UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Joseph J. Simons, Chairman**
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of	)	
	)	
BENCO DENTAL SUPPLY CO.,	)	
a corporation,	)	
	)	**DOCKET NO. 9379**
HENRY SCHEIN, INC.,	)	
a corporation, and	)	
	)	
PATTERSON COMPANIES, INC.,	)	
a corporation,	)	
	)	
Respondents.	)	

OPINION AND ORDER OF THE COMMISSION
[Provisionally Redacted Public Version]

By Commissioner Rebecca Kelly Slaughter, for the Commission:

This case involves the distribution of dental supply products to dental practices in the United States. The Respondents, Benco Dental Supply Co. ("Benco"), Henry Schein, Inc. ("Schein"), and Patterson Companies, Inc. ("Patterson"), are full-service distributors that sell consumable dental supplies and equipment to dentists and dental practices. Consumables include gloves, bibs, cement, and sterilization and prevention products, while equipment includes such items as x-ray machines, lights, compressors, and dental chairs.

The Commission's Complaint alleges that the Respondents have violated Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45, by coordinating and agreeing among themselves not to offer discounted prices or otherwise negotiate with certain groups of customers known as "buying groups," "group purchasing organizations," "GPOs," or "buying clubs." We refer to these organizations herein as "buying groups."

Approximately 30 days before the scheduled trial date, Respondent Patterson filed a Motion for Summary Decision (the "Motion") pursuant to Rule 3.24 of the Commission's Rules of Practice. Patterson's Motion concerns Patterson only. Patterson asserts that Complaint Counsel's evidence is insufficient to allow a reasonable trier of fact to conclude that Patterson conspired with the other Respondents to restrict discounting to buying groups. Complaint Counsel oppose the Motion. For the reasons stated in this Opinion, we deny Patterson's Motion.

I. COMPLAINT ALLEGATIONS AND PROCEDURAL BACKGROUND

On February 12, 2018, the Commission issued a four-count administrative complaint against Benco, Schein, and Patterson. The Complaint charges all three Respondents with three counts of restraint of trade (conspiracy) under Section 5 of the FTC Act for an alleged concerted scheme to refuse to negotiate with, or offer discounts to, buying groups. The first count charges the Respondents with a conspiracy under the rule of *per se* illegality, while the second and third counts charge the same conduct as an "inherently suspect" violation and a violation of the truncated rule of reason, respectively. Additionally, the Complaint charges Respondent Benco with one count of unfair methods of competition, based on an alleged invitation to collude.

We summarize the Complaint's allegations briefly. The Respondents collectively control approximately 85 percent of the sale of all dental products and services made through distributors in the United States. Compl. ¶ 2. Respondents sell to, among other buyers, a fragmented customer base of independent dentists. *Id.* Historically these small and discrete customers predominated; but in recent years, buying groups have begun to take root, offering independent dentists the opportunity to combine their purchasing power and obtain more favorable pricing for the supplies and equipment they purchase. *Id.* at ¶¶ 3-4. One advantage of such buying groups is that they allow independent dentists the opportunity to seek lower prices without having to become part of a larger dental practice, corporate dental provider, or other entity. *Id.* at ¶ 4.

According to the Complaint, the Respondents feared that buying groups would drive down prices and threaten their profit margins. *Id.* at ¶ 5. Rather than compete independently for the business of buying groups, Respondents allegedly responded to this threat by agreeing with one another not to provide discounts or otherwise negotiate with buying groups composed of independent dentists. *Id.* at ¶ 8. According to the Complaint, the Respondents' executives engaged in high-level communications with each other during the period 2012-2014 to reach, implement, and police their agreement. *Id.* at ¶¶ 31, 35-73 (summarizing purported conspiratorial communications). The conspiracy allegedly began no later than July 2012 as to Respondents Benco and Schein, and no later than February 2013 as to Respondent Patterson. *Id.* at ¶¶ 32, 36. In keeping with the agreement, Respondents' executives allegedly informed their sales forces not to provide discounts or compete for the business of such groups. *Id.* at ¶ 9. In 2013, the Complaint alleges, Respondent Benco invited Burkhart Dental Supply ("Burkhart"), a regional distributor, to join the agreement. *Id.* at ¶ 11.

The Complaint alleges that the Respondents' conduct has had the purpose, tendency, and effect of, *inter alia*, injuring consumers by restraining price competition, distorting prices, limiting the ability of independent dentists to obtain discounts, and eliminating competitive bidding for sales to buying groups. *Id.* at ¶ 75.

The Respondents deny the substantive allegations of the Complaint.

In support of the Motion, Patterson asserts that a "mountain" of uncontroverted evidence shows that it competed vigorously against Benco and Schein on price and service during the alleged conspiracy period, PMSD[1] at 1; that the record contains numerous sworn denials of conspiracy by all of the relevant executives, *id.* at 3; and that Complaint Counsel lack sufficient evidence in the face of those denials to create a genuine issue of material fact for trial, *id.* at 3-4.

II. STANDARD FOR SUMMARY DECISION

We review Patterson's Motion pursuant to Rule 3.24 of our Rules of Practice, which provides standards analogous to those that apply to a motion for summary judgment under Federal Rule of Civil Procedure 56. *See McWane, Inc. & Star Pipe Prods., Ltd.,* 2012 WL 4101793, at *5 (F.T.C. Sept. 14, 2012); *Polygram Holding, Inc.,* 2002 WL 31433923, at *1 (F.T.C. Feb. 26, 2002). A party moving for summary decision must show that "there is no genuine issue as to any material fact" and that it is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also* 16 C.F.R. § 3.24(a)(2).

As with a summary judgment motion, the party seeking summary decision "bears the initial responsibility of . . . identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986) (internal quotations omitted). Provided the movant meets this burden, the "party opposing the motion may not rest upon the mere allegations or denials of his or her pleading," but must instead "set forth specific facts showing that there is a genuine issue of material fact for trial." 16 C.F.R. § 3.24(a)(3); *see also Celotex*, 477 U.S. at 323-24.

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[1] We use the following abbreviations in this opinion:

Compl.:	Complaint
PMSD:	Memorandum in Support of Patterson's Motion for Summary Decision
PSMF:	Statement of Material Facts as to Which There Is No Genuine Dispute in Support of Respondent's Patterson Companies, Inc.'s Motion for Summary Decision
PRB:	Respondent Patterson's Reply in Support of its Motion for Summary Decision
CCOppB:	Complaint Counsel's Opposition to Respondent Patterson Companies, Inc.'s Motion for Summary Decision
CCSMF:	Complaint Counsel's Statement of Disputed Material Facts as to Which There Is a Genuine Issue for Trial Part 1: Statement of Material Facts as to Which There Exists a Genuine Issue for Trial
CX:	Complaint Counsel's Exhibits
RX:	Respondent Patterson's Exhibits
IH:	Investigational Hearing Transcript
Dep.:	Deposition Transcript

In evaluating the existence of a dispute for trial, we are required to resolve all factual ambiguities and draw all justifiable inferences in the light most favorable to the party opposing the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *McWane, Inc.,* 2012 WL 4101793, at *5.

Below, we discuss specific legal principles that govern summary decision in antitrust conspiracy cases.

A. The Sherman Act

Section 5 of the FTC Act prohibits "unfair methods of competition," including conduct that violates the antitrust laws.[2] Violations of Section 1 of the Sherman Act also violate Section 5 of the FTC Act, and the law that has developed under Section 1 is relevant herein. To state a claim under Section 1 of the Sherman Act, a complainant must show 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 II, Ltd. v. FTC*, 635 F.3d 815, 824 (6th Cir. 2011) (citation omitted). "[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.'" *Realcomp*, 635 F.3d at 825 (citing *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 457-58 (1986)). The *per se* rule summarily condemns certain types of agreements because of their pernicious effects on competition and lack of any redeeming virtue. 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. Pac. Stationery and Printing Co.*, 472 U.S. 284, 293-95 (1985), *FTC v. Superior Ct. Trial Lawyers Ass'n,* 493 U.S. 411 (1990).

As the Supreme Court has emphasized, "protection of price competition from conspiratorial restraint is an object of special solicitude under the antitrust laws." *United States v. Gen. Motors Corp.,* 384 U.S. 127, 148 (1966). Thus, 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,* 446 U.S. 643 (1980) (per curiam) (agreement to standardize credit terms offered to a purchaser); *Sugar Institute 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 scheme, 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 Oil Co.*, 310 U.S. at 223. Thus, "an 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.

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[2] *See Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 762 & n.3 (1999); *FTC v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 394-95 (1953).

Collusive boycotts of customers designed to affect price are also illegal *per se.* In *Superior Court Trial Lawyers Association,* the Supreme Court addressed an agreement reached by a group of court-appointed counsel in the District of Columbia to cease providing representation to defendants until the District increased their compensation. 493 U.S. at 421. The Court observed that the purpose of the agreement was to obtain higher fees and that it was implemented by a concerted refusal to serve an important customer. *Id.* at 422-23. Thus, the horizontal arrangement was "unquestionably a 'naked restraint' on price and output" and illegal *per se*. *Id.* (quoting *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.,* 468 U.S. 85, 110 (1984)).

B. Summary Judgment in Sherman Act Conspiracy Cases

"The existence of an agreement is '[t]he 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. Schumacher & Co.*, 37 F.3d 996, 999 (3d Cir. 1994)). To show an agreement, the plaintiff must demonstrate that the defendants shared a "unity of purpose or a common design and understanding, or a meeting of minds." *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946); *see also, e.g.*, *Insulate SB, Inc. v. Advanced Finishing Sys., Inc.*, 797 F.3d 538, 543 (8th Cir. 2015).

An agreement need not be express to violate the Sherman Act. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1948). "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)). Moreover, the plaintiff non-movant's evidence on summary judgment may be direct or circumstantial. *In re Publ'n Paper Antitrust Litig.,* 690 F.3d 51, 63 (2d Cir. 2012); *see also Erie Cty., Ohio v. Morton Salt, Inc.*, 702 F.3d 860, 867–68 (6th Cir. 2012) ("An agreement, either tacit or express, may ultimately be proven either by direct evidence of communications between the defendants or by circumstantial evidence of conduct that, in the context, negates the likelihood of independent action and raises an inference of coordination."). Thus, the non-movant does not have to submit direct evidence of agreement, *i.e.,* the so-called smoking gun, but can rely solely on circumstantial evidence and reasonable inferences drawn therefrom. *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.,* 998 F.2d 1224, 1230 (3d Cir. 1993). Indeed, "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); *see also ES Dev., Inc. v. RWM Enters., Inc.*, 939 F.2d 547, 553 (8th Cir. 1991) ("[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.") (internal quotations omitted); 6 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1410c, at 73 (4th ed. 2017) (an agreement "can exist without any documentary trail and without any admission by the participants").

In a concentrated market, evidence of parallel behavior by market participants, without more, is insufficient to establish a Section 1 violation. *Twombly*¸ 550 U.S. at 553-54. To survive a motion for summary judgment, a plaintiff who relies on such ambiguous evidence "must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita*, 475 U.S. at 588 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984)). Put another way, there must be evidence "that reasonably tends to prove . . . a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto*, 465 U.S. at 768; *In re Ins. Brokerage Antitrust Litig.,* 618 F.3d 300, 315 (3d Cir. 2010). The plaintiff, however, need not demonstrate that the inference of conspiracy is the sole inference. *In re Publ'n Paper Antitrust Litig*., 690 F.3d at 63. Rather, the inference of conspiracy need only be "reasonable in light of the competing inferences of independent action or collusive action." *Matsushita*, 475 U.S. at 588.

Summary judgment for a defendant is generally not appropriate where a plaintiff has produced direct evidence of an agreement. *See Williamson Oil Co. v. Philip Morris USA,* 346 F.3d 1287, 1300 (11th Cir. 2003); *Petruzzi's IGA Supermarkets,* 998 F.2d at 1233; *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 441 (9th Cir. 1990). We need not draw a bright line between direct and circumstantial evidence, however. *See In re Publ'n Paper Antitrust Litig.*, 690 F.3d at 63. Instead, we are to evaluate whether the record evidence *as a whole* suffices to support an inference of concerted action. *Intervest, Inc. v. Bloomberg, L.P.,* 340 F.3d 144, 160 (3d Cir. 2003).

The case law thus instructs that, in ruling on the summary decision motion by Patterson, we evaluate the record as a whole in the light most favorable to Complaint Counsel to determine whether there exists a genuine dispute of any material fact. In the absence of such a disputed material fact, a tribunal would also decide whether the law and facts compel a decision for Patterson. Because Patterson's Motion only addresses whether it participated in an agreement with the other Respondents, we limit our analysis to this issue. *See Celotex*, 477 U.S. at 323 ("a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion.").

III. EVIDENCE OF AN AGREEMENT

In order to succeed in its motion for summary decision, Patterson must demonstrate that, upon review of the evidence in the light most favorable to Complaint Counsel, there is no genuine dispute that Patterson behaved independently rather than pursuant to an agreement with Benco and Schein. Complaint Counsel may defeat summary decision by pointing to specific facts that would allow a trier of fact to reasonably infer an agreement between the Respondents, hence creating a genuine issue for trial. In this section, we discuss Complaint Counsel's evidence.

Complaint Counsel's primary evidence consists of email communications between senior executives of Patterson and Benco regarding sales to buying groups; they assert these communications constitute "direct and unambiguous evidence" of conspiracy. CCOppB at 15-18. Direct evidence is evidence that is explicit and requires no inferences to establish the proposition being asserted. *See, e.g., Champagne Metals v. Ken-Mac Metals,* 458 F.3d 1073,

1083 (10th Cir. 2006); *but cf. In re Publ'n Paper Antitrust Litig.*, 690 F.3d at 64 ("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.") (quotation omitted).

In addition to these communications, Complaint Counsel point to other evidence, including email communications and text messages, that they say provide (1) internal confirmation of the existence of an agreement; (2) evidence that Patterson complied with the agreement; and (3) evidence that Patterson monitored the other firms' compliance with the agreement. CCOppB at 15-18; CCSMF ¶¶ 20-30, 33-48, 51-52.

Finally, Complaint Counsel proffer circumstantial, "plus factor" evidence that they claim supports an inference of a conspiracy. Courts evaluate plus factor evidence to decide summary judgment motions when an antitrust plaintiff relies on parallel behavior by the defendants to support a finding of conspiracy.[3] *See, e.g., Williamson Oil*, 346 F.3d at 1301; *Todd v. Exxon Corp.,* 275 F.3d 191, 198 (2d Cir. 2001). The plus factor analysis seeks to ensure that courts punish concerted action and not merely the "unilateral, independent conduct of competitors." *In re Flat Glass Antitrust Litig.*, 385 F.3d at 360 (quoting *In re Baby Food Antitrust Litig.,* 166 F.3d 112, 122 (3d Cir. 1999)). Although most cases that apply plus factor analysis involve consciously parallel pricing, the analysis is equally useful for a claim of conspiracy that involves, as this one does, putatively parallel refusals to bid for sales to certain types of customers. *See, e.g.*, *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 427-31 (4th Cir. 2015), *as amended on reh'g in part* (Oct. 29, 2015); *Petruzzi's IGA Supermarkets*, 998 F.2d at 1243.

We briefly elaborate on Complaint Counsel's evidence as follows, though we need not conclude whether the evidence is direct or circumstantial for the purpose of resolving this motion.[4]

A. Inter- and Intra-Firm Communications

In February 2013, Chuck Cohen, Benco's Managing Director, learned that Patterson was planning to discount to the buying group New Mexico Dental Cooperative ("NMDC"). CCSMF ¶ 20. In response, Cohen wrote to several Benco officials, "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." *Id.* Cohen emailed Patterson's President, Paul Guggenheim, forwarding an email in which NMDC had announced its intention to partner with Patterson. CX0056-001. Cohen wrote to Guggenheim:

[3] Plus factors are unnecessary if there is direct evidence of an agreement. *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 323 (3d Cir. 2010). As discussed above, Complaint Counsel have adduced what they contend is direct evidence sufficient to defeat Patterson's motion. Without reaching that contention, we discuss the evidence of plus factors for the sake of completeness.

[4] Whether the proffered evidence is direct or circumstantial is an issue that need not be resolved in order to rule on the motion. *See In re Publ'n Paper Antitrust Litig.*, 690 F.3d at 64 (a tribunal need not draw a "bright line" between direct and circumstantial evidence to decide summary judgment motion).

> 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.

CCSMF ¶ 21.

Guggenheim forwarded Cohen's email to Patterson's Vice Presidents of Sales (Dave Misiak) and Marketing (Tim Rogan). CCSMF ¶ 24. Guggenheim then responded to Cohen a few hours later: "Thanks for the heads up. I'll investigate the situation. We feel the same way about these." *Id.* at ¶ 25.

Three days later, Patterson informed NMDC that it would not partner with the buying group. CCSMF ¶ 27.

That same month, Atlantic Dental Care ("ADC") approached Patterson's Chesapeake, Virginia, branch manager seeking a bid. CCSMF ¶ 42. Patterson's Misiak directed the region to reject ADC, saying, "[C]urrently we do [not] participate with group purchasing organizations. . . . 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." *Id.* at ¶ 43. Guggenheim later learned that Benco bid on ADC and won the account. *Id.* at ¶ 45. On June 6, 2013, Guggenheim reached out to Cohen, replying to the February 2013 email in which Cohen had communicated Benco's no-buying-group policy. *Id.* Guggenheim asked:

> Reflecting back on our conversation earlier this year, could you shed some light on your business agreement with Atlantic Dental Care? ... I'm wondering if your position on buying groups is still as you articulated back in February?

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[6]

> Let me know your thoughts . . . Sometimes these things grow legs without our awareness.

CX0095-001. In an email response, Cohen explained that

Cohen also confirmed that, "[a]s we've discussed, we don't recognize buying groups." *Id.*[7] He further assured Guggenheim that *Id.* Guggenheim replied, Just wanted to clarify where you guys stand." *Id.* After receiving Cohen's email, Guggenheim recalled

In October 2013, the Texas Dental Association ("TDA") created the TDAPerks buying group. CCSMF ¶ 49. Patterson executives discussed TDAPerks with their competitors and coordinated with the other Respondents on whether the parties would attend the TDA annual trade show, which is an important source of revenue for TDA. CCSMF at ¶ 50; *see also* CX0110-003 (Patterson "discussed this TDAPerks site . . . with our dealer competitors at the local San Antonio & Houston level"). Benco's Texas regional manager wrote that he would call the Patterson manager about whether Patterson pulled out of the TDA annual meeting, adding that, "[l]ast time I spoke with him about three weeks ago, they were out, but considering options." CX1289-001. In January 2014, Patterson's Misiak and Schein's VP & General Manager Dave Steck had a 14-minute phone call about attendance at the TDA trade show. CCSMF at ¶ 51. Steck emailed Misiak two weeks later, saying, "I'll be calling you to let you know about our decision on the matter we recently discussed in the next couple of days," apparently referring to a decision on whether to pull out of the TDA annual meeting. *Id.*[8] Misiak forwarded Steck's email to his colleague Tim Rogan (Patterson): "He already told me they were out. Full blown!" Rogan responded: "That sucks. You should call

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[7] Large group practices, sometimes referred to as dental service organizations ("DSOs"), are distinct from buying groups in that the former have multiple locations combined under a single ownership structure, while the latter seek to aggregate the purchases of practices that remain independently owned. *See* The Respondents recognized this distinction as critical to how they treated the entities. *See, e.g.*, CX0011-003 (Ryan (Benco) email: "We don't allow [large group] pricing unless there is common ownership. Neither Schein nor Patterson do either.").

[8] *See also* CX2884-001 ("I have to get back to PDCO on whether or not we are attending the TDA.").

him," and suggested a "'[t]hought I could trust you' type of conversation." *Id.*

Patterson's internal communications also discussed the company's position on buying groups. In August 2013, Patterson's Vice President of Marketing, Tim Rogan, wrote: "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." CCSMF at ¶ 29. In June 2014, Neal McFadden, Patterson's President of Special Markets, sent a text message to a former colleague who was working for a buying group. The text message stated, "[W]e've signed an agreement that we won't work with GPO's." *Id.* at ¶ 30.

Benco's internal communications discuss the Respondents' positions on buying groups as well. In May 2015, Benco's Patrick Ryan turned down a buying group called Dentistry Unchained, stating internally, "[t]he best part about calling these [buying groups] is I already KNOW that Patterson and Schein have said NO." *Id.* In July 2015, Ryan wrote to a Benco sales representative who was concerned about losing an account to a buying group, saying, "[w]e don't allow [volume discount] pricing unless there is common ownership. Neither Schein nor Patterson do either." *Id.* at ¶ 31. Regarding the TDA, a Schein executive wrote, "[t]he good thing here is that [Patterson], Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott." *Id.* at 11 n.61.

For purposes of its Motion, Patterson does not appear to contest the authenticity of the above-described email communications and text messages. Instead, Patterson vigorously contests Complaint Counsel's interpretation of the communications and offers alternative explanations.[9] However, Patterson's alternative explanations largely confirm the existence of a material factual dispute rather than detract from one. In any event, as we discuss further below, taking the evidence as a whole in the light most favorable to Complaint Counsel, a reasonable trier of fact could conclude that Patterson agreed to join a boycott of buying groups.

[9] For example, Patterson argues that Cohen's email to Guggenheim ("Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups . . .") PMSD at 16. Guggenheim's response, in turn, ("We feel the same way about these."), Supporting this interpretation, Guggenheim testified that he did not view Cohen's statement as a commitment from Benco, but rather a piece of *Id.* at 17; PRB at 6. Patterson also argues that McFadden's text message ("we've signed an agreement not to work with GPOs") PRB at 8.

B. Compliance and Monitoring Evidence

Complaint Counsel point to evidence pertaining to compliance with and monitoring of the alleged agreement. Complaint Counsel assert that Patterson's executives repeatedly instructed its salesforce not to do business with buying groups during the alleged conspiracy period, and identify approximately a dozen Patterson emails to support this assertion. CCSMF ¶¶ 33-41. Complaint Counsel also assert that Patterson routinely rejected buying groups during the conspiracy. CCSMF ¶ 59. For its part, Patterson explains that

Complaint Counsel also offer evidence that they say demonstrates that Patterson monitored and enforced against cheating by the other Respondents. *See* CCOppB at 17-18; CCSMF ¶¶ 43-44 (Misiak wrote to a branch manager that "our 2 largest competitors stay out of these [buying groups] as well. If you hear differently and have specific proof please send that to me"; Misiak wrote to Guggenheim that "I'm concerned that Schein and Benco sneak into these co-op bids and deny it"); CCSMF ¶ 45 (Guggenheim email to Cohen: "Reflecting back on our conversation earlier this year, could you shed some light on your business agreement with Atlantic Dental Care?").

C. Plus Factors

Complaint Counsel further adduce "plus factors" to support an inference of conspiracy. Complaint Counsel seek to rely on four plus factors recognized by courts: 1) a common motive to conspire; 2) evidence that the defendant acted contrary to its unilateral self-interest; 3) a high level of inter-firm communications; and 4) abrupt changes in conduct. *See Twombly v. Bell Atlantic Corp.,* 425 F.3d 99, 114 (2d Cir. 2005), *rev'd on other grounds*, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *In re Publ'n Paper Antitrust Litig.*, 690 F.3d at 62; *In re Domestic Drywall Antitrust Litig.*, 163 F. Supp. 3d 175, 255-56 (E.D. Pa. 2016).

Below, we discuss each plus factor separately for clarity's sake, but we remain mindful that we must evaluate the evidence "as a whole to see if together it supports an inference of concerted action." *Intervest, Inc. v. Bloomberg, L.P.,* 340 F.3d at 160.

1. Respondents' Motive to Conspire

Complaint Counsel posit that the Respondents, including Patterson, had a common motive to conspire. Economic logic suggests that the buying groups could aggregate their purchasing power to demand bigger discounts on their supplies and equipment than what individual dentists or small practices could demand; such discounts could cut into the distributors' margins. Complaint Counsel have marshalled evidence to show that this is what the

Respondents feared. *See, e.g.*, ; CX1149-002 (thread comment from Benco's Ryan: "GPOs are what [ruined] the medical supply business If this door is ever opened in dental, its [*sic*] all over for all of us. . . .).

Complaint Counsel argue this evidence supports the position that Respondents shared a motive to resist discounting without risking the loss of business to one another.

2. Actions Against Patterson's Unilateral Economic Self Interest

Complaint Counsel offer evidence that, although Patterson and the other Respondents *collectively* had a motive to conspire and to refuse to deal with buying groups, Patterson acted against its *unilateral* self-interest in refusing to sell to them. CCOppB at 21-23.

For example, Complaint Counsel point to deposition testimony that *see also* CX3089-001 to -002 (Patterson losing "high quality / high producing clients" to Kois, a buying group, and "the cut is deep to us all"; "many of our best doctors are Kois followers, so I think this is a precarious situation for us as a company"); CX0093-001 (noting a concern that Patterson may lose a "big chunk of business" by not bidding on a GPO RFP); CX3043-001 (regarding the threat of existing customers joining Smile Source, a buying group: "Don't underestimate the impact they can have . . . scary," then "I totally agree. We're already suffering under that Synergy Dental Partners buying group here and Smile Source will only make it worse.").[10]

Complaint Counsel also offer the analysis of an expert economist, Dr. Robert C. Marshall, to support their contention that Patterson acted against its unilateral self-interest by declining to bid for buying groups.[11] Dr. Marshall opined that,

[10] Other emails suggest that the distributors understood that it was in their individual best interest to compete for buying groups' business at times. For example, Misiak's email ("I'm concerned that Schein and Benco sneak into these co-op bids and deny it.") makes sense only if he believed that Schein and Benco had an incentive to sell to the buying groups. CX0092-001. *See also*

[11] Patterson argues that because Dr. Marshall's opinion is unsworn, we should not consider it in opposition to summary decision. PRB at 3. "Subsequent verification or reaffirmation of an unsworn expert's report, either by affidavit or deposition," however, "allows the court to consider the unsworn expert's report on a motion for summary judgment." *DG&G, Inc. v. FlexSol Packaging Corp. of Pompano Beach*, 576 F.3d 820, 826 (8th Cir. 2009) (brackets and quotations omitted); *Humphreys & Partners Architects, L.P. v. Lessard Design, Inc.*, 790 F.3d 532, 539 (4th Cir. 2015), *as amended* (June 24, 2015) (accord); *Maytag Corp. v. Electrolux Home Products, Inc.*, 448 F. Supp. 2d 1034, 1065 (N.D. Iowa 2006), *aff'd*, 224 Fed. App'x 972 (Fed. Cir. 2007) ("an unsworn expert

Finally, to support the argument that Patterson was acting against its own interests, Complaint Counsel contrast Patterson's actions during the alleged conspiracy period with its behavior afterward. Specifically, Complaint Counsel state that in 2016, a year after the Commission began its investigation into the Respondents' alleged agreement and the Texas Attorney General settled related charges with Benco, Patterson's stance changed, and it began to pursue business from buying groups. *See* CCOppB at 12 & n.68 ("Normally I would . . . stat[e] that we do not participate in buying groups for multiple reasons . . . . Given our recent discussion with Smile Source are we looking at talking with Buying Groups now?"). In [redacted], less than a year after it refused Dentistry Unchained, Patterson offered the group discounted pricing, reasoning: "[W]e must start stretching—This seems to be the only way for now to insert ourselves into the mix with these GPO's." CCSMF ¶ 66.

report may be considered at summary judgment where the opinions therein are otherwise adopted or reaffirmed in an admissible affidavit or deposition testimony by the expert"). Dr. Marshall was deposed at length about his report and reaffirmed his findings throughout. *See, e.g.*, RX2963 at 262-63; RX2964 at 42-43, 101-02. Accordingly, his expert report is properly considered on a motion for summary decision.

3. Unexplained Communications with Competitors

As discussed above in Section III.A, Complaint Counsel offer evidence of high-level contacts between the Respondents' executives, during which they exchanged views about their intentions not to bid for particular buying groups. In an appropriate case, such contacts can constitute a "plus factor" that tends to exclude the inference that the defendants acted independently. *See, e.g.*, *In re Publ'n Paper Antitrust Litig.*, 690 F.3d at 65 (finding inference of conspiracy permissible because, among other reasons, defendants engaged in private phone calls and meetings at which they disclosed their pricing intentions before those decisions were publicly announced); *Gainesville Utils. Dep't v. Florida Power & Light Co.*, 573 F.2d 292, 300-01 (5th Cir. 1978) (finding that parallel activity plus numerous communications between rival firms' high-level executives, including notifications to each other about refusals to serve customers in the other's territory, point strongly to existence of conspiracy).

Here, Complaint Counsel have submitted evidence they assert demonstrates that Respondents' inter-firm communications were not mere information exchanges, but were intended to elicit mutual assurances of non-competition. For example, Complaint Counsel note that Cohen's original impetus for reaching out to Guggenheim about NMDC was that he had learned that the buying group was touting a potential partnership with Patterson. CCOppB at 5; CX0055-004. Afterward, [redacted] CCSMF ¶ 22. Complaint Counsel suggest that Cohen veiled his outreach to Guggenheim to avoid suspicion. *See* CCOppB at 5-6. Complaint Counsel also offer evidence that Benco's personnel understood that they had a channel to Patterson that they could use if necessary. When Benco executive Patrick Ryan learned that another distributor, Burkhart, was discounting to buying groups, he wrote to Cohen: "CHUCK – maybe what you should do is make sure you tell Tim [Sullivan, President of Schein] and Paul [Guggenheim] to hold their positions as we are." CCSMF ¶ 32.

4. Evidence of Patterson's Changes of Conduct

Complaint Counsel point to an additional "plus factor" in the form of evidence of changes in Patterson's conduct. Courts have held that abrupt changes in conduct can serve as a "plus factor" because they tend to show that a market participant's conduct was not independent. In *Toys "R" Us, Inc. v. FTC,* 221 F.3d 928 (7th Cir. 2000), toy manufacturers abruptly decided to stop dealing with warehouse clubs based on direct negotiations between the toy manufacturers and Toys "R" Us, which was attempting to organize a boycott of the clubs. The Seventh Circuit found that it was "suspicious" for the manufacturers to deprive themselves of a profitable sales outlet. *Id.* at 935-36. The court affirmed that this was a horizontal agreement. *Id.*; *see also In re Domestic Drywall Antitrust Litig.*, 163 F. Supp. 3d at 255-56 (within weeks of each other, drywall manufacturers all changed policy and refused to issue "job quotes" that had been in use since the 1980s).

Based on Mr. Guggenheim's testimony, Complaint Counsel assert that [redacted] in February 2013 when Cohen sent his initial email to Guggenheim. CCOppB at 25 (citing [redacted] Complaint

Counsel assert that after the February 2013 Cohen-Guggenheim correspondence, however, Patterson instructed its salesforce to reject buying groups and, in fact, repeatedly rejected buying group customers. *Id.* at 25-26. Complaint Counsel also point to the change of conduct that took place after the alleged conspiracy ended – namely, that in 2016 Patterson did provide discounts to some buying groups. *Id*. at 12, 27. Complaint Counsel also identify two apparent shifts in Patterson's approach to ADC, as discussed above in Section III.A: (1) Patterson's rejection of ADC in February 2013 after the Cohen-Guggenheim correspondence; and (2) Patterson's effort to re-engage with ADC after a June 2013 Cohen-Guggenheim exchange in which Benco clarified its view that ADC was not a buying group. CCOppB at 26-27.

IV. ANALYSIS

Complaint Counsel insist that it has proffered direct and unambiguous evidence of an agreement, including the Cohen-Guggenheim email exchange. CCOppB at 13-18. In support of its Motion, Patterson has, in significant part, offered competing interpretations of Complaint Counsel's evidence and disputed whether it is direct evidence. PMSD at 16-19; PRB at 11-12. At summary decision, we need not choose among the competing interpretations or decide whether the evidence is direct or circumstantial. We need only determine whether the record *as a whole* offers sufficient evidence of an agreement to create a genuine issue of material fact. *See In re High Fructose Corn Syrup Antitrust Litig.,* 295 F.3d 651, 661 (7th Cir. 2002); *see also Gallo v. Prudential Residential Servs.*, 22 F.3d 1219, 1224 (2d Cir. 1994) ("When no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight, there is no genuine issue of material fact and a grant of summary judgment is proper.").[12] We find that the record contains evidence of an agreement sufficient to create a genuine issue for trial.

A. Inter- and Intra-Firm Communications and Monitoring and Compliance Evidence

We find that it is a plausible interpretation of the evidence 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. Moreover, the intra-firm communications could support an inference that Patterson understood that Benco and Schein had joined it in declining to bid for buying groups. *See, e.g.*, CCSMF ¶ 43 (quoting a Patterson document stating, "Confidential and not for discussion . . [.] our 2 largest competitors stay out of these as well").

Furthermore, the inter- and intra-firm communications could support an inference that Patterson believed it had channels through which it could raise with Benco its concerns about potential sales to buying groups. Regarding Benco's potential sponsorship of the TDA trade

[12] In *High Fructose Corn Syrup,* Judge Posner explained that a "trap to be avoided" is to suppose that "if no single item of evidence presented by the plaintiff points unequivocally to conspiracy, the evidence as a whole cannot defeat summary judgment. It is true that zero plus zero equals zero. But evidence can be susceptible of different interpretations, only one of which supports the party sponsoring it, without being wholly devoid of probative value for that party. Otherwise what need would there ever be for a trial?" 295 F.3d at 655.

show, Patterson's Rogan suggested a "[t]hought I could trust you" conversation, which could imply a sense of mutual obligation to boycott buying groups. *Id.* at ¶ 51. Regarding Benco's bid to ADC, Guggenheim wrote directly to his counterpart, Cohen, to inquire whether Benco's policy toward buying groups had changed. CX3301-001. Cohen's elaborate response to Guggenheim, in which he described in detail why ADC was not a buying group, could support the inference that Cohen felt obligated to explain this apparent shift to Guggenheim and to remain compliant with the original assurance he provided not to deal with buying groups. *See Twombly*, 550 U.S. at 556 n. 4 (noting that "conduct that indicates the sort of restricted freedom of action and sense of obligation" is "generally associate[d] with agreement") (citation and original brackets omitted).

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," and perhaps even mimic one another's behavior.[13] However, the June 2013 Guggenheim-Cohen exchange regarding ADC, which revisits the assurances that each gave to refuse to compete for buying groups, could support an inference that Patterson sought to monitor or foster compliance with a conspiracy.[14] Patterson's apparent desire to avoid documenting the assurances against competition for buying groups' business underscores their oddity. CCSMF ¶ 43 ("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."); *see also* CX3300-001 ("Please discuss live and no further emails [on this topic]"); CCSMF ¶ 35 ("We don't sell to buying groups. Let's talk live.").

Patterson asserts that its communications with competitors cannot support a finding of conspiracy because all of the communications involving particular buying groups took place after Patterson independently decided not to negotiate with those groups. PMSD at 29. Specifically, Patterson notes that [redacted] *Id.* at 16. Patterson also asserts that [redacted] *Id.* at 26. In addition, Patterson claims that [redacted] *Id.*

We find Patterson's argument unpersuasive. First, Patterson's factual assertions regarding the timing of key decisions are disputed. Complaint Counsel claim that, although Patterson's branch manager cancelled the meeting with NMDC before the Cohen-Guggenheim

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[13] *See In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 873, 879 (7th Cir. 2015) (Posner, J.). Of course, consciously parallel behavior by competitors in a concentrated market without a meeting of the minds is not, by itself, unlawful. *Twombly,* 550 U.S. at 553-54 (citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 227 (1993)).

[14] Patterson contends that Guggenheim only sought to gain [redacted] by his June 2013 email to Cohen. PRB at 12. However, Patterson's dispute of the meaning of the evidence does not support its claim for summary decision because it either suggests a genuine issue of material fact or it fails to view the evidence in the light most favorable to the non-moving party, which is not the appropriate standard on summary decision.

exchange, he expressed his intention to schedule a different meeting with NMDC and to continue partnering with the group. CCOppB at 6 n.30 (citing CX4090). It was not until three days after the exchange that Patterson informed NMDC that it would not be partnering with the buying group. *Id.* at 6. Further, with respect to the communications regarding whether ADC was a buying group, Complaint Counsel have provided evidence that, even though Patterson did not bid for that business initially, Guggenheim instructed his salesforce after the exchange with Cohen to [redacted] *Id.* at 26. Thus, there is a factual dispute regarding whether Patterson's communications about particular buying groups or transactions occurred prior to the relevant Patterson decision.

Second, viewed in the light most favorable to Complaint Counsel, a factfinder could reasonably conclude that Patterson's communications with its rivals regarding past decisions helped ensure its continued adherence to a conspiracy when presented with future business opportunities. In other words, confirming that Benco or Schein stuck to a boycott could influence Patterson's decision to continue doing the same when approached by buying groups in the future. Indeed, Complaint Counsel have provided evidence from which a reasonable trier of fact could find that the Respondents' inter-firm communications actually influenced Patterson's business decisions. Guggenheim's email response to Cohen's NMDC email appears to have preceded an outpouring of instructions from Patterson's upper management to its sales staff not to deal with buying groups and to monitor Benco and Schein's engagements with buying groups. CCSMF ¶ 33 ("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."); *id.* ¶¶ 34-40 (email from Misiak: "My guidance has been to politely say no [to buying groups] and w[ea]ther the storm with these"; email from Rogan: "We don't sell to buying groups. Let's talk live"; email from McFadden (President of Special Markets): "As a rule we are trying our best to steer clear of all buying groups").

Third, even if *Patterson* had already reached its decision not to deal with a particular buying group, a factfinder could reasonably infer that its inter-firm communications encouraged Benco and Schein to continue to refuse to negotiate with buying groups. Benco and Schein executives made it clear that Patterson's assurances were relevant to their decision not to sell to buying groups. CCSMF ¶ 31 ("We don't allow [volume discount] pricing unless there is common ownership. Neither Schein nor Patterson do either."). Regarding the TDA, a Schein executive wrote, "[t]he good thing here is that [Patterson], Benco and us are on the same page regarding these buying groups/consortiums." *Id.* at 11 n.61.

Patterson also proffers evidence that its representatives met with and evaluated buying groups during the conspiracy period, but this evidence does not compel summary decision in Patterson's favor. Complaint Counsel need not prove that the parties to a conspiracy complied perfectly with it. *See In re High Fructose Corn Syrup,* 295 F.3d at 656 (counseling against the "trap" on summary judgment of "failing to distinguish between the existence of a conspiracy and its efficacy"). In any event, the parties sharply dispute the extent to which Patterson sold to buying groups during the alleged conspiracy period. *Compare* PMSD at 24 (Patterson "met with and evaluated whether to sell to 'buying groups' – and sold to them when it made sense to Patterson, and did not, when it did not") *with* CCSMF ¶ 59 ("Patterson routinely rejected buying

groups during the conspiracy") *and* CCSMF ¶ 30 ("[W]e've signed an agreement that we won't work with GPO's.").

Patterson's other claims of non-compliance also do not preclude an inference of a conspiracy. Patterson points to evidence that it competed vigorously against Benco and Schein for market share during the alleged conspiracy period. Among other examples, this evidence includes efforts to [redacted] competitors with price cuts and better service; to [redacted] them to Patterson; to [redacted]; and to [redacted] PMSD at 1; PSMF ¶¶ 21-32. Patterson argues that this evidence is inconsistent with a conspiracy and demonstrates its independent decision-making and procompetitive conduct. PMSD at 24-25. In response, Complaint Counsel point out that Patterson's evidence describes competition for DSOs and independent dentists, not buying groups. CCOppB at 27-28. DSOs and independent dentists are outside the scope of the alleged conspiracy, say Complaint Counsel, and hence competition for their business is not material. *Id.* We agree. Respondents' vigorous competitive give-and-take for the business of independent dentists and DSOs could be seen as highlighting, by way of contrast, the unusual nature of their conduct in declining to compete for buying groups.

When viewed in the light most favorable to Complaint Counsel, as they must be at the summary decision stage, the inter- and intra-firm communications, combined with the other evidence of Patterson's monitoring and compliance efforts during the alleged conspiracy period, provide support for a reasonable trier of fact to find that the Respondents shared a "unity of purpose or a common design and understanding, or a meeting of minds." *Am. Tobacco Co.*, 328 U.S. at 810. *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."); *White v. R.M. Packer Co.,* 635 F.3d 571, 576 (1st Cir. 2011) (tacit agreement can be shown by "uniform behavior among competitors, preceded by conversations implying that later uniformity might prove desirable") (quotation omitted); *see also United States v. Beaver,* 515 F.3d 730, 738 (7th Cir. 2008) (upholding jury's conspiracy verdict in part based on monitoring evidence); *In re Plywood Antitrust Litig.,* 655 F.2d 627, 634 (5th Cir. 1981) (same).[15]

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[15] The Ninth Circuit's discussion in *Esco Corp. v. United States*, 340 F.2d 1000 (9th Cir. 1965), is also instructive. There, the court provided an example of competitors who meet and state in round-robin fashion what they plan to charge for their products, while simultaneously denying that they intend to fix prices. *Id.* at 1007. The competitors leave the meeting and all charge the same price for their products. Observing that "[a] knowing wink can mean more than words," *id.,* the court reasoned that, while such facts would not compel an inference of conspiracy, they also would not compel an inference of no conspiracy, and the case is appropriate for disposition by a factfinder. *Id.; see also United States v. Foley,* 598 F.2d 1323, 1332 (4th Cir. 1979) (upholding conspiracy verdict when real estate broker announced his intention to raise commissions, stating that he did not care what the others did, and each competitor raised its commissions in tandem).

B. Plus Factors

Complaint Counsel identify four plus factors that they contend support the inference of a conspiracy. Patterson substantially disputes this conclusion with respect to each of the four factors. For the reasons describe below, we find that the plus factor evidence put forward by Complaint Counsel further militates against summary decision.

1. Respondents' Motive to Conspire

First, Complaint Counsel maintain that Respondents shared a motive to resist discounting without risking the loss of business to one another. CCOppB at 19-20. Complaint Counsel have marshalled evidence that Patterson perceived buying groups as a threat and was concerned about its competitors' willingness to compete for buying group business. *See* Section III.C.1. Patterson does not specifically assert that it did not have a common motive to conspire with Benco and Schein. Instead, it produces evidence to show that it generally had independent and legitimate reasons to refuse business with buying groups, including [redacted]. PMSD at 11-12; PSMF ¶¶ 16-19; PRB at 9-10.

Patterson's asserted independent reasons arguably might be a plausible basis for Patterson to decline to bid for buying group business, but such reasons are insufficient to preclude a finding that Patterson had a collective interest to conspire with Benco and Schein. Viewing the record as a whole, a factfinder could conclude that buying groups were undesirable for the reasons Patterson claims *and also* a threat to each Respondent's margins if the others chose to compete. If indeed buying groups posed such a threat, a factfinder could also reasonably infer that a conspiracy with Benco and Schein could minimize the threat. *See* [redacted]

Moreover, antitrust defendants are not entitled to summary judgment "merely by showing that there is a plausible explanation for their conduct." *In re Linerboard Antitrust Litig*., 504 F. Supp. 2d 38, 61-62 (E.D. Pa. 2007) (quoting *Intervest, Inc. v. Bloomberg, LP*., 340 F.3d at 160). "Indeed, if solid economic reasons existed for refusing service to [potential customers], there was no reason for communicating with a competitor about the refusal[.]" *Gainesville Utils. Dep't v. Florida Power & Light Co.*, 573 F.2d at 301. We conclude, therefore, that there is evidence from which a trier of fact could find that the Respondents had a common motive to conspire.

2. Actions Against Patterson's Unilateral Economic Self Interest

For a second plus factor, Complaint Counsel submit that Patterson acted against its *unilateral* self-interest in refusing to sell to the buying groups. As one court explained, action against self-interest requires "a showing that the defendants' behavior would not be reasonable or explicable (*i.e.* not in their legitimate economic self-interest) if they were not conspiring to fix prices or otherwise restrain trade – that is, that the defendants would not have acted as they did

had they not been conspiring in restraint of trade." *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d at 572.

Complaint Counsel offer sufficient evidence from which a fact finder could conclude that Patterson took actions against its unilateral self-interest in declining to deal with buying groups, including (1) admissions by Patterson officials about lost buying group business, *see* [redacted]; CX3089; CX0093; CX3043, (2) an economic analysis of lost profits, *see* [redacted] and (3) a change in Patterson's behavior before and after the alleged conspiracy. *See* CCOppB at 12 & n.68; CCSMF ¶ 66.

Patterson asserts that Complaint Counsel's allegation of actions against self-interest "suffer[s] from severe hindsight bias." PRB at 13. Patterson points to evidence that the Kois buying group was [redacted] *Id.* at 9-10 (citing RX3023 (Kois Sr. Dep.) at 125-27). Burkhart, another dental supplier not alleged to be part of the conspiracy, had also rejected Kois initially. PRB at 13. Patterson also disputes the validity and utility of Dr. Marshall's analysis, calling it "sleight-of-hand." *Id.* at 3. Patterson points out that Dr. Marshall's case studies involved Kois and Smile Source, *not* the two specific buying groups – NMDC and ADC – that the company had discussed in emails with Benco, and asserts that some of the examples do not pertain to the alleged conspiracy period. *Id.* Patterson further argues that Dr. Marshall's sample size of dentists is insufficient and that [redacted] *Id.* at 3-4.

Complaint Counsel's evidence of Patterson's actions against self-interest may reasonably be subject to differing views. Nonetheless, resolving ambiguities in favor of Complaint Counsel, as we must on summary decision, we find that Complaint Counsel's evidence identified above tends to exclude the possibility that Patterson acted independently in declining to compete for the business of buying groups.[16] *See Petruzzi's IGA Supermarkets*, 998 F.2d at 1244-46 (holding that the defendants' failure to bid on each other's accounts raised an inference of a conspiracy). Patterson does not dispute that some of its "high quality / high producing clients" joined Kois, CX3089, yet the company did not bid for Kois business. Furthermore, the fact that Patterson and Benco did not specifically discuss Kois and Smile Source does not defeat the inference that Complaint Counsel seek, because the emails *did* discuss the parties' respective policies vis-à-vis buying groups generally. Accordingly, we find that this plus factor weighs against summary decision.

3. Unexplained Communications with Competitors

Third, Complaint Counsel assert that the proffered evidence of high-level, inter-firm communications between the Respondents' executives amount to unexplained communications with competitors, a plus factor that tends to exclude the inference that the defendants acted

[16] In the absence of a well-founded motion to exclude Dr. Marshall's testimony as unreliable under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), we find that Patterson's critique of his methods and conclusions is appropriate for cross-examination at trial rather than a basis for summary decision.

independently. Patterson maintains that the inter-firm communications in this case are too few and innocuous to serve as plus factor evidence. PRB at 15-16. To be sure, courts have held "sporadic exchanges of shop talk" by lower-level employees insufficient to defeat summary judgment in price-fixing cases. *See, e.g.*, *In re Baby Food Antitrust Litig.,* 166 F.3d at 125. However, the exchanges here go beyond shop talk and, as discussed in Section IV.A above, could be interpreted as efforts to elicit assent and encourage adherence to an agreement. Accordingly, we find that this plus factor could contribute to an inference of conspiracy.

4. Evidence of Patterson's Change of Conduct

Finally, Complaint Counsel contend that Patterson's change of conduct amounts to a plus factor. As noted above, the parties disagree sharply over the extent to which Patterson did, or did not, decline to deal with buying groups during the alleged conspiracy. *See* Section IV.A. They also disagree over the extent to which Patterson's hesitance to deal with such groups represented a change in its policies.

Complaint Counsel proffer evidence that [REDACTED] in early 2013 and was actively negotiating with NMDC. CCOppB at 25; CCSMF ¶¶ 19-20, 23. After the February 2013 Cohen-Guggenheim exchange, according to Complaint Counsel, Patterson executives instructed employees to refuse buying group business and they complied. CCOppB at 25; CCSMF ¶¶ 33-41. Complaint Counsel also submit evidence that Patterson changed course on ADC twice after Cohen-Guggenheim exchanges in February and June 2013, first to decline the ADC opportunity because Patterson believed it to be a buying group and second to seek to re-engage with ADC upon learning that Benco did not regard ADC as a buying group. CCOppB at 26-27; CCSMF ¶¶ 42-48. By contrast, Patterson points to evidence that it was reluctant to deal with buying groups and refused to do business with them even before the alleged conspiracy. PMSD at 11; PRB at 2; PSMF ¶¶ 51-54. At the same time, Patterson claims, [REDACTED] *Id.* at 13-14.

The trial in this matter should help resolve the parties' disagreement over whether Patterson changed its behavior as part of an agreement with its competitors not to deal with buying groups. What is clear at this point, however, is that the factual disputes reflected by the parties' divergent positions on this question raise an issue of fact appropriate for resolution at trial.

C. Sworn Statements

Having surveyed the record evidence above, we now address Patterson's argument that, at summary decision, some types of record evidence are not rebuttable by others. Specifically, Patterson argues that, without sworn rebuttals from Complaint Counsel, the "hundreds" of sworn denials of conspiracy from "every witness in the case" compel summary decision in its favor. PMSD at 3 (citing *City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 130 (D.D.C.

2006) ("Facing the sworn denial of the existence of conspiracy, it [is] up to plaintiff to produce significant probative evidence by affidavit or deposition that conspiracy existed if summary judgment [is] to be avoided") (citation omitted)). If Patterson reads the relevant case law to preclude a non-movant from relying on unsworn record evidence, such as contemporaneous emails and text messages, to defeat summary decision, that reading is erroneous.[17]

In *Celotex,* 477 U.S. at 324, the Supreme Court confirmed that a non-moving party may use any part of the evidentiary record, "except the mere pleadings themselves," to oppose summary judgment. Here, as required by our Rule 3.24(a)(2), Complaint Counsel filed a Statement of Disputed Material Facts as to Which There Is a Genuine Issue for Trial that was supported by numerous record cites to documentary evidence and deposition testimony. As *Celotex* instructs, these documents and this testimony may be used in an effort to rebut Patterson's sworn denials and to defeat summary decision.

Patterson is also incorrect when it argues that, in the face of sworn denials, a conspiracy may be shown only by direct evidence, such as an admission by a conspirator. As discussed above, a plaintiff may defeat summary decision by producing evidence from which such an agreement can be inferred. *In re High Fructose Corn Syrup Antitrust Litig.,* 295 F.3d at 655; *see also City of Tuscaloosa v. Harcros Chems.,* 158 F.3d at 569. Consequently, the sworn denials of conspiracy do not compel summary decision in Patterson's favor.

IV. CONCLUSION

Complaint Counsel have provided evidence showing that Patterson and the other Respondents exchanged communications emphasizing their policies against negotiating with buying groups; discussed coordinating with each other in internal documents; monitored each other's actions; and contacted each other to confirm continued compliance with those policies. Complaint Counsel also have provided evidence supportive of findings that Patterson had an economic motive to conspire; acted contrary to its own self-interest; and severed ongoing discussions with and shifted policies concerning buying groups. Based on this evidence, a trier of fact reasonably could conclude that Patterson conspired with the other Respondents to refrain

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[17] Patterson's reliance on *City of Moundridge* is misplaced for several reasons. As a procedural matter, the opinion to which Patterson cites was rendered on the plaintiffs' motion for preliminary injunction, not a motion for summary judgment. 429 F. Supp. 2d at 117, 127, 129-30. In a subsequent opinion, the court granted the defendants' motion for summary judgment because the plaintiffs could not show that the defendants discussed pricing or made pricing decisions based on information exchanges. *City of Moundridge v. Exxon Mobil Corp.*, 2009 WL 5385975, at *9 (D.D.C. Sept. 30, 2009), *aff'd*, 409 F. App'x 362 (D.C. Cir. 2011). In this case by contrast, as discussed above, there is evidence from which a trier of fact could find that Respondents discussed their refusal to deal with buying groups and made decisions based on these communications. Moreover, the Seventh Circuit case, *Lamb's Patio Theatre, Inc. v. Universal Film Exchanges, Inc.*, from which *City of Moundridge* takes the language quoted by Patterson, is inapposite to the situation before us. 582 F.2d 1068 (7th Cir. 1978). There, the plaintiff sought an inference of conspiracy solely from allegations that (1) the defendant rejected the plaintiff's bid in favor of a bid with less favorable terms, and (2) the defendant's explanation for its decision was inconsistent with its prior course of dealing. *Id.* at 1069-70. Only after holding that these allegations by themselves were insufficient to support a finding of conspiracy did the court go on to make the statement quoted in *City of Moundridge*. *Id.* at 1070. In the instant case, we have before us not only allegations that could support a showing of conspiracy, but also sufficient evidence from which a reasonable trier of fact could infer an agreement, something that was entirely lacking in *Lamb's Patio Theatre*.

from negotiating with buying groups. Patterson vigorously debates the significance and implication of Complaint Counsel's evidence and offers countervailing evidence of its own, but in doing so, it does no more than underscore the material issues of disputed fact in this case. Those issues are properly resolved at trial. We therefore deny Patterson's Motion for Summary Decision.

Accordingly,

IT IS ORDERED THAT Respondent Patterson's Motion for Summary Decision is **DENIED.**

By the Commission.

Donald S. Clark
Secretary

SEAL:
ISSUED: November 26, 2018