contact and if anything came of it.” (CX0057 (Excel worksheet “Chats” tab row 80); Cohen, Tr. 538-39; *see also* CX0057_EXCERPT at 006). Cohen responded to Taylor in a text: “I just sent [Guggenheim] a note about [NMDC]. Don’t want to call because it might be construed as price fixing.” (Cohen, Tr. 539-40; CX0057 (Excel worksheet “Chats” tab row 81); *see also* CX0057_EXCERPT at 006).

**c. The February 8, 2013 email from Guggenheim to Cohen
regarding New Mexico Dental Cooperative and buying groups**

693. On February 8, 2013, approximately 20 minutes after receiving the email from Cohen regarding Benco’s no buying group policy (F. 684), Guggenheim forwarded it to Patterson sales executives Dave Misiak and Tim Rogan. (Misiak, Tr. 1329, 1331; Guggenheim, Tr. 1606-07; CX0091 at 001).
694. Guggenheim forwarded the February 8 email from Cohen (F. 684) for “informational purposes,” and did so without writing any text of his own in the body of the email that he forwarded to Misiak and Rogan. (Guggenheim, Tr. 1700-01).
695. When Guggenheim was president of Patterson, the individuals who would evaluate GPOs for the company were Misiak, Rogan, Neal McFadden, and Wesley Fields. (CX0314 (Guggenheim, IHT at 225)).

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696. David Misiak was Patterson's vice president of sales from 2010 to 2016. (Misiak, Tr. 1297-98). During the time that Misiak was the vice president of sales for Patterson, he reported to Paul Guggenheim. (Misiak, Tr. 1299). During the time Misiak was the vice president of sales for Patterson, he provided guidance to Patterson's regions and branch office about working with customers. (Misiak, Tr. 1300, 1383).
697. Tim Rogan was Patterson's vice president of marketing for merchandise from 2009 to May 2017. (Rogan, Tr. 3423). Rogan reported to Guggenheim until approximately January 2016. (Rogan, Tr. 3424-25). During that time, Rogan was responsible for consumables (merchandise) relationships with vendors, global sourcing, customer loyalty program, and pricing. (Rogan, Tr. 3424, 3513; Guggenheim, Tr. 1606-07).
698. A few hours after Guggenheim received the February 8, 2013 email from Cohen about Patterson's involvement with NMDC and Benco's no buying group policy, Guggenheim responded to Benco's Cohen:

Thanks for the heads up. I'll investigate the situation. We feel the same way about these.

(CX0090 at 001; Guggenheim, Tr. 1607-08).

699. In testimony, Guggenheim confirmed that his response to Cohen's February 8, 2013, email about Patterson's involvement with NMDC and Benco's no buying group policy (F. 698) meant that Patterson felt the same way about buying groups. (Guggenheim, Tr. 1611-12).
700. Cohen interpreted Guggenheim's statement in his February 8, 2013 email (F. 698) that "we feel the same way" to mean that Patterson's position with respect to dealing with buying groups was similar to Benco's policy. (Cohen, Tr. 589-90 ("Q. What did you think Mr. Guggenheim's position was on GPOs at the time of this e-mail? A. I thought – it goes back to the e-mail exchange that we had several months before in the context of the New Mexico cooperative, and he said, 'We feel the same way about these.' Q. So did you think that his policy was similar to yours? A. That's the way I interpreted that sentence. Yes.")).
701. Guggenheim could not identify any business reason for his February 8, 2013 communication to Cohen about Patterson's view of buying groups. (Guggenheim, Tr. 1612-13).
702. Guggenheim testified that he did not ask Misiak or Rogan to do anything in relation to the email he had received from Cohen and forwarded to Misiak and Rogan on February 8, 2013. (Guggenheim, Tr. 1607, 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.")).
703. Misiak testified that he did not recall doing anything specific in relation to receiving the February 8, 2013 email from Cohen to Guggenheim, forwarded to him by Guggenheim.

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(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.”)).

704. Rogan testified that he did not recall doing anything in relation to receiving the February 8, 2013 email from Cohen to Guggenheim, forwarded to him by Guggenheim. Rogan further testified that he did not receive any instructions from Guggenheim in connection with the forwarded email. (Rogan, Tr. 3576-77).
705. At trial, Guggenheim testified that he could not recall one way or the other whether he investigated the NMDC situation. (Guggenheim, Tr. 1611). In his deposition, Guggenheim testified, “It’s possible that I called [Patterson’s New Mexico branch manager] and looked into it, but I don’t remember that specifically.” (CX8023 (Guggenheim, Dep. at 121)).

3. Exchange regarding Atlantic Dental Care and buying groups

a. Patterson’s interactions with Atlantic Dental Care

706. In February 2013, Devon Nease, then branch manager for Patterson’s Chesapeake branch office, met with Dr. Michael Fernandez who provided Nease with a request for proposal (RFP) from an entity called Atlantic Dental Care (ADC). (CX0092; CX8002 (Nease, Dep. at 16, 30-32, 42)).
707. In February 2013, Nease was responsible for overseeing the operations and sales of Patterson’s Chesapeake branch office. (CX8002 (Nease, Dep. at 17)).
708. The RFP from Dr. Fernandez (F. 706) described ADC as “a group of general dentists in the Southeastern region of Virginia” who “were looking to preserve their autonomy and independent practice and take advantage of the economy of scale that a large corporate or group practice enjoys.” (CX0092 at 004; CX8002 (Nease, Dep. at 40-41)).
709. On February 27, 2013, Nease sent an email to Anthony Fruehauf, Patterson’s Mid-Atlantic regional manager and forwarded ADC’s RFP (F. 706). (CX0092 at 001-02; *see also* CX8002 (Nease, Dep. at 40)).
710. Later on February 27, 2013, Fruehauf forwarded the ADC RFP (F. 706) to Misiak with the following message:

I have attached an RFP that the GPO in Chesapeake will be sending out. 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. Devon is on board and understands our position. His concern was more of how he would be judged if we lost a big chunk of business.

(CX0092 at 001; CX8013 (Fruehauf, Dep. at 99-100)).

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711. Later on February 27, 2013, Misiak forwarded the RFP from ADC and the email message Misiak had received from Fruehauf (F. 710) to Guggenheim, with the following message:

Attached is an RFP from a dentist who's formed a Co-op. I've coached Anthony [Fruehauf] on how to stay out of this with grace. I'm concerned that Schein and Benco sneak into these co-op bids and deny it.

(CX0092 at 001; *see also* Misiak, Tr. 1365-66, 1371).

712. Misiak's use of the word "Co-op" in F. 711 refers to buying groups or GPOs. (Misiak, Tr. 1365-66).
713. From Misiak's perspective, competitors sometimes act covertly in meeting with customers and do sometimes try to hide attempts to steal customers. Misiak disclaimed any personal knowledge of Schein's buying group strategies. (Misiak, Tr. 1371, 1502-05).
714. Misiak denied that the statement in his February 27, 2013 email, "I'm concerned that Schein and Benco sneak into these co-op bids and deny it" (F. 711), was referring to Benco and Schein violating an agreement with Patterson not to work with buying groups and maintained that his concern was obtaining an understanding of what the competition was doing. (Misiak, Tr. 1369, 1508-09).
715. After sending his email to Guggenheim (F. 711), Misiak responded to Fruehauf's email (F. 710), in a February 27, 2013 email, with the following message:

These co-op situations can be very challenging so stay connected. You may have to help [Devon Nease] at the meeting communicate our position verbally to the reps. . . . When I get these calls directly I politely say that I appreciate the opportunity, but currently we do [not] participate with group purchasing organizations. . . . Continue to help Devon stay out of this with grace. . . .

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 001) (emphasis in original).

716. Misiak sent his response to Fruehauf (F. 715) as a blind copy to Guggenheim. (CX0093 at 001).
717. Where Misiak wrote in CX0093 (F. 715) that "currently we *do* participate with group purchasing organizations" he meant to write "currently we do *not* participate with group purchasing organizations." (Misiak, Tr. 1350 (emphasis added)). Where Misiak wrote in

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- CX0093 (F. 715) “stay out of this with grace,” “this” referred to the GPO. (Misiak, Tr. 1354-55).
718. In reference to his statement in CX0093 that “our 2 largest competitors stay out of these as well” (F. 715), Misiak meant that he believed that Schein and Benco stay out of buying groups, just as Patterson stayed out of buying groups. (Misiak, Tr. 1357-58). Misiak explained that his belief that neither Schein nor Benco did business with buying groups was based on market intelligence and things he had heard “from the field.” (Misiak, Tr. 1356-58; CX0316 (Misiak, IHT at 279-80)). Misiak acknowledged that his statement that “[o]ur two largest competitors stay out of these as well” was speculation about what Schein was doing and that he had no personal knowledge of Schein’s strategy or practice regarding buying groups. (Misiak, Tr. 1504-05, 1507-08).
719. In his February 27, 2013 email to Fruehauf regarding ADC’s bid proposal (F. 715), Misiak instructed Fruehauf and his sales team not to bid for ADC. (CX0093 at 001; CX0316 (Misiak, IHT at 243) (“Q. Is it fair to say that you told Anthony to not submit a bid for this Atlantic Dental Care group? A. I think, yeah, that’s what I say in this email.”)).
720. Patterson acknowledges that it decided not to bid for the ADC business in February 2013. PFF 311 (citing CX0092 at 1 (February 27, 2013 email from Patterson’s Misiak to Guggenheim discussing “stay[ing] out of” the Atlantic Dental Care RFP process)).
721. On May 31, 2013, Nease sent Guggenheim an email informing him that Benco had bid for and won the business of ADC. (CX0094 at 001 (“Just a heads up on a situation in Chesapeake, VA, Benco recently responded to and won a bid proposal with a buying group called Atlantic Dental Care.”); Guggenheim, Tr. 1622, 1625-27).
722. As of May 31, 2013, Patterson viewed ADC as a buying group. (*See* F. 721).

b. The June 6, 2013 email from Guggenheim to Cohen regarding Atlantic Dental Care

723. After learning from Nease that Benco bid for and won ADC’s business (F. 721), Patterson’s Guggenheim located the email that Guggenheim had received from Benco’s Cohen on February 8, 2013 (four months earlier), which explained Benco’s no buying group policy (F. 684). (Guggenheim, Tr. 1627).
724. On June 6, 2013, Guggenheim sent an email to Cohen concerning ADC. (CX0062 at 002). Guggenheim’s June 6, 2013 email to Cohen was written on top of and as a forwarding of the February 8, 2013 email from Cohen to Guggenheim regarding the New Mexico Dental Cooperative, discussed in F. 684. (CX0062 at 002).

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725. Guggenheim's June 6, 2013 email to Cohen stated:

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 002 ("Guggenheim's June 6, 2013 email") (ellipses in original)).

726. Guggenheim's June 6, 2013 email (F. 725) was also sent as a blind copy to Misiak, Rogan, and Nease. (CX0095 at 001; Guggenheim, Tr. 1630).
727. Guggenheim viewed Benco's bidding on and doing business with ADC as a deviation from what Cohen previously told him in February 2013 about Benco's policy not to do business with buying groups (F. 684). (Guggenheim, Tr. 1628-29 ("[A]fter Devon brought this up to me, I went back and looked at what [Cohen] said in that e-mail, and I just was wondering if his – it seemed inconsistent with what he told me at that time.")).

c. The June 8, 2013 email from Cohen to Guggenheim regarding Atlantic Dental Care

728. Benco's Cohen replied to Patterson's Guggenheim's June 6, 2013 email (F. 725) two days later on June 8, 2013 and reiterated to Guggenheim that Benco had a no buying-group policy. (Cohen, Tr. 561-62; CX0062 at 001).
729. On June 8, 2013, Cohen replied to Guggenheim's June 6, 2013 email (F. 725), stating:

As we've discussed, we don't recognize buying groups. On the Atlantic Dental Care situation, here's our understanding after several in-depth conversations

. . . . [W]e believe this meets our criteria for a large group practice. We've asked to see the merger documents once they are completed, to confirm that they've really become a legally merged entity, and we're going to continue monitoring the process to ensure that ADC delivers on their commitment to us. Happy to discuss in more detail, if you'd like.

(CX0062 at 001 ("Cohen's June 8, 2013 email"); Cohen, Tr. 561-64).

730. In his June 8, 2013 email (F. 729), Cohen provided multiple reasons why Benco believed ADC was not a buying group, including that ADC had a total of 32 practices; the 32

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practices had “legally merged together”; the merged entity was “owned by the former practice owners”; ADC was in the “process of rebranding all the offices Atlantic Dental Care”; and the company had a board of directors “made up of some of the stakeholders that makes the decisions.” (CX0062 at 001; Cohen, Tr. 562-63).

731. Cohen believed that Guggenheim’s June 6, 2013 email (F. 725) asked how Benco doing business with buying group ADC was consistent with the no buying group policy that Cohen had communicated to Guggenheim in Cohen’s February 8, 2013 email. (Cohen, Tr. 561).

d. Patterson’s follow up to the June 8, 2013 email from Cohen

732. Based on what Patterson’s Guggenheim learned from Benco’s Cohen’s June 8, 2013 email (F. 729), Guggenheim then viewed ADC as a DSO rather than a buying group. (Guggenheim, Tr. 1636).
733. On June 10, 2013, Guggenheim responded to Cohen’s June 8, 2013 email (F. 729), stating: “Sounds good Chuck, Just wanted to clarify where you guys stand.” (CX0062 at 001).
734. Guggenheim forwarded Cohen’s June 8, 2013 email (F. 729) to Nease, the branch manager for the region where ADC was located, to which Nease replied, on June 10, 2013, “So are they making an exception because they have legally merged? How do you feel about this?” (CX0096 at 001).
735. In response to Nease’s June 10, 2013 email (F. 734), Guggenheim replied, “I guess that does create a different situation as they would logically buy as one entity. It’s a little grey but I guess he has a point.” (CX0096 at 001).
736. Guggenheim forwarded the email exchange with Cohen (CX0062) to his boss, CEO of Patterson Companies, Scott Anderson, and to McFadden, one of the individuals at Patterson who evaluated GPOs. (CX0314 (Guggenheim, IHT at 225); CX0098 at 001; CX0097 at 001).
737. Following the June 8, 2013 email from Cohen (F. 729), Guggenheim directed Nease to “aggressively get after [ADC’s] business and compete.” (Guggenheim, Tr. 1634; CX0314 (Guggenheim, IHT at 303)).

I. Patterson’s Conduct Regarding Buying Groups

1. Conduct and guidance prior to February 2013

738. Prior to February 2013, Patterson did not have a corporate policy against doing business with buying groups or a uniform way of dealing with buying groups. Instead, each buying group opportunity was individually evaluated by salespeople and managers at the

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- branch level. (Guggenheim, Tr. 1603-04; CX8023 (Guggenheim, Dep. at 134); McFadden, Tr. 2676; CX8004 (McFadden, Dep. at 37-38)).
739. Prior to February 2013, Patterson's corporate office did not provide guidance to Patterson's branches about whether or not to do business with buying groups. (CX8023 (Guggenheim, Dep. at 136); *see also* CX8023 (Guggenheim, Dep. at 38) ("Q. While you were Southwest regional manager, did you receive any guidance from Patterson corporate on whether to do business with GPOs? A. Not directly, no. Q. What about indirectly? A. No."); CX8004 (McFadden, Dep. at 37-38)).
740. Prior to February 2013, buying groups were not part of Patterson's core strategy. (Misiak, Tr. 1493, 1499; RX0046 at 00017-20 (Patterson's internal strategy plans in November 2012 identifying only two business segments to focus on: (1) private practice and (2) large groups) (i.e., DSOs)).
741. Prior to February 2013, Patterson viewed buying groups with skepticism. (RX0020 at 00001 (in an August 20, 2011 response to an email from a Patterson sales representative relaying her concerns that the Florida Dental Association was considering the formation of a buying group which would affect her ability to earn a sales commission, Misiak wrote to McFadden and Rogan, "We have seen this attempted elsewhere. We need to simply remain value added, stand our ground with our people and customers and these 'programs' go away on their own."); CX3114 at 001 (in an October 27, 2009 email, Misiak described the group purchasing organization basis as where a percentage of "sales are given to the referring company" and stated, "this type of relationship has not been a good fit or need for our dental business.")).
742. Prior to February 2013, there were a few occasions when Patterson salespeople met with and evaluated buying groups, but declined to sign contracts with them. (*E.g.*, RX0401 at 00001 (Patterson did not bid on MMCAP in 2009 because "[i]t's a GPO" and the requirements for working with the group included a fee of 1% of total sales purchased from Patterson); RX0029 (In March 2012, the Florida Dental Association ("FDA") informed McFadden that it would be establishing a group purchasing organization and approached McFadden about a dental supply discount program for FDA members. Patterson declined to bid on the FDA's group purchasing organization for a second time, after having "spoke[n] with [the] FDA President" several months prior. On March 8, 2012, McFadden, then a regional manager, wrote to Misiak, vice president of sales, "This stuff scares me. I'm gonna tell him thanks but no thanks." Misiak responded to McFadden, "Your response is right.")).
743. Prior to February 2013, there were a few occasions when Patterson did do business with buying groups. (CX8023 (Guggenheim, Dep. at 141) ("my gut would tell me, yeah, we've probably done business with buying groups and that's probably been done in branches, you know, for many years"); *e.g.*, CX3422 at 001 (June 26, 2012 email from Rogan approving discounts for Smile Source buying group dentists in Hawaii: "Just tell us what discount you want to go with and we will get it loaded."); RX0010 at 00001

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(March 31, 2010 email from a branch manager to Guggenheim about approving discounts for “a group of dentists who have gathered together to boost purchasing power”)).

2. Corporate guidance relating to buying groups after February 2013

744. In a February 27, 2013 email to a regional manager, Misiak wrote that when he gets calls from group purchasing organizations, he tells them that Patterson does not participate with group purchasing organizations. Misiak instructed the regional manager to help the branch manager stay out of working with the GPO. (F. 715).
745. In an August 2, 2013 email from McFadden to Rogan, then vice president of marketing, forwarding market intelligence that Schein might be contracting with a buying group, McFadden wrote: “I know in the past we have said no[.] Is it worth it to explore GPO?????” Rogan replied 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. My two cents . . .” McFadden replied to Rogan that it appeared “Schein is in this space.” (CX0106 at 001 (ellipses in original); CX0161).
746. Rogan explained that his statement that “Schein, Benco, and Patterson have always said no” (F. 745) was his opinion, based on his years of experience in the dental industry and that in referencing “our duty,” Rogan was referring to the senior leadership of Patterson. Rogan also admitted that, based on the market intelligence forwarded by McFadden, Schein was taking a different approach than saying “no” to buying groups, as McFadden believed. (Rogan, Tr. 3573-75, 3660-61).
747. In a September 3, 2013 email to Guggenheim and Anderson, CEO of Patterson Companies, Misiak wrote: “the GPO noise has been pretty loud from the field. We have said no at every turn. . . . Benco has also crept into few of these. My guidance has been to politely say no and whether [*sic*] the storm with these.” (CX3116 at 001).
748. When Misiak used the phrase “the GPO noise has been pretty loud from the field” (F. 747), he meant that he had received a lot of emails about buying groups from branch offices or sales representatives. (Misiak Tr. 1386; CX3116 at 001).
749. When Misiak used the phrase “[w]e have said no at every turn” (F. 747), he meant that he has “remained disciplined as the sales leader of the organization to say no” to GPOs. (Misiak Tr. 1386-87; CX3116 at 001).
750. Misiak provided the guidance to say no to buying groups (F. 747) to Patterson’s sales team in the regions. (Misiak, Tr. 1388; CX3116 at 001).
751. In a November 20, 2013 email to Patterson’s manager of marketing communications, who forwarded a request from a buying group, Rogan, Patterson’s vice president of marketing, wrote: “We don’t sell to buying groups. Let’s talk live.” (CX3168 at 001).

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752. In a July 26, 2015 email, a territory manager asked of McFadden: “I wanted to make sure that GPO’s are not something we as a company are choosing to partner with at this point. I know Dave [Misiak] has been clear about this in the past and I wanted to verify that this still is the case.” (CX3342).

3. Special Markets’ actions relating to buying groups

a. Creation of Special Markets

753. In the fall of 2012, a consulting firm hired by Patterson provided Patterson’s management with a 99-page report and recommendation for how to win some of the DSO market away from Schein and Benco. (Guggenheim, Tr. 1581-82; CX8004 (McFadden, Dep. at 49-51)).
754. Patterson’s executive team obtained the approval of its board of directors and made a significant investment in early spring 2013 to build out a “Special Markets” sales and service organization. (Guggenheim, Tr. 1777-78; CX8023 (Guggenheim, Dep. at 174-76); CX0315 (McFadden, IHT at 51-52)).
755. Neal McFadden, then Patterson’s Southeast regional manager, moved to Patterson’s corporate headquarters outside of Minneapolis, Minnesota in June 2013 to lead the newly formed Patterson Special Markets division and began to hire and train a sales and support team. (CX8004 (McFadden, Dep. at 103); CX0315 (McFadden, IHT at 24, 274); McFadden, Tr. 2668).
756. On September 4, 2013, Patterson issued a memorandum officially announcing the June 2013 formation of the Special Markets division. The memorandum was from McFadden, president (Special Markets) and Misiak, vice president (sales) and was sent to regional managers and branch managers with a “re” line of: “Patterson Special Markets (PSM) Definition.” (CX0158 at 002).
757. Patterson’s announcement of its Special Markets division (F. 756) defined the Special Markets division as serving dental corporations with at least 15 practices and more than \$600,000 in annual purchasing. (CX0158 at 002).
758. Patterson’s announcement of its Special Markets division (F. 756) explicitly stated: “This definition will not include group purchasing organizations (GPOs).” (CX0158 at 002).
759. Guggenheim and Misiak provided input into the definition of Special Markets in CX0158. (McFadden, Tr. 2697-99).
760. The September 4, 2013 memorandum from McFadden defining Special Markets as excluding GPOs (F. 758) was approved by Guggenheim. (Guggenheim, Tr. 1641-42).

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b. Communications from Special Markets

761. On December 2, 2013, in response to an inquiry from a Patterson account specialist who was asking about how to handle an inquiry from a group purchasing organization, McFadden responded: “[A]s of now we are not working with GPO’s.” (CX3010 at 001).
762. In February 2014, Dr. George Lennon submitted an RFP to Patterson on behalf of North American Integrated Dental Society (“NAIDS”). The request was evaluated by the Special Markets division. McFadden approved his staff member to evaluate the bid when he thought that Dr. Lennon represented the Community Health Center. After McFadden realized that Dr. Lennon represented a GPO representing CHC and would be getting 3% of sales, McFadden declined to work with Dr. Lennon. McFadden wrote to Dr. Lennon: “At the advice of our legal department and our executive leadership team I am respectfully declining your offer to participate further in your RFP. Patterson has historically never done business with GPO’s and culturally we do not feel it is a long term strategy for our company.” McFadden forwarded his correspondence with Dr. Lennon to Guggenheim, writing that McFadden had contacted someone from Patterson Companies and asked about their experience with dealing with GPOs in the medical space and was told it as a “necessary evil” in that area. “However, my gut told me that historically we’ve never done this [in dental,] so I sent the bottom letter declining the offer.” (CX3419; CX3064; Guggenheim, Tr. 1795-96).
763. On May 19, 2014, in response to an inquiry from a Patterson Special Markets specialist asking whether there were minimum requirements for buying groups, McFadden responded: “For now – I am electing to not participate with these [buying] groups – we have said no to several already[.]” (CX3004 at 001).
764. On June 12, 2014, McFadden received a text message from a former Patterson employee, Dave McIntosh, requesting a potential partnership with Patterson on behalf of a group of dental offices called Choice One. (CX0164 at 002). In response, McFadden wrote: “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.” (CX0164 at 002; McFadden, Tr. 2735-37).
765. Although McFadden wrote in CX0164 that “we’ve signed an agreement” (F. 764), McFadden testified that there was no signed agreement and that he had said this to McIntosh, an employee who McFadden had terminated in late 2012 or early 2013, in order to shut down the exchange with McIntosh. (McFadden, Tr. 2737-38; CX8004 (McFadden, Dep. at 110-11); CX0315 (McFadden, IHT at 235-39)).
766. On July 29, 2014, a director of Patterson’s Special Markets asked 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 forwarded that email to Guggenheim, stating: “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

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specialty group.” (CX3081 at 001). *See also* RX0333 at 00001 (“Orthosynetics pays all the bills of their offices. They’re not a buying club per se.”); McFadden, Tr. 2728-30 (contrasting OrthoSynetics against buying groups: “So [OrthoSynetics] was not a threat I saw to our normal general dental business because this was a small specialty group.”).

767. On September 19, 2014, McFadden declined to attend a convention hosted by a buying group in Georgia, stating: “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 00001).
768. On October 23, 2014, in response to an inquiry from a branch manager, McFadden stated: “As a rule we are trying our best to steer clear of all buying groups.” (CX3128 at 001).
769. On January 14, 2015, in response to an inquiry from a regional manager, McFadden stated: “[D]oes he own all these offices – if not then he is a GPO – we don’t deal with GPO’s[.]” (CX3045).
770. In May 2015, McFadden wrote: “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 Miskiak’s lead here. We have said no many times in order to remain pure in our intent and consistent across the company. 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.” Patterson’s Maine branch manager responded, “Thanks for the insight Neal – we will handle at the Branch level.” (RX0451 at 00001).
771. In 2014, Patterson’s Special Markets division received between 10 and 25 requests from buying groups but did not do business with those groups. (McFadden, Tr. 2724-25, 2685).
772. McFadden confirmed that: “[P]retty much every inquiry I received from buying groups or GPOs and such, I always told them thank you, but no thanks.” (McFadden, Tr. 2685).

4. Patterson’s branches’ actions relating to buying groups

773. In November 2013, Patterson chose not to bid on Smile Source. (F. 819-824).
774. On February 12, 2014, Lou Graham, a Patterson customer, emailed Patterson’s Misiak about meeting regarding the Catapult Group. Misiak forwarded Graham’s email to Patterson’s Guggenheim, Rogan, and others, stating: “All, I will respond to Dr. Graham, bcc each of you, with a polite pass on this request. . . .” Guggenheim asked, “What exactly is he proposing?” Misiak responded, “A co-op buying group that we pay Catapult (him) and he provided CE [continuing education.]” (CX3287 at 001).

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775. On March 18, 2014, a branch manager received a request from a dentist affiliated with United Orthodontic Buying Group who was seeking a discount on a piece of equipment, a Sirona x-ray machine. (RX0227). When McFadden learned of this request, he forwarded the email to Misiak, stating, “you ever here [sic] of this Ortho group? – sounds like a GPO?” (RX0227 at 00001).
776. On April 23, 2014, when a branch manager asked McFadden how to handle a request from a veterinarian, not a dentist, McFadden forwarded the question to Guggenheim, who responded: “Nothing unusual here. Typical approach of an upstart buying group. We pass on these as a matter of protecting our business model.” (CX3080).
777. On May 29, 2014, Rogan, vice president of marketing, received from branch manager Alain Carles, a vendor application from the Jackson Health System. Rogan responded by email: “This is a GPO. They are taking 2% off the top. This is a very slippery slope.” Patterson’s branch manager responded to Rogan: “The Branch has been selling to the Jackson system of hospitals and clinics for over 10 years I sent it up to corporate to read before I sign on behalf of the company” (RX0271 at 00001; Rogan, Tr. 3534 (accepting branch manager’s statement that Jackson Health is not a buying group)).
778. In an email on May 29, 2014 related to the email referenced in F. 777, the branch manager explained to his regional manager: “this is not a GPO, this is the Jack[s]on Health system that owns and manages several hospitals in the area.” (RX0270 at 00001).
779. On September 2, 2014, when Dr. Stephen Sebastian inquired about establishing an account for dental groups consisting of multiple offices across the country, the branch manager forwarded the request to the regional manager, Fruehauf, who responded: “We do not have an answer for him. We generally do not deal with groups that are formed just to get better pricing.” (CX3038 at 001). After receiving Fruehauf’s response, the branch manager responded to Dr. Sebastian’s request: “Patterson Dental has an existing loyalty program in place for dentists that utilize our products & services as their primary source. For this reason, we do not have a separate discount program for group buyers. . . . Thank you for your inquiry . . . if you are interested in opening an individual practice account please let me know & I’ll have one of my local representatives get in contact with you.” (CX3125 at 001) (ellipses in original)).
780. In the fall of 2014, Patterson rejected a proposal to work with the Kois Buyers Group. (F. 884-896).

5. Conduct after the alleged conspiracy period**a. Evaluation of buying groups generally**

781. From 2015 until 2016, Tim Rogan served as the vice president of strategy and organizational effectiveness at Patterson Companies as well as vice president of marketing for Patterson Dental. (Rogan, Tr. 3423-24). As the vice president of strategy

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and organizational effectiveness, Rogan was responsible for the strategic planning process for Patterson Companies. (Rogan, Tr. 3444).

782. On November 10, 2015, Rogan sent an email to Guggenheim and Misiak regarding a planning meeting to prepare for the strategic planning meeting in January 2016. In that email, Rogan reported that he asked McKinsey & Company (“McKinsey”), a consulting firm, to evaluate the North American dental business. Rogan suggested that maybe “we add GPO’s/Buying Groups to the strategic plan. Meaning we are going to build out a strategy of how we are going to go to market with them?” (CX3362 at 001-02; Rogan, Tr. 3445).
783. In November 2015, Patterson asked McKinsey to analyze the buying group market. When Patterson hired McKinsey, it was the first time that Patterson hired a consultant to analyze the buying group market. (Rogan, Tr. 3455).
784. On December 17, 2015, Rogan received a slide deck from McKinsey titled “Dental business growth strategy project: Second review session.” (CX3178 at 001-02 (the “McKinsey December 2015 Discussion Document”).
785. The McKinsey December 2015 Discussion Document stated that it conducted a “deep dive on a few key manufacturer – and customer-related market trends,” including “GPOs.” (CX3178 at 008; *see also* Rogan, Tr. 3461 (“Q. And GPOs is listed as one of the customer-related trends that Patterson wanted McKinsey to study? A. It’s – it’s, yeah, one piece of customer-related trends. Yes.”)).
786. In November 2015, Patterson hired Wesley Fields as a director of business development with the instruction to evaluate the opportunities to work with buying groups. (CX0312 (Fields, IHT at 8, 24-25); Rogan, Tr. 3474; Guggenheim, Tr. 1654).

b. Evaluation of specific buying groups

787. On July 29, 2015, Bill Neal, a territory manager, evaluated working with Dentistry Unchained and reported on his meeting to McFadden, writing: “a GPO arrangement” can be a “slippery slope.” “I was honest with them that we have not elected to participate in these type of programs in the past.” McFadden replied to the territory manager: “I’m not sure how this looks in the Patterson landscape, but I am glad to hear we are at least beginning to have these conversations. I believe that GPOs are not going away anytime soon.” (CX3006 at 001-02).
788. In January 2016, Neal met again with a Dentistry Unchained representative and “again explained to her very nicely that we are not going to participate in a GPO type program at this point.” (CX0137 at 001).
789. In February 2016, Neal met again with a Dentistry Unchained representative and told her that a potential offer from Patterson would need to be approved by upper management. Neal forwarded the Dentistry Unchained proposal to McFadden, who responded: “All

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this looks fine Bill – let’s try this out – we need to figure out how to work with these types of organizations[.]” (CX3018 at 001).

790. On March 2, 2016, McFadden approved the Dentistry Unchained proposal, writing to Neal: “I will take responsibility – we must start stretching – This seems to be the only way for now to insert ourselves into the mix with these GPO’s or quasi.” (CX3018 at 001).
791. On March 21, 2016, McFadden wrote to Fields: “This is the Georgia dental Association GPO. FYI I believe we’re gonna pass on this one[.]” (CX0133 at 001).
792. On March 22, 2016, McFadden wrote to Fields in reference to the Georgia Dental Association: “This is the GPO I met with. Yes, they are intriguing – I do think it’s worth an opportunity to meet with them and listen. I hate the industry moving this way BUT we need to learn and see if there is a way we can coexist” (CX0135 at 001 (capitalization in original)).
793. Fields responded to McFadden’s email (F. 792): “Thanks Neal. I completely agree that I think we need to continue exploring this market” (CX0135 at 001).
794. In 2017, Patterson submitted a bid on Smile Source. (Rogan, Tr. 3540-41; *see also* McFadden, Tr. 2733-34). Rogan, Misiak, and perhaps Guggenheim were involved in the decision to pursue Smile Source’s business. (Misiak, Tr. 1318). The 2017 bid was the first time Patterson bid for Smile Source’s business. (Rogan, Tr. 3540-41).
795. In May 2018, Patterson entered into an agreement with two buying groups, [REDACTED]. (CX8028 (Lepley, Dep. at 37-39), *in camera*).

J. Respondents’ Approaches to Smile Source and to the Kois Buyers Group**1. Smile Source****a. Background**

796. Smile Source was formed in 2006. (Goldsmith, Tr. 2070).
797. Smile Source is a franchise organization. Smile Source members are considered franchisees and are given exclusive territories. (Goldsmith, Tr. 2040-41, 2046; RX0290).
798. Smile Source registers as a franchise, and its members pay Smile Source a franchise fee. The franchise fee, also called a membership fee or a royalty fee, is collected monthly and is Smile Source’s primary source of income. (Goldsmith, Tr. 1971; 2042; RX0290).
799. Smile Source members are independent dentists. (Goldsmith, Tr. 1936).

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800. Smile Source's goal is to "level the playing field for independent practice dentists to give them the opportunity to be competitive with large corporate group practices" by providing members "access to resources that they wouldn't otherwise have access to as a solo independent practice owner," such as marketing and advertising services, continuing education, accounting services, and practice management consulting. Smile Source also seeks to "leverage [its] economies of scale" to provide members access to discounted goods and services. (Goldsmith, Tr. 1934-36; Maurer, Tr. 5017).
801. Smile Source had 21 members at the beginning of 2011 and 28 members at the end of 2011. (RX2952 (Maurer, Dep. at 26-27)).
802. In April 2011, Smile Source received private equity funding from Brazos Private Equity Fund. (Goldsmith, Tr. 2072; CX2299 at 001).
803. On September 1, 2011, Smile Source sent an email to Schein notifying them of the April 2011 investment by Brazos Private Equity Fund. The email further stated that Smile Source had "fine-tuned [its] model and value proposition," and hired new employees, including a new president, Dr. Goldsmith, who had previously been a full-time practicing dentist. One of Dr. Goldsmith's top priorities was to grow the membership. (CX2299 at 001; Goldsmith, Tr. 2040-41, 2072-73).
804. [REDACTED]
[REDACTED]
[REDACTED] (Goldsmith, Tr. 1971-72, 2073).
805. Dr. Goldsmith remained president of Smile Source until February 2013, when he became chief dental officer and vice president of vendor relations. Trevor Mauer, who had been vice president of business development for Smile Source since November 2012 became president of Smile Source. (Goldsmith, Tr. 2030-32, 2041-42; Mauer, Tr. 4938).
806. At the end of 2012, Smile Source had 58 members. At the end of 2013, Smile Source had 145 members. At the end of 2015, Smile Source had 352 members. At the end of 2016, Smile Source had 470 members. At the end of 2017, Smile Source had 562 members. (RX2952 (Maurer, Dep. at 27-28)).⁵⁵
807. Under the Smile Source franchise agreement, members do not have to purchase supplies from vendors through Smile Source's discount program. (Goldsmith, Tr. 2053-54).

b. Benco dealings with Smile Source

808. Smile Source has approached Benco on several occasions and, consistent with Benco's no buying group policy, each time Benco responded that it does not do business with buying groups like Smile Source. (Ryan, Tr. 1181-82; F. 809-818).

⁵⁵ The parties do not cite to information in the record for 2014.

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809. On September 26, 2011, Dr. Goldsmith, as president of Smile Source, sent an email to Benco stating that Smile Source operated in 8 states and had 40 practices and that Smile Source currently used Henry Schein for its services, but wanted to see what kind of relationship it could establish with Benco. (CX1333).
810. On September 30, 2011, Benco's Ryan sent an email to Dr. Goldsmith asking four questions: (1) "Smile Source has no ownership stake in the offices, is that correct?"; (2) "Can Smile Source control and direct . . . who the offices purchase from?"; (3) "Who places the orders?"; and (4) "Who pays the bills?" (CX1138 at 002).
811. Dr. Goldsmith responded to Ryan's email (F. 810) that: (1) "Smile takes 1% of the collections of the practice as a fee, but has no ownership"; (2) "We direct the formulary and the products"; (3) "The orders are still placed by the individual practices"; and (4) "The practices are responsible for all their bills" (CX1138 at 001).
812. Ryan forwarded Dr. Goldsmith's response (F. 811) to Cohen, stating that Smile Source "[s]mells like a GPO to me," but questioned whether it was a GPO if "they are in control of purchasing" or whether the fact that the individual offices pay their bills negates that. Cohen responded to Ryan: "It's a GPO, no central ownership or bill paying. Please pass." (CX0004).
813. Ryan responded to Dr. Goldsmith on September 30, 2011: "Your structure meets our definition of GPO, and Benco does not participate in group purchasing organizations. Thanks for thinking of us. I wish you the best." (CX1138 at 001; Ryan, Tr. 1183).
814. On July 25, 2012, Dr. Goldsmith sent an email to Benco writing: "In the past, we were in Special Markets division of Henry Schein and worked directly with Tim Sullivan. We would like to explore a relationship with you instead" (CX0018 at 001-02).
815. Ryan responded to Dr. Goldsmith's July 25, 2012 email that same day, saying: "If I recall correctly, and please correct me if I am wrong, Smile Source, for the purposes of dental supplies and equipment, is essentially a group purchasing organization. If this is indeed how Smile Source functions (management/purchasing services with no ownership stake in the individual practices), Benco Dental doesn't recognize GPOs as a single customer." (CX1220).
816. On January 30, 2014, Mauer, who had become the president of Smile Source, emailed Cohen to set up a meeting between Benco and Smile Source. (RX1022).
817. Benco's Cohen and Ryan had a meeting with Smile Source's Mauer during the American Dental Association ("ADA") Midwinter meeting in Chicago in February 2014. (Ryan, Tr. 1188-89; RX1022 at 001-02).
818. In the conversation referenced in F. 817, Benco advised Mauer of Benco's policy and that Benco would not do business with Smile Source. (Ryan Tr. 1189; Cohen, Tr. 787).

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c. Patterson dealings with Smile Source

819. On September 30, 2013, Dr. Goldsmith sent an email to Patterson to explore “possibilities for a partnership” since it was “growing rapidly” and Burkhart, a regional distributor (F. 43), did “not have a national footprint.” (CX3277 at 001-02).
820. On October 9, 2013, Dr. Goldsmith met with Patterson’s head of Special Markets McFadden at an ADA meeting, and met again with McFadden and Patterson’s vice president of sales Misiak, at Patterson’s headquarters in November 2013. (CX3278 at 001; McFadden, Tr. 2717-18; Misiak, Tr. 1401-02; Goldsmith, Tr. 2172-73).
821. At the time when Dr. Goldsmith met with Patterson executives (F. 820), Smile Source was working with Burkhart as a distributor and was looking to add a second, supplemental distributor outside of Burkhart’s service region. (Goldsmith, Tr. 2173).
822. A few days after Patterson’s meeting with Smile Source (F. 820), on November 20, 2013, Misiak wrote Dr. 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 001).
823. On December 31, 2013, a Patterson corporate collections manager emailed McFadden and Misiak and reported that every individual doctor listed on Smile Source’s website that she looked up was already a Patterson customer. (CX0148 at 001 (“[W]hen I went to SmileSource’s 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.”)).
824. In 2015, in response to a question from a Patterson director of marketing, McFadden wrote: “[W]e have said no to [S]mile [S]ource. They are [a] buying club.” (CX3009 at 001).
825. In 2017, Patterson submitted a bid on Smile Source. (Rogan, Tr. 3540-41; F. 794).

d. Schein dealings with Smile Source**i. Relationship with Smile Source from 2008 to 2012**

826. Schein was the first distributor to contract with Smile Source, entering into a relationship with Smile Source in or around 2008 through its Special Markets division. (Goldsmith, Tr. 1976; 2071; Steck, Tr. 3687; Foley, Tr. 4526).
827. Schein viewed Smile Source as a buying group and treated it as such. (RX2956 at 004; RX3087 at 004).

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828. [REDACTED]
[REDACTED]
[REDACTED]; Foley, Tr. 4524-26; Steck, Tr. 3776-77).
829. On August 31, 2010, Schein regional manager Mike Finnan sent an email to, among others, Special Markets president Muller and HSD president Sullivan, expressing concerns about Schein's working with Smile Source and Smile Source's attempt to recruit an existing HSD customer served by Florida FSC Scott Schenker. Finnan explained that the "customer is not a corporate accounts customers[,] [h]e is simply a solo practitioner[,] and noted the resulting conflict: "This appears to be another situation similar to Pugh Dental Alliance that is playing us against each other[,] and "[a]ll that can be accomplish[ed] by allowing this activity is deterioration in our [g]ross profit." (CX2111 at 010).
830. After receiving the August 31, 2010 email referenced in F. 829, Sullivan and Muller worked to develop a plan for addressing the concerns expressed therein. Muller recommended "continu[ing] the relationship with Smile Source." (CX2111 at 007). He explained to Sullivan and others at Schein that Smile Source "is much more than [just] a buying group," and that doing business with Smile Source was consistent with the guidance Schein had developed in 2010 (F. 216) that Schein would entertain buying groups that could "force compliance." (CX2111 at 001). Muller explained that Smile Source is providing "management services for dental offices for a percentage of revenue or actual fees for each admin function" and "expects more [than] just purchases." (CX2111 at 009). Muller further explained that, if Smile Source had evolved into just a discount-only buying group (meaning that it was primarily focused on offering discounted supplies), then Muller was concerned that any "FSC can say 'I can put you on the same program, save your fee to them' [and] we will be pushing them to the competition." (CX2117 at 006).
831. Sullivan responded to Muller's email (F. 830) on September 2, 2010, that he does "not agree with" allowing Smile Source "to market to other practices . . . discounts from Schein [that would] not otherwise [be] available." (CX2111 at 006).
832. Sullivan and Muller had a meeting concerning Smile Source and the HSD account that Smile Source was recruiting, which Sullivan, on September 15, 2010, summarized for Breslawski. Sullivan stated that he and Muller "agreed" that "neither of us support the concept of buying groups. Whereas it may benefit SM [Special Markets] to some extent, the risk to overall HSI [Henry Schein, Inc.] (due to having 40% share in market) for margin erosion, image, as well as other competitors then following suit and huge price war breaks out." (CX2113). Sullivan further reported that neither Muller nor Sullivan "want[s] to lose SS [Smile Source] as an account. They are \$1 million and growing." Sullivan concluded that he was willing to test the theory, stating: "I am inclined to 'allow' this account to join [HSD] (not that it's up to me/us) and see what happens. After all, Scott and HSD (per Hal Muller) only get about 30% of this account[']s business

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today. So, if theory works we would get 100% at lower margins, but all parties win in overall GP \$'s [gross profit dollars]." (CX2113; Sullivan, Tr. at 3922-24).

833. On October 13, 2010, Schein had a conference call with Smile Source to discuss Schein's proposal to transfer the Smile Source account to HSD. (Sullivan, Tr. 4135-36). Schein also wanted to set up another meeting with Smile Source so that it could "pitch [Schein's] total value story," as Schein believed that it could add value to Smile Source's members other than just pricing discounts. (Sullivan, Tr. 4136).
834. In January 2011, Smile Source was transferred from Schein's Special Markets to HSD. (CX2454; CX0238). This transfer was designed to resolve conflicts between Special Markets and HSD concerning FSCs and related issues identified in F. 829-832, and to better serve Smile Source. (Sullivan, Tr. 3926-28, 4132, 4134-35, 4138-40; CX2111, 2113, 2115). As Foley later recounted to his team in an email on February 20, 2012:

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

(CX0238 at 001).

835. In February 2011, senior leadership for HSD, including Sullivan, met with senior leadership for Smile Source. At this meeting, the parties expressed their mutual desire for the relationship to grow. (CX2687; CX2899). Todd Nickerson, Smile Source's national director of business development, thanked Schein for "extending such a WARM welcome to us," and noted Smile Source's "excite[ment] about the future of our business relationship" Sullivan responded, "I remain very excited about our future together and the business model you have created," explaining that their service-oriented approach "lines up extremely well with [HSD's] approach." (CX2899 at 001) (capitalization in original).
836. Because Smile Source had only approximately 25 members at the time of Schein's February 2011 meeting with Smile Source (F. 835), Sullivan remained skeptical "about the value that Smile Source [could] actually bring to their members. Could they drive compliance? And, at the end of the day, was it worth the fee for dentists to sign up for the group to get enough value to pay for the membership fee?" (Sullivan, Tr. 4142). By September 2011, Sullivan remained concerned about Smile Source's "model" because Schein had not seen any growth in Smile Source's membership or "additional penetration in the existing members." (Sullivan, Tr. 4143; CX2299 at 001; *see also* F. 801 (Smile Source had 21 members at the beginning of 2011 and 28 members at the end of 2011)).

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837. In September 2011, about a month after Dr. Goldsmith joined Smile Source, Dr. Goldsmith started to reach out to other distributors in an effort to replace Schein as Smile Source's primary distributor. (Goldsmith, Tr. 2083-84; CX1116 at 002 (September 26, 2011 email to Benco from Goldsmith); *see also* CX1138 at 003 (September 30, 2011 Goldsmith email to Benco stating that "[w]e need a new distribut[or] . . . that we can grow with and build a long-term relationship with.")).
838. In or around January 2012, Smile Source ended its relationship with Schein and moved to Burkhart. (Sullivan, Tr. 3935-36).
839. Burkhart operated largely west of the Mississippi and all or almost all of Smile Source's members at the time were located within Burkhart's territory. (Burkhart, Tr. 4365; Goldsmith, Tr. 1990-91). There were also substantial growth opportunities for Smile Source within Burkhart's territory. (Goldsmith, Tr. 2003-04).
840. On February 9, 2012, Dr. Goldsmith wrote to Sullivan: "You believed in Smile Source from the very beginning I also believe that we parted on very good terms. . . . Our very difficult decision to move [to Burkhart] was based on the level of support we are getting from Burkhart. Because they are smaller, they can adapt to our needs differently (not necessarily better just differently)." (RX2090 at 001-02).

ii. Schein's bid to Smile Source in 2014

841. On October 28, 2013, Dr. Goldsmith sent an email to Sullivan seeking to set up a meeting at an upcoming trade show to "discuss some possibilities for . . . renewing our partnership." (CX2580 at 001). On October 29, 2013, Sullivan sent a response agreeing to meet and he and Schein's Chatham met Dr. Goldsmith at the ADA meeting the following week. (CX2580 at 001; RX2328 at 001-02; Goldsmith, Tr. 2014, 2137; Sullivan, Tr. 4165-66).
842. Dr. Goldsmith described the meeting as a "brief encounter," in which he reiterated that Smile Source was growing and wanted to "explore the idea of working with Henry Schein again." (Goldsmith, Tr. 2014). Dr. Goldsmith did not explain how he left things with Schein at that meeting, or what Schein's response was, but he acknowledged that Schein had not said "no" to doing a deal at that time. (Goldsmith, Tr. 2138).
843. On November 20, 2013, Dr. Goldsmith followed up with Sullivan asking whether he could "foresee any possibility of doing business together," and again suggested a brief meeting at another trade show. Sullivan promptly responded, by email on that same day, "Yes, we absolutely would like to discuss further. However, I think we need more than a few minutes together on a convention floor. I think we could use a couple of hours discussing details. . . . I am confident that there is something here for us to partner on together." (RX2328 at 001-02; Goldsmith, Tr. 2014-18; Sullivan, Tr. 4167-68).

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844. Based on his meetings and communications with Sullivan (F. 841-843), Dr. Goldsmith perceived “Sullivan’s response [to be] different than the responses [he] had gotten from Benco and Patterson.” (Goldsmith, Tr. 2139).
845. Schein’s response to Smile Source’s 2013 search for a distributor was different from Patterson’s and Benco’s. (Goldsmith, Tr. 2139; *compare* RX2328 at 001 *with* CX0147 at 001 *and* CX1163 at 002; *see also* F. 841-843).
846. Schein expressed an interest in working with Smile Source on the same day Patterson declined to do so in 2013. (*Compare* CX3117 at 001 (November 20, 2013 Patterson exchange with Smile Source) *with* RX2328 at 001 (November 20, 2013 Schein email from Sullivan to Smile Source stating, “Yes, we absolutely would like to discuss further”)).
847. On January 22, 2014, Schein’s Sullivan and Chatham met with Smile Source’s president Maurer, its chief dental officer Dr. Goldsmith, and vice president of vendor relations Dr. John McCall, to discuss the possibility of working together. (CX2587 at 001; Sullivan, Tr. 4167-68; Maurer, Tr. 4940-41). Sullivan described the meeting as “very positive.” (Sullivan, Tr. 4168).
848. On February 19, 2014, Steck, HSD’s vice president and general manager, circulated a draft of Schein’s Smile Source proposal to HSD and Special Markets for input. (CX2462 at 001). On March 18, 2014, Steck circulated a revised version of what Schein planned to offer Smile Source. (RX2419 at 001). Steck recognized that Smile Source would want a “higher discount,” but believed that this was a “good negotiating place for us to begin.” (RX2419 at 001; Sullivan, Tr. 4170). Shortly after March 18, 2014, Schein presented an initial “Partnership Proposal” to Smile Source. (CX4105; Sullivan, Tr. 4170).
849. Among other provisions, the Partnership Proposal (F. 848) offered a “trained and certified” FSC to each member, “a discount on all products and services purchased from Henry Schein Dental,” including a 7% discount on branded supplies, a 14% discount on private label supplies, a 10% discount on equipment, 10% discount on technical service, and a 5% discount on business solutions, practice management software licenses, and CAD-CAM supplies or fees. Schein also offered an additional 2% rebate if certain volume and other conditions were met. (CX4105 at 003-04, 009).
850. Schein considered using its Smile Source offer (F. 848-849) “as a template . . . for GPOs going forward.” (CX2508 at 001).
851. On April 23, 2014, Chatham, HSD vice president, reported: “Guys, [I] [j]ust spoke with Andrew Goldsmith. They as a group have decided to probably go with Darby [F. 118 n.46] for their supply business. I truly believe he wanted us and was voted down by the group. We chatted for 20 minutes and I brought up some things he hadn’t thought of I believe he is going to make one more run with the business leaders.” (CX2591 at 002).

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852. Schein planned to “sweeten” the pot for Smile Source by increasing its proposed discounts. Steck recommended that Schein “increase the discount” from a 7% discount on branded supplies, and a 14% discount on private label supplies to 9% and 18%, respectively, as a “best and final” offer. Chatham responded that he did not think Smile Source “will bite. They are stuck on price and I’m sure Darby is at 20 [%] off. . . . Will let you know.” (CX2591 at 001; Steck, Tr. 3795).
853. Smile Source rejected Schein’s offer. Smile Source continued its partnership with Burkhart and on July 21, 2014 entered into a new contract with Darby. (CX2591 at 002; RX3079 at 001; Steck, Tr. 3794; Sullivan, Tr. 4170-73; Goldsmith, Tr. 2156-57; Maurer, Tr. 4942-43, 4945).
854. As Mauer explained, Schein’s offer “was similar. And I would say that the reason we didn’t switch to Schein was just loyalty of Burkhart. It’s pretty typical to go to an incumbent and say we’re leaving you because we have a similar offer. . . . The only benefit we would have seen is a national footprint, but the pricing was the same.” (Mauer, Tr. 4945-46).

iii. Additional Schein dealings with Smile Source after 2014

855. On August 17, 2015, Smile Source’s Maurer reached out to Schein’s Sullivan asking him if he was interested in catching up soon and Sullivan replied that he would “love to connect again.” (RX2444; Sullivan, Tr. 4173). Two months later, in October 2015, Sullivan and Cavaretta went to meet with Maurer at Smile Source’s headquarters. (CX2605; CX2606 at 001). At the meeting, Maurer explained that Smile Source had grown its membership to 360 members and “claim[ed] to have 85% compliance” from its members on purchasing supplies. (CX2606 at 001-02).
856. After the meeting referenced in F. 855, Sullivan believed that Smile Source had “reached [a] tipping point and will gain momentum” in the future, and Sullivan was interested in working out a deal with Smile Source. (CX2606 at 003; Sullivan, Tr. 4177). In late November 2015, Sullivan met with Maurer again, this time at the Greater New York dental meeting. (RX2116 at 002; Sullivan, Tr. 4176-77). At this point, Schein began working on a proposal to Smile Source based on the “new formulary pricing” program that had just been developed for the “Buying Group pricing model.” (CX2606 at 004; RX2116 at 001-02).
857. On January 12, 2016, Maurer reached out to Sullivan asking to push back a planned meeting between Schein and Smile Source on Schein’s proposal until after March 2016 due to competing demands on his time. Sullivan replied to Maurer that he thought it was a “potentially missed opportunity” but that he would be “ready when you are.” (RX2092 at 001; RX2152 at 001 (noting that Schein expected to connect with Smile Source in April)).
858. On August 30, 2016, Schein met with Smile Source at Smile Source’s corporate headquarters. (RX2160).

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859. On February 8, 2017, Smile Source's Maurer noted in an email to Mlotek of Schein that Schein "was head and shoulders above the rest in my opinion, specifically because of Tim Sullivan. I've been 'meeting' with Tim about this deal for 3 years, and he made some great moves to make it happen." (RX2091 at 001).
860. On March 1, 2017, Schein and Smile Source entered into a "Primary Vendor Agreement." (CX4099 at 001-02).

2. The Kojs Buyers Group**a. Overview of the Kojs Buyers Group**

861. The Kojs Buyers Group was an outgrowth of the Kojs Center, a curriculum-based, graduate-level "private teaching center for practicing dentists" founded by Dr. John Kojs, Sr. ("Dr. Kojs") in 1994 in Seattle, Washington. (Kojs Sr., Tr. 163-64). Dr. Kojs has been the director of the Kojs Center since its inception. (Kojs Sr., Tr. 163-64).
862. Dr. Kojs has been practicing dentistry since 1977 and opened his own private practice in Tacoma, Washington in 1985. (Kojs Sr., Tr. 161-63; CX8007 (Kojs Sr., Dep. at 9-10)).
863. Dr. Kojs has always utilized Burkhart as his primary and favored supplier. (Kojs Sr., Tr. 168-69, 171-73).
864. The curriculum at the Kojs Center is "completely taught" by Dr. Kojs and involves "many fields in dentistry from treatment planning, occlusion, restoration of teeth and implants." (Kojs Sr., Tr. 164). Each course runs from 7:00 a.m. to 6:00 p.m. for three-to-five days. A three-day course costs around \$5,000, while a five-day course costs around \$10,000. (Kojs Sr., Tr. 164, 233-34).
865. To be eligible to join the Kojs Buyers Group, a dentist must first take at least one of the courses at the Kojs Center. (Kojs Sr., Tr. 235; Kojs Jr., Tr. 317-18).
866. Any dentist who takes a Kojs Center course is deemed to be a member of "the tribe." (Kojs Sr., Tr. 165, 234). Since the inception of the Kojs Center, approximately 4,000 dentists have taken a course there, with approximately 900 completing the full curriculum. (Kojs Sr., Tr. 165).

b. Qadeer Ahmed and Equalizer ProServices

867. By August 2014, Dr. Kojs began working with a Canadian-based consultant named Qadeer Ahmed, through Ahmed's company called Equalizer ProServices (d/b/a ProCare Dental Services) ("ProCare Dental Services" or "Equalizer ProServices"), to create a buying group. (Kojs Sr., Tr. 188-89; CX0116 at 002). Ahmed had also partnered with a Canadian dentist named Dr. Bobby Chagger. (RX2197 at 001; Guggenheim, Tr. 1669-70).

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868. Dr. Kois had no personal knowledge of Ahmed's background at the time he began working with him. (Kois Sr., Tr. 216, 219). Dr. Kois did not meet with Ahmed in person and did not know how many people ProCare Dental Services employed. (Kois Sr., Tr. 215, 244). To Dr. Kois' knowledge, neither Ahmed nor ProCare Dental Services had any experience in the dental industry. (Kois Sr., Tr. 217, 244-45).
869. Ahmed used a Hotmail email address for his business communications, and appeared to have been working out of his home in Canada. (RX0377 at 00001; Reece, Tr. 4494-95).
870. Dr. Kois agreed to pay Ahmed 50% of membership fees to be collected for the buying group. (Kois Sr., Tr. 242).
871. Dr. Kois advertised ProCare Dental Services to his students as a company "led by people who get big things done in business . . . quickly. Their 'hit list' includes multi-billion dollar 'wins' in retail (Wal-Mart, Home Depot, Loblaws, Metro, Best Buy), media (Sony Music, CanWest), distribution (Ingram, Globelle, OfficeMax) and technology. They are involved right now in a billion-dollar project with the largest financial company in the world." (RX2113 at 003 (ellipses in original)).
872. Dr. Kois did not verify that any of the information about ProCare Dental Services referenced in F. 871 was correct. (Kois Sr., Tr. 216).
873. Ahmed composed an email for Dr. Kois to send to the tribe announcing the launch of the "Kois Tribal Membership Program." Dr. Kois sent the email on October 8, 2014. (CX0290 at 002; Kojs Sr., Tr. 205).
874. The October 8, 2014 email from Dr. Kois (F. 873) set forth the costs for joining the buying group: an initial deposit of between \$398 and \$998 depending on spending levels, and monthly fees between \$199 and \$499 per month (or \$2,388 and \$5,988 per year), also depending on spending levels. The email invited tribe members to immediately sign-up and stated that they would get a discount "code" within about "3 calendar weeks." (CX0290 at 004; Kojs Sr., Tr. 239).
875. The costs referenced in F. 874 did not include the \$5,000 to \$10,000 in tuition costs at the Kojs Center that were required for tribe membership and buying group eligibility. (Kois Sr., Tr. 233-34; Kojs Jr., Tr. 319-20).
876. The October 8, 2014 email from Dr. Kois (F. 873) further stated: "We will pick one distribution partner from between Patterson Dental, Henry Schein and smaller distributors. We have confirmed prices from manufacturers AND distributors IF we can work together." (CX0290 at 003 (capitalization in original)).
877. Dr. Kois acknowledged that in October 2014, "the buyers[]" club didn't even exist, so that many companies would not want to take a risk on engaging with something that isn't going to even turn out to be anything." (CX8007 (Kois Sr., Dep. at 37-38)).

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c. Qadeer Ahmed's proposal for the Kois Buyers Group

878. Qadeer Ahmed created a proposal for the new buying group to send to distributors (the "Kois proposal"). (See RX0377 (Kois proposal to Patterson); RX2197 (Kois proposal to Schein)). Though the buying group was Dr. Kois' "vision," he did not have any input on the Koīs proposal and did not review it. (Kois Sr., Tr. 255).
879. Though Ahmed was responsible for reaching out to distributors for the new buying group, Dr. Kois had ultimate authority to sign-off on any agreement. (Kois Sr., Tr. 189).
880. The Koīs proposal noted that the Koīs Buyers Group is "not a standard BUYING GROUP." "Normal buying groups," the proposal continued, "ask distributors to lose margin % . . . [but] do not allow the distributor to recover the margin % which is lost." (RX2197 at 004 (Kois proposal to Schein); RX0377 at Slide 3 (Kois proposal to Patterson) (capitalization in original)).
881. The Koīs proposal asserted that it was "profoundly different" from other buying groups in that it promised to "compensate the distributor for the margin % sacrificed." (RX2197 at 004 (Kois proposal to Schein); RX0377 at Slide 3 (Kois proposal to Patterson)). This claim was based on promising to transfer members' patient revenues to the distributor, such as by sharing revenues on "services which the distributor does NOT" provide. (RX2197 at 004 (Kois proposal to Schein); RX0377 at Slide 3 (Kois proposal to Patterson)). Under the Koīs proposal, "[t]he distributor DEFERS margin % on products currently sold (dental supplies) to receive greater immediate volume. The distributor RECOVERS margin % from PATIENT ACQUISITION AND VALUE-ADDED PRODUCTS not offered today." (RX2197 at 004 (Kois proposal to Schein); RX0377 at Slide 3 (Kois proposal to Patterson) (capitalization in original)).
882. The Koīs proposal calculated "deferral and immediate gains" "[b]ased on a pilot (1,700 dentists)," which was the total number of dentists in the Koīs tribe. (RX2197 at 004-05 (Kois proposal to Schein); RX0377 at Slide 3-4 (Kois proposal to Patterson)). The proposal asserted that an "additional 1,000 dentists" would join the group in "Phase 2." (RX2197 at 007 (Kois proposal to Schein); RX0377 at Slide 6 (Kois proposal to Patterson)).
883. The Koīs proposal stated, in bold and red letters, that the Koīs Buyers Group "will pursue manufacturers on our own." (RX2197 at 008 (Kois proposal to Schein); RX0377 at Slide 7 (Kois proposal to Patterson)).

d. Patterson's response to the Koīs Buyers Group proposal

884. The Koīs proposal was sent to Patterson on September 22, 2014 (RX0377), weeks after Ahmed and Patterson first communicated with each other. F. 885-886.
885. On August 14, 2014, Ahmed, using the company name Equalizer ProServices, sent an email to Patterson's Toronto branch manager Marc Beaudet with the subject line "Top 4

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- Dental Manufacturers Committed.” Ahmed’s August 14 email stated, in part, “I’m writing to advise that we have verbal confirmation of discount in the range required (10%-20%) from the following major 4 manufacturers,” listing 3M (Canada/US), Ivoclar Vivadent, Kerr Corporation, and Dentsply. (CX0116 at 002).
886. On August 17, 2014, Patterson’s Beudet forwarded Ahmed’s email to Patterson’s Guggenheim, writing, “I had two phone conversations with them so far before I asked for your assistance. You can see below that they are trying to dictate an MO [mode of operating] with us, nevertheless, relationship and trust are good so far.” (CX0116 at 002).
887. Guggenheim forwarded Beudet’s email (F. 886) to Patterson’s Rogan, writing, “I’ll address this with Marc but can you see what the 4 vendors mentioned below are doing with this?” (CX0116 at 001).
888. Rogan responded to Guggenheim’s email (F. 887), writing, “I believe this is a buying group/GPO that has a line in the water and wants someone to bite.” Rogan wrote that he had just spoken with a representative from Ivoclar, one of the four manufacturers listed by Ahmed in his August 14, 2014 email (F. 885), and “[t]hey don’t know these people . . .” Rogan concluded that Ahmed’s statement in his August 14, 2014 email suggesting he had a verbal confirmation of discounts from manufacturers (F. 885) “is wrong.” (CX0116 at 001).
889. Rogan explained that when he used the phrases “a line in the water” and “he wants someone to bite,” in the email referenced in F. 888, Rogan was indicating that Ahmed was using a fabricated story to try to get somebody to commit to recognize him. (Rogan, Tr. 3646-47).
890. Guggenheim responded to Rogan’s email (F. 888) on August 18, 2014, writing, “Agreed... I’ll kill it. Just want to make sure we’re not surprised on the vendor side.” (CX0116 at 001 (ellipses in original)).
891. Rogan confirmed that none of the four manufacturers listed in Ahmed’s August 14 email (F. 885) had heard of Ahmed or the Kois Buyers Group. (Rogan Tr. 3645-46). He confirmed that Ivoclar had not heard of Equalizer ProServices before his email exchange with Guggenheim on August 18, 2014 (F. 887-888). He confirmed that Kerr had not heard of Equalizer ProServices on September 2, 2014. (Rogan Tr. 3645-46; RX0336 at 00001).
892. On September 22, 2014, Ahmed, using the company name Equalizer ProServices, transmitted the Kois proposal to Patterson with a PowerPoint presentation entitled “Dental Program, Invitation to Patterson.” (RX0377 at Slide 1).
893. Patterson viewed Ahmed’s claims in the Kois proposal (F. 892) that the Kois Buyers Group would have more than 1,000 dentists in the first phase as unrealistic. As a point of

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comparison, the largest DSO in the country, Heartland Dental, has only 850 dentists' offices. (Rogan Tr. 3646-47; Guggenheim Tr. 1676-77).

894. At the time of Ahmed's outreach to Patterson (F. 885, 892), as acknowledged by Dr. Kois, the Kois Buyers Group did not exist, so it had zero members. (CX8007 (Kois Sr., Dep. at 37-38, 135-36)).
895. Patterson viewed Ahmed's "presentation numbers" (F. 882, 893) as "crazy," and viewed the proposal as asking Patterson to "cut margins to the bone." (CX3086 at 002).
896. In a November 25, 2014 email to Patterson sales representatives, referring to the Kois Buyers Group, Guggenheim wrote: "We have explored this opportunity for both the U.S. and Canadian business and decided to pass at this time due to the implications to our margins and therefor our Sales Reps." (CX3086 at 001).
897. The Kois Buyers Group did not reach out to Patterson when it was negotiating renewed agreements with Burkhart in 2016 and 2018. (Kois Jr., Tr. 382-83).

e. Benco's response to the Kois Buyers Group proposal

898. On October 21, 2014, Dr. Kois emailed Cohen explaining that he "ha[d] been approached by a company to organize our members for group purchase opportunities" and referred Cohen to Ahmed. Cohen responded to Dr. Kois later that day, telling him that an opportunity that "involve[d] an outside company like Equalizer Pro Services or anyone else" was not appealing because "they'll just take a cut of the savings." Cohen informed Dr. Kois that he was "going to politely give Qadeer [Ahmed] our standard answer of: 'thanks, but we don't do buying groups.'" (RX1039 at 001).
899. On October 26, 2014, Cohen informed Ahmed that Benco would decline to do business with the buying group, noting "our policy is that we don't support, or work with, buying groups" (CX1240 at 001; *see also* Cohen, Tr. 565-66; CX1075 at 001 ("I spoke with the gentleman who's putting it together, and told him that we don't work with buying clubs.")).

f. Schein's response to the Kois Buyers Group proposal

900. On September 8, 2014, Schein's Muller sent Sullivan and Breslawski a copy of a letter sent by Dr. Kois to a member of the Kois "tribe" regarding his goal to form a membership group for the purpose of reducing costs. Sullivan responded that, "I still believe this is slippery slope and have yet to see a successful one in dental and don't plan to take the lead role. Watching closely." (CX2469 at 002; CX8025 (Sullivan, Dep. at 295) (CX2469 referred to the Kois Buyers Group)). In a follow up email on September 9, 2014, Sullivan wrote that he was "open to discussing the topic, but I don't think we want to be the first in this game." (CX2470 at 001; Sullivan, Tr. 4005-06).

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901. Regarding Sullivan's statement in CX2469 that he did not "plan to take the lead role," (F. 900), Sullivan explained that he did not want to take the lead role in proactively "putting something together with Kois if it was going to be a price-only" type of buying group. Based on his reading of Dr. Kois' letter (F. 900), it appeared to Sullivan that "the only thing they'd be looking for was a volume discount." (CX8025 (Sullivan, Dep. at 295-97)).
902. Schein received the Kois proposal on October 22, 2014. (Kois Sr., Tr. 255; RX2197 at 001).
903. The Kois proposal to Schein included a slide titled "Detailed Economics," which asserted "immediate" gains to Schein. (RX2197 at 008). The proposal noted that Schein had an approximately 32% market share and that, under the proposal, Schein would lose "\$709,000 per month" as to its existing business. According to the proposal, Schein would immediately gain the remaining 68% of the business, giving Schein a 100% market share and a net gain of "\$842,000 per month." (RX2197 at 008).
904. Sullivan's reaction to the assertions in the Kois proposal regarding the number of dentists that would join the Kois Buyers Group was that they were "big" numbers, and not realistic. Sullivan was unaware of any buying group that had 1,700 dentists and suspected the claim was puffery. (Sullivan, Tr. 4223).
905. The Kois proposal did not explain how it would ensure 100% purchasing compliance among 1,700 members. Both Dr. Kois and his son, John C. Kois, Jr.,⁵⁶ acknowledged that the Kois Buyers Group could not guarantee purchasing compliance. (*See, e.g.*, CX0321 (Kois Jr., IHT at 97) ("Q. So does Kois Buyers Group guarantee any level of purchases for any particular vendor? A. No.")).
906. It is a point of "pride" to Dr. Kois that members of the Kois Buyers Group can purchase from any supplier rather than just "who we have alliances with." (CX8007 (Kois Sr., Dep. at 160)). John Kois, Jr. "encourage[s]" members to "find the lowest price anywhere since there's no exclusivity as part of the buying group. I tell them – if a member tells me they found a cheaper price somewhere else[,] I tell them they should buy it there." (CX8008 (Kois Jr., Dep. at 13)).
907. On October 22, 2014, after receiving the Kois proposal, Schein's Sullivan informed Dr. Chagger, a dentist who was connected with the Kois Buyers Group, that he would find time for them "to speak in the next week or so. I look forward to catching up with you and learning more about your group." (RX2424 at 003). Sullivan's assistant then asked Dr. Chagger about his availability on October 30 or October 31. (RX2424 at 002). Dr. Chagger replied that he "would like to schedule a WebEx [video conference] this week as time is of the essence." (RX2424 at 002). Sullivan accommodated, and spoke with Dr. Chagger and Ahmed the following day on October 23, 2014. (RX2602 at 006).

56 John Kois, Jr. became CEO of the Kois Center in March 2015. (Kois, Jr., Tr. 306).

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908. On October 23, 2014, Sullivan forwarded a copy of the Kojs proposal to other Schein executives, including Breslawski, Steck, and Chatham. Cy Elborne, president of Henry Schein Canada, responded to the Kojs proposal that he didn't see "the additional revenue stream . . . other than theoretical higher GP \$\$ [gross profit dollars]. . . . I am not sure about this one Tim – and a real challenge for an organization to change 1700 buying relationships overnight as the model indicates. Not to mention I don't like the math." Sullivan replied, "I totally get it. This model is a complicated one for sure and you'd have to hear the 'pitch' from Qadeer. I would never sign us up for a straight out GPO model. Our value is worth much more!" (CX6617).
909. After the October 23, 2014 discussion with Dr. Chagger and Ahmed referenced in F. 907, Sullivan sent a follow up email to Dr. Chagger and Ahmed thanking them for their time and stating, "We are very interested in learning more about this initiative as it certainly seems very unique to anything we've heard thus far. I need a little bit of time to do some homework and will follow up next week on thoughts regarding next steps." (RX2602 at 006).
910. On October 27, 2014, Sullivan wrote to Ahmed:
- I was able to coordinate an internal meeting today at noon central to provide the Exec Team an update. I will provide you with an update after that meeting but I highly doubt I'll be able to coordinate such a broader meeting for a deep dive with this same group again in the next 24-48 hours. I am hopeful you can buy us a little more time considering we were invited to this discussion so late in the game and considering what we believe we heard from you regarding the global impact Henry Schein brings to the discussions ... [I]t feels like 'right vs. fast' may be the best approach. I also believe a face-to-face meeting with you and Dr. Kojs would be of great value to everyone. . . .
- I will follow up early this afternoon as mentioned and hopefully we can outline some quick next steps.
- (RX2602 at 005).
911. Sullivan explained regarding his email to Ahmed of October 27, 2014 (F. 910): "I'm basically saying to him we're not saying no. There are some things that we have been talking about that actually sound like there's some potential opportunity here. It's a large group. If we could figure some things out, it's potentially a large opportunity, but we need time to analyze this, and I am not going to rush into an agreement with them." (Sullivan, Tr. 4225-26).
912. Ahmed replied to Sullivan's October 27, 2014 email (F. 910) the same day stating that he would be happy to spend "serious time" discussing "extended aspects of the program," including with Dr. Kojs, "after we get a basic initial deal done that gives you an 'out' if we don't deliver on the rest in a timely fashion." (RX2602 at 004).

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913. Sullivan responded to Ahmed later in the day on October 27, 2014, noting that he had the initial internal team meeting mentioned in his earlier email on October 27, 2014 (F. 910) and that “[t]he good news is that our interest continues to remain high. The challenge is that this appears to be quite complicated in structure and modeling and [we] have many more questions than we do answers at this time. I’m not sure what you are looking for in ‘a basic initial deal’ as you note” Sullivan asked if Ahmed could “send us an outline of what such a deal would look like and how it could be structured. . . . We will quickly turn around our thoughts on next steps.” (RX2602 at 004).
914. On October 28, 2014, Ahmed sent Sullivan a proposal, which Ahmed summarized as asking Schein to match “the same deal every other distributor has already offered in writing and we’ll set them aside and work exclusively” with Schein. (RX2602 at 002). Ahmed further stated, “After you give us the supply deal, we’ll spend the time to share our detailed plans with your team, and understand where you want to take your business. . . . I can visit you 48 hours after we launch the supply deal.” If the buying group did not ultimately “deliver,” Ahmed asserted, they could “kill the deal” Ahmed asserted that if he and Schein could “wrap this up in the next few days, I’ll go to the Tribe with a sole recommendation of Henry Schein and you can see how well we perform first-hand.” (RX2602 at 003).
915. Sullivan described his reaction to Ahmed’s approach, expressed in his email of October 28, 2014 (F. 914) as follows: “I’m kind of laughing. So after we give them whatever discount or deal they’re looking for, . . . then they want to talk about, you know, the benefits for Henry Schein. That’s not how you enter a contract. That’s not how you enter a partnership.” (Sullivan, Tr. 4227; *see also* Sullivan, Tr. 4228 (“[T]his is a – almost a nonstarter. We are not going to enter an agreement, launch it out to the market . . . for their members, but I have no message yet to my team. How do I explain it to them? What’s the win – where is the win-win? There’s so much missing from this. There’s no way I would enter into an agreement like this.”)).
916. Later in the day on October 28, 2014, Sullivan responded to Ahmed:
- Thank you very much for your quick response. I appreciate the “get r done” approach, but it’s not a style/approach that I am comfortable working in. I can’t get married with a “no big deal, we can always divorce later” mentality. We do not enter partnerships lightly and ONLY commit if we see long-term mutual value. I can’t put out a public “go to market” strategy that includes a special pricing program (i.e. appearance of Buying Group only) for a targeted group of customers that doesn’t include “the rest of the story.” If that means we are out of your consideration then I respect your decision and hope that we can stay connected along the way for future consideration. However, if we can slow down and really understand your model better that you believe is going to change dentistry, then we believe it’s worth rolling up sleeves and getting to know each

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other better This will take some time to put together thoughtfully and diligently.

(RX2602 at 002 (capitalization in original)).

917. Ahmed responded to Sullivan's October 28, 2014 email (F. 916) that "[i]f we believe the process is moving to an intelligent and rapid conclusion, we'll stay engaged." (RX2602 at 001).
918. Dr. Kojs was copied on the communications between Sullivan and Ahmed (*e.g.*, F. 909-914, 916-917), but did not pay attention to them. (Kojs Sr., Tr. 261, 266-67).
919. When Dr. Kojs selected Burkhardt as a distributor on October 30, 2014 (F. 931), he had not yet heard back from Schein "with any certainty." (CX8007 (Kojs Sr., Dep. at 167-68)).
920. Dr. Kojs never met with Sullivan and never took part in a meeting with Schein about the Kojs proposal. (Kojs Sr., Tr. 259, 260-61).
921. On November 3, 2014, Schein's Chatham wrote to Ahmed: "We have conferenced as a team and at this point believe we need to take a pass on the offer. This is the consensus of the entire senior management team, based largely on not having enough time to do our due diligence and the current dental market conditions. . . . Thank you for the opportunity, just not the 'right' thing for us at this time." (CX4310 at 001; Sullivan, Tr. 4230 ("[T]here was no way for us to do it in the time frame they were looking for.")).
922. After signing an agreement with Burkhardt in November 2014 (F. 932), the Kojs Buyers Group never sought to change suppliers. The Kojs Buyers Group did not reach out to Schein when it was negotiating renewed agreements with Burkhardt in 2016 and 2018. (Kojs Jr., Tr. 340-41, 362-63).

g. Burkhardt's partnership with the Kojs Buyers Group

923. On October 20, 2014, Dr. Kojs wrote to Dave Anderson of Burkhardt, "I am starting a membership program for the Kojs Center, however, it is not managed by me. It is managed by ProCare Services and the person to contact is Mr. Qadeer Ahmed. Please contact him directly." (CX4284 at 001).
924. [REDACTED]
[REDACTED].
925. [REDACTED]
[REDACTED];
RX0377; RX2197).

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926. Burkhart met with Ahmed on October 22, 2014. Burkhart informed Dr. Kois that it was “very interested in participation,” and that it intended to submit a proposal. Burkhart scheduled a conference call for October 23, 2014 to discuss further with Dr. Kois. (CX4282 at 001; CX4292).
927. [REDACTED]
928. Burkhart pursued a relationship with the Kois Buyers Group in part because, like Burkhart, the Kois Center was based in Washington state. (Reece, Tr. 4451 (“[I]t was logical within our market . . .”)).
929. “[A]t first,” Burkhart was not “very positive to Qadeer,” so Dr. Kois had to “rel[y] more on [his] personal relationship and reputation. . . .” (CX8007 (Kois Sr., Dep. at 68)). “The reason that [Burkhart] entered into the relationship [with the Kois Buyers Group] was based solely on Dr. John Kois and his reputation with Burkhart” (Reece, Tr. 4495).
930. Dr. Kois participated personally in negotiations with Burkhart for Burkhart to supply the Kois Buyers Group. (Kois Sr., Tr. 261).
931. On October 30, 2014, Ahmed told Burkhart that it had reached an agreement with the Kois Buyers Group as to the path forward. Dr. Kois made the decision to choose Burkhart. (CX4251 at 001 (“I spoke to John [Kois Sr.] at 5:30 am – we have agreement on the approach we’re going to take together”); Kois Sr., Tr. 302-03).
932. The Kois Buyers Group signed an agreement with Burkhart on November 14, 2014. (Kois Sr., Tr. 265-66).
933. Dr. Kois explained that he chose Burkhart “because of my relationship with the company, which at that point was about thirty years, I really trusted the company, and they actually showed the most interest, so we decided to work with Burkhart.” (Kois Sr., Tr. 191).

h. Evolution of the Kois Buyers Group

934. One year into its existence, the Kois Buyers Group only had approximately 174 members. After three years, the Kois Buyers Group had 515 members. (Kois Jr., Tr. 317; CX0321 (Kois Jr., IHT at 27)).
935. John Kois, Jr. took over management of the buying group from Ahmed in October of 2015. (Kois Jr., Tr. 361).
936. John Kois, Jr. implemented numerous changes to the buying group’s operations. Among other things, he created a website, handed out fliers to students, sent out newsletters and updated the group’s social media presence. In addition, John Kois, Jr. changed the

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pricing structure, including reducing the cost of membership to \$299 per year and added additional vendors that were manufacturers that sold direct to the dental practices. (Kois Jr., Tr. 363-64; Kois Sr., Tr. 240).

937. By the end of 2016, the Kois Buyers Group had grown to 391 members. (CX4228; Reece, Tr. 4480).
938. As of October 2018, the Kois Buyers Group had approximately 570 members. (Kois Jr., Tr. 308).

K. Communications Surrounding the 2014 Texas Dental Association Meeting**1. Background**

939. The Texas Dental Association (“TDA”) holds a meeting for its members annually. (Rogan, Tr. 3561-62; Steck, Tr. 3691). The TDA’s members are customers of dental suppliers. (Sullivan, Tr. 4011-12).
940. To attend the TDA’s annual meetings and set up an exhibit booth at the convention requires payment by the attendee. (CX0305 (Cavaretta, IHT at 207); CX0311 (Sullivan, IHT at 358-59); CX0317 (Rogan, IHT at 323); CX0301 (Cohen, IHT at 337)).
941. In September 2013, the TDA entered into an agreement with SourceOne Dental Supply (“SourceOne”), which ran an online marketplace that offered discounts on dental supplies. Pursuant to that agreement, SourceOne agreed to operate a website under the name TDA Perks Supplies, and the TDA agreed to endorse or promote this website. (CX9024 (Osio, Dep. at 365-66, 377-79); Cohen, Tr. 576; Rogan, Tr. 3562).
942. In October 2013, the TDA launched a discount program as a benefit for its members, which it called TDA Perks Supplies. (Cohen, Tr. 576; Rogan, Tr. 3562; CX2616 at 002).
943. As described by Donovan Osio, the general manager of TDA Financial Services, Inc. (a for-profit subsidiary of the TDA): “TDA Perks Supplies is a white label marketing name^[57] that we put together in – with SourceOne Dental in order to market SourceOne Dental to TDA members.” (CX9024 (Osio, Dep. at 12, 62)).
944. Neither SourceOne, nor the TDA, was the actual seller of the supplies that TDA members purchased through the TDA Perks Supplies portal. Rather, SourceOne had one or more distributors who shipped products to customers. (CX9024 (Osio, Dep. at 363, 403-04, 427-29, 626)).
945. Patterson viewed the TDA as becoming a competitor to Patterson through the TDA Perks Supplies program. (Rogan, Tr. 3563-64; CX0316 (Misiak, IHT at 300)).

57 White labeling means that a company has rebranded another company’s product or service in order to offer it to customers as their own.

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946. Patterson's Clint Edens, Texas regional manager, met with the TDA on December 18, 2013 and informed them that Patterson would not be attending the May 2014 TDA Annual Meeting, stating "it was hard for [Patterson] to support the meeting, if they were going to be in direct competition" with the TDA. (CX9024 (Osio, Dep. at 165, 568, 574); *see also* CX0316 (Misiak, IHT at 300-02) (Edens decided to withdraw because the "TDA decided to compete with Patterson, made some slanderous comments about Patterson and the pricing structures, and we had a growing concern about supporting a competitor and making strategic investments, which is what a trade show booth is.")).
947. Schein viewed the TDA as becoming a competitor to Schein through the TDA Perks Supplies program. (CX2746 at 003-04 (Statement of Sullivan: "I don't believe that creating a Buying Group mentality with State Associations is a good long term strategy. We can and do support the associations in MANY ways and continue to have strong relationships with them, but there are a few that are starting to dip their toes into competing with us and I support sending a strong message in return. Just as they would not want us owning or sponsoring specific dentists or large groups.") (capitalization in original)).
948. On April 3, 2014, Schein's Kyle and Cavaretta met with representatives of the TDA. (Cavaretta, Tr. 5614-15; RX2361). They requested that the TDA switch partners from SourceOne to Schein. (RX2361 at 002 ("Proposed we work together instead of against each other.")). They also communicated to the TDA that, if TDA continued to endorse SourceOne, Schein would not attend the TDA trade show in 2014. (RX2361 at 003 ("We are very encouraged by your willingness to look at future opportunities and we look forward to hearing what the board decides later today. Please know Henry Schein will not be able to attend the TDA meeting in May until we are better aligned.")).
949. On April 8, 2014, Schein learned that the TDA had removed Schein from the public floorplan of the 2014 TDA trade show. (RX0232 at 001 (email from Cavaretta, "not only did Dr. Duncan . . . not call me back after I tried to call him twice . . . we found out from our conventions team that they had already sold our booth space") (ellipses in original); Cavaretta, Tr. 5616-17).
950. Benco viewed the TDA as becoming a competitor to Benco through the TDA Perks Supplies program. (CX1062 at 001 ("Not only [is TDA] our new competitor, but they basically tell their members that dental distributors rip off the dentists.")).
951. On April 9, 2014, Benco informed the TDA that it was not going to attend the TDA trade show in 2014. (CX0303 (McElaney, IHT at 142, 144-45, 149) ("[I]t wasn't worth the costs anymore . . . and the convention was no longer a level playing field.")).

2. Communications

952. On October 14, 2013, Cohen wrote in an email to a Benco regional manager, Ron Fernandez, regarding the TDA: "Suggest that we make it clear to the TDA that we will be cutting back our support of their meetings & programs, but that's your call. Also, give a

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heads up to our friends from Patterson, Schein, Midwest, etc.; they can/should/will make their own decision on how to respond, but they should at least understand what's going on here.” (CX1057 at 001).

953. On October 15, 2013, Benco's Texas regional manager, Fernandez, called Schein's Texas regional manager, Showgren. (CX1328 at 007 (Benco's Response to RFA ¶¶ 8, 9); RX1126 (Fernandez, Dep. at 72-73)).
954. Showgren memorialized the October 15, 2013 call with Fernandez (F. 953) in an email dated October 15, 2013 to Kyle and Cavaretta of Schein, stating, “Chuck Cohen will be reaching out to, or has reached out to, Tim Sullivan to see if HSD would do the same thing (suspending all activities with the TDA including pulling out of the state show). Ron wanted to know if I have a relationship with local PDCO RM [Patterson regional manager] to see if they would consider pulling out as well. I will be having lunch with Ron week after next to discuss concerns and share what we have found about the program. I laid out ground rules that I will NOT discuss a pricing response and any action would have to be cleared by my Legal Team before communicating with the TDA.” (CX0178 at 002-03 (capitalization in original)).
955. Sullivan replied to Showgren's email (F. 954), “What exactly is TDA doing?” and “Agree that we should NOT be having these discussions w/Benco. Chuck has not contacted me nor would he on such a topic.” (CX0178 at 002 (capitalization in original)).
956. In late 2013, Benco's Texas regional manager Fernandez communicated with Patterson's regional manager in Texas John Hyden by telephone. In that call, Hyden told Fernandez that Patterson would not be attending the 2014 TDA Annual Meeting. (CX1328 at 007-08 (Benco's Response to RFA ¶ 11); CX3365 at 003 (Patterson's Response RFA ¶ 3)).
957. On January 6, 2014, Patterson's Misiak called Schein's Steck. The topic was attendance at the 2014 TDA meeting. (CX6027 at 036 (Row 298)). Misiak told Steck that Patterson had decided not to attend the 2014 TDA meeting. Steck told Misiak that Schein had not made a decision on attending the 2014 TDA meeting. (Steck, Tr. 3701-02).
958. In a January 21, 2014 email from Schein's Steck to Patterson's Misiak, Steck wrote: “I'll be calling you to let you know about our decision on the matter we recently discussed in the next couple days.” (CX0112). In an internal email from Steck on the same day, Steck wrote, “Guys, I have to get back to PDCO [Patterson] on whether or not we are attending the TDA.” (CX0205 at 002; Steck, Tr. 3705).
959. In reference to his plan for a follow-up contact with Misiak regarding the 2014 TDA meeting (F. 958), Steck explained that he felt it a matter of courtesy to get back to Misiak once Schein made its decision. (Steck, Tr. 3702-03).
960. Schein's Steck did not ever inform Patterson's Misiak of Schein's decision with regard to attendance at the TDA meeting in 2014. (Steck, Tr. 3716).

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961. On March 5, 2014, Chad Thompson of Heartland Dental, a large DSO customer of Schein, emailed Schein's Foley asking whether Schein was supplying TDA Perks, and noting that he had heard Patterson was "boycotting" the TDA annual meeting "because of this." Foley responded in part: "The good thing here is that PDCO [Patterson], Benco and [we] are on the same page regarding these buying groups/consortiums." (CX2106 at 001; Foley, Tr. 4596-98).
962. Foley did not have any conversation with anyone at Benco or Patterson about "being on the same page" about buying groups. Foley had no personal knowledge supporting the statement made in the email referenced in F. 961. (Foley, Tr. 4710-12).
963. On April 16, 2014, Benco's Cohen sent a text message to Schein's Sullivan saying: "Got a minute?" Cohen's text did not indicate what he was calling Sullivan about. (CX6027 at 041 (row 343)). Sullivan called Cohen 20 minutes later. The call lasted 9 minutes and 16 seconds. (CX6027 at 042 (row 344, 346)).
964. Complaint Counsel did not elicit any testimony as to the content of the call referenced in F. 963, Sullivan denied discussing TDA Perks with Cohen, and Cohen did not recall the conversation. (Sullivan, Tr. 4015-16, 4246-47; Cohen, Tr. 577).
965. On April 16, 2014, Cohen sent an email to Sullivan and Guggenheim jointly, with the subject line, TDA Perks Letter and forwarded an article from the November 2013 Texas Dental Journal promoting the TDA Perks program. (CX1062 at 001). Cohen wrote, "Tim & Paul . . . Thought you'd be interested in this 'essay' from our friends at the TDA." (CX1062 at 001 (ellipses in original); Cohen, Tr. 577).

3. Settlement

966. Benco settled an antitrust investigation into its refusal to attend the TDA annual meeting by entering into an Agreed Final Judgment and Stipulated Injunction with the state of Texas on April 9, 2015 (the "2015 Benco Final Judgment"). (CX6021; CX1328 at 013 (Benco's Response to RFA ¶ 29)).
967. The 2015 Benco Final Judgment included a requirement that Benco, for a period of three years, log and submit to the state of Texas any communications relating in whole or in part to the distribution or sale of dental supplies in the United States, between or among any of Benco's "officers, directors, or sales employees" and, with certain exceptions, "any person employed by or associated with another dental supply distributor." (CX6021 at 012-13 ¶ J).
968. Schein entered into an Agreed Final Judgment and Stipulated Injunction with the state of Texas on August 3, 2017, which included a requirement that Schein, for a period of two years, log and submit to the state of Texas any communications, "relating in whole or in part to the distribution or sale of dental supplies in the United States, between or among" individuals holding certain executive and managerial positions with Schein, and "any

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person employed by or associated with another dental supply distributor.” (CX6023 at 006 ¶ J).

969. Patterson entered into an Agreed Final Judgment and Stipulated Injunction with the state of Texas on April 19, 2018, which included a requirement that Patterson, for a period of one year, log and submit to the state of Texas any communications “relating in whole or in part to the distribution or sale of dental supplies in the United States, between or among” individuals holding certain executive and managerial positions with Patterson and “any person employed by or associated with another dental supply distributor.” (CX6024 at 005 ¶ I).

L. Invitation to Collude

1. Background on Burkhart

970. Burkhart Dental Supply Company, Inc. (“Burkhart”) is a family-owned distributor of dental supplies, equipment, and technical services. (Reece, Tr. 4357-58, 4365; JX0003 at 002 (Joint Stipulations of Fact No. 7)). It has been in the dental supply business for 130 years. (Reece, Tr. 4358).
971. Burkhart is a full-service dental products distributor. (Reece, Tr. 4361; Cohen, Tr. 675; JX0003 at 002 (Joint Stipulations of Fact No. 7)).
972. Burkhart is the fourth largest dental distributor in the United States. (Reece, Tr. 4363; Cohen, Tr. 572; Rogan, Tr. 3437-38; Ryan, Tr. 1046).
973. Burkhart is not a national full-service distributor. It is a regional dental products distributor, headquartered in Tacoma, Washington. (Reece, Tr. 4357). Burkhart operates throughout the Northwest and the Western United States. (Reece, Tr. 4357, 4365-66; CX0319 (Reece, IHT at 16) (Burkhart’s regions include Alaska, Washington, Oregon, Idaho, Utah, California, Colorado, Arizona, Texas, and Oklahoma); Ryan, Tr. 1046, 1089; Sullivan, Tr. 3936).
974. Burkhart formed a Special Markets division in 2011 to work with groups, including buying groups. (Reece, Tr. 4393).
975. Burkhart began discussions with buying groups in 2011, starting with Amerinet. (Reece, Tr. 4466-67).
976. Burkhart began discussions with Smile Source in 2011 and began selling to Smile Source in 2012. (Reece, Tr. 4465-67; CX4232 at 008; Goldsmith, Tr. 1947-48, 1990).
977. In or around September 2013, Benco believed that Burkhart had entered into a supply agreement with a buying group. (CX1112 at 026-27 (Answer of Benco ¶ 53)).

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2. The September 13, 2013 phone call from Benco to Burkhart

978. Mike McElaney, Benco's vice president of sales, had previously worked at Burkhart with Jeff Reece, Burkhart's vice president of sales and marketing. McElaney had left Burkhart around 2011. (Reece, Tr. 4376).
979. On September 13, 2013, Benco's McElaney called Burkhart's Reece, to discuss buying groups ("the September 13, 2013 call"). (CX1328 at 011 (Benco's Response to RFA ¶ 22); CX0303 (McElaney, IHT at 27-28); CX0319 (Reece, IHT at 150-51)).
980. It was not a surprise to Reece to receive a call from McElaney because Reece and McElaney had previously worked together, were friends, and had done a lot of business together. (CX0319 (Reece, IHT at 150)).
981. McElaney called Reece on September 13, 2013 (F. 979) because he had just learned that Burkhart "was moving ahead with an agreement to service a GPO." (CX0303 (McElaney, IHT at 27-28); Reece, Tr. 4377-78).
982. On the September 13, 2013 call, McElaney "discussed some potential pitfalls" that may happen when dealing with buying groups. (CX0303 (McElaney, IHT at 29-30); *see also* Reece, Tr. 4377-78).
983. McElaney testified that he did not tell Reece that Benco had a policy against doing business with buying groups on the September 13, 2013 call. (CX0303 (McElaney, IHT at 30-31)).
984. On the September 13, 2013 call, McElaney expressed his opinion to Reece that the group purchasing model was a threat to the dental industry. (CX0319 (Reece, IHT at 153) ("He [McElaney], more than anything, I think, just wanted to be really clear that he thought it was a threat. Q. That buying groups are a threat? A. That a group purchasing model is a threat to our industry.")).
985. Reece testified that McElaney told Reece that Burkhart "needed to be really careful, that group purchasing organizations were not favorable to the dental industry and were not going to be good for Burkhart" (Reece, Tr. 4377).
986. At the time of the September 13, 2013 call, Reece believed that Benco was doing business with GPOs. For that reason, McElaney's statement to Reece that Burkhart needed to be careful with group purchasing organizations came as a surprise to Reece and did not make sense to Reece. (Reece, Tr. 4377-79 ("I remember thinking, but wait a second, you're in this space, right? So why is it good for you and not good for Burkhart?"))).
987. On the September 13, 2013 call, Reece "challenged" McElaney by asking whether Benco was "working in this space" (i.e., working with GPOs), and McElaney did not answer. (Reece, Tr. 4378).

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988. The conversation between McElaney and Reece on the September 13, 2013 call did not affect Burkhart's strategy regarding buying groups. (Reece, Tr. 4379-80).
989. Following the September 13, 2013 call, McElaney reported to Cohen and Ryan at Benco in a September 16, 2013 email:

I spoke with Jeff Reece at length late Friday about buying groups.
JEFF DOES NOT GET IT!!! . . . I will be meeting Jeff at the ADA
meeting to continue the discussion.

(CX0023 at 001 (capitalization in original)).

990. After receiving the September 16, 2013 email from McElaney (F. 989), Cohen did not tell McElaney not to meet with Reece at the ADA meeting to continue discussions about buying groups. (Cohen, Tr. 580-81).
991. Ryan responded to McElaney's September 16, 2013 email (F. 989), "Maybe we should discuss with Lori as well." Ryan's email referred to raising the discussion of buying groups with Lori Burkhart, owner of Burkhart. (CX0023 at 001; Ryan, Tr. 1111-13).
992. Reece testified at trial that McElaney made a second call to Reece to discuss buying groups. (Reece, Tr. 4380 (McElaney called Reece approximately three to four weeks after the September 13, 2013 call and told him that buying groups are not good for Burkhart's business)). In his investigational hearing, Reece testified only to the September 13, 2013 call (F. 979) and to a conversation at the October Dental Trade Alliance ("DTA") meeting (F. 994-995). (CX0319 (Reece, IHT at 154) ("After [the September 13, 2013 call], I saw Mike [McElaney] at the DTA.")).
993. McElaney testified that there was only one phone conversation between McElaney and Reece. (CX0303 (McElaney, IHT at 31) ("Q. And can you remember, was it one conversation you had with Mr. Reece or multiple conversations that you had with him? A. One conversation. My phone call to Jeff. That was all there was on the GPO.")).

3. The October 2013 Dental Trade Alliance Annual Meeting

994. In October 2013, Benco's McElaney, Ryan, and Cohen and Burkhart's Reece attended the Dental Trade Alliance Annual Meeting in Ponte Vedra Beach, Florida ("October 2013 DTA meeting"). (Reece, Tr. 4383-84; CX1112 at 028-29 (Answer of Benco ¶ 59) ("Benco admits that Mr. Cohen spoke to Mr. Reece at that meeting."); Ryan, Tr. 1107-08).
995. While at the October 2013 DTA meeting, Benco's McElaney, Ryan, and Cohen spoke with Burkhart's Reece. (CX0027; Ryan, Tr. 1118-20; CX1112 at 028-29 (Answer of Benco ¶ 59); Reece, Tr. 4382-83 (McElaney introduced Reece to Cohen and one other man from Benco)).

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996. Reece testified that at the October 2013 DTA meeting, Cohen told Reece that Cohen felt that buying groups were not healthy for the dental supply industry and that buying groups could do damage to the dental supply industry. (Reece, Tr. 4384-85, 4444-45 (“What Mr. Cohen told me was that it was not in Burkhart’s best interest to be working with group purchasing organizations.”); *see also* CX8021 (Reece, Dep. at 110-11) (“My recollection is very clear that Chuck Cohen asked me about group purchasing organizations and that his opinion was that it was not good for the industry and it was not good for Burkhart and that you might want to be careful about that.”); CX0319 (Reece, IHT at 154-55) (Cohen and McElaney “kind of went immediately to their disappointment, that ‘Are you sure you really know what you are getting yourself into by working with buying groups?’ . . . [I]t was clear that Chuck wanted to send a very clear message that it wasn’t acceptable.”)).
997. Reece testified that at the October 2013 DTA meeting, Reece responded to what Cohen and McElaney told him (F. 996) by asking Cohen and McElaney if Benco was doing business with buying groups and Cohen and McElaney did not respond. (CX0319 (Reece, IHT at 155) (“I kind of looked at them incredulously, saying, ‘So what you are telling me is you are not working with these groups, right,’ and they just tended to kind of overlook that and not acknowledge my challenge.”)).
998. Cohen testified that he never had a conversation with Reece or anyone else at Burkhart about buying groups. (Cohen, Tr. 828).
999. McElaney testified that he did not recall having an in-person conversation with Reece about buying groups. (CX0303 (McElaney, IHT at 31) (“Q. Do you remember any in-person conversations with Mr. Reece during any dental conventions concerning GPOs? A. No. I saw Jeff and had coffee with him at many conventions, but we never discussed the GPO.”)).
1000. Ryan testified that either McElaney or Cohen introduced him to Reece at the October 2013 DTA meeting. (Ryan, Tr. 1107-08). Ryan also testified that he could not recall if Cohen was present when Ryan was introduced to Reece at the October 2013 DTA meeting. (Ryan, Tr. 1120). Ryan further testified that he does not recall being part of a conversation with Reece about buying groups. (Ryan, Tr. 1122).
1001. Reece could not recall having a conversation with Ryan present where buying groups were discussed. (CX0319 (Reece, IHT at 149-50) (the only people from Benco who talked to Reece about buying groups were McElaney and Cohen)).
1002. On October 23, 2013, a few days after the October 2013 DTA meeting, Ryan sent a text message to Cohen that stated “I think I figured out what Jeff Reece was talking about with that buying group.” (Ryan, Tr. 1121-23).
1003. When Reece was asked at trial whether, in any conversation with Benco, Benco made “any suggestion of how Burkhart should conduct its business,” Reece testified: “No.” (Reece, Tr. 4389).

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1004. When Reece was asked at trial whether, in any conversation with Benco, Benco encouraged Burkhardt not to do business with buying groups, Reece testified: “Benco had encouraged Burkhardt not to engage in group purchasing organizations based on the fact that that was going to be detrimental to our business and certainly to the business in the dental industry for those that participated.” (Reece, Tr. 4390-91).
1005. Reece was never told by anyone at Benco that there was an agreement between Benco and any other company to not do business with buying groups and stated that he was not invited to join any such agreement. (Reece, Tr. 4445-46; CX0303 (McElaney, IHT at 27-28); Cohen, Tr. 828).
1006. Burkhardt did not change its policy or strategy with regard to working with buying groups after Reece’s communications with Benco. (Reece, Tr. 4446, 4487).

IV. SUMMARY OF CONCLUSIONS OF LAW

1. Complaint Counsel bears the burden of proving jurisdiction and liability by a preponderance of evidence.
2. Respondents Benco, Schein, and Patterson are each corporations and engage in activities in or affecting commerce, within the meaning of Section 4 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 44.
3. The Commission has jurisdiction over each Respondent and the subject matter of this proceeding, pursuant to Section 5 of the of the FTC Act, 15 U.S.C. § 45.
4. The FTC Act’s prohibition of unfair methods of competition encompasses violations of Section 1 of the Sherman Act.
5. Section 1 of the Sherman Act prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States” 15 U.S.C. § 1.
6. At all times, the burden of persuading the factfinder that a conspiracy occurred is on the plaintiff, or the federal government, the FTC in this case. The burden of proof includes not just the burden of production, but the risk of non-persuasion.
7. A conspiracy cannot be presumed. A litigant may not proceed by first assuming a conspiracy and then explaining the evidence accordingly.
8. To prove an agreement, the evidence must demonstrate that the alleged conspirators had a conscious commitment to a common scheme designed to achieve an unlawful objective. Put another way, the evidence must prove a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.

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9. Conduct that indicates restricted freedom of action and sense of obligation is generally associated with an agreement.
10. A finding of an agreement may be based on proof that the defendants, or Respondents in this case, got together and exchanged assurances of common action.
11. An agreement need not be express to violate the Sherman Act. An agreement may be demonstrated by direct or circumstantial evidence.
12. An agreement can be inferred from proof that, knowing that concerted action was contemplated and invited, the defendants gave their adherence to the scheme and participated in it. It is enough that a concert of action is contemplated and that the defendants conformed to the arrangement.
13. A defendant's consent to an unlawful scheme proposed by another can be inferred in part from evidence that the defendant confronted others about cheating on the agreement or reassured others that the defendant was abiding by the agreement.
14. The crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express.
15. To determine whether an antitrust conspiracy exists, courts must consider the totality of the evidence. The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.
16. Circumstantial evidence of a conspiracy, when considered as a whole, must tend to rule out the possibility of independent action. This requirement does not mean that the plaintiff must disprove all nonconspiratorial explanations for the conduct of a defendant; rather, the evidence need only be sufficient to allow a reasonable factfinder to infer that the conspiratorial explanation is more likely than not.
17. In order to find a conspiracy, the inference of a conspiracy must be more probable than the inference of independent action. Where an inference of conspiracy is equally consistent with an inference of independent conduct, the evidence of conspiracy would not preponderate.
18. All evidence, including direct evidence, can sometimes require a factfinder to draw inferences to reach a particular conclusion, though perhaps on average circumstantial evidence requires a longer chain of inferences.
19. Witness denials of an agreement are properly given little weight when other evidence shows an agreement.
20. Proof of parallel conduct and "plus factors" is one way to seek to prove an unlawful agreement.

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21. Parallel conduct, i.e., proof that defendants took identical actions within a time period suggestive of prearrangement, is a powerful form of circumstantial evidence. However, a plaintiff need not prove parallel conduct to prove an agreement based on circumstantial evidence.
22. It will not be presumed that parallel intentions resulted in corresponding parallel conduct.
23. Where a case is based on parallel conduct, proof of plus factors is necessary to serve as proxies for direct evidence of an agreement.
24. Plus factors are relied on to support an inference that demonstrated parallel conduct is more likely the result of an agreement, than the result of independent conduct or conscious parallelism.
25. There is no exhaustive list of plus factors. Plus factors are generally grouped into three categories: (1) evidence that the defendant had a motive to enter into a conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) evidence implying a traditional conspiracy.
26. Because the plus factors of motive and actions contrary to interest often only restate the phenomenon of interdependence among oligopolists, evidence implying a traditional conspiracy, i.e., evidence indicating an actual, manifest agreement, is the key to a proper determination.
27. Even where there is proof of parallel conduct and one or more plus factors, this does not mandate a finding of an unlawful agreement. The finder of fact may still conclude, based upon the evidence before it, that the defendants acted independently of one another, and not in violation of antitrust laws.
28. Actions against unilateral interest by an alleged participant in a conspiracy means conduct that would be irrational assuming that the defendant operated in a competitive market. In other words, in order to constitute actions against interest, and therefore be probative of an agreement, the parallel conduct at issue must be so unusual that in the absence of an advance agreement, no reasonable firm would have engaged in it.
29. Opportunity evidence is not necessarily probative of conspiracy. It remains the plaintiff's burden to prove that the defendant succumbed to temptation and conspired. It is not enough to point out the temptation and ask that the defendants bear the onerous, if not impossible, burden of proving the negative – that no conspiracy occurred.
30. An expert opinion that is not supported by facts cannot support a verdict.
31. Complaint Counsel has met its burden of proving that Benco and Patterson conspired to refuse to discount to or otherwise compete for the business of buying groups.

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32. Complaint Counsel has failed to meet its burden of proving a conspiracy involving Schein.
33. A restraint of trade may be adjudged unreasonable either because it fits within a class of restraints that has been held to be *per se* unreasonable, or because it violates what has come to be known as the rule of reason.
34. Under *per se* analysis, certain agreements or practices are so plainly anticompetitive and so often lack any redeeming virtue that they are conclusively presumed illegal without further examination.
35. An agreement to eliminate discounts is a type of agreement that falls squarely within the traditional *per se* rule against price fixing.
36. The agreement between Benco and Patterson to refuse to offer discounted prices to buying groups or otherwise negotiate with buying groups is a horizontal agreement to eliminate discounts and is illegal *per se*.
37. Any agreement by a group of competitors to boycott a particular buyer or group of buyers is illegal *per se*.
38. The agreement between Benco and Patterson to refuse to offer discounted prices to buying groups or otherwise negotiate with buying groups constitutes a horizontal group boycott of a buyer or group of buyers and is illegal *per se*.
39. When horizontal restraints involve agreements between competitors not to compete in some way, it is not necessary to precisely define the relevant market to conclude that these agreements were anticompetitive.
40. The term “invitation to collude” describes an improper communication from a firm to an actual or potential competitor that the firm is ready and willing to coordinate on price or output or other important terms of competition.
41. Highly ambiguous communications should not be actionable as a solicitation to enter into an anticompetitive agreement. Sanctions are not warranted for unaccepted invitations that are highly ambiguous.
42. Complaint Counsel has failed to meet its burden of proving that Benco invited Burkhart to collude in a joint agreement to refuse to provide discounts to or otherwise compete for the business of buying groups.
43. Once a violation of the antitrust laws has been shown, the Commission has wide discretion with respect to cease and desist orders.
44. When defendants are shown to have entered into a conspiracy violative of the antitrust laws, courts will not assume that it has been abandoned without clear proof.

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45. The power to grant injunctive relief survives discontinuance of the illegal conduct.
46. Although persuasive of a less harsh order than otherwise, termination of illegal conduct, even if it occurs prior to the issuance of a complaint, does not wholly absolve a defendant.
47. Voluntary cessation of an illegal practice, even where proven, does not by itself render the entry of a cease and desist order inappropriate. The propriety of an order in such case depends on a consideration of all the surrounding facts and circumstances.
48. The moving party must satisfy the court that relief is needed. Where challenged conduct has ceased, this burden includes demonstrating that there exists some cognizable danger of recurrent violation, something more than the mere possibility.
49. The factors relevant to the question of whether to issue an order when a defendant professes to have ceased the complained-of activities are: the bona fides of the defendant's expressed intent to comply with the law in the future; the effectiveness of the claimed discontinuance; and the character of the past violations.
50. Complaint Counsel has met its burden of proving that an order for relief should be entered in this case.
51. The Order entered herewith is necessary and appropriate to remedy the violation found to have occurred, and to prevent a recurrence.

ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. "Benco Dental Supply Co." means Benco Dental Supply Co., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Benco Dental Supply Co., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "Patterson Companies, Inc." means Patterson Companies, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Patterson Companies, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. "Respondents" means Benco Dental Supply Co., and Patterson Companies, Inc., individually and collectively.

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- D. “Antitrust Laws” means the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 et seq., the Sherman Act, 15 U.S.C. § 1 et seq., and the Clayton Act, 15 U.S.C. §12 et seq.
- E. “Association” means a dental trade association, state dental association, or other professional dental association.
- F. “Business Information” means, with respect to information regarding Buying Groups, information regarding a Distributor’s (including Respondents’) manner of doing business with a Buying Group, including business and strategic plans, marketing, sales, pricing, pricing and sales strategy, costs, revenues, margins, marketing, and customer information.
- G. “Buying Group” means a buying club, buying cooperative, buying co-op, group purchasing organization (GPO) or other entity whose members are independent and separately owned and managed dental practices, that negotiates terms for the sale of Dental Products and Dental Services by Distributors or Manufacturers to its members, and which holds itself out as seeking to aggregate and leverage the collective purchasing power of separately owned and separately managed dental practices in exchange for lower prices on Dental Products and Dental Services.
- H. “Communicate” or “Communicating” means exchanging, transferring, or disseminating any information, without regard to the means by which it is accomplished.
- I. “Communication” means any information exchange, transfer, or dissemination, without regard to the means by which it is accomplished, including, without limitation, orally, telephonically, or by mail, e-mail, notice memorandum, text message, or other electronic transmission.
- J. “Dental Practice Customer” means any dental practice that does business in the United States and purchases Dental Products or Dental Services (regardless of size, ownership, or corporate structure).
- K. “Dental Products” means all products, supplies, materials, equipment, and other items used in the provision of dental services by a dentist, dental practice, or any Dental Services business or clinic.
- L. “Dental Services” means any repair, warranty support, business, technical, design or administrative services, or any other ancillary or incidental services used by a dentist, dental practice, or any Dental Services business or clinic.
- M. “Distributor” means any business other than a Buying Group who purchases Dental Products and Dental Services for resale and distribution to Dental Practice Customers. Respondents are included in the definition of Distributor.

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- N. “Executive and Sales Staff” means Respondents’ officers, directors, and employees whose job responsibilities include, in whole or in part, (i) the sale or pricing of Dental Products or Dental Services or (ii) communications with Distributors or Manufacturers.
- O. “Manufacturer” means an entity that manufactures Dental Products for sale to Dental Practice Customers.

II.

IT IS FURTHER ORDERED that Respondents, directly or indirectly, or through any corporate or other device, in connection with the sale of Dental Products and Dental Services in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from and are prohibited from:

- A. Entering into or participating in an agreement or understanding, whether express or implied, with a Distributor relating to:
 - 1. Conducting business with a Buying Group, including providing or offering discounts or rebates, responding to solicitations, or refusing to do business;
 - 2. Preventing or discouraging any Dental Practice Customer from joining or endorsing a Buying Group, including by refusing to provide certain Dental Products or Dental Services to a Dental Practice Customer, or withholding financial incentives, including discounts or rebates, to a Dental Practice Customer because of such Dental Practice Customer’s participation in or affiliation with a Buying Group;
 - 3. Preventing or discouraging an Association from doing business with, endorsing, creating, or partnering with a Buying Group or Distributor, including by withholding advertising or refusing to attend or sponsor the Association’s seminars, meetings, or other events; or
 - 4. Preventing or discouraging a Manufacturer from doing business with a Buying Group, including by withholding or limiting business with the Manufacturer;
- B. Inducing, urging, encouraging, assisting, or attempting to induce any Distributor to engage in the actions described in Paragraph II.A(1) to (4); and
- C. Communicating Business Information regarding Buying Groups (including but not limited to, a Distributor’s willingness to do business with a Buying Group) to a Distributor, or requesting, encouraging, or facilitating the Communication of Business Information regarding a Buying Group between or among Distributors.
- D. For avoidance of doubt, nothing in this Order shall prevent Respondents from unilaterally deciding not to enter into any agreement or negotiate with any Buying

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Group, Dental Practice Customer, Association, or Manufacturer so long as the conduct does not violate Paragraphs II.B and II.C of this Order.

III.

IT IS FURTHER ORDERED that Benco Dental Supply Co., and Patterson Companies, Inc. shall each maintain an antitrust compliance program that sets forth the policies and procedures each Respondent has implemented to comply with this Order and with the Antitrust Laws. In connection with this program, each Respondent, Benco Dental Supply Co., and Patterson Companies, Inc., shall:

- A. Designate an antitrust compliance officer to supervise the design, maintenance, and operation of its program;
- B. Provide training regarding Respondent's obligations under this Order and the Antitrust Laws as follows:
 - 1. No later than 60 days after this Order becomes final, provide training regarding Respondent's obligations under this Order to Respondent's Executive and Sales Staff, or for an employee hired or promoted to Executive and Sales Staff, within 30 days of their employment start date; and
 - a. At least annually for the term of this Order;
- C. Establish a procedure to enable Respondent's Executive and Sales Staff to ask questions about, and report violations of, this Order and the Antitrust Laws confidentially and without fear of retaliation of any kind; and
- D. Establish policies to discipline Respondent's Executive and Sales Staff who fail to comply with this Order and the Antitrust Laws.

IV.

IT IS FURTHER ORDERED that Respondents shall file verified written reports ("compliance reports") in accordance with the following:

- A. Benco Dental Supply Co., and Patterson Companies, Inc. shall separately and individually submit an interim compliance report 60 days after this Order is issued, a compliance report one year after the date this Order is issued, and annual compliance reports for the next four years on the anniversary of that date; and additional compliance reports as the Commission or its staff may request.
- B. Each compliance report shall set forth in detail the manner and form in which submitting Respondent, Benco Dental Supply Co., or Patterson Companies, Inc., intends to comply, is complying, and has complied with this Order. Each

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compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether submitting Respondent, Benco Dental Supply Co., or Patterson Companies, Inc., is in compliance with this Order. Conclusory statements that the submitting Respondent has complied with its obligations under this Order are insufficient. Benco Dental Supply Co., and Patterson Companies, Inc. shall each include in its individual reports, among other information or documentation that may be necessary to demonstrate compliance:

1. A full description of the substance and timing of all measures it has implemented or plans to implement to ensure that it has complied or will comply with each paragraph of this Order;
2. The name and title of its designated antitrust compliance officer, as required by Paragraph III.A above;
3. A description of all trainings it has conducted in compliance with Paragraph III.B above (excluding trainings described in a prior compliance report);
4. In each compliance report submitted by Benco Dental Supply Co., it shall provide documentation of:
 - a. Communications between or among:
 - i. Any of Benco Dental Supply Co.'s officers, directors, or employees, including the following executives, or their successors: Charles Cohen (Managing Director) and Patrick Ryan (Director, Sales); and
 - ii. Any officer, director, or employee of Patterson Companies, Inc., including the following executives or their successors: Paul Guggenheim (former President), David Misiak (Vice President, Sales), and Timothy Rogan (Vice President, Marketing). Documentation of such Communication shall identify (name, employer, and job title) the persons involved, the method of communication, the subject matter of the Communication, and its duration; and
 - b. Intra-firm Communications regarding each Communication identified in Paragraph IV.B(4)(a) above, including the name, employer, and job title of all persons involved in the Communication, a description of the subject matter of the Communication, and the duration of the Communication;

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5. In each compliance report submitted by Patterson Companies, Inc., it shall provide documentation of:
 - a. Communications between and among:
 - i. Any officer, director, or employee of Patterson Companies, Inc., including the following executives or their successors: Paul Guggenheim (former President), David Misiak (Vice President, Sales), and Timothy Rogan (Vice President, Marketing); and
 - ii. Any officer, director, or employee of Benco Dental Supply Co., including the following executives, or their successors: Charles Cohen (Managing Director) and Patrick Ryan (Director, Sales). Documentation of such Communications shall identify (name, employer, and job title) the persons involved, the method of communication, the subject matter of the Communication, and its duration; and
 - b. Intra-firm Communications regarding each Communication identified in Paragraph IV.B(5)(a) above, including the name, employer, and job title of all persons involved in the Communication, a description of the subject matter of the Communication, and the duration of the Communication.
- C. Respondents shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents shall submit an original and two copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov.

V.

IT IS FURTHER ORDERED that Respondent, Benco Dental Supply, Co., or Patterson Companies, Inc., shall notify the Commission at least 30 days prior to:

- A. Its proposed dissolution;
- B. Its proposed acquisition, merger, or consolidation; or
- C. Any other change in the Respondent, including assignment and creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

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VI.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and 5 days' notice to the relevant Respondent, Benco Dental Supply, Co., or Patterson Companies, Inc., made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters office, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of the respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at the request of the authorized representative of the Commission and at the expense of the Respondent; and
- B. To interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

VII.

IT IS FURTHER ORDERED that this Order shall terminate 15 years from the date it is issued.

Complaint

IN THE MATTER OF

**US FOODS HOLDING CORP.,
SERVICES GROUP OF AMERICA, INC.,
II. AND
FOOD SERVICES OF AMERICA, INC.**

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL
TRADE COMMISSION ACT AND SECTION 7 OF THE CLAYTON ACT

*Docket No. C-4688; File No. 181 0215
Complaint, September 10, 2019 – Decision, November 15, 2019*

This consent order addresses the \$1.8 billion acquisition by US Foods Holding Corp. (“USF”) of certain assets of Services Group of America, Inc. (“SGA”). The complaint alleges that the Proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by substantially lessening competition in the market for broadline foodservice distribution in Eastern Idaho, Western North Dakota, Eastern North Dakota, the Seattle Area, and nationwide for multi-regional and national broadline distribution customers. The consent order requires USF to divest certain of SGA’s distribution centers and broadline distribution assets, including employees and tangible assets that are necessary to the operation of the businesses in Eastern Idaho, Western and Eastern North Dakota, and the Seattle Area to Shamrock Foods Co., Cash-Wa Distributing, and Harbor Wholesale Foods, respectively.

Participants

For the Commission: Ryan Andrews, Gustav Chiarello, Guia Dixon, Amy Dobrzynski, Stuart Hirschfeld, Michael Mikawa, Anthony Saunders, Sophia Vandergrift, and Robert Zuver.

For the Respondents: Maggie D’Amico and Christine Varney, Cravath, Swaine & Moore LLP; Ronan Harty and Howard Shelanski, Davis Polk & Wardwell LLP.

COMPLAINT

Pursuant to the provisions of the Clayton Act and the Federal Trade Commission Act (“FTC Act”), and by the virtue of the authority vested in it by said Acts, the Federal Trade Commission (“FTC” or “Commission”), having reason to believe that Respondent US Foods Holding Corp. and US Foods, Inc. (together “USF”), corporations subject to the jurisdiction of the Commission, and Respondent Services Group of America, Inc., Respondent Food Services of America, Inc., and Amerifresh, Inc., Ameristar Meats, Inc., GAMPAC Express, Inc., and Systems Services of America, Inc. (collectively “SGA”), corporations subject to the jurisdiction of the Commission, have reached an agreement (the “Proposed Acquisition”) in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, pursuant to which US Foods, Inc. will acquire 100% of outstanding common stock for each of SGA’s Food Group of Companies, which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and, it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows: