

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

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The trial record is crystal clear: Patterson did not conspire with Benco or Schein. Instead, the record at the close of the government’s case proves that Patterson consistently made its own, independent and pro-competitive decisions before, during, and after the alleged February 2013-April 2015 conspiracy period:

- Patterson provided its core customer base, the solo and small-practices that account for the vast majority of all dentists, with *innumerable price concessions* on individual purchase orders, and *thousands and thousands of additional documented blanket discounts* on all purchases—enough discounts to fill the “Marianas Trench,” in the Court’s words, and a literal wall of price concessions so that they could do things like “take from Schein” and “kick . . . Benco in the mouth . . . and finally kick them out the door,” right in the middle of the alleged conspiracy.<sup>1</sup>
- Patterson invaded the fast-growing corporate DSO segment long dominated by Schein (75-85%) and Benco (10%)—right during the heart of their supposed conspiracy—and transformed its business in a multi-year effort, at great expense and great risk, to beat its rivals in their corporate DSO stronghold.<sup>2</sup>
- Patterson met with and evaluated “buying groups” one-by-one and it always made its own decisions about whether to do business with them—*without ever once*

Association,<sup>4</sup> MMCAP,<sup>5</sup> George Lennon,<sup>6</sup> Jackson Health<sup>7</sup>), *during* (Smile Source,<sup>8</sup> Kois,<sup>9</sup> Catapult,<sup>10</sup> Dr. Stephen Sebastian,<sup>11</sup> the Dental Purchasing Group—run by a New Hampshire veterinarian,<sup>12</sup> OrthoSynetics<sup>13</sup>), and *after* the supposed conspiracy (Smile Source,<sup>14</sup> the Georgia Dental Association,<sup>15</sup> Stratus Dental,<sup>16</sup> Dentistry Unchained<sup>17</sup>). Every Patterson witness flatly denied communicating with Benco or Schein about any of these groups—“No” “No, I didn’t. I did not” “Never”—and Dr. Marshall admitted that he has no such evidence.<sup>18</sup>

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<sup>4</sup> CX0159 (“I’m gonna tell him thanks but no thanks.”).

<sup>5</sup> RX0401 (“it’s a GPO,” “every month . . . we had to send them a check for 1% of total sales”).

<sup>6</sup> CX0146.

<sup>7</sup> RX0271 (“The branch has been selling to the Jackson system of hospitals and clinics for over 10 years”).

<sup>8</sup> CX0148 (“I went to Smile Sources website . . . we do conduct business with all that I looked up.”).

<sup>9</sup> CX0116 (showing some of Patterson’s due diligence on Kois, including “I just spoke with Sarah Anders, Senior VP North America, from Ivoclar and she spoke with her Canadian Director. They don’t know these people . . .”).

<sup>10</sup> Trial VOL 7 (Guggenheim), 1812:16–1814:9 (Catapult wanted Patterson to pay a “vig or fee that we felt was inappropriate”).

<sup>11</sup> Trial Transcript VOL 10 (McFadden), 2817:6–19 (“This was no upside to Patterson Dental. And he doesn’t even have a company, he doesn’t even have any clients . . . so it doesn’t make any sense.”).

<sup>12</sup> CX3080.

<sup>13</sup> RX0333 (considering whether Patterson’s “historical” feelings towards “buying groups” might need to be revised for OrthoSynetics).

<sup>14</sup> Trial Transcript VOL 13 (Rogan), 3538:8–3540:8 (Patterson bid on Smile Source in early 2017).

<sup>15</sup> CX3094 (September 10, 2015 email reflecting Patterson decision not to respond to GDA outreach); CX8011 (Capaldo Dep. 22:23–23:5) (Patterson was not interested in the GDA RFP).

<sup>16</sup> CX3008 (discussing Stratus in late August 2015 as “very complicated” and “touchy”).

<sup>17</sup> CX0137 (Patterson “again explained to her very nicely that we are not going to participate in a GPO type program at this point”).

<sup>18</sup> Kois: Trial Transcript VOL 7 (Guggenheim), 1829:6–23 (Q. Did you call up Chuck Cohen in between this e-mail and the WebEx and say, Hey, Chuck, I got this guy has a line in the water? A. No. Q. Is it okay to sell him? A. No.); Dental Purchasing Group: Trial Transcript VOL 7 (Guggenheim), 1817:7–15 (“Q. Did you call up Chuck Cohen and ask him permission? A. No. No. Q. Did you decide with Mr. McFadden not to pursue this opportunity? A. I did. Q. And did you decide on your own internal to Patterson Companies? A. Absolutely.”); George Lennon/NAICSD: Trial Transcript VOL 7 (Guggenheim), 1810:23–25 (“Q. Did you call Mr. Cohen up at any point in this process and ask him about George Lennon and

- “Buying groups” were never part of Patterson’s core strategy, and for good reason. Their members were always free to buy from anyone and did not commit to purchase anything.<sup>19</sup> Often, they were fledgling start-ups with few, if any members, and business plans that were “incoherent” and “outlandish”<sup>20</sup>—circumstances under which Complaint Counsel’s expert conceded it would not mak”t1o33 0 Td [( ( t)-5.1 do ( bu9-1 (i)-2 (ne)4



- **David Misiak** (“Absolutely not.” “I did not.” “I did not.” “I did not.” “I did not.”).<sup>28</sup>
- **Neal McFadden** (“We never had any agreement, any signed agreement, that we would not work with GPOs.” “I do not.” “I do not.” “I do not.” “[T]here is no signed agreement with anyone.”).<sup>29</sup>
- **Tim Rogan** (“No.” “No.” “I do not.” “I do not.” “I do not.” “No.” “No.”).<sup>30</sup>

It also includes every Benco witness:

- **Chuck Cohen** (“No.” “No.” “No.” “No.” “No.”).<sup>31</sup>
- **Patrick Ryan** (“Not to my knowledge.” “No.” “No.” “No, I’m not.”).<sup>32</sup>

And it includes every Schein witness (Complaint Counsel does not dispute it has no evidence of communications between Patterson and Schein regarding buying groups<sup>33</sup>—a problem where Complaint Counsel argues all three Respondents needed to be on board for the conspiracy to work,<sup>34</sup> and where uncontradicted testimony shows Schein was working with buying groups):

- **Tim Sullivan** (“I don’t know if people understand the consequences of being falsely accused . . . There are consequences to falsely accusing people of things we know we didn’t do.”)<sup>35</sup>

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<sup>28</sup> Trial Transcript VOL 6 (Misiak), 1502:11–13; CX8038 (Misiak Dep. 314:18–315:13).

<sup>29</sup> Trial Transcript VOL 10 (McFadden), 2738:7–12; CX8004 (McFadden Dep. 192:5–193:5); CX0315 (McFadden I.H. 250:24–25).

<sup>30</sup> Trial Transcript VOL 13 (Rogan), 3651:6–12; CX8017 (Rogan Dep. 257:20–258:12; 261:14–19).

<sup>31</sup> Trial Transcript VOL 4 (Cohen), 705:4–6; 713:23–714:6; 921:2–7; CX8015 (Cohen Dep. 484:5–10); CX0301 (Cohen I.H. 385:18–21).

<sup>32</sup> Trial Transcript VOL 5 (Ryan), 1269:20–25; CX8037 (Ryan Dep. 391:5–392:16).

<sup>33</sup> Opp. 18 n.106; *see also* RDX225 (a blank piece of paper listing all documents or testimony showing Schein communicated with Patterson about buying groups); Trial Transcript VOL 15 (Sullivan), 4929:17–4293:13 (Sullivan testifying that Complaint Counsel had not asked him a single question about communications with Patterson).

<sup>34</sup> Trial Transcript VOL 1 (Openings), 25:11–17

<sup>35</sup> Trial Transcript VOL 15 (Sullivan), 4021:11–15.

- **Kathleen Titus** (“Absolutely not, because no agreement existed . . . I find [Complaint Counsel’s allegations] personally diminishing because I spent so much of my career at Henry Schein working with buying groups.”)<sup>36</sup>
- **Jake Meadows** (“I do not.” “Never heard of it.” “No.” “No.”)<sup>37</sup>
- **Dave Steck** (“I have no knowledge.” “No.” “No.” No.” “No, I do not.”)<sup>38</sup>
- **Randy Foley** (“No.” “Never.” “I was surprised when I saw [the allegations] because I’d been working with buying groups from the day I started with Special Markets until the day I retired.” “No.” No.” “No.” “No.”)<sup>39</sup>

Witness after witness also rejected Complaint Counsel’s sworn interrogatory responses claiming they had “knowledge” of a conspiracy.<sup>40</sup> Asked about these sworn statements at trial, they testified they were “false,” “a lie,” “not a true statement,” and one witness even noted that no one from Complaint Counsel “asked me my permission to put something false in a document.”<sup>41</sup> Complaint Counsel also has no defense for having cited about 60 interfirm text messages about sports, hurricane relief, sexual harassment training, and trade groups in sworn interrogatory responses as “relat[ing] to the conspiracy.”<sup>42</sup>

Complaint Counsel’

Guggenheim to do or commit to anything. Nor did Cohen expect a response.<sup>43</sup> And Guggenheim fired off a “ten-second” response to be polite,<sup>44</sup> stating Patterson’s preexisting (and thus also independently decided) feelings.<sup>45</sup> Complaint Counsel *assumes* Guggenheim’s “ten-second”

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Counsel nor its expert can point to any evidence supporting their assumption that Patterson’s Albuquerque branch cancelled a meeting due to Guggenheim’s email. Paul Guggenheim testified that he never talked to anyone from NMDC.<sup>49</sup> And, while he did forward Cohen’s email to Dave Misiak and Tim Rogan, Guggenheim testified that he did not instruct them or anyone else at Patterson to do anything.<sup>50</sup> Rogan testified that he gave no instruction to Albuquerque and had no idea what the branch did regarding NMDC, and Misiak had no memory of the email.<sup>51</sup> And NMDC’s Brenton Mason testified that he had “no reason to doubt” that Patterson’s decision was made by its Albuquerque branch.<sup>52</sup> Complaint Counsel’s opposition brief ignores all of this.

As to the June 2013 emails, Complaint Counsel’s opposition brief ignores the uncontradicted evidence that Patterson made its own decision on ADC months before the emails, that Benco did too, that their decisions were opposite (Benco bid, Schein bid, Patterson didn’t bid),<sup>53</sup> and that Patterson *never* pursued ADC’s business after the emails (despite Complaint Counsel’s assertions to the contrary<sup>54</sup>). Complaint Counsel argues that Patterson monitored and confronted Benco through this email, but both participants on the email (Guggenheim and Cohen) denied that,<sup>55</sup> and Complaint Counsel’s “mere disbelief” of witnesses is not evidence. *Alvord-*

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<sup>49</sup> Trial Transcript VOL 7 (Guggenheim), 1704:9–18.

<sup>50</sup> Trial Transcript VOL 7 (Guggenheim), 1700:14–1701:17.

<sup>51</sup> Trial Transcript VOL 13 (Rogan), 3576:18–3577:21; CX0316 (Misiak I.H.) 235:8–12.

<sup>52</sup> Trial Transcript VOL 9 (Mason), (“Q. You have no reason to doubt that this was Mr. Reinhardt’s decision, do you? A. No, I don’t.”).

<sup>53</sup> CX0093; RX3028 (Fruehauf Dep. 114:7–115:6) (Patterson decides not to bid on ADC in February 2013); CX2020; CX2021 (Schein bid for ADC’s business in April 2013); CX0094 (Benco bid for ADC’s business in May 2013); CX2579 (ADC selects Benco in mid-May 2013).

<sup>54</sup> Compl. ¶ 50 (alleging Patterson “ultimately competed for ADC’s business despite previously notifying ADC that it would not submit a bid”).

<sup>55</sup> Trial Transcript VOL 8 (Guggenheim), 1872:2–5 (“[B]y this email, did you believe that you were enforcing any agreement between Patterson and Benco not to do business with buying groups? A. Absolutely not.”); Trial Transcript VOL 4 (Cohen), 918:19–919:10 (“Q. . . . was there



*States v. Foley*, 598 F.2d 1323, 1332 (4th Cir. 1979). Here, neither Guggenheim nor Cohen stated that they would change their business practices regarding buying groups at all. And after-the-fact statements about existing policies (or feelings) “cannot support a [price-fixing] conspiracy.” *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1033–34 (8th Cir. 2000) (“*Subsequent* price verification evidence on particular sales cannot support a conspiracy”) (emphasis in original).

Complaint Counsel’s brief ignores these evidentiary gaps:

***First*** Findings of (v)4um00 de2 (c)(e)4 (l)-2 (op2 (so-6 (ut)-2 (r)3 0./TT3 1 Tf 0.00c(ot)-2 (a1 (e)4 (4)-8 (i

*Second*, Complaint Counsel still has not produced evidence that Patterson even viewed NMDC as a “buying group.”<sup>59</sup> Brenton Mason of NMDC testified under oath that NMDC is not a buying group.<sup>60</sup> Complaint Counsel has therefore also failed to put on evidence tending to exclude the possibility that Patterson declined to work with NMDC for reasons other than the government’s view that NMDC was a buying group.

*Third*, Complaint Counsel still has not accounted for evidence that Patterson’s views on NMDC changed—and the Albuquerque branch decided to cancel the meeting—*before* the February 8, 2013 emails. Again, on February 4, 2013, Brenton Mason sent an industry-wide email blast to manufacturers about a partnership he thought NMDC was forming with Patterson.<sup>61</sup> His email “created quite a stir” and, in *his* view, caused Patterson to walk back its ar(e)4 f]TJ 0 Tc1r 0 Tc 0c1r

the New Mexico Dental Cooperative.<sup>63</sup> NMDC's Brenton Mason did testify, though, and he said he had no reason to doubt that Patterson's decision was made by its Albuquerque branch.<sup>64</sup>

to exclude the possibility that Guggenheim’s email was an after-the-fact discussion permitted under antitrust law. *Blomkest*, 203 F.3d at 1033–34.

**C. Patterson Made Its Own Decisions On “Buying Groups” In General.**

Complaint Counsel also offers no response to the Marianas Trench full of evidence that during the alleged conspiracy, Patterson was competing vigorously with Schein and Benco. They did not compete over buying groups because buying groups do not buy anything, and because Patterson generally did not work with them *before or during* the alleged conspiracy.<sup>68</sup> And Complaint Counsel provides no evidence that Patterson competed with Benco or Schein over buying groups *before* the alleged conspiracy and then stopped.

Complaint Counsel makes much of every negative statement Patterson employees made about “buying groups” during the alleged conspiracy.<sup>69</sup> But Complaint Counsel ignores all evidence showing Patterson felt the same way about “buying groups” both before and after Guggenheim heard from Cohen in February 2013.<sup>70</sup>

**Pre-conspiracy:**

- David Misiak in 2009: “[GPOs] ha[ve] not been a good fit or need for [Patterson’s] dental business.”<sup>71</sup>
- Neal McFadden in 2012: “I get these [emails from prospective GPOs] more often than I like. . . . I’m gonna tell him thanks but no thanks. . . .”

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<sup>68</sup> Trial Transcript VOL 6 (Misiak) 1493:16–19, 1499:14–19 (buying groups were not part of Patterson’s core strategy in 2009 or 2012); Trial Transcript VOL 13 (Rogan), 3605:18–25 (Patterson was not pursuing buying group business in 2012 because it would have been a distraction); *supra* p.5.

<sup>69</sup> *See* Opp. 16.

<sup>70</sup> *See id.*

<sup>71</sup> CX3114.

David Misiak responding to McFadden: “Your response is right.”<sup>72</sup>

- Shelley Beckler in 2014: “These are the reasons we didn’t bid on it back in 2009: it’s a GPO . . . .”<sup>73</sup>

**Post-**

Nor does Complaint Counsel acknowledge any evidence that Patterson thought it *was* working with and competing over a handful of buying groups before and during the alleged conspiracy. Complaint Counsel thinks it knows better; that OrthoS

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 14, 2019 I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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**CERTIFICATE FOR ELECTRONIC FILING**

I certify that the electronic copy sent to the Secretary of the Commission is a true and

Notice of Electronic Service

**I hereby certify that on February 14, 2019, I filed an electronic copy of the foregoing 2019-02-14 Patterson's Reply ISO Motion to Dismiss the Case Against Patterson in its Entirety, with:**

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