

PUBLIC

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



In the Matter of )  
)  
)

BENCO DENTAL SUPPLY CO., )  
a corporation, )  
)

HENRY SCHEIN, INC., )  
a corporation, and )  
)

PATTERSON COMPANIES, INC. )  
a corporation. )  
)  
)  
)

DOCKET NO. 9379

COMPLAINT COUNSEL'S POST-TRIAL REPLY TO RESPONDENT BENCO  
DENTAL SUPPLY CO.'S PROPOSED FINDINGS OF FACT

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## RECORD REFERENCES

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

CX# – Complaint Counsel Exhibit

RX# – Respondent Exhibit

CXD# – Complaint Counsel Demonstrative Exhibit

RXD# – Respondent Demonstrative Exhibit

Name of Witness, Tr. xx – Trial Testimony

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

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

JSLF ¶ x – Joint Stipulations of Law and Fact

Complaint ¶ x – Complaint Counsel’s Complaint filed February 14, 2018

Answer ¶ x – (Name of Respondent) Answer to Complaint

RFA ¶ x – (Name of Respondent) Response to Complaint Counsel’s Requests for Admission

CRFA ¶ x – Complaint Counsel’s Response to Respondent’s Requests for Admission

CMTD at x – Complaint Counsel’s Opposition to Patterson’s Motion to Dismiss

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

CCFF ¶ – Complaint Counsel Finding of Fact

CCRF ¶ – Complain Counsel Reply Finding of Fact

BFF ¶ – Benco Proposed Finding of Fact

{ **bold** } – *In Camera* Material

**I. RESPONSES TO PROPOSED FINDINGS REGARDING “OVERVIEW AND BACKGROUND OF BENCO DENTAL SUPPLY CO.”**

**A. RESPONSES TO PROPOSED FINDINGS REGARDING “BENCO BASICS”**

1. Benco is a privately-owned distributor of dental supplies and equipment headquartered in Pittston, Pennsylvania. (Cohen, Tr. 400).

**Response to Proposed Finding No. 1**

Complaint Counsel has no specific response.

2. Benco has over 50 showrooms and 5 distribution centers located across the United States, and, in 2016 sold over 62,000 distinct dental products. (Cohen, Tr. 408; RX1140).

**Response to Proposed Finding No. 2**

The Proposed Finding is incorrect in part and improperly cited in part. The single page of Cohen’s trial testimony cited contradicts the proposed fact that Benco has “over 50 showrooms.” The testimony was “Q. And 50 regional showrooms? A. It’s fewer than 50 now. We have about 35 local showrooms.” (Cohen, Tr. 408). There is no cited basis for the claim that in 2016 Benco sold over 62,000 distinct dental products. Perhaps the citation is meant to be found in RX1140. However, there is no pin citation and, more importantly, RX1140 is the expert report of Dr. John H. Johnson, IV, from a separate litigation to which the FTC was not a party. Pursuant to the court’s orders, the finding should be disregarded because Dr. Johnson, Respondent’s expert in a separate matter, is being relied upon for factual propositions that should be established through fact witnesses or documents, not through an expert. (*See* Feb. 21, 2019 Order on Post-Trial Briefs; Tr. 25).

3. Benco employs over 400 sales representatives (including territory representatives, equipment specialists, and regional managers) and 300 service technicians. (Cohen, Tr. 408).

**Response to Proposed Finding No. 3**

Complaint Counsel has no specific response.



4. Benco offers services that include dental office design, practice consulting, financing and real estate planning, wealth management, equipment repairs, and computer hardware, software, and systems for dentists. (Cohen, Tr. 404; 601).

**Response to Proposed Finding No. 4**

The Proposed Finding is not supported in part by the evidence cited. The Proposed Finding states that Benco offers financing and real estate planning, wealth management, computer hardware, software, and systems for dentists, none of which have support in the cited testimony.

5. Benco sells all of the supplies, equipment and services that are essential to running a dental practice. (Cohen, Tr. 600).

**Response to Proposed Finding No. 5**

Complaint Counsel has no specific response.

6. [REDACTED]

**Response to Proposed Finding No. 6**

The Proposed Finding is not supported by the evidence cited. The Proposed Finding cites a single page of deposition testimony from an unrelated case, held at Cohen's lawyers' office in a matter to which the FTC was neither a party nor present. The Proposed Finding includes unsupported statements such as [REDACTED]

[REDACTED]  
[REDACTED].

7. Benco organizes its sales representatives into regions, many of which span portions of multiple states. (CX0301).

**Response to Proposed Finding No. 7**

The Proposed Finding is not verifiable. The Proposed Finding cites the entire Cohen investigational hearing. It is indeterminable which of the 388 pages of testimony should be credited, if at all.

8. Benco's customers include independent dentists, dental laboratories, corporate dentistry, institutions, and dental service organizations ("DSO's"). (Cohen, Tr. 600-601).

**Response to Proposed Finding No. 8**

The Proposed Finding includes unsupported assertions. The Proposed Finding says Benco customers include "corporate dentistry" and "DSO's." It is unclear to what corporate dentistry refers. Cohen did not say "corporate dentistry;" he only referred to "DSOs."

9. Dental supplies, or consumables, are the products that dentists use to provide services to patients, including gloves, fillings, amalgam, anesthetic, and instruments. (Cohen, Tr. 601).

**Response to Proposed Finding No. 9**

Complaint Counsel has no specific response.

10. Dental equipment are large items within a dental office, including chairs, lights, cabinets, and x-ray machines. (Cohen, Tr. 601).

**Response to Proposed Finding No. 10**

The Proposed Finding lacks support for the statement attributed to Cohen that "dental equipment" includes lights, cabinets, and x-ray machines. In the single page of support cited for this Proposed Finding, Cohen said dental equipment included chairs (in Proposed Finding), lasers (not in Proposed Finding), and handpieces (not in Proposed Finding). It is unclear what the basis is for stating that dental equipment includes "lights, cabinets, and X-ray machines" in the Proposed Finding.

11. Benco distributes dental supplies and equipment supplied by various manufacturers. (CX0301).

**Response to Proposed Finding No. 11**

The Proposed Finding is not verifiable. The Proposed Finding cites the entire Cohen investigational hearing. It is indeterminable which of the 388 pages of testimony should be credited, if at all.

12. Manufacturers that supply Benco with dental supplies and equipment for distribution include household names such as Proctor & Gamble or 3M, large dental-only manufacturers like Dentsply, Kavo-Kerr, and Ivoclar, and smaller vendors such as GC America, Butler Sunstar, and Premier Dental. (Cohen, Tr. 602).

**Response to Proposed Finding No. 12**

Complaint Counsel has no specific response.

13. Some manufacturers sell directly to dentists. (Cohen, Tr. 602).

**Response to Proposed Finding No. 13**

Complaint Counsel has no specific response.

14. Some manufacturers sell exclusively through only one distributor. (Cohen, Tr. 602).

**Response to Proposed Finding No. 14**

The Proposed Finding is not supported by the evidence cited. The cited testimony does not say that “some manufactures sell exclusively through only one distributor”; rather, the testimony says “[t]here are some manufacturers who sell through Benco and other distributors as well.”

The word “exclusively” is not used and the testimony does not suggest it.

15. Benco does not have, and does not believe in, exclusive distribution relationships with manufacturers.

**Response to Proposed Finding No. 15**

The Proposed Finding should be rejected. There is no offer of proof or citation of any kind.

Moreover, the Proposed Finding is inconsistent with Benco’s Proposed Findings Nos. 96, 114, and 116.

16. Benco distributes dental supplies and equipment from “thousands” of manufacturers. (Cohen, Tr. 603).

**Response to Proposed Finding No. 16**

Complaint Counsel has no specific response.

17. Some of Benco's relationships with manufacturers have existed for decades, whereas for others, Benco must consistently work hard to build and maintain its relationships with manufacturers. (Cohen, Tr. 605).

**Response to Proposed Finding No. 17**

Complaint Counsel has no specific response.

18. Chuck Cohen believes that Benco's sterling reputation is a critical factor to developing manufacturer relationships and representing the manufacturer's products that Benco distributes. (Cohen, Tr. 605).

**Response to Proposed Finding No. 18**

Complaint Counsel has no specific response.

19. By consolidating products from various manufacturers for distribution, Benco provides its customers with a one-stop shopping experience for the entire market basket of goods required to operate and run a dental practice. (Cohen, Tr. 605-606).

**Response to Proposed Finding No. 19**

Complaint Counsel has no specific response.

20. Benco's sales force is comprised of territory representatives and equipment specialists. Benco service technicians also visit dental offices. (Cohen, Tr. 608).

**Response to Proposed Finding No. 20**

Complaint Counsel has no specific response.

21. Territory representatives make regular visits to dental offices and serve as the primary point of contact between Benco and its customers. (Cohen, Tr. 608).

**Response to Proposed Finding No. 21**

The Proposed Finding is not supported in part by the cited evidence. The finding fails to provide any support for the part of the finding stating "[Territory Representatives] serve as the primary point of contact between Benco and its customers."

22. Benco currently has approximately 400 territory representatives throughout the United States. (Cohen, Tr. 612).

**Response to Proposed Finding No. 22**

Complaint Counsel has no specific response.

23. Equipment specialists focus solely on selling equipment to dental practices and often work closely with territory representatives in connection with equipment sales. (Cohen, Tr. 608).

**Response to Proposed Finding No. 23**

The Proposed Finding is not supported by the evidence cited. The Proposed Finding states:

“Equipment specialists focus solely on selling equipment to dental practices and often work closely with territory representatives in connection with equipment sales.” However, the cited testimony merely states “we have equipment specialists who come when it’s time for the doctor to buy equipment,” saying nothing about the focus of the equipment specialists, nor about working with the representatives closely.

24. Benco currently has 68 equipment specialists throughout the United States. (Cohen, Tr. 408).

**Response to Proposed Finding No. 24**

Complaint Counsel has no specific response.

25. Benco also has service technicians that install dental equipment, repair equipment if it breaks down, or otherwise provide required maintenance. (Cohen, Tr. 608).

**Response to Proposed Finding No. 25**

Complaint Counsel has no specific response.

26. Benco currently has approximately 300 service technicians throughout the United States. (Cohen, Tr. 408).

**Response to Proposed Finding No. 26**

Complaint Counsel has no specific response.

27. Benco today has approximately 1,500 employees and generated approximately \$800M in revenue in 2018. (Cohen, Tr. 612).

**Response to Proposed Finding No. 27**

Complaint Counsel has no specific response.

28. [REDACTED]

**Response to Proposed Finding No. 28**

Complaint Counsel has no specific response.

29. Benco does not allow any thing or any entity to come between Benco and its customers. (RX1127-486).

**Response to Proposed Finding No. 29**

The Proposed Finding is misleading and irrelevant. It is misleading to the extent it omits Benco's Success Partners including the Kois Center, (BFF ¶ 334), and Cain Waters, (BFF ¶ 235), or the relationship with the buying group, EDA, (BFF ¶ 247). The Proposed Finding is irrelevant to whether Benco conspired with its competitors to avoid discounting to buying groups.

30. Benco competes with Schein, Patterson and any other seller of dental supplies and equipment through its value proposition. Benco competes and distinguishes itself from its competitors by relying upon the exceptional service provided by its sales force, better selection of products, better delivery of products, better pricing, and better overall value. (RX1127-486).

**Response to Proposed Finding No. 30**

The Proposed Finding misrepresents Cohen's testimony in the cited deposition to which the FTC was neither present nor a party. Cohen was asked who Benco competes with and he answered "primarily with Henry Schein, primarily with Patterson, Burkhart and the full-line distributors." (RX1127 at 485). Cohen did not say that Benco distinguished itself by relying on the "exceptional service provided by its sales force"; Cohen said that they compete by using "face-to-face sales people." (RX1127 at 485).

**B. RESPONSES TO PROPOSED FINDINGS REGARDING "BENCO CO-MANAGING DIRECTOR, CHUCK COHEN"**

31. Charles F. Cohen ("Chuck Cohen" or "Cohen") and Richard S. Cohen ("Rick Cohen") are Co-Managing Directors of Benco. (Cohen, Tr. 400).

**Response to Proposed Finding No. 31**

Complaint Counsel has no specific response.

32. Chuck Cohen and Rick Cohen have been Co-Managing Directors of Benco since around 1998 or 1999. (Cohen, Tr. 401).

**Response to Proposed Finding No. 32**

Complaint Counsel has no specific response.

33. Chuck Cohen and Rick Cohen are the Co-Owners of Benco. (Cohen, Tr. 400).

**Response to Proposed Finding No. 33**

Complaint Counsel has no specific response.

34. Between 1984 and 1989, Chuck Cohen had various part-time roles working at Benco. (Cohen, Tr. 401-402).

**Response to Proposed Finding No. 34**

Complaint Counsel has no specific response.

35. Chuck Cohen joined Benco full-time in 1989 as a Territory Representative in New York visiting independent dentists and other Benco customers. (Cohen, Tr. 402).

**Response to Proposed Finding No. 35**

Complaint Counsel has no specific response.

36. In 1994, Chuck Cohen assumed a larger role within Benco, taking over various responsibilities from his father, Larry Cohen. (Cohen, Tr. 402).

**Response to Proposed Finding No. 36**

Complaint Counsel has no specific response.

37. Chuck Cohen assumed a leadership role at Benco in 1996, taking over day-to-day management of Benco from Larry Cohen. (Cohen, Tr. 400).

**Response to Proposed Finding No. 37**

Complaint Counsel has no specific response, except to say that the proper citation is (Cohen, Tr. 401).

38. As Co-Managing Director, Chuck Cohen, along with Rick Cohen and Benco's management team, oversees Benco's business strategy, including its strategy for growth, development, and expansion. (Cohen, Tr. 401).

**Response to Proposed Finding No. 38**

Complaint Counsel has no specific response.

39. As Co-Managing Director, Chuck Cohen also directly manages Benco's human resource, finance, sales, marketing, and business development functions. (Cohen, Tr. 401).

**Response to Proposed Finding No. 39**

Complaint Counsel has no specific response.

C. RESPONSES TO PROPOSED FINDINGS REGARDING "BENCO BEGINNINGS"

40. Benco was founded in 1924 by a 19-year old Russian immigrant, Ben Cohen, who started selling dental products out of his suitcase door-to-door throughout Pennsylvania and New York. (RX1099-003; Cohen, Tr. 618).

**Response to Proposed Finding No. 40**

Complaint Counsel has no specific response.

41. In 1930, Ben Cohen opened a small office in downtown Wilkes-Barre, Pennsylvania, a small city in the coal-mining region of Northeastern Pennsylvania. At the time, many small towns and cities in the United States had a single, small dental distributor like Benco. (RX1099-003; Cohen, Tr. 618).

**Response to Proposed Finding No. 41**

Complaint Counsel has no specific response.

42. Ben Cohen ran Benco as a small, "mom-and-pop" business from its inception into the 1960's. (RX1099-003; Cohen, Tr. 618-19).

**Response to Proposed Finding No. 42**

Complaint Counsel has no specific response.

43. Ben Cohen's son, Larry Cohen, joined Benco in 1959. During the 1960's, Larry Cohen assumed control of Benco's day-to-day operations. (RX1099-003; Cohen, Tr. 619).

**Response to Proposed Finding No. 43**

Complaint Counsel has no specific response.



44. Larry Cohen began to expand Benco by making it a full-service distributor, selling dental equipment and hiring service technicians to install and service dental equipment. (RX1099-003).

**Response to Proposed Finding No. 44**

Complaint Counsel has no specific response.

45. Larry Cohen established relationships with key manufacturers of dental supplies, was an early adopted of UPS, and began building Benco's distribution network. As a result, Benco expanded beyond Wilkes-Barre and Northeastern Pennsylvania to become a dental distributor that serviced the entire Mid-Atlantic Region of the United States. (RX1099-003-005; Cohen, Tr. 619-20).

**Response to Proposed Finding No. 45**

The Proposed Finding is vague; the finding does not offer a timeframe for the statement.

46. In 1993, Benco had just expanded into New England with the opening of a Boston office. Thereafter, Benco opened in Ohio and Richmond, Virginia. In 1993, Benco's territory was from Boston to Cleveland to Richmond, with the center still located in Wilkes-Barre, Pennsylvania. (RX1127-473).

**Response to Proposed Finding No. 46**

Complaint Counsel has no specific response.

47. Larry Cohen ran Benco until 1996, when Chuck and Rick Cohen assumed day-to-day management of the business. (Cohen, Tr. 400).

**Response to Proposed Finding No. 47**

Complaint Counsel has no specific response.

D. RESPONSES TO PROPOSED FINDINGS REGARDING "BENCO'S RAPID NATIONAL EXPANSION"

48. When Chuck Cohen assumed control of Benco, the company had 538 employees and generated \$116M in revenue in 1995. (RX1099-005).

**Response to Proposed Finding No. 48**

Complaint Counsel has no specific response.

49. At this time, Patterson was the largest full-service dental distributor in the United States, followed by Henry Schein, Sullivan Dental and Meer Dental. Benco was the fifth largest dental distributor. (Cohen, Tr. 623-24).

**Response to Proposed Finding No. 49**

Complaint Counsel has no specific response.

50. In 1998, Henry Schein merged with Sullivan Dental and Meer Dental, creating the largest full-service dental distributor in the United States. Following this merger, Patterson dropped to second and Benco – through no actions of its own – became the third largest full-service dental distributor in the United States. (Cohen, Tr. 625).

**Response to Proposed Finding No. 50**

Complaint Counsel has no specific response.

51. Chuck Cohen and Rick Cohen had an ambitious expansion plan; they wanted to grow Benco into a national, full-service dental distributor. (RX1127-473; Cohen, Tr. 628).

**Response to Proposed Finding No. 51**

Complaint Counsel has no specific response.

52. Benco sought to grow region-by-region across the nation, because Chuck Cohen saw an opportunity in the market for a national independent, family-owned dental distributor to compete with the publicly-traded Schein and Patterson. (RX1127-473-74).

**Response to Proposed Finding No. 52**

Complaint Counsel has no specific response.

53. Benco's strategy was to become the first independent dental distributor to have nationwide coverage. It aimed to accomplish this strategy by offering a better customer experience, a passion for innovation, and a caring family culture. (Cohen, Tr. 628).

**Response to Proposed Finding No. 53**

Complaint Counsel has no specific response.

54. Benco expanded market-by-market and region-by-region across the country by hiring new sales employees, building a national distribution infrastructure, and scaling up its business operations. (Cohen, Tr. 629).

**Response to Proposed Finding No. 54**

Complaint Counsel has no specific response.

55. Pat Ryan was heavily involved in Benco's national expansion, leading the opening of many new markets for Benco in the Southeast, Southwest, Midwest, and West regions of the United States. (Ryan, Tr. 1149-50).

**Response to Proposed Finding No. 55**

Complaint Counsel has no specific response.

56. In 1996, Benco had only one distribution center in Wilkes-Barre, Pennsylvania. (Cohen, Tr. 629).

**Response to Proposed Finding No. 56**

Complaint Counsel has no specific response.

57. At the beginning of Benco's rapid national expansion, Benco started out as a regional distributor within a 150-mile radius of Northeastern Pennsylvania. Benco had only one warehouse that it leveraged well to grow as far from that warehouse as it could before opening another warehouse. (RX1127-479).

**Response to Proposed Finding No. 57**

Complaint Counsel has no specific response.

58. Benco proceeded to add four additional distribution centers in the next fifteen years: Jacksonville, Florida (1998); Ft. Wayne, Indiana (2003); Dallas, Texas (2004); and Reno, Nevada (2011). (Cohen, Tr. 630-31).

**Response to Proposed Finding No. 58**

Complaint Counsel has no specific response.

59. Benco acquired and opened its distribution centers in various way, but each one was part of the overall strategy to expand Benco's geographic coverage from the east coast to the west coast across the country. (RX1127-479).

**Response to Proposed Finding No. 59**

Complaint Counsel has no specific response.

60. Benco sells a lots of products that are heavy and thus have high shipping costs and times relative to the price of the product. Benco, like any dental distributor, cannot ship heavy boxes at a reasonable price from one central location around the country. Benco needed to establish a distribution network with warehouses in different regions across the country to serve customers quickly, cheaply, and efficiently. (RX1127-479-80).

**Response to Proposed Finding No. 60**

Complaint Counsel has no specific response.

61. Each distribution center allowed Benco to ship products overnight or via or 2-day shipping to dentists within the surrounding states. Quick shipping times are a critical component of providing a premium, full-service experience to a dentist. (RX1127-479-80).

**Response to Proposed Finding No. 61**

Complaint Counsel has no specific response.

62. [REDACTED]

**The Response to Proposed Finding No. 62**

Complaint Counsel has no specific response.

63. [REDACTED]

**Response to Proposed Finding No. 63**

Complaint Counsel has no specific response.

64. In 2010, Benco moved into a new headquarters in Pittston, Pennsylvania. CenterPoint East, with approximately 272,800 square feet of space, housed Benco's corporate offices, a distribution center and warehouse, and the largest dental equipment showroom in North America – including 24 operatories of dental equipment from all major vendors in standard configurations. (RX1108).

**Response to Proposed Finding No. 64**

Complaint Counsel has no specific response.

65. In addition to building a national distribution infrastructure, Benco also set about to expand its sales force into new markets across the country. (RX1127-480).

**Response to Proposed Finding No. 65**

Complaint Counsel has no specific response.

66. Through a combination of mergers and acquisitions activity, competitive hiring, hiring rookies sales employees, and organic growth, Benco methodically expanded one local region and market at a time westward from its prior Mid-Atlantic footprint. (Cohen, Tr. 629-36).

**Response to Proposed Finding No. 66**

Complaint Counsel has no specific response.

67. To enter a new market, Benco hired territory representatives, equipment specialists, and service technicians, opened an office, often opened a showroom, established local customer relationships, and competed aggressively by lowering its prices. (Cohen, Tr. 629-36).

**Response to Proposed Finding No. 67**

The Proposed Finding of fact is incomplete. Its purpose is to state that Benco expansion was based on hiring, but does not include the pertinent fact that expansion also relied on outsourcing independent equipment service repair. (Cohen, Tr. 633).

68. Many of the new sales employees that Benco hired were hired away from competitors Schein and Patterson. (Cohen, Tr. 636).

**Response to Proposed Finding No. 68**

Complaint Counsel has no specific response.

69. Pat Ryan was responsible for and involved in the hiring of many new sales employees by Benco, as Benco opened new markets and expanded west across the country. (Ryan, Tr. 1150-51).

**Response to Proposed Finding No. 69**

Complaint Counsel has no specific response.

70. Between two-thirds and three-quarters of all experienced sales employees that Benco hired during its rapid national expansion were hired away from Henry Schein. (Ryan, Tr. 1151).

**Response to Proposed Finding No. 70**

The Proposed Finding of fact is misleading and incomplete. The finding cites an estimate from Pat Ryan that does not capture the pertinent fact that “one of the most exciting times in the company's history” (referring to the opening of Dallas and allowing expansion to Oklahoma, Phoenix, and all of Texas) was the result of a dental supplies distributor going out of business which Benco “acquired for free, basically hired all their people.” (Cohen, Tr. 630-631).

E. RESPONSES TO PROPOSED FINDINGS REGARDING “COMPETITIVE  
HIRING AGREEMENT BETWEEN BENCO AND SCHEIN”

71. In about 1998, after Schein had merged with a company called Meer Dental, Schein had too many sales representatives in certain markets, so Benco had opportunities to hire people who could not find a place in Schein’s new organization. (Cohen, Tr. 637).

**Response to Proposed Finding No. 71**

Complaint Counsel has no specific response.

72. It was a significant part of Benco's growth strategy to hire people from Schein and other competitors. (Cohen, Tr. 637).

**Response to Proposed Finding No. 72**

Complaint Counsel has no specific response.

73. Many of the sales representatives that Benco hired from Schein and other companies had non-compete agreements, which caused problems for Benco, because it is expensive to litigate non-compete agreements and it distracted attention away from focusing on the customers. (Cohen, Tr. 638).

**Response to Proposed Finding No. 73**

Complaint Counsel has no specific response.

74. Benco's hiring of Schein employees who had non-compete agreements led to litigation between Schein and Benco. (Cohen, Tr. 638).

**Response to Proposed Finding No. 74**

Complaint Counsel has no specific response.

75. In 1998, after Benco had hired an office of former Meer Dental employees in Pittsburgh who did not want to work for Schein, Schein sued Benco. After several months, the litigation was settled. (Cohen, Tr. 638-639).

**Response to Proposed Finding No. 75**

Complaint Counsel has no specific response.

76. Part of the settlement included an agreement between Benco and Schein that established rules for the orderly movement of sales reps with non-compete agreements between the companies (the “Competitive Hiring Agreement”). (Cohen, Tr. 639-640; Sullivan, Tr. 4265-66).

**Response to Proposed Finding No. 76**

Complaint Counsel objects to use of the word “competitive” to describe this agreement. The agreement was between competitors, (Sullivan, Tr. 3893-3894; Cohen, Tr. 646; Ryan, Tr. 1054), that involved a “significant” business strategy, (Cohen, Tr. 637; BFF ¶ 72), and lowered costs of doing business by agreeing to “rules of the road” with a competitor. (Cohen, Tr. 639-640; CCFF ¶¶ 313-319). The agreement limited the number of hires between the two companies. (Sullivan, Tr. 3894 (“Q. And does this confirm that the number – the limit on the number of hires between Benco and Schein was three per zone per half a year? A. Yes, it does.”); Ryan, Tr. 1057-1058). The agreement increased the “sit-out” time of others. (Ryan, Tr. 1057 (“Q. And if I’m understanding you correctly, before 2011, the time period piece of this [hiring agreement] was shorter than six months. A. That’s my recollection.”)). The agreement expanded over time to cover additional employees. (CX6027 (communication log) at 25 (Row 223)); Sullivan, Tr. 3894 (Cohen texted Sullivan “‘We agreed that she would sit even though she didn’t have a contract.’ Do you see that? A. I do. Q. And ‘sit’ there, that refers to this employee not contacting the former Schein customers that she had worked with. A. That’s correct.”)). For all these reasons, “competitive” is an inaccurate description of this horizontal agreement between competitors.

77. The Competitive Hiring Agreement provided the fuel that allowed Benco to grow its business over the next decade and execute its national expansion strategy. (Cohen, Tr. 640).

#### **Response to Proposed Finding No. 77**

The Proposed Finding is misleading because agreeing to and enforcing “rules of the road,” (Cohen, Tr. 639-640; CCFF ¶ 316), regarding a “significant” business strategy, (Cohen, Tr. 637; BFF ¶ 72), with a competitor, (Sullivan, Tr. 3893-3894; Cohen, Tr. 646; Ryan, Tr. 1054), is not a legitimate type of “fuel” to grow is business. Complaint Counsel also objects to use of the word “competitive” to describe this agreement. The agreement was between competitors, (Sullivan, Tr. 3893-3894; Cohen, Tr. 646; Ryan, Tr. 1054), that involved a “significant” business strategy,

(Cohen, Tr. 637; BFF ¶ 72), and lowered costs of doing business by agreeing to “rules of the road” with a competitor. (Cohen, Tr. 639-640; CCFF ¶¶ 313-319). The agreement limited the number of hires between the two companies. (Sullivan, Tr. 3894 (“Q. And does this confirm that the number – the limit on the number of hires between Benco and Schein was three per zone per half a year? A. Yes, it does.”); Ryan, Tr. 1057-1058). The agreement increased the “sit-out” time of others. (Ryan, Tr. 1057 (“Q. And if I’m understanding you correctly, before 2011, the time period piece of this [hiring agreement] was shorter than six months. A. That’s my recollection.”)). The agreement expanded over time to cover additional employees. (CX6027 (communication log) at 25 (Row 223); Sullivan, Tr. 3894 (Cohen texted Sullivan “‘We agreed that she would sit even though she didn’t have a contract.’ Do you see that? A. I do. Q. And ‘sit’ there, that refers to this employee not contacting the former Schein customers that she had worked with. A. That’s correct.”)). For all these reasons, “competitive” is an inaccurate description of this horizontal agreement between competitors.

78. As Benco proceeded to hire approximately 120 Schein sales employees over the next decade plus, Benco never again had to face a lawsuit from Schein over non-compete issues stemming from Benco’s hiring of Schein sales employees. (RX1127-476-77).

#### **Response to Proposed Finding No. 78**

Complaint Counsel has no specific response.

79. Non-compete litigation is expensive, it distracts from running the business, and slows the ability to hire employees from competitors. (Sullivan, Tr. 4265).

#### **Response to Proposed Finding No. 79**

This Proposed Finding is weak and lacks credibility because it cites responses from Sullivan to detailed leading questions. Sullivan did not volunteer this description of non-compete litigation. The questions were not objected to, but they should be given less weight because they appear to be constructed by counsel rather than the witness.



80. The Competitive Hiring Agreement allowed Benco to hire sales representatives who did not want to work at Schein but had non-competes. Without litigation, or the prospect of litigation, it lowered Benco's costs and uncertainty of hiring Schein employees and expedited Benco's hiring. (Cohen, Tr. 640-641).

**Response to Proposed Finding No. 80**

Complaint Counsel objects to use of the word “competitive” to describe this agreement. The agreement was between competitors, (Sullivan, Tr. 3893-3894; Cohen, Tr. 646; Ryan, Tr. 1054), that involved a “significant” business strategy, (Cohen, Tr. 637; BFF ¶ 72), and lowered costs of doing business by agreeing to “rules of the road” with a competitor. (Cohen, Tr. 639-640; CCFF ¶¶ 313-319). The agreement limited the number of hires between the two companies. (Sullivan, Tr. 3894 (“Q. And does this confirm that the number – the limit on the number of hires between Benco and Schein was three per zone per half a year? A. Yes, it does.”); Ryan, Tr. 1057-1058). The agreement increased the “sit-out” time of others. (Ryan, Tr. 1057 (“Q. And if I’m understanding you correctly, before 2011, the time period piece of this [hiring agreement] was shorter than six months. A. That’s my recollection.”)). The agreement expanded over time to cover additional employees. (CX6027 (communication log) at 25 (Row 223); Sullivan, Tr. 3894 (Cohen texted Sullivan “‘We agreed that she would sit even though she didn’t have a contract.’ Do you see that? A. I do. Q. And ‘sit’ there, that refers to this employee not contacting the former Schein customers that she had worked with. A. That’s correct.”)). For all these reasons, “competitive” is an inaccurate description of this horizontal agreement between competitors.

81. The Competitive Hiring Agreement allowed sales representatives hired by the other company to “sit out” – or not call on their existing customers, for a period of 90 days, rather than a full year under a non-compete contract. Sales representatives could call on new customers during those 90 days. (Cohen, Tr. 641-642).

**Response to Proposed Finding No. 81**

The Proposed Finding is incomplete and misleading because it fails to note that the sit-out period was actually lengthened for some employees under the agreement between Benco and Schein on

hiring. (CCFF ¶¶ 314, 323; Ryan, Tr. 1057 (“Q. And if I’m understanding you correctly, before 2011, the time period piece of this [hiring agreement] was shorter than six months. A. That’s my recollection.”)).

Complaint Counsel objects to use of the word “competitive” to describe this agreement. The agreement was between competitors, (Sullivan, Tr. 3893-3894; Cohen, Tr. 646; Ryan, Tr. 1054), that involved a “significant” business strategy, (Cohen, Tr. 637; BFF ¶ 72), and lowered costs of doing business by agreeing to “rules of the road” with a competitor. (Cohen, Tr. 639-640; CCFF ¶¶ 313-319). The agreement limited the number of hires between the two companies. (Sullivan, Tr. 3894 (“Q. And does this confirm that the number – the limit on the number of hires between Benco and Schein was three per zone per half a year? A. Yes, it does.”); Ryan, Tr. 1057-1058). The agreement increased the “sit-out” time of others. (Ryan, Tr. 1057 (“Q. And if I’m understanding you correctly, before 2011, the time period piece of this [hiring agreement] was shorter than six months. A. That’s my recollection.”)). The agreement expanded over time to cover additional employees. (CX6027 (communication log) at 25 (Row 223); Sullivan, Tr. 3894 (Cohen texted Sullivan “‘We agreed that she would sit even though she didn’t have a contract.’ Do you see that? A. I do. Q. And ‘sit’ there, that refers to this employee not contacting the former Schein customers that she had worked with. A. That’s correct.”)). For all these reasons, “competitive” is an inaccurate description of this horizontal agreement between competitors.

82. Benco also knew that expenses for hiring a Schein employee would be minimal because it would not have to go to court over the hired ex-Schein employees. (Cohen, Tr. 641).

### **Response to Proposed Finding No. 82**

Complaint Counsel has no specific response.

83. The Competitive Hiring Agreement made Benco’s hiring of Schein employees predictable, and, thus easier. It provided timing and cost certainty without the hassle and expense of non-compete litigation with Schein. (RX1127-477).

**Response to Proposed Finding No. 83**

The Proposed Finding is misleading in that it suggests competitors may form an agreement in order to make a “significant” business strategy “predictable and, thus easier.” Complaint Counsel objects to use of the word “competitive” to describe this agreement. The agreement was between competitors, (Sullivan, Tr. 3893-3894; Cohen, Tr. 646; Ryan, Tr. 1054), that involved a “significant” business strategy, (Cohen, Tr. 637; BFF ¶ 72) and lowered costs of doing business by agreeing to “rules of the road” with a competitor. (Cohen, Tr. 639-640; CCFF ¶¶ 313-319). The agreement limited the number of hires between the two companies. (Sullivan, Tr. 3894 (“Q. And does this confirm that the number – the limit on the number of hires between Benco and Schein was three per zone per half a year? A. Yes, it does.”); Ryan, Tr. 1057-1058). The agreement increased the “sit-out” time of others. (Ryan, Tr. 1057 (“Q. And if I’m understanding you correctly, before 2011, the time period piece of this [hiring agreement] was shorter than six months. A. That’s my recollection.”)). The agreement expanded over time to cover additional employees. (CX6027 (communication log) at 25 (Row 223); Sullivan, Tr. 3894 (Cohen texted Sullivan “‘We agreed that she would sit even though she didn’t have a contract.’ Do you see that? A. I do. Q. And ‘sit’ there, that refers to this employee not contacting the former Schein customers that she had worked with. A. That’s correct.”)). For all these reasons, “competitive” is an inaccurate description of this horizontal agreement between competitors.

84. Once the Competitive Hiring Agreement was in place, it increased the number of Schein representatives that Benco hired. Since 1998, Benco has hired over 120 sales representatives from Schein, while Schein has hired only about 60 sales representatives from Benco. (Cohen, Tr. 642-643; Sullivan, Tr. 4266-67).

**Response to Proposed Finding No. 84**

Complaint Counsel objects to use of this Proposed Finding claiming that the agreement “increased” the number of Schein representatives that Benco hired. The Proposed Finding does

not explain what number of Schein representatives that were hired by Benco were an increase nor from what base. First, the agreement was between competitors, (Sullivan, Tr. 3893-3894; Cohen, Tr. 646; Ryan, Tr. 1054), that involved a “significant” business strategy, (Cohen, Tr. 637; BFF ¶ 72), and lowered costs of doing business by agreeing to “rules of the road” with a competitor. (Cohen, Tr. 639-640; CCFF ¶¶ 313-319). The agreement limited the number of hires between the two companies. (Sullivan, Tr. 3894 (“Q. And does this confirm that the number – the limit on the number of hires between Benco and Schein was three per zone per half a year? A. Yes, it does.”); Ryan, Tr. 1057-1058). The agreement increased the “sit-out” time of others. (Ryan, Tr. 1057 (“Q. And if I’m understanding you correctly, before 2011, the time period piece of this [hiring agreement] was shorter than six months. A. That’s my recollection.”)). The agreement expanded over time to cover additional employees. (CX6027 (CX6027 (communication log) at 25 (Row 223); Sullivan, Tr. 3894 (Cohen texted Sullivan ““We agreed that she would sit even though she didn’t have a contract.’ Do you see that? A. I do. Q. And ‘sit’ there, that refers to this employee not contacting the former Schein customers that she had worked with. A. That’s correct.”)). For all these reasons, “competitive” is an inaccurate description of this horizontal agreement between competitors.

85. The Competitive Hiring Agreement was integral and essential to Benco's rapid national expansion. Without the Competitive Hiring Agreement, Benco could not have hired experienced sales employees from Schein and would have had to have grown much more slowly. (Cohen, Tr. 643-644).

### **Response to Proposed Finding No. 85**

The Proposed Finding is misleading and is not supported by the cited evidence and evidence in total. The Proposed Finding is misleading in that it says Benco could not have hired experienced sales people without the agreement because Benco hired experienced Schein sales people before and after the hiring agreement with Schein. Further, Benco hired experienced sales people from

distributors who did not feel comfortable entering into a hiring agreement with Benco. For example, Burkhart declined Benco's offer to enter into a hiring agreement, which was presented by a Benco-hired, former Burkhart employee. (Reece, Tr. 4392; CCFF ¶¶ 321-324; CX4260 at 001 (Burkhart turned down proposed agreement); CX0303 (McElaney, IHT at 100, 165); *see also* CX4261 (internal Burkhart email raising antitrust concerns about the proposed hiring agreement with Benco)). Complaint Counsel objects to use of the word "competitive" to describe this agreement. The agreement was between competitors, (Sullivan, Tr. 3893-3894; Cohen, Tr. 646; Ryan, Tr. 1054), that involved a "significant" business strategy, (Cohen, Tr. 637; BFF ¶ 72), and lowered costs of doing business by agreeing to "rules of the road" with a competitor. (Cohen, Tr. 639-640; CCFF ¶¶ 313-319). The agreement limited the number of hires between the two companies. (Sullivan, Tr. 3894 ("Q. And does this confirm that the number – the limit on the number of hires between Benco and Schein was three per zone per half a year? A. Yes, it does."); Ryan, Tr. 1057-1058). The agreement increased the "sit-out" time of others. (Ryan, Tr. 1057 ("Q. And if I'm understanding you correctly, before 2011, the time period piece of this [hiring agreement] was shorter than six months. A. That's my recollection.")). The agreement expanded over time to cover additional employees. (CX6027 (communication log) at 25 (Row 223); Sullivan, Tr. 3894 (Cohen texted Sullivan "'We agreed that she would sit even though she didn't have a contract.' Do you see that? A. I do. Q. And 'sit' there, that refers to this employee not contacting the former Schein customers that she had worked with. A. That's correct.")). For all these reasons, "competitive" is an inaccurate description of this horizontal agreement between competitors.

86. Due to the Competitive Hiring Agreement, Benco would often hire Schein employees in areas and new markets where Benco was seeking to open or expand. (RX1127-477).

**Response to Proposed Finding No. 86**

Complaint Counsel objects to use of the word “competitive” to describe this agreement. The agreement was between competitors, (Sullivan, Tr. 3893-3894; Cohen, Tr. 646; Ryan, Tr. 1054), that involved a “significant” business strategy, (Cohen, Tr. 637; BFF ¶ 72), and lowered costs of doing business by agreeing to “rules of the road” with a competitor. (Cohen, Tr. 639-640; CCF ¶¶ 313-319). The agreement limited the number of hires between the two companies. (Sullivan, Tr. 3894 (“Q. And does this confirm that the number – the limit on the number of hires between Benco and Schein was three per zone per half a year? A. Yes, it does.”); Ryan, Tr. 1057-1058). The agreement increased the “sit-out” time of others. (Ryan, Tr. 1057 (“Q. And if I’m understanding you correctly, before 2011, the time period piece of this [hiring agreement] was shorter than six months. A. That’s my recollection.”)). The agreement expanded over time to cover additional employees. (CX6027 (communication log) at 25 (Row 223); Sullivan, Tr. 3894 (Cohen texted Sullivan “‘We agreed that she would sit even though she didn’t have a contract.’ Do you see that? A. I do. Q. And ‘sit’ there, that refers to this employee not contacting the former Schein customers that she had worked with. A. That’s correct.”)). For all these reasons, “competitive” is an inaccurate description of this horizontal agreement between competitors.

87. The predictability and certainty provided by the Competitive Hiring Agreement, allowed Benco to compete better against Schein, Patterson and other dental distributors. As the primary enabler of Benco’s rapid national expansion, the Competitive Hiring Agreement allowed Benco to offer customers greater choice and price competition in new markets against Schein, Patterson and other distributors already entrenched in those markets. (RX1127-478).

#### **Response to Proposed Finding No. 87**

Complaint Counsel objects to use of the word “competitive” to describe this agreement. The agreement was between competitors, (Sullivan, Tr. 3893-3894; Cohen, Tr. 646; Ryan, Tr. 1054), that involved a “significant” business strategy, (Cohen, Tr. 637; BFF ¶ 72), and lowered costs of doing business by agreeing to “rules of the road” with a competitor. (Cohen, Tr. 639-640; CCF ¶¶ 313-319). The agreement limited the number of hires between the two companies. (Sullivan,

Tr. 3894 (“Q. And does this confirm that the number – the limit on the number of hires between Benco and Schein was three per zone per half a year? A. Yes, it does.”); Ryan, Tr. 1057-1058). The agreement increased the “sit-out” time of others. (Ryan, Tr. 1057 (“Q. And if I’m understanding you correctly, before 2011, the time period piece of this [hiring agreement] was shorter than six months. A. That’s my recollection.”)). The agreement expanded over time to cover additional employees. (CX6027 (communication log) at 25 (Row 223); Sullivan, Tr. 3894 (Cohen texted Sullivan “‘We agreed that she would sit even though she didn’t have a contract.’ Do you see that? A. I do. Q. And ‘sit’ there, that refers to this employee not contacting the former Schein customers that she had worked with. A. That’s correct.”)). For all these reasons, “competitive” is an inaccurate description of this horizontal agreement between competitors.

88. The Competitive Hiring Agreement with Schein was in place from 1998 until 2016. Benco entered the Pacific Northwest market in 2015, so the term of the Competitive Hiring Agreement matches the period of Benco’s national expansion. (Cohen, Tr. 646; Sullivan, Tr. 4266-67).

### **Response to Proposed Finding No. 88**

The Proposed Finding is misleading in that it suggests agreements with competitors delineating the terms of competition for sales people raises no competitive concerns if the agreement exists simultaneous to one participant’s geographic expansion. Complaint Counsel objects to use of the word “competitive” to describe this agreement. The agreement was between competitors, (Sullivan, Tr. 3893-3894; Cohen, Tr. 646; Ryan, Tr. 1054), that involved a “significant” business strategy, (Cohen, Tr. 637; BFF ¶ 72), and lowered costs of doing business by agreeing to “rules of the road” with a competitor. (Cohen, Tr. 639-640; CCFF ¶¶ 313-319). The agreement limited the number of hires between the two companies. (Sullivan, Tr. 3894 (“Q. And does this confirm that the number – the limit on the number of hires between Benco and Schein was three per zone per half a year? A. Yes, it does.”); Ryan, Tr. 1057-1058). The agreement increased the “sit-out”

time of others. (Ryan, Tr. 1057 (“Q. And if I’m understanding you correctly, before 2011, the time period piece of this [hiring agreement] was shorter than six months. A. That’s my recollection.”)). The agreement expanded over time to cover additional employees. (CX6027 (communication log) at 25 (Row 223); Sullivan, Tr. 3894 (Cohen texted Sullivan ““We agreed that she would sit even though she didn’t have a contract.’ Do you see that? A. I do. Q. And ‘sit’ there, that refers to this employee not contacting the former Schein customers that she had worked with. A. That’s correct.”)). For all these reasons, “competitive” is an inaccurate description of this horizontal agreement between competitors.

89. The Competitive Hiring Agreement never prevented Benco from hiring any Henry Schein sales reps that it wanted to hire. (Ryan, Tr. 1154).

#### **Response to Proposed Finding No. 89**

The Proposed Finding is misleading because it goes beyond the scope of the evidence cited. The Proposed Finding cites Ryan, who merely testified he was not aware of any incidents when the agreement prevented a hire. Complaint Counsel objects to use of the word “competitive” to describe this agreement. The agreement was between competitors, (Sullivan, Tr. 3893-3894; Cohen, Tr. 646; Ryan, Tr. 1054), that involved a “significant” business strategy, (Cohen, Tr. 637; BFF ¶ 72), and lowered costs of doing business by agreeing to “rules of the road” with a competitor. (Cohen, Tr. 639-640; CCFF ¶¶ 313-319). The agreement limited the number of hires between the two companies. (Sullivan, Tr. 3894 (“Q. And does this confirm that the number – the limit on the number of hires between Benco and Schein was three per zone per half a year? A. Yes, it does.”); Ryan, Tr. 1057-1058). The agreement increased the “sit out” time of others. (Ryan, Tr. 1057 (“Q. And if I’m understanding you correctly, before 2011, the time period piece of this [hiring agreement] was shorter than six months. A. That’s my recollection.”)). The agreement expanded over time to cover additional employees. (CX6027 (communication log) at



25 (Row 223); Sullivan, Tr. 3894 (Cohen texted Sullivan “‘We agreed that she would sit even though she didn’t have a contract.’ Do you see that? A. I do. Q. And ‘sit’ there, that refers to this employee not contacting the former Schein customers that she had worked with. A. That’s correct.”)). For all these reasons, “competitive” is an inaccurate description of this horizontal agreement between competitors.

F. RESPONSES TO PROPOSED FINDINGS REGARDING “BENCO AS MARKET INNOVATOR AND DISRUPTOR”

90. Benco’s quest to provide dentists with an exceptional customer experience includes moving dentistry forward through innovation. (RX1105).

**Response to Proposed Finding No. 90**

Complaint Counsel has no specific response.

91. Benco, as a family-owned private company, has long been an innovator in the dental distribution market. (Cohen, Tr. 613).

**Response to Proposed Finding No. 91**

The Proposed Finding is not supported by the evidence cited. The cited page of Cohen’s testimony does not support the statement that “Benco, as a family-owned private company, has long been an innovator in the dental distribution market.” The testimony cited discusses customer experience.

92. Benco prides itself on having the largest product offering among dental distributors. (RX1099-001).

**Response to Proposed Finding No. 92**

Complaint Counsel has no specific response.

93. Benco is constantly looking for new and innovative products to distribute. Often, Benco has brought new products to market that could not find an avenue to market through Schein or Patterson. (Cohen, Tr. 613-14).

**Response to Proposed Finding No. 93**

Complaint Counsel has no specific response.

94. Vatech was a company based in South Korea that was one of the world's leaders in imaging technology. Vatech had a fabulous line of products that they could not bring into the United States market because they could not find a dental distributor to work with them. (Cohen, Tr. 614)

**Response to Proposed Finding No. 94**

Complaint Counsel has no specific response.

95. Benco eagerly brought Vatech's products to the United States market and they are now one of the imaging leaders within the United States. As a result, they have lower the price that consumers pay and increased the quality of x-ray products sold in dentistry today. (Cohen, Tr. 614-15).

**Response to Proposed Finding No. 95**

Complaint Counsel has no specific response.

96. Benco is the only United States distributor for Herman Miller's office furniture, including Herman Miller's medical-grade reception desks and business furniture. (Cohen, Tr. 615-16).

**Response to Proposed Finding No. 96**

The Proposed Finding is inconsistent with Benco's Proposed Finding No. 15, which states that Benco is against exclusive arrangements. Otherwise, Complaint Counsel has no specific response.

97. Benco embraces innovative products sold by traditional manufacturers. (Cohen, Tr. 613-16; 649).

**Response to Proposed Finding No. 97**

Complaint Counsel has no specific response.

98. Straumann is one of the largest dental manufacturers in the world. Benco sought out and developed an innovator partnership with Straumann that allows Benco to distribute Straumann's most innovative products. (Cohen, Tr. 615).

**Response to Proposed Finding No. 98**

Complaint Counsel has no specific response.

99. Benco has a reputation in the market for jumping on innovative products earlier than its competitors. (Cohen, Tr. 649).

**Response to Proposed Finding No. 99**

This Proposed Finding of fact lacks credibility. Little weight should be given this self-serving, singular statement.

100. Benco continually seeks to innovate its own services and product offerings to dentists. (RX1105).

**Response to Proposed Finding No. 100**

Complaint Counsel has no specific response.

101. In 1968, Benco was the first company to hire equipment specialists to help dentists integrate new technologies into their dental offices. (RX1105).

**Response to Proposed Finding No. 101**

Complaint Counsel has no specific response.

102. In 1974, Benco was the first dental distributor to leverage United Parcel Services to deliver dental supplies quickly through the mail. (RX1105).

**Response to Proposed Finding No. 102**

Complaint Counsel has no specific response.

103. In 1978, Benco was the first dental distributor to add a dental space planner, resulting in the creation of the industry's leading dental office design team. (RX1105).

**Response to Proposed Finding No. 103**

Complaint Counsel has no specific response.

104. In 1988, Benco was the first dental distributor to offer dentists electronic ordering. (RX1105).

**Response to Proposed Finding No. 104**

Complaint Counsel has no specific response.

105. In 1995, Benco was the first dental distributor to offer dentists Windows-based dental supplies ordering platform, which Benco called Painless®. (RX1105).

**Response to Proposed Finding No. 105**

Complaint Counsel has no specific response.

106. In 1996, Benco was the first dental distributor to offer a customer loyalty program, called Bluchips. (RX1105).

**Response to Proposed Finding No. 106**

Complaint Counsel has no specific response.

107. In 2003, Benco became the first dental distributor to measure customer satisfaction using Net Promoter Score. (RX1105).

**Response to Proposed Finding No. 107**

Complaint Counsel has no specific response.

108. In 2010, Benco became the first dental distributor to launch a complete dental design, equipment showroom, called CenterPoint. (RX1105).

**Response to Proposed Finding No. 108**

Complaint Counsel has no specific response.

109. In 2011, Benco became the first dental distributor to harness the power of women in dentistry through The Lucy Hobbs Project®. (RX1105).

**Response to Proposed Finding No. 109**

Complaint Counsel has no specific response.

110. Benco was the first independent dental distributor to establish nationwide coverage, from the Atlantic to the Pacific. (RX1105).

**Response to Proposed Finding No. 110**

Complaint Counsel has no specific response.

111. In 2014, Benco was the first dental distributor to launch an open, in-office CAD-CAM digital impression milling system. (RX1105).

**Response to Proposed Finding No. 111**

Complaint Counsel has no specific response.

112. Today, Benco's online and mobile ordering system, Painless®, allows dentists to streamline not only their ordering of dental supplies, but also helps dentists control their inventory management process. (Cohen, Tr. 648-49).

**Response to Proposed Finding No. 112**

Little weight should be given this self-serving statement.

113. Benco brings innovative products to market via its Pro Sys and other private label products. For example, Benco recently launched a brand-new sonic toothbrush called the VarioSonic. It is similar to Philips' SonicCare, but much less expensive. (Cohen, Tr. 616).

**Response to Proposed Finding No. 113**

Complaint Counsel has no specific response.

114. For most of the last three decades, the two leading brands of core equipment were A-dec and Pelton & Crane. From the mid-1990s through 2013, Benco was the only dental distributor authorized to sell both brands. (Cohen, Tr. 650-51).

**Response to Proposed Finding No. 114**

The Proposed Finding is inconsistent with Benco's Proposed Finding No. 15, which states that Benco is against exclusive arrangements.

115. Through Benco's innovation in securing supply relationships with both A-dec and Pelton & Crane, Benco provided dentists a one-stop source to compare and purchase both brands of core equipment. (Cohen, Tr. 650-51).

**Response to Proposed Finding No. 115**

Complaint Counsel has no specific response.

116. Benco's national expansion during the 1990s and 2000s was aided by the fact that Benco offered both A-dec and Pelton & Crane, whereas Schein and Patterson did not. Thus, Benco had a competitive advantage that allowed it to provide greater customer choice, open new markets, and grow its sales. (Cohen, Tr. 651).

**Response to Proposed Finding No. 116**

The Proposed Finding is inconsistent with Benco's Proposed Finding No. 15, which states that Benco is against exclusive arrangements.

117. During Benco's national expansion, Benco opened new markets where dentists previously only had the option of Schein and Patterson as full-service dental distributors. (Cohen, Tr. 644).

**Response to Proposed Finding No. 117**

Complaint Counsel has no specific response.

118. Benco gave dentists greater choice. Benco's presence increased competition in these markets, thus providing consumers with lower prices. (Cohen, Tr. 644-45).

**Response to Proposed Finding No. 118**

Complaint Counsel has no specific response.

119. Often, Benco entered a new market by lowering price as a strategy to win customer from Schein and Patterson and gain market share from its competitors. (Cohen, Tr. 644-45).

**Response to Proposed Finding No. 119**

Complaint Counsel objects to the word "often" as vague and as unsupported by the evidence cited. In the cited testimony, Cohen did not use the term "often," nor does he opine as to the frequency at which Benco entered a new market by lowering price. In fact, lowering price only came up after suggestive, leading questions by counsel and, even then, not in support of the Proposed Finding.

120. A majority of the customers that Benco gained in new markets as its expanded came directly from Schein and Patterson. (Cohen, Tr. 644-45).

**Response to Proposed Finding No. 120**

The Proposed Finding is not supported by the evidence cited. The cited testimony does not include a statement about where a majority of new customers came from and does not directly address acquisitions of new customers from Schein or Patterson.

G. RESPONSES TO PROPOSED FINDINGS REGARDING "BENCO'S PRICING"

121. Every year, Benco publishes a catalog with prices for the dental supplies that Benco sells. The prices for supplies published in Benco's catalog are referred to as Benco's catalog price. (Cohen, Tr. 414).

**Response to Proposed Finding No. 121**

Complaint Counsel has no specific response.

122. Benco sets prices based on its overall value proposition that it offers to its customers. Benco's goal is to justify a value-added relationship whereby dentists and other customers will pay the catalog price for dental supplies. Nonetheless, due to a multi-factor

pricing and discounting strategy, the large majority of Benco's customers pay less than catalog price for dental supplies. (Cohen, Tr. 414; 671).

**Response to Proposed Finding No. 122**

The Proposed Finding is not supported in part by the evidence cited. It is incorrect as to the statement that "the large majority of Benco's customers pay less than catalog price for dental supplies." The cited testimony says the opposite of the Proposed Finding. At the provided citation, Cohen testified that "our goal" is for the dentist "to pay the catalog price." (Cohen, Tr. 414). Cohen goes on to note that sales representatives do often discount from catalog, "so much of the product we sell is not sold at catalog price." (Cohen, Tr. 414). The Proposed Finding is not credible because its characterization that the majority of Benco's customers do not pay the catalog price is inconsistent with Benco's stated goals and is against the weight of the evidence. For example, Cohen testified that the "lion's share" of independent dentists pay Tier 1, or catalog, prices. (Cohen, Tr. 418). Further, the second citation is not on point to the Proposed Finding. Finally, the Proposed Finding is contradicted by the unopposed Benco's Proposed Finding No. 147.

123. Benco's pricing philosophy is called "Hug Pricing." It means that every customer receives the best price, with the best discount, that they have earned – without asking. (RX1113).

**Response to Proposed Finding No. 123**

The Proposed Finding is irrelevant and incomplete. The sole citation is incomplete as it refers to an entire 24 page document with no specificity. The Proposed Finding is irrelevant as it has nothing to do with buying groups.

124. Benco's caring family culture is reflected in its pricing, where Benco strives to deliver an exceptional customer experience by "hugging" its customers so that they can best experience the value that Benco delivers to their dental practice. (Cohen, Tr. 671-73).

**Response to Proposed Finding No. 124**

Complaint Counsel has no specific response.

125. Benco delivers its value proposition through its “Hug Pricing” by delivering to its customers concierge free goods, Elite Dental Alliance, 5% Solution, Painless® value shopper, customer reviews, and Bluchips. (RX1113).

**Response to Proposed Finding No. 125**

The Proposed Finding is irrelevant and incomplete. The sole citation is incomplete as it refers to an entire 24 page document with no specificity. The Proposed Finding is irrelevant as it has nothing to do with buying groups.

126. Benco provides customers with access to concierge free goods via an integrated process for maximizing and tracking manufacturer coupons and offers. (RX1113).

**Response to Proposed Finding No. 126**

The Proposed Finding is irrelevant and incomplete. The sole citation is incomplete as it refers to an entire 24 page document with no specificity. The Proposed Finding is irrelevant as it has nothing to do with buying groups.

127. Benco provides customers with access to Elite Dental Alliance, dentistry’s largest group purchase organization. (RX1113).

**Response to Proposed Finding No. 127**

The Proposed Finding is incomplete at best. The sole citation is to an entire 24 page document with no specificity.

128. Benco provides customers with a 5% solution by guaranteeing supply costs that are 20% less than the national average. (RX1113).

**Response to Proposed Finding No. 128**

The Proposed Finding is irrelevant and incomplete. The sole citation is to an entire 24 page document with no specificity. The Proposed Finding is irrelevant as it has nothing to do with buying groups.

129. Benco provides customers with access to Painless® value shopper, which shows customers better-value alternatives, item-by-item, for products displayed while using Benco’s Painless® online ordering system. (RX1113).

**Response to Proposed Finding No. 129**



The Proposed Finding is irrelevant and incomplete. The sole citation is incomplete as it refers to an entire 24 page document with no specificity. The Proposed Finding is also irrelevant as it has nothing to do with buying groups.

130. Benco provides customers with access to customer reviews, which are a suite of reports used by Benco's territory representatives to examine and improve the profitability of a dentist's practice. (RX1113).

**Response to Proposed Finding No. 130**

The Proposed Finding is incomplete at best. The sole citation is to an entire 24 page document with no specificity.

131. Benco provides customers with access to Bluchips, which is dentistry's original and still most rewarding frequent buyer club. (RX1113).

**Response to Proposed Finding No. 131**

The Proposed Finding is irrelevant and incomplete. The sole citation is to an entire 24 page document with no specificity. The Proposed Finding is also irrelevant as it has nothing to do with buying groups.

132. Benco's pricing strategy chart is meaningfully entitled as "Fair & Flexible." (CX1100-001).

**Response to Proposed Finding No. 132**

Complaint Counsel objects to the term "meaningfully" as vague. There is no testimony or context to ground the description. This is not a proper fact and should be disregarded.

133. Benco's pricing includes several categories or "Price Tiers" available to independent dentists. These include Tier 1, Tier 2, Tier 4 and Tier 6. (CX1100-001).

**Response to Proposed Finding No. 133**

The Proposed Finding includes claims not supported by the evidence cited. Specifically, the Proposed Finding purports to describe pricing available to independent dentists, but relies on a document that notes Benco's pricing tiers with no reference to "independent dentists."

134. Benco's Tier 1 pricing is available to independent dentists who value the Benco buying experience. It includes daily pricing that is at least 2% lower than Patterson's catalog price. (CX1100-001).

**Response to Proposed Finding No. 134**

The Proposed Finding is in part not supported by the evidence cited. The Proposed Finding purports to apply pricing available to "independent dentists" relying on a citation to a document that does not discuss "independent dentists."

135. Benco's Tier 2 pricing is available to independent dentists who are more price-conscious and would prefer to receive a greater discount and less BluChips than Tier 1 customers. (CX1100-001).

**Response to Proposed Finding No. 135**

The Proposed Finding is misleading. The Proposed Finding relies on evidence that does not include the term "independent dentists" but instead only refers to "dental offices." The evidence cited does not state that prices were made available to "independent dentists"; that term is omitted from the cited evidence.

136. Benco's Tier 4 pricing is available to independent dentists that are most price-conscious and would prefer to receive a greater discount than Tier 2, but do not receive any BluChips. (CX1100-001).

**Response to Proposed Finding No. 136**

The Proposed Finding is misleading. The Proposed Finding claims discounts are available to "independent dentists" but relies on a document that refers instead to "dental offices."

137. Benco's Tier 6 pricing is available to independent dentists that are new customers and do not yet understand the full value proposition that Benco provides to their practice. (CX1100-001).

**Response to Proposed Finding No. 137**

The Proposed Finding is misleading. The Proposed Finding uses the term "independent dentists" but relies on a document that uses a term "dental offices" instead. The two terms are not synonymous and accordingly the Proposed Finding is misleading.

138. The discounts received by customers at Tier 2, Tier 4 and Tier 6 are measured a percentage off of Benco's catalog price. (CX1100-001).

**Response to Proposed Finding No. 138**

The Proposed Finding is unsupported by the evidence cited. The Proposed Finding stretches and does not cover the proposition for which it is offered. Specifically, the Proposed Finding offers a page in a document that does not mention methodology for deriving discounts, yet the Proposed Finding claims that the document shows the way discounts received by customers are measured. The evidence cited does not include measurement.

139. The BluChip program is Benco's frequent buyer program. BluChips are points that are awarded to Benco's loyal customers that are earned when customers purchase products, services and other activities from Benco. Customers that purchase through Painless®, Benco's internet and mobile ordering system, receive a 100% BluChip bonus. (Cohen, Tr. 654-55; CX1100).

**Response to Proposed Finding No. 139**

Complaint Counsel has no specific response.

140. Customers can redeem BluChips for account credits, discounts, and practice-oriented products and services. (Cohen, Tr. 655).

**Response to Proposed Finding No. 140**

Complaint Counsel has no specific response.

141. Benco's pricing philosophy takes into consideration the level of discount and amount of BluChips at each Price Tier. As independent dentists pay less in price on dental supplies, via a larger percentage discount off of Benco's catalog price, the amount of BluChips awarded goes down. (Cohen, Tr. 655-56; CX1100-001).

**Response to Proposed Finding No. 141**

The Proposed Finding is inaccurate. As written it refers to "independent dentists," but the cited testimony refers to "customers."

142. In addition to the discount level and BluChips, independent dentists also receive a discount from Benco in the form of free goods. Dental manufacturers often offer free goods or specials that result in free goods depending on purchase volumes or other criteria. Benco has the best computerized tracking system in dentistry to ensure that every customer receives all of the

free goods that they are entitled to based on their purchase history and purchase volumes. (Cohen, Tr. 657).

**Response to Proposed Finding No. 142**

The Proposed Finding is inaccurate. As written it refers to “independent dentists,” but the cited testimony refers to “customers.”

143. Benco’s free goods tracking system goes a step farther than its competitors. Whereas other distributors make dentists handle the collection of free goods that are earned, via coupons and applications, Benco’s system automatically prints the free good coupons and the Benco territory representatives redeem the coupons and deliver the free goods directly to the dentists. Benco’s free goods system saves independent dentists money and, more importantly, time that would otherwise be spent tracking and collecting the free goods. (Cohen, Tr. 657).

**Response to Proposed Finding No. 143**

The Proposed Finding is inaccurate. As written it refers to “independent dentists,” but the cited testimony refers to “customers.”

144. Benco’s territory representatives have pricing authority to offer customers further price discounts on some, or all, dental supply purchases. Territory representatives have the authority to, and often do, provide additional discounts to Benco’s customers. (Cohen, Tr. 414; 661-62).

**Response to Proposed Finding No. 144**

The Proposed Finding is inaccurate and contrary to the evidence. First, the Proposed Finding states that territory representatives have pricing authority to offer customers price discounts on “some, or all” purchases. But the cited testimony states only that Benco’s goal is to get customers to pay the catalog price. There is no testimony cited in support of the claim that a representative can offer customers discounts on “all” supply purchases. Second, the proposed fact is unsupported inasmuch as it refers to “independent dentists.” The cited testimony in the second citation, (Cohen, Tr. 661-662), is limited to “corporate” accounts rather than all customers.

145. Even though Benco’s Hug Pricing philosophy ensures that its customers receive the best deal that they have earned without asking for it, if independent dentists ask their territory

representative for a lower price than what they have earned, the territory representative has the ability to lower the price even further. (Cohen, Tr. 673-74).

**Response to Proposed Finding No. 145**

Complaint Counsel has no specific response.

146. Benco's territory representatives have unilateral authority to discount dental supplies all the way down to cost, if they feel they need to do so to win business and to compete. (Cohen, Tr. 415-16, 610).

**Response to Proposed Finding No. 146**

The Proposed Finding is misleading and incomplete. While the testimony did suggest territory representatives can discount all the way down to cost, there is a corresponding penalty in commission for doing so. This penalty is omitted from the Proposed Finding. (Cohen, Tr. 415-416).

147. Approximately 30% of Benco's sales to customers involve some level of discount applied by a Benco territory representative. (Cohen, Tr. 418).

**Response to Proposed Finding No. 147**

Complaint Counsel has no specific response.

148. Dentists all have a different pricing mix, because they all have a different product mix. Dentists have different free goods rules, based on their purchase history, product mix, and volumes. (Cohen, Tr. 658).

**Response to Proposed Finding No. 148**

The Proposed Finding is inaccurate and unsupported by the cited evidence. The Proposed Finding states: "Dentists have different free goods rules based on purchase history, product mix, and volumes." However, the cited testimony notes that corporate customers do not get free goods based on purchase history, product mix, or volume, but instead because of their corporate structure.

149. Prices paid by independent dentists vary greatly even within each Price Tier. Despite the Price Tier, or target price, Benco's multi-factor discounting strategy results in independent dentists paying highly individualized prices based on their Price Tier allocation, product mix, purchase history, purchase volume, BluChips earned, free goods rules, and territory

representative discounts. Benco is committed to using all of the discounting tools and strategies available to effectively compete for, and win, the business of independent dentists. (Cohen, Tr. 658).

#### **Response to Proposed Finding No. 149**

The Proposed Finding is misleading and unsupported in part because it goes well beyond the cited testimony. The final statement in this Proposed Finding does not appear in the designated testimony. Specifically, page 658 of Cohen’s testimony does not include something that can be credited for the argumentative statement, “Benco is committed to using all of the discounting tools and strategies available to effectively compete for, and win, the business of independent dentists.”

150. As a result of Benco’s Hug Pricing philosophy and Fair and Flexible pricing strategy, labels and generalizations regarding the prices paid by independent dentists to Benco for dental supplies are meaningless. To ultimately determine the level of discount that an independent dentist receives from Benco, you would need to look directly at Benco’s transactional-level data for that particular dentist and then account for, at least, the following factors: Price Tier, product mix, purchase history, purchase volume, BluChips earned, free goods rules, and territory representative discounts. (Cohen, Tr. 653-58; 661-62).

#### **Response to Proposed Finding No. 150**

The Proposed Finding is misleading and incomplete. The Proposed Finding is misleading and incomplete because it suggests that there is no anchor to the prices paid by independent dentists, but Benco publishes a catalog of prices and Cohen testified During the relevant period, most independent dentists paid catalog prices for their dental supplies. (Cohen, Tr. 414, 422 (explaining that Benco Tier 1 pricing is catalogue pricing, and that the “lion’s share” of independent dentists pay Tier 1 catalogue prices); [REDACTED]

[REDACTED]; CX0301 (Cohen, IHT at 78).

Complaint Counsel objects to the term “meaningless” in this Proposed Finding. The Proposed Finding cites eight pages of Cohen testimony, none of which uses the term “meaningless.” In

addition, the proposition that Price Tiers are meaningless is in conflict with the other Proposed Findings on the generalizations to be drawn from the different Price Tiers.

151. In addition to the Price Tiers for independent dentists, Benco's Fair & Flexible pricing strategy included price codes for other categories of Benco customers. Benco had pricing categories for certain specialties, such as dental laboratories, oral surgery, and partner sharing. Benco also had categories for customers that were handled by its Special Markets division. Special Markets customers included institutions and non-profits, community health centers, dental schools, government entities and corporate accounts (which includes DSOs). (Cohen, Tr. 653; CX1100).

**Response to Proposed Finding No. 151**

Complaint Counsel has no specific response.

152. [REDACTED]  
[REDACTED]  
(CX1100; [REDACTED]).

**Response to Proposed Finding No. 152**

The Proposed Finding is not supported by the evidence cited. The Proposed Finding claims that

[REDACTED]

[REDACTED] The first cited document's reference to PS or Partner Sharing is limited to "specialists" listed alongside laboratories and oral surgeons; this limitation is not reflected in the Proposed Finding. Further, the Proposed Finding says [REDACTED], but the cited document says \$85,000. Finally, the second document [REDACTED]

[REDACTED]

[REDACTED].

153. Corporate accounts receive cost-plus pricing. Benco calculates the corporate account customer's price from the cost Benco pays and adds a set margin, rather than calculating a discount off of catalog price, as Benco does for Price Tiers applicable to independent dentists. (Cohen, Tr. 653-54; CX1100).

**Response to Proposed Finding No. 153**

Complaint Counsel has no specific response.

154. Benco's corporate account codes are listed as CA 1, CA 2, and CA 3. (Cohen, Tr. 654; CX1100).

**Response to Proposed Finding No. 154**

Complaint Counsel has no specific response.

155. Since Benco's corporate account pricing is cost-plus, the prices paid by Benco's corporate account customers, including DSOs, fluctuate based on changes in manufacturer's price to Benco. This fluctuation occurs on a customer-by-customer basis, due to the differences in product mix and volume across customers. (Cohen, Tr. 654; CX1100).

**Response to Proposed Finding No. 155**

The Proposed Finding is misleading and incomplete because it fails to add the qualifiers from the cited testimony to the Proposed Finding. Specifically, the Proposed Finding claims that corporate accounts pricing causes fluctuation on a customer-by-customer basis, but the testimony said "sometimes" such fluctuation occurs. The Proposed Finding is misleading because it stretches the evidence beyond its credible point.

156. The impact of changes in a manufacturer's price can cut both ways for a Benco corporate account customer. If a manufacturer increases a price on a product purchased by Benco's customer, that price increase is passed on by Benco to the customer through Benco's cost-plus pricing. But if a manufacturer lowers a price or offers a discount, Benco passes that price reduction or discount on to the customer so that customer receives the discount. (Cohen, Tr. 654).

**Response to Proposed Finding No. 156**

Complaint Counsel has no specific response.

157. Passing on manufacturer discounts to corporate account customers is consistent with Benco's Hug Pricing philosophy. When Benco does not have to spend as much to service a corporate account customer, Benco can pass those savings on to the customer. (Cohen, Tr. 690-91).

**Response to Proposed Finding No. 157**

Complaint Counsel has no specific response.



H. RESPONSES TO PROPOSED FINDINGS REGARDING “BENCO’S DISTRIBUTION AGREEMENT WITH A-DEC”

158. From the mid-1990’s through the 2000’s there were two main brands of core dental equipment, A-dec and Pelton & Crane. (Cohen, Tr. 650-651).

**Response to Proposed Finding No. 158**

Complaint Counsel has no specific response.

159. Until 2014, A-dec was sold by Benco and Patterson, while Pelton & Crane was sold by Benco & Schein. (Cohen, Tr. 651). Benco’s ability to sell both A-dec and Pelton & Crane, where neither Patterson nor Schein could, was a significant advantage in its expansion strategy to grow into a national distributor. (Cohen, Tr. 651).

**Response to Proposed Finding No. 159**

Complaint Counsel has no specific response.

160. A-dec was Benco’s number one brand of operator equipment. (Cohen, Tr. 650).

**Response to Proposed Finding No. 160**

Complaint Counsel has no specific response.

161. At the DTA meeting in October 2013, A-dec told Benco that it wanted to cancel its distribution agreement with Benco. (Cohen, Tr. 663).

**Response to Proposed Finding No. 161**

Complaint Counsel has no specific response.

162. The cancellation of Benco’s distribution of A-dec products was announced to the market on January 1, 2014. (Cohen, Tr. 662:20-25 (Cohen)).

**Response to Proposed Finding No. 162**

Complaint Counsel has no specific response.

163. At the time Benco announced the loss of the A-dec business, Benco and Schein were in the middle of discussions about a merger. (Sullivan, Tr. 4081). Benco’s loss of A-dec’s business was a significant potential impact to that deal, and Tim Sullivan reached out to Chuck Cohen to discuss it. (Sullivan, Tr. 4081; RX2756).

**Response to Proposed Finding No. 163**

Complaint Counsel has no specific response.

164. When Benco lost the line of A-dec products, it was a stressful and traumatic event for Benco. As a result, Benco had to reshuffle its vendors, and change its entire business strategy, which had been based on being a national distributor for A-dec. (Cohen, Tr. 665).

**Response to Proposed Finding No. 164**

Complaint Counsel has no specific response.

165. It took Benco two years to retool its core equipment line, and figure out how to continue its growth without one of the major brands of dental equipment in the industry. (Cohen, Tr. 666).

**Response to Proposed Finding No. 165**

Complaint Counsel has no specific response.

**II. RESPONSES TO PROPOSED FINDINGS REGARDING “BENCO’S NO-MIDDLEMAN POLICY WAS DEVELOPED AND APPLIED UNILATERALLY AND CONSISTENTLY BEFORE, DURING AND AFTER THE ALLEGED CONSPIRACY PERIOD.”**

**A. RESPONSES TO PROPOSED FINDINGS REGARDING “BENCO’S NO-MIDDLEMAN POLICY”**

166. Benco has a policy, going back to mid-1990’s that it does not recognize or work with middlemen that come between it and its customers. Among the middlemen that Benco does not recognize or work with are buying groups. (Cohen, Tr. 445).

**Response to Proposed Finding No. 166**

Complaint Counsel objects to the reference to a no-middlemen policy when discussing a no-buying group policy. Cohen testified it is fair to say Benco had a no *buying group* policy.

(Cohen, Tr. 445; *see also* Benco Post Tr. Br. at 10 (Benco followed its “longstanding policy . . .

not to deal with buying groups”); CCFF ¶ 419 (“Benco has a firm policy of non-recognition of GPOs as a single customer.”); [REDACTED]; CX0062 (Guggenheim asking Cohen

“wondering if your position on buying groups is still as you articulated back in February?”)). The

Proposed Finding is misleading in that it suggests that Benco executed from a policy not aimed

at buying groups specifically. (CCFF ¶¶ 394-431). While Benco used the term no-middlemen

policy during these proceedings, the contemporaneous documents and communications evidence

a no-buying group policy and lack any reference to a no-middleman policy. (CCFF ¶¶ 399 (“Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups”), 404 (“We do not participate in buying groups. Ever.”); 410, 406, 416, 419, 527-528, 574-575, 582, 661-664, 677). Likewise, during discovery, Benco witnesses referred to a policy of not working with buying groups. Cohen testified: “Our no buying group policy has been very consistent since 1996.” (CX8015 (Cohen, Dep. at 341)). Cohen also testified: “We have a policy that we don’t do business – we don’t recognize dental buying groups.” (CX8015 (Cohen, Dep. at 243)). Similarly, during trial, Benco employees referred to a no buying group policy. (Cohen, Tr. 870 (Benco counsel: “Q. . . . And that was consistent with your no-buying group policy? A: Yes.”); CCFF ¶ 399 (citing Ryan, Tr. 1032 (“And is it right that the no-buying group policy was communicated up and down the company? A. Yes.”)). Ryan, the individual responsible for enforcing Benco’s no buying group policy (CCFF ¶ 402), did not mention a “no middleman policy” during his entire trial examination. (Ryan, Tr. 1004-1281, 1027 (“Q. Benco has had a policy of not selling to buying groups; right? A. Yes.”)). Moreover, it is irrelevant what label Benco gives, the evidence shows that throughout the conspiracy period, Benco instructed its employees to refuse to discount to *buying groups*. (CCFF ¶¶ 423, 396, 401, 417).

167. Although it had the same policy prior to that time, Cohen first clearly articulated it in 1996. (Cohen, Tr. 693).

#### **Response to Proposed Finding No. 167**

Complaint Counsel has no specific response.

168. Before groups of independent dentists started to approach Benco, other companies, such as dental insurance companies and dental laboratories, would call and ask if Benco would offer a discount on supplies to dental practices that accepted their insurance or used their laboratory services. Benco would decline, because it did not put anyone between Benco and its customer. (Cohen, Tr. 693-694; RX1127-486).

#### **Response to Proposed Finding No. 168**

Complaint Counsel has no specific response.

169. The policy was based upon Cohen's own experience as a territory representative at Benco and his vision of the kind of company that he wanted Benco to be. (Cohen, Tr. 694:3-15).

**Response to Proposed Finding No. 169**

Complaint Counsel has no specific response.

170. The policy determines who Benco considers its customer and which entities Benco will sell to as a single customer. It is important for Benco to determine who the customer is because Benco's belief is that no one should come between Benco and its customers. (Cohen, Tr. 679).

**Response to Proposed Finding No. 170**

Complaint Counsel has no specific response.

171. The customer is the person who makes the purchasing decisions and then pays the bills at the end. (Cohen, Tr. 679-680).

**Response to Proposed Finding No. 171**

Complaint Counsel has no specific response.

172. There are five rules under Benco's "Group Practice Engagement Rules" to determine when a group will be recognized as a single customer:

- (a) Where all offices are owned by a single entity;
- (b) Where a single entity owns all of the hard assets of all offices and a dentist or multiple dentists own the practices;
- (c) Where a single entity has majority ownership in all the offices but may have multiple minority partners;
- (d) Where a management company with no ownership in any office but can compel purchasing from vendors it chooses, provides purchasing services for the group, and is the entity that is invoiced for the group, and is the entity that pays the bills for the group;
- (e) Any group combinations of (a) through (d). (RX1143-047)

**Response to Proposed Finding No. 172**

Complaint Counsel objects to the Proposed Finding as there is no time frame or dates provided for the cited evidence.

173. Rules 1 through 4 of the Benco policy describe different forms of common ownership, which is critically important to Benco because common ownership results in common control. Only those who have control over the dental practices can compel compliance in purchasing decisions. (Cohen, Tr. 684).

**Response to Proposed Finding No. 173**

The Proposed Finding is not credible because it cites the view of only one market participant.

Benco's axiom that common ownership is required for compliance is not universal. For example, the Kois Group is able to compel compliance without common ownership. [REDACTED]

[REDACTED]; CX8021 (Reece, Dep. at 71)). In addition, Benco's experience with EDA provides a self-contradicting counter-example of a buying group without common ownership, (BFF ¶ 245), that Benco believes is successful, (BFF ¶ 264), and with whom Benco chooses to continue to work. (BFF ¶ 250; CCFF ¶ 1688). This Proposed Finding should be given little weight.

174. Benco believes that there must be common ownership of separate dental practices in order for Benco to sell to a group as a single customer. (RX1127-486; Ryan, Tr. 1165-66).

**Response to Proposed Finding No. 174**

The Proposed Finding is vague because what would constitute "separate" in such a context is unclear. The Proposed Finding claims that Benco believes it cannot sell to a single customer without common ownership of separate dental practices, but it is not clear what would constitute a separate dental practice under common ownership.

175. "Compliance" means that someone can make a commitment for purchasing and then actually deliver on that commitment. For example, if a group has 100 locations, and the group says that all 100 are going to buy their products from Benco, the group can "flip a switch" and all 100 do in fact buy their products from Benco. (Cohen, Tr. 684-685; RX1127-487-88).

**Response to Proposed Finding No. 175**

Complaint Counsel has no specific response.

176. If only 30 of those 100 offices purchased from Benco, that would cause problems for Benco. First, Benco would have priced the product based upon a projected volume of sales to 100 offices. Second, if the 30 offices that take advantage of the lower prices are already Benco customers, then Benco would have offered a discount to existing customers without adding new customers – in effect cannibalizing its existing customers. (Cohen, Tr. 685-686).

**Response to Proposed Finding No. 176**

Complaint Counsel has no specific response.

177. The rationale for Benco's policy is that where Benco can be assured that compliance will happen, Benco can lower its costs to serve and lower pricing to the customer without anyone coming between Benco and the customer. (Cohen, Tr. 692; Ryan, Tr. 1166-67).

**Response to Proposed Finding No. 177**

Complaint Counsel has no specific response.

178. Groups that lack common ownership cannot compel compliance at all. (Ryan, Tr. 1166-67).

**Response to Proposed Finding No. 178**

To the extent the Proposed Finding suggests buying groups cannot lead to incremental business for a distributor, it is not supported by the evidence cited nor the weight of the evidence generally. Dentists who are members of buying groups purchase from the buying group's distributor partner to take advantage of savings, even though there is no contractual requirement to do so. (CCFF ¶¶ 1685-1692). For example, the Kois Group drove incremental business to its distributor partner, Burkhart, even though there was no common ownership between the buying group members and even though [REDACTED]

[REDACTED]; CX8021 (Reece, Dep. at 71); CCFF ¶ 1689). In addition, Benco's experience with EDA provides a self-contradicting counter-example of a buying group without common ownership, (BFF ¶ 245), that Benco believes is successful, (BFF ¶ 264), and with whom Benco chooses to continue to work. (BFF ¶ 250; CCFF ¶ 1688).

179. Groups that lack common ownership offer Benco only a "hunting license," meaning that they can only provide Benco an opportunity to pursue its members as customers, but cannot promise that those members will actually buy from Benco or what volume they might buy from Benco. (Ryan, Tr. 1166-67).

**Response to Proposed Finding No. 179**

To the extent the Proposed Finding suggests buying groups cannot lead to incremental business for a distributor, it is not supported by the evidence cited nor the weight of the evidence generally. Dentists who are members of buying groups purchase from the buying group's distributor partner to take advantage of savings, even though there is no contractual requirement to do so. (CCFF ¶¶ 1685-1692). For example, the Kojs Group drove incremental business to its distributor partner, Burkhart, even though there was no common ownership between the buying group members and even though [REDACTED]

[REDACTED] ( [REDACTED] ; CX8021 (Reece, Dep. at 71); CCFF ¶ 1689). In addition, Benco's experience with EDA provides a self-contradicting counter-example of a buying group, (BFF ¶ 245), that Benco believes is successful, (BFF ¶ 264), and with whom Benco chooses to continue to work, (BFF ¶ 250; CCFF ¶ 1688), despite no common ownership, (BFF ¶ 245), or required exclusivity. (Cohen, Tr. 818-820; BFF ¶ 258). Other examples include the Kojs Buyers Group and Smile Source, where the lack of common ownership has not prevented success in compliance and commitment. [REDACTED] [REDACTED] ; Reece, Tr. 4408, [REDACTED] ; CX8021 (Reece, Dep. at 71, 88); Foley Tr. 4534).

180. A buying group that offers only a "hunting license" offers the opposite of compliance ("you have a right to shoot a deer, but you may not see a deer" or "you may see a deer, but you may miss the deer"). Such an offer promises no compliance at all, only the opportunity to sell to independent dentists – which is what Benco does everyday without needing to make any meaningless deal with a middleman offering only a "hunting license." (Ryan, Tr. 1179-80).

#### **Response to Proposed Finding No. 180**

To the extent the Proposed Finding suggests buying groups cannot lead to incremental business for a distributor, it is not supported by the evidence cited nor the weight of the evidence generally. Dentists who are members of buying groups purchase from the buying group's

distributor partner to take advantage of savings, even though there is no contractual requirement to do so. (CCFF ¶¶ 1685-1692). For example, the Kois Group drove incremental business to its distributor partner, Burkhart, even though there was no common ownership between the buying group members and even though [REDACTED]

[REDACTED] ( [REDACTED] ); CX8021 (Reece, Dep. at 71); CCFF ¶ 1689). In addition, Benco's experience with EDA provides a self-contradicting counter-example of a buying group without common ownership, (BFF ¶ 245), that Benco believes is successful, (BFF ¶ 264), and with whom Benco chooses to continue to work. (BFF ¶ 250; CCFF ¶ 1688). The Proposed Finding is misleading to the extent it suggests that groups lacking common ownership only offer an opportunity to pursue clients, but that is untrue, distributors see benefits from working with buying groups. (CCFF ¶ 1685).

181. In the past, it was Pat Ryan's job to figure out what a group actually is. The usual approach was that a group would approach a territory representative, who would pass it along to Ryan. Ryan would have a conversation with the group to ask how it was structured, where it operated, and how large it was. (Cohen, Tr. 681).

#### **Response to Proposed Finding No. 181**

Complaint Counsel has no specific response.

182. When a group approaches Benco, Pat Ryan will discuss with the group its ownership structure. In addition to gathering information directly from the group, Pat Ryan would look at the group's website, talk to other Benco sales employees, and conduct other independent research on the group's ownership structure. (Ryan, Tr. 1167).

#### **Response to Proposed Finding No. 182**

Complaint Counsel has no specific response.

183. When a group approaches Benco, the name of the group or what it may call itself does not impact Benco's evaluation of the group's ownership structure and application of Benco's policy. (Ryan, Tr. 1168-69).

#### **Response to Proposed Finding No. 183**

Complaint Counsel has no specific response.



184. In some instances, Benco would ask for documentation or visit some of the locations to verify information the group provided. (Cohen, Tr. 681-682).

**Response to Proposed Finding No. 184**

Complaint Counsel has no specific response.

185. It is sometimes very difficult to figure out what kind of group it is, because there are a lot of different forms a group may take when aggregating dental practices. (Cohen, Tr. 682).

**Response to Proposed Finding No. 185**

Complaint Counsel has no specific response.

186. There is radical variation in the structures of the groups that approach Benco. Pat Ryan and others have a saying, “if you’ve seen one DSO, you’ve seen one DSO.” (Ryan, Tr. 1169).

**Response to Proposed Finding No. 186**

The Proposed Finding is misleading and incomplete to the extent it suggests diversity is unique to DSO customers because Benco testified about the diversity of buying groups as well.

Specifically, all buying groups are different and present different structures. (Cohen, Tr. 682 (“[Y]ou’ve seen one buying group, you’ve seen one buying group. There are a lot of different flavors.”)).

187. Benco considers buying groups to be middlemen between Benco and its customers, and therefore, pursuant to its policy, it has turned down opportunities to recognize buying groups as a single customer. (Cohen, Tr. 446).

**Response to Proposed Finding No. 187**

The Proposed Finding is incomplete and misleading. Specifically, the Proposed Finding omits the contextual question and answer on the proceeding page of transcript where Cohen answers that it is fair to say Benco has a *no buying group* policy. (Cohen, Tr. 445; *see also* Ryan, Tr. 1216 (describing how to communicate Benco’s no buying group policy)).

The Proposed Finding is misleading in that it suggests that Benco executed from a policy not aimed at buying groups specifically. (CCFF ¶¶ 394-431). While Benco used the term no-

middlemen policy during these proceedings, the contemporaneous documents and communications evidence a no-buying group policy and lack any reference to a no-middleman policy. (CCFF ¶¶ 527-528, 574-575, 582, 661-664, 677).

188. Benco provides discounts to individual customers, and those customers may or may not also be a member of a buying group, but it does not offer a discount to a dentist because it is a member of a buying group. (Cohen, Tr. 445-46).

#### **Response to Proposed Finding No. 188**

Complaint Counsel has no specific response.

189. Benco's business strategy is that it does not participate in buying groups. Benco believes its business strategy is in its own unilateral economic interest. (Ryan, Tr. 1216-17).

#### **Response to Proposed Finding No. 189**

The Proposed Finding is not supported by the evidence and is misleading. The unilateral incentive to discount to buying groups was so strong that Cohen and other Benco management had to repeatedly instruct its sales force against it. For example, when a regional manager brought a \$3-\$5 million dollars sales opportunity currently going to Benco's competitors Schein and Patterson to Cohen's attention, Cohen replied "Here's the issue: we can't do what he asks. We have an exclusive arrangement with Transitions on practice development, **we don't offer discounts to buying groups.**" (CX1120 at 001 (emphasis added); *see also* CX1242 (Benco regional manager seeks to work with a buying group as "a great opportunity to win some business from Schein" but Ryan responds "We do not participate in buying groups. Ever.")). Benco's policy was unrelated to resource constraints. (Ryan, Tr. 1031 ("So in other words, it has not been a matter of resources restraining Benco from selling to buying groups? A. No.")). Further, by Benco's own admission, buying groups represented both a threat and opportunity to Benco. (CX0068 at 18). Given the fact that each buying group has a unique structure, a blanket no-buying group ban as against economic interest is illogical. (*See* Cohen, Tr. 682; Ryan Tr.

1169 (“What we say is if you’ve seen one DSO, you’ve seen one DSO, you’ve seen one buying group, you’ve seen one buying group. There are a lot of different flavors and a lot of different creative answers to this aggregation question on the part of the dental practices.”); Ryan, Tr.

1028-1029 (Ryan, Tr. 1028-1029 “**Q. And once Benco determined that a group was a buying group, you do not do any further discovery; right?** A. No. Typically not . . . **And is it 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. **Q. And the answer was no regardless of whether the buying group's members were your competitors' customers or Benco's customers.**”) (emphasis added)).

The Proposed Finding is incomplete because at the citation provided, Benco’s counsel suggested by questions that Benco saw refusing buying groups as in its “unilateral economic interest.”

While Ryan agreed to the suggestion, he did not volunteer the information. Therefore, the Proposed Finding is incomplete and misleading to the extent that it fails to explain or demonstrate when, how, and if Benco thought of this policy as in its “unilateral economic interest” before being asked by its own counsel at trial. As such, it should be given little weight.

Moreover, Benco’s assertion that working with buying groups is against their unilateral economic interest is not supported by the evidence. (CCFF ¶ 1685). Other competitors in the industry had relationships with buying groups that proved profitable. (CCFF ¶¶ 1686-1692;

Reece, Tr. 4408; [REDACTED]

[REDACTED] [REDACTED] [REDACTED]). In any event, to the extent there was any unilateral interest Benco had in not discounting to buying groups, it only extended as far as its largest rivals abstained as well: Benco believed that it would be forced to

discount to buying groups once its largest rivals began doing so. (CCFF ¶¶ 266-268; CX1149 (“If this door is ever opened in dental, its all over for all of us.”)).

**B. RESPONSES TO PROPOSED FINDINGS REGARDING “APPLICATION OF BENCO’S NO-MIDDLEMAN POLICY TO A BUYING GROUP - THE KOIS BUYERS GROUP”**

190. Applying Benco’s policy to the Kois Buyers Group, as Benco understands it, the Kois Buyers Group does not check any of the boxes under Benco’s policy to determine whether it is a single customer:

- (a) The Kois Buyers Group members’ offices are not owned by a single entity;
- (b) There is no entity that owns the hard assets of the members of the Kois Buyers Group;
- (c) There is no entity that owns a majority ownership in the members’ practices;
- (d) There is no management company that can compel purchasing decisions by members. (Cohen, Tr. 683-684).

**Response to Proposed Finding No. 190**

The Proposed Finding is misleading in that it suggests that a buying group cannot compel compliance to a distributor without common ownership or central purchasing which is against the weight of the evidence generally. (CCFF ¶ 1672). [REDACTED]

[REDACTED]  
[REDACTED]. (CCFF ¶¶

1247, 1249). The Proposed Finding is misleading because the reason Benco turned down the Kois Buyers Group in 2014 because it is a buying group, explaining to Dr. Kois: “At Benco, our policy is that we don’t support, or work with, buying groups, so we’ll decline your request.” (CCFF ¶ 421 (quoting CX1240 at 001)). In addition, the Proposed Finding is misleading because even in Benco’s experience with EDA, that buying group was able to compel compliance without meeting any of the criteria in the Proposed Finding. (BFF ¶¶ 264, 265; Cohen, Tr. 471, 824).

191. Under Benco's policy, therefore, Benco's customers are the individual dentists who are members of the Kois Buyers Group – not the Kois Buyers Group itself. (Cohen, Tr. 684).

**Response to Proposed Finding No. 191**

Complaint Counsel has no specific response.

192. Applying Benco's policy to another customer, Affordable Care, which is a DSO, demonstrates why Affordable care is considered a single customer. Affordable Care has 250 offices, and is Benco's largest customer. Affordable Care's offices are controlled, although they are not all owned, by a central office that determines the purchasing decisions for all 250 offices. (Cohen, Tr. 686-687).

**Response to Proposed Finding No. 192**

Complaint Counsel has no specific response.

193. Affordable Care's central office owns all of, or a portion of, all of the offices, and Affordable Care either buys products directly from Benco or directs the offices to place orders with Benco. Therefore, Affordable Care delivers compliance by all 250 offices. (Cohen, Tr. 687-688).

**Response to Proposed Finding No. 193**

The Proposed Finding is incomplete. Specifically, the Proposed Finding omits Cohen's relevant testimony on this customer, stating that there is not 100% compliance as suggested by the Proposed Finding. In fact, Cohen did not say compliance was absolute but rather that offices stray at times. (Cohen, Tr. 687).

194. Benco does not send territory representatives to the individual offices of Affordable Care, because it offers them a lower price, and in return they get a lower level of service. (Cohen, Tr. 688-689).

**Response to Proposed Finding No. 194**

The Proposed Finding is incomplete and misleading. The Proposed Finding is incomplete because it omits that this specific customer, Affordable Care, did not want Benco to send any representatives to its dental offices: "They believe in their model that the sales rep from Benco would be a distraction." (Cohen, Tr. 689). The Proposed Fact is misleading because it states that Benco does not send territory representatives because the customer gets a lower price, when the

testimony cited supports that Benco does not send representatives because that is the specific request of the customer of the lower price.

195. Not providing territory representatives' service to Affordable Care offices lowers Benco's costs to serve Affordable Care, because Benco does not have to pay commission to its territory representatives, which are 25% of the gross margin dollars of sales. (Cohen, Tr. 689).

**Response to Proposed Finding No. 195**

Complaint Counsel has no specific response.

196. Since Affordable Care lowers Benco's cost to serve, Benco is able to offer Affordable Care lower prices. Consistent with Benco's Hug Pricing philosophy, Affordable Care has earned that lower price. (Cohen, Tr. 688-89; RX1113).

**Response to Proposed Finding No. 196**

Complaint Counsel has no specific response.

C. RESPONSES TO PROPOSED FINDINGS REGARDING "CORPORATE DENTAL PRACTICES AND DSO'S"

197. A corporate dental practice, also called a DSO, is, in general, a group of dental practices that have one common ownership structure and operates in multiple locations, usually multiple cities and multiple states. The dentists who work for these corporate dental practices are employees, sometimes small or minority owners, but not the majority owners and not the decision makers. (Cohen, Tr. 412).

**Response to Proposed Finding No. 197**

The proposed answer is incomplete. The Proposed Finding omits the first portion of Cohen's cited testimony, which started with, "It's a little fuzzy sometimes." (Cohen, Tr. 412).

198. In a DSO, the different locations are not independently owned. However, certain states have regulated the ownership of dental practices, so there are creative ways that some DSOs get around those regulations. (Cohen, Tr. 412-413).

**Response to Proposed Finding No. 198**

Complaint Counsel has no specific response.

199. With a DSO there is common, centralized ownership over all individual locations and common control over business decisions. (Cohen, Tr. 413).

**Response to Proposed Finding No. 199**

The Proposed Finding is incomplete. As written, this Proposed Finding insinuates simplicity of DSO structure, but Cohen testified that discerning the nature of a DSO is “very difficult” because “[if] you’ve seen one DSO, you’ve seen one DSO, you’ve seen one buying group, you’ve seen one buying group. There are a lot of different flavors and a lot of different creative answers to this aggregation question on the part of the dental practices.” (Cohen, Tr. 682; Ryan, Tr. 1169; *see also* BFF ¶ 186).

200. Before Benco had a national infrastructure, serving DSOs that operated on a national level presented problems. Ultimately, Benco had to grow a national footprint in order to better compete for the business of corporate dental practices. (Cohen, Tr. 808-809).

#### **Response to Proposed Finding No. 200**

Complaint Counsel has no specific response.

201. After 2004, when Benco opened its distribution center in Dallas, Texas, but prior to achieving a national footprint, Benco would compete for the business of national DSO’s. For customers on the West Coast, where Benco did not have a distribution center or service operation, Benco would farm out the service operation to a third party or ship product second-day air at Benco’s expense. (Cohen, Tr. 809).

#### **Response to Proposed Finding No. 201**

Complaint Counsel has no specific response.

202. During that time period, for DSO customers west of the Rocky Mountains, Benco would find independent independent service technicians to whom it could outsource the service of those customers' equipment. Pat Ryan would identify a good independent service technician to perform service work for those offices, and Benco would pay that service technician. (Cohen, Tr. 809-810).

#### **Response to Proposed Finding No. 202**

Complaint Counsel has no specific response.

### **D. RESPONSES TO PROPOSED FINDINGS REGARDING “BENCO’S STRATEGIC MARKETS DIVISION”**

203. 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, universities and schools. (Cohen, Tr. 802-803).

**Response to Proposed Finding No. 203**

Complaint Counsel has no specific response.

204. The Strategic Markets division did not have a name when it was developed, it was then called “Special Markets,” and ultimately the name was changed to “Strategic Markets.” (Cohen, Tr. 805).

**Response to Proposed Finding No. 204**

Complaint Counsel has no specific response.

205. Benco changed the name of its Special Markets division in 2013 or 2014 to Strategic Markets. It has been called Strategic Markets since that time. (Ryan, Tr. 1154-55).

**Response to Proposed Finding No. 205**

Complaint Counsel has no specific response.

206. The Strategic Markets division does not have a separate profit and loss statement, but it does have a separate sales team that pursues Strategic Markets’ customers and the salespeople have a different compensation structure. (Cohen, Tr. 803).

**Response to Proposed Finding No. 206**

Complaint Counsel has no specific response.

207. Benco uses the same service technicians and distribution centers to service the customers of the Strategic Markets division. (Cohen, Tr. 803).

**Response to Proposed Finding No. 207**

Complaint Counsel has no specific response.

208. Pat Ryan started building the Strategic Markets business around 2004, when Benco saw a market opportunity and hired an experienced employee from Schein. (Ryan, Tr. 1155; Cohen, Tr. 803-804).

**Response to Proposed Finding No. 208**

Complaint Counsel has no specific response.

209. At its inception, Strategic Markets focused only on DSOs. (Ryan, Tr. 1157).

**Response to Proposed Finding No. 209**

Complaint Counsel has no specific response.



210. Prior to the creation of the Strategic Markets division, Benco had no targeted strategy to sell to DSOs. (Cohen, Tr. 806).

**Response to Proposed Finding No. 210**

Complaint Counsel has no specific response.

211. At that time, Benco had an internal conversation around the consolidation of dental practices and the growth of DSOs, and saw that there was a consolidation movement in the market. And although Strategic Markets are a lower-margin market and requires a different go-to-market strategy, Benco decided that it could not ignore that market. (Cohen, Tr. 804).

**Response to Proposed Finding No. 211**

Complaint Counsel has no specific response.

212. Benco was convinced that ignoring the Strategic Markets segment of the market would be like Kellogg saying it would not sell to Walmart. (Cohen, Tr. 804).

**Response to Proposed Finding No. 212**

Complaint Counsel has no specific response, except to note that buying groups are a part of the segment that Benco was convinced it should not ignore. (BFF ¶ 203 (defining special markets as anything other than an independent dentist)).

213. Benco hired Johnny Bunn away from Schein, who was by far the biggest player in the DSO space at the time with a greater than a 90% market share. (Ryan, Tr. 1156).

**Response to Proposed Finding No. 213**

Complaint Counsel has no specific response.

214. Johnny Bunn had significant experience with DSO's from his time at Schein and at a prior dental distributor. (Ryan, Tr. 1156-57).

**Response to Proposed Finding No. 214**

Complaint Counsel has no specific response.

215. Before adding Johnny Bunn to Benco's Strategic Markets division, Benco only had one DSO customer. (Ryan, Tr. 1157).

**Response to Proposed Finding No. 215**

Complaint Counsel has no specific response.

216. Bunn immediately brought three more DSOs to Benco from Schein. (Ryan, Tr. 1158).

**Response to Proposed Finding No. 216**

Complaint Counsel has no specific response.

217. Benco's entry into the DSO market was warmly received, as many DSOs were looking for an alternative to Schein. (Ryan, Tr. 1158-59).

**Response to Proposed Finding No. 217**

Complaint Counsel has no specific response.

218. Some DSOs, however, regarded Benco as too small of a company and were concerned that Benco's lack of a national footprint would impact service. (Ryan, Tr. 1159).

**Response to Proposed Finding No. 218**

Complaint Counsel has no specific response.

219. As a regional dental distributor at the time, Benco did not have any service technicians, service van, or any service infrastructure in large regions of the country, specifically west of the Mississippi River. (Ryan, Tr. 1159-60).

**Response to Proposed Finding No. 219**

Complaint Counsel has no specific response.

220. To address the concerns raised by national DSOs, Pat Ryan assembled a network of outsourced service technicians in the markets where Benco lacked a physical presence. As a result, Benco's DSO customers enjoyed a seamless customer experience. (Ryan, Tr. 1159-60).

**Response to Proposed Finding No. 220**

Complaint Counsel has no specific response.

221. As a result of Ryan's creation of Benco's outsourced service network, Benco was able to provide seamless customer service to national DSOs, even in markets where Benco had no physical presence. Ryan's ingenuity allowed Benco to compete directly with Schein for national DSO accounts and was critical in launching the success of Benco's Strategic Markets division. (Ryan, Tr. 1159-61).

**Response to Proposed Finding No. 221**

Complaint Counsel has no specific response.

222. The DSO customers that Benco gained almost all came from Schein. (Ryan, Tr. 1161).

**Response to Proposed Finding No. 222**

Complaint Counsel has no specific response.

223. Affordable Dentures was the second large national DSO that Benco landed as a Strategic Markets customer. They were significant to Benco for many reasons. Affordable Dentures was one of the top ten largest DSOs in the nation and left Schein to come to Benco. (Ryan, Tr. 1161-62).

**Response to Proposed Finding No. 223**

Complaint Counsel has no specific response.

224. Affordable Dentures becoming a Benco customer opened the floodgates for Benco in the national DSO market. Landing such an important national DSO customer significantly enhanced Benco's credibility in the market for national DSO customers. It signaled to the market that Benco was not too small to provide exceptional, national service to national DSOs, giving that customer segment a legitimate alternative to Schein. (Ryan, Tr. 1161-62).

**Response to Proposed Finding No. 224**

Complaint Counsel has no specific response.

225. During Benco's rapid national expansion, Benco's Strategic Markets was posting approximately 20% growth per year. (Ryan, Tr. 1161).

**Response to Proposed Finding No. 225**

Complaint Counsel has no specific response.

226. The main difference in developing Strategic Markets was that Benco decided to go after the DSO market without its traditional sales representatives and determined that it needed a separate sales team, with a separate compensation structure and separate go-to-market strategy to address the growing DSO segment of the market. (Cohen, Tr. 806).

**Response to Proposed Finding No. 226**

Complaint Counsel has no specific response.

227. By the time Benco created the Strategic Markets division, Schein had dominated the DSO segment of the market for many years with an estimated 85-90% share of that market. (Cohen, Tr. 806-807).

**Response to Proposed Finding No. 227**

Complaint Counsel has no specific response.

228. Benco estimates that today, Schein as above a 50% share of the DSO market, and that Benco has between 15% and 20% of that market. (Cohen, Tr. 807).

**Response to Proposed Finding No. 228**

Complaint Counsel has no specific response.

229. Benco's Strategic Market division has had a significant impact on Benco's growth and expansion. In 2007, Benco generated approximate \$2M a year from Strategic Markets, and by 2017, Strategic Markets' revenue had grown to over \$100M a year, representing about 17% or 18% of Benco's overall revenue. (Cohen, Tr. 807-808).

**Response to Proposed Finding No. 229**

Complaint Counsel has no specific response.

230. The growth of Benco's Strategic Markets was critically important to Benco's overall rapid national expansion. By "riding the DSO wave," Benco was able to attract national DSO customers that facilitated infrastructure development and growth in new markets across the country. (Cohen, Tr. 808).

**Response to Proposed Finding No. 230**

Complaint Counsel has no specific response.

231. All requests to Benco from buying groups would be sent to Pat Ryan, as the head of Strategic Markets. Ryan would do the vetting, and he would make a decision, along with Chuck Cohen, on how Benco would handle the request. (Cohen, Tr. 810).

**Response to Proposed Finding No. 231**

Complaint Counsel has no specific response.

E. RESPONSES TO PROPOSED FINDINGS REGARDING "BENCO'S JOINT VENTURE WITH CAIN WATTERS - ELITE DENTAL ALLIANCE"

232. Benco's no-middlemen policy still remains in place today, but Benco has made an exception to its policy to accommodate Elite Dental Alliance ("EDA"), which is a joint venture between Cain Watters and Benco. (Cohen, Tr. 451; 814; 819; 824).

**Response to Proposed Finding No. 232**

Complaint Counsel objects to the use of the words "no-middlemen policy" to refer to a no-buying group policy. Cohen testified it is fair to say Benco had a no *buying group* policy.

(Cohen, Tr. 445; *see also* Benco Post Tr. Br. at 10 (Benco followed its “longstanding policy . . . not to deal with buying groups”); CCFF ¶ 419 (“Benco has a firm policy of non-recognition of GPOs as a single customer.”); [REDACTED]; CX0062 (Guggenheim asking Cohen “wondering if your position on buying groups is still as you articulated back in February?”)). The Proposed Finding is misleading in that it suggests that Benco operated under a policy not aimed at buying groups specifically. (CCFF ¶¶ 394-431). While Benco used the term no-middlemen policy during these proceedings, the contemporaneous documents and communications evidence a no-buying group policy and lack any reference to a no-middleman policy. (CCFF ¶¶ 399 (“Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups”), 404 (“We do not participate in buying groups. Ever.”), 410, 406, 416, 419, 527-528, 574-575, 582, 661-664, 677). It is irrelevant what label Benco gives: the evidence shows that throughout the conspiracy period, Benco instructed its employees to refuse to discount to *buying groups*. (CCFF ¶¶ 423, 396, 401, 417). Complaint Counsel has no specific response to the remainder of this Proposed Finding.

233. Although Benco may consider EDA an exception to Benco’s no-middleman policy, Benco believes that EDA – due to Benco’s direct involvement in EDA and EDA’s unique characteristics – is not inconsistent with Benco’s policy. (Cohen, Tr. 816-24; Ryan, Tr. 1228-29).

### **Response to Proposed Finding No. 233**

Complaint Counsel objects to the use of the words “no-middlemen policy” to refer to a no-buying group policy. Cohen testified it is fair to say Benco had a no *buying group* policy.

(Cohen, Tr. 445; *see also* Benco Post Tr. Br. at 10 (Benco followed its “longstanding policy . . . not to deal with buying groups”); CCFF ¶ 419 (“Benco has a firm policy of non-recognition of GPOs as a single customer.”); [REDACTED]; CX0062 (Guggenheim asking Cohen “wondering if your position on buying groups is still as you articulated back in February?”)). The

Proposed Finding is misleading in that it suggests that Benco executed from a policy not aimed at buying groups specifically. (CCFF ¶¶ 394-431). While Benco used the term no-middlemen policy during these proceedings, the contemporaneous documents and communications evidence a no-buying group policy and lack any reference to a no-middleman policy. (CCFF ¶¶ 399 (“Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups”), 404 (“We do not participate in buying groups. Ever.”), 410, 406, 416, 419, 527-528, 574-575, 582, 661-664, 677). It is irrelevant what label Benco gives: the evidence shows that throughout the conspiracy period, Benco instructed its employees to refuse to discount to *buying groups*. (CCFF ¶¶ 423, 396, 401, 417). The Proposed Finding is also misleading and incorrect to the extent that it suggests that EDA is not a buying group. (*See* Respondents’ Joint Proposed Conclusion of Law ¶ 162 (“And since 2015, it has offered discounts to a buying group on only one occasion – the Elite Dental Alliance.”)). Contemporaneous documents and testimony from Benco’s own witnesses confirm that EDA is a buying group. Cohen admitted at trial that Benco changed its no buying group policy to accommodate EDA. (CCFF ¶ 1370). Cohen identified EDA as an example of a buying group in the dental industry in prior testimony. (CX0301 (Cohen, IHT at 107) (“Q. As you sit here today, can you name any buying groups in the dental industry? A. Elite Dental Alliance . . . .”); Cohen, Tr. 448). Ryan also identified EDA as an example of an exception to Benco’s no buying group policy in prior testimony. (CX0304 (Ryan, IHT at 117-118) (“Q. Is the no-GPO policy still in effect today? A. Yes, with two exceptions. Q. And what are the two exceptions? A. The Elite Dental Alliance . . . .”); *see also* CX0304 (Ryan, IHT at 256) (“Q. . . .Is EDA a group purchasing organization? A. I would consider it one.”); Ryan, Tr. 1274). Benco’s December 2015 Case Study refers to EDA as a “GPO founded by Cain Watters.” (CCFF ¶ 1372; CX1084 at 001 (“Elite Dental Alliance (EDA): A GPO founded by Cain Watters . . . .”)). That document specified that GPO and buying group were

interchangeable. (CX1084 at 001 (“While there may be technical differences, we’ll use the terms ‘buying group’ and ‘GPO’ interchangeably.”); Cohen, Tr. 458 (testifying that in CX1084, Cohen was using the terms “buying group” and “GPO” interchangeably)). Further, Benco’s contemporaneous analysis refers to EDA as a GPO, not a DSO, and does not identify EDA as having “unique” characteristics. (CX1084 at 001, 003, 005-006 (EDA Case Study referring to EDA as a GPO and similar to Kois)). The Proposed Finding that EDA is not inconsistent with Benco’s no buying group policy is misleading because both Cohen and Ryan testified that Benco made an exception to its no buying group policy to accommodate EDA. (CCFF ¶ 1370; CX0304 (Ryan, IHT at 117-118) (“Q. Is the no-GPO policy still in effect today? A. Yes, with two exceptions. Q. And what are the two exceptions? A. The Elite Dental Alliance . . .”); *see also* CX0304 (Ryan, IHT at 256) (“Q. Is EDA a group purchasing organization? A. I would consider it one.”)).

234. Cain Watters is the largest financial services company dealing with independent dentists and dental practices. It provides services such as accounting services, bill paying, and financial planning for dentists. (Cohen, Tr. 814-815).

#### **Response to Proposed Finding No. 234**

Complaint Counsel has no specific response.

235. Since the mid-2000’s, long before the formation of EDA, Cain Watters had been one of Benco’s Success Partners. Benco developed an exclusive cross-referral working relationship with Cain Watters, where Benco would recommend Cain Watters’ services to its clients, and Cain Watters would recommend Benco as a distributor to its clients. (Cohen, Tr. 815-816).

#### **Response to Proposed Finding No. 235**

Complaint Counsel has no specific response.

236. Although Benco does not have an ownership interest in EDA, it has an agreement with Cain Watters that the companies will work together to grow EDA, and if there are profits, those profits are split 50/50 between Benco and Cain Watters. (Cohen, Tr. 816).

#### **Response to Proposed Finding No. 236**

The Proposed Finding conflicts with another Proposed Finding. In Benco's Proposed Finding 256, where Benco asserts: "Because Benco was a partner in EDA, it had the ability to restrict the growth of EDA" (BFF ¶ 256 (citing Cohen, Tr. 821)).

237. Cain Watters, not Benco, drove the timing of EDA. (Cohen, Tr. 827).

**Response to Proposed Finding No. 237**

Complaint Counsel has no specific response.

238. Benco first learned of Cain Watters' potential interest in finding a dental supplier to provide volume discounts to Cain Watters clients on June 8, 2015. (CX1280; Cohen, Tr. 827).

**Response to Proposed Finding No. 238**

Complaint Counsel has no specific response.

239. After learning of Cain Waters' interest from a Benco territory representative, Chuck Cohen reached out to Brian Bortz of Cain Watters who told Chuck Cohen that Cain Watters was looking to form a venture with a supplier to provide discounted dental supplies to Cain Watters clients. (Cohen, Tr. 818; 827; CX1280).

**Response to Proposed Finding No. 239**

The Proposed Finding fails to account for the contradictory testimony that Cohen provided.

Specifically, Cohen testified that Cain Waters reached out to Benco first. (Cohen, Tr. 818).

240. Benco is always interested in exploring ways to build and deepen its relationships with its Success Partners. (Cohen, Tr. 815-16).

**Response to Proposed Finding No. 240**

Complaint Counsel has no specific response.

241. After that initial contact, in June 2015, Benco had regular discussions with Cain Watters as they negotiated what became the EDA. (Cohen, Tr. 828).

**Response to Proposed Finding No. 241**

Complaint Counsel has no specific response.

242. In evaluating whether to enter into the EDA relationship with Cain Watters, Benco considered the rationales underlying its non-middlemen policy and assessed whether EDA was in Benco's unilateral economic interest. (Cohen, Tr. 818).



**Response to Proposed Finding No. 242**

The Proposed Finding is not supported by the evidence cited and is misleading. At the citation provided is a one word answer from Cohen: “yes” in response to the question of whether Benco considered the rationales. But, the Proposed Finding has no support for the statement that Benco assessed whether EDA was in Benco’s unilateral economic interest. (Cohen, Tr. 818). To the extent Benco did evaluate the economics of working with EDA, it considered that working with EDA Cohen was concerned that if he did not do EDA, Schein and Patterson might. (CCFF ¶ 217). And when Benco found out that Schein was working with Smile Source, Cohen wanted to “push EDA to the next level as a way of competing against Schein’s GPO.” (CCFF ¶ 248 (quoting Cohen, Tr. 480)). Additionally, following the conspiracy, Benco worked with buying group EDA, and even sought to get the Kois Buyers Group to join EDA. (CX1084 at 003 (“JLR and I convinced [EDA] that . . . we should bring in Seattle Study Club and Kois as additional partners, because of their broad market reach and strong brands.”)). The Proposed Finding is incomplete to the extent that it suggests Benco’s determination of whether to work with buying groups was unilateral, when Cohen’s focus was on what his competitors would do. (CX1218 at 007 (“Our Risks” include “Other GPOs get started, and are recognized by Schein or PDCO [Patterson].”); [REDACTED]; [REDACTED]; CX1084 at 007 (“Other GPOs get started, and are recognized by Schein or PDCO [Patterson].”); *see also* Cohen, Tr. 466).

Complaint Counsel objects to the use of the words “no-middlemen policy” to refer to a no-buying group policy. Cohen testified it is fair to say Benco had a no *buying group* policy. (Cohen, Tr. 445; *see also* Benco Post Tr. Br. at 10 (Benco followed its “longstanding policy . . . not to deal with buying groups”); CCFF ¶ 419 (“Benco has a firm policy of non-recognition of

GPOs as a single customer.”); [REDACTED]; CX0062 Guggenheim asking Cohen (“wondering if your position on buying groups is still as you articulated back in February?”)). The Proposed Finding is misleading in that it suggests that Benco executed from a policy not aimed at buying groups specifically. (CCFF ¶¶ 394-431). While Benco used the term no-middlemen policy during these proceedings, the contemporaneous documents and communications evidence a no-buying group policy and lack any reference to a no-middleman policy. (CCFF ¶¶ 399 (“Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups”), 410 (“We do not participate in buying groups. Ever.”), 404, 406, 416, 419, 527-528, 574-575, 582, 661-664, 677). It is irrelevant what label Benco gives: the evidence shows that throughout the conspiracy period, Benco instructed its employees to refuse to discount to *buying groups*. (CCFF ¶¶ 423, 396, 401, 417). Finally, passing up Smile Source and other buying groups was a missed opportunity to gain revenue as [REDACTED]

[REDACTED] (See CCFF ¶¶ 1306, 1301, 1653, 1664, 1695).

Finally, the incentive to work with buying groups was so strong that Benco had to repeatedly warn its sales force against doing it. (CX1120 (regional manager seeks to work with buying group to attract “a total of 5 to 8 million dollars in merch business” from Schein and Patterson, to which Cohen responds Benco cannot do it because “we don’t offer discounts to buying groups”); CX1242 (regional manager seeks to do business with a buying group as “a great opportunity to win some business from Schein” to which Ryan responds: “We don’t participate in buying groups ever”); *see also* CX0170 (Schein also had to instructs its sales team against instincts to offer discounts to buying groups.)). For those reasons, characterizing turning down buying groups cannot accurately be described as in Benco’s unilateral interest.

243. It only made sense to move forward with Cain Watters, if EDA could solve the core structural problem that plagued all other buying groups and made them unattractive to Benco's unilateral economic interests. (Cohen, Tr. 818-23).

**Response to Proposed Finding No. 243**

The Proposed Finding is misleading and incomplete. The Proposed Finding is misleading because it suggests that a categorical ban on buying groups was in Benco's unilateral interest, except EDA. However, Benco itself identified that buying groups represented both a threat and opportunity to Benco. (CX0068 at 18). Benco also recognizes that each buying group has a unique structure. (Cohen, Tr. 682 (“[If] you’ve seen one DSO, you’ve seen one DSO, you’ve seen one buying group, you’ve seen one buying group. There are a lot of different flavors and a lot of different creative answers to this aggregation question on the part of the dental practices.”); Ryan Tr. 1169). The EDA buying group is not unique in its ability to drive value for a distributor, other buying group relationships have driven value for distributors. (CCFF ¶¶ 1297-1299, 1301, 1306, 1312-1313, 1685-1687, 1689, 1694-1695, 1698-1700, 1718, 1723-1725, 1730; *see also* CCFF ¶¶ 1652-1654, 1656, 1644, 1666, 1673, 1681, 1727, 1729). Therefore, if EDA could drive value for Benco, (*e.g.*, BFF ¶¶ 264-265, 267), a categorical ban on buying groups is illogical and was not in Benco's unilateral economic interest.

244. Benco and Cain Watters were faced with the challenge of driving compliance among EDA members, securing volume commitments from EDA members, and ensuring that Benco would receive increased revenue in exchange for lowering its margins on dental supplies sold to EDA members. (Cohen, Tr. 818-21).

**Response to Proposed Finding No. 244**

The Proposed Finding is not supported, in part, by the evidence cited. Specifically, the cited evidence does not support the assertion that Cain Watters faced the referenced challenges. The assertion that Benco and Cain Watters jointly addressed the referenced challenges is in tension with Cohen's testimony that Benco's unilateral ability to “restrict the growth” of EDA was a

positive factor of evaluation. (Cohen, Tr. 821). Moreover, to the extent that Respondent Benco faced a challenge of ensuring the lower margins extended to the buying group would result in higher revenues through increased volume, it is the same buying group calculation between any dental supply distributor and any buying group, a challenge that has been routinely solved. (CCFF ¶¶ 1297-1299, 1301, 1306, 1312-1313, 1685-1687, 1689, 1694-1695, 1698-1700, 1718, 1723-1725, 1730; *see also* CCFF ¶¶ 1652-1654, 1656, 1644, 1666, 1673, 1681, 1727, 1729).

245. EDA is structurally different than any buying group Benco has ever seen. It is more like a DSO, but without common ownership. (Cohen, Tr. 818-22; Ryan, Tr. 1228).

#### **Response to Proposed Finding No. 245**

The Proposed Finding is misleading, incomplete, and unsupported by the totality of evidence.

The Proposed Finding is misleading because Cohen testified that EDA is a buying group.

(Cohen, Tr. 448; CX0301 (Cohen, IHT at 107); *but see* Cohen, Tr. 822 (“I think it’s closer to what I now understand is a group purchase organization than a buying group.”)). The Proposed Finding that EDA is more like a DSO is not supported by the Cohen testimony cited; Cohen never testified that EDA is more like a DSO. (Cohen, Tr. 818-822). The Proposed Finding is also misleading because Benco’s EDA Case Study refers to EDA as a GPO and specifically identifies that it used the terms GPO and buying group interchangeably. (CX1084 at 001, 003).

Additionally, Cohen testified that he uses the terms GPO and buying group interchangeably generally, (Cohen Tr. 437-438), and specifically used the terms interchangeably with regards to the EDA Case Study. (Cohen Tr. 458; CX1084; *see also* Respondents’ Joint Proposed Conclusion of Law ¶ 162 (“And since 2015, it has offered discounts to a buying group on only one occasion – the Elite Dental Alliance.”)).

While Ryan testified that EDA is more like a DSO “in the sense that there’s an enforced minimum purchase level,” the finding is incomplete and misleading because the minimum

purchase level is only required to get discounts from Benco. The minimum purchase level is not a requirement of EDA. (Cohen, Tr. 817 (“Q. Does EDA require dentists to make volume commitments to qualify for discounts? A. In order to qualify for discounts from Benco, yes. But in order to qualify for other benefits, no.”); Cohen, Tr. 818 (“EDA members are free to buy wherever they would like.”)). The Proposed Finding is also incomplete because Ryan identified EDA as an example of an exception to Benco’s no buying group policy in prior testimony. (CX0304 (Ryan, IHT at 117-118) (“Q. Is the no-GPO policy still in effect today? A. Yes, with two exceptions. Q. And what are the two exceptions? A. The Elite Dental Alliance . . .”); *see also* CX0304 (Ryan, IHT at 256) (“Is EDA a group purchasing organization? A. I would consider it one.”); Ryan, Tr. 1274).

The Proposed Finding is also misleading and incorrect to the extent that it suggests that EDA is not a buying group. Contemporaneous documents and testimony from Benco’s own witnesses confirm that EDA is a buying group. (*See* Respondents’ Joint Proposed Conclusion of Law ¶ 162 (“And since 2015, [Benco] has offered discounts to a buying group on only one occasion – the Elite Dental Alliance.”)). Cohen admitted at trial that Benco changed its no buying group policy to accommodate EDA. (CCFF ¶ 1370). Cohen identified EDA as an example of a buying group in the dental industry in prior testimony. (Cohen, Tr. 448; CX0301 (Cohen, IHT at 107) (“Q. As you sit here today, can you name any buying groups in the dental industry? A. Elite Dental Alliance . . .”)). Ryan also identified EDA as an example of an exception to Benco’s no buying group policy in prior testimony. (CX0304 (Ryan, IHT at 117-118) (“Q. Is the no-GPO policy still in effect today? A. Yes, with two exceptions. Q. And what are the two exceptions? A. The Elite Dental Alliance . . .”); *see also* CX0304 (Ryan, IHT at 256) (“Is EDA a group purchasing organization? A. I would consider it one.”); Ryan, Tr. 1274). Benco’s December 2015 Case Study refers to EDA as a “GPO founded by Cain Watters.” (CCFF ¶ 1372; CX1084 at 001

(“Elite Dental Alliance (EDA): A GPO founded by Cain Watters . . .”). That document specified that GPO and buying group were interchangeable. (CX1084 at 001 (“While there may be technical differences, we’ll use the terms ‘buying group’ and ‘GPO’ interchangeably.”); Cohen, Tr. 458 (testifying that in CX1084, Cohen was using the terms “buying group” and “GPO” interchangeably)). Further, Benco’s contemporaneous analysis refers to EDA as a GPO, not a DSO, and does not identify EDA as having “unique” characteristics. (CX1084 at 001, 003 005-006 (EDA Case Study referring to EDA as a GPO and similar to Kois)).

Finally, the Proposed Finding is misleading in that it suggests other buying groups are not unique. To the contrary, Benco recognizes that each buying group has a unique structure. (Cohen, Tr. 682 (“[If] you’ve seen one DSO, you’ve seen one DSO, you’ve seen one buying group, you’ve seen one buying group. There are a lot of different flavors and a lot of different creative answers to this aggregation question on the part of the dental practices.”); Ryan, Tr. 1169).

246. EDA’s unique characteristics include:

- A. Membership. Members of EDA need to be either:
  - i. Cain Watters clients who have an in-person meeting at least once a year to discuss the financial health and business planning for their dental practice. The Cain Watters’ account planner has significant control over directing the financial decisions of the dental practice; (Cohen, Tr. 819-21); or
  - ii. Dentists with over \$2M in revenue who are very large independent dental practices that would qualify for significant discounts under Benco’s Price Tiers, specifically, Benco’s Profit Sharing (PS) Tier. (Cohen, Tr. 818; 820-22).
- B. Firm Purchase Commitment. Members of EDA make a firm purchase commitment to Benco. Every EDA member practice must make a minimum purchase commitment, which is factored into the discount they receive from Benco. (Cohen, Tr. 468; 817).
- C. Profit Sharing. As partner in the joint venture, Benco receives 50% of the profits from EDA, which helps offset the discounts provided to EDA members. (Cohen, Tr. 816).
- D. Control. Benco has absolute control over the selection of members and vendors of EDA. (Cohen, Tr. 817; 820-21).

**Response to Proposed Finding No. 246**

The Proposed Finding is misleading, inaccurate, unsupported by cited evidence, and irrelevant.

The Proposed Finding is inaccurate and unsupported with respect to the claims that every EDA members make and *must* make a minimum purchase agreement because the cited testimony contradicts these statements. (Cohen, Tr. 817 (“Q. Does EDA require dentists to make volume commitments to qualify for discounts? A. In order to qualify for discounts from Benco, yes. But in order to qualify for other benefits, no.”)). Additionally, the Proposed Finding is incomplete on this point because it omits the next page of testimony that also contradicts the claims that EDA members must make firm commitments to Benco. (Cohen, Tr. 818 (“EDA members are free to buy wherever they would like.”)). The Proposed Finding is also inaccurate and misleading with regard to the claim that Benco has ‘absolute control over the members,’ because Cohen testified to something far different: namely, that Benco has “control over the rules for admitting members into EDA, and membership in EDA is restricted to clients of Cain Watters or practices with more than \$2 million of gross revenue.” (Cohen, Tr. 821). The Proposed Finding is also incomplete because it omits that Benco’s EDA Case Study from December 2015 does not identify these unique characteristics. (CX1084 at 001, 003, 005-006 (EDA Case Study referring to EDA as a GPO and similar to Kois)).

The Proposed Finding is also misleading and incorrect to the extent that it suggests that EDA is not a buying group. Contemporaneous documents and testimony from Benco’s own witnesses confirm that EDA is a buying group. (*See* Respondents’ Joint Proposed Conclusion of Law ¶ 162 (“And since 2015, it has offered discounts to a buying group on only one occasion – the Elite Dental Alliance.”)). Cohen admitted at trial that Benco changed its no buying group policy to accommodate EDA. (CCFF ¶ 1370). Cohen identified EDA as an example of a buying group in the dental industry in prior testimony. (Cohen, Tr. 448; CX0301 (Cohen, IHT at 107) (“Q. As

you sit here today, can you name any buying groups in the dental industry? A. Elite Dental Alliance . . . .’)). Ryan also identified EDA as an example of an exception to Benco’s no buying group policy in prior testimony. (CX0304 (Ryan, IHT at 117-118) (“Q. Is the no-GPO policy still in effect today? A. Yes, with two exceptions. Q. And what are the two exceptions? A. The Elite Dental Alliance . . . .”); *see also* CX0304 (Ryan, IHT at 56 ) (“Is EDA a group purchasing organization? A. I would consider it one.”); Ryan, Tr. 1274). Benco’s December 2015 Case Study refers to EDA as a “GPO founded by Cain Watters.” (CCFF ¶ 1372; CX1084 at 001 (“Elite Dental Alliance (EDA): A GPO founded by Cain Watters . . . .”)). That document specified that GPO and buying group were interchangeable. (CX1084 at 001 (“While there may be technical differences, we’ll use the terms ‘buying group’ and ‘GPO’ interchangeably.”); Cohen, Tr. 458 (testifying that in CX1084, Cohen was using the terms “buying group” and “GPO” interchangeably)). Further, Benco’s contemporaneous analysis refers to EDA as a GPO, not a DSO, and does not identify EDA as having “unique” characteristics. (CX1084 at 001, 003 005-006 (EDA Case Study referring to EDA as a GPO and similar to Kois)).

The Proposed Finding is also misleading and incomplete because it omits that throughout the conspiracy period, Benco rejected all buying groups as a matter of policy, regardless of whether any buying group had “unique” characteristics. (CCFF ¶¶ 395-396; Ryan, Tr. 1028-1029 (“Q. And once Benco determined that a group was a buying group, you do not do any further discovery; right? A. No. Typically not . . . And is it 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. Q. And the answer was no regardless of whether the buying group's members were your competitors' customers or Benco's customers. A. Correct.”)). Then, in late 2015, for the first time, Benco evaluated the



individual characteristics of the EDA buying group, and entered into a discounting arrangement. (CCFF ¶¶ 1367-1387).

The Proposed Finding is also misleading to the extent it suggests other buying groups are not unique because Cohen recognized that each buying group has a unique structure. (Cohen, Tr. 682 (“[If] you’ve seen one DSO, you’ve seen one DSO, you’ve seen one buying group, you’ve seen one buying group. There are a lot of different flavors and a lot of different creative answers to this aggregation question on the part of the dental practices.”)). Finally, the Proposed Finding is irrelevant and misleading with regards to the membership of the buying group because all buying group memberships is unique to the individual buying group. For all the forgoing reasons this Proposed Finding should be rejected.

247. Based on EDA’s wholly unique characteristics, which were different than any other buying group, Benco determined that it was in its own unilateral economic interest to partner with Cain Watters on EDA. (Cohen, Tr. 469; 820-23)

#### **Response to Proposed Finding No. 247**

The Proposed Finding is misleading and irrelevant. First, Benco only worked with one buying group so there is little basis for the statement that EDA is different than any other buying group. Second the Proposed Finding is misleading to the extent it suggests there are typical buying groups, Benco admits that each buying group is different. (Cohen, Tr. 682 (“[If] you’ve seen one DSO, you’ve seen one DSO, you’ve seen one buying group, you’ve seen one buying group. There are a lot of different flavors and a lot of different creative answers to this aggregation question on the part of the dental practices.”); Ryan Tr. 1169). For those reasons, to the extent it was in Benco’s unilateral economic interest to work with buying group EDA, it was in Benco’s unilateral economic interest to partner with other buying groups that demonstrably drove incremental value to distributors. (See CCFF ¶¶ 1297-1299, 1301, 1306, 1312-1313, 1685-1687, 1689, 1694-1695, 1698-1700, 1718, 1723-1725, 1730; *see also* CCFF ¶¶ 1652-1654, 1656, 1644,

1666, 1673, 1681, 1727, 1729). At a minimum a categorical objection to buying groups was not in Benco's unilateral economic interest and this Proposed Finding should be rejected.

248. In some ways, EDA is similar to a buying group, and other ways EDA is different from a buying group. (Cohen, Tr. 818-819).

**Response to Proposed Finding No. 248**

The Proposed Finding is misleading and inaccurate and unsupported by the cited evidence.

Cohen testified that EDA is a buying group. (Cohen, Tr. 448; CX0301 (Cohen, IHT at 107)).

Contemporaneous documents and testimony from Benco's own witnesses confirm that EDA is a buying group. (*See also* Respondents' Joint Proposed Conclusion of Law ¶ 162 ("And since 2015, it has offered discounts to a buying group on only one occasion – the Elite Dental Alliance.")). Cohen admitted at trial that Benco changed its no buying group policy to accommodate EDA. (CCFF ¶ 1370). Cohen identified EDA as an example of a buying group in the dental industry in prior testimony. (Cohen, Tr. 448; CX0301 (Cohen, IHT at 107) ("Q. As you sit here today, can you name any buying groups in the dental industry? A. Elite Dental Alliance . . . .")). Ryan also identified EDA as an example of an exception to Benco's no buying group policy in prior testimony. (CX0304 (Ryan, IHT at 117-118) ("Q. Is the no-GPO policy still in effect today? A. Yes, with two exceptions. Q. And what are the two exceptions? A. The Elite Dental Alliance . . . .")); *see also* CX0304 (Ryan, IHT at 256) ("Is EDA a group purchasing organization? A. I would consider it one."); Ryan, Tr. 1274). Benco's December 2015 Case Study refers to EDA as a "GPO founded by Cain Watters." (CCFF ¶ 1372; CX1084 at 001 ("Elite Dental Alliance (EDA): A GPO founded by Cain Watters . . . .")). That document specified that GPO and buying group were interchangeable. (CX1084 at 001 ("While there may be technical differences, we'll use the terms 'buying group' and 'GPO' interchangeably."));

Cohen, Tr. 458 (testifying that in CX1084, Cohen was using the terms “buying group” and “GPO” interchangeably)).

The Proposed Finding is misleading in that it suggests other buying groups are not unique. To the contrary, Benco recognizes that each buying group has a unique structure. (Cohen, Tr. 682 (“[If] you’ve seen one DSO, you’ve seen one DSO, you’ve seen one buying group, you’ve seen one buying group. There are a lot of different flavors and a lot of different creative answers to this aggregation question on the part of the dental practices.”); Ryan Tr. 1169). Finally, Benco has only worked with one buying group (EDA) so it is not the best source for how EDA compares to other buying groups.

249. Benco determined that, at least on a trial basis, that participation in EDA would result in an increase in volume and therefore more margin dollars coming in to make up for any margin dollars lost by giving discounts to existing Benco customers who joined EDA. (Cohen, Tr. 820).

#### **Response to Proposed Finding No. 249**

The Proposed Finding is misleading and incomplete. It is incomplete because it omits that Benco worked with EDA in part to avoid losing the EDA partnership to Schein or Patterson. (CCFF ¶ 1383). The Proposed Finding is misleading because the cited Cohen testimony articulating criteria that should apply, is applicable to the evaluation of any buying group, not just EDA. That is, the motivation to work with any buying group is “to pick up more incremental business than the margin dollars that are lost by giving discounts to current Benco customers” is not EDA-specific. (Cohen, Tr. 820).

250. Benco determined that it was in its economic interests to partner with Cain Watters and EDA. (Cohen, Tr. 823-824), and decided to partner with Cain Watters on EDA on a one-year trial basis, and when the trial worked out well, Benco decided to continue on. (Cohen, Tr. 463; 823).

#### **Response to Proposed Finding No. 250**

This proposed fact shows that Benco completed a straightforward analysis of a buying group and came to the same conclusion that many competitor distributors reached with buying groups for years—namely, that there was an economic incentive to work with buying groups to gain incremental revenue by more sales, albeit at a reduced margin. (Cohen, Tr. 840). This was the same conclusion Burkhart reached in deciding to work with Smile Source and Kois. (Reece, Tr. 4452 (“I guess looked at [the Kois Buyers Group] differently. I looked at it more as an opportunity, an offensive play.”); CX0215 (Burkhart’s predictions of the increased sales they would gain from offering discounts to the Smile Source buying groups); Reece, Tr. 4398-4399 (discussing CX0215)). This Proposed Finding illustrates that Benco’s policy of not working with any buying groups (prior to EDA) was against Benco’s unilateral interest. Benco’s policy was unrelated to resource constraints. (Ryan, Tr. 1031 (“So in other words, it has not been a matter of resources restraining Benco from selling to buying groups? A. No.”)). Buying groups represented both a threat and opportunity to Benco. (CX0068 at 18). Given the fact that each buying group has a unique structure, a blanket no-buying group ban is against economic interest and is illogical. (Cohen, Tr. 682 (“[If] you’ve seen one DSO, you’ve seen one DSO, you’ve seen one buying group, you’ve seen one buying group. There are a lot of different flavors and a lot of different creative answers to this aggregation question on the part of the dental practices.”); Ryan Tr. 1169).

251. Benco announced its partnership with Cain Watters and EDA at its sales meeting in early 2016. (Cohen, Tr. 823).

#### **Response to Proposed Finding No. 251**

Complaint Counsel has no specific response.

252. Under the agreement with Cain Watters, Benco is the exclusive dental distributor for the EDA, 817:14-15 (Cohen), but there are also direct sellers of products that are vendor partners of EDA. (Cohen, Tr. 817).

**Response to Proposed Finding No. 252**

Complaint Counsel has no specific response.

253. Benco has veto power over proposed vendors for the EDA program. (Cohen, Tr. 817).

**Response to Proposed Finding No. 253**

Complaint Counsel has no specific response.

254. In order to qualify for discounts from Benco, EDA members must purchase a minimum volume of products from Benco. (Cohen, Tr. 817).

**Response to Proposed Finding No. 254**

Complaint Counsel has no specific response except to note that Cohen testified “EDA members are free to buy from wherever they would like.” (Cohen, Tr. 818).

255. Benco also looked at the relationship between the dentists and Cain Watters and determined that because Cain Watters meets with its clients once a year for an in-depth conversation on financial planning and other issues, that that would help Benco because there would be a reason for the clients to listen to the story about EDA and want to participate. (Cohen, Tr. 819).

**Response to Proposed Finding No. 255**

Complaint Counsel has no specific response.

256. Because Benco was a partner in EDA, it had the ability to restrict the growth of EDA. As a result, Benco could be confident that it understood EDA’s strategy going forward (Cohen, Tr. 821).

**Response to Proposed Finding No. 256**

Complaint Counsel has no specific response except to note the tension with Benco’s Proposed Fact 236. (*See* BFF ¶ 236 (“Although Benco does not have an ownership interest in EDA, it has an agreement with Cain Watters that the companies will work together to grow EDA.”)).

257. Benco also has control over the rules for admitting members into EDA, and membership is restricted to clients of Cain Watters or large dental practices with more than \$2 million in gross revenue. (Cohen, Tr. 821).

**Response to Proposed Finding No. 257**

Complaint Counsel has no specific response.

258. Looking at the issue of compliance, or whether EDA members would actually purchase from Benco, Benco believed there would be a good measure of compliance by EDA members about buying from Benco. (Cohen, Tr. 820).

**Response to Proposed Finding No. 258**

The Proposed Finding is vague and counsel objects to the phrase “a good measure of compliance”. It is unclear whether this refers to a way to measure compliance or whether there would be a considerable amount of compliance.

259. For EDA, Benco looked at the entirety of the situation, and combined that with Benco’s ability to have some measure of control over EDA and how it markets, and Benco decided that it would make an exception to its policy by working with Cain Watters to develop EDA. (Cohen, Tr. 463; 819).

**Response to Proposed Finding No. 259**

Complaint Counsel does not disagree and would add that many of the buying groups at issue in this case should have led Benco to the same conclusion for two reasons. First, EDA presents similarly to other buying groups with no contractual provisions to purchase from Benco and no common ownership. Second, buying groups drive incremental value for distributors. *See* CCFF ¶¶ 1297-1299, 1301, 1306, 1312-1313, 1685-1687, 1689, 1694-1695, 1698-1700, 1718, 1723-1725, 1730; *see also* CCFF ¶¶ 1652-1654, 1656, 1644, 1666, 1673, 1681, 1727, 1729).

260. Whereas, on the one hand, Benco considers EDA an exception to its no-middlemen policy, because EDA is an entity positioned between Benco and its customers – the independent dentist members of EDA, on the other hand, no exception is required because Benco is a partner in the joint venture of EDA and has a 50% stake in the profits of EDA. (Cohen, Tr. 816-24).

**Response to Proposed Finding No. 260**

To the extent that the Proposed Finding suggests no change in conduct, it is not supported by the weight of the evidence and is misleading. Cohen testified that EDA is a buying group and that Benco made an exception to their policy in order to discount to the buying group members of EDA. (Cohen, Tr. 451; *see also* Respondents’ Joint Proposed Conclusion of Law ¶ 162 (“And

since 2015, it has offered discounts to a buying group on only one occasion – the Elite Dental Alliance.”)). In addition, Complaint Counsel objects to the use of the words “no-middlemen policy” to refer to a no-buying group policy. Cohen testified it is fair to say Benco had a no *buying group* policy. (Cohen, Tr. 445; *see also* Benco Post Tr. Br. at 10 (Benco followed its “longstanding policy . . . not to deal with buying groups”); CCFF ¶ 419 (“Benco has a firm policy of non-recognition of GPOs as a single customer.”); [REDACTED]; CX0062 Guggenheim asking Cohen (“wondering if your position on buying groups is still as you articulated back in February?”)). The Proposed Finding is misleading in that it suggests that Benco executed from a policy not aimed at buying groups specifically. (CCFF ¶¶ 394-431). While Benco used the term no-middlemen policy during these proceedings, the contemporaneous documents and communications evidence a no-buying group policy and lack any reference to a no-middleman policy. (CCFF ¶¶ 399 (“Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups”), 410 (“We do not participate in buying groups. Ever.”), 404, 406, 416, 419, 527-528, 574-575, 582, 661-664, 677). It is irrelevant what label Benco gives, the evidence shows that throughout the conspiracy period, Benco instructed its employees to refuse to discount to *buying groups*. (CCFF ¶¶ 423, 396, 401, 417).

261. The structure of EDA is closer to a GPO than a buying group, because there are services that are handled by EDA that go beyond just a membership and access to specials – like financial services and discounts on products and services beyond the dental supplies and equipment. (Cohen, Tr. 822).

### **Response to Proposed Finding No. 261**

The Proposed Finding of fact is misleading, inaccurate, and irrelevant. The Proposed Finding is misleading to the extent it suggests that Cohen recognized a difference between GPOs and buying groups at the time it partnered with EDA because Cohen testified that he uses the terms GPO and buying group interchangeably generally (Cohen, Tr. 437-438) and specifically with

regards to EDA. (Cohen, Tr. 458). First, a contemporaneous document Cohen drafted in late 2015 about EDA specifically stated: “Group Purchase Organization (GPO): A group of independent offices that join together to leverage their purchasing power for a bigger discount; in exchange, they 'commit' to purchase from specific vendors. While there may be technical differences, we'll use the terms 'buying group' and 'GPO' interchangeably.” (CX1084 at 001; Cohen, Tr. 458 (confirming he used the terms interchangeably in reference to EDA)). In addition to confirming the terms are interchangeable in reference to EDA, Cohen also testified he generally used the terms interchangeably. (Cohen, Tr. 437-438). It is irrelevant if Cohen perceives a difference at the time of trial. The Court should reject this finding as misleading and against the weight of the evidence. The Proposed Finding is also misleading and incorrect to the extent that it suggests that EDA is not a buying group. (*See* Respondents’ Joint Proposed Conclusion of Law ¶ 162 (“And since 2015, it has offered discounts to a buying group on only one occasion – the Elite Dental Alliance.”)). Contemporaneous documents and testimony from Benco’s own witnesses confirm that EDA is a buying group. Cohen admitted at trial that Benco changed its no buying group policy to accommodate EDA. (CCFF ¶ 1370). Cohen identified EDA as an example of a buying group in the dental industry in prior testimony. (Cohen, Tr. 448; CX0301 (Cohen, IHT at 107) (“Q. As you sit here today, can you name any buying groups in the dental industry? A. Elite Dental Alliance . . . .”)). Ryan also identified EDA as an example of an exception to Benco’s no buying group policy in prior testimony. (CX0304 (Ryan, IHT at 117-118) (“Q. Is the no-GPO policy still in effect today? A. Yes, with two exceptions. Q. And what are the two exceptions? A. The Elite Dental Alliance . . . .”); *see also* CX0304 (Ryan, IHT at 256) (“Is EDA a group purchasing organization? A. I would consider it one.”); Ryan, Tr. 1274). Benco’s December 2015 Case Study refers to EDA as a “GPO founded by Cain Watters.” (CCFF ¶ 1372; CX1084 at 001 (“Elite Dental Alliance (EDA): A GPO founded by Cain Watters . . . .”)).



That document specified that GPO and buying group were interchangeable. (CX1084 at 001 (“While there may be technical differences, we’ll use the terms ‘buying group’ and ‘GPO’ interchangeably.”); Cohen, Tr. 458 (testifying that in CX1084, Cohen was using the terms “buying group” and “GPO” interchangeably)).

262. Benco’s role in EDA is not inconsistent with its policy and does not represent any change in behavior by Benco. (Cohen, Tr. 816-24; 863).

**Response to Proposed Finding No. 262**

The Proposed Finding is misleading and contrary to the weight of the evidence. Specifically, the Proposed Finding does not mention that while Cohen stated in the cited testimony that he did not believe Benco’s role in EDA was inconsistent with its policy, he also stated that Benco’s role in EDA was an “exception” to the policy. (Cohen, Tr. 824). Moreover, Cohen went on to testify that the policy is still in place today, except for with regards to EDA. (Cohen, Tr. 824).

Similarly, Cohen admitted at trial that Benco changed its no buying group policy to accommodate EDA. (CCFF ¶ 1370). And Cohen identified EDA as an example of a buying group in the dental industry in prior testimony. (Cohen, Tr. 448; CX0301 (Cohen, IHT at 107) (“Q. As you sit here today, can you name any buying groups in the dental industry? A. Elite Dental Alliance . . . .”)). Ryan also identified EDA as an example of an exception to Benco’s no buying group policy in prior testimony. (CX0304 (Ryan, IHT at 117-118) (“Q. Is the no-GPO policy still in effect today? A. Yes, with two exceptions. Q. And what are the two exceptions? A. The Elite Dental Alliance . . . .”); *see also* CX0304 (Ryan, IHT at 256) (“Is EDA a group purchasing organization? A. I would consider it one.”); Ryan, Tr. 1274). An exception to policy is by definition inconsistent with it. The Proposed Finding is also misleading and incomplete because it omits that throughout the conspiracy period, Benco rejected all buying groups as a matter of policy, regardless of whether any buying group had “unique” characteristics. (CCFF ¶¶

395-396; Ryan, Tr. 1028-1029 (“Q. And once Benco determined that a group was a buying group, you do not do any further discovery; right? A. No. Typically not . . . And is it 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. Q. And the answer was no regardless of whether the buying group's members were your competitors' customers or Benco's customers. A. Correct.”)). Indeed, Benco did not bid for American Academy of Cosmetic Dentistry, (CCFF ¶ 418); DDS Group, (CCFF ¶ 415); Dental Purchasing Group, (CCFF ¶ 422); Dental Visits LLC, (CCFF ¶ 419); Dentistry Unchained, (CCFF ¶ 425); Dr. David Carter, (CCFF ¶ 411); Dr. Stephen Sebastian, (CCFF ¶ 420); Erie Family Dental Equipment, (CCFF ¶ 417); Insight Sourcing Group, (CCFF ¶ 423); Kois Buyers Group, (CCFF ¶ 421); New Mexico Dental Cooperative, (CCFF ¶ 414); Nexus Dental, (CCFF ¶ 409); Save Dentists, Inc., (CX1208 at 001; CCFF ¶ 404); Schulman Group, (CCFF ¶ 424); Smile Source, (CCFF ¶ 410); Synergy Dental Partners, (CCFF ¶ 408); Unified Smiles, (CCFF ¶ 412); WheelSpoke LLP, (CCFF ¶ 416); XYZ Dental, (CCFF ¶ 413). Then, in late 2015, for the first time, Benco evaluated the individual characteristics of the EDA buying group, and entered into a discounting arrangement. (CCFF ¶¶ 1367-1387). Thus, Benco’s decision to work with a buying group in a long term purchasing arrangement clearly represents a change in behavior by Benco. (See Respondents’ Joint Proposed Conclusion of Law ¶ 162 (“And since 2015, it has offered discounts to a buying group on only one occasion – the Elite Dental Alliance.”)). Notably, Benco did not begin working with EDA until after the settlement with the Texas Attorney General over potentially anticompetitive actions with regards to coordination with Patterson and Schein. (Cohen, Tr. 452-453). Further, by Benco’s own admission EDA is a success, helped Benco compete for new customers and is the only meaningful experience with a buying group Benco has had, aside from turning buying groups down. EDA is Benco’s first and only buying group

and by its own assessment EDA has successfully delivered compliance, customers, as well as financial and competitive gains. (BFF ¶¶ 250, 264-268; CX1016).

263. Benco's policy remains in place and Benco still believes that buying groups provide no economic value to Benco because they cannot drive compliance or deliver volume commitments. (Cohen, Tr. 445; 451; 816-24; 863).

**Response to Proposed Finding No. 263**

This Proposed Finding is unsupported by the evidence. EDA is a buying group, Cohen has referred to them as such on multiple occasions. (Cohen, Tr. 449 (“Q. Elite Dental Alliance is the first buying group that Benco has worked with? A. Yes.”); *see also* Respondents’ Joint Proposed Conclusion of Law ¶ 162 (“And since 2015, it has offered discounts to a buying group on only one occasion – the Elite Dental Alliance.”)). EDA is Benco's first and only buying group and by its own assessment EDA has successfully delivered compliance, customers, as well as financial and competitive gains. (BFF ¶¶ 264-268). In fact, Benco continues to choose to work with the EDA buying group as a result of its success. (BFF ¶ 250). Benco successfully uses that buying group to compete and convert customers from its larger competitors Schein and Patterson. Benco has won customers from Schein using buying group EDA. (CX1016). In response to reports of “a new EDA customer coming from Schein” in June of 2016, Cohen responded “[h]ow great that we get the opportunity to steal this deal from [a former employee] and Schein.” (CX1016 at 001). In February of 2017, Cohen received an email from Cain Watters stating that Benco just stole a multi-million dollar account away from Schein “because of EDA.” (CX1087 at 001). Similarly, Benco has won customers from Patterson by competing through buying group EDA. In May of 2016, a Benco Sales rep Julie Radzynski offered congratulations to a sales rep that “just signed up a new customer on EDA Gold who USED to buy all of their supplies from Patterson! Now they are switching to Benco . . . Great job Teresa!” (CX1086 at 008). Because the only concrete experience Benco has had with a buying group is successful and ongoing, and

used for competitive purposes, this Proposed Finding should be rejected as unsupported by the weight of the evidence.

Finally the Proposed Finding is incomplete because Benco recognized that buying groups represented both a threat and opportunity to Benco, (CX0068 at 18), and that each buying group has a unique structure. (Cohen, Tr. 682; Ryan, Tr. 1169). As a result, maintaining its blanket no-buying group policy and rejecting all buying groups is against economic interests and illogical. (Ryan, Tr. 1028-1029 (“Q. And once Benco determined that a group was a buying group, you do not do any further discovery; right? A. No. Typically not . . . And is it 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. Q. And the answer was no regardless of whether the buying group's members were your competitors' customers or Benco's customers. A. Correct.”)). Further, Benco knew that due to its no-buying group policy, it was losing customers who switched to competitors supplying buying groups. (Ryan, Tr. 1129-1130).

264. EDA has been in operation for nearly two years and Benco believes that EDA has been successful. (Cohen, Tr. 471; 824).

**Response to Proposed Finding No. 264**

Complaint Counsel has no specific response.

265. Through EDA, Benco has added new customers and EDA has almost 1,000 members. (Cohen, Tr. 824).

**Response to Proposed Finding No. 265**

Complaint Counsel does not object but would note that while Benco argues that EDA is a successful relationship, (BFF ¶ 264), and that Benco has gained 1000 customers through EDA, (BFF ¶ 265), the 1000 customers does not reflect all the members of EDA. In a 2015 email Cain Waters solicits Benco with access to its 1600 customers. (CX1280 at 002). Benco thus believes

EDA to be successful even though EDA only produced relationships with approximately 62.5% of the original membership (1000/1600) despite that the relationship with EDA is exclusive to Benco. (BFF ¶ 252).

266. [REDACTED]

**Response to Proposed Finding No. 266**

The Proposed Finding is inaccurate and misleading. [REDACTED]

[REDACTED], rather Cohen testified that Benco has “control over the rules for admitting members into EDA, and membership in EDA is restricted to clients of Cain Watters or practices with more than \$2 million of gross revenue.” (Cohen, Tr. 821). To the extent that the Proposed Finding suggests that [REDACTED], Complaint Counsel does not object. Additionally, following the conspiracy, Benco even sought to get the Kois Buyers Group to join EDA. (CX1084 at 003 (“JLR and I convinced [EDA] that . . . we should bring in Seattle Study Club and Kois as additional partners, because of their broad market reach and strong brands.”)).

267. In addition to the financial gain that Benco has realized from EDA through its 50% profit-sharing with Cain Watters, Benco has realized other benefits from EDA that would not have been possible through any other buying group that did not possess the unique characteristics of EDA. (Cohen, Tr. 824-25).

**Response to Proposed Finding No. 267**

The Proposed Finding is not supported by the cited evidence. While working with a buying group may have afforded Benco the claimed benefit, the cited testimony does not tie it to 50% profit-sharing with Cain Waters. (Cohen, Tr. 824-825).

268. Due to the control over EDA that Benco has through its agreement with Cain Watters and due to the 50% profit-sharing agreement, Benco has been able to use EDA as a controlled testing laboratories for new product offerings and new go-to-market strategies. (Cohen, Tr. 824-26).

**Response to Proposed Finding No. 268**

The Proposed Finding is not supported by the cited evidence. While working with a buying group may have afforded Benco the claimed benefit, the cited testimony does not tie it to 50% profit-sharing with Cain Waters. (Cohen, Tr. 824-825).

269. In particular, Benco has tested various shipping plans and strategies directed at increasing incremental customer acquisitions. (Cohen, Tr. 824-26).

**Response to Proposed Finding No. 269**

Complaint Counsel has no specific response.

270. Most importantly, Benco has used EDA as a testing ground for rethinking its overall go-to-market strategy and its customer value proposition. It has tested the behavior of dentists and responses of dentists who are members of EDA. The information learned through member testing in EDA has directly impacted Benco's new strategy, which it intends to introduce to the market in 2019. (Cohen, Tr. 824-26).

**Response to Proposed Finding No. 270**

Complaint Counsel does not disagree that Benco has obtained pro-competitive results from work with a buying group.

### **III. RESPONSES TO PROPOSED FINDINGS REGARDING “BENCO ACTED IN ITS OWN ECONOMIC INTEREST AND CONSISTENT WITH ITS NO-MIDDLEMAN POLICY IN ITS DEALING WITH THE KOIS CENTER & THE KOIS BUYERS GROUP”**

#### **A. RESPONSES TO PROPOSED FINDINGS REGARDING “DR. KOIS & THE KOIS CENTER”**

271. Dr. John Kois is a dentist and director of the Kois Center. (Kois, Sr., Tr. 161).

**Response to Proposed Finding No. 271**

Complaint Counsel has no specific response.

272. The Kois Center is a private teaching center for practicing dentists located in Seattle, Washington. (Kois, Sr., Tr. 163; Cohen, Tr. 788).

**Response to Proposed Finding No. 272**

Complaint Counsel has no specific response.

273. Dr. Kois founded the Kois Center in 1994 to help practicing dentists further their education and improve their delivery of healthcare to their patients. (Kois, Sr., Tr. 164).

**Response to Proposed Finding No. 273**

Complaint Counsel has no specific response.

274. There are nine courses in the Kois Center curriculum, involving many fields of dentistry, all taught by Dr. Kois. Each course runs from three to five days, and the Kois Center offers over 30 courses per year. (Kois, Sr., Tr. 164-165).

**Response to Proposed Finding No. 274**

Complaint Counsel has no specific response.

275. There are about 40 students in each course, who come from all over the world. (Kois, Sr., Tr. 165).

**Response to Proposed Finding No. 275**

Complaint Counsel has no specific response.

276. Approximately 4,000 dentists have taken course at the Kois Center, and approximately 900 dentists have completed all of the courses. (Kois, Sr., Tr. 165).

**Response to Proposed Finding No. 276**

Complaint Counsel has no specific response.

277. Students of the Kois Center are nicknamed “The Tribe.” (Kois, Sr., Tr. 165).

**Response to Proposed Finding No. 277**

Complaint Counsel has no specific response.

278. In Dr. Kois’s private practice, he purchased most of his dental products from Burkhardt, and the remainder are supplied through separate individual companies. (Kois, Sr., Tr. 168).

**Response to Proposed Finding No. 278**

Complaint Counsel has no specific response.

279. Kois estimated that for his own practice, he purchased 75 percent of disposables through dental distributors and 25 percent from direct vendors. (Kois, Sr., Tr. 285).

**Response to Proposed Finding No. 279**

Complaint Counsel has no specific response.

280. Burkhart was the original supply company that Dr. Kois started working with in 1985. It provided all the equipment that was necessary to build his office and it continues to supply many of the supply items that he uses on a daily basis in practice. (Kois, Sr., Tr. 169).

**Response to Proposed Finding No. 280**

Complaint Counsel has no specific response.

281. Burkhart also provides services to Dr. Kois's dental practice. Burkhart has a representative that informs Dr. Kois of new products and helps control some of his inventory by making sure he has the right stock of equipment and doesn't run out of anything. (Kois, Sr., Tr. 169-170).

**Response to Proposed Finding No. 281**

Complaint Counsel has no specific response.

282. The Burkhart sales representative comes to Dr. Kois's office once every two weeks. (Kois, Sr., Tr. 170).

**Response to Proposed Finding No. 282**

Complaint Counsel has no specific response.

283. When placing orders with Burkhart, Dr. Kois's staff record items that are needed, and they provide that information to the Burkhart sales representative when he comes in. (Kois, Sr., Tr. 171). If there is something more important, they would call or get in touch with the Burkhart sales representative. (Kois, Sr., Tr. 171).

**Response to Proposed Finding No. 283**

Complaint Counsel has no specific response.

284. Dr. Kois considers Burkhart to be a full-service distributor, meaning it not only sell supplies, but also services the equipment and provides instruction or training on equipment that it sells to Dr. Kois. (Kois, Sr., Tr. 170-171).

**Response to Proposed Finding No. 284**

Complaint Counsel has no specific response.

285. When Dr. Kois's staff needs to be trained on new equipment, some of the training comes directly from the supply company [Burkhart]. For other types of equipment, they depend on the actual company [the manufacturer] to supply training. (Kois, Sr., Tr. 171).



**Response to Proposed Finding No. 285**

Complaint Counsel has no specific response.

286. Burkhart services his equipment, and when equipment needs servicing, his staff calls Burkhart directly. (Kois, Sr., Tr. 171-172).

**Response to Proposed Finding No. 286**

Complaint Counsel has no specific response.

287. Dr. Kois has also purchased from Benco, Schein and Patterson. (Kois, Sr., Tr. 168-169).

**Response to Proposed Finding No. 287**

Complaint Counsel has no specific response.

288. When Dr. Kois purchases products from Benco, Schein and Patterson, he receives discounts. (Kois, Sr., Tr. 231; 286-287).

**Response to Proposed Finding No. 288**

The Proposed Finding is misleading and irrelevant to the extent it suggests all independent dentists receive discounts from all distributors because Dr. Kois receives discounts as Dr. Kois is a celebrity. (CCFF ¶ 165; CX8021 (Reece, Dep. at 71) (Dr. Kois is on the “top rung of respect in dentistry.”)).

289. Price is a factor “many times” for disposable products the Dr. Kois purchases for his practice. (Kois, Sr., Tr. 176-177).

**Response to Proposed Finding No. 289**

Complaint Counsel has no specific response.

B. RESPONSES TO PROPOSED FINDINGS REGARDING “THE KOIS BUYERS GROUP”

290. Dr. Kois started the Kois Buyers Group in 2014, and anyone that has come to the Kois Center for a course has access to the Kois Buyers Group. (Kois, Sr., Tr. 23).

**Response to Proposed Finding No. 290**

The Proposed Finding is not supported by the evidence cited. The citation is to the opening statement of Lin Kahn. In addition, the Proposed Finding is inaccurate. A student of the Kois Center has the opportunity to join the Kois Buyers Group, but access is not automatic. (Kois, Jr., Tr. 317-318).

291. The Kois Buyers Group is managed by Dr. Kois' son, John C. Kois, Jr. ("Johnny Kois"), who is the CEO of the Kois Center. (Kois, Jr., Tr. 305).

**Response to Proposed Finding No. 291**

Complaint Counsel has no specific response.

292. Members pay a \$299 yearly fee, and the Kois Buyers Group does all of the research on the products and provides training for products that it recommends. (Kois, Sr., Tr. 24).

**Response to Proposed Finding No. 292**

The Proposed Finding is not supported by the evidence cited. The citation is to the opening statement of Lin Kahn.

293. Dr. Kois does not know how much of a percentage volume discount members of the Kois Buyers Group receive. (Kois, Sr., Tr. 24).

**Response to Proposed Finding No. 293**

The Proposed Finding is not supported by the evidence cited. The citation is to a page that does not contain testimony of Dr. Kois. To the extent that the citation was intended to be (Kois, Sr., Tr. 180-181), the Proposed Finding is incomplete and misleading. Dr. Kois is not in the best position to know—his son, as the CEO of the Kois Center and manager of the Kois Buyers Group, is in the best position to know. (Kois, Sr., Tr. 185 ("Q: Do you negotiate a discount or is it just an across-the-board cut? How does that work? A: I did not negotiate the discounts, so that – it would be a better question for my son Johnny.")), and in fact Johnny Kois does know the percentage discounts that members of the Kois Buyers Group receive and posts those discounts on the Kois Center webpage. (Kois, Jr., Tr. 316, 325-327 ("[A]s a member, you're getting at

least a 15 percent discount off of the manufacturer's retail price through the Kois Buyers Group.")). The Proposed Finding is also misleading because it does not include the fact that Dr. Kois testified that he does not know exactly what percentage discount members of the Kois Buying Group receive but is aware that the members are saving money. (Kois, Sr., Tr. 181).

294. All students of the Kois Center ("The Tribe") are eligible to be a member of the Kois Buyers Group, but not every member of The Tribe is a member of the Kois Buyers Group. (Kois, Sr., Tr. 234- 235; Kois, Jr., Tr. 308).

#### **Response to Proposed Finding No. 294**

Complaint Counsel has no specific response.

295. Kois Buyers Group fee structure was originally for members to pay an initial deposit of between \$398 and \$998 dollars, and to pay a monthly fee ranging from \$199 to \$299 depending upon how much the dentist would spend per month on inventory. (Kois, Sr., Tr. 238-239; CX 290).

#### **Response to Proposed Finding No. 295**

The Proposed Finding is incorrect in part. Specifically, the initial Kois Buyers Group fee structure had a monthly fee ranging from \$199 to \$499, not \$299. (Kois, Sr., Tr. 239).

296. That fee structure was way too expensive, and the Kois Buyers Club did not get enough people that would follow that kind of purchase agreement. (Kois, Sr., Tr. 239).

#### **Response to Proposed Finding No. 296**

Complaint Counsel objects to use of the word "Club" to describe the Kois Buyers Group.

Elsewhere in the Proposed Findings, the buying group is referred to as Kois Buyers Group. Kois Buyers Group and Kois Buyers Club are not different entities and should be referred to consistently throughout the Proposed Findings. (CCFF ¶¶ 140-141, 163).

297. The original fee schedule was in effect for less than a year, and then the fee was changed to \$299 per year. Any dentist who had paid the initial deposit of almost a thousand dollars got a three-year membership in the Kois Buyers Club. (Kois, Sr., Tr. 240).

#### **Response to Proposed Finding No. 297**

Complaint Counsel objects to use of the word “Club” to describe the Kois Buyers Group.

Elsewhere in the Proposed Findings, the buying group is referred to as Kois Buyers Group. Kois Buyers Group and Kois Buyers Club are not different entities and should be referred to consistently throughout the Proposed Findings. (CCFF ¶¶ 140-141, 163).

298. The Kois Buyers Group changed the fee to \$299 per year after Qadeer Ahmed was no longer part of the buying group. (Kois, Sr., Tr. 241).

**Response to Proposed Finding No. 298**

Complaint Counsel has no specific response.

299. There are members of the Kois Buyers Group that do not purchase from the buying group vendors. (Kois, Sr., Tr. 2460).

**Response to Proposed Finding No. 299**

The Proposed Finding is not supported by the evidence cited. To the extent that the citation was intended to be to (Kois, Sr., Tr. 246), the Proposed Finding is incomplete to the extent it suggests the relationship does not provide incremental volume to the distributor (Burkhart). The Proposed Finding does not mention the fact that Burkhart sees incremental revenue and customers through its partnership with the Kois Buying Group, outside purchases by members of the Group notwithstanding. ( [REDACTED] ; [REDACTED] ).

300. Johnny Kois is surprised there have not been more dentists sign up, and does not know why there have not been more sign-ups. (Kois, Sr., Tr. 254).

**Response to Proposed Finding No. 300**

The Proposed Finding is not supported by the evidence cited. The citation is to testimony by Kois, Sr. and does not mention whether or not Johnny Kois had any reaction to the number of dentist sign-ups to Kois Buyers Group.

301. Burkhart has an exclusive agreement with the Kois Buyers Group, meaning that for the United States Burkhart is the only distributor that offers a discount specifically through the Kois Buyers Group. (Kois, Jr., Tr. 322; 324).

**Response to Proposed Finding No. 301**

Complaint Counsel has no specific response.

302. The Kois Buyers Group agreement with Burkhart provides for a 15% discount off of retail prices. (Kois, Jr., Tr. 335).

**Response to Proposed Finding No. 302**

Complaint Counsel has no specific response.

303. A dentist may already be getting a better price than retail, so those dentists may not actually see a 15% discount off of what they are currently paying. (Kois, Jr., Tr. 335).

**Response to Proposed Finding No. 303**

Complaint Counsel has no specific response.

304. Johnny Kois does not know the difference between the 15% discount off of retail prices the Kois Buyers Group members receive and what discounts the members might receive on purchases outside of the Kois Buyers Group. (Kois, Jr., Tr. 359).

**Response to Proposed Finding No. 304**

Complaint Counsel has no specific response.

305. The Kois Buyers Group agreement with Burkhart was signed in November 2014. (CX 1032).

**Response to Proposed Finding No. 305**

Complaint Counsel has no specific response.

306. Johnny Kois's responsibilities as manager of the Kois Buyers Group is to manage and maintain the relationships with its vendors, assist members that have any issues when they sign up, and manage the membership and the website. (Kois, Jr., Tr. 309).

**Response to Proposed Finding No. 306**

Complaint Counsel has no specific response.

307. Johnny Kois is the only employee of the Kois Buyers Group. (Kois, Jr., Tr. 313-314).

**Response to Proposed Finding No. 307**

Complaint Counsel has no specific response.

308. For Burkhart, the margin that Burkhart receives on sales of supplies to Kois Buyers Group members is blended, between members west of the Mississippi, where Burkhart

acts as a full service distributor, and east of the Mississippi, where Burkhart does not offer a full suite of services. (Kois, Jr., Tr. 357-357).

**Response to Proposed Finding No. 308**

Complaint Counsel has no specific response.

309. Johnny Kojs does not know what discounts members of the Kojs Buyers Group might receive from Schein, Patterson or Benco for purchases they make outside of the Kojs Buyers Group program. (Kois, Jr., Tr. 357-358).

**Response to Proposed Finding No. 309**

Complaint Counsel has no specific response.

310. The contract that Mr. Ahmed negotiated with Burkhart was a two-year contract that would end in 2016. (CX1032).

**Response to Proposed Finding No. 310**

Complaint Counsel has no specific response.

311. Johnny Kojs negotiated a renewal contract for the Kojs Buyers Group to last from January 2016 through the end of 2017. (Kois, Jr., Tr. 341; RX1078).

**Response to Proposed Finding No. 311**

Complaint Counsel has no specific response.

312. Johnny Kojs did not contact Patterson about becoming a supplier for the Kojs Buyers Group when he renegotiated the contract that was to begin in January 2016. (Kois, Jr., Tr. 382-383).

**Response to Proposed Finding No. 312**

The Proposed Finding is irrelevant. Whether or not Patterson was approached about becoming a distributor for the Kojs Buyers Group in 2016 has no bearing on the matter in this case and does not detract from the fact that Patterson turned down the opportunity to bid for Kojs Buyers Group during the conspiracy in 2014. (CCFF ¶¶ 639-640).

313. Johnny Kojs has not reached out to Schein regarding the Kojs Buyers Group in the United States since he took over in October 2015, (Kois, Jr., Tr. 362), including when he was negotiating the renewed contracts with Burkhart. (Kois, Jr., Tr. 362).

**Response to Proposed Finding No. 313**

The Proposed Finding is irrelevant because it occurs after the alleged conspiracy and does not detract from Schein's lack of a bid for the Kois Buyers Group during the conspiracy. (CCFF ¶ 928).

314. In the fall of 2015, at the time of the negotiations for the 2016 Kois Buyers Group contract, Johnny Kois had discussions with Burkhart and Benco. (Kois, Jr., Tr. 342).

**Response to Proposed Finding No. 314**

Complaint Counsel has no specific response.

315. Kois asked both Burkhart and Benco if they would both be interested in being dental supply companies for the Kois Buyers Group. (Kois, Jr., Tr. 342).

**Response to Proposed Finding No. 315**

Complaint Counsel has no specific response.

316. Neither Burkhart nor Benco was interested in having another distributor in the Kois Buyers Group. (Kois, Sr., Tr. 352-353).

**Response to Proposed Finding No. 316**

Complaint Counsel has no specific response.

317. Johnny Kois did not ask for bids for the 2016 contract. When Burkhart said it did not want to be in the group with another distributor, Johnny Kois continued the negotiation process with Burkhart alone because he already had an agreement with Burkhart. (Kois, Jr., Tr. 343).

**Response to Proposed Finding No. 317**

Complaint Counsel has no specific response.

318. Dr. Kois made the decision to move forward with Burkhart as the distributor for the Kois Buyers Group around October 30, 2014. (Kois, Sr., Tr. 302-303; CX4251).

**Response to Proposed Finding No. 318**

The Proposed Finding is incomplete, misleading, and inaccurate. First, CX4251 is a 60-page document. The Proposed Finding does not specify what it suggests is the basis for the Proposed Finding nor can Complaint Counsel find such a basis. The penultimate email in CX4251 is from Ahmed on October 30, 2014 where he states "we're close to cracking this thing open" and by no

means conveys a decision to work with Burkhart. Similarly, the final email in the 60 page document CX4251 shows Burkhart is still working on its analysis for the bid on October 30, 2014. Second, the date is irrelevant to the fact that Dr. Kois did not select Burkhart until Kois Buyers Group was turned down by Benco, Schein, and Patterson first. (CX8007 (Dr. Kois, Sr., Dep. at 161-162) (“Q. Take you back again to the fall of 2014 when you were . . . working at setting up the Kois Buying Group with Mr. Ahmed. Did you turn to Burkhart to be the distributor only after you found out from Qadeer that Benco, Schein and Patterson were not willing to do a contract? [ . . . ] A. Yes.”)).

319. Dentists who have taken a course at the Kois Center have the ability to get a membership code, and Burkhart acknowledges and recognizes the code and passes on a negotiated discount for those purchases. (Kois, Sr., Tr. 184-185).

**Response to Proposed Finding No. 319**

The Proposed Finding is misleading because although it is true that dentists who have taken a course at the Kois Center are eligible to obtain membership with Kois Buyers Group, dentists who have taken a course at the Kois Center but have not yet obtained membership with Kois Buyers Group do not have the ability to get a membership code.

320. A student at the Kois Center, Dr. Robert Cappell of Toronto, Canada, told Dr. Kois that he had a friend, named Qadeer Ahmed, who had some ability to make contacts on behalf of the Kois Center in connection with the proposed Kois Buyers Group. (Kois, Sr., Tr. 187-188, 212-213).

**Response to Proposed Finding No. 320**

Complaint Counsel has no specific response.

321. Mr. Ahmed had a company called Procure Services in Canada. In August or September 2014, Dr. Kois asked Ahmed to reach out to companies and see who might be interested in working with the still unformed Kois Buyers Group. (Kois, Sr., Tr. 188; 189).

**Response to Proposed Finding No. 321**



Complaint Counsel has no specific response except to say that Qadeer Ahmed was the Chief Executive Officer of a company called Equalizer ProServices and the Proposed Finding does not include the correct name of Ahmed's company. (RX1039).

322. Mr. Ahmed was a consultant to the Kois Buyers Group, and was never an employee. (Kois, Sr., Tr. 189).

**Response to Proposed Finding No. 322**

Complaint Counsel has no specific response.

323. Neither Mr. Ahmed nor ProCare Dental Services had any experience in the dental industry, or setting up buying groups or arranging distribution in the medical field. (Kois, Sr., Tr. 217-218).

**Response to Proposed Finding No. 323**

The Proposed Finding is irrelevant. Whether Mr. Ahmed had previous experience in the dental industry or medical field is not relevant because Mr. Ahmed was ultimately excluded from all but the first the agreement between Kois Buyers Group and Burkhart.

324. It was Dr. Kois's decision to select Burkhart as the distributor for the Kois Buyers Group. (Kois, Sr., Tr. 196).

**Response to Proposed Finding No. 324**

Complaint Counsel has no specific response.

325. Dr. Kois does not know anything about Mr. Ahmed's discussion with Schein, Patterson and Benco other than what Mr. Ahmed told him. (Kois, Sr., Tr. 196).

**Response to Proposed Finding No. 325**

The Proposed Finding is incomplete because it does not include what Mr. Ahmed actually told Dr. Kois: that Schein, Patterson, and Benco declined to act as distributor for the Kois Buyers Group.

326. There was not a Kois Buyers Group prior to October 2014. (Kois, Sr., Tr. 202).

**Response to Proposed Finding No. 326**

Complaint Counsel has no specific response.

327. Kois Buyers Group members are free to purchase from whomever they want. (Kois, Sr., Tr. 247-248).

**Response to Proposed Finding No. 327**

Complaint Counsel has no specific response.

328. The Kois Buyers Group is not a centralized purchaser and does not make any purchases itself. Every individual dental practice that is a member makes its own purchases. (Kois, Sr., Tr. 248-249).

**Response to Proposed Finding No. 328**

The Proposed Finding is incomplete because it does not mention the fact that Burkhart sees significant incremental revenue and increased the numbers of its customers through its partnership with the Kois Buying Group, despite no centralized purchasing. ( [REDACTED] [REDACTED] ; [REDACTED] ). In fact, The Kois Buyers Group alone accounted for more than [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] ).

329. The Kois Buyers Group has no buying power. (Kois, Sr., Tr. 249-250).

**Response to Proposed Finding No. 329**

The Proposed Finding is not supported by the evidence overall and should be given little weight.

Dr. Kois stated that the Kois Buying Group has [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (CCFF ¶ 1247). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]).

330. Johnny Kois negotiates the discounts offered to Kois Buyers Group members with Burkhart. (Kois, Sr., Tr. 27-28).

**Response to Proposed Finding No. 330**

The Proposed Finding is not supported by the evidence cited. The cited testimony is the opening statement of Lin Kahn.

331. Burkhart is the distributor for the Kois Buyers Group, but there are also manufacturers who are part of the buying group. (Kois, Sr., Tr.25).

**Response to Proposed Finding No. 331**

The Proposed Finding is not supported by the evidence cited. The cited testimony is the opening statement of Lin Kahn.

332. Johnny Kois is the chief executive officer for the Kois Center and has been since March 2015. (Kois, Jr., Tr. 305).

**Response to Proposed Finding No. 332**

Complaint Counsel has no specific response.

333. Johnny Kois is also the manager Kois Tribal Management, the company that runs the Kois Buyers Group. (Kois, Jr., Tr. 305; 307).

**Response to Proposed Finding No. 333**

Complaint Counsel has no specific response.

C. RESPONSES TO PROPOSED FINDINGS REGARDING “BENCO’S  
RELATIONSHIP WITH DR. KOIS AND THE KOIS CENTER”

334. The Kois Center has been one of Benco’s Success Partners. (Cohen, Tr. 567-68; 789; Kois, Sr., Tr. 270).

**Response to Proposed Finding No. 334**

Complaint Counsel has no specific response.

335. Dr. Kois is one of the most respected dentists, clinicians, researchers, and dental education lecturers in the United States. (Cohen, Tr. 568; 788).

**Response to Proposed Finding No. 335**

Complaint Counsel has no specific response.

336. Chuck Cohen held Dr. Kojs in high regard, believing that Dr. Kojs ran a terrific operation, and considers him a friend from a business perspective. (Cohen, Tr. 568; 788).

**Response to Proposed Finding No. 336**

Complaint Counsel has no specific response.

337. Dr. Kojs, both at the onset of The Kojs Center's relationship with Benco and today, views Benco as an East Coast dental supply company and not as national distributor. (Kojs, Sr., Tr. 268-69).

**Response to Proposed Finding No. 337**

Complaint Counsel has no specific response.

338. The Kojs Center is a one-of-a-kind teaching facility for dentists and the quality of the education it provides to dentists is top notch. (Cohen, Tr. 790-91).

**Response to Proposed Finding No. 338**

Complaint Counsel has no specific response.

339. Benco formed a Success Partner relationship with The Kojs Center due to Dr. Kojs' reputation and the preeminence of The Kojs Center. The agreement between Benco and The Kojs Center was dated June 8, 2012. (Kojs, Sr., Tr. 269).

**Response to Proposed Finding No. 339**

Complaint Counsel has no specific response.

340. Benco had an agreement with Dr. Kojs and the Kojs Center whereby Benco representatives would help promote the activities of the Kojs Center. (Cohen, Tr. 789; Kojs, Sr., Tr. 269-71).

**Response to Proposed Finding No. 340**

Complaint Counsel has no specific response.

341. Benco would market Dr. Kojs's courses in its magazines. And at different times Dr. Kojs came and spoke to Benco sales representatives and attended Benco's sales meetings to educated Benco's team on the value of The Kojs Center's educational programs. (Cohen, Tr. 790).

**Response to Proposed Finding No. 341**

Complaint Counsel has no specific response.

342. Prior to its agreement with Benco, The Kois Center had a policy that it did not advertise, instead relying on word of mouth to promote itself. (Kois, Sr., Tr. 270).

**Response to Proposed Finding No. 342**

Complaint Counsel has no specific response.

343. Benco's advertising and promotion of The Kois Center was the first and only time The Kois Center advertised its courses. Benco did not receive any compensation for its marketing and advertising of The Kois Center. (Kois, Sr., Tr. 270-71).

**Response to Proposed Finding No. 343**

Complaint Counsel has no specific response.

344. Benco's agreement with The Kois Center lasted for a few years from approximately 2012 to 2015. (Cohen, Tr. 790).

**Response to Proposed Finding No. 344**

Complaint Counsel has no specific response.

345. Benco's relationship with The Kois Center and Dr. Kois was positive because it allowed Benco to partner with one of the most respected names in dentistry. (Cohen, Tr. 790).

**Response to Proposed Finding No. 345**

Complaint Counsel has no specific response.

346. Dr. Kois wrote an e-mail to Chuck Cohen on October 21, 2014, noting that he "had been approached by a company to organize our members for group purchase opportunities," and that he wanted Cohen to "talk to him to see if their [sic] would be an opportunity to work with your company." (RX1039).

**Response to Proposed Finding No. 346**

Complaint Counsel has no specific response.

347. In this e-mail, Dr. Kois provided Chuck Cohen with the name of Qadeer Ahmed and an e-mail address for Mr. Ahmed @proequalizerservices.com. Dr. Kois also copied Mr. Ahmed on his e-mail to Chuck Cohen. (RX1039).

**Response to Proposed Finding No. 347**

Complaint Counsel has no specific response.

348. Prior to receiving Dr. Kois's October 21, 2014 e-mail, Chuck Cohen had no understanding that Dr. Kois or The Kois Center was seeking to form a buying group. (Cohen, Tr. 791).

**Response to Proposed Finding No. 348**

Complaint Counsel has no specific response.

349. Dr. Kois' October 21, 2014 e-mail is the first and only approach that The Kois Buyers Club made to Benco. (Kois, Sr., Tr. 273).

**Response to Proposed Finding No. 349**

The Proposed Finding is inaccurate. There are multiple pieces of evidence showing more than a single communications between Benco and representatives of the Kois Buyers Group. (*E.g.*, Cohen, Tr. 565-566; Kois, Sr., Tr. 280 (noting multiple face to face discussions with Cohen about the buyers group); 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."); RX1039 (Cohen refers to Benco's "standard answer of: 'thanks, but we don't do buying groups'")).

Complaint Counsel objects to use of the word "Club" to describe the Kois Buyers Group.

Elsewhere in the Proposed Findings, the buying group is referred to as Kois Buyers Group. Kois Buyers Group and Kois Buyers Club are not different entities and should be referred to consistently throughout the Proposed Findings. (CCFF ¶¶ 140-141, 163).

350. Benco and Chuck Cohen had never heard of Qadeer Ahmed or ProEqualizer Services before receiving this e-mail from Dr. Kois. Qadeer Ahmed and ProEqualizer Services were not known or credible entities in the dental industry. (Cohen, Tr. 792).

**Response to Proposed Finding No. 350**

The Proposed Finding is not supported in part by the evidence cited and is in any event irrelevant. The assertion that Qadeer Ahmed and ProEqualizer Services are not known or credible entities goes well beyond the cited testimony, which only states that Cohen was not aware of Qadeer Ahmed or ProEqualizer Services prior to the receipt of the email from Dr. Kois. (Cohen, Tr. 792 ("Q: And before we get into [the email], had you ever heard of Qadeer Ahmed

before this email? A: No. Q: Have you ever heard of Pro Equalizer Services before this email?

A: No.”)). The testimony does not specify, explicitly or implicitly, whether Qadeer Ahmed and ProEqualizer Services were credible entities in the dental industry generally. Moreover, whether Qadeer Ahmed and ProEqualizer Services were credible entities in the dental industry is irrelevant, because it had no impact on Benco’s decision not to work with the Kois Buying Group. Benco chose not to work with ProEqualizer Services and Kois Buying Group because had a no buying group policy. (Cohen, Tr. 793-795).

351. Dr. Kois wrote this e-mail for the purpose of trying to introduce Qadeer Ahmed to Benco and Chuck Cohen because Dr. Kois knew that Mr. Ahmed “was not known in the dental industry.” (Kois, Sr., Tr. 273).

**Response to Proposed Finding No. 351**

Complaint Counsel has no specific response.

352. Chuck Cohen responded to the e-mail from Dr. Kois, his longtime Success Partner whom he respected greatly, later the same day on October 21, 2014. (Cohen, Tr. 792; RX1039).

**Response to Proposed Finding No. 352**

The Proposed Finding is incomplete because it does not include that when Cohen responded to the e-mail from Dr. Kois on October 21, 2014, he specifically turned down the opportunity to work with the Kois Buying Group. (Cohen, Tr. 793-795).

353. Chuck Cohen responds to Dr. Kois that Benco is confidentially looking at buying club options and should have some ideas to discuss with Dr. Kois in early 2015. (RX1039; Cohen, Tr. 793).

**Response to Proposed Finding No. 353**

Complaint Counsel has no specific response.

354. Chuck Cohen further responds to Dr. Kois that “whatever we do, I don’t think that we’ll need to involve an outside company like Equalizer Pro Services or anyone else, they’ll just take a cut of the savings.” (RX1039; Cohen, Tr. 793).

**Response to Proposed Finding No. 354**

Complaint Counsel has no specific response.

355. Chuck Cohen testified that this sentence meant what it said, elaborating that if Benco and Dr. Kois were going to discuss a buying club arrangement for Kois Tribe members, they did not need any unknown entity in the middle making money or taking a cut of the savings that should instead flow to Kois Tribe members. Instead, Benco could offer savings directly to dentists that were Kois Tribe members. (Cohen, Tr. 793; RX1039).

**Response to Proposed Finding No. 355**

Complaint Counsel objects to the use of the term “unknown entity” to describe an outside company Equalizer ProServices. This term is not in the cited testimony. The proposed finding is also misleading to the extent it suggests Respondents’ coordinated refusal to discount to buying groups caused no harm because Benco discounted to individual members of buying groups. Discounting to an individual dentist is not the same as discounting to buying groups, which leverage their purchasing power to obtain greater discounts than an independent dentist can get alone. (CCFF ¶¶ 1607-1609, 1441; CX7101 at 029 (¶70) (Marshall Rebuttal Expert Report)).

356. For this reason, Chuck Cohen advises Dr. Kois that he will “reconnect on this issue [with Dr. Kois] sometime in early 2015. (RX1039; Cohen, Tr. 794).

**Response to Proposed Finding No. 356**

Complaint Counsel has no specific response.

357. Dr. Kois understood Chuck Cohen’s e-mail to mean that Chuck Cohen and Benco were interested in having the proposed discussion about formation of a buying group with Dr. Kois, Benco’s Success Partner, but were not interested in involving Qadeer Ahmed, an unnecessary middleman that was not known in the dental industry. (Kois, Sr., Tr. 275-76).

**Response to Proposed Finding No. 357**

The Proposed Finding is not supported by the evidence cited because it goes beyond the cited testimony. The cited testimony says nothing about whether Qadeer Ahmed is known in the dental industry nor does it use the terms “unnecessary” or “middleman;” rather, it simply says “third party”. (Kois, Sr., Tr. 275-276 (“Q: So just to be clear, when you got this e-mail, did you



understand Mr. Cohen to be saying, I'm interested in having this discussion with you, Dr. Kois, my customer, my success partner, but not with Mr. Ahmed, a third party? A: Yes.”)).

358. Dr. Kois understood Chuck Cohen's e-mail to mean that Chuck Cohen would reconnect with Dr. Kois sometime in early 2015. (Kois, Sr., Tr. 275).

**Response to Proposed Finding No. 358**

Complaint Counsel has no specific response.

359. Based on his positive relationship with Chuck Cohen, Dr. Kois believed Chuck Cohen when he promised to get back to him in early 2015. (Kois, Sr., Tr. 276).

**Response to Proposed Finding No. 359**

Complaint Counsel has no specific response.

360. Consistent with his advice to Dr. Kois that Benco did not need a middleman to blunt any future discounts Benco would offer to Kois Tribe members, Chuck Cohen advises Dr. Kois that he intends to “politely” tell Mr. Ahmed thanks, but no thanks. (RX1039; Cohen, Tr. 793).

**Response to Proposed Finding No. 360**

Complaint Counsel has no specific response.

361. Chuck Cohen did not intend in his October 21, 2014 e-mail response to Dr. Kois to communicate to Dr. Kois that Benco was not interested in talking to Dr. Kois about the formation of a buying group. Exactly the opposite, Chuck Cohen intended to convey to Dr. Kois that Benco was interested in talking to Dr. Kois about the formation of buying group, but simply did not want to involve Qadeer Ahmed, an unknown and unnecessary middleman, in that conversation. (Cohen, Tr. 794; RX1039).

**Response to Proposed Finding No. 361**

The Proposed Finding is not supported by the evidence cited and is in any event irrelevant. The assertion that Qadeer Ahmed is not known in the dental industry goes well beyond the cited testimony, which only states that Cohen was not interested in working with ProEqualizer Services as a middleman. (Cohen, Tr. 794 (“Q: Did you intend for this e-mail to communicate to Dr. Kois that you were not interested in talking to him about the formation of a buying group? A: No. Q: You just didn't want to talk to the independent entity; right? A: Yes.”)). The cited

testimony says nothing about whether Qadeer Ahmed is known in the dental industry, or whether middlemen are generally unnecessary to coordinate with buying groups in the dental industry. Moreover, whether Qadeer Ahmed and ProEqualizer Services were credible entities in the dental industry is irrelevant, because Benco's decision not to work with Kois is because they did not want to work with a buying group. (Cohen, Tr. 793 (Cohen refers to middleman instead of buying group)).

362. Chuck Cohen's response to Dr. Kois was wholly consistent with Benco's no middlemen policy in that Benco would not allow any independent entity to come between Benco and its customers. Chuck Cohen's response to Dr. Kois was also wholly consistent with his respect, admiration, and long-term business friendship with Dr. Kois in that Benco was open to working with Dr. Kois on the formation of a buying group comprised of Kois Tribe members. (RX1039).

#### **Response to Proposed Finding No. 362**

Complaint Counsel objects to the use of the words "no middlemen policy" to refer to a no-buying group policy. Cohen testified it is fair to say Benco had a no *buying group* policy. (Cohen, Tr. 445; *see also* Benco Post Tr. Br. at 10 (Benco followed its "longstanding policy . . . not to deal with buying groups"); CCFF ¶ 419 ("Benco has a firm policy of non-recognition of GPOs as a single customer."); [REDACTED]; CX0062 (Guggenheim asking Cohen "wondering if your position on buying groups is still as you articulated back in February?")). The Proposed Finding is misleading in that it suggests that Benco executed from a policy not aimed at buying groups specifically. (CCFF ¶¶ 394-431). While Benco used the term no-middlemen policy during these proceedings, the contemporaneous documents and communications evidence a no-buying group policy and lack any reference to a no-middleman policy. (CCFF ¶¶ 399 ("Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups"), 410 ("We do not participate in buying groups. Ever."), 404, 406, 416, 419, 527-528, 574-575, 582, 661-664, 677). It is irrelevant what label Benco gives; the evidence shows that throughout

the conspiracy period, Benco instructed its employees to refuse to discount to *buying groups*. (CCFF ¶¶ 423, 396, 401, 417). Specifically, the use of no middlemen is misleading and incomplete here because in the sole cited document, RX1039, Cohen refers to Benco's "standard answer of: 'thanks, but we don't do buying groups.'"

363. Even though Chuck Cohen had dropped Qadeer Ahmed from his October 21, 2014 response to Dr. Kois, Dr. Kois – unbeknownst to Chuck Cohen – forwarded Chuck Cohen's e-mail to Qadeer Ahmed. (Kois, Sr. Tr. 276-77).

**Response to Proposed Finding No. 363**

Complaint Counsel has no specific response.

364. Dr. Kois forwarded Chuck Cohen's e-mail to Qadeer Ahmed "just to let him know about how Chuck felt." (Kois, Sr., Tr. 277).

**Response to Proposed Finding No. 364**

Complaint Counsel has no specific response.

365. Qadeer Ahmed responds to Dr. Kois within hours, writing "Well I guess Chuck knows our secret plans better than you and I do. Anyway, life is too short to deal with guys who believe they know everything. Appreciate the intelligence, we'll proceed with people who want to make a difference and make money too." (RX1040; Kois, Sr., Tr. 279).

**Response to Proposed Finding No. 365**

Complaint Counsel has no specific response.

366. Dr. Kois understood from Qadeer Ahmed's e-mail that he "was upset with Chuck wanting to work with me directly and not work with him." (Kois, Sr., Tr. 279).

**Response to Proposed Finding No. 366**

Complaint Counsel has no specific response.

367. Consistent with his commitment to Dr. Kois, Chuck Cohen wrote an e-mail to Qadeer Ahmed politely telling him thanks, but no thanks. (RX1042; Cohen, Tr. 794-95).

**Response to Proposed Finding No. 367**

Complaint Counsel has no specific response.

368. At no time did Chuck Cohen intend for his e-mail to Qadeer Ahmed to indicate that he and Benco were not interested in talking to Dr. Kois directly. They unequivocally were. (Cohen, Tr. 795; RX1039; RX1042).

**Response to Proposed Finding No. 368**

The Proposed Finding is misleading and irrelevant because even if Cohen intended to convey that Benco was interested in working with the Kois Buying Group directly, Cohen did not move forward with working with Kois, rather he was polite to a trusted and respected dental figure.

The totality of the evidence suggests that Benco was simply executing its no-buying group policy. (See CCFF ¶¶ 404 (“We do not participate in buying groups. Ever.”), 410, 419, 399, 404, 406, 416, 419, 527-528, 574-575, 661-664, 667).

369. Qadeer Ahmed responds to Chuck Cohen’s e-mail by saying that his concept – which is not even close to being formed at this time – is not a buying group and that over time members would pay more margin for dental supplies. (RX1042).

**Response to Proposed Finding No. 369**

Complaint Counsel has no specific response.

370. Chuck Cohen responds to Qadeer Ahmed hours later, inviting him to “Please help me understand how your plan for a buying group is different.” (RX1042; Cohen, Tr. 796).

**Response to Proposed Finding No. 370**

Complaint Counsel has no specific response.

371. Even though Chuck Cohen had already told Qadeer Ahmed politely, thanks, but no thanks, Chuck Cohen was still open to further discussion with Qadeer Ahmed about how his concept might be different. (Cohen, Tr. 796; RX1042).

**Response to Proposed Finding No. 371**

Complaint Counsel has no specific response.

372. In response to Chuck Cohen’s invitation, Qadeer Ahmed writes back and advises that “[b]etween my first note to you and your reply, we have introduced our plan and have received, or are about to receive, written offers from various parties.” (RX1042).

**Response to Proposed Finding No. 372**

Complaint Counsel has no specific response.

373. Qadeer Ahmed further advises Chuck Cohen that he is no longer interested in talking to Benco, writing “I hope we’ll find something in the future we can do together.” (RX1042).

**Response to Proposed Finding No. 373**

Complaint Counsel has no specific response.

374. Chuck Cohen testified that he understand Qadeer Ahmed’s response to mean that he was getting a lot of attention from others and really did not need Benco. (Cohen, Tr. 797).

**Response to Proposed Finding No. 374**

Complaint Counsel has no specific response.

375. Chuck Cohen believed that there was no doubt as to Qadeer Ahmed’s intention as he clearly ended the conversation in the final sentence of his e-mail. (Cohen, Tr. 797; RX1042).

**Response to Proposed Finding No. 375**

The Proposed Finding should be given little weight and in any event is irrelevant. The Proposed Finding should be given little weight because what Cohen believed about Qadeer Ahmed’s intention has no bearing on what Ahmed’s intention actually was. In addition, whatever Qadeer Ahmed’s intention was, it is not relevant. Benco decided not to work with the Kois Buying Group prior to receipt of this email, just as it had refused all buying groups before pursuant to its no buying group policy. (*E.g.*, CX1199 (“Benco does not recognize ‘buying groups’”); CX1120 at 001 (“[W]e don’t offer discounts to buying groups.”)).

376. Chuck Cohen believed that he had given Qadeer Ahmed a chance to have a conversation and it was Qadeer Ahmed’s decision not to have that conversation with Benco. (Cohen, Tr. 797; RX1042).

**Response to Proposed Finding No. 376**

Complaint Counsel has no specific response.

377. Qadeer Ahmed confirmed that it was the Kois Buyers Club that turned down Benco in 2014. (RX1040 (“we avoided these guys”).

**Response to Proposed Finding No. 377**

Complaint Counsel objects to use of the word “Club” to describe the Kois Buyers Group.

Elsewhere in the Proposed Findings, the buying group is referred to as Kois Buyers Group. Kois Buyers Group and Kois Buyers Club are not different entities and should be referred to consistently throughout the Proposed Findings. (CCFF ¶¶ 140-141, 163).

378. As he had promised, Chuck Cohen reconnected with Dr. Kois in early 2015 to explore the potential formation of a buying group. (Cohen, Tr. 797-98; Kois, Sr., Tr. 279-80).

**Response to Proposed Finding No. 378**

The Proposed Finding is misleading and irrelevant because Benco did not launch its EDA buying group until late 2015 or early 2016, at least a full year after Dr. Kois was looking to find a supplier for the Kois Buyers Group in 2014. (CCFF ¶¶ 163-164, 1368, 1406; BFF ¶ 251; CX4040; CX4042). The Proposed Finding is misleading because even by April 2016 EDA still was not fully operational and did not have results. (CX4040 (April 2016 Benco email stating “You and your team have decided not to participate in the Elite Dental Alliance at this time, but we can follow up in a year or so with some actual results.”)).

379. Dr. Kois, however, did not wait for Chuck Cohen to reconnect with him as promised. Instead, in November 2014, Dr. Kois and Qadeer Ahmed had signed an agreement with Burkhardt to supply the Kois Buyers Group. (CX1032).

**Response to Proposed Finding No. 379**

The Proposed Finding is irrelevant and goes beyond the cited evidence because Benco did not launch its EDA buying group until late 2015 or early 2016, a full year after Dr. Kois was looking to find a supplier for the Kois Buyers Group in 2014. (CCFF ¶¶ 163-164, 1367-1368, 1406); BFF ¶ 251; CX4042 (January 2016 email from Benco on exploring an agreement with Kois Buyers Group); CX4040 (April 2016 email from Benco suggesting Benco could follow up in 2017 with actual results to compete for Kois Buyers Group business with EDA)).

380. Ultimately, due to the relationship that the Kois Buyers Club already had with Burkhart, Dr. Kois told Chuck Cohen that he was no longer interested in talking to Benco about the Kois Buyers Club. (Cohen, Tr. 800-801).

**Response to Proposed Finding No. 380**

The Proposed Finding is incomplete, misleading and should be given little weight. Dr. Kois testified he did not want to move forward with Benco because Benco's (year-late) proposal involved a complicated partnership with an investment firm (Cain Waters). (Kois, Sr., Tr. at 282-283 (Q. So when you said a moment ago in your answer that you were not interested, what did you mean? A. We didn't want to work with an investment company. . . . Q. Okay. What was your understanding of how he had proposed that that would work? A. It seemed too complicated because of the involvement with the investment company. Q. Okay. And so when you said you weren't interested, you were not interested in the discounted dental supplies component, but that was because there was an investment company involved; is that a fair characterization? A. Yes.")). Furthermore, by that time, the Kois Buyers Group had successfully launched with Burkhart. (CCFF ¶ 421; BFF ¶ 378; CCRF (Benco) ¶ 378). In fact, Kois, Jr. testified that Benco had turned down a second opportunity to work with the Kois Buyers Group in late 2015 alongside Burkhart. (Kois, Jr., Tr. at 372-373 ("[Benco] didn't have an interest in being in a buying group with another dental supply company.")). Further, the 2016 interest from Benco was viewed from the Kois Buyers Group as being a separate inquiry from the original 2014 solicitation for distributors altogether. (Kois, Jr., Tr. at 375) (in reference to CX4042, a January 2016 email "A. This was a part of a different proposal . . . It's my understanding that Benco and Cain Watters and, if my recollection is correct, the Seattle Study Club, were creating a GPO, and they had an interest in giving a discount to members of that group for the courses offered at the Kois Center. And they wanted to offer -- as a competitor to the Kois buying group or Kois Buyers Group, they wanted to offer their products.")). Finally, the Proposed Finding is irrelevant

in any event because Benco's follow up on discounting to the Kois Buyers Group after initially turning it down twice during the conspiracy, only happened after the end of the conspiracy in 2016. (CCFF ¶ 421; CX4040; CX4042; Kois, Jr., Tr. at 372-373). Additionally, Complaint Counsel objects to use of the word "Club" to describe the Kois Buyers Group. Elsewhere in the Proposed Findings, the buying group is referred to as Kois Buyers Group. Kois Buyers Group and Kois Buyers Club are not different entities and should be referred to consistently throughout the Proposed Findings. (CCFF ¶¶ 140-141, 163).

381. Dr. Kois told Chuck Cohen that the Kois Buyers Club's agreement with Burkhart was the reason he did not want to move forward with Benco. (Cohen, Tr. 800-801).

**Response to Proposed Finding No. 381**

The Proposed Finding is incomplete and misleading because it goes beyond the cited testimony and is vague with regard to timeline. The Proposed Finding is misleading because Benco turned down the Kois Buyers Group during the conspiracy and approached in earnest after the conspiracy ended. The Proposed Finding is incomplete because while Cohen stated that he recalled Dr. Kois mentioning that he had already had a deal with Burkhart, the conversation between Dr. Kois and Cohen occurred after the Kois Buyers Group had launched. (Cohen, Tr. 800-801 ("Q: How do you know that? A: Dr. Kois told me. One of the bits of the conversation that I recall from our meeting in his office was him stating that they had I believe already made a deal with Burkhart, and he was flattered that we had a conversation but that was where he was going to stick.")). The Proposed Finding is misleading because Benco had previously turned down the Kois Buyers Group, which had subsequently launched in 2014. (CCFF ¶ 421; CX1240 at 001 (Statement of Cohen to Kois Buyers Group: "At Benco, our policy is that we don't support, or work with, buying groups, so we'll decline your request"); Cohen, Tr. 565-566; 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"); *see also* Ryan, Tr. 1131). In fact, Kojs, Jr. testified that Benco had turned down a second opportunity to work with the Kojs Buyers Group in late 2015 alongside Burkhardt. (Kojs, Jr., Tr. at 372-373 (“[Benco] didn't have an interest in being in a buying group with another dental supply company.”)). The Proposed Finding is also misleading and incomplete because Dr. Kojs testified that he was not interested in Benco's (informal and late) proposal ultimately involved EDA and a complicated partnership with Cain Waters investment firm. (Kojs, Sr., Tr. at 282-283 (Q. So when you said a moment ago in your answer that you were not interested, what did you mean? A. We didn't want to work with an investment company. . . . Q. Okay. What was your understanding of how he had proposed that that would work? A. It seemed too complicated because of the involvement with the investment company. Q. Okay. And so when you said you weren't interested, you were not interested in the discounted dental supplies component, but that was because there was an investment company involved; is that a fair characterization? A. Yes.”)). Finally, the Proposed Finding is irrelevant in any event because Benco's follow up on discounting to the Kojs Buyers Group after initially turning it down during the conspiracy, only happened after the end of the conspiracy in 2016. (CCFF ¶ 421; CX4040; CX4042).

Complaint Counsel objects to use of the word “Club” to describe the Kojs Buyers Group. Elsewhere in the Proposed Findings, the buying group is referred to as Kojs Buyers Group. Kojs Buyers Group and Kojs Buyers Club are not different entities and should be referred to consistently throughout the Proposed Findings. (CCFF ¶¶ 140-141, 163).

382. Benco's Success Partner agreement with The Kojs Center ended around 2016. (Cohen, Tr. 801).

### **Response to Proposed Finding No. 382**

Complaint Counsel has no specific response.

383. Benco has, and continues to, aggressively compete for the business of the dentists that are Kois Tribe members and members of the Kois Buyers Club. (Cohen, Tr. 801-802).

**Response to Proposed Finding No. 383**

The Proposed Finding is incomplete and misleading in part. The proposed finding is misleading to the extent it suggests Respondents' coordinated refusal to discount to buying groups caused no harm because Benco discounted to individual members of buying groups. Discounting to an individual dentist is not the same as discounting to buying groups, which leverage their purchasing power to obtain greater discounts than an independent dentist can get alone. (CCFF ¶¶ 1607-1609, 1441; CX7101 at 029 (¶70) (Marshall Rebuttal Expert Report)). For example,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. In addition, the Proposed Finding is irrelevant because at issue is Benco's campaign against buying groups, not individual dentists. Also, Complaint Counsel objects to use of the word "Club" to describe the Kois Buyers Group. Elsewhere in the Proposed Findings, the buying group is referred to as Kois Buyers Group. Kois Buyers Group and Kois Buyers Club are not different entities and should be referred to consistently throughout the Proposed Findings. (CCFF ¶¶ 140-141, 163).

384. One of the ways that Benco tries to compete for the members of the Kois Buyers Club is by offering lower prices and discounts to Kois Buyers Club members. (Cohen, Tr. 802).

**Response to Proposed Finding No. 384**

The Proposed Finding is incomplete and misleading in part. The proposed finding is misleading to the extent it suggests Respondents' coordinated refusal to discount to buying groups caused no harm because Benco discounted to individual members of buying groups. Discounting to an individual dentist is not the same as discounting to buying groups, which leverage their purchasing power to obtain greater discounts than an independent dentist can get alone. (CCFF ¶¶ 1607-1609, 1441; CX7101 at 029 (¶70) (Marshall Rebuttal Expert Report)).

The Proposed Finding is also misleading because Benco also uses buying group EDA to compete and convert customers from its larger competitors Schein and Patterson. (CX1016; CX1086). In response to reports of "a new EDA customer coming from Schein" in June of 2016, Cohen responded "[h]ow great that we get the opportunity to steal this deal from [a former employee] and Schein." (CX1016 at 001). In February of 2017, Cohen received an email from Cain Watters stating that Benco just stole a multi-million dollar account away from Schein "because of EDA." (CX1087 at 001). Similarly, Benco has won customers from Patterson by competing through buying group EDA. (CX1086). In May of 2016, a Benco Sales rep Julie Radzynski offered congratulations to a sales rep that "just signed up a new customer on EDA Gold who USED to buy all of their supplies from Patterson! Now they are switching to Benco ..... Great job Teresa!" (CX1086 at 008). Also, Complaint Counsel objects to use of the word "Club" to describe the Kois Buyers Group. Elsewhere in the Proposed Findings, the buying group is referred to as Kois Buyers Group. Kois Buyers Group and Kois Buyers Club are not different entities and should be referred to consistently throughout the Proposed Findings. (CCFF ¶¶ 140-141, 163).

385. Benco also competes by matching the prices offered by Burkhart to Kois Buyers Club members. (Cohen, Tr. 802).

**Response to Proposed Finding No. 385**

The Proposed Finding is incomplete and misleading in part. The proposed finding is misleading to the extent it suggests Respondents' coordinated refusal to discount to buying groups caused no harm because Benco discounted to individual members of buying groups. Discounting to an individual dentist is not the same as discounting to buying groups, which leverage their purchasing power to obtain greater discounts than an independent dentist can get alone. (CCFF ¶¶ 1607-1609, 1441); CX7101 at 029 (¶70) (Marshall Rebuttal Expert Report)). The Proposed Finding is incomplete because it fails to identify that Burkhart has a limited geographic reach and [REDACTED] [REDACTED] (CCFF ¶ 1203; [REDACTED]; CX8021 (Reece Dep., at 125); CX4255). The Kojs Buyers Group was looking for full service distribution. (Reece, Tr. 4451-4452; Kojs, Sr., Tr. 188). Therefore, any discounting by Benco aimed at Burkhart's Kojs customers is also limited to those overlapping geographies where Burkhart offers full service distribution to Kojs Buyers Group members. Further, had Benco been successful in convincing Burkhart to discontinue discounting to buying groups in 2013, (CCFF ¶¶ 1237-1241), the discounting described here would not occur as Kojs would not have a full service distributor with whom price competition would be incentivized. (CCFF ¶ 1250). All the other full-service dealers had already turned Kojs down, just like Benco. (CCFF ¶¶ 637-639 (Patterson did not bid for the Kojs Buyers Group); CCFF ¶¶ 809, 928 (Schein did not bid for the Kojs Buyers Group); CCFF ¶ 421 (Benco turned Kojs down)). Finally, Complaint Counsel objects to the use of the word "Club" to describe the Kojs Buyers Group. Elsewhere in the Proposed Findings, the buying group is referred to as the Kojs Buyers Group. Kojs Buyers Group and Kojs Buyers Club are not different entities and should be referred to consistently using the actual name, the Kojs Buyers Group. (CCFF ¶¶ 140-141, 163).

386. Dr. Kois himself received a discount from Benco when he purchased dental supplies from Benco for his own practice as an independent dentist. (Kois, Sr., Tr. 287).

**Response to Proposed Finding No. 386**

Complaint Counsel has no specific response.

387. Beyond the Kois Buyers Club, for any buying groups that have approached Benco, Benco has never stopped competing for the business of the independent dentists who are members of a buying group. (Cohen, Tr. 802).

**Response to Proposed Finding No. 387**

The Proposed Finding is incomplete and misleading in part. The proposed finding is misleading to the extent it suggests Respondents' coordinated refusal to discount to buying groups caused no harm because Benco discounted and competed for individual members of buying groups.

Discounting to an individual dentist is not the same as discounting to buying groups, which leverage their purchasing power to obtain greater discounts than an independent dentist can get alone. (CCFF ¶¶ 1607-1609, 1441). In addition, Complaint Counsel objects to use of the word "Club" to describe the Kois Buyers Group. Elsewhere in the Proposed Findings, the buying group is referred to as Kois Buyers Group. Kois Buyers Group and Kois Buyers Club are not different entities and should be referred to consistently throughout the Proposed Findings. (CCFF ¶¶ 140-141, 163).

388. The record does not support a finding of any agreement concerning Benco's and Schein's or Patterson's interactions with the Kois Buyers Group.

**Response to Proposed Finding No. 388**

The Proposed Finding is unsupported by any cited evidence and should be rejected for that reason. But, in addition the Proposed Finding could be rejected because it is contradicted by the totality of evidence in this case. Benco did not bid for Kois in 2014, explaining to Dr. Kois: "At Benco, our policy is that we don't support, or work with, buying groups, so we'll decline your request." (CCFF ¶ 421 (quoting CX1240 at 001)). On August 18, 2014, a month *before* Patterson

was scheduled to meet with Kois, Guggenheim already decided against working with the group, writing to Rogan, “Agreed . . . I’ll kill it.” (CCFF ¶ 638; CX0116 at 001; Guggenheim Tr. 1676-1678). True to his word, Patterson did not bid for Kois in 2014. (CCFF ¶ 629 (CX3086 at 001)). A few weeks later, on September 8, 2014, Schein’s Sullivan explained regarding Kois: “I still believe this is a slippery slope and have yet to see a successful one in dental and don’t plan to take the lead role.” (CCFF ¶ 809; CX2469 at 002; CX8025 (Sullivan, Dep. 295)). Mirroring Benco and Patterson, Schein decided to take a pass on working with Kois. (CCFF ¶ 928; Kois, Sr., Tr. 190, 196 (Respondents all refused to work with Kois)). When this evidence is placed in context of Respondents’ parallel directives against discounting to buying groups, the evidence of agreement is persuasive.

#### **IV. RESPONSES TO PROPOSED FINDINGS REGARDING “BENCO UNILATERALLY DETERMINED NOT TO DO BUSINESS WITH SMILE SOURCE UNDER ITS NO-MIDDLEMAN POLICY”**

389. The record does not support a finding of any agreement concerning Benco’s and Schein’s interactions with Smile Source.

##### **Response to Proposed Finding No. 389**

The Proposed Finding is incomplete and misleading in that it omits evidence that Cohen and Sullivan had opportunities to communicate and did in fact communicate in and around the time period denoted in the Proposed Finding. Cohen and Sullivan both attended several industry trade events in the weeks following September 26, 2011. (CCFF ¶ 379 (Cohen and Sullivan participated in the Dental Trade Alliance Foundation Board Meeting held in Las Vegas October 10, 2011); CCFF ¶ 380 (Sullivan and Cohen attended the American Dental Association Meeting held in Las Vegas October 10-13, 2011); CCFF ¶ 363 (Cohen and Sullivan attended the Dental Trade Alliance Annual Meeting held November 1-3, 2011)). And at the end of November Cohen and Sullivan were at a “confidential” breakfast together in New York City. (CCFF ¶ 383). The

Proposed Finding is also incomplete and misleading because Cohen and Sullivan called each other at least 13 times for a total duration of 50 minutes and 14 seconds between March and December 2011. (CCFF ¶ 347 (CX6027 at 012, 016-017)). Cohen and Sullivan also exchanged a total of 89 text messages in 2011, 23 of which the content was not produced and may have contained buying group communications. (CCFF ¶¶ 349-350 (CX6027 at 003-018)). Six of the 23 text messages for which Respondents did not produce content occurred between March and December 2011, *after* Sullivan's February 23, 2011 email expressing his enthusiasm for Smile Source's buying group business model. (CX2899 ("Here's to our mutual success . . . . TOGETHER!! ☺"); CX6027 at 003-005, 010-011, 014 (Rows 62, 63, 64, 106, 110, 133)). Three text messages for which Respondents did not produce content occurred in October and November 2011. (CX6027 at 010-011, 014 (Rows 106, 110, 133)). Sullivan exchanged additional communications with Cohen, including written notes and voicemail messages, that are not reflected in CX6027. (CCFF ¶¶ 353-354; Sullivan, Tr. 3885 (Sullivan produced all cell phone records but could have called Cohen from a land line)); Cohen, Tr. 526 (Cohen sent Sullivan notes by mail from time to time); Sullivan, Tr. 3886 ("Q: And you didn't keep all of the notes that Chuck Cohen sent you over the years, right? A: No.")). Finally, the Proposed Finding is also factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Benco and Schein did not reach an agreement to refuse to discount to buying groups in 2011. (CCFF ¶¶ 661-1158, 1167-1198).

A. RESPONSES TO PROPOSED FINDINGS REGARDING "SMILE SOURCE'S FIRST APPROACH TO BENCO – SEPTEMBER 26, 2011"

390. Smile Source has approached Benco on several occasions and, consistent with its no-middlemen policy, each time Benco has responded that it does not do business with buying groups like Smile Source. (Ryan, Tr. 1181-82).

**Response to Proposed Finding No. 390**

Complaint Counsel objects to the use of the words “no-middlemen policy” to refer to a no-buying group policy. Cohen testified it is fair to say Benco had a no *buying group* policy. (Cohen, Tr. 445; *see also* Benco Post Tr. Br. at 10 (Benco followed its “longstanding policy . . . not to deal with buying groups”); CCFF ¶ 419 (“Benco has a firm policy of non-recognition of GPOs as a single customer.”); [REDACTED]; CX0062 (Guggenheim asking Cohen “wondering if your position on buying groups is still as you articulated back in February?”)). The Proposed Finding is misleading in that it suggests that Benco executed from a policy not aimed at buying groups specifically. (CCFF ¶¶ 394-431). While Benco used the term no-middlemen policy during these proceedings, the contemporaneous documents and communications evidence a no-buying group policy and lack any reference to a no-middleman policy. (CCFF ¶¶ 399 (“Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups”), 404 (“We do not participate in buying groups. Ever.”), 410, 406, 416, 419, 527-528, 574-575, 582, 661-664, 677). It is irrelevant what label Benco gives: the evidence shows that throughout the conspiracy period, Benco instructed its employees to refuse to discount to *buying groups*. (CCFF ¶¶ 423, 396, 401, 417).

391. On September 26, 2011, Dr. Andrew Goldsmith e-mailed Benco as President of Smile Source, in a cold solicitation, stating that Smile Source operated in 8 states and had 40 practices. The e-mail stated that Smile Source currently used Henry Schein for its services, but wanted to see what kind of relationship it could establish with Benco. (CX1333).

#### **Response to Proposed Finding No. 391**

Complaint Counsel has no specific response.

392. That e-mail was routed to Pat Ryan at Benco. On September 30, 2011, consistent with Benco’s no-middlemen policy, Ryan e-mailed Dr. Goldsmith with four clarifying questions about Smile Source: (1) “Smile Source has no ownership stake in the offices, is that correct?”; (2) “Can Smile Source control and direct the [sic] who the offices purchase from?”; (3) “Who places the orders?”; and (4) “Who pays the bills?” (CX1138-02).

#### **Response to Proposed Finding No. 392**



Complaint Counsel objects to the use of the words “no-middlemen policy” to refer to a no-buying group policy. The Proposed Finding itself relies on a single document that does not contain a “no-middlemen” reference, but instead that “Benco does not participate in *group purchasing* organizations.” (BFF ¶ 392 (citing CX1138) (emphasis added); BFF ¶ 395). Also, Cohen testified it is fair to say Benco had a no *buying group* policy. (Cohen, Tr. 445; *see also* Benco Post Tr. Br. at 10 (Benco followed its “longstanding policy . . . not to deal with buying groups”); CCFF ¶ 419 (“Benco has a firm policy of non-recognition of GPOs as a single customer.”); [REDACTED]; CX0062 (Guggenheim asking Cohen (“wondering if your position on buying groups is still as you articulated back in February?”)). The Proposed Finding is misleading in that it suggests that Benco executed from a policy not aimed at buying groups specifically. (CCFF ¶¶ 394-431). While Benco used the term no-middlemen policy during these proceedings, the contemporaneous documents and communications evidence a no-buying group policy and lack any reference to a no-middleman policy. (CCFF ¶¶ 399 (“Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups”), 404 (“We do not participate in buying groups. Ever.”), 410, 406, 416, 419, 527-528, 574-575, 582, 661-664, 677). It is irrelevant what label Benco gives, the evidence shows that throughout the conspiracy period, Benco instructed its employees to refuse to discount to *buying groups*. (CCFF ¶¶ 423, 396, 401, 417).

393. Dr. Goldsmith responded 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).

### **Response to Proposed Finding No. 393**

Complaint Counsel has no specific response.

394. Ryan forwarded Dr. Goldsmith’s response to Chuck Cohen, stating that Smile Source “smells like a GPO to me” but questioned whether it was a GOP if “they are in control of

purchasing” or whether “the fact that the individual office paying negate that?” (CX0004). Cohen responded that “It’s a GPO, no central ownership or bill paying. Please pass.” (CX0004).

#### **Response to Proposed Finding No. 394**

Complaint Counsel has no specific response, except to note the citation makes no reference to a no-middlemen policy. Rather Benco’s focus is, once again, on buying groups or Group Purchasing Organizations.

395. Ryan responded back to Dr. Goldsmith that “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; Ryan, Tr. 1183).

#### **Response to Proposed Finding No. 395**

Complaint Counsel has no specific response, except to note the citation makes no reference to a no-middlemen policy. Rather Benco’s focus is, once again, on buying groups or Group Purchasing Organizations. (BFF ¶ 395; *see also* 394).

396. Dr. Goldsmith had no reason to doubt that Ryan was telling the truth when he said that Benco does not participate in group purchasing organizations. (Goldsmith, Tr. 2180-2181).

#### **Response to Proposed Finding No. 396**

Complaint Counsel has no specific response.

397. Ryan had no idea whether or not Smile Source was, in fact, working with Schein and did not investigate the issue because it did not matter to Benco. (Ryan, Tr. 1190).

#### **Response to Proposed Finding No. 397**

The Proposed Finding is inaccurate and misleading and should be disregarded. The Proposed Finding is misleading and incomplete because Ryan suggested that Cohen communicate with Schein about Smile Source in July 2012 and spoke with his counterpart at Schein in October 2013 about bidding on Smile Source. On July 25, 2012, Ryan learned from market intelligence that Schein was working with Smile Source. (CCFF ¶¶ 978-983). Ryan immediately forwarded the email to Cohen, writing, “Better tell your buddy Tim to knock this shit off.” (CCFF ¶¶ 981-986). It is undisputed that Ryan was informing Cohen to tell Sullivan to stop working with Smile

Source. (CCFF ¶¶ 984-986). In response, Cohen agreed to confront Sullivan, writing, “Please resend this e-mail without your comment on top so that I can print & send to Tim with a note.” (CCFF ¶¶ 989-992 (quoting CX0018)). Cohen testified he was planning to send a note to Sullivan about Smile Source, (CCFF ¶ 991), and he would not be surprised if he did send a note to Sullivan about Smile Source. (CCFF ¶ 992). Later, Ryan went on to speak with Schein on October 1, 2013 after receiving market intelligence that Schein might be discounting to the Smile Source buying group. (CCFF ¶¶ 1005-1019). Ryan spoke to his counter-part Foley at Schein for 18 minutes, and according to Foley, Ryan informed him that Benco would not bid on Smile Source and wanted to know if Schein would bid. (CCFF ¶¶ 1010-1013). Ryan reported the conversation to Cohen saying that he had “talked specifically about” Smile Source with Foley. (CCFF ¶ 1014).

398. There is no evidence that anyone from Benco contacted anyone from Schein about Smile Source or buying groups in general during this time frame. Mr. Cohen had no communications with Mr. Sullivan between September 26, 2011 to October 6, 2011, when there was a communication about a former employee of Schein that Benco had hired. (CX6027-006; Cohen, Tr. 750-751).

### **Response to Proposed Finding No. 398**

The Proposed Finding is incomplete and misleading in that it erroneously suggests infrequent contacts because these men had several opportunities to communicate in the time period the Proposed Finding denotes. Specifically, Cohen and Sullivan were in the same place at the same time several times in the time frame between September 26, 2011 and November 1, 2011. (CCFF ¶ 379 (Cohen and Sullivan participated in the Dental Trade Alliance Foundation Board Meeting held in Las Vegas October 10, 2011); CCFF ¶ 380 (Sullivan and Cohen attended the American Dental Association Meeting held in Las Vegas October 10-13, 2011); CCFF ¶ 363 (Cohen and Sullivan attended the Dental Trade Alliance Annual Meeting held November 1-3, 2011)). And at the end of November Cohen and Sullivan were at a “confidential” breakfast together in New

York City. (CCFF ¶ 383). Finally, the Proposed Finding is incomplete and misleading because of the 89 text messages exchanged between Cohen and Sullivan in 2011, there are 23 text messages with no content available. (CCFF ¶¶ 349-350 (CX6027 at 003-018)). Finally, the Proposed Finding is misleading to the extent that it suggests that Complaint Counsel should or could have records of all the communications between competitors, the examples in the record are the tip of the iceberg, and suggest the existence of similar anti-competitive communications below the surface that are not captured in evidence for a variety of reasons that affect anticompetitive conspiracies generally.

**B. RESPONSES TO PROPOSED FINDINGS REGARDING “SMILE SOURCE’S SECOND APPROACH TO BENCO – JULY 25, 2012”**

399. Dr. Goldsmith approached Benco again via e-mail on July 25, 2012. (CX1220).

**Response to Proposed Finding No. 399**

Complaint Counsel has no specific response.

400. In his July 25, 2012 e-mail to Benco, Dr. Goldsmith wrote that “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...” (CX10018).

**Response to Proposed Finding No. 400**

Complaint Counsel has no specific response except that the document cited should be CX0018.

401. Pat Ryan responded to Dr. Goldsmith’s e-mail 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. f this is indeed how Smile Source functions (management/purchasing services with no ownership stake in the individual practices), Benco Dental doesn’t recognize GOPs as a single customer.” (CX1220).

**Response to Proposed Finding No. 401**

Complaint Counsel has no specific response except that there is a typographical error; the

Finding should say “[I]f this is indeed . . .”

402. Ryan also forwarded his response to Chuck Cohen with a note “Better tell your buddy Tim to knock this shit off.” (CX0018). Although Cohen responded requesting that Ryan forward the e-mail chain to him without Ryan’s off-color comment so that he could send it to

Tim, there is no evidence that Ryan ever re-forwarded the e-mail to Cohen. Instead, Ryan responded to Cohen by e-mailing back that Dr. Goldsmith described Smile Source as a ‘franchise’, and not a GPO. (CX1147). That was the end of Ryan’s e-mail exchange with Cohen concerning Smile Source. (Ryan, Tr. 1193-1194).

### **Response to Proposed Finding No. 402**

The Proposed Finding is misleading, incomplete, and contrary to the weight of the evidence. The evidence shows that Cohen asked Ryan to “resend this e-mail without your comment on top.” (CCFF ¶ 990). Ryan complied with that request one minute later when he sent CX1147. Per Cohen’s instructions, Ryan forwarded the same e-mail chain but without his comment, “Better tell your buddy Tim to knock this shit off” at the top. (*Compare* CX0018, *with* CX1147). The timing of this email exchange shows that Ryan forwarded the email, (CX1147), in compliance with Cohen’s request that Ryan “resend this e-mail without your comment on top.” Specifically, Ryan learned that Schein was working with buying group, Smile Source, and forwarded that information to Cohen with a note that said “Better tell your buddy Tim to knock this shit off” at 12:53 PM. (CCFF ¶¶ 981-986; CX0018 at 001). At 5:27PM, Cohen responded to Ryan and asked Ryan to “resend this e-mail without your comment on top so that I can print & send to Tim with a note.” (CX0018 at 001; CCFF ¶ 990). One minute later, Ryan followed that instruction by resending the e-mail without his initial comment on top. (CX1147 at 001 (“He was quick to tell me he’s a ‘franchise’, not a GPO, although without ownership stake, for all practical purposes, what’s the difference.”)). Cohen approved of Ryan’s comment in CX1147: one minute later, he wrote, “I agree.” (CX1251 at 001). Cohen’s email also thanked Ryan for resending the email. (CX1251 at 001 (“Thanks.”)). Additionally, Cohen testified that he did not remember if he sent the note, but that he might have. (Cohen, Tr. 526-527). Cohen testified that he intended to send Sullivan a note in the mail at the time. (CCFF ¶ 991 (Cohen, Tr. 522 “Q. So is it fair to say that when you wrote that, you were planning to print and send it to Tim with a note. A. Yes.”)).

Cohen also testified that he would not be surprised if he sent Sullivan a physical message about Smile Source and further that he sent such messages to Sullivan from time to time. (CCFF ¶ 992; Cohen, Tr. 526-527; CX0301 (Cohen, IHT at 223)). In addition the Proposed Finding is incomplete and misleading because Ryan went on to speak with Schein on October 1, 2013 after receiving market intelligence that Schein might be discounting to the Smile Source buying group. (CCFF ¶¶ 1005-1019). Ryan spoke to his counter-part Foley at Schein for 18 minutes; and, according to Foley, Ryan informed him that Benco would not bid on Smile Source and wanted to know if Schein would bid. (CCFF ¶¶ 1010-1013). Ryan reported the conversation to Cohen saying that he had “talked specifically about” Smile Source with Foley. (CCFF ¶ 1014).

403. There is no evidence in the record that Mr. Cohen ever sent Mr. Ryan’s e-mail to Mr. Sullivan at Schein, Mr. Cohen does not recall ever sending it, and Mr. Sullivan did not receive any note from Mr. Cohen about Smile Source or buying groups generally. (Cohen, Tr. 885-886; Sullivan, Tr. 4252-53).

#### **Response to Proposed Finding No. 403**

The Proposed Finding is misleading and incomplete. The Proposed Finding omits that Cohen testified that he planned on sending Sullivan the note when it was written. (CCFF ¶ 991; *see also* Cohen, Tr. 522 (“Q: So is it fair to say that when you wrote that, you were planning to print and send it to Tim with a note. A: Yes.”)). Cohen also testified that he might have sent the note to Sullivan. (Cohen, Tr. 526-527). Cohen also testified that he would not be surprised if he sent Sullivan a physical message about Smile Source and further that he sent such messages to Sullivan from time to time. (CCFF ¶ 992; Cohen, Tr. 526-527; CX0301 (Cohen, IHT at 223)). Sullivan likewise acknowledged that Cohen sent him notes in the mail. (Sullivan, Tr. 3885). The Proposed Finding is also misleading because Cohen did not testify that he did not send a note in the mail, only that he did not *recall* doing so. (Cohen, Tr. 838, 886). The Proposed Finding also fails to include that Sullivan did not keep notes sent to him by Cohen. (Sullivan, Tr. 4253).

Cohen's contemporaneous email reflects his intent to send a note to Sullivan, and Cohen admitted at trial that, at the time he wrote his email, he had planned to send a note to Sullivan. (CCFF ¶¶ 990-991). Cohen testified that he did not think that his communications with Sullivan regarding a buying group policy were inappropriate so there is no reason to doubt that he would have followed through on his promise to send the note in the mail. (CX8015 (Cohen, Dep. at 243-244)). Additionally, the Proposed Finding statement that "Mr. Sullivan did not receive any note from Mr. Cohen about Smile Source" is not supported by the evidence cited, which states that Mr. Sullivan did not print out any emails from Mr. Cohen about Smile Source, but does not state that Mr. Sullivan did not receive any note from Mr. Cohen about Smile Source. (Sullivan, Tr. 4253).

404. The communications log prepared by Complaint Counsel does not reflect any text or telephone communication between Mr. Sullivan and Mr. Cohen between July 25, 2012 and January 2, 2013. (CX6027-25-26). Complaint Counsel also failed to introduce any evidence of any change in conduct by either Schein or Benco that could reasonably be tied to any such communication in July 2012.

#### **Response to Proposed Finding No. 404**

The Proposed Finding is incomplete and misleading. The Proposed Finding omits evidence that Sullivan and Cohen both attended at least three industry trade events between July 25, 2012 and January 2, 2013. (CCFF ¶ 385 (Dental Trade Alliance Meeting); CCFF ¶ 386 (Dental Trade Alliance Breakfast); CCFF ¶ 369 (Greater New York Dental Trade Show)). The Proposed Finding is misleading because it omits those three opportunities for Cohen and Sullivan to coordinate on buying groups. The Proposed Finding is also misleading in that it fails to note that Sullivan exchanged additional communications with Cohen, including written notes and voicemail messages, that are not reflected in CX6027. (CCFF ¶¶ 353-354; Sullivan, Tr. 3885 (Sullivan produced all cell phone records but could have called Cohen from a land line); Cohen, Tr. 526 (Cohen sent Sullivan notes by mail from time to time); Sullivan, Tr. 3886 ("Q: And you

didn't keep all of the notes that Chuck Cohen sent you over the years, right? A: No.”)). Finally, the Proposed Finding is incomplete and misleading because it suggests there is no other evidence that Schein and Benco communicated about Smile Source, but the Proposed Finding omits the undisputed evidence that Ryan called Foley at Schein on October 1, 2013 after receiving market intelligence that Schein might be discounting to the Smile Source buying group. (CCFF ¶¶ 1005-1019). Ryan spoke to his counterpart at Schein, Foley, for 18 minutes; according to Foley's description of the call, (1) he got the impression Benco was anti-buying group; (2) Ryan informed Foley that Benco would not bid on Smile Source; and (3) Ryan wanted to know if Schein would bid on Smile Source. (CCFF ¶¶ 1010-1013). Contemporaneous documents confirm that the call was about Smile Source. (CCFF ¶¶ 1013-1014). Ryan reported the conversation to Cohen saying that he had “talked specifically about” Smile Source with Foley. (CCFF ¶ 1014). Foley also reported that he and Ryan discussed Smile Source on the telephone call. (CCFF ¶ 1017 (quoting CX0243 at 001; Foley, Tr. 4588-4589) (“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.”)).

Finally, the Proposed Finding is misleading and inaccurate in its suggestion that proof of a change in conduct is required and second that Complaint Counsel did not introduce evidence of any such change. Schein worked with Smile Source prior to the conspiracy period, that relationship ended during the conspiracy, and Schein once again worked with the valuable Smile Source account after the conspiracy ended. (CCFF ¶¶ 1319-1320, 1701-1707, 1722-1725, 1681).



C. RESPONSES TO PROPOSED FINDINGS REGARDING “THE OCTOBER 1, 2013 PHONE CALL FROM MR. RYAN TO MR. FOLEY”

405. On October 1, 2013, Mr. Ryan called Randy Foley, the head of Schein’s special markets division. Mr. Ryan called to discuss a change in DSO pricing that one of Benco’s manufacturing partners, Dentsply, was making. (Ryan, Tr. 1222-24).

**Response to Proposed Finding No. 405**

The Proposed Finding is factually inaccurate, contrary to the weight of the evidence, incomplete and misleading. Ryan called Foley at Schein on October 1, 2013 after receiving market intelligence that Schein might be discounting to the Smile Source buying group. (CCFF ¶¶ 1005-1019). Ryan spoke to his counterpart at Schein, Foley, for 18 minutes; according to Foley’s description of the call, (1) he got the impression Benco was anti-buying group; (2) Ryan informed Foley that Benco would not bid on Smile Source; and (3) Ryan wanted to know if Schein would bid on Smile Source. (CCFF ¶¶ 1010-1013). Contemporaneous documents confirm that the call was about Smile Source. (CCFF ¶¶ 1013-1014). Ryan reported the conversation to Cohen saying that he had “talked specifically about” Smile Source with Foley. (CCFF ¶ 1014). Foley also reported that he and Ryan discussed Smile Source on the telephone call. (CCFF ¶ 1017 (quoting CX0243 at 001; Foley, Tr. 4588-4589) (“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.”)). For these reasons, the weight of the evidence shows that Ryan called Foley to discuss Smile Source, and the Proposed Finding should be rejected. Finally, even if Foley and Ryan discussed pricing of a common supplier, that is not inconsistent with the weight of the evidence establishing that Foley and Ryan discussed Smile Source on that 18 minute call. (CCFF ¶¶ 1005-1017).

406. Prior to Dentsply’s change, a customer purchasing \$5 million of one product would get a certain level of discount, and after the change, that same customer would get a

significantly smaller discount unless they started purchasing more categories of products from Dentsply. (Ryan, Tr. 1223).

**Response to Proposed Finding No. 406**

Complaint Counsel has no specific response.

407. Because Benco provides cost-plus pricing to DSO's and passes manufacturer discounts on to its DSO customers, Dentsply's policy change did not affect Benco's margins, but it would matter greatly to the customer. (Ryan, Tr. 1224).

**Response to Proposed Finding No. 407**

Complaint Counsel has no specific response.

408. At that time, Benco and Schein were basically the only dental distributors serving DSO's. Because it was such a big change for DSO customers, Mr. Ryan wanted to talk to Mr. Foley about what he thought of it and get a gut check reaction to see if Mr. Foley understood the ramifications of Dentsply's change to customers the same way Mr. Ryan did. (Ryan, Tr. 1225-1226).

**Response to Proposed Finding No. 408**

The Proposed Finding is factually inaccurate, contrary to the weight of the evidence, incomplete and misleading. Ryan called Foley at Schein on October 1, 2013 after receiving market intelligence that Schein might be discounting to the Smile Source buying group. (CCFF ¶¶ 1005-1019). Ryan spoke to his counterpart at Schein, Foley, for 18 minutes; according to Foley's description of the call, (1) he got the impression Benco was anti-buying group; (2) Ryan informed Foley that Benco would not bid on Smile Source; and (3) Ryan wanted to know if Schein would bid on Smile Source. (CCFF ¶¶ 1010-1013). Contemporaneous documents confirm that the call was about Smile Source. (CCFF ¶¶ 1013-1014). Ryan reported the conversation to Cohen saying that he had "talked specifically about" Smile Source with Foley. (CCFF ¶ 1014). Foley also reported that he and Ryan discussed Smile Source on the telephone call. (CCFF ¶ 1017 (quoting CX0243 at 001; Foley, Tr. 4588-4589) ("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.”)). For these reasons, the weight of the evidence shows that Ryan called Foley to discuss Smile Source, and the Proposed Finding should be rejected. Finally, even if Foley and Ryan discussed pricing of a common supplier, that is not inconsistent with the weight of the evidence establishing that Foley and Ryan discussed Smile Source on that 18 minute call. (CCFF ¶¶ 1005-1017).

409. Although Mr. Foley later reported that Mr. Ryan discussed Smile Source during that call, Mr. Ryan does not recall discussing Smile Source or buying groups during that call. (Ryan, Tr. 1226). At that time, Smile Source fell under Henry Schein Dental, not under Schein’s Special Markets division, the division headed by Mr. Foley. (Foley, Tr. 4590).

#### **Response to Proposed Finding No. 409**

The Proposed Finding is misleading and incomplete because the contemporaneous documents confirm the content of the 18 minute conversation between competitors related to not bidding on the buying group, Smile Source. (CCFF ¶¶ 1005-1017). Ryan called Foley at Schein on October 1, 2013 after receiving market intelligence that Schein might be discounting to the Smile Source buying group. (CCFF ¶¶ 1005-1019). Ryan spoke to his counterpart at Schein, Foley, for 18 minutes; according to Foley’s description of the call, (1) he got the impression Benco was anti-buying group; (2) Ryan informed Foley that Benco would not bid on Smile Source; and (3) Ryan wanted to know if Schein would bid on Smile Source. (CCFF ¶¶ 1010-1013). Contemporaneous documents confirm that the call was about Smile Source. (CCFF ¶¶ 1013-1014). Ryan reported the conversation to Cohen saying that he had “talked specifically about” Smile Source with Foley. (CCFF ¶ 1014). Foley also reported that he and Ryan discussed Smile Source on the telephone call (CCFF ¶ 1017 (quoting CX0243 at 001; Foley, Tr. 4588-4589) (“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.”)). For these reasons, the weight of the evidence shows that Ryan

called Foley to discuss Smile Source, and the Proposed Finding should be rejected. Finally, even if Foley and Ryan discussed pricing of a common supplier, that is not inconsistent with the weight of the evidence establishing that Foley and Ryan discussed Smile Source on that 18 minute call. (CCFF ¶¶ 1005-1017).

The Proposed Finding that Smile Source fell under Henry Schein Dental (HSD), not the Special Markets division headed by Foley, is contrary to the weight of the evidence and irrelevant. The record of evidence shows that Foley did continue to have involvement in HSD's decisions relating to Smile Source in 2014, even though he did not have direct responsibility for the customer. (Foley, Tr. 4654). The record of evidence shows that Foley shared the information he learned from the call with Ryan with Hal Muller, President of Special Markets. (CX0243 at 001; Foley, Tr. 4588-4589). Moreover, Hal Muller internally discussed buying groups with Sullivan. (CCFF ¶ 901). The Proposed Finding that Foley was the head of the Special Markets is inaccurate as Muller was the President of Special Markets. (CCFF ¶ 2054).

410. The October 1, 2013 phone call was the only conversation that Mr. Ryan had with Mr. Foley. (Ryan, Tr. 1242), and Mr. Foley never told Mr. Ryan about Schein's position on buying groups or discounts to buying groups. (Ryan, Tr. 1243). The call did not include any agreement of any kind between Mr. Ryan and Mr. Foley. (Ryan, Tr. 1243-1244).

#### **Response to Proposed Finding No. 410**

The Proposed Finding is also factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Benco and Schein did not reach an agreement to refuse to discount to buying groups. (CCFF ¶¶ 661-1158, 1167-1198). The Proposed Finding is also misleading as it suggests a conclusion of law. An agreement, for antitrust purposes, can be found despite denials by participants. (CC Post-Tr. Br. at 90-91). The Proposed Finding is also misleading and incomplete because it omits that Foley and Ryan discussed not bidding for buying groups on that call. Ryan called Foley at Schein on October 1, 2013 after receiving market intelligence that

Schein might be discounting to the Smile Source buying group. (CCFF ¶¶ 1005-1019). Ryan spoke to his counterpart at Schein, Foley, for 18 minutes; according to Foley’s description of the call, (1) he got the impression Benco was anti-buying group; (2) Ryan informed Foley that Benco would not bid on Smile Source; and (3) Ryan wanted to know if Schein would bid on Smile Source. (CCFF ¶¶ 1010-1013). Moreover, the Proposed Finding is incomplete and misleading because one of the participants in the October 1, 2013 phone call (Foley) was explicit in his concern about collusion. (CCFF ¶ 1017 (quoting CX0243)). The weight of the evidence shows that Foley shared information about Schein’s policies toward buying groups. Following the call on October 1, 2013 with Foley, Ryan wrote to his boss, Cohen: “[Smile Source is] [v]ery familiar. Talked to them three times. Nothing is different. Randy at Schein and I talked specifically about them. Buh-bye.” (CX0019 at 001; Ryan, Tr. 1101). Ryan’s reference to “Randy” in CX0019 meant Foley. (Ryan, Tr. 1101). Ryan then disseminated the information he learned about his competitor to members of Benco leadership. (CCFF ¶ 1014) (“[Smile Source is] [v]ery familiar. Talked to them three times. Nothing is different. Randy and Schein and I talked specifically about them. Buh-bye.”)).

D. RESPONSES TO PROPOSED FINDINGS REGARDING “BENCO’S 2014 MEETING WITH SMILE SOURCE”

411. On January 30, 2014 Trevor Mauer, who had become the president of Smile Source, e-mailed Chuck Cohen to set up a meeting between Benco and Smile Source. (RX1022).

**Response to Proposed Finding No. 411**

Complaint Counsel has no specific response.

412. The Smile Source meeting with Benco involved Mr. Cohen, Mr. Ryan and Mr. Mauer, and it took place during the Chicago Midwinter dental meeting in February 2014. (Ryan, Tr. 1188-1189).

**Response to Proposed Finding No. 412**

Complaint Counsel has no specific response.

413. In that conversation, Benco advised Mr. Mauer about its policy of not putting anyone between Benco and its customers, and informed Mr. Mauer that Benco would not do business with Smile Source as a single customer. (Cohen, Tr. 787:9-718:15; Ryan Tr. 1189).

**Response to Proposed Finding No. 413**

The Proposed Finding cites an incomprehensible testimony range. To the extent it intends to cite Cohen testimony either from page 787-788 or 717-718, the evidence cited does not support the proposition that Benco would not do business with Smile Source as a *single customer*. Cohen did testify that Benco declined to do business with Smile Source. (Cohen, Tr. 787). To the extent the Proposed Finding admits that Benco turned down Smile Source in 2014, Complaint Counsel does not disagree.

414. The application of Benco's no-middlemen policy to Smile Source was consistent with the policy and was Benco's own decision based on its unilateral economic interests. (Cohen, Tr. 781).

**Response to Proposed Finding No. 414**

The Proposed Finding is misleading and incomplete. Complaint Counsel objects to the use of the words "no-middlemen policy" to refer to a no-buying group policy. Cohen testified it is fair to say Benco had a no *buying group* policy. (Cohen, Tr. 445; *see also* Benco Post Tr. Br. at 10 (Benco followed its "longstanding policy . . . not to deal with buying groups"); CCFF ¶ 419 ("Benco has a firm policy of non-recognition of GPOs as a single customer."); [REDACTED]; [REDACTED]; CX0062 (Guggenheim asking Cohen "wondering if your position on buying groups is still as you articulated back in February?")). The Proposed Finding is misleading in that it suggests that Benco executed from a policy not aimed at buying groups specifically. (CCFF ¶¶ 394-431; Ryan, Tr. 1028-1029 ("Q. And once Benco determined that a group was a buying group, you do not do any further discovery; right? A. No. Typically not . . . And is it 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. Q. And the answer was no regardless of whether the buying group's members were your competitors' customers or Benco's customers. A. Correct”)). While Benco used the term no-middlemen policy during these proceedings, the contemporaneous documents and communications evidence a no-buying group policy and lack any reference to a no-middleman policy. (CCFF ¶¶ 399 (“Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups”), 404 (“We do not participate in buying groups. Ever.”), 410, 406, 416, 419, 527-528, 574-575, 582, 661-664, 677; CX1199 (“Benco does not recognize ‘buying groups’”)). It is irrelevant what label Benco gives: the evidence shows that throughout the conspiracy period, Benco instructed its employees to refuse to discount to *buying groups*. (CCFF ¶¶ 423, 396, 401, 417).

Further, the Proposed Finding is incomplete and misleading because Benco recognizes that buying groups represented both a threat and opportunity to Benco. (CX0068 at 18). The overarching conspiracy insulated Benco from the threat that its full service competitors would work with buying groups and take business and share from Benco. (CCFF ¶¶ 1178-1198). For example, in 2015 in turning down a buying group, Ryan wrote “[t]he best part about calling these guys is I already KNOW that Patterson and Schein have said NO.” (Ryan, Tr. 1131; CX0012 at 001; CCFF ¶ 425). While Ryan testified he wrote that based on “experience” that Benco gets approached after Schein and Patterson, (Ryan, Tr. 1209-1210), the facts do not support that explanation. (*Compare* CX1240 at 001 (Kois reached out to Benco on October 21, 2014), *with* CX4310 at 010-011 (Kois and Schein communications reflecting discussions on October 23, 2014 and later); *compare* Mason, Tr. 2334-2335; CX8035 (Mason, Dep. at 76) (testifying that NMDC approached all three distributors, *with* CX8035 (Mason, Dep. at 77) (following meeting with Patterson in which Patterson declined the participate, NMDC knew that it did not have a distributor partner because Patterson and Schein had already turned down the NMDC)). Outside

of the agreement insulating the threat of buying groups, the fact that each buying group has a unique structure, a blanket no-buying group ban as against economic interest is illogical. (Cohen, Tr. 682 (“[If] you've seen one DSO, you've seen one DSO, you've seen one buying group, you've seen one buying group. There are a lot of different flavors and a lot of different creative answers to this aggregation question on the part of the dental practices.”); Ryan, Tr. 1169). Benco knew that due to its no-buying group policy, it was losing customers who switched to competitors supplying buying groups, including Smile Source. (Ryan, Tr. 1129-1130; CX0013 at 001 (“The past week I have talked to 4 offices that have switched over to Nashville Dental because of the discounts they get through Smile Source.”); CCFF ¶ 53). Finally, passing up Smile Source and other buying groups was a missed opportunity to gain revenue as [REDACTED]

[REDACTED] (See CCFF ¶¶ 1306, 1301, 1653, 1664, 1695). In fact, the incentive to work with buying groups was so strong that Benco had to repeatedly tell its sales force against it. (CX1120 (regional manager seeks to work with buying group to attract “a total of 5 to 8 million dollars in merch business” from Schein and Patterson, to which Cohen responds Benco cannot do it because “we don’t offer discounts to buying groups”); CX1242 (regional manager seeks to do business with a buying group as “a great opportunity to win some business from Schein,” to which Ryan responds: “We don’t participate in buying groups ever”); *see also* CX0170 (Schein also had to instructs its sales team against instincts to offer discounts to buying groups)). For those reasons, characterizing turning down buying groups cannot accurately be described as in Benco’s unilateral interest.

415. If a buying group approaches Benco, and Benco declines, Benco retains its pre-existing customers who may be in the buying group at the same rate that it retains customers in general. (Ryan, Tr. 1187-1188).

#### **Response to Proposed Finding No. 415**



The Proposed Finding is misleading, incomplete and irrelevant. It is misleading and irrelevant to the extent Ryan, who has limited experience with a single buying group, is opining on the mechanics of how buying groups in general affect customers. The finding is misleading and incomplete to the extent other distributors who have experience working with buying groups have gained customers. (CCFF ¶¶ 1246, 1260). Burkhart's existing customers even went on to purchase more from Burkhart after Burkhart began discounting to Kois members through the buying group. (CCFF ¶ 1299).

416. Chuck Cohen has never had any discussions with Tim Sullivan or anyone at Schein, or anyone at Patterson, about Smile Source. (Cohen, Tr. 779; 788).

**Response to Proposed Finding No. 416**

The Proposed Finding is against the weight of the evidence, misleading, and incomplete because Cohen planned to confront Sullivan about Smile Source in 2012, Ryan and Foley discussed Smile Source at length in late 2013, and Cohen had a renewed opportunity to discuss the no-buying group agreement and Smile Source with Sullivan and Guggenheim at the Dental Trade Alliance Meeting in 2013. The Proposed Finding is incomplete and misleading because Cohen planned to confront Sullivan in July of 2012 after he learned from Ryan that Schein was working with a buying group, Smile Source. (CCFF ¶¶ 978-983). Ryan learned that Schein was working with buying group, Smile Source, and forwarded that information to Cohen with a note that said "Better tell your buddy Tim to knock this shit off." (CCFF ¶¶ 981-986). Ryan wanted Cohen to tell Sullivan to stop working Smile Source. (CCFF ¶¶ 984-986). Cohen agreed to do so, responding to Ryan by asking him to resend his email without the commentary so that Cohen could "print & send to Tim with a note." (CCFF ¶¶ 988-992). Cohen testified that he might have sent the note to Sullivan. (Cohen, Tr. 526-527). Cohen also testified that he would not be surprised if he sent Sullivan a physical message about Smile Source and further that he sent such

messages to Sullivan from time to time. (CCFF ¶ 992; Cohen, Tr. 526-527; CX0301 (Cohen, IHT at 223)). In addition, the Proposed Finding is incomplete and misleading because there is other direct evidence of Smile Source communications between Benco and Schein when Ryan spoke with his counterpart at Schein on October 1, 2013 after receiving market intelligence (again) that Schein might be discounting to the Smile Source buying group. (CCFF ¶¶ 1005-1019). Ryan spoke to his counterpart Foley at Schein for 18 minutes; according to Foley, Ryan informed him that Benco would not bid on Smile Source and wanted to know if Schein would bid. (CCFF ¶¶ 1010-1013). Ryan reported the conversation to Cohen saying that he had “talked specifically about” Smile Source with Foley. (CCFF ¶ 1014). In accord, just a few weeks before the Dental Trade Alliance meeting in October 2013, Burkhart had refused Benco’s first invitation from McElaney to stop discounting to buying groups, (CCFF ¶¶ 1238-1251), and Ryan’s response was a recommendation to Cohen: “CHUCK—maybe what you should do is make sure you tell Tim [Sullivan] and Paul [Guggenheim] to hold their positions as we are.” (CCFF ¶¶ 1101-1105 (quoting CX0023 at 001)). Shortly thereafter, Cohen had his chance because Cohen, Guggenheim, Sullivan, and Reece were all at the same Dental Trade Alliance Meeting in October of 2013. (CCFF ¶¶ 364-366, 1242-1245). Buying groups were on Cohen’s mind at the 2013 DTA meeting, in fact, Cohen himself invited Burkhart not to work with buying groups again at this Dental Trade Alliance Meeting in October 2013. (CCFF ¶¶ 1238-1241). Taken together, the contemporaneous Benco plans to tell Sullivan and Guggenheim to hold their positions on buying groups, (CX0023 at 001), followed directly by the opportunity when Sullivan, Guggenheim, and Cohen all attended the same DTA meeting, (CCFF ¶¶ 364, 366, 1243), plus Cohen’s renewed invitation to Burkhart at the same meeting, (CCFF ¶¶ 1238-1241), is circumstantial evidence that Cohen sought to reaffirm the no buying group positions with Guggenheim and Sullivan at the DTA meeting. (See CCFF ¶¶ 358-380, 384-389, 1101-1109; *see*

*also* Cohen, Tr. 595-597 (Guggenheim and Cohen regularly attended the DTA, “it’s not that big a meeting” and they typically saw each other); Guggenheim, Tr. 1678-1679 (Guggenheim attended DTA meetings regularly); CX8023 (Guggenheim, Dep. at 373); CX8015 (Cohen, Dep at 359-360); Sullivan, Tr. 3878 (Sullivan attends the DTA annual meeting every year, and typically sees and would see Cohen at the meeting); Sullivan, Tr. 3879-3880 (Sullivan typically attended five to six dental industry conventions each year and “might run into” Chuck Cohen at those meetings)).

Finally, even if there were no circumstantial evidence that Cohen had communicated about Smile Source to Schein and Patterson, the Proposed Finding would be irrelevant and misleading, because it is undisputed that Benco and Schein did communicate competitively sensitive information about Smile Source through Ryan to Foley. (CCFF ¶¶ 1005-1017). Ryan spoke with his counterpart at Schein on October 1, 2013 after receiving market intelligence that Schein might be discounting to the Smile Source buying group. (CCFF ¶¶ 1005-1019). Ryan spoke to his counterpart Foley at Schein for 18 minutes; according to Foley, Ryan informed him that Benco would not bid on Smile Source and wanted to know if Schein would bid. (CCFF ¶¶ 1010-1013). Ryan reported the conversation to Cohen saying that he had “talked specifically about” Smile Source with Foley. (CCFF ¶ 1014).

**V. RESPONSES TO PROPOSED FINDINGS REGARDING “THE ALLEGED INTERFIRM COMMUNICATIONS ARE NOT EVIDENCE OF AN AGREEMENT INVOLVING BENCO”**

417. Chuck Cohen never formed or sought to form any agreement with Patterson or Schein about buying groups. (Cohen, Tr. 705).

**Response to Proposed Finding No. 417**

The Proposed Finding is factually inaccurate and contrary to the weight of the evidence for the reasons discussed in Complaint Counsel’s Post-Trial Brief, Reply Post-Trial Brief, and Proposed

Findings of Fact. (CCFF ¶¶ 1-2037). For example, the evidence shows that Cohen informed Sullivan of Benco's no buying group policy. (CCFF ¶¶ 662-664; *see also* CX0301 (Cohen, IHT at 195-196) ("Q. Have you ever communicated with anyone at Schein about buying groups? A. I believe I have. Q. Can you tell me about those instances? A. . . **I believe I have, at different times, communicated our policy on buying groups.**") (emphasis added)). As a result of communications with Schein, Benco gained the understanding that Schein would adopt a policy against recognizing buying groups. (CCFF ¶¶ 680, 675-678). Cohen testified that, based on text messages with Sullivan, he understood that "the policy that Henry Schein had was that they do not recognize GPOs." (CCFF ¶ 676). Consistent with Benco's understanding, Schein adopted a no buying group strategy beginning in late 2011. (CCFF ¶¶ 705-870). Benco and Schein communicated about buying groups multiple other times during the conspiracy. (1) In January 2012, Cohen confronted Sullivan when he discovered that Schein was working with buying group, Unified Smiles. (CCFF ¶¶ 965-972). Ryan passed information to Cohen that Schein was working with a buying group called Unified Smiles with a note "For Timmy [Sullivan] conversation." (CCFF ¶¶ 958-960). Cohen then set up a call with Sullivan and Cohen responded to Ryan's initial email with the response "Talking this AM" just before his call with Sullivan. (CCFF ¶¶ 964-967). Sullivan and Cohen spoke for 11 minutes and 34 seconds on January 13, 2012. (CCFF ¶ 968). While neither Cohen nor Sullivan remembered the content of the call, Cohen admitted he had buying groups on his mind within the hour he called Sullivan. (CCFF ¶¶ 971-972). (2) Cohen planned to confront Sullivan a second time in July of 2012 after he once again learned from Ryan that Schein was working with a buying group, this time Smile Source. (CCFF ¶¶ 978-983). This time, Ryan forwarded the information to Cohen with a note that says "Better tell your buddy Tim to knock this shit off." (CCFF ¶¶ 981-986). Ryan wanted Cohen to tell Sullivan to stop working with buying group Smile Source (CCFF ¶¶ 983-986). Cohen

agreed, responding to Ryan by asking him to resend his email without the commentary so that Cohen could “print & send to Tim with a note.” (CCFF ¶¶ 988-992). Cohen testified it would not be a surprise if he sent Sullivan a note about Smile Source. (CCFF ¶ 992). (3) On March 26, 2013, Cohen contacted Sullivan again regarding buying groups. (CCFF ¶ 994). Cohen had emailed a Benco sales representative to ask for the name of the buying group in his area that worked with Schein. (CCFF ¶ 995). Almost immediately after receiving the response from the sales representative, Cohen copied and pasted the Benco sales representative’s email into a text to Sullivan: “As per my guy in Raleigh: ‘Dental alliance. . . . A guy named Sam contacted me about a year ago and asked if Benco was interested. Told him he was out of his tree . . . . Could be a rumor, sometimes stories go around. Thanks.’” (CCFF ¶ 997). Cohen confirmed at trial that he was informing “Tim Sullivan about market intelligence on Schein doing business with a buying group.” (CCFF ¶ 994; Cohen, Tr. 557 (“Q. So here you’re texting Tim Sullivan about market intelligence on Schein doing business with a buying group. A. Yes.”)). (4) In March 2013, ADC approached Benco asking for a bid for its \$3.5 million dental supply business. (CCFF ¶ 1022). Benco was unsure whether ADC qualified as a buying group so Cohen contacted his competitor, Tim Sullivan, to help determine “how [Benco] would handle that account.” (CCFF ¶¶ 1023-1032, 1037). On March 25, 2013, Cohen created a calendar entry reminding him to call Tim Sullivan regarding buying groups. (CCFF ¶ 1028). Cohen texted Sullivan asking for a call, and the two set up a time to talk at 5 p.m. on March 25, 2013. (CCFF ¶¶ 1029-1032). Cohen and Sullivan spoke on the call regarding a customer, ADC. (CCFF ¶¶ 1034-1035). Cohen testified that he and Sullivan were “exchanging information” about whether ADC was a buying group or a DSO. (CCFF ¶¶ 1036-1037). (5) Two days later, Cohen learned, through outside counsel hired by Benco, that ADC was not a buying group. (CCFF ¶¶ 1061-1065). Benco decided to bid. (CCFF ¶ 1066). Cohen contacted Sullivan the same day to tell him that Benco

would be bidding on a potential \$3.5 million customer, ADC. (CCFF ¶¶ 1068-1070). Cohen admitted at trial that he told Sullivan of Benco's bidding plans because he wanted to maintain "a high level of credibility" with Sullivan (CCFF ¶ 1075-1076). (6) In addition, Ryan (Benco) and Foley (Schein) communicated about the buying group Smile Source in October 2013. (CCFF ¶¶ 1005-1021). The record also shows that Cohen admitted that he communicated Benco's no buying group policy to Guggenheim February 8, 2013, (Cohen, Tr. 501 ("Q. You've communicated Benco's no-buying group policy to Mr. Guggenheim? A. . . . [Y]es.")), and that a few hours after Guggenheim received Cohen's email about Patterson's involvement with NMDC and 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." (CX0090 at 001; Guggenheim, Tr. 1607-1608; CCFF ¶¶ 483, 495-496). The record also shows that Cohen had no business reasons for communicating 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 of Benco's no-GPO policy? A. I don't think [there] is a business reason.")). Cohen, moreover, admitted that he was concerned with communicating with Guggenheim about "the buying group situation" in New Mexico because it was a "customer situation" and might be construed as price fixing. (Cohen, Tr. 539-540). The record also shows that, several months later in June 2013, when Guggenheim learned that Benco was working with Atlantic Dental Care ("ADC"), a group Patterson thought was a buying group, Guggenheim initiated a communication with Cohen asking if Benco was changing its position. (CX0095 at 001 ("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!")). Cohen then provided Guggenheim – his competitor – with extensive information about how he evaluated customers and why he did or did not do business with those customers. (CX0062 at 001 (June 8, 2013 email from Cohen to

Guggenheim, reiterating Benco's no buying-group policy); Cohen, Tr. 561-562; CCFF ¶ 575).

Cohen not only disclosed his policy and his decisions about competing to his competitor, he also assured Guggenheim about his future plans -- that he would "continue monitoring the process to ensure that ADC delivers on their commitment to us," including ensuring that ADC was not a buying group. (Cohen, Tr. 563-564; CX0062 at 001). For these reasons, and other reasons discussed in more detail in Complaint Counsel's Post-Trial Brief, Reply Post-Trial Brief, and Proposed Findings of Fact, (CCFF ¶¶ 1-2037), this Proposed Finding is contrary to the weight of the evidence and should be rejected.

418. Chuck Cohen did not engage in frequent or repeated communications with Patterson or Schein about buying groups. (Cohen, Tr. 705).

#### **Response to Proposed Finding No. 418**

The Proposed Finding is factually inaccurate and contrary to the weight of the evidence. The evidence shows that Respondents engaged in repeated communications with each other regarding buying groups. (CCFF ¶¶ 491-502, 564-588, 661-684, 955-1100). The Proposed Finding is misleading and incomplete because the evidence shows there were at least 15 inter-firm communications among Schein, Patterson, and Benco about buying groups during the conspiracy period.

(1) January 13, 2012, Sullivan and Cohen shared a telephone call about a buying group.

(CCFF ¶¶ 955-972). On January 13, 2012 Cohen and Sullivan spoke on the telephone regarding the buying group Unified Smiles on a telephone call that lasted 11 minutes and 34 seconds. (CCFF ¶¶ 958-975; Cohen, Tr. 510-511; CX6027 at 019 (Row 170)).

(2) February 8, 2013, Cohen emailed Guggenheim about a buying group and about Benco's no buying group policy. (CCFF ¶¶ 474-490). Cohen reached out to Guggenheim on February 8, 2013, about Patterson's potential involvement with buying group the New

Mexico Dental Co-op and included information about Benco's no buying group policy. (CX0090 at 001; CCFF ¶¶ 479-480, 483).

- (3) February 8, 2013, Guggenheim emailed Cohen about a buying group and Patterson's no buying group policy. (CCFF ¶¶ 491-502). On February 8, 2013, hours after receiving Cohen's email about Patterson's involvement with NMDC and Benco's no buying group policy, Guggenheim emailed Cohen confirming that Patterson felt the same way as Benco about buying groups. (CCFF ¶¶ 495-496).
- (4) March 25, 2013, Cohen and Sullivan shared a phone call about a suspected buying group. (CCFF ¶¶ 1022-1060). On March 25, 2013, Cohen made himself a calendar note to "Call Tim Sullivan re: Buying Groups." (CX0058 at 001; Cohen Tr. 543). After setting up the call, Sullivan called Cohen on March 25, 2013 and the two spoke for 8 minutes and 35 seconds about buying group ADC. (CCFF ¶¶ 1028-1036).
- (5) March 25, 2013, Cohen and Sullivan exchanged texts about a suspected buying group. (CCFF ¶¶ 1022-1048, 1051). On March 25, 2013, Cohen initiated text message contact with Sullivan in order to set up a conversation about buying groups. (CCFF ¶¶ 1028-1030). Sullivan responded to Cohen's text messages within minutes. (CCFF ¶ 1031). The two rivals exchanged further text messages on March 25, 2013 including Cohen sending Sullivan a link to a press release about a buying group, (CCFF ¶ 1045), Sullivan thanking Cohen for the conversation, (CCFF ¶ 1033), and separately thanking Cohen for the link about buying group ADC. (CCFF ¶¶ 1036, 1047, 1057-1058).
- (6) March 26, 2013, Cohen texted Sullivan about a buying group. (CCFF ¶¶ 994-1004). Cohen texted Sullivan about buying group Dental Alliance on March 26, 2013. (CCFF ¶ 995-1004). Sullivan admitted that on March 26, 2013, Cohen sent him yet another text message about a buying group. (CCFF ¶ 1059 (citing Sullivan Tr. 3957)).



(7) March 27, 2013, Cohen texted Sullivan about a classifying a suspected buying group.

(CCFF ¶¶ 1061-1071). On March 27, 2013, Cohen texted Sullivan that Benco had determined that ADC was not a buying group and that Benco planned to bid for the ADC business as it was not a buying group. (CCFF ¶¶ 1068-1071).

(8) June 6, 2013, Guggenheim emailed Cohen about a suspected buying group. (CCFF ¶¶ 564-573). On June 6, 2013, Guggenheim dug up Cohen's email from February 2013, and sent a new email to Cohen asking for him to address Benco's work with ADC in light of the policy Cohen had articulated against buying groups in earlier in the year. (CCFF ¶¶ 566-570; CX0095 at 001).

(9) June 8, 2013, Cohen emailed Guggenheim about buying groups. (CCFF ¶¶ 574-579). On June 8, 2013, Cohen emailed Guggenheim to explain that Benco's no buying group policy was the same and that it was because ADC was not a buying group that Benco had chosen to work with them. (CCFF ¶¶ 574-576). Cohen disclosed Benco's future plans to monitor against ADC becoming a buying group in the email to his competitor, Guggenheim. (CCFF ¶ 577).

(10) June 10, 2013, Guggenheim emailed Cohen about the no buying group policy. (CCFF ¶¶ 580-588). On June 10, 2013, Guggenheim emailed Cohen to say he was satisfied by Cohen's policy explanation writing "[s]ounds good Chuck. Just wanted to know where you guys stand." (CX0062 at 001; CCFF ¶¶ 581-582).

(11) October 1, 2013, Ryan and Foley shared a telephone call about a buying group. (CCFF ¶¶ 1005-1019). On October 1, 2013 Benco's Ryan contacted his counterpart, Foley, at Schein about buying group Smile Source in a call that lasted 18 minutes. (CCFF ¶¶ 1009-1014).

(12) January 6, 2014, Patterson's VP of Sales, David Misiak, called Schein's VP of Sales, David Steck about a buying group. (CCFF ¶¶ 1123-1128). Patterson's Misiak called Schein's Steck about a response to the TDA Perks buying group on January 6, 2014, and the two spoke for 14 minutes. (CCFF ¶¶ 1123-1126). Misiak informed Steck that "Patterson was withdrawing from the [upcoming] TDA meeting." (CCFF ¶¶ 1124-1125; Steck, Tr. 3701).

(13) January 21, 2014, Steck emailed Misiak about a buying group. (CCFF ¶¶ 1129-1132).

On January 21, after internal research, Steck emailed Misiak about Schein's response to TDA Perks. (CCFF ¶¶ 1129-1132).

(14) April 16, 2014, Cohen emailed both Guggenheim and Sullivan about a buying group.

(CCFF ¶¶ 1133-1137). On April 16, 2014, Cohen emailed Sullivan and Guggenheim about the buying group TDA Perks. (CCFF ¶ 1133-1137).

(15) Unspecified date when Cohen (admittedly) informed Sullivan of Benco's no buying group policy. (CCFF ¶¶ 661-664).

There is strong circumstantial evidence of a 16<sup>th</sup> as well because on July 25, 2012, Patrick Ryan received a message implicating Schein, and Sullivan in particular, working with a buying group, Smile Source. (CCFF ¶ 980 (citing CX0018)). Ryan's response was to forward the message to Cohen with a note to "Better tell your buddy Tim to knock this shit off." (CX0018 at 001; Ryan Tr. 1065). Cohen asked Ryan to send the note again, without his comment, so Cohen could print and send to Sullivan. (CCFF ¶ 989-990 (citing CX0018)). Cohen testified he sent notes by mail to Sullivan from time to time, and specifically that he would not be surprised if he sent a note to Sullivan about this buying group. (CCFF ¶ 992). At the least, this shows Cohen's intention to send another inter-firm communication about a buying group and likely signifies a 16<sup>th</sup> such incident. (Cohen, Tr. 522; CCFF ¶¶ 980-992).

The Proposed Finding is also misleading as it implies there is a record of each relevant communications between the executives of Patterson, Schein, and Benco on buying groups, but, the Big Three communicated regularly and registered for and attended the same industry events during the conspiracy period. (CCFF ¶¶ 269-393). We only have records for the content of a fraction of the written and oral communications. Tellingly, Benco acknowledges that there were communications between Benco and Patterson and Schein regarding buying groups. (Benco Post-Tr. Br. at 23-31). Neither Cohen nor Guggenheim could identify procompetitive or business justifications for the February 2013 conversation about Benco's no buying group policy. (CCFF ¶¶ 1167-1168). Neither Cohen nor Guggenheim could identify procompetitive or business justifications for their June 2013 communications with each other about customer ADC. (CCFF ¶¶ 1169-1170). Similarly, neither Sullivan nor Cohen could not provide business justifications for communications with Sullivan about ADC either. (CCFF ¶¶ 1171-1172). The Proposed Finding is also factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Benco and Schein did not reach an agreement to refuse to discount to buying groups. (CCFF ¶¶ 661-1158, 1167-1198). The Proposed Finding is also factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Benco and Patterson did not reach an agreement to refuse to discount to buying groups. (CCFF ¶¶ 474-660, 1101-1158). Contrary to the Proposed Finding, the inter-firm communications, in conjunction with the totality of the evidence in this case, establishes a meeting of the minds among Respondents. (CCFF ¶¶ 1-2037).

419. The only communications that Chuck Cohen has ever even had with anyone at Patterson about buying groups is limited to two brief e-mail exchanges with Paul Guggenheim, neither of which come close to forming any type of agreement. (Cohen, Tr. 705).

#### **Response to Proposed Finding No. 419**

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Benco did not initiate communications with and enter into an agreement with Patterson (and Schein) not to do business with buying groups. CCFF ¶¶ 474-660, 1101-1158). The record shows that Cohen admitted that he communicated Benco's no buying group policy to Guggenheim via email on February 8, 2013. (CCFF ¶ 484 (Cohen, Tr. 501 ("Q. You've communicated Benco's no-buying group policy to Mr. Guggenheim? A. . . . [Y]es.")). A few hours after Guggenheim received Cohen's email about Patterson's involvement with NMDC and 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." (CX0090 at 001; Guggenheim, Tr. 1607-1608; CCFF ¶¶ 483, 495-496). The record also shows that Cohen had no business reasons for communicating Benco's no buying group policy. (CCFF ¶ 488; CX0301 (Cohen, IHT at 243) ("Q. Can you think of any business reason for you to tell Mr. Guggenheim of Benco's no-GPO policy? A. I don't think [there] is a business reason . . . Q. So just to be clear, is it your testimony that you cannot think of any business reasons for you to tell Mr. Guggenheim Benco's no-GPO policy, as you sit here today? A. Yes.")). Cohen, moreover, admitted that he was concerned with communicating with Guggenheim about "the buying group situation" in New Mexico because it was a "customer situation" and might be construed as price fixing. (CCFF ¶ 516 (Cohen, Tr. 539-540)). The record also shows that, several months later in June 2013, when Guggenheim learned that Benco was working with Atlantic Dental Care ("ADC"), a group Patterson thought was a buying group, Guggenheim initiated a communication with Cohen asking if Benco was changing its position. (CCFF ¶ 570; CX0095 at 001 ("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!")). The record shows Guggenheim viewed Benco's bidding on and doing business with ADC as a deviation from what

Cohen previously told him about Benco's policy not to do business with buying groups in February 2013. (CCFF ¶ 572; CX0056; Guggenheim, Tr. 1628). Cohen then provided Guggenheim – his competitor – with extensive information about how he evaluated customers and why he did or did not do business with those customers. (CCFF ¶ 575; CX0062 at 001 (June 8, 2013 email from Cohen to Guggenheim, reiterating Benco's no buying-group policy); Cohen, Tr. 561-562). Cohen not only disclosed his policy and his decisions about competing to his competitor, he also assured Guggenheim about his future plans -- that he would "continue monitoring the process to ensure that ADC delivers on their commitment to us," including ensuring that ADC was not a buying group. (CCFF ¶ 575; Cohen, Tr. 563-564; CX0062 at 001). The Proposed Finding is also misleading to the extent that it implies that there is not substantial evidence that Benco orchestrated an agreement with Patterson not to discount to buying groups. (See CCFF ¶¶ 474-660). The Proposed Finding is also misleading to the extent that it implies that there is not substantial evidence that Benco orchestrated an agreement with Schein not to discount to buying groups. (See CCFF ¶¶ 661-1100). Accordingly, Cohen's testimony regarding his lack of knowledge of an agreement is contrary to the weight of the evidence.

420. The only communications that Chuck Cohen has ever even had with anyone at Schein about buying groups is limited to one exchange with Tim Sullivan regarding Atlantic Dental Care. (Cohen, Tr. 705-706).

#### **Response to Proposed Finding No. 420**

The Proposed Finding is factually inaccurate, misleading, incomplete, and contrary to the weight of the evidence. The Proposed Finding ignores multiple pieces of unambiguous evidence that Cohen and Sullivan communicated about buying groups more than once. Cohen himself testified that he had communicated about buying groups with Schein more than once. (CCFF ¶¶ 662-664 (quoting CX0301 (Cohen, IHT at 195-196)) ("Q. Have you ever communicated with anyone at Schein about buying groups? A. I believe I have. Q. Can you tell me about those instances? A. . .

**I believe I have, at different times,** communicated our policy on buying groups.”) (emphasis added)). The Proposed Finding also ignores other unambiguous evidence of communications about buying groups between Cohen and Sullivan. (1) In January 2012, Cohen confronted Sullivan when he discovered that Schein was working with buying group, Unified Smiles. (CCFF ¶¶ 965-972). Ryan passed information to Cohen that Schein was working with a buying group called Unified Smiles with a note “For Timmy [Sullivan] conversation.” (CCFF ¶¶ 958-960). Cohen then set up a call with Sullivan and Cohen responded to Ryan’s initial email with the response “Talking this AM” just before his call with Sullivan. (CCFF ¶¶ 964-967). Sullivan and Cohen spoke for 11 minutes and 34 seconds on January 13, 2012 . (CCFF ¶ 968). While neither Cohen nor Sullivan remembered the content of the call, Cohen admitted he had buying groups on his mind within the hour he called Sullivan. (CCFF ¶¶ 971-972). (2) Cohen planned to confront Sullivan a second time in July of 2012 after he once again learned from Ryan that Schein was working with a buying group, this time Smile Source. (CCFF ¶¶ 978-983). This time, Ryan forwarded the information to Cohen with a note that says “Better tell your buddy Tim to knock this shit off.” (CCFF ¶¶ 981-986). Ryan wanted Cohen to tell Sullivan to stop working with Smile Source. (CCFF ¶¶ 984-986). Cohen agreed, responding to Ryan by asking him to resend his email without the commentary so that Cohen could “print & send to Tim with a note.” (CCFF ¶¶ 988-992). Cohen testified it would not be a surprise if he sent Sullivan a note about Smile Source, and he planned to send the note in the mail. (CCFF ¶¶ 991-992). (3) On March 26, 2013, Cohen contacted Sullivan again regarding buying groups. (CCFF ¶ 994). Cohen had emailed a Benco sales representative to ask for the name of the buying group in his area that worked with Schein. (CCFF ¶ 995). Almost immediately after receiving the response from the sales representative, Cohen copied and pasted the Benco sales representative’s email into a text to Sullivan: “As per my guy in Raleigh: ‘Dental alliance. . . . A guy named Sam contacted me

about a year ago and asked if Benco was interested. Told him he was out of his tree . . . . Could be a rumor, sometimes stories go around. Thanks.” (CCFF ¶ 997). Cohen confirmed at trial that he was informing “Tim Sullivan about market intelligence on Schein doing business with a buying group.” (CCFF ¶ 994; Cohen, Tr. 557 (“Q. So here you’re texting Tim Sullivan about market intelligence on Schein doing business with a buying group. A. Yes.”)). (4) In March 2013, ADC approached Benco asking for a bid for its \$3.5 million dental supply business. (CCFF ¶ 1022). Benco was unsure whether ADC qualified as a buying group so Cohen contacted his competitor, Tim Sullivan, to help determine “how [Benco] would handle that account.” (CCFF ¶¶ 1023-1032, 1037). On March 25, 2013, Cohen created a calendar entry reminding him to call Tim Sullivan regarding buying groups. (CCFF ¶ 1028). Cohen texted Sullivan asking for a call, and the two set up a time to talk at 5 p.m. on March 25, 2013. (CCFF ¶¶ 1029-1032). Cohen and Sullivan spoke on the call regarding a customer, ADC. (CCFF ¶¶ 1034-1035). Cohen testified that he and Sullivan were “exchanging information” about whether ADC was a buying group or a DSO. (CCFF ¶¶ 1036-1037). (5) Two days later, Cohen learned, through outside counsel hired by Benco, that ADC was not a buying group. (CCFF ¶¶ 1061-1065). Benco decided to bid. (CCFF ¶ 1066). Cohen contacted Sullivan the same day to tell him that Benco *would be bidding* on a potential \$3.5 million customer, ADC. (CCFF ¶¶ 1068-1070). Cohen admitted at trial that he told Sullivan of Benco’s bidding plans because he wanted to maintain “a high level of credibility” with Sullivan (CCFF ¶¶ 1075-1076). In addition, Ryan (Benco) and Foley (Schein) communicated about the buying group Smile Source in October 2013. (CCFF ¶¶ 1005-1021).

The Proposed Finding should be rejected.

A. RESPONSES TO PROPOSED FINDINGS REGARDING “THE SINGLE E-MAIL EXCHANGE BETWEEN BENCO AND PATTERSON REGARDING THE NEW MEXICO DENTAL COOPERATIVE IS NOT EVIDENCE OF AN AGREEMENT AMONG RESPONDENTS”

421. On February 8, 2013, Chuck Cohen sent an e-mail to Paul Guggenheim with the subject line of “Fwd: New Mexico Dental Cooperative purchasing.” It was a forward of a longer, underlying e-mail chain. (CX0056).

**Response to Proposed Finding No. 421**

Complaint Counsel has no specific response.

422. Prior to this February 8, 2013 e-mail, Chuck Cohen had never had any communications with Paul Guggenheim about buying groups. (Cohen, Tr. 706).

**Response to Proposed Finding No. 422**

The Proposed Fact is misleading and irrelevant The Proposed Finding is misleading because prior to February 8, 2013, Cohen has ample opportunities to communicate with Guggenheim about buying groups. (CCFF ¶¶ 352, 355-359, 363, 376, 380, 384; CX6027 at 005-006, 018 (Rows 70-77, 161) (reflecting twelve telephone calls between Cohen and Guggenheim prior to February 8, 2013)). But, even if Cohen had never spoken to Guggenheim about buying groups before that date, it would be irrelevant because at the time of this communication between the competitors, Patterson was on the cusp of working with its first buying group, the New Mexico Dental Coop, which is what prompted Cohen’s communication. (CCFF ¶¶ 454-479). Until this point, Cohen didn’t think Patterson had ever worked with a buying group (BFF ¶¶ 431-432).

423. Prior to this February 8, 2013 e-mail, Chuck Cohen had never had any communications with Tim Sullivan about buying groups. (Cohen, Tr. 706).

**Response to Proposed Finding No. 423**

The Proposed Finding is misleading, incomplete, inaccurate, and contrary to the weight of the evidence. Cohen himself testified that he had communicated about buying groups with Schein more than once. (CCFF ¶¶ 662-664; CX0301 (Cohen, IHT at 195-196) (“Q. Have you ever communicated with anyone at Schein about buying groups? A. I believe I have. Q. Can you tell



me about those instances? A. . . **I believe I have, at different times**, communicated our policy on buying groups.”) (emphasis added)). The weight of the evidence shows that Benco gained an understanding that Schein had a policy against doing business with buying groups following conversations with Sullivan in 2011. (CCFF ¶ 680; *see also* CCFF ¶¶ 661-684). The evidence shows that throughout 2011, Cohen received market intelligence indicating that Schein was working with buying groups. Based on that market intelligence, Cohen understood that Schein worked with buying groups in 2011. (CCFF ¶¶ 665-673). By 2012, however, Cohen no longer believed that Schein would be working with the buying group Smile Source. (CCFF ¶¶ 674-678). In 2013 and 2014, Cohen likewise did not believe that Schein was in the buying group space. (CCFF ¶¶ 675-678). Cohen’s belief that Schein was not working with buying groups was *contrary* to the market intelligence that he received indicating that Schein did work with buying groups. (CCFF ¶¶ 665-673, 684-685). Indeed, Cohen continued to receive market intelligence indicating that Schein worked with buying groups throughout the conspiracy. (CCFF ¶¶ 665-673, 684-685; *see also* CX1104; Ryan, Tr. 1252 (testifying that he received an August 2014 email in which Benco territory reps reported to Ryan that Henry Schein was working with Schulman Group)). Consistent with Cohen’s knowledge, 2011 was the year that Schein, at the direction of Tim Sullivan, changed its buying group strategy. While Schein had discounted to buying groups historically and profited from such arrangements, by late 2011, Sullivan informed his employees that he did “NOT want to lead in getting” the buying group initiative started in dental. (CCFF ¶ 709; *see also* CCFF ¶¶ 712-714). It is also undisputed that Benco’s Cohen and Schein’s Sullivan communicated on multiple occasions throughout 2011. Between March and December 2011 alone, Cohen and Sullivan called each other at least 13 times for a total duration of 50 minutes and 14 seconds. (CCFF ¶ 347; CX6027 at 012, 016-017). Cohen and Sullivan also exchanged a total of 89 text messages in 2011, 23 of which the content was not produced and may have

contained buying group communications. (CCFF ¶¶ 349-350 (CX6027 at 003-018)). Six of the 23 text messages for which Respondents did not produce content occurred between March and December 2011. (CX6027 at 005, 010-011, 014 (Rows 62, 63, 64, 106, 110, 133)). Sullivan exchanged additional communications with Cohen, including written notes and voicemail messages, that are not reflected in CX6027. (CCFF ¶¶ 353-354 (Sullivan, Tr. 3885 (Sullivan produced all cell phone records but could have called Cohen from a land line); Cohen, Tr. 526 (Cohen sent Sullivan notes by mail from time to time); Sullivan, Tr. 3886 (“Q: And you didn’t keep all of the notes that Chuck Cohen sent you over the years, right? A: No.”)). Cohen and Sullivan saw each other at multiple industry events in 2011. (CCFF ¶¶ 358, 380, 379, 381, 363, 383; *see also* Attachment B to Complaint Counsel’s Post-Tr. Br.). The evidence also shows that Cohen “communicate[d] Benco’s no-buying group policy to Mr. Sullivan.” (CCFF ¶¶ 662-664). Contemporaneous internal company documents also demonstrate that Benco was confident that Schein rejected buying groups during the conspiracy notwithstanding market intelligence to the contrary. The Proposed Finding also ignores other unambiguous evidence that Cohen and Sullivan communications about buying groups before February 8, 2013. (1) In January 2012, Cohen confronted Sullivan when he discovered that Schein was working with buying group, Unified Smiles. (CCFF ¶¶ 965-972). Ryan passed information to Cohen that Schein was working with a buying group called Unified Smiles with a note “For Timmy [Sullivan] conversation.” (CCFF ¶¶ 958-960). The next day, Cohen set up a call with Sullivan and Cohen responded to Ryan’s initial email with the response “Talking this AM” just before his call with Sullivan. (CCFF ¶¶ 964-967). Sullivan and Cohen spoke for 11 minutes and 34 seconds that day. (CCFF ¶ 968). While neither Cohen nor Sullivan remembered the content of the call, Cohen admitted he had buying groups on his mind within the hour he called Sullivan. (CCFF ¶¶ 971-972). (2) Cohen planned to confront Sullivan a second time in July of 2012 after he once again learned

from Ryan that Schein was working with a buying group, this time Smile Source. (CCFF ¶¶ 978-983). This time, Ryan forwarded the information to Cohen with a note that says “Better tell your buddy Tim to knock this shit off.” (CCFF ¶¶ 981-986). Ryan wanted Cohen to tell Sullivan to stop working with Smile Source (CCFF ¶¶ 984-986). Cohen agreed responding to Ryan by asking him to resend his email without the commentary so that Cohen could “print & send to Tim with a note.” (CCFF ¶¶ 988-992). Cohen testified it would not be a surprise if he sent Sullivan a note about Smile Source. (CCFF ¶ 992).

424. Chuck Cohen did not write the February 8, 2013 e-mail for the purpose of forming any agreement with Paul Guggenheim or with Patterson. (Cohen, Tr. 707).

#### **Response to Proposed Finding No. 424**

The Proposed Finding is misleading and incomplete and should be disregarded. The Proposed Finding is misleading and incomplete because contemporaneous documents show that the purpose of the communication was to persuade Patterson not to work with buying groups. Cohen received an email from an employee informing him of “concerning” news that Patterson was working with a buying group. (CCFF ¶¶ 474-477). Cohen’s response was that “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.” (CCFF ¶ 479). But, when Cohen reached out it was not just information about NMDC, Cohen included detailed information about *Benco’s* own policy and Cohen could not identify any procompetitive justifications for his February 2013 communications with Guggenheim about Benco’s no buying group policy. (CCFF ¶¶ 484, 488; CX0301 (Cohen, IHT at 243) (“Q. Can you think of any business reason for you to tell Mr. Guggenheim of Benco’s no-GPO policy? A. I don’t think [there] is a business reason. . . . Q. So just to be clear, is it your testimony that you cannot think of any business reasons for you to tell Mr. Guggenheim Benco’s no-GPO policy, as you sit here today? A. Yes.”)). In fact, Cohen testified that he sent the

Guggenheim communication to establish a quid pro quo with his competitor. (Cohen, Tr. 712-713 (“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.”)). Finally, Cohen’s contemporaneous internal Benco documents describe the nature of the communications. On the day he sent the communication to Guggenheim, Cohen wrote to the Benco manager in New Mexico, “I just sent [Guggenheim] a note about [NMDC]. Don’t want to call because it might be construed as price fixing.” (CCFF ¶¶ 516, 513-514).

425. The first e-mail in the e-mail chain was written by Brenton Mason on February 4, 2013, with the subject line of “New Mexico Dental Cooperative.” (CX0056).

**Response to Proposed Finding No. 425**

Complaint Counsel has no specific response.

426. On February 4, 2013, the New Mexico Dental Cooperative’s (“NMDC”) Brenton Mason sent a New Mexico industry-wide e-mail blast to dental manufacturers setting a meeting for March 13, 2013 at Patterson’s Albuquerque branch office. (CX0090-04).

**Response to Proposed Finding No. 426**

Complaint Counsel objects to the phrase “setting a meeting” in the Proposed Finding as misleading in that it suggests that Mason created the meeting unilaterally. To the extent Dr. Mason set a meeting, he testified he did so with Patterson, agreeing to the meeting and the date before the email. (Mason, Tr. 2340, 2342; CCFF ¶¶ 454, 462-464).

427. In his e-mail, Dr. Mason wrote “We have partnered with Patterson.” (CX0090-04; Mason, Tr. 2340).

**Response to Proposed Finding No. 427**

Complaint Counsel has no specific response.

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

**Response to Proposed Finding No. 428**

The Proposed Finding is misleading and incomplete because the cited testimony is offered out of context. The quote in the Proposed Finding is incomplete and is misleading as a result. The full quote was “Q. ... [D]o you remember any specific conversations with Patterson before you sent this e-mail out about the dental co-op? A. I don't remember any specific conversations. There were many conversations.” (Mason, Tr. 2344). While Dr. Mason testified that he did not remember a specific conversation, he was clear that he remembered speaking to Patterson about starting the New Mexico Dental Co-op. (Mason, Tr. 2339). Dr. Mason also testified that when he wrote that NMDC had partnered with Patterson, he had already worked out a deal with them and that he had even set the time and date with Patterson before he sent the email. (Mason, Tr. 2340, 2342; CCFF ¶¶ 454, 462-464). The Proposed Finding is misleading and incomplete to the extent that it excludes those portions of Dr. Mason’s testimony in which he testified that he met with and spoke with representatives of Patterson, (Mason, Tr. 2335-2336), and that he has spoken to the Patterson representatives before February 4, 2013, (Mason, Tr. 2339). It is also misleading to the extent that it implies that Dr. Mason did not have a basis for his belief that “NMDC had partnered with Patterson” only because he did not recall specific conversations. In fact, Dr. Mason specifically testified that he had spoken with someone from Patterson to obtain permission to use the room at Patterson’s facilities for purposes of the meeting he was scheduling. (Mason, Tr. 2342). He also testified that, at the time he sent his email contained in CX0090, “I believe that we 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. 2343-2344). Because the Proposed Finding is incomplete in a way that makes it misleading, it should be disregarded.

429. Dr. Mason’s February 4, 2013 e-mail caused “quite a stir.” (Mason, Tr. 2376 (“Q. You would agree with me that the e-mail you sent out on February 4 to a number of manufacturers and some distributors and others in New Mexico entitled New Mexico Dental Cooperative Purchasing created quite a stir. A. Yes, it did.”)).

**Response to Proposed Finding No. 429**

Complaint Counsel has no specific response.

430. Chuck Cohen recalls focusing his attention on the claims in Dr. Mason's e-mail that the NMDC had "partnered with Patterson" and that the location for the NMDC's meeting was Patterson's Albuquerque, New Mexico office. (Cohen, Tr. 707-708).

**Response to Proposed Finding No. 430**

Complaint Counsel has no specific response.

431. At that time, Chuck Cohen was not aware that Patterson had any Special Markets Division or any business operations focused on DSOs. (Cohen, Tr. 708).

**Response to Proposed Finding No. 431**

The Proposed Finding is misleading because the email at issue does not mention anything about a DSO or a Special Markets Division, rather the email that Cohen focused on, (BFF ¶ 431), was about Patterson working with a buying group. (CX0090).

432. At that time, Chuck Cohen had not seen any evidence in the marketplace of Patterson selling to DSOs or any kind of group. (Cohen, Tr. 708).

**Response to Proposed Finding No. 432**

Complaint Counsel has no specific response.

433. Chuck Cohen's reaction to receiving Dr. Mason's e-mail was surprise to learn of the suggestion that Patterson was entering the DSO or group market because this would have been a significant shift in Patterson's business strategy. Accordingly, Chuck Cohen was "skeptical" of the truth of this information. (Cohen, Tr. 708-709).

**Response to Proposed Finding No. 433**

Complaint Counsel has no objection to the extent the Proposed Finding concedes Cohen was piqued by a perceived change in its close competitor's business strategy.

434. Initially, Dr. Mason's e-mail is forwarded by Michael Stanislawski, a Territory Manager for Midmark Corporation, a manufacturer of dental products. (CX0056).

**Response to Proposed Finding No. 434**

Complaint Counsel has no specific response.

435. The e-mail chain is then forwarded to Stewart Hanley, a former Benco Territory Representative in the New Mexico market. (CX0056; Cohen, Tr. 709-10).

**Response to Proposed Finding No. 435**

Complaint Counsel has no specific response.

436. Stewart Hanley then forwards the e-mail chain to Mike Trimble, a Benco Equipment Specialist in the New Mexico market. (CX0056; Cohen, Tr. 709-10).

**Response to Proposed Finding No. 436**

Complaint Counsel has no specific response.

437. Mike Trimble then forwards the e-mail chain to Don Taylor, a former Benco Regional Manager responsible for the New Mexico market. (CX0056; Cohen, Tr. 710).

**Response to Proposed Finding No. 437**

Complaint Counsel has no specific response.

438. Don Taylor then forwards the e-mail chain to Chuck Cohen, Pat Ryan, and Brian Evans of Benco. Brian Evans was Benco's Sales District Manager for the West Region, whose responsibility included the New Mexico market. (CX0056; Cohen, Tr. 710-11).

**Response to Proposed Finding No. 438**

Complaint Counsel has no specific response.

439. Don Taylor forwards the e-mail chain with a note that, in part, says: "I'd like to connect for just a couple if [sic] minutes to get your feedback and coaching on this." (CX0056; Cohen, Tr. 711).

**Response to Proposed Finding No. 439**

The Proposed Finding is incomplete and misleading because the information that comes to Cohen about NMDC originally comes from an email from a Schein regional manager containing that information. (CX0055 at 001; Cohen, Tr. 528-531; *see also* CX0090 at 002).

440. Chuck Cohen understood Don Taylor's request to mean that he was looking for help on what to do to compete in the New Mexico market in light of the new information that Patterson had partnered with the NMDC. (CX0056; Cohen, Tr. 711).

**Response to Proposed Finding No. 440**

The Proposed Finding is misleading and incomplete. The Proposed Finding is misleading because Cohen's communication to Guggenheim didn't just seek info that could help Benco compete -- Cohen told Guggenheim Benco's buying group and corporate group strategy. (CX0090 at 001 ("FYI: Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups (though we do work with corporate accounts) and our team understands that policy.")). Cohen testified he was seeking a quid pro quo through the communication and that he hoped that Guggenheim would also share information with him. (Cohen, Tr. 712-713 ("Q. [W]hy then did you take it upon yourself to send that information to Mr. Guggenheim? 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.")). Similarly, Don Taylor's follow up with Cohen shows his interest was not in how to compete as he asked if Cohen had been "able to connect with your Patterson contact and if anything came of it." (CX0057 (Excel worksheet "Chats" tab row 80); CX0057\_EXCERPT at 006). In the same vein, when Cohen responded to Taylor he clearly knew the sensitive nature of the communication stating: "I just sent [Guggenheim] a note about [NDMC]. Don't want to call **because it might be construed as price fixing.**" (Cohen, Tr. 539-540; CX0057 (Excel worksheet "Chats" tab row 81) (emphasis added); *see also* CX0057\_EXCERPT at 006)).

441. Chuck Cohen did not take Don Taylor's e-mail as a question about Benco getting involved with the NMDC. (Cohen, Tr. 711).

#### **Response to Proposed Finding No. 441**

The Proposed Response is misleading. The best context for understanding Cohen's state of mind is the contemporaneous exchange between Taylor and Cohen following up on the NMDC.

Taylor wrote:



Good morning. 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. Thanks! (CX0057 (Excel worksheet “Chats” tab row 80); CX0057\_EXCERPT at 006).

And Cohen responded to Taylor with the following:

I don’t expect to hear anything. I just sent him a note about it. Don’t want to call because it might be construed as price fixing. Thanks. (CX0057 (Excel worksheet “Chats” tab row 81); CX0057\_EXCERPT at 006).

This communication reflects that Cohen sought to coordinate with Patterson regarding responding to buying groups.

442. Chuck Cohen then forwarded Don Taylor’s e-mail and the underlying e-mail starting with Dr. Mason’s e-mail to Paul Guggenheim. (CX0056).

**Response to Proposed Finding No. 442**

The Proposed Finding is incomplete because in addition to the email he forwarded, Cohen also added a note to Guggenheim explaining Benco’s buying group and corporate group strategy. A move that Cohen could not justify later. (CCFF ¶¶ 484, 488; CX0301 (Cohen, IHT at 243) (“Q. Can you think of any business reason for you to tell Mr. Guggenheim of Benco’s no-GPO policy? A. I don’t think [there] is a business reason.”)). A move that explicitly stated raised antitrust concerns for Cohen. (Cohen, Tr. 539-540; CX0057 (Excel worksheet “Chats” tab row 81) (“I just sent [Guggenheim] a note about [NDMC]. Don’t want to call because it might be construed as price fixing.”)).

443. Chuck Cohen’s rationale for forwarding the e-mail chain to Paul Guggenheim was that Cohen wanted to let Guggenheim know about a some noise about one of Patterson’s branches that he might not have heard about and might want to know. (Cohen, Tr. 712-15).

**Response to Proposed Finding No. 443**

The Proposed Finding is misleading because Cohen’s communication to Guggenheim did not just seek info that could help Benco compete. Cohen told Guggenheim Benco’s buying group and corporate group strategy. (CX0090 at 001 (“FYI: Our policy at Benco is that we do not

recognize, work with, or offer discounts to buying groups (though we do work with corporate accounts) and our team understands that policy.”)). Cohen testified about the communication that he hoped that Guggenheim would also share information with him. (Cohen, Tr. 712-713 (“Q. [W]hy then did you take it upon yourself to send that information to Mr. Guggenheim? 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.”)). Similarly, Don Taylor’s follow up with Cohen shows his interest was not in how to compete as he asked if Cohen had been “able to connect with your Patterson contact and if anything came of it,” (CX0057 (Excel worksheet “Chats” tab row 80); CX0057\_EXCERPT at 006), and Cohen responded, “I just sent [Guggenheim] a note about [NDMC]. Don’t want to call because it might be construed as price fixing.” (Cohen, Tr. 539-540; CX0057 (Excel worksheet “Chats” tab row 81); *see also* CX0057\_EXCERPT at 006).

444. Chuck Cohen thought that Paul Guggenheim might not have known the information contained in Dr. Mason’s e-mail, and if the shoe had been on the other foot, hoped that Guggenheim would have let him know of information about Benco that he might not have known. (Cohen, Tr. 712-13).

#### **Response to Proposed Finding No. 444**

The Proposed Finding is misleading and incomplete because it ignores that Cohen did not merely forward Dr. Mason’s e-mail to Guggenheim. Instead, Cohen told Guggenheim Benco’s buying group and corporate group strategy. (CX0090 at 001 (“FYI: Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups (though we do work with corporate accounts) and our team understands that policy.”)). Cohen testified about the communication that he hoped that Guggenheim would also share information with him. (Cohen, Tr. 712-713 (“Q. [W]hy then did you take it upon yourself to send that information to Mr. Guggenheim? 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.”)). Similarly, Don Taylor’s follow up with Cohen shows his interest was not in how to compete as he asked if Cohen had been “able to connect with your Patterson contact and if anything came of it” (CX0057 (Excel worksheet “Chats” tab row 80); CX0057\_EXCERPT at 006), Cohen responded, “I just sent [Guggenheim] a note about [NDMC]. Don’t want to call because it might be construed as price fixing.” (Cohen, Tr. 539-540; CX0057 (Excel worksheet “Chats” tab row 81); *see also* CX0057\_EXCERPT at 006).

445. It was not Chuck Cohen’s intent to form any kind of agreement with Paul Guggenheim about anything. (Cohen, Tr. 713).

#### **Response to Proposed Finding No. 445**

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent that it implies that Benco did not initiate communications with and participate in a conspiracy with Schein and Patterson not to do business with buying groups. For example, the record shows that Cohen admitted that he communicated Benco’s no buying group policy to Guggenheim February 8, 2013, (Cohen, Tr. 501 (“Q. You’ve communicated Benco’s no-buying group policy to Mr. Guggenheim? A. . . . [Y]es.”)), and that a few hours after Guggenheim received Cohen’s email about Patterson’s involvement with NMDC and 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.” (CX0090 at 001; Guggenheim, Tr. 1607-1608; CCFF ¶¶ 483, 495-496). The record also shows that Cohen had no business reasons for communicating 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 of Benco’s no-GPO policy? A. I don’t think [there] is a business reason.”)). Cohen, moreover, admitted that he was concerned with communicating with Guggenheim about “the buying group situation” in New Mexico because it was a “customer

situation” and might be construed as price fixing. (Cohen, Tr. 539-540). The record also shows that, several months later in June 2013, when Guggenheim learned that Benco was working with Atlantic Dental Care (“ADC”), a group Patterson thought was a buying group, Guggenheim initiated a communication with Cohen asking if Benco was changing its position. (CX0095 at 001 (“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!”)). Cohen then provided Guggenheim – his competitor – with extensive information about how he evaluated customers and why he did or did not do business with those customers. (CX0062 at 001 (June 8, 2013 email from Cohen to Guggenheim, reiterating Benco’s no buying-group policy); Cohen, Tr. 561-562; CCFF ¶ 575). Cohen not only disclosed his policy and his decisions about competing to his competitor, he also assured Guggenheim about his future plans -- that he would “continue monitoring the process to ensure that ADC delivers on their commitment to us,” including ensuring that ADC was not a buying group. (Cohen, Tr. 563-564; CX0062 at 001). The Proposed Finding is also misleading to the extent that it implies that there is not substantial evidence that Benco orchestrated an agreement with Schein that neither would discount to buying groups. (*See, e.g.*, CCFF ¶¶ 661-1100). Finally, the Proposed Finding is irrelevant because finding an agreement is a term of art and a conclusion for the fact-finder that does not require proof of intent.

446. Chuck Cohen’s e-mail did not ask Paul Guggenheim to do anything. (Cohen, Tr. 714).

#### **Response to Proposed Finding No. 446**

The Proposed Finding is misleading, irrelevant, and contrary to the weight of the evidence. The evidence show that Cohen forwarded the information to Guggenheim because 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). The evidence further shows that Cohen hoped that Guggenheim would also share information with him. (Cohen, Tr. 712-713 (“Q. [W]hy then did you take it upon yourself to send that information to Mr. Guggenheim? A. 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.”); CCFF ¶ 487). In sending his email to Guggenheim, Cohen as aware of the antitrust risk in communicating with a competitor about customers. (CX0057 (Excel worksheet “Chats” tab row 81) (Cohen text to Benco Regional Manager about NMDC: “I just sent [Guggenheim] a note about [NDMC]. Don’t want to call because it might be construed as price fixing.”); *see also* CX0057\_EXCERPT at 006; Cohen, Tr. 539-540). Cohen also testified that could not identify any procompetitive justifications for his February 2013 communications with 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 of Benco’s no-GPO policy? A. I don’t think [there] is a business reason.”); CCFF ¶ 488). Finally, the Proposed Finding is irrelevant to the extent it erroneously suggests that a finding of antitrust conspiracy is predicated on Cohen asking Guggenheim to take an action or using magic words.

447. Chuck Cohen did not expect Paul Guggenheim to do anything. (Cohen, Tr. 714).

#### **Response to Proposed Finding No. 447**

The Proposed Finding is misleading and factually inaccurate because it is directly contrary to other testimony in the record from Cohen in which he stated that he hoped that Guggenheim would also share information with him. (Cohen, Tr. 712-713 (“Q. [W]hy then did you take it upon yourself to send that information to Mr. Guggenheim? “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.”)). The quotation to CX0057 in the Proposed Finding is also misleading because it truncates Cohen’s full message. The full text message states, “I don’t expect to hear anything. I just sent him a note about it. Don’t want to call because it might be construed as price fixing. Thanks.” Thus, the full message supports the finding that Cohen was aware of the potential antitrust violation his communications with Guggenheim would raise. (Cohen, Tr. 539-540; CCFF ¶ 514).

448. Chuck Cohen never followed up with Paul Guggenheim about his e-mail. (Cohen, Tr. 714).

#### **Response to Proposed Finding No. 448**

The Proposed Finding is misleading, inaccurate, and incomplete. The Proposed Finding is misleading and inaccurate because both Cohen and Guggenheim followed up on this email. Guggenheim replied to this email several months later forwarding to Cohen and then Cohen followed up with an explanation detailing Benco’s no buying group policy and a commitment to maintain it. (CX0062 at 001; Cohen, Tr. 561-564; CCFF ¶¶ 575-577). The Proposed Finding is incomplete and misleading to the extent that it implies that Cohen did not feel constrained to speak with Guggenheim about NMDC because, in Cohen’s words, a call “might be viewed as price fixing.” When Benco’s New Mexico Regional Manager Don Taylor contacted Cohen on February 26, 2013 about whether Cohen had communicated with Patterson about NMDC, asking if Cohen have been “able to connect with your Patterson contact and if anything came of it.” (CX0057 (Excel worksheet “Chats” tab row 80); CX0057\_EXCERPT at 006), Cohen responded, “I just sent [Guggenheim] a note about [NDMC]. Don’t want to call because it might be construed as price fixing.” (Cohen, Tr. 539-540; CX0057 (Excel worksheet “Chats” tab row 81); *see also* CX0057\_EXCERPT at 006). The Proposed Finding is also misleading because it suggests that any “follow up” was necessary after Guggenheim responded to Cohen, expressing

his agreement with Cohen's original email. ("Thanks for the heads up. I'll investigate the situation. We feel the same way about these." (CX0090 at 001; Guggenheim, Tr. 1607-1608; *see* CCFF ¶¶ 495-496).

449. Chuck Cohen did not recall why he included an FYI about Benco's policy in his e-mail to Paul Guggenheim. ("It seemed to be germane to the topic, but no special reason."). (Cohen, Tr. 714).

#### **Response to Proposed Finding No. 449**

The Proposed Finding is incomplete and misleading. Cohen received an email from an employee informing him of "concerning" news that Patterson was working with a buying group. (CCFF ¶¶ 474-477). Cohen's response was "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." (CCFF ¶ 479). But, when Cohen reached out it was not just information about NMDC, Cohen included detailed information about *Benco's* own policy; and Cohen could not identify any procompetitive justifications for his February 2013 communications with Guggenheim about Benco's no buying group policy. (CCFF ¶¶ 484, 488; CX0301 (Cohen, IHT at 243) ("Q. Can you think of any business reason for you to tell Mr. Guggenheim of Benco's no-GPO policy? A. I don't think [there] is a business reason.")). In fact, Cohen testified that he sent the Guggenheim communication to establish a quid pro quo with his competitor. (Cohen, Tr. 712-713 ("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.")). Finally, Cohen's contemporaneous internal Benco documents describe the nefarious nature of the communications. On the day he sent the communication to Guggenheim, Cohen wrote to the Benco manager in New Mexico, "I just sent [Guggenheim] a note about [NMDC]. Don't want to call because it might be construed as price fixing." (CCFF ¶¶ 516, 513-514).

450. Benco's policy had been in place since 1996. (Cohen, Tr. 714).

**Response to Proposed Finding No. 450**

The Proposed Finding is vague because it does not specify what policy. The Proposed Finding is also misleading and unsupported by the cited evidence because in the cited testimony, Cohen testified it was Benco's policy for "many years." (Cohen, Tr. 714). To the extent the policy is Benco's no buying group policy, Complaint Counsel has no specific response.

451. Benco's policy was not confidential and it was not a secret. (Cohen, Tr. 714).

**Response to Proposed Finding No. 451**

The Proposed Finding is misleading and against the weight of the evidence. When Benco approached Burkhart several times about ceasing work with buying groups, Reece was under the impression Benco *did* work with buying groups. (E.g., BFF ¶ 642 ("Reece found the conversation with McElaney 'a little perplexing' because Reece believed that Benco was working with group purchasing organizations.")) (quoting Reece, Tr. 4377-78)). Similarly, when Ryan discussed the Smile Source buying group with his counterpart at Schein, Foley reported that the particular policy disclosure gave him the impression that Benco was anti-buying group. (CCFF ¶¶ 1010-1012; Foley, Tr. 4584, 4589; CX0243 at 001 (on the October 1, 2013 phone call, Foley "got the impression that they're anti buying group.")). Additionally, Guggenheim testified that he was not previously aware that Benco had a policy against discounting to buying groups; and Guggenheim did not believe this was public information. (CCFF ¶¶ 489-490).

452. Chuck Cohen believed that Benco's policy was widely known in the dental industry. (Cohen, Tr. 714).

**Response to Proposed Finding No. 452**

The Proposed Finding is irrelevant to the extent it suggests that sharing customer strategies with enough competitors makes the disclosure benign. It is also misleading and contrary to the weight of the evidence. When Benco approached Burkhart several times about ceasing work with



buying groups, Reece was under the impression Benco *did* work with buying groups. (*E.g.*, BFF ¶ 642 (Reece found the conversation with McElaney “a little perplexing” because Reece believed that Benco was working with group purchasing organizations) (quoting Reece, Tr. 4377-78)). Similarly, when Ryan discussed the Smile Source buying group with his counterpart at Schein, Foley reported that the particular policy disclosure gave him the impression that Benco was anti-buying group. (CCFF ¶¶ 1010-1012; Foley, Tr. 4584, 4589; CX0243 at 001 (On the October 1, 2013 phone call, Foley “got the impression that they're anti buying group.”)). Additionally, Guggenheim testified that he was not previously aware that Benco had a policy against discounting to buying groups; and Guggenheim did not believe this was public information. (*Compare* CCFF ¶¶ 489-490, *with* BFF ¶ 649).

453. Benco had shared its policy with many others in the dental industry. (Cohen, Tr. 714).

### **Response to Proposed Finding No. 453**

The Proposed Finding is irrelevant and misleading to the extent it suggests that it is acceptable for competitors to exchange information about a policy of not discounting to a customer segment such communications are squarely at odds with antitrust law. It is also misleading and contrary to the weight of the evidence. When Benco approached Burkhardt several times about ceasing work with buying groups, Reece was under the impression Benco *did* work with buying groups. (*E.g.*, BFF ¶ 642 (“Reece found the conversation with McElaney ‘a little perplexing’ because Reece believed that Benco was working with group purchasing organizations”) (quoting Reece, Tr. 4377-78)). Similarly, when Ryan discussed the Smile Source buying group with his counterpart at Schein, Foley reported that the particular policy disclosure gave him the impression that Benco was anti-buying group. (CCFF ¶¶ 1010-1012; Foley, Tr. 4584, 4589; CX0243 at 001 (On the October 1, 2013 phone call, Foley “got the impression that they're anti buying group.”)).

Additionally, Guggenheim testified that he was not previously aware that Benco had a policy against discounting to buying groups; and Guggenheim did not believe this was public information. (CCFF ¶¶ 489-490).

454. By sharing an FYI about Benco's policy with Paul Guggenheim, Chuck Cohen was not telling him anything that Benco had not over the prior two decades already told many others within the dental industry. (Cohen, Tr. 714).

**Response to Proposed Finding No. 454**

To the extent the Proposed Finding acknowledges that Cohen shared Benco's strategy with regards to buying groups to his competitors over decades, Complaint Counsel does not object. However, the Proposed Finding is irrelevant and misleading to the extent it suggests that it is acceptable for competitors to exchange information about a policy of not discounting to a customer segment; such communications are squarely at odds with antitrust law. Further the Proposed Finding is not supported by the cited evidence. At the citation, Cohen merely testifies that this was Benco's policy for many years and that it was widely known. Additionally, Guggenheim testified that he was not previously aware that Benco had a policy against discounting to buying groups; and Guggenheim did not believe this was public information. (CCFF ¶¶ 489-490).

455. Schein was the dental distributor working with the Utah Dental Cooperative. (Mason, Tr. 2362).

**Response to Proposed Finding No. 455**

The Proposed Finding is incomplete and misleading to the extent it suggests Schein actively worked with buying groups during the conspiracy because the Utah Dental Cooperative relationship with Schein proceeds the conspiracy and Schein ended that buying group relationship during the conspiracy. (Sullivan, Tr. 3913-3914; CX0174 at 001 (2014 email

discussing end of relationship with Utah Co-op after 8 years of working together); CX8033 (Cavaretta, Dep. at 104-105); CCFF ¶¶ 688, 442, 1745).

456. Dr. Mason and the New Mexico Dental Cooperative did business with Schein through the Utah Dental Cooperative, of which it was a branch. (Mason, Tr. 2391).

**Response to Proposed Finding No. 456**

The Proposed Finding is misleading and inaccurate. First, Dr. Mason testified that the New Mexico Dental Cooperative was never formed. (CX8035 (Mason, Dep. 101) (“That concept never even came to fruition because we never opened the New Mexico Dental Co-Op. We joined another state.”)). The New Mexico Dental Cooperative approached and was turned down by Patterson, Schein and Benco. (Mason, Tr. 2335 (NMDC approached “Patterson, Henry Schein and Benco”), 2336 (Dr. Montoya approached Benco), 2361 (“we were declined by the three distributors that we approached.”)). The Proposed Finding is incomplete and misleading because Dr. Mason’s NMDC never got off the ground because Schein, Patterson, and Benco would not supply it. (CCFF ¶¶ 505-506 (Patterson refused to supply NMDC); ¶ 509 (Schein refused to supply NMDC; CCFF ¶ 510 (Benco refused to supply NMDC); 511-512). Further the Proposed Finding is misleading because Schein’s relationship with the Utah Dental Cooperative proceeds the conspiracy and Schein ended the Dental Cooperative buying group relationship during the conspiracy. (Sullivan, Tr. 3912-3914; CX0174 at 001 (2014 email discussing end of relationship with Utah Co-op after 8 years of working together); CX8033 (Cavaretta, Dep. at 104-105); CCFF ¶¶ 688, 442, 1745).

457. There is insufficient evidence to find that Chuck Cohen’s February 8, 2013 e-mail had any impact on Patterson’s decision with respect to the yet unformed “New Mexico Dental Cooperative.”

**Response to Proposed Finding No. 457**

The Proposed Finding is misleading and inaccurate because within three days of Guggenheim's receipt of the email from Cohen, Patterson ended its negotiations with the buying group NMDC. (CCFF ¶¶ 503-505). The NMDC never launched because Schein, Patterson, and Benco would not supply it. (CCFF ¶¶ 505-506, 511-512). Contemporary documents reveal that on February 7, 2013, the Patterson branch manager intended to continue partnering with NMDC: "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. . . . I am hoping Patterson can be a partner you trust and that will always do the right thing for you. . . . I definitely want to keep this moving forward." (CX4090 at 001-002). At the time of the email, Patterson and NMDC had scheduled a dinner for February 11 to work out the details of their partnership and Patterson's email to Mason mentioned the "dinner Monday night" to "help us get guidelines in place." (CX4090 at 002; CX8035 (Mason, Dep. at 53-54)). The Cohen-Guggenheim exchange occurred on February 8. With no contact since the February 7 emails from Patterson on wanting to keep things moving forward, (CX4090 at 001), Dr. Mason was surprised to discover at the dinner meeting that Patterson refused to work with NMDC, as NMDC was "well on our way" to partnering with Patterson. (CX8035 (Mason, Dep. at 51-55)).

458. The February 8, 2013 e-mail from Chuck Cohen to Paul Guggenheim, and Guggenheim's response, is not probative evidence of any alleged conspiracy between Benco and Patterson.

#### **Response to Proposed Finding No. 458**

The Proposed Finding is misleading and incomplete because the inter-firm emails between Cohen and Guggenheim that began in February 2013, are direct evidence of a meeting of the minds between the executives of Benco and Patterson. Cohen told Guggenheim "Our policy at Benco is 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," and Guggenheim replied "I'll investigate the situation. We feel the same way about these." (CCFF ¶ 483 (quoting CX0055

at 001)). Additionally, the emails continue in June of 2013 when Guggenheim followed up on the same email chain from months before “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. Let me know your thoughts.” (CX0062 at 02). Cohen replied with details about how the group was not a buying group and reaffirmed “As we’ve discussed, we don’t recognize buying groups.”, and finally with Guggenheim affirming “Sounds good Chuck, Just wanted to clarify where you guys stand.” (CCFF ¶ 570 (quoting CX0095 at 001)). The Proposed Finding is against the weight of the evidence because after the Guggenheim and Cohen exchange of assurances by email over NMDC, Patterson began to implement a general no buying group policy throughout its organization and assured its salespeople that Schein and Benco would also stay away from buying groups. (CCFF ¶¶ 534-557, 627-656).

B. RESPONSES TO PROPOSED FINDINGS REGARDING “THE COMMUNICATIONS BETWEEN BENCO AND SCHEIN REGARDING ATLANTIC DENTAL CARE ARE NOT EVIDENCE OF AN AGREEMENT AMONG RESPONDENTS.”

459. Chuck Cohen never formed or sought to form any agreement with Schein about buying groups. (Cohen, Tr. 705; 715).

**Response to Proposed Finding No. 459**

The Proposed Finding is factually inaccurate and contrary to the weight of the evidence. The evidence shows that Cohen testified that he informed Sullivan of Schein’s no buying group policy. (CCFF ¶¶ 662-664; *see also* CX0301 (Cohen, IHT at 195-196) (“Q. Have you ever communicated with anyone at Schein about buying groups? A. I believe I have. Q. Can you tell me about those instances? A. . . **I believe I have, at different times**, communicated our policy on buying groups. When asked, I answer.”) (emphasis added)). As a result of communications with Schein, Benco gained the understanding that Schein would adopt a policy against

recognizing buying groups. (CCFF ¶¶ 680, 675-678). Cohen testified that, based on text messages with Sullivan, he understood that “the policy that Henry Schein had was that they do not recognize GPOs.” (CCFF ¶ 676). Consistent with Benco’s understanding, Schein adopted a no buying group strategy beginning in late 2011. (CCFF ¶¶ 705-870). Benco and Schein communicated about buying groups multiple other times during the conspiracy. (1) In January 2012, Cohen confronted Sullivan when he discovered that Schein was working with buying group, Unified Smiles. (CCFF ¶¶ 965-972). Ryan passed information to Cohen that Schein was working with a buying group called Unified Smiles with a note “For Timmy [Sullivan] conversation.” (CCFF ¶¶ 958-960). Cohen then set up a call with Sullivan and Cohen responded to Ryan’s initial email with the response “Talking this AM” just before his call with Sullivan. (CCFF ¶¶ 964-967). Sullivan and Cohen spoke for 11 minutes and 34 seconds on January 13, 2012. (CCFF ¶ 968). While neither Cohen nor Sullivan remembered the content of the call, Cohen admitted he had buying groups on his mind within the hour he called Sullivan. (CCFF ¶¶ 971-972). (2) Cohen planned to confront Sullivan a second time in July of 2012 after he once again learned from Ryan that Schein was working with a buying group, this time Smile Source. (CCFF ¶¶ 978-983). This time, Ryan forwarded the information to Cohen with a note that says “Better tell your buddy Tim to knock this shit off.” (CCFF ¶¶ 981-986). Ryan wanted Cohen to tell Sullivan to stop working with Smile Source. (CCFF ¶¶ 984-986). Cohen agreed, responding to Ryan by asking him to resend his email without the commentary so that Cohen could “print & send to Tim with a note.” (CCFF ¶¶ 988-992). Cohen testified it would not be a surprise if he sent Sullivan a note about Smile Source. (CCFF ¶ 992). (3) On March 26, 2013, Cohen contacted Sullivan again regarding buying groups. (CCFF ¶ 994). Cohen had emailed a Benco sales representative to ask for the name of the buying group in his area that worked with Schein. (CCFF ¶ 995). Almost immediately after receiving the response from the sales representative,

Cohen copied and pasted the Benco sales representative's email into a text to Sullivan: "As per my guy in Raleigh: 'Dental alliance. . . . A guy named Sam contacted me about a year ago and asked if Benco was interested. Told him he was out of his tree . . . . Could be a rumor, sometimes stories go around. Thanks.'" (CCFF ¶ 997). Cohen confirmed at trial that he was informing "Tim Sullivan about market intelligence on Schein doing business with a buying group." (CCFF ¶ 994; Cohen, Tr. 557 ("Q. So here you're texting Tim Sullivan about market intelligence on Schein doing business with a buying group. A. Yes.")). (4) In March 2013, ADC approached Benco asking for a bid for its \$3.5 million dental supply business. (CCFF ¶ 1022). Benco was unsure whether ADC qualified as a buying group so Cohen contacted his competitor, Tim Sullivan, to help determine "how [Benco] would handle that account." (CCFF ¶¶ 1023-1032, 1037). On March 25, 2013, Cohen created a calendar entry reminding him to call Tim Sullivan regarding buying groups. (CCFF ¶ 1028). Cohen texted Sullivan asking for a call, and the two set up a time to talk at 5 p.m. on March 25, 2013. (CCFF ¶¶ 1029-1032). Cohen and Sullivan spoke on the call regarding a customer, ADC. (CCFF ¶¶ 1034-1035). Cohen testified that he and Sullivan were "exchanging information" about whether ADC was a buying group or a DSO. (CCFF ¶¶ 1036-1037). (5) Two days later, Cohen learned, through outside counsel hired by Benco, that ADC was not a buying group. (CCFF ¶¶ 1061-1065). Benco decided to bid. (CCFF ¶ 1066). Cohen contacted Sullivan the same day to tell him that Benco *would be bidding* on a potential \$3.5 million customer, ADC. (CCFF ¶¶ 1068-1070). Cohen admitted at trial that he told Sullivan of Benco's bidding plans because he wanted to maintain "a high level of credibility" with Sullivan (CCFF ¶¶ 1075-1076). (6) In addition, Ryan (Benco) and Foley (Schein) communicated about the buying group Smile Source in October 2013. (CCFF ¶¶ 1005-1021). (7) On April 16, 2014, Cohen emailed Sullivan and Guggenheim about TDA buying group, attaching an article about TDA leveraging the volume purchasing power of TDA members to level the playing field

between independent dentists and corporate practices. (CCFF ¶ 1134). Following this email, Sullivan called Cohen and the two spoke the same day for 9 minutes and 16 seconds. (CCFF ¶ 1135). The weight of the evidence shows that Benco and Schein entered into an agreement to refuse to discount to buying groups.

460. Chuck Cohen never communicated with Tim Sullivan or anyone at Schein about Smile Source. (Cohen, Tr. 715).

**Response to Proposed Finding No. 460**

The Proposed Finding is against the weight to the evidence, misleading, and incomplete because Cohen planned to confront Sullivan about Smile Source in 2012, Ryan and Foley discussed Smile Source at length in late 2013, and Cohen had a renewed opportunity to discuss the no-buying group agreement and Smile Source with Sullivan and Guggenheim at the Dental Trade Alliance Meeting in October 2013. The Proposed Finding is misleading and incomplete. Cohen planned to confront Sullivan in July of 2012 after he learned from Ryan that Schein was working with a buying group, Smile Source. (CCFF ¶¶ 978-983). Ryan learned that Schein was working with buying group, Smile Source, and forwarded that information to Cohen with a note that said “Better tell your buddy Tim to knock this shit off.” (CCFF ¶¶ 981-986). Ryan wanted Cohen to tell Sullivan to stop working with Smile Source (CCFF ¶¶ 984-986). Cohen agreed to do so, responding to Ryan by asking him to resend his email without the commentary so that Cohen could “print & send to Tim with a note.” (CCFF ¶¶ 988-992). Cohen testified that he might have sent the note to Sullivan. (Cohen, Tr. 526-527). Cohen also testified that he would not be surprised if he sent Sullivan a physical message about Smile Source and further that he sent such messages to Sullivan from time to time. (CCFF ¶ 992; Cohen, Tr. 526-527; CX0301 (Cohen, IHT at 223)). In addition, the Proposed Finding is incomplete and misleading because there is other direct evidence of Smile Source communications between Benco and Schein when Ryan



spoke with his counterpart at Schein on October 1, 2013 after receiving market intelligence that Schein might be discounting to the Smile Source buying group. (CCFF ¶¶ 1005-1019). Ryan spoke to his counterpart Foley at Schein for 18 minutes; according to Foley, Ryan informed him that Benco would not bid on Smile Source and wanted to know if Schein would bid. (CCFF ¶¶ 1010-1013). Ryan reported the conversation to Cohen saying that he had “talked specifically about” Smile Source with Foley. (CCFF ¶ 1014).

In accord, just a few weeks before the Dental Trade Alliance Meeting in October 2013, Burkhart had refused Benco’s first invitation from McElaney to stop discounting to buying groups, (CCFF ¶¶ 1238-1241), and Ryan’s response was a recommendation to Cohen: “CHUCK—maybe what you should do is make sure you tell Tim [Sullivan] and Paul [Guggenheim] to hold their positions as we are.” (CCFF ¶¶ 1101-1105 (quoting CX0023 at 001)). Shortly thereafter, Cohen had his chance because Cohen, Guggenheim, Sullivan, and Reece were all at the same Dental Trade Alliance Meeting in October of 2013. (CCFF ¶¶ 364-366, 1242-1245). Buying groups were on Cohen’s mind at the 2013 DTA meeting, in fact, Cohen himself invited Burkhart not to work with buying groups again at this Dental Trade Alliance Meeting in October 2013. (CCFF ¶¶ 1238-1241). Taken together, the contemporaneous Benco plans to tell Sullivan and Guggenheim to hold their positions on buying groups, (CX0023 at 001), followed directly by the opportunity when Sullivan, Guggenheim, and Cohen all attended the same DTA meeting, (CCFF ¶¶ 364, 366, 1243), plus Cohen’s renewed invitation to Burkhart at the same meeting, (CCFF ¶¶ 1238-1241), is circumstantial evidence that Cohen sought to reaffirm the no buying group positions with Guggenheim and Sullivan at the DTA meeting. (*See* CCFF ¶¶ 358-380, 384-389, 1103-1108; *see also* Cohen, Tr. 595-597 (Cohen regularly attended the DTA, “it’s not that big a meeting” and typically saw rival distributors); Sullivan, Tr. 3878 (Sullivan attends the DTA annual meeting every year, and typically sees and would see Cohen at the meeting); Sullivan, Tr.

3879-3880 (Sullivan typically attended five to six dental industry conventions each year and “might run into” Chuck Cohen at those meetings)).

Finally, even if there was no circumstantial evidence that Cohen had communicated about Smile Source to Schein, the Proposed Finding would be irrelevant and misleading, because it is undisputed that Benco and Schein did communicate competitively sensitive information about Smile Source through Ryan to Foley. (CCFF ¶¶ 1005-1017). Ryan spoke with his counterpart at Schein on October 1, 2013 after receiving market intelligence that Schein might be discounting to the Smile Source buying group. (CCFF ¶¶ 1005-1019). Ryan spoke to his counterpart Foley at Schein for 18 minutes; according to Foley, Ryan informed him that Benco would not bid on Smile Source and wanted to know if Schein would bid. (CCFF ¶¶ 1010-1013). Ryan reported the conversation to Cohen saying that he had “talked specifically about” Smile Source with Foley. (CCFF ¶ 1014).

461. Chuck Cohen never communicated with Tim Sullivan or anyone at Schein about The Kois Buyers Group. (Cohen, Tr. 715).

#### **Response to Proposed Finding No. 461**

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it suggests that Schein did not turn down the Kois Buyers Group pursuant to its participation in a conspiracy. The record evidence shows the Big Three were part of an overarching conspiracy not to discount to buying groups, and that as part of that conspiracy, Schein instructed its sales force to reject buying groups. (CCFF ¶¶ 661-1100, 1178-1198). The record evidence is replete with examples of buying groups that Schein categorically rejected because it had a policy not to do business with buying groups during the conspiracy period. (CCFF ¶¶ 661-1100, 1159-1166, 1316-1322; *see also* CC Post-Tr. Br., at Attachment C)). Schein’s rejection of the Kois Buyers Group is just one example. The record evidence shows that

by September 8, 2014, Sullivan communicated to Muller and his boss, Breslawski, regarding Kois: “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.” (CCFF ¶ 809 (quoting CX2469 at 002); CX8025 (Sullivan, Dep. at 295) (CX2469 referred to Kois Buyers Group)). Again, the next day, Sullivan sent an email to Breslawski regarding Kois Buyers Group: “I don’t think we want to be the first in this game.” (CCFF ¶ 1750 (citing CX2470 at 001); Sullivan, Tr. 4005-4006). Schein rejected the Kois Buyers Group in November 2014, and stated that it would “pass” on working with the buying group. (CCFF ¶ 928). Just like Schein, Benco and Patterson, refused to work with Kois. (Kois, Sr., Tr. 190, 196 (Respondents all refused to work with Kois)).

462. The only communications that Chuck Cohen has ever even had with anyone at Schein about buying groups is limited to one exchange with Tim Sullivan about Atlantic Dental Care (“ADC”), which was not actually a buying group. (Cohen, Tr. 715).

#### **Response to Proposed Finding No. 462**

The Proposed Finding is factually inaccurate, misleading, incomplete, and contrary to the weight of the evidence. The Proposed Finding ignores multiple pieces of unambiguous evidence that Cohen and Sullivan communicated about buying groups more than once and specifically about ADC. Cohen himself testified that he had communicated about buying groups with Schein more than once. (CCFF ¶¶ 662-664 (quoting CX0301 (Cohen, IHT at 195-196) (“Q. Have you ever communicated with anyone at Schein about buying groups? A. I believe I have. Q. Can you tell me about those instances? A. . . **I believe I have, at different times,** communicated our policy on buying groups.”) (emphasis added))). The Proposed Finding also ignores other unambiguous evidence of communications about buying groups between Cohen and Sullivan. (1) In January 2012, Cohen confronted Sullivan when he discovered that Schein was working with buying group, Unified Smiles. (CCFF ¶¶ 965-972). Ryan passed information to Cohen that Schein was working with a buying group called Unified Smiles with a note “For Timmy [Sullivan]

conversation.” (CCFF ¶¶ 958-960). Cohen then set up a call with Sullivan and Cohen responded to Ryan’s initial email with the response “Talking this AM” just before his call with Sullivan. (CCFF ¶¶ 964-967). Sullivan and Cohen spoke for 11 minutes and 34 seconds on January 13, 2012. (CCFF ¶ 968). While neither Cohen nor Sullivan remembered the content of the call, Cohen admitted he had buying groups on his mind within the hour he called Sullivan. (CCFF ¶¶ 971-972). (2) Cohen planned to confront Sullivan a second time in July of 2012 after he once again learned from Ryan that Schein was working with a buying group, this time Smile Source. (CCFF ¶¶ 978-983). This time, Ryan forwarded the information to Cohen with a note that says “Better tell your buddy Tim to knock this shit off.” (CCFF ¶¶ 981-986). Ryan wanted Cohen to tell Sullivan to stop working with Smile Source. (CCFF ¶¶ 984-986). Cohen agreed, responding to Ryan by asking him to resend his email without the commentary so that Cohen could “print & send to Tim with a note.” (CCFF ¶¶ 988-992). Cohen testified it would not be a surprise if he sent Sullivan a note about Smile Source, and he planned to send the note in the mail. (CCFF ¶¶ 991-992). (3) On March 26, 2013, Cohen contacted Sullivan again regarding buying groups. (CCFF ¶ 994). Cohen had emailed a Benco sales representative to ask for the name of the buying group in his area that worked with Schein. (CCFF ¶ 995). Almost immediately after receiving the response from the sales representative, Cohen copied and pasted the Benco sales representative’s email into a text to Sullivan: “As per my guy in Raleigh: ‘Dental alliance. . . . A guy named Sam contacted me about a year ago and asked if Benco was interested. Told him he was out of his tree . . . . Could be a rumor, sometimes stories go around. Thanks.’” (CCFF ¶ 997). Cohen confirmed at trial that he was informing “Tim Sullivan about market intelligence on Schein doing business with a buying group.” (CCFF ¶ 994; Cohen, Tr. 557 (“Q. So here you’re texting Tim Sullivan about market intelligence on Schein doing business with a buying group. A. Yes.”)). (4) In March 2013, ADC approached Benco asking for a bid for its \$3.5 million dental supply business.

(CCFF ¶ 1022). Benco was unsure whether ADC qualified as a buying group so Cohen contacted his competitor, Tim Sullivan, to help determine “how [Benco] would handle that account.” (CCFF ¶¶ 1023-1032, 1037). On March 25, 2013, Cohen created a calendar entry reminding him to call Tim Sullivan regarding buying groups. (CCFF ¶ 1028). Cohen texted Sullivan asking for a call, and the two set up a time to talk at 5 p.m. on March 25, 2013. (CCFF ¶¶ 1029-1032). Cohen and Sullivan spoke on the call regarding a customer, ADC. (CCFF ¶¶ 1034-1035). Cohen testified that he and Sullivan were “exchanging information” about whether ADC was a buying group or a DSO. (CCFF ¶¶ 1036-1037). (5) Two days later, Cohen learned, through outside counsel hired by Benco, that ADC was not a buying group. (CCFF ¶¶ 1061-1065). Benco decided to bid. (CCFF ¶ 1066). Cohen contacted Sullivan the same day to tell him that Benco *would be bidding* on a potential \$3.5 million customer, ADC. (CCFF ¶¶ 1068-1070). Cohen admitted at trial that he told Sullivan of Benco’s bidding plans because he wanted to maintain “a high level of credibility” with Sullivan (CCFF ¶¶ 1075-1076). (6) On April 16, 2014, Cohen emailed Sullivan and Guggenheim about TDA buying group, attaching an article about TDA leveraging the volume purchasing power of TDA members to level the playing field between independent dentists and corporate practices. (CCFF ¶ 1134). Following this email, Sullivan called Cohen and the two spoke the same day for 9 minutes and 16 seconds. (CCFF ¶ 1135). (6) In addition, Ryan (Benco) and Foley (Schein) communicated about the buying group Smile Source in October 2013. (CCFF ¶¶ 1005-1021). The Proposed Finding should be rejected.

**1. Benco and Schein’s Proposals to ADC in April 2013 Are Not Evidence of an Agreement.**

463. ADC was not a buying group. (Cohen, Tr. 715-16).

**Response to Proposed Finding No. 463**

The Proposed finding is misleading to the extent that it omits that Benco did not know if ADC was a buying group or not at the time of the communications between Schein and Benco about ADC. (CCFF ¶¶ 1025-1027; BFF ¶¶ 487, 494).

464. ADC was a DSO or Large Group with common ownership. (Cohen, Tr. 715-16).

**Response to Proposed Finding No. 464**

The Proposed Finding is misleading and unsupported by the evidence. The Proposed Finding is unsupported by the evidence because Cohen does not use the term “large group” in the cited testimony. Rather Cohen agrees that ADC is recognized by Benco as a DSO. Complaint Counsel objects to the use of the capitalized phrase “Large Group” as that is not supported by the testimony and is vague as to what it refers to. Finally, the Proposed Finding is also misleading because it omits a time frame and fails to capture that the distributors struggled whether to categorize ADC as a buying group or DSO. (CCFF ¶¶ 1023, 1025-1027).

465. In 2013, Benco competed with Schein for the business of ADC. Benco won the business of ADC. (Cohen, Tr. 715-16).

**Response to Proposed Finding No. 465**

Complaint Counsel objects to the term “competed.” Benco’s conduct with regard to ADC is anticompetitive. Both Benco and Schein bid for ADC’s business, but only after conspicuous coordination led by Cohen. (CCFF ¶¶ 1069, 1061-1075, 1080, 1088; CX2054 at 001 (April 5, 2013, Sullivan emails relevant Schein employees he expects Benco to bid after receiving confirmation from Cohen that Benco will bid.)).

466. The Complaint alleges that, “[i]n late February 2013, pursuant to the agreement, each of the Respondents refused to submit a bid for a customer called Atlantic Dental Care ... as each of the Distributors believed it to be a Buying Group.” (Complaint, ¶ 42).

**Response to Proposed Finding No. 466**

Complaint Counsel has no specific response.

467. Complaint Counsel asserts that Respondents' conduct relating to the buying group ADC demonstrates the existence of an agreement among Respondents to boycott buying groups. (CC Pretrial Br. 27-32). The evidence does not support that allegation.

**Response to Proposed Finding No. 467**

The last sentence of the Proposed Finding is unsupported by any cited evidence and contrary to the weight of evidence generally. In 2013, ADC approached Schein, Patterson, and Benco asking for a bid for its \$3.5 million dental supply business; all three initially refused to bid, believing it was a buying group. (CCFF ¶¶ 1022-1024, 534-549 (Patterson's initial response to ADC: "I've coached Anthony on how to stay out of this with grace"), 1097; CX2021 at 013 (Schein: "Our first reaction to this was it was simply a buying group and we were going to walk away.")). Indeed, Benco initially thought ADC was a buying group. (CCFF ¶¶ 1022-1024; CX0021 at 002 (Benco's initial response to ADC: "We're out.")). Ryan, Tr. 1093-1094 (admitting that in the middle of the day on March 25, 2013, he believed ADC was a buying group and therefore wrote, "We're out.")). Despite Benco's initial reaction, ADC "was adamant that they [were] not a buying group," but a DSO. (CX0021 at 001 (He Zhao told Patrick Ryan that ADC "is adamant that they are not a buying group and that ADC owns all the practices involved.))). Unsure whether Benco could bid on the customer, Cohen contacted Sullivan to discuss ADC, creating a calendar entry on March 25, 2013 reminding him to call Tim Sullivan regarding buying groups. (CCFF ¶ 1028). Cohen texted Sullivan asking for a call, and the two set up a time to talk at 5 p.m. on that very day, March 25, 2013. (CCFF ¶¶ 1029-1032). Cohen and Sullivan spoke on the call regarding a customer, ADC. (CCFF ¶¶ 1034-1035). Cohen testified that he and Sullivan were "exchanging information" about whether ADC was a buying group or a DSO. (CCFF ¶¶ 1036-1037). Cohen admitted at trial he was seeking "facts, knowledge, conjecture" from Sullivan to "help us form an opinion and a ruling on how we would handle that account." (CCFF ¶ 1037). Two days later, Cohen learned, through outside counsel hired by Benco, that ADC was not a buying group.

(CCFF ¶¶ 1061-1065). Benco decided to bid. (CCFF ¶ 1066). Cohen contacted Sullivan the same day to tell him that Benco would be bidding on a potential \$3.5 million customer, ADC. (CCFF ¶¶ 1068-1070). Cohen admitted at trial that he told Sullivan of Benco's bidding plans because he wanted to maintain "a high level of credibility" with Sullivan (CCFF ¶¶ 1075-1076). After the information that Benco would bid on a potential large customer they had been discussing, Sullivan told his team working on ADC that Benco would bid. (CCFF ¶¶ 1084-1086; CX2054 at 001).

Patterson declined to bid on ADC, believing that it was a buying group. (CCFF ¶¶ 534-543). On May 31, 2013, Patterson's Guggenheim received an email from a branch manager informing him that Benco had successfully bid on ADC. (CCFF ¶ 565). After learning that Benco bid for and won ADC's business, (CX0094), Guggenheim located an email from Cohen from four months earlier, which explained Benco's no buying group policy, (CX0056), and he responded to Cohen. (CCFF ¶ 568; Guggenheim, Tr. 1627). On June 6, 2013, Guggenheim sent an email to Cohen and asked his competitor to "shed some light on [Benco's] business agreement with Atlantic Dental Care." (CCFF ¶ 569; CX0095 at 001; Guggenheim, Tr. 1627-1628). Guggenheim viewed Benco's bidding on and doing business with ADC as a deviation from what Cohen previously told him about Benco's policy not to do business with buying groups in February 2013 (CX0056). (CCFF ¶ 572; Guggenheim, Tr. 1628). Cohen understood that Guggenheim's June 2013 email (CX0095) asked how Benco doing business with buying group ADC was consistent with the no buying group policy that Cohen had communicated to Guggenheim in February 2013 (CX0056). (CCFF ¶ 573; Cohen, Tr. 561). Finally, the Proposed Finding is not supported by any cited evidence. For this reason alone, it should be rejected.

468. Complaint Counsel did not introduce any evidence that Schein or Benco refused to submit a bid for ADC in late February 2013, nor did Complaint Counsel present any communications among respondents in late February 2013 concerning ADC.



**Response to Proposed Finding No. 468**

The Proposed Finding is not supported by evidence and is also irrelevant. To the extent that the Proposed Finding suggests that there were no communications among respondents about ADC in late February 2013, the finding is irrelevant because the relevant communications took place later, beginning in March 2013 when Cohen contacted Sullivan to discuss ADC and when Cohen told Sullivan that Benco will bid on ADC, (CCFF ¶ 1069 (quoting CX0196 at 010)); when Sullivan responded to information from Benco about ADC, (CCFF ¶¶ 1046-1047, 1069-1070); and months later when Patterson followed up about Benco's work with ADC, (CCFF ¶ 570); and Cohen responded to Guggenheim with an analysis of why ADC is not a buying group (CCFF ¶ 576). The contemporaneous documents show that Benco and Schein were not going to bid for ADC initially, when they thought it was a buying group. (CCFF ¶ 1097; CX2021 at 013 (Schein: "Our first reaction to this was it was simply a buying group and we were going to walk away."); CCFF ¶¶ 1022-1024; CX0021 at 002 (Benco's initial response to ADC: "We're out.")). Communications between Schein and Benco clearly show that Benco changed its position. (CCFF ¶ 1069 (CX0196) ("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.")). Further, after that information, Sullivan shared the information that Benco would bid on ADC, (CCFF ¶¶ 1084-1086; CX2054 at 001), and Schein proceeded to bid. (CX2019; CX2021).

Even if communications in February were relevant, the Proposed Finding erroneously states that no evidence was presented on communications among the respondents about ADC in February 2013. However, there is evidence that the Big Three's Cohen, Guggenheim, and Sullivan all attended the Chicago Mid-Winter Meeting together, in-person the last week of February 2013 (CCFF ¶¶ 518-527). Complaint Counsel also offered evidence that on the last day of that

meeting, Benco reiterated its “no buying group” policy to the salesforce of the company (CCFF ¶ 527). The Proposed Finding makes no citation to the record and omits relevant evidence and it should be rejected for all the foregoing reasons.

469. Schein did not receive ADC’s RFP until March 22, 2013, and Schein timely submitted a proposal by the RFP’s April 8, 2013 deadline (extended from April 5, 2013). (CX2019).

**Response to Proposed Finding No. 469**

The Proposed Finding fails to offer any citation for its assertions of how and when Schein responded to ADC’s bid. The Proposed Finding cites a single document, a 12 page email that forwards an RFP from ADC, but the singularly cited document does not have any evidence of how Schein evaluated ADC, whether it submitted a proposal for ADC, whether it responded “timely,” or whether it received an extension for responding. For these reasons the Proposed Finding should be rejected.

470. Benco timely submitted a proposal in response to the RFP, and was ultimately awarded the contract. (Cohen, Tr. 724).

**Response to Proposed Finding No. 470**

The Proposed Finding is not supported by the cited evidence. The Proposed Finding cites a single page of Cohen’s testimony. That testimony does not offer any support for the assertions that Benco submitted a bid, that it was timely, or that it was in response to an RFP. The testimony supports only the fact that Benco did win ADC’s business. Because the Proposed Finding does not support the majority of the assertions through citation to evidence, it should be rejected.

471. As to Patterson, the record shows that ADC sent Patterson a draft of the RFP in late February 2013, and that Patterson unilaterally decided not to bid for the business. Specifically, on or about February 27, 2013, ADC sent Patterson a copy of a draft RFP that ADC intended to send out. (CX0092). The same day, Patterson decided not to submit a bid because Patterson does not “currently ... participate with group purchasing organizations. (CX0093; CX0092).

**Response to Proposed Finding No. 471**

The Proposed Finding is deficient in numerous ways and should be rejected. First, the Proposed Finding is not supported by the evidence cited in part because it makes several factual statements without any citation. The Proposed Finding offers a citation to CX0092, which shows only that Patterson obtained a draft of an ADC RFP on February 27, 2013. It is unclear from the document how Patterson received it or whether ADC sent it. Further, the document cited shows that Patterson was basing its decision on multilateral rather than unilateral considerations as one Benco executive is concerned about Schein and Benco might “sneak” into this buying group. (CCFF ¶ 549 (quoting CX0093 at 001)). The idea of sneaking makes no sense if there is not an expectation of behavior to deviate from – in this case, that none of the Big Three would bid for an apparent buying group. In addition, Benco cites to CX0093, which also shows the coordinated approach to buying groups, undermining the Proposed Finding’s statement that Patterson’s approach was unilateral. (CX0093 (“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.”)). Finally Complaint Counsel has no objection to the cited language in the Proposed Finding that Patterson was “currently” not participating in buying groups as that came after agreeing with Benco to mutually stay away from buying groups in early February inter-firm communications about NMDC. (CCFF ¶¶ 474-512).

472. Complaint Counsel did not introduce any evidence that Patterson communicated with Benco or Schein about its decision not to submit a bid for ADC. Complaint Counsel’s summary exhibit and communications log also does not reflect any phone call or text message during this period. (CX6027).

**Response to Proposed Finding No. 472**

The Proposed Finding is incomplete and misleading because Cohen, Guggenheim, and Sullivan were together at the Chicago Mid-Winter meeting the last week of February 2013. (CCFF ¶¶

360, 518-527). At this meeting, on the last day a Benco executive in attendance at the meeting sent out messaging to Benco employees reiterating the no buying group policy. (CCFF ¶¶ 527, 518-520).

The Proposed Finding is also incomplete and misleading because it suggests that Patterson did not communicate with Benco about its decision not to bid for ADC, but when Guggenheim explicitly challenged Cohen on Benco's work with ADC, it implicitly communicated that Patterson did not bid for ADC. (CCFF ¶ 570 (quoting CX0095 at 001)).

The Proposed Finding is misleading to the extent it suggests that Patterson would have communicated about a decision that is in accord with an agreement not to do business with buying groups, to the extent Patterson declined a buying group, there would be no need to communicate. Of course, when Patterson thought that Benco had acted outside the agreement, that is when Patterson thought Benco was working with buying group ADC, Guggenheim reached out directly and specifically to challenge the perceived aberration in the agreement. (CCFF ¶ 570; CX0095 at 001).

473. The preponderance of the evidence does not support the conclusion that Schein, Patterson, and Benco conspired to refuse to submit a bid for ADC.

#### **Response to Proposed Finding No. 473**

The Proposed Finding is unsupported by evidence. Benco provides no support for its assertions and, as such, the Proposed Finding should be rejected. The Proposed Finding is also factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that there was no agreement between Respondents not to offer discounts to buying groups. (CCFF ¶¶ 474-1158, 1167-1198).

474. The Complaint alleges that following Patterson's decision not to bid for ADC, Benco, Schein, and Patterson executives then began communicating about whether ADC was, in fact, a buying group." (Complaint ¶ 44).

**Response to Proposed Finding No. 474**

Complaint Counsel has no specific response.

475. Complaint Counsel has not identified any communication between Schein and Patterson about ADC.

**Response to Proposed Finding No. 475**

The Proposed Finding is unsupported by evidence. Benco provides no support for its assertions and, as such, the finding should be rejected. In addition, there are opportunities to communicate for which we have no content. For example, the executives were together in February 2013 for the Chicago Mid-Winter meeting (CCFF ¶¶ 360, 518-527).

476. Complaint Counsel has also failed to identify any communication between Patterson and Benco prior to Benco's submission of a bid in April 2013 about whether ADC was a buying group.

**Response to Proposed Finding No. 476**

The Proposed Finding is unsupported by evidence. Benco provides no support for its assertions and, as such, the finding should be rejected. The Proposed Finding is misleading because Guggenheim's challenge to Cohen about working with ADC references Benco's February articulation of its no-buying group policy. (CCFF ¶ 570 (quoting CX0095 at 001)). In addition, the Proposed Finding is misleading because the executives were together in February 2013 for the Chicago Mid-Winter meeting (CCFF ¶¶ 360, 518-527).

477. The communications about ADC that Complaint Counsel has identified do not show the existence of an agreement among the Respondents.

**Response to Proposed Finding No. 477**

The Proposed Finding is unsupported by evidence. Benco provides no support for its assertions and, as such, the finding should be rejected. The Proposed Finding is also factually inaccurate and contrary to the weight of the evidence which shows that the communications about ADC, when considered among the totality of the evidence, establish an agreement among Respondents

to refuse to discount to buying groups. (CCFF ¶¶ 474-1158, 1167-1198). In 2013, ADC approached Schein, Patterson, and Benco asking for a bid for its \$3.5 million dental supply business; all three initially refused to bid, believing it was a buying group. (CCFF ¶¶ 1022-1024 (Benco), 534-549 (Patterson’s initial response to ADC: “I’ve coached Anthony on how to stay out of this with grace”), 1097; CX2021 at 013 (Schein: “Our first reaction to this was it was simply a buying group and we were going to walk away.”)). Indeed, Benco initially thought ADC was a buying group. (CCFF ¶¶ 1022-1024; CX0021 at 002 (Benco’s initial response to ADC: “We’re out.”). Ryan, Tr. 1093-1094 (admitting that in the middle of the day on March 25, 2013, he believed ADC was a buying group and therefore wrote, “We’re out.”). Despite Benco’s initial reaction, ADC “was adamant that they [were] not a buying group,” but a DSO. (CX0021 at 001 (He Zhao told Patrick Ryan that ADC “is adamant that they are not a buying group and that ADC owns all the practices involved.”). Unsure whether Benco could bid on the customer, Cohen contacted Sullivan to discuss ADC. (CCFF ¶¶ 1025-1029). On March 25, 2013, Cohen created a calendar entry reminding him to call Tim Sullivan regarding buying groups. (CCFF ¶ 1028). Cohen texted Sullivan asking for a call, and the two set up a time to talk at 5 p.m. on March 25, 2013. (CCFF ¶¶ 1029-1032). Cohen and Sullivan spoke on the call regarding a customer, ADC. (CCFF ¶¶ 1034-1035). Cohen testified that he and Sullivan were “exchanging information” about whether ADC was a buying group or a DSO. (CCFF ¶¶ 1036-1037). Cohen admitted at trial he was seeking “facts, knowledge, conjecture” from Sullivan to “help us form an opinion and a ruling on how we would handle that account.” (CCFF ¶ 1037). Two days later, Cohen learned, through outside counsel hired by Benco, that ADC was not a buying group. (CCFF ¶¶ 1061-1065). Benco decided to bid. (CCFF ¶ 1066). Cohen contacted Sullivan the same day to tell him that Benco *would be bidding* on a potential \$3.5 million customer, ADC. (CCFF ¶¶ 1068-1070). Cohen admitted at trial that he told Sullivan of Benco’s bidding plans because he

wanted to maintain “a high level of credibility” with Sullivan (CCFF ¶¶ 1075-1076). Patterson declined to bid on ADC, believing that it was a buying group. (CCFF ¶¶ 534-543). On May 31, 2013, Patterson’s Guggenheim received an email from a branch manager informing him that Benco had successfully bid on ADC. (CCFF ¶ 565). After learning that Benco bid for and won ADC’s business, (CX0094), Guggenheim located an email from Cohen from four months earlier, which explained Benco’s no buying group policy, (CX0056), and he responded to Cohen. (CCFF ¶ 568; Guggenheim, Tr. 1627). On June 6, 2013, Guggenheim sent an email to Cohen and asked his competitor to “shed some light on [Benco’s] business agreement with Atlantic Dental Care.” (CCFF ¶ 569; CX0095 at 001; Guggenheim, Tr. 1627-1628). Guggenheim viewed Benco’s bidding on and doing business with ADC as a deviation from what Cohen previously told him about Benco’s policy not to do business with buying groups in February 2013 (CX0056; CCFF ¶ 572; Guggenheim, Tr. 1628). Cohen understood that Guggenheim’s June 2013 email, (CX0095) asked how Benco doing business with buying group ADC was consistent with the no buying group policy that Cohen had communicated to Guggenheim in February 2013. (CX0056; CCFF ¶ 573; Cohen, Tr. 561).

## 2. Benco’s Analysis of ADC

478. When a group like ADC approaches Benco, Benco must gather information about the group so that it can apply its policy. (Cohen, Tr. 716-17).

### **Response to Proposed Finding No. 478**

The Proposed Finding is incomplete and should be rejected. The Proposed Finding is incomplete and misleading because it erroneously suggests Benco’s information gathering for ADC was unilateral, when in fact it was coordinated. (CCFF ¶¶ 1022, 1036, 534, 1094, 1097). Benco was approached by ADC in the conspiracy period and Benco took great pains to evaluate and then communicated about ADC with its co-conspirators. (BFF ¶¶ 487, 490, 500, 503). The Proposed

Fact should be rejected because it is against the totality of evidence which shows Benco did this in order to comport with the shared policy of refusing to discount to buying groups rather than Benco's unilateral policy. (CCFF ¶¶ 1048-1050, 1068-1070, 1072-1074, 1076).

479. Benco must determine whether the group is a single group of dental practices with common ownership and control or whether it's a collection of independent dental practices without common ownership or common control. (Cohen, Tr. 716-717).

**Response to Proposed Finding No. 479**

The Proposed Finding is vague in that it refers to an unspecified group "the group" and is phrased as what Benco must do about "the group." In addition, Benco has several Proposed FFs that suggest each group is different. (BFF ¶¶ 481-482).

480. When assessing groups, Benco's focus is always on the ownership structure and the control of the purchasing decisions of the dental practices. (Cohen, Tr. 717).

**Response to Proposed Finding No. 480**

Complaint Counsel has no specific response.

481. The groups that approach Benco tend to be very different when it comes to the ownership structure. (Cohen, Tr. 717).

**Response to Proposed Finding No. 481**

Complaint Counsel has no specific response.

482. It is often a challenge for Benco to determine the ownership structure and control structure of a group. (Cohen, Tr. 717).

**Response to Proposed Finding No. 482**

Complaint Counsel has no specific response.

483. Pat Ryan is a long-time Benco employee, who at the time of the events at issue here, was Benco's Director of Special Markets. (Cohen, Tr. 717-18).

**Response to Proposed Finding No. 483**

Complaint Counsel has no specific response.



484. Pat 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. (Cohen, Tr. 717-18).

**Response to Proposed Finding No. 484**

Complaint Counsel has no specific response.

485. In situations where Pat Ryan was unable to determine the ownership or control structure of a group, Chuck Cohen would get involved to help Pat Ryan reach a determination so that Benco could apply its policy. (Cohen, Tr. 718).

**Response to Proposed Finding No. 485**

Complaint Counsel has no specific response.

486. In addition to discussing the group's structure with Chuck Cohen, Pat Ryan would also ask the group for documentation and conduct independent research regarding the group. (Cohen, Tr. 718).

**Response to Proposed Finding No. 486**

The Proposed Finding is vague in that it refers to an unspecified group "the group" and is phrased as what Benco must do about "the group." In addition, Benco has several Proposed Findings of Fact that suggest each group is different. (BFF ¶¶ 481-482).

487. Benco's evaluation of ADC was the most difficult and longest evaluation of a group that Benco had ever conducted. (Cohen, Tr. 718-19; Ryan, Tr. 1199).

**Response to Proposed Finding No. 487**

Complaint Counsel has no specific response.

488. Benco was confused by ADC's ownership structure because it was a collection of 35-50 independent dental practices that had merged together to form a single entity. (Cohen, Tr. 716-19).

**Response to Proposed Finding No. 488**

Complaint Counsel has no specific response.

489. Benco had never before seen an ownership structure like ADC. (Cohen, Tr. 719).

**Response to Proposed Finding No. 489**

The Proposed Finding is misleading because it fails to note that “[T]he groups that approach Benco tend to be very different when it comes to ownership structure,” (Cohen, Tr. 717), as a result, most groups would present uniquely. (*See* BFF ¶ 481).

490. Pat Ryan and Benco’s Strategic Markets team spent months assessing ADC. (Cohen, Tr. 719; Ryan, Tr. 1199).

**Response to Proposed Finding No. 490**

Complaint Counsel does not disagree, but would point out this Proposed Finding is in tension with Benco Proposed Finding Number 514 which argues this resource-intensive information was not competitively sensitive.

491. Benco tried several sources to obtain additional information regarding ADC, including asking ADC itself for documentation, consulting with Benco’s local sales team, conducting independent research, and ultimately consulting with others in the dental industry. (Cohen, Tr. 719-20).

**Response to Proposed Finding No. 491**

Complaint Counsel has no specific response.

492. Chuck Cohen eventually reached out to Tim Sullivan to see if Mr. Sullivan had any additional information on the structure of ADC that Benco might be able to use in its independent evaluation of ADC. (Cohen, Tr. 719-20).

**Response to Proposed Finding No. 492**

The Proposed Finding is misleading because it describes reluctance by saying Cohen “eventually” contacted Sullivan to discuss ADC, but that is misleading and inaccurate because Cohen reached out to Sullivan the very day he received an email from Ryan about difficulty evaluating the structure of ADC. (BFF ¶¶ 494-495). The Proposed Finding is incomplete because it leaves out that Cohen enjoyed an “open relationship” with Tim Sullivan, (CCFF ¶¶ 270, 277), and that he felt comfortable approaching him with business issues, not reluctance. (CCFF ¶¶ 277-279). The Proposed Finding that Cohen reached out to Sullivan for information Benco might use to make an “independent” evaluation of ADC is factually inaccurate, contrary to the weight

of the evidence, and mislead. Cohen testified that he was seeking “facts, knowledge, conjecture” when he contacted Sullivan for help to decide whether it could bid on ADC, (Cohen, Tr. 720) (“Q. And for what purpose? A. It would help us make our decision and it would help us form an opinion and a ruling on how we would handle that account”)), showing that the conduct was not “independent.” “Independent” means “*not* looking to others for one’s opinion or for guidance on conduct.” (Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/independent>). The totality of the evidence shows that the evaluation of ADC was cooperative rather than unilateral. (CCFF ¶¶ 1022-1032, 1037).

493. Chuck Cohen’s intent in reaching out to Tim Sullivan regarding ADC was to gather facts that might help Benco make its own independent evaluation of ADC. Chuck Cohen did not intend to make any collective decision with Tim Sullivan about ADC. (Cohen, Tr. 719-20).

#### **Response to Proposed Finding No. 493**

The Proposed Finding is factually inaccurate and against the weight of the evidence because it suggests that Cohen reached out to Sullivan to help Benco makes its own independent evaluation of ADC. Cohen testified that he contacted Sullivan for help to decide whether it could bid on ADC. (Cohen, Tr. 720) (“Q. And for what purpose? A. It would help us make our decision and it would help us form an opinion and a ruling on how we would handle that account”)), showing that the conduct was not “independent.” “Independent” means “*not* looking to others for one’s opinion or for guidance on conduct.” (Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/independent>). The totality of the evidence shows that the evaluation of ADC was cooperative rather than unilateral. (CCFF ¶¶ 1022-1032, 1037). Cohen reached out to Sullivan when Benco did not know whether it could bid on ADC because it was unclear whether ADC was a buying group (subject to the agreement) or a DSO (outside the scope of the agreement). (CCFF ¶¶ 1022-1032, 1034-1037, 1045-1046). In addition, after Benco determined

that ADC was not a buying group, Cohen told Sullivan that Benco would bid for ADC. (CCFF ¶¶ 1068-1069). Updating a competitor with details of a revised plan to bid for a large customer is inconsistent with unilateral decision making. (CCFF ¶¶ 1038-1040, 1061-1065). Indeed, after one of its most difficult customer evaluations ever, (BFF ¶¶ 487, 490), Benco shared the result of its analysis, including information that Benco learned through outside counsel, with Schein and later with Patterson. (CCFF ¶¶ 574-576, 1062-1065; BFF ¶ 525; *see* CCFF ¶ 1039). Cohen admitted that providing this information to Sullivan was against Benco's business interests. (CCFF ¶¶ 1072-1075).

### **3. Communications Between Benco and Schein Relating to ADC Are Not Evidence of an Agreement.**

494. On March 25, 2015, Mr. Cohen received an internal e-mail from Mr. Ryan, attaching an article about ADC's recent securities offering, and noting that he could not "figure out if [ADC] is a buying group or not." (CX0020). Mr. Ryan then discussed the issue with Mr. Cohen. (Ryan, Tr. 1199).

#### **Response to Proposed Finding No. 494**

Complaint Counsel has no specific response.

495. Following that discussion, Mr. Cohen sent a text message to Mr. Sullivan at 3:13 pm on March 25, 2013, asking if Mr. Sullivan is "[a]vailable to talk." (CX6027-027).

#### **Response to Proposed Finding No. 495**

Complaint Counsel has no specific response.

496. In his text message, Mr. Cohen did not indicate the subject matter he wished to talk about, and Mr. Sullivan testified that he did not know what Mr. Cohen wanted to talk about. (CX6027-027; Sullivan, Tr. 4187-88).

#### **Response to Proposed Finding No. 496**

Complaint Counsel has no specific response, but would note however that Sullivan and Cohen had both attended the Hinman Dental Trade Show less than one week earlier (CCFF ¶ 387). Their interactions there may have obviated the need for specificity in this March 25, 2013 text message.

497. Mr. Sullivan responded to Mr. Cohen's text message that he was available at 5:00 pm eastern, and he called Mr. Cohen at that time. (CX6027-027).

**Response to Proposed Finding No. 497**

Complaint Counsel has no specific response, except to note Sullivan responded within minutes to Cohen's request to talk. (CX6027 at 027).

498. Call records show that the call lasted 8 minutes and 35 seconds, but the records do not reveal the content of the call. (CX6027-027). Both Mr. Cohen and Mr. Sullivan testified about the call.

**Response to Proposed Finding No. 498**

Complaint Counsel has no specific response.

499. Mr. Cohen did not recall what was said on the March 25, 2013 call. (Cohen, Tr. 721).

**Response to Proposed Finding No. 499**

The Proposed Finding is misleading because Cohen and Sullivan testified that they discussed ADC in the call. (CCFF ¶¶ 1034-1035). Cohen also testified he and Sullivan were "exchanging information" about whether ADC was a buying group or not. (CCFF ¶ 1036).

500. The purpose of Mr. Cohen's call was to find out if Mr. Sullivan had any information about ADC, since Benco could not determine whether it was a buying group or DSO. (Cohen, Tr. 719-20).

**Response to Proposed Finding No. 500**

The Proposed Finding is misleading and incomplete. Cohen reached out to Sullivan when Benco did not know whether it could bid on ADC because it was unclear whether ADC was a buying group (subject to the agreement) or a DSO (outside the scope of the agreement). (CCFF ¶¶ 1022-1032, 1034-1037, 1045-1046). Benco then updated Schein when it determined it would be bidding on large customer ADC, explicitly *because* it was not a buying group. (CCFF ¶ 1069 (CX0196) ("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.”)). Both Cohen and Sullivan admit the call’s purpose was to discuss ADC. (BFF ¶ 500; Cohen, Tr. 546, 968; CX0301 (Cohen, IHT at 271); Sullivan, Tr. 3946-3947; CX0311 (Sullivan, IHT at 261)). In prior sworn testimony, Sullivan testified that Cohen informed him on the March 25, 2013 call that Benco did not plan to bid on the ADC group. (CCFF ¶¶ 1038-1043; *but see* Sullivan, Tr. 3948 (acknowledging that his testimony changed)). Cohen testified that he and Sullivan were “exchanging information” about whether ADC was a buying group or a DSO. (CCFF ¶¶ 1036-1037). Cohen admitted at trial he was seeking “facts, knowledge, conjecture” from Sullivan to “help us form an opinion and a ruling on how we would handle that account.” (CCFF ¶ 1037; Cohen, Tr. 720). The Proposed Finding should be rejected.

501. Mr. Cohen denied having reached any agreement with Mr. Sullivan about ADC, or discussing Benco’s no middlemen policy on that call. (Cohen, Tr. 705; 715).

#### **Response to Proposed Finding No. 501**

The Proposed Finding is misleading and against the weight of the evidence. The Proposed Finding is misleading to the extent it suggests that Complaint Counsel must or should show that Schein and Benco reached an agreement on a particular phone call for which there is no transcript. However, the communications about ADC, (CCFF ¶¶ 1025-1055), in combination with the totality of the evidence, establish that Benco and Schein reached an agreement not to discount to buying groups. (CCFF ¶¶ 661-1158, 1167-1198). Both Cohen and Sullivan admit the purpose of the telephone call was to discuss ADC. (CCFF ¶¶ 1034-1044; BFF ¶ 500; Cohen, Tr. 546, 968; CX0301 (Cohen, IHT at 271); Sullivan, Tr. 3946-3947; CX0311 (Sullivan, IHT at 261)). Sullivan testified under oath at his investigational hearing that, in his March 25, 2013 call with Cohen, Cohen “basically said to me that they [Benco] don’t plan to, you know, bid on their—this group . . . .” (CCFF ¶ 1040; CX0311 (Sullivan, IHT at 260-261); *but see* CCFF ¶ 1042 (Sullivan no longer remembered the content of the call by trial.)). Multiple communications on

the day of the call between Cohen and Sullivan refer to ADC and reflect frequent, friendly, responsive communications. (CCFF ¶¶ 1044-1047). To set up the call, Cohen texted Sullivan asking for a time to talk, and two minutes later Sullivan responded and set a time to talk that day. (CCFF ¶ 1030). Sullivan and Cohen spoke on March 25 for 8 minutes and 35 seconds (CCFF ¶ 1032, BFF ¶ 498). Four minutes after that call, Sullivan reached out to Cohen to thank him for the ADC call. (CCFF ¶¶ 1033, 1051, 1058; CX6027 at 027 (Row 241) (“Hi Chuck. Thanks for the call.”); Sullivan, Tr. 3957). Next, in the evening of the same day, March 25, 2013, Cohen sent Sullivan a link to an article about ADC by text stating “Here’s a link to the press release we discussed.” (CCFF ¶¶ 1045-1046; CX6027 at 028 (Row 243)). A few minutes later, Sullivan responded “Thanks for the follow up on that article.” (CCFF ¶ 1047; CX6027 at 028 (Row 244); Cohen, Tr. 546; Sullivan, Tr. 3957). The inter-firm communications between Schein and Benco on ADC culminate two days later with a text that Benco would in fact bid for the customer the two men had been discussing precisely *because* ADC was “not a buying group.” (CCFF ¶ 1069; CX0196 at 010 (“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.”); Cohen, Tr. 549). There is simply no way to read that text in the absence of an understanding between Cohen and Sullivan about Benco's no buying group policy. Indeed, Cohen’s own explanations for the ADC communications inherently reflect mutual expectations about how the companies would approach buying group customers. At trial, Cohen testified he shared his customer bidding strategy with his competitor because he didn’t want his competitor to think Benco was “duplicitous” or “was trying to head-fake them.” (Cohen, Tr. 723; CCFF ¶ 1076). There can be no head-fake or duplicity without prior shared expectations—in this case, that Benco had committed to a no-buying group policy. Cohen admitted at trial he shared Benco’s no buying group policy with Sullivan. (CCFF ¶ 624). Finally, Complaint Counsel

objects to the use of the words “no middlemen policy” to refer to a no-buying group policy. (*See* SFF ¶ 1489 (using identical language to this Proposed Finding, but referring to a no buying group policy)). Cohen testified it is fair to say Benco had a no *buying group* policy. (Cohen, Tr. 445; *see also* Benco Post-Tr. Br. at 10 (Benco followed its “longstanding policy . . . not to deal with buying groups”); CCFF ¶ 419 (“Benco has a firm policy of non-recognition of GPOs as a single customer.”); [REDACTED]; CX1199 (“Benco does not recognize ‘buying groups’”); CX0062 (Guggenheim asking Cohen “wondering if your position on buying groups is still as you articulated back in February?”)). The Proposed Finding is misleading in that it suggests that Benco executed from a policy not aimed at buying groups specifically. (CCFF ¶¶ 394-431). While Benco used the term no-middlemen policy during these proceedings, the contemporaneous documents and communications evidence a no-buying group policy and lack any reference to a no-middleman policy. (CCFF ¶¶ 399 (“Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups”), 410 (“We do not participate in buying groups. Ever.”), 404, 406, 416, 419, 527-528, 574-575, 582, 661-664, 677). It is irrelevant what label Benco gives, the evidence shows that throughout the conspiracy period, Benco instructed its employees to refuse to discount to *buying groups*. (CCFF ¶¶ 423, 396, 401, 417). For all these reasons the Proposed Finding should be rejected.

502. Mr. Cohen also stated he does not recall Mr. Sullivan revealing any information about Schein’s policies, plans, or practices concerning ADC or buying groups generally. (Cohen, Tr. 848-50; 899).

### **Response to Proposed Finding No. 502**

The Proposed Finding is misleading and against the weight of the evidence. The Proposed Finding is misleading to the extent it suggests Benco did not enter into an agreement with Schein, as defined under Section 1 of the Sherman Act, to refuse to discount to buying groups. The competitors’ communications about ADC, combined with the testimony, and the totality of



Complaint Counsel's evidence, establishes that Benco and Schein reached an agreement. (CCFF ¶¶ 1025-1055; *see also* CCFF ¶¶ 661-1158, 1167-1198). The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that Cohen and Sullivan did not discuss ADC on the March 25, 2013 telephone call, as described in Complaint Counsel's Response to Proposed Finding 504. The Proposed Finding is also factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Cohen testified that Sullivan did not ever reveal Schein's policies, plans, or practices concerning buying groups. The weight of the evidence shows that Benco gained an understanding that Schein had a policy against doing business with buying groups following conversations with Sullivan in 2011. (CCFF ¶ 680; *see also* CCFF ¶¶ 661-684). The evidence shows that throughout 2011, Cohen received market intelligence indicating that Schein was working with buying groups. Based on that market intelligence, Cohen understood that Schein worked with buying groups in 2011. (CCFF ¶¶ 665-673). By 2012, however, Cohen no longer believed that Schein would be working with the buying group Smile Source. (CCFF ¶¶ 674-678). In 2013 and 2014, Cohen likewise did not believe that Schein was in the buying group space. (CCFF ¶¶ 675-678). Cohen's belief that Schein was not working with buying groups was *contrary* to the market intelligence that he received indicating that Schein did work with buying groups. (CCFF ¶¶ 665-673, 684-685). Indeed, Cohen continued to receive market intelligence indicating that Schein worked with buying groups throughout the conspiracy. (CCFF ¶¶ 665-673, 684-685; *see also* CX1104; Ryan, Tr. 1252 (testifying that he received an August 2014 email in which Benco territory reps reported to Ryan that Henry Schein was working with Schulman Group)). Consistent with Cohen's knowledge, 2011 was the year that Schein, at the direction of Tim Sullivan, changed its buying group strategy. While Schein had discounted to buying groups historically and profited from such arrangements, by late 2011, Sullivan informed his employees that he did "NOT want to lead

in getting” the buying group initiative started in dental. (CCFF ¶ 709; *see also* CCFF ¶¶ 712-716). It is also undisputed that Benco’s Cohen and Schein’s Sullivan communicated on multiple occasions throughout 2011. Between March and December 2011 alone, Cohen and Sullivan called each other at least 13 times for a total duration of 50 minutes and 14 seconds. (CCFF ¶ 347; CX6027 at 012, 016-017). Cohen and Sullivan also exchanged a total of 89 text messages in 2011, 23 of which the content was not produced and may have contained buying group communications. (CCFF ¶¶ 349-350 (CX6027 at 003-018)). Six of the 23 text messages for which Respondents did not produce content occurred between March and December 2011. (CX6027 at 005, 010-011, 014 (Rows 62, 63, 64, 106, 110, 133)). Sullivan exchanged additional communications with Cohen, including written notes and voicemail messages, that are not reflected in CX6027. (CCFF ¶¶ 353-354; Sullivan, Tr. 3885 (Sullivan produced all cell phone records but could have called Cohen from a land line); Cohen, Tr. 526 (Cohen sent Sullivan notes by mail from time to time); Sullivan, Tr. 3886 (“Q: And you didn’t keep all of the notes that Chuck Cohen sent you over the years, right? A: No.”)). Cohen and Sullivan saw each other at multiple industry events in 2011. (CCFF ¶¶ 358, 380, 379, 381, 363, 383; *see also* Attachment B to Complaint Counsel’s Post-Tr. Br.). The evidence also shows that Cohen “communicate[d] Benco’s no-buying group policy to Mr. Sullivan.” (CCFF ¶¶ 662-664). Contemporaneous internal company documents also demonstrate that Benco was confident that Schein rejected buying groups during the conspiracy notwithstanding market intelligence to the contrary. For example, Benco’s Ryan instructed Benco’s sales team in 2013: “It [doesn’t] catch on here, because so far, all of the major dental companies have said, ‘NO’ [to buying groups], and that’s the stance we will continue to take.” (CCFF ¶¶ 527-528 (CX1149 at 002) (emphasis in original); Ryan, Tr. 1075-1078, 1080-1083; *see also* CCFF ¶¶ 1191, 1193, 1103).

503. Mr. Sullivan testified that Mr. Cohen asked about ADC on the March 25, 2013 call, and that Mr. Sullivan did not know anything about ADC at the time of the call. (CX8025; Sullivan, Dep. at 345, 402).

**Response to Proposed Finding No. 503**

The Proposed Finding is misleading and irrelevant in part. The Proposed Finding is irrelevant to the extent that Mr. Sullivan testified at trial he did not know anything about ADC before the call because whether Sullivan knew of ADC before the call, it is undisputed that ADC was discussed in that call, and after the call, Sullivan thanked Cohen. (BFF ¶¶ 500, 503, 510-511, 520; CCFF ¶¶ 1034-1036, 1038, 1044-1047). The Proposed Finding also omits testimony from Sullivan in which he stated that Cohen informed Sullivan on the March 25, 2013 call that Benco did not plan to bid on the ADC group. (CCFF ¶¶ 1038-1043; *but see* Sullivan, Tr. 3948 (acknowledging that his recollection of the call changed after his investigational hearing)).

504. Mr. Sullivan also denied reaching any agreement with Mr. Cohen, and did not disclose any information to Mr. Cohen, about ADC or any buying group. (Sullivan, Tr. 4190).

**Response to Proposed Finding No. 504**

The Proposed Finding is misleading and against the weight of the evidence. The Proposed Finding is misleading to the extent it suggests Benco did not enter into an agreement with Schein, as defined under Section 1 of the Sherman Act, to refuse to discount to buying groups. The competitors' communications about ADC, combined with the testimony, and the totality of Complaint Counsel's evidence, establishes that Benco and Schein reached an agreement. (CCFF ¶¶ 1025-1055; *see also* CCFF ¶¶ 661-1158, 1167-1198). Both Cohen and Sullivan admit the call's purpose was to discuss ADC. (BFF ¶ 500; Cohen, Tr. 546, 968; CX0301 (Cohen, IHT at 271); Sullivan, Tr. 3946-3947; CX0311 (Sullivan, IHT at 261)). In prior sworn testimony, Sullivan testified that Cohen informed him on the March 25, 2013 call that Benco did not plan to bid on the ADC group. (CCFF ¶¶ 1038-1043; *but see* Sullivan, Tr. 3948 (acknowledging that his

testimony changed)). Cohen testified that he and Sullivan were “exchanging information” about whether ADC was a buying group or a DSO. (CCFF ¶¶ 1036-1037). Cohen admitted at trial he was seeking “facts, knowledge, conjecture” from Sullivan to “help us form an opinion and a ruling on how we would handle that account.” (CCFF ¶ 1037; Cohen, Tr. 720). The Proposed Finding is also misleading and contrary to the weight of the evidence because the communications on the day of the call between Cohen and Sullivan refer to ADC and reflect frequent and prompt communications from Sullivan to Cohen. (CCFF ¶¶ 1044-1047). To set up the call, Cohen texted Sullivan asking for a time to talk, and two minutes later Sullivan responded and set a time to talk that day. (CCFF ¶ 1030). Sullivan called Cohen on March 25, 2013 and they spoke 8 minutes and 35 seconds. (CCFF ¶ 1032, BFF ¶ 498). Four minutes after that call, Sullivan reached out to Cohen to thank him for the ADC call. (CCFF ¶ 1033; CX6027 at 027 (Row 241) (“Hi Chuck. Thanks for the call.”); Sullivan, Tr. 3957). Next, in the evening of the same day, March 25, 2013, Cohen sent Sullivan a link to an article about ADC by text stating “Here’s a link to the press release we discussed.” (CX6027 at 028 (Row 243); CCFF ¶¶ 1045-1046). A few minutes later, Sullivan responds “Thanks for the follow up on that article.” (CCFF ¶¶ 1033, 1051, 1058; CX6027 at 028 (Row 244); Cohen, Tr. 546; Sullivan, Tr. 3957). Sullivan testified that at this time he wanted to be cordial and treat Cohen with respect (BFF ¶ 508; Sullivan Tr. 4260-4261). The inter-firm communications between Schein and Benco on ADC culminate two days later with a text that Benco would bid precisely because ADC was “not a buying group.” (CCFF ¶ 1069 (CX0196 at 010) (“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.”); Cohen, Tr. 549). There is simply no way to read that text in the absence of an mutual understanding between Cohen and Sullivan about a no buying group policy. Indeed, Cohen’s own explanations for the ADC

communications inherently reflect mutual expectations about how the companies would approach buying group customers. At trial, Cohen testified he shared his customer bidding strategy with his competitor because he did not want his competitor to think Benco “was trying to head-fake them.” (CCFF ¶ 1076; Cohen, Tr. 723). Cohen’s testimony that he did not want his competitor to think Benco was trying to “head-fake” Schein indicates mutual expectations and that Cohen had a sense of obligation to be truthful to his competitor about bidding on buying groups. Finally, Cohen admitted at trial he shared Benco’s no buying group policy with Sullivan. (CCFF ¶ 624).

The Proposed Finding is also incomplete and misleading because it omits that Sullivan contradicted himself under oath regarding the March 25, 2013 call. Sullivan initially testified that Cohen informed him on the March 25, 2013 call that Benco did not plan to bid on the ADC group. (CCFF ¶¶ 1038-1043; *but see* Sullivan, Tr. 3948 (acknowledging that his testimony changed)). In fact, Sullivan testified on three separate occasions at his investigational hearing that Cohen informed Sullivan that Benco did not plan to bid on the ADC group on the March 25, 2013 call: (1) Cohen “basically said to me that they [Benco] don’t plan to, you know, bid on their – this group . . .,” (CCFF ¶ 1038; CX0311 (Sullivan, IHT at 260-261)); (2) “Q. During the call Mr. Cohen indicated to you that they were not going to bid on Atlantic Dental Care because it was a buying group; is that right? A. I don’t recall him saying why, just that he was – they were not going to go bid on it,” (CCFF ¶ 1039; CX0311 (Sullivan, IHT at 299-300)); (3) on the March 25, 2013 call, Cohen said, “we’re not interested” in ADC. (CCFF ¶ 1041; CX0311 (Sullivan, IHT at 261)). Sullivan also contradicted himself regarding the follow up calls after the March 25, 2013 call. (CCFF ¶¶ 1079-1080, 1088). Sullivan testified at his investigational hearing that he had no recollection of why he called Cohen on March 27, 2013, but that it was not even “possible” that the call related to ADC. (CX0311 (Sullivan, IHT at 306)). Sullivan later self-

servingly testified that it was his intent on March 27, 2013 to “remind” Cohen that they “should not be talking about this.” (CX8025 (Sullivan, Dep. at 409-410); *see also* Sullivan, Tr. 3963, 3965). Sullivan changed his testimony another time regarding an April 3, 2013 telephone call with Cohen. Sullivan initially testified that he did not believe it was “possible” that the call related to ADC. (CCFF ¶ 1089). Sullivan then changed his story at his deposition to insist that he told Cohen on April 3, 2013 that it was inappropriate to discuss ADC. (CX8025 (Sullivan, Dep. at 415, 416)).

For all these reasons the Proposed Finding should be rejected.

505. Immediately following the call, at 5:09 pm on March 25, 2013, Mr. Sullivan sent Mr. Cohen a text stating, “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. :)” (CX6027-027).

#### **Response to Proposed Finding No. 505**

The Proposed Finding is incomplete because it does not include the entire text message from Sullivan to Cohen following the ADC call. (CCFF ¶ 1051). Within minutes after the March 25, 2013 telephone call ended, Sullivan thanked Chuck for the call before he made a joke. (CX6027 at 027 (Row 241)). Sullivan wrote, “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.:)”. (CX6027 at 027 (Row 241)). The Proposed Finding is also misleading because thanking and joking with Cohen is important to the context because it is not the reaction of someone who is worried that an antitrust policy violation has occurred as Sullivan later claimed. (CCFF ¶¶ 1049-1050).

506. Both Mr. Sullivan and Mr. Cohen testified that Mr. Sullivan’s text message referred to a long-running joke between the two about who was going to work for whom in the event that ongoing merger discussions came to fruition. (Cohen, Tr. 722; 897-98; Sullivan, Tr. 3955-56).

#### **Response to Proposed Finding No. 506**

The Proposed Finding is misleading to the extent it suggests that the proceeding phone call, which the parties concede was about ADC, was about something else. (BFF ¶ 500; Cohen, Tr. 546, 968; CX0301 (Cohen, IHT at 271); Sullivan, Tr. 3946-3947; CX0311 (Sullivan, IHT at 261)). The admissions combined with the text message from Cohen to Sullivan later that day attaching an article about ADC preclude any inference that ADC was not the topic of that call. (CCFF ¶¶ 1038, 1040, 1043, 1058; CX6027 at 027 (Row 243) (Cohen sent Sullivan a link via text message to an article about ADC and referred to it as “the press release we discussed.”)).

507. Regarding the ongoing merger discussions between Schein and Benco, a few days earlier Mr. Cohen and his brother had finalized arrangements to meet with Schein’s CEO, Stanley Bergman, and its head of Business Development, Mark Mlotek, to explore M&A opportunities, the following Monday, April 1, 2013, in New York. (Cohen, Tr. 892-95; Sullivan, Tr. 4185-87; CX1476).

#### **Response to Proposed Finding No. 507**

The Proposed Finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that Cohen and Sullivan did not communicate regarding ADC and buying groups in the days surrounding April 1, 2013. (CCFF ¶¶ 994-1004 (March 26, 2013 communications regarding Dental Alliance), 1022-1098 (communications regarding ADC)). The Proposed Finding is also misleading to the extent that it suggests that Sullivan played a role in the meeting scheduled for April 1, 2013; the documents and testimony cited reference a meeting with Chuck and Rick Cohen (Benco) and Mark Mlotek and Stanley Bergman (Schein), but do not reference Sullivan’s participation or attendance at any such April 1, 2013 meeting. In fact, Sullivan testified that he did not attend the meeting. (Sullivan, Tr. 4186). The Proposed Finding is incomplete in that it excludes evidence indicating that additional topics were discussed during the Schein and Benco merger discussions. Specifically, in 2011 there were Benco/Schein discussions at the same New York home of Stanley Bergman in November of 2011. (CX0231). Following that meeting, Larry Cohen wrote to Schein executives including Sullivan on the risks

of “rumors spreading of a ‘warmer’ Benco – Schein relationship... So, before we did any project together, we’d need to agree upon a plan for confidentiality.” (CX0231 at 001). Bergman replied, cc’ing Sullivan and Cohen and wrote “Our historic business sparing has in the end been good for both co’s and the dental market place. Having said this, we concur with your thoughts below and are confident that we can work together to advance mutual goals- makes some money and perhaps even have a little fun doing this . . . we totally agree the confidentiality is critical.” (CX0231 at 001).

508. Mr. Sullivan testified that the ongoing merger discussions between Schein and Benco impacted his interactions with Mr. Cohen. He wanted to be cordial and treat Mr. Cohen with respect because they might working for one another if a merger went through. (Sullivan, Tr. 4260-61).

#### **Response to Proposed Finding No. 508**

The Proposed Finding is misleading to the extent that it suggests that merger discussions constitute a defense to an anticompetitive agreement. Complaint Counsel has no specific response to the remainder of this Proposed Finding except to note Cohen and Sullivan had already been working together and had a long-term business relationship. (CCFF ¶¶ 270-271).

509. Mr. Sullivan’s and Mr. Cohen’s joke about who would work for whom is consistent with a discussion on the March 25, 2013 call about this upcoming meeting, as are follow-up texts between Mr. Cohen and Mr. Sullivan that continued to joke. (CX 6026-027).

#### **Response to Proposed Finding No. 509**

The Proposed Finding is irrelevant and misleading. The Proposed Finding is misleading to the extent it suggests that the call on March 25, 2013 between Sullivan and Cohen was not for the purpose and actually consisted of discussing ADC, which has been conceded. (BFF ¶ 500; Cohen, Tr. 546, 968; CX0301 (Cohen, IHT at 271); Sullivan, Tr. 3946-3947; CX0311 (Sullivan, IHT at 261); CX6027 at 028 (Row 243); CCFF ¶¶ 1044-1047; Cohen, Tr. 555 (Cohen admits that this text was a joke, and he did not recall trying to recruit Sullivan to join Benco on the



March 25, 2013 telephone call); *see also* CCRF (Benco) ¶¶ 501, 504). The Proposed Finding is irrelevant to the extent anything else might have been mentioned in that call.

510. Later that evening on March 25, 2013, Mr. Cohen forwarded a link to an article reporting on ADC's financing. (CX 6026-028).

**Response to Proposed Finding No. 510**

The Proposed Finding is incomplete because it fails to note the entire message from Cohen to Sullivan attaching a link to the ADC article discussed. The brief message accompanying the linked ADC article is critical to the context because it explicitly refers to the discussion of ADC in the call earlier that day. (CX6027 at 028 (Row 243) ("Here's a link to the press release we discussed <http://marketbrief.com/atlantic-dental-care-plc/d/form-d/2012/11/21/9835185>.")); CCFR ¶¶ 1044-1047). Benco believed that the information in the press release regarding ADC would help determine whether ADC was a buying group. (CCFR ¶ 1048; CX0304 (Ryan, IHT at 227) (testifying regarding forwarding Cohen the press release about ADC: "Q. Did you think there was something in this information that you pasted into the e-mail that would help determine whether ADC was a buying group? A. I - I think that's what I thought at the time."); CX0020 at 001 (email from Ryan to Cohen, forwarding press release regarding ADC); Cohen, Tr. 722 (press release that Cohen sent to Sullivan was about the "merger of Atlantic Dental Care's practices into one entity"), 966 (press release sent to Sullivan contained additional information about ADC)).

511. In response, Mr. Sullivan simply wrote, "unusual." (CX 6026-028). Mr. Sullivan did not provide any information about ADC. Nor did Mr. Sullivan reveal Schein's plans about ADC.

**Response to Proposed Finding No. 511**

The Proposed Finding is misleading and incomplete. The Proposed Finding is incomplete because it fails to include the entire message from Sullivan which states: "Thanks for the follow

up on that article. Unusual.” (CX6027 at 028 (Row 244); Cohen, Tr. 546; Sullivan, Tr. 3957).

The Proposed Finding is misleading to the extent it minimizes the mutual reciprocity and encouragement from the communications. (*See* CCFF ¶¶ 1030-1033, 1045-1047). In addition, the “Thanks” undercuts Sullivan’s testimony in these proceedings characterizing his communications as aimed at admonishing Cohen for discussing buying groups. (*See* Schein Post-Tr Br. at 84).

Finally, the Proposed Fact is misleading to the extent it suggests Sullivan and Cohen did not exchange information about ADC because his text is but one of multiple communications between Sullivan and Cohen about ADC, some of which Sullivan initiated. (CCFF ¶¶ 1060, 1079; CX6027 at 028 (Row 247), 029 (Row 250), 029 (Row 255)).

512. The preponderance of the evidence thus does not support the allegation that Schein and Benco reached any agreement concerning ADC or buying groups on the March 25, 2013 call.

#### **Response to Proposed Finding No. 512**

The Proposed Finding should be disregarded. It contains no citations to the record whatsoever and is a broad conclusion of law improperly submitted. In addition, the Proposed Finding is misleading and contrary to the weight of the evidence. The Proposed Finding is misleading to the extent it suggests Benco did not enter into an agreement with Schein, as defined under Section 1 of the Sherman Act, to refuse to discount to buying groups. The competitors’ communications about ADC, combined with the testimony, and the totality of Complaint Counsel’s evidence, establishes that Benco and Schein reached an agreement. (CCFF ¶¶ 1025-1055; *see also* CCFF ¶¶ 661-1158, 1167-1198). Both Cohen and Sullivan admit the call’s purpose was to discuss ADC. (BFF ¶ 500; Cohen, Tr. 546, 968; CX0301 (Cohen IHT, at 271); Sullivan, Tr. 3946-3947; CX0311 (Sullivan, IHT at 261)). In prior sworn testimony, Sullivan testified that Cohen informed him on the March 25, 2013 call that Benco did not plan to bid on the ADC group.

(CCFF ¶¶ 1038-1043; *but see* Sullivan, Tr. 3948 (acknowledging that his testimony changed)). Cohen testified that he and Sullivan were “exchanging information” about whether ADC was a buying group or a DSO. (CCFF ¶¶ 1036-1037). Cohen admitted at trial he was seeking “facts, knowledge, conjecture” from Sullivan to “help us form an opinion and a ruling on how we would handle that account.” (CCFF ¶ 1037; Cohen, Tr. 720). The Proposed Finding is also misleading and contrary to the weight of the evidence because the communications on the day of the call between Cohen and Sullivan refer to ADC and reflect frequent and prompt communications from Sullivan to Cohen. (CCFF ¶¶ 1044-1047). To set up the call, Cohen texted Sullivan asking for a time to talk, and two minutes later Sullivan responded and set a time to talk that day. (CCFF ¶ 1030). Sullivan called Cohen on March 25, 2013 and they spoke 8 minutes and 35 seconds (CCFF ¶ 1032; BFF ¶ 498). Four minutes after that call, Sullivan reached out to Cohen to thank him for the ADC call. (CCFF ¶ 1033; CX6027 at 027 (Row 241) (“Hi Chuck. Thanks for the call.”); Sullivan, Tr. 3957). Next, in the evening of the same day, March 25, 2013, Cohen sent Sullivan a link to an article about ADC by text stating “Here’s a link to the press release we discussed.” (CX6027 at 028 (Row 243); CCFF ¶¶ 1045-1046). A few minutes later, Sullivan responds “Thanks for the follow up on that article.” (CCFF ¶¶ 1033, 1051, 1058; CX6027 at 028 (Row 244)); Cohen, Tr. 546; Sullivan, Tr. 3957). Sullivan testified that at this time he wanted to be cordial and treat Cohen with respect (BFF ¶ 508; Sullivan Tr. 4260-4261). The inter-firm communications between Schein and Benco on ADC culminate two days later with a text that Benco would bid precisely *because* ADC was “not a buying group.” (CCFF ¶ 1069; CX0196 at 010 (“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.”); Cohen, Tr. 549). There is simply no way to read that text in the absence of an mutual understanding between Cohen and Sullivan about a no buying group policy. Indeed,

Cohen’s own explanations for the ADC communications inherently reflect mutual expectations about how the companies would approach buying group customers. At trial, Cohen testified he shared his customer bidding strategy with his competitor because he did not want his competitor to think Benco “was trying to head-fake them.” (CCFF ¶ 1076; Cohen, Tr. 723). Cohen’s testimony that he did not want his competitor to think Benco was trying to “head-fake” Schein indicates mutual expectations and that Cohen had a sense of obligation to be truthful to his competitor about bidding on buying groups. Moreover, Cohen previously testified under oath that informing Sullivan of Benco’s decision to bid was counter to his rational self-interest: “In fact, there’s a counter-business reason, which is, I probably, in saying that we’re going to bid, I probably, gave more information . . . than a rational business owner would give, which is, hey, we’re bidding on it.” (CCFF ¶ 1074; CX0301 (Cohen, IHT at 277); Cohen, Tr. 551-52). Finally, Cohen admitted at trial he shared Benco’s no buying group policy with Sullivan (CCFF ¶ 624).

513. Two days later, on March 27, 2017, Mr. Cohen sent Mr. Sullivan another text, saying that he “[d]id some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all practices. So it’s not a buying group, it’s a big group. We’re going to bid. Thanks.” (CX6027-029).

#### **Response to Proposed Finding No. 513**

Complaint Counsel has no specific response.

514. The first part of Mr. Cohen’s text message – whether ADC is or is not a buying group – is not competitively sensitive information; it simply reflects market research that Benco had performed. (CX6027-029).

#### **Response to Proposed Finding No. 514**

The Proposed Finding is misleading, incorrect, and not supported by the evidence. The Proposed Finding is misleading to the extent it suggests that Benco’s analysis of a potential customer, ADC, was not competitively sensitive. In providing such information to Sullivan, Cohen shared confidential and privileged information from its outside counsel retained by Benco to analyze

ADC's SEC filings and incorporation papers. (CCFF ¶¶ 1062-1065, 1068-1069). In Benco's Proposed Finding 487, Benco concedes that ADC was "the most difficult and longest evaluations of a group that Benco had ever conducted." (Cohen, Tr. 718-19; Ryan, Tr. 1199). In its Proposed Findings 490 and 491, Benco admits that the evaluation of ADC took one of its executives months to assess, (Cohen, Tr. 719; Ryan, Tr. 1199 ("Pat Ryan and Benco's Strategic Markets team spent months assessing ADC.")), and that Benco tried several sources to obtain information about ADC, (BFF ¶¶ 490-491), including hiring outside counsel to analyze ADC's SEC filings and incorporation papers. (BFF ¶ 525; CCFF ¶ 1062). Therefore, the evidence shows that it was resource-intensive, difficult, and costly for Benco to determine the structure of ADC; Benco's Proposed Finding that the information was "not competitively sensitive" is contrary to the weight of the evidence.

515. The last sentence of Mr. Cohen's text message – that Benco is going to bid – did reveal Benco's plans. However, it does not evince a pre-existing agreement between the two companies not to do business with buying groups. The text does not reference any pre-existing agreement and does not discuss any information about Schein's plans, policies, or practices. (CX6027-029).

#### **Response to Proposed Finding No. 515**

The Proposed Finding is misleading, incomplete, and not supported by the totality of the evidence. The Proposed Finding is misleading because makes sweeping arguments and conclusions of law which are neither supported by any cited evidence, nor are proper in a Proposed Finding of Fact. The Proposed Finding is misleading to the extent it suggests Benco did not enter into an agreement with Schein, as defined under Section 1 of the Sherman Act, to refuse to discount to buying groups. The competitors' communications about ADC, combined with the testimony, and the totality of Complaint Counsel's evidence, establishes that Benco and Schein reached an agreement. (CCFF ¶¶ 1025-1055; *see also* CCFF ¶¶ 661-1158, 1167-1198). Both Cohen and Sullivan admit the purpose of the March 25, 2013 telephone call was to discuss

ADC (CCFF ¶¶ 1034-1044; BFF ¶ 500; Cohen, Tr. 546, 968; CX0301 (Cohen, IHT at 271); Sullivan, Tr. 3946-3947; CX0311 (Sullivan, IHT at 261)). The notably responsive, friendly communications on the day of the call between Cohen and Sullivan refer to ADC and reflect frequent and prompt communications suggesting Sullivan was more than happy to reciprocate. (CCFF ¶¶ 1044-1047). To set up the call, Cohen texted Sullivan asking for a time to talk, and two minutes later Sullivan responded and set a time to talk that day. (CCFF ¶ 1030). Sullivan did call Cohen on March 25, 2013 and they spoke 8 minutes and 35 seconds. (CCFF ¶ 1032; BFF ¶ 498). Four minutes after that call, Sullivan reached out to Cohen to thank him for the ADC call. (CCFF ¶ 1033; CX6027 at 027 (Row 241) (“Hi Chuck. Thanks for the call.”); Sullivan, Tr. 3957). Next, in the evening of the same day, March 25, 2013, Cohen sent Sullivan a link to an article about ADC by text stating “Here’s a link to the press release we discussed.” (CX6027 at 028 (Row 243); CCFF ¶¶ 1045-1046). A few minutes later, Sullivan responded “Thanks for the follow up on that article.” (CX6027 at 028 (Row 244); Cohen, Tr. 546; Sullivan, Tr. 3957). The inter-firm communications between Schein and Benco on ADC culminate two days later with a text that Benco would bid precisely *because* ADC was “not a buying group.” (CCFF ¶ 1069; CX0196 at 010 (“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.”); Cohen, Tr. 549). There is simply no way to read that text in the absence of a mutual understanding between Cohen and Sullivan about a no buying group policy. Indeed, Cohen’s own explanations for the ADC communications inherently reflect mutual expectations about how the companies would approach buying group customers. At trial, Cohen testified he shared his customer bidding strategy with his competitor because he did not want his competitor to think Benco was “duplicitous” or “was trying to head-fake them.” (Cohen, Tr. 723; CCFF ¶ 1076). There can be no head-fake or duplicity without mutual expectations, in this case

that Benco had a no buying group policy and that it would not bid on buying groups. Moreover, Cohen previously testified under oath that informing Sullivan of Benco's decision to bid was counter to his rational self-interest: "In fact, there's a counter-business reason, which is, I probably, in saying that we're going to bid, I probably, gave more information . . . than a rational business owner would give, which is, hey, we're bidding on it." (CCFF ¶ 1074; CX0301 (Cohen, IHT at 277); Cohen, Tr. 551-52). Finally, Cohen admitted at trial he shared Benco's no buying group policy with Sullivan. (CCFF ¶ 624). For all these reasons, the Proposed Finding should be rejected.

The Proposed Finding is also misleading to the extent it suggests that Schein never gave Benco a basis to understand it had agreed not to work with buying groups. The evidence shows that Cohen informed Sullivan of Benco's no buying group policy. (CCFF ¶¶ 662-664; *see also* CX0301 (Cohen, IHT at 195-196) ("Q. Have you ever communicated with anyone at Schein about buying groups? A. I believe I have. Q. Can you tell me about those instances? A. . . **I believe I have, at different times,** communicated our policy on buying groups.") (emphasis added)). As a result of communications with Schein, Benco gained the understanding that Schein would adopt a policy against recognizing buying groups. (CCFF ¶¶ 680, 675-678). Cohen testified that, based on text messages with Sullivan, he understood that "the policy that Henry Schein had was that they do not recognize GPOs." (CCFF ¶ 676). Consistent with Benco's understanding, Schein adopted a no buying group strategy beginning in late 2011. (CCFF ¶¶ 705-870).

516. While Complaint Counsel asserts that Mr. Cohen's March 27, 2017 text message can be interpreted as an effort to seek clarity as to application of a pre-existing agreement to ADC, such an assertion would require the fact finder to first assume the existence of a conspiracy. The Court declines to make such an assumption.

#### **Response to Proposed Finding No. 516**

The Proposed Finding offers no citation to any evidence and must be rejected. In addition, the Proposed Finding is misleading and contrary to the weight of the evidence for the reasons set forth in the Response to (Benco's) Proposed Finding Number 515.

517. The Complaint also alleges that "Cohen and Sullivan [later] exchanged additional text messages and phone calls, culminating in a 5.5 minute phone call on April 3, 2013," and that "[f]ollowing these communications, both Schein and Benco changed course and submitted a bid for ADC." (Complaint ¶ 47; see also CX6027). Complaint Counsel asserts that such communications support an inference that Schein and Benco reached an unlawful agreement. The Court disagrees.

### **Response to Proposed Finding No. 517**

The Proposed Finding that "The Court disagrees" is a conclusion which is not supported by any evidence and should be rejected. Further, the Proposed Finding is misleading to the extent it suggests Benco did not enter into an agreement with Schein, as defined under Section 1 of the Sherman Act, to refuse to discount to buying groups. The competitors' communications about ADC, combined with the testimony, and the totality of Complaint Counsel's evidence, establishes that Benco and Schein reached an agreement. (CCFF ¶¶ 1025-1055; *see also* CCFF ¶¶ 661-1158, 1167-1198). The communication following the March 25, 2013 call indicated Sullivan's approval of their discussion. (CCFF ¶ CX6027 ("Hi Chuck. Thanks for the call. Yes, I am good with the terms we discussed and I look forward to joining Team Benco!")); Sullivan, Tr. 3956 ("Q: Even though you say you viewed what Chuck Cohen did as crazy and something you would never do, you sent Chuck Cohen a joke about the call a minute later. A: That's correct. Q: And even though you say you told Chuck Cohen to stop communicating with you about this, he, in fact, sent you even more information about Atlantic Dental Care later that same day, right? A: He did."), 3956-3957 (Sullivan acknowledging that Cohen texted him a link "to the press release we discussed," an article about Atlantic Dental Care)). Following the March 25, 2013 call, Sullivan attempted to call Cohen on March 27, 2013 and April 3, 2013. (CCFF ¶ 1051; CX6027



at 028 (Row 247), 029 (Row 250), 029 (Row 255)). Subsequent to these conversations, both Schein and Benco bid on ADC, and Benco won. (CCFF ¶¶ 1080, 1088). Sullivan’s internal emails acknowledge, “Our first reaction to [ADC] was it was simply a buying group and we were going to walk away,” but following communications with Benco on March 25, 2013 and March 27, 2013, Schein decided to bid. (CCFF ¶ 1097). Complaint Counsel has no specific response to the remainder of this Proposed Finding.

518. Mr. Sullivan placed a phone call to Mr. Cohen before receiving Mr. Cohen’s text message that said Benco had determined ADC was not a buying group and that it was going to bid for the business. (CX 6027-028).

#### **Response to Proposed Finding No. 518**

The Proposed Finding is misleading and incomplete. Sullivan initiated more than one communication to Cohen in the time frame Schein was evaluating ADC and following Cohen’s messages about ADC. (CCFF ¶¶ 1079-1080). Following the receipt of Cohen’s March 27, 2013 text message regarding bidding on ADC, Sullivan attempted to reach Cohen over the phone but was unable to do so. (CCFF ¶ 1080; Sullivan, Tr. 3959; CX6027 at 029 (Row 250)). After failing to connect with Cohen, the very next call Sullivan made was to Michael Porro on March 27, 2013, the zone manager where ADC was located. (CCFF ¶ 1082; Sullivan, Tr. 3968 (“Q. And when you didn’t get through to Chuck Cohen, the very next call that you made at the time, on March 27<sup>th</sup>, was to Mr. Porro, the zone manager in charge of ADC, right? A. Yes.”)). He then informed Porro and other Schein executives that Schein should bid on ADC. (CCFF ¶¶ 1084-1086; CX2054 at 001). Following a conversation with Sullivan, Porro wrote in an email, “[t]he thinking is that Benco . . . will put in a bid.” (CCFF ¶ 1086). Sullivan also attempted to reach Cohen again on April 3, 2013. (CCFF ¶ 1080; CX6027 at 029 (Row 255)).

519. Mr. Sullivan’s April 3, 2013 call was the first time Mr. Sullivan and Mr. Cohen actually connected after playing phone tag. As such, the evidence does not support an inference

that the purpose of the April 3, 2013 call was to discuss express assent to Benco's plan to bid for ADC. (CX6027-028).

**Response to Proposed Finding No. 519**

Complaint Counsel objects to the Proposed Finding as inaccurate, misleading, and unsupported by the evidence cited. The Proposed Finding cites to a single page of CX6027 which is Complaint Counsel's communications summary exhibit. While this citation supports a finding that Sullivan did call Cohen on April 3, 2013, it offers no support for the remainder of this Proposed Finding of Fact because that the call and attempted calls do support a strong inference that the purpose of the April 3, 2013 call was to express assent to Benco's assessment and plan to bid for ADC. (CCFF ¶¶ 1088-1090). Further, the Proposed Finding is misleading and without any basis for the suggestion that Sullivan's call to Cohen on April 3, 2013 was not related to either party's plan to bid for ADC. Schein did not bid for ADC until after the April 3, 2013 call. (See CCFF ¶ 1094 (Schein sends ADC a proposal on April 8, 2013)).

520. The record evidence does not indicate any further communications between Mr. Cohen and Mr. Sullivan about any customer or any buying group following the April 3, 2013 call. (CX6027).

**Response to Proposed Finding No. 520**

The Proposed Finding is both incomplete and misleading. The Proposed Finding is incomplete because it fails to include Cohen's communication with Sullivan in 2014 when the Texas Dental Association started a buying group program, TDA Perks. Cohen and Sullivan saw TDA as a buying group. (CCFF ¶¶ 1111-1112). On April 16, 2014, Cohen sent an article to Sullivan (and Guggenheim) about the TDA buying group explaining it would level the playing field between dentists and corporate dental practices by leveraging group buying power. (CCFF ¶¶ 1133-1134). Cohen and Sullivan spoke for nine minutes that day. (CCFF ¶ 1135). In addition, the Proposed Finding is misleading and incomplete because on September 16, 2013, in response to a message

about Burkhart’s refusal to stop dealing with buying groups, Ryan told Cohen to “make sure you tell Tim [Sullivan] and Paul [Guggenheim] to hold their positions as we are[.]” (CCFF ¶¶ 1103-1105). Shortly thereafter, Cohen, Guggenhiem, Sullivan, and Reece were all at the same Dental Trade Alliance Meeting in October of 2013. (CCFF ¶¶ 364-366, 1242-1245). The evidence shows that Cohen spoke with his competitors at that meeting about buying groups—in fact, Cohen himself invited Burkahrt not to work with buying groups again at this Dental Trade Association Meeting in October 2013. (CCFF ¶¶ 1238-1241). Taken together, the contemporaneous email reflecting that Benco planned to tell Sullivan and Guugenheim to “hold their positions” on buying groups, (CX0023 at 001), followed directly by the opportunity when Sullivan, Guggenheim, and Cohen all attended the same DTA meeting, (CCFF ¶¶ 364, 366, 1243), plus Cohen’s renewed invitation to Burkhart to stop discounting to buying groups at the same meeting, (CCFF ¶¶ 1238-1241), is circumstantial evidence that Cohen sought to reaffirm the no buying group positions with Guggenheim and Sullivan at the DTA meeting in 2013. (*See* CCFF ¶¶ 1103-1108). Moreover, Benco’s Ryan and Schein’s Foley communicated in October 2013 about buying groups when Ryan confronted Foley regarding the buying group, Smile Source. Ryan spoke to his counterpart Foley at Schein for 18 minutes and, according to Foley, Ryan informed him that Benco would not bid on Smile Source and wanted to know if Schein would bid. (CCFF ¶¶ 1010-1013). Ryan reported the conversation to Cohen saying that he had “talked specifically about” Smile Source with Foley. (CCFF ¶ 1014).

521. Complaint Counsel also failed to show that Benco changed course and submitted a bid for ADC following the April 3, 2013 call. Mr. Cohen’s March 27, 2013 text message states that Benco was going to submit a bid. (CX6027-029). It was a declarative statement, and Mr. Cohen neither asked for Mr. Sullivan’s assent nor suggested that Benco’s decision was contingent on Mr. Sullivan’s views. Thus, Benco cannot be said to have changed course following the April 3, 2013 call.

#### **Response to Proposed Finding No. 521**

The Proposed Finding is misleading and incomplete. The text message and the communications relating to ADC show that *Schein* changed its conduct by submitting a bid for ADC after learning from Cohen that Benco would bid. (CCFF ¶¶ 1082-1087). The Proposed Finding is incomplete because it does not include the entire text message from Cohen which shows that Benco was updating Schein about a future change in its own conduct with regard to ADC and shows an understanding that Benco would not bid. The text, (CX6027-029 (“[d]id some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all practices. So it’s not a buying group, it’s a big group. We’re going to bid. Thanks.”)), shows Benco is changing course precisely because ADC is *not* a buying group. (CCFF ¶¶ 1068-1071; *see also* CCFF ¶¶ 1072-1074 (Cohen testified it was against Benco’s business interest to share the future bidding strategy with Sullivan)). This text message inherently reflects a prior understanding or meeting of the minds between Cohen and Sullivan, as the message about Benco’s new course of action in bidding for ADC, does not make sense without a prior understanding that Benco was not going to bid. (CCFF ¶¶ 1034-1036 (Cohen and Sullivan admit ADC was discussed on March 25, 2013); *see* CCFF ¶¶ 1040, 1043; Sullivan, Tr. 3948 (“Q. So you testified that Chuck Cohen somehow, at some point, told you that they were not going to bid on Atlantic Dental Care, right? A. That was my recollection at the time.”)).

522. The evidence also does not support an inference that Mr. Sullivan and Mr. Cohen reached an agreement during the March 25, 2013 or April 3, 2015 phone calls. Rather, the evidence shows that that Mr. Cohen inquired about ADC and that Mr. Sullivan revealed no information about Schein’s policies, practices, or plans relating to ADC or buying groups generally.

### **Response to Proposed Finding No. 522**

The Proposed Finding is unsupported by evidence and at odds with the weight of the evidence in this matter. The Proposed Finding offers no citations and is a sweeping conclusion of law, it should therefore be rejected. The Proposed Finding is misleading to the extent it suggests Benco

did not enter into an agreement with Schein, as defined under Section 1 of the Sherman Act, to refuse to discount to buying groups. The competitors' communications about ADC, combined with the testimony, and the totality of Complaint Counsel's evidence, establishes that Benco and Schein reached an agreement. (CCFF ¶¶ 1025-1055; *see also* CCFF ¶¶ 661-1158, 1167-1198). The Proposed Finding is also contrary to the weight of the evidence to the extent that it suggest that Cohen and Sullivan's communications regarding ADC are not indicative of an agreement. Both Cohen and Sullivan admit the call's purpose was to discuss ADC (BFF ¶ 500; Cohen, Tr. 546, 968; CX0301 (Cohen, IHT at 271); (Sullivan, Tr. 3946-3947; CX0311 (Sullivan, IHT at 261)). In prior sworn testimony, Sullivan testified that Cohen informed him on the March 25, 2013 call that Benco did not plan to bid on the ADC group. (CCFF ¶¶ 1038-1043; *but see* Sullivan, Tr. 3948 (acknowledging that his testimony changed)). Cohen testified that he and Sullivan were "exchanging information" about whether ADC was a buying group or a DSO. (CCFF ¶¶ 1036-1037). Cohen admitted at trial he was seeking "facts, knowledge, conjecture" from Sullivan to "help us form an opinion and a ruling on how we would handle that account." (CCFF ¶ 1037; Cohen, Tr. 720). The Proposed Finding is also misleading and contrary to the weight of the evidence because the communications on the day of the call between Cohen and Sullivan refer to ADC and reflect frequent and prompt communications from Sullivan to Cohen. (CCFF ¶¶ 1044-1047). To set up the call, Cohen texted Sullivan asking for a time to talk, and two minutes later Sullivan responded and set a time to talk that day. (CCFF ¶ 1030). Sullivan called Cohen on March 25, 2013 and they spoke 8 minutes and 35 seconds. (CCFF ¶ 1032, BFF ¶ 498). Four minutes after that call, Sullivan reached out to Cohen to thank him for the ADC call. (CCFF ¶ 1033; CX6027 at 027 (Row 241) ("Hi Chuck. Thanks for the call."); Sullivan, Tr. 3957). Next, in the evening of the same day, March 25, 2013, Cohen sent Sullivan a link to an article about ADC by text stating "Here's a link to the press release we discussed." (CX6027 at

028 (Row 243); CCFF ¶¶ 1045-1046). A few minutes later, Sullivan responds “Thanks for the follow up on that article.” (CCFF ¶¶ 1033, 1051, 1058; CX6027 at 028 (Row 244); Cohen, Tr. 546; Sullivan, Tr. 3957). Sullivan testified that at this time he wanted to be cordial and treat Cohen with respect. (BFF ¶ 508; Sullivan Tr. 4260-4261). The inter-firm communications between Schein and Benco on ADC culminate two days later with a text that Benco would bid precisely *because* ADC was “not a buying group.” (CCFF ¶ 1069; CX0196 at 010 (“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.”); Cohen, Tr. 549). There is simply no way to read that text in the absence of an mutual understanding between Cohen and Sullivan about a no buying group policy. Indeed, Cohen’s own explanations for the ADC communications inherently reflect mutual expectations about how the companies would approach buying group customers. At trial, Cohen testified he shared his customer bidding strategy with his competitor because he did not want his competitor to think Benco “was trying to head-fake them.” (CCFF ¶ 1076; Cohen, Tr. 723). Cohen’s testimony that he did not want his competitor to think Benco was trying to “head-fake” Schein indicates mutual expectations and that Cohen had a sense of obligation to be truthful to his competitor about bidding on buying groups. Finally, Cohen admitted at trial he shared Benco’s no buying group policy with Sullivan. (CCFF ¶ 624).

523. Accordingly, the evidence does not support an inference of a conspiracy among Respondents.

### **Response to Proposed Finding No. 523**

The Proposed Finding is unsupported by evidence and at odds with the weight of the evidence in this matter. The Proposed Finding offers no citations and is a sweeping conclusion of law, it should therefore be rejected. Further, the Proposed Finding is absolutely wrong that no evidence

supports an inference of conspiracy among respondents. (*See* CC Post Tr. Br. and Reply Br.). The inter-firm communications in conjunction with the totality of the evidence in this case, establishes a meeting of the minds among Respondents by a preponderance of the evidence. (CCFF ¶¶ 1-2037).

#### 4. **Benco Independently Bid For – And Won – The Business of ADC**

524. Benco made its own independent decision to bid for the business of ADC. (Cohen, Tr. 724).

#### **Response to Proposed Finding No. 524**

The Proposed Finding is incomplete and against the weight of the evidence. The Proposed Finding is incomplete because it omits Respondent Benco's own admissions that preclude a finding that Benco took an independent approach to its decision to bid for the business of ADC. Cohen testified that he contacted Schein to determine "how [Benco] would handle that account." (CCFF ¶¶ 1023-1032, 1037). Finally, that Cohen followed up with Schein after deciding it would bid for ADC. Had Benco's evaluation been independent there was no reason for Cohen to provide updated information to Schein. (CCFF ¶¶ 1073-1078). The Proposed Finding is also misleading to the extent it suggests Benco did not enter into an agreement with Schein, as defined under Section 1 of the Sherman Act, to refuse to discount to buying groups. The competitors' communications about ADC, combined with the testimony, and the totality of Complaint Counsel's evidence, establishes that Benco and Schein reached an agreement. (CCFF ¶¶ 1025-1055; *see also* CCFF ¶¶ 661-1158, 1167-1198).

525. On March 27, 2013, after speaking with outside counsel, Mr. Ryan was able to determine that ADC had common ownership. Therefore, under Benco's policy, ADC was a single customer and Benco made the decision to bid on ADC. (Ryan, Tr. 1201-1202).

#### **Response to Proposed Finding No. 525**

The Proposed Finding is misleading to the extent it characterized Ryan's determination that "ADC was a single customer" so Benco bid, rather the evidence shows Ryan's determination

was about whether ADC was a *buying group*. Indeed, that is just how Cohen put it in his email to Schein “So [ADC is] not a buying group, it’s a big group. We’re going to bid.” (CCFF ¶ 1069 (CX0196)).

526. Benco won the business of ADC and ADC has remained a customer of Benco from that time through the present. (Cohen, Tr. 724).

**Response to Proposed Finding No. 526**

Complaint Counsel has no specific response.

527. Benco considers ADC a DSO because it has common ownership and control of its member dental practices. (Cohen, Tr. 724; Ryan, Tr. 1202).

**Response to Proposed Finding No. 527**

The Proposed Finding is not supported by the evidence cited. The citation to Cohen’s testimony does not include a basis for, or even whether Benco considers of ADC as a DSO. (Cohen, Tr. 724). Similarly, at the citation to Ryan’s testimony does not include testimony to support the proffered fact, that is that Benco considers ADC and DSO for a particular reason. (Ryan, Tr. 1202).

528. During the five-plus years that ADC has been a Benco customer, the group has performed “excellently.” ADC has delivered on its volume commitments to Benco and purchases almost all of its dental supplies from Benco. (Cohen, Tr. 724-25; Ryan, Tr. 1202).

**Response to Proposed Finding No. 528**

Complaint Counsel has no specific response, except to note Benco’s only experience with a buying group was also a success, by its own account. (CCFF ¶¶ 1385-1887).

529. Consistent with DSOs, Benco’s conversion rate with ADC has been 90% plus. Conversion rate means the percentage of customers within a group that are converted to Benco customers. Conversion rate is a measure of the level of compliance exhibited by a DSO or Large Group. (Ryan, Tr. 1203-1205).

**Response to Proposed Finding No. 529**

The Proposed Finding is misleading and not supported by the evidence. The Proposed Finding is not supported by the citation because nowhere in the Ryan transcript pages 1203-1205 are the



words DSO or Large Group mentioned. Complaint Counsel objects to the phrase “Large Group” as vague. As those words are not in the cited evidence it is unclear what the Proposed Finding indicates. The Proposed Finding is misleading because the cited testimony Ryan gave on conversion rate was not tied a particular type of customer. Complaint Counsel has no specific response to the remaining portion of the Proposed Finding that the DSO ADC had less than 100% compliance.

530. ADC’s common ownership allowed it to drive compliance among its member practices and has converted new customers to Benco. These new customers were previously Schein and Patterson customers. (Cohen, Tr. 726-28; Ryan, Tr. 1202).

**Response to Proposed Finding No. 530**

The Proposed Finding is not supported by the cited evidence. Nowhere in the cited evidence did Ryan or Cohen testify that ADC customers were converted from Schein. (Cohen, Tr. 726-728; Ryan 1202). Further, in the cited testimony, the witnesses do not assert that common ownership was the basis for compliance. (Cohen, Tr. 726-728; Ryan 1202).

531. ADC’s performance validates Benco’s determination that ADC was, in fact, a DSO, as ADC’s performance is consistent with a DSO and inconsistent with a buying group. (Cohen, Tr. 726-27; Ryan, Tr. 120-1203).

**Response to Proposed Finding No. 531**

The Proposed Finding is misleading because Respondent Benco argues it has not worked with buying groups and therefore any response to the suggested, leading, question from its own counsel, does not have a basis in fact as to whether ADC performed more like a DSO than a buying group. Even experience with one buying group, EDA, does not form a basis for a persuasive comparison between the performance of DSOs versus buying groups. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CCFF ¶¶ 182-184, 255 1246-1247).

532. It was worth the effort for Benco to spend the time to properly evaluate ADC under Benco's policy and it was in Benco's unilateral economic interest to have taken the time necessary, gathered whatever information was available, to have properly evaluated ADC so that Benco could add ADC to its significant portfolio of DSO accounts. (Cohen, Tr. 726-27; RX1127-500; Ryan, Tr. 1202-1203).

### **Response to Proposed Finding No. 532**

The Proposed Finding is incomplete and misleading. The Proposed Fact is misleading to the extent it suggests that a determination of whether or not ADC was a buying group was in Benco's "unilateral economic interest." A categorical ban on buying groups was not in Benco's unilateral economic interest as buying groups are diverse, (Cohen, Tr. 682; Ryan, Tr. 1169), and [REDACTED] (CCFF ¶¶ 182-184, 255 1246-1247). Benco itself saw buying groups as both an opportunity and a threat. (CX0068 at 18 (June 2014 presentation by Cohen titled 2015 Strategic Planning Session describing the threat and the opportunity of "Buying Clubs gaining traction practices don't have to sell to leverage buying power.")). Additionally, when Benco worked with the buying group EDA, it saw success, and continues to work with the buying group, presumably because it sees it as in its economic interest. (BFF ¶¶ 264-265, 250 (arguing that working with the EDA buying group was in Benco's "economic interest.")).

Complaint Counsel objects to the word "properly" used twice in this Proposed Finding to describe the evaluation of ADC which involved horizontal communications with Benco's closest competitors, where Benco sought and disclosed competitively sensitive information it gathered at great expense, including that it would bid on potential customer. (CCFF ¶¶ 1034-1037, 1044-1049, 1069-1070). Even Cohen described the process as counter-to a business rationale. (CCFF ¶¶ 1077, 1074-1075). Complaint Counsel also objects to the Proposed Finding to the extent it suggests gathering "whatever information was available" was proper. Exchanging strategic

information on a potential customer with competitors to determine whether to bid, (CCFF ¶ 1036), is an improper method under the antitrust laws.

**5. Patterson’s June 6, 2013 E-Mail Is Not Evidence of Any Alleged Conspiracy Regarding ADC**

533. On June 6, 2013, Guggenheim sent an e-mail to Cohen concerning ADC. (CX0062). Guggenheim wrote his e-mail on top of the February 8, 2013 e-mail from Cohen. (CX0062).

**Response to Proposed Finding No. 533**

Complaint Counsel has no specific response.

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

**Response to Proposed Finding No. 534**

Complaint Counsel has no specific response.

535. Guggenheim testified that he had sent the e-mail to gain business intelligence. (CX0314 (Guggenheim, IHT at 299, 300–03)). He did this because he had been approached by the Patterson local branch manager, Devon Nease, at the end of May 2013 concerning Benco winning the ADC bid. (Guggenheim, Tr. 1622; CX0094 at 1). Guggenheim’s purpose was to see what he “could learn in terms of field intelligence about what we might be missing here.” (CX0314 (Guggenheim, IHT at 285)). Guggenheim was attempting to gain information that would better allow Nease to compete for this business. (CX0314 (Guggenheim, IHT at 287) (“I wanted to see what intelligence I could find out to help Devon get back in there and compete.”)).

**Response to Proposed Finding No. 535**

The Proposed Finding is misleading and incomplete because it cites testimony that it taken out of context. In addition, the Proposed Finding relies on testimony that is not credible and should be disregarded. Although the Proposed Finding cites Guggenheim’s investigational hearing testimony that he purportedly sent the email to Cohen to “gain market intelligence,” (CX0314 (Guggenheim, IHT at 299)), Guggenheim very next statement is that he could not think of any reason why he was asking about Benco’s policy with respect to selling to buying groups.

(CX0314 (Guggenheim, IHT at 299) (“Q. Can you think of any reason why you would want to know whether Benco still has – still had a policy against selling to buying groups? A. No.”)). Guggenheim’s testimony that he contacted his competitor to gain “market intelligence” that would allow Nease compete for business is also contrary to the question he actually asked in his email. Guggenheim’s email to Cohen asks only one question: “I’m wondering if your position on buying groups is still as you articulated back in February.” (CX0062 at 002). The document shows that Guggenheim was not seeking information about anything other than Benco’s buying group policy. (CX0062 at 002). The record also shows that Guggenheim did not provide a credible explanation about what type of information he was purportedly seeking that would help Nease complete. He testified that an example of what he was seeking was information about ADC’s “structure.” (CX0314 (Guggenheim, IHT at 288) (“Q. Can you give me one example of some information that would help you understand more about the account? A. Well, an example would be the structure of the business. Q. Structure of Atlantic Dental Care? A. Yeah.”)). 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 when Guggenheim was seeking information about ADC’s structure—a fact that could more easily be obtained from ADC itself. In fact, Guggenheim admitted that Patterson made no effort to obtain information about ADC’s structure from ADC. (CX0314 (Guggenheim, IHT at 290) (“Q. And did you or anyone else within Patterson reach out to Atlantic Dental Care to understand more about their structure after this e-mail? A. I didn’t. Q. Do you know if anyone else did? A. I’m not aware.”)). Thus, Guggenheim has offered no credible reason for his email to Cohen other than the reason identified on the face of the document – to ask if Benco was deviating from the “position on buying groups” that Benco had “articulated back in February.” (CX0062 at 002). Furthermore, even assuming Guggenheim sought to “gain business

intelligence” from Benco that would help Patterson to compete for ADC, that also proves coordination; if Patterson was acting independently, there would be no need to check with Benco. Indeed, after Cohen informed Guggenheim that ADC was not an entity subject to the no buying group policy, Guggenheim directed his team to “aggressively get after [ADC’s] business and compete.” (CCFF ¶ 586). Because this Proposed Finding is contrary to the weight of the evidence and lacks credibility, it should be disregarded.

536. Specifically, Chuck Cohen testified that Paul Guggenheim asked him if Benco’s position on buying groups was the same as it had been in February 2013. (Cohen, Tr. 733).

**Response to Proposed Finding No. 536**

Complaint Counsel has no specific response. Complaint Counsel would note the Proposed Finding evidences communications and a specific common understanding between the executives in February 2013. (BFF ¶ 534; CX0095 at 001 (“I’m wondering if your position on buying groups is still as you articulated back in February?”); CCFF ¶¶ 570, 573; CX0062; Cohen, Tr. 733).

537. Chuck Cohen testified that it was an easy question to answer because the ADC contract had already been awarded to Benco, and there was no harm in sharing Benco’s thinking regarding the ownership structure of ADC. (Cohen, Tr. 733-35).

**Response to Proposed Finding No. 537**

The Proposed Finding is misleading and incomplete. First, it omits that Benco provided Patterson, its close competitor, with a detailed analysis of ADC, a large customer. Cohen’s elaborate response to this question detailed an analysis of how ADC was not a buying group. (CCFF ¶ 574). Cohen’s response provided multiple reasons why ADC was not a buying group, including 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 of the offices Atlantic Dental Care”; and the company had a board of directors

“made up of some of the stakeholders who makes the decisions.” (CCFF ¶ 576; CX0062 at 001; Cohen, Tr. 562-563 (“Q. And then you went on to explain why you believed ADC was not a buying group. A. Yes. . . . What you were explaining to him was that the individual practices of ADC had actually merged together; is that what you were saying? A. Yes. Q. And that meant they weren’t a buying group, but they were a corporate or big group. A. DSO. Yes.”)). Benco also committed to adhere to the same policy in the future. Specifically, that Cohen that would “continue monitoring the process to ensure that ADC delivers on their commitment to us,” including ensuring that ADC was not a buying group. (CCFF ¶ 577; Cohen, Tr. 563-564; CX0062 at 001). Finally, by common sense, a contract with a customer is not permanent and sharing details of your business strategy on a particular customer at the request of one of your closest competitors, is not a benign communication. In this case, Benco acknowledges that assessing ADC was “the most difficult and longest evaluations of a group that Benco had ever conducted.” (BFF ¶ 487; Cohen, Tr. 718-19; Ryan, Tr. 1199). Benco describes the length of the evaluation of ADC: “Pat Ryan and Benco’s Strategic Markets team spent months assessing ADC.” and that Benco tried several sources to obtain information about ADC including outside counsel. (Cohen, Tr. 719; Ryan, Tr. 1199; BFF ¶¶ 490-491, 525; CCFF ¶ 1062). The weight of the evidence shows that it was against Benco’s unilateral interest to share such resource-intensive information with a top competitor. For these reasons, the Proposed Finding should be rejected.

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

#### **Response to Proposed Finding No. 538**

Complaint Counsel has no specific response to this Proposed Finding.

539. Guggenheim then responded with a polite reply. (CX3301) (“Sounds good Chuck. Just wanted to clarify where guys stand.”).

**Response to Proposed Finding No. 539**

Complaint Counsel objects to the term “polite reply” to label the horizontal communication between the executives of two of the largest dental distributors in regards to actual (Benco’s) and potential clients (Patterson’s). With regard to buying groups, Guggenheim’s reply explicitly states he wanted to know where his competitor stands. (CX3301).

540. Both Guggenheim and Cohen deny that this e-mail constituted enforcement of an agreement not to work with buying groups. (Guggenheim, Tr. 1871-72 (“Q. And again, just so the record is crystal clear on this, by this e-mail, did you believe that you were enforcing any agreement between Patterson and Benco not to do business with buying groups? A. Absolutely not. Q. And by this e-mail, did you intend to enforce any such agreement? A. No.”)); (Cohen, Tr. 918–19 (“Q. Is there a secret code that you and Mr. Guggenheim worked out where one of these terms means enforce or enforcement? A. No. Q. Was there ever -- when you were a kid, did you ever use lemon juice to create invisible ink and then you put it over a candle or something and it appears? Did you ever do when you were a kid? A. Yes. Q. Is there -- was there lemon juice with a secret code that’s invisible to the rest of us that has ‘enforce’ or ‘enforcement’ in there? A. No. Q. I mean, you’d pretty much have to make that up if you were interpreting this to contain the word “enforce” or “enforcement,” wouldn’t you, sir? A. The answer is no, and Paul ran at that point a much larger operation than Benco did. I’m not in the business of telling him how to run his business. It would not be something I would say even in jest. Q. All right. And just so we’re clear, you’d pretty much have to make it up to think that this e-mail thread between you and Mr. Guggenheim somehow had the word “enforce” or “enforcement” in it, wouldn’t you? A. I would think so.”)).

**Response to Proposed Finding No. 540**

Complaint Counsel objects to this finding as misleading, incomplete, and, in part, irrelevant. The Proposed Finding is misleading to the extent it suggests that witness denials about the characterization of enforcement communications, preclude a finding that the communications were indeed enforcement of an agreement not to work with buying groups. In fact, they provide strong and clear evidence of that Patterson was monitoring the agreement and that it confronted Benco when it suspected cheating. (*See* CCFF ¶¶ 564-573). Among the other evidence in this case, the plain reading of the email exchange between Cohen and Guggenheim on ADC show a meeting of the minds and enforcement of the terms of that agreement. (CCFF ¶¶ 565, 568-570). Once Guggenheim became aware that Benco was working with a potential buying group,

Guggenheim reached out to Cohen and asked if Benco’s “position on buying groups is still as you articulated back in February?” (BFF ¶¶ 533-534 (quoting CX0062)). As Cohen acknowledged, this shows that Cohen had shared Benco’s no buying group policy with Patterson in February 2013. (BFF ¶ 536; CCFF ¶¶ 572-573). Cohen’s elaborate response to this question from one of his most significant competitors hinged on an analysis of how ADC was not a buying group. (CCFF ¶ 574). Cohen’s response provided multiple reasons why ADC was not a buying group, including 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 of the offices Atlantic Dental Care”; and the company had a board of directors “made up of some of the stakeholders who makes the decisions.” (CX0062 at 001; Cohen, Tr. 562-563 (“Q. And then you went on to explain why you believed ADC was not a buying group. A. Yes. . . . What you were explaining to him was that the individual practices of ADC had actually merged together; is that what you were saying? A. Yes. Q. And that meant they weren’t a buying group, but they were a corporate or big group. A. DSO. Yes.”)). But the response to Guggenheim’s questions about Benco’s deviation from its articulated no buying group policy also included assurance of future compliance. Specifically, that Cohen that would “continue monitoring the process to ensure that ADC delivers on their commitment to us,” including ensuring that ADC was not a buying group. (Cohen, Tr. 563-564; CX0062 at 001). The Proposed Finding is misleading to the extent it suggests that something more than the plain language of the exchanges is required to find an enforcement of an agreement not to work with buying groups. (See BFF ¶ 540 (“Q. Is there a secret code. . .”); Cohen, Tr. 918-919). Similarly, the Proposed Finding appears to focus on whether the word “enforcement” is in the messages in question, that is irrelevant and use of the language “enforcement” would not be expected, nor does it preclude a finding of enforcement. (See BFF ¶ 540).



The Proposed Finding is, moreover, contrary to the weight of the evidence. The weight of the evidence shows that, after Guggenheim and Cohen exchanged emails in early February 2013, and Guggenheim provided that assurance that “we feel the same way about these,” (CX0090 at 001), Patterson executives directed their teams not to do business with ADC expressly because they believed it was a buying group. When Fruehauf (Nease’s boss) communicated to Misiak that ADC was seeking a bid, Misiak, in a February 27, 2013 response said:

These co op situations can be very challenging so stay connected. You may have to help [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 [not] participate with group purchasing organizations. Continue to help Devon stay out of this with grace.

(CX0093 at 001; CCFF ¶¶ 544-546). Misiak also explained that Patterson’s largest competitors,

Henry Schein and Benco, refused buying groups as well: “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); Misiak, Tr. 1356-1358).

The evidence then shows that in June 2013, when Patterson learned that Benco had, in fact, bid on ADC, Guggenheim wrote to Cohen, first finding and responding to a four month-old email describing Benco’s no buying group policy, and asked specifically about that policy. (CX0062 at 002). Guggenheim asked Cohen to “shed some light on your business agreement with Atlantic Dental Care” and added, “I’m wondering if your position on buying groups is still as you articulated back in February.” (CX0062 at 002). Whether or not Guggenheim’s June 6, 2013 email to Cohen was enforcing an agreement, it is clear evidence of Guggenheim’s understanding of the agreement. Cohen’s response, moreover, provides additional evidence to corroborate that Benco had an understanding with Patterson about buying groups. Cohen tells his competitor about Benco’s reasons for doing business with his customer ADC, and explains, “we’re going to continue monitoring the process to ensure that ADC delivers on their commitment to us [to be a

merged entity].” (CX0062 at 001). In case Cohen has not provided enough information about ADC to his competitor, Cohen adds, “Happy to discuss in more detail, if you’d like.” (CX0062 at 001). In sum, the Proposed Finding is contrary to the weight of the evidence and should be disregarded.

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

#### **Response to Proposed Finding No. 541**

The Proposed Finding is misleading and incomplete. Notably, eight days after this email exchange regarding ADC, on June 18, 2013, there were two calls between Cohen and Sullivan, and two calls between Cohen and Guggenheim. (CX6027 at 030 (Rows, 261-264)). And no less than two weeks after the email exchange, Guggenheim called Cohen and left a message. While Guggenheim does not recall the contents of his message, the transcribed record of the message shows that Guggenheim referenced a “policy” in that message. (CX6027 at 032; Guggenheim, Dep. at 254 (testifying that he does not know what he meant by “Pretty firm on that policy.”)). The Proposed Finding is also misleading to the extent that it suggests Guggenheim’s denial that there was not a buying group conspiracy precludes such a finding. Guggenheim’s characterization is at odds with the totality of evidence in this case. (*See* Complaint Counsel’s Post Tr. Brief and Reply Brief; CCFF ¶¶ 564-573). Finally, the weight of the evidence shows that, after Guggenheim and Cohen exchanged emails about *buying groups* in early February 2013, and Guggenheim provided that assurance that “we feel the same way about these,” (CX0090 at 001), Patterson executives directed their teams not to do business with ADC expressly because they believed it was a buying group. When Fruehauf (Nease’s boss)

communicated to Misiak that ADC was seeking a bid, Misiak, in a February 27, 2013 response said:

These co op situations can be very challenging so stay connected. You may have to help [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 [not] participate with group purchasing organizations. Continue to help Devon stay out of this with grace.

(CX0093 at 001; CCF 544-546). Misiak also explained that Patterson's largest competitors,

Henry Schein and Benco, refused buying groups as well: "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); Misiak, Tr. 1356-1358).

The evidence then shows that in June 2013, when Patterson learned that Benco had, in fact, bid

on ADC, Guggenheim wrote to Cohen, first finding and replying to a four month-old email

describing Benco's no buying group policy, and asked specifically about that policy. (CX0062 at

002). Guggenheim asked Cohen to "shed some light on your business agreement with Atlantic

Dental Care" and added, "I'm wondering if your position on buying groups is still as you

articulated back in February." (CX0062 at 002). Whether or not Guggenheim's June 6, 2013

email to Cohen was enforcing an agreement, it is clear evidence of Guggenheim's understanding

of the agreement. Cohen's response, moreover, provides additional evidence to corroborate that

Benco had an understanding with Patterson about buying groups. Cohen tells his competitor

about Benco's reasons for doing business with his customer ADC, and explains, "we're going to

continue monitoring the process to ensure that ADC delivers on their commitment to us [to be a

merged entity]." (CX0062 at 001). In case Cohen has not provided enough information about

ADC to his competitor, Cohen adds, "Happy to discuss in more detail, if you'd like." (CX0062 at

001). In sum, the Proposed Finding is contrary to the weight of the evidence and should be

disregarded.

542. Guggenheim did not change Patterson's business strategy following the June 2013 e-mail exchange with Cohen. (Guggenheim, Tr. 1697 ("Q. After that, did you change the company's strategy? A. No.")).

**Response to Proposed Finding No. 542**

The Proposed Finding is irrelevant. Patterson adopted a business strategy that it would not do business with buying groups after Guggenheim and Cohen exchanged emails in February 2013. Prior to February 2013, Patterson did not have a strategy regarding dealing with buying groups. (CX8023 (Guggenheim, Dep. at 134) (no company policy at time received Cohen's February 8, 2013 email, and Patterson "evaluated individually" each buying group); CX8023 (Guggenheim, Dep at 137) ("don't have . . . a uniform way to deal with [buying groups]"); McFadden, Tr. 2676 (Patterson did not have a policy regarding buying groups when McFadden was the Southeast Regional Manager from 2009 to 2013); *see also* CX8004 (McFadden, Dep. at 37-38) (McFadden was not aware of any Patterson corporate policy regarding buying groups); CCFF ¶¶ 498-499). By late February 2013, Patterson executives articulated their position with respect to buying groups: "These co op situations can be very challenging so stay connected. You may have to help [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 [not] participate with group purchasing organizations." (CX0093 at 001 (February 27, 2013 email from Misiak to Fruehauf); CCFF ¶¶ 543-546). The policy did not state that buying groups would be evaluated individually; rather, the statement from Patterson's VP of Sales applied to all "group purchasing organizations." As such, at the time of the June 2013 email exchange, Patterson was not doing business with buying groups. The fact that continued to reject buying groups after June 2013 is irrelevant to whether it had joined the conspiracy. The Proposed Finding of Fact is irrelevant and should be disregarded.

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

**Response to Proposed Finding No. 543**

The Proposed Finding only provides some of the cited paragraph of the Complaint. Complaint Paragraph 50 (referring to the June 2013 exchange of emails between Guggenheim and Cohen) reads: “Following this exchange, Guggenheim informed Patterson’s sales team to change course and pursue ADC’s business. Patterson ultimately competed for ADC’s business despite previously notifying ADC that it would not submit a bid.” (Compl. ¶ 50). Complaint Counsel notes that Guggenheim testified in accord with this allegation. (CCFF ¶ 587; Guggenheim, Tr. 1634).

544. But there is no evidence in the record that the ADC business was available for bid in June 2013, because Benco had **already won** ADC’s business in **May** 2013. (CX0094 at 1).

**Response to Proposed Finding No. 544**

The Proposed Finding is misleading and irrelevant. The Proposed Finding is misleading because the fact that Benco was working with ADC in June of 2013, does not mean that Patterson would not compete for the large customer, ADC. Respondents vigorously argue they competed for and took customers from each other. There is no evidence in the record that once a customer was working with one distributor the others would no longer compete for the business. Further, the Proposed Finding is misleading to the extent that it implies that Patterson did not seek to obtain the business of ADC once it learned from Cohen that ADC was not a buying group. Following the June 2013 communication with Cohen, (CX0062), Guggenheim directed Nease to “aggressively get after [ADC’s] business and compete.” (Guggenheim, Tr. 1634; CX0314 (Guggenheim, IHT at 303)). RX0095, a June 28, 2013 Benco email, further indicates that Patterson made some sort of bid for ADC’s business. (RX0095 at 00001 (Benco email stating

that the person they were working with at ADC “admitted that our proposal was better than Schein’s and Patterson’s.”)). The evidence in the record thus shows that Patterson became interested in the ADC account once it learned from Benco that ADC was not a buying group. The fact that Patterson did not win the business is irrelevant.

545. Indeed, Benco’s having **already won** ADC’s business was the reason for Guggenheim’s June 2013 e-mail. (CX0094 at 1).

**Response to Proposed Finding No. 545**

Complaint Counsel has no specific response, but would note that this finding appears to concede that Guggenheim emailed Benco over its work with a customer.

**VI. RESPONSES TO PROPOSED FINDINGS REGARDING “VERY FEW OF THE COMMUNICATIONS IDENTIFIED BY COMPLAINT COUNSEL, WERE RELATED TO BUYING GROUPS”**

**A. RESPONSES TO PROPOSED FINDINGS REGARDING “THE VAST MAJORITY OF COHEN AND SULLIVAN’S COMMUNICATIONS BETWEEN 2011 AND 2016 WERE ABOUT THE COMPETITIVE HIRING AGREEMENT BETWEEN BENCO AND SCHEIN”**

546. Complaint Counsel contends that Chuck Cohen had a large number of communications with Tim Sullivan during the time period at issue in this case. (CX6027).

**Response to Proposed Finding No. 546**

Complaint Counsel has no specific response.

547. The vast majority of communications between Chuck Cohen and Tim Sullivan between 2011 and 2016 were about the Competitive Hiring Agreement. (Sullivan, Tr. 4268).

**Response to Proposed Finding No. 547**

The Proposed Finding is factually inaccurate and contrary to the weight of the evidence to the extent that it asserts or implies that the Cohen and Sullivan did not discuss buying groups during any of their communications between 2011 and 2015. Benco reached out to Schein to discuss buying groups on no fewer than six occasions during the conspiracy period. (CCFF ¶ 679). The six communications consist of: (1) a communication during which Cohen informed Sullivan of

Benco's no buying group policy, (CCFF ¶¶ 662-664); (2) an 11 minute and 34 seconds call between Cohen and Sullivan on January 13, 2012, (CCFF ¶ 968); (3) an 8 minute and 35 seconds call between Cohen and Sullivan on March 25, 2013, (CCFF ¶ 1032); (4) a text message between Cohen and Sullivan on March 27, 2013, (CCFF ¶ 1069); (5) a text message between Cohen and Sullivan on March 26, 2013, (CCFF ¶ 997); and (6) an 18 minute call between Benco's Ryan and Schein's Foley on October 1, 2013. (CCFF ¶ 1010). In addition, Cohen planned to send a note in the mail to Sullivan about the buying group Smile Source in July 2012. (CCFF ¶¶ 990, 991).

That is, of course, merely the evidence for which the two companies left a written trail. Cohen and Sullivan exchanged 56 calls and 225 text messages between 2011 and 2015. (CCFF ¶¶ 327-351). Cohen and Sullivan saw each other at multiple industry events each year during the conspiracy period. (CCFF ¶¶ 355-377, 379, 381, 383, 385-387). Moreover, Sullivan exchanged additional communications with Cohen, including written notes and voicemail messages that are not part of the evidentiary record. (CCFF ¶¶ 350, 353). Sullivan testified that he may also have called Cohen from his office land line telephone, the records for which were not produced to Complaint Counsel. (CCFF ¶ 354).

The Proposed Finding is also factually inaccurate and contrary to the weight of the evidence because Cohen testified that the hiring agreement only required negotiation or renegotiation with Schein "every few years," and he testified that communications regarding the hiring agreement happened a few times a year. (Cohen, Tr. 736-737).

Complaint Counsel objects to use of the word "competitive" to describe the hiring agreement. The agreement was between competitors, (Sullivan, Tr. 3893-3894; Cohen, Tr. 646; Ryan, Tr. 1054), that involved a "significant" business strategy, (Cohen, Tr. 637; BFF ¶ 72), and lowered costs of doing business by agreeing to "rules of the road" with a competitor. (Cohen, Tr. 639-640; CCFF ¶¶ 313-319). The agreement limited the number of hires between the two companies.

(Sullivan, Tr. 3894 (“Q. And does this confirm that the number – the limit on the number of hires between Benco and Schein was three per zone per half a year? A. Yes, it does.”); Ryan, Tr. 1057-1058). The agreement increased the “sit-out” time of others. (Ryan, Tr. 1057 (“Q. And if I’m understanding you correctly, before 2011, the time period piece of this [hiring agreement] was shorter than six months. A. That’s my recollection.”)). The agreement expanded over time to cover additional employees. (CX6027 (communication log) at 25 (Row 223); Sullivan, Tr. 3894 (Cohen texted Sullivan “‘We agreed that she would sit even though she didn’t have a contract.’ Do you see that? A. I do. Q. And ‘sit’ there, that refers to this employee not contacting the former Schein customers that she had worked with. A. That’s correct.”)). For all these reasons, “competitive” is an inaccurate description of this horizontal hiring agreement between competitors

548. Chuck Cohen testified that there were pro-competitive, business reasons for communicating with Tim Sullivan during this time period. (Cohen, Tr. 735-779).

#### **Response to Proposed Finding No. 548**

The proposed finding is factually inaccurate and contrary to the weight of the evidence to the extent that it asserts or implies that the Cohen identified any procompetitive business reasons to communicate with Tim Sullivan about buying groups. Cohen testified that his communication with Sullivan about ADC was “counter-business” or “more information than [] a rational business owner would give” and testified that he could not provide any legitimate business justification for these communications that he described as potentially “improper” and “counter-business.” (CCFF ¶ 1171). Cohen could not identify any business reason for him to contact Sullivan after learning that Schein was going to bid on a corporate account. (CX0301 (Cohen, IHT at 105)). Cohen could not identify any business reason to tell a competitor about Benco’s no buying group policy. (CCFF ¶ 1167).



549. As part of the 1998 settlement of the lawsuit between Benco and Schein, Benco and Schein entered into a Competitive Hiring Agreement that allowed for the orderly movement of sales personnel subject to non-compete agreements without the need for expensive litigation. (Cohen, Tr. 735).

**Response to Proposed Finding No. 549**

Complaint Counsel objects to use of the word “competitive” to describe the hiring agreement. The agreement was between competitors, (Sullivan, Tr. 3893-3894; Cohen, Tr. 646; Ryan, Tr. 1054), that involved a “significant” business strategy, (Cohen, Tr. 637; BFF ¶ 72), and lowered costs of doing business by agreeing to “rules of the road” with a competitor. (Cohen, Tr. 639-640; CCFF ¶¶ 313-319). The agreement limited the number of hires between the two companies. (Sullivan, Tr. 3894 (“Q. And does this confirm that the number – the limit on the number of hires between Benco and Schein was three per zone per half a year? A. Yes, it does.”); Ryan, Tr. 1057-1058). The agreement increased the “sit-out” time of others. (Ryan, Tr. 1057 (“Q. And if I’m understanding you correctly, before 2011, the time period piece of this [hiring agreement] was shorter than six months. A. That’s my recollection.”)). The agreement expanded over time to cover additional employees. (CX6027 (communication log) at 25 (Row 223); Sullivan, Tr. 3894 (Cohen texted Sullivan “‘We agreed that she would sit even though she didn’t have a contract.’ Do you see that? A. I do. Q. And ‘sit’ there, that refers to this employee not contacting the former Schein customers that she had worked with. A. That’s correct.”)). For all these reasons, “competitive” is an inaccurate description of this horizontal hiring agreement between competitors. Additionally, Cohen testified that it was a “competitor” hiring agreement not a “competitive” hiring agreement. (Cohen, Tr. 735). Complaint Counsel has no specific response to the remainder of the proposed finding.

550. Maintaining the Competitive Hiring Agreement over the long-term was critical to Benco’s growth and success from 1998 through 2016. (Cohen, Tr. 735).

**Response to Proposed Finding No. 550**

Complaint Counsel objects to use of the word “competitive” to describe this agreement. The agreement was between competitors, (Sullivan, Tr. 3893-3894; Cohen, Tr. 646; Ryan, Tr. 1054), that involved a “significant” business strategy, (Cohen, Tr. 637; BFF ¶ 72), and lowered costs of doing business by agreeing to “rules of the road” with a competitor. (Cohen, Tr. 639-640; CCF ¶¶ 313-319). The agreement limited the number of hires between the two companies. (Sullivan, Tr. 3894 (“Q. And does this confirm that the number – the limit on the number of hires between Benco and Schein was three per zone per half a year? A. Yes, it does.”); Ryan, Tr. 1057-1058). The agreement increased the “sit-out” time of others. (Ryan, Tr. 1057 (“Q. And if I’m understanding you correctly, before 2011, the time period piece of this [hiring agreement] was shorter than six months. A. That’s my recollection.”)). The agreement expanded over time to cover additional employees. (CX6027 (communication log) at 25 (Row 223); Sullivan, Tr. 3894 (Cohen texted Sullivan “‘We agreed that she would sit even though she didn’t have a contract.’ Do you see that? A. I do. Q. And ‘sit’ there, that refers to this employee not contacting the former Schein customers that she had worked with. A. That’s correct.”)). For all these reasons, “competitive” is an inaccurate description of this horizontal hiring agreement between competitors. Complaint Counsel has no specific response to the remainder of the proposed finding.

551. Chuck Cohen unequivocally believes that the Competitive Hiring Agreement benefitted Benco dramatically more than it benefitted Schein. (Cohen, Tr. 735-36).

#### **Response to Proposed Finding No. 551**

Complaint Counsel objects to use of the word “competitive” to describe this agreement. The agreement was between competitors, (Sullivan, Tr. 3893-3894; Cohen, Tr. 646; Ryan, Tr. 1054), that involved a “significant” business strategy, (Cohen, Tr. 637; BFF ¶ 72), and lowered costs of doing business by agreeing to “rules of the road” with a competitor. (Cohen, Tr. 639-640; CCF

¶¶ 313-319). The agreement limited the number of hires between the two companies. (Sullivan, Tr. 3894 (“Q. And does this confirm that the number – the limit on the number of hires between Benco and Schein was three per zone per half a year? A. Yes, it does.”); Ryan, Tr. 1057-1058). The agreement increased the “sit-out” time of others. (Ryan, Tr. 1057 (“Q. And if I’m understanding you correctly, before 2011, the time period piece of this [hiring agreement] was shorter than six months. A. That’s my recollection.”)). The agreement expanded over time to cover additional employees. (CX6027 (communication log) at 25 (Row 223); Sullivan, Tr. 3894 (Cohen texted Sullivan “‘We agreed that she would sit even though she didn’t have a contract.’ Do you see that? A. I do. Q. And ‘sit’ there, that refers to this employee not contacting the former Schein customers that she had worked with. A. That’s correct.”)). For all these reasons, “competitive” is an inaccurate description of this horizontal hiring agreement between competitors. Complaint Counsel has no specific response to the remainder of the proposed finding.

552. During the time that the Competitive Hiring Agreement was in place, Benco hired over 120 sales employees from Schein, whereas Schein only hired about 60 from Benco. (Cohen, Tr. 736).

#### **Response to Proposed Finding No. 552**

Complaint Counsel objects to use of the word “competitive” to describe this agreement. The agreement was between competitors, (Sullivan, Tr. 3893-3894; Cohen, Tr. 646; Ryan, Tr. 1054), that involved a “significant” business strategy, (Cohen, Tr. 637; BFF ¶ 72), and lowered costs of doing business by agreeing to “rules of the road” with a competitor. (Cohen, Tr. 639-640; CCF ¶¶ 313-319). The agreement limited the number of hires between the two companies. (Sullivan, Tr. 3894 (“Q. And does this confirm that the number – the limit on the number of hires between Benco and Schein was three per zone per half a year? A. Yes, it does.”); Ryan, Tr. 1057-1058). The agreement increased the “sit-out” time of others. (Ryan, Tr. 1057 (“Q. And if I’m

understanding you correctly, before 2011, the time period piece of this [hiring agreement] was shorter than six months. A. That's my recollection.")). The agreement expanded over time to cover additional employees. (CX6027 (communication log) at 25 (Row 223); Sullivan, Tr. 3894 (Cohen texted Sullivan "'We agreed that she would sit even though she didn't have a contract.' Do you see that? A. I do. Q. And 'sit' there, that refers to this employee not contacting the former Schein customers that she had worked with. A. That's correct.")). For all these reasons, "competitive" is an inaccurate description of this horizontal hiring agreement between competitors. Complaint Counsel has no specific response to the remainder of the proposed finding.

553. Chuck Cohen was regularly concerned that Schein might terminate the Competitive Hiring Agreement. It was important for Benco to maintain the Competitive Hiring Agreement with Schein. (Cohen, Tr. 736).

#### **Response to Proposed Finding No. 553**

Complaint Counsel objects to use of the word "competitive" to describe this agreement. The agreement was between competitors, (Sullivan, Tr. 3893-3894; Cohen, Tr. 646; Ryan, Tr. 1054), that involved a "significant" business strategy, (Cohen, Tr. 637; BFF ¶ 72), and lowered costs of doing business by agreeing to "rules of the road" with a competitor. (Cohen, Tr. 639-640; CCF ¶¶ 313-319). The agreement limited the number of hires between the two companies. (Sullivan, Tr. 3894 ("Q. And does this confirm that the number – the limit on the number of hires between Benco and Schein was three per zone per half a year? A. Yes, it does."); Ryan, Tr. 1057-1058). The agreement increased the "sit-out" time of others. (Ryan, Tr. 1057 ("Q. And if I'm understanding you correctly, before 2011, the time period piece of this [hiring agreement] was shorter than six months. A. That's my recollection.")). The agreement expanded over time to cover additional employees. (CX6027 (communication log) at 25 (Row 223); Sullivan, Tr. 3894 (Cohen texted Sullivan "'We agreed that she would sit even though she didn't have a contract.'

Do you see that? A. I do. Q. And ‘sit’ there, that refers to this employee not contacting the former Schein customers that she had worked with. A. That’s correct.”)). For all these reasons, “competitive” is an inaccurate description of this horizontal hiring agreement between competitors. Complaint Counsel has no specific response to the remainder of the proposed finding.

554. The terms of the Competitive Hiring Agreement changed over time, leading to frequent negotiations between Chuck Cohen and Tim Sullivan. Chuck Cohen and Tim Sullivan had frequent calls and communications regarding the Competitive Hiring Agreement. (Sullivan, Tr. 4267-68; Ryan, Tr. 1152-53).

#### **Response to Proposed Finding No. 554**

The Proposed Finding is factually inaccurate and contrary to the weight of the evidence because Cohen testified that the hiring agreement only required negotiation or renegotiation with Schein “every few years,” and he testified that communications regarding the hiring agreement happened a few times a year. (Cohen, Tr. 736-737). The Proposed Finding is also not supported by the cited Ryan testimony. Ryan testified that the hiring agreement changed over time; he did not know how frequently the agreement changed; and he did not testify that Cohen and Sullivan had frequent calls and communications regarding the hiring agreement. (Ryan, Tr. 1152-1153). Complaint Counsel objects to use of the word “competitive” to describe this agreement. The agreement was between competitors, (Sullivan, Tr. 3893-3894; Cohen, Tr. 646; Ryan, Tr. 1054), that involved a “significant” business strategy, (Cohen, Tr. 637; BFF ¶ 72), and lowered costs of doing business by agreeing to “rules of the road” with a competitor. (Cohen, Tr. 639-640; CCF ¶¶ 313-319). The agreement limited the number of hires between the two companies. (Sullivan, Tr. 3894 (“Q. And does this confirm that the number – the limit on the number of hires between Benco and Schein was three per zone per half a year? A. Yes, it does.”); Ryan, Tr. 1057-1058). The agreement increased the “sit-out” time of others. (Ryan, Tr. 1057 (“Q. And if I’m

understanding you correctly, before 2011, the time period piece of this [hiring agreement] was shorter than six months. A. That's my recollection.")). The agreement expanded over time to cover additional employees. (CX6027 (communication log) at 25 (Row 223); Sullivan, Tr. 3894 (Cohen texted Sullivan "'We agreed that she would sit even though she didn't have a contract.' Do you see that? A. I do. Q. And 'sit' there, that refers to this employee not contacting the former Schein customers that she had worked with. A. That's correct.")). For all these reasons, "competitive" is an inaccurate description of this horizontal hiring agreement between competitors.

The Proposed Finding is factually inaccurate and contrary to the weight of the evidence to the extent that it asserts or implies that the Cohen and Sullivan did not discuss buying groups during any of their communications between 2011 and 2015. Benco reached out to Schein to discuss buying groups on no fewer than six occasions during the conspiracy period. (CCFF ¶ 679; *see also* CCRF (Benco) ¶ 547).

Complaint Counsel has no specific response to the remainder of the proposed finding.

555. The Competitive Hiring Agreement required frequent negotiation and regular communications between Benco and Schein. Chuck Cohen and Tim Sullivan were the primary points of contact for the other regarding the Competitive Hiring Agreement. (Cohen, Tr. 736-37; Sullivan, Tr. 4267-68).

#### **Response to Proposed Finding No. 555**

The first sentence of the Proposed Finding is factually inaccurate and contrary to the weight of the evidence because Cohen testified that the hiring agreement only required negotiation or renegotiation with Schein "every few years," and he testified that communications regarding the hiring agreement happened a few times a year. (Cohen, Tr. 736-737). The first sentence of the Proposed Finding is also not supported by the evidence cited because neither Cohen nor Sullivan

testified that the hiring agreement required regular communications between Benco and Schein. (Cohen, Tr. 736-37; Sullivan, Tr. 4267-68).

Complaint Counsel objects to use of the word “competitive” to describe this agreement. The agreement was between competitors, (Sullivan, Tr. 3893-3894; Cohen, Tr. 646; Ryan, Tr. 1054), that involved a “significant” business strategy, (Cohen, Tr. 637; BFF ¶ 72), and lowered costs of doing business by agreeing to “rules of the road” with a competitor. (Cohen, Tr. 639-640; CCFF ¶¶ 313-319). The agreement limited the number of hires between the two companies. (Sullivan, Tr. 3894 (“Q. And does this confirm that the number – the limit on the number of hires between Benco and Schein was three per zone per half a year? A. Yes, it does.”); Ryan, Tr. 1057-1058). The agreement increased the “sit-out” time of others. (Ryan, Tr. 1057 (“Q. And if I’m understanding you correctly, before 2011, the time period piece of this [hiring agreement] was shorter than six months. A. That’s my recollection.”)). The agreement expanded over time to cover additional employees. (CX6027 (communication log) at 25 (Row 223); Sullivan, Tr. 3894 (Cohen texted Sullivan “‘We agreed that she would sit even though she didn’t have a contract.’ Do you see that? A. I do. Q. And ‘sit’ there, that refers to this employee not contacting the former Schein customers that she had worked with. A. That’s correct.”)). For all these reasons, “competitive” is an inaccurate description of this horizontal hiring agreement between competitors.

The Proposed Finding is factually inaccurate and contrary to the weight of the evidence to the extent that it asserts or implies that the Cohen and Sullivan did not discuss buying groups during any of their communications between 2011 and 2015. Benco reached out to Schein to discuss buying groups on no fewer than six occasions during the conspiracy period. (CCFF ¶ 679; *see also* CCRF (Benco) ¶ 547).

Complaint Counsel has no specific response to the second sentence of the Proposed Finding.

556. Chuck Cohen and Tim Sullivan communicated several times a year regarding discrepancies in the way that the two sides were interpreting the Competitive Hiring Agreement and its application to certain employees or employee groups. (Cohen, Tr. 737).

**Response to Proposed Finding No. 556**

The Proposed Finding is factually inaccurate and contrary to the weight of the evidence to the extent that it asserts or implies that the Cohen and Sullivan did not discuss buying groups during any of their communications between 2011 and 2015. Benco reached out to Schein to discuss buying groups on no fewer than six occasions during the conspiracy period. (CCFF ¶ 679; *see also* CCRF (Benco) ¶ 547).

Complaint Counsel objects to use of the word “competitive” to describe this agreement. The agreement was between competitors, (Sullivan, Tr. 3893-3894; Cohen, Tr. 646; Ryan, Tr. 1054), that involved a “significant” business strategy, (Cohen, Tr. 637; BFF ¶ 72), and lowered costs of doing business by agreeing to “rules of the road” with a competitor. (Cohen, Tr. 639-640; CCFF ¶¶ 313-319). The agreement limited the number of hires between the two companies. (Sullivan, Tr. 3894 (“Q. And does this confirm that the number – the limit on the number of hires between Benco and Schein was three per zone per half a year? A. Yes, it does.”); Ryan, Tr. 1057-1058). The agreement increased the “sit-out” time of others. (Ryan, Tr. 1057 (“Q. And if I’m understanding you correctly, before 2011, the time period piece of this [hiring agreement] was shorter than six months. A. That’s my recollection.”)). The agreement expanded over time to cover additional employees. (CX6027 (communication log) at 25 (Row 223); Sullivan, Tr. 3894 (Cohen texted Sullivan “‘We agreed that she would sit even though she didn’t have a contract.’ Do you see that? A. I do. Q. And ‘sit’ there, that refers to this employee not contacting the former Schein customers that she had worked with. A. That’s correct.”)). For all these reasons, “competitive” is an inaccurate description of this horizontal hiring agreement between competitors.



Complaint Counsel has no specific response to the remainder of the Proposed Finding.

557. Chuck Cohen believed it to be one of Benco's highest priorities to maintain the Competitive Hiring Agreement with Schein for as long as possible. (Cohen, Tr. 737).

**Response to Proposed Finding No. 557**

Complaint Counsel objects to use of the word "competitive" to describe this agreement. The agreement was between competitors, (Sullivan, Tr. 3893-3894; Cohen, Tr. 646; Ryan, Tr. 1054), that involved a "significant" business strategy, (Cohen, Tr. 637; BFF ¶ 72), and lowered costs of doing business by agreeing to "rules of the road" with a competitor. (Cohen, Tr. 639-640; CCFF ¶¶ 313-319). The agreement limited the number of hires between the two companies. (Sullivan, Tr. 3894 ("Q. And does this confirm that the number – the limit on the number of hires between Benco and Schein was three per zone per half a year? A. Yes, it does."); Ryan, Tr. 1057-1058). The agreement increased the "sit-out" time of others. (Ryan, Tr. 1057 ("Q. And if I'm understanding you correctly, before 2011, the time period piece of this [hiring agreement] was shorter than six months. A. That's my recollection.")). The agreement expanded over time to cover additional employees. (CX6027 (communication log) at 25 (Row 223); Sullivan, Tr. 3894 (Cohen texted Sullivan "'We agreed that she would sit even though she didn't have a contract.' Do you see that? A. I do. Q. And 'sit' there, that refers to this employee not contacting the former Schein customers that she had worked with. A. That's correct.")). For all these reasons, "competitive" is an inaccurate description of this horizontal hiring agreement between competitors.

Complaint Counsel has no specific response to the remainder of the Proposed Finding.

558. Pat Ryan became aware of the existence of the Competitive Hiring Agreement shortly after its formation. In opening new markets for Benco, and leading Benco's hiring of Schein sales employees, Ryan became familiar with the terms of the Competitive Hiring Agreement and its application to Benco's national expansion. (Ryan, Tr. 1148-54).

**Response to Proposed Finding No. 558**

Complaint Counsel objects to use of the word “competitive” to describe this agreement. The agreement was between competitors, (Sullivan, Tr. 3893-3894; Cohen, Tr. 646; Ryan, Tr. 1054), that involved a “significant” business strategy, (Cohen, Tr. 637; BFF ¶ 72), and lowered costs of doing business by agreeing to “rules of the road” with a competitor. (Cohen, Tr. 639-640; CCFF ¶¶ 313-319). The agreement limited the number of hires between the two companies. (Sullivan, Tr. 3894 (“Q. And does this confirm that the number – the limit on the number of hires between Benco and Schein was three per zone per half a year? A. Yes, it does.”); Ryan, Tr. 1057-1058). The agreement increased the “sit-out” time of others. (Ryan, Tr. 1057 (“Q. And if I’m understanding you correctly, before 2011, the time period piece of this [hiring agreement] was shorter than six months. A. That’s my recollection.”)). The agreement expanded over time to cover additional employees. (CX6027 (communication log) at 25 (Row 223); Sullivan, Tr. 3894 (Cohen texted Sullivan “‘We agreed that she would sit even though she didn’t have a contract.’ Do you see that? A. I do. Q. And ‘sit’ there, that refers to this employee not contacting the former Schein customers that she had worked with. A. That’s correct.”)). For all these reasons, “competitive” is an inaccurate description of this horizontal hiring agreement between competitors.

Complaint Counsel has no specific response to the remainder of the Proposed Finding.

559. Chuck Cohen wanted to maintain a positive, professional relationship with Tim Sullivan, including maintaining his credibility with Tim Sullivan, for purposes of maintaining the Competitive Hiring Agreement with Schein for as long as possible. (Cohen, Tr. 550; 737-38).

#### **Response to Proposed Finding No. 559**

The Proposed Finding is not supported by the evidence cited on Cohen, Tr. 550. There, Cohen testified that he wanted to maintain credibility with Sullivan in the context of informing Sullivan that Benco was going to bid on Atlantic Dental Care. (CCFF ¶¶ 1072-1076). Cohen believed that it was against Benco’s business interest to tell Sullivan that Benco was going to bid on ADC “in

the smaller picture” to share its competitive position with its largest rival, but that “in the larger picture” he did so to maintain credibility with Sullivan in the long term. (CCFF ¶ 1075; Cohen, Tr. 551-552; *see also* CX301 (Cohen, IHT at 277-278)). Cohen provided Benco’s bidding information to Sullivan because he “did not want [Sullivan] to think I was “duplicitous in his first call and was trying to head-fake them” if he did not follow up. (CCFF ¶ 1076; Cohen, Tr. 723). Cohen testified, “I wanted to be perceived as an honest purveyor of information and maintain a high level of credibility with Tim and others.” (CCFF ¶ 1076; Cohen, Tr. 723). Cohen would hate for Tim Sullivan to find out that Cohen had not been fully forthcoming with respect to the ADC situation. (CCFF ¶ 1076; Cohen, Tr. 553).

Complaint Counsel objects to use of the word “competitive” to describe this agreement. The agreement was between competitors, (Sullivan, Tr. 3893-3894; Cohen, Tr. 646; Ryan, Tr. 1054), that involved a “significant” business strategy, (Cohen, Tr. 637; BFF ¶ 72), and lowered costs of doing business by agreeing to “rules of the road” with a competitor. (Cohen, Tr. 639-640; CCFF ¶¶ 313-319). The agreement limited the number of hires between the two companies. (Sullivan, Tr. 3894 (“Q. And does this confirm that the number – the limit on the number of hires between Benco and Schein was three per zone per half a year? A. Yes, it does.”); Ryan, Tr. 1057-1058). The agreement increased the “sit-out” time of others. (Ryan, Tr. 1057 (“Q. And if I’m understanding you correctly, before 2011, the time period piece of this [hiring agreement] was shorter than six months. A. That’s my recollection.”)). The agreement expanded over time to cover additional employees. (CX6027 (communication log) at 25 (Row 223); Sullivan, Tr. 3894 (Cohen texted Sullivan ““We agreed that she would sit even though she didn’t have a contract.’ Do you see that? A. I do. Q. And ‘sit’ there, that refers to this employee not contacting the former Schein customers that she had worked with. A. That’s correct.”)). For all these reasons,

“competitive” is an inaccurate description of this horizontal hiring agreement between competitors.

Complaint Counsel has no specific response to the remainder of this Proposed Finding.

560. Because Chuck Cohen was frequently negotiating different issues with Tim Sullivan under the Competitive Hiring Agreement, he believed that it was critical for Tim Sullivan to regard him as honest and able to deliver on his word. If not, Chuck Cohen believes that Tim Sullivan would have cancelled the Competitive Hiring Agreement. (Cohen, Tr. 738).

**Response to Proposed Finding No. 560**

The first clause of the Proposed Finding is factually inaccurate and contrary to the weight of the evidence because Cohen testified that the hiring agreement only required negotiation or renegotiation with Schein “every few years,” and he testified that communications regarding the hiring agreement happened a few times a year, not “frequently.” (Cohen, Tr. 736-737).

Complaint Counsel objects to use of the word “competitive” to describe this agreement. The agreement was between competitors, (Sullivan, Tr. 3893-3894; Cohen, Tr. 646; Ryan, Tr. 1054), that involved a “significant” business strategy, (Cohen, Tr. 637; BFF ¶ 72), and lowered costs of doing business by agreeing to “rules of the road” with a competitor. (Cohen, Tr. 639-640; CCF ¶¶ 313-319). The agreement limited the number of hires between the two companies. (Sullivan, Tr. 3894 (“Q. And does this confirm that the number – the limit on the number of hires between Benco and Schein was three per zone per half a year? A. Yes, it does.”); Ryan, Tr. 1057-1058). The agreement increased the “sit-out” time of others. (Ryan, Tr. 1057 (“Q. And if I’m understanding you correctly, before 2011, the time period piece of this [hiring agreement] was shorter than six months. A. That’s my recollection.”)). The agreement expanded over time to cover additional employees. (CX6027 (communication log) at 25 (Row 223); Sullivan, Tr. 3894 (Cohen texted Sullivan ““We agreed that she would sit even though she didn’t have a contract.” Do you see that? A. I do. Q. And ‘sit’ there, that refers to this employee not contacting the

former Schein customers that she had worked with. A. That’s correct.”)). For all these reasons, “competitive” is an inaccurate description of this horizontal hiring agreement between competitors.

Complaint Counsel has no specific response to the remainder of this Proposed Finding.

#### A. UNIFIED SMILES

561. Chuck Cohen has never had any communications with Tim Sullivan or anyone else at Schein regarding an entity called Unified Smiles. (Cohen, Tr. 738).

#### **Response to Proposed Finding No. 561**

The Proposed Finding is factually inaccurate and contrary to the weight of the evidence. On January 11, 2012, Benco learned from a customer that Schein might be offering discounts to the buying group Unified Smiles. (CCFF ¶¶ 955-957, 961). Within minutes of receiving the news, Benco’s Director of Sales, Patrick Ryan, forwarded the information to Chuck Cohen, with the message “For Timmy conversation,” referring to Tim Sullivan of Schein. (CCFF ¶¶ 958-960). Cohen agreed, responding on January 13, 2012 “Talking this AM...” (CCFF ¶ 967). Cohen texted Sullivan the night of January 12, 2012 and the two agreed to speak at 8 a.m. Central Time on January 13, 2012. (CCFF ¶¶ 964-966). Cohen and Sullivan spoke on January 13, 2012 for 11 minutes and 34 seconds. (CCFF ¶ 968). Cohen does not have an independent recollection of what was discussed on that January 13, 2012 call with Sullivan. (CCFF ¶ 970). Less than thirty minutes before the scheduled call with Sullivan, Cohen emailed Benco employees to reinforce Benco’s no buying group policy. (CCFF ¶¶ 971-972).

562. Complaint Counsel cites an unsolicited text message from Mr. Cohen to Mr. Sullivan on January 12, 2012, and a follow-up call on January 13, 2012 as evidence that “Benco enforced agreement with Schein” and “monitored and continually confronted Schein on suspicions of cheating.” (FTC Opening, Slide 16; Opening, Tr. 43; CC Pretrial Br. at 14; CX2347; CX1118).

#### **Response to Proposed Finding No. 562**

The Proposed Finding is factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Complaint Counsel does not cite any other evidence to support its position that Benco began confronting Schein when it received market intelligence that indicated that Schein was deviating for their agreement. The weight of the evidence shows that Benco confronted Schein at least four times when it received market intelligence that indicated that Schein was deviating for their agreement. (CCFF ¶¶ 955-1021).

The Proposed Finding is also factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Complaint Counsel does not cite any other evidence to support its position that the January 13, 2012 telephone call between Cohen and Sullivan is an example of Benco confronting Schein when it received market intelligence indicating that Schein was deviating from the agreement. On January 11, 2012, Benco learned from a customer that Schein might be offering discounts to the buying group Unified Smiles. (CCFF ¶¶ 955-957, 961).

Within minutes of receiving the news, Benco's Director of Sales, Patrick Ryan, forwarded the information to Chuck Cohen, with the message "For Timmy conversation," referring to Tim Sullivan of Schein. (CCFF ¶¶ 958-960). Cohen agreed, responding on January 13, 2012 "Talking this AM..." (CCFF ¶ 967). Cohen texted Sullivan the night of January 12, 2012 and the two agreed to speak at 8 a.m. Central Time on January 13, 2012. (CCFF ¶¶ 964-966). Cohen and Sullivan spoke on January 13, 2012 for 11 minutes and 34 seconds. (CCFF ¶ 968). Cohen does not have an independent recollection of what was discussed on that January 13, 2012 call with Sullivan. (CCFF ¶ 970). Sullivan also does not have an independent recollection of what was discussed on the January 13, 2012 call. (Sullivan, Tr. 4218 ("Q. Do you recall what you talked about? A. I don't. . . ."), 4218-4220 (admitting that he "assumed" that the call related to merger or employment issues)). Less than thirty minutes before the scheduled call with Sullivan, Cohen emailed Benco employees to reinforce Benco's no buying group policy. (CCFF ¶¶ 971-972).

Complaint Counsel has no specific response to the remainder of the Proposed Finding.

563. There is no record of what was discussed on this call. (CC Pretrial Br. at 14-15).

**Response to Proposed Finding No. 563**

Complaint Counsel objects to this Proposed Finding as vague as to which call it refers. To the extent that the Proposed Finding refers to the January 13, 2012 call with Sullivan, Complaint Counsel objects to the Proposed Finding as misleading and incomplete to the extent the Proposed Finding suggests there is no evidence that Unified Smiles was discussed on the call. On January 11, 2012, Benco learned from a customer that Schein might be offering discounts to the buying group Unified Smiles. (CCFF ¶¶ 955-957, 961). Within minutes of receiving the news, Benco's Director of Sales, Patrick Ryan, forwarded the information to Chuck Cohen, with the message "For Timmy conversation," referring to Tim Sullivan of Schein. (CCFF ¶¶ 958-960). Cohen agreed, responding on January 13, 2012 "Talking this AM. . . ." (CCFF ¶ 967). Cohen texted Sullivan the night of January 12, 2012 and the two agreed to speak at 8 a.m. Central Time on January 13, 2012. (CCFF ¶¶ 964-966). Cohen and Sullivan spoke on January 13, 2012 for 11 minutes and 34 seconds. (CCFF ¶ 968). Cohen admitted he "had buying groups on his mind" on January 13, 2012 at 8:39 a.m., less than thirty minutes before his call with Sullivan. (CCFF ¶ 971; Cohen, Tr. 516). Further, Cohen testified that thirty minutes before his call with Sullivan, Cohen emailed Benco employees reinforcing Benco's no buying group policy. (CCFF ¶ 972; Cohen, Tr. 514; CX1051). Specifically, on January 13, 2012 at 8:39 a.m., Cohen emailed Ryan and asked him to tell Benco's VP of Sales, Mike McElaney, to review Benco's no buying group policy with Benco's sales management team. (CCFF ¶ 972; Cohen, Tr. 515 ("Q. So there in that second sentence in your e-mail on January 13, 2012, less than 30 minutes before your call with Tim Sullivan, you were telling . . . Patrick Ryan [to] tell the VP of sales to review Benco's no-buying group policy with the team? A. With the management team, the sales management team.

Yes.”); CX1051 at 001). Also, just before the call, Cohen found Ryan’s two-day old email about having a conversation with Sullivan about buying group Unified Smiles, and wrote: “Talking this AM . . . .” with Sullivan. (Cohen Tr. 503; CX1052 at 001; *see also* CX8015 (Cohen, Dep. at 216); CX8037 (Ryan, Dep. at 110); CCFF ¶¶ 957-973).

564. Neither Mr. Sullivan nor Mr. Cohen testified that their January 13, 2012 call was about Unified Smiles. (Cohen, Tr. 747; Sullivan, Tr. 4218-4219). Rather, both Mr. Cohen and Mr. Sullivan testified that they discussed employment issues in California relating to certain employees recruited by Benco. (Cohen, Tr. 747; Sullivan, Tr. 4218-4219).

#### **Response to Proposed Finding No. 564**

The Proposed Finding is factually inaccurate, misleading, and against the weight of the evidence. Both Sullivan and Cohen testified that they did not recall what they discussed on the January 13, 2012 telephone call. Cohen testified that he did not recall the contents of the January 13, 2012 call. (CCFF ¶ 970; Cohen, Tr. 973 (“Q. You don’t recall the contents of that [January 13, 2012’ call; right? A. I do not.”)). Cohen also testified that he did not “have an independent recollection of” the January 13, 2012 call. (CCFF ¶ 970; Cohen, Tr. 974 (“I don’t have an independent recollection of that [January 13, 2012 call], that is true.”)). Cohen testified that he simply “assumed” that call was about an employment issue. (Cohen, Tr. 973). This trial testimony is corroborated by deposition testimony, where Cohen testified “I don’t know what we talked about or didn’t talk about.” (CX8015 (Cohen, Dep. at 211)). Cohen also testified, “I do not recall what I spoke with Mr. Sullivan about.” (CX8015 (Cohen, Dep. at 224)). Sullivan testified that he does not recall what he discussed with Cohen on the January 13, 2012 call. (Sullivan, Tr. 4218 (“Q. Do you recall what you talked about? A. I don’t. . . .”)). Sullivan also admits that he “assumed” that it related to merger or employment issues. (Sullivan, Tr. 4218-4220). Notably, Sullivan’s testimony is contrary to prior testimony in which he testified that he heard of Unified Smiles through a message from Cohen. (CX8025 (Sullivan, Dep. at 393) (“Have you ever heard of a



group called Unified Smiles? A. Only through a message I got from Chuck.”); *see also* Sullivan, Tr. 4346 (acknowledging that he changed his testimony)). In the absence of witness memory on the substance of the call, the contemporaneous documents are the only evidence in the record of what transpired—and those documents confirm that Cohen scheduled a call with Sullivan in response to Ryan’s email informing Cohen of market rumors that Schein worked with buying group, Unified Smiles. (CCFF ¶¶ 958-967). Additionally, Cohen admitted he “had buying groups on his mind” on January 13, 2012 at 8:39 a.m., less than thirty minutes before his call with Sullivan. (CCFF ¶ 971; Cohen, Tr. 516). Cohen testified that thirty minutes before his call with Sullivan, Cohen emailed Benco employees reinforcing Benco’s no buying group policy. (CCFF ¶ 972; Cohen, Tr. 514; CX1051). Specifically, on January 13, 2012 at 8:39 a.m., Cohen emailed Ryan and asked him to tell Benco’s VP of Sales, Mike McElaney, to review Benco’s no buying group policy with Benco’s sales management team. (CCFF ¶ 972; Cohen, Tr. 515 (“Q. So there in that second sentence in your e-mail on January 13, 2012, less than 30 minutes before your call with Tim Sullivan, you were telling . . . Patrick Ryan [to] tell the VP of sales to review Benco’s no-buying group policy with the team? A. With the management team, the sales management team. Yes.”); CX1051 at 001). Also, just before the call, Cohen found Ryan’s 2-day old email about having a conversation with Sullivan about buying group Unified Smiles, and wrote: “Talking this AM...” with Sullivan. (Cohen Tr. 503; CX1052 at 001; *see also* CX8015 (Cohen, Dep. at 216); CX8037 (Ryan, Dep. at 110); CCFF ¶¶ 957-973). The Proposed Finding is also misleading and inaccurate to the extent that it suggests that Cohen and Sullivan could not have discussed both employment issues and buying groups.

565. Nevertheless, Complaint Counsel argues that an inference can be made that Unified Smiles was discussed on the January 13, 2012 call, from an internal Benco document. (CX1062). The Court declines to draw such an inference, not only because the testimony is to the contrary, but because the sequence of events does not support such an inference.

**Response to Proposed Finding No. 565**

The Proposed Finding is factually inaccurate and contrary to the weight of the evidence. On January 11, 2012, Benco learned from a customer that Schein might be offering discounts to the buying group Unified Smiles. (CCFF ¶¶ 955-957, 961). Within minutes of receiving the news, Benco's Director of Sales, Patrick Ryan, forwarded the information to Chuck Cohen, with the message "For Timmy conversation," referring to Tim Sullivan of Schein. (CCFF ¶¶ 958-960). Two days later, Cohen located Ryan's email about Schein discounting to Unified Smiles and agreed, responding on January 13, 2012 "Talking this AM . . . ." (CCFF ¶ 967). Cohen texted Sullivan the night of January 12, 2012 and the two agreed to speak at 8 a.m. Central Time on January 13, 2012. (CCFF ¶¶ 964-966). Cohen and Sullivan spoke on January 13, 2012 for 11 minutes and 34 seconds. (CCFF ¶ 968). Cohen does not have an independent recollection of what was discussed on that January 13, 2012 call with Sullivan. (CCFF ¶ 970). Sullivan also does not have an independent recollection of what was discussed on the January 13, 2012 call. (Sullivan, Tr. 4218 ("Q. Do you recall what you talked about? A. I don't. . . ."), 4218-4220 (admitting that he "assumed" that the call related to merger or employment issues)). The contemporaneous evidence undeniably shows that Benco was *planning* to confront Schein about discounting to a buying group. Benco offered no explanation as to why Ryan sent Cohen information about Schein discounting to a buying group for the stated purpose of a conversation with Sullivan. (CCFF ¶ 963; CX8037 (Ryan, Dep. at 100) ("Q. Sitting here today, can you think of any reason why you said: "For Timmy conversation?" A. No.")). Less than thirty minutes before the scheduled call with Sullivan, Cohen emailed Benco employees to reinforce Benco's no buying group policy. (CCFF ¶¶ 971-972). The weight of the evidence shows that Sullivan and Cohen discussed buying group Unified Smiles on the January 13, 2012 telephone call. (CCFF ¶ 969).

The Proposed Finding is also factually inaccurate to the extent that it suggests that Complaint Counsel cites CX1062 as evidence relating to the January 13, 2012 telephone call. (CX1062). CX1062 relates to a different communication from Cohen to Sullivan and Guggenheim about TDA's buying group. (CX1062).

566. Unified Smiles approached Benco and Schein demanding DSO-level discounted pricing. (CX2062; CX1145).

**Response to Proposed Finding No. 566**

The Proposed Fact that Unified Smiles demanded "DSO-level discounted pricing" is not supported by the evidence cited. CX1145 shows that Unified Smiles approached Benco seeking its participation in the buying group it was starting. (CX1145). CX2062 shows that Unified Smiles approached Schein to discuss "Schein's potential role" in the buying group it was starting. (CX2062 at 005). Neither document supports the statement that Unified Smiles "demand[ed] DSO-level discounted pricing." (CX2062; CX1145). CX1145 shows that Unified Smiles's mission was to "provide independent dental practitioners the same competitive advantage as large corporate dental providers while maintaining the ability to make your own decisions about what is best for the dental health of your patients." (CX1145 at 002).

567. Pat Ryan has never had any communications with anyone at Schein or Patterson regarding an entity called Unified Smiles. (Ryan, Tr. 1172).

**Response to Proposed Finding No. 567**

The Proposed Finding is factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Benco and Schein did not reach an agreement to refuse to discount to buying groups. (CCFF ¶¶ 661-1158, 1167-1198).

The Proposed Finding is also factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Benco's agreement with Schein was not relevant to its decision to reject Unified Smiles. (CCFF ¶¶ 661-1158, 1167-1198). After reaching an agreement with

Schein in 2011 not to discount to buying groups, Benco complied with that agreement by refusing to discount to Unified Smiles. (CCFF ¶¶ 412, 661-1158, 1167-1198).

Complaint Counsel has no specific response to the remainder of this Proposed Finding.

568. Pat Ryan evaluated Unified Smiles' ownership structure, applied Benco's policy, and informed Unified Smiles that Benco would not do business with Unified Smiles as a single customer. (Ryan, Tr. 1172-73).

#### **Response to Proposed Finding No. 568**

The Proposed Finding is factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Benco and Schein did not reach an agreement to refuse to discount to buying groups. (CCFF ¶¶ 661-1158, 1167-1198).

The Proposed Finding is also factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Benco's agreement with Schein was not relevant to its decision to reject Unified Smiles. (CCFF ¶¶ 661-1158, 1167-1198). After reaching an agreement with Schein in 2011 not to discount to buying groups, Benco complied with that agreement by refusing to discount to Unified Smiles. (CCFF ¶¶ 412, 661-1158, 1167-1198).

Complaint Counsel has no specific response to the remainder of this Proposed Finding.

569. Pat Ryan independently made Benco's decision on Unified Smiles by applying Benco's policy and reaching a decision that was in Benco's unilateral economic interest. Any involvement that Schein may, or may not have had, with Unified Smiles played absolutely no role in Ryan's decision. (Ryan, Tr. 1172-73).

#### **Response to Proposed Finding No. 569**

The Proposed Finding is factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Benco and Schein did not reach an agreement to refuse to discount to buying groups. (CCFF ¶¶ 661-1158, 1167-1198).

The Proposed Finding is also factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Benco's agreement with Schein was not relevant to its decision to

reject Unified Smiles. (CCFF ¶¶ 661-1158, 1167-1198). After reaching an agreement with Schein in 2011 not to discount to buying groups, Benco complied with that agreement by refusing to discount to Unified Smiles. (CCFF ¶¶ 412, 661-1158, 1167-1198).

Complaint Counsel has no specific response to the remainder of this Proposed Finding.

570. For Schein, Mr. Foley had the authority to approve or disapprove Unified Smiles. (Foley, Tr. 4692-4693; CX2062).

**Response to Proposed Finding No. 570**

The Proposed Finding is also factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Schein's agreement with Benco was not relevant to its decision to reject Unified Smiles. (CCFF ¶¶ 661-1158, 1167-1198). After reaching an agreement with Benco in 2011, Schein complied with its agreement in December 2011 by refusing to discount to Unified Smiles. (CCFF ¶¶ 661-1158, 1167-1198). In rejecting Unified Smiles in December 2011, Foley specified that he was employing a new policy not to work with buying groups: "we no longer participate in Buying Groups." (CCFF ¶¶ 719-720; CX2062 at 001 ("[U]nless 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.")). Whether or not Foley may have had authority to approve or disapprove Unified Smiles, his decision to reject Unified Smiles was informed by Schein's policy in December 2011 that it "no longer participate[d] in Buying Groups." (CCFF ¶¶ 719-720; CX2062 at 001 ("[U]nless 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.")).

Complaint Counsel has no specific response to the remainder of this Proposed Finding.

571. Mr. Foley independently made the decision to turn down Unified Smiles' for DSO pricing and communicated this to Unified Smiles' Ms. Kynsz via e-mail on December 21, 2011. (Foley, Tr. 4692-4693; CX2062).

**Response to Proposed Finding No. 571**

The Proposed Finding is factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Benco and Schein did not reach an agreement to refuse to discount to buying groups. (CCFF ¶¶ 661-1158, 1167-1198).

The Proposed Finding is also factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Schein's agreement with Benco was not relevant to its decision to reject Unified Smiles. (CCFF ¶¶ 661-1158, 1167-1198). After reaching an agreement with Benco in 2011, Schein complied with its agreement in December 2011 by refusing to discount to Unified Smiles. (CCFF ¶¶ 661-1158, 1167-1198). In rejecting Unified Smiles in December 2011, Foley specified that he was employing a new policy not to work with buying groups: "we no longer participate in Buying Groups." (CCFF ¶¶ 719-720; CX2062 at 001 ("[U]nless 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.")).

The Proposed Finding is also not supported by the evidence because none of the evidence cited supports the statement that Unified Smiles sought DSO pricing.

Complaint Counsel has no specific response to the remainder of this Proposed Finding.

572. Mr. Foley never communicated with anyone at Benco or Patterson regarding Unified Smiles. (Foley Tr. 4696).

**Response to Proposed Finding No. 572**

The Proposed Finding is factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Benco and Schein did not reach an agreement to refuse to discount to buying groups. (CCFF ¶¶ 661-1158, 1167-1198).

The Proposed Finding is also factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Schein's agreement with Benco was not relevant to its decision to

reject Unified Smiles. (CCFF ¶¶ 661-1158, 1167-1198). After reaching an agreement with Benco in 2011, Schein complied with its agreement in December 2011 by refusing to discount to Unified Smiles. (CCFF ¶¶ 661-1158, 1167-1198). In rejecting Unified Smiles in December 2011, Foley specified that he was employing a new policy not to work with buying groups: “we no longer participate in Buying Groups.” (CCFF ¶¶ 719-720; CX2062 at 001 (“[U]nless 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.”)). Complaint Counsel has no specific response to the remainder of this Proposed Finding.

573. On January 5, 2012 – a few weeks after Schein declined to extend Unified Smiles DSO pricing – Unified Smiles announced the group’s launch via a letter. (CX1145).

**Response to Proposed Finding No. 573**

The Proposed Finding that “Schein declined to extend Unified Smiles DSO pricing” a few weeks before January 5, 2012 is not supported by the document cited. Complaint Counsel has no specific response to the remainder of this Proposed Finding.

574. On January 11, 2012, a local Benco representative forwarded the letter to Benco’s Patrick Ryan, adding that Schein was likely involved. (CX1144).

**Response to Proposed Finding No. 574**

The Proposed Finding is incomplete because the letter cited states, “Dr. Aksu thought that Schein would be [participating in this buying group].” (CX1144 at 001). Complaint Counsel has no specific response to the remainder of this Proposed Finding.

575. Patrick Ryan responded “We’ve already spoken to them and turned them down” and later that day, Mr. Ryan forwarded the letter to Chuck Cohen, also noting, “For Timmy Conversation.” (CX1144; CX1145).

**Response to Proposed Finding No. 575**

The Proposed Finding is misleading where it states, “later that day” because Ryan responded “We’ve already spoken to them and turned them down” at 10:12 PM on January 11, 2012.

(CX1144 at 001). Ryan immediately (*i.e.* in the same minute, at 10:12 PM on January 11, 2012), forwarded the email and letter to Cohen, writing “For Timmy conversation.” (CX1145 at 001).

Complaint Counsel has no specific response to the remainder of this Proposed Finding.

576. Though Schein and Benco had already each independently declined to do business with Unified Smiles, Complaint Counsel contends Mr. Ryan’s suggested conversation regarding Unified Smiles took place on January 13, 2012. (FTC Opening, Slide 16; Opening Tr. 43; CC Pretrial Br. at 14). The evidence does not support that contention.

#### **Response to Proposed Finding No. 576**

The Proposed Finding is factually inaccurate and contrary to the weight of the evidence. On January 11, 2012, Benco learned from a customer that Schein might be offering discounts to the buying group Unified Smiles. (CCFF ¶¶ 955-957, 961). Within minutes of receiving the news, Benco’s Director of Sales, Patrick Ryan, forwarded the information to Chuck Cohen, with the message “For Timmy conversation,” referring to Tim Sullivan of Schein. (CCFF ¶¶ 958-960). Based on the market intelligence, Ryan understood at the time that Schein would be participating in the Unified Smiles buying group. (CCFF ¶ 957). Cohen agreed to communicate with Sullivan, responding on January 13, 2012 “Talking this AM . . . .” (CCFF ¶ 967). Cohen texted Sullivan the night of January 12, 2012 and the two agreed to speak at 8 a.m. Central Time on January 13, 2012. (CCFF ¶¶ 964-966). Cohen and Sullivan spoke on January 13, 2012 for 11 minutes and 34 seconds. (CCFF ¶ 968). Cohen does not have an independent recollection of what was discussed on that January 13, 2012 call with Sullivan. (CCFF ¶ 970). Sullivan also does not have an independent recollection of what was discussed on the January 13, 2012 call. (Sullivan, Tr. 4218 (“Q. Do you recall what you talked about? A. I don’t. . . .”), 4218-4220 (admitting that he “assumed” that the call related to merger or employment issues)). Less than thirty minutes before the scheduled call with Sullivan, Cohen emailed Benco employees to reinforce Benco’s no buying group policy. (CCFF ¶¶ 971-972). The weight of the evidence shows that Sullivan and



Cohen discussed buying group Unified Smiles on the January 13, 2012 telephone call. (CCFF ¶ 969).

The Proposed Finding is also factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Benco and Schein did not reach an agreement to refuse to discount to buying groups. (CCFF ¶¶ 661-1158, 1167-1198).

The Proposed Finding is also factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Benco's agreement with Schein was not relevant to its decision to reject Unified Smiles. (CCFF ¶¶ 661-1158, 1167-1198). After reaching an agreement with Schein in 2011 not to discount to buying groups, Benco complied with that agreement by refusing to discount to Unified Smiles. (CCFF ¶¶ 412, 661-1158, 1167-1198).

577. In late October, 2011, Benco recruited four or five Schein employees from the Fresno, California area. (CX4412; Sullivan, Tr. 4272).

#### **Response to Proposed Finding No. 577**

The Proposed Finding is not supported by the evidence cited. CX4412 consists of cell phone records that do not support the Proposed Finding in any way. (CX4412). The cited Sullivan testimony does not support the finding either. (Sullivan, Tr. 4792). Sullivan did not testify that the recruitment happened in late October, 2011; rather, on a different page, he testified in response to a leading question from his counsel that it "Sounds right" that Mr. Rotert and his group left Schein for Benco in the fall of 2011. (Sullivan, Tr. 4270).

578. Pat Ryan was involved in the recruitment of the Fresno, California group from Schein, as he was responsible for the California market at that time. (Ryan, Tr. 1173-75).

#### **Response to Proposed Finding No. 578**

The Proposed Finding is not supported by the evidence cited. The evidence supports the fact that Ryan "had a role for hiring in California for Benco," (Ryan, Tr. 1173), and that he knew about group that came from Schein in Fresno, California. (Ryan, Tr. 1173-1175). The testimony does

not state that Ryan was involved in the recruitment of the Fresno, California group or was responsible for California market at the time.

579. Benco's hiring of the Fresno, California group was especially problematic for Schein because it was effectively a "group hiring event" and there were other "idiosyncrasies of California employment law." (Sullivan, Tr. 4270).

**Response to Proposed Finding No. 579**

The Proposed Finding is not supported by the evidence cited. Sullivan did not testify that Benco's hiring of the Fresno, California group was "especially problematic." (Sullivan, Tr. 4270). Complaint Counsel has no specific response to the remainder of this Proposed Finding.

580. The leader of the group in Fresno that Benco hired was Bill Rotert. (Cohen, Tr. 742).

**Response to Proposed Finding No. 580**

Complaint Counsel has no specific response to this Proposed Finding.

581. There were several issues surrounding Benco's hiring of the Rotert Group from Schein. Moreover, the issues raised by the Rotert Group's hiring led to a global renegotiation of the Competitive Hiring Agreement. (Cohen, Tr. 742-43; Ryan, Tr. 1174-75).

**Response to Proposed Finding No. 581**

The Proposed Finding that there was a "global" renegotiation is not supported by the evidence cited. Neither Cohen nor Ryan testified about a global renegotiation on the cited pages.

Complaint Counsel objects to use of the word "competitive" to describe this agreement. The agreement was between competitors, (Sullivan, Tr. 3893-3894; Cohen, Tr. 646; Ryan, Tr. 1054), that involved a "significant" business strategy, (Cohen, Tr. 637; BFF ¶ 72), and lowered costs of doing business by agreeing to "rules of the road" with a competitor. (Cohen, Tr. 639-640; CCF ¶¶ 313-319). The agreement limited the number of hires between the two companies. (Sullivan, Tr. 3894 ("Q. And does this confirm that the number – the limit on the number of hires between Benco and Schein was three per zone per half a year? A. Yes, it does."); Ryan, Tr. 1057-1058).

The agreement increased the “sit-out” time of others. (Ryan, Tr. 1057 (“Q. And if I’m understanding you correctly, before 2011, the time period piece of this [hiring agreement] was shorter than six months. A. That’s my recollection.”)). The agreement expanded over time to cover additional employees. (CX6027 (communication log) at 25 (Row 223); Sullivan, Tr. 3894 (Cohen texted Sullivan “‘We agreed that she would sit even though she didn’t have a contract.’ Do you see that? A. I do. Q. And ‘sit’ there, that refers to this employee not contacting the former Schein customers that she had worked with. A. That’s correct.”)). For all these reasons, “competitive” is an inaccurate description of this horizontal hiring agreement between competitors.

Complaint Counsel has no specific response to the remainder of this Proposed Finding.

582. These issues caused Mr. Sullivan and Mr. Cohen to have several discussions over several months about these issues. (Sullivan, Tr. 4270-4271).

#### **Response to Proposed Finding No. 582**

The Proposed Finding is factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Cohen and Sullivan did not discuss buying group Unified Smiles on their January 13, 2012 call. On January 11, 2012, Benco learned from a customer that Schein might be offering discounts to the buying group Unified Smiles. (CCFF ¶¶ 955-957, 961).

Within minutes of receiving the news, Benco’s Director of Sales, Patrick Ryan, forwarded the information to Chuck Cohen, with the message “For Timmy conversation,” referring to Tim Sullivan of Schein. (CCFF ¶¶ 958-960). Based on the market intelligence, Ryan understood at the time that Schein would be participating in the Unified Smiles buying group. (CCFF ¶ 957).

Cohen agreed to communicate with Sullivan, responding on January 13, 2012 “Talking this AM . . . .” (CCFF ¶ 967). Cohen texted Sullivan the night of January 12, 2012 and the two agreed to speak at 8 a.m. Central Time on January 13, 2012. (CCFF ¶¶ 964-966). Cohen and

Sullivan spoke on January 13, 2012 for 11 minutes and 34 seconds. (CCFF ¶ 968). Cohen does not have an independent recollection of what was discussed on that January 13, 2012 call with Sullivan. (CCFF ¶ 970). Sullivan also does not have an independent recollection of what was discussed on the January 13, 2012 call. (Sullivan, Tr. 4218 (“Q. Do you recall what you talked about? A. I don’t. . . .”), 4218-4220 (admitting that he “assumed” that the call related to merger or employment issues)). Less than thirty minutes before the scheduled call with Sullivan, Cohen emailed Benco employees to reinforce Benco’s no buying group policy. (CCFF ¶¶ 971-972). The weight of the evidence shows that Sullivan and Cohen discussed buying group Unified Smiles on the January 13, 2012 telephone call. (CCFF ¶ 969). The Proposed Finding is misleading to the extent it suggests that enforcing and discussing one agreement (hiring) precludes enforcement and discussion of a second agreement (buying groups). Complaint Counsel has no specific response to the remainder of this Proposed Finding.

583. Benco’s Pat Ryan was involved and aware of these discussions between Mr. Cohen and Mr. Sullivan concerning these issues. (Ryan, Tr. 1175-1176).

### **Response to Proposed Finding No. 583**

The Proposed Finding that Ryan was “involved” in discussions between Sullivan and Cohen is not supported by the evidence cited. (Ryan, Tr. 1175-1176). Complaint Counsel has no specific response to the remainder of this Proposed Finding except to note that Ryan was aware of the hiring agreement discussions as well as the buying group discussions between Schein and Benco as evidenced by, among other things, the Unified Smiles buying group email he forwarded to Cohen suggesting it was for a conversation with Sullivan. (CCFF ¶¶ 958-960; *see also* CCFF ¶¶ 982, 527).

584. When Mr. Ryan received the January 11, 2012 e-mail from the field providing the Unified Smiles launch letter, he was aware that Mr. Cohen and Mr. Sullivan would be having a conversation concerning the Fresno recruits in the coming days. (Ryan, Tr. 1176).

**Response to Proposed Finding No. 584**

The Proposed Finding is factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Cohen and Sullivan did not discuss buying group Unified Smiles on their January 13, 2012 call. On January 11, 2012, Benco learned from a customer that Schein might be offering discounts to the buying group Unified Smiles. (CCFF ¶¶ 955-957, 961).

Within minutes of receiving the news, Benco's Director of Sales, Patrick Ryan, forwarded the information to Chuck Cohen, with the message "For Timmy conversation," referring to Tim Sullivan of Schein. (CCFF ¶¶ 958-960). Based on the market intelligence, Ryan understood at the time that Schein would be participating in the Unified Smiles buying group. (CCFF ¶ 957).

Cohen agreed to communicate with Sullivan, responding on January 13, 2012 "Talking this AM . . . ." (CCFF ¶ 967). Cohen texted Sullivan the night of January 12, 2012 and the two agreed to speak at 8 a.m. Central Time on January 13, 2012. (CCFF ¶¶ 964-966). Cohen and Sullivan spoke on January 13, 2012 for 11 minutes and 34 seconds. (CCFF ¶ 968). Cohen does not have an independent recollection of what was discussed on that January 13, 2012 call with Sullivan. (CCFF ¶ 970). Sullivan also does not have an independent recollection of what was discussed on the January 13, 2012 call. (Sullivan, Tr. 4218 ("Q. Do you recall what you talked about? A. I don't. . . ."), 4218-4220 (admitting that he "assumed" that the call related to merger or employment issues)). Less than thirty minutes before the scheduled call with Sullivan, Cohen emailed Benco employees to reinforce Benco's no buying group policy. (CCFF ¶¶ 971-972). The weight of the evidence shows that Sullivan and Cohen discussed buying group Unified Smiles on the January 13, 2012 telephone call. (CCFF ¶ 969). The Proposed Finding is misleading to the extent it suggests that enforcing and discussing one agreement (hiring) precludes enforcement and discussion of a second agreement (buying groups). Complaint Counsel has no specific response to the remainder of this Proposed Finding.

585. On January 12, 2012, Chuck Cohen texted Tim Sullivan on January 12, 2012 to set up a call, and the two spoke the next day. (CX2347).

**Response to Proposed Finding No. 585**

Complaint Counsel has no specific response to this Proposed Finding.

586. On January 13, 2012, Mr. Cohen called Mr. Sullivan and the two spoke for 11 minutes and 34 seconds. (CX1118; Cohen, Tr. 741).

**Response to Proposed Finding No. 586**

Complaint Counsel has no specific response to this Proposed Finding.

587. Mr. Cohen's review of employment records refreshed his recollection concerning the substance of the January 13, 2012 phone call. (CX1118; Cohen, Tr. 741).

**Response to Proposed Finding No. 587**

The Proposed Finding is factually inaccurate and contrary to the weight of the evidence. Cohen testified that he did not have an independent recollection of what was discussed on the January 13, 2012 call. (CCFF ¶ 970; Cohen, Tr. 973-975). Cohen testified that he did not recall the contents of his telephone call with Sullivan on January 13, 2012. (Cohen, Tr. 973; *see also* CCFF ¶ 970). Cohen also testified that he does not have any recollection of what he discussed with his attorney on the call before his call with Sullivan and on the call with his attorney after his call with Sullivan. (Cohen, Tr. 974; *see also* CCFF ¶ 970). This trial testimony is corroborated by deposition testimony, where Cohen testified "I don't know what we talked about or didn't talk about." (CX8015 (Cohen, Dep. at 211)). The Proposed Finding is also factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Cohen and Sullivan did not discuss buying group Unified Smiles on their January 13, 2012 call. On January 11, 2012, Benco learned from a customer that Schein might be offering discounts to the buying group Unified Smiles. (CCFF ¶¶ 955-957, 961). Within minutes of receiving the news, Benco's Director of Sales, Patrick Ryan, forwarded the information to Chuck Cohen, with the message "For Timmy conversation," referring to Tim Sullivan of Schein. (CCFF ¶¶ 958-960). Based on

the market intelligence, Ryan understood at the time that Schein would be participating in the Unified Smiles buying group. (CCFF ¶ 957). Cohen agreed to communicate with Sullivan, responding on January 13, 2012 “Talking this AM . . . .” (CCFF ¶ 967). Cohen texted Sullivan the night of January 12, 2012 and the two agreed to speak at 8 a.m. Central Time on January 13, 2012. (CCFF ¶¶ 964-966). Cohen and Sullivan spoke on January 13, 2012 for 11 minutes and 34 seconds. (CCFF ¶ 968). Cohen does not have an independent recollection of what was discussed on that January 13, 2012 call with Sullivan. (CCFF ¶ 970). Sullivan also does not have an independent recollection of what was discussed on the January 13, 2012 call. (Sullivan, Tr. 4218 (“Q. Do you recall what you talked about? A. I don’t. . . .”), 4218-4220 (admitting that he “assumed” that the call related to merger or employment issues)). Less than thirty minutes before the scheduled call with Sullivan, Cohen emailed Benco employees to reinforce Benco’s no buying group policy. (CCFF ¶¶ 971-972). The weight of the evidence shows that Sullivan and Cohen discussed buying group Unified Smiles on the January 13, 2012 telephone call. (CCFF ¶ 969).

588. Mr. Cohen “can say with confidence that Tim and I were discussing some employee issues that started in – with the movement of reps – some reps in California and resulted in a renegotiation of the Competitive Hiring Agreement. (Cohen, Tr. 741-42).

#### **Response to Proposed Finding No. 588**

The Proposed Finding is factually inaccurate and contrary to the weight of the evidence. Cohen testified that he did not have an independent recollection of what was discussed on the January 13, 2012 call. (CCFF ¶ 970; Cohen, Tr. 973-975). Cohen testified that he did not recall the contents of his telephone call with Sullivan on January 13, 2012. (CCFF ¶ 970; Cohen, Tr. 973 (“Q. You don’t recall the contents of that [January 13, 2012] call; right? A. I do not.”)). Cohen also testified that he did not “have an independent recollection of” the January 13, 2012 call. (CCFF ¶ 970; Cohen, Tr. 974 (“I don’t have an independent recollection of that [January 13,

2012 call], that is true.”)). This trial testimony is corroborated by deposition testimony, where Cohen testified “I don’t know what we talked about or didn’t talk about.” (CX8015 (Cohen, Dep. at 211)). Cohen also testified, “I do not recall what I spoke with Mr. Sullivan about.” (CX8015 (Cohen, Dep. at 224)). Cohen also testified that he does not have any recollection of what he discussed with his attorney on the call before his call with Sullivan and on the call with his attorney after his call with Sullivan. (Cohen, Tr. 974; CX8015 (Cohen, Dep. at 227-228 (“Q. Do you recall talking to your attorney on those calls that are sandwiching the call with Mr. Sullivan . . . ? A. I do not. Q. So you don’t recall what those calls would have been about, correct? A. No . . . .”)); *see also* CCFF ¶ 970). Cohen testified that he simply “assumed” that the call was about an employment issue. (Cohen, Tr. 973). In the absence of witness memory of the substance of the call, the contemporaneous documents about this call are the *only* evidence in the record of what transpired—which shows Cohen had scheduled the call with Sullivan specifically to discuss Schein doing business with a buying group. (CCFF ¶¶ 958-968; *see also* CCFF ¶ 958 (Ryan forwarding email regarding Unified Smiles to Cohen and writing “For Timmy conversation”), CCFF ¶ 965; CX2347 at 001 (texting Sullivan to set up call on Thursday, January 12, 2012)).

The Proposed Finding is also factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Cohen and Sullivan did not discuss buying group Unified Smiles on their January 13, 2012 call. On January 11, 2012, Benco learned from a customer that Schein might be offering discounts to the buying group Unified Smiles. (CCFF ¶¶ 955-957, 961).

Within minutes of receiving the news, Benco’s Director of Sales, Patrick Ryan, forwarded the information to Chuck Cohen, with the message “For Timmy conversation,” referring to Tim Sullivan of Schein. (CCFF ¶¶ 958-960). Based on the market intelligence, Ryan understood at the time that Schein would be participating in the Unified Smiles buying group. (CCFF ¶ 957). Cohen agreed to communicate with Sullivan, responding on January 13, 2012 “Talking this



AM . . . .” (CCFF ¶ 967). Cohen texted Sullivan the night of January 12, 2012 and the two agreed to speak at 8 a.m. Central Time on January 13, 2012. (CCFF ¶¶ 964-966). Cohen and Sullivan spoke on January 13, 2012 for 11 minutes and 34 seconds. (CCFF ¶ 968). Less than thirty minutes before the scheduled call with Sullivan, Cohen emailed Benco employees to reinforce Benco’s no buying group policy. (CCFF ¶¶ 971-972). The weight of the evidence shows that Sullivan and Cohen discussed buying group Unified Smiles on the January 13, 2012 telephone call. (CCFF ¶ 969). Further, there is no evidence that Cohen scheduled the call with Sullivan in response to anything related to the hiring agreement, nor did he schedule the call after speaking with his employment attorney. (*Compare* CCFF ¶ 958 (Ryan forwarding email regarding Unified Smiles to Cohen and writing “For Timmy conversation”), *and* CCFF ¶ 965 (CX2347 at 001) (texting Sullivan to set up call on Thursday, January 12, 2012), *with* Cohen, Tr. 748, *and* CX1118 at 001 (testifying that Cohen spoke to an employment lawyer on January 13, 2012 at 7:39 AM)). In any event, the call was long enough to have discussed multiple topics. Finally, Complaint Counsel objects to use of the word “competitive” to describe this agreement. The agreement was between competitors, (Sullivan, Tr. 3893-3894; Cohen, Tr. 646; Ryan, Tr. 1054), that involved a “significant” business strategy, (Cohen, Tr. 637; BFF ¶ 72), and lowered costs of doing business by agreeing to “rules of the road” with a competitor. (Cohen, Tr. 639-640; CCFF ¶¶ 313-319). The agreement limited the number of hires between the two companies. (Sullivan, Tr. 3894 (“Q. And does this confirm that the number – the limit on the number of hires between Benco and Schein was three per zone per half a year? A. Yes, it does.”); Ryan, Tr. 1057-1058). The agreement increased the “sit-out” time of others. (Ryan, Tr. 1057 (“Q. And if I’m understanding you correctly, before 2011, the time period piece of this [hiring agreement] was shorter than six months. A. That’s my recollection.”)). The agreement expanded over time to cover additional employees. (CX6027 (communication log) at 25 (Row 223); Sullivan, Tr. 3894

(Cohen texted Sullivan “‘We agreed that she would sit even though she didn’t have a contract.’ Do you see that? A. I do. Q. And ‘sit’ there, that refers to this employee not contacting the former Schein customers that she had worked with. A. That’s correct.”)). For all these reasons, “competitive” is an inaccurate description of this horizontal hiring agreement between competitors.

589. The context around the January 13, 2012 phone call supports Mr. Cohen’s testimony. (CX1118; Cohen, Tr. 746-50).

### **Response to Proposed Finding No. 589**

The Proposed Finding is factually inaccurate and contrary to the weight of the evidence. The contemporaneous documents about this call are the only evidence in the record of what transpired, and they show that Cohen scheduled a call with Sullivan specifically to discuss Schein doing business with a buying group. On January 11, 2012, Benco learned from a customer that Schein might be offering discounts to the buying group Unified Smiles. (CCFF ¶¶ 955-957, 961). Within minutes of receiving the news, Benco’s Director of Sales, Patrick Ryan, forwarded the information to Chuck Cohen, with the message “For Timmy conversation,” referring to Tim Sullivan of Schein. (CCFF ¶¶ 958-960). Based on the market intelligence, Ryan understood at the time that Schein would be participating in the Unified Smiles buying group. (CCFF ¶ 957). Cohen did not inform Ryan that he would not talk to Sullivan regarding a potential customer, Unified Smiles, or otherwise express any confusion regarding the meaning of Ryan’s email. (CCFF ¶ 962). Cohen agreed to communicate with Sullivan, responding on January 13, 2012 “Talking this AM . . . .” (CCFF ¶ 967). Cohen texted Sullivan the night of January 12, 2012 and the two agreed to speak at 8 a.m. Central Time on January 13, 2012. (CCFF ¶¶ 964-966). Cohen and Sullivan spoke on January 13, 2012 for 11 minutes and 34 seconds. (CCFF ¶ 968). Cohen does not have an independent recollection of what was discussed

on that January 13, 2012 call with Sullivan. (CCFF ¶ 970). Sullivan also does not have an independent recollection of what was discussed on the January 13, 2012 call. (Sullivan, Tr. 4218 (“Q. Do you recall what you talked about? A. I don’t. . . .”), 4218-4220 (admitting that he “assumed” that the call related to merger or employment issues)). Further, there is no evidence that Cohen scheduled the call with Sullivan in response to anything related to the hiring agreement, nor did he schedule the call after speaking with his employment attorney. (*Compare* CCFF ¶ 958 (Ryan forwarding email regarding Unified Smiles to Cohen and writing “For Timmy conversation”), *and* CCFF ¶ 965 (CX2347 at 001) (texting Sullivan to set up call on Thursday, January 12, 2012), *with* Cohen, Tr. 748, *and* CX1118 at 001 (testifying that Cohen spoke to an employment lawyer on January 13, 2012 at 7:39 AM)). In any event, the call was long enough to have discussed multiple topics. Additionally, the sequence of events shows that Cohen scheduled the call with Sullivan *after* he received Ryan’s email regarding Unified Smiles (stating simply, “For Timmy conversation”). (CCFF ¶ 958 (Ryan forwarding email regarding Unified Smiles to Cohen and writing “For Timmy conversation”); CCFF ¶ 965; CX2347 at 001 (texting Sullivan to set up call on Thursday, January 12, 2012)). In contrast, Cohen did not set up the call with Sullivan *after* Cohen spoke with his employment lawyer. (*Compare* CCFF ¶ 958 (Ryan forwarding email regarding Unified Smiles to Cohen and writing “For Timmy conversation”), *and* CCFF ¶ 965; CX2347 at 001 (texting Sullivan to set up call on Thursday, January 12, 2012) *with* Cohen, Tr. 748; CX1118 at 001 (testifying that Cohen spoke to an employment lawyer on January 13, 2012 at 7:39 AM)). At 8:39 AM, less than thirty minutes before the scheduled call with Sullivan, Cohen emailed Benco employees to reinforce Benco’s no buying group policy. (CCFF ¶¶ 971-972). The weight of the evidence shows that Sullivan and Cohen discussed buying group Unified Smiles on the January 13, 2012 telephone call. (CCFF ¶ 969).

590. The morning before the call, at 7:39am, Mr. Cohen spoke with his attorney, Joe Dougherty, who was handling the employment matters for Benco. (CX1118; Cohen, Tr. 749).

**Response to Proposed Finding No. 590**

The Proposed Finding is factually inaccurate, incomplete, and contrary to the weight of the evidence to the extent that it suggests that Cohen and Sullivan did not discuss buying group Unified Smiles on their January 13, 2012 call. On January 11, 2012, Benco learned from a customer that Schein might be offering discounts to the buying group Unified Smiles. (CCFF ¶¶ 955-957, 961). Within minutes of receiving the news, Benco's Director of Sales, Patrick Ryan, forwarded the information to Chuck Cohen, with the message "For Timmy conversation," referring to Tim Sullivan of Schein. (CCFF ¶¶ 958-960). Based on the market intelligence, Ryan understood at the time that Schein would be participating in the Unified Smiles buying group. (CCFF ¶ 957). Cohen did not inform Ryan that he would not talk to Sullivan regarding a potential customer, Unified Smiles, or otherwise express any confusion regarding the meaning of Ryan's email. (CCFF ¶ 962). Cohen agreed to communicate with Sullivan, responding on January 13, 2012 "Talking this AM . . . ." (CCFF ¶ 967). Cohen texted Sullivan the night of January 12, 2012 and the two agreed to speak at 8 a.m. Central Time on January 13, 2012. (CCFF ¶¶ 964-966). Cohen and Sullivan spoke on January 13, 2012 for 11 minutes and 34 seconds. (CCFF ¶ 968). Cohen does not have an independent recollection of what was discussed on that January 13, 2012 call with Sullivan. (CCFF ¶ 970). Sullivan also does not have an independent recollection of what was discussed on the January 13, 2012 call. (Sullivan, Tr. 4218 ("Q. Do you recall what you talked about? A. I don't. . . ."), 4218-4220 (admitting that he "assumed" that the call related to merger or employment issues)). Additionally, the sequence of events shows that Cohen scheduled the call with Sullivan *after* he received Ryan's email regarding Unified Smiles. (stating simply, "For Timmy conversation"). (CCFF ¶ 958 (Ryan

forwarding email regarding Unified Smiles to Cohen and writing “For Timmy conversation”); CCFF ¶ 965; CX2347 at 001 (texting Sullivan to set up call on Thursday, January 12, 2012)). In contrast, Cohen did not set up the call with Sullivan *after* Cohen spoke with his employment lawyer. (*Compare* CCFF ¶ 958 (Ryan forwarding email regarding Unified Smiles to Cohen and writing “For Timmy conversation”), *and* CCFF ¶ 965; CX2347 at 001 (texting Sullivan to set up call on Thursday, January 12, 2012) *with* Cohen, Tr. 748; CX1118 at 001 (testifying that Cohen spoke to an employment lawyer on January 13, 2012 at 7:39 AM)). Nor does Cohen remember the calls with his attorney, or the content of those calls. (CX8015 (Cohen, Dep. at 227-228). But, it is clear that at 8:39 AM, less than thirty minutes before the scheduled call with Sullivan, Cohen emailed Benco employees to reinforce Benco’s no buying group policy. (CCFF ¶¶ 971-972). The weight of the evidence shows that Sullivan and Cohen discussed buying group Unified Smiles on the January 13, 2012 telephone call. (CCFF ¶ 969). Complaint Counsel has no specific response to the remainder of this Proposed Finding.

591. Immediately after the call with Mr. Sullivan, Mr. Cohen again spoke to Mr. Dougherty. (CX1118; Cohen, Tr. 749).

#### **Response to Proposed Finding No. 591**

The Proposed Finding is factually inaccurate, incomplete, and contrary to the weight of the evidence to the extent that it suggests that Cohen and Sullivan did not discuss buying group Unified Smiles on their January 13, 2012 call. On January 11, 2012, Benco learned from a customer that Schein might be offering discounts to the buying group Unified Smiles. (CCFF ¶¶ 955-957, 961). Within minutes of receiving the news, Benco’s Director of Sales, Patrick Ryan, forwarded the information to Chuck Cohen, with the message “For Timmy conversation,” referring to Tim Sullivan of Schein. (CCFF ¶¶ 958-960). Based on the market intelligence, Ryan understood at the time that Schein would be participating in the Unified Smiles buying group.

(CCFF ¶ 957). Cohen did not inform Ryan that he would not talk to Sullivan regarding a potential customer, Unified Smiles, or otherwise express any confusion regarding the meaning of Ryan’s email. (CCFF ¶ 962). Cohen agreed to communicate with Sullivan, responding on January 13, 2012 “Talking this AM . . . .” (CCFF ¶ 967). Cohen texted Sullivan the night of January 12, 2012 and the two agreed to speak at 8 a.m. Central Time on January 13, 2012. (CCFF ¶¶ 964-966). Cohen and Sullivan spoke on January 13, 2012 for 11 minutes and 34 seconds. (CCFF ¶ 968). Cohen does not have an independent recollection of what was discussed on that January 13, 2012 call with Sullivan. (CCFF ¶ 970). Sullivan also does not have an independent recollection of what was discussed on the January 13, 2012 call. (Sullivan, Tr. 4218 (“Q. Do you recall what you talked about? A. I don’t. . . .”), 4218-4220 (admitting that he “assumed” that the call related to merger or employment issues)). Additionally, the sequence of events shows that Cohen scheduled the call with Sullivan *after* he received Ryan’s email regarding Unified Smiles (stating simply, “For Timmy conversation”). (CCFF ¶¶ 958 (Ryan forwarding email regarding Unified Smiles to Cohen and writing “For Timmy conversation”), 965; CX2347 at 001 (texting Sullivan to set up call on Thursday, January 12, 2012)). In contrast, Cohen did not set up the call with Sullivan *after* Cohen spoke with his employment lawyer. (*Compare* CCFF ¶ 958 (Ryan forwarding email regarding Unified Smiles to Cohen and writing “For Timmy conversation”), *and* CCFF ¶ 965; CX2347 at 001 (texting Sullivan to set up call on Thursday, January 12, 2012), *with* Cohen, Tr. 748; CX1118 at 001 (testifying that Cohen spoke to an employment lawyer on January 13, 2012 at 7:39 AM)). Nor does Cohen remember the calls with his attorney, or the content of those calls. (CX8015 (Cohen, Dep. at 227-228)). But, it is clear that at 8:39 AM, less than thirty minutes before the scheduled call with Sullivan, Cohen emailed Benco employees to reinforce Benco’s no buying group policy. (CCFF ¶¶ 971-972). The weight of the evidence shows that Sullivan and Cohen discussed buying group Unified Smiles on

the January 13, 2012 telephone call. (CCFF ¶ 969). Complaint Counsel has no specific response to the remainder of this Proposed Finding.

592. Mr. Sullivan does not recall the details of the January 13, 2012 call, but he is certain Unified Smiles was not discussed. (Sullivan, Tr. 4218-19).

**Response to Proposed Finding No. 592**

The Proposed Finding is misleading and incomplete. Sullivan testified that he does not recall what he discussed with Cohen on the January 13, 2012 call. (Sullivan, Tr. 4218 (“Q. Do you recall what you talked about? A. I don’t. . . .”); Schein Post-Tr. Br. at 66 (acknowledging that Sullivan lacks specific recollection of the call)). Benco argues that Sullivan testified that he was certain that Unified Smiles was not discussed on the call. (Benco Post-Tr. Br. at 16). Benco is incorrect. Sullivan testified that he does not recall what he discussed with Cohen. (Sullivan, Tr. 4218 (“Q. Do you recall what you talked about? A. I don’t. . . .”)). Sullivan also admits that he “assumed” that it related to merger or employment issues. (Sullivan, Tr. 4218-4220). Notably, Sullivan’s testimony is contrary to prior testimony in which he testified that he heard of Unified Smiles through a message from Cohen. (CX8025 (Sullivan, Dep. at 393) (“Have you ever heard of a group called Unified Smiles? A. Only through a message I got from Chuck”)); *see also* Sullivan, Tr. 4346). Sullivan later recanted his testimony. (CX8025 (Sullivan, Dep. at 396); Sullivan, Tr. 4346). The Proposed Finding is also factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Cohen and Sullivan did not discuss buying group Unified Smiles on their January 13, 2012 call. On January 11, 2012, Benco learned from a customer that Schein might be offering discounts to the buying group Unified Smiles. (CCFF ¶¶ 955-957, 961). Within minutes of receiving the news, Benco’s Director of Sales, Patrick Ryan, forwarded the information to Chuck Cohen, with the message “For Timmy conversation,” referring to Tim Sullivan of Schein. (CCFF ¶¶ 958-960). Based on the market intelligence, Ryan

understood at the time that Schein would be participating in the Unified Smiles buying group. (CCFF ¶ 957). Cohen agreed to communicate with Sullivan, responding on January 13, 2012 “Talking this AM . . . .” (CCFF ¶ 967). Cohen texted Sullivan the night of January 12, 2012 and the two agreed to speak at 8 a.m. Central Time on January 13, 2012. (CCFF ¶¶ 964-966). Cohen and Sullivan spoke on January 13, 2012 for 11 minutes and 34 seconds. (CCFF ¶ 968). Cohen does not have an independent recollection of what was discussed on that January 13, 2012 call with Sullivan. (CCFF ¶ 970). Less than thirty minutes before the scheduled call with Sullivan, Cohen emailed Benco employees to reinforce Benco’s no buying group policy. (CCFF ¶¶ 971-972). The contemporaneous evidence undeniably shows that Benco was *planning* to confront Schein about discounting to a buying group. Benco offered no explanation as to why Ryan sent Cohen information about Schein discounting to a buying group for the stated purpose of a conversation with Sullivan. (CX8037 (Ryan, Dep. at 100) (“Q. Sitting here today, can you think of any reason why you said: “For Timmy conversation?” A. No.”)). The weight of the evidence shows that Sullivan and Cohen discussed buying group Unified Smiles on the January 13, 2012 telephone call. (CCFF ¶ 969).

593. Based on the text messages around the time of the call, Mr. Sullivan believes they discussed Kent Hayes (a Fresno recruit) and employment related issues. (Sullivan, Tr. 4218-4219).

### **Response to Proposed Finding No. 593**

The Proposed Finding is misleading and incomplete. Sullivan testified that he does not recall what he discussed with Cohen on the January 13, 2012 call. (Sullivan, Tr. 4218 (“Q. Do you recall what you talked about? A. I don’t. . . .”)). Sullivan also admits that he “assumed” that it related to merger or employment issues. (Sullivan, Tr. 4218-4220). Notably, Sullivan’s testimony is contrary to prior testimony in which he testified that he heard of Unified Smiles through a message from Cohen. (CX0311 (Sullivan, Dep. at 393) (“Have you ever heard of a



group called Unified Smiles? A. Only through a message I got from Chuck”); *see also* Sullivan, Tr. 4346 (acknowledging that he changed his testimony)). The Proposed Finding is also factually inaccurate and contrary to the weight of the evidence to the extent that it suggests that Cohen and Sullivan did not discuss buying group Unified Smiles on their January 13, 2012 call. On January 11, 2012, Benco learned from a customer that Schein might be offering discounts to the buying group Unified Smiles. (CCFF ¶¶ 955-957, 961). Within minutes of receiving the news, Benco’s Director of Sales, Patrick Ryan, forwarded the information to Chuck Cohen, with the message “For Timmy conversation,” referring to Tim Sullivan of Schein. (CCFF ¶¶ 958-960). Based on the market intelligence, Ryan understood at the time that Schein would be participating in the Unified Smiles buying group. (CCFF ¶ 957). Cohen agreed to communicate with Sullivan, responding on January 13, 2012 “Talking this AM . . . .” (CCFF ¶ 967). Cohen texted Sullivan the night of January 12, 2012 and the two agreed to speak at 8 a.m. Central Time on January 13, 2012. (CCFF ¶¶ 964-966). Cohen and Sullivan spoke on January 13, 2012 for 11 minutes and 34 seconds. (CCFF ¶ 968). Cohen does not have an independent recollection of what was discussed on that January 13, 2012 call with Sullivan. (CCFF ¶ 970). Less than thirty minutes before the scheduled call with Sullivan, Cohen emailed Benco employees to reinforce Benco’s no buying group policy. (CCFF ¶¶ 971-972). The weight of the evidence shows that Sullivan and Cohen discussed buying group Unified Smiles on the January 13, 2012 telephone call. (CCFF ¶ 969).

594. The evidence at trial and context around the January 13, 2012 phone call conclusively demonstrate that the phone call concerned hiring issues, and there is no support for Complaint Counsel’s suggestion that the conversation reflects the existence of an agreement regarding Unified Smiles or any other buying group.

#### **Response to Proposed Finding No. 594**

The Proposed Finding is factually inaccurate and contrary to the weight of the evidence . The contemporaneous documents about this call are the only evidence in the record of what

transpired, and they show that Cohen scheduled a call with Sullivan specifically to discuss Schein doing business with a buying group. On January 11, 2012, Benco learned from a customer that Schein might be offering discounts to the buying group Unified Smiles. (CCFF ¶¶ 955-957, 961). Within minutes of receiving the news, Benco’s Director of Sales, Patrick Ryan, forwarded the information to Chuck Cohen, with the message “For Timmy conversation,” referring to Tim Sullivan of Schein. (CCFF ¶¶ 958-960). Based on the market intelligence, Ryan understood at the time that Schein would be participating in the Unified Smiles buying group. (CCFF ¶ 957). Cohen did not inform Ryan that he would not talk to Sullivan regarding a potential customer, Unified Smiles, or otherwise express any confusion regarding the meaning of Ryan’s email. (CCFF ¶ 962). Cohen agreed to communicate with Sullivan, responding on January 13, 2012 “Talking this AM . . . .” (CCFF ¶ 967). Cohen texted Sullivan the night of January 12, 2012 and the two agreed to speak at 8 a.m. Central Time on January 13, 2012. (CCFF ¶¶ 964-966). Cohen and Sullivan spoke on January 13, 2012 for 11 minutes and 34 seconds. (CCFF ¶ 968). Cohen does not have an independent recollection of what was discussed on that January 13, 2012 call with Sullivan. (CCFF ¶ 970). Further, there is no evidence that Cohen scheduled the call with Sullivan in response to anything related to the hiring agreement, nor did he schedule the call after speaking with his employment attorney. (*Compare* CCFF ¶ 958 (Ryan forwarding email regarding Unified Smiles to Cohen and writing “For Timmy conversation”), *and* CCFF ¶ 965; CX2347 at 001 (texting Sullivan to set up call on Thursday, January 12, 2012), *with* Cohen, Tr. 748; CX1118 at 001 (testifying that Cohen spoke to an employment lawyer on January 13, 2012 at 7:39 AM)). In any event, the call was long enough to have discussed multiple topics. Indeed, the sequence of events shows that Cohen scheduled the call with Sullivan *after* he received Ryan’s email regarding Unified Smiles (stating simply, “For Timmy conversation”). (CCFF ¶¶ 958 (Ryan forwarding email regarding Unified Smiles to

Cohen and writing “For Timmy conversation”), 965; CX2347 at 001 (texting Sullivan to set up call on Thursday, January 12, 2012)). The contemporaneous evidence undeniably shows that Benco was *planning* to confront Schein about discounting to a buying group. Benco offered no explanation as to why Ryan sent Cohen information about Schein discounting to a buying group for the stated purpose of a conversation with Sullivan. (Ryan, Dep. at 100 (“Q. Sitting here today, can you think of any reason why you said: “For Timmy conversation?” A. No.”)). In contrast, Cohen did not set up the call with Sullivan *after* Cohen spoke with his employment lawyer. (*Compare* CCFF ¶ 958 (Ryan forwarding email regarding Unified Smiles to Cohen and writing “For Timmy conversation”), *and* CCFF ¶ 965; CX2347 at 001 (texting Sullivan to set up call on Thursday, January 12, 2012), *with* Cohen, Tr. 748; CX1118 at 001 (testifying that Cohen spoke to an employment lawyer on January 13, 2012 at 7:39 AM)). At 8:39 AM, less than thirty minutes before the scheduled call with Sullivan, Cohen emailed Benco employees to reinforce Benco’s no buying group policy. (CCFF ¶¶ 971-972). The weight of the evidence shows that Sullivan and Cohen discussed buying group Unified Smiles on the January 13, 2012 telephone call. (CCFF ¶ 969). Both Sullivan and Cohen testified that they did not recall what they discussed on the January 13, 2012 telephone call. Cohen testified that he did not recall the contents of the January 13, 2012 call. (CCFF ¶ 970; Cohen, Tr. 973 (“Q. You don’t recall the contents of that [January 13, 2012] call; right? A. I do not.”)). Cohen also testified that he did not “have an independent recollection of” the January 13, 2012 call. (CCFF ¶ 970; Cohen, Tr. 974 (“I don’t have an independent recollection of that [January 13, 2012 call], that is true.”)). Cohen testified that he simply “assumed” that call was about an employment issue. (Cohen, Tr. 973). Sullivan testified that he does not recall what he discussed with Cohen on the January 13, 2012 call. (Sullivan, Tr. 4218 (“Q. Do you recall what you talked about? A. I don’t. . . .”)). Sullivan also admits that he “assumed” that it related to merger or employment issues. (Sullivan, Tr.

4218-4220). Notably, Sullivan’s testimony is contrary to prior testimony in which he testified that he heard of Unified Smiles through a message from Cohen. (CX0311 (Sullivan, Dep. at 393) (“Have you ever heard of a group called Unified Smiles? A. Only through a message I got from Chuck”); *see also* Sullivan, Tr. 4346 (acknowledging that he changed his testimony)). There is no reason to believe that Cohen and Sullivan could not have discussed both employment issues and the no buying group agreement on the 11 minute and 34 second call.

**VII. RESPONSES TO PROPOSED FINDINGS REGARDING “NON-BUYING GROUP COMMUNICATIONS ARE NOT EVIDENCE OF AN AGREEMENT AMONG RESPONDENTS”**

**A. RESPONSES TO PROPOSED FINDINGS REGARDING “COMMUNICATIONS REGARDING THE TDA ARE NOT EVIDENCE OF A CONSPIRACY REGARDING BUYING GROUPS”**

595. While Complaint Counsel does “not allege a group boycott of the [TDA] trade show,” they allege “inter-firm communications” about the TDA “are evidence of [Respondents’] conscious commitment to coordinate their respond to the threat of Buying Groups.” (Opening, Tr. 52; Complaint ¶ 74).

**Response to Proposed Finding No. 595**

Complaint Counsel has no specific response to this Proposed Finding except that the quote cited states “to coordinate their response to the threat of Buying Groups,” not “to coordinate their respond (*sic*) to the threat of Buying Groups.” (Complaint ¶ 74).

596. Each Respondent made its own unilateral decision regarding attendance at the 2014 TDA Trade Show. (RX0198; RX1028; Cavaretta, Tr. 5613-18).

**Response to Proposed Finding No. 596**

The Proposed Finding that each Respondent made a “unilateral decision” regarding attendance at the 2014 TDA Trade Show is factually inaccurate and contrary to the weight of the evidence.

The evidence shows that Respondents communicated with each other regarding attendance at the 2014 TDA Trade Show and then each withdrew from attending the trade show. (CCFF ¶¶ 1109-1158). On October 14, 2013, Cohen instructed his Regional Manager in Texas, Ron Fernandez,

to contact Schein and Patterson to discuss cutting back support for TDA's meetings and programs because TDA was starting a buying group. (CCFF ¶ 1118; CX1057 at 001; CX8015 (Cohen, Dep. at 362)). The Regional Manager (Ron Fernandez) followed that direction and contacted Patterson and Schein employees to coordinate "taking a stand together" against TDA. (CCFF ¶ 1119; CX1278 (Excel worksheet "Chats" tab at row 9) ("I have been talking to the directors of Schein and Patterson. We are going to be taking a stand together against [TDA].")); CX1328 at 007 (Benco's Response RFA ¶ 8) (Benco's Ron Fernandez spoke with Schein's Glenn Showgren by telephone about TDA Perks Supplies on October 15, 2013); *see also* CX0178 at 002-003; CX1289 at 001; CX0108 at 001 ("As for Patterson, we have briefly discussed this TDAPerks site . . . with our dealer competitors at the local San Antonio & Houston level . . ."). Ron Fernandez (Benco) contacted Glenn Showgren (Schein) and the two discussed not attending the TDA trade show; Fernandez stated that Cohen would reached out to Sullivan to see if HSD would pull out of the TDA trade show and asked whether Showgren had a relationship with a Patterson representative "to see if they would consider pulling out as well." (CCFF ¶ 1120; CX0178 at 002-003). In late 2013, Benco's Regional Manager Ron Fernandez communicated with Patterson's John Hyden by telephone about the 2014 TDA Annual Meeting. (CCFF ¶ 1121; CX1328 at 007-008 (Benco's Response RFA. ¶ 11); CX3365 at 003 (Patterson's Response RFA ¶3)). In that call, Hyden told Fernandez that Patterson would not be attending the 2014 TDA Annual Meeting. (CX3365 at 003 (Patterson's Response RFA ¶ 3)). In December 2013, a Schein regional manager in Texas visited a Patterson branch manager. (CCFF ¶ 1122; CX3113 at 007 (Answer of Patterson ¶ 71(b))). On December 13, 2013, Schein 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." (CX0179 at 002). High-ranking executives at Schein and Patterson also communicated regarding coordinating a

response to the TDA buying group. (CCFF ¶¶ 1123-1132). On January 6, 2014, Patterson's Misiak called Schein's Steck. (CCFF ¶ 1124; CX6027 (communication log) at 036 (Row 298)). The two spoke for 14 minutes. (CX6027 at 036 (Row 298)). On that January 6, 2014 telephone call, Patterson's Misiak informed his counterpart at Schein, Steck, that "Patterson was withdrawing from the [upcoming] TDA meeting." (CCFF ¶¶ 1124-1125; Steck, Tr. 3701-3702; CX6027 at 036 (Row 298); *see also* CX2801 at 015 (Schein's Response RFA ¶ 23) (at some point between December 2013 and January 2014, Patterson's Dave Misiak and Schein's Dave Steck communicated; one topic that was discussed concerned the TDA trade show); CX3113 at 007 (Answer of Patterson ¶ 71(c)) (TDA was mentioned in January 2014 phone call between Patterson and Schein)). In return, Steck "felt an *obligation* to get back to Mr. Misiak . . . regarding what Schein's plans were" once Schein made a decision. (CCFF ¶¶ 1126, 1129; Steck, Tr. 3702). According to Steck, on that January 6, 2014 call, Steck told Patterson that Schein had not made a decision on attending the 2014 TDA. (CCFF ¶ 1126; Steck, Tr. 3702). Steck promised to get back to Misiak with Schein's final decision. (CCFF ¶ 1126; Steck, Tr. 3702-3703). Steck reported his conversation with Patterson's Misiak to Schein's President, Tim Sullivan and to Joe Cavaretta; Steck informed Sullivan that he would follow up with Misiak as to Schein's decision regarding the TDA buying group. (CCFF ¶ 1128; Steck, Tr. 3703). On January 21, 2014, Steck sent an internal email to three Schein managers, stating "Guys, I have to get back to PDCO on whether or not we are attending the TDA." (CCFF ¶ 1129; CX0205 at 002; Steck, Tr. 3705). On the same day, January 21, 2014, but after Steck had sent his internal email to Schein managers, Steck emailed Misiak at Patterson under the subject matter "Texas," saying, "Hi Dave, I'll be calling you to let you know about our decision on the matter we recently discussed in the next couple days." (CCFF ¶ 1130; CX0112 at 001; Misiak, Tr. 1413-1414; Steck, Tr. 3704). Misiak forwarded Steck's January 21, 2014 email to his colleague, Tim Rogan,

Patterson's VP for Merchandise Marketing, stating, "[Steck] already told me they were out. Full blown!" (CCFF ¶ 1131; CX0112 at 001; Misiak, Tr. 1413-1414). Misiak could think of no other way to read this email other than to mean that Steck had communicated that Schein had pulled out of the TDA Annual Meeting. (CCFF ¶ 1132; Misiak, Tr. 1414; CX8038 (Misiak, Dep. at 290-293)). On April 16, 2014, Cohen emailed Sullivan and Guggenheim on the same email chain about the TDA buying group; Cohen forwarded an article promoting the TDA Perks program. (CCFF ¶ 1133; Cohen, Tr. 577; CX1062 at 001). Sullivan and Cohen spoke by telephone on April 16, 2014, for nine minutes and 16 seconds. (CCFF ¶ 1135; CX6027 (communication log) at 042 (Row 344)). After receiving Cohen's email regarding the TDA buying group, Guggenheim made himself a calendar entry task to call Cohen about the TDA Perks letter. (CCFF ¶ 1136; CX0101 at 001). The task "Percent Complete" is 100%. (CCFF ¶ 1136; CX0101 at 001). There is no evidence that suggests that Respondents communicated for any legitimate purpose. These communications reflect that the withdrawal from the TDA Trade Show was likely not unilateral. The Proposed Finding is also irrelevant and misleading because whether or not Respondents coordinated their withdrawal, the communications regarding TDA's buying group is further evidence that Respondents coordinated to address the threat of buying groups. The Proposed Finding is also not supported by the evidence cited; the documents and testimony cited supports the notion that each Respondent did not attend the 2014 TDA Meeting, but do not state that they did so unilaterally or without communications with their competitors.

597. On December 18, 2013, Patterson unilaterally decided that it would not attend the 2014 TDA Trade Show. (RX0198).

#### **Response to Proposed Finding No. 597**

The Proposed Finding that Patterson "unilaterally decided" that it would not attend the 2014 TDA Trade Show is factually inaccurate and contrary to the weight of the evidence. The

evidence shows that Respondents communicated with each other regarding attendance at the 2014 TDA Trade Show and then each withdrew from the trade show. On October 14, 2013, Cohen instructed his Regional Manager in Texas, Ron Fernandez, to contact Schein and Patterson to discuss cutting back support for TDA's meetings and programs because TDA was starting a buying group. (CCFF ¶ 1118; CX1057 at 001; CX8015 (Cohen, Dep. at 362)). The Regional Manager (Ron Fernandez) followed that direction and contacted Patterson and Schein employees to coordinate "taking a stand together" against TDA. (CCFF ¶ 1119; CX1278 (Excel worksheet "Chats" tab at row 9) ("I have been talking to the directors of Schein and Patterson. We are going to be taking a stand together against [TDA]."); CX1328 at 007 (Benco's Response RFA ¶ 8) (Benco's Ron Fernandez spoke with Schein's Glenn Showgren by telephone about TDA Perks Supplies on October 15, 2013); *see also* CX0178 at 002-003; CX1289 at 001; CX0108 at 001 ("As for Patterson, we have briefly discussed this TDAPerks site . . . with our dealer competitors at the local San Antonio & Houston level . . .")). Ron Fernandez (Benco) contacted Glenn Showgren (Schein) and the two discussed not attending the TDA trade show; Fernandez stated that Cohen would reached out to Sullivan to see if HSD would pull out of the TDA trade show and asked whether Showgren had a relationship with a Patterson representative "to see if they would consider pulling out as well." (CCFF ¶ 1120; CX0178 at 002-003). In late 2013, Benco's Regional Manager Ron Fernandez communicated with Patterson's John Hyden by telephone about the 2014 TDA Annual Meeting. (CCFF ¶ 1121; CX1328 at 007-008 (Benco's Response RFA ¶ 11); CX3365 at 003 (Patterson's Response RFA ¶3)). In that call, Hyden told Fernandez that Patterson would not be attending the 2014 TDA Annual Meeting. (CX3365 at 003 (Patterson's Response RFA ¶3)). In December 2013, a Schein regional manager in Texas visited a Patterson branch manager. (CCFF ¶ 1122; CX3113 at 007 (Answer of Patterson ¶71(b))). On December 13, 2013, Schein 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.” (CX0179 at 002). High-ranking executives at Schein and Patterson also communicated regarding coordinating a response to the TDA buying group. (CCFF ¶¶ 1123-1132). On January 6, 2014, Patterson’s Misiak called Schein’s Steck. (CCFF ¶ 1124 (CX6027 at 036) (communication log) (Row 298)). The two spoke for 14 minutes. (CX6027 at 036) (Row 298)). On that January 6, 2014 telephone call, Patterson’s Misiak informed his counterpart at Schein, Steck, that “Patterson was withdrawing from the [upcoming] TDA meeting.” (CCFF ¶¶ 1124-1125; Steck, Tr. 3701-3702; CX6027 at 036 (Row 298); *see also* CX2801 at 015 (Schein’s Response RFA ¶ 23) (at some point between December 2013 and January 2014, Patterson’s Dave Misiak and Schein’s Dave Steck communicated; one topic that was discussed concerned the TDA trade show); CX3113 at 007 (Answer of Patterson ¶71(c)) (TDA was mentioned in January 2014 phone call between Patterson and Schein)). In return, Steck “felt an *obligation* to get back to Mr. Misiak . . . regarding what Schein’s plans were” once Schein made a decision. (CCFF ¶¶ 1126, 1129; Steck, Tr. 3702). According to Steck, on that January 6, 2014 call, Steck told Patterson that Schein had not made a decision on attending the 2014 TDA. (CCFF ¶ 1126; Steck, Tr. 3702). Steck promised to get back to Misiak with Schein’s final decision. (CCFF ¶ 1126; Steck, Tr. 3702-3703). Steck reported his conversation with Patterson’s Misiak to Schein’s President, Tim Sullivan and to Joe Cavaretta; Steck informed Sullivan that he would follow up with Misiak as to Schein’s decision regarding the TDA buying group. (CCFF ¶ 1128; Steck, Tr. 3703). On January 21, 2014, Steck sent an internal email to three Schein managers, stating “Guys, I have to get back to PDCO on whether or not we are attending the TDA.” (CCFF ¶ 1129; CX0205 at 002; Steck, Tr. 3705). On the same day, January 21, 2014, but after Steck had sent his internal email to Schein managers, Steck emailed Misiak at Patterson under the subject matter “Texas,” saying, “Hi Dave, I’ll be calling you to let you know

about our decision on the matter we recently discussed in the next couple days.” (CCFF ¶ 1130; CX0112 at 001; Misiak, Tr. 1413-1414; Steck, Tr. 3704). Misiak forwarded Steck’s January 21, 2014 email to his colleague, Tim Rogan, Patterson’s VP for Merchandise Marketing, stating, “[Steck] already told me they were out. Full blown!” (CCFF ¶ 1131; CX0112 at 001; Misiak, Tr. 1413-1414). Misiak could think of no other way to read this email other than to mean that Steck had communicated that Schein had pulled out of the TDA Annual Meeting. (CCFF ¶ 1132; Misiak, Tr. 1414; CX8038 (Misiak, Dep. at 290-293)). On April 16, 2014, Cohen emailed Sullivan and Guggenheim on the same email chain about the TDA buying group; Cohen forwarded an article promoting the TDA Perks program. (CCFF ¶ 1133; Cohen, Tr. 577; CX1062 at 001). Sullivan and Cohen spoke by telephone on April 16, 2014, for nine minutes and 16 seconds. (CCFF ¶ 1135; CX6027 (communication log) at 042 (Row 344)). After receiving Cohen’s email regarding the TDA buying group, Guggenheim made himself a calendar entry task to call Cohen about the TDA Perks letter. (CCFF ¶ 1136; CX0101 at 001). The task “Percent Complete” is 100%. (CCFF ¶ 1136; CX0101 at 001). There is no evidence that suggests that Respondents communicated for any legitimate purpose. These communications reflect that the withdrawal from the TDA Trade Show was likely not unilateral. The Proposed Finding is also irrelevant and misleading because whether or not Respondents coordinated their withdrawal, the communications regarding TDA’s buying group is further evidence that Respondents coordinated to address the threat of buying groups. The Proposed Finding is also not supported by the evidence cited; RX0198 reflects that Patterson pulled out of the TDA meeting, but does not support the notion that it did so without communications with Schein and Benco. The Proposed Finding is also incomplete because it omits that Patterson did not attend the 2014 TDA Annual meeting because, in part, of TDA’s decision to create and endorse TDA Perks Supplies. (CX3365 at 003 (Patterson’s Response RFA ¶¶ 1-2)).

598. On April 8, 2014, the TDA removed Schein from the public floorplan for the 2014 TDA Trade Show, thus effectively making the decision for Schein that it would not be attending the 2014 TDA Trade Show. (Cavaretta, Tr. 5613-18).

**Response to Proposed Finding No. 598**

This finding is misleading and not relevant to the issue of whether Respondents conspired not to provide discounts to or otherwise compete for the business of buying groups of independent dentists. The evidence shows that Respondents communicated with each other regarding attendance at the 2014 TDA Trade Show and then each withdrew from attending the trade show. On October 14, 2013, Cohen instructed his Regional Manager in Texas, Ron Fernandez, to contact Schein and Patterson to discuss cutting back support for TDA's meetings and programs because TDA was starting a buying group. (CCFF ¶ 1118; CX1057 at 001; CX8015 (Cohen, Dep. at 362)). The Regional Manager (Ron Fernandez) followed that direction and contacted Patterson and Schein employees to coordinate "taking a stand together" against TDA. (CCFF ¶ 1119; CX1278 (Excel worksheet "Chats" tab at row 9) ("I have been talking to the directors of Schein and Patterson. We are going to be taking a stand together against [TDA]."); CX1328 at 007 (Benco's Response RFA ¶ 8) (Benco's Ron Fernandez spoke with Schein's Glenn Showgren by telephone about TDA Perks Supplies on October 15, 2013); *see also* CX0178 at 002-003; CX1289 at 001; CX0108 at 001 ("As for Patterson, we have briefly discussed this TDAPerks site . . . with our dealer competitors at the local San Antonio & Houston level . . .")). Ron Fernandez (Benco) contacted Glenn Showgren (Schein) and the two discussed not attending the TDA trade show; Fernandez stated that Cohen would reached out to Sullivan to see if HSD would pull out of the TDA trade show and asked whether Showgren had a relationship with a Patterson representative "to see if they would consider pulling out as well." (CCFF ¶ 1120; CX0178 at 002-003). In late 2013, Benco's Regional Manager Ron Fernandez communicated with Patterson's John Hyden by telephone about the 2014 TDA Annual Meeting. (CCFF ¶ 1121;

CX1328 at 007-008 (Benco's Response RFA ¶ 11); CX3365 at 003 (Patterson's Response RFA ¶ 3)). In that call, Hyden told Fernandez that Patterson would not be attending the 2014 TDA Annual Meeting. (CX3365 at 003 (Patterson's Response RFA ¶ 3)). In December 2013, a Schein regional manager in Texas visited a Patterson branch manager. (CCFF ¶ 1122; CX3113 at 007 (Answer of Patterson ¶ 71(b))). On December 13, 2013, Schein 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." (CX0179 at 002). High-ranking executives at Schein and Patterson also communicated regarding coordinating a response to the TDA buying group. (CCFF ¶¶ 1123-1132). On January 6, 2014, Patterson's Misiak called Schein's Steck. (CCFF ¶ 1124; CX6027 (communication log) at 036 (Row 298)). The two spoke for 14 minutes. (CX6027 at 036 (Row 298)). On that January 6, 2014 telephone call, Patterson's Misiak informed his counterpart at Schein, Steck, that Patterson was planning to pull out of the TDA meeting. (CCFF ¶ 1125; Steck, Tr. 3701-3702; CX6027 at 036 (Row 298); *see also* CX2801 at 015 (Schein's Response RFA ¶ 23) (at some point between December 2013 and January 2014, Patterson's Dave Misiak and Schein's Dave Steck communicated; one topic that was discussed concerned the TDA trade show); CX3113 at 007 (Answer of Patterson ¶ 71(c)) (TDA was mentioned in January 2014 phone call between Patterson and Schein)). According to Steck, on that January 6, 2014 call, Steck told Patterson that Schein had not made a decision on attending the 2014 TDA. (CCFF ¶ 1126; Steck, Tr. 3702). Steck promised to get back to Misiak with Schein's final decision. (CCFF ¶ 1126; Steck, Tr. 3702-3703). Steck reported his conversation with Patterson's Misiak to Schein's President, Tim Sullivan and to Joe Cavaretta; Steck informed Sullivan that he would follow up with Misiak as to Schein's decision regarding the TDA buying group. (CCFF ¶ 1128; Steck, Tr. 3703). On January 21, 2014, Steck sent an internal email to three Schein managers, stating "Guys, I have to get back to PDCO on whether

or not we are attending the TDA.” (CCFF ¶ 1129; CX0205 at 002; Steck, Tr. 3705). On the same day, January 21, 2014, but after Steck had sent his internal email to Schein managers, Steck emailed Misiak at Patterson under the subject matter “Texas,” saying, “Hi Dave, I’ll be calling you to let you know about our decision on the matter we recently discussed in the next couple days.” (CCFF ¶ 1130; CX0112 at 001; Misiak, Tr. 1413-1414; Steck, Tr. 3704). Misiak forwarded Steck’s January 21, 2014 email to his colleague, Tim Rogan, Patterson’s VP for Merchandise Marketing, stating, “[Steck] already told me they were out. Full blown!” (CCFF ¶ 1131; CX0112 at 001; Misiak, Tr. 1413-1414). Misiak could think of no other way to read this email other than to mean that Steck had communicated that Schein had pulled out of the TDA Annual Meeting. (CCFF ¶ 1132; Misiak, Tr. 1414; CX8038 (Misiak, Dep. at 290-293)). On April 16, 2014, Cohen emailed Sullivan and Guggenheim on the same email chain about the TDA buying group; Cohen forwarded an article promoting the TDA Perks program. (CCFF ¶ 1133; Cohen, Tr. 577; CX1062 at 001). Sullivan and Cohen spoke by telephone on April 16, 2014, for nine minutes and 16 seconds. (CCFF ¶ 1135; CX6027 (communication log) at 042 (Row 344)). After receiving Cohen’s email regarding the TDA buying group, Guggenheim made himself a calendar entry task to call Cohen about the TDA Perks letter. (CCFF ¶ 1136; CX0101 at 001). The task “Percent Complete” is 100%. (CCFF ¶ 1136; CX0101 at 001). There is no evidence that suggests that Respondents communicated for any legitimate purpose. These communications reflect that the withdrawal from the TDA Trade Show was likely not unilateral. The Proposed Finding is also irrelevant and misleading because whether or not Respondents coordinated their withdrawal, the communications regarding TDA’s buying group is further evidence that Respondents coordinated to address the threat of buying groups. The Proposed Finding is also misleading to the extent that it argues that Schein did not attend the 2014 TDA Annual Meeting in part because of TDA’s Perks Supplies program; the evidence shows that

Schein did not attend the 2014 TDA Annual meeting because of TDA's decision to endorse SourceOne as the supplier for TDA Perks Supplies. (CX2801 at 008-009 (Schein's Response RFA ¶¶ 2-4)). Complaint Counsel has no specific response to the remainder of this Proposed Finding.

599. On April 9, 2014, Benco unilaterally decided that it would not attend the 2014 TDA Trade Show. (RX1028).

**Response to Proposed Finding No. 599**

The Proposed Finding that Benco "unilaterally decided" that it would not attend the 2014 TDA Trade Show is factually inaccurate and contrary to the weight of the evidence. The evidence shows that Respondents communicated with each other regarding attendance at the 2014 TDA Trade Show and then each withdrew from attending the trade show. On October 14, 2013, Cohen instructed his Regional Manager in Texas, Ron Fernandez, to contact Schein and Patterson to discuss cutting back support for TDA's meetings and programs because TDA was starting a buying group. (CCFF ¶ 1118; CX1057 at 001; CX8015 (Cohen, Dep. at 362)). The Regional Manager (Ron Fernandez) followed that direction and contacted Patterson and Schein employees to coordinate "taking a stand together" against TDA. (CCFF ¶ 1119; CX1278 (Excel worksheet "Chats" tab at row 9) ("I have been talking to the directors of Schein and Patterson. We are going to be taking a stand together against [TDA]."); CX1328 at 007 (Benco's Response RFA ¶ 8) (Benco's Ron Fernandez spoke with Schein's Glenn Showgren by telephone about TDA Perks Supplies on October 15, 2013); *see also* CX0178 at 002-003; CX1289 at 001; CX0108 at 001 ("As for Patterson, we have briefly discussed this TDAPerks site . . . with our dealer competitors at the local San Antonio & Houston level . . .")). Ron Fernandez (Benco) contacted Glenn Showgren (Schein) and the two discussed not attending the TDA trade show; Fernandez stated that Cohen would reached out to Sullivan to see if HSD would pull out of the TDA trade show

and asked whether Showgren had a relationship with a Patterson representative “to see if they would consider pulling out as well.” (CCFF ¶ 1120; CX0178 at 002-003). In late 2013, Benco’s Regional Manager Ron Fernandez communicated with Patterson’s John Hyden by telephone about the 2014 TDA Annual Meeting. (CCFF ¶ 1121; CX1328 at 007-008 (Benco’s Response RFA. ¶ 11); CX3365 at 003 (Patterson’s Response RFA ¶ 3)). In that call, Hyden told Fernandez that Patterson would not be attending the 2014 TDA Annual Meeting. (CX3365 at 003 (Patterson’s Response RFA ¶3)). In December 2013, a Schein regional manager in Texas visited a Patterson branch manager. (CCFF ¶ 1122; CX3113 at 007 (Answer of Patterson ¶ 71(b))). On December 13, 2013, Schein 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..” (CX0179 at 002). High-ranking executives at Schein and Patterson also communicated regarding coordinating a response to the TDA buying group. (CCFF ¶¶ 1123-1132). On January 6, 2014, Patterson’s Misiak called Schein’s Steck. (CCFF ¶ 1124; CX6027 at 036 (communication log) (Row 298)). The two spoke for 14 minutes. (CX6027 at 036 (Row 298)). On that January 6, 2014 telephone call, Patterson’s Misiak informed his counterpart at Schein, Steck, that “Patterson was withdrawing from the [upcoming] TDA meeting.” (CCFF ¶¶ 1124-1125; Steck, Tr. 3701-3702; CX6027 at 036 (Row 298); *see also* CX2801 at 015 (Schein’s Response RFA ¶ 23) (at some point between December 2013 and January 2014, Patterson’s Dave Misiak and Schein’s Dave Steck communicated; one topic that was discussed concerned the TDA trade show); CX3113 at 007 (Answer of Patterson ¶71(c)) (TDA was mentioned in January 2014 phone call between Patterson and Schein)). “Patterson was withdrawing from the [upcoming] TDA meeting.” In return, Steck “felt an *obligation* to get back to Mr. Misiak . . . regarding what Schein’s plans were” once Schein made a decision. (CCFF ¶¶ 1126, 1129; Steck, Tr. 3702). According to Steck, on that January 6, 2014

call, Steck told Patterson that Schein had not made a decision on attending the 2014 TDA. (CCFF ¶ 1126; Steck, Tr. 3702). Steck promised to get back to Misiak with Schein's final decision. (CCFF ¶ 1126; Steck, Tr. 3702-3703). Steck reported his conversation with Patterson's Misiak to Schein's President, Tim Sullivan and to Joe Cavaretta; Steck informed Sullivan that he would follow up with Misiak as to Schein's decision regarding the TDA buying group. (CCFF ¶ 1128; Steck, Tr. 3703). On January 21, 2014, Steck sent an internal email to three Schein managers, stating "Guys, I have to get back to PDCO on whether or not we are attending the TDA." (CCFF ¶ 1129; CX0205 at 002; Steck, Tr. 3705). On the same day, January 21, 2014, but after Steck had sent his internal email to Schein managers, Steck emailed Misiak at Patterson under the subject matter "Texas," saying, "Hi Dave, I'll be calling you to let you know about our decision on the matter we recently discussed in the next couple days." (CCFF ¶ 1130; CX0112 at 001; Misiak, Tr. 1413-1414; Steck, Tr. 3704). Misiak forwarded Steck's January 21, 2014 email to his colleague, Tim Rogan, Patterson's VP for Merchandise Marketing, stating, "[Steck] already told me they were out. Full blown!" (CCFF ¶ 1131; CX0112 at 001; Misiak, Tr. 1413-1414). Misiak could think of no other way to read this email other than to mean that Steck had communicated that Schein had pulled out of the TDA Annual Meeting. (CCFF ¶ 1132; Misiak, Tr. 1414; CX8038 (Misiak, Dep. at 290-293)). On April 16, 2014, Cohen emailed Sullivan and Guggenheim on the same email chain about the TDA buying group; Cohen forwarded an article promoting the TDA Perks program. (CCFF ¶ 1133; Cohen, Tr. 577; CX1062 at 001). Sullivan and Cohen spoke by telephone on April 16, 2014, for nine minutes and 16 seconds. (CCFF ¶ 1135; CX6027 (communication log) at 042 (Row 344)). After receiving Cohen's email regarding the TDA buying group, Guggenheim made himself a calendar entry task to call Cohen about the TDA Perks letter. (CCFF ¶ 1136; CX0101 at 001). There is no evidence that suggests that Respondents communicated for any legitimate purpose. These communications reflect that the



withdrawal from the TDA Trade Show was likely not unilateral. The Proposed Finding is also irrelevant and misleading because whether or not Respondents coordinated their withdrawal, the communications regarding TDA's buying group is further evidence that Respondents coordinated to address the threat of buying groups. The task "Percent Complete" is 100%. (CCFF ¶ 1136; CX0101 at 001). The Proposed Finding is also not supported by the evidence cited; RX1028 reflects that Benco decided to pull out of the TDA meeting, but does not support the notion that it did so without communications with Patterson and Schein. The Proposed Finding is also incomplete because it omits that Benco did not attend the 2014 TDA Annual meeting because of TDA's decision to create and endorse TDA Perks Supplies. (CX1063 (Statement of Cohen: "You may have heard some noise about a new program called #TDAPerks . . . In response, Schein, Patterson & Benco decided independently to withdraw as an exhibitor at the TDA meeting this year."))).

600. Complaint Counsel introduced evidence of an April 16, 2014 e-mail that Mr. Cohen sent to Mr. Sullivan and Mr. Guggenheim. (CX1062).

**Response to Proposed Finding No. 600**

Complaint Counsel has no specific response.

601. Mr. Cohen's April 16, 2014 e-mail is dated one week after Benco made its unilateral decision not to attend the 2014 TDA Trade Show. (CX1062; RX1028).

**Response to Proposed Finding No. 601**

The Proposed Finding that Benco made a "unilateral decision not to attend the 2014 TDA Trade Show" is factually inaccurate and contrary to the weight of the evidence. The evidence shows that Respondents communicated with each other regarding attendance at the 2014 TDA Trade Show and then each withdrew from attending the trade show. On October 14, 2013, Cohen instructed his Regional Manager in Texas, Ron Fernandez, to contact Schein and Patterson to discuss cutting back support for TDA's meetings and programs because TDA was starting a

buying group. (CCFF ¶ 1118; CX1057 at 001; CX8015 (Cohen, Dep. at 362)). The Regional Manager (Ron Fernandez) followed that direction and contacted Patterson and Schein employees to coordinate “taking a stand together” against TDA. (CCFF ¶ 1119; CX1278 (Excel worksheet “Chats” tab at row 9) (“I have been talking to the directors of Schein and Patterson. We are going to be taking a stand together against [TDA].”)); CX1328 at 007 (Benco’s Response RFA ¶ 8) (Benco’s Ron Fernandez spoke with Schein’s Glenn Showgren by telephone about TDA Perks Supplies on October 15, 2013); *see also* CX0178 at 002-003; CX1289 at 001; CX0108 at 001 (“As for Patterson, we have briefly discussed this TDAPerks site . . . with our dealer competitors at the local San Antonio & Houston level . . . ”)). Ron Fernandez (Benco) contacted Glenn Showgren (Schein) and the two discussed not attending the TDA trade show; Fernandez stated that Cohen would reached out to Sullivan to see if HSD would pull out of the TDA trade show and asked whether Showgren had a relationship with a Patterson representative “to see if they would consider pulling out as well.” (CCFF ¶ 1120; CX0178 at 002-003). In late 2013, Benco’s Regional Manager Ron Fernandez communicated with Patterson’s John Hyden by telephone about the 2014 TDA Annual Meeting. (CCFF ¶ 1121; CX1328 at 007-008 (Benco’s Response RFA ¶ 11); CX3365 at 003 (Patterson’s Response RFA ¶ 3)). In that call, Hyden told Fernandez that Patterson would not be attending the 2014 TDA Annual Meeting. (CX3365 at 003 (Patterson’s Response RFA ¶ 3)). In December 2013, a Schein regional manager in Texas visited a Patterson branch manager. (CCFF ¶ 1122; CX3113 at 007 (Answer of Patterson ¶ 71(b))). On December 13, 2013, Schein 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.” (CX0179 at 002). High-ranking executives at Schein and Patterson also communicated regarding coordinating a response to the TDA buying group. (CCFF ¶¶ 1123-1132). On January 6, 2014, Patterson’s Misiak called Schein’s Steck. (CCFF ¶ 1124;

CX6027 (communication log) at 036 (Row 298)). The two spoke for 14 minutes. (CX6027 at 036 (Row 298)). On that January 6, 2014 telephone call, Patterson's Misiak informed his counterpart at Schein, Steck, that Patterson was planning to pull out of the TDA meeting. (CCFF ¶ 1125; Steck, Tr. 3701-3702; CX6027 at 036 (Row 298); *see also* CX2801 at 015 (Schein's Response RFA ¶ 23) (at some point between December 2013 and January 2014, Patterson's Dave Misiak and Schein's Dave Steck communicated; one topic that was discussed concerned the TDA trade show); CX3113 at 007 (Answer of Patterson ¶ 71(c)) (TDA was mentioned in January 2014 phone call between Patterson and Schein)). According to Steck, on that January 6, 2014 call, Steck told Patterson that Schein had not made a decision on attending the 2014 TDA. (CCFF ¶ 1126; Steck, Tr. 3702). Steck promised to get back to Misiak with Schein's final decision. (CCFF ¶ 1126; Steck, Tr. 3702-3703). Steck reported his conversation with Patterson's Misiak to Schein's President, Tim Sullivan and to Joe Cavaretta; Steck informed Sullivan that he would follow up with Misiak as to Schein's decision regarding the TDA buying group. (CCFF ¶ 1128; Steck, Tr. 3703). On January 21, 2014, Steck sent an internal email to three Schein managers, stating "Guys, I have to get back to PDCO on whether or not we are attending the TDA." (CCFF ¶ 1129; CX0205 at 002; Steck, Tr. 3705). On the same day, January 21, 2014, but after Steck had sent his internal email to Schein managers, Steck emailed Misiak at Patterson under the subject matter "Texas," saying, "Hi Dave, I'll be calling you to let you know about our decision on the matter we recently discussed in the next couple days." (CCFF ¶ 1130; CX0112 at 001; Misiak, Tr. 1413-1414; Steck, Tr. 3704). Misiak forwarded Steck's January 21, 2014 email to his colleague, Tim Rogan, Patterson's VP for Merchandise Marketing, stating, "[Steck] already told me they were out. Full blown!" (CCFF ¶ 1131; CX0112 at 001; Misiak, Tr. 1413-1414). Misiak could think of no other way to read this email other than to mean that Steck had communicated that Schein had pulled out of the TDA Annual Meeting. (CCFF ¶ 1132; Misiak,

Tr. 1414; CX8038 (Misiak, Dep. at 290-293)). On April 16, 2014, Cohen emailed Sullivan and Guggenheim on the same email chain about the TDA buying group; Cohen forwarded an article promoting the TDA Perks program. (CCFF ¶ 1133; Cohen, Tr. 577; CX1062 at 001). Sullivan and Cohen spoke by telephone on April 16, 2014, for nine minutes and 16 seconds. (CCFF ¶ 1135; CX6027 (communication log) at 042 (Row 344)). After receiving Cohen's email regarding the TDA buying group, Guggenheim made himself a calendar entry task to call Cohen about the TDA Perks letter. (CCFF ¶ 1136; CX0101 at 001). The task "Percent Complete" is 100%. (CCFF ¶ 1136; CX0101 at 001). There is no evidence that suggests that Respondents communicated for any legitimate purpose. These communications reflect that the withdrawal from the TDA Trade Show was likely not unilateral. The Proposed Finding is also irrelevant and misleading because whether or not Respondents coordinated their withdrawal, the communications regarding TDA's buying group is further evidence that Respondents coordinated to address the threat of buying groups. Complaint Counsel has no specific response to the remainder of this Proposed Finding.

602. Mr. Cohen's April 16, 2014 e-mail is also dated after Schein and Patterson both made their own unilateral decisions not to attend the 2014 TDA Trade Show. (CX1062; Cavaretta, Tr. 5613-18; RX0198).

#### **Response to Proposed Finding No. 602**

The Proposed Finding that Schein and Patterson made their own unilateral decisions not to attend the 2014 TDA Trade Show is factually inaccurate and contrary to the weight of the evidence.

The evidence shows that Respondents communicated with each other regarding attendance at the 2014 TDA Trade Show and then each withdrew from attending the trade show. On October 14, 2013, Cohen instructed his Regional Manager in Texas, Ron Fernandez, to contact Schein and Patterson to discuss cutting back support for TDA's meetings and programs because TDA was starting a buying group. (CCFF ¶ 1118; CX1057 at 001; CX8015 (Cohen, Dep. at 362)). The

Regional Manager (Ron Fernandez) followed that direction and contacted Patterson and Schein employees to coordinate “taking a stand together” against TDA. (CCFF ¶ 1119; CX1278 (Excel worksheet “Chats” tab at row 9) (“I have been talking to the directors of Schein and Patterson. We are going to be taking a stand together against [TDA].”); CX1328 at 007 (Benco’s Response RFA ¶ 8) (Benco’s Ron Fernandez spoke with Schein’s Glenn Showgren by telephone about TDA Perks Supplies on October 15, 2013); *see also* CX0178 at 002-003; CX1289 at 001; CX0108 at 001 (“As for Patterson, we have briefly discussed this TDAPerks site . . . with our dealer competitors at the local San Antonio & Houston level . . . .”). Ron Fernandez (Benco) contacted Glenn Showgren (Schein) and the two discussed not attending the TDA trade show; Fernandez stated that Cohen would reached out to Sullivan to see if HSD would pull out of the TDA trade show and asked whether Showgren had a relationship with a Patterson representative “to see if they would consider pulling out as well.” (CCFF ¶ 1120; CX0178 at 002-003). In late 2013, Benco’s Regional Manager Ron Fernandez communicated with Patterson’s John Hyden by telephone about the 2014 TDA Annual Meeting. (CCFF ¶ 1121; CX1328 at 007-008 (Benco’s Response RFA ¶ 11); CX3365 at 003 (Patterson’s Response RFA ¶ 3)). In that call, Hyden told Fernandez that Patterson would not be attending the 2014 TDA Annual Meeting. (CX3365 at 003 (Patterson’s Response RFA ¶ 3)). In December 2013, a Schein regional manager in Texas visited a Patterson branch manager. (CCFF ¶ 1122; CX3113 at 007 (Answer of Patterson ¶ 71(b))). On December 13, 2013, Schein 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.” (CX0179 at 002). High-ranking executives at Schein and Patterson also communicated regarding coordinating a response to the TDA buying group. (CCFF ¶¶ 1123-1132). On January 6, 2014, Patterson’s Misiak called Schein’s Steck. (CCFF ¶ 1124; CX6027 (communication log) at 036 (Row 298)). The two spoke for 14 minutes. (CX6027 at

036 (Row 298)). On that January 6, 2014 telephone call, Patterson's Misiak informed his counterpart at Schein, Steck, that Patterson was planning to pull out of the TDA meeting. (CCFF ¶ 1125; Steck, Tr. 3701-3702; CX6027 at 036 (Row 298); *see also* CX2801 at 015 (Schein's Response RFA ¶ 23) (at some point between December 2013 and January 2014, Patterson's Dave Misiak and Schein's Dave Steck communicated; one topic that was discussed concerned the TDA trade show); CX3113 at 007 (Answer of Patterson ¶ 71(c)) (TDA was mentioned in January 2014 phone call between Patterson and Schein)). According to Steck, on that January 6, 2014 call, Steck told Patterson that Schein had not made a decision on attending the 2014 TDA. (CCFF ¶ 1126; Steck, Tr. 3702). Steck promised to get back to Misiak with Schein's final decision. (CCFF ¶ 1126; Steck, Tr. 3702-3703). Steck reported his conversation with Patterson's Misiak to Schein's President, Tim Sullivan and to Joe Cavaretta; Steck informed Sullivan that he would follow up with Misiak as to Schein's decision regarding the TDA buying group. (CCFF ¶ 1128; Steck, Tr. 3703). On January 21, 2014, Steck sent an internal email to three Schein managers, stating "Guys, I have to get back to PDCO on whether or not we are attending the TDA." (CCFF ¶ 1129; CX0205 at 002; Steck, Tr. 3705). On the same day, January 21, 2014, but after Steck had sent his internal email to Schein managers, Steck emailed Misiak at Patterson under the subject matter "Texas," saying, "Hi Dave, I'll be calling you to let you know about our decision on the matter we recently discussed in the next couple days." (CCFF ¶ 1130; CX0112 at 001; Misiak, Tr. 1413-1414; Steck, Tr. 3704). Misiak forwarded Steck's January 21, 2014 email to his colleague, Tim Rogan, Patterson's VP for Merchandise Marketing, stating, "[Steck] already told me they were out. Full blown!" (CCFF ¶ 1131; CX0112 at 001; Misiak, Tr. 1413-1414). Misiak could think of no other way to read this email other than to mean that Steck had communicated that Schein had pulled out of the TDA Annual Meeting. (CCFF ¶ 1132; Misiak, Tr. 1414; CX8038 (Misiak, Dep. at 290-293)). On April 16, 2014, Cohen emailed Sullivan and

Guggenheim on the same email chain about the TDA buying group; Cohen forwarded an article promoting the TDA Perks program. (CCFF ¶ 1133; Cohen, Tr. 577; CX1062 at 001). Sullivan and Cohen spoke by telephone on April 16, 2014, for nine minutes and 16 seconds. (CCFF ¶ 1135; CX6027 (communication log) at 042 (Row 344)). After receiving Cohen's email regarding the TDA buying group, Guggenheim made himself a calendar entry task to call Cohen about the TDA Perks letter. (CCFF ¶ 1136; CX0101 at 001). The task "Percent Complete" is 100%. (CCFF ¶ 1136; CX0101 at 001). There is no evidence that suggests that Respondents communicated for any legitimate purpose. These communications reflect that the withdrawal from the TDA Trade Show was likely not unilateral. The Proposed Finding is also irrelevant and misleading because whether or not Respondents coordinated their withdrawal, the communications regarding TDA's buying group is further evidence that Respondents coordinated to address the threat of buying groups. Complaint Counsel has no specific response to the remainder of this Proposed Finding.

603. Mr. Cohen's April 16, 2014 e-mail simply passes along an article that the TDA sent to its members approximately six months prior, in November 2013, discussing the TDA Perks Supplies program. It does not mention the TDA tradeshow or the Respondents' plans concerning attendance at the show. The e-mail reflects a lawful exchange of public information, and is not suggestive of a conspiracy to boycott the TDA. (CX1062).

### **Response to Proposed Finding No. 603**

The Proposed Finding is factually inaccurate and contrary to the weight of the evidence to the extent it suggests that Cohen's April 16, 2014 email is the only evidence concerning Respondents' communications regarding TDA. The evidence shows that Respondents communicated with each other regarding attendance at the 2014 TDA Trade Show and then each withdrew from attending the trade show. On October 14, 2013, Cohen instructed his Regional Manager in Texas, Ron Fernandez, to contact Schein and Patterson to discuss cutting back support for TDA's meetings and programs because TDA was starting a buying group. (CCFF ¶

1118; CX1057 at 001; CX8015 (Cohen, Dep. at 362)). The Regional Manager (Ron Fernandez) followed that direction and contacted Patterson and Schein employees to coordinate “taking a stand together” against TDA. (CCFF ¶ 1119; CX1278 (Excel worksheet “Chats” tab at row 9) (“I have been talking to the directors of Schein and Patterson. We are going to be taking a stand together against [TDA].”); CX1328 at 007 (Benco’s Response RFA ¶ 8) (Benco’s Ron Fernandez spoke with Schein’s Glenn Showgren by telephone about TDA Perks Supplies on October 15, 2013); *see also* CX0178 at 002-003; CX1289 at 001; CX0108 at 001 (“As for Patterson, we have briefly discussed this TDAPerks site . . . with our dealer competitors at the local San Antonio & Houston level . . . ”)). Ron Fernandez (Benco) contacted Glenn Showgren (Schein) and the two discussed not attending the TDA trade show; Fernandez stated that Cohen would reached out to Sullivan to see if HSD would pull out of the TDA trade show and asked whether Showgren had a relationship with a Patterson representative “to see if they would consider pulling out as well.” (CCFF ¶ 1120; CX0178 at 002-003). In late 2013, Benco’s Regional Manager Ron Fernandez communicated with Patterson’s John Hyden by telephone about the 2014 TDA Annual Meeting. (CCFF ¶ 1121; CX1328 at 007-008 (Benco’s Response to RFA ¶ 11); CX3365 at 003 (Patterson’s Response RFA ¶ 3)). In that call, Hyden told Fernandez that Patterson would not be attending the 2014 TDA Annual Meeting. (CX3365 at 003 (Patterson’s Response RFA ¶ 3)). In December 2013, a Schein regional manager in Texas visited a Patterson branch manager. (CCFF ¶ 1122; CX3113 at 007 (Answer of Patterson ¶71(b))). On December 13, 2013, Schein 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.” (CX0179 at 002). High-ranking executives at Schein and Patterson also communicated regarding coordinating a response to the TDA buying group. (CCFF ¶¶ 1123-1132). On January 6, 2014, Patterson’s Misiak called Schein’s Steck. (CCFF ¶ 1124;



CX6027 (communication log) at 036 (Row 298)). The two spoke for 14 minutes. (CX6027 at 036 (Row 298)). On that January 6, 2014 telephone call, Patterson's Misiak informed his counterpart at Schein, Steck, that Patterson was planning to pull out of the TDA meeting. (CCFF ¶ 1125; Steck, Tr. 3701-3702; CX6027 at 036 (Row 298); *see also* CX2801 at 015 (Schein's Response RFA ¶ 23) (at some point between December 2013 and January 2014, Patterson's Dave Misiak and Schein's Dave Steck communicated; one topic that was discussed concerned the TDA trade show); CX3113 at 007 (Answer of Patterson ¶ 71(c)) (TDA was mentioned in January 2014 phone call between Patterson and Schein)). According to Steck, on that January 6, 2014 call, Steck told Patterson that Schein had not made a decision on attending the 2014 TDA. (CCFF ¶ 1126; Steck, Tr. 3702). Steck promised to get back to Misiak with Schein's final decision. (CCFF ¶ 1126 (Steck, Tr. 3702-3703)). Steck reported his conversation with Patterson's Misiak to Schein's President, Tim Sullivan and to Joe Cavaretta; Steck informed Sullivan that he would follow up with Misiak as to Schein's decision regarding the TDA buying group. (CCFF ¶ 1128; Steck, Tr. 3703). On January 21, 2014, Steck sent an internal email to three Schein managers, stating "Guys, I have to get back to PDCO on whether or not we are attending the TDA." (CCFF ¶ 1129; CX0205 at 002; Steck, Tr. 3705). On the same day, January 21, 2014, but after Steck had sent his internal email to Schein managers, Steck emailed Misiak at Patterson under the subject matter "Texas," saying, "Hi Dave, I'll be calling you to let you know about our decision on the matter we recently discussed in the next couple days." (CCFF ¶ 1130; CX0112 at 001; Misiak, Tr. 1413-1414; Steck, Tr. 3704). Misiak forwarded Steck's January 21, 2014 email to his colleague, Tim Rogan, Patterson's VP for Merchandise Marketing, stating, "[Steck] already told me they were out. Full blown!" (CCFF ¶ 1131; CX0112 at 001; Misiak, Tr. 1413-1414). Misiak could think of no other way to read this email other than to mean that Steck

had communicated that Schein had pulled out of the TDA Annual Meeting. (CCFF ¶ 1132; Misiak, Tr. 1414; CX8038 (Misiak, Dep. at 290-293)).

The Proposed Finding is also misleading and incomplete. The email reflects that Cohen communicated with Guggenheim and Sullivan on the same email chain regarding buying groups, (CCFF ¶ 1133; Cohen, Tr. 577; CX1062 at 001); this is one piece of evidence, to be considered among the totality of the evidence, that Respondents conspired not to provide discounts to or otherwise compete for the business of buying groups. Additionally, following Cohen's email, Sullivan and Cohen spoke by telephone on April 16, 2014, for nine minutes and 16 seconds. (CCFF ¶ 1135; CX6027 (communication log) at 042 (Row 344)). After receiving Cohen's email regarding the TDA buying group, Guggenheim made himself a calendar entry task to call Cohen about the TDA Perks letter. (CCFF ¶ 1136; CX0101 at 001). The task "Percent Complete" is 100%. (CCFF ¶ 1136; CX0101 at 001). On April 16, 2014, Cohen emailed Sullivan and Guggenheim on the same email chain about the TDA buying group; Cohen forwarded an article promoting the TDA Perks program. (CCFF ¶ 1133; Cohen, Tr. 577; CX1062 at 001). Sullivan and Cohen spoke by telephone on April 16, 2014, for nine minutes and 16 seconds. (CCFF ¶ 1135; CX6027 (communication log) at 042 (Row 344)).

604. Mr. Cohen's April 16, 2014 e-mail is not evidence of any agreement, or any conscious commitment, among Respondents.

#### **Response to Proposed Finding No. 604**

The Proposed Finding is misleading and contrary to the weight of the evidence. The email reflects that Cohen communicated with Guggenheim and Sullivan on the same email chain regarding buying groups (CCFF ¶ 1133; Cohen, Tr. 577; CX1062 at 001); this is one piece of evidence, to be considered among the totality of the evidence (CCFF ¶¶ 1-2037), that Respondents conspired not to provide discounts to or otherwise compete for the business of

buying groups. Additionally, following Cohen's email, Sullivan and Cohen spoke by telephone on April 16, 2014, for nine minutes and 16 seconds. (CCFF ¶ 1135; CX6027 (communication log) at 042 (Row 344)). After receiving Cohen's email regarding the TDA buying group, Guggenheim made himself a calendar entry task to call Cohen about the TDA Perks letter. (CCFF ¶ 1136; CX0101 at 001). The task "Percent Complete" is 100%. (CCFF ¶ 1136; CX0101 at 001).

**B. RESPONSES TO PROPOSED FINDINGS REGARDING "NON-BUYING GROUP COMMUNICATIONS ARE NOT EVIDENCE OF A CONSPIRACY"**

605. Complaint Counsel cites to communications between Benco and Schein that are unrelated to buying groups in support of their alleged conspiracy. (See, e.g., CX6027-023 ("Tim: You asked me to let you know re Anne Cox. We are hiring her, starts next week. Thanks. Cfc"), CX6027-026-027 (A-dec "divorces" Benco), CX6027-\_\_ ("Thanks for Amazon change."), CX6027-010 ("BTW, I love the way that the Sullivan Foundation/DTAF joint scholarship has turned out. ... Thank you for helping to set the standard."), CX6027-039 ("Ok. I've got Badgers. You've got Harvard. For a beer. 🍷🍷🍷🍷"), CX6027-021 ("Must have had great snow day yesterday!! We had to leave early for airport to get out ahead of it!!") CX6027-019 ("Just wrapped up. They boo'd me off the stage. Threw fruit. Ornery crowd. I'm sure you'll do great!!").

**Response to Proposed Finding No. 605**

Complaint Counsel has no specific response.

606. Non-buying group communications, however, are not probative of a conspiracy not to do business with buying groups but rather are innocuous communications related to hiring issues, manufacturers, Amazon, charity, sports, niceties, and jokes. *Id.*

**Response to Proposed Finding No. 606**

The Proposed Finding is misleading, inaccurate and contrary to the weight of the evidence to the extent that it suggests that the Respondents' non-buying group communications are not relevant to the conspiracy. The non-buying group communications establish a pattern by which Cohen contacted Sullivan and Guggenheim when he saw the opportunity to advance their "mutual interests" by coordinating their conduct. (CCFF ¶¶ 269-326). Cohen admitted at trial that he had an "open relationship" with Sullivan and Guggenheim. (CCFF ¶¶ 277, 300, 310). This "open

relationship” resulted in coordinated conduct in refusing to discount to buying groups. (CCFF ¶¶ 474-1390).

607. Notably, Complaint Counsel did not identify any communications between Benco and Schein relating to buying groups at the time the alleged conspiracy supposedly began in December 2011. (CX6027-018).

**Response to Proposed Finding No. 607**

The Proposed Finding is misleading and factually inaccurate. Between March and December 2011, Cohen and Sullivan called each other at least 13 times for a total duration of 50 minutes and 14 seconds, (CX6027 (communication log) at 012, 016-017), and exchanged a total of 89 text messages in 2011—for 23 of which no content was available which may have contained buying group communications. (CX6027 at 003-018). Sullivan exchanged additional communications with Cohen, including written notes and voicemail messages, that are not reflected in CX6027. (*See* Sullivan, Tr. 3885 (Sullivan produced all cell phone records but could have called Cohen from a land line); Cohen, Tr. 526 (Cohen sent Sullivan notes by mail from time to time); Sullivan, Tr. 3886 (“Q: And you didn’t keep all of the notes that Chuck Cohen sent you over the years, right? A: No.”)). Cohen and Sullivan saw each other at multiple industry events each year during and prior to the conspiracy period. (CCFF ¶¶ 358-380, 384-389; *see also* Cohen, Tr. 595-597 (Cohen regularly attended the DTA, which is “not that big a meeting”); CX8015 (Cohen, Dep. at 359-360); Sullivan, Tr. 3878 (Sullivan attends the DTA annual meeting every year, and typically sees and would see Cohen at the meeting), 3879 (Sullivan attended the Chicago Midwinter Meeting and sometimes saw Cohen there), 3879-3880 (Sullivan typically attended five to six dental industry conventions each year and “might run into” Cohen at those meetings); CCFF ¶¶ 358-364, 367-375, 377; Attachment B to Complaint Counsel’s Post-Trial Brief; CX4360 at 014-020 (registering to attend the Chicago Dental Society Midwinter Meeting); CX4444-a at 001 (same)). Executives from Benco and Schein visited each other at their

companies' corporate offices near the time of the conspiracy period. (CX1045 (October 2011 email from Chuck Cohen to Rick Cohen: "I've personally visited both Schein's & Patterson's corporate offices" and discussing accommodating Sullivan and Guggenheim visiting Benco)). In addition to the extensive opportunities for Benco and Schein to communicate related to buying groups, Cohen's notes following a November 2011 meeting with key Schein leaders indicate a desire to "explore opportunities to work together 'quietly'" and further note that "Schein has a long history of covertly aligning with (co-opting?) competitors and vendors, either through partnerships or small ownership stakes." (CX1403 at 002).

608. At trial, Complaint Counsel introduced two December 2011 e-mails sent by Mr. Cohen – one to Mr. Sullivan and a second to Mr. Guggenheim – about Procter & Gamble. (Guggenheim, Tr. 1547; Sullivan, Tr. 3890-93; Cohen, Tr. 488; CX2422, CX1049, CX3067.)

**Response to Proposed Finding No. 608**

Complaint Counsel has no specific response.

609. Procter & Gamble is a manufacturer of dental products; not a buying group. (Cohen, Tr. 832-33; Sullivan, Tr., 3891; Guggenheim, Tr. 1692).

**Response to Proposed Finding No. 609**

Complaint Counsel has no specific response.

610. The Procter & Gamble e-mails had "nothing to do with buying groups." (Cohen, Tr. 833; Sullivan, 4262; Guggenheim, Tr. 1692).

**Response to Proposed Finding No. 610**

The Proposed Finding is misleading and irrelevant. Though there is no explicit reference to buying groups, the e-mails represent an explicit call for help by Cohen to his direct competitors in addressing the issue with Procter & Gamble packaging and pricing of a product because Benco is "a small player in the market, and there's sometimes when there's mutual best interest." (Cohen, Tr. 489). Specifically, the Procter & Gamble e-mails spell out the collective issue and solution he was proposing. Both emails state, "I think you see the issue: we (all of us) are going

to lose money on every box we sell.... When we at Benco called this issue to the attention of P&G management, they replied that no one else (i.e. you, Schein, Burkhart) seemed concerned about it, so they're not going to make any changes. Our feeling is that we distributors either need more margin, or P&G needs to take out the cavity rinse." (CX1049 at 001-002; CX1050 at 001-002; Guggenheim, Tr. 1547-1551; Sullivan, Tr. 3890-3891; CX3067 at 002). In these e-mails, Cohen sent Benco's margin and profitability analysis on the product, asking his competitors to raise the same issues with Procter & Gamble. Whether Benco was explicitly referencing a buying group with these e-mail is irrelevant as the communications are probative of the collective actions undertaken by the Respondents.

611. Legitimate interfirm communications about manufacturer issues cannot support the alleged conspiracy regarding buying groups, or an inference that Respondents communicated about buying groups at this time.

#### **Response to Proposed Finding No. 611**

The Propose Finding is misleading and irrelevant. Though there is no explicit reference to buying groups, the e-mails represent an explicit call for help by Cohen to his direct competitors in addressing the issue with Procter & Gamble packaging and pricing of a product because Benco is "a small player in the market, and there's sometimes when there's mutual best interest." (Cohen, Tr. 489). Specifically, the Procter & Gamble e-mails spell out the collective issue and solution he was proposing. Both emails state, "I think you see the issue: we (all of us) are going to lose money on every box we sell.... When we at Benco called this issue to the attention of P&G management, they replied that no one else (i.e. you, Schein, Burkhart) seemed concerned about it, so they're not going to make any changes. Our feeling is that we distributors either need more margin, or P&G needs to take out the cavity rinse." (CX1049 at 001-002; CX1050 at 001-002; Guggenheim, Tr. 1547-1551; Sullivan, Tr. 3890-3891; CX3067 at 002). In these e-mails, Cohen sent Benco's margin and profitability analysis on the product, asking his competitors to

raise the same issues with Procter & Gamble. Whether Benco was explicitly referencing a buying group with these e-mail is irrelevant.

612. Complaint Counsel introduced an exchange of calls between Mr. Cohen and Mr. Sullivan on January 8, 2013. (CX6027 at 026-027).

**Response to Proposed Finding No. 612**

Complaint Counsel has no specific response.

613. The testimony at trial established that these January 8, 2013 calls were also about a manufacturer issue: A-dec's announcement of its "divorce" from Benco. (Cohen, Tr. 770-71 ("January of 2013 was when A-dec and Benco announced that we were getting divorced."), Sullivan, Tr. 4081-82; see also RX2756 ("Chuck and I finally hooked up today after a few days of failed attempts... Chuck would not make changes Adec requested so they terminated.")).

**Response to Proposed Finding No. 613**

Complaint Counsel does not object to the Proposed Finding's suggestion that the exchange of calls were "*also* about a manufacturer issue." But, to the extent anything besides buying groups were discussed, it is irrelevant to whether Respondents coordinated a mutual refusal to discount to buying groups. The Proposed Finding is also incomplete and should be given little weight as Cohen did not even articulate until questioned by his own counsel. (Cohen, Tr. 770 ("Q: So any significance in your mind of the dates January 7 and January 8, 2013? A: I believe, in researching for – in preparing for the testimony today, that that was a period of time where Tim and Henry Schein wanted to cancel this competitor hire agreement. Q: Okay. In addition to that, were there any issues with a manufacturer called A-dec around this time? A: Oh, yeah. Sorry.")).

614. "A-dec is a dental equipment company. It stands for Austin Dental Equipment Company out of Oregon. And it is considered to be the top-of-the-line dental chair and dental unit and dental light and cabinetry." (McFadden, Tr. 2752).

**Response to Proposed Finding No. 614**

Complaint Counsel has no specific response.

615. The loss of A-dec was "traumatic" to Benco and flattened Benco's expansion and growth. (Cohen, Tr. 665-667)

**Response to Proposed Finding No. 615**

Complaint Counsel has no specific response.

616. In January 2013, Schein and Benco had been discussing the sale of Benco to Schein. (Sullivan, Tr. 4081 (“We were surprised to hear that A-dec cut off Benco, and we're actually in the midst of discussions with them about a merger.”)).

**Response to Proposed Finding No. 616**

Complaint Counsel has no specific response.

617. Benco’s loss of A-dec was “a big deal to – a potential impact to [the] deal” with Schein. (Sullivan Tr. 4081; see also RX2756).

**Response to Proposed Finding No. 617**

Complaint Counsel has no specific response.

618. The evidence thus indicates that the January 2013 calls stemmed from Schein-Benco merger talks and concerned Benco losing a major vendor. (Sullivan, Tr. 4081, RX2756).

**Response to Proposed Finding No. 618**

The Proposed Finding should be given little weight because it is not strongly supported. The witness did not even articulate until questioned by his own counsel. (Cohen, Tr. 770 (“Q: So any significance in your mind of the dates January 7 and January 8, 2013? A: I believe, in researching for – in preparing for the testimony today, that that was a period of time where Tim and Henry Schein wanted to cancel this competitor hire agreement. Q: Okay. In addition to that, were there any issues with a manufacturer called A-dec around this time? A: Oh, yeah. Sorry.”)).

619. There is no indication that buying groups were discussed or mentioned on the January 2013 calls. (Sullivan, Tr. 4081, Cohen, Tr. 770-71). The calls thus cannot support Complaint Counsel’s allegations.

**Response to Proposed Finding No. 619**

The Proposed Finding is misleading and not supported by the evidence. Complaint Counsel alleges, and the evidence proves, that the calls are part of a pattern of cooperation among Benco, Schein, and Patterson to confront competitive threats. (CCFF ¶¶ 284-322). The Proposed Finding



is misleading to the extent it implies that proof of the content of calls must or should be evidence in this case. Contemporaneous communications for which we do have content show that buying groups was on the mind of Sullivan and Cohen at the time of the calls. Cohen emailed Guggenheim just a few weeks later sharing with that competitor Benco's no buying group policy explicitly. (CCFF ¶ 483). A few months later, Cohen shared with Sullivan Benco's no-buying group strategy with regards to potential customer ADC. (CCFF ¶¶ 1032, 1034, 1039-1040). Around the same time, Cohen confronted Sullivan about whether Schein is working with buying group Dental Alliance. (CCFF ¶ 997). After the fact explanations of the calls are weak evidence as to what was actually discussed. Even if A-dec was discussed it does not preclude discussion about buying groups. The calls themselves are probative of the open relationship between Respondents Benco and Schein that led to horizontal agreements.

The Proposed Finding is incomplete and misleading to the extent it suggests that Cohen and Sullivan spoke about mergers in the two telephone calls in January 2013 because there is no showing that Sullivan had anything to do with the merger talks, which were held at Stanley Bergman's private residence. (CX0231).

620. Complaint Counsel introduced a series of communications between Mr. Cohen and Mr. Sullivan on March 16, 2010 as evidence of an alleged buying group conspiracy. (CX6027-001-002).

#### **Response to Proposed Finding No. 620**

The Proposed Finding is misleading and incomplete as it suggests that the communications in 2010 are the basis of Complaint Counsel's case against respondents. First, the communications are one of several examples of Cohen and Sullivan coordinating responses to perceived industry issues, a practice that proceeds and continues through and is probative of this particular conspiracy not to discount to buying groups. (CCFF ¶¶ 269-326). The Proposed Finding is incomplete and misleading because Complaint Counsel introduced a significant amount of

communications and opportunities to communicate between Mr. Cohen and Mr. Sullivan throughout the start and pendency of the conspiracy. Between March and December 2011 alone, Cohen and Sullivan called each other at least 13 times for a total duration of 50 minutes and 14 seconds, (CX6027 (communication log) at 012, 016-017), and exchanged a total of 89 text messages in 2011—for 23 of which no content was available and could have been about refusing to discount to buying groups. (CX6027 at 003-018). Sullivan exchanged additional communications with Cohen, including written notes and voicemail messages, that are not reflected in CX6027. (*See* Sullivan, Tr. 3885 (Sullivan produced all cell phone records but could have called Cohen from a land line); Cohen, Tr. 526 (Cohen sent Sullivan notes by mail from time to time); Sullivan, Tr. 3886 (“Q: And you didn’t keep all of the notes that Chuck Cohen sent you over the years, right? A: No.”)). Cohen and Sullivan saw each other at multiple industry events each year during and prior to the conspiracy period. (CCFF ¶¶ 358-380, 384-389; *see also* Cohen, Tr. 595-597 (Cohen regularly attended the DTA, which is “not that big a meeting.”); CX8015 (Cohen, Dep. at 359-360); Sullivan, Tr. 3878 (Sullivan attends the DTA annual meeting every year, and typically sees and would see Cohen at the meeting), 3879 (Sullivan attended the Chicago Midwinter Meeting and sometimes saw Cohen there), 3879-3880 (Sullivan typically attended five to six dental industry conventions each year and “might run into” Cohen at those meetings); CCFF ¶¶ 358-364, 367-375, 377; Attachment B to Complaint Counsel’s Post-Trial Brief; CX4360 at 014-020 (registering to attend the Chicago Dental Society Midwinter Meeting); CX4444-a at 001 (same)). Executives from Benco and Schein visited each other at their companies’ corporate offices near the time of the conspiracy period. (CX1045 (October 2011 email from Chuck Cohen to Rick Cohen “I’ve personally visited both Schein’s & Patterson’s corporate offices” and volunteering a willingness to accommodate Sullivan and Guggenheim visiting Benco)). In addition to the extensive opportunities for Benco and Schein to communicate

related to buying groups, Cohen notes, following a November 2011 meeting with key Schein leaders, a desire to “explore opportunities to work together ‘quietly’” and further note that “Schein has a long history of covertly aligning with (co-opting?) competitors and vendors, either through partnerships or small ownership stakes.” (CX1403 at 002).

621. The March 16, 2010 communications occur more than a year before Complaint Counsel claims the alleged conspiracy began.

**Response to Proposed Finding No. 621**

The Proposed Finding is irrelevant, incomplete, and misleading because it suggests that evidence of a long-term open relationship and repeated coordinated approaches to industry issues involving suppliers and customers are not a proper basis for an inference that Respondents coordinated a joint refusal to discount to buying group customers. This is just one of many such examples. (CCFF ¶¶ 269-326).

622. Moreover, the March 16, 2010 communications had nothing to do with buying groups, but rather an issue with KaVo’s new handset program. (Sullivan, Tr. 4076, CX2346, CX2452).

**Response to Proposed Finding No. 622**

The Proposed Finding is irrelevant, incomplete, and misleading because it suggests that evidence of a long-term open relationship and repeated coordinated approaches to industry issues involving suppliers and customers are not a proper basis for an inference that Respondents coordinated a joint refusal to discount to buying group customers. This is just one of many such examples. (CCFF ¶¶ 269-326).

623. Benco and Schein had distributor agreements with KaVo. (Sullivan, Dep. at 354).

**Response to Proposed Finding No. 623**

Complaint Counsel has no specific response.

624. KaVo was offering sample handsets, but “[t]he problem was with their keeping them, it wasn’t like they would then choose the dealer that they want this to be billed through.

They were billing the customers directly, which goes against [the distributor] agreement with them.” (Sullivan, Tr. 4075).

**Response to Proposed Finding No. 624**

Complaint Counsel has no specific response.

625. There is no evidence that the March 16, 2010 communications had anything to do with buying groups and predated the alleged conspiracy by more than a year. They thus cannot support Complaint Counsel’s claims. (Sullivan, Tr. 4261-62).

**Response to Proposed Finding No. 625**

The Proposed Finding is irrelevant, incomplete, and misleading because it suggests that evidence of a long-term open relationship and repeated coordinated approaches to industry issues involving suppliers and customers are not a proper basis for an inference that Respondents coordinated a joint refusal to discount to buying group customers as well. This is just one of many such examples. (CCFF ¶¶ 269-326). The non-buying group communications establish a pattern by which Cohen contacted Sullivan and Guggenheim when he saw the opportunity to advance their “mutual interests” by coordinating their conduct. (CCFF ¶¶ 269-326). Cohen admitted at trial that he had an “open relationship” with Sullivan and Guggenheim. (CCFF ¶¶ 277, 300, 310). This “open relationship” resulted in coordinated conduct in refusing to discount to buying groups. (CCFF ¶¶ 474-1390).

626. The fact that Mr. Sullivan and Mr. Cohen communicated about legitimate business issues provides no support to Complaint Counsel’s allegation that Schein later agreed to behave in a certain way with regard to buying groups at Benco’s behest.

**Response to Proposed Finding No. 626**

The Proposed Finding is inaccurate, misleading, and lacks any citation to the record. The Proposed Finding should be rejected for failing to provide any citation. Further, the Proposed Finding is misleading because it mischaracterizes the evidence, Sullivan and Cohen didn’t just communicate about legitimate business issues. Instead, the competitors coordinated rather and competed on responses to several issues facing dental distributors, (CCFF ¶¶ 287-326),

establishing a pattern and a practice which is probative that they took a similar coordinated approach with regards to buying groups. In addition, Complaint Counsel objects to the suggestion that competitors can legitimately coordinate strategies with regard to suppliers. To the extent Benco or Schein faced “legitimate business issues,” in regards to dental distribution, it does not make it proper fodder for joint communications crafting coordinated strategies among competitors.

627. Complaint Counsel also introduced a series of communications from Mr. Cohen to Mr. Guggenheim and Mr. Sullivan that related to end-user data that distributors provide to manufacturers. (CX1054; CX1055).

**Response to Proposed Finding No. 627**

Complaint Counsel has no specific response.

628. On June 12, 2013 Mr. Cohen separately sent e-mails to Mr. Sullivan and Mr. Guggenheim regarding formalizing industry practice of supplying end-user data to suppliers such as Dentsply, 3M, Hu Friedy, and Ivoclar. (CX1054; CX1055).

**Response to Proposed Finding No. 628**

The Proposed Finding is misleading and inaccurate because Cohen did not send emails to his competitors to formalize an industry practice as suggested by the Proposed Finding. Rather Cohen discovered that Benco’s “poison pill” policy of requiring suppliers to give three years notice before selling directly to consumers was not included in Schein’s and Patterson’s supply contracts. (CCFF ¶ 301). Benco was concerned because, in Cohen’s words, “If Benco signed a contract with a manufacturer that contained a poison pill clause, but Schein and Patterson had not” Benco was still at risk. (CCFF ¶ 302 (quoting Cohen, Tr. 487)). Rather than let the market determine whether the clause hemming the actions of suppliers should exist, in nearly identical emails Cohen explicitly encouraged his largest competitors Schein and Patterson to insist on the poison pill clause as well. (CX2337 at 001 (“In every negotiation since [the first meeting with the manufacturer], we insisted on, and received, the three-year ‘poison pill’ clause . . . . At

Benco, we're NOT changing our stance on this issue, and urge you to re-examine the agreements you've already signed to make sure they include the 'poison pill' clause."); Cohen, Tr. 486-488; Guggenheim, Tr. 1556-1595; CX1055 at 001-002). The ploy was effective; both Guggenheim and Sullivan looked into the issue raised by their competitor. (CCFF ¶¶ 307-308). Cohen's tactics were not hidden. He wrote to Paul Jackson that saying "I sent **the** email to Tim {Sullivan] and Paul [Guggenheim] . . . Don't sign without the poison pill." (CX1023 at 001 (emphasis added); CCFF ¶ 309). Cohen testified that this was an example of the open relationship that existed between the competitors. (CCFF ¶ 310).

629. Mr. Cohen's e-mails reflect his concern that "manufacturers receive data feeds from [distributors] about sales of their products to end users" without restrictions. (CX8023 (Guggenheim, Dep. at 81), CX2337, CX1055).

#### **Response to Proposed Finding No. 629**

The Proposed Finding is misleading, because while this is the language that Cohen used to bring the issue to his competitors attention, Cohen was urging them to adopt Benco's strategy. (CCFF ¶¶ 301-310). Unlike the Proposed Finding, Cohen testified his competitor communications was motivated because, in Cohen's words, "If Benco signed a contract with a manufacturer that contained a poison pill clause, but Schein and Patterson had not" Benco was still at risk. (CCFF ¶ 302 (quoting Cohen, Tr. 487)).

630. Mr. Sullivan did not reply to Mr. Cohen's e-mail or ever discuss the issue with Mr. Cohen. (Sullivan, Tr. 4080).

#### **Response to Proposed Finding No. 630**

The Proposed Finding is misleading and incomplete because it implies that Sullivan did not act on Benco's request. After receiving Cohen's June 12, 2013 email regarding Benco's concern with inclusion of poison pill clauses, Sullivan looked into the issue. (CX2337 at 001 (June 13, 2013 email from Sullivan to Paul Hinsch: "Paul, what are your thoughts in general regarding this

issue? . . . Right now, which suppliers do we share such end-user data with?”)). Sullivan also forwarded Cohen’s June 12, 2013, email to his boss. (Sullivan, Tr. 4079-4080; CX2337 at 001). Further, before the end of 2013, Cohen, Sullivan, and Guggenheim were in the same place at the same time at least three times at the Dental Trade Alliance Meeting, (CCFF ¶ 364), the American Dental Association Meeting, (CCFF ¶ 373), and the Greater New York Dental Trade Show, (CCFF ¶ 370), they might have discussed it at any one of these events.

631. Mr. Guggenheim told Mr. Cohen that Patterson had already formalized their end user data sharing in their vendor agreements. (CX1055, CX3070, CX3071, CX3222).

**Response to Proposed Finding No. 631**

The Proposed Finding is incomplete and misleading. After receiving Cohen’s June 12, 2013 email regarding Benco’s concern with inclusion of poison pill clauses, Guggenheim looked into the issue. (Guggenheim, Tr. 1560-1564; CX3222 (June 17, 2013 Cohen email to Guggenheim, “I received your message on the HF issue, glad you’re on top of it.”)). Guggenheim later communicated again with Cohen to inform Cohen of what he had learned. (Guggenheim, Tr. 1562-1564). Guggenheim reported to Cohen Patterson’s contracting approach with regards to the poison pill issue and that it had included the clause at issue in its own contracts. (Guggenheim, Tr. 1565; CX6027 (communication log) at 031 (Row 265) (June 18, 2013 text from Guggenheim to Cohen about Patterson’s inclusion of similar clauses)). Further, before the end of 2013, Cohen, Sullivan, and Guggenheim were in the same place at the same time at least three times at the Dental Trade Alliance Meeting, (CCFF ¶ 364), the American Dental Association Meeting, (CCFF ¶ 373), and the Greater New York Dental Trade Show, (CCFF ¶ 370), they might have communicated about the poison pill issue again at any one of these events.

632. The communications concerning end-user data sharing with suppliers have nothing to do with buying groups. (Sullivan, Tr. 4262). They are not evidence of the alleged buying group conspiracy; nor can they support an inference of such a conspiracy.

**Response to Proposed Finding No. 632**

The Proposed Finding is incomplete, misleading, and unsupported by the cited evidence. The Proposed Finding is misleading and incomplete as it suggests that Cohen's communications to Schein describing Benco's strategy and urging Schein to adopt a similar insistence on contractual provisions is not probative of whether a similar approach was taken with regards to buying groups. On June 12, 2013, Cohen wrote to Sullivan, "At Benco, we're NOT changing our stance on this issue, and urge you to re-examine the agreements you've already signed to make sure that they include the 'poison pill' clause." (CX2337 at 001). First, the communications are just one of several examples of Cohen and Sullivan coordinating responses to perceived industry issues, a practice that proceeds and continues through and is probative of this particular conspiracy not to discount to buying groups. (CCFF ¶¶ 269-326). Second, the Proposed Finding is misleading to the extent it suggests Sullivan was not responsive to Cohen's suggestion because Sullivan looked into the issue. (CX2337 at 001 (June 13, 2013 email from Sullivan to Paul Hinsch: "Paul, what are your thoughts in general regarding this issue? . . . Right now, which suppliers do we share such end-user data with?")). Sullivan also forwarded Cohen's June 12, 2013, email to his boss. (Sullivan, Tr. 4079-4080; CX2337 at 001). Finally, the Proposed Finding is misleading in that it suggests there is no other opportunities to discuss the issue. Sullivan and Cohen were in the same place at the same time several times over the year that included the end-user data contracting issue and the executives may have spoken about this issue or other horizontal, competitive issues at any of those encounters. (*See* CCFF ¶¶ 364 (Dental Trade Alliance Meeting), 373 (American Dental Association Meeting), 370 (Greater New York Dental Trade Show)).

633. Complaint Counsel introduced a December 2013 task list entry by Mr. Cohen and an April 16, 2014 telephone call between Mr. Sullivan and Mr. Cohen regarding Amazon. (CX0065; Cohen, Tr. 834; Sullivan, Tr. 4015, 4246 ("A. You'll see a couple texts later about, you know, thanks for the Amazon change ... So at that time, he had called me about -- he thought he saw Henry Schein products on Amazon. We don't sell to Amazon."))).



**Response to Proposed Finding No. 633**

The Proposed Finding is incomplete, inaccurate, and misleading because the task entry Cohen created in December 2013 specifically said: “[w]ork with Schein & Patterson” to discuss a joint response. (Cohen, Tr. 490-492; CX0065 at 001 (“Subject: Discuss Amazon Response re Distributors . . . start the conversations NOW! Work with Schein & Patterson . . .”)). The priority for this Amazon task was “High” and its status is marked “Completed.” (CX0065). Rick Cohen’s January 2014 email spelled out Benco’s strategy in coordinating with Benco’s competitors on Amazon when he wrote, “Schein won’t talk to Patterson about [Amazon]. They hate each other too much. We could be the glue to make it happen.” (CX0066 at 001; *see also* CX0066 at 001 (January 2014 email from Benco Director Rick Cohen to Chuck Cohen, with the subject line “RE: Amazon Response . . .” stating “We could be the glue to make it happen. If we had a schein/patterson/benco response it would be much more effective than a benco only response.”); CCFF ¶ 311; Cohen, Tr. 490-492). Chuck Cohen’s reply to his brother’s suggestion about coordinating with Patterson and Schein was: “Good call.” (CX0066 at 001). In addition, the Proposed Finding is misleading because the April 16, 2014 call introduced by Complaint Counsel was about the TDA Perks buying group, (CCFF ¶¶ 1131-1137), although further coordination among the competitors on Amazon may have also occurred. Finally, Complaint Counsel has no objection to the Proposed Finding with regards to Sullivan’s admissions that Cohen thanked Schein for the Amazon change.

634. Amazon is not a buying group. (Cohen, Tr. 834; [REDACTED]). Communications about Amazon do not support Complaint Counsel’s alleged buying group conspiracy, or an inference of such a conspiracy.

**Response to Proposed Finding No. 634**

The Proposed Finding is incomplete and against the weight of the evidence. The proposed finding is incomplete because in context, the intra and inter firm communications about Amazon

is further evidence of Benco's pattern of conduct in contacting its top two competitors when faced with an industry threat, and thus, supports finding a conspiracy with regards to buying groups.

When Benco feared competition from Amazon, just as with buying groups, Cohen turned to coordination with his closest competitors. (CCFF ¶¶ 311-312). In December 2013, Cohen wrote himself a reminder to "[w]ork with Schein & Patterson" to discuss a joint response to Amazon. (CX0065 at 001; CCFF ¶ 311; Cohen, Tr. 490-492). Benco's other co-owner Richard Cohen was on the same page, in an email with the subject line "RE: Amazon Response . . ." Richard Cohen explicitly stated Benco's culture of collusion: "We could be the glue to make it happen. If we had a schein/patterson/benco response it would be much more effective than a benco only response." (CX0066 at 001 (January 2014). Chuck Cohen's reply to his brother's suggestion about coordinating with Patterson and Schein was: "Good call." (CX0066 at 001). In fact, Cohen testified about coordinating with Schein and Patterson to achieve "mutual best interests." (Cohen, Tr. 484-489 ("Sometimes our mutual best interest is good for me"); CCFF ¶ 284).

Specifically, the Proposed Finding is incomplete because it omits internal Benco communications about Amazon that illustrate when Benco perceived a threat, amazon entering its business, its instincts were to develop a shared strategy with both Patterson and Schein.

The Proposed Finding is against the weight of the evidence because the Amazon communications illustrate the "open relationship" among the leaders of the 3 largest dental supply distributors that Cohen valued and maintained. (CCFF at VI (BENCO MAINTAINED AN "OPEN RELATIONSHIP" WITH PATTERSON AND SCHEIN FOR THE BIG THREE'S "MUTUAL BEST INTEREST.")). Cohen wished to "maintain" these open relationships for when they might come in handy, admitting he approached Sullivan and Guggenheim about issues facing them in the dental supply distribution business and felt comfortable doing so.

(CCFF ¶¶ 277-282). The Amazon communications are just one example of Benco’s instinct to turn to its competitors to shape collective strategies, (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.”); Sullivan, Tr. 4080 (“Q. So we’ve looked at three instances, that KaVo Kerr handpiece issue, the P&G issue, and now the poison pill issue, where Mr. Cohen reached out to you about manufacturers. A. Correct.”); CCFF ¶¶ 285-289).

Amazon is one in a mutual pattern of horizontal strategies (*See, e.g.*, CX1045 at 001 (Cohen describes in a 2011 email how Patterson “shared thoughts and strategies” with Benco); CCFF ¶¶ 299 (Schein follows up on Benco’s suggestion on Proctor & Gamble), 308 (Schein follows up on Benco’s suggestion on Poison Pill)).

635. Complaint Counsel introduced communications related to charitable work and organizations. (Cohen, Tr. 773-774; Sullivan, Tr. 4280; CX6027-010 (“the Sullivan Foundation/DTAF joint scholarship”); CX6027-012 (“DTAF fund”), CX6027-043 (“[Sullivan] family foundation”)).

#### **Response to Proposed Finding No. 635**

Complaint Counsel has no specific response except to note that the communications between the competing dental supply distributors show an open, friendly relationship and an opportunity to collude. Cohen admitted at trial that he had an “open relationship” with Sullivan and Guggenheim. (CCFF ¶¶ 277, 300, 310). This “open relationship” resulted in coordinated conduct in refusing to discount to buying groups. (CCFF ¶¶ 474-1390).

636. Communications related to charity work are not evidence of an alleged buying group conspiracy, nor do they support an inference of one.

#### **Response to Proposed Finding No. 636**

The Proposed Finding has no citation to any evidence, nor does it identify particular communications and is not a proper fact and so should be disregarded. The Proposed Finding is

misleading to the extent it suggests frequent, friendly communications among the executive of competing firms are not probative of the existence of a conspiracy among them.

Communications introduced by Compliant Counsel reflect an open relationship between the competitors. (CCFF ¶¶ 269-393). Further, frequent communications among Cohen, Sullivan, and Guggenheim are probative of the pattern and practice respondents shared of addressing issues, of all sorts, collectively rather than competitively. (CCFF ¶¶ 284-326, 1123-1155, 1156-1158). The Proposed Finding is misleading to the extent that it implies that text messages containing communications between key executives at Benco, Patterson, and Schein are not relevant to show the close personal relationship, frequency of communications and opportunity of these individual to meet and to collude. The non-buying group communications establish a pattern by which Cohen contacted Sullivan and Guggenheim when he saw the opportunity to advance their “mutual interests” by coordinating their conduct. (CCFF ¶¶ 269-326). Cohen admitted at trial that he had an “open relationship” with Sullivan and Guggenheim. (CCFF ¶¶ 277, 300, 310). This “open relationship” resulted in coordinated conduct in refusing to discount to buying groups. (CCFF ¶¶ 474-1390).

637. Similarly, banter about sports and jokes cannot support Complaint Counsel alleged conspiracy, or an inference of it. (CX6027-038 (“Good pick, #2 seed. They'll have to get past Creighton & McDermott, will be tough.”); CX6027-007 (“I'm going to Yankee Stadium for game 5 tomorrow nite. Go Yanks!”); CX6027-043 (“Weekend lacrosse tourney here at St. Thomas academy...”); CX6027-027 (“Problem with this joke is if Stan says 'Great!' It's a risk...”); CX6027-051 (“Teasing and jokes are always welcome!! :-”)).

### **Response to Proposed Finding No. 637**

The Proposed Finding is misleading to the extent that it implies that text messages containing personal communications between key executives at Patterson and Schein are not relevant to show the close personal relationship, frequency of communications and opportunity of these individual to meet and to collude. The Proposed Finding is misleading, inaccurate and contrary

to the weight of the evidence to the extent that it suggests that the Respondents' non-buying group communications are not relevant to the conspiracy. The non-buying group communications establish a pattern by which Cohen contacted Sullivan and Guggenheim when he saw the opportunity to advance their "mutual interests" by coordinating their conduct. (CCFF ¶¶ 269-326). Cohen admitted at trial that he had an "open relationship" with Sullivan and Guggenheim. (CCFF ¶¶ 277, 300, 310). This "open relationship" resulted in coordinated conduct in refusing to discount to buying groups. (CCFF ¶¶ 474-1390).

#### **VIII. RESPONSES TO PROPOSED FINDINGS REGARDING "COMMUNICATIONS BETWEEN BENCO AND BURKHART ARE NOT EVIDENCE OF AN INVITATION TO COLLUDE"**

638. Mike McElaney, a Benco employee, had previously worked at Burkhart with Jeff Reece. McElaney had left Burkhart around 2011. (Reece, Tr. 4376; Cohen, Tr. 828-29).

##### **Response to Proposed Finding No. 638**

Complaint Counsel has no specific response.

639. After he left Burkhart, McElaney remained friends with Reece, and they exchanged occasional personal communications. (Reece, Tr. 4376).

##### **Response to Proposed Finding No. 639**

The Proposed Finding mischaracterizes the evidence cited. Reece testified he communicated with McElaney "infrequently." (Reece, Tr. 4376).

640. In October 2013, McElaney had a conversation with Mr. Reece concerning buying groups, in which Reece claimed that McElaney said that buying groups were "not good for the medical industry" because of "declining margins." (Reece, Tr. 4378).

##### **Response to Proposed Finding No. 640**

The Proposed Finding is misleading and incomplete because it characterizes the content of the first buying group conversation Benco initiated with Burkhart as about buying groups not being good for the medical industry. However, the Proposed Finding omits the primary testimony on the substance of the call, where Reece described that call with Benco as a "statement from Mike

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) (emphasis added)). Reece later went on to address McElaney’s explanation, which involved declining margins in the medical field, but only as secondary to McElaney’s point that dental buying groups were bad for the dental industry and Burkhart specifically. (CCFF ¶¶ 1208-1213). Further, the Proposed Finding is incomplete and misleading because McElaney admitted initiating a conversation with Burkhart against buying groups and testified that Reece disagreed and insisted that Burkhart would continue working with buying groups. (CX0303 (McElaney, IHT at 28-30) (McElaney testified Reece said about buying groups: “Lori [Burkhart] wants to do it so we're going to give it a try.”); *see also* CX0023 at 001 (Following his call with Reece, McElaney reported to Cohen, his boss, “JEFF [REECE] DOES NOT GET IT!!”); CX0319 (Reece, IHT at 152-153)).

641. At the time, Reece believed that Benco was working with buying groups, and when Reece asked McElaney whether Benco was working with buying groups, McElaney declined to answer. (Reece, Tr. 4377-78 (“I said, so you're not working in this space. Is that correct? And he never answered.”)).

#### **Response to Proposed Finding No. 641**

The Proposed Finding is incomplete, misleading and in tension with other Proposed Findings.

The Proposed Finding is incomplete and misleading to the extent it omits that regardless of what McElaney said about Benco’s work with buying groups, McElaney encouraged Burkhart to cease working with buying groups and Reece refused. (CX0303 (McElaney, IHT at 28-30) (McElaney testified Reece informed him: “Lori [Burkhart] wants to do it so we're going to give it a try.”); CCFF ¶¶ 1207-1218). To the extent Benco argues that informing its larger competitors, Schein and Patterson, of Benco’s no-buying group policy was not competitively

sensitive because it was widely known, this Proposed Finding and the fact that Reece assumed Benco would work with buying groups undermined those arguments.

642. Reece found the conversation with McElaney “a little perplexing” because Reece believed that Benco was working with group purchasing organizations. (Reece, Tr. 4377-78).

**Response to Proposed Finding No. 642**

Complaint Counsel has no specific response. Complaint Counsel notes, however, that to the extent Benco argues that informing its larger competitors, Schein and Patterson, of Benco’s no-buying group policy was not competitively sensitive because it was widely known, this Proposed Finding and the fact that Reece assumed Benco would work with buying groups undermine those arguments.

643. In a second call that Reece claims occurred between him and McElaney a few weeks later, Reece again asked McElaney if Benco was working with buying groups, and McElaney again did not give a clear response. (Reece, Tr. 4380-81).

**Response to Proposed Finding No. 643**

The proposed finding is misleading because while McElaney did not provide a clear response to the question posed by Reece, overall it was clear that Benco wanted Burkhardt to reject buying groups. Reece described this second conversation as being “not as social” as the first call, but similar in that it was “directed” at telling Burkhardt that “group purchasing organizations are not good for your business” and “you need to be very careful.” (CCFF ¶ 1222 (Reece, Tr. 4380-4381)).

644. There is no evidence that McElaney discussed Benco’s policy, or Schein’s or Patterson’s view of buying groups, during those calls. (Reece, Tr. 4375-81).

**Response to Proposed Finding No. 644**

The Proposed Finding is misleading and unsupported by the evidence. The Proposed Finding states there is no evidence that McElaney discussed Benco’s policy of buying groups in the calls with Reece. However, Benco’s policy was not to work with buying groups and there evidence

shows that McElaney encouraged Burkhart to adopt Benco's buying group policy by telling Burkhart, on multiple occasions, that "group purchasing organizations are not good for your business." (Reece, Tr. 4377, 4380; CCFF ¶¶ 1213, 1214, 1222-1226). Benco had a no buying group policy at the time that it encouraged Burkhart to refrain from working with buying groups multiple times. (CX0303 (McElaney, IHT at 30-31); CX0023 at 001 (McElaney reporting an unsuccessful no-buying group conversation with Burkhart to Cohen and committing to "continue the discussion" with Burkhart)).

645. Cohen never instructed McElaney to ask Reece to do anything, and it does not matter to Benco what Burkhart does with buying groups or affect what Benco does with respect to buying groups. (Cohen, Tr. 829-30).

#### **Response to Proposed Finding No. 645**

The Proposed Finding is misleading and inconsistent with the evidence. The Proposed Finding asserts that Cohen never instructed McElaney to ask Reece to do anything. However, McElaney reported, in an email titled "Burkhart" and sent to Cohen and other Benco top management on September 16, 2013, that he spoke to Reece about buying groups. Specifically, the email stated, "I spoke with Jeff Reece at length last Friday about buying groups. JEFF DOES NOT GET IT!!!," (CX0023; Ryan, Tr. 1109-1110), where "it" referred to Benco's view on buying groups, (CX0023; Ryan Tr. 1108-1110), and where McElaney said he would continue the Burkhart no-buying group conversation with Reece. (CX0023 at 001). Cohen did not respond to that email in any way to indicate that he was indifferent about what Burkhart did with buying groups. (CCFF ¶ 1219). Nor did Cohen respond in any way that could be construed as discouraging McElaney. Instead, the email chain went on to suggest more interaction with Burkhart. Patrick Ryan suggested they have the same conversation with Lori Burkhart, Reece's boss. (Ryan, Tr. 1111). In parallel, Benco went on to discuss Burkhart's work with buying groups again six months later. (CCFF ¶ 1108). In February 2014, Benco executives were once again emailing about their



concerns with Burkhart's work with buying groups. In reply to these emails about Burkhart working with buying groups, Paul Jackson suggested twice that McElaney again try to get Burkhart to stop working with buying groups. (CX0040 ("Mike, please talk some cents [sic] into them . . . Mike, maybe you can give someone at Burkhart a call to help them understand most GPO contacts have to be able to install equipment nationwide. Last I checked there is no hope of Burkhart being nationwide."))).

The Proposed Finding is misleading in that it suggests that neither Cohen nor McElaney asked Reece to do anything, but that is inaccurate and contradicted by the evidence. 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." (Reece, Tr. 4391). Cohen's agenda with Reece was "to tell me [Reece] that he really felt that group purchasing organizations were not healthy for our industry and that it could do damage to our business and threaten our business." (Reece, Tr. 4385; *see also* CX8021 (Reece, Dep. at 112) (Cohen "proceeded to challenge me on why Burkhart was working with group purchasing organizations, of which I took great offense to."))). Additionally, the Proposed Finding is inconsistent and against the weight of the evidence in this matter because, while Cohen testified it did not matter to Benco what Burkhart did with buying groups, the documents show at least three separate communications where Benco executives discussed speaking with Burkhart in the future about their work with buying groups. (CX0023; CX0040). In addition, Cohen separately articulated how one full service dental distributor could affect all the distributors (and their margins). (Cohen, Tr. 440-441; Ryan, Tr. 1082-1083; [REDACTED]; CX8015 (Cohen, Dep. at 314)). Finally, a case study Cohen drafted in December 2015 still noted Burkhart as one of two dental distributors to work with buying

groups, further evidencing Cohen's interest in Burkhart's work with buying groups. (CX1084 at 001 (Burkhart is one of only two significant distributors work with buying groups)).

646. Reece has testified inconsistently with regard to an alleged conversation he supposedly had with Cohen. Reece first testified that his only interactions with Cohen were an "informal passing in the hallway," or "maybe just an acknowledgement". (RX1135; Reece, Dep., at 17:25-18:1). At trial, Reece testified that he had a conversation with Cohen and McElaney at the DTA meeting in Florida in the fall of 2013, which was the "really the first time [he] had met" Cohen. (Reece, Tr. 4382-84).

#### **Response to Proposed Finding No. 646**

The Proposed Finding is misleading and incomplete. Specifically, the assertion that Reece testified inconsistently about the buying group conversation with Cohen at the 2013 DTA meeting is misleading because Reece has testified consistently about that conversation throughout this case. (*See* Reece, Tr. 4384-4385; CX8021 (Reece, Dep. at 112, 114); CX0319 (Reece, IHT at 154-155)). The Proposed Finding suggests inconsistency, but cites testimony in response to a set of unrelated line of questions in a proceeding to which the FTC was neither present nor a party. (RX1135). Further, the Proposed Finding is incomplete because it fails to cite that Reece addressed the alleged inconsistency as an "oversight" at trial when confronted with the alleged inconsistency. (Reece, Tr. 4444). Finally, the Proposed Finding is incomplete because it omits that Benco's Answer to the Complaint concedes that Cohen and Reece spoke at the 2013 DTA. (CX1112 at 028-029 (Benco's Answer to Complaint ¶ 59) (Cohen spoke with Reece at the October 2013 DTA annual meeting)).

647. Cohen does not recall any discussion with Reece about buying groups at the DTA meeting and Cohen's contemporaneous notes from the meeting do not reflect any discussion or meeting with Reece. (Cohen, Tr. 828-30).

#### **Response to Proposed Finding No. 647**

The Proposed Finding is misleading to the extent it suggests there is no evidence showing that Cohen discussed buying groups with Reece at the 2013 DTA Meeting. The Proposed Finding is

misleading and incomplete because it omits contemporaneous documents as well as direct testimony from trial, and other sworn testimony. (See CCF ¶¶ 1225-1239). First, Reece testified about the buying group conversation initiated by Benco at the DTA meeting. Reece testified he was introduced to Cohen, who then launched into a discussion against buying groups. (Reece, Tr. 4384 (“Q. How did the conversation begin? A. Very respectfully . . . And then [Cohen] proceeded to share similar thoughts about group purchasing organizations with me as Mr. McElaney had previously.”); CX0319 (Reece, IHT at 154) (“They 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”). Second, Benco’s Answer concedes that Cohen spoke with Reece at the 2013 DTA meeting. (CX1112 at 028-029 (Benco’s Answer to Complaint ¶ 59) (Cohen spoke with Reece at the October 2013 DTA annual meeting)). The Proposed Finding is also misleading and incomplete without including the contemporaneous evidence that shortly after the DTA meeting in October of 2013, Cohen and Ryan texted about the conversation with Jeff Reece about buying groups. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. At trial, Cohen testified these text messages were indeed about Jeff Reece of Burkhart and occurred right after the DTA meeting in 2013. (Cohen, Tr. 584-585). Further, Patrick Ryan testified that he met Reece at that 2013 DTA meeting, and volunteered he may have been introduced to Reece at that meeting by Cohen, if not McElaney. (Ryan, Tr. 1107-1108 (testifying he met Reece at the DTA meeting and was introduced by “either [McElaney] or Chuck [Cohen]”)). For all these reasons the proposed fact should be rejected as misleading and against the weight of the evidence.

648. In none of the conversations identified by Reece did Benco ever suggest how Burkhart should conduct its business. (Reece, Tr. 4389 (“Q. Over the course of those three conversations with Benco about buying groups, was there any suggestion of how Burkhart should conduct its business? A. No.”)).

**Response to Proposed Finding No. 648**

The Proposed Finding should be disregarded because it is factually inaccurate and contrary to the weight of the evidence. The Proposed Finding asserts that Benco never suggested how Burkhart should conduct its business. However, Respondents’ narrowly selected exchange should be read in context of the testimony which suggests the opposite. Specifically, Reece clarified his testimony cited in the Proposed Finding: “Q. In any of those conversations, did Benco encourage Burkhart not to do business with buying groups? A. I think I tried to share that Benco had encouraged Burkhart not to engage in group purchasing organizations based on the fact that was going to be detrimental to our business and certainly to the business in the dental industry for those that participated.” (Reece, Tr. 4390-4391). Reece consistently testified how Benco encouraged Burkhart not to engage in buying groups. (Reece, Tr. 4391, 4444-4445 (“What Mr. Cohen told me was that it was not in Burkhart’s best interest to be working with group purchasing organizations.”); Reece, Tr. 4385 (“Mr. Cohen proceeded to tell me that he really felt that group purchasing organizations were not healthy for our industry and that it could do damage to our business and threaten our business.”); CX8021 (Reece, Dep. at 110-111) (“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.”)). In fact, Reece testified the conversation with Cohen did not feel very good precisely because he does not “appreciate people that tell me how to run our business.” (Reece, Tr. 4387). The totality of the evidence shows that Benco repeatedly

encouraged Burkhart not to work with buying groups for its own sake and the sake of the industry. (CCFF ¶¶ 1199-1251).

649. Reece's perception was that Benco was doing business with buying groups at that time or was willing to do business with buying groups. (Reece, Tr. 4445).

**Response to Proposed Finding No. 649**

Complaint Counsel has no specific response, except to say this Proposed Finding is inconsistent with Benco's argument that its no-buying group policy was well known in the industry. (See BFF ¶ 452).

650. Reece was never told that there was any agreement between Benco and any other company not to do business with buying groups or dentist groups, and was not invited to join such an agreement. (Reece, Tr. 4445-46).

**Response to Proposed Finding No. 650**

The Proposed Finding includes factually inaccuracies that are contrary to the weight of the evidence. While it is true that Reece was not informed of an agreement between Benco and Schein and Patterson not to discount to buying groups, evidence shows that Burkhart was invited to adopt the parties' no buying group conduct by Benco repeatedly. (CCFF ¶¶ 1199-1252). The fact that Benco did not spell out the existence of an agreement is irrelevant to the repeated invitation to agree not to discount to buying groups.

651. Burkhart did not change or modify any policy, including any policy to do business with buying groups, as a result of any communication with Benco. (Reece, Tr. 4446).

**Response to Proposed Finding No. 651**

Complaint Counsel has no specific response.

**IX. RESPONSES TO PROPOSED FINDINGS REGARDING "DR. MARSHALL'S METHODOLOGY AND CONCLUSIONS ARE UNRELIABLE"**

624. Dr. Marshall's economic methodology is inherently unreliable. (J. Johnson, Tr. 4784-86).

**Response to Proposed Finding No. 624a**

The Proposed Finding is misleading, incomplete, and vague insofar as it does not specify to what part or parts of Dr. Marshall's expert analyses and opinions the proposed finding is referring.

The Proposed Finding is also misleading, incomplete, and vague insofar as it relies on the word "unreliable." Additionally, the Proposed Finding is argumentative and not appropriate for a factual finding. The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that Dr. Marshall did not use appropriate methodologies to define the relevant product and geographic markets, assess competitive market conditions, assess the economic interests of distributors, and evaluate whether the conspiracy had anticompetitive effects. Record evidence establishes that Dr. Marshall used appropriate analyses to render his economic opinions in this matter. (CCFF ¶¶ 1553-1566, 1581-1592, 1593-1636, 1637-1684, 1412-1445).

625. Dr. Marshall's analyses are fundamentally flawed as a matter of economics. (J. Johnson, Tr. 4873-4875).

**Response to Proposed Finding No. 625a**

The Proposed Finding is misleading, incomplete, and vague insofar as it does not specify to what analyses of Dr. Marshall's the proposed finding is referring. The Proposed Finding is also misleading, incomplete, and vague insofar as it relies on the words "fundamentally flawed" without further elaboration of what are the alleged flaws. Additionally, the Proposed Finding is argumentative and not appropriate for a factual finding. The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that Dr. Marshall did not use appropriate analyses to define the relevant product and geographic markets, assess competitive market conditions, assess the economic interests of distributors, and evaluate whether the conspiracy had anticompetitive effects. Record evidence establishes that Dr. Marshall used appropriate analyses to render his economic opinions in this matter. (CCFF ¶¶ 1553-1566, 1581-1592, 1593-1636, 1637-1684, 1412-1445).

626. At each step of his analyses, Dr. Marshall makes mistakes that render his analyses unreliable. (J. Johnson, Tr. 4873-4875).

**Response to Proposed Finding No. 626a**

The Proposed Finding is misleading, incomplete, and vague insofar as it does not specify to what analyses of Dr. Marshall's the proposed finding is referring. The Proposed Finding is also misleading, incomplete, and vague insofar as it does not identify the mistakes that Dr. Marshall is alleged to have made. Thus the proposed finding is unverifiable. Additionally, the Proposed Finding is argumentative and not appropriate for a factual finding. The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that Dr. Marshall did not use appropriate analyses to define the relevant product and geographic markets, assess competitive market conditions, assess the economic interests of distributors, and evaluate whether the conspiracy had anticompetitive effects. Record evidence establishes that Dr. Marshall used appropriate analyses to render his economic opinions in this matter. (CCFF ¶¶ 1553-1566, 1581-1592, 1593-1636, 1637-1684, 1412-1445).

627. Dr. Marshall didn't apply his own geographic markets in his analysis; he improperly combined consumables and equipment in the same product market; he excluded other sources of competition, including manufacturer direct sales and non-full-service distributors; he relied on a limited sample and erroneous assumptions in his SSNIP tests; he improperly assessed the market structure because he ignored key economic evidence about actual economic characteristics; his reliance on industry characteristics to determine likelihood of collusion is suspect; his analysis of unilateral economic self-interest is improper because he failed to conduct a counterfactual analysis and he made a series of unsupported assumptions; he relied on a flawed assessment of a "structural break" driven in part by his misunderstanding of the salient features of the Elite Dental Alliance partnership; and he made unsupported assertions that the alleged conduct resulted in anticompetitive harm. (J. Johnson, Tr. 4873-4875).

**Response to Proposed Finding No. 627a**

The Proposed Finding is misleading, incomplete, and vague in that it provides no explanation of how these alleged shortcomings of Dr. Marshall's analyses matter to the factual findings of this matter. The Proposed Finding is thus irrelevant. The Proposed Finding is also argumentative

and not appropriate for a factual finding. The Proposed Finding is misleading and inaccurate insofar as it suggests that Dr. Marshall did not use appropriate analyses to define the relevant product and geographic markets, assess competitive market conditions, assess the economic interests of distributors, and evaluate whether the conspiracy had anticompetitive effects. Record evidence establishes that Dr. Marshall used appropriate analyses to render his economic opinions in this matter. (CCFF ¶¶ 1553-1566, 1581-1592, 1593-1636, 1637-1684, 1412-1445).

628. As a result of Dr. Marshall's errors, his analysis is not reliable as a matter of economics. (J. Johnson, Tr. 4873-4875).

**Response to Proposed Finding No. 628a**

The Proposed Finding is misleading, incomplete, and vague insofar as it does not specify to what analysis of Dr. Marshall's the proposed finding is referring. The Proposed Finding is also misleading, incomplete, and vague insofar as it does not identify the errors that Dr. Marshall is alleged to have made. Thus the proposed finding is unverifiable. Additionally, the Proposed Finding is argumentative and not appropriate for a factual finding. The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that Dr. Marshall did not use appropriate analyses to define the relevant product and geographic markets, assess competitive market conditions, assess the economic interests of distributors, and evaluate whether the conspiracy had anticompetitive effects. Record evidence establishes that Dr. Marshall used appropriate analyses to render his economic opinions in this matter. (CCFF ¶¶ 1553-1566, 1581-1592, 1593-1636, 1637-1684, 1412-1445).

629. Dr. Marshall failed to follow appropriate economic practice or methods to draw his conclusions. (J. Johnson, 4882).

**Response to Proposed Finding No. 629a**

The Proposed Finding is misleading, incomplete, and vague insofar as it does not specify to what conclusions of Dr. Marshall's the proposed finding is referring. The Proposed Finding is also



misleading, incomplete, and vague insofar as it does not identify the appropriate economic practices or methods that Dr. Marshall is alleged to have not followed. Thus the proposed finding is unverifiable. Additionally, the Proposed Finding is argumentative and not appropriate for a factual finding. The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that Dr. Marshall did not use appropriate economic practices and methods to define the relevant product and geographic markets, assess competitive market conditions, assess the economic interests of distributors, and evaluate whether the conspiracy had anticompetitive effects. Record evidence establishes that Dr. Marshall used appropriate analyses to render his economic opinions in this matter. (CCFF ¶¶ 1553-1566, 1581-1592, 1593-1636, 1637-1684, 1412-1445).

630. Because Dr. Marshall failed to follow appropriate economic practice or methods, it is inappropriate for Dr. Marshall as a professional economist to draw the conclusions that he did. (J. Johnson, 4882).

**Response to Proposed Finding No. 630a**

The Proposed Finding is misleading, incomplete, and vague insofar as it does not specify to what economic practices or methods of Dr. Marshall's the proposed finding is referring. The Proposed Finding is also misleading, incomplete, and vague insofar as it does not identify the conclusions of Dr. Marshall's to which the proposed finding is referring. Thus the proposed finding is unverifiable. Additionally, the Proposed Finding is argumentative and not appropriate for a factual finding. The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that Dr. Marshall did not use appropriate economic practices and methods to define the relevant product and geographic markets, assess competitive market conditions, assess the economic interests of distributors, and evaluate whether the conspiracy had anticompetitive effects. Record evidence establishes that Dr. Marshall used appropriate analyses to render his

economic opinions in this matter. (CCFF ¶¶ 1553-1566, 1581-1592, 1593-1636, 1637-1684, 1412-1445).

631. Dr. Marshall's opinions in this matter don't meet the accepted scientific practices that economists apply. (J. Johnson, Tr. 4883).

**Response to Proposed Finding No. 631a**

The Proposed Finding is misleading, incomplete, and vague insofar as it relies on the phrase "accepted scientific practices that economists apply" without identifying what those are. The Proposed Finding is also misleading, incomplete, and vague insofar as it does not identify to which of Dr. Marshall's opinions the proposed finding is referring. Thus the proposed finding is unverifiable. Additionally, the Proposed Finding is argumentative and not appropriate for a factual finding. The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that Dr. Marshall did not use accepted scientific and economic practices to define the relevant product and geographic markets, assess competitive market conditions, assess the economic interests of distributors, and evaluate whether the conspiracy had anticompetitive effects. Record evidence establishes that Dr. Marshall used appropriate analyses to render his economic opinions in this matter. (CCFF ¶¶ 1553-1566, 1581-1592, 1593-1636, 1637-1684, 1412-1445).

632. Dr. Marshall relied in part on his interpretation of e-mails and communications to reach his opinion that Respondents' conduct was consistent with coordinated action. (Marshall, Tr. 2885-2886 (interfirm communications, together with his five case studies, "are leading me to the conclusion that we have coordinated action."); CX7100 at 123-127, ¶¶ 309-327).

**Response to Proposed Finding No. 632a**

This Proposed Finding is vague as to what is referred to by "interpretation" and incomplete and misleading because it omits that Dr. Marshall explained that when reviewing the evidentiary record, he considered the economic content of the communications and "discussions that Respondents had amongst themselves as to what is or is not a buying group as that issue arose in

their discussions.” (Marshall, Tr. 2877). Regarding his discussion about inter-firm communications, Dr. Marshall testified that he was not offering any legal opinions with respect to the communications but was “talking about the competitive environment from the viewpoint of an economist and about the damage to the efficiency of transactions in the economy through collusive conduct by firms that should be competing in the marketplace but are not.” (CX8040 (Marshall, Dep. at 475); *see also* (CX7100 at 123-127, 142 (¶¶ 309-327, 342) (Marshall Expert Report) (explaining and analyzing the effects of Respondents’ private communications regarding the suppression of rivalry for the business of Buying Groups and stopping their sales forces from doing business with Buying Groups based on his knowledge and expertise as an economist))). Dr. Marshall described scholarly publications in antitrust economics that support his review of case-specific facts in connection with economic analysis. (CX7101 at 070 (¶¶ 181-182) (Marshall Rebuttal Expert Report)). Additionally, Respondent Schein’s own economic expert, Dr. Carlton, has taken a similar position and confirmed this view in his deposition in this case. (RX2966 (Carlton, Dep. at 83-84 (acknowledging that inter-firm communications can be relevant to economic analysis), at 314-315 (describing his assessment of the facts related to a purported Smile Source discount in 2012 and 2014 and reaching an economic conclusion based on those facts))).

633. Inferring an agreement from e-mails and communications is outside of any training, accepted methodology, or competence of an economist. (J. Johnson, Tr. 4817-4818; J. Johnson, Tr. 4863-4864; RX2832 at 63, ¶ 94 (“an economist is not qualified to form a legal conclusion about whether companies have formed an agreement.”); Carlton, Tr. 5421-5422; Wu, Tr. 5035 (“As an economist, I cannot possibly presume to divine what someone may have meant or intended in an e-mail.”); Gregory J. Werden, “Economic Evidence of the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory,” *Antitrust Law Journal* 71, No. 3 719 at 747 (2004) (“as a general matter, economic expertise cannot contribute to drawing [an] inference” of an agreement forming a cartel)).

**Response to Proposed Finding No. 633a**

The Proposed Finding is misleading and incomplete insofar as it suggests that Dr. Marshall was forming a legal opinion about emails and communications in this matter. Dr. Marshall testified that he was not offering any legal opinions with respect to the communications. (CX8041 (Marshall, Dep. at 475)). Dr. Marshall testified that in describing inter-firm communications, he was “talking about the competitive environment from the viewpoint of an economist and about the damage to the efficiency of transactions in the economy through collusive conduct by firms that should be competing in the marketplace but are not.” (CX8041 (Marshall, Dep. at 475); *see also* (CX7100 at 123-127, 142 (¶¶ 309-327, 342) (Marshall Expert Report) (explaining and analyzing the effects of Respondents’ private communications regarding the suppression of rivalry for the business of Buying Groups and stopping their sales forces from doing business with Buying Groups based on his knowledge and expertise as an economist)). Dr. Marshall further explained that when reviewing the evidentiary record, he considered the economic content of the communications and “discussions that Respondents had amongst themselves as to what is or is not a buying group as that issue arose in their discussions.” (Marshall, Tr. 2877). In addition, Dr. Marshall described scholarly publications in antitrust economics that support his review of case-specific facts in connection with economic analysis. (CX7101 at 070 (¶¶ 181-182) (Marshall Rebuttal Expert Report). Additionally, Respondent Schein’s own economic expert, Dr. Carlton, has taken a similar position and confirmed this view in his deposition in this case. (RX2966 (Carlton, Dep. at 83-84 (acknowledging that inter-firm communications can be relevant to economic analysis), at 314-315 (describing his assessment of the facts related to a purported Smile Source discount in 2012 and 2014 and reaching an economic conclusion based on those facts))). Finally, Complaint Counsel notes that Respondent is citing as support an academic journal article (the Werden article) that is not included in the record in this matter.

634. Dr. Marshall failed to offer a persuasive explanation of how his interpretation of the “economic content” of e-mails and communications assists the trier of fact in this matter. (Marshall, Tr. 2880 (“JUDGE CHAPPELL: I’m trying to figure out why you think there’s a need for an expert opinion in here other than bill the government \$2.5 million. Why can’t a layperson look at the facts in this case and make a determination on their own? THE WITNESS: Your Honor, I think that in terms of the economic content of what is being offered in these communications, I don’t think it’s reasonable to think that a layperson can look at that information on their own.”)).

#### **Response to Proposed Finding No. 634a**

The Proposed Finding is misleading and incomplete insofar as it suggests that Dr. Marshall was forming a legal opinion about emails and communications in this matter. Dr. Marshall testified that he was not offering any legal opinions with respect to the communications. (CX8041 (Marshall, Dep. at 475)). The Proposed Finding is argumentative and not appropriate for a proposed factual finding. It is the role of the trier of fact to determine the persuasiveness of a witness.

635. The only previous time Dr. Marshall testified in a trial was on behalf of the United States in an antitrust conspiracy case. (Marshall, Tr. 3179-3180; Marshall, Tr. 3184.) In that case, the court excluded Dr. Marshall’s testimony because, in part, “Dr. Marshall’s opinions don’t ‘fit’ the evidence in this case.” (Marshall, Tr. 3181; Marshall, Tr. 3184-3186; see also RXD0222; United States ex rel. Bunk v. Birkart Globistics GmbH & Co., 89 F.Supp.3d 778 (E.D. Va. 2014) at 800 (“Having now considered [Dr. Marshall’s] testimony based on all the evidence in the case, the Court concludes that Dr. Marshall’s testimony should have been excluded under *Daubert*.”)).

#### **Response to Proposed Finding No. 635a**

The Proposed Finding is irrelevant and untimely to the extent that it suggests that Dr. Marshall or any of his opinions in this case are unreliable. To the extent this Proposed Finding is propounded in an attempt to exclude Dr. Marshall’s expert testimony from consideration, Respondents are time barred from such an argument, as the deadline to challenge Dr. Marshall under the strictures of *Daubert* has passed. (Order Grant’g Joint Mot. to Extend Certain Expert Disc. Deadlines (Sept. 5, 2018) (setting an October 10, 2018 deadline for motions *in limine* as to expert discovery)). The Proposed Finding is based on a damages calculation that Dr. Marshall

did in an unrelated False Claims Act case more than five years ago. Any suggestion that Dr. Marshall's damages opinion in that case is relevant to his analysis of anticompetitive effects from a conspiracy in the dental industry is without basis. The Proposed Finding is misleading to the extent that it suggests that Dr. Marshall is not experienced or qualified to serve as an expert economist. None of Respondents' counsel asked that Dr. Marshall be disqualified as an expert economist during trial, and Dr. Marshall has served as an expert economist in more than a dozen other matters. (CX7100 at 220-221 (Appendix A (Curriculum Vitae of Robert C. Marshall, PhD))). The Proposed Finding is also irrelevant and should be disregarded because it relies on demonstrative RXD0222 for support, in contrary to this Court's Order On Post-Trial Briefs at 3 ("Do not cite to demonstrative exhibits as substantive evidence.").

**X. RESPONSES TO PROPOSED FINDINGS REGARDING "DR. MARSHALL OFFERED NO OPINION REGARDING THE APPLICABLE LEGAL STANDARD"**

636. Dr. Marshall did not offer any opinion as to whether the conduct alleged in this matter should be treated as *per se* unlawful. (Marshall, Tr. 3331; RX2964 (Marshall, Dep. 140-141)).

**Response to Proposed Finding No. 636a**

The Proposed Finding is misleading insofar as it suggests it is appropriate for an economic expert to opine on a legal question such as whether conduct should be treated by the court as *per se* unlawful.

637. Dr. Marshall did not offer any opinion as to whether the conduct alleged in this matter should be characterized as inherently suspect. (Marshall, Tr. 3331-3332; RX2964 (Marshall, Dep. 141)).

**Response to Proposed Finding No. 637a**

The Proposed Finding is misleading insofar as it suggests it is appropriate for an economic expert to opine on a legal question such as whether conduct should be treated by the court as inherently suspect.

638. Dr. Marshall did not offer any opinion as to whether the conduct alleged in this matter should be analyzed pursuant to a truncated rule of reason analysis. (Marshall, Tr. 3332; RX2964 (Marshall, Dep. 141)).

**Response to Proposed Finding No. 638a**

The Proposed Finding is misleading insofar as it suggests it is appropriate for an economic expert to opine on a legal question such as whether conduct should be analyzed pursuant to a truncated rule of reason analysis.

**XI. RESPONSES TO PROPOSED FINDINGS REGARDING “DR. MARSHALL FAILED TO CONDUCT HIS ANALYSIS IN A PROPERLY DEFINED RELEVANT MARKET”**

**A. RESPONSES TO PROPOSED FINDINGS REGARDING “DR. MARSHALL FAILED TO DEFINE LOCAL RELEVANT GEOGRAPHIC MARKETS”**

**1. The Relevant Geographic Markets Are Local in Nature**

639. The relevant geographic markets for the distribution of dental supplies are local. (CX7100 at 10, ¶ 11; CX7100 at 90, heading III.B; RX2834 at 13 ¶ 17; J. Johnson, Tr. 4788-4789).

**Response to Proposed Finding No. 639a**

Complaint Counsel does not disagree that the relevant geographic markets are local in nature.

(See CCFF ¶ 1581). The relevant geographic markets are no larger than the United States, and regional geographic markets contained therein. (See CCFF ¶¶ 1568-1592).

640. The relevant geographic markets for the distribution of dental supplies are local because there are numerous dental product distributors in the United States, many of which operate on a regional or local level. (██████████; J. Johnson, Tr. 4788-4789).

**Response to Proposed Finding No. 640a**

Complaint Counsel notes that, contrary to this Court’s Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. J. Johnson is Benco’s expert in this matter and RX2834 is Dr. Johnson’s Expert Report. The Proposed Finding is misleading insofar as Respondent does not identify a factual basis for the claim that “there are numerous dental product distributors in the United States.” Also, the Proposed Finding is misleading insofar as

Respondent does not specify if “dental product distributors” includes both full-service and non full-service distributors.

641. The relevant geographic markets for the distribution of dental supplies are local because prices and discounting are determined at a local level. (RX2834 at 13 ¶ 18; J. Johnson, Tr. 4788-4789).

**Response to Proposed Finding No. 641a**

Complaint Counsel has no specific response.

642. The relevant geographic markets for the distribution of dental supplies are local because timeliness of deliveries of some products can be affected by shipping distances. (J. Johnson, Tr. 4788-4789).

**Response to Proposed Finding No. 642a**

Complaint Counsel notes that, contrary to this Court’s Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. J. Johnson is Benco’s expert in this matter. The Proposed Finding is misleading insofar as Respondent does not identify a factual basis for the claim that the “timeliness of deliveries of some products can be affected by shipping distances.” The cited testimony does not provide factual evidence or economic data to support this Proposed Finding. Instead the cited testimony refers to some analysis that Dr. Johnson claims he did in some prior report. But without more specificity, this proposed finding is unverifiable and should be disregarded.

**2. Dr. Marshall Failed to Define or Apply Local Geographic Markets in His Analysis**

643. Dr. Marshall failed to consider the implications of local markets in his analysis. (RX2834 at 13, ¶ 17; J. Johnson, Tr. 4790-4791).

**Response to Proposed Finding No. 643a**

The Proposed Fact is misleading, incomplete, and vague insofar as it does not identify in what analysis Dr. Marshall allegedly failed to consider the implications of local markets. Thus the proposed finding is not verifiable and should be disregarded. To the extent that the Proposed



Finding is referring to Dr. Marshall's profitability analyses, to determine whether Respondents acted against their own unilateral self-interests, the Proposed Finding is irrelevant and inaccurate. Dr. Marshall conducted five natural experiments using data that examined whether or not it was profitable for dental supply distributors, including Respondents, to bid for and obtain the business of buying groups. (Marshall, Tr. 2859-2861; CX7100 at 150-187 (¶¶347-415) (Marshall Expert Report); CCFF ¶¶ 1637-1684). In these natural experiments, Dr. Marshall observed conduct inconsistent with Respondents' unilateral self-interests and instead consistent with coordinated action. (CCFF ¶¶ 1637-1684). Dr. Marshall noted in his Rebuttal Expert Report that "geographic differences . . . could help average out the influence of any of these confounding factors [(such as differences in product mix and profit margins across local markets, changes in product mix that occur across customers or over time, and other contemporaneous changes in economic conditions that affect margin)] and help provide a more, not less, accurate estimate of the value of bidding for buying group business in each of my five studies." (CX7101 at 062 (¶159) (Marshall Rebuttal Expert Report)).

644. Dr. Marshall did not define relevant geographic markets in this matter. (J. Johnson, Tr. 4790-91).

**Response to Proposed Finding No. 644a**

The proposed finding is inaccurate and misleading insofar as Dr. Marshall did define relevant geographic markets in this matter. Dr. Marshall opined in his Expert Report in this matter that "the relevant geographic markets are no larger than the United States, and local in nature." (CX7100 at 010-011, 090-110 (¶¶11, 227-280) (Marshall Expert Report); *see also* CCFF ¶¶ 1581-1592). Moreover, the testimony that Respondent cites to in support of this proposed finding does not state that Dr. Marshall failed to define a relevant geographic market.

645. Dr. Marshall did not know how many relevant markets there are in the United States. (Marshall, Tr. 3370).

**Response to Proposed Finding No. 645a**

The Proposed Finding is vague in that it does not specify what is meant by “relevant market”. It is unclear if the proposed finding refers to relevant product or relevant geographic markets. Thus, the proposed finding should be disregarded. To the extent Respondent is referring to relevant geographic markets, the Proposed Finding is misleading, incomplete, and vague insofar as it suggests that Dr. Marshall did not define the relevant geographic market. Dr. Marshall opined in his Expert Report in this matter that “the relevant geographic markets are no larger than the United States, and local in nature.” (CX7100 at 010-011, 090-110 (¶¶11, 227-280) (Marshall Expert Report)). Moreover, Dr. Marshall illustrates two of these local relevant geographic markets (Atlanta and Seattle) in his expert report. (CX7100 at 092-109 (¶¶233-277) (Marshall Expert Report)). In Dr. Marshall’s opinion, these geographic markets are “representative of similar analyses that could be performed throughout the United States” and that “Atlanta and Seattle are local markets in which [the Respondents] are least likely to have collective market power.” (CX7100 at 109 (¶ 278) (Marshall Expert Report)). Dr. Marshall continues that “delineating the bounds of many separate local geographic markets is neither relevant to nor necessary for my subsequent analysis of Respondents’ conduct and its effects.” (CX7100 at 109 (¶ 278) (Marshall Expert Report)). (*See also* CCFF ¶¶ 1581-1592).

646. Dr. Marshall did not define the markets in which most major American cities would be located.

**Response to Proposed Finding No. 646a**

The Proposed Finding is unsupported and should thus be disregarded.

647. Dr. Marshall did not define the relevant market that would include some or all of Houston. (Marshall, Tr. 3371).

**Response to Proposed Finding No. 647a**

The Proposed Finding is vague in that it does not specify what is meant by “relevant market”. It is unclear if the proposed finding refers to relevant product or relevant geographic markets. Thus, the proposed finding should be disregarded. To the extent Respondent is referring to relevant geographic markets, the Proposed Finding is misleading, incomplete, and vague insofar as it suggests that Dr. Marshall did not define the relevant geographic market. Dr. Marshall opined in his Expert Report in this matter that “the relevant geographic markets are no larger than the United States, and local in nature.” (CX7100 at 010-011, 090-110 (¶¶11, 227-280) (Marshall Expert Report)). Moreover, Dr. Marshall illustrates two of these local relevant geographic markets (Atlanta and Seattle) in his expert report. (CX7100 at 092-109 (¶¶233-277) (Marshall Expert Report)). In Dr. Marshall’s opinion, these geographic markets are “representative of similar analyses that could be performed throughout the United States” and that “Atlanta and Seattle are local markets in which [the Respondents] are least likely to have collective market power.” (CX7100 at 109 (¶ 278) (Marshall Expert Report)). Dr. Marshall continued that “delineating the bounds of many separate local geographic markets is neither relevant to nor necessary for my subsequent analysis of Respondents’ conduct and its effects.” (CX7100 at 109 (¶ 278) (Marshall Expert Report)). (*See also* CCFF ¶¶ 1581-1592).

648. Dr. Marshall did not define the relevant market that would include some or all of Chicago. (Marshall, Tr. 3371-3372).

**Response to Proposed Finding No. 648a**

The Proposed Finding is vague in that it does not specify what is meant by “relevant market”. It is unclear if the proposed finding refers to relevant product or relevant geographic markets. Thus, the proposed finding should be disregarded. To the extent Respondent is referring to relevant geographic markets, the Proposed Finding is misleading, incomplete, and vague insofar as it suggests that Dr. Marshall did not define the relevant geographic market. Dr. Marshall

opined in his Expert Report in this matter that “the relevant geographic markets are no larger than the United States, and local in nature.” (CX7100 at 010-011, 090-110 (¶¶11, 227-280) (Marshall Expert Report)). Moreover, Dr. Marshall illustrates two of these local relevant geographic markets (Atlanta and Seattle) in his expert report. (CX7100 at 092-109 (¶¶233-277) (Marshall Expert Report)). In Dr. Marshall’s opinion, these geographic markets are “representative of similar analyses that could be performed throughout the United States” and that “Atlanta and Seattle are local markets in which [the Respondents] are least likely to have collective market power.” (CX7100 at 109 (¶ 278) (Marshall Expert Report)). Dr. Marshall continued that “delineating the bounds of many separate local geographic markets is neither relevant to nor necessary for my subsequent analysis of Respondents’ conduct and its effects.” (CX7100 at 109 (¶ 278) (Marshall Expert Report)). (*See also* CCFF ¶¶ 1581-1592).

649. Dr. Marshall did not define the relevant market that would include some or all of Miami. (Marshall, Tr. 3372).

#### **Response to Proposed Finding No. 649a**

The Proposed Finding is vague in that it does not specify what is meant by “relevant market”. It is unclear if the proposed finding refers to relevant product or relevant geographic markets. Thus, the proposed finding should be disregarded. To the extent Respondent is referring to relevant geographic markets, the Proposed Finding is misleading, incomplete, and vague insofar as it suggests that Dr. Marshall did not define the relevant geographic market. Dr. Marshall opined in his Expert Report in this matter that “the relevant geographic markets are no larger than the United States, and local in nature.” (CX7100 at 010-011, 090-110 (¶¶11, 227-280) (Marshall Expert Report)). Moreover, Dr. Marshall illustrates two of these local relevant geographic markets (Atlanta and Seattle) in his expert report. (CX7100 at 092-109 (¶¶ 233-277) (Marshall Expert Report)). In Dr. Marshall’s opinion, these geographic markets are

“representative of similar analyses that could be performed throughout the United States” and that “Atlanta and Seattle are local markets in which [the Respondents] are least likely to have collective market power.” (CX7100 at 109 (¶ 278) (Marshall Expert Report)). Dr. Marshall continued that “delineating the bounds of many separate local geographic markets is neither relevant to nor necessary for my subsequent analysis of Respondents’ conduct and its effects.” (CX7100 at 109 (¶ 278) (Marshall Expert Report)). (*See also* CCFF ¶¶ 1581-1592).

650. Dr. Marshall did not define the relevant market that would include some or all of Denver. (Marshall, Tr. 3372).

#### **Response to Proposed Finding No. 650a**

The Proposed Finding is vague in that it does not specify what is meant by “relevant market”. It is unclear if the proposed finding refers to relevant product or relevant geographic markets.

Thus, the proposed finding should be disregarded. To the extent Respondent is referring to relevant geographic markets, the Proposed Finding is misleading, incomplete, and vague insofar as it suggests that Dr. Marshall did not define the relevant geographic market. Dr. Marshall opined in his Expert Report in this matter that “the relevant geographic markets are no larger than the United States, and local in nature.” (CX7100 at 010-011, 090-110 (¶¶ 11, 227-280) (Marshall Expert Report)). Moreover, Dr. Marshall illustrates two of these local relevant geographic markets (Atlanta and Seattle) in his expert report. (CX7100 at 092-109 (¶¶ 233-277) (Marshall Expert Report)). In Dr. Marshall’s opinion, these geographic markets are “representative of similar analyses that could be performed throughout the United States” and that “Atlanta and Seattle are local markets in which [the Respondents] are least likely to have collective market power.” (CX7100 at 109 (¶ 278) (Marshall Expert Report)). Dr. Marshall continued that “delineating the bounds of many separate local geographic markets is neither

relevant to nor necessary for my subsequent analysis of Respondents' conduct and its effects.” (CX7100 at 109 (¶ 278) (Marshall Expert Report)). (*See also* CCFF ¶¶ 1581-1592).

651. Dr. Marshall did not define the relevant market that would include some or all of St. Louis. (Marshall, Tr. 3372).

**Response to Proposed Finding No. 651a**

The Proposed Finding is vague in that it does not specify what is meant by “relevant market”. It is unclear if the proposed finding refers to relevant product or relevant geographic markets.

Thus, the proposed finding should be disregarded. To the extent Respondent is referring to relevant geographic markets, the Proposed Finding is misleading, incomplete, and vague insofar as it suggests that Dr. Marshall did not define the relevant geographic market. Dr. Marshall opined in his Expert Report in this matter that “the relevant geographic markets are no larger than the United States, and local in nature.” (CX7100 at 010-011, 090-110 (¶¶11, 227-280) (Marshall Expert Report)). Moreover, Dr. Marshall illustrates two of these local relevant geographic markets (Atlanta and Seattle) in his expert report. (CX7100 at 092-109 (¶¶ 233-277) (Marshall Expert Report)). In Dr. Marshall’s opinion, these geographic markets are “representative of similar analyses that could be performed throughout the United States” and that “Atlanta and Seattle are local markets in which [the Respondents] are least likely to have collective market power.” (CX7100 at 109 (¶ 278) (Marshall Expert Report)). Dr. Marshall continued that “delineating the bounds of many separate local geographic markets is neither relevant to nor necessary for my subsequent analysis of Respondents’ conduct and its effects.” (CX7100 at 109 (¶ 278) (Marshall Expert Report)). (*See also* CCFF ¶¶ 1581-1592).

652. Dr. Marshall did not define the relevant market that would include some or all of Boston. (Marshall, Tr. 3372).

**Response to Proposed Finding No. 652**

The Proposed Finding is vague in that it does not specify what is meant by “relevant market”. It is unclear if the proposed finding refers to relevant product or relevant geographic markets. Thus, the proposed finding should be disregarded. To the extent Respondent is referring to relevant geographic markets, the Proposed Finding is misleading, incomplete, and vague insofar as it suggests that Dr. Marshall did not define the relevant geographic market. Dr. Marshall opined in his Expert Report in this matter that “the relevant geographic markets are no larger than the United States, and local in nature.” (CX7100 at 010-011, 090-110 (¶¶11, 227-280) (Marshall Expert Report)). Moreover, Dr. Marshall illustrates two of these local relevant geographic markets (Atlanta and Seattle) in his expert report. (CX7100 at 092-109 (¶¶ 233-277) (Marshall Expert Report)). In Dr. Marshall’s opinion, these geographic markets are “representative of similar analyses that could be performed throughout the United States” and that “Atlanta and Seattle are local markets in which [the Respondents] are least likely to have collective market power.” (CX7100 at 109 (¶ 278) (Marshall Expert Report)). Dr. Marshall continued that “delineating the bounds of many separate local geographic markets is neither relevant to nor necessary for my subsequent analysis of Respondents’ conduct and its effects.” (CX7100 at 109 (¶ 278) (Marshall Expert Report)). (*See also* CCFF ¶¶ 1581-1592).

653. Dr. Marshall did not define the relevant market that would include some or all of Washington D.C. (Marshall, Tr. 3372-3373).

#### **Response to Proposed Finding No. 653**

The Proposed Finding is vague in that it does not specify what is meant by “relevant market”. It is unclear if the proposed finding refers to relevant product or relevant geographic markets. Thus, the proposed finding should be disregarded. To the extent Respondent is referring to relevant geographic markets, the Proposed Finding is misleading, incomplete, and vague insofar as it suggests that Dr. Marshall did not define the relevant geographic market. Dr. Marshall

opined in his Expert Report in this matter that “the relevant geographic markets are no larger than the United States, and local in nature.” (CX7100 at 010-011, 090-110 (¶¶11, 227-280) (Marshall Expert Report)). Moreover, Dr. Marshall illustrates two of these local relevant geographic markets (Atlanta and Seattle) in his expert report. (CX7100 at 092-109 (¶¶ 233-277) (Marshall Expert Report)). In Dr. Marshall’s opinion, these geographic markets are “representative of similar analyses that could be performed throughout the United States” and that “Atlanta and Seattle are local markets in which [the Respondents] are least likely to have collective market power.” (CX7100 at 109 (¶ 278) (Marshall Expert Report)). Dr. Marshall continued that “delineating the bounds of many separate local geographic markets is neither relevant to nor necessary for my subsequent analysis of Respondents’ conduct and its effects.” (CX7100 at 109 (¶ 278) (Marshall Expert Report)). (*See also* CCFF ¶¶ 1581-1592).

654. Dr. Marshall failed to evaluate the differences in competitive options available to dentists in the different regions of the United States. (RX2834 at 13, ¶ 17; J. Johnson, Tr. 4790-4791; *see also* RX1140 at 20, Exhibit 2).

#### **Response to Proposed Finding No. 654**

The Proposed Finding is misleading, vague, inaccurate, and incomplete. Dr. Marshall did evaluate the competitive options available to dentists in different regions by illustrating two of the local relevant geographic markets (Atlanta and Seattle) in his expert report. (CX7100 at 092-109 (¶¶ 233-277) (Marshall Expert Report)). Dr. Marshall illustrated these regions because of the presence in the regions of local full-service distributors Atlanta Dental and Burkhardt. (CX7100 at 109 (¶ 278) (Marshall Expert Report)). In Dr. Marshall’s opinion, these geographic markets are “representative of similar analyses that could be performed throughout the United States” and that “Atlanta and Seattle are local markets in which [the Respondents] are least likely to have collective market power.” (CX7100 at 109 (¶ 278) (Marshall Expert Report)). Dr. Marshall continued that “delineating the bounds of many separate local geographic markets is



neither relevant to nor necessary for my subsequent analysis of Respondents' conduct and its effects." (CX7100 at 109 (¶ 278) (Marshall Expert Report)). Thus, the Proposed Finding is also irrelevant. For all these reasons, the proposed finding should be disregarded.

655. Dr. Marshall's failure to properly apply his conclusion that relevant markets in this matter are local, and his failure to define relevant local markets, rendered unreliable his subsequent opinion in Section IV of his expert report that the industry is susceptible to collusion. (J. Johnson, Tr. 4791-4792; J. Johnson, Tr. 4821-4822).

#### **Response to Proposed Finding No. 655**

The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that Dr. Marshall did not define relevant geographic markets. Dr. Marshall opined in his Expert Report in this matter that "the relevant geographic markets are no larger than the United States, and local in nature." (CX7100 at 010-011, 090-110 (¶¶11, 227-280) (Marshall Expert Report). Additionally, the Proposed Finding is misleading, incomplete, and vague when it suggests that Dr. Marshall failed to properly apply his conclusion that relevant markets in this matter are local. The Proposed Finding fails to specify to what conclusions Dr. Marshall allegedly failed to apply this conclusion. Thus, the proposed finding is not verifiable. The Proposed Finding is misleading, incomplete, inaccurate and contrary to the weight of evidence in this matter insofar as it suggests that the full-service distribution of dental supplies industry is not susceptible to collusion. The weight of the factual and economic evidence in this matter establishes that the competitive dynamics of the market for the full line of dental products and services sold through full-service distributors to independent dentists are conducive to effective collusion. (CCFF ¶¶ 1601-1623). Moreover, Patterson's expert, Dr. Wu, described the industry structure in this case as having "the potential for strategic interaction." (RX2833 at 017 (¶27) (Wu Expert Report)).

656. Dr. Marshall's failure to properly apply his conclusion that relevant markets in this matter are local, and his failure to define relevant local markets, rendered unreliable his subsequent opinion in Section III of his report that Benco, Schein and Patterson acted contrary to their unilateral economic self-interest. (J. Johnson, Tr. 4791-4792).

**Response to Proposed Finding No. 656**

The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that Dr. Marshall did not define relevant geographic markets. Dr. Marshall opined in his Expert Report in this matter that “the relevant geographic markets are no larger than the United States, and local in nature.” (CX7100 at 010-011, 090-110 (¶¶11, 227-280) (Marshall Expert Report). Additionally, the Proposed Finding is misleading, incomplete, and vague when it suggests that Dr. Marshall failed to properly apply his conclusion that relevant markets in this matter are local. The Proposed Finding fails to specify to what conclusions Dr. Marshall allegedly failed to apply this conclusion. Thus, the proposed finding is not verifiable. The Proposed Finding is misleading, incomplete, inaccurate and contrary to the weight of evidence in this matter insofar as it suggests that there is no evidence that the Respondents acted contrary to their unilateral economic self-interest. There is ample evidence, including factual evidence, in the record that Respondents acted against their self-interests. (CCFF ¶¶ 1074, 1254-1390, 1637-1684). Thus the proposed finding should be disregarded.

657. Dr. Marshall’s failure to properly apply his conclusion that relevant markets in this matter are local, and his failure to define relevant local markets, rendered unreliable his subsequent opinion in Section VI of his expert report that the alleged conduct caused harm to competition. (J. Johnson, Tr. 4791-4792; [REDACTED]).

**Response to Proposed Finding No. 657**

The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that Dr. Marshall did not define relevant geographic markets. Dr. Marshall opined in his Expert Report in this matter that “the relevant geographic markets are no larger than the United States, and local in nature.” (CX7100 at 010-011, 090-110 (¶¶11, 227-280) (Marshall Expert Report). Additionally, the Proposed Finding is misleading, incomplete, and vague when it suggests that Dr. Marshall failed to properly apply his conclusion that relevant markets in this matter are local.

The Proposed Finding fails to specify to what conclusions Dr. Marshall allegedly failed to apply this conclusion. Thus, the proposed finding is not verifiable. The Proposed Finding is misleading, incomplete, inaccurate and contrary to the weight of evidence in this matter insofar as it suggests that the conspiracy not to bid to buying groups caused no harm to competition. There is ample evidence, including factual evidence, in the record that the conspiracy not to bid to buying groups caused harm to competition. (CCFF ¶¶ 1412-1445). Thus the proposed finding should be disregarded.

658. Dr. Marshall's failure to properly define relevant geographic markets and to analyze competitive conditions and effects in properly defined local markets fatally undermined his overall conclusions in this matter. (J. Johnson, Tr. 4873-4875).

#### **Response to Proposed Finding No. 658**

The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that Dr. Marshall did not define relevant geographic markets. Dr. Marshall opined in his Expert Report in this matter that "the relevant geographic markets are no larger than the United States, and local in nature." (CX7100 at 010-011, 090-110 (¶¶11, 227-280) (Marshall Expert Report). Indeed, Dr. Johnson agreed with Dr. Marshall that the geographic markets in this matter are local in nature. (J. Johnson, Tr. 4788-4789; RX2965 (J. Johnson, Dep. at 29)). Additionally, the Proposed Finding is misleading, incomplete, and vague when it suggests that Dr. Marshall failed to properly apply his conclusion that relevant markets in this matter are local. The Proposed Finding fails to specify to what conclusions Dr. Marshall allegedly failed to apply this conclusion. The Proposed Finding is also misleading, incomplete, and vague in that it fails to specifically identify what are the Marshall overall conclusions were fatally undermined. Thus, the proposed finding is not verifiable and should be disregarded.

B. RESPONSES TO PROPOSED FINDINGS REGARDING “DR. MARSHALL FAILED TO PROPERLY DEFINE THE RELEVANT PRODUCT MARKET”

659. Dr. Marshall made multiple errors in his definition of the relevant product market. (J. Johnson, Tr. 4790-91).

**Response to Proposed Finding No. 659**

The proposed finding is vague and misleading insofar as it is not supported by the evidence cited. In the testimony cited by Respondent, Respondent’s expert is testifying about *geographic* market definition and not product market definition to which the proposed fact refers.

660. Dr. Marshall’s errors in defining the relevant product market in this matter rendered unreliable his opinions regarding whether the industry is conducive to collusion, the assessment of the unilateral self-interest of Benco and other distributors, and the assessment of competitive impact. (J. Johnson, Tr. 4811-4812; 4815-4816).

**Response to Proposed Finding No. 660**

The Proposed Finding is misleading, vague, inaccurate, and contrary to the weight of evidence in this matter insofar as it suggests that the full line of dental products and services sold through full-service distributors to independent dentists is not the relevant product market in this matter. There is ample factual evidence in the record demonstrating that the full line of dental products and services sold through full-service distributors to independent dentists is the appropriate relevant market definition. (CCFF ¶¶ 1446-1566). The Proposed Finding is misleading, vague, and inaccurate insofar as it suggests that Dr. Marshall did not properly define a relevant product market in this matter. Through appropriate and well accepted methodologies, Dr. Marshall reached the opinion that the relevant product market in this matter is the full line of dental products and services sold through full-service distributors to independent dentists. (CX7100 at 010, 072-073 (¶¶10, 176-179) (Marshall Expert Report)). The Proposed Finding should thus be disregarded.

661. Dr. Marshall’s errors in defining the relevant product market in this matter fatally undermined his overall conclusions in this matter. (J. Johnson, Tr. 4811-4812; 4815-4816).

**Response to Proposed Finding No. 661**

The Proposed Finding is misleading, vague, inaccurate, and contrary to the weight of evidence in this matter insofar as it suggests that the full line of dental products and services sold through full-service distributors to independent dentists is not the relevant product market in this matter. There is ample factual evidence in the record demonstrating that the full line of dental products and services sold through full-service distributors to independent dentists is the appropriate relevant market definition. (CCFF ¶¶ 1446-1566). The Proposed Finding is misleading, vague, and inaccurate insofar as it suggests that Dr. Marshall did not properly define a relevant product market in this matter. Through appropriate and well accepted methodologies, Dr. Marshall reached the opinion that the relevant product market in this matter is the full line of dental products and services sold through full-service distributors to independent dentists. (CX7100 at 010, 072-073 (¶¶ 10, 176-179) (Marshall Expert Report)). The Proposed Finding should thus be disregarded.

**1. Dr. Marshall Erred By Failing to Include Direct-Selling  
Manufacturers in the Relevant Product Market**

662. Dr. Marshall opined that “direct sales from manufacturers” were not in the relevant market. (CX7100 at 10.)

**Response to Proposed Finding No. 662**

Complaint Counsel has no specific response.

663. Dentists purchase dental products through two channels: (1) through distributors of dental products; and (2) directly from manufacturers. (RX2834 at 16, ¶ 24 and Exhibit 1; J. Johnson, Tr. 4796-4799; *see also* RXD0105-008).

**Response to Proposed Finding No. 663**

Complaint Counsel notes that, contrary to this Court’s Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. J. Johnson is Benco’s economic expert and

RX2834 is Dr. Johnson's expert report in this matter. In addition, Respondent is improperly citing a demonstrative (RXD0105-008).

664. Dentists purchase as much as 25 percent of dental products directly from manufacturers. (CX3285 at 24; CX7100 at 15, ¶ 20; J. Johnson, Tr. 4799-4800; Kois, Sr. Tr. 285).

**Response to Proposed Finding No. 664**

Complaint Counsel notes that, contrary to this Court's Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. J. Johnson is Benco's economic expert and CX7100 is Complaint Counsel expert Dr. Marshall's Expert Report. The Proposed Finding is incomplete in that it cites to the testimony of one dentist, Dr. Kois, and in the cited testimony, Dr. Kois was testifying about just his practice. Additionally, the Proposed Finding is misleading insofar as it suggests that products purchased directly from manufacturers are in the relevant product market with dental products and services sold through full-service distributors to independent dentists. Record evidence establishes that direct sale manufacturers are not included in the relevant product market. (CCFF ¶¶ 1509-1521, 1544-1551).

665. Dentists regularly purchase dental products from multiple sources. (RX2834 at 19, ¶ 27; RX2834 at 20, Exhibit 2; J. Johnson, Tr. 4799-4800; J. Johnson, Tr. 4802-4803; RX2967 (Wu, Dep. 240-241)).

**Response to Proposed Finding No. 665**

Complaint Counsel notes that, contrary to this Court's Order, Respondent is improperly citing the testimony of experts for a proposition of fact. J. Johnson is Benco's economic expert and RX2834 is Dr. Johnson's expert report in this matter. Dr. Wu is Patterson's economic expert in this matter. Additionally, the Proposed Finding is misleading, inaccurate, vague, and contrary to the weight of the evidence in this matter insofar as it suggests that the full line of dental products and services sold through full-service distributors to independent dentists is not the appropriate relevant product market definition in this matter. Record evidence establishes that the full line of

dental products and services sold through full-service distributors to independent dentists is the appropriate relevant product market definition in this matter. (CCFF ¶¶ 1446-1566).

666. The seven independent dentists named as plaintiffs in the class litigation each purchased from a combination of distributors and direct-sale manufacturers. (RX2834 at 20-21, Exhibit 2; J. Johnson, Tr. 4799-4800; J. Johnson, Tr. 4803-4804 (“ . . . dentists do, all of them, regularly source across multiple suppliers, including both distributors and direct-selling manufacturers.”)).

### **Response to Proposed Finding No. 666**

Complaint Counsel notes that, contrary to this Court’s Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. J. Johnson is Benco’s economic expert and RX2834 is Dr. Johnson’s expert report in this matter. Moreover, the proposed finding is vague and misleading insofar as it suggests that the material Dr. Johnson presented in Exhibit 2 of his expert report (RX2834) supports a broader definition of the relevant product market. Dr. Johnson’s Expert Report Exhibit 2 (RX2834 at 20-21, Exhibit 2) is misleading and should be disregarded because it does not support Dr. Johnson’s opinion that the relevant market is broader than Dr. Marshall’s definition. Dr. Johnson’s Exhibit 2 purports to show that dentists regularly source dental products across multiple suppliers. (J. Johnson, Tr. 4905-4906; RX2965 (J. Johnson, Dep. at 38-40); RX2834 at 019-021 (¶ 27) (Johnson Expert Report)). As an initial matter, the seven (7) “dentists” that make up Dr. Johnson’s Exhibit 2 are not a random sample of dentists as they were the named class representatives in the Dental Supplies Class Action. (J. Johnson, Tr. 4906; RX2965 (J. Johnson, Dep. at 39-40)). Dr. Johnson agreed that there were approximately 188,000 dentists in the United States. (J. Johnson, Tr. 4906; RX2965 (J. Johnson, Dep. at 40)). These seven dentists shown in Exhibit 2 only represent purchases of 0.00003723 percent of dentists in the United States. (J. Johnson, Tr. 4907-4908). The evidence underlying Dr. Johnson’s Exhibit 2 analysis did not provide sufficient information about when, how much, and in most cases, what the dentists purchased from the various suppliers. As Dr. Johnson

admitted at trial, Exhibit 2 does not identify which supplier is the primary supplier for each dentist listed in the exhibit. (J. Johnson, Tr. 4909; RX2965 (J. Johnson, Dep. at 40)). As Dr. Johnson admitted at trial, Exhibit 2 does not identify what products each dentist listed in the exhibit bought from the suppliers listed in the exhibit. (J. Johnson, Tr. 4909; RX2965 (J. Johnson, Dep. at 41)). As Dr. Johnson admitted at trial, Exhibit 2 does not identify the quantity each dentist purchased from each of the suppliers listed in Exhibit 2. (J. Johnson, Tr. 4911; RX2965 (J. Johnson, Dep. at 41)). As Dr. Johnson admitted at trial, Exhibit 2 does not identify whether a dentist bought most of their dental supplies from a full-service distributor. (J. Johnson, Tr. 4912). As Dr. Johnson admitted at trial, Exhibit 2 does not identify whether a supplier listed in the exhibit has products that are not available for purchase from a full-service distributor. (J. Johnson, Tr. 4912; RX2965 (J. Johnson, Dep. at 41-42)). As Dr. Johnson admitted at trial, Exhibit 2 does not identify how many times the dentists purchased from each of the suppliers listed in the exhibit. (J. Johnson, Tr. 4912; RX2965 (J. Johnson, Dep. at 42)). As Dr. Johnson admitted at trial, Exhibit 2 does not identify the time period over which each of the dentists purchased from each of the suppliers listed in the exhibit. (J. Johnson, Tr. 4912; RX2965 (J. Johnson, Dep. at 43)). Finally, as Dr. Johnson admitted at trial, Exhibit 2 does not identify whether a dentist purchased only once from one of these suppliers listed in Exhibit 2, that supplier would still be listed in the exhibit. (J. Johnson, Tr. 4912; RX2965 (J. Johnson, Dep. at 43)). Additionally, one of the seven named plaintiffs in the Dental Supplies Class Action (and listed in Dr. Johnson's Exhibit 2) is not even a dentist – Evolution Dental is a dental laboratory in Buffalo, NY. (*In Re: Dental Supplies Antitrust Litigation* (Complaint ¶22)). At trial, Dr. Johnson was not able to recall if Evolution Dental was a dentist's office or a dental laboratory. (J. Johnson, Tr. 4908-4909). The finding is also misleading because Dr. Johnson admitted that five of the six dental offices listed in Exhibit 2 of his report in this matter are not buying group



members. (J. Johnson, Tr. 4909). The Proposed Finding is also misleading because a relevant market need not include all possible sources that a customer can use as a substitute. (J. Johnson, Tr. 4929; RX2965 (J. Johnson, Dep. at 34) (admitting that in defining a relevant product market, it's possible that a substitute to which some customers turn could be excluded from the market)). Thus, the Proposed Finding should be disregarded as it relies on Dr. Johnson's Exhibit 2.

667. In total, the seven independent dentists named as plaintiffs in the class litigation purchased products directly from over 40 different direct-sale manufacturers, dental labs, and independent suppliers of products and services. (RX2834 at 20-21, Exhibit 2; J. Johnson, Tr. 4799-4800).

#### **Response to Proposed Finding No. 667**

Complaint Counsel notes that, contrary to this Court's Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. J. Johnson is Benco's economic expert and RX2834 is Dr. Johnson's expert report in this matter. Moreover, the Proposed Finding is misleading insofar as it relies on Dr. Johnson's Exhibit 2, which is unreliable for the reasons set forth in response to Complaint Counsel's response to Benco Proposed Finding No. 666, above.

668. Independent dentists purchased products directly from substantial manufacturers of dental product such as Procter and Gamble, Dentsply Sirona, and Brasseler, as well as smaller manufacturers and suppliers of services. (RX2834-020 – 021 at Exhibit 2).

#### **Response to Proposed Finding No. 668**

Complaint Counsel notes that, contrary to this Court's Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. RX2834 is Benco economic expert Dr. Johnson's expert report in this matter. Moreover, the Proposed Finding is misleading, incomplete and vague insofar as it does not identify the "independent dentists" who purchased directly from manufacturers. Moreover, the Proposed Finding is misleading insofar as it relies on Dr. Johnson's Exhibit 2, which is unreliable for the reasons set forth in response Complaint Counsel's response to Benco Proposed Finding No. 666, above.

669. These seven dentists studied by Dr. Johnson can be expected to be representative of dentists in general because they were selected to represent the large class of dentists in the class litigation. (J. Johnson, Tr. 4906).

**Response to Proposed Finding No. 669**

The Proposed Finding is misleading and inaccurate insofar as it suggests the seven plaintiffs in a different litigation with different factual issues should be the basis for findings in this matter. Dr. Johnson admitted in testimony that *Dental Supplies Class Action* does not involve a conspiracy not to discount to buying groups. (J. Johnson, Tr. 4905). The Proposed Finding is also misleading and incomplete insofar as seven dentists is too few a number of dentists upon which to make factual findings. In testimony, Dr. Johnson admitted that the seven dentists are not a random sample of dentists. (RX2965 (J. Johnson, Dep. at 40); (J. Johnson, Tr. 4906). Dr. Johnson agreed that there were approximately 188,000 dentists in the United States (J. Johnson, Tr. 4906; RX2965 (J. Johnson, Dep. at 40)), and Dr. Johnson agreed that the seven dentists represent the purchases of only 0.00003723 percent of dentists in the United States. (J. Johnson, Tr. 4907-4908). *See also* Complaint Counsel's response to Benco Proposed Finding 666.

670. Dentists that purchase dental products from direct-selling manufacturers do not have to forego value-added services because there are independent companies that provide such services. (J. Johnson, Tr. 4804-4805).

**Response to Proposed Finding No. 670**

Complaint Counsel notes that, contrary to this Court's Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. J. Johnson is Benco's economic expert. Also, the Proposed Finding is misleading, incomplete, and contrary to the weight of evidence insofar as it suggests direct-selling manufacturers should be included in the relevant product market. Record evidence establishes that direct-selling manufacturers are not included in the relevant product market. (CCFF ¶¶ 1511-1521, 1544-1551).

671. Dentists that purchase dental products from direct-selling manufacturers do not have to forego value-added services because they can purchase repair and other services from full-service distributors without also purchasing consumables or equipment from them. (RX2833 at 45, ¶ 107).

**Response to Proposed Finding No. 671**

Complaint Counsel notes that, contrary to this Court's Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. RX2833 is the expert report of Dr. Wu, Patterson's expert in this matter. Also, the Proposed Finding is misleading, incomplete, and contrary to the weight of evidence insofar as it suggests direct-selling manufacturers should be included in the relevant product market. Record evidence establishes that direct-selling manufacturers are not included in the relevant product market. (CCFF ¶¶ 1511-1521, 1544-1551).

672. Patterson had up to 10,000 customers, over 95% of whose purchases were services. (RX2833 at 45, ¶ 107).

**Response to Proposed Finding No. 672**

Complaint Counsel notes that, contrary to this Court's Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. RX2833 is the expert report of Dr. Wu, Patterson's expert in this matter. Additionally, Proposed Finding is misleading, vague, and incomplete insofar as it suggests the amount of services that Patterson sells. Respondent offers no evidence of how many total customers Patterson has and what percentage of the total are these 10,000 customers.

673. Customers that purchased almost exclusively services from Patterson included Dental Dreams, Ocean Dental, Dr. Zachary Lechner (Root River Dental), Dr. Howard Henry (Arizona Orthodontics Exclusively), and JT Herres Dental Association. (RX2833 at 45-46, ¶ 108).

**Response to Proposed Finding No. 673**

Complaint Counsel notes that, contrary to this Court's Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. RX2833 is the expert report of Dr. Wu,

Patterson's expert in this matter. Additionally, Proposed Finding is misleading, vague, and incomplete. Respondent offers no evidence to suggest that these specific Patterson customers should be considered representative of any particular type of customer.

674. Benco and other distributors regard direct-sale manufacturers as competitors. (CX0311 (Sullivan, Dep. 53 (" . . . some of our manufacturers we partner with, but they also have a direct selling component to their business . . . so those segments we view as competitors.")); CX0314 (Guggenheim, Dep. 48-49 ("There's hundreds of competitors, including manufacturers, who sell direct, compete with us.")); J. Johnson, Tr. 4799-4800; RX2834 at 18, ¶ 25).

#### **Response to Proposed Finding No. 674**

The Proposed Finding is misleading, vague, inaccurate, and incomplete. Respondent does not cite the testimony of any Benco fact witness for the proposition that Benco regards direct-sale manufacturers as competitors. Complaint Counsel notes that, contrary to this Court's Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. J. Johnson is Benco's expert witness and RX2834 is the expert report of Dr. Johnson in this matter.

Respondent also cites the testimony of Sullivan, a representative of Schein, and Guggenheim, a representative of Patterson. The Proposed Finding is also misleading, vague, inaccurate, and incomplete insofar as it suggests that Schein views direct-sale manufacturers as competitors on the same level as the other full-service distributors. In the cited testimony, Schein's Sullivan notes that while manufacturers may have a direct selling component to their business, "it's primarily on the specialty side of [the] business." (CX0311 (Sullivan, IHT at 53)). The Proposed Finding is also contrary to the weight of evidence insofar as it suggests that direct-selling manufacturers should be included in the relevant product market. Record evidence establishes that direct-selling manufacturers are not included in the relevant product market. (CCFF ¶¶ 1511-1521, 1544-1551).

675. Many dentists who are members of buying groups purchase dental supplies from direct-selling manufacturers. (Kois, Sr. Tr. 174-77; J. Johnson, Tr. 4800-4801; [REDACTED]).

**Response to Proposed Finding No. 675**

Complaint Counsel notes that, contrary to this Court’s Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. J. Johnson is Benco’s expert witness and RX2834 is the expert report of Dr. Johnson in this matter. The Proposed Finding is misleading, vague, inaccurate, and incomplete insofar as it relies on the testimony of only one dentist, Dr. Kois, for a proposed finding describing the purchases of “many dentists.” The Proposed Finding is also contrary to the weight of evidence insofar as it suggests that direct-selling manufacturers should be included in the relevant product market. Record evidence establishes that direct-selling manufacturers are not included in the relevant product market. (CCFF ¶¶ 1511-1521, 1544-1551).

676. Many buying groups partner with direct-selling manufacturers. (RX1100 (listing multiple direct-selling manufacturers among the vendors participating in the Kois Buyers Group); J. Johnson, Tr. 4800-4802; RX2834 at 18, ¶ 26).

**Response to Proposed Finding No. 676**

Complaint Counsel notes that, contrary to this Court’s Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. J. Johnson is Benco’s expert witness and RX2834 is the expert report of Dr. Johnson in this matter. The Proposed Finding is misleading, vague, inaccurate, and incomplete insofar as it relies on the document of only one buying group, Kois, for a proposed finding describing the partners of “many buying groups.” The Proposed Finding is also contrary to the weight of evidence insofar as it suggests that direct-selling manufacturers should be included in the relevant product market. Record evidence establishes that direct-selling manufacturers are not included in the relevant product market. (CCFF ¶¶ 1511-1521, 1544-1551).

677. Many of the Kois Tribe members didn't see the value of the buyers club until the Kois Buyers Group enlisted direct-selling manufacturers to participate. (CX8007 (J. Kois, Sr., Dep. 74-75).

**Response to Proposed Finding No. 677**

The Proposed Finding is misleading and incomplete insofar as it suggests that buying group members do not value the discounts offered by full-service distributors to buying groups. This Proposed Finding is also misleading in that it relies on the testimony of only one buying group. The Proposed Finding is misleading insofar as it relies on the term "many." Additionally, the Proposed Finding is misleading and contrary to the weight of the evidence establishing that the Kois Buyers Group relied on having a full-service distributor partner to grow its membership. Kois, Jr. testified that without a full-service distributor partner, the buying group's membership would "be quite a bit lower, because the majority of the products purchased by dental practices are done so through a dental supply company." (Kois, Jr., Tr. 338). Finally, the Proposed Finding is misleading, incomplete, and contrary to the evidence in this matter insofar as it suggests that direct-selling manufacturers should be included in the relevant product market. Record evidence establishes that appropriate relevant product market in this matter is the full line of dental products and services sold through full-service distributors to independent dentists. (CCFF ¶¶ 1446-1566).

678. Many buying groups view it as important to include direct-selling manufacturers among the suppliers that they offer to their members. (J. Johnson, Tr. 4800-4801).

**Response to Proposed Finding No. 678**

Complaint Counsel notes that, contrary to this Court's Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. J. Johnson is Benco's economic expert. The Proposed Finding is also contrary to the weight of evidence insofar as it suggests that direct-selling manufacturers should be included in the relevant product market. Record evidence

establishes that direct-selling manufacturers are not included in the relevant product market.

(CCFF ¶¶ 1511-1521, 1544-1551).

679. Kois and Smile Source, the two buying groups that Dr. Marshall chose to study, each partner with direct-selling manufacturers. (Kois, Sr., Tr. 174-77; J. Johnson, Tr. 4799-4800; Maurer, IHT at 66-67; RX2834 at 18, ¶ 26).

**Response to Proposed Finding No. 679**

Complaint Counsel notes that, contrary to this Court’s Order, Respondent is improperly citing the testimony of an expert, at least in part, for a proposition of fact. J. Johnson is Benco’s economic expert, and RX2834 is Dr. Johnson’s expert report in this matter. The Proposed Finding is misleading, vague, and incomplete insofar as the cited testimonies of Kois, Sr. and Maurer do quantify how often buying groups partner with direct-selling manufacturers and how much business buying groups and their members do with these manufacturers. The Proposed Finding is also contrary to the weight of evidence insofar as it suggests that direct-selling manufacturers should be included in the relevant product market. Record evidence establishes that direct-selling manufacturers are not included in the relevant product market. (CCFF ¶¶ 1511-1521, 1544-1551).

680. Dr. Marshall never considered whether direct-selling manufacturers are in the relevant market. (J. Johnson, Tr. 4799-4800 (“So Dr. Marshall starts from a position that direct-selling manufacturers aren’t even considered in his relevant market.”); RX2833 at 54, ¶ 135).

**Response to Proposed Finding No. 680**

The Proposed Finding is misleading, incomplete, and inaccurate in that Dr. Marshall did consider whether direct-selling manufacturers are in the relevant market. (CX7101 at 013 (¶26) (Marshall Rebuttal Expert Report); CX7100 at 020-021, 055, 072-074 (¶¶29-33, 120-123, 176-184) (Marshall Expert Report)). Dr. Marshall wrote that “A set of customers buying a set of a products forms a relevant product market if a small but significant non-transitory increase in price (SSNIP) on those customers would be profitable because too few customers would

substitute away from the relevant product or would use arbitrage to defeat the price increase.” (CX7100 at 072 (¶177) (Marshall Expert Report)). Following this approach, Dr. Marshall applied the hypothetical monopolist test to “investigate whether independent dentists would substitute enough to buying . . . directly from manufacturers to render a SSNIP unprofitable.” (CX7100 at 072-073 (¶178) (Marshall Expert Report)). Dr. Marshall concluded that the full line of dental products and services sold through full-service distributors to independent dentists is a relevant product market. (CX7100 at 073 (¶179) (Marshall Expert Report)). In addition, the Proposed Finding is contrary to the weight of evidence insofar as it suggests that direct-selling manufacturers should be included in the relevant product market. Record evidence establishes that direct-selling manufacturers are not included in the relevant product market. (CCFF ¶¶ 1511-1521, 1544-1551).

681. Dr. Marshall never tested whether direct-selling manufacturers are in the relevant market. (J. Johnson, Tr. 4799-4800 (“ . . . none of his testing involves direct selling. He just rules them out of hand in his analysis.”); RX2833 at 54, ¶ 135; *see also* [REDACTED]; Marshall, Tr. 3356-3357).

### **Response to Proposed Finding No. 681**

The Proposed Finding is misleading, incomplete, and inaccurate in that the testimony of Dr. Marshall referenced at Marshall, Tr. 3356-3357 is in response to questions from Respondents only about Dr. Marshall’s “SSNIP analysis with respect to Benco's entry into Southern California.” (Marshall, Tr. 3352). Dr. Marshall did consider whether direct-selling manufacturers are in the relevant market, thus Proposed Finding is misleading, incomplete, and inaccurate. (CX7101 at 013 (¶26) (Marshall Rebuttal Expert Report); CX7100 at 020-021, 055, 072-074 (¶¶29-33, 120-123, 176-184) (Marshall Expert Report)). Dr. Marshall’s approach to defining a relevant product market followed the 2010 Horizontal Merger Guidelines, which provide guidance as to how to define a product market in the presence of price discrimination.



(CX7100 at 072 (¶177) (Marshall Expert Report)). Dr. Marshall wrote that “A set of customers buying a set of a products forms a relevant product market if a small but significant non-transitory increase in price (SSNIP) on those customers would be profitable because too few customers would substitute away from the relevant product or would use arbitrage to defeat the price increase.” (CX7100 at 072 (¶177) (Marshall Expert Report)). Following this approach, Dr. Marshall applied the hypothetical monopolist test to “investigate whether independent dentists would substitute enough to buying . . . directly from manufacturers to render a SSNIP unprofitable.” (CX7100 at 072-073 (¶178) (Marshall Expert Report)). Dr. Marshall concluded that the full line of dental products and services sold through full-service distributors to independent dentists is a relevant product market. (CX7100 at 073 (¶179) (Marshall Expert Report)). The Proposed Finding is also misleading, incomplete, and inaccurate in that the testimony of Dr. Marshall referenced at Marshall, Tr. 3356-3357 is in response to questions from Respondents only about Dr. Marshall’s “SSNIP analysis with respect to Benco's entry into Southern California.” (Marshall, Tr. 3352). In addition, the Proposed Finding is contrary to the weight of evidence insofar as it suggests that direct-selling manufacturers should be included in the relevant product market. Record evidence establishes that direct-selling manufacturers are not included in the relevant product market. (CCFF ¶¶ 1511-1521, 1544-1551).

682. Dr. Marshall’s exclusion of direct-selling manufacturers from the relevant market does not make sense as a matter of economics. (J. Johnson, Tr. 4800-4801).

### **Response to Proposed Finding No. 682**

The Proposed Finding is misleading, vague, and inaccurate in that it suggests that Dr. Marshall did not follow accepted methodology in defining a relevant product market. Dr. Marshall did consider whether direct-selling manufacturers are in the relevant market. (CX7101 at 013 (¶26) (Marshall Rebuttal Expert Report); CX7100 at 020-021, 055, 072-074 (¶¶29-33, 120-123, 176-

184) (Marshall Expert Report)). Dr. Marshall’s approach to defining a relevant product market followed the 2010 Horizontal Merger Guidelines, which provide guidance as to how to define a product market in the presence of price discrimination. (CX7100 at 072 (¶177) (Marshall Expert Report)). Dr. Marshall wrote that “A set of customers buying a set of a products forms a relevant product market if a small but significant non-transitory increase in price (SSNIP) on those customers would be profitable because too few customers would substitute away from the relevant product or would use arbitrage to defeat the price increase.” (CX7100 at 072 (¶177) (Marshall Expert Report)). Following this approach, Dr. Marshall applied the hypothetical monopolist test to “investigate whether independent dentists would substitute enough to buying . . . directly from manufacturers to render a SSNIP unprofitable.” (CX7100 at 072-073 (¶178) (Marshall Expert Report)). Dr. Marshall concluded that the full line of dental products and services sold through full-service distributors to independent dentists is a relevant product market. (CX7100 at 073 (¶179) (Marshall Expert Report)). The Proposed Finding is also contrary to the weight of evidence insofar as it suggests that direct-selling manufacturers should be included in the relevant product market. Record evidence establishes that direct-selling manufacturers are not included in the relevant product market.(CCFF ¶¶ 1511-1521, 1544-1551).

## **2. Dr. Marshall Erred By Combining Equipment and Consumables in a Single Relevant Product Market**

683. Dr. Marshall opined that the relevant product market is the “full line of dental products and services” sold through full-service distributors to independent dentists. (CX7100 at 10.)

### **Response to Proposed Finding No. 683**

Complaint Counsel has no specific response.

684. Dr. Marshall erred in lumping together the distribution of dental equipment and the distribution of dental consumables. (J. Johnson, Tr. 4812-4815; [REDACTED]).

### **Response to Proposed Finding No. 684**

The Proposed Finding is misleading, vague, incomplete, and inaccurate. Dr. Marshall's opinion that products and services are naturally grouped together is consistent with the economic literature of cluster markets. (CX7101 at 024 (¶56, n. 87) (Marshall Rebuttal Expert Report)). Additionally, Patterson's economic expert, Dr. Wu, agreed with Dr. Marshall on this, and Dr. Wu found it reasonable to "start with the cluster of products that is included in the FTC's definition of relevant product market." (RX2833 at 044 (¶103) (Wu Expert Report)).

685. Dental consumables consist of the products that dentists use in treating their patients every day and need constant replacement, such as anesthetics, fillings, fluoride, and cotton swabs. (Cohen, Tr. 601; J. Johnson, Tr. 4812-4815; [REDACTED]; RX1140 at 20, ¶ 24).

#### **Response to Proposed Finding No. 685**

The Proposed Finding is largely similar to Joint Stipulation of Fact 1, "Dental Supplies."

686. Dental equipment consists of large, expensive products that are purchased occasionally and often require skilled installation and service, such as dental chairs and x-ray equipment. (Cohen, Tr. 601; J. Johnson, Tr. 4812-4815; [REDACTED]; RX1140 at 20, ¶ 24).

#### **Response to Proposed Finding No. 686**

The Proposed Finding is similar to Joint Stipulation of Fact 2, "Dental Equipment."

687. Distribution of dental equipment and distribution of dental consumables are governed by very different conditions of demand; dentists purchase dental consumables frequently, but they purchase dental equipment only very rarely. (J. Johnson, Tr. 4812-4815; [REDACTED]).

#### **Response to Proposed Finding No. 687**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. J. Johnson is Benco's expert in this matter.

The Proposed Finding is misleading, vague, and inaccurate insofar as it suggests that dental products and services are not clustered or grouped together in a relevant product market. Cluster market analysis is appropriate in this case where competitive conditions of supply (i.e. the suppliers) for the products and equipment are similar. (CX7101 at 024 (¶56, n. 87) (Marshall

Rebuttal Expert Report)). Additionally, Patterson’s economic expert, Dr. Wu, agreed with Dr. Marshall on this, and Dr. Wu found it reasonable to “start with the cluster of products that is included in the FTC’s definition of relevant product market.” (RX2833 at 044 (¶103) (Wu Expert Report)).

688. Distribution of dental equipment and distribution of dental consumables are governed by different shipping considerations; dental consumables generally can be shipped much farther economically than can dental equipment, which has a much more local distribution pattern. (J. Johnson, Tr. 4812-4815; [REDACTED]).

**Response to Proposed Finding No. 688**

Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. J. Johnson is Benco’s expert in this matter, and RX2834 is Dr. Johnson’s expert report in this matter.

689. The sales representatives who sell dental consumables are different from the sales representatives who sell dental equipment. (J. Johnson, Tr. 4812-4815; [REDACTED]; RX1140 at 23-24, ¶¶ 30-32).

**Response to Proposed Finding No. 689**

Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. J. Johnson is Benco’s expert in this matter, RX2834 is Dr. Johnson’s expert report in this matter, and RX1140 is Dr. Johnson’s expert report in the SourceOne litigation.

690. Benco uses different models of pricing and negotiates prices with customers differently for dental consumables and dental equipment. (J. Johnson, Tr. 4812-4815; [REDACTED]).

**Response to Proposed Finding No. 690**

Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. J. Johnson is Benco’s expert in this matter, and RX2834 is Dr. Johnson’s expert report in this matter.

691. Different companies compete for the sale of dental consumables and the sale of dental equipment. (J. Johnson, Tr. 4812-4815). [REDACTED]

**Response to Proposed Finding No. 691**

Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. J. Johnson is Benco’s expert in this matter, and RX2834 is Dr. Johnson’s expert report in this matter.

692. Sales of dental consumables don’t have the same competitive conditions as sales of dental equipment. (J. Johnson, Tr. 4812-4815; [REDACTED]).

**Response to Proposed Finding No. 692**

Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. J. Johnson is Benco’s expert in this matter, and RX2834 is Dr. Johnson’s expert report in this matter. Additionally, the Proposed Finding is misleading, vague, inaccurate, and contrary to the weight of evidence. Many consumable products are tied to the use of equipment. (CX7100 at 014 (¶18) (Marshall Expert Report) (citing Patterson and Schein Internet catalogs describing Patterson and Schein products such as IPS e.max CAD blocks used in milling machines and x-ray machines and x-ray film)). The Proposed Finding is misleading and inaccurate insofar as it suggests that dental products and services are not clustered or grouped together in a relevant product market. Cluster market analysis is appropriate in this case where competitive conditions of supply (i.e. the suppliers) for the products and equipment are similar. (CX7101 at 024 (¶56, n. 87) (Marshall Rebuttal Expert Report)). Additionally, Patterson’s economic expert, Dr. Wu, agreed with Dr. Marshall on this, and Dr. Wu found it reasonable to “start with the cluster of products that is included in the FTC’s definition of relevant product market.” (RX2833 at 044 (¶103) (Wu Expert Report)).

693. Distribution of dental consumables and distribution of dental equipment are not in the same relevant product market. (J. Johnson, Tr. 4812-4815; [REDACTED]).

**Response to Proposed Finding No. 693**

The Proposed Finding is misleading and inaccurate insofar as it suggests that dental products and services are not clustered or grouped together in a relevant product market. Cluster market analysis is appropriate in this case where competitive conditions of supply (i.e. the suppliers) for the products and equipment are similar. (CX7101 at 024 (¶56, n. 87) (Marshall Rebuttal Expert Report)). Additionally, Patterson’s economic expert, Dr. Wu, agreed with Dr. Marshall on this, and Dr. Wu found it reasonable to “start with the cluster of products that is included in the FTC’s definition of relevant product market.” (RX2833 at 044 (¶103) (Wu Expert Report)).

694. Dr. Marshall erred in including in a single product market the distribution of dental equipment and the distribution of dental consumables. (J. Johnson, Tr. 4812-4815; [REDACTED]).

**Response to Proposed Finding No. 694**

The Proposed Finding is misleading, vague, and inaccurate. Grouping dental products and services in the same relevant product market is appropriate in this case where competitive conditions of supply (i.e. the suppliers) for the products and equipment are similar. (CX7101 at 024 (¶56, n. 87) (Marshall Rebuttal Expert Report)). Additionally, Patterson’s economic expert, Dr. Wu, agreed with Dr. Marshall on this, and Dr. Wu found it reasonable to “start with the cluster of products that is included in the FTC’s definition of relevant product market.” (RX2833 at 044 (¶103) (Wu Expert Report)).

695. Dr. Marshall’s failure properly to distinguish between distribution of dental consumables and distribution of dental equipment rendered unreliable his subsequent opinions. (J. Johnson, Tr. 4815).

**Response to Proposed Finding No. 695**

The Proposed Finding is misleading, vague, incomplete, and inaccurate. Grouping dental products and services in the same relevant product market is appropriate in this case where

competitive conditions of supply (i.e. the suppliers) for the products and equipment are similar. (CX7101 at 024 (¶56, n. 87) (Marshall Rebuttal Expert Report)). Additionally, Patterson’s economic expert, Dr. Wu, agreed with Dr. Marshall on this, and Dr. Wu found it reasonable to “start with the cluster of products that is included in the FTC’s definition of relevant product market.” (RX2833 at 044 (¶103) (Wu Expert Report)).

### **3. Dr. Marshall Erred By Failing to Include Non-Full-Service Distributors in the Relevant Product Market**

696. Dr. Marshall opined that the relevant product market is the full line of dental products and services “sold through full-service distributors” to independent dentists. (CX7100 at 10.)

#### **Response to Proposed Finding No. 696**

Complaint Counsel has no specific response. Complaint Counsel also notes that this proposed finding is nearly identical to Benco Proposed Finding No. 683.

697. Dr. Marshall erred in excluding non-full-service distributors from the relevant product market. (J. Johnson, Tr. 4805-4807).

#### **Response to Proposed Finding No. 697**

This proposed finding is vague, misleading, and contrary to the weight of evidence. Record Evidence, including practical indicia of full-service distributors’ peculiar characteristics and uses and unique facilities, support the conclusion that full-service dental distribution to independent dentists is the relevant product market. (CCFF ¶¶ 1446-1521). Full-service distributors provide independent dentists with a distinctive offering of products and services that independent dentists value. These valuable attributes of full-service distributors include: product breadth and diversity, one-stop shopping and fast delivery, customer service and value-added services, prompt supply delivery, equipment service, and maintenance. (CCFF ¶¶ 1460-1490). Record evidence supports the conclusion that non-full-line distributors should be excluded from the relevant product market. (CCFF ¶¶ 1492-1508; 1537-1543). Benco’s CEO Cohen repeatedly

acknowledged in ordinary course documents that full-service distribution is distinct from mail-order: “Dentists value the sales rep. They value the service tech, as evidenced by the fact that GPOs can work with Darby [the largest mail-order/internet distributor] all day long, and they choose not to because dentists want the service that a Benco or full-service dealer would provide.” (CCFF ¶ 1471). Also, record empirical evidence, including the hypothetical monopolist test, also support the conclusion that full-service dental distribution to independent dentists is the relevant product market. (CCFF ¶¶ 1553-1566). Additionally, the Proposed Finding is misleading and unsupported by the testimony of Benco’s expert, Dr. Johnson. Unlike Dr. Marshall, Dr. Johnson did not actually define a relevant product market in this case, nor did he perform the Hypothetical Monopolist Test independently. (CCFF ¶¶ 1960-1963). Dr. Johnson did not study the extent to which non-full-service distributors and full-service distributors sell the same products to dentists. (CCFF ¶ 1966, *see also* CCFF ¶¶ 1965, 1968). While Dr. Johnson put forward a pricing analysis cribbed from *another* antitrust case in which Benco hired him to testify, the analysis is irrelevant because it did not isolate the price constraints attributable to any particular source of alleged competition, and thus, has no bearing on the relevant product market. (CCFF ¶¶ 1969, 1971, 1973, 1976-1979).

698. Non-full-service distributors include distributors that focus on mail-order, phone-order or internet business. (J. Johnson, Tr. 4805). Examples of non-full-service distributors include Darby Dental Supply, Safco, Scott’s Dental, and Net32. (J. Johnson, Tr. 4805; *see also* RXD0105 at 12).

#### **Response to Proposed Finding No. 698**

Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to the testimony of an expert (Dr. J. Johnson) for a proposition of fact. Additionally, RXD0105 at 12 (a slide from Dr. Johnson’s testimony at trial) is not in evidence and is a demonstrative used at trial.



699. Darby Dental Supply (“Darby”) is an on-line distributor of over 40,000 dental products; in 2016, it had over \$250 million in sales. (CX7100 at 51-52).

**Response to Proposed Finding No. 699**

Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. CX7100 is Dr. Marshall’s Expert Report in this matter.

700. [REDACTED]

**Response to Proposed Finding No. 700**

The Proposed Finding is misleading and incomplete insofar as it fails to include [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; CCF ¶ 1824).

701. In 2016, Darby supplied over 24% of all purchases of dental supplies made by Smile Source members. (RX2833 at 49 ¶ 18).

**Response to Proposed Finding No. 701**

Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. RX2833 is Dr. Wu’s (Patterson’s) Expert Report in this matter.

702. Four of the seven individual dentists named as plaintiffs in the class litigation purchased dental supplies from Darby. (RX2834 at 20-21).

**Response to Proposed Finding No. 702**

Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. RX2834 is Dr. J. Johnson’s (Benco’s) Expert Report in this matter. Moreover, the Proposed Finding is misleading and contrary to the

weight of evidence insofar as it suggests that Darby, as a non-full-service distributor, is in the same relevant market as full service distributors. Record evidence supports the conclusion that non-full-line distributors should be excluded from the relevant product market. (CCFF ¶¶ 1492-1508; 1537-1566). Additionally, the Proposed Finding is misleading insofar as it relies on Dr. Johnson's Exhibit 2, which is unreliable for the reasons set forth in Complaint Counsel's response to Benco Proposed Finding No. 666, above.

703. Dentists almost never purchase dental supplies exclusively from Darby; this is consistent with Darby being in the same relevant market as full-service distributors. (RX2833 at 49, ¶ 119).

#### **Response to Proposed Finding No. 703**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact that dentists almost never purchase dental supplies exclusively from Darby. RX2833 is Dr. Wu's (Patterson's) Expert Report in this matter. Moreover, the Proposed Finding is misleading and contrary to the weight of evidence insofar as it suggests that Darby, as a non-full-service distributor, is in the same relevant market as full service distributors. Record evidence supports the conclusion that non-full-line distributors should be excluded from the relevant product market. (CCFF ¶¶ 1492-1508; 1537-1566). *See also* Complaint Counsel's response to Benco Proposed Finding No. 697.

704. The dental supplies that Darby sells overlap to a significant degree with the dental supplies sold by full-service distributors; this is consistent with Darby being in the same market as full-service distributors. (RX2833 at 49, ¶ 119).

#### **Response to Proposed Finding No. 704**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact that the dental supplies that Darby sells overlap to a significant degree with the dental supplies sold by full-service distributors. RX2833 is Dr. Wu's (Patterson's) Expert Report in this matter. Moreover, the Proposed Finding is

misleading and contrary to the weight of evidence insofar as it suggests that Darby, a non full-service distributor, is in the same relevant market as full service distributors. Record evidence supports the conclusion that non-full-line distributors, including Darby, should be excluded from the relevant product market. (CCFF ¶¶ 1492-1508; 1537-1566). *See also* Complaint Counsel's response to Benco Proposed Finding No. 697.

705. Safco is a limited service distributor. (J. Johnson, Tr. 4805; RX2833 at 15 n.51).

**Response to Proposed Finding No. 705**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. J. Johnson is Benco's expert in this matter, and RX2833 is Dr. Wu's (Patterson's) Expert Report in this matter.

706. Scott's Dental is a limited service distributor. (J. Johnson, Tr. 4805).

**Response to Proposed Finding No. 706**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. J. Johnson is Benco's expert in this matter.

707. Three of the seven individual dentists named as plaintiffs in the class litigation purchased dental supplies from Scott's Dental. (RX2834 at 20-21).

**Response to Proposed Finding No. 707**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. RX2834 is Dr. J. Johnson's (Benco's) Expert Report in this matter. Moreover, the Proposed Finding is misleading, vague, incomplete, and contrary to the weight of the evidence to the extent it suggests that Scott's Dental should be in the relevant product market. Record evidence supports the conclusion that non-full-line distributors, such as Scott's Dental, should be excluded from the relevant product market. (CCFF ¶¶ 1492-1508; 1537-1543). Additionally, the Proposed Finding is misleading insofar as

it relies on Dr. Johnson's Exhibit 2, which is unreliable for the reasons set forth in Complaint Counsel's response to Benco Proposed Finding No. 666, above.

708. Net32 is a limited service distributor. (J. Johnson, Tr. 4805).

**Response to Proposed Finding No. 708**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. J. Johnson is Benco's expert in this matter.

709. Three of the seven individual dentists named as plaintiffs in the class litigation purchased dental supplies from Net32. (RX2834 at 20-21).

**Response to Proposed Finding No. 709**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. RX2834 is Dr. J. Johnson's (Benco's) Expert Report in this matter. Moreover, the Proposed Finding is misleading, vague, incomplete, and contrary to the weight of the evidence to the extent it suggests that Net32 should be in the relevant product market. Record evidence supports the conclusion that non-full-line distributors, such as Net 32, should be excluded from the relevant product market. (CCFF ¶¶ 1492-1508; 1537-1543). Additionally, the Proposed Finding is misleading insofar as it relies on Dr. Johnson's Exhibit 2, which is unreliable for the reasons set forth in Complaint Counsel's response to Benco Proposed Finding No. 666, above.

710. Dentists that purchase dental products from non-full-service distributors do not have to forego value-added services because there are independent companies and full-service distributors that provide such services. (J. Johnson, Tr. 4804-4806).

**Response to Proposed Finding No. 710**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. J. Johnson is Benco's expert in this matter.

711. [REDACTED]

[REDACTED]; J. Johnson, Tr. 4805-4807).

**Response to Proposed Finding No. 711**

The Proposed Finding is unsupported. The quoted text from RX0380 appears to be the statement of one Benco representative contained in a PowerPoint presentation. No context is given for the quote and the document appears to be undated. Additionally, Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing, at least in part, to the testimony of an expert for a proposition of fact. J. Johnson is Benco's expert in this matter. The Proposed Finding is vague, misleading, and contrary to the weight of evidence insofar as it suggests that Darby, a non full-service distributor should be included in the relevant product market. Record evidence, including practical indicia of full-service distributors' peculiar characteristics and uses and unique facilities, support the conclusion that full-service dental distribution to independent dentists is the relevant product market. (CCFF ¶¶ 1446-1521). Full-service distributors provide independent dentists with a distinctive offering of products and services that independent dentists value. These valuable attributes of full-service distributors include: product breadth and diversity, one-stop shopping and fast delivery, customer service and value-added services, prompt supply delivery, equipment service, and maintenance. (CCFF ¶¶ 1460-1490). Record evidence supports the conclusion that non-full-line distributors should be excluded from the relevant product market. (CCFF ¶¶ 1492-1508; 1537-1543). Benco's CEO Cohen repeatedly acknowledged in ordinary course documents that full-service distribution is distinct from mail-order: "Dentists value the sales rep. They value the service tech, as evidenced by the fact that GPOs can work with Darby [the largest mail-order/internet distributor] all day long, and they choose not to because dentists want the service that a Benco or full-service dealer would provide." (CCFF ¶ 1471). Also, record empirical evidence, including the hypothetical monopolist test, also supports the conclusion that full-service dental distribution to independent dentists is the relevant product market. (CCFF ¶¶ 1553-1566). Additionally, the Proposed

Finding is misleading and unsupported by the testimony of Benco's expert, Dr. Johnson. Unlike Dr. Marshall, Dr. Johnson did not actually define a relevant product market in this case, nor did he perform the Hypothetical Monopolist Test independently. (CCFF ¶¶ 1960-1963). Dr. Johnson did not study the extent to which non-full-service distributors and full-service distributors sell the same products to dentists. (CCFF ¶ 1966, *see also* CCFF ¶¶ 1965, 1968). While Dr. Johnson put forward a pricing analysis cribbed from *another* antitrust case in which Benco hired him to testify, the analysis is irrelevant because it did not isolate the price constraints attributable to any particular source of alleged competition, and thus, has no bearing on the relevant product market. (CCFF ¶¶ 1969, 1971, 1973, 1976-1979).

712. In at least some markets, Benco uses "selective price overrides to make Benco's prices competitive with low-priced competitors like Darby and Safco." (CX1100 at 3; [REDACTED]).

#### **Response to Proposed Finding No. 712**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing, at least in part, to the testimony of an expert for a proposition of fact. RX2834 is Dr. Johnson's (Benco's) Expert Report in this matter. The Proposed Finding is vague, misleading, and contrary to the weight of evidence insofar as it suggests that Darby and Safco, non full-service distributors should be included in the relevant product market. Record evidence supports the conclusion that non-full-line distributors should be excluded from the relevant product market. (CCFF ¶¶ 1492-1508; 1537-1543). Benco's CEO Cohen repeatedly acknowledged in ordinary course documents that full-service distribution is distinct from mail-order: "Dentists value the sales rep. They value the service tech, as evidenced by the fact that GPOs can work with Darby [the largest mail-order/internet distributor] all day long, and they choose not to because dentists want the service that a Benco or full-service dealer would provide." (CCFF ¶ 1471). Also, record empirical evidence, including the hypothetical monopolist test, also supports the conclusion that full-

service dental distribution to independent dentists is the relevant product market. (CCFF ¶¶ 1553-1566). Additionally, the Proposed Finding is misleading and unsupported by the testimony of Benco's expert, Dr. Johnson. Unlike Dr. Marshall, Dr. Johnson did not actually define a relevant product market in this case, nor did he perform the Hypothetical Monopolist Test independently. (CCFF ¶¶ 1960-1963). Dr. Johnson did not study the extent to which non-full-service distributors and full-service distributors sell the same products to dentists. (CCFF ¶ 1966, *see also* CCFF ¶¶ 1965, 1968). While Dr. Johnson put forward a pricing analysis cribbed from *another* antitrust case in which Benco hired him to testify, the analysis is irrelevant because it did not isolate the price constraints attributable to any particular source of alleged competition, and thus, has no bearing on the relevant product market. (CCFF ¶¶ 1969, 1971, 1973, 1976-1979).

713. Schein and Patterson regard Darby and other non-full-service distributors to be significant competitors. (RX2833 at 47, ¶¶ 112-113).

### **Response to Proposed Finding No. 713**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. RX2833 is Dr. Wu's (Patterson's) Expert Report in this matter. The Proposed Finding is vague, misleading, and contrary to the weight of evidence insofar as it suggests that Darby and Safco, non full-service distributors should be included in the relevant product market. Record evidence supports the conclusion that non-full-line distributors should be excluded from the relevant product market. (CCFF ¶¶ 1492-1508; 1537-1543). Benco's CEO Cohen repeatedly acknowledged in ordinary course documents that full-service distribution is distinct from mail-order: "Dentists value the sales rep. They value the service tech, as evidenced by the fact that GPOs can work with Darby [the largest mail-order/internet distributor] all day long, and they choose not to because dentists want the service

that a Benco or full-service dealer would provide.” (CCFF ¶ 1471). Also, record empirical evidence, including the hypothetical monopolist test, also supports the conclusion that full-service dental distribution to independent dentists is the relevant product market. (CCFF ¶¶ 1553-1566).

714. Patterson price change class forms list Darby and Safco as both offensive and defensive reasons to grant discounts. (RX2833 at 47, ¶ 112).

**Response to Proposed Finding No. 714**

Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. RX2833 is Dr. Wu’s (Patterson’s) Expert Report in this matter. The Proposed Finding is vague, misleading, and contrary to the weight of evidence insofar as it suggests that Darby and Safco, non full-service distributors should be included in the relevant product market. Record evidence supports the conclusion that non-full-line distributors should be excluded from the relevant product market. (CCFF ¶¶ 1492-1508; 1537-1543). Benco’s CEO Cohen repeatedly acknowledged in ordinary course documents that full-service distribution is distinct from mail-order: “Dentists value the sales rep. They value the service tech, as evidenced by the fact that GPOs can work with Darby [the largest mail-order/internet distributor] all day long, and they choose not to because dentists want the service that a Benco or full-service dealer would provide.” (CCFF ¶ 1471). Also, record empirical evidence, including the hypothetical monopolist test, also supports the conclusion that full-service dental distribution to independent dentists is the relevant product market. (CCFF ¶¶ 1553-1566).

715. The data show that online distributors are effective in taking sales away from full-service distributors. (RX2833 at 48, ¶ 115).

**Response to Proposed Finding No. 715**



The Proposed Finding is misleading, incomplete, and vague in that it relies on the term “effective.” The analysis cited in this finding actually showed [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]).

716. Darby’s share of sales to 137 Smile Source dentists increased from 2.5% in 2013 to 8.9% in 2015. (RX2833 at 48, ¶ 115).

#### **Response to Proposed Finding No. 716**

The Proposed Finding is incomplete. In the context of this hypothetical monopolist test analysis,

[REDACTED]

[REDACTED]).

717. There is substantial diversion of sales from the full-service distributors to Darby, indicating that online distributors could be a competitive constraint on the full-service distributors. (RX2833 at 48, ¶ 117).

#### **Response to Proposed Finding No. 717**

The Proposed Finding is misleading, incorrect, and relies on the vague terms “substantial” and “could be.” The analysis cited in this finding incorrectly applies the concept of “diversion,” and uses an improper sample of dentists that exaggerates switching to Darby and that cannot be used to apply the hypothetical monopolist test in a valid way. (CX7101 at 21 (¶¶48-51) (Marshall Rebuttal Expert Report)).

718. Non-full-service distributors should be included in the relevant product market. (J. Johnson, Tr. 4805-4807; RX2833 at 46-47, ¶ 111).

#### **Response to Proposed Finding No. 718**

The Proposed Finding is misleading, vague, incomplete, and unsupported by the testimony of Benco’s expert, Dr. Johnson. Unlike Dr. Marshall, Dr. Johnson did not actually define a relevant product market in this case, nor did he perform the Hypothetical Monopolist Test independently.

(CCFF ¶¶ 1960-1963). Dr. Johnson did not study the extent to which non-full-service distributors and full-service distributors sell the same products to dentists. (CCFF ¶ 1966, *see also* CCFF ¶¶ 1965, 1968). While Dr. Johnson put forward a pricing analysis cribbed from *another* antitrust case in which Benco hired him to testify, the analysis is irrelevant because it did not isolate the price constraints attributable to any particular source of alleged competition, and thus, has no bearing on the relevant product market. (CCFF ¶¶ 1969, 1971, 1973, 1976-1979). Additionally, the Proposed Finding is misleading and incorrect. Dr. Wu never offered the opinion that “non-full-service distributors” should be included in the relevant product market. The cited portion of his report states only Dr. Wu’s view that it would be “reasonable” to include “online distributors” in the relevant product market. (RX2833 at 46-47 (¶111) (Wu Expert Report)). And Dr. Wu’s view on this narrower issue is wrong because it relies on his incorrect analysis of Dr. Marshall’s hypothetical monopolist test. (CX7101 at 20 (¶¶44-46) (Marshall Rebuttal Expert Report)). Additionally, the Proposed Finding is contrary to the weight of the evidence that non full-service distributors are not in the relevant product market. *See* CCFF ¶¶ 1492-1508, 1537-1543. The Proposed Finding is vague, misleading, and contrary to the weight of evidence insofar as it suggests that non full-service distributors should be included in the relevant product market. Record evidence supports the conclusion that non-full-line distributors should be excluded from the relevant product market. (CCFF ¶¶ 1492-1508, 1537-1543, 1553-1566).

719. Dr. Marshall erred in excluding non-full-service distributors from the relevant market. (J. Johnson, Tr. 4805-4807).

#### **Response to Proposed Finding No. 719**

The Proposed Finding is misleading, vague, incomplete, and unsupported by the testimony of Benco’s expert, Dr. Johnson. Unlike Dr. Marshall, Dr. Johnson did not actually define a relevant

product market in this case, nor did he perform the Hypothetical Monopolist Test independently. (CCFF ¶¶ 1960-1963). Dr. Johnson did not study the extent to which non-full-service distributors and full-service distributors sell the same products to dentists. (CCFF ¶ 1966, *see also* CCFF ¶¶ 1965, 1968). While Dr. Johnson put forward a pricing analysis cribbed from *another* antitrust case in which Benco hired him to testify, the analysis is irrelevant because it did not isolate the price constraints attributable to any particular source of alleged competition, and thus, has no bearing on the relevant product market. (CCFF ¶¶ 1969, 1971, 1973, 1976-1979). Additionally, the Proposed Finding is contrary to the weight of the evidence that non full-service distributors are not in the relevant product market. *See* CCFF ¶¶ 1492-1508, 1537-1543. The Proposed Finding is vague, misleading, and contrary to the weight of evidence insofar as it suggests that non full-service distributors should be included in the relevant product market. Record evidence supports the conclusion that non-full-line distributors should be excluded from the relevant product market. (CCFF ¶¶ 1492-1508, 1537-1543, 1553-1566).

720. [REDACTED]

#### **Response to Proposed Finding No. 720**

The Proposed Finding is unsupported by the citation, which appears to be just a heading in CX2834, Dr. Johnson's (Benco's) Expert Report. The Proposed Finding is vague, misleading, and contrary to the weight of evidence insofar as it suggests that non full-service distributors should be included in the relevant product market. Record evidence supports the conclusion that non-full-line distributors should be excluded from the relevant product market. (CCFF ¶¶ 1492-1508, 1537-1543, 1553-1566). The Proposed Finding is misleading, vague, incomplete, and unsupported by the testimony of Benco's expert, Dr. Johnson. Unlike Dr. Marshall, Dr. Johnson did not actually define a relevant product market in this case, nor did he perform the

Hypothetical Monopolist Test independently. (CCFF ¶¶ 1960-1963). Dr. Johnson did not study the extent to which non-full-service distributors and full-service distributors sell the same products to dentists. (CCFF ¶ 1966, *see also* CCFF ¶¶ 1965, 1968). While Dr. Johnson put forward a pricing analysis cribbed from *another* antitrust case in which Benco hired him to testify, the analysis is irrelevant because it did not isolate the price constraints attributable to any particular source of alleged competition, and thus, has no bearing on the relevant product market. (CCFF ¶¶ 1969, 1971, 1973, 1976-1979).

721. Dr. Marshall's failure properly to distinguish between distribution of dental consumables and distribution of dental equipment rendered unreliable his subsequent opinions. (J. Johnson, Tr. 4811-4812).

#### **Response to Proposed Finding No. 721**

Complaint Counsel notes that Proposed Finding 721 is identical to Proposed Finding 695. The Proposed Finding is misleading, vague, incomplete, and inaccurate. Grouping dental products and services in the same relevant product market is appropriate in this case where competitive conditions of supply (i.e. the suppliers) for the products and equipment are similar. (CX7101 at 024 (¶56, n. 87) (Marshall Rebuttal Expert Report)). Additionally, Patterson's economic expert, Dr. Wu, agreed with Dr. Marshall on this, and Dr. Wu found it reasonable to "start with the cluster of products that is included in the FTC's definition of relevant product market." (RX2833 at 044 (¶103) (Wu Expert Report)).

#### **4. Dr. Marshall's Purported SSNIP Tests Contain Multiple Flaws and Fail To Support His Conclusions**

722. Dr. Marshall claims to have based his opinion on "[e]mpirical evidence." (CX7100 at 76). The "empirical evidence" on which Dr. Marshall purports to rely consists of two SSNIP tests, one based on purchases of Smile Source members from Darby, and one based on Benco's entry into Southern California. (CX7100 at 85 ¶ 214; CX7100 at 78 ¶ 196; Tr. 3333).

#### **Response to Proposed Finding No. 722**

The Proposed Finding is misleading, incomplete, and vague in that Respondent does not specify to which of Dr. Marshall's opinions it is referring. To the extent the Proposed Finding is referring to Dr. Marshall's opinion that mail-order/telesales/Internet purchasing was not in the relevant product market, the Proposed Finding is misleading, inaccurate, and incomplete. First, Dr. Marshall based his opinion that mail-order/telesales/Internet purchasing was not in the relevant product market on both qualitative and empirical evidence. (CCFF ¶ 1556). Qualitative record evidence establishes that no reasonable substitute exists for products and services offered by full-service distributors to independent dentists. (CCFF ¶¶ 1525-1552). Second, in addition to the two SSNIP tests, Dr. Marshall presented empirical evidence of what percentage of their supplies independent dentists purchased from Darby, a non-full service distributor, to support his opinion that mail-order/telesales/Internet purchasing was not in the relevant product market. (CCFF ¶ 1566).

a. Errors With Dr. Marshall's SSNIP Tests In General

723. Dr. Marshall made multiple errors in conducting each of his SSNIP tests, and neither constitutes a reliable basis to draw any conclusions regarding the relevant product market. (J. Johnson, Tr. 4808-4810).

**Response to Proposed Finding No. 723**

The Proposed Finding is misleading, incomplete, and vague in that it does not identify with specificity the errors that Dr. Marshall allegedly made. Thus the finding is not verifiable and should be disregarded. The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that there is not sufficient record evidence to establish that the full line of dental products and services sold through full-service distributors to independent dentists is a relevant product market. The record in this matter contains both qualitative and empirical evidence that the full line of dental products and services sold through full-service distributors to independent dentists is a relevant product market. (CCFF ¶¶ 1446-1566). The Proposed Finding is

misleading insofar as it suggests that the SSNIP test is not a reliable method for determining the relevant product market. Dr. Johnson noted that to define a relevant product market he too would follow the DOJ FTC Merger Guidelines, which set out the SSNIP test for defining relevant product markets. (RX2965 (J. Johnson, Dep. at 30-31)).

724. A SSNIP test assumes a hypothetical monopolist in a candidate market, and then assumes that the hypothetical monopolist imposes a 5-10% price increase on products in the candidate market. (Marshall, Tr. 3338-3339; *see also* RXD0102).

**Response to Proposed Finding No. 724**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to a demonstrative exhibit (RXD0102) for a proposition of fact. Otherwise, Complaint Counsel has no specific response.

725. Diversion refers to customers' substitution away from products that are subject to the price increase to other products. (Marshall, Tr. 3340; *see also* RXD0102).

**Response to Proposed Finding No. 725**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to a demonstrative exhibit (RXD0102) for a proposition of fact. Otherwise, Complaint Counsel has no specific response.

726. Critical loss is the break-even point in terms of whether a price increase is or is not profitable, or "the amount of business the hypothetical monopolist would lose from a price increase such that they're exactly indifferent between implementing the price increase and not implementing the price increase." (Marshall, Tr. 3342).

**Response to Proposed Finding No. 726**

Complaint Counsel has no specific response.

727. Assuming a margin of approximately 30% and a 5% price increase on all products in the candidate market, Dr. Marshall calculated a critical loss of approximately 14%. (Marshall, Tr. 3344-3345). According to Dr. Marshall's calculation, diversion of 14% or more of sales from full-service distributors to *all* other suppliers – direct-selling manufacturers, non-full-service distributors, and others – in response to a 5% price increase would defeat Dr. Marshall's proposed relevant product market. (RX1139 at 8-9, § 4.1.3).

**Response to Proposed Finding No. 727**

The Proposed Finding is misleading, incomplete and inaccurate. In his Expert Report, Dr. Marshall wrote that:

“With a margin of 30% and a SSNIP of 5%, the full line of dental products and services sold through full-service distributors to independent dentists would be a relevant market as long as the aggregate diversion ratio  $A$  is greater than 14%. Recall that the value of  $(1-A)$  is that fraction of sales lost by products in the candidate market, sales that go to products outside the candidate market. So a SSNIP of 5% would have to divert 86% or more of the business to products *outside* the FTC’s alleged market for it *not* to be a relevant product market.” (CX7100 at 090 (¶225) (Marshall Expert Report)).

Thus 14%, or the critical loss ratio, is the fraction of sales lost by one product in the candidate market that are *recaptured* by another product (or stay in) the candidate market. (CX7100 at 089-090 (¶¶222, 225) (Marshall Expert Report)). And 1 minus 14% (or 86%) is the fraction of sales lost by products in the candidate market, namely sales that go to products *outside* the candidate market. (CX7100 at 089-090 (¶¶222, 225) (Marshall Expert Report)). So properly stated, the second sentence of the Proposed Finding should read: “According to Dr. Marshall’s calculation, diversion of 86% or more of sales from full-service distributors to *all* other suppliers – direct-selling manufacturers, non-full-service distributors, and others – in response to a 5% price increase would defeat Dr. Marshall’s proposed relevant product market.” (CX7100 at 089-090 (¶¶222, 225) (Marshall Expert Report) (emphasis added to highlight correction)).

728. Dr. Marshall never tested diversion to all other suppliers in response to a SSNIP; in his SSNIP tests, Dr. Marshall looked only at diversion to a single alternate supplier – Darby. (CX7100 at 78, ¶ 198; CX7100 at 86, ¶ 215; Marshall, Tr. 3356-3357).

### **Response to Proposed Finding No. 728**

The Proposed Finding is misleading and incomplete insofar as it suggests that Dr. Marshall did not rely on evidence other than the SSNIP tests to opine that the relevant market was the full line of dental products and services sold through full-service distributors to independent dentists. Dr.

Marshall also relied on testimony and documents in the record in forming his opinion on the relevant product market. (CX7100 at 073-076 (¶181-191) (Marshall Expert Report)).

729. Dr. Marshall's SSNIP tests ignored competition from all other non-full-service distributors (J. Johnson, Tr. 4808-4810).

**Response to Proposed Finding No. 729**

The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that in his Expert Report, Dr. Marshall did not consider whether other non-full service distributors were in the relevant product market. Dr. Marshall did rely on documents and testimonial evidence in forming his opinion that sales from non-full-service distributors were not in the relevant product market. (CX7100 at 074-076 (¶185-191) (Marshall Expert Report)).

b. Errors With Dr. Marshall's "Smile Source" SSNIP Test

730. Dr. Marshall conducted one purported SSNIP test with respect to Darby becoming a supplier to Smile Source in 2014. (CX7100 at 85, ¶ 214).

**Response to Proposed Finding No. 730**

Complaint Counsel has no specific response.

731. Dr. Marshall's purported SSNIP test with respect to Smile Source considered purchases of a total of only 137 dentists. (CX7100 at 86, ¶ 216).

**Response to Proposed Finding No. 731**

Complaint Counsel has no specific response.

732. Dr. Marshall's purported SSNIP test with respect to Smile Source relied on an artificially small and unreliable data sample. (██████████, ¶ 30; J. Johnson, Tr. 4808-4810; *see also* RXD0105 at 13).

**Response to Proposed Finding No. 732**

The Proposed Finding is misleading, incomplete, and vague in that it relies on the vague terms "artificially small" and "unreliable." The Proposed Finding is misleading and inaccurate insofar as it suggests that Dr. Marshall did not follow standard, accepted principles in defining the relevant product market. Dr. Marshall applied the hypothetical monopolist test to "investigate



whether independent dentists would substitute enough to buying from non-full-service distributors and directly from manufacturers to render a SSNIP unprofitable.” (CX7100 at 072-073 (¶178-179) (Marshall Expert Report)). This Proposed Finding is also misleading, incomplete, and vague to the extent that it suggests that Dr. Marshall did have sufficient evidence to support his definition of the relevant product market. Dr. Marshall concluded based on qualitative and economic evidence that the appropriate relevant market in this matter is the full line of dental products and services sold through full-service distributors to independent dentists. (CX7100 at 010, 072-073 (¶¶10, 176-179) (Marshall Expert Report); *see also* CCFF ¶¶ 1446-1566). Also, Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to a demonstrative exhibit (RXD0105) for a proposition of fact.

733. Dr. Marshall’s SSNIP test was strongly influenced by his decision to examine only 137 Smile Source dentists. (RX2833 at 50, ¶ 121).

#### **Response to Proposed Finding No. 733**

The Proposed Finding is misleading, incomplete, and vague in that it relies on the vague terminology “strongly influenced.” This Proposed Finding is also misleading, incomplete, and vague to the extent that it suggests that Dr. Marshall did have sufficient evidence to support his definition of the relevant product market. Dr. Marshall concluded based on qualitative and economic evidence that the appropriate relevant market in this matter is the full line of dental products and services sold through full-service distributors to independent dentists. (CX7100 at 010, 072-073 (¶¶10, 176-179) (Marshall Expert Report); *see also* CCFF ¶¶ 1446-1566).

734. Dr. Marshall looked only at diversion to a single alternate supplier – Darby. Dr. Marshall never tested diversion to all other suppliers in response to a SSNIP. (CX7100 at 86, ¶ 215; Marshall, Tr. 3356-3357 (“Q. . . . So then you also did consider diversion to the other suppliers that are marked in blue here; correct? A. Yes. To Darby. Q. . . . You considered diversion only to Darby; is that correct? A. The test that I conducted – the empirical test I conducted was only to Darby, that’s correct.”)).

#### **Response to Proposed Finding No. 734**

The Proposed Finding is misleading, inaccurate, and incomplete insofar as it suggests that Dr. Marshall did not consider evidence from other suppliers, including other non-full service distributors and direct sale manufacturers when forming his opinion about the relevant product market in this matter. Dr. Marshall concluded based on qualitative and economic evidence that the appropriate relevant market in this matter is the full line of dental products and services sold through full-service distributors to independent dentists. (CX7100 at 010, 072-073 (¶¶10, 176-179) (Marshall Expert Report); *see also* CCFF ¶¶ 1446-1566).

735. [REDACTED]

**Response to Proposed Finding No. 735**

The Proposed Finding is misleading, inaccurate, and incomplete insofar as it suggests that Dr. Marshall did not consider evidence from other suppliers, including other non-full service distributors and direct sale manufacturers when forming his opinion about the relevant product market in this matter. Dr. Marshall concluded based on qualitative and economic evidence that the appropriate relevant market in this matter is the full line of dental products and services sold through full-service distributors to independent dentists. (CX7100 at 010, 072-073 (¶¶10, 176-179) (Marshall Expert Report); *see also* CCFF ¶¶ 1446-1566).

736. Dr. Marshall cut off his SSNIP test in 2015, thereby failing to consider the substantial continuing growth of Darby's share of supply to Smile Source members. (CX7100 at 87, ¶ 218).

**Response to Proposed Finding No. 736**

The Proposed Finding is misleading, incomplete, and vague in that it relies on the vague terminology "substantial continuing growth." The Proposed Finding is misleading, inaccurate, and incomplete insofar as it suggests that Dr. Marshall did not have sufficient evidence for his opinion and definition of the relevant product market definition in this matter. Dr. Marshall

concluded based on qualitative and economic evidence that the appropriate relevant market in this matter is the full line of dental products and services sold through full-service distributors to independent dentists. (CX7100 at 010, 072-073 (¶¶10, 176-179) (Marshall Expert Report); *see also* CCFF ¶¶ 1446-1566).

737. The results of Dr. Marshall's purported SSNIP tests are contradicted by Dr. Marshall's own data showing that Darby's share of sales to active Smile Source members grew from 2% in 2013 and 9% in 2014, to 19% in 2015 and 24% in 2016. ( [REDACTED] ; J. Johnson, Tr. 4808-4810).

#### **Response to Proposed Finding No. 737**

The Proposed Finding is misleading and contrary to the weight of the evidence insofar as [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; CCFF ¶ 1824).

Additionally, the weight of the evidence in this matter establishes that non full-service distributors are not in the relevant product market. *See* CCFF ¶¶ 1492-1508, 1537-1543.

738. Applying the SSNIP test to all Smile Source members, from 2013 to 2016 full-service distributors experienced a loss of sales share of 22.1 percent. (RX2833 at 50, ¶ 121).

#### **Response to Proposed Finding No. 738**

The Proposed Finding is misleading and incomplete. Among other problems, Dr. Wu's analysis (in RX2833) exaggerates switching to Darby and incorrectly includes all active Smile Source members in the data when calculating the actual loss. (CX7101 at 021 (¶¶48-51) (Marshall Rebuttal Expert Report)).

739. Dr. Marshall calculated the critical loss as 17%. (CX7100 at 88, ¶ 219).

#### **Response to Proposed Finding No. 739**

The Proposed Finding is misleading, vague, and incomplete insofar as it does not identify for which analysis Dr. Marshall calculated [REDACTED]

[REDACTED]; CCFF ¶ 1564).

740. Applying the SSNIP test to all Smile Source members from 2013 to 2016 results in an actual loss greater than Dr. Marshall's critical loss, which suggests that Darby is likely to be in the relevant product market. (RX2833 at 50, ¶ 121).

#### **Response to Proposed Finding No. 740**

The Proposed Finding is misleading and incomplete. Among other problems, Dr. Wu's analysis (in RX2833) exaggerates switching to Darby and incorrectly includes all active Smile Source members in the data when calculating the actual loss, leading to an incorrect and unreliable SSNIP test result. (CX7101 at 021 (¶¶48-51) (Marshall Rebuttal Expert Report)).

#### **c. Errors With Dr. Marshall's "Southern California" SSNIP Test**

741. Dr. Marshall applied a different test with respect to Benco's entry into Southern California. (Marshall, Tr. 3346). That test contained additional errors. (J. Johnson, Tr. 4808-4812).

#### **Response to Proposed Finding No. 741**

The Proposed Finding is misleading, incomplete, and vague in that it relies on the term "different test" and does not identify with specificity what were the alleged "additional errors." Thus the Proposed Finding should be disregarded.

742. Dr. Marshall excluded Los Angeles and Orange counties from his test with respect to Benco's entry into Southern California. (Marshall, Tr. 3346; J. Johnson, Tr. 4808-4810; RX2833 at 51-52, ¶ 127.) Dr. Marshall did not know the relative size of the areas of Southern California that he excluded from his study. (Marshall, Tr. 3347-3348).

#### **Response to Proposed Finding No. 742**

The Proposed Finding is misleading and incomplete to the extent that it does not identify why Dr. Marshall excluded Los Angeles and Orange counties from his test with respect to Benco's entry into Southern California. Dr. Marshall did not analyze Benco's sales to customers in Los

Angeles County “to minimize the impact on the switching analysis of Benco’s acquisition of Esparanza Dental,” and he did not analyze Benco’s sales to customers in Orange County “because of the similarity in changes to distributor shares in Kern, Riverside, and San Diego counties.” (CX7100 at 079 (¶198, n. 379) (Marshall Expert Report)).

743. Within Kern, Riverside and San Diego counties, Dr. Marshall considered only a subset of Benco’s customers. (Marshall, Tr. 3348.)

**Response to Proposed Finding No. 743**

The Proposed Finding is misleading and vague in that it does not identify in which analysis Dr. Marshall considered only a subset of Benco customers. To the extent that the Proposed Finding is referring to Dr. Marshall’s hypothetical monopolist test of Benco’s entry into Southern California, the Proposed Finding is misleading, incomplete, and vague. Dr. Marshall’s analysis of [REDACTED]

[REDACTED]  
[REDACTED]).

744. [REDACTED]  
[REDACTED].

**Response to Proposed Finding No. 744**

The Proposed Finding is misleading and vague, in that “thousands of dentists” is vague and not specific. Additionally, the Proposed Finding is not supported as there is no evidence in the cited testimony to support the claim that there are “thousands of dentists in Southern California.”

745. Dr. Marshall improperly assumed that purchases by a limited number of dentists in selected counties in Southern California could be extended generally. (J. Johnson, Tr. 4808-4810; [REDACTED]).

**Response to Proposed Finding No. 745**

The Proposed Finding is misleading and unsupported by the cited testimony. The cited testimony provides no evidence that Dr. Marshall's assumption altered the results of his analysis, so the Proposed Finding should be disregarded.

746. Dr. Wu found that Dr. Marshall's results were "strongly influenced" by his decision to eliminate much of the distributor sales from Southern California. (RX2833 at 53, ¶ 131).

**Response to Proposed Finding No. 746**

The Proposed Finding is misleading and incorrect. Dr. Wu's finding (in RX2833) was wrong. In fact, Dr. Marshall showed that his hypothetical monopolist test result is the same using Dr. Wu's own preferred set of distributor sales data from Southern California. (CX7101 at 20 (¶47) (Marshall Expert Report)). Thus, Dr. Marshall's result was not "strongly influenced" by the choice of sales data, because Dr. Wu's own choice of sales data leads to the same conclusion. (CX7101 at 20 (¶47) (Marshall Expert Report)).

747. Rather than considering a price increase by a hypothetical monopolist, Dr. Marshall examined entry by Benco into Southern California. (Marshall, Tr. 3346).

**Response to Proposed Finding No. 747**

The Proposed Finding is misleading, incomplete, and vague in that it does not identify to which of Dr. Marshall's analyses it pertains. To the extent that it pertains to Dr. Marshall's hypothetical monopolist test based on Benco's entry into Southern California, the Proposed Finding is incomplete and inaccurate. The cited testimony does not support the Proposed Finding and instead contradicts it. Dr. Marshall's hypothetical monopolist test based on Benco's entry into Southern California "replicate[s] an increase in price" in a product line. (Marshall, Tr. 3346; *see also* CCFF ¶ 1564).

748. Benco was not a hypothetical monopolist; indeed, it had only a tiny share of distribution of dental products in Southern California. (CX7101 at 142, Figure 16 (during the relevant time period, Benco had a 5% share of full-service distributor sales in California)).

**Response to Proposed Finding No. 748**

The Proposed Finding is misleading insofar as it suggests that the SSNIP test is not a reliable method for determining the relevant product market. Dr. Johnson noted that to define a relevant product market he too would follow the DOJ FTC Merger Guidelines, which set out the SSNIP test for defining relevant product markets. (RX2965 (J. Johnson, Dep. at 30-31)).

749. Benco did not increase prices in Southern California; rather, it lowered its prices over time. (Marshall, Tr. 3346.)

#### **Response to Proposed Finding No. 749**

The Proposed Finding is misleading and incomplete in that it mischaracterizes one of the hypothetical monopolist (SSNIP) tests that Dr. Marshall performed. To define the relevant product market in this matter, Dr. Marshall considered a natural experiment – Benco’s entry into southern California – and applied the Hypothetical Monopolist Test to study customer switching patterns in response to price increases. (CCFF ¶ 1564). To simulate a price increase, Dr. Marshall looked at Benco’s entry in reverse. (CX7100 at 078 (¶197) (Marshall Expert Report)). Additionally, the Proposed Finding is misleading insofar as it suggests that the SSNIP test is not a reliable method for determining the relevant product market. Dr. Johnson noted that to define a relevant product market he too would follow the DOJ FTC Merger Guidelines, which set out the SSNIP test for defining relevant product markets. (RX2965 (J. Johnson, Dep. at 30-31)).

750. Dr. Marshall hypothesized Benco’s entry in reverse to treat Benco’s entry as an exit. (Marshall, Tr. 3346.) Trying to test a hypothetical price increase by a hypothetical monopolist on Benco’s entry doesn’t make economic sense. (J. Johnson, Tr. 4808-4810).

#### **Response to Proposed Finding No. 750**

The Proposed Finding is misleading, incomplete, and vague insofar as it relies on the phrase “economic sense” without further elaboration. The Proposed Finding is irrelevant and argumentative and not appropriate for a factual finding because it does not identify why Dr. Marshall’s analysis does not make economic sense. The Proposed Finding is misleading and

vague in that it does not identify to which of Benco's entries it is referring. To the extent the Proposed Finding is referring to Dr. Marshall's analysis of Benco's entry into Southern California, the Proposed Finding is misleading and incomplete in that it does not fully and accurately describe Dr. Marshall's analysis. To define the relevant product market in this matter, Dr. Marshall considered a natural experiment – Benco's entry into southern California – and applied the Hypothetical Monopolist Test to study customer switching patterns in response to price increases. (CCFF ¶ 1564). To simulate a price increase, Dr. Marshall looked at Benco's entry in reverse. (CX7100 at 078 (¶197) (Marshall Expert Report)). Additionally, the Proposed Finding is misleading insofar as it suggests that the SSNIP test is not a reliable method for determining the relevant product market. Dr. Johnson noted that to define a relevant product market he too would follow the DOJ FTC Merger Guidelines, which set out the SSNIP test for defining relevant product markets. (RX2965 (J. Johnson, Dep. at 30-31)).

751. Dr. Marshall never tested diversion to all other suppliers in response to a SSNIP; in his Southern California SSNIP test, Dr. Marshall looked only at diversion to a single alternate supplier – Darby. (CX7100 at 78, ¶ 198; Marshall, Tr. 3356-3357; RX2833 at 51, ¶ 125).

#### **Response to Proposed Finding No. 751**

The Proposed Finding is misleading, inaccurate, and incomplete insofar as it suggests that Dr. Marshall did not consider evidence from other suppliers, including other non-full service distributors and direct sale manufacturers when forming his opinion about the relevant product market in this matter. Dr. Marshall concluded based on qualitative and economic evidence that the appropriate relevant market in this matter is the full line of dental products and services sold through full-service distributors to independent dentists. (CX7100 at 010, 072-073 (¶¶10, 176-179) (Marshall Expert Report); *see also* CCFF ¶¶ 1446-1566).

752. Dr. Marshall failed to properly distinguish between symmetric and asymmetric SSNIP tests. As a result, he failed to determine whether the factual preconditions were satisfied before applying an asymmetric SSNIP test, and then improperly applied a symmetric formula for



critical loss to the results of his asymmetric SSNIP test, yielding a nonsensical result. (J. Johnson, Tr. 4804-4812).

### **Response to Proposed Finding No. 752**

The Proposed Finding is not supported by the cited testimony. Dr. Johnson, Benco's expert, did not testify at trial about symmetric versus asymmetric SSNIP tests and Dr. Marshall's alleged improper use of them. Additionally, the topic of symmetric versus asymmetric SSNIP tests does not appear in Dr. Johnson's Expert Report in this matter (RX2834). Thus the Proposed Finding should be disregarded as it is outside the scope of Benco's Expert's Report.

753. For the structure of his analysis, Dr. Marshall relied upon an article published by Joseph Farrell and Carl Shapiro, "Improving Critical Loss Analysis," *The Antitrust Source* 1 (February 2008). (Marshall, Tr. 3362; CX7100 at 89, fn. 390).

### **Response to Proposed Finding No. 753**

The Proposed Finding is misleading, incomplete, and vague in that it does not identify to which of Dr. Marshall's analyses it is referring. To the extent the Proposed Finding is referring to Dr. Marshall's critical loss analyses, the Proposed Finding is misleading and incomplete in that in addition to the Farrell and Shapiro article, Dr. Marshall relied on other articles. (CX7100 at 088-089 (¶¶220-222, nn. 387-390) (Marshall Expert Report)).

754. The source that Dr. Marshall relied upon for the methodology of his Southern California SSNIP test referred to a SSNIP imposed on all the products in a candidate market as a "symmetric" test. (Marshall, Tr. 3365-3366; J. Farrell & C. Shapiro, "Improving Critical Loss Analysis," *The Antitrust Source* 1 (February 2008) at p. 5; *id.* fn. 17; *see also* RXD0104 at p. 5.)

### **Response to Proposed Finding No. 754**

The Proposed Finding is misleading, incomplete, and vague in that it relies on the terms "source" and "relied upon for the methodology. In the trial testimony cited as support for this proposed finding, Dr. Marshall was shown text from the article that said: "This is the test for whether a uniform SSNIP, imposed on all the (symmetric) products in the candidate market, is more profitable than the status quo price" and Marshall agreed that the article stated that. Dr.

Marshall did not agree that this was the SSNIP test he had applied with respect to Benco's entry into Southern California. Rather Dr. Marshall testified that he used the "recapture rate." (Marshall, Tr. 3366). Also, when asked if he used an asymmetric SSNIP, Dr. Marshall testified: "No. I don't think it's an asymmetric SSNIP. I'm using – because the asymmetry here refers to the products in the candidate market, I'm not making – I don't see any reason to assume the products in the candidate are asymmetric." (Marshall, Tr. 3366). Additionally, Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to an article that is not in evidence (Farrell and Shapiro) and to a demonstrative exhibit (RXD0104) for a proposition of fact.

755. Dr. Marshall replicated a price increase by Benco only. (Marshall, Tr. 3354.) Dr. Marshall's test was not the equivalent of a SSNIP imposed by a hypothetical monopolist on all products in a candidate market. (Marshall, Tr. 3354; *see also* RXD0103.)

#### **Response to Proposed Finding No. 755**

The Proposed Finding is misleading and incomplete in that it does not identify in which test Dr. Marshall allegedly "replicated a price increase by Benco only." To the extent the Proposed Finding is referring to Dr. Marshall's hypothetical monopolist test based on Benco's entry into Southern California, the Proposed Finding is misleading, incomplete, and vague in that it relies on the term "equivalent." Dr. Marshall was not asked in the testimony cited as support for this Proposed Finding if his test was or was not "the equivalent of a SSNIP imposed by a hypothetical monopolist *on all products in a candidate market*." (Marshall, Tr. 3354 (emphasis added)). Instead, Dr. Marshall was asked if he considered his test "to be the equivalent of a SSNIP imposed *on the Benco line*." (Marshall, Tr. 3354 (emphasis added)). Thus, the cited testimony does not support the Proposed Finding. Additionally, Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing, at least in part, to a demonstrative exhibit (RXD0103) for a proposition of fact.

756. The “symmetric” SSNIP test described in the first sentence of footnote 17 of Farrell & Shapiro does not apply to the SSNIP that Dr. Marshall hypothesized with respect to Benco’s entry into Southern California. (Marshall, Tr. 3369; *see also* RXD0103.)

**Response to Proposed Finding No. 756**

The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that Dr. Marshall used an asymmetric SSNIP test with respect to Benco’s entry into Southern California. Dr. Marshall testified that he used the “recapture rate.” (Marshall, Tr. 3366). Also, when asked if he used an asymmetric SSNIP, Dr. Marshall testified: “No. I don't think it's an asymmetric SSNIP. I'm using -- because the asymmetry here refers to the products in the candidate market, I'm not making -- I don't see any reason to assume the products in the candidate are asymmetric.” (Marshall, Tr. 3366). Additionally, Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing, at least in part, to a demonstrative exhibit (RXD0103) for a proposition of fact.

757. The source that Dr. Marshall relied upon for the methodology of his Southern California SSNIP test referred to a SSNIP imposed by a hypothetical monopolist on just one product line in a candidate market as an “asymmetric” test. (Marshall, Tr. 3366-3367; J. Farrell & C. Shapiro, “Improving Critical Loss Analysis,” *The Antitrust Source* 1 (February 2008) at p. 5 fn. 17; *see also* RXD0104 at p. 5.)

**Response to Proposed Finding No. 757**

The Proposed Finding is not supported by the cited testimony of Dr. Marshall. At trial, Dr. Marshall was shown text from the Farrell and Shapiro article that stated: “A different condition diagnoses whether the hypothetical monopolist would find a SSNIP imposed on just one product more profitable than the status quo.” (Marshall, Tr. 3366). Also, Dr. Marshall was shown text that stated: “the asymmetric test follows the Merger Guidelines in asymmetric situations where an asymmetric SSNIP is more apt to be profitable than is a symmetric one.” (Marshall, Tr. 3367). These two passages of text that Dr. Marshall was shown do not support the Proposed Finding that a SSNIP imposed by a hypothetical monopolist on just one product line in a

candidate market is an “asymmetric” test. Additionally, Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to an article that is not in evidence (Farrell and Shapiro) and to a demonstrative exhibit (RXD0104) for a proposition of fact.

758. Dr. Marshall replicated a price increase by Benco only. (Marshall, Tr. 3354.) Dr. Marshall’s test was the equivalent of a SSNIP imposed by a hypothetical monopolist on only one product line out of multiple product lines in a candidate market. (Marshall, Tr. 3354; Marshall, Tr. 3366; *see also* Tr. 3354:18-25; RXD0103.)

**Response to Proposed Finding No. 758**

The Proposed Finding is misleading and incomplete in that it does not identify in which test Dr. Marshall allegedly “replicated a price increase by Benco only.” To the extent the Proposed Finding is referring to Dr. Marshall’s hypothetical monopolist test based on Benco’s entry into Southern California, the Proposed Finding is misleading, incomplete, and vague in that it relies on the term “equivalent.” Additionally, Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing, at least in part, to a demonstrative exhibit (RXD0103) for a proposition of fact.

759. Although Dr. Marshall applied an asymmetric SSNIP test as described by Farrell & Shapiro, he did not understand the test and mistakenly believed he had applied a symmetric SSNIP test. (Marshall, Tr. 3367-3368; *see also* RXD0103.)

**Response to Proposed Finding No. 759**

The Proposed Finding is misleading and vague in that it does not identify to which of Dr. Marshall’s two SSNIP tests it is referring – the Schein-Darby case or the Benco’s entry into Southern California case. To the extent the Proposed Finding is referring to the Benco’s entry into Southern California case, the Proposed Finding is misleading, incomplete, inaccurate, and not supported by the cited testimony. Dr. Marshall did not testify that he did not understand the test or that he applied an asymmetric test. Dr. Marshall testified about the Benco’s entry into Southern California test that:

“It's a symmetric SSNIP test applied across the product lines of a hypothetical monopolist. Again, the four -- we have Schein, Patterson, Burkhart and Benco constitute in this context the product lines of the hypothetical monopolist. The reverse entry story says that we have this increase in price by Benco. Where does that go? When consumers substitute away from Benco, do they substitute to Schein, Patterson and Burkhart, or instead do they substitute to Darby in such magnitude that this SSNIP is defeated, it is not profitable?” (Marshall, Tr. 3368-3369).

Additionally, Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing, at least in part, to a demonstrative exhibit (RXD0103) for a proposition of fact.

760. Dr. Marshall recognized that the “symmetric” SSNIP test described in the first sentence of footnote 17 of *Farrell & Shapiro* does not apply to the SSNIP that Dr. Marshall hypothesized with respect to Benco's entry into Southern California. (Marshall, Tr. 3369; *see also* RXD0103.) Nevertheless, Dr. Marshall did not understand that he had applied an asymmetric SSNIP test. (Marshall, Tr. 3367-3369).

#### **Response to Proposed Finding No. 760**

The Proposed Finding is misleading, incomplete, and not supported by the cited testimony. The cited testimony does not support the proposed finding that the first sentence of footnote 17 refers to a “symmetric” SSNIP test. And Dr. Marshall did not testify that he did not understand the test or that he applied an asymmetric test. Dr. Marshall testified about the Benco's entry into Southern California test that:

“It's a symmetric SSNIP test applied across the product lines of a hypothetical monopolist. Again, the four -- we have Schein, Patterson, Burkhart and Benco constitute in this context the product lines of the hypothetical monopolist. The reverse entry story says that we have this increase in price by Benco. Where does that go? When consumers substitute away from Benco, do they substitute to Schein, Patterson and Burkhart, or instead do they substitute to Darby in such magnitude that this SSNIP is defeated, it is not profitable?” (Marshall, Tr. 3368-3369).

Additionally, Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing, at least in part, to a demonstrative exhibit (RXD0103) for a proposition of fact

761. As stated by the source relied upon by Dr. Marshall for the structure of his analysis, an asymmetric SSNIP test is appropriate if, but only if, “an asymmetric SSNIP is more apt to be profitable than is a symmetric one.” (J. Farrell & C. Shapiro, “Improving Critical Loss Analysis,” *The Antitrust Source* 1 (February 2008) at p. 5 fn. 17).

**Response to Proposed Finding No. 761**

Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to an article that is not in evidence (Farrell and Shapiro). Additionally, the Proposed Finding is misleading, incomplete, and vague in that it relies on the terms “source,” “relied upon” and “structure of his analysis,” which are not identified or defined.

762. Dr. Marshall never tested to determine whether a hypothetical monopolist in Southern California would find a price increase on only Benco’s sales to be more profitable than a price increase on the combined sales of Schein, Patterson, Burkhardt and Benco. (Marshall, Tr. 3367; CX7100 at 88-90, ¶¶ 220-226). Dr. Marshall had no basis for applying the SSNIP test that he did. .” (J. Farrell & C. Shapiro, “Improving Critical Loss Analysis,” *The Antitrust Source* 1 (February 2008) at p. 5 fn. 17).

**Response to Proposed Finding No. 762**

The Proposed Finding is misleading, incomplete, and not supported by the cited testimony. Dr. Marshall was asked at trial if “Q. Now, nowhere in your report did you conduct an analysis to determine whether an asymmetric SSNIP would be more profitable than a symmetric one, did you?” (Marshall, Tr. 3367). That is not the same question as the one described in the first part of this Proposed Finding: “whether a hypothetical monopolist in Southern California would find a price increase on only Benco’s sales to be more profitable than a price increase on the combined sales of Schein, Patterson, Burkhardt and Benco.” Complaint Counsel notes that, contrary to this Court’s order, for the second part of the Proposed Finding, Respondent is improperly citing to an article that is not in evidence (Farrell and Shapiro). Thus the Proposed Finding should be disregarded as there is no support for either part of it.

763. Dr. Marshall applied a formula for critical loss taken from Farrell & Shapiro. (CX7100 at 89, ¶ 222). The formula applies only “in the symmetric case.” (J. Farrell & C. Shapiro, “Improving Critical Loss Analysis,” *The Antitrust Source* 1 (February 2008) at p. 5.) “A

different condition” diagnoses whether a hypothetical monopolist would find a SSNIP imposed on just one product to be profitable. (J. Farrell & C. Shapiro, “Improving Critical Loss Analysis,” *The Antitrust Source* 1 (February 2008) at p. 5 fn. 17.) Dr. Marshall erroneously applied a formula for critical loss intended for symmetric case to the results of an asymmetric SSNIP test. *Id.*

#### **Response to Proposed Finding No. 763**

For the first part of the Proposed Finding – “Dr. Marshall applied a formula for critical loss taken from Farrell & Shapiro” – Complaint Counsel has no specific response. For the next parts of the Proposed Finding – “The formula applies only “in the symmetric case.” and “Dr. Marshall erroneously applied a formula for critical loss intended for symmetric case to the results of an asymmetric SSNIP test.” – Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to an article that is not in evidence (Farrell and Shapiro).

764. Incorrectly analyzing a symmetric case using an asymmetric SSNIP test or vice versa “will likely result in an incorrect conclusion.” (CX7101 at 19, ¶ 40).

#### **Response to Proposed Finding No. 764**

The Proposed Finding is misleading and not supported by the cited evidence. The statement at paragraph 40 of Dr. Marshall’s Rebuttal Expert Report reads: “Incorrectly analyzing Type 1 using a Type 2 structure or vice versa will likely result in an incorrect conclusion.” (CX7101 at 19, ¶ 40 (Marshall Rebuttal Expert Report)). No where in his Rebuttal Expert Report does Dr. Marshall refer to symmetric or asymmetric SSNIP tests.

765. Dr. Marshall’s SSNIP test relating to Benco’s entry into Southern California is internally inconsistent and fatally flawed, and the results of that test are inherently unreliable. (J. Johnson, Tr. 4808-4812).

#### **Response to Proposed Finding No. 765**

The Proposed Finding is misleading, incomplete, and vague in that the Proposed Finding relies on the terms “internally inconsistent” and “fatally flawed” without specific descriptions of what the Proposed Finding means by those phrases. The Proposed Finding is thus not verifiable. Additionally, the Proposed Finding is improper argument rather than factual statement.

766. Dr. Marshall’s own data shows that there was significant diversion of sales from Darby to Benco following Benco’s entry in Southern California. (RX2833 at 52, ¶ 129).

**Response to Proposed Finding No. 766**

The Proposed Finding is misleading, incomplete, and misconstrues the term “significant.” The analysis cited in this finding incorrectly applies the concept of “diversion.” The application of the hypothetical monopolist test to Benco’s entry in Southern California—whether implemented with Dr. Marshall’s own data or Dr. Wu’s preferred data—confirmed that Darby is not in the relevant product market. (CX7101 at 21 (¶¶ 44-47) (Marshall Rebuttal Expert Report); CX7100 at 81-82 (¶¶ 203-205) (Marshall Expert Report)).

767. Dr. Marshall’s own data shows that, following Benco’s entry into Southern California, Darby lost 37.7% of its 2012 sales by 2015. (RX2833 at 52, ¶ 129).

**Response to Proposed Finding No. 767**

The Proposed Finding is misleading, incomplete, and irrelevant to the economic analysis at issue. Dr. Marshall found that full-service distributors accounted for 93.7% of Benco’s new business, while Darby accounted for only 6.3% of the new business. (CX7100 at 81 (¶ 203) (Marshall Expert Report)). These basic facts are relevant to the critical loss analysis, which confirmed that Darby is not in the relevant product market. (CX7100 at 81-82 (¶¶ 203-205) (Marshall Expert Report)).

768. From 2010 to 2015, when Benco increased its share in Southern California, no full-service distributor experienced a percentage decrease in sales as dramatic as Darby. (RX2833 at 50, ¶ 124).

**Response to Proposed Finding No. 768**

The Proposed Finding is misleading, incomplete, and irrelevant to the economic analysis at issue.

[REDACTED]

[REDACTED]

[REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]. In any event, applying the hypothetical monopolist test to Benco’s entry in Southern California—whether implemented with Dr. Marshall’s own data or Dr. Wu’s preferred data—confirmed that Darby is not in the relevant product market. (CX7101 at 21 (¶¶ 44-47) (Marshall Rebuttal Expert Report); CX7100 at 81-82 (¶¶ 203-205) (Marshall Expert Report)).

769. From 2010 to 2015, when Benco increased its share in Southern California, Schein was the only full-service distributor to experience a loss of sales as great as Darby’s in percentage point terms. (RX2833 at 50, ¶ 124).

**Response to Proposed Finding No. 769**

The Proposed Finding is misleading, incomplete, and irrelevant to the economic analysis at issue.

As with the prior proposed finding, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. In any event, applying the hypothetical monopolist test to Benco’s entry in Southern California—whether implemented with Dr. Marshall’s own data or Dr. Wu’s preferred data—confirmed that Darby is not in the relevant product market. (CX7101 at 21 (¶¶ 44-47) (Marshall Rebuttal Expert Report); CX7100 at 81-82 (¶¶ 203-205) (Marshall Expert Report)).

770. If Darby were not in the same relevant product market, an economist would not expect to see such a large diversion of sales from Darby to Benco. (RX2833 at 52, ¶ 129; RX2833 at 50, ¶ 124).

**Response to Proposed Finding No. 770**

The Proposed Finding is wrong, misleading, and incorrectly applies the concept of “diversion.” “An economist” acting consistent with well-accepted economic principles would not base relevant product market definition on an incorrect concept of diversion and a misleading comparison of percentage changes in share of sales. Rather, a reliable economist would be more likely to perform the hypothetical monopolist test to determine the relevant product. Here, applying the hypothetical monopolist test to Benco’s entry in Southern California—whether implemented with Dr. Marshall’s own data or Dr. Wu’s preferred data—confirmed that Darby is not in the relevant product market. (CX7101 at 21 (¶¶ 44-47) (Marshall Rebuttal Expert Report); CX7100 at 81-82 (¶¶ 203-205) (Marshall Expert Report)).

771. The results of Dr. Marshall’s SSNIP test are inconsistent with the evidence of diversion from Darby to Benco in Dr. Marshall’s own data. (RX2833 at 52, ¶¶ 128-129; RX2833 at 50, ¶ 124).

**Response to Proposed Finding No. 771**

The Proposed Finding is wrong. Dr. Marshall’s SSNIP test based on Benco’s entry in Southern California—whether performed using his own data or Dr. Wu’s preferred data—confirmed that Darby is not in the relevant product market. (CX7101 at 21 (¶¶ 44-47) (Marshall Rebuttal Expert Report); CX7100 at 81-82 (¶¶ 203-205) (Marshall Expert Report)). There is nothing inconsistent.

772. The results of Dr. Marshall’s SSNIP test are inconsistent with other evidence of competition between Benco and Darby. (J. Johnson, Tr. 4808-4810; [REDACTED]).

**Response to Proposed Finding No. 772**

The Proposed Finding is misleading, incomplete, and vague in that it does not specify to which of Dr. Marshall’s two SSNIP tests it is referring. The Proposed Finding is also misleading, inaccurate, and not supported by the weight of evidence insofar as it suggests that Darby and other non-full service distributors are in the relevant product market. Dr. Marshall concluded

that the appropriate relevant market in this matter is the full line of dental products and services sold through full-service distributors to independent dentists. (CX7100 at 010, 072-073 (¶¶10, 176-179) (Marshall Expert Report); *see also* CCF ¶¶ 1446-1566). The Proposed Finding is misleading, incomplete, and vague insofar as it relies on “other evidence of competition between Benco and Darby.” The Proposed Finding does not identify what this evidence is and the cited testimony is to Benco’s expert witness, Dr. Johnson. Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to the testimony of an expert for a proposition of fact.

773. When Dr. Wu repeated the analysis of Benco’s entry into Southern California using all of the available data for Southern California, he concluded that 22 percent of Benco’s new business came from Darby. (RX2833 at 53, ¶ 131).

**Response to Proposed Finding No. 773**

The Proposed Finding is misleading and not relevant to the correct application of the hypothetical monopolist test. Correctly applying the hypothetical monopolist test to Dr. Wu’s data (in RX2833) shows that Darby is *not* in the relevant product market. (CX7101 at 020 (¶¶44-46) (Marshall Rebuttal Expert Report)).

774. Given Dr. Marshall’s estimated critical loss of 12 percent, Dr. Wu’s calculation that 22 percent of Benco’s new business came from Darby suggests that Darby is in the relevant product market. (RX2833 at 53, ¶ 131).

**Response to Proposed Finding No. 774**

The Proposed Finding is misleading, incorrect, and not relevant to the correct application of the hypothetical monopolist test. In his expert report (RX2833), Dr. Wu did not analyze or apply the relevant data correctly. Correctly applying the hypothetical monopolist test refutes Dr. Wu’s finding and confirms that Darby is not in the relevant product market. (CX7101 at 020 (¶¶45-46) (Marshall Rebuttal Expert Report)).

775. In his rebuttal report, Dr. Marshall asserted that Dr. Wu should have used the “second type” of SSNIP test, in which the hypothetical monopolist increases price for only one product in a candidate relevant market. (CX7101 at 20, ¶¶ 44-45). But Dr. Marshall failed to establish that the conditions for application of this type of SSNIP test are satisfied.

**Response to Proposed Finding No. 775**

The Proposed Finding is incorrect and does not cite any supporting evidence for its bare assertion that Dr. Marshall “failed to establish” the conditions for the SSNIP test. This Proposed Finding appears to consist of a legal argument rather than factual findings. Dr. Marshall explained his application of the SSNIP test in detail. (CX7101 at 018-019 (¶¶36-43) (Marshall Rebuttal Expert Report)).

776. In his rebuttal report, Dr. Marshall also responded to Dr. Wu’s conclusions by asserting that “the recapture rate (78%) is greater than the critical loss (12%),” which shows that Darby is not in the relevant market. (CX7101 at 20, ¶ 46).

**Response to Proposed Finding No. 776**

Complaint Counsel has no specific response.

777. The U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (2010) describe a “critical loss analysis” to determine whether a SSNIP would increase or reduce a hypothetical monopolist’s profits. (RX1139 at 9, § 4.1.3). The Horizontal Merger Guidelines state that a SSNIP is profitable “if the *predicted loss* is less than the critical loss.” (RX1139 at 9, § 4.1.3 (emphasis added)).

**Response to Proposed Finding No. 777**

Complaint Counsel has no specific response.

778. In his rebuttal report, Dr. Marshall incorrectly compared the *recapture rate* to the critical loss. (CX7101 at 20, ¶ 46).

**Response to Proposed Finding No. 778**

The Proposed Finding is incorrect and does not cite any supporting evidence for its bare assertion that Dr. Marshall incorrectly compared the recapture rate to the critical loss. This Proposed Finding appears to consist of a legal argument rather than factual findings. Dr.

Marshall's comparison involving the recapture rate to the critical loss was correct and appropriate. (CX7101 at 018-019 (¶¶36-43) (Marshall Rebuttal Expert Report)).

779. Dr. Marshall's calculation in his rebuttal report is inconsistent with the Horizontal Merger Guidelines and is incorrect. (RX2967 (Wu, Dep. 229)).

**Response to Proposed Finding No. 779**

The Proposed Finding is incorrect and not supported by the cited evidence. Dr. Marshall's calculation of the recapture rate was correct. (CX7101 at 018-019 (¶¶36-43) (Marshall Rebuttal Expert Report)). Further, Dr. Marshall's calculation is consistent with the Horizontal Merger Guidelines and is a method to implement the type of analysis described in the Guidelines. (CX7100 at 088-089 (¶¶220-222) (Marshall Expert Report); CX7101 at 019 (¶39, n.64) (Marshall Rebuttal Expert Report)).

780. Dr. Wu properly compared the predicted loss (based on the actual loss experienced by Darby when Benco entered in Southern California) to the critical loss. (RX1139 at 9, § 4.1.3; RX2833 at 53, ¶ 131; RX2967 (Wu, Dep. 229-231)).

**Response to Proposed Finding No. 780**

The Proposed Finding is incorrect. Dr. Wu performed the wrong comparison in his application of the critical loss test, and he got the wrong result. (CX7101 at 020 (¶¶44-47) (Marshall Rebuttal Expert Report)).

**5. Dr. Marshall's Failure to Properly Define the Relevant Market  
Rendered His Other Opinions in this Matter Unreliable**

781. Dr. Marshall's failure to properly define the relevant product market rendered unreliable his subsequent opinion in Section IV of his expert report that the industry is susceptible to collusion. (J. Johnson, Tr. 4811-4812; J. Johnson, Tr. 4815-4816; J. Johnson, Tr. 4821-4822).

**Response to Proposed Finding No. 781**

The Proposed Finding is misleading, incomplete, and inaccurate. Dr. Marshall's approach to defining a relevant product market followed the 2010 Horizontal Merger Guidelines, which provide guidance as to how to define a product market in the presence of price discrimination.

(CX7100 at 072 (¶177) (Marshall Expert Report)). Dr. Marshall wrote that “A set of customers buying a set of a products forms a relevant product market if a small but significant non-transitory increase in price (SSNIP) on those customers would be profitable because too few customers would substitute away from the relevant product or would use arbitrage to defeat the price increase.” (CX7100 at 072 (¶177) (Marshall Expert Report)). Following this approach, Dr. Marshall applied the hypothetical monopolist test to “investigate whether independent dentists would substitute enough to buying from non-full-service distributors and directly from manufacturers to render a SSNIP unprofitable.” (CX7100 at 072-073 (¶178) (Marshall Expert Report)). Dr. Marshall concluded that that neither substitution away from full-service distributors’ products and services, nor arbitrage to defeat price discrimination, are sufficient to constrain the pricing of a hypothetical monopolist of the full line of dental products and services sold through full-service distributors to independent dentists. (CX7100 at 073 (¶179) (Marshall Expert Report)). The Proposed Finding is also contrary to the weight of the evidence that establishes that the full line of dental products and services sold through full-service distributors to independent dentists is a relevant product market. (CCFF ¶¶ 1492-1552, 1553-1556).

782. Dr. Marshall’s failure to properly define the relevant product market rendered unreliable his subsequent opinion in Section V of his report that Benco, Schein and Patterson acted contrary to their unilateral economic self-interest. (J. Johnson, Tr. 4811-4812; J. Johnson, Tr. 4815-4816).

### **Response to Proposed Finding No. 782**

The Proposed Finding is misleading, incomplete, and inaccurate. Dr. Marshall’s approach to defining a relevant product market followed the 2010 Horizontal Merger Guidelines, which provide guidance as to how to define a product market in the presence of price discrimination. (CX7100 at 072 (¶177) (Marshall Expert Report)). Dr. Marshall wrote that “A set of customers buying a set of a products forms a relevant product market if a small but significant non-

transitory increase in price (SSNIP) on those customers would be profitable because too few customers would substitute away from the relevant product or would use arbitrage to defeat the price increase.” (CX7100 at 072 (¶177) (Marshall Expert Report)). Following this approach, Dr. Marshall applied the hypothetical monopolist test to “investigate whether independent dentists would substitute enough to buying from non-full-service distributors and directly from manufacturers to render a SSNIP unprofitable.” (CX7100 at 072-073 (¶178) (Marshall Expert Report)). Dr. Marshall concluded that that neither substitution away from full-service distributors’ products and services, nor arbitrage to defeat price discrimination, are sufficient to constrain the pricing of a hypothetical monopolist of the full line of dental products and services sold through full-service distributors to independent dentists. (CX7100 at 073 (¶179) (Marshall Expert Report)). The Proposed Finding is also contrary to the weight of the evidence that establishes that the full line of dental products and services sold through full-service distributors to independent dentists is a relevant product market. (CCFF ¶¶ 1492-1552, 1553-1556).

783. Dr. Marshall’s failure to properly define the relevant product market, rendered unreliable his subsequent opinion in Section VI of his expert report that the alleged conduct caused harm to competition. (J. Johnson, Tr. 4811-4812; J. Johnson, Tr. 4815-4816; [REDACTED]).

### **Response to Proposed Finding No. 783**

The Proposed Finding is misleading, incomplete, and inaccurate. Dr. Marshall’s approach to defining a relevant product market followed the 2010 Horizontal Merger Guidelines, which provide guidance as to how to define a product market in the presence of price discrimination. (CX7100 at 072 (¶177) (Marshall Expert Report)). Dr. Marshall wrote that “A set of customers buying a set of a products forms a relevant product market if a small but significant non-transitory increase in price (SSNIP) on those customers would be profitable because too few customers would substitute away from the relevant product or would use arbitrage to defeat the

price increase.” (CX7100 at 072 (¶177) (Marshall Expert Report)). Following this approach, Dr. Marshall applied the hypothetical monopolist test to “investigate whether independent dentists would substitute enough to buying from non-full-service distributors and directly from manufacturers to render a SSNIP unprofitable.” (CX7100 at 072-073 (¶178) (Marshall Expert Report)). Dr. Marshall concluded that that neither substitution away from full-service distributors’ products and services, nor arbitrage to defeat price discrimination, are sufficient to constrain the pricing of a hypothetical monopolist of the full line of dental products and services sold through full-service distributors to independent dentists. (CX7100 at 073 (¶179) (Marshall Expert Report)). The Proposed Finding is also contrary to the weight of the evidence establishing the relevant product market is the full line of dental products and services sold through full-service distributors to independent dentists. (CCFF ¶¶ 1492-1552, 1553-1556). The Proposed Finding is also misleading and incomplete insofar as it suggests that Dr. Marshall did not report evidence supporting his opinion that the Respondent’s conspiracy caused harm to competition. In his Expert Report, Dr. Marshall identified harm to competition. (CX7100 at 206-218 (¶482-507) (Marshall Expert Report)). *See also* CCFF ¶¶ 1391-1445.

784. Dr. Marshall’s failure to properly define the relevant product market and to analyze competitive conditions and effects in properly defined markets fatally undermined his overall conclusions in this matter. (J. Johnson, Tr. 4873-4875).

#### **Response to Proposed Finding No. 784**

The Proposed Finding is misleading, incomplete, and inaccurate. Dr. Marshall’s approach to defining a relevant product market followed the 2010 Horizontal Merger Guidelines, which provide guidance as to how to define a product market in the presence of price discrimination. (CX7100 at 072 (¶177) (Marshall Expert Report)). Dr. Marshall wrote that “A set of customers buying a set of a products forms a relevant product market if a small but significant non-transitory increase in price (SSNIP) on those customers would be profitable because too few



customers would substitute away from the relevant product or would use arbitrage to defeat the price increase.” (CX7100 at 072 (¶177) (Marshall Expert Report)). Following this approach, Dr. Marshall applied the hypothetical monopolist test to “investigate whether independent dentists would substitute enough to buying from non-full-service distributors and directly from manufacturers to render a SSNIP unprofitable.” (CX7100 at 072-073 (¶178) (Marshall Expert Report)). Dr. Marshall concluded that that neither substitution away from full-service distributors’ products and services, nor arbitrage to defeat price discrimination, are sufficient to constrain the pricing of a hypothetical monopolist of the full line of dental products and services sold through full-service distributors to independent dentists. (CX7100 at 073 (¶179) (Marshall Expert Report)). The Proposed Finding is also contrary to the weight of the evidence that establishes that the full line of dental products and services sold through full-service distributors to independent dentists is a relevant product market. (CCFF ¶¶ 1492-1552, 1553-1556). The Proposed Finding is misleading, incomplete, and contrary to the weight of evidence insofar as it suggests that the competitive conditions of the market were not such that the market was conducive to effective collusion against dental buying groups. Record evidence establishes that the market for the full line of dental products and services sold through full-service distributors to independent dentists was conducive to effective collusion. (CCFF ¶¶ 1601-1623).

**XII. RESPONSES TO PROPOSED FINDINGS REGARDING “DR. MARSHALL ERRED IN CONCLUDING THAT MARKET STRUCTURE WAS CONDUCTIVE TO EFFECTIVE COLLUSION”**

785. Dr. Marshall opined that the structure of the market for the distribution of dental products and services was “conductive to effective collusion.” (CX7100 at 11, ¶ 12; CX7100 at 111, ¶ 281).

**Response to Proposed Finding No. 785**

Complaint Counsel has no specific response.

786. Dr. Marshall’s conclusion is flawed for multiple reasons. (J. Johnson, Tr. 4817-4818).

**Response to Proposed Finding No. 786**

The Proposed finding it misleading, incomplete, and vague insofar as it does not identify to which of Dr. Marshall’s conclusions the proposed refers. The Proposed Finding is thus not verifiable. To the extent the proposed finding is intended to refer to the structure of the market for the distribution of dental products, the weight of the factual evidence in this matter establishes that the competitive dynamics of the market for the full line of dental products and services sold through full-service distributors to independent dentists are conducive to effective collusion. (CCFF ¶¶ 1606-1623). Moreover, Patterson’s expert, Dr. Wu, described the industry structure in this case as having “the potential for strategic interaction.” (RX2833 at 017 (¶27) (Wu Expert Report)).

A. RESPONSES TO PROPOSED FINDINGS REGARDING “CONSPIRACY CANNOT BE INFERRED FROM INDUSTRY CHARACTERISTICS”

787. To the extent that Dr. Marshall suggests that a conspiracy can be inferred from industry characteristics, that is wrong. (Carlton, Tr. 5382-5383).

**Response to Proposed Finding No. 787**

The Proposed Finding is misleading, vague, and inaccurate. Dr. Marshall did not opine that a conspiracy can be *inferred* from industry characteristics. Instead, Dr. Marshall opined that the industry was “conducive to effective collusion.” (CX7100 at 011 (¶12) (Marshall Expert Report)). Moreover, Patterson’s expert, Dr. Wu, described the industry structure in this case as having “the potential for strategic interaction.” (RX2833 at 017 (¶27) (Wu Expert Report)).

788. The existence of a conspiracy can’t be inferred from industry characteristics. (Carlton, Tr. 5382-5383; RX2832 at 65, ¶ 98).

**Response to Proposed Finding No. 788**

The Proposed Finding is misleading, vague, and inaccurate insofar as it suggests that Dr. Marshall so testified. Dr. Marshall did not opine that a conspiracy can be *inferred* from industry characteristics. Instead, Dr. Marshall opined that the industry was “conducive to effective collusion.” (CX7100 at 011 (¶12) (Marshall Expert Report)). Moreover, Patterson’s expert, Dr. Wu, described the industry structure in this case as having “the potential for strategic interaction.” (RX2833 at 017 (¶27) (Wu Expert Report)).

789. Oligopolistic interdependence explains why there may be parallel behavior that has nothing to do with conspiracy. (Carlton, Tr. 5383; RX2832 at 66, ¶ 99).

### **Response to Proposed Finding No. 789**

This Proposed Finding is inaccurate, incomplete, and misleading to the extent that it suggests that the facts of the case at hand constitute lawful oligopolistic coordination. Dr. Marshall disagreed with Dr. Carlton’s opinion (cited here) that Respondents’ parallel behavior could be the result of oligopolistic conscious parallelism or oligopolistic interdependence given the inter-firm communications in this case. (CX7101 at 026-028, 038-039 (¶¶ 63-66, 88-90) (Marshall Rebuttal Expert Report); *see also* Marshall, Tr. 2877-2888)). Dr. Carlton’s conclusion that oligopolistic interdependence could explain Respondents’ parallel conduct, is also based on a false premise as applied to this case. While Dr. Carlton opined that it is possible that Respondents each decided not to discount to buying groups in parallel, taking a “wait and see” approach (RX2832 ¶ 99), it is undisputed that Schein began discounting to buying groups before the conspiracy. (CCFF ¶¶ 432-453). In other words, contrary to Dr. Carlton’s opinion, Schein never took a “wait and see” approach, it affirmatively changed its conduct from working with buying groups to instructing its sales team to refuse buying groups. (CX7101 ¶¶ 63-65; ¶ 63 (“Dr. Carlton does not explain how his client, Schein, came to its own spontaneous unilateral understanding to not bid.”); *see also* CX7100 at 203 (¶ 475) (Marshall Expert Report) (“I

describe how Respondents behaved toward customers other than buying groups and how Benco entered Southern California. The behavior underlying both these episodes contrasts with Respondents' non-competitive behavior toward dental buying groups. This contrast suggests that the Respondents' non-competitive behavior toward buying groups is not the result of the Respondents acting as they typically do. In other words, this contrast in conduct is an indicator that Respondents' parallel conduct with respect to buying groups is driven by something other than non-competitive oligopoly behavior.”)).

790. Dr. Marshall failed to distinguish between oligopolistic interdependence and conspiracy. (Carlton, Tr. 5383-5384).

**Response to Proposed Finding No. 790**

The Proposed Finding is misleading, incomplete, and inaccurate. In his Rebuttal Expert Report, Dr. Marshall explained that he disagreed with Dr. Carlton's opinion that Respondents' parallel behavior could be the result of oligopolistic conscious parallelism or oligopolistic interdependence given the inter-firm communications in this case. (CX7101 at 026-028, 038-039 (¶¶ 63-66, 88-90) (Marshall Rebuttal Expert Report); *see also* Marshall, Tr. 2877-2888)). Dr. Carlton's conclusion that oligopolistic interdependence could explain Respondents' parallel conduct, is based on a false premise as applied to this case. While Dr. Carlton opined that it is possible that Respondents each decided not to discount to buying groups in parallel, taking a “wait and see” approach (RX2832 ¶ 99), it is undisputed that Schein began discounting to buying groups before the conspiracy. (CCFF ¶¶ 432-453). In other words, contrary to Dr. Carlton's opinion, Schein never took a “wait and see” approach, it affirmatively changed its conduct from working with buying groups to instructing its sales team to refuse buying groups. (CX7101 ¶¶ 63-65; ¶ 63 (“Dr. Carlton does not explain how his client, Schein, came to its own spontaneous unilateral understanding to not bid.”); *see also* CX7100 at 203 (¶ 475) (Marshall Expert Report)

(“I describe how Respondents behaved toward customers other than buying groups and how Benco entered Southern California. The behavior underlying both these episodes contrasts with Respondents’ non-competitive behavior toward dental buying groups. This contrast suggests that the Respondents’ non-competitive behavior toward buying groups is not the result of the Respondents acting as they typically do. In other words, this contrast in conduct is an indicator that Respondents’ parallel conduct with respect to buying groups is driven by something other than non-competitive oligopoly behavior.”)).

**B. RESPONSES TO PROPOSED FINDINGS REGARDING “DR. MARSHALL’S EVALUATION OF INDUSTRY CHARACTERISTICS IS FUNDAMENTALLY FLAWED”**

791. The very set of characteristics that Dr. Marshall cited as conducive to collusion are also the very same characteristics that would undermine the ability of a cartel to form at all. (J. Johnson, Tr. 4817-4818).

**Response to Proposed Finding No. 791**

The Proposed Finding is misleading, incomplete, and vague insofar as the cited testimony for the Proposed Finding does not explain why the characteristics would undermine the ability of a cartel to form. Thus, it is not possible to verify the full basis and support for the Proposed Finding. Additionally, the Proposed Finding does not identify with clarity to which characteristics that Dr. Marshall cited the Proposed Finding is referring. In his expert report submitted in this matter, Dr. Johnson did not opine about how the characteristics are “the very same characteristics that would undermine the ability of a cartel to form at all.” Dr. Johnson’s testimony at trial about the characteristics undermining the ability of a cartel to form appears to be beyond the scope of Dr. Johnson’s expert report filed in this matter. Instead, in his report for this matter, Dr. Johnson expressed his opinion that “these reasons—and Dr. Marshall’s conclusions about the ‘structure’ of the relevant market—ignore the competitive dynamics of the

industry.” (RX2834 at 024-025 (¶35) (Johnson Expert Report); *see also* Section VII of Johnson Expert Report (RX2834 at 024-028)).

792. The characteristics that Dr. Marshall relied upon as conducive to collusion don’t apply uniformly to the dental distribution industry. (J. Johnson, Tr. 4817-4818).

**Response to Proposed Finding No. 792**

The Proposed Finding is misleading, vague, and incomplete. The Proposed Finding does not identify with specificity to what characteristics Respondent is referring, making it hard to verify the finding. Also, the cited testimony of Dr. Johnson is incomplete and vague and does not explain in full which of the characteristics “don’t apply across the board” (J. Johnson, Tr. 4818) and why the characteristics don’t apply. The Proposed Finding is also contrary to the weight of the evidence in this matter which establishes that the market for the full line of dental products and services sold through full-service distributors to independent dentists was conducive to collusion. (CCFF ¶¶ 1601-1623).

793. Dr. Marshall ignored important competitive constraints in the dental distribution industry. (J. Johnson, Tr. 4818-4820; RX2834 at 25, ¶ 36).

**Response to Proposed Finding No. 793**

The Proposed Finding is misleading, incomplete, and vague insofar as it does not identify what “important competitive constraints” Dr. Marshall is alleged to have ignored, and thus the finding is not verifiable. To the extent that the Proposed Finding is referring to whether or not direct selling manufacturers and non-full-service distributors should be included in the relevant product market, Dr. Marshall did not ignore those segments when forming his opinion of the relevant market definition. Dr. Marshall’s approach to defining a relevant product market followed the 2010 Horizontal Merger Guidelines, which provide guidance as to how to define a product market in the presence of price discrimination. (CX7100 at 072 (¶177) (Marshall Expert Report)). Dr. Marshall wrote that “A set of customers buying a set of a products forms a relevant

product market if a small but significant non-transitory increase in price (SSNIP) on those customers would be profitable because too few customers would substitute away from the relevant product or would use arbitrage to defeat the price increase.” (CX7100 at 072 (¶177) (Marshall Expert Report)). Following this approach, Dr. Marshall applied the hypothetical monopolist test to “investigate whether independent dentists would substitute enough to buying from non-full-service distributors and directly from manufacturers to render a SSNIP unprofitable.” (CX7100 at 072-073 (¶178) (Marshall Expert Report)). Dr. Marshall concluded that that neither substitution away from full-service distributors’ products and services, nor arbitrage to defeat price discrimination, are sufficient to constrain the pricing of a hypothetical monopolist of the full line of dental products and services sold through full-service distributors to independent dentists. (CX7100 at 073 (¶179) (Marshall Expert Report)). The Proposed Finding is also contrary to the weight of the evidence establishing that the full line of dental products and services sold through full-service distributors to independent dentists is a relevant product market. (CCFF ¶¶ 1492-1552, 1553-1556).

794. Because he ignored direct-selling manufacturers and partial-line distributors, because he omitted mail-order and on-line distributors from the market, and because he combined distribution of consumables and equipment in a single market, Dr. Marshall is unable to determine whether or not the market structure actually would be conducive to collusion. (J. Johnson, Tr. 4818-4820; J. Johnson, Tr. 4821-4822).

#### **Response to Proposed Finding No. 794**

The Proposed Finding is misleading, incomplete, and contrary to the weight of evidence in this case insofar as it suggests that direct-selling manufacturers are in the relevant product market with dental products and services sold through full-service distributors to independent dentists. Record evidence establishes that direct sale manufacturers are not included in the relevant product market. (CCFF ¶¶ 1509-1521, 1544-1551). The Proposed Finding is also misleading, incomplete, and contrary to the weight of evidence in this case insofar as it suggests that non-

full-line distributors should be included in the relevant product market. Record evidence supports the conclusion that non-full-line distributors should be excluded from the relevant product market. (CCFF ¶¶ 1492-1508; 1537-1543). Additionally, the Proposed Finding is misleading, incomplete, and contrary to the weight of evidence in this case insofar as it suggests that grouping consumables and equipment in a single market is not appropriate. Grouping dental products and services in the same relevant product market is appropriate in this case where competitive conditions of supply (i.e. the suppliers) for the products and equipment are similar. (CX7101 at 024 (¶56, n. 87) (Marshall Rebuttal Expert Report)). Additionally, Patterson’s economic expert, Dr. Wu, agreed with Dr. Marshall on this, and Dr. Wu found it reasonable to “start with the cluster of products that is included in the FTC’s definition of relevant product market.” (RX2833 at 044 (¶103) (Wu Expert Report)).

795. Because he excluded significant potential competitive constraints, Dr. Marshall was unable to draw a meaningful conclusion about the likelihood of collusion in the industry. (J. Johnson, Tr. 4818-4820; J. Johnson, Tr. 4821-4822).

#### **Response to Proposed Finding No. 795**

The Proposed Finding is misleading, incomplete, and vague insofar as it does not identify the “significant potential competitive constraints” that Dr. Marshall is alleged to have excluded. Thus the Proposed Finding is not verifiable. The Proposed Finding is misleading, incomplete, and contrary to the weight of evidence in this matter insofar as it suggests that Dr. Marshall’s opinion on the relevant product market in this matter is not supported by record evidence. Dr. Marshall opined that the full line of dental products and services sold through full-service distributors to independent dentists is an appropriate relevant antitrust market. (CX7100 at 010, 072-073 (¶¶10, 176-179) (Marshall Expert Report); *see also* CCFF ¶¶ 1446-1566).

796. Because Dr. Marshall did not properly define local relevant markets, he is not in a position to know whether industry concentration is high. (J. Johnson, Tr. 4820-4821; J. Johnson, Tr. 4822-4823; RX2834 at 25, ¶ 37).



**Response to Proposed Finding No. 796**

The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that Dr. Marshall did not properly define the relevant geographic market in this matter. Dr. Marshall opined in his Expert Report that “the relevant geographic markets are no larger than the United States, and local in nature.” (CX7100 at 010-011, 090-110 (¶¶11, 227-280) (Marshall Expert Report)). Moreover, Dr. Johnson agreed with Dr. Marshall that the geographic markets in this matter are local in nature. (J. Johnson, Tr. 4788-4789; RX2965 (J. Johnson, Dep. at 29)).

797. Benco has relatively small sales in certain regions. (Cohen, Tr. 631-33; J. Johnson, Tr. 4822-4823; RX2834 at 25, ¶ 38; CX7100 at 107-08, ¶¶ 273-74).

**Response to Proposed Finding No. 797**

The Proposed Finding is misleading, incomplete, and vague in that it does not identify in which regions Benco has relatively small shares and the Proposed Finding does not identify a time period for which this Proposed Finding may be relevant. Thus the Proposed Finding is not verifiable and should be disregarded. The cited testimony refers mainly to the Seattle region at a time when Benco was only just entering the region and to Southern California when Benco was entering.

798. Benco had a share of only about ½ of one percent in Seattle in 2014. (J. Johnson, Tr. 4822-4823; RX2834 at 25, ¶ 38; CX7100 at 107-08, ¶¶ 273-74).

**Response to Proposed Finding No. 798**

The Proposed Finding is misleading, vague, and incomplete insofar as it does not identify the relevant product market in which Benco had a share of only about ½ of one percent. The Proposed Finding is also misleading and incomplete in that Benco was in the process of entering Seattle and the Pacific Northwest at in 2014, and Benco’s share of the sales of full-service distributors grew when it entered. (Cohen, Tr. 631-633).

799. Dr. Marshall improperly ignored the fact that other distributors, such as Burkhart and Darby, might have a larger presence in various local areas. (J. Johnson, Tr. 4822-4823).

**Response to Proposed Finding No. 799**

The Proposed Finding is misleading, vague, and incomplete insofar as it does not identify in which areas Burkhart or Darby may have had a larger presence. The cited testimony also does not identify these areas. Indeed Dr. Johnson admitted that he did not calculate market shares in any relevant product market nor in any relevant geographic market in this matter, and he did not offer an opinion about market shares. (J. Johnson, Tr. 4895; RX2965 (J. Johnson, Dep. at 78, 115-116)). Dr. Johnson also conceded that he offered no opinion about market shares for either the relevant product or geographic market in his reports in the SourceOne Action or Dental Supplies Class Action. (RX2965 (J. Johnson, Dep. at 115-116)). Thus the Proposed Finding is not verifiable and should be disregarded.

800. Benco generally represents only a small portion of most manufacturers' [REDACTED]. (J. Johnson, Tr. 4824-4826; [REDACTED]).

**Response to Proposed Finding No. 800**

The Proposed Finding is misleading, incomplete, and vague in that it relies on the term “small.” Also, the Respondent is citing to an expert for a proposition of fact. J. Johnson refers to Dr. Johnson, Benco’s expert in this matter, RX2834 is Dr. Johnson’s (Benco’s) Expert Report in this matter, and RX1140 is Dr. Johnson’s Expert Report in the SourceOne Dental litigation. In addition, the Proposed Finding is misleading, incomplete, vague, and unverifiable in its use of the term “most manufacturers’.” To support this proposed finding, Respondent is citing material in an expert report from another litigation – the SourceOne matter. Complaint Counsel cannot verify that manufacturers listed in Exhibit 14 of that report constitute “most manufacturers.” Indeed, in Exhibit 14, Dr. Johnson describes the list as “the top 20 dental consumable and equipment manufacturers in 2014 as well as the manufacturers that Dr. Leitzinger [private

plaintiff expert in SourceOne] uses as examples,” and does not describe it as a list of most manufacturers. (RX1140 at 057 (¶83) (SourceOne Johnson Expert Report)). Thus, the Proposed Finding should be disregarded as misleading, incomplete, vague, and unverifiable.

801. [REDACTED]

**Response to Proposed Finding No. 801**

The Proposed Finding is misleading and vague insofar as the Proposed finding does not provide evidence about Benco’s leverage with manufacturers. To support this proposed finding, Respondent is citing material in an expert report from another litigation (RX1140) – the SourceOne matter. The Proposed Finding is misleading, incomplete, and vague as it refers to data on Benco’s share but does not also include data for Schein, Patterson, and Burkhart as a point of comparison.

802. Some manufacturers have entered into exclusive agreements with either Schein or Patterson. (J. Johnson, Tr. 2824-2826; [REDACTED])

**Response to Proposed Finding No. 802**

Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. J. Johnson refers to Dr. Johnson, Benco’s expert in this matter, and RX2834 is Dr. Johnson’s (Benco’s) Expert Report in this matter.

803. Manufacturers of key brands or unique products have higher bargaining power. (J. Johnson, Tr. 4824-4826).

**Response to Proposed Finding No. 803**

The Proposed Finding is misleading, vague, inaccurate, and incomplete insofar as Dr. Johnson does not have any basis for the opinion he was expressing in the cited testimony. Dr. Johnson did not interview any manufacturers, including direct selling manufacturers, to learn about the

distribution chain in the dental supplies industry. ( [REDACTED]

[REDACTED]; RX2834 at 068-085 (Appendix C) (Johnson FTC Expert Report) (listing no interviews relied upon);

[REDACTED]). Additionally, Dr. Johnson does not offer an opinion in his report in this matter on the elasticity of supply on the part of manufacturers in the dental products industry, which would indicate how responsive manufacturers are to changes in price. (RX2965 (J. Johnson, Dep. at 147)). The Proposed Finding is vague insofar as it does not identify the specific manufacturers that Dr. Johnson opined have higher bargaining power. Thus the proposed finding is unverifiable and should be disregarded.

804. Dentsply, a leading manufacturer of false teeth, is an example of a manufacturer with higher bargaining power. (J. Johnson, Tr. 4824-4826).

#### **Response to Proposed Finding No. 804**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. J. Johnson refers to Dr. Johnson, Benco's expert in this matter. Also, the Proposed Finding is misleading and unsupported by evidence in the record in this matter. The cited trial testimony allegedly supporting this proposed finding is outside the scope of Dr. Johnson's expert report in this matter. When Complaint Counsel searched Dr. Johnson's report (and specifically Section VII, paragraph 40 on the bargaining power of manufacturers relative to distributors), Complaint Counsel found no references to the bargaining power of manufacturer Dentsply. (RX2834 at 026-027 (¶40) (Johnson Expert Report)). Additionally, in his trial testimony, Dr. Johnson does not affirmatively state that Dentsply has higher bargaining power. Instead his testimony is that "[p]eople know about

Dentsply false teeth, for example, they know that brand, so there are certain of these large manufacturers that do have brand recognition, and that also is going to require or allow them to push back on distributors.” (Johnson, Tr. 4825). Dr. Johnson speculates that certain large manufacturers may have higher bargaining power because people know of them, but he does not testify that this is true for Dentsply. Thus the Proposed Finding is unsupported and should be disregarded.

805. A-dec, a manufacturer of dental chairs, pushed very hard on Benco, and ultimately took away its business. (Cohen, Tr. 662-63; J. Johnson, Tr. 4824-4826).

**Response to Proposed Finding No. 805**

The Proposed Finding is misleading, incomplete, and vague in that it relies on the phrase “pushed very hard” without explanation of what this means. Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing, at least in part, to the testimony of an expert for a proposition of fact. J. Johnson refers to Dr. Johnson, Benco’s expert in this matter. Additionally, the Proposed Finding is misleading, inaccurate and incomplete in that Cohen’s cited testimony does not support the finding. Cohen testified that he only had “a guess” as to why Benco lost the product line. (Cohen, Tr. 663). Cohen did not testify that A-dec “pushed very hard on Benco.” (Cohen, Tr. 662-663). Cohen testified that representatives of A-dec had told him that “we had different business strategies, the two companies did, and they wanted to cancel our distribution agreement.” (Cohen, Tr. 663). But Cohen testified that A-dec did not explain what they meant by this. (Cohen, Tr. 663).

806. There is ample economic evidence of manufacturers pushing back on distributors. (J. Johnson, Tr. 4824-4826).

**Response to Proposed Finding No. 806**

The Proposed Finding is misleading, incomplete, and vague insofar as the proposed finding does not identify what the “ample economic evidence” is. The cited testimony does not describe any

economic studies of the conduct of manufacturers and cites to only alleged factual actions undertaken by manufacturers. To the extent that factual evidence might support this Proposed Finding, Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. J. Johnson refers to Dr. Johnson, Benco's expert in this matter. Dr. Johnson did not interview any manufacturers, including direct selling manufacturers, to learn about the distribution chain in the dental supplies industry.

( [REDACTED]  
[REDACTED]  
[REDACTED]; RX2834 at 068-085 (Appendix C) (Johnson FTC Expert Report) (listing no interviews relied upon); [REDACTED]  
[REDACTED]).

Additionally, Dr. Johnson does not offer an opinion in his report in this matter on the elasticity of supply on the part of manufacturers in the dental products industry, which would indicate how responsive manufacturers are to changes in price. (RX2965 (J. Johnson, Dep. at 147)).

807. Dr. Marshall's conclusion that manufacturer bargaining power could not discipline the respondents is inconsistent with the economic evidence. (J. Johnson, Tr. 4824-4826).

#### **Response to Proposed Finding No. 807**

The Proposed Finding is misleading, incomplete, and vague in that it does not specify what economic evidence Dr. Marshall's conclusion is allegedly inconsistent with. Additionally, the cited testimony does not describe any economic evidence or studies. Thus the proposed finding is not verifiable and should be disregarded. To the extent that factual evidence might support this Proposed Finding, Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. J. Johnson refers to Dr. Johnson, Benco's expert in this matter. *See also* response to Proposed Finding 806.

808. Dr. Marshall responded to Dr. Johnson's conclusions by asserting that, based on a series of unsupported assumptions, that Benco's lack of bargaining power over manufacturers is "even stronger evidence of Benco acting against its own unilateral self-interest" by not agreeing to offer discounts to buying groups. (CX7101 at 31, ¶ 77). Dr. Marshall's assertion simply adds more unsupported assumptions to the litany of errors in his assessment of Benco's unilateral economic self-interest. (J. Johnson, Tr. 4820-22).

**Response to Proposed Finding No. 808**

The Proposed Finding is misleading, incomplete, and vague in that the proposed finding does not identify with specificity the assumptions of Dr. Marshall that are allegedly unsupported. Thus, the Proposed Finding is unverifiable. The testimony of Dr. Johnson cited to support this proposed finding also does not identify what these additional assumptions are that Dr. Marshall is allegedly making. To the extent that the Proposed Finding is suggesting that Benco has no bargaining power over manufacturers, that is inconsistent with the weight of factual evidence in this matter. (CCFF ¶ 1623).

809. Benco successfully completed its expansion to the west coast and into the Pacific Northwest during the time period in question. (RX1105; Cohen, Tr. 628-34).

**Response to Proposed Finding No. 809**

The Proposed Finding is misleading, incomplete, and vague in that it does not specify what is "the time period in question." The proposed finding cannot thus be verified.

810. Dr. Marshall's opinion that barriers to entry are high ignores Benco's experience of successfully expanding and entering new markets. (J. Johnson, Tr. 4820-4821; J. Johnson, Tr. 4823-4824; TRX2834 at 26, ¶ 39).

**Response to Proposed Finding No. 810**

The Proposed Finding is misleading, vague, incomplete, inaccurate, and contrary to the weight of evidence in the record insofar as it suggests that entry barriers into full-service distribution of dental products and services to independent dentists are low. Record evidence suggests that there are high barriers to entry in full-service distribution. (CCFF ¶¶ 1616-1622). Additionally, the Proposed Finding is misleading and inaccurate in that Dr. Marshall did not ignore the

experience of Benco. Dr. Marshall specifically referenced the testimony of Benco's Cohen regarding the expenses involved in operating as a full-service distributor and other evidence. (CX7101 at 030-031 (¶¶75-76) (Marshall Rebuttal Expert Report)).

811. Benco successfully entered the Seattle region during the time period in question. (Cohen, Tr. 632-33; J. Johnson, Tr. 4820-4821; J. Johnson, Tr. 4823-4824).

**Response to Proposed Finding No. 811**

The Proposed Finding is misleading, vague, and incomplete insofar as it does not specify the time period in which Benco entered the Seattle region. The Proposed Finding is thus not verifiable and should be disregarded. Additionally, Complaint Counsel notes that, contrary to this Court's order, Respondent is, in part, improperly citing to the testimony of an expert for a proposition of fact. J. Johnson refers to Dr. Johnson, Benco's expert in this matter.

812. Benco successfully entered the Los Angeles region during the time period in question. (Cohen, Tr. 632-33; J. Johnson, Tr. 4820-4821; J. Johnson, Tr. 4823-4824).

**Response to Proposed Finding No. 812**

The Proposed Finding is misleading, vague, and incomplete insofar as it does not specify the time period in which Benco entered the Los Angeles region. The Proposed Finding is thus not verifiable and should be disregarded. Additionally, Complaint Counsel notes that, contrary to this Court's order, Respondent is, in part, improperly citing to the testimony of an expert for a proposition of fact. J. Johnson refers to Dr. Johnson, Benco's expert in this matter.

813. Dr. Marshall responded by citing Benco's growth in *national* share over the past 25 years, since the early 1990s. (CX7101 at 30, ¶ 75). By citing to national shares, Dr. Marshall deliberately obscures the point. Looking at *individual regions*, Benco was able to enter a series of regions and, within each region, increase its share from zero to a significant presence in just a short period of time. (Cohen, Tr. 628-34).

**Response to Proposed Finding No. 813**

The Proposed Finding is misleading, vague, inaccurate, and contrary to the weight of evidence in the record insofar as it suggests that entry barriers into full-service distribution of dental products



and services to independent dentists are low. Record evidence suggests that there are high barriers to entry in full-service distribution. (CCFF ¶¶ 1616-1622). Additionally, the second sentence of the Proposed Finding is not unsupported and is improper argument rather than a factual finding. The last sentence of the Proposed Finding is vague and unsupported insofar as it does not specify what is meant by “a short period of time” or “significant presence.” Cohen’s testimony on the cited pages merely describes how Benco geographically expanded its business. (Cohen, Tr. 628-634). For all these reasons, the Proposed Finding should be disregarded.

814. Dr. Marshall ignored certain characteristics of the dental distribution industry that would make the alleged conspiracy less likely to succeed. (RX2832 at 67, ¶ 100).

**Response to Proposed Finding No. 814**

The Proposed Finding is misleading, incomplete, and vague insofar as it does not identify what “certain characteristics of the dental distribution industry that would make the alleged conspiracy less likely to succeed” Dr. Marshall is alleged to have ignored. The cited evidence also does not specify what characteristics these are. Thus the proposed finding cannot be verified and should be disregarded.

815. Dr. Marshall ignored certain characteristics of the dental distribution industry that would make it difficult to detect any cheating from the alleged conspiracy. (RX2832 at 67, ¶ 100).

**Response to Proposed Finding No. 815**

The Proposed Finding is misleading, incomplete, and vague insofar as it does not identify what “certain characteristics of the dental distribution industry that would make it difficult to detect any cheating from the alleged conspiracy” Dr. Marshall is alleged to have ignored. The cited evidence also does not specify what characteristics these are. Thus the proposed finding cannot be verified and should be disregarded.

816. Dr. Marshall ignored the fact that nothing would prevent an alleged co-conspirator from offering a discount directly to buying group members, which would undercut the purpose of the alleged agreement. (RX2832 at 67, ¶ 101).

**Response to Proposed Finding No. 816**

The Proposed Finding is misleading, incomplete, and inaccurate insofar as that Dr. Marshall addressed this scenario in his Rebuttal Report, noting he had seen no data showing that Respondents offered buying group members the opportunity to buy at prices equal to or below buying group prices. (CX7101 at 029 (¶70) (Marshall Rebuttal Expert Report)). The Proposed Finding is misleading and inaccurate insofar as it suggests that Schein's expert, Dr. Carlton, presented empirical evidence supporting this scenario in his expert report (RX2832). Dr. Carlton presented no such evidence in his report at the citation offered as support for this proposed finding.

817. Dr. Marshall noted, but failed to consider, that individual dentists purchase large bundles of different products, and pricing is not transparent. (RX2832 at 67, ¶ 102).

**Response to Proposed Finding No. 817**

The Proposed Finding is misleading, vague, and incomplete in that it does not identify where in his opinions or towards what conclusion Dr. Marshall allegedly failed to consider "that individual dentists purchase large bundles of different products, and pricing is not transparent." Thus the proposed finding is not verifiable. To the extent that the Proposed Finding is meant to refer to cheating on the conspiracy, Dr. Marshall does distinguish in his Expert Report between contractual discounts to buying groups that are monitored by the administrators of buying groups and idiosyncratic offers to discount to individual dentists that could end after a few months. (CX7101 at 029 (¶70) (Marshall Rebuttal Expert Report)). The Proposed Finding is misleading and vague in that dentists' individual purchases and the size of such purchases is irrelevant to

whether or not the Respondent conspired not to discount to buying groups, and there is ample evidence in the record that Respondents so conspired. (CCFF ¶¶ 474-1108).

818. Dr. Marshall noted, but failed to consider, that dental distributors offer a multitude of services, which is another mechanism with which a distributor could effectively lower prices to individual dentists. (RX2832 at 101-102, ¶ 102).

**Response to Proposed Finding No. 818**

The Proposed Finding is misleading, vague, and incomplete in that it does not identify where in his opinions or towards what conclusion Dr. Marshall allegedly failed to consider “that dental distributors offer a multitude of services, which is another mechanism with which a distributor could effectively lower prices to individual dentists.” Thus the proposed finding is not verifiable. To the extent that the Proposed Finding is meant to refer to cheating on the conspiracy, Dr. Marshall does distinguish in his Expert Report between contractual discounts to buying groups that are monitored by the administrators of buying groups and idiosyncratic offers to individual dentists that could end after a few months. (CX7101 at 029 (¶70) (Marshall Rebuttal Expert Report)). The Proposed Finding is misleading and vague in that the multitude of services offered by Respondents to individual dentists is irrelevant to whether or not the Respondent conspired not to discount to buying groups, and there is ample evidence in the record that Respondents so conspired. (CCFF ¶¶ 474-1108).

819. Dr. Marshall failed to identify any mechanism by dental distributors to enforce any conspiracy. (RX2832 at 68, ¶ 103).

**Response to Proposed Finding No. 819**

The Proposed Finding is misleading, contrary to the evidence, and inaccurate. Dr. Marshall did identify a mechanism by which dental distributors could enforce a conspiracy and that was “the Respondents revert to competitive conduct where they each bid for the business of buying groups,” an obvious mechanism that was even identified by Dr. Carlton. (CX7101 at 029 (¶71)).

820. The various factors cited by Dr. Marshall don't support his conclusion that the structure of the dental products distribution business is conducive to collusion. (J. Johnson, Tr. 4826).

**Response to Proposed Finding No. 820**

The Proposed Finding is misleading, incomplete, inaccurate and against the weight of evidence in this case. Dr. Marshall opined that the industry was "conducive to effective collusion." (CX7100 at 011 (¶12) (Marshall Expert Report)). The weight of the factual evidence in this matter establishes that the market for the full line of dental products and services sold through full-service distributors to independent dentists displays the factors that Dr. Marshall opinioned are conducive to collusion. (CCFF ¶¶ 1606-1623). Moreover, Patterson's expert, Dr. Wu, described the industry structure in this case as having "the potential for strategic interaction." (RX2833 at 017 (¶27) (Wu Expert Report)).

821. Dr. Marshall's conclusion that conditions in the dental products distribution business are conducive to effective collusion is inconsistent with the competitive dynamics found in the industry. (RX2834 at 25, ¶ 42).

**Response to Proposed Finding No. 821**

The Proposed Finding is misleading, incomplete, inaccurate and against the weight of evidence in this case. The weight of the factual evidence in this matter establishes that the competitive dynamics of the market for the full line of dental products and services sold through full-service distributors to independent dentists are conducive to collusion. (CCFF ¶¶ 1606-1623).

Moreover, Patterson's expert, Dr. Wu, described the industry structure in this case as having "the potential for strategic interaction." (RX2833 at 017 (¶27) (Wu Expert Report)).

**XIII. RESPONSES TO PROPOSED FINDINGS REGARDING "DR. MARSHALL'S ASSERTION THAT BENCO, SCHEIN AND PATTERSON ENGAGED IN PARALLEL CONDUCT IS UNSUPPORTED BY HIS ANALYSIS AND CONTRARY TO THE EVIDENCE"**

822. Dr. Marshall opined that Benco, Schein and Patterson engaged in parallel conduct with respect to buying groups. (CX7100 at 121-122, ¶¶ 304-306).

**Response to Proposed Finding No. 822**

Proposed finding is misleading, incomplete, and inaccurate in that Dr. Marshall actually opined that “[w]ith regard to the decision by each Respondent to not bid for the business of buying groups from 2011 through 2015, it is simply not reasonable to believe that not bidding would arise without communication amongst the Respondents.” (CX7100 at 122 (¶306) (Marshall Expert Report)). In the text that Respondent has cited, Dr. Marshall explicitly opined that Respondents were not engaged in mere parallel conduct but that they had agreed among themselves not to bid for buying groups. (CX7100 at 121-122 (¶304-306) (Marshall Expert Report)).

823. Dr. Marshall made multiple economic mistakes and erroneous factual assumptions in connection with his assertion that Benco, Schein and Patterson engaged in parallel conduct with respect to buying groups. (Carlton, Tr. 5359-5360; Carlton, Tr. 5364).

**Response to Proposed Finding No. 823**

The Proposed Finding is misleading and inaccurate in that Dr. Marshall did not assert that Benco, Schein, and Patterson had engaged in mere parallel conduct. *See* Complaint Counsel’s response to Benco Proposed Finding 822. Moreover, Proposed Finding is misleading, incomplete, and vague insofar as it does not identify the economic mistakes and erroneous factual assumptions that Dr. Marshall is alleged to have made. Moreover, the testimony cited here by Respondent as support for the Proposed Finding does not refer at all to Dr. Marshall’s work in this matter. The Proposed Finding is also misleading and unsupported insofar as Dr. Carlton’s opinions and testimony were only with regard to Schein. (Carlton, Tr. 5360 (“I’m only opining with respect to Schein. . . . my opinions are limited to Schein.”)). The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that Schein that Schein continued to bid for buying groups during the conspiracy period and unsupported in that the Proposed Finding relies on the testimony of Dr. Carlton. In analyzing Schein’s sales, Dr. Carlton

employed a broader definition of “buying group” throughout his expert report (and in his analysis of Schein’s sales data in his Table 1) then the definition of buying group alleged in this matter. (CCFF ¶ 2031). Dr. Carlton admitted that the “buying groups” in Appendix D of his expert report, which form the basis for his analysis in Table 1, include groups that are not comprised of independent dentists. (CCFF ¶ 2033). For these reasons, Dr. Carlton’s analysis of Schein’s sales during the relevant period in Table 1 (“Schein Sales To Buying Groups”) is overly inflated and unreliable. *See also* Complaint Counsel’s Response to Benco Proposed Finding No. 832.

824. In fact, Benco, Schein and Patterson did not engage in parallel conduct, but rather pursued fundamentally different strategies with respect to buying groups. (Carlton, Tr. 5359-5360; Carlton, Tr. 5364).

#### **Response to Proposed Finding No. 824**

The Proposed Finding is misleading, incomplete, and vague insofar as it relies on the term “parallel conduct” and does not describe what type of parallel conduct. Complaint Counsel notes that, contrary to this Court’s order, Respondent appears to be improperly citing to the testimony of an expert for a proposition of fact. Dr. Carlton is Schein’s expert in this matter. The Proposed Finding is also misleading and unsupported insofar as Dr. Carlton’s opinions and testimony were only with regard to Schein. (Carlton, Tr. 5360 (“I’m only opining with respect to Schein. . . . my opinions are limited to Schein.”)). The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that Schein continued to bid for buying groups during the conspiracy period and unsupported in that the Proposed Finding relies on the testimony of Dr. Carlton. In analyzing Schein’s sales, Dr. Carlton employed a broader definition of “buying group” throughout his expert report (and in his analysis of Schein’s sales data in his Table 1) then the definition of buying group alleged in this matter. (CCFF ¶ 2031). Dr. Carlton admitted that the “buying groups” in Appendix D of his expert report, which form the basis for his

analysis in Table 1, include groups that are not comprised of independent dentists. (CCFF ¶ 2033). For these reasons, Dr. Carlton’s analysis of Schein’s sales during the relevant period in Table 1 (“Schein Sales To Buying Groups”) is overly inflated and unreliable. *See also* Complaint Counsel’s Response to Benco Proposed Finding No. 832.

A. RESPONSES TO PROPOSED FINDINGS REGARDING “BENCO HAD A CONSISTENT POLICY NOT TO DO BUSINESS WITH BUYING GROUPS”

825. Benco had a policy of not doing business with buying groups since 1996. (Cohen, Tr. 445).

**Response to Proposed Finding No. 825**

Complaint Counsel has no specific response.

826. During the alleged conspiracy period from 2011 to 2015, Benco continued its policy of not doing business with buying groups. (Cohen, Tr. 445; 684).

**Response to Proposed Finding No. 826**

Complaint Counsel has no specific response.

B. RESPONSES TO PROPOSED FINDINGS REGARDING “PATTERSON GENERALLY DID NOT DO BUSINESS WITH BUYING GROUPS, BUT ITS REGIONAL OFFICES COULD DO SO IF THEY CHOSE”

827. Patterson generally did not do business with buying groups before 2013, but Patterson’s regional offices were free to deal with buying groups if they chose. (Guggenheim, Tr. 1601-02).

**Response to Proposed Finding No. 827**

Complaint Counsel has no specific response.

828. During the alleged conspiracy period from 2013 to 2015, Patterson continued its policy of generally not doing business with buying groups, but permitting its regional offices to deal with buying groups if they chose. (Guggenheim, Tr. 1601-04).

**Response to Proposed Finding No. 828**

The Proposed Finding is misleading and not supported by the cited testimony. In the cited testimony Guggenheim was not asked about the alleged conspiracy period of 2013 to 2015.

Instead he was asked if prior to the time of an e-mail with Benco’s Cohen on February 8, 2013,

Patterson had come up with a uniform way of dealing with buying groups or whether at that time Patterson had such a policy. (Guggenheim, Tr. 1600-1602, 1603-1604).

C. RESPONSES TO PROPOSED FINDINGS REGARDING “SCHEIN EVALUATED BUYING GROUP OPPORTUNITIES ON A CASE BY CASE BASIS, AND SOMETIMES BID FOR BUYING GROUP BUSINESS”

829. Schein evaluated the opportunity to bid for buying group business on a case by case basis between 2011 and 2015; sometimes Schein bid for buying group business, and sometimes Schein decided not to bid for buying group business, between 2011 and 2015. (Titus, Tr. 5280; RX2957 at 12-13).

**Response to Proposed Finding No. 829**

The Proposed Finding is misleading, inaccurate, incomplete, and contrary to the weight of evidence insofar as it suggests that Schein was not a part of the conspiracy because it bid on some buying groups between 2011 and 2015. Record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

830. Dr. Marshall observed instances in which Schein bid for the business of buying groups between 2011 and 2015. (Carlton, Tr. 5366-67).

**Response to Proposed Finding No. 830**

This Proposed Finding is misleading and inaccurate because the testimony cited does not support the Proposed Finding – Dr. Marshall is not mentioned on any of the pages cited from Dr. Carlton’s trial transcript. Nonetheless, this Proposed Finding is irrelevant and misleading to the extent that it suggests that it is necessary for Schein’s sales during the relevant period to be reduced to “zero” in order to find that Schein participated in the conspiracy not to bid on buying



groups and changed its conduct with regards to buying groups during the relevant period. Some buying group relationships and sales that occurred during the relevant period were either pre-existing, legacy relationships formed prior the conspiracy or those that were entered into after the conspiracy became difficult to maintain and Schein began competing for buying groups. (CCFF ¶¶ 440-444). Schein executives did not even know that some of these “legacy” buying groups were customers and referred to some as “inherited messes.” (CX2287 at 001; CX2286 at 001). The Proposed Finding is misleading, inaccurate, incomplete, and contrary to the weight of evidence insofar as it suggests that Schein was not a part of the conspiracy because it bid on some buying groups between 2011 and 2015. Indeed, record evidence clearly shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

This Proposed Finding is also unreliable, inaccurate, and misleading to the extent that it relies on Dr. Carlton’s testimony and his Expert Report Table 1 analysis of Schein sales purporting to show lack of parallel conduct or structural break for Schein. (RX2832 at 021-022 (¶ 29) (Carlton Expert Report)). In response to Dr. Carlton’s Table 1, Dr. Marshall explained that if sales for admitted non-buying groups and contested groups are removed from Table 1 in Dr. Carlton’s Expert Report, the total sales reported in that table would be reduced by more than 95 percent. (CCFF ¶ 2036). Dr. Marshall determined that, once sales for admitted non-buying groups and contested groups are removed from Dr. Carlton’s Table 1, the data show that Schein’s sales to dentists in buying groups decreased considerably from 2013 to 2015, followed by a significant

increase from 2016 to 2017. (CCFF ¶ 2037). When Dr. Marshall removed Schein's sales to the admitted non-buying groups and contested groups from Dr. Carlton's Table 1, the pattern of Schein's sales to buying groups is contrary to Schein's representation that there was no change in its conduct during the conspiracy period and entirely consistent with a collusive agreement to avoid doing business with buying groups, as illustrated by Figure 3 in Dr. Marshall's Rebuttal Report. [REDACTED].

To summarize the results, Schein's sales to dentists in buying groups decreased considerably from 2013 to 2015, followed by a significant increase from 2016 to 2017. [REDACTED]

[REDACTED]:

{

[REDACTED]

}

Each of Schein's buying group relationships represented in Figure 3 above is consistent with and explained by Schein's shift in behavior relating to buying groups around the start of the relevant period. (CX7101 at 035 (¶ 83) (Marshall Rebuttal Expert Report)).

831. Dr. Carlton reviewed Schein's sales data and determined that Schein was making sales to buying groups before the alleged conspiracy, during the alleged conspiracy, and after the alleged conspiracy. (Carlton, Tr. 5365).

### **Response to Proposed Finding No. 831**

The Proposed Finding is misleading, incomplete, and vague insofar as it does not specify to which review of Dr. Carlton's reviews or analyses it is referring. To the extent that Proposed Finding is referring to the review in Table 1 of Dr. Carlton's Expert Report (RX2832 at 022-023 (¶30)), it is incomplete and misleading. First, throughout his expert report and analyses, Dr. Carlton employed a definition of "buying groups" that is different from the definition alleged in this matter. (CCFF ¶ 2031; *see also* Carlton, Tr. 5434-5435). Dr. Carlton admitted that the "buying groups" in his Appendix D (supporting the analysis in Table 1 of his expert report) included groups that are not comprised of independent dentists. (CCFF ¶ 2033). Thus, the analysis in Dr. Carlton's Table 1 ("Schein Sales To Buying Groups") are inflated and unreliable because it includes entities that are irrelevant to the allegations in this matter due to Dr. Carlton's use of an overly broad definition.

As explained in more detail in Complaint Counsel's Response to Benco Proposed Finding No. 830, this Proposed Finding is irrelevant and misleading to the extent that it suggests that it is necessary for Schein's sales during the relevant period to be reduced to "zero" in order to find that Schein participated in the conspiracy not to bid on buying groups and changed its conduct with regards to buying groups during the relevant period. *See* Complaint Counsel's Response to Benco Proposed Finding No. 830.

As explained in more detail in Complaint Counsel’s Response to Benco Proposed Finding No. 830, this Proposed Finding is irrelevant and misleading to the extent that it suggests that it is necessary for Schein’s sales during the relevant period to be reduced to “zero” in order to find that Schein participated in the conspiracy not to bid on buying groups and changed its conduct with regards to buying groups during the relevant period. *See* Complaint Counsel’s Response to Benco Proposed Finding No. 830.

**832.** [REDACTED]

**Response to Proposed Finding No. 832**

The Proposed Finding is misleading, incomplete, and inconsistent with the evidence in this case.

The Proposed Finding appears to reference [REDACTED]

[REDACTED]. In Appendix D, Dr.

Carlton groups alleged buying groups into categories, but many of these groups are not buying groups as defined in this matter, and Dr. Carlton’s categories are based on flawed constructs and unreliable sources. As an initial matter, Dr. Carlton employed a broader definition of “buying group” than the definition alleged in this matter throughout his expert report, rendering his analysis in Appendix D and Table 1 of buying groups that Schein purportedly did business with during the relevant period overly broad, inflated, and unreliable. (CCFF ¶ 2031). Although Dr. Carlton employs a different definition of “buying groups” than what is alleged in this matter, he conceded at trial that he does not conclude anywhere in his report that the definition employed by the FTC’s expert Dr. Marshall is unreasonable. (Carlton, Tr. 5437 (“Q. You don’t conclude anywhere in your report that Dr. Marshall’s definition of a buying group is unreasonable; correct? A. I -- I don’t say that in -- in the report.”)). Dr. Carlton also admitted that he did not personally investigate whether the entities that he lists in Appendix D are actually buying groups.

(Carlton, Tr. 5438 (“Q. Okay. And you didn’t personally investigate whether any of these entities are actually buying groups; correct? A. Yes.”)).

Dr. Carlton admitted that the “four categories” referenced in Appendix D of his expert report, include groups that are not comprised of independent dentists, rendering his analyses overly inflated and unreliable. (CCFF ¶ 2033; Carlton, Tr. 5438 (“Q. And that’s buying groups including but not limited to buying groups of independent dentists, as you discussed with Mr. Kass this morning; right? A. Exactly.”)). In addition, Dr. Carlton’s “four categories” groupings are also unreliable for the following specific reasons:

#### **Group B “Buying Groups” In Carlton Report Appendix D**

Dr. Carlton testified that buying groups in of Carlton Appendix D, Group B (“Group B”) are buying groups that Schein has identified as comprised of independent dentists. (Carlton, Tr. 5439). To make the list of groups for Group B, Dr. Carlton was “provided testimony or interrogatories indicating that [these groups] are composed...of independent dentists” and that this was the only criteria he used in selecting these groups (Carlton, Tr. 5439).

Dr. Carlton’s testimony about these groups debunk his opinion that these groups are relevant to show that Schein negotiated and offered discounts to buying groups during the relevant period – when in fact, it is not clear that these groups are actually buying groups within the definition alleged in this matter and/or Schein dealt with these groups either before or after the relevant period (2011-2015).

- **Ciraden:** Dr. Carlton claims that “Ciraden was a buying group comprised of independent dentists. Ciraden had a relationship with Schein from 2005 to 2010.” (RX2382 at 123 (Carlton Expert Report); Carlton, Tr. 5439). This timeframe falls before the relevant time period and should not be included in Appendix D or Table 1. Dr. Carlton also acknowledged that he identified in his report that Ciraden’s management disbanded in

approximately 2011 and that there was no more buying group after that time. (Carlton, Tr. 5440-5441).

- **Mastermind Group**: Dr. Carlton conceded that Schein's relationship with the Mastermind Group began after the end of the alleged conspiracy period. (Carlton, Tr. 5442).
- **Dental Smart**: Dr. Carlton states that "Schein contends that Dental Smart possibly falls within the FTC's definition of a buying group." (RX2832 at 123 (Carlton Expert Report); Carlton, Tr. 5444). Dr. Carlton testified that all he is saying in this sentence is that there is a possibility, according to Schein, that Dental Smart is a buying group." (Carlton, Tr. 5444).

#### **Group C "Buying Groups" In Carlton Report Appendix D**

Dr. Carlton testified that buying groups in of Carlton Appendix D, Group C ("Group C") are "Buying Groups That Describe Their Members As Independent Dentists." (Carlton, Tr. 5445; RX2832 at 125 (Carlton Expert Report)). Dr. Carlton made clear that DSOs are excluded from his definition of a buying group. (Carlton, Tr. 5445). Dr. Carlton testified that it was intention to exclude DSOs from his Table 1 because it is his understanding that DSOs are "not part of this case." (Carlton, Tr. 5445). However, some groups in Group C appear to be DSOs or undeterminable entities and, therefore, should be excluded from Dr. Carlton's analysis. Others should be excluded because they fall outside of the relevant period, similar to some of the entities identified in Group B discussed above.

- **Comfort Dental**: Dr. Carlton admitted that he "might have seen documents" where Schein referred to Comfort Dental as an elite DSO. (Carlton, Tr. 5446). He agreed that if Comfort Dental were a DSO, it would not be properly included within his Group C. (Carlton, Tr. 5446-5447). Dr. Carlton admitted that he included Comfort Dental in his

Group C because “Schein identified this as one of the 44 groups that are buying groups.” (Carlton, Tr. 5446).

- **Cordon Palmer**: Dr. Baytosh was an officer at Cordon Palmer. Dr. Carlton testified that he did not include Dr. Baytosh’s deposition in the list of depositions he relied on in preparing his report and that he did not rely on Dr. Baytosh’s testimony in his conclusion that Cordon Palmer should be included in Group C. (Carlton, Tr. 5448-5449). Dr. Carlton further admitted that he had never even read Dr. Baytosh’s deposition. (Carlton, Tr. 5449-5450).
- **Teeth Tomorrow**: Dr. Carlton agreed that the relationship between Teeth Tomorrow and Schein began after the conspiracy period alleged by the FTC. (Carlton, Tr. 5451).
- **Klear Impakt**: Dr. Carlton agreed that it is fair to say that Schein’s agreement with Klear Impakt became effective no earlier than August 2015. (Carlton, Tr. 5452).

Dr. Carlton admitted that he did not interview anybody at any of the entities that he lists in Group C. (Carlton, Tr. 5445). Instead, Dr. Carlton explained that he relied on his staff’s “internet searches” that provided information on the dentists listed above in Group C. (Carlton, Tr. 5445). Dr. Carlton testified that he did not consider whether the information his staff googled to determine whether Group C was accurate or inaccurate. (Carlton, Tr. 5445).

Dr. Carlton also clarified that with the entities in Group C he is “taking the categorizations as a given” and “relying on other people’s characterizations” for his groupings. (Carlton, Tr. 5445-5446). Accordingly, in addition to being irrelevant for the reasons previously described in this section, the entities in Group C should be excluded because his opinions improperly rely on the interpretation of written or verbal statements by others.

#### **Group A “Buying Groups” In Carlton Report Appendix D**

Dr. Carlton testified that buying groups in Carlton Appendix D, Group A (“Group A”) are “Buying Groups That The FTC Has Identified As Comprised Of Independent Dentists.” (Carlton, Tr. 5454; RX2832 at 118 (Carlton Expert Report)). These should be excluded because Dr. Carlton’s analysis for these are, again, based on his inappropriate interpretation of facts, among other reasons:

- **Smile Source**: for Smile Source, Dr. Carlton again concedes that he did not do any economic analysis regarding the offer that Schein made to Smile Source in 2014 other than “noting it.” Again, Dr. Carlton stated that this analysis in his report is “reporting what I understand to be the facts.” (Carlton, Tr. 5452-5453).
- **Steadfast Medical**: Dr. Carlton’s representation that Steadfast Medical had agreements with Schein from 2011 to 2017 is also based on his understanding of the facts. (Carlton, Tr. 5453). When confronted with a Schein email, attaching a spreadsheet indicating sales to Steadfast in 2010, Dr. Carlton admitted that if the spreadsheet was accurate, then he agrees that Schein’s relationship with Steadfast actually began in 2010, not 2011. (Carlton, Tr. 5455 (“If this is accurate, the [Steadfast-Schein] relationship would have begun in 2010, yes.”)).

**833.** [REDACTED]

### **Response to Proposed Finding No. 833**

This Proposed Finding is inaccurate and misleading [REDACTED]

Dr. Marshall described “Buying groups that the FTC has identified are buying groups” is one of four categories that Dr. Carlton claimed to identify as buying groups. (CX7101 at 32-33 (¶ 80) (Marshall Rebuttal Expert Report)).



This Proposed Finding is irrelevant and should be disregarded to the extent that Benco is attempting to use this Proposed Finding based on expert testimony to establish facts in violation of the Court's Order On Post-Trial Briefs. (Order On Post-Trial Briefs at 3 ("Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents.")). This Proposed Finding is irrelevant, inaccurate, and should be disregarded to the extent that it suggests [REDACTED]

[REDACTED]. Both this Court and Dr. Marshall acknowledged that Dr. Marshall is not a fact-finder. (Marshall Tr. at 2884-2885 (J. Chappell: "My advice to both parties, experts are not fact witnesses"), 2946 (Marshall testified that he is "not offering an opinion about the facts.")). As explained in more detail in Complaint Counsel's Response to Benco Proposed Finding No. 830, this Proposed Finding is irrelevant and misleading to the extent that it suggests that it is necessary for Schein's sales during the relevant period to be reduced to "zero" in order to find that Schein participated in the conspiracy not to bid on buying groups and changed its conduct with regards to buying groups during the relevant period. *See* Complaint Counsel's Response to Benco Proposed Finding No. 830.

**834.** [REDACTED]

#### **Response to Proposed Finding No. 834**

This Proposed Finding is irrelevant to the extent that it suggests [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (CCFF ¶

2031). Dr. Carlton admitted that the "buying groups" in Appendix D of his expert report, which

form the basis for his analysis in Table 1, include groups that are not comprised of independent dentists. (CCFF ¶ 2033).

This Proposed Finding is irrelevant and should be disregarded to the extent that Benco is attempting to use this Proposed Finding based on expert testimony to establish facts in violation of the Court's Order On Post-Trial Briefs. (Order On Post-Trial Briefs at 3 ("Do not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents.")). This Proposed Finding is irrelevant, inaccurate, and should be disregarded to the extent that it suggests [REDACTED]

[REDACTED]. Both this Court and Dr. Marshall acknowledged that Dr. Marshall is not a fact-finder. (Marshall Tr. at 2884-2885 (J. Chappell: "My advice to both parties, experts are not fact witnesses"), 2946 (Marshall testified that he is "not offering an opinion about the facts.")). As explained in more detail in Complaint Counsel's Response to Benco Proposed Finding No. 830, this Proposed Finding is irrelevant and misleading to the extent that it suggests that it is necessary for Schein's sales during the relevant period to be reduced to "zero" in order to find that Schein participated in the conspiracy not to bid on buying groups and changed its conduct with regards to buying groups during the relevant period. *See* Complaint Counsel's Response to Benco Proposed Finding No. 830.

**835.** [REDACTED]

#### **Response to Proposed Finding No. 835**

Complaint Counsel does not disagree with the Proposed Finding but adds that Dr. Carlton employed a broader definition of "buying group" than the definition alleged in this matter throughout his expert report, including in his analysis of Schein's sales data in his Table 1. (CCFF ¶ 2031). Dr. Carlton admitted that the "buying groups" in Appendix D of his expert

report, which form the basis for his analysis in Table 1, include groups that are not comprised of independent dentists. (CCFF ¶ 2033). For these reasons, the analysis of Schein’s sales during the relevant period in Dr. Carlton’s Table 1 (“Schein Sales To Buying Groups”) is overly inflated and unreliable because it includes entities that are irrelevant to the allegations in this matter due to Dr. Carlton use of an overly broad “buying group” definition.

836. [REDACTED]

**Response to Proposed Finding No. 836**

This Proposed Finding is incomplete and misleading because it omits that Dr. Carlton employed a broader definition of “buying group” than the definition alleged in this matter throughout his expert report, including in his analysis of Schein’s sales data in his Table 1. (CCFF ¶ 2031). Dr. Carlton admitted that the “buying groups” in Appendix D of his expert report, which form the basis for his analysis in Table 1, include groups that are not comprised of independent dentists. (CCFF ¶ 2033). For these reasons, the analysis of Schein’s sales during the relevant period in Dr. Carlton’s Table 1 (“Schein Sales To Buying Groups”) is overly inflated and unreliable because it includes entities that are irrelevant to the allegations in this matter due to Dr. Carlton use of an overly broad “buying group” definition. *See also* Complaint Counsel’s Response to Benco Proposed Finding No. 832.

This Proposed Finding is irrelevant and misleading to the extent that it suggests that it is necessary for Schein’s sales during the relevant period to be reduced to “zero” in order to find that Schein participated in the conspiracy not to bid on buying groups and changed its conduct with regards to buying groups during the relevant period. Some buying group relationships and sales that occurred during the relevant period were either pre-existing, legacy relationships formed prior the conspiracy or those that were entered into after the conspiracy became difficult

to maintain and Schein began competing for buying groups. (CCFF ¶¶ 440-444). Schein executives did not even know that some of these “legacy” buying groups were customers and referred to some as “inherited messes.” (CX2287 at 001; CX2286 at 001). The Proposed Finding is misleading, inaccurate, incomplete, and contrary to the weight of evidence insofar as it suggests that Schein was not a part of the conspiracy because it bid on some buying groups between 2011 and 2015. Indeed, record evidence clearly shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C). This Proposed Finding is also unreliable, inaccurate, and misleading for reasons explained in Complaint Counsel’s Response to Benco Proposed Finding No. 830 to the extent that it relies on Dr. Carlton’s testimony and his Expert Report Table 1 analysis of Schein sales that purport to show lack of parallel conduct or structural break for Schein. (RX2832 at 021-022 (¶ 29) (Carlton Expert Report)).

**837.** [REDACTED]

**Response to Proposed Finding No. 837**

For reasons explained in more detail in Complaint Counsel’s Response to Benco Proposed Finding Nos. 830 and 836, this Proposed Finding is irrelevant, inaccurate, incomplete, and misleading to the extent that Benco is referencing Dr. Carlton’s Table 1 to support his opinion that there was no parallel conduct or structural break in this case. *See* Complaint Counsel’s Response to Benco Proposed Finding Nos. 830 and 836. As described in more detail in

Complaint Counsel's Response to Benco Proposed Finding No. 830, in response to Dr. Carlton's Table 1, Dr. Marshall explained that if sales for admitted non-buying groups and contested groups are removed from Table 1 in Dr. Carlton's Expert Report, the total sales reported in that table would be reduced by more than 95 percent. (CCFF ¶ 2036). Dr. Marshall determined that, once sales for admitted non-buying groups and contested groups are removed from Dr. Carlton's Table 1, the data show that Schein's sales to dentists in buying groups decreased considerably from 2013 to 2015, followed by a significant increase from 2016 to 2017. (CCFF ¶ 2037). When Dr. Marshall removed Schein's sales to the admitted non-buying groups and contested groups from Dr. Carlton's Table 1, the pattern of Schein's sales to buying groups is contrary to Schein's representation that there was no change in its conduct during the conspiracy period and entirely consistent with a collusive agreement to avoid doing business with buying groups, as illustrated by Figure 3 in Dr. Marshall's Rebuttal Report. [REDACTED]

[REDACTED].

This Proposed Finding is also incomplete and misleading because it omits that Dr. Carlton employed a broader definition of "buying group" than the definition alleged in this matter throughout his expert report, including in his analysis of Schein's sales data in his Table 1. (CCFF ¶ 2031). Dr. Carlton admitted that the "buying groups" in Appendix D of his expert report, which form the basis for his analysis in Table 1, include groups that are not comprised of independent dentists. (CCFF ¶ 2033). For these reasons, the analysis of Schein's sales during the relevant period in Dr. Carlton's Table 1 ("Schein Sales To Buying Groups") is overly inflated and unreliable because it includes entities that are irrelevant to the allegations in this matter due to Dr. Carlton use of an overly broad "buying group" definition.

This Proposed Finding is also vague [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(RX2832 at 021-022 (Carlton Expert Report)). Dr. Carlton used Appendix D and Table 1 to support his opinion that Schein negotiated and offered discounts to buying groups during the relevant period. (RX2832 at 021-022 (Carlton Expert Report)). As explained in more detail in Complaint Counsel's Response to Benco Proposed Finding No. 832, the categories in Dr. Carlton's Appendix D are based on flawed constructs and unreliable sources, rendering these inputs into and results of Dr. Carlton's Table 1 similarly flawed and unreliable.

838. Dr. Carlton's calculations of Schein's business with buying groups was conservative and tend to understate Schein's business with buying groups. (Carlton, Tr. 5371).

**Response to Proposed Finding No. 838**

For reasons explained in more detail in Complaint Counsel's Response to Benco Proposed Finding Nos. 830, 832, and 836, this Proposed Finding is misleading to the extent that Benco relies on Dr. Carlton's analysis in Table 1 to support a claim that there was no parallel conduct or structural break in this case because Dr. Carlton's opinion and analyses in Appendix D and Table 1 are flawed and unreliable. *See* Complaint Counsel's Response to Benco Proposed Finding Nos. 830, 832, and 836. As described in more detail in Complaint Counsel's Response to Benco Proposed Findings No. 830, in response to Dr. Carlton's Table 1, Dr. Marshall explained that if sales for admitted non-buying groups and contested groups are removed from Table 1 in Dr. Carlton's Expert Report, the total sales reported in that table would be reduced by more than 95 percent. (CCFF ¶ 2036). Dr. Marshall determined that, once sales for admitted non-buying groups and contested groups are removed from Dr. Carlton's Table 1, the data show that Schein's sales to dentists in buying groups decreased considerably from 2013 to 2015, followed by a significant increase from 2016 to 2017. (CCFF ¶ 2037). When Dr. Marshall removed

Schein's sales to the admitted non-buying groups and contested groups from Dr. Carlton's Table 1, the pattern of Schein's sales to buying groups is contrary to Schein's representation that there was no change in its conduct during the conspiracy period and entirely consistent with a collusive agreement to avoid doing business with buying groups, as illustrated by Figure 3 in Dr. Marshall's Rebuttal Report. [REDACTED]

839. Even if one adopted different definitions of buying groups, it would not change Dr. Carlton's conclusions. (Carlton, Tr. 5456-5457).

**Response to Proposed Finding No. 839**

This Proposed Finding is irrelevant, inaccurate, incomplete, and misleading to the extent that Benco is using Dr. Carlton's Table 1 to support his opinion that there was no parallel conduct or structural break in this case for reasons explained in Complaint Counsel's Response to Benco Proposed Finding Nos. 830, 832, and 836. As described in more detail in Complaint Counsel's Response to Benco Proposed Finding No. 830, in response to Dr. Carlton's Table 1, Dr. Marshall explained that if sales for admitted non-buying groups and contested groups are removed from Table 1 in Dr. Carlton's Expert Report, the total sales reported in that table would be reduced by more than 95 percent. (CCFF ¶ 2036). Dr. Marshall determined that, once sales for admitted non-buying groups and contested groups are removed from Dr. Carlton's Table 1, the data show that Schein's sales to dentists in buying groups decreased considerably from 2013 to 2015, followed by a significant increase from 2016 to 2017. (CCFF ¶ 2037). When Dr. Marshall removed Schein's sales to the admitted non-buying groups and contested groups from Dr. Carlton's Table 1, the pattern of Schein's sales to buying groups is contrary to Schein's representation that there was no change in its conduct during the conspiracy period and entirely consistent with a collusive agreement to avoid doing business with buying groups, as illustrated

by Figure 3 in Dr. Marshall's Rebuttal Report. [REDACTED]

840. If the buying groups that are in Dr. Carlton's group B or group C change, the exact numbers would change, but there is no evidence that it would undermine Dr. Carlton's conclusions. (Carlton, Tr. 5457).

**Response to Proposed Finding No. 840**

This Proposed Finding is irrelevant, inaccurate, incomplete, and misleading to the extent that Benco is using Dr. Carlton's Table 1 to support his opinion that there was no parallel conduct or structural break in this case for reasons explained in Complaint Counsel's Response to Benco Proposed Finding Nos. 830, 832, and 836. As described in more detail in Complaint Counsel's Response to Benco Proposed Finding No. 830, in response to Dr. Carlton's Table 1, Dr. Marshall explained that if sales for admitted non-buying groups and contested groups are removed from Table 1 in Dr. Carlton's Expert Report, the total sales reported in that table would be reduced by more than 95 percent. (CCFF ¶ 2036). Dr. Marshall determined that, once sales for admitted non-buying groups and contested groups are removed from Dr. Carlton's Table 1, the data show that Schein's sales to dentists in buying groups decreased considerably from 2013 to 2015, followed by a significant increase from 2016 to 2017. (CCFF ¶ 2037). When Dr. Marshall removed Schein's sales to the admitted non-buying groups and contested groups from Dr. Carlton's Table 1, the pattern of Schein's sales to buying groups is contrary to Schein's representation that there was no change in its conduct during the conspiracy period and entirely consistent with a collusive agreement to avoid doing business with buying groups, as illustrated by Figure 3 in Dr. Marshall's Rebuttal Report. [REDACTED]

841. [REDACTED]



**Response to Proposed Finding No. 841**

This Proposed Finding is irrelevant and misleading to the extent that it [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

Some buying group relationships and sales that occurred during the relevant period were either pre-existing, legacy relationships formed prior the conspiracy or those that were entered into after the conspiracy became difficult to maintain and Schein began competing for buying groups. (CCFF ¶¶ 440-444). Schein executives did not even know that some of these “legacy” buying groups were customers and referred to some as “inherited messes.” (CX2287 at 001; CX2286 at 001).

The Proposed Finding is misleading, inaccurate, incomplete, and contrary to the weight of evidence insofar as it suggests that Schein was not a part of the conspiracy because it bid on some buying groups between 2011 and 2015. Indeed, record evidence clearly shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

This Proposed Finding is also unreliable, inaccurate, and misleading to the extent that it suggests that Dr. Marshall’s response to Dr. Carlton’s analyses does not support Schein’s

participation in the conspiracy between 2011 and 2015. *See* Complaint Counsel's Response to Benco Proposed Finding No. 830. Rather, in response to Dr. Carlton's Table 1, Dr. Marshall explained that if sales for admitted non-buying groups and contested groups are removed from Table 1 in Dr. Carlton's Expert Report, the total sales reported in that table would be reduced by more than 95 percent. (CCFF ¶ 2036). Dr. Marshall determined that, once sales for admitted non-buying groups and contested groups are removed from Dr. Carlton's Table 1, the data show that Schein's sales to dentists in buying groups decreased considerably from 2013 to 2015, followed by a significant increase from 2016 to 2017. (CCFF ¶ 2037). When Dr. Marshall removed Schein's sales to the admitted non-buying groups and contested groups from Dr. Carlton's Table 1, the pattern of Schein's sales to buying groups is contrary to Schein's representation that there was no change in its conduct during the conspiracy period and entirely consistent with a collusive agreement to avoid doing business with buying groups, as illustrated by Figure 3 in Dr. Marshall's Rebuttal Report. [REDACTED]

[REDACTED]. To summarize the results, Schein's sales to dentists in buying groups decreased considerably from 2013 to 2015, followed by a significant increase from 2016 to 2017. [REDACTED]

[REDACTED]



}

Each of Schein's buying group relationships represented in Figure 3 above is consistent with and explained by Schein's shift in behavior relating to buying groups around the start of the relevant period. (CX7101 at 035 (¶ 83) (Marshall Rebuttal Expert Report)).

**842.**   


**Response to Proposed Finding No. 842**

This Proposed Finding is irrelevant and misleading to the extent that it suggests that it is necessary for Schein's sales during the relevant period to be reduced to "zero" in order to find that Schein participated in the conspiracy not to bid on buying groups and changed its conduct with regards to buying groups during the relevant period. Some buying group relationships and

sales that occurred during the relevant period were either pre-existing, legacy relationships formed prior the conspiracy or those that were entered into after the conspiracy became difficult to maintain and Schein began competing for buying groups. (CCFF ¶¶ 440-444). Schein executives did not even know that some of these “legacy” buying groups were customers and referred to some as “inherited messes.” (CX2287 at 001; CX2286 at 001).

The Proposed Finding is misleading, inaccurate, incomplete, and contrary to the weight of evidence insofar as it suggests that Schein was not a part of the conspiracy because it bid on some buying groups between 2011 and 2015. Indeed, record evidence clearly shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

As explained in more detail in Complaint Counsel’s Response to Benco Proposed Finding No. 830, this Proposed Finding is also unreliable, inaccurate, and misleading to the extent that it relies on Dr. Carlton’s testimony and his Expert Report Table 1 analysis of Schein sales that purport to show lack of parallel conduct or structural break for Schein. *See* Complaint Counsel’s Response to Benco Proposed Finding No. 830.

**843.** [REDACTED]

**Response to Proposed Finding No. 843**

Complaint Counsel has no specific response.

**844.** [REDACTED]

**Response to Proposed Finding No. 844**

The Proposed Finding is misleading, incomplete, and vague insofar as it does not disclose that Dental Gator was formed by MB2, a DSO that did business with Schein, and that any discounts to Dental Gator were a result of the MB2 contract with Schein. The Proposed Finding is also contrary to the weight of the evidence as Schein did not offer discounts directly to Dental Gator. Dental Gator became a customer of Schein Special Markets when MB2 Solutions (“MB2”), an elite DSO customer of Schein that created Dental Gator, extended the pricing it received from Schein under a 2014 agreement (“2014 MB2 Agreement”) to Dental Gator, initially without Schein’s knowledge. (CCFF ¶¶ 1778, 1783, 1789-1796). The 2014 MB2 Agreement limited MB2 from extending Schein’s MB2-specific pricing and prohibited MB2 from forming a buying group. (CCFF ¶¶ 1791-1792). When Schein learned that MB2 formed buying group Dental Gator without its permission and extended its Schein pricing to it, Schein deemed it a breach of the 2014 MB2 agreement. (CCFF ¶¶ 1796). Schein informed Dental Gator that if “it looks at any time like a GPO [Schein] will disenroll” and imposed advertising guidelines to ensure that Dental Gator did not “represent in their marketing anything that looks like a GPO.” (CCFF ¶¶ 1797-1800; *see also* CCFF ¶¶ 1812-1817). Sullivan and other executives sought to end the relationship with Dental Gator, but Schein was worried about losing MB2’s business in doing so, which was a long-term and top 50 customer for Special Markets. (CCFF ¶¶ 1801-1806, 1776-1782). Schein was “accommodating [Dental Gator] for unique reasons” but feared “open[ing] the floodgates on buying groups.” (CCFF ¶¶ 1811 (citing CX0188 at 001), 1802-1810). Indeed, Schein would not have tolerated Dental Gator but for its relationship with MB2, and the record evidence shows that Schein never bid on Dental Gator, did not have a separate contract with Dental Gator, and that Dental Gator became a Schein customer without its knowledge. (CCFF

¶¶ 1790, 1795, 1810). As such, the Proposed Finding is contrary to the weight of the evidence and should be disregarded.

845. [REDACTED]

**Response to Proposed Finding No. 845**

The Proposed Finding is misleading, incomplete, and vague [REDACTED]

[REDACTED] Dental Gator became a customer of Schein Special Markets when MB2 Solutions (“MB2”), an elite DSO customer of Schein that created Dental Gator, extended the pricing it received from Schein under a 2014 agreement (“2014 MB2 Agreement”) to Dental Gator, initially without Schein’s knowledge. (CCFF ¶¶ 1778, 1783, 1789-1796). The 2014 MB2 Agreement limited MB2 from extending Schein’s MB2-specific pricing and prohibited MB2 from forming a buying group. (CCFF ¶¶ 1791-1792). When Schein learned that MB2 formed buying group Dental Gator without its permission and extended its Schein pricing to it, Schein deemed it a breach of the 2014 MB2 agreement. (CCFF ¶¶ 1796). Schein informed Dental Gator that if “it looks at any time like a GPO [Schein] will disenroll” and imposed advertising guidelines to ensure that Dental Gator did not “represent in their marketing anything that looks like a GPO.” (CCFF ¶¶ 1797-1800; *see also* CCFF ¶¶ 1812-1817). Sullivan and other executives sought to end the relationship with Dental Gator, but Schein was worried about losing MB2’s business in doing so, which was a long-term and top 50 customer for Special Markets. (CCFF 1801-1806, 1776-1782). Schein was “accommodating [Dental Gator] for unique reasons” but feared “open[ing] the floodgates on buying groups.” (CCFF ¶¶ 1811 (citing CX0188 at 001), 1802-1810). Indeed, Schein would not have tolerated Dental Gator but for its relationship with MB2, and the record evidence shows that Schein never bid on Dental Gator, did not have a separate contract with Dental Gator, and that Dental Gator became a Schein

customer without its knowledge. (CCFF ¶¶ 1790, 1795, 1810). As such, the Proposed Finding is contrary to the weight of the evidence and should be disregarded.

**846.** [REDACTED]

**Response to Proposed Finding No. 846**

The Proposed Finding is misleading, incomplete, and contrary to the weight of the evidence in this matter [REDACTED]

[REDACTED]. Dental Gator became a customer of Schein Special Markets when MB2 Solutions (“MB2”), an elite DSO customer of Schein that created Dental Gator, extended the pricing it received from Schein under a 2014 agreement (“2014 MB2 Agreement”) to Dental Gator, initially without Schein’s knowledge. (CCFF ¶¶ 1778, 1783, 1789-1796). The 2014 MB2 Agreement limited MB2 from extending Schein’s MB2-specific pricing and prohibited MB2 from forming a buying group. (CCFF ¶¶ 1791-1792). When Schein learned that MB2 formed buying group Dental Gator without its permission and extended its Schein pricing to it, Schein deemed it a breach of the 2014 MB2 agreement. (CCFF ¶¶ 1796). Schein informed Dental Gator that if “it looks at any time like a GPO [Schein] will disenroll” and imposed advertising guidelines to ensure that Dental Gator did not “represent in their marketing anything that looks like a GPO.” (CCFF ¶¶ 1797-1800; *see also* CCFF ¶¶ 1812-1817). Sullivan and other executives sought to end the relationship with Dental Gator, but Schein was worried about losing MB2’s business in doing so, which was a long-term and top 50 customer for Special Markets. (CCFF ¶¶ 1801-1806, 1776-1782). Schein was “accommodating [Dental Gator] for unique reasons” but feared “open[ing] the floodgates on buying groups.” (CCFF ¶¶ 1811 (citing CX0188 at 001), 1802-1810). Indeed, Schein would not have tolerated Dental Gator but for its relationship with MB2, and the record evidence shows

that Schein never bid on Dental Gator, did not have a separate contract with Dental Gator, and that Dental Gator became a Schein customer without its knowledge. (CCFF ¶¶ 1790, 1795, 1810). As such, the Proposed Finding is contrary to the weight of the evidence and should be disregarded.

847. [REDACTED]

**Response to Proposed Finding No. 847**

The Proposed Finding is misleading, incomplete, and contrary to the weight of the evidence in this matter [REDACTED]

[REDACTED]. Dental Gator became a customer of Schein Special Markets when MB2 Solutions (“MB2”), an elite DSO customer of Schein that created Dental Gator, extended the pricing it received from Schein under a 2014 agreement (“2014 MB2 Agreement”) to Dental Gator, initially without Schein’s knowledge. (CCFF ¶¶ 1778, 1783, 1789-1796). The 2014 MB2 Agreement limited MB2 from extending Schein’s MB2-specific pricing and prohibited MB2 from forming a buying group. (CCFF ¶¶ 1791-1792). When Schein learned that MB2 formed buying group Dental Gator without its permission and extended its Schein pricing to it, Schein deemed it a breach of the 2014 MB2 agreement. (CCFF ¶¶ 1796). Schein informed Dental Gator that if “it looks at any time like a GPO [Schein] will disenroll” and imposed advertising guidelines to ensure that Dental Gator did not “represent in their marketing anything that looks like a GPO.” (CCFF ¶¶ 1797-1800; *see also* CCFF ¶¶ 1812-1817). Sullivan and other executives sought to end the relationship with Dental Gator, but Schein was worried about losing MB2’s business in doing so, which was a long-term and top 50 customer for Special Markets. (CCFF ¶¶ 1801-1806, 1776-1782). Schein was “accommodating [Dental Gator] for unique reasons” but feared “open[ing] the floodgates on



buying groups.” (CCFF ¶¶ 1811 (citing CX0188 at 001), 1802-1810). Indeed, Schein would not have tolerated Dental Gator but for its relationship with MB2, and the record evidence shows that Schein never bid on Dental Gator, did not have a separate contract with Dental Gator, and that Dental Gator became a Schein customer without its knowledge. (CCFF ¶¶ 1790, 1795, 1810). As such, the Proposed Finding is contrary to the weight of the evidence and should be disregarded.

**848.** [REDACTED]

**Response to Proposed Finding No. 848**

The Proposed Finding is misleading and vague insofar as [REDACTED]

[REDACTED]. To the extent the Proposed Finding is referring to [REDACTED]

[REDACTED], Complaint Counsel has no specific response.

**849.** [REDACTED]

**Response to Proposed Finding No. 849**

Complaint Counsel notes that, contrary to this Court’s order, Respondent appears to be improperly citing to the testimony of an expert for a proposition of fact. Dr. Marshall is Complaint Counsel’s expert. The Proposed Finding is misleading and vague [REDACTED]

[REDACTED]. Record evidence established that Schein first started making sales to the Dental Cooperative of Utah in 2007. (CCFF ¶ 889).

**850.** [REDACTED]

**Response to Proposed Finding No. 850**

Complaint Counsel notes that, contrary to this Court’s order, Respondent appears to be improperly citing to the testimony of an expert for a proposition of fact. Dr. Marshall is Complaint Counsel’s expert. The Proposed Finding is misleading and vague [REDACTED]

[REDACTED]. Record evidence established that Schein first started making sales to the Dental Cooperative of Utah in 2007. (CCFF ¶ 889).

**851.** [REDACTED]

**Response to Proposed Finding No. 851**

The Proposed Finding is misleading and vague insofar as it [REDACTED]

[REDACTED]. Record evidence establishes that Schein’s decision to work with the Dental Cooperative of Utah was a legacy decision (CCFF ¶ 887) made in or before 2007 (CCFF ¶ 889). By July 2011, Schein’s Muller recognized the Dental Cooperative of Utah as “one of the largest HSD [(Henry Schein Dental)] account[s] (over \$1M).” (CCFF ¶ 446). Shortly after Titus was transferred to HSD in March 2014, she started doing some discovery on the Dental Cooperative of Utah. (CCFF ¶ 890). In April 2014, Hight reported to Foley and Titus that the Dental Cooperative in Utah was a “true GPO” and she reported that she had informed the Schein individual who managed the Dental Coop relationship, “we are very careful about not going GPOs.” (CCFF ¶ 898). Titus believed that “The decision of HSD to treat [the Dental

Cooperative of Utah] as a GPO is a legacy decision that I do not believe, if presented with the same circumstances today, HSD would have embraced.” (CCFF ¶ 886). In 2014, Titus elevated the issue of whether to shut down the Dental Cooperative of Utah to her superiors. (CCFF ¶ 892). Schein stopped doing business with the Dental Cooperative of Utah in 2014. (CCFF ¶ 893). Additional record evidence clearly shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

**852.** [REDACTED]

**Response to Proposed Finding No. 852**

The Proposed Finding is misleading and vague insofar as it [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-op of Utah in 2014. In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta with a list

of “hot topics,” which included “Dental Coop.” (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-op of Utah to her superiors, after which Schein stopped doing business with the Dental Co-op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-op of Utah. (CCFF ¶ 894). In addition, a July 29, 2014 email from Cavaretta also referenced the shutting down of the Dental Co-op of Utah in 214: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other.” (CCFF ¶ 895). Additionally, the Proposed Finding is misleading and inaccurate to the extent it suggests that Schein would not do business with a buying group unless it had an exclusive relationship with it. Record evidence shows that Schein’s 2017 contract with Smile Source is not exclusive. (CCFF ¶ 1733). And record evidence shows that Schein said no to at least one buying group during the conspiracy period that was even willing to be exclusive. (CCFF ¶¶ 799-803).

**853.**

**Response to Proposed Finding No. 853**

The Proposed Finding is misleading and vague insofar as it

[REDACTED]

[REDACTED]. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-op of Utah in 2014. In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta with a list of “hot topics,” which included “Dental Coop.” (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-op of Utah to her superiors, after which Schein stopped doing business with the Dental Co-op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-op of Utah. (CCFF ¶ 894). In addition, a July 29, 2014 email from Cavaretta also referenced the shutting down of the Dental Co-op of Utah in 214: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other.” (CCFF ¶ 895). Additionally, the Proposed Finding is misleading and inaccurate to the extent it suggests that Schein would not do business with a buying group unless it had an exclusive relationship with it. Record evidence shows that Schein’s 2017 contract with Smile Source is not exclusive. (CCFF ¶ 1733). And record evidence shows that Schein said no to at least one buying group during the conspiracy period that was even willing to be exclusive. (CCFF ¶¶ 799-803).

**854.** [REDACTED]

**Response to Proposed Finding No. 854**

The Proposed Finding is misleading and vague insofar as it [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. The record evidence shows that Schein terminated a profitable pre-existing, legacy relationship with the Dental Co-op of Utah in 2014. In March 2014, after Titus was transferred to Henry Schein Dental, she started doing some discovery on the Dental Co-op of Utah. (CCFF ¶¶ 871-873, 890). On May 8, 2014, Titus wrote to her boss, Cavaretta with a list of “hot topics,” which included “Dental Coop.” (CCFF ¶ 873). Titus wanted to speak with her boss about these four companies because they had a GPO component. (CCFF ¶ 873). Titus elevated the issue of whether to shut down the Dental Co-op of Utah to her superiors, after which Schein stopped doing business with the Dental Co-op of Utah in 2014. (CCFF ¶¶ 892-893). The record evidence also shows that the relationship was profitable, as in the 2014 time period, Schein did more than a million dollars of business with the Dental Co-op of Utah. (CCFF ¶ 894). In addition, a July 29, 2014 email from Cavaretta also referenced the shutting down of the Dental Co-op of Utah in 214: “I agree . . . as [Dental Gator] is the second big GPO we will be shutting down. . . Co-op is the other.” (CCFF ¶ 895). Additionally, the Proposed Finding is misleading and inaccurate to the extent it suggests that Schein would not do business with a buying group unless it had an exclusive relationship with it. Record evidence shows that Schein’s 2017 contract with Smile Source is not exclusive. (CCFF ¶ 1733). And record evidence shows that Schein said no to at least one buying group during the conspiracy period that was even willing to be exclusive. (CCFF ¶¶ 799-803).

855. [REDACTED]

**Response to Proposed Finding No. 855**

The Proposed Finding is misleading and vague [REDACTED]

[REDACTED]. To the extent the Proposed Finding is referring to [REDACTED]

[REDACTED], Complaint Counsel has no specific response.

856. [REDACTED]

**Response to Proposed Finding No. 856**

Complaint Counsel has no specific response.

857. [REDACTED]

**Response to Proposed Finding No. 857**

Complaint Counsel notes that, contrary to this Court's order, Respondent appears to be improperly citing to the testimony of an expert for a proposition of fact; CX7101 is Dr. Marshall's Rebuttal Expert Report. The Proposed Finding is misleading and incomplete

[REDACTED]. Complaint Counsel does not allege that Schein ended its existing relationships with buying groups as part of the alleged conspiracy. [REDACTED]

[REDACTED].

Buying groups that Schein entered into a contract with prior to the conspiracy period that continued into the conspiracy period, are irrelevant to Schein's conduct regarding buying groups that approached Schein during the conspiracy period. Thus, the Proposed Finding is not only irrelevant but misleading to the extent it asserts pre-conspiracy buying groups disprove Schein's participation in a conspiracy.

858. [REDACTED]

**Response to Proposed Finding No. 858**

Complaint Counsel notes that, contrary to this Court's order, Respondent appears to be improperly citing to the testimony of an expert for a proposition of fact; CX7101 is Dr. Marshall's Rebuttal Expert Report. The Proposed Finding is misleading and incomplete

[REDACTED]. Complaint Counsel does not allege that Schein ended its existing relationships with buying groups as part of the alleged conspiracy. [REDACTED]

[REDACTED].  
Buying groups that Schein entered into a contract with prior to the conspiracy period that continued into the conspiracy period, are irrelevant to Schein's conduct regarding buying groups that approached Schein during the conspiracy period. Thus, the Proposed Finding is not only irrelevant but misleading [REDACTED]

859. [REDACTED]

**Response to Proposed Finding No. 859**

Complaint Counsel has no specific response.

860. [REDACTED]

**Response to Proposed Finding No. 860**

Complaint counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Marshall is Complaint Counsel's expert. The Proposed Finding is misleading, incomplete, and contrary to the weight of evidence in this



case. Record evidence shows that Steadfast was a pre-existing, legacy buying group relationship, which was shut down during the conspiracy period. The evidence shows that Schein had a relationship and sold to Steadfast in 2010 or prior to the conspiracy. (CX2667 (lines 174-177, 5238-5244 showing sales to Steadfast in 2010); *see also* CX0306 (Foley, IHT at 91 (“[Steadfast] first came to special markets in 2009 or ‘10”)). The evidence also shows that Schein shut down Steadfast in June 2014 during the conspiracy period. (CCFF ¶¶ 871-885). On March 25, 2014, Titus sent an email to her boss Cavaretta 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 \$150K last year. Rick H was asked repeatedly to deal with it, but nothing ever happened.” (CCFF ¶¶ 875, 871-872). On May 8, 2014, Titus wrote to Cavaretta again, this time about a list of “hot topics,” which included Steadfast and three other groups, that she wanted to speak to Cavaretta about. (CCFF ¶ 873). Titus wanted to speak to Cavaretta about Steadfast because it had a GPO component. (CCFF ¶ 873). Titus then sought permission from her superiors to “shut down” Steadfast, and on June 10, 2014, she did so by writing to the CEO of Steadfast, Jon Staples: “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.” (CCFF ¶¶ 877-878). Titus sought to cease doing business with Steadfast because Steadfast’s “GPO business model,” which had been in place for the entirety of Schein’s relationship with Steadfast, was “counter to [Schein’s] business practices.” (CCFF ¶ 879). Titus received permission from her superiors, Cavaretta and Foley, to terminate the relationship with Steadfast. (CCFF ¶¶ 882-884). After Schein ended its relationship with Steadfast, Titus’ boss, Cavaretta praised her for “shut[ting] down” a GPO; on

June 10, 2014, Cavaretta wrote: “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.” (CCFF ¶ 885 (citing CX2216 at 001)).

**861.** [REDACTED]

**Response to Proposed Finding No. 861**

Complaint counsel notes that, contrary to this Court’s order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Marshall is Complaint Counsel’s expert. The Proposed Finding is misleading, incomplete, and contrary to the weight of evidence in this case. Record evidence shows that Steadfast was a pre-existing, legacy buying group relationship, which was shut down during the conspiracy period. The evidence shows that Schein had a relationship and sold to Steadfast in 2010 or prior to the conspiracy. (CX2667 (lines 174-177, 5238-5244 showing sales to Steadfast in 2010); *see also* CX0306 (Foley, IHT at 91 (“[Steadfast] first came to special markets in 2009 or ‘10”)). The evidence also shows that Schein shut down Steadfast in June 2014 during the conspiracy period. (CCFF ¶¶ 871-885). On March 25, 2014, Titus sent an email to her boss Cavaretta 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 \$150K last year. Rick H was asked repeatedly to deal with it, but nothing ever happened.” (CCFF ¶¶ 875, 871-872). On May 8, 2014, Titus wrote to Cavaretta again, this time about a list of “hot topics,” which included Steadfast and three other groups, that she wanted to speak to Cavaretta about. (CCFF ¶ 873). Titus wanted to speak to Cavaretta about Steadfast because it had a GPO component. (CCFF ¶ 873). Titus then sought permission from her superiors to “shut down” Steadfast, and on June 10, 2014, she did so by writing to the CEO

of Steadfast, Jon Staples: “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.” (CCFF ¶¶ 877-878). Titus sought to cease doing business with Steadfast because Steadfast’s “GPO business model,” which had been in place for the entirety of Schein’s relationship with Steadfast, was “counter to [Schein’s] business practices.” (CCFF ¶ 879). Titus received permission from her superiors, Cavaretta and Foley, to terminate the relationship with Steadfast. (CCFF ¶¶ 882-884). After Schein ended its relationship with Steadfast, Titus’ boss, Cavaretta praised her for “shut[ting] down” a GPO; on June 10, 2014, Cavaretta wrote: “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.” (CCFF ¶ 885 (citing CX2216 at 001)).

**862.** [REDACTED]

**Response to Proposed Finding No. 862**

The Proposed Finding is misleading, incomplete, and vague [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing, at least in part, to the testimony of an expert for a proposition of fact. Dr. Marshall is Complaint Counsel’s expert.

**863.** [REDACTED]

[REDACTED]

**Response to Proposed Finding No. 863**

Complaint Counsel has no specific response.

864. [REDACTED]

**Response to Proposed Finding No. 864**

Complaint Counsel has no specific response.

865. [REDACTED]

**Response to Proposed Finding No. 865**

The Proposed Finding is misleading, incomplete, and vague [REDACTED]

[REDACTED]. Indeed, Table 3 of Dr. Marshall's Expert Report showed that "Schein's sales to dentists in buying groups decreased considerably from 2013 to 2015." [REDACTED]

[REDACTED]. The Proposed Finding is misleading, inaccurate, incomplete, and contrary to the weight of evidence [REDACTED]

[REDACTED]. Record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all

communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

**866.** [REDACTED]

**Response to Proposed Finding No. 866**

The Proposed Finding is misleading and inaccurate [REDACTED]

[REDACTED]. Indeed, Table 3 of Dr. Marshall’s Expert Report showed that “Schein’s sales to dentists in buying groups decreased considerably from 2013 to 2015.” [REDACTED]

[REDACTED]. The Proposed Finding is misleading, inaccurate, incomplete, and contrary to the weight of evidence insofar as it suggests that Schein was not a part of the conspiracy because it bid on or did business with some buying groups between 2011 and 2015. Record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

**867.** [REDACTED]

**Response to Proposed Finding No. 867**

The Proposed Finding is misleading and inaccurate [REDACTED]

[REDACTED]. Indeed, Table 3 of Dr. Marshall’s Expert Report showed that “Schein’s sales to dentists in buying groups

decreased considerably from 2013 to 2015.” [REDACTED]

[REDACTED]. The Proposed Finding is misleading, inaccurate, incomplete, and contrary to the weight of evidence insofar as it suggests that Schein was not a part of the conspiracy because it bid on or did business with some buying groups between 2011 and 2015. Indeed, record evidence establishes that Schein’s conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

**868.** [REDACTED]

**Response to Proposed Finding No. 868**

The Proposed Finding is misleading, incomplete, and unsupported by the cited testimony. Table 3 of Dr. Marshall’s Expert Report did show that “Schein’s sales to dentists in buying groups decreased considerably from 2013 to 2015.” [REDACTED]

[REDACTED]. However, in the cited testimony, Dr. Marshall does not opine that the decrease in 2014 is caused solely by declining sales to Dental Cooperative or Steadfast. [REDACTED]

[REDACTED]. The Proposed Finding is misleading and irrelevant in that the Proposed Finding does not identify how large were the sales to Dental Cooperative and Steadfast and to

what extent those sales would account for the decline in overall sales. The Proposed Finding is misleading, inaccurate, incomplete, and contrary to the weight of evidence [REDACTED]

[REDACTED]. Indeed, record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

869. Dr. Marshall conceded that Schein submitted a bid for the business of Smile Source in 2014. (Marshall, Tr. 2954).

#### **Response to Proposed Finding No. 869**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert and a demonstrative for a proposition of fact. The Proposed Finding is misleading, inaccurate, incomplete, and contrary to the weight of evidence insofar as it suggests that Schein was not a part of the conspiracy because it bid on the Smile Source buying group in 2014. [REDACTED]. (CCFF ¶ 1838). Indeed, record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including

Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

870. Dr. Marshall opined that Schein's bid for Smile Source's business in 2014 was "nonserious." (Marshall, Tr. 2954-2955, 2956).

**Response to Proposed Finding No. 870**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert and a demonstrative for a proposition of fact. Dr. Marshall is Complaint Counsel's expert. The Proposed Finding is misleading, incomplete, and vague in that it relies on the term "nonserious." Record evidence establishes that in 2014, Schein's bid for Smile Source's business offered a low discount, [REDACTED]

[REDACTED]. (CCFF ¶¶ 1829-1837). [REDACTED]

[REDACTED]. (CCFF ¶ 1838).

871. The record evidence confirms that Schein's bid for Smile Source's business in 2014 was serious and sincere. (Maurer, Tr. 4942-46).

**Response to Proposed Finding No. 871**

The Proposed Finding is misleading, incomplete, and vague in that it relies on the terms "serious" and "sincere." Additionally, the Proposed Finding is contrary to the weight of the evidence that establishes that in 2014, Schein's bid for Smile Source's business offered a low discount, [REDACTED].

(CCFF ¶¶ 1829-1837). [REDACTED].

(CCFF ¶ 1838).

872. Even Complaint Counsel concedes that Schein's bid for Smile Source business in 2014 was serious, but describe it as an attempt to cheat. (Marshall, Tr. 2957; *see also* RXD 17 ("Schein Attempted To Cheat.")).

**Response to Proposed Finding No. 872**



Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert and a demonstrative for a proposition of fact. Additionally, the Proposed Finding is misleading, incomplete, and vague in that it relies on the term "serious." Additionally, the Proposed Finding is contrary to the weight of the evidence that establishes that in 2014, Schein's bid for Smile Source's business offered a low discount, [REDACTED] [REDACTED]. (CCFF ¶¶ 1829-1837). [REDACTED] [REDACTED]. (CCFF ¶ 1838). Thus, the Proposed Finding should be disregarded.

873. Dr. Marshall opined that making a high offer to a buying group is different from making no offer. (CX7101 at 7, ¶ (6)C ("Making no offer to a buying group is not the same, from an economic perspective, as making a high offer.")). Thus, Schein's conduct of bidding for Smile Source's business in 2014, regardless of whether it was serious, was not parallel to the conduct of Benco and Patterson, which did not bid for the Smile Source business. (CX7101 at 7, ¶ (6)C).

### **Response to Proposed Finding No. 873**

The Proposed Finding is misleading, inaccurate, incomplete, and contrary to the weight of evidence insofar as it suggests that Schein was not a part of the conspiracy because it bid on the Smile Source buying group in 2014. [REDACTED] [REDACTED]. (CCFF ¶ 1838). Indeed, record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

874. Dr. Marshall conceded that if Schein's bid to Smile Source in 2014 was serious and one does not assume the existence of a conspiracy, its conduct was not parallel to that of Benco and Patterson. (Marshall, Tr. 2958).

**Response to Proposed Finding No. 874**

The Proposed Finding is misleading, incomplete, and contrary to the weight of the evidence insofar as it suggests that Schein was not a part of the conspiracy because it bid on the Smile Source buying group in 2014. [REDACTED]

[REDACTED]. (CCFF ¶ 1838). Indeed record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C). Additionally, the Proposed Finding is contrary to the weight of the evidence that establishes that in 2014, Schein's bid for Smile Source's business offered a low discount, [REDACTED]

[REDACTED]. (CCFF ¶¶ 1829-1837). [REDACTED]

[REDACTED]. (CCFF ¶ 1838).

875. [REDACTED]

**Response to Proposed Finding No. 875**

Complaint Counsel has no specific response.

876. [REDACTED]

**Response to Proposed Finding No. 876**

The Proposed Finding is misleading and irrelevant [REDACTED]

[REDACTED]. Schein entered into an agreement with KlearImpakt after the conspiracy became difficult to maintain. (CCFF ¶ 1318). Additionally, Schein's Sullivan was unaware of Schein's dealings with the KlearImpakt buying groups, and any discussions with it during the conspiracy period, even as of November 2015. (CCFF ¶¶ 843-849). Additionally, Complaint Counsel notes that, contrary to this Court's Order, Respondent is improperly citing, at least in part, to the testimony of an expert for a proposition of fact. Dr. Marshall is Complaint Counsel's expert in this matter.

**877.** [REDACTED]

**Response to Proposed Finding No. 877**

The Proposed Finding is misleading and incomplete [REDACTED]

[REDACTED].

Record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015, following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322). Schein contracted with Klear Impakt after the conspiracy became difficult to maintain and any discussions with it during the conspiracy period were unbeknownst to Schein's Sullivan. (*See* Complaint Counsel's Responses to Schein's Proposed Finding Nos. 802-838).

878. Dr. Marshall's analysis is circular and internally inconsistent: he assumes parallel conduct as evidence of conspiracy, and assumes conspiracy to explain away evidence of non-parallel conduct. (Marshall, Tr. 2889 ("Q. . . . Did you begin with an assumption of a conspiracy in this case? THE WITNESS: Oh, no, sir."); Marshall, Tr. 2952-2953 ("Q. . . . It's important when you're trying to determine whether there is a conspiracy first to have parallel conduct and then to determine whether that parallel conduct can be explained by unilateral behavior or whether it is a result of collusive behavior; is that right? A. Sure."); Marshall, Tr. 2959 ("Q. Okay. So if complaint counsel is right, that Schein actually did intend to win the Smile Source business in 2014, then you would have nonparallel conduct if you don't assume the existence of a conspiracy; fair? A. Well, again, you're saying if you don't assume the existence of a conspiracy. Within the assumption of the existence of a conspiracy, it's a legitimate interpretation of cheating, which happens all the time in conspiracies.")).

### **Response to Proposed Finding No. 878**

The Proposed Finding is misleading and argumentative and not appropriate for a factual finding because the proposed finding is making an argumentative claim about expert analysis.

Additionally, the Proposed Finding is misleading, incomplete, and contrary to the weight of the evidence insofar as it suggests that Schein was not a part of the conspiracy because it bid on the Smile Source buying group in 2014. [REDACTED]

[REDACTED]. (CCFF ¶ 1838). Indeed, record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

**XIV. RESPONSES TO PROPOSED FINDINGS REGARDING “CONTRARY TO DR. MARSHALL’S ASSERTIONS, BENCO, SCHEIN AND PATTERSON EACH ACTED CONSISTENTLY WITH ITS UNILATERAL ECONOMIC SELF-INTEREST”**

**A. RESPONSES TO PROPOSED FINDINGS REGARDING “BENCO’S UNILATERAL ECONOMIC SELF-INTEREST WAS BASED ON ITS VALUE PROPOSITION AND ITS BUSINESS STRATEGY”**

**1. Benco’s Value Proposition Was To Offer Its Customers The Best Possible Support At a Reasonable Price**

879. Benco’s value proposition was to offer customers the best value based on a combination of price and customer support. (RX1113; Cohen, Tr. 671-77; J. Johnson, Tr. 4829-4831; [REDACTED]).

**Response to Proposed Finding No. 879**

Complaint Counsel notes that, contrary to this Court’s Order, Respondent is improperly citing, at least in part, to the testimony of an expert for a proposition of fact. J. Johnson is Benco’s expert and RX2834 is Dr. Johnson’s Expert Report. Complaint Counsel has no specific response on the Proposed Finding with respect to its citations to RX1113 and to Cohen’s testimony.

880. Benco was focused on providing customers with the best possible customer experience. (RX1113; Cohen, Tr. 628-29; J. Johnson, Tr. 4829-4831).

**Response to Proposed Finding No. 880**

Complaint Counsel notes that, contrary to this Court’s Order, Respondent is improperly citing, at least in part, to the testimony of an expert for a proposition of fact. J. Johnson is Benco’s expert. Complaint Counsel has no specific response on the Proposed Finding with respect to its citations to RX1113 and to Cohen’s testimony.

881. Benco has a very “high-touch” sales model. (Cohen, Tr. 675-77; J. Johnson, Tr. 4829-4831).

**Response to Proposed Finding No. 881**

The Proposed Finding is incomplete and vague insofar as it relies on the term “high-touch.” Additionally, Complaint Counsel notes that, contrary to this Court’s Order, Respondent is

improperly citing, at least in part, to the testimony of an expert for a proposition of fact. J. Johnson is Benco's expert.

882. Benco's sales representatives are a very important part of Benco's value proposition. (Cohen, Tr. 675-77; J. Johnson, Tr. 4829-4831; [REDACTED]).

**Response to Proposed Finding No. 882**

Complaint Counsel notes that, contrary to this Court's Order, Respondent is improperly citing, at least in part, to the testimony of an expert for a proposition of fact. J. Johnson is Benco's expert and RX2834 is Dr. Johnson's Expert Report. Complaint Counsel has no specific response on the Proposed Finding with respect to its citations to Cohen's testimony.

883. Benco encourages its representatives to develop one-on-one relationships with their dentist customers. (Cohen, Tr. 675-77; J. Johnson, Tr. 4829-4831).

**Response to Proposed Finding No. 883**

The Proposed Finding is not supported by the cited testimony. Cohen does not testify about "one-on-one" relationships. Additionally, Complaint Counsel notes that, contrary to this Court's Order, Respondent is improperly citing, at least in part, to the testimony of an expert for a proposition of fact. J. Johnson is Benco's expert.

884. Benco has invested heavily in its distribution network. (Cohen, Tr. 629-32; J. Johnson, Tr. 4829-4831; [REDACTED]).

**Response to Proposed Finding No. 884**

The Proposed Finding is misleading, incomplete, and vague insofar as it relies on the term "heavily." Additionally, the Proposed Finding is unsupported by the Cohen testimony, which describes the number of distribution centers but not the level of investment in the centers or in the distribution network. (Cohen, Tr. 629-632). Additionally, Complaint Counsel notes that, contrary to this Court's Order, Respondent is improperly citing, at least in part, to the testimony of an expert for a proposition of fact. J. Johnson is Benco's expert and RX2834 is Dr. Johnson's Expert Report.

885. Because Benco's "high-touch" sales method and its representatives' relationships with customers were so important to Benco's business model, Benco did not want any entity to come between it and its customers. (Cohen, Tr. 445; 671-77).

**Response to Proposed Finding No. 885**

The Proposed Finding is incomplete and vague in that it relies on the term "high-touch."

886. Benco's long-standing policy was not to let any entity come between it and its customers. (Cohen, Tr. 445).

**Response to Proposed Finding No. 886**

The Proposed Finding is misleading and incomplete insofar as it suggests that Benco did not have a no buying group policy. Record evidence establishes that Benco had a longstanding policy of not recognizing or selling to buying groups. (CCFF ¶¶ 394-431).

**2. Benco Did Business With DSOs Because They Permitted Benco To Reduce Its Costs**

887. Dental service organizations, or DSOs, are corporate dental customers. (Cohen, Tr. 675-77; J. Johnson, Tr. 4832; RX2834 at 34, ¶ 54).

**Response to Proposed Finding No. 887**

The Proposed Finding is not supported by the cited Cohen testimony. At the cited pages, Cohen does not testify about Dental service organizations or DSOs. Additionally, Complaint Counsel notes that, contrary to this Court's Order, Respondent is improperly citing, at least in part, to the testimony of an expert for a proposition of fact. J. Johnson is Benco's expert and RX2834 is Dr. Johnson's Expert Report.

888. Because a DSO is the customer, Benco maintains direct contact and communication with the customer. (Ryan, Tr. 1166). Dealing with DSOs is consistent with Benco's policy of not letting any entity come between Benco and its customers. (Ryan, Tr. 1165).

**Response to Proposed Finding No. 888**

Complaint Counsel has no specific response.

889. Because DSOs are under a single corporate umbrella, they centralized decision makers and centralized purchasing agents. (Puckett, Tr. 2205-06; Ryan, Tr. 1166; J. Johnson, Tr.

4832; CX8033 (Cavaretta, Dep. at 42-45); CX8010 (Titus, Dep. at 26, 255-56; CX8005 (Muller, Dep. at 94-95); *see also* RX2832 at 41, ¶ 58).

**Response to Proposed Finding No. 889**

Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing, at least in part, to the testimony of experts for a proposition of fact. J. Johnson refers to Dr. J.

Johnson, Benco’s expert in this matter and RX2832 is Dr. Carlton’s (Schein’s) Expert Report.

As to the other support for this Proposed Finding, Complaint Counsel has no specific response.

890. When purchasing products, DSOs can agree to volume commitments and drive compliance. (Ryan, Tr. 1166-1167; J. Johnson, Tr. 4832; CX8033 (Cavaretta, Dep. at 42-45); CX8010 (Titus, Dep. at 255-256); [REDACTED]; *see also* RX2832 at 41, ¶ 58; RX2833 at 19-20, ¶ 33).

**Response to Proposed Finding No. 890**

The Proposed Finding is misleading and vague as it relies on the terminology “drive compliance.” Additionally, Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing, at least in part, to the testimony of experts for a proposition of fact. J. Johnson refers to Dr. J. Johnson, Benco’s expert in this matter, and RX2834 is Dr. Johnson’s Expert Report. RX2832 is Dr. Carlton’s (Schein’s) Expert Report and RX2833 is Dr. Wu’s (Patterson’s) Expert Report.

891. [REDACTED]

**Response to Proposed Finding No. 891**

Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Marshall refers to Dr. Marshall, Complaint Counsel’s expert in this matter.

892. [REDACTED]

**Response to Proposed Finding No. 892**



Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Marshall refers to Dr. Marshall, Complaint Counsel’s expert in this matter.

893. DSOs can agree to purchase specific baskets of products, which lowers costs for manufacturers. (J. Johnson, Tr. 4832; RX2833 at 19-20, ¶ 33 CX0309 (Muller, IHT at 59-60)).

#### **Response to Proposed Finding No. 893**

Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing, at least in part, to the testimony of experts for a proposition of fact. J. Johnson refers to Dr. J. Johnson, Benco’s expert in this matter, and RX2833 is Dr. Wu’s (Patterson’s) Expert Report. Additionally, the Proposed Finding is misleading and unsupported in that Muller does not use the term “specific basket of products” in his testimony.

894. When DSOs commit to purchase certain volumes of specific products from Benco, Benco is able to negotiate discounted prices from upstream manufacturers. (J. Johnson, Tr. 4833; 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 “spend ... will be delivered,” which makes it easy to “base pricing” on such volume commitments)). RX2832 at 33, ¶ 48; RX2833 at 19-20, ¶ 33).

#### **Response to Proposed Finding No. 894**

The Proposed Finding is unsupported by the cited Muller IHT testimony. At the cited pages, Muller testified: “We get lower pricing from the manufacturers for our segments and then we pass those onto the customer.” (CX0309 (Muller, IHT at 60)). This testimony does not tie discounts from manufacturers to volume commitments. Also, the Proposed Finding is not supported by the cited Meadows testimony. In the cited pages, Meadows does not mention manufacturers giving discounted prices. The cited Foley testimony does not support the Proposed Finding. At the cited pages, Foley is testifying about DSO pricing plans and “chargebacks” from some manufacturers, but the testimony does not connect the volume of purchases with a manufacturer’s willingness to give a discount. (Foley, Tr. 4687-4688). And

Ryan's testimony does not support the Proposed Fact as Ryan's testimony on the cited pages does not tie vendor/manufacturer discounts with volume commitments. Additionally, Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing, at least in part, to the testimony of experts for a proposition of fact. J. Johnson refers to Dr. J. Johnson, Benco's expert in this matter, RX2832 is Dr. Carlton's (Schein's) Expert Report, and RX2833 is Dr. Wu's (Patterson's) Expert Report.

895. DSOs can place large consolidated orders, which reduces distributors' shipping costs. (J. Johnson, Tr. 4832-4833; *see also* RX2833 at 19, ¶ 33).

**Response to Proposed Finding No. 895**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of experts for a proposition of fact. J. Johnson refers to Dr. J. Johnson, Benco's expert in this matter, and RX2833 is Dr. Wu's (Patterson's) Expert Report.

896. DSOs generally place orders electronically, which also reduces distributors' selling costs. (J. Johnson, Tr. 4832).

**Response to Proposed Finding No. 896**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. J. Johnson refers to Dr. J. Johnson, Benco's expert in this matter.

897. Because DSOs have centralized decision makers and purchasing agents, a distributor doesn't need a hundred sales representatives to service a hundred dentists employed by a DSO. (J. Johnson, Tr. 4833; Meadows, Tr. 2523-24; CX8016 (Meadows, Dep. at 271-72); CX8010 (Titus, Dep. at 26); CX0309 (Muller, IHT at 59-60, 63); *see also* RX2832 at 41, ¶ 58; RX2833 at 19-20, ¶ 33).

**Response to Proposed Finding No. 897**

The Proposed Finding is misleading, inaccurate, and not supported by the cited testimony insofar as it suggests that a distributor needs 100 sales representatives to service 100 dental offices (or one sales representative per dentist's office). The cited testimony at most supports the point that

a DSO may not require a sales representative (Meadows, Tr. 2523-24; CX8010 (Titus, Dep. at 26)), but the testimony is silent about how much time or resources a typical dentist's office requires of a sales representative. Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of experts for a proposition of fact. J. Johnson refers to Dr. J. Johnson, Benco's expert in this matter, RX2832 is Dr. Carlton's (Schein's) Expert Report, and RX2833 is Dr. Wu's (Patterson's) Expert Report.

898. Because DSOs have centralized decision makers and purchasing agents, a distributor can service DSO customers with a much smaller sales force. (J. Johnson, Tr. 4833; Meadows, Tr. 2523-24; CX8016 (Meadows, Dep. at 271-72); CX8010 (Titus, Dep. at 26); CX0309 (Muller, IHT at 59-60, 63); [REDACTED]; *see also* RX2832 at 41, ¶ 58).

#### **Response to Proposed Finding No. 898**

The Proposed Finding is misleading, incomplete, and vague insofar as it relies on the phrase "much smaller sales force." The cited testimony at most supports the point that a DSO may not require a sales representative (Meadows, Tr. 2523-24; CX8010 (Titus, Dep. at 26)), but the testimony does not support the claim that "a much smaller sales force" is needed. The cited testimony contains no references to how many sales representatives are required to service specific types and numbers of customers. Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of experts for a proposition of fact. J. Johnson refers to Dr. J. Johnson, Benco's expert in this matter, RX2834 is Dr. Johnson's Expert Report, and RX2832 is Dr. Carlton's (Schein's) Expert Report.

899. DSOs often purchased dental supplies at lower prices than those paid by individual dentists. (Cohen, Tr. 423-424; RX2834 at 34, ¶ 54).

#### **Response to Proposed Finding No. 899**

With respect to the citation to Cohen's testimony in support of this Proposed Finding, Complaint Counsel has no specific response. Complaint Counsel notes that, contrary to this Court's order,

Respondent is improperly citing to the testimony of an expert, at least in part, for a proposition of fact. RX2834 is Dr. Johnson's Expert Report.

900. Benco did business with DSO customers between 2011 and 2015 because they permitted Benco to realize cost savings that offset the lower prices. (Cohen, Tr. 689-690; J. Johnson, Tr. 4833; [REDACTED]).

**Response to Proposed Finding No. 900**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert, at least in part, for a proposition of fact. J. Johnson refers to Dr. J. Johnson, Benco's expert in this matter, and RX2834 is Dr. Johnson's Expert Report. As to the citation of Cohen's testimony for the Proposed Finding, Complaint Counsel has no specific response.

901. Schein was willing to offer discounts to DSOs because DSOs could move the collective volume of purchases of their members and could generate lower costs for the distributor. (RX2832 at 41, ¶ 58).

**Response to Proposed Finding No. 901**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. RX2832 is Dr. Carlton's (Schein's expert) Expert Report.

902. Patterson offered discounts to DSOs on a case-by-case basis; these discounts were possible because DSOs reduced Patterson's costs. (RX2833 at 19-20, ¶ 33).

**Response to Proposed Finding No. 902**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. RX2833 is Dr. Wu's (Patterson's expert) Expert Report.

### 3. **Benco's Unilateral Economic Self-Interest Was Not To Do Business With Buying Groups Because They Came Between Benco and Its Customers and Didn't Permit Benco To Reduce Its Costs**

903. Buying groups are not customers. (Cavaretta, Tr. 5568-69; Cohen, Tr. 861; Ryan, Tr. 1034-36; see also RX2928 (member “[p]urchases are made directly from the vendor”); Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65).

#### **Response to Proposed Finding No. 903**

The Proposed Finding is not supported by the cited testimony. Cavaretta does not testify about buying groups not being customers at the cited pages. The cited Cohen testimony does not include any testimony about buying groups not being customers. The cited Ryan testimony is about Benco's definition of a buying group but does not identify buying groups as not being customers. RX2928 is a screen shot of the Kois Buyers Group website and it does not state that the buying group is not a customer. The Kois, Sr. testimony is about buying group buying power and who makes the purchases for buying group members but does not contain any testimony describing a buying group as not a customer. The Kois, Jr. testimony is about the role the Kois group plays in its members purchases but does not mention anything about buying groups not being customers. The Maurer testimony describes the role Smile Source plays in its members' purchases but does not describe the buying group as not a customer. Additionally, the record evidence establishes that Respondents did view buying groups as customers. (CCFF ¶ 404 (citing CX1372 at 002 (Cohen: Benco does NOT currently recognize as a single *customer* . . . Any kind of GPO.” (emphasis added); ¶ 410 (citing CX1219 at 002 (Ryan: “Benco doesn't recognize GPOs as a single customer”)); *see also* CCRF (Benco) ¶ 903 (CX0305 (Cavaretta, IHT at 119 (“A buying group would be . . . a customer of Henry Schein.”); CX0312 (Fields, IHT at 77 (“Q. So you viewed GPOs or buying groups as customers? A. I do.”))).

904. Buying groups don't decide what to order. (Cavaretta, Tr. 5568-69; Cohen, Tr. 861; Ryan, Tr. 1034-36; see also RX2928 (member “[p]urchases are made directly from the vendor”); Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65).

**Response to Proposed Finding No. 904**

The Proposed Finding is misleading, incomplete, and vague in that it does not describe what is being ordered, and the Proposed Finding does not list who is doing the ordering if a buying group does not.

905. Buying groups don't place orders. (Cavaretta, Tr. 5568-69; Cohen, Tr. 861; Ryan, Tr. 1034-36; see also RX2928 (member "[p]urchases are made directly from the vendor"); Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65).

**Response to Proposed Finding No. 905**

The Proposed Finding is misleading, incomplete, and vague in that it does not describe what it is that buying groups don't order.

906. Buying groups don't take delivery of orders. (Cavaretta, Tr. 5568-69; Cohen, Tr. 861; Ryan, Tr. 1034-36; see also RX2928 (member "[p]urchases are made directly from the vendor"); Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65).

**Response to Proposed Finding No. 906**

The Proposed Finding is misleading, incomplete, and vague in that it does not identify what buying groups don't take deliveries of.

907. Buying groups don't receive invoices for products ordered. (Cavaretta, Tr. 5568-69; Cohen, Tr. 861; Ryan, Tr. 1034-36; see also RX2928 (member "[p]urchases are made directly from the vendor"); Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65).

**Response to Proposed Finding No. 907**

The Proposed Finding is misleading, incomplete, and vague in that it does not identify for what buying groups don't receive invoices.

908. Buying groups don't pay for any products ordered by their members. (Cavaretta, Tr. 5568-69; Cohen, Tr. 861; Ryan, Tr. 1034-36; see also RX2928 (member "[p]urchases are made directly from the vendor"); Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65).).

**Response to Proposed Finding No. 908**

Complaint Counsel has no specific response.

909. Buying groups are “middle men” between distributors and the ultimate customers – individual dentists. (Cohen, Tr. 444-45).

**Response to Proposed Finding No. 909**

The Proposed Finding is misleading, incomplete, irrelevant, and vague in that it relies on the term “middle men” and does not describe the role that buying groups play between distributors and dental offices.

910. Individual dentists who are members of buying groups decide what to purchase, place orders, take delivery and pay for the products ordered. They perform the functions of customers. (Cavaretta, Tr. 5568-69; Ryan, Tr. 1034-36; Kois Jr., Tr. 312-13).

**Response to Proposed Finding No. 910**

Complaint Counsel has no specific response.

911. Benco believed that buying groups interfered with Benco’s relations with its individual dentist customers. (Cohen, Tr. 444-45).

**Response to Proposed Finding No. 911**

The Proposed Finding is not supported by the cited testimony. At the cited pages, Cohen testified that “Benco sells or discounts to individual customers. Those individual customers may be members of buying groups, but we don't offer -- we don't deal with a middleman between us and our customers.” But Cohen does not testify at the cited pages that Benco believed buying groups interfered.

912. Buying groups did nothing to permit Benco to reduce its costs to serve buying group members. (Ryan, Tr. 1082; J. Johnson, Tr. 4836-4837; [REDACTED]).

**Response to Proposed Finding No. 912**

The Proposed Finding is not supported by the cited testimony of fact witness Ryan. At the cited page, Ryan testified that buying groups lead to reduced margins and profitability, but Ryan does not state anything about costs on this page. Additionally, Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing, at least in part, to the testimony of an

expert for a proposition of fact. J. Johnson is Benco's expert Dr. Johnson, and RX2834 is Dr. Johnson's Expert Report in this matter.

913. Benco believed that buying groups could not ensure compliance by their members. (Ryan, Tr. 1166-67, 1179-80; J. Johnson, Tr. 4834-4835).

**Response to Proposed Finding No. 913**

The Proposed Finding is misleading, incomplete, and vague insofar as it relies on the term "compliance" without explaining what is meant by that term. Additionally, Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing, at least in part, to the testimony of an expert for a proposition of fact. J. Johnson is Benco's expert witness in this matter.

914. Buying groups could not guarantee that their members would change their purchasing behavior. (Ryan, Tr. 1166-67, 1179-80; Meadows, Tr. 2491-92; J. Johnson, Tr. 4834-4835; *see also* RX2832 at 41-42, ¶ 59; RX2833 at 21-22, ¶ 39).

**Response to Proposed Finding No. 914**

The Proposed Finding is misleading, incomplete, and vague insofar as it relies on the phrase "change their purchasing behavior" without explaining what that means. Additionally, Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of experts, at least in part, for a proposition of fact. J. Johnson is Benco's expert in this matter; RX2832 is Dr. Carlton's (Schein's) Expert Report; and RX2833 is Dr. Wu's (Patterson's) Expert Report.

915. Buying groups could not guarantee that their members would buy any particular volume of products from Benco. (Ryan, Tr. 1166-67, 1179-80; Meadows, Tr. 2491-92; J. Johnson, Tr. 4834-4835; *see also* RX2832 at 41-42, ¶ 59; RX2833 at 21-22, ¶ 39).

**Response to Proposed Finding No. 915**

The Proposed Finding is misleading and incomplete insofar as it suggests that discounts offered by distributors to members of buying groups do not incentivize members to buy from the buying groups distributor partner. Record evidence established that the Kois Buyers Group members



met purchase goals set by the distributor partner and thus earned an additional discount in 2017. (CX0285 at 001). Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of experts, at least in part, for a proposition of fact. J. Johnson is Benco's expert in this matter; RX2832 is Dr. Carlton's (Schein's) Expert Report; and RX2833 is Dr. Wu's (Patterson's) Expert Report.

916. [REDACTED]

**Response to Proposed Finding No. 916**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Marshall is Complaint Counsel's expert in this matter.

917. [REDACTED]

**Response to Proposed Finding No. 917**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Marshall is Complaint Counsel's expert in this matter.

918. [REDACTED]

**Response to Proposed Finding No. 918**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr Marshall is Complaint Counsel's expert in this matter.

919. Without product or volume commitments, Benco could not negotiate lower prices from manufacturers. (J. Johnson, Tr. 4836-4837; [REDACTED]; *see also* RX2833 at 21, ¶ 37).

**Response to Proposed Finding No. 919**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of expert witnesses for a proposition of fact. J. Johnson refers to Dr. Johnson, Benco's expert in this matter. RX2834 is Dr. Johnson's Expert Report and RX2833 is Dr. Wu's (Patterson's) Expert Report in this matter.

920. Buying groups required Benco to continue to ship products separately to all individual members. (J. Johnson, Tr. 4834-4835; [REDACTED]; *see also* RX2832 at 43, ¶ 62; RX2833 at 20-21, ¶¶ 36, 39).

**Response to Proposed Finding No. 920**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of expert witnesses for a proposition of fact. J. Johnson refers to Dr. Johnson, Benco's expert in this matter. RX2834 is Dr. Johnson's Expert Report, RX2832 is Dr. Carlton's (Schein's) Expert Report, and RX2833 is Dr. Wu's (Patterson's) Expert Report in this matter.

921. Buying groups did not permit Benco to reduce its shipping costs. (J. Johnson, Tr. 4836-4837; [REDACTED]; *see also* RX2832 at 43, ¶ 62; RX2833 at 20-21, ¶¶ 36, 39).

**Response to Proposed Finding No. 921**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of expert witnesses for a proposition of fact. J. Johnson refers to Dr. Johnson, Benco's expert in this matter. RX2834 is Dr. Johnson's Expert Report, RX2832 is Dr. Carlton's (Schein's) Expert Report, and RX2833 is Dr. Wu's (Patterson's) Expert Report in this matter.

922. [REDACTED]

**Response to Proposed Finding No. 922**

Complaint Counsel notes that, contrary to this Court's order, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

923. [REDACTED]

**Response to Proposed Finding No. 923**

Complaint Counsel notes that, contrary to this Court's order, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

924. [REDACTED]

**Response to Proposed Finding No. 924**

The Proposed Finding is misleading, incomplete, and vague in that it relies on the term

[REDACTED].

Additionally, the Proposed Finding relies on the testimony of [REDACTED]

[REDACTED]

[REDACTED]. Complaint

Counsel notes that, contrary to this Court's order, [REDACTED]

[REDACTED]

[REDACTED]

925. Benco concluded that buying groups demanded lower prices but gave nothing in return. (Cohen, Tr. 685; J. Johnson, Tr. 4834-4835; J. Johnson, Tr. 4836-4837).

**Response to Proposed Finding No. 925**

The Proposed Finding is misleading, incomplete, and vague insofar as it relies on the phrase "gave nothing in return." To the extent the Proposed Finding is suggesting that Benco concluded it would not attract new customers through partnering with buying groups, the Proposed Finding is contrary to other evidence from Benco. In considering working with the buying group Elite Dental Alliance, Cohen believed that one of the upsides would be that Benco could add more

than 250 customers and gain more than 25 million in sales. (CCFF ¶¶ 1376-1377). Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert witness, at least in part, for a proposition of fact. J. Johnson is Benco's expert, Dr. Johnson.

926. Without the ability to achieve cost savings, it wouldn't make business sense to offer discounts to a buying group. (Cohen, Tr. 685; J. Johnson, Tr. 4836-4837; [REDACTED]; RX2833 at 24, ¶ 45).

#### **Response to Proposed Finding No. 926**

The Proposed Finding is not supported by the cited testimony of the factual witness. In the cited testimony, Cohen is testifying about his concern that not all members of a buying group that partners with Benco will buy from Benco, but the cited testimony does not discuss a lack of ability to achieve cost savings with buying groups. Additionally, to the extent the Proposed Finding is suggesting that Benco concluded it would not attract new customers through partnering with buying groups, the Proposed Finding is contrary to other evidence from Benco. In considering working with the buying group Elite Dental Alliance, Cohen believed that one of the upsides would be that Benco could add more than 250 customers and gain more than 25 million in sales. (CCFF ¶¶ 1376-1377). Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of expert witnesses, at least in part, for a proposition of fact. J. Johnson is Benco's expert, Dr. Johnson, and RX2834 is Dr. Johnson's Expert Report. RX2833 is Dr. Wu's (Patterson's) Expert Report.

927. [REDACTED]

#### **Response to Proposed Finding No. 927**

The Proposed Finding is misleading, incomplete, and vague in that [REDACTED]

██████████. The Proposed Finding is misleading in that it relies on the testimony of only one buying group – Smile Source – for a proposed factual finding that appears structured to cover all buying groups. Additionally, the Proposed Finding is not supported by the cited testimony. In the cited testimony, Goldsmith testified about administrative fees that Darby pays to Smile Source and royalty fees that members pay to Smile Source, but Goldsmith does not address how these fees increase the overall cost of doing business.

928. Benco concluded that buying groups were inconsistent with Benco’s value proposition and its business model.

### **Response to Proposed Finding No. 928**

The Proposed Finding is unsupported.

- B. RESPONSES TO PROPOSED FINDINGS REGARDING “DR. MARSHALL ABANDONED HIS GENERAL ASSERTION THAT BENCO ACTED CONTRARY TO ITS UNILATERAL ECONOMIC SELF-INTEREST BY NOT BIDDING FOR THE BUSINESS OF BUYING GROUPS IN GENERAL”

#### **1. Dr. Marshall’s Initial Position Was Contrary To The Factual Record and to Common Sense**

929. Initially, Dr. Marshall asserted that Benco (and Schein and Patterson) acted contrary to its unilateral economic self-interest by deciding not to bid for the business of buying groups in general between 2011 and 2015. (CX7100 at 151, ¶ 352 (“I conclude that . . . Benco’s conduct of not bidding for buying group business was inconsistent with acting in their own unilateral economic self-interest.”)).

### **Response to Proposed Finding No. 929**

Complaint Counsel has no specific response.

930. Initially, Dr. Marshall asserted, broadly and without limitation, that “It was in each Respondent’s unilateral economic self-interest to discount to buying groups . . .” and that “Respondents’ conduct toward dental buying groups was inconsistent with acting in their own unilateral economic self-interest . . .”. (CX7100 at 11, ¶ 13).

### **Response to Proposed Finding No. 930**

The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that Dr. Marshall made such an assertion without a basis for his opinion. The cited testimony is to the

“Summary of conclusions” Section of Dr. Marshall’s report, which is “[b]ased on the analysis and evidence reviewed in [the] report” and includes the opinions Dr. Marshall reached in the matter. (CX7100 at 010-012 (¶¶9-14, Section I.C) (Marshall Expert Report) (quoting material from ¶9)). To determine whether Respondents acted against their own unilateral self-interests, Dr. Marshall conducted five natural experiments using data that examined whether or not it was profitable for dental supply distributors, including Respondents, to bid for and obtain the business of buying groups. (Marshall, Tr. 2859-2861; [REDACTED]; [REDACTED]; CCFF ¶¶ 1637-1684). In these natural experiments, Dr. Marshall observed conduct inconsistent with Respondents’ unilateral self interests and instead consistent with coordinated action. (CCFF ¶¶ 1637-1684).

931. Initially, Dr. Marshall claimed, again broadly and without limitation, that “the loss from not winning the buying group contract given that the buying group exists . . . will *always* result in a decrease in profits.”). (CX7100 at 150, ¶ 349 (emphasis added)).

### **Response to Proposed Finding No. 931**

The Proposed Finding is misleading, incomplete, and inaccurate. Paragraph 349 of Dr. Marshall’s Expert Report, which is cited as support for this Proposed Finding, is theoretical only and describes the theory and methodology that Dr. Marshall used to set up his natural experiments to test the profitability of dealing with buying groups. Specifically, in this paragraph, Dr. Marshall is describing various benchmarks he could use to conduct his experiments. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). The purpose of Dr. Marshall’s five profitability natural experiments (studies) was to examine different episodes of dentists’ purchasing patterns before and after a distributor starts to (or stops) supplying a buying group. (Marshall, Tr. 2861-2862). Dr. Marshall’s five profitability studies also analyze whether it was profitable for Respondents and other distributors to bid for and obtain buying group

business and whether it was unprofitable for them not to bid for the business of buying groups. (Marshall, Tr. 2861).

932. Dr. Marshall's assertions were overly broad, internally inconsistent, contrary to the factual record, and could not be sustained.

**Response to Proposed Finding No. 932**

The Proposed Finding is unsupported.

933. Benco had a policy of not doing business with buying groups since 1996. (Cohen, Tr. 445, 569). Dr. Marshall understood that Benco had a policy of not dealing with buying groups before 2011. (Marshall, Tr. 3391).

**Response to Proposed Finding No. 933**

Complaint Counsel has no specific response.

934. Dr. Marshall did not opine that Benco acted contrary to its unilateral economic self-interest by declining to do business with buying groups before 2011. (Marshall, Tr. 3391 (“Q. Now, you don’t conclude that Benco acted contrary to its unilateral economic self-interest before 2011, do you? A. No. I’m making no such representation.”)).

**Response to Proposed Finding No. 934**

The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that Benco was not acting in its unilateral self-interest by declining to do business with buying groups before 2011. Record evidence establishes that prior to 2011, Benco did not discount to buying groups because it believed neither Schein nor Patterson had yet “open[ed] this door.” (CCFF ¶¶ 261, 266-268, *see also* ¶¶ 527-528). Record evidence irrefutably shows that Benco believed it would have been forced to discount to buying groups if its largest rivals began discounting to buying groups:

- “If this door is ever opened in dental, its 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 its [sic] a race to the bottom.” (CCFF ¶ 527).
- “Once a national dealer opens this door [to buying groups], in less than 5 years, we will turn into medical and be working for 10% over cost.” (CCFF ¶ 261).

This evidence shows that even though Benco maintained a no buying group policy prior to 2011, it was concerned that it would need to lower its prices to buying groups if one of its competitors began discounting to buying groups.

935. Dr. Marshall did nothing to investigate why Benco declined to offer discounts to buying groups before 2011. (Marshall, Tr. 3391).

#### **Response to Proposed Finding No. 935**

The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that Benco was not acting in its unilateral self-interest by declining to do business with buying groups before 2011. Record evidence establishes that prior to 2011, Benco did not discount to buying groups because it believed neither Schein nor Patterson had yet “open[ed] this door.” (CCFF ¶¶ 261, 266-268, *see also* ¶¶ 527-528). Record evidence irrefutably shows that Benco believed it would have been forced to discount to buying groups if its largest rivals began discounting to buying groups. (CCFF ¶¶ 261, 527). *See also* Complaint Counsel’s Response to Benco Proposed Finding No. 934.

936. Dr. Marshall offered no explanation for why Benco declined to offer discounts to buying groups before 2011. (Marshall, Tr. 3391 (“I’m not offering any explanation of that, no. That’s not part of the analysis.”)).

#### **Response to Proposed Finding No. 936**

The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that Benco was not acting in its unilateral self-interest by declining to do business with buying groups before 2011. Record evidence establishes that prior to 2011, Benco did not discount to buying groups because it believed neither Schein nor Patterson had yet “open[ed] this door.” (CCFF ¶¶ 261, 266-268, *see also* ¶¶ 527-528). Record evidence irrefutably shows that Benco believed it would have been forced to discount to buying groups if its largest rivals began discounting to buying



groups. (CCFF ¶¶ 261, 527). *See also* Complaint Counsel’s Response to Benco Proposed Finding No. 934.

937. If Dr. Marshall’s initial opinion were correct – that it was contrary to Benco’s unilateral economic self-interest not to bid for buying group business – Benco would have been acting contrary to its own unilateral economic self-interest consistently for a period of 15 years, from 1996 to 2011. Yet Dr. Marshall did *not* opine that Benco acted contrary to its economic self-interest between 1996 and 2011. (Marshall, Tr. 3391).

#### **Response to Proposed Finding No. 937**

The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that Benco was acting contrary to its unilateral self-interest by declining to do business with buying groups before 2011. Record evidence establishes that prior to 2011, Benco did not discount to buying groups because it believed neither Schein nor Patterson had yet “open[ed] this door.” (CCFF ¶¶ 261, 266-268, *see also* ¶¶ 527-528). Record evidence irrefutably shows that Benco believed it would have been forced to discount to buying groups if its largest rivals began discounting to buying groups. (CCFF ¶¶ 261, 527). *See also* Complaint Counsel’s Response to Benco Proposed Finding No. 934.

938. Dr. Marshall has no explanation for why Benco would have acted contrary to its unilateral economic self-interest for 15 years, from 1996 to 2011. (Marshall, Tr. 3391).

#### **Response to Proposed Finding No. 938**

The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that Benco was acting contrary to its unilateral self-interest by declining to do business with buying groups from 1996 to 2011. Record evidence establishes that prior to 2011, Benco did not discount to buying groups because it believed neither Schein nor Patterson had yet “open[ed] this door.” (CCFF ¶¶ 261, 266-268, *see also* CCFF ¶¶ 527-528). Record evidence irrefutably shows that Benco believed it would have been forced to discount to buying groups if its largest rivals began

discounting to buying groups. (CCFF ¶¶ 261, 527). *See also* Complaint Counsel’s Response to Benco Proposed Finding No. 934.

939. Dr. Marshall did not observe any change in behavior regarding Benco in 2011 or 2012. (Marshall, Tr. 3391-3392). Dr. Marshall observed that Benco continued to decline to offer discounts to buying groups from 2011 to 2015, as it had from 1996 to 2011. (Marshall, Tr. 3392).

#### **Response to Proposed Finding No. 939**

The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that Benco was acting contrary to its unilateral self-interest by declining to do business with buying groups from 1996 to 2011. Record evidence establishes that prior to 2011, Benco did not discount to buying groups because it believed neither Schein nor Patterson had yet “open[ed] this door.” (CCFF ¶¶ 261, 266-268, *see also* ¶¶ 527-528). Record evidence irrefutably shows that Benco believed it would have been forced to discount to buying groups if its largest rivals began discounting to buying groups. (CCFF ¶¶ 261, 527). *See also* Complaint Counsel’s Response to Benco Proposed Finding No. 934. The Proposed Finding is also misleading and incomplete insofar as it fails to cite the record evidence establishing that in 2011, 2012, and 2013, Benco orchestrated an agreement with Schein and Patterson not to discount to buying groups. (CCFF ¶¶ 474-1100).

940. Conversely, if Benco acted consistently with its unilateral economic self-interest from 1996 to 2011, Dr. Marshall had no explanation for why the identical conduct – declining to do business with buying groups – was in Benco’s unilateral economic self-interest from 1996 to 2011, but contrary to Benco’s unilateral economic self-interest from 2011 to 2015.

#### **Response to Proposed Finding No. 940**

The Proposed Finding is unsupported.

941. Patterson generally did not do business with buying groups before 2013, but Patterson’s regional offices were free to deal with buying groups if they chose. (Guggenheim, Tr. 1601-02).

#### **Response to Proposed Finding No. 941**

Complaint Counsel has no specific response.

942. [REDACTED]

**Response to Proposed Finding No. 942**

The Proposed Finding is misleading, incomplete, and contrary to the weight of the evidence

[REDACTED]. Record evidence establishes that Patterson began discussing a partnership with the buying group New Mexico Dental Cooperative between late 2012 or early February 2013. (CCFF ¶¶ 454-455). Moreover, Dr. Mason of the New Mexico Dental Cooperative believed that, as of February 7, 2013, his buying group had an agreement with Patterson and that the guidelines of the deal would be “worked out.” (CCFF ¶ 473). However, following a communication with Benco (in fact just three days later), Patterson ended negotiations with the New Mexico Dental Cooperative. (CCFF ¶¶ 503-512). On February 8, 2013, Benco’s Cohen had communicated with Patterson’s Guggenheim about the New Mexico Dental Cooperative, 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.” (CCFF ¶ 483). Additionally, the Proposed Finding is misleading, incomplete, and inaccurate [REDACTED]

[REDACTED]. Record evidence establishes this conspiracy. (CCFF ¶¶ 269-393, 474-1158).

943. [REDACTED]

**Response to Proposed Finding No. 943**

The Proposed Finding is misleading, incomplete, and contrary to the weight of the evidence

[REDACTED]. Record evidence establishes that Patterson began discussing a partnership with the buying group New Mexico Dental Cooperative between late 2012 or early February 2013. (CCFF ¶¶ 454-455). Moreover, Dr. Mason of the New Mexico Dental Cooperative believed that, as of February 7, 2013, his buying group had an agreement with Patterson and that the guidelines of the deal would be “worked out.” (CCFF ¶ 473). However, following a communication with Benco (in fact just three days later), Patterson ended negotiations with the New Mexico Dental Cooperative. (CCFF ¶¶ 503-512). On February 8, 2013, Benco’s Cohen had communicated with Patterson’s Guggenheim about the New Mexico Dental Cooperative, 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.” (CCFF ¶ 483). Additionally, the Proposed Finding is misleading, incomplete, and inaccurate [REDACTED]

[REDACTED]. Record evidence establishes this conspiracy. (CCFF ¶¶ 269-393, 474-1158).

944. Dr. Marshall admitted that his analysis showed the exact same action by Patterson, supposedly contrary to its unilateral economic self-interest, before 2013 and after 2015. (Marshall, Tr. 3240 (“Q. . . . So your analysis if we take out the period that my client allegedly conspired, February 2013 to April 2015, . . . your analysis shows in the but-for world the exact same action supposedly contrary to self-interest by Patterson Companies in the period before and the period after; correct? A. Yeah. . . .”)).

#### **Response to Proposed Finding No. 944**

The Proposed Finding is misleading, incomplete, and vague in that it relies on the phrase “exact same action” without identifying what that action is. To the extent that the Proposed Finding is

suggesting that Patterson was acting contrary to its unilateral self-interest in not bidding on buying groups before 2013, the Proposed Finding is misleading, incomplete, and contrary to the weight of the evidence. Record evidence establishes that Patterson began discussing a partnership with the buying group New Mexico Dental Cooperative between late 2012 or early February 2013. (CCFF ¶¶ 454-455). Moreover, Dr. Mason of the New Mexico Dental Cooperative believed that, as of February 7, 2013, his buying group had an agreement with Patterson and that the guidelines of the deal would be “worked out.” (CCFF ¶ 473). However, following a communication with Benco (in fact just three days later), Patterson ended negotiations with the New Mexico Dental Cooperative. (CCFF ¶¶ 503-512). On February 8, 2013, Benco’s Cohen had communicated with Patterson’s Guggenheim about the New Mexico Dental Cooperative, 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.” (CCFF ¶ 483).

945. [REDACTED]

#### **Response to Proposed Finding No. 945**

The Proposed Finding is misleading, incomplete, and contrary to the weight of the evidence to the extent that it is suggesting [REDACTED]

[REDACTED]. Record evidence establishes that Patterson began discussing a partnership with the buying group New Mexico Dental Cooperative between late 2012 or early February 2013. (CCFF ¶¶ 454-455). Moreover, Dr. Mason of the New Mexico Dental Cooperative believed that, as of February 7, 2013, his buying group had an agreement with Patterson and that the guidelines of the deal would be “worked out.” (CCFF ¶ 473). However, following a

communication with Benco (in fact just three days later), Patterson ended negotiations with the New Mexico Dental Cooperative. (CCFF ¶¶ 503-512). On February 8, 2013, Benco’s Cohen had communicated with Patterson’s Guggenheim about the New Mexico Dental Cooperative, 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.” (CCFF ¶ 483).

**946.** [REDACTED]

**Response to Proposed Finding No. 946**

The Proposed Finding is misleading, incomplete, and vague in that it relies on the phrase [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] the Proposed Finding is misleading, incomplete, and contrary to the weight of the evidence. Record evidence establishes that Patterson began discussing a partnership with the buying group New Mexico Dental Cooperative between late 2012 or early February 2013. (CCFF ¶¶ 454-455). Moreover, Dr. Mason of the New Mexico Dental Cooperative believed that, as of February 7, 2013, his buying group had an agreement with Patterson and that the guidelines of the deal would be “worked out.” (CCFF ¶ 473). However, following a communication with Benco (in fact just three days later), Patterson ended negotiations with the New Mexico Dental Cooperative. (CCFF ¶¶ 503-512). On February 8, 2013, Benco’s Cohen had communicated with Patterson’s Guggenheim about the New Mexico Dental Cooperative, 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.” (CCFF ¶ 483).

947. [REDACTED]

#### **Response to Proposed Finding No. 947**

The Proposed Finding is misleading, incomplete, and contrary to the weight of the evidence to the extent that it is suggesting [REDACTED]

[REDACTED]. Record evidence establishes that Patterson began discussing a partnership with the buying group New Mexico Dental Cooperative between late 2012 or early February 2013. (CCFF ¶¶ 454-455). Moreover, Dr. Mason of the New Mexico Dental Cooperative believed that, as of February 7, 2013, his buying group had an agreement with Patterson and that the guidelines of the deal would be “worked out.” (CCFF ¶ 473). However, following a communication with Benco (in fact just three days later), Patterson ended negotiations with the New Mexico Dental Cooperative. (CCFF ¶¶ 503-512). On February 8, 2013, Benco’s Cohen had communicated with Patterson’s Guggenheim about the New Mexico Dental Cooperative, 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.” (CCFF ¶ 483).

948. Schein evaluated the opportunity to bid for buying group business on a case by case basis before 2011; sometimes Schein bid for buying group business, and sometimes Schein decided not to bid for buying group business, before 2011. (Titas, Tr. 5192-94; RX2957 at 12-13).

**Response to Proposed Finding No. 948**

Complaint Counsel has no specific response.

949. Dr. Marshall did not review the entire record to determine whether Schein ever said no to buying groups before it said no to Unified Smiles in 2011. (Marshall, Tr. 2949).

**Response to Proposed Finding No. 949**

Complaint Counsel has no specific response.

950. Dr. Marshall didn't know whether Schein said no to buying groups before Unified Smiles in 2011. (Marshall, Tr. 2949).

**Response to Proposed Finding No. 950**

The Proposed Finding is misleading and incomplete in that it mischaracterizes Dr. Marshall's testimony about the buying group Unified Smiles. Dr. Marshall testified that "what was stated in Unified Smiles is that Schein does not do business with buying groups. That's different from just turning down Unified Smiles." (Marshall, Tr. 2949-2950). In his testimony, Dr. Marshall was referring to CX2062, a December 21, 2011 email in which Schein's Foley writes to Unified Smiles: "[U]nless 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." (CX7100 at 190 (¶428, n. 689) (Marshall Expert Report)).

951. Both before and after 2011, Schein bid for the business of those buying groups that offered Schein a value proposition and the potential for increased sales, and declined to bid for the business of buying groups that didn't. (Cavaretta, Tr. 5568-5570, 5574-5576, 5607-5608; Titus, Tr., 5199, 5201-5202, 5207-5208, 5251-5253).

**Response to Proposed Finding No. 951**

The Proposed Finding is misleading and contrary to the weight of the evidence to the extent it implies or asserts that Schein's approach to buying groups *prior* to the conspiracy period was consistent *into and during* the conspiracy period. Record evidence shows that Schein did not evaluate certain characteristics of buying groups to decide whether or not to do business with them during the conspiracy period (after 2011). Record evidence establishes that Schein's



conduct changed from working with buying groups before the conspiracy, to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322). The record is replete with examples of buying groups that Schein turned down during the conspiracy period pursuant to an instruction to do so without any evaluation of the buying groups characteristics. (Complaint Counsel's Post-Trial Brief, at Attachment C).

952. If Dr. Marshall's were correct that Schein acted contrary to its unilateral economic self-interest by not bidding for buying group business, Schein would have acted contrary to its unilateral economic self-interest on multiple occasions before 2011.

**Response to Proposed Finding No. 952**

The Proposed Finding is unsupported and should be disregarded.

953. Because he was unaware that Schein had said no to some buying groups before 2011, Dr. Marshall offered no explanation for why Schein sometimes did not bid for buying group business before 2011. (Marshall, Tr. 2949).

**Response to Proposed Finding No. 953**

The Proposed Finding is misleading, incomplete, and contrary to the weight of the evidence insofar as it suggests Schein's policy on working with buying groups did not change at the time of the conspiracy and then again post conspiracy. Record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy (before 2011), to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322).

954. Because he was unaware that Schein had said no to some buying groups before 2011, Dr. Marshall offered no explanation for why Schein would have acted contrary to its unilateral economic self-interest before 2011. (Marshall, Tr. 2949).

**Response to Proposed Finding No. 954**

The Proposed Finding is misleading, incomplete, and contrary to the weight of the evidence insofar as it suggests Schein's policy on working with buying groups did not change at the time of the conspiracy and then again post conspiracy. Record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy (before 2011), to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322).

955. Conversely, if Schein acted consistently with its unilateral economic self-interest before 2011, Dr. Marshall had no explanation for why the identical conduct – sometimes declining to do business with buying groups – was in Schein's unilateral economic self-interest before 2011, but contrary to Schein's unilateral economic self-interest from 2011 to 2015. (Marshall, Tr. 2949; [REDACTED]).

**Response to Proposed Finding No. 955**

The Proposed Finding is misleading, incomplete, and contrary to the weight of the evidence insofar as it suggests Schein's policy on working with buying groups did not change at the time of the conspiracy and then again post conspiracy. Record evidence establishes that Schein's conduct changed from working with buying groups before the conspiracy (before 2011), to indiscriminate rejection of all buying groups during the conspiracy pursuant to a policy to do so, and then to competing for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all

communications with its competitors, including Schein. (CCFF ¶¶ 432-452, 661-1100, 1159-1166, 1316-1322).

**2. Dr. Marshall Admitted That He Had No Knowledge Regarding Any of the 36 Other Buying Groups Upon Which His Opinion Was Based**

956. Dr. Marshall listed 38 buying groups that he claims approached Schein, Patterson or Benco between 2011 and 2015 and were turned down by at least one of them. (Marshall, CX7100 at 209, ¶ 491).

**Response to Proposed Finding No. 956**

Complaint Counsel has no specific response.

957. [REDACTED]

**Response to Proposed Finding No. 957**

Complaint Counsel has no specific response.

958. With the exception of Kois and Smile Source, Dr. Marshall did not perform any factual analysis of the other 36 buying groups that he included in his report. (Marshall, Tr. 3387).

**Response to Proposed Finding No. 958**

The Proposed Finding is misleading, incomplete, and vague in that it relies on the phrase “factual analysis” that is undefined. Additionally, the Proposed Finding is unsupported by the cited testimony. At the cited transcript page, Dr. Marshall was not asked about “factual analysis.”

959. Dr. Marshall had no knowledge of most of the other buying groups that he included in his report. He was unable to answer even the most basic questions about many of the buying groups that he included in his report.

**Response to Proposed Finding No. 959**

The Proposed Finding is unsupported.

960. Dr. Marshall included Dental Gator among the buying groups listed in paragraph 491 of his report. (CX7100 at 209, 213, ¶ 491).

**Response to Proposed Finding No. 960**

Complaint Counsel has no specific response.

961. [REDACTED]

**Response to Proposed Finding No. 961**

The Proposed Finding is misleading and vague in that it does not include a reference to a time period during which Schein was allegedly doing business with Dental Gator. The Proposed Finding is misleading, incomplete, and vague insofar as it does not disclose that Dental Gator was formed by MB2, a DSO that did business with Schein, and that any discounts to Dental Gator were a result of the MB2 contract with Schein. The Proposed Finding is also contrary to the weight of the evidence as Schein did not offer discounts directly to Dental Gator. Dental Gator became a customer of Schein Special Markets when MB2 Solutions (“MB2”), an elite DSO customer of Schein that created Dental Gator, extended the pricing it received from Schein under a 2014 agreement (“2014 MB2 Agreement”) to Dental Gator, initially without Schein’s knowledge. (CCFF ¶¶ 1778, 1783, 1789-1796). The 2014 MB2 Agreement limited MB2 from extending Schein’s MB2-specific pricing and prohibited MB2 from forming a buying group. (CCFF ¶¶ 1791-1792). When Schein learned that MB2 formed buying group Dental Gator without its permission and extended its Schein pricing to it, Schein deemed it a breach of the 2014 MB2 agreement. (CCFF ¶¶ 1796). Schein informed Dental Gator that if “it looks at any time like a GPO [Schein] will disenroll” and imposed advertising guidelines to ensure that Dental Gator did not “represent in their marketing anything that looks like a GPO.” (CCFF ¶¶ 1797-1800; *see also* CCFF ¶¶ 1812-1817). Sullivan and other executives sought to end the relationship with Dental Gator, but Schein was worried about losing MB2’s business in doing so, which was a long-term and top 50 customer for Special Markets. (CCFF ¶¶ 1801-1806, 1776-1782). Schein was “accommodating [Dental Gator] for unique reasons” but feared “open[ing] the floodgates on buying groups.” (CCFF ¶¶ 1811 (citing CX0188 at 001), 1802-1810). Indeed,

Schein would not have tolerated Dental Gator but for its relationship with MB2, and the record evidence shows that Schein never bid on Dental Gator, did not have a separate contract with Dental Gator, and that Dental Gator became a Schein customer without its knowledge. (CCFF ¶¶ 1790, 1795, 1810). As such, the Proposed Finding is contrary to the weight of the evidence and should be disregarded.

**962.** [REDACTED]

#### **Response to Proposed Finding No. 962**

The Proposed Finding is misleading, incomplete, and vague insofar as it does not disclose that Dental Gator was formed by MB2, a DSO that did business with Schein, and that any discounts to Dental Gator were a result of the MB2 contract with Schein. The Proposed Finding is also contrary to the weight of the evidence as Schein did not offer discounts directly to Dental Gator. Dental Gator became a customer of Schein Special Markets when MB2 Solutions (“MB2”), an elite DSO customer of Schein that created Dental Gator, extended the pricing it received from Schein under a 2014 agreement (“2014 MB2 Agreement”) to Dental Gator, initially without Schein’s knowledge. (CCFF ¶¶ 1778, 1783, 1789-1796). The 2014 MB2 Agreement limited MB2 from extending Schein’s MB2-specific pricing and prohibited MB2 from forming a buying group. (CCFF ¶¶ 1791-1792). When Schein learned that MB2 formed buying group Dental Gator without its permission and extended its Schein pricing to it, Schein deemed it a breach of the 2014 MB2 agreement. (CCFF ¶¶ 1796). Schein informed Dental Gator that if “it looks at any time like a GPO [Schein] will disenroll” and imposed advertising guidelines to ensure that Dental Gator did not “represent in their marketing anything that looks like a GPO.” (CCFF ¶¶ 1797-1800; *see also* CCFF ¶¶ 1812-1817). Sullivan and other executives sought to end the relationship with Dental Gator, but Schein was worried about losing MB2’s business in doing so,

which was a long-term and top 50 customer for Special Markets. (CCFF ¶¶ 1801-1806, 1776-1782). Schein was “accommodating [Dental Gator] for unique reasons” but feared “open[ing] the floodgates on buying groups.” (CCFF ¶¶ 1811 (citing CX0188 at 001), 1802-1810). Indeed, Schein would not have tolerated Dental Gator but for its relationship with MB2, and the record evidence shows that Schein never bid on Dental Gator, did not have a separate contract with Dental Gator, and that Dental Gator became a Schein customer without its knowledge. (CCFF ¶¶ 1790, 1795, 1810). As such, the Proposed Finding is contrary to the weight of the evidence and should be disregarded.

963. Dr. Marshall included New Mexico Dental Cooperative among the buying groups listed in paragraph 491 of his report. (CX7100 at 209, 210, ¶ 491).

**Response to Proposed Finding No. 963**

Complaint Counsel has no specific response.

964. Schein did business with the New Mexico Dental Cooperative through the Dental Co-op of Utah. (Mason, Tr. 2391).

**Response to Proposed Finding No. 964**

The Proposed Finding is misleading to the extent it asserts or implies that evidence regarding The Utah Dental Co-op, or its New Mexico chapter, disproves Schein’s participation in a conspiracy not to do business with buying groups. The record evidence shows otherwise. The record evidence shows that Schein rejected the New Mexico Dental Co-op’s request for a supply partnership. (CCFF ¶ 507-509). Having no full-service distributor, the New Mexico Dental Co-op’s attempt to build a buying group was stymied, and it merged with the existing Dental Co-op of Utah and became a branch of the Dental Co-op of Utah. (CCFF ¶ 511). Schein already had a relationship with the Utah Dental Co-op since 2007, or well before the conspiracy. (CCFF ¶¶ 688, 889). As such, the Proposed Finding simply asserts that Schein did business with a legacy buying group and one of its branches. As such, the Proposed Finding is irrelevant, as continued

business with a legacy buying group or one of its branches has no bearing on its conduct regarding distinct buying groups during the conspiracy period.

**965.** [REDACTED]

**Response to Proposed Finding No. 965**

The Proposed Finding is misleading to the extent it asserts or implies [REDACTED]

[REDACTED]. The record evidence shows otherwise.

The record evidence shows that Schein rejected the New Mexico Dental Co-op's request for a supply partnership. (CCFF ¶ 507-509). Having no full-service distributor, the New Mexico Dental Co-op's attempt to build a buying group was stymied, and it merged with the existing Dental Co-op of Utah and became a branch of the Dental Co-op of Utah. (CCFF ¶ 511). Schein already had a relationship with the Utah Dental Co-op since 2007, or well before the conspiracy. (CCFF ¶¶ 688, 889). As such, the Proposed Finding simply asserts that Schein did business with a legacy buying group and one of its branches. As such, the Proposed Finding is irrelevant, as continued business with a legacy buying group or one of its branches has no bearing on its conduct regarding distinct buying groups during the conspiracy period.

966. Dr. Marshall included Merit Dental among the buying groups listed in paragraph 491 of his report. (CX7100 at 209, 213, ¶ 491).

**Response to Proposed Finding No. 966**

The Proposed Finding is misleading and vague insofar as "Merit Dental" is not listed among the buying groups listed in paragraph 491 of the Marshall Expert Report. (CX7100 at 209-213 (¶491) (Marshall Expert Report)). To the extent that Respondent meant to write "Merit *Dent* Group" (emphasis added) in this Proposed Finding, Complaint Counsel has no specific response.

967. Schein entered into a contract with Merit Dental Group. (Sullivan, Tr. 4243-44; RX2393).

**Response to Proposed Finding No. 967**

The Proposed Finding is misleading and vague insofar as “Merit Dental” is not listed among the buying groups listed in paragraph 491 of the Marshall Expert Report. (CX7100 at 209-213 (¶491) (Marshall Expert Report)). To the extent that Respondent meant to write “Merit *Dent* Group” (emphasis added) in this Proposed Finding, the Proposed Finding is misleading, incomplete, and vague insofar as it does not include a time element. The Proposed Finding is also misleading, incomplete, and inaccurate insofar as it suggests that Schein’s executives approved of the deal with Merit Dent. Record evidence establishes that after a meeting at which Merit Dent was discussed, Cavaretta wrote: “I just met with Tim, Dave and John about the Merit Dent 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.” (CCFF ¶ 713; *see also* CCFF ¶¶ 712, 714). The Proposed Finding is misleading, inaccurate, incomplete, and contrary to the weight of evidence insofar as it suggests that Schein was not a part of the conspiracy because it did business with the Merit Dent at some unspecified time. Indeed, record evidence clearly shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

968. [REDACTED]

**Response to Proposed Finding No. 968**



The Proposed Finding is misleading and vague insofar as “Merit Dental” is not listed among the buying groups listed in paragraph 491 of the Marshall Expert Report. (CX7100 at 209-213 (¶491) (Marshall Expert Report)). To the extent that Respondent meant to write “Merit *Dent* Group” (emphasis added) in this Proposed Finding, the Proposed Finding is irrelevant as to whether or not Schein entered into a contract with Merit Dent. Complaint Counsel notes that Dr. Marshall is Complaint Counsel’s expert, and to the extent that Respondent is improperly citing to the testimony of an expert for a proposition of fact, that is contrary to this Court’s order.

**969.** [REDACTED]

**Response to Proposed Finding No. 969**

The Proposed Finding is misleading and vague insofar as “Merit Dental” is not listed among the buying groups listed in paragraph 491 of the Marshall Expert Report. (CX7100 at 209-213 (¶491) (Marshall Expert Report)). To the extent that Respondent meant to write “Merit *Dent* Group” (emphasis added) in this Proposed Finding, the Proposed Finding is misleading, incomplete, and unsupported insofar as it relies on CX2393 at 004. In assessing purchases of Merit Dent members, Upchurch, the author of CX2393 at 004 notes that he may not be basing his analysis on the newest roster of members. (CX2393 at 004 ). The Proposed Finding is misleading, inaccurate, incomplete, and contrary to the weight of evidence insofar as it suggests that Schein was not a part of the conspiracy because it did business with Merit Dent at some unspecified time. Indeed, record evidence clearly shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all

communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

970. [REDACTED]

**Response to Proposed Finding No. 970**

Complaint Counsel has no specific response.

971. Dr. Marshall included the Schulman Group among the buying groups listed in paragraph 491 of his report. (CX7100 at 209, 212, ¶ 491).

**Response to Proposed Finding No. 971**

Complaint Counsel has no specific response.

972. Schein did business with the Schulman Group. (CX2047).

**Response to Proposed Finding No. 972**

The Proposed Finding is misleading, incomplete, and vague insofar as it relies on the phrase “did business with” without including a time element or any other description of what and how much the business entailed. The Proposed Finding is misleading, inaccurate, incomplete, and contrary to the weight of evidence insofar as it suggests that Schein was not a part of the conspiracy because it did business with the Schulman Group at some unspecified time. Indeed, record evidence clearly shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

973. [REDACTED]

**Response to Proposed Finding No. 973**

The Proposed Finding is irrelevant. Complaint Counsel notes that Dr. Marshall is Complaint Counsel's expert, and to the extent that Respondent is improperly citing to the testimony of an expert for a proposition of fact, that is contrary to this Court's order.

974. Dr. Marshall included Dr. Stephen Sebastian among the buying groups listed in paragraph 491 of his report. (CX7100 at 209, 211, ¶ 491).

**Response to Proposed Finding No. 974**

Complaint Counsel has no specific response.

975. Dr. Marshall was unable to say anything about Dr. Stephen Sebastian's buying club other than three citations in a footnote. (Marshall, Tr. 3262). He could not say whether Dr. Stephen Sebastian's buying club made a coherent proposal to Patterson. (Marshall, Tr. 3263-3264).

**Response to Proposed Finding No. 975**

The Proposed Finding is unsupported insofar as it suggests that Dr. Stephen Sebastian's buying club was not a buying group or was not turned down by at least one of the Respondents.

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Marshall is Complaint Counsel's expert.

Additionally, the Proposed Finding is inaccurate insofar as it suggests that Dr. Stephen Sebastian's buying club was not a buying group or was not turned down by at least one of the Respondents. Record evidence shows that Benco did not bid for Dr. Stephen Sebastian's buying club in 2014, after identifying it as a buying group. (CCFF ¶ 420). Additionally, Patterson did not bid for Dr. Stephen Sebastian's buying club in 2014. (CCFF ¶ 644).

976. Dr. Marshall included Nexus Dentistry among the buying groups listed in paragraph 491 of his report. (CX7100 at 209, 211, ¶ 491).

**Response to Proposed Finding No. 976**

Complaint Counsel has no specific response.

977. Dr. Marshall was unable to say anything about Nexus Dentistry other than the single citation in a footnote. (Marshall, Tr. 3264). He could not say whether Nexus Dentistry

approached Patterson or whether it made a coherent business proposal to Patterson. (Marshall, Tr. 3264-3265).

**Response to Proposed Finding No. 977**

The Proposed Finding is unsupported insofar as it suggests that Nexus Dentistry was not a buying group or was not turned down by at least one of the Respondents. Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Marshall is Complaint Counsel's expert. Additionally, the Proposed Finding is inaccurate insofar as it suggests that Nexus Dentistry was not a buying group or was not turned down by at least one of the Respondents. Record evidence shows that Benco did not bid for Nexus in 2011 because it met Benco's definition of a buying group. (CCFF ¶¶ 404, 409).

978. Dr. Marshall included Catapult among the buying groups listed in paragraph 491 of his report. (CX7100 at 209, 211, ¶ 491).

**Response to Proposed Finding No. 978**

Complaint Counsel has no specific response.

979. Dr. Marshall was unable to say anything about Catapult other than the single citation in a footnote. (Marshall, Tr. 3265). He could not say whether Catapult made a coherent proposal to Patterson. (Marshall, Tr. 3265).

**Response to Proposed Finding No. 979**

The Proposed Finding is unsupported insofar as it suggests that Catapult was not a buying group or was not turned down by at least one of the Respondents. Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Marshall is Complaint Counsel's expert. Additionally, the Proposed Finding is inaccurate insofar as it suggests that Catapult was not a buying group or was not turned down by at least one of the Respondents. Record evidence shows that Patterson did not

bid for Catapult in 2014. (CCFF ¶ 645; *see also* CCFF ¶ 1486 (Catapult GPO is looking for a national distributor)).

980. Dr. Marshall included Dental Purchasing Group among the buying groups listed in paragraph 491 of his report. (CX7100 at 209, 212, ¶ 491).

**Response to Proposed Finding No. 980**

Complaint Counsel has no specific response.

981. Dr. Marshall was unable to say anything about Dental Purchasing Group other than the single citation in a footnote. (Marshall, Tr. 3265-3266). He could not say whether Dental Purchasing Group made a coherent proposal to Patterson. (Marshall, Tr. 3267). He was unaware that the doctor was a veterinarian, not a dentist. (CX3080; Guggenheim, Tr. 1657; Marshall, Tr. 3269-3270).

**Response to Proposed Finding No. 981**

The Proposed Finding is unsupported insofar as it suggests that the Dental Purchasing Group was not a buying group or was not turned down by at least one of the Respondents. Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Marshall is Complaint Counsel's expert. Additionally, the Proposed Finding is inaccurate insofar as it suggests that the Dental Purchasing Group was not a buying group or was not turned down by at least one of the Respondents. Record evidence shows that Benco did not bid for the Dental Purchasing Group in 2014. (CCFF ¶ 422). Record evidence shows that Patterson did not bid for the Dental Purchasing Group in 2014. (CCFF ¶ 646). Guggenheim testified that Patterson did not bid on Dental Purchasing Group because it was a buying group. (CCFF ¶¶ 646-647).

982. Dr. Marshall included Dentistry Unchained among the buying groups listed in paragraph 491 of his report. (CX7100 at 209, 211, ¶ 491).

**Response to Proposed Finding No. 982**

Complaint Counsel has no specific response.

983. Dr. Marshall was unable to say anything about Dentistry Unchained other than three citations in a footnote. (Marshall, Tr. 3272-3273). He was unaware that Dentistry

Unchained was not formed until after the end of the alleged conspiracy period. (Marshall, Tr. 3273-3274).

**Response to Proposed Finding No. 983**

The Proposed Finding is unsupported insofar as it suggests that the Dentistry Unchained was not a buying group or was not turned down by at least one of the Respondents. Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Marshall is Complaint Counsel's expert. Additionally, the Proposed Finding is inaccurate insofar as it suggests that the Dentistry Unchained was not a buying group or was not turned down by at least one of the Respondents. Record evidence shows that Benco did not bid for Dentistry Unchained in 2015. (CCFF ¶ 425). On May 19, 2015, Ryan (Benco) received an inquiry from Dentistry Unchained, a buying group with 226 dentists that "want[ed] to use Benco"; in response, Ryan wrote to Cohen: "The best part about calling these [buying groups] is I already KNOW that Patterson and Schein have said NO." (CCFF ¶ 1191).

984. Dr. Marshall included Stratus Dental among the buying groups listed in paragraph 491 of his report. (CX7100 at 209, 212, ¶ 491).

**Response to Proposed Finding No. 984**

Complaint Counsel has no specific response.

985. Dr. Marshall was unable to say anything about Stratus other than the single citation in a footnote. (Marshall, Tr. 3274-3275). He could not say whether Stratus made a coherent proposal to Patterson. (Marshall, Tr. 3275).

**Response to Proposed Finding No. 985**

The Proposed Finding is unsupported insofar as it suggests that Stratus was not a buying group or was not turned down by at least one of the Respondents. Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Marshall is Complaint Counsel's expert. Additionally, the Proposed

Finding is inaccurate insofar as it suggests that the Stratus was not a buying group or was not turned down by at least one of the Respondents. Record evidence shows that Patterson considered Stratus to be a buying group and turned the opportunity to bid. (CX3008 at 001-002; CX8004 (McFadden, Dep. at 140-141)).

986. Dr. Marshall included XYZ Dental among the buying groups listed in paragraph 491 of his report. (CX7100 at 209, 210, ¶ 491).

**Response to Proposed Finding No. 986**

Complaint Counsel has no specific response.

987. Dr. Marshall knew nothing about XYZ Dental other than that Benco considered it to be a buying group. (Marshall, Tr. 3383). He did nothing to investigate the business opportunity that XYZ Dental presented to Benco. (Marshall, Tr. 3383). Dr. Marshall offered no opinion as to whether it was in Benco's unilateral economic self-interest to decline to do business with XYZ Dental. (Marshall, Tr. 3385).

**Response to Proposed Finding No. 987**

The Proposed Finding is unsupported insofar as it suggests that XYZ Dental was not a buying group or was not turned down by at least one of the Respondents. Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Marshall is Complaint Counsel's expert. Additionally, the Proposed Finding is inaccurate insofar as it suggests that the XYZ Dental was not a buying group or was not turned down by at least one of the Respondents. Record evidence shows that Benco did not bid for XYZ Dental in 2012 because it considered XYZ Dental to be a "GPO or 'buying club' and Benco does not recognize these types of affiliations." (CCFF ¶ 413).

988. Dr. Marshall included DDS Group among the buying groups listed in paragraph 491 of his report. (CX7100 at 209, 210, ¶ 491).

**Response to Proposed Finding No. 988**

Complaint Counsel has no specific response.

989. Dr. Marshall knew nothing about DDS Group other than that it was a buying group and the single citation in a footnote. (Marshall, Tr. 3385-3386). Although the document

cited by Dr. Marshall in his report indicates that DDS Group falsely listed Benco as a “featured sponsor” without Benco’s permission, Dr. Marshall conducted no investigation. (CX1200; Marshall, Tr. 3386-3387). Dr. Marshall offered no opinion as to whether Benco acted contrary to its unilateral economic self-interest by deciding not to do business with DDS Group. (Marshall, Tr. 3387).

### **Response to Proposed Finding No. 989**

The Proposed Finding is unsupported insofar as it suggests that the DDS Group was not a buying group or was not turned down by at least one of the Respondents. Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Marshall is Complaint Counsel’s expert. Additionally, the Proposed Finding is inaccurate insofar as it suggests that the DDS Group was not a buying group or was not turned down by at least one of the Respondents. Record evidence shows that Benco did not bid for the DDS Group in 2013. (CCFF ¶ 415).

### **3. Dr. Marshall Abandoned His General Assertion That Benco Acted Contrary To Its Unilateral Economic Self-Interest By Not Dealing With Buying Groups**

990. Initially, Dr. Marshall asserted, generally and without limitation, that it was in Benco’s unilateral economic self-interest to discount to buying groups, that the loss from not winning the buying group contract will *always* result in a decrease in profits, and that Benco’s conduct of not bidding for buying group business was inconsistent with acting in their own unilateral economic self-interest.

### **Response to Proposed Finding No. 990**

The Proposed Finding is unsupported.

991. At trial, Dr. Marshall opined only that Benco acted contrary to its unilateral economic self-interest by not bidding for the business of the Kois and Smile Source buying groups. (Marshall, Tr. 3387-3388).

### **Response to Proposed Finding No. 991**

The Proposed Finding is misleading and vague in its use and placement of the word “only.” It is unclear if “only” is meant to apply to Benco; in which case the Proposed Finding is incorrect because Dr. Marshall also testified about the unilateral self-interests of Schein and Patterson.



(Marshall, Tr. 2857-2877). Insofar as the word “only” is to be applied to Kois and Smile Source, the Proposed Finding is misleading and incomplete in that it does not describe Marshall’s analyses, which were five natural experiments using Kois and Smile Source data that examined whether or not it was profitable for dental supply distributors, including Respondents, to bid for and obtain the business of buying groups. (Marshall, Tr. 2859-2861; [REDACTED]; [REDACTED]; CCFF ¶¶ 1637-1684). In these natural experiments, Dr. Marshall observed conduct inconsistent with Respondents’ unilateral self interests and instead consistent with coordinated action. (CCFF ¶¶ 1637-1684).

992. At trial, Dr. Marshall offered no opinion as to whether Benco’s conduct of not bidding for the business of the other 36 buying groups identified in his expert report was inconsistent with Benco’s own unilateral economic self-interest. (Marshall, Tr. 3387-3388).

**Response to Proposed Finding No. 992**

The Proposed Finding is misleading and incomplete insofar as it does not reference the reason that Dr. Marshall included this list of buying groups in his Expert Report. Dr. Marshall testified that in the section of his report on the likely anticompetitive harm from the Respondents’ conspiracy not to do business with buying groups, Dr. Marshall listed buying groups that were turned down by the Respondents and would be harmed by not receiving discounts. (Marshall, Tr. 3384 (testifying about CX7100 at 209-213 (¶491) (Marshall Expert Report))).

993. At trial, Dr. Marshall confirmed that he was not offering an opinion, one way or the other, as to whether it was in Benco’s unilateral self-interest to decline to do business with XYZ Dental. (Marshall, Tr. 3385).

**Response to Proposed Finding No. 993**

The Proposed Finding is misleading and incomplete insofar as it does not reference the reason that Dr. Marshall included the example of XYZ Dental in his Expert Report. Dr. Marshall testified that in the section of his report on the likely anticompetitive harm from the Respondents’ conspiracy not to do business with buying groups, Dr. Marshall listed buying

groups that were turned down by the Respondents and would be harmed by not receiving discounts. (Marshall, Tr. 3383-3384 (testifying about CX7100 at 209-213 (¶491) (Marshall Expert Report))). XYZ Dental was on Dr. Marshall's list. (CX7100 at 209-213 (¶491, number 6) (Marshall Expert Report)).

994. At trial, Dr. Marshall confirmed that he had not done any empirical analysis necessary to determine whether it was consistent with Benco's unilateral economic self-interest to decline to do business with XYZ Dental. (Marshall, Tr. 3384-3385).

**Response to Proposed Finding No. 994**

Complaint Counsel has no specific response.

995. At trial, Dr. Marshall confirmed that he was not offering any opinion, one way or the other, that Benco acted contrary to its unilateral self-interest by deciding not to do business with DDS Group. (Marshall, Tr. 3387).

**Response to Proposed Finding No. 995**

The Proposed Finding is misleading and incomplete insofar as it does not reference the reason that Dr. Marshall included the example of DDS Group in his Expert Report. Dr. Marshall testified that in the section of his report on the likely anticompetitive harm from the Respondents' conspiracy not to do business with buying groups, Dr. Marshall listed buying groups that were turned down by the Respondents and would be harmed by not receiving discounts. (Marshall, Tr. 3383-3384 (testifying about CX7100 at 209-213 (¶491) (Marshall Expert Report))). DDS Group was on this list. (CX7100 at 209-213 (¶491, number 7) (Marshall Expert Report)).

996. At trial, Dr. Marshall confirmed that he had not done any specific data analysis regarding the DDS Group, and therefore was not offering any opinion, one way or the other, as to whether Benco acted contrary to its unilateral self-interest by deciding not to do business with DDS Group. (Marshall, Tr. 3387).

**Response to Proposed Finding No. 996**

Complaint Counsel has no specific response.

997. At trial, Dr. Marshall confirmed that he hadn't done a specific data analysis with regard to the other 36 buying groups identified in his expert report. (Marshall, Tr. 3387-3388).

**Response to Proposed Finding No. 997**

The Proposed Finding is misleading and vague in that it relies on the term "data analysis" without reference to the type of data analysis. The Proposed Finding is misleading and incomplete insofar as it does not reference the reason that Dr. Marshall included the 36 other buying groups in his Expert Report. Dr. Marshall testified that in the section of his report on the likely anticompetitive harm from the Respondents' conspiracy not to do business with buying groups, Dr. Marshall listed buying groups that were turned down by the Respondents and would be harmed by not receiving discounts. (Marshall, Tr. 3384 (testifying about CX7100 at 209-213 (¶491) (Marshall Expert Report))). Additionally, the Proposed Finding is incomplete and misleading because many of these groups were never fully formed because they could not secure supply discounts from Respondents, precluding any data analysis. (CX7101 at 64 (¶ 163) (Marshall Rebuttal Expert Report) ("Many of these 38 buying groups may simply not have gotten off the ground due to their inability to secure supply from Schein, Patterson, or Benco, and so there would be no data to analyze in the first place.")).

998. At trial, Dr. Marshall confirmed that he was not offering an opinion as to whether it was contrary to Benco's unilateral self-interest to decline to do business with the 36 buying groups that he had not studied. (Marshall. Tr. 3387-3388).

**Response to Proposed Finding No. 998**

The Proposed Finding is misleading and incomplete insofar as it does not reference the reason that Dr. Marshall included the example of these buying groups in his Expert Report. Dr. Marshall testified that in the section of his report on the likely anticompetitive harm from the Respondents' conspiracy not to do business with buying groups, Dr. Marshall listed buying groups that were turned down by the Respondents and would be harmed by not receiving

discounts. (Marshall, Tr. 3384 (testifying about CX7100 at 209-213 (¶491) (Marshall Expert Report))).

999. At trial, Dr. Marshall confirmed that he was arguing that Benco acted contrary to its unilateral self-interest only from the Kois and Smile Source analyses. (Marshall, Tr. 3387-3388).

### **Response to Proposed Finding No. 999**

The Proposed Finding is misleading, incomplete, and vague insofar as it does not describe what the Kois and Smile analyses were. In his Expert Report, Dr. Marshall reported on five natural experiments using Kois and Smile Source data that examined whether or not it was profitable for dental supply distributors, including Respondents, to bid for and obtain the business of buying groups. (Marshall, Tr. 2859-2861; [REDACTED]; [REDACTED]; CCFF ¶¶ 1637-1684). In these natural experiments, Dr. Marshall observed conduct inconsistent with Respondents' unilateral self-interests and instead consistent with coordinated action. (CCFF ¶¶ 1637-1684). The Proposed Finding is also misleading and incomplete insofar as it suggests that the only evidence Dr. Marshall had that Respondents, including Benco, were acting contrary to their unilateral self-interests in not bidding for buying groups was the five natural experiments. Dr. Marshall also based his opinion on documentary and testimonial evidence in the record on the opportunities buying groups offered to gain new customers from rivals and grow profits. [REDACTED]

### **C. RESPONSES TO PROPOSED FINDINGS REGARDING “DR. MARSHALL’S PROFITABILITY STUDIES OF DEALING WITH THE KOIS AND SMILE SOURCE BUYING GROUPS WERE DEEPLY FLAWED AND FAIL TO SUPPORT HIS CONCLUSIONS”**

#### **1. Dr. Marshall’s Theoretical Basis For His Analysis Is Incorrect**

1000. Dr. Marshall’s theory behind his analysis is wrong. (Carlton, Tr. 5384; Carlton, Tr. 5386-5387; RX2832 at 45, ¶ 65; RX2832 at 48-49, ¶¶ 70-71).

**Response to Proposed Finding No. 1000**

This Proposed Finding is vague as to what “theory” and “analysis” is referring to. To the extent that this Proposed Finding is referring to Dr. Marshall’s profitability analyses, it is inaccurate, incomplete, and misleading for reasons explained in Complaint Counsel’s Response to Proposed Finding Nos. 1001-1242. Additionally, this Proposed Finding is argumentative and not appropriate for a factual finding.

1001. The economic construct of Dr. Marshall’s analysis conflates conspiratorial behavior with non-conspiratorial oligopolistic behavior. (RX2832 at 48, ¶ 71).

**Response to Proposed Finding No. 1001**

This Proposed Finding is inaccurate, incomplete, and misleading to the extent that it suggests that the facts of the case at hand constitute lawful oligopolistic coordination. Dr. Marshall disagreed with Dr. Carlton’s opinion (cited here) that Respondents’ parallel conduct could be the result of oligopolistic conscious parallelism given the inter-firm communications in this case. (CX7101 at 026-027, 038-039 (¶¶ 63-66, 88-90) (Marshall Rebuttal Expert Report); *see also* Marshall, Tr. 2877-2888). Dr. Carlton’s conclusion that oligopolistic interdependence could explain Respondents’ parallel conduct, is also based on a false premise as applied to this case. While Dr. Carlton opined that it is possible that Respondents each decided not to discount to buying groups in parallel, taking a “wait and see” approach (RX2832 at 066 (¶ 99)), it is undisputed that Schein began discounting to buying groups before the conspiracy. (CCFF ¶¶ 432-453). In other words, contrary to Dr. Carlton’s opinion, Schein never took a “wait and see” approach, it affirmatively changed its conduct from working with buying groups to instructing its sales team to refuse buying groups. (CCFF ¶¶ 686-954; CX7101 at 026-027 (¶¶ 63-65; ¶ 63 (“Dr. Carlton does not explain how his client, Schein, came to its own spontaneous unilateral understanding to not bid.”)); *see also* CX7100 at 203 (¶ 475) (Marshall Expert Report) (“I

describe how Respondents behaved toward customers other than buying groups and how Benco entered Southern California. The behavior underlying both these episodes contrasts with Respondents' non-competitive behavior toward dental buying groups. This contrast suggests that the Respondents' non-competitive behavior toward buying groups is not the result of the Respondents acting as they typically do. In other words, this contrast in conduct is an indicator that Respondents' parallel conduct with respect to buying groups is driven by something other than non-competitive oligopoly behavior.”)).

1002. The flaws in Dr. Marshall's analysis render it lacking in any theoretically valid foundation for reaching any conclusions about whether a distributor's behavior can be explained by a conspiracy. (RX2832 at 48, ¶ 70).

#### **Response to Proposed Finding No. 1002**

This Proposed Finding is vague as to what “analysis” is referring to. To the extent that this Proposed Finding is referring to Dr. Marshall's profitability analyses, this Proposed Finding is inaccurate and misleading to the extent it suggests that these analyses are not are reliable and do not illustrate that it was against Schein, Patterson, and Benco's own unilateral economic self-interest to have a no buying group policy during the relevant period.

Rather, Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report; (CCFF ¶¶ 1637-1684)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). Accordingly, consistent with Dr. Marshall's analyses, it was against Respondents' unilateral self-interest to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650, 1651-1656, 1664-1666, 1672-1673, 1678). To the extent that this Proposed Finding relies on the paragraph of Dr. Carlton's expert report suggesting that Dr. Marshall conflates

conspiratorial behavior with non-conspiratorial oligopolistic behavior, this Proposed Finding irrelevant, inaccurate, incomplete, and misleading for reasons explained in Complaint Counsel's Response to Benco Proposed Finding No. 1001.

1003. There are many potential disadvantages of dealing with buying groups. (Cavaretta, Tr. 5568-69; Cohen, Tr. 444-45, 861; Ryan, Tr. 1034-36, 1166-67; see also RX2928; Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65).

### **Response to Proposed Finding No. 1003**

This Proposed Finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that buying groups are not profitable for distributors because the record evidence shows that buying groups are profitable for distributors, even without contractual volume guarantees. (CCFF ¶¶ 1320, 1381, 1385-1387, 1651, 1656, 1681, 1686-1687, 1689, 1718, 1723-1724, 1726). Additionally, the record evidence shows that buying groups save dentists money and help preserve independent dentistry. (CCFF ¶¶ 138-145).

Moreover, Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report); CCFF ¶¶ 1637-1684). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). Accordingly, while there might be some potential disadvantages with dealing with buying groups, Dr. Marshall's profitability analyses show it was against Respondents' unilateral self-interest to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups because these analyses show that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1651-1656, 1664-1666, 1672-1673, 1678).

1004. Potential disadvantages of dealing with buying groups include the fact that buying groups cannot ensure compliance by their members, interfered with Benco's relations with its

individual dentist customers, and did not create efficiencies for Benco. (Ryan, Tr. 1082, 1166-67, 1179-80; Cohen, Tr. 444-45, 780).

#### **Response to Proposed Finding No. 1004**

This Proposed Finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that buying groups are not profitable for distributors because the record evidence shows that buying groups are profitable for distributors, even without contractual volume guarantees. (CCFF ¶¶ 1320, 1381, 1385-1387, 1651, 1656, 1681, 1686-1687, 1689, 1718, 1723-1724, 1726). Additionally, the record evidence show that buying groups save dentists money and help preserve independent dentistry. (CCFF ¶¶ 138-145).

Moreover, Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report); (CCFF ¶¶ 1637-1684)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). Accordingly, while there might be some potential disadvantages with dealing with buying groups, Dr. Marshall's profitability analyses show it was against Respondents' unilateral self-interest to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups because these analyses show that buying groups drive incremental business to the distributor. (CCFF ¶¶ 630-650, 1651-1656, 1664-1666, 1672-1673, 1678).

1005. From an economic point of view, there are many reasons why a distributor might not want to deal with a particular buying group. (Carlton, Tr. 5387).

#### **Response to Proposed Finding No. 1005**

This Proposed Finding is incomplete because it ignores that the "many reasons" identified in this Proposed Finding are irrelevant to any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five profitability analyses to determine whether a buying



group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents' unilateral self-interest, including Benco's, to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also* Marshall, Tr. 3387, 3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."); Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group'...and it's passing on this as a matter of policy.'"))).

1006. From an economic point of view, reasons why a distributor might not want to deal with a particular buying group include the lower price to customers who otherwise would have bought from the distributor, the possibility of inducing other customers to join the buying group, and the possibility of other customers learning of the discounts and inducing salespeople to offer them similar discounts. (Carlton, Tr. 5387-5390).

**Response to Proposed Finding No. 1006**

The testimony cited as support for this Proposed Finding is irrelevant to Benco because Dr. Carlton testified that the factors in the formula mentioned in the testimony cited are specific to Schein's consideration. (Carlton, Tr. 5390 ("Q. Okay. Now, you said that Schein needs to consider all of these factors in deciding whether or not to do business with a buying group...." A. Yes.")). Moreover, this Proposed Finding is irrelevant and unreliable because the cited testimony of Dr. Carlton relies on a flawed and unsupported "formula" that Dr. Carlton presented in his expert report. (RX2832 at 051 (§ 76) (Carlton Expert Report)). Dr. Carlton failed to do any quantitative analysis to support the assertions in this Proposed Finding. While Dr. Carlton identified a formula in paragraph 75 of his expert report purporting to show opportunity and profitability costs related to Schein working with or not working with Kois Buyers Group (RX2832 at 051 (§ 76) (Carlton Expert Report)), Dr. Carlton never actually applied the formula to any data to support his assertion. (RX2966 (Carlton, Dep. at 269-270 ("Q. Now, in the scope of your report, or in the four corners of your report have you attempted to perform this calculation? A. I don't perform this calculation.")). The support and foundation for this purported "formula" is unreliable because it is solely based on Dr. Carlton's memory and interpretation of facts conveyed to him by Schein executives for which he did not even bother to keep his notes. (Carlton, Tr. at 5427-5428, 5458- 5466). He describes that the formula is "based on his understanding of speaking to Schein executives." (Carlton, Tr. 5460-5461). In Dr. Carlton's own words, the formula is "basically, my summary of what [Schein executives are] telling me." (Carlton, Tr. 5460-5461). Dr. Carlton admitted that he never showed this equation to anybody at Schein or even asked if Schein uses this equation to make business decisions. (Carlton, Tr. 5464; *see also* RX2966 (Carlton, Dep. at 270, 281 ("Q. Are there any examples in this report that would show that Schein performed these, this calculation that you set forth in

paragraph 75?...A. I don't know that there was such a, that Schein had enough time to do such a calculation. I'm not aware of such a calculation...Q. Okay. But you didn't ask specific questions that would explain how Schein would carry out the, understanding the values for the inputs into your equation. Correct?...A. I didn't go over each element and ask them how they form expectations of each element.”)). He further admitted that he solely relied on the interviews and did not cite any other evidence. (Carlton, Tr. 5465-5466).

This Proposed Finding is incomplete because it ignores the point that the “reasons” identified in this Proposed Finding are irrelevant to any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349)

(Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED]

[REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents' unilateral self-interest, including Benco's, to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that “[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight.”); *see also* Marshall, Tr. 3387, 3384 (“I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups,” “I am just noting again that they

have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."); Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group'...and it's passing on this as a matter of policy.'")).

1007. Other factors that might affect whether a distributor chooses to deal with buying groups include whether selling to buying groups aligns with the strategic objectives of the distributor. (Carlton, Tr. 5387-5390).

#### **Response to Proposed Finding No. 1007**

The testimony cited in this Proposed Finding is irrelevant to Benco because Dr. Carlton testified that the factors in the formula mentioned in the testimony cited are specific to Schein's consideration. (Carlton, Tr. 5390 ("Q. Okay. Now, you said that Schein needs to consider all of these factors in deciding whether or not to do business with a buying group...." A. Yes.))). Moreover, for reasons explained in more detail in Complaint Counsel's Response to Benco Proposed Finding No. 1006, this Proposed Finding is irrelevant and unreliable because Dr. Carlton's testimony cited relies on a flawed and unsupported "formula" that Dr. Carlton presented in his expert report. (RX2832 at 051 (¶ 76) (Carlton Expert Report)). *See* Response to Proposed Finding No. 1006.

This Proposed Finding is irrelevant because the "other factors" identified in this Proposed Finding are irrelevant to any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED])

██████████). Accordingly, Dr. Marshall opined that it was against Respondents' unilateral self-interest, including Benco's, to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also* Marshall, Tr. 3387, 3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."); Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group'...and it's passing on this as a matter of policy.'"))).

1008. Dealing with a buying group might reduce the money or commissions that a distributor's field service consultants or sales consultants make, which can create internal conflict. (Carlton, Tr. 5387-5390).

#### **Response to Proposed Finding No. 1008**

The testimony cited in this Proposed Finding is irrelevant to Benco because Dr. Carlton (Schein's expert) testified that the factors in the formula mentioned in the testimony cited as support for this Proposed Finding are specific to Schein's consideration. (Carlton, Tr. 5390 ("Q.

Okay. Now, you said that Schein needs to consider all of these factors in deciding whether or not to do business with a buying group....” A. Yes.”)). Moreover, for reasons explained in more detail in Complaint Counsel’s Response to Benco Proposed Finding No. 1006, this Proposed Finding is irrelevant and unreliable because Dr. Carlton’s testimony cited relies on a flawed and unsupported “formula” that Dr. Carlton presented in his expert report. *See* Complaint Counsel’s Response to Benco Proposed Finding No. 1006.

This Proposed Finding is irrelevant because the reduction of commissions identified in this Proposed Finding is irrelevant to any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1651-1656, 1664-1666, 1672-1673, 1678; *see also* [REDACTED]).

Accordingly, Dr. Marshall opined that it was against Respondents’ unilateral self-interest, including Benco’s, to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall’s review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents’ self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that “[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight.”); *see also* Marshall, Tr. 3387, 3384 (“I’m noting, though, that again that they’re making a blanket statement here: We don’t do business with buying groups,”

“I am just noting again that they have made statements of a blanket nature: We don’t do business with buying groups,” “It says right here ‘we would consider them a GPO,’ group purchasing organization these types of affiliations as single customer.’ It’s just a blanket statement Buying club, we don’t do business with it. That’s it. It doesn’t reflect any incremental evaluation.”); Marshall, Tr. 3266 (“I’m looking at this quotation and it says ‘Typical approach of an upstart buying group’ ...and it’s passing on this as a matter of policy.’”)).

1009. There could be costs associated with dealing with a buying group; for example, a buying group may charge a distributor a fee for dealing with the buying group. (Carlton, Tr. 5387-5390).

### **Response to Proposed Finding No. 1009**

The testimony cited in this Proposed Finding is irrelevant to Benco because Dr. Carlton testified that the factors in the formula mentioned in the testimony cited as support for this Proposed Finding are specific to Schein’s consideration. (Carlton, Tr. 5390 (“Q. Okay. Now, you said that Schein needs to consider all of these factors in deciding whether or not to do business with a buying group....” A. Yes.”)). Moreover, for reasons explained in more detail in Complaint Counsel’s Response to Benco Proposed Finding No. 1006, this Proposed Finding is irrelevant and unreliable because Dr. Carlton’s testimony cited as support for this proposed finding relies on a flawed and unsupported “formula” that Dr. Carlton presented in his expert report. (RX2832 at 051 (¶ 76) (Carlton Expert Report)). *See* Complaint Counsel’s Response to Benco Proposed Finding No. 1006.

The Proposed Finding is irrelevant because the “costs associated with doing business with a buying group” identified in this Proposed Finding are irrelevant to any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that

buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents' unilateral self-interest, including Benco's, to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also* Marshall, Tr. 3387, 3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."); Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group'...and it's passing on this as a matter of policy.'"))).

1010. All of these factors matter when a distributor is trying to decide whether to deal with a buying group. (Carlton, Tr. 5387-5390).

#### **Response to Proposed Finding No. 1010**

This Proposed Finding is vague as to what "all of these factors" is referring to. The testimony cited in this Proposed Finding is irrelevant to Benco because Dr. Carlton (Schein's expert)



testified that the factors in the formula mentioned in the testimony cited as support for the proposed finding are specific to Schein's consideration. (Carlton, Tr. 5390 ("Q. Okay. Now, you said that Schein needs to consider all of these factors in deciding whether or not to do business with a buying group...." A. Yes.")). Moreover, for reasons explained in more detail in Complaint Counsel's Response to Benco Proposed Finding No. 1006, this Proposed Finding is irrelevant and unreliable because Dr. Carlton's testimony cited relies on a flawed and unsupported "formula" that Dr. Carlton presented in his expert report. (RX2832 at 051 (¶ 76) (Carlton Expert Report)). *See* Complaint Counsel's Response to Benco Proposed Finding No. 1006.

This Proposed Finding is irrelevant because "all these other factors" identified in this Proposed Finding are irrelevant to any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents' unilateral self-interest, including Benco's, to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against

pursuing such business, is a plus factor that also carries much weight.”); *see also* Marshall, Tr. 3387, 3384 (“I’m noting, though, that again that they’re making a blanket statement here: We don’t do business with buying groups,” “I am just noting again that they have made statements of a blanket nature: We don’t do business with buying groups,” “It says right here ‘we would consider them a GPO,’ group purchasing organization these types of affiliations as single customer.’ It’s just a blanket statement Buying club, we don’t do business with it. That’s it. It doesn’t reflect any incremental evaluation.”); Marshall, Tr. 3266 (“I’m looking at this quotation and it says ‘Typical approach of an upstart buying group’...and it’s passing on this as a matter of policy.’”)).

1011. Dr. Marshall did not consider any disadvantages of dealing with buying groups other than cannibalization. (Marshall, Tr. 3380).

#### **Response to Proposed Finding No. 1011**

This Proposed Finding irrelevant to any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents’ unilateral self-interest, including Benco’s, to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall’s review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents’ self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his

Report that “[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight.”); *see also* Marshall, Tr. 3387, 3384 (“I’m noting, though, that again that they’re making a blanket statement here: We don’t do business with buying groups,” “I am just noting again that they have made statements of a blanket nature: We don’t do business with buying groups,” “It says right here ‘we would consider them a GPO,’ group purchasing organization these types of affiliations as single customer.’ It’s just a blanket statement Buying club, we don’t do business with it. That’s it. It doesn’t reflect any incremental evaluation.”); Marshall, Tr. 3266 (“I’m looking at this quotation and it says ‘Typical approach of an upstart buying group’...and it’s passing on this as a matter of policy.’”)).

1012. Dr. Marshall did not account for the various factors affecting whether a distributor chooses to deal with a buying group. (Carlton, Tr. 5390).

#### **Response to Proposed Finding No. 1012**

The Proposed Finding is unsupported. The testimony cited as support is irrelevant to Benco because Dr. Carlton testified that the factors in the formula mentioned in the testimony cited are specific to Schein’s consideration. (Carlton, Tr. 5390 (“Q. Okay. Now, you said that Schein needs to consider all of these factors in deciding whether or not to do business with a buying group....” A. Yes.”)). Moreover, for reasons explained in more detail in Complaint Counsel’s Response to Benco Proposed Finding No. 1006, this Proposed Finding is irrelevant and unreliable because Dr. Carlton’s testimony cited as support relies on a flawed and unsupported “formula” that Dr. Carlton presented in his expert report. (RX2832 at 051 (¶ 76) (Carlton Expert Report)). *See* Complaint Counsel’s Response to Benco Proposed Finding No. 1006.

The Proposed Finding is irrelevant because “various factors” identified in this Proposed Finding are irrelevant to any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents’ unilateral self-interest, including Benco’s, to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall’s review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents’ self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that “[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight.”); *see also* Marshall, Tr. 3387, 3384 (“I’m noting, though, that again that they’re making a blanket statement here: We don’t do business with buying groups,” “I am just noting again that they have made statements of a blanket nature: We don’t do business with buying groups,” “It says right here ‘we would consider them a GPO,’ group purchasing organization these types of affiliations as single customer.’ It’s just a blanket statement Buying club, we don’t do business with it. That’s it. It doesn’t reflect any incremental evaluation.”); Marshall, Tr. 3266 (“I’m looking at this quotation and it says ‘Typical approach of an upstart buying group’ ...and it’s passing on this as a matter of policy.”)).

1013. Dr. Carlton summarized the factors that influence a distributor's decision whether to do business with a buying group in an equation. (Carlton, Tr. 5390-5392).

**Response to Proposed Finding No. 1013**

The Proposed Finding is unsupported. The testimony cited as support for this Proposed Finding is irrelevant to Benco because Dr. Carlton testified that the factors in the formula (or "equation") mentioned in the testimony cited are specific to Schein's consideration. (Carlton, Tr. 5390 ("Q. Okay. Now, you said that Schein needs to consider all of these factors in deciding whether or not to do business with a buying group...." A. Yes.")). Moreover, for reasons explained in more detail in Complaint Counsel's Response to Benco Proposed Finding No. 1006, this Proposed Finding is irrelevant and unreliable because Dr. Carlton's testimony cited relies on a flawed and unsupported "formula" that Dr. Carlton presented in his expert report. (RX2832 at 051 (¶ 76) (Carlton Expert Report)). *See* Complaint Counsel's Response to Benco Proposed Finding No. 1006.

The Proposed Finding is incomplete because it ignores the point that other "factors" identified in this Proposed Finding are irrelevant to any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents' unilateral self-interest, including Benco's, to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a

categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that “[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight.”); *see also* Marshall, Tr. 3387, 3384 (“I’m noting, though, that again that they’re making a blanket statement here: We don’t do business with buying groups,” “I am just noting again that they have made statements of a blanket nature: We don’t do business with buying groups,” “It says right here ‘we would consider them a GPO,’ group purchasing organization these types of affiliations as single customer.’ It’s just a blanket statement Buying club, we don’t do business with it. That’s it. It doesn’t reflect any incremental evaluation.”); Marshall, Tr. 3266 (“I’m looking at this quotation and it says ‘Typical approach of an upstart buying group’...and it’s passing on this as a matter of policy.”)).

1014. Dr. Marshall agreed that Dr. Carlton’s equation was the right equation to determine whether a distributor acted contrary to its self-interest. (Carlton, Tr. 5392).

#### **Response to Proposed Finding No. 1014**

The Proposed Finding is inaccurate, misleading, and unsupported because the testimony cited does not support the Proposed Finding – it only cites to Dr. Carlton’s trial testimony for this point; it does not cite to any of Dr. Marshall’s testimony or expert reports indicating that Dr. Marshall agrees that Dr. Carlton’s equation is correct.

1015. Dr. Marshall did not attempt to apply Dr. Carlton’s equation. (Carlton, Tr. 5392-5393).

#### **Response to Proposed Finding No. 1015**

The Proposed Finding is unsupported. The testimony cited as support for the Proposed Finding is irrelevant to Benco because Dr. Carlton testified that the factors in the formula (or “equation”)

mentioned in the testimony cited are specific to Schein's consideration. (Carlton, Tr. 5390 ("Q. Okay. Now, you said that Schein needs to consider all of these factors in deciding whether or not to do business with a buying group...." A. Yes.")). This Proposed Finding is irrelevant and unreliable to the extent that it suggests that Dr. Carlton's equation has and can be "applied." Dr. Carlton never actually applied the formula to any data to support his assertion. (RX2966 (Carlton, Dep. at 269-270 ("Q. Now, in the scope of your report, or in the four corners of your report have you attempted to perform this calculation? A. I don't perform this calculation.))). Dr. Marshall also points out that Dr. Carlton himself never actually applied the "equation" in the Proposed Finding "[i]f that is how Schein actually made its decisions, given that Schein claims to evaluate buying groups on a case-by-case basis, one might expect Dr. Carlton to cite to the evidence showing that Schein performed the calculation he describes. Instead, he cites no evidence that Schein ever performed such a calculation with respect to Smile Source, Kois Buyers Group, or any other buying group. Furthermore, Dr. Carlton's "complex" calculation is impossible to implement without data from Schein about its understandings and expectations. Dr. Carlton points to no such evidence in the record of this case." (CX7101 at 054-055 (¶ 138) (Marshall Rebuttal Expert Report)).

Moreover, this Proposed Finding is irrelevant and unreliable because Dr. Carlton's "equation" that this Proposed Finding references is unreliable, flawed, and unsupported for reasons explained in more detail in Complaint Counsel's Response to Benco Proposed Finding No. 1006.

The Proposed Finding is incomplete because it ignores that Dr. Carlton's "equation" in this Proposed Finding is irrelevant to any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall

Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents' unilateral self-interest, including Benco's, to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also* Marshall, Tr. 3387, 3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."); Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group'...and it's passing on this as a matter of policy.'"))).

1016. Although Dr. Marshall says it's difficult to apply Dr. Carlton's equation, businesses make judgments every day based on factors like those described by Dr. Carlton. (Carlton, Tr. 5393).

**Response to Proposed Finding No. 1016**



The Proposed Finding is unsupported by the cited testimony. The testimony cited as support for this Proposed Finding is irrelevant to Benco because Dr. Carlton testified that the factors in the formula mentioned in the testimony cited are specific to Schein's consideration. (Carlton, Tr. 5390 ("Q. Okay. Now, you said that Schein needs to consider all of these factors in deciding whether or not to do business with a buying group...." A. Yes.")). This Proposed Finding is irrelevant and unreliable to the extent that it suggests that Dr. Carlton's equation has and can be "applied." Dr. Carlton never actually applied the formula to any data to support his assertion. (RX2966 (Carlton, Dep. at 269-270 ("Q. Now, in the scope of your report, or in the four corners of your report have you attempted to perform this calculation? A. I don't perform this calculation.")). Dr. Carlton also admitted that he never showed this equation to anybody at Schein or even asked if Schein uses this equation to make business decisions. (Carlton, Tr. 5464; *see also* RX2966 (Carlton, Dep. at 270, 281 ("Q. Are there any examples in this report that would show that Schein performed these, this calculation that you set forth in paragraph 75?...A. I don't know that there was such a, that Schein had enough time to do such a calculation. I'm not aware of such a calculation...Q. Okay. But you didn't ask specific questions that would explain how Schein would carry out the, understanding the values for the inputs into your equation. Correct?...A. I didn't go over each element and ask them how they form expectations of each element.))). He further admitted that he solely relied on the interviews and does not cite any other evidence. (Carlton, Tr. 5465-5466). Dr. Marshall points out that Dr. Carlton himself never actually applied the "equation" in the Proposed Finding "[i]f that is how Schein actually made its decisions, given that Schein claims to evaluate buying groups on a case-by-case basis, one might expect Dr. Carlton to cite to the evidence showing that Schein performed the calculation he describes. Instead, he cites no evidence that Schein ever performed such a calculation with respect to Smile Source, Kois Buyers Group, or any other buying group.

Furthermore, Dr. Carlton’s “complex” calculation is impossible to implement without data from Schein about its understandings and expectations. Dr. Carlton points to no such evidence in the record of this case.” (CX7101 at 054-055 (¶ 138) (Marshall Rebuttal Expert Report)). Moreover, this Proposed Finding is irrelevant and unreliable because Dr. Carlton’s “equation” that this Proposed Finding references is unreliable, flawed, and unsupported for reasons explained in more detail in Complaint Counsel’s Response to Benco Proposed Finding No. 1006.

This Proposed Finding is irrelevant because it ignores that Dr. Carlton’s formula in this Proposed Finding is irrelevant to any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1651-1656, 1664-1666, 1672-1673, 1678; *see also* [REDACTED]).

Accordingly, Dr. Marshall opined that it was against Respondents’ unilateral self-interest, including Benco’s, to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall’s review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents’ self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that “[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight.”); *see also* Marshall, Tr. 3387, 3384 (“I’m noting, though, that again that they’re making a blanket statement here: We don’t do business with buying groups,”

“I am just noting again that they have made statements of a blanket nature: We don’t do business with buying groups,” “It says right here ‘we would consider them a GPO,’ group purchasing organization these types of affiliations as single customer.’ It’s just a blanket statement Buying club, we don’t do business with it. That’s it. It doesn’t reflect any incremental evaluation.”); Marshall, Tr. 3266 (“I’m looking at this quotation and it says ‘Typical approach of an upstart buying group’ ...and it’s passing on this as a matter of policy.’”)).

1017. Dr. Carlton’s discussions with Schein’s executives confirm that the formula is what the business executives are trying to implement in their own business judgment. (Carlton, Tr. 5393; Carlton, Tr. 5460-5461).

### **Response to Proposed Finding No. 1017**

The Proposed Finding is unsupported insofar as the cited testimony is irrelevant to Benco because Dr. Carlton testified that the factors in the formula mentioned in the testimony cited are specific to Schein’s consideration. (Carlton, Tr. 5390 (“Q. Okay. Now, you said that Schein needs to consider all of these factors in deciding whether or not to do business with a buying group....” A. Yes.”)). Moreover, this Proposed Finding is irrelevant and unreliable because Dr. Carlton’s “formula” that this Proposed Finding references is unreliable, flawed, and unsupported for reasons explained in more detail in Complaint Counsel’s Response to Benco Proposed Finding No. 1006. Dr. Carlton never actually applied the formula to any data to support his assertion. (RX2966 (Carlton, Dep. at 269-270 (“Q. Now, in the scope of your report, or in the four corners of your report have you attempted to perform this calculation? A. I don’t perform this calculation.”)). Dr. Carlton also admitted that he never showed this equation to anybody at Schein or even asked if Schein uses this equation to make business decisions. (Carlton, Tr. 5464; *see also* RX2966 (Carlton, Dep. at 270, 281 (“Q. Are there any examples in this report that would show that Schein performed these, this calculation that you set forth in paragraph 75?...A. I don’t know that there was such a, that Schein had enough time to do such a calculation. I’m

not aware of such a calculation...Q. Okay. But you didn't ask specific questions that would explain how Schein would carry out the, understanding the values for the inputs into your equation. Correct?...A. I didn't go over each element and ask them how they form expectations of each element.”)). He further admitted that he solely relied on the interviews and does not cite any other evidence. (Carlton, Tr. 5465-5466).

This Proposed Finding is irrelevant because it ignores that Dr. Carlton's formula in this Proposed Finding is irrelevant to any blanket or categorical policy not to do business with buying groups.

Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED]

[REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents' unilateral self-interest, including Benco's, to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that “[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight.”); *see also* Marshall, Tr. 3387, 3384 (“I’m noting, though, that again that they’re making a blanket statement here: We don’t do business with buying groups,” “I am just noting again that they have made statements of a blanket nature: We don’t do business with buying groups,” “It says right here ‘we would

consider them a GPO,’ group purchasing organization these types of affiliations as single customer.’ It’s just a blanket statement Buying club, we don’t do business with it. That’s it. It doesn’t reflect any incremental evaluation.”); Marshall, Tr. 3266 (“I’m looking at this quotation and it says ‘Typical approach of an upstart buying group’...and it’s passing on this as a matter of policy.’”)).

1018. Dr. Marshall’s analysis doesn’t consider the right factors and so doesn’t implement the right calculation. (Carlton, Tr. 5393-5395).

### **Response to Proposed Finding No. 1018**

The Proposed Finding is unsupported insofar as the cited testimony is irrelevant to Benco because Dr. Carlton testified that the factors in the formula mentioned in the testimony cited are specific to Schein’s consideration. (Carlton, Tr. 5390 (“Q. Okay. Now, you said that Schein needs to consider all of these factors in deciding whether or not to do business with a buying group....” A. Yes.”)). Moreover, this Proposed Finding is irrelevant and unreliable because Dr. Carlton’s formula that this Proposed Finding references as the “right calculation” (RX2832 at 051 (¶ 76) (Carlton Expert Report)) is unreliable, flawed, and unsupported for reasons explained in more detail in Complaint Counsel’s Response to Benco Proposed Finding No. 1006.

This Proposed Finding is irrelevant because it ignores that Dr. Carlton’s formula in this Proposed Finding is irrelevant to any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents’ unilateral self-interest, including Benco’s, to have a no-buying group policy whereby they

instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall’s review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents’ self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that “[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight.”); *see also* Marshall, Tr. 3387, 3384 (“I’m noting, though, that again that they’re making a blanket statement here: We don’t do business with buying groups,” “I am just noting again that they have made statements of a blanket nature: We don’t do business with buying groups,” “It says right here ‘we would consider them a GPO,’ group purchasing organization these types of affiliations as single customer.’ It’s just a blanket statement Buying club, we don’t do business with it. That’s it. It doesn’t reflect any incremental evaluation.”); Marshall, Tr. 3266 (“I’m looking at this quotation and it says ‘Typical approach of an upstart buying group’...and it’s passing on this as a matter of policy.’”)).

1019. The fact that Dr. Marshall’s analysis ignores many factors that influence the decision to discount, combined with his assumption that buying groups can deliver sufficient incremental volume to make discounting profitable, renders his analysis unreliable. (RX2832 at 44, ¶ 64).

#### **Response to Proposed Finding No. 1019**

The Proposed Finding is irrelevant and unreliable because Dr. Carlton’s “calculation” that this Proposed Finding references is unreliable, flawed, and unsupported for reasons explained in more detail in Complaint Counsel’s Response to Benco Proposed Finding No. 1006.

The Proposed Finding is irrelevant because it ignores that Dr. Carlton's formula in this Proposed Finding is irrelevant to any blanket or categorical policy not to do business with buying groups. This Proposed Finding is inaccurate in suggesting that Dr. Marshall assumed that buying groups can deliver sufficient incremental volume to make discounting profitable. Rather, Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents' unilateral self-interest, including Benco's, to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also* Marshall, Tr. 3387, 3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental

evaluation.”); Marshall, Tr. 3266 (“I’m looking at this quotation and it says ‘Typical approach of an upstart buying group’ ...and it’s passing on this as a matter of policy.’”)).

## **2. Dr. Marshall’s Profitability Studies Followed No Accepted Methodology and Included Multiple Fundamental Flaws**

1020. Setting aside the fact that the theory is wrong, Dr. Marshall’s empirical study of the Kois and Smile Source buying groups is wrong. (Carlton, Tr. 5384; Carlton, Tr. 5386-5387; J. Johnson, Tr. 4828-4829).

### **Response to Proposed Finding No. 1020**

The Proposed Finding is vague and unintelligible as to what “the theory” refers to. This Proposed Finding is inaccurate, misleading, and incomplete for reasons explained in Complaint Counsel’s Response to Benco Proposed Finding Nos. 1021-1242. Additionally, the Proposed Finding is argumentative and not appropriate for a factual finding.

1021. Dr. Marshall’s empirical analyses of the Kois and Smile Source buying groups are flawed and do not provide a reliable basis for his assertions. (RX2832 at 44, ¶ 64).

### **Response to Proposed Finding No. 1021**

The Proposed Finding is vague as to what Dr. Marshall’s “empirical analyses” and “his assertions” is referring to. This Proposed Finding is inaccurate, incomplete, and contrary to the weight of the evidence to the extent that it suggests that Complaint Counsel’s evidence that Respondents acted contrary to their unilateral self-interest is limited to Dr. Marshall’s opinion. Instead, the record evidence, including qualitative documentary and testimonial evidence and Dr. Marshall’s analyses and opinions, demonstrate that Respondents acted contrary to their unilateral self-interest. (CCFF ¶¶ 1254-1390, 1637-1684). This Proposed Finding is also inaccurate, incomplete, and misleading for reasons explained in Complaint Counsel’s Response to Benco Proposed Finding Nos. 1022-1242.

1022. The collective significance of Dr. Marshall’s errors in his Kois and Smile Source studies is that they don’t tell us anything about Benco’s unilateral self-interest. (J. Johnson, Tr. 4856).



**Response to Proposed Finding No. 1022**

The Proposed Finding is vague as to which of Dr. Marshall's alleged "errors" it is referring to. This Proposed Finding is inaccurate, incomplete, and contrary to the weight of the evidence to the extent that it suggests that Complaint Counsel's evidence that Respondents acted contrary to their unilateral self-interest is limited to Dr. Marshall's opinion. Instead, the record evidence, including qualitative documentary and testimonial evidence and Dr. Marshall's analyses and opinions, demonstrate that Respondents acted contrary to their unilateral self-interest. (CCFF ¶¶ 1254-1390, 1637-1684). This Proposed Finding is also inaccurate, incomplete, and misleading for reasons explained in Complaint Counsel's Response to Benco Proposed Finding Nos. 1022-1242.

a. **Dr. Marshall's Profitability Studies Did Not Follow Any Accepted Method of Economic Analysis**

1023. Dr. Marshall's analysis of respondent's business opportunities with the Kois and Smile Source buying groups failed to follow any recognized method of economic analysis. (J. Johnson, Tr. 4837-38).

**Response to Proposed Finding No. 1023**

The Proposed Finding is vague as to what "analysis" is referring to. Additionally, the Proposed Finding is argumentative and not appropriate for a factual finding. This Proposed Finding is inaccurate and misleading to the extent that it is suggesting that Dr. Marshall's profitability studies are not a recognized method of economic analysis. Dr. Marshall testified that "part of [his] analysis was to look at five natural experiments that presented to me by the data to make a determination in this regard." (Marshall, Tr. 2860). Natural experiments are standard, accepted method of economic analysis in antitrust cases. Even Respondents' experts concede the value of natural experiments: Patterson's economic expert Dr. Wu employed a natural experiment in conducting a product market analysis in his expert report. (RX2833 at 050 (¶122)) (Wu Expert

Report) (“I also looked at this natural experiment to determine whether dentists are turning to full-service distributors to discipline the prices charged by online distributors like Darby.”)).

1024. Dr. Marshall’s expert report did not cite to a single academic, peer-reviewed study endorsing the type of analysis he performed to evaluate respondent’s business opportunities with the Kois and Smile Source buying groups. (Marshall, Tr. 3241; [REDACTED]).

#### **Response to Proposed Finding No. 1024**

The Proposed Finding is inaccurate and misleading to the extent that it is suggesting that Dr. Marshall’s profitability studies are not a recognized method of economic analysis. Dr. Marshall testified that “part of [his] analysis was to look at five natural experiments that presented to me by the data to make a determination in this regard.” (Marshall, Tr. 2860). Natural experiments are standard, accepted method of economic analysis in antitrust cases. Even Respondents’ experts concede the value of natural experiments: Patterson’s economic expert Dr. Wu employed a natural experiment in conducting a product market analysis in his expert report. (RX2833 at 050 (¶122) (Wu Expert Report) (“I also looked at this natural experiment to determine whether dentists are turning to full-service distributors to discipline the prices charged by online distributors like Darby.”)).

1025. Dr. Marshall couldn’t remember whether he cited to a single academic, peer-reviewed study endorsing the type of analysis he performed to evaluate respondent’s business opportunities with the Kois and Smile Source buying groups. (Marshall, Tr. 3241).

#### **Response to Proposed Finding No. 1025**

The Proposed Finding is inaccurate and misleading to the extent that it is suggesting that Dr. Marshall’s profitability studies are not a recognized method of economic analysis. Dr. Marshall testified that “part of [his] analysis was to look at five natural experiments that presented to me by the data to make a determination in this regard.” (Marshall, Tr. 2860). Natural experiments are standard, accepted method of economic analysis in antitrust cases. Even Respondents’

experts concede the value of natural experiments: Patterson’s economic expert Dr. Wu employed a natural experiment in conducting a product market analysis in his expert report. (RX2833 at 050 (¶122) (Wu Expert Report) (“I also looked at this natural experiment to determine whether dentists are turning to full-service distributors to discipline the prices charged by online distributors like Darby.”)).

b. Dr. Marshall’s Profitability Studies Included Only a Tiny Fraction of Dentists

1026. Dr. Marshall’s analysis of respondent’s business opportunities with the Kois and Smile Source buying groups studied only a tiny fraction of the approximately 200,000 dentists in the United States. (Marshall, Tr. 3219-3220).

**Response to Proposed Finding No. 1026**

The Proposed Finding is irrelevant, misleading, and incomplete to the extent that it suggests that Dr. Marshall should have studied a broader group of dentists than he did. For the buying group member dentists that Dr. Marshall studied in his profitability analyses, Dr. Marshall explained:

[REDACTED]

[REDACTED]

[REDACTED].

The purpose of Dr. Marshall’s five profitability studies was to examine different episodes of dentist purchasing pattern before and after a distributor starts to (or stops) supply a buying group. (Marshall, Tr. 2861-2862).

In the Kois-Burkhart (and his other) profitability studies, Dr. Marshall looked at which distributors the buying group member dentists purchased from *before* the distributor started

supplying the buying group and which distributors the members purchased from *after* the distributor started supplying the buying group. (Marshall, Tr. 2865).

Specifically explaining why he studied the Kois Buyers Group member dentists, Dr. Marshall explained that “[w]ell, the [REDACTED] dentists are the only ones to study for that study. They’re the only ones who are making these decisions about who to buy from, the only ones who bought anything from Burkhart, who was the supplier, so they’re the relevant ones to look at in this case, but they -- they are – that’s – that’s who should be studied in that case.” (Marshall, Tr. 3222).

By performing the five profitability analyses, Dr. Marshall was able to assess the substitution behavior patterns of buying group member dentists before and after a distributor begins (or stops) supplying a buying group. (Marshall, Tr. 2861). Accordingly, studying purchasing patterns of dentists, including dentists who were not a part of buying groups would not have made sense because including non-buying-group dentists in the case studies would not have yielded results relevant to product purchasing pattern switching after a dentist joins a buying group.

Dr. Marshall’s profitability studies analyzed the purchasing behavior of *all* dentists who were members of Smile Source and Kois at different points in time. [REDACTED]

[REDACTED]. This entailed the analysis of hundreds of dentists across the country—[REDACTED]

[REDACTED]. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].

Finally, Dr. Marshall's profitability analysis is simply an examination of dentists' behavior upon joining a buying group. Respondents have not argued that the dentists who joined Kois and Smile Source are unrepresentative of other dentists across the country.

1027. [REDACTED]

**Response to Proposed Finding No. 1027**

The Proposed Finding is irrelevant, misleading, and incomplete to the extent that it suggests

[REDACTED]. The reasons that Dr. Marshall's analysis was appropriate are explained in Complaint Counsel's Response to Benco Proposed Finding No. 1026, including the fact that the dentists studied were the relevant dentists for Dr. Marshall to study to determine substitution patterns of dentists receiving the benefits of the reduced pricing from the buying group distributors.

Dr. Marshall's profitability studies also analyzed the purchasing behavior of *all* dentists who were members of Smile Source and Kois at different points in time. [REDACTED]

[REDACTED]. This entailed the analysis of hundreds of dentists across the country—[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

Finally, Dr. Marshall's profitability analysis is simply an examination of dentists' behavior upon joining a buying group. Respondents have not argued that the dentists who joined Kois and Smile Source are unrepresentative of other dentists across the country.

1028. There was a total of 621 dentists in Dr. Marshall's first three studies in sections V.D.a, 2 and 3 of Dr. Marshall's report, which amounted to only three-tenths of one percent of all dentists in the United States. (Marshall, Tr. 3219-3220).

**Response to Proposed Finding No. 1028**

The Proposed Finding is irrelevant, misleading, and incomplete to the extent that it suggests that Dr. Marshall should have studied a broader group of dentists than he did. The reasons that Dr. Marshall's analysis was appropriate are explained in Complaint Counsel's Response to Benco Proposed Finding No. 1026, including the fact that the dentists studied were the relevant dentists to for Dr. Marshall to study in order to determine substitution patterns of dentists receiving the benefits of the reduced pricing from the buying group distributors.

Dr. Marshall's profitability studies analyzed the purchasing behavior of *all* dentists who were members of Smile Source and Kois at different points in time. [REDACTED]

[REDACTED]. This entailed the analysis of hundreds of dentists across the country—[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

Finally, Dr. Marshall's profitability analysis is simply an examination of dentists' behavior upon joining a buying group. Respondents have not argued that the dentists who joined Kois and Smile Source are unrepresentative of other dentists across the country.

**1029.** [REDACTED]

[REDACTED]

**Response to Proposed Finding No. 1029**

The Proposed Finding is irrelevant, misleading, and incomplete to the extent that it suggests that Dr. Marshall should have studied a broader group of dentists than he did. The reasons that Dr. Marshall's analysis was appropriate are explained in Complaint Counsel's Response to Benco Proposed Finding No. 1026, including the fact that the dentists studied were the relevant dentists to for Dr. Marshall to study in order to determine substitution patterns of dentists receiving the benefits of the reduced pricing from the buying group distributors.

**1030.** [REDACTED]

**Response to Proposed Finding No. 1030**

The Proposed Finding is irrelevant, misleading, and incomplete to the extent that it suggests that Dr. Marshall should have studied a different group of dentists than he did. The reasons that Dr. Marshall's analysis was appropriate are explained in Complaint Counsel's Response to Benco Proposed Finding No. 1026, including the fact that the dentists studied were the relevant dentists to for Dr. Marshall to study in order to determine substitution patterns of dentists receiving the benefits of the reduced pricing from the buying group distributors.

**1031.** [REDACTED]

**Response to Proposed Finding No. 1031**

The Proposed Finding is irrelevant, misleading, and incomplete to the extent that it suggests that Dr. Marshall should have studied a different group of dentists than he did. The reasons that Dr. Marshall's analysis was appropriate are explained in Complaint Counsel's Response to Benco Proposed Finding No. 1026, including the fact that the dentists studied were the relevant dentists to for Dr. Marshall to study in order to determine substitution patterns of dentists receiving the benefits of the reduced pricing from the buying group distributors.

1032. [REDACTED]

**Response to Proposed Finding No. 1032**

The Proposed Finding is irrelevant, misleading, and incomplete to the extent that it suggests that Dr. Marshall should have studied a different group of dentists than he did. The reasons that Dr. Marshall's analysis was appropriate are explained in Complaint Counsel's Response to Benco Proposed Finding No. 1026, including the fact that the dentists studied were the relevant dentists to for Dr. Marshall to study in order to determine substitution patterns of dentists receiving the benefits of the reduced pricing from the buying group distributors.

1033. [REDACTED]

**Response to Proposed Finding No. 1033**

The Proposed Finding is irrelevant, misleading, and incomplete to the extent that it suggests that Dr. Marshall should have studied a different group of dentists than he did. The reasons that Dr. Marshall's analysis was appropriate are in Complaint Counsel's Response to Benco Proposed Finding No. 1026, including the fact that the dentists studied were the relevant dentists to for Dr. Marshall to study in order to determine substitution patterns of dentists receiving the benefits of the reduced pricing from the buying group distributors.

1034. [REDACTED]

**Response to Proposed Finding No. 1034**

The Proposed Finding is irrelevant, misleading, and incomplete to the extent that it suggests [REDACTED]. The reasons that Dr. Marshall's analysis was appropriate are explained in Complaint Counsel's



Response to Benco Proposed Finding No. 1026, including the fact that the dentists studied were the relevant dentists to for Dr. Marshall to study in order to determine substitution patterns of dentists receiving the benefits of the reduced pricing from the buying group distributors.

**1035.** [REDACTED]

**Response to Proposed Finding No. 1035**

The Proposed Finding is irrelevant, misleading, and incomplete to the extent that it suggests

[REDACTED]. The reasons that Dr. Marshall’s analysis was appropriate are explained in Complaint Counsel’s Response to Benco Proposed Finding No. 1026, including the fact that the dentists studied were the relevant dentists to for Dr. Marshall to study in order to determine substitution patterns of dentists receiving the benefits of the reduced pricing from the buying group distributors.

**1036.** [REDACTED]

**Response to Proposed Finding No. 1036**

The Proposed Finding is misleading, incomplete, and vague insofar as it does not identify the “studies” that involve “an average of four and a half dentists per geographic area.” The Proposed Finding is argumentative and not appropriate as a factual finding. Moreover, Dr. Johnson’s Expert Report (RX2834) does not contain any discussion of how the number of dentists per region in a study may impact the results of a study, so the Proposed Finding is outside the scope of Dr. Johnson’s Expert Report in this matter. (*See* RX2834 at 038 (¶ 59, [REDACTED]) (Johnson Expert Report)). To the extent that the Proposed Finding refers to Dr. Marshall’s profitability studies, this Proposed Finding is irrelevant, misleading, and incomplete to the extent that it suggests that Dr. Marshall should have studied a different group of dentists than he did.

The reasons that Dr. Marshall's analysis was appropriate are explained in Complaint Counsel's Response to Benco Proposed Finding No. 1026, including the fact that the dentists studied were the relevant dentists to for Dr. Marshall to study in order to determine substitution patterns of dentists receiving the benefits of the reduced pricing from the buying group distributors.

c. Dr. Marshall's Profitability Studies Focused On Only Two Buying Groups, Neither of Which Was Representative

1037. Dr. Marshall based his opinion that Benco acted against its unilateral economic self-interest on a total of five case studies. (Marshall, Tr. 3373).

**Response to Proposed Finding No. 1037**

The Proposed Finding is inaccurate, incomplete, and misleading because it omits that Dr. Marshall did not just base his opinion that Benco acted against its unilateral economic self-interest on a total of five case studies. Rather, Dr. Marshall also testified that he based his opinion on "Five case studies in conjunction with the interfirm and intrafirm communications." (Marshall, Tr. 3373).

1038. Dr. Marshall's five case studies involved only two buying groups: Kois and Smile Source. (Marshall, Tr. 3373).

**Response to Proposed Finding No. 1038**

The Proposed Finding is inaccurate, incomplete, and misleading to the extent that it suggests that Dr. Marshall only offered an opinion with respect to two buying groups. Rather, Dr. Marshall opined, based in part on his review of Kois and Smile Source in his profitability studies, that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also* Marshall, Tr. 3387, 3384 ("I'm noting, though, that

again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."); Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group' ...and it's passing on this as a matter of policy.'")).

To the extent the Proposed Finding suggests that Dr. Marshall's five profitability studies involving Kois and Smile Source are not representative of other buying groups, it is irrelevant, incomplete, and misleading are not representative of buying groups because it ignores the point that the buying groups in Dr. Marshall studied in his five profitability studies are representative

[REDACTED]

[REDACTED]

[REDACTED]; *see also* CX8040 (Marshall, Dep. at 212) (explaining that Kois and Smile Source are "the same in the sense of the definition I offer in paragraph 139.")). Additionally, Dr. Marshall explained that for buying groups generally "[a]ll these groups will have different management and they'll be issues that are different between them. But, again, these fall within what's identified in paragraph 139 of my report." (CX8040 (Marshall, Dep. at 212)). Regarding why Smile Source and Kois Buyers Group were good case studies for his profitability analysis, Dr. Marshall explained that "Smile Source and Kois had characteristics associated with them that suggested that they were good candidates for investigating the profitability as done in section 5 of my original report." (CX8040 (Marshall, Dep. at 148)). Regarding the additional characteristics that made Smile Source and Kois Buyers Group good case studies, Dr. Marshall elaborated:

Q: Why did you choose to study Kois and Smile Source?

A: *So these are highly representative of what's going on in this following sense.* It covers a broad geography of the country. It covered a broad time span going from 2012 through 2017. And in addition to that, there were different sizes of the buying groups at the times I looked at them. For Kois it was at the inception of the buying group. And then in the other studies, we had small size to the buying group, medium size to the buying group, large size to the buying group, so I was able to get a good look at what was going on with buying groups in that diversity.

(Marshall, Tr. 2863 (emphasis added); Marshall, Tr. 3244 (“What I had said is the following, that the Kois and the five studies cover a geography of the United States. And in addition to that, we have buying groups at different stages. We had -- in terms of size. We have -- when they're at their inception, when they're small, when they're medium and when they're large in size, that this is the nature of the representativeness that I had spoken about with – in my direct testimony.”); *see also* CX8041 (Marshall, Dep. at 382) (“I felt that the data that was available for Kois and Smile Source spoke to a broad range of the issues in this matter; and therefore, I felt comfortable with the analysis being conducted in Section 5 [of the Marshall Expert Report].”)). Dr. Marshall's profitability analysis is simply an examination of dentists' behavior upon joining a buying group. Respondents have not argued that the dentists who joined Kois and Smile Source are unrepresentative of other dentists across the country.

Additionally, Dr. Marshall studied Kois Buyers Group and Smile Source because in addition to having gotten off the ground, these buying groups operate in geographies (Seattle and Atlanta) in which Schein, Patterson, and Benco are likely to have their lowest collective share of sales and another distributor was likely to have a high share of sales. (CX7101 at 045-046, 064 (¶¶ 107-112, 165) (Marshall Rebuttal Expert Report)). These facts addressed potential concerns that the relative sizes of Schein and Patterson make it more costly for them to supply buying groups, both because (1) Schein and Patterson are likely to find itself more profitable to discount when they have a lower share of sales and (2) where Burkhart and Atlanta Dental are large, it illuminates

whether a full-service distributor found it profitable to supply a buying group so in a geographic area in which its share of sales was relatively large. (CX7101 at 064 (¶ 165) (Marshall Rebuttal Expert Report)). Differences between the Kois Buyers Group, with its single regional full-service distributor, and Smile Source, with its changing network of distributors over time, provide further reasons to believe that the experiences of distributors with these two groups provides some information about likely outcomes with other potential buying groups that went nowhere as a result of being rejected by Schein, Patterson, and/or Benco. (CX7101 at 064 (¶ 166) (Marshall Rebuttal Expert Report)).

1039. A study based only on two buying groups can only possibly make sense if the two selected buying groups are representative of other buying groups. (Wu, Tr. 5037; Wu, Tr. 5039).

**Response to Proposed Finding No. 1039**

The Proposed Finding is inaccurate, incomplete, and misleading to the extent that it suggests that Dr. Marshall only offered an opinion with respect to two buying groups. Rather, Dr. Marshall opined, based in part on his review of Kois and Smile Source in his profitability studies, that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also* Marshall, Tr. 3387, 3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket

statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."); Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group' ...and it's passing on this as a matter of policy.'")).

To the extent the Proposed Finding suggests that Dr. Marshall's five profitability studies involving Kois and Smile Source are not representative of other buying groups, it is irrelevant, incomplete, and misleading for reasons explained in more detail in Complaint Counsel's Response to Benco Proposed Finding No. 1038.

1040. Dr. Marshall claimed that Kois and Smile Source were representative of buying groups in general. (Marshall, Tr. 3244-3245). But what Dr. Marshall meant was simply that members could choose to buy from the selected distributor or not. (Marshall, Tr. 3247).

#### **Response to Proposed Finding No. 1040**

The Proposed Finding is irrelevant and incomplete to the extent that it suggests that Dr.

Marshall's five profitability studies involving Kois and Smile Source are not representative of buying groups because the Proposed Finding ignores the point that the buying groups that Dr. Marshall studied in his five profitability studies share the common feature of being [REDACTED]

[REDACTED]

[REDACTED]; *see also*

CX8040 (Marshall, Dep. at 212) (explaining that Kois and Smile Source are "the same in the sense of the definition I offer in paragraph 139.")). Additionally, Dr. Marshall explained that for buying groups generally "[a]ll these groups will have different management and they'll be issues that are different between them. But, again, these fall within what's identified in paragraph 139 of my report." (CX8040 (Marshall, Dep. at 212)). Regarding why Smile Source and Kois Buyers Group were good case studies for his profitability analysis, Dr. Marshall explained that "Smile Source and Kois had characteristics associated with them that suggested that they were

good candidates for investigating the profitability as done in section 5 of my original report.”  
(CX8040 (Marshall, Dep. at 148)).

Regarding the additional characteristics that made Smile Source and Kois Buyers Group good case studies, Dr. Marshall elaborated:

Q: Why did you choose to study Kois and Smile Source?

A: *So these are highly representative of what's going on in this following sense. It covers a broad geography of the country. It covered a broad time span going from 2012 through 2017. And in addition to that, there were different sizes of the buying groups at the times I looked at them. For Kois it was at the inception of the buying group. And then in the other studies, we had small size to the buying group, medium size to the buying group, large size to the buying group, so I was able to get a good look at what was going on with buying groups in that diversity.*

(Marshall Tr. 2863 (emphasis added); Marshall, Tr. 3244 (“What I had said is the following, that the Kois and the five studies cover a geography of the United States. And in addition to that, we have buying groups at different stages. We had -- in terms of size. We have -- when they're at their inception, when they're small, when they're medium and when they're large in size, that this is the nature of the representativeness that I had spoken about with – in my direct testimony.”); *see also* CX8041 (Marshall, Dep. at 382) (“I felt that the data that was available for Kois and Smile Source spoke to a broad range of the issues in this matter; and therefore, I felt comfortable with the analysis being conducted in Section 5 [of the Marshall Expert Report].”)). Dr. Marshall also explained that he studied five different relationships with the Kois Buyers Group and Smile Source because, in addition to having gotten off the ground, these buying groups operate in geographies (Seattle and Atlanta) in which Schein, Patterson, and Benco are likely to have their lowest collective share of sales and another distributor was likely to have a high share of sales. (CX7101 at 045-046, 064 (¶¶ 107-112, 165) (Marshall Rebuttal Expert Report)). These facts addressed potential concerns that the relative sizes of Schein and Patterson make it more costly for them to supply buying groups, both because (1) Schein and Patterson are

likely to find itself more profitable to discount when they have a lower share of sales and (2) where Burkhart and Atlanta Dental are large, it illuminates whether a full-service distributor found it profitable to supply a buying group so in a geographic area in which its share of sales was relatively large. (CX7101 at 64 (¶ 165) (Marshall Rebuttal Expert Report)). Differences between the Kois Buyers Group, with its single regional full-service distributor, and Smile Source, with its changing network of distributors over time, provide further reasons to believe that the experiences of distributors with these two groups provides some information about likely outcomes with other potential buying groups that went nowhere as a result of being rejected by Schein, Patterson, and/or Benco. (CX7101 at 64 (¶ 166) (Marshall Rebuttal Expert Report)). Like all buying groups, Kois and [REDACTED] do not force members to purchase from contracted distributors—in other words, they do not *require* compliance. (CCFF ¶¶ 1685-1687, 1689-1695; Kois, Sr., Tr. at 181 (“[T]hey’re free to purchase from whoever they want to.”);

[REDACTED]

[REDACTED]

[REDACTED]; [REDACTED]; CX8040 (Marshall, Dep. 212)).

Finally, Dr. Marshall’s profitability analysis is simply an examination of dentists’ behavior upon joining a buying group. Respondents have not argued that the dentists who joined Kois and Smile Source are unrepresentative of other dentists across the country.

1041. In fact, Kois and Smile Source were highly unusual, and were not representative of buying groups in general. (Wu, Tr. 5039; Wu, Tr. 5040-5041; Wu, Tr. 5044).

#### **Response to Proposed Finding No. 1041**

Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Wu is Patterson’s expert. Additionally, the Proposed Finding is irrelevant and incomplete to the extent that it suggests that Dr.



Marshall's five profitability studies involving Kois and Smile Source are not representative of buying groups. Dr. Marshall opined that Kois and Smile Source were representative buying groups as is explained in more detail in Complaint Counsel's Response to Benco Proposed Finding No. 1040.

1042. Buying groups differ tremendously from one another. (Cohen, Tr. 682-83; CX8004 (McFadden, Dep. 119-120)).

**Response to Proposed Finding No. 1042**

The Proposed Finding is irrelevant and incomplete to the extent that it suggests that Dr. Marshall's five profitability studies involving Kois and Smile Source are not representative of buying groups. Dr. Marshall opined that Kois and Smile Source were representative buying groups as is explained in more detail in Complaint Counsel's Response to Benco Proposed Finding No. 1040.

Moreover, Dr. Marshall's five profitability analyses determined that buying groups can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report; CCFF ¶¶ 1637-1684). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED]). Accordingly, while buying groups might differ, Dr. Marshall's profitability analyses show it was against Respondents' unilateral self-interest to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups because these analyses show that buying groups drive incremental business to the distributor. (CCFF ¶¶ 630-650, 1651-1656, 1664-1666, 1672-1673, 1678).

Additionally, this Proposed Finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that buying groups were not profitable opportunities for distributors because the record evidence shows that buying groups are profitable for distributors,

even without contractual volume guarantees. (CCFF ¶¶ 1320, 1381, 1385-1387, 1651, 1656, 1681, 1686-1687, 1689, 1718, 1723-1724, 1726). Moreover, the record evidence also shows that buying groups save dentists money and help preserve independent dentistry. (CCFF ¶¶ 138-145).

Like all buying groups, Kois and [REDACTED] do not force members to purchase from contracted distributors—in other words, they do not *require* compliance. (CCFF ¶¶ 1685-1687, 1689-1695; [REDACTED]; CX8040 (Marshall, Dep. 212)).

1043. Buying groups differ in many important ways that affect whether they are likely to be a profitable opportunity or not. (Wu, Tr. 5040-5041; Wu, Tr. 5045-5046; RX2833 at 10, ¶ 13).

#### **Response to Proposed Finding No. 1043**

Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Wu is Patterson’s expert.

This Proposed Finding is also unreliable because it relies on to Patterson’s economic expert Dr. Wu’s conclusory, self-serving, and unsupported trial testimony. Because many of Dr. Wu’s primary opinions involve claims about Patterson’s costs (cost savings and opportunity costs related to dealing or not dealing with buying groups), his opinions should be grounded in a quantifiable framework. However, despite his background as an economist and his \$1,100 hourly fees to offer economic support for Patterson (CCFF ¶ 2005), Dr. Wu admitted that he failed to perform any quantitative analysis to support his central opinions, including whether it was profitable or made “economic sense” for Patterson to do business with buying groups, including the Kois Buyers Group and Smile Source referenced in this Proposed Finding. Rather, Dr. Wu conceded that he merely interpreted documents and testimony to form these opinions.<sup>1</sup>

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<sup>1</sup> Wu, Tr. 5079-5080 (admitting that his opinions regarding Patterson’s unilateral interest to do business with these buying groups was his “review of the...documents in the record, yes, which reflects, deposition testimony, documents, contemporaneous business documents, and that would include emails.”); *see also* Wu, Tr. 5085 (“Q.

The table below summarizes Dr. Wu's unsupported primary opinions and his many corresponding admissions that he failed to perform the necessary analysis to support his claims, rendering Dr. Wu's opinions regarding the profitability of buying groups unreliable:<sup>2</sup>

<b>Opinion Dr. Wu Offered to the Court</b>	<b>Admitted Failure to Perform Quantitative Analysis</b>
Buying groups did not offer Patterson cost savings compared to Patterson dealing with individual dentists outside of a buying group. <sup>3</sup>	Q. You did not do any quantitative analysis to show that buying groups would not have offered Patterson cost savings. Correct?  A: I have not done my own quantitative analysis on that question. <sup>4</sup>
It is likely that contracting with buying groups during the relevant period would have increased Patterson's costs. <sup>5</sup>	Q. Did you do any quantitative analysis to show that contracting with buying groups would actually have increased Patterson's costs? A. As I said earlier, I did not do any calculations on my own. <sup>6</sup>
The opportunity cost of Patterson dealing with buying groups was 'too high.' <sup>7</sup>	Q: My question is, did you do any quantitative analysis to support the conclusion that Patterson had too high an opportunity cost to deal with buying groups? A. I did not. <sup>8</sup>

Similar to what we saw before, the only source you cited in paragraph 85, which provides your opinion on ADC, is a single Patterson document; correct? A. Yes.”)).

<sup>2</sup> See also CXD15 (demonstrative from cross-examination of Dr. Wu summarizing his failure to perform quantitative analysis for many key opinions).

<sup>3</sup> RX2833 at 020-022, Section 4.2.1 (“Buying Groups Did Not Offer Patterson Cost Savings”) (¶¶ 36-40) (Wu Expert Report); RX2967 (Wu, Dep. at 120)).

<sup>4</sup> RX2967 (Wu, Dep. at 128); Wu, Tr. 5070-71.

<sup>5</sup> RX2833 at 022, Section 4.2.2 (¶ 41) (Wu Expert Report); RX2967 (Wu, Dep. at 132)).

<sup>6</sup> RX2967 (Wu, Dep. at 132-134); Wu, Tr. 5071-5072.

<sup>7</sup> RX2833 at 025 (¶ 46) (Wu Expert Report)).

<sup>8</sup> RX2967 (Wu, Dep. at 149); Wu, Tr. 5072-73. Dr. Wu further conceded that he did do any calculation to determine Patterson's opportunity costs at all, (RX2967 (Wu, Dep. at 149)), and that he did not do any calculation of what level of opportunity cost would be ‘too high’ for a firm to deal with buying groups. (RX2967 (Wu, Dep. at 149-150)).

In Sept. 2013, Patterson started the special markets division to pursue business with group practices and DSOs, but Patterson could not also handle doing business with buying groups. <sup>9</sup>	<p>Q. So, did you perform any quantitative analysis showing that the special markets division could not also handle doing business with buying groups?</p> <p>A. I did not.<sup>10</sup></p>
It was more costly for Patterson than for Schein to deal with buying groups. <sup>11</sup>	<p>Q. Did you do any quantitative analysis comparing Patterson's cost of dealing with buying groups with Schein's cost of dealing with buying groups?</p> <p>A. No, I did not.<sup>12</sup></p>
Patterson had unilateral reasons for declining to work with the buying groups it had rejected (addressed in Section 5.3.1 of Dr. Wu's report). <sup>13</sup>	<p>Q. There is no quantitative analysis anywhere in Section 5.3.1, correct?</p> <p>A. That's correct.<sup>14</sup></p>
Patterson's decision to not work with Kois was based on the lack of profitability due to unreasonably low margins it saw in contracting Kois. <sup>15</sup>	<p>Q. Did you perform any analysis showing that it would not have been profitable for Patterson to work with Kois?</p> <p>A. No. I have not.<sup>16</sup></p>

The Proposed Finding is irrelevant and incomplete to the extent that it suggests that Dr.

Marshall's five profitability studies involving Kois and Smile Source are not representative of

<sup>9</sup> RX2967 (Wu, Dep. at 150).

<sup>10</sup> RX2967 (Wu, Dep. at 151); Wu, Tr. 5073.

<sup>11</sup> RX2967 (Wu, Dep. at 160).

<sup>12</sup> RX2967 (Wu, Dep. at 160); Wu, Tr. 5074.

<sup>13</sup> RX2967 (Wu, Dep. at 249); RX2833 at 037-040 (Section 5.3.1) ("Patterson's Rationale for Not Dealing with Buying Groups Was Unilateral and in Its Own Self-Interest") (Wu Expert Report).

<sup>14</sup> RX2967 (Wu, Dep. at 250); Wu, Tr. 5076.

<sup>15</sup> RX2967 (Wu, Dep. at 258).

<sup>16</sup> RX2967 (Wu, Dep. at 258); Wu, Tr. 5080-5081. Dr. Wu further admitted that he did not do any analysis to determine what constitutes an unreasonably low margin as he used that term in paragraph 82 of his expert report discussing this opinion. (RX2967 (Wu, Dep. at 258)). In fact, the only source Dr. Wu cited for his conclusions about Kois in paragraph 82 of his expert report is a single email. (RX2967 (Wu, Dep. 259)).

buying groups. Dr. Marshall opined that Kois and Smile Source are representative for reasons explained in more detail in Complaint Counsel's Response to Benco Proposed Finding No. 1040.

1044. Buying groups differ in how they are organized. (Wu, Tr. 5040-5041; RX2833 at 10, ¶ 13).

**Response to Proposed Finding No. 1044**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Wu is Patterson's expert.

The Proposed Finding is irrelevant and incomplete to the extent that it suggests that Dr.

Marshall's five profitability studies involving Kois and Smile Source are not representative of buying groups. Dr. Marshall opined that Kois and Smile Source are representative as is explained in more detail in Complaint Counsel's Response to Benco Proposed Finding No. 1040.

Additionally, like all buying groups, Kois and [REDACTED] do not force members to purchase from contracted distributors—in other words, they do not *require* compliance. (CCFF ¶¶ 1685-1687, 1689-1695; [REDACTED]; CX8040 (Marshall, Dep. 212)).

1045. Buying groups differ in terms of the services they provide to their members; some provide services, but others don't provide any services at all. (Wu, Tr. 5040-5041; RX2833 at 10, ¶ 13).

**Response to Proposed Finding No. 1045**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Wu is Patterson's expert and RX2833 is his Expert Report.

The Proposed Finding is irrelevant and incomplete to the extent that it suggests that Dr.

Marshall's five profitability studies involving Kois and Smile Source are not representative of

buying groups. Dr. Marshall opined that these groups are representative as is explained in more detail in Complaint Counsel's Response to Proposed Benco Finding No. 1040.

Like all buying groups, Kois and [REDACTED] do not force members to purchase from contracted distributors—in other words, they do not *require* compliance. (CCFF ¶¶ 1685-1687, 1689-1695; [REDACTED]; CX8040 (Marshall, Dep. 212)).

1046. Buying groups differ in terms of membership; some have many members, but others have no members at all. (Wu, Tr. 5040-5041; RX2833 at 10, ¶ 13).

#### **Response to Proposed Finding No. 1046**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Wu is Patterson's expert and RX2833 is his Expert Report.

The Proposed Finding is irrelevant and incomplete to the extent that it suggests that Dr.

Marshall's five profitability studies involving Kois and Smile Source are not representative of buying groups. Dr. Marshall opined that these groups are representative as is explained in more detail in Complaint Counsel's Response to Benco Proposed Finding No. 1040.

Like all buying groups, Kois and [REDACTED] do not force members to purchase from contracted distributors—in other words, they do not *require* compliance. (CCFF ¶¶ 1685-1687, 1689-1695; [REDACTED]; CX8040 (Marshall, Dep. 212)).

1047. Given how different buying groups are, it is not reasonable as a matter of economics to infer from two buying groups that it would have been profitable to work with buying groups. (Wu, Tr. 5043; Wu, Tr. 5037).

#### **Response to Proposed Finding No. 1047**

The Proposed Finding is unreliable and only relies on Patterson's economic expert Dr. Wu's conclusory, self-serving, and unsupported trial testimony. Because many of Dr. Wu's primary opinions involve claims about Patterson's costs (cost savings and opportunity costs related to

dealing or not dealing with buying groups), his opinions should be grounded in a quantifiable framework. However, despite his background as an economist and his \$1,100 hourly fees to offer economic support for Patterson (CCFF ¶ 2005), Dr. Wu admitted that he failed to perform any quantitative analysis to support his central opinions, including whether it was profitable or made “economic sense” for Patterson to do business with buying groups, including the Kois Buyers Group and Smile Source referenced in this Proposed Finding. Rather, Dr. Wu conceded that he merely interpreted documents and testimony to form these opinions.<sup>17</sup> The table below summarizes Dr. Wu’s unsupported primary opinions and his many corresponding admissions that he failed to perform the necessary analysis to support his claims, rendering Dr. Wu’s opinions regarding the profitability of buying groups unreliable.<sup>18</sup>

<b>Opinion Dr. Wu Offered to the Court</b>	<b>Admitted Failure to Perform Quantitative Analysis</b>
Buying groups did not offer Patterson cost savings compared to Patterson dealing with individual dentists outside of a buying group. <sup>19</sup>	<p>Q. You did not do any quantitative analysis to show that buying groups would not have offered Patterson cost savings. Correct?</p> <p>A: I have not done my own quantitative analysis on that question.<sup>20</sup></p>
It is likely that contracting with buying groups during the relevant period would have increased Patterson’s costs. <sup>21</sup>	<p>Q. Did you do any quantitative analysis to show that contracting with buying groups would actually have</p>

<sup>17</sup> Wu, Tr. 5079-5080 (admitting that his opinions regarding Patterson’s unilateral interest to do business with these buying groups was his “review of the...documents in the record, yes, which reflects, deposition testimony, documents, contemporaneous business documents, and that would include emails.”); *see also* Wu, Tr. 5085 (“Q. Similar to what we saw before, the only source you cited in paragraph 85, which provides your opinion on ADC, is a single Patterson document; correct? A. Yes.”)).

<sup>18</sup> *See also* CXD15 (demonstrative from cross-examination of Dr. Wu summarizing his failure to perform quantitative analysis for many key opinions).

<sup>19</sup> RX2833 at 020-022, Section 4.2.1 (“Buying Groups Did Not Offer Patterson Cost Savings”) (¶¶ 36-40) (Wu Expert Report); RX2967 (Wu, Dep. at 120)).

<sup>20</sup> RX2967 (Wu, Dep. at 128); Wu, Tr. 5070-71.

<sup>21</sup> RX2833 at 022, Section 4.2.2 (¶ 41) (Wu Expert Report); RX2967 (Wu, Dep. at 132).

Opinion Dr. Wu Offered to the Court	Admitted Failure to Perform Quantitative Analysis
	<p>increased Patterson's costs?</p> <p>A. As I said earlier, I did not do any calculations on my own.<sup>22</sup></p>
<p>The opportunity cost of Patterson dealing with buying groups was 'too high.'<sup>23</sup></p>	<p>Q: My question is, did you do any quantitative analysis to support the conclusion that Patterson had too high an opportunity cost to deal with buying groups?</p> <p>A. I did not.<sup>24</sup></p>
<p>In Sept. 2013, Patterson started the special markets division to pursue business with group practices and DSOs, but Patterson could not also handle doing business with buying groups.<sup>25</sup></p>	<p>Q. So, did you perform any quantitative analysis showing that the special markets division could not also handle doing business with buying groups?</p> <p>A. I did not.<sup>26</sup></p>
<p>It was more costly for Patterson than for Schein to deal with buying groups.<sup>27</sup></p>	<p>Q. Did you do any quantitative analysis comparing Patterson's cost of dealing with buying groups with Schein's cost of dealing with buying groups?</p> <p>A. No, I did not.<sup>28</sup></p>
<p>Patterson had unilateral reasons for declining to work with the buying groups it had rejected (addressed in Section 5.3.1 of Dr. Wu's report).<sup>29</sup></p>	<p>Q. There is no quantitative analysis anywhere in Section 5.3.1, correct?</p> <p>A. That's correct.<sup>30</sup></p>

<sup>22</sup> RX2967 (Wu, Dep. at 132-134); Wu, Tr. 5071-5072.

<sup>23</sup> RX2833 at 025 (¶ 46) (Wu Expert Report)).

<sup>24</sup> RX2967 (Wu, Dep. at 149); Wu, Tr. 5072-73. Dr. Wu further conceded that he did do any calculation to determine Patterson's opportunity costs at all, (RX2967 (Wu, Dep. at 149)), and that he did not do any calculation of what level of opportunity cost would be 'too high' for a firm to deal with buying groups. (RX2967 (Wu, Dep. at 149-150)).

<sup>25</sup> RX2967 (Wu, Dep. at 150).

<sup>26</sup> RX2967 (Wu, Dep. at 151); Wu, Tr. 5073.

<sup>27</sup> RX2967 (Wu, Dep. at 160).

<sup>28</sup> RX2967 (Wu, Dep. at 160); Wu, Tr. 5074.

<sup>29</sup> RX2967 (Wu, Dep. at 249); RX2833 at 037-040 (Section 5.3.1) ("Patterson's Rationale for Not Dealing with Buying Groups Was Unilateral and in Its Own Self-Interest") (Wu Expert Report).



Opinion Dr. Wu Offered to the Court	Admitted Failure to Perform Quantitative Analysis
Patterson’s decision to not work with Kois was based on the lack of profitability due to unreasonably low margins it saw in contracting Kois. <sup>31</sup>	<p>Q. Did you perform any analysis showing that it would not have been profitable for Patterson to work with Kois?</p> <p>A. No. I have not.<sup>32</sup></p>

The Proposed Finding is irrelevant and incomplete to the extent that it suggests that Dr.

Marshall’s five profitability studies involving Kois and Smile Source are not representative of buying groups. Dr. Marshall opined that these groups were representative as is explained in more detail in Complaint Counsel’s Response to Benco Proposed Finding No. 1040.

*i. The Kois Buyers Group Was Not Representative of Buying Groups In General*

1048. The Kois Buyers Group claimed to be profoundly different from other buying groups. (CX4060 (“This is not a standard BUYING GROUP. . . . We are profoundly different.”); Rogan, Tr. 3754-55).

**Response to Proposed Finding No. 1048**

The Proposed Finding should be disregarded to the extent that it relies on CX4060 because this document is not in evidence. (JX00002 (Attachment 1) (Compliant Counsel’s Exhibit List)). To the extent that this Proposed Finding is meant to refer to RX0354, the Proposed Finding is incomplete and misleading. Nothing in RX0354 describes the buying group as serving any purpose other than to obtain discounts for the dentist members. The reference to RX0354, as quoted, is misleading. The reference to Kois as “not a standard BUYING GROUP” is to

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<sup>30</sup> RX2967 (Wu, Dep. at 250); Wu, Tr. 5076.

<sup>31</sup> RX2967 (Wu, Dep. at 258).

<sup>32</sup> RX2967 (Wu, Dep. at 258); Wu, Tr. 5080-5081. Dr. Wu further admitted that he did not do any analysis to determine what constitutes an unreasonably low margin as he used that term in paragraph 82 of his expert report discussing this opinion. (RX2967 (Wu, Dep. at 258)). In fact, the only source Dr. Wu cited for his conclusions about Kois in paragraph 82 of his expert report is a single email. (RX2967 (Wu, Dep. 259)).

financial benefits that the Kois Buying Group could provide to *dental products distributors*, not to the buying group having a different relationship with its member dentists. (RX0354 in native document at 003, Slide 3). The citation referenced in the Proposed Finding has nothing to do with whether the Kois Buyers Group functions as other buyers groups. John Kois, Jr., the President of the Kois Buyers Group, testified that the group was created “to allow the smaller dentists an option to compete with the larger companies, by reducing some of their overhead.” (CCFF ¶ 164; CX0321 (Kois Jr., IHT at 35)). Additionally, the Proposed Finding is unsupported by the cited Rogan testimony. In the cited testimony, Rogan does not discuss the Kois Buyers Group.

1049. Dr. Marshall was aware of the unique aspects of the Kois Buyers Group but chose to ignore them. (Marshall, Tr. 3255).

**Response to Proposed Finding No. 1049**

Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to the testimony of an expert for what appears to be a proposition of fact. Additionally, the Proposed Finding is misleading and incomplete because it specifically omits the sentence following the cited testimony where Dr. Marshall’s did, in fact, reconcile the cited document (CX4060) (which is not in evidence) at trial by explaining that “I read this as a standard kind of marketing document.” (Marshall, Tr. 3255; *see also* CX8041 (Marshall, Dep. at 396) (again explaining the nature of the same marketing document “And when you point to things in a document like this about it being not standard or profoundly different, I would think that this is just a -- something you’d see in any solicitation that would be put together by a buying group.”))). Moreover, the Proposed Finding is also incomplete because it omits Dr. Marshall’s testimony explaining why Kois and Smile Source were representative of other buying groups. Dr. Marshall elaborated:

Q: Why did you choose to study Kois and Smile Source?

A: *So these are highly representative of what's going on in this following sense.* It covers a broad geography of the country. It covered a broad time span going from 2012 through 2017. And in addition to that, there were different sizes of the buying groups at the times I looked at them. For Kois it was at the inception of the buying group. And then in the other studies, we had small size to the buying group, medium size to the buying group, large size to the buying group, so I was able to get a good look at what was going on with buying groups in that diversity.

(Marshall Tr. 2863 (emphasis added); Marshall, Tr. 3244 (“What I had said is the following, that the Kois and the five studies cover a geography of the United States. And in addition to that, we have buying groups at different stages. We had -- in terms of size. We have -- when they’re at their inception, when they’re small, when they’re medium and when they’re large in size, that this is the nature of the representativeness that I had spoken about with – in my direct testimony.”); *see also* CX8041 (Marshall, Dep. at 382) (“I felt that the data that was available for Kois and Smile Source spoke to a broad range of the issues in this matter; and therefore, I felt comfortable with the analysis being conducted in Section 5 [of the Marshall Expert Report].”)). Additionally, Dr. Marshall explained that the Kois and Smile Source buying groups that he studied in his five profitability studies are representative as they share the common feature of being [REDACTED]; *see also* CX8040 (Marshall, Dep. at 212) (explaining that Kois and Smile Source are “the same in the sense of the definition I offer in paragraph 139.”)). Additionally, Dr. Marshall explained that for buying groups generally “[a]ll these groups will have different management and they’ll be issues that are different between them. But, again, these fall within what's identified in paragraph 139 of my report.” (CX8040 (Marshall, Dep. at 212)).

Like all buying groups, Kois and [REDACTED] do not force members to purchase from contracted distributors—in other words, they do not *require* compliance. (CCFF ¶¶ 1685-1687, 1689-1695; [REDACTED]; CX8040 (Marshall, Dep. 212)).

1050. A distributor had legitimate reasons to view the initial pitch by the Kois Buyers Group with suspicion. (Cohen, Tr. 792).

**Response to Proposed Finding No. 1050**

The Proposed Finding is misleading, incomplete, and vague insofar as it relies on the phrase “legitimate reasons” without any identification of what these reasons might be. Additionally, the Proposed Finding is unsupported by cited testimony. In the cited testimony, Cohen testifies about receiving an email from Dr. Kois with an introduction to Qadeer Ahmed. Cohen testified that he did not know Ahmed, but Cohen did not describe any reasons in the cited testimony of why he might be suspicious of the initial pitch. Indeed, Cohen does not even testify that he was suspicious. The Proposed Finding should thus be disregarded. Moreover, in a contemporaneous email, Cohen simply replied to Ahmed after Ahmed’s first contact with Benco that “At Benco, our policy is that we don’t support, or work with, buying groups, so we’ll decline your request.” (CX1240 at 001).

1051. The Kois Buyers Group was initially represented by an individual named Qadeer Ahmed of a company named ProService. (Cohen, Tr. 792; RX1039).

**Response to Proposed Finding No. 1051**

The Proposed Finding is misleading, incomplete, and not supported by the cited evidence. RX1039 identifies Qadeer Ahmed as the Chief Executive Officer of a company called Equalizer ProServices.

1052. ProService was run out of Qadeer Ahmed’s house. (Reese, Tr. 4493-95; RXD0211).

**Response to Proposed Finding No. 1052**

The Proposed Finding is irrelevant, misleading, incomplete, and not supported by the cited evidence. First, this Proposed Finding is a irrelevant and should be disregarded because it relies on demonstrative RXD0211 for support, in violation of the Court’s Order On Post-Trial Briefs at 3 (“Do not cite to demonstrative exhibits as substantive evidence.”). Second, this Proposed Finding is misleading, incomplete, and not supported by the testimony cited as support for the proposed finding. Reece did not testify that ProService was run out of Qadeer Ahmed’s house. Instead, when shown demonstrative RXD0211 at trial and asked by Patterson’s counsel “do you know if Qadeer lived there?,” Reece answered “I have no idea.” (Reese, Tr. 4495). Finally, this Proposed Finding is misleading and irrelevant to the extent that it suggests that knowing the location of ProService would change the results of Dr. Marshall’s data-driven profitability studies indicating that it would have been profitable and in Respondents’ self-interest to bid for the business of Kois Buyers Group. (CCFF ¶¶ 1655, 1657-1659).

1053. Qadeer Ahmed had no prior experience in the dental industry. (Cohen, Tr. 792; Kois, Sr., Tr. 273).

#### **Response to Proposed Finding No. 1053**

The Proposed Finding is unsupported by cited testimony. In the cited testimony, Cohen testifies about receiving an email from Dr. Kois with an introduction to Qadeer Ahmed – nowhere in the testimony cited does it indicate that Qadeer Ahmed had no prior experience in the dental industry. (Cohen, Tr. 792; Kois Sr., Tr. 273).

This Proposed Finding is misleading and irrelevant to the extent that it suggests that knowing Qadeer Ahmed’s prior experience in the dental industry would change the results of Dr. Marshall’s data-driven profitability studies indicating that it would have been profitable and in Respondents’ self-interest to bid for the business of Kois Buyers Group. (CCFF ¶¶ 1655, 1657-1659).

1054. Qadeer Ahmed contacted prospects using his personal e-mail, [qadeerahmed@hotmail.com](mailto:qadeerahmed@hotmail.com). (RX1042).

**Response to Proposed Finding No. 1054**

The Proposed Finding is incomplete and misleading because RX1042 shows every email correspondence including Qadeer Ahmed includes the email address [qadeer.ahmed@equalizerproservices.com](mailto:qadeer.ahmed@equalizerproservices.com). (RX1042).

This Proposed Finding is misleading and irrelevant to the extent that it suggests that knowing Qadeer Ahmed's email address would change the results of Dr. Marshall's data-driven profitability studies indicating that it would have been profitable and in Respondents' self-interest to bid for the business of Kois Buyers Group. (CCFF ¶¶ 1655, 1657-1659).

1055. Qadeer Ahmed sent a proposal to Patterson stating that Kois Buyers Group had 1,700 members, when in fact it had none. (CX4060; Wu, Tr. 5057-58).

**Response to Proposed Finding No. 1055**

The Proposed Finding should be disregarded to the extent that it relies on CX4060 because this document is not in evidence. (JX00002 (Attachment 1) (Compliant Counsel's Exhibit List)).

Moreover, this Proposed Finding is contradicted by the record evidence – specifically,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

Additionally, this Proposed Finding is misleading and irrelevant to the extent that it suggests that knowing Qadeer Ahmed's proposal to Patterson would change the results of Dr. Marshall's data-

driven profitability studies indicating that it would have been profitable and in Respondents' self-interest to bid for the business of Kois Buyers Group. (CCFF ¶¶ 1655, 1657-1659).

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing, at least in part, to the testimony of an expert for a proposition of fact. Dr. Wu is Patterson's expert.

1056. Dr. Marshall admitted that the proposal sent by Qadeer Ahmed would start a conversation in which the distributor would ask Mr. Ahmed exactly what he had in mind, and that he could understand if a distributor concluded that the Kois Buyers Group had incoherent management and walked away from the Kois Buyers Group proposal. (Marshall, Tr. 3260 ("I understand that if the conclusion is incoherent management, I can understand someone walking away from that.")).

#### **Response to Proposed Finding No. 1056**

The Proposed Finding is misleading, inaccurate, and not supported by the cited testimony. At the citation listed for support, Dr. Marshall was asked a hypothetical question about someone having an "incoherent conversation with management." (Marshall, Tr. 3259-3260). Dr. Marshall agreed that "if you had an incoherent conversation with management, that would seem perfectly reasonable to me to turn away from engaging in a business deal with somebody like that." (Marshall, Tr. 3260). But, when Patterson's counsel asked Dr. Marshall about Qadeer Ahmed, Dr. Marshall specifically stated that he did not know about "the Mr. Ahmed part being inserted [by Patterson's counsel]." (Marshall, Tr. 3260). The Proposed Finding is misleading and unsupported insofar as it suggests that the Kois proposal was incoherent or that Ahmed was incoherent. Dr. Marshall's response to a hypothetical question does not support such a Proposed Finding. Indeed, Dr. Marshall never met Ahmed and did not evaluate the Kois proposal, and according to this Court's order, experts are not to be cited for factual findings. Additionally, this Proposed Finding is incomplete and misleading to the extent that it suggests that doing business with Kois Buyers Group was not in Respondents' self-interest. Rather, in his profitability

analyses, Dr. Marshall found that it would have been profitable and in Respondents' self-interest to bid for the business of Kois Buyers Group . (CCFF ¶¶ 1655, 1657-1659).

1057. The differences between the Kois Buyers Group and other buying groups matter because they shape whether a buying group is going to be a profitable opportunity or not. (Wu, Tr. 5044-5045).

### **Response to Proposed Finding No. 1057**

The Proposed Finding is unreliable and only relies on Patterson's economic expert Dr. Wu's conclusory, self-serving, and unsupported trial testimony. While Dr. Wu testified that "[Kois and Smile Source] are not representative of other buying groups given how different they are on all the dimensions I mentioned a couple minutes ago, and they're not even similar to each other," Dr. Wu did no analysis of a representative buying group. (Wu, Tr. 5044 (testifying about facts); *see also generally* RX2833 (Wu Expert Report) (no profitability analyses for any buying groups)).

Because many of Dr. Wu's primary opinions involve claims about Patterson's costs (cost savings and opportunity costs related to dealing or not dealing with buying groups), his opinions should be grounded in a quantifiable framework. However, despite his background as an economist and his \$1,100 hourly fees to offer economic support for Patterson (CCFF ¶ 2005), Dr. Wu admitted that he failed to perform any quantitative analysis to support his central opinions, including whether it was profitable for Patterson (or any other Respondent) to do business with buying groups. Rather, Dr. Wu conceded that he merely interpreted documents and testimony to form these opinions.<sup>33</sup> The table below summarizes Dr. Wu's unsupported primary opinions and his

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<sup>33</sup> Wu, Tr. 5079-5080 (admitting that his opinions regarding Patterson's unilateral interest to do business with these buying groups was his "review of the...documents in the record, yes, which reflects, deposition testimony, documents, contemporaneous business documents, and that would include emails."); *see also* Wu, Tr. 5085 ("Q. Similar to what we saw before, the only source you cited in paragraph 85, which provides your opinion on ADC, is a single Patterson document; correct? A. Yes.")).



many corresponding admissions that he failed to perform the necessary analysis to support his claims, rendering Dr. Wu's opinions regarding the profitability of buying groups unreliable:<sup>34</sup>

Opinion Dr. Wu Offered to the Court	Admitted Failure to Perform Quantitative Analysis
Buying groups did not offer Patterson cost savings compared to Patterson dealing with individual dentists outside of a buying group. <sup>35</sup>	<p>Q. You did not do any quantitative analysis to show that buying groups would not have offered Patterson cost savings. Correct?</p> <p>A: I have not done my own quantitative analysis on that question.<sup>36</sup></p>
It is likely that contracting with buying groups during the relevant period would have increased Patterson's costs. <sup>37</sup>	<p>Q. Did you do any quantitative analysis to show that contracting with buying groups would actually have increased Patterson's costs?</p> <p>A. As I said earlier, I did not do any calculations on my own.<sup>38</sup></p>
The opportunity cost of Patterson dealing with buying groups was 'too high.' <sup>39</sup>	<p>Q: My question is, did you do any quantitative analysis to support the conclusion that Patterson had too high an opportunity cost to deal with buying groups?</p> <p>A. I did not.<sup>40</sup></p>
In Sept. 2013, Patterson started the special markets division to pursue business with group practices and DSOs, but Patterson could not	Q. So, did you perform any quantitative analysis showing that the special markets division could not also handle

<sup>34</sup> See also CXD15 (demonstrative from cross-examination of Dr. Wu summarizing his failure to perform quantitative analysis for many key opinions).

<sup>35</sup> RX2833 at 020-022, Section 4.2.1 ("Buying Groups Did Not Offer Patterson Cost Savings") (¶¶ 36-40) (Wu Expert Report); RX2967 (Wu, Dep. at 120)).

<sup>36</sup> RX2967 (Wu, Dep. at 128); Wu, Tr. 5070-71.

<sup>37</sup> RX2833 at 022, Section 4.2.2 (¶ 41) (Wu Expert Report); RX2967 (Wu, Dep. at 132).

<sup>38</sup> RX2967 (Wu, Dep. at 132-134); Wu, Tr. 5071-5072.

<sup>39</sup> RX2833 at 025 (¶ 46) (Wu Expert Report)).

<sup>40</sup> RX2967 (Wu, Dep. at 149); Wu, Tr. 5072-73. Dr. Wu further conceded that he did do any calculation to determine Patterson's opportunity costs at all, (RX2967 (Wu, Dep. at 149)), and that he did not do any calculation of what level of opportunity cost would be 'too high' for a firm to deal with buying groups. (RX2967 (Wu, Dep. at 149-150)).

also handle doing business with buying groups. <sup>41</sup>	doing business with buying groups?  A. I did not. <sup>42</sup>
It was more costly for Patterson than for Schein to deal with buying groups. <sup>43</sup>	Q. Did you do any quantitative analysis comparing Patterson's cost of dealing with buying groups with Schein's cost of dealing with buying groups?  A. No, I did not. <sup>44</sup>
Patterson had unilateral reasons for declining to work with the buying groups it had rejected (addressed in Section 5.3.1 of Dr. Wu's report). <sup>45</sup>	Q. There is no quantitative analysis anywhere in Section 5.3.1, correct?  A. That's correct. <sup>46</sup>
Patterson's decision to not work with Kois was based on the lack of profitability due to unreasonably low margins it saw in contracting Kois. <sup>47</sup>	Q. Did you perform any analysis showing that it would not have been profitable for Patterson to work with Kois?  A. No. I have not. <sup>48</sup>

To the extent that this Proposed Finding suggests that Dr. Marhsall's profitability analyses are not representative of other buying groups, Dr. Marshall explained that he studied five different relationships with the Kois Buyers Group and Smile Source because, in addition to having gotten off the ground, these buying groups operate in geographies (Seattle and Atlanta) in which Schein, Patterson, and Benco are likely to have their lowest collective share of sales and another

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<sup>41</sup> RX2967 (Wu, Dep. at 150).

<sup>42</sup> RX2967 (Wu, Dep. at 151); Wu, Tr. 5073.

<sup>43</sup> RX2967 (Wu, Dep. at 160).

<sup>44</sup> RX2967 (Wu, Dep. at 160); Wu, Tr. 5074.

<sup>45</sup> RX2967 (Wu, Dep. at 249); RX2833 at 037-040 (Section 5.3.1) ("Patterson's Rationale for Not Dealing with Buying Groups Was Unilateral and in Its Own Self-Interest") (Wu Expert Report).

<sup>46</sup> RX2967 (Wu, Dep. at 250); Wu, Tr. 5076.

<sup>47</sup> RX2967 (Wu, Dep. at 258).

<sup>48</sup> RX2967 (Wu, Dep. at 258); Wu, Tr. 5080-5081. Dr. Wu further admitted that he did not do any analysis to determine what constitutes an unreasonably low margin as he used that term in paragraph 82 of his expert report discussing this opinion. (RX2967 (Wu, Dep. at 258)). In fact, the only source Dr. Wu cited for his conclusions about Kois in paragraph 82 of his expert report is a single email. (RX2967 (Wu, Dep. 259)).

distributor was likely to have a high share of sales. (CX7101 at 045-046, 064 (¶¶ 107-112, 165) (Marshall Rebuttal Expert Report)). These facts addressed potential concerns that the relative sizes of Schein and Patterson make it more costly for them to supply buying groups, both because (1) Schein and Patterson are likely to find itself more profitable to discount when they have a lower share of sales and (2) where Burkhart and Atlanta Dental are large, it illuminates whether a full-service distributor found it profitable to supply a buying group so in a geographic area in which its share of sales was relatively large. (CX7101 at 64 (¶ 165) (Marshall Rebuttal Expert Report)). Differences between the Kois Buyers Group, with its single regional full-service distributor, and Smile Source, with its changing network of distributors over time, provide further reasons to believe that the experiences of distributors with these two groups provides some information about likely outcomes with other potential buying groups that went nowhere as a result of being rejected by Schein, Patterson, and/or Benco. (CX7101 at 64 (¶ 166) (Marshall Rebuttal Expert Report)).

Dr. Marshall also explained that a common feature of the buying groups that he studied and other buying groups was that [REDACTED]

[REDACTED]; *see also* CX8040 (Marshall, Dep. at 212) (explaining that Kois and Smile Source are “the same in the sense of the definition I offer in paragraph 139.”)). Dr. Marshall elaborated that for buying groups generally “[a]ll these groups will have different management and they’ll be issues that are different between them. But, again, these fall within what’s identified in paragraph 139 of my report.” (CX8040 (Marshall, Dep. at 212)).

Dr. Marshall also explained that for the buying groups in his profitability studies and buying groups generally, [REDACTED]

- ii. *The Smile Source Buying Group Was Not Representative of Buying Groups In General*

1058. [REDACTED]

**Response to Proposed Finding No. 1058**

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it [REDACTED]

[REDACTED]. Schein considered Smile Source to be a buying group and referred to it as such. (CCFF ¶ 175).

1059. [REDACTED]

**Response to Proposed Finding No. 1059**

The Proposed Finding is misleading and contrary to the weight of the record evidence to the extent it [REDACTED]

[REDACTED]. Schein considered Smile Source to be a buying group and referred to it as such. (CCFF ¶ 175). Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing, at least in part, to the testimony of an expert for a proposition of fact. Dr. Marshall is Complaint Counsel's expert.

1060. Dr. Marshall was unaware of any other buying group that required a dentist to sign a franchise agreement to become a member. (Marshall, Tr. 3256).

**Response to Proposed Finding No. 1060**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Marshall is Complaint Counsel's expert.

1061. Dr. Marshall considered Smile Source to be representative of other buying groups only because at least one of the respondents recognized it to be a buying group. (Marshall, Tr. 3256).

**Response to Proposed Finding No. 1061**

The Proposed Finding is inaccurate, incomplete, and misleading because Dr. Marshall's complete testimony was that Smile Source is "representative in the sense that at least one of the respondents recognized the buying groups in paragraph 491 to be a buying group, and the features of . . . Smile Source that are relevant to me is the buying group features of them." (Marshall, Tr. 3256 (Smile Source was listed in paragraph 491 of Dr. Marshall's Expert Report)). This Proposed Finding is also inaccurate, incomplete, and misleading because it omits Dr. Marshall's testimony explaining why Kois and Smile Source were representative of other buying groups. Dr. Marshall elaborated:

Q: Why did you choose to study Kois and Smile Source?

A: *So these are highly representative of what's going on in this following sense.* It covers a broad geography of the country. It covered a broad time span going from 2012 through 2017. And in addition to that, there were different sizes of the buying groups at the times I looked at them. For Kois it was at the inception of the buying group. And then in the other studies, we had small size to the buying group, medium size to the buying group, large size to the buying group, so I was able to get a good look at what was going on with buying groups in that diversity.

(Marshall Tr. 2863 (emphasis added); Marshall, Tr. 3244 ("What I had said is the following, that the Kois and the five studies cover a geography of the United States. And in addition to that, we have buying groups at different stages. We had -- in terms of size. We have -- when they're at their inception, when they're small, when they're medium and when they're large in size, that this is the nature of the representativeness that I had spoken about with -- in my direct testimony."); *see also* Marshall, Dep. at 382 ("I felt that the data that was available for Kois and Smile Source spoke to a broad range of the issues in this matter; and therefore, I felt comfortable with the analysis being conducted in Section 5 [of the Marshall Expert Report].")).

Additionally, Dr. Marshall explained that the Kois and Smile Source buying groups that he studied in his five profitability studies are representative as they share the common feature of being [REDACTED]; *see also* CX8040 (Marshall, Dep. at 212) (explaining that Kois and Smile Source are “the same in the sense of the definition I offer in paragraph 139.”)). Additionally, Dr. Marshall explained that for buying groups generally “[a]ll these groups will have different management and they’ll be issues that are different between them. But, again, these fall within what’s identified in paragraph 139 of my report.” (CX8040 (Marshall, Dep. at 212)). Moreover, Like all buying groups, Kois and [REDACTED] do not force members to purchase from contracted distributors—in other words, they do not *require* compliance. (CCFF ¶¶ 1685-1687, 1689-1695; [REDACTED]; CX8040 (Marshall, Dep. 212)).

1062. The differences between Smile Source and other buying groups matter because they shape whether a buying group is going to be a profitable opportunity or not. (Wu, Tr. 5044-5045).

### **Response to Proposed Finding No. 1062**

The Proposed Finding is unreliable and only relies on Patterson’s economic expert Dr. Wu’s conclusory, self-serving, and unsupported trial testimony. While Dr. Wu testified that “[Kois and Smile Source] are not representative of other buying groups given how different they are on all the dimensions I mentioned a couple minutes ago, and they’re not even similar to each other,” Dr. Wu did no analysis of a representative buying group. (Wu, Tr. 5044 (testifying about facts); *see also generally* RX2833 (Wu Expert Report) (no profitability analyses for any buying groups)).

Because many of Dr. Wu’s primary opinions involve claims about Patterson’s costs (cost savings and opportunity costs related to dealing or not dealing with buying groups), his opinions should

be grounded in a quantifiable framework. However, despite his background as an economist and his \$1,100 hourly fees to offer economic support for Patterson (CCFF ¶ 2005), Dr. Wu admitted that he failed to perform any quantitative analysis to support his central opinions, including whether it was profitable for Patterson (or any other Respondent) to do business with buying groups. Rather, Dr. Wu conceded that he merely interpreted documents and testimony to form these opinions.<sup>49</sup> The table below summarizes Dr. Wu’s unsupported primary opinions and his many corresponding admissions that he failed to perform the necessary analysis to support his claims, rendering Dr. Wu’s opinions regarding the profitability of buying groups unreliable.<sup>50</sup>

Opinion Dr. Wu Offered to the Court	Admitted Failure to Perform Quantitative Analysis
Buying groups did not offer Patterson cost savings compared to Patterson dealing with individual dentists outside of a buying group. <sup>51</sup>	<p>Q. You did not do any quantitative analysis to show that buying groups would not have offered Patterson cost savings. Correct?</p> <p>A: I have not done my own quantitative analysis on that question.<sup>52</sup></p>
It is likely that contracting with buying groups during the relevant period would have increased Patterson’s costs. <sup>53</sup>	<p>Q. Did you do any quantitative analysis to show that contracting with buying groups would actually have increased Patterson's costs?</p> <p>A. As I said earlier, I did not do any calculations on my own.<sup>54</sup></p>

<sup>49</sup> Wu, Tr. 5079-5080 (admitting that his opinions regarding Patterson’s unilateral interest to do business with these buying groups was his “review of the...documents in the record, yes, which reflects, deposition testimony, documents, contemporaneous business documents, and that would include emails.”); *see also* Wu, Tr. 5085 (“Q. Similar to what we saw before, the only source you cited in paragraph 85, which provides your opinion on ADC, is a single Patterson document; correct? A. Yes.”)).

<sup>50</sup> *See also* CXD15 (demonstrative from cross-examination of Dr. Wu summarizing his failure to perform quantitative analysis for many key opinions).

<sup>51</sup> RX2833 at 020-022, Section 4.2.1 (“Buying Groups Did Not Offer Patterson Cost Savings”) (¶¶ 36-40) (Wu Expert Report); RX2967 (Wu, Dep. at 120)).

<sup>52</sup> RX2967 (Wu, Dep. at 128); Wu, Tr. 5070-71.

<sup>53</sup> RX2833 at 022, Section 4.2.2 (¶ 41) (Wu Expert Report); RX2967 (Wu, Dep. at 132).

<sup>54</sup> RX2967 (Wu, Dep. at 132-134); Wu, Tr. 5071-5072.

The opportunity cost of Patterson dealing with buying groups was ‘too high.’ <sup>55</sup>	Q: My question is, did you do any quantitative analysis to support the conclusion that Patterson had too high an opportunity cost to deal with buying groups? A. I did not. <sup>56</sup>
In Sept. 2013, Patterson started the special markets division to pursue business with group practices and DSOs, but Patterson could not also handle doing business with buying groups. <sup>57</sup>	Q. So, did you perform any quantitative analysis showing that the special markets division could not also handle doing business with buying groups? A. I did not. <sup>58</sup>
It was more costly for Patterson than for Schein to deal with buying groups. <sup>59</sup>	Q. Did you do any quantitative analysis comparing Patterson’s cost of dealing with buying groups with Schein’s cost of dealing with buying groups? A. No, I did not. <sup>60</sup>
Patterson had unilateral reasons for declining to work with the buying groups it had rejected (addressed in Section 5.3.1 of Dr. Wu’s report). <sup>61</sup>	Q. There is no quantitative analysis anywhere in Section 5.3.1, correct? A. That’s correct. <sup>62</sup>
Patterson’s decision to not work with Kois was based on the lack of profitability due to unreasonably low margins it saw in contracting Kois. <sup>63</sup>	Q. Did you perform any analysis showing that it would not have been profitable for Patterson to work with Kois?

<sup>55</sup> RX2833 at 025 (¶ 46) (Wu Expert Report)).

<sup>56</sup> RX2967 (Wu, Dep. at 149); Wu, Tr. 5072-73. Dr. Wu further conceded that he did do any calculation to determine Patterson’s opportunity costs at all, (RX2967 (Wu, Dep. at 149)), and that he did not do any calculation of what level of opportunity cost would be ‘too high’ for a firm to deal with buying groups. (RX2967 (Wu, Dep. at 149-150)).

<sup>57</sup> RX2967 (Wu, Dep. at 150).

<sup>58</sup> RX2967 (Wu, Dep. at 151); Wu, Tr. 5073.

<sup>59</sup> RX2967 (Wu, Dep. at 160).

<sup>60</sup> RX2967 (Wu, Dep. at 160); Wu, Tr. 5074.

<sup>61</sup> RX2967 (Wu, Dep. at 249); RX2833 at 037-040 (Section 5.3.1) (“Patterson’s Rationale for Not Dealing with Buying Groups Was Unilateral and in Its Own Self-Interest”) (Wu Expert Report).

<sup>62</sup> RX2967 (Wu, Dep. at 250); Wu, Tr. 5076.

<sup>63</sup> RX2967 (Wu, Dep. at 258).



	A. No. I have not. <sup>64</sup>
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To the extent that this Proposed Finding suggests that Dr. Marhsall's profitability analyses are not representative of other buying groups, Dr. Marshall explained that he studied five different relationships with the Kois Buyers Group and Smile Source because, in addition to having gotten off the ground, these buying groups operate in geographies (Seattle and Atlanta) in which Schein, Patterson, and Benco are likely to have their lowest collective share of sales and another distributor was likely to have a high share of sales. (CX7101 at 045-046, 064 (¶¶ 107-112, 165) (Marshall Rebuttal Expert Report)). These facts addressed potential concerns that the relative sizes of Schein and Patterson make it more costly for them to supply buying groups, both because (1) Schein and Patterson are likely to find itself more profitable to discount when they have a lower share of sales and (2) where Burkhart and Atlanta Dental are large, it illuminates whether a full-service distributor found it profitable to supply a buying group so in a geographic area in which its share of sales was relatively large. (CX7101 at 64 (¶ 165) (Marshall Rebuttal Expert Report)). Differences between the Kois Buyers Group, with its single regional full-service distributor, and Smile Source, with its changing network of distributors over time, provide further reasons to believe that the experiences of distributors with these two groups provides some information about likely outcomes with other potential buying groups that went nowhere as a result of being rejected by Schein, Patterson, and/or Benco. (CX7101 at 64 (¶ 166) (Marshall Rebuttal Expert Report)).

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<sup>64</sup> RX2967 (Wu, Dep. at 258); Wu, Tr. 5080-5081. Dr. Wu further admitted that he did not do any analysis to determine what constitutes an unreasonably low margin as he used that term in paragraph 82 of his expert report discussing this opinion. (RX2967 (Wu, Dep. at 258)). In fact, the only source Dr. Wu cited for his conclusions about Kois in paragraph 82 of his expert report is a single email. (RX2967 (Wu, Dep. 259)).

Dr. Marshall also explained that a common feature of the buying groups that he studied and other buying groups was that [REDACTED]

[REDACTED]; *see also* CX8040 (Marshall, Dep. at 212) (explaining that Kois and Smile Source are “the same in the sense of the definition I offer in paragraph 139.”)). Dr. Marshall elaborated that for buying groups generally “[a]ll these groups will have different management and they’ll be issues that are different between them. But, again, these fall within what’s identified in paragraph 139 of my report.” (CX8040 Marshall, Dep. at 212)).

Dr. Marshall also explained that for the buying groups in his profitability studies and buying groups generally, he [REDACTED]

d. Dr. Marshall’s Profitability Studies Focused On Only Three Distributors, None of Which Was Benco

1063. Dr. Marshall’s five studies focused on the dealings of three distributors: Burkhart, Atlanta Dental and Schein. (Marshall, Tr. 3373).

**Response to Proposed Finding No. 1063**

The Proposed Finding is inaccurate, incomplete, and misleading in suggesting that Dr. Marshall’s profitability studies are limited to studying three distributors – Dr. Marshall studied data “provided by the...respondents in this matter [including Benco] as well as other distributors, Atlanta Dental, Burkhart...” (Marshall, Tr. 2860; *see also* [REDACTED]).

1064. None of Dr. Marshall’s five case studies focused on Benco. (Marshall, Tr. 3373).

**Response to Proposed Finding No. 1064**

The Proposed Finding is inaccurate, incomplete, and misleading insofar as it suggests that Dr. Marshall's five case studies did not focus on Benco. In all of his profitability analyses, Dr. Marshall uses data from distributors (both Respondents and other distributors such as Atlanta Dental, Burkhart, and Darby) to examine the dentists switching behavior in the context of specific episodes of distributors doing business or not doing business with buying groups. (Marshall, Tr. 2860). Dr. Marshall's five profitability studies also analyze whether it was profitable for Respondents, including Benco, and other distributors to bid for and obtain buying group business and whether it was unprofitable for them not to bid for the business of buying groups. (Marshall, Tr. 2861). In his five profitability studies, Dr. Marshall examines what Respondents, including Benco, (who were not bidding for the buying group business) were foregoing in profits by not pursuing buying group business as their dentists customers substitute away from them towards the lower-priced buying group distributor supplier. (Marshall, Tr. 2867). This Proposed Finding is also incomplete and misleading because the testimony cited omits that Dr. Marshall testified that he did not specifically study Benco's relationship with Kois because "Benco was not a supplier to the Kois buying group." (Marshall, Tr. 3373).

1065. Burkhart, Atlanta Dental and Schein are not representative of Benco.

**Response to Proposed Finding No. 1065**

The Proposed Finding is unsupported.

1066. Burkhart and Schein are very different companies, and there is no reason to think that what is true for Burkhart is necessarily true for Schein. (Carlton, Tr. 5396).

**Response to Proposed Finding No. 1066**

Complaint Counsel notes, that Contrary to this Court's order, Respondent is citing to an expert for a proposition of fact. Dr. Carlton is Schein's expert.

This Proposed Finding is inaccurate, incomplete, and misleading to the extent that it suggests that Dr. Marshall did not study whether doing business with buying groups would have been profitable for Schein. Dr. Marshall's Schein-Smile Source 2017 profitability study directly examines Schein's decision to supply Smile Source in 2017. (CX7101 at 053 (¶ 134) (Marshall Rebuttal Expert Report); [REDACTED]

[REDACTED]. This study demonstrates that it was profitable for Schein to supply Smile Source members, despite Schein having the largest nationwide share of any full-service distributor. (CX7101 at 053 (¶ 134) (Marshall Rebuttal Expert Report)). Dr. Marshall testified that buying group opportunities were profitable even for a larger full-service distributor and describes that in the state of Washington, Burkhart, Patterson, and Schein have roughly equivalent market share, so by analogy, "what is profitable in that case for Burkhart would be profitable for Schein or Patterson to engage in." (Marshall, Tr. 2874-2875); *see also* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1067. Burkhart and Schein are very different companies; just because it's profitable for Burkhart doesn't mean it would be profitable for Schein. (Carlton, Tr. 5396).

**Response to Proposed Finding No. 1067**

Complaint Counsel notes, that Contrary to this Court's order, Respondent is citing to an expert for a proposition of fact. Dr. Carlton is Schein's expert. The Proposed Finding is inaccurate, incomplete, and misleading to the extent that it suggests that Dr. Marshall did not study whether doing business with buying groups would have been profitable for Schein. Dr. Marshall's Schein-Smile Source 2017 profitability study directly examines Schein's decision to supply Smile Source in 2017. (CX7101 at 053 (¶ 134) (Marshall Rebuttal Expert Report); [REDACTED]

[REDACTED]. This study demonstrates that it was profitable for Schein to supply Smile Source members, despite Schein having the largest nationwide share of any full-service distributor. (CX7101 at 053 (¶ 134) (Marshall Rebuttal Expert Report)). Dr. Marshall testified that buying group opportunities were profitable even for a larger full-service distributor and describes that in the state of Washington, Burkhart, Patterson, and Schein have roughly equivalent market share, so by analogy, "what is profitable in that case for Burkhart would be profitable for Schein or Patterson to engage in." (Marshall, Tr. 2874-2875); *see also* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

1068. Patterson's economics are completely different from those of Burkhart, Atlanta Dental and Schein. (Wu, Tr. 5046).

**Response to Proposed Finding No. 1068**

The Proposed Finding is misleading, subjective, and not supported by the evidence cited. The weight of the evidence shows that Patterson and other full-service distributors are similar to each other, engaged in the same business, and face similar economics. (CCFF ¶¶ 5-56, 89-113, 196-268, 1446-1490). This Proposed Finding is also unreliable and only relies on Patterson's economic expert Dr. Wu's conclusory, self-serving, and unsupported trial testimony. While Dr. Wu testified that "When I look at it, I think Patterson's economics are completely different," Dr. Wu did no economic or quantitative analyses to substantiate this conclusory statement. (Wu, Tr. 5046; *see also generally* RX2833 (Wu Expert Report) (no profitability analyses for any buying groups)).

Because many of Dr. Wu's primary opinions involve claims about Patterson's costs (cost savings and opportunity costs related to dealing or not dealing with buying groups), his opinions should be grounded in a quantifiable framework. However, despite his background as an economist and his \$1,100 hourly fees to offer economic support for Patterson (CCFF ¶ 2005), Dr. Wu admitted that he failed to perform any quantitative analysis to support his central opinions, including whether it was profitable for Patterson (or any other Respondent) to do business with buying groups. Rather, Dr. Wu conceded that he merely interpreted documents and testimony to form

these opinions.<sup>65</sup> The table below summarizes Dr. Wu’s unsupported primary opinions and his many corresponding admissions that he failed to perform the necessary analysis to support his claims, rendering Dr. Wu’s opinions regarding the profitability of buying groups unreliable.<sup>66</sup>

Opinion Dr. Wu Offered to the Court	Admitted Failure to Perform Quantitative Analysis
Buying groups did not offer Patterson cost savings compared to Patterson dealing with individual dentists outside of a buying group. <sup>67</sup>	<p>Q. You did not do any quantitative analysis to show that buying groups would not have offered Patterson cost savings. Correct?</p> <p>A: I have not done my own quantitative analysis on that question.<sup>68</sup></p>
It is likely that contracting with buying groups during the relevant period would have increased Patterson’s costs. <sup>69</sup>	<p>Q. Did you do any quantitative analysis to show that contracting with buying groups would actually have increased Patterson's costs?</p> <p>A. As I said earlier, I did not do any calculations on my own.<sup>70</sup></p>
The opportunity cost of Patterson dealing with buying groups was ‘too high.’ <sup>71</sup>	<p>Q: My question is, did you do any quantitative analysis to support the conclusion that Patterson had too high an opportunity cost to deal with buying groups?</p> <p>A. I did not.<sup>72</sup></p>

<sup>65</sup> Wu, Tr. 5079-5080 (admitting that his opinions regarding Patterson’s unilateral interest to do business with these buying groups was his “review of the...documents in the record, yes, which reflects, deposition testimony, documents, contemporaneous business documents, and that would include emails.”); *see also* Wu, Tr. 5085 (“Q. Similar to what we saw before, the only source you cited in paragraph 85, which provides your opinion on ADC, is a single Patterson document; correct? A. Yes.”)).

<sup>66</sup> *See also* CXD15 (demonstrative from cross-examination of Dr. Wu summarizing his failure to perform quantitative analysis for many key opinions).

<sup>67</sup> RX2833 at 020-022, Section 4.2.1 (“Buying Groups Did Not Offer Patterson Cost Savings”) (¶¶ 36-40) (Wu Expert Report); RX2967 (Wu, Dep. at 120)).

<sup>68</sup> RX2967 (Wu, Dep. at 128); Wu, Tr. 5070-71.

<sup>69</sup> RX2833 at 022, Section 4.2.2 (¶ 41)(Wu Expert Report); RX2967 (Wu, Dep. at 132).

<sup>70</sup> RX2967 (Wu, Dep. at 132-134); Wu, Tr. 5071-5072.

<sup>71</sup> RX2833 at 025 (¶ 46) (Wu Expert Report)).

<sup>72</sup> RX2967 (Wu, Dep. at 149); Wu, Tr. 5072-73. Dr. Wu further conceded that he did do any calculation to determine Patterson’s opportunity costs at all, (RX2967 (Wu, Dep. at 149)), and that he did not do any calculation of

In Sept. 2013, Patterson started the special markets division to pursue business with group practices and DSOs, but Patterson could not also handle doing business with buying groups. <sup>73</sup>	Q. So, did you perform any quantitative analysis showing that the special markets division could not also handle doing business with buying groups?  A. I did not. <sup>74</sup>
It was more costly for Patterson than for Schein to deal with buying groups. <sup>75</sup>	Q. Did you do any quantitative analysis comparing Patterson's cost of dealing with buying groups with Schein's cost of dealing with buying groups?  A. No, I did not. <sup>76</sup>
Patterson had unilateral reasons for declining to work with the buying groups it had rejected (addressed in Section 5.3.1 of Dr. Wu's report). <sup>77</sup>	Q. There is no quantitative analysis anywhere in Section 5.3.1, correct?  A. That's correct. <sup>78</sup>
Patterson's decision to not work with Kois was based on the lack of profitability due to unreasonably low margins it saw in contracting Kois. <sup>79</sup>	Q. Did you perform any analysis showing that it would not have been profitable for Patterson to work with Kois?  A. No. I have not. <sup>80</sup>

This Proposed Finding is incomplete and misleading to the extent that it suggests that Dr.

Marshall did not specifically study the effects of cannibalization in relation to Respondents, including Benco, in this matter and conclude that it was still profitable for Respondents to do

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what level of opportunity cost would be 'too high' for a firm to deal with buying groups. (RX2967 (Wu, Dep. at 149-150)).

<sup>73</sup> RX2967 (Wu, Dep. at 150).

<sup>74</sup> RX2967 (Wu, Dep. at 151); Wu, Tr. 5073.

<sup>75</sup> RX2967 (Wu, Dep. at 160).

<sup>76</sup> RX2967 (Wu, Dep. at 160); Wu, Tr. 5074.

<sup>77</sup> RX2967 (Wu, Dep. at 249); RX2833 at 037-040 (Section 5.3.1) ("Patterson's Rationale for Not Dealing with Buying Groups Was Unilateral and in Its Own Self-Interest") (Wu Expert Report).

<sup>78</sup> RX2967 (Wu, Dep. at 250); Wu, Tr. 5076.

<sup>79</sup> RX2967 (Wu, Dep. at 258).

<sup>80</sup> RX2967 (Wu, Dep. at 258); Wu, Tr. 5080-5081. Dr. Wu further admitted that he did not do any analysis to determine what constitutes an unreasonably low margin as he used that term in paragraph 82 of his expert report discussing this opinion. (RX2967 (Wu, Dep. at 258)). In fact, the only source Dr. Wu cited for his conclusions about Kois in paragraph 82 of his expert report is a single email. (RX2967 (Wu, Dep. 259)).



business with buying groups – he did. Specifically, Dr. Marshall examined the effects of potential cannibalization in his five profitability studies and found that the distributor-buying groups relationships were profitable for the distributor despite the potential for cannibalization.

(CCFF ¶¶ 1637-1684).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In addition to analyzing Burkhart's profitability in Washington State, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

1069. Whether Burkhart, Atlanta Dental and Schein are representative of other distributors depends in part on their business models. (Wu, Tr. 5051).

**Response to Proposed Finding No. 1069**

The Proposed Finding is misleading and incomplete. This factor is considered and addressed in

Dr. Marshall's analysis. [REDACTED]

[REDACTED]

1070. Whether Burkhart, Atlanta Dental and Schein are representative of other distributors depends in part on whether the distributor is already doing work with the dentists in the area. (Wu, Tr. 5051).

**Response to Proposed Finding No. 1070**

The Proposed Finding is unreliable and only relies on Patterson’s economic expert Dr. Wu’s conclusory, self-serving, and unsupported trial testimony. While Dr. Wu testified that “When I look at it, I think Patterson’s economics are completely different,” Dr. Wu did no economic or quantitative analyses to substantiate this conclusory statement. (Wu, Tr. 5046; *see also generally* RX2833 (Wu Expert Report) (no profitability analyses for any buying groups)).

Because many of Dr. Wu’s primary opinions involve claims about Patterson’s costs (cost savings and opportunity costs related to dealing or not dealing with buying groups), his opinions should be grounded in a quantifiable framework. However, despite his background as an economist and his \$1,100 hourly fees to offer economic support for Patterson (CCFF ¶ 2005), Dr. Wu admitted that he failed to perform any quantitative analysis to support his central opinions, including whether it was profitable for Patterson (or any other Respondent) to do business with buying groups. Rather, Dr. Wu conceded that he merely interpreted documents and testimony to form these opinions.<sup>81</sup> The table in Complaint Counsel’s Response to Benco Proposed Finding No. 1068 above summarizes Dr. Wu’s unsupported primary opinions and his many corresponding admissions that he failed to perform the necessary analysis to support his claims, rendering Dr. Wu’s opinions regarding the profitability of buying groups unreliable.<sup>82</sup>

This Proposed Finding is incomplete and misleading to the extent that it suggests that Dr. Marshall did not specifically study the effects of cannibalization in relation to Respondents, including Benco for reasons explained in more detail in Complaint Counsel’s Response to Benco Proposed Finding No. 1068.

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<sup>81</sup> Wu, Tr. 5079-5080 (admitting that his opinions regarding Patterson’s unilateral interest to do business with these buying groups was his “review of the...documents in the record, yes, which reflects, deposition testimony, documents, contemporaneous business documents, and that would include emails.”); *see also* Wu, Tr. 5085 (“Q. Similar to what we saw before, the only source you cited in paragraph 85, which provides your opinion on ADC, is a single Patterson document; correct? A. Yes.”)).

<sup>82</sup> *See also* CXD15 (demonstrative from cross-examination of Dr. Wu summarizing his failure to perform quantitative analysis for many key opinions).

1071. [REDACTED]

**Response to Proposed Finding No. 1071**

Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to [REDACTED]

1072. [REDACTED]

**Response to Proposed Finding No. 1072**

The Proposed Finding is misleading, incomplete, and vague in that it does not include a date for when [REDACTED]

[REDACTED] Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing, at least in part, [REDACTED]

1073. [REDACTED]

**Response to Proposed Finding No. 1073**

The Proposed Finding is vague in that it relies on the phrase [REDACTED]. Additionally, the Proposed Finding is vague in that it relies on the term [REDACTED]. The Proposed Finding is unsupported as there is no indication in the testimony cited as support that [REDACTED], Cohen testified that “[Benco] didn’t open in Seattle until 2014.” (Cohen, Tr. 632). Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly

citing, at least in part, to the testimony of an expert for a proposition of fact. RX2834 is Dr. Johnson's (Benco's) Expert Report.

1074. [REDACTED]

**Response to Proposed Finding No. 1074**

Complaint Counsel notes that, contrary to this Court's order, [REDACTED]

[REDACTED]

[REDACTED].

This Proposed Finding is incomplete and misleading to the extent that it suggests [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Specifically, Dr. Marshall examined the effects of potential cannibalization in his five profitability studies and found that the distributor-buying groups relationships were profitable for the distributor despite the potential for cannibalization.

(CCFF ¶¶ 1637-1684). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. [REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In addition to analyzing Burkhart's profitability in Washington State, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]



[REDACTED]

[REDACTED]

1075. On the basis of his studies focused on *Burkhart*, *Atlanta Dental* and *Schein*, Dr. Marshall concluded that *Benco*'s decision not to bid for buying group business was inconsistent with acting in its own economic self-interest. (Marshall, Tr. 3374).

**Response to Proposed Finding No. 1075**

The Proposed Finding is inaccurate, incomplete, and misleading insofar as it suggests that Dr. Marshall's five case studies did not focus on Benco -- in all of his profitability analyses, Dr. Marshall uses data from distributors (both Respondents and other distributors such as Atlanta Dental, Burkhart, and Darby) to examine the dentists switching behavior in the context of specific episodes of distributors doing business or not doing business with buying groups. (Marshall, Tr. 2860). Dr. Marshall's five profitability studies also analyze whether it was profitable for Respondents, including Benco, and other distributors to bid for and obtain buying group business and whether it was unprofitable for them not to bid for the business of buying groups. (Marshall, Tr. 2861). In his five profitability studies, Dr. Marshall examines what Respondents, including Benco, (who were not bidding for the buying group business) were foregoing in profits by not pursuing buying group business as their dentists customers substituted away from them towards the lower-priced buying group distributor supplier. (Marshall, Tr. 2867). This Proposed Finding is incomplete and misleading to the extent that it suggests that Dr. Marshall did not specifically study the effects of cannibalization in relation to Respondents, including Benco for reasons explained in more detail in Complaint Counsel's Response to Benco Proposed Finding No. 1068. Additionally, the testimony cited is incomplete because it omits that Dr. Marshall further elaborated that "Because of Benco's size and given what I was seeing in the other studies, it would make perfect sense by analogy that they would find it profitable to pursue that business." (Marshall, Tr. 3374).

1076. Burkhart, Atlanta Dental and Schein also were not representative of Patterson. (Wu, Tr. 5046-5055).

**Response to Proposed Finding No. 1076**

The Proposed Finding is misleading and not supported by the evidence cited. The weight of the evidence shows that Patterson and other full-service distributors are similar to each other, engaged in the same business, and face similar economics. (CCFF ¶¶ 5-56, 89-113, 196-268, 1446-1490).

This Proposed Finding is unreliable and only relies on Patterson's economic expert Dr. Wu's conclusory, self-serving, and unsupported trial testimony. While Dr. Wu testified that "When I look at it, I think Patterson's economics are completely different," Dr. Wu did no economic or quantitative analyses to substantiate this conclusory statement. (Wu, Tr. 5046; *see also generally* RX2833 (Wu Expert Report) (no profitability analyses for any buying groups)).

Because many of Dr. Wu's primary opinions involve claims about Patterson's costs (cost savings and opportunity costs related to dealing or not dealing with buying groups), his opinions should be grounded in a quantifiable framework. However, despite his background as an economist and his \$1,100 hourly fees to offer economic support for Patterson (CCFF ¶ 2005), Dr. Wu admitted that he failed to perform any quantitative analysis to support his central opinions, including whether it was profitable for Patterson (or any other Respondent) to do business with buying groups. Rather, Dr. Wu conceded that he merely interpreted documents and testimony to form these opinions.<sup>83</sup> The table below summarizes Dr. Wu's unsupported primary opinions and his

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<sup>83</sup> Wu, Tr. 5079-5080 (admitting that his opinions regarding Patterson's unilateral interest to do business with these buying groups was his "review of the...documents in the record, yes, which reflects, deposition testimony, documents, contemporaneous business documents, and that would include emails."); *see also* Wu, Tr. 5085 ("Q. Similar to what we saw before, the only source you cited in paragraph 85, which provides your opinion on ADC, is a single Patterson document; correct? A. Yes.")).

many corresponding admissions that he failed to perform the necessary analysis to support his claims, rendering Dr. Wu's opinions regarding the profitability of buying groups unreliable:<sup>84</sup>

<b>Opinion Dr. Wu Offered to the Court</b>	<b>Admitted Failure to Perform Quantitative Analysis</b>
Buying groups did not offer Patterson cost savings compared to Patterson dealing with individual dentists outside of a buying group. <sup>85</sup>	Q. You did not do any quantitative analysis to show that buying groups would not have offered Patterson cost savings. Correct?  A: I have not done my own quantitative analysis on that question. <sup>86</sup>
It is likely that contracting with buying groups during the relevant period would have increased Patterson's costs. <sup>87</sup>	Q. Did you do any quantitative analysis to show that contracting with buying groups would actually have increased Patterson's costs? A. As I said earlier, I did not do any calculations on my own. <sup>88</sup>
The opportunity cost of Patterson dealing with buying groups was 'too high.' <sup>89</sup>	Q: My question is, did you do any quantitative analysis to support the conclusion that Patterson had too high an opportunity cost to deal with buying groups? A. I did not. <sup>90</sup>
In Sept. 2013, Patterson started the special markets division to pursue business with group practices and DSOs, but Patterson could not	Q. So, did you perform any quantitative analysis showing that the special markets division could not also handle

<sup>84</sup> See also CXD15 (demonstrative from cross-examination of Dr. Wu summarizing his failure to perform quantitative analysis for many key opinions).

<sup>85</sup> RX2833 at 020-022, Section 4.2.1 ("Buying Groups Did Not Offer Patterson Cost Savings") (¶¶ 36-40) (Wu Expert Report); RX2967 (Wu, Dep. at 120)).

<sup>86</sup> RX2967 (Wu, Dep. at 128); Wu, Tr. 5070-71.

<sup>87</sup> RX2833 at 022, Section 4.2.2 (¶ 41) (Wu Expert Report); RX2967 (Wu, Dep. at 132).

<sup>88</sup> RX2967 (Wu, Dep. at 132-134); Wu, Tr. 5071-5072.

<sup>89</sup> RX2833 at 025 (¶ 46) (Wu Expert Report)).

<sup>90</sup> RX2967 (Wu, Dep. at 149); Wu, Tr. 5072-73. Dr. Wu further conceded that he did do any calculation to determine Patterson's opportunity costs at all, (RX2967 (Wu, Dep. at 149)), and that he did not do any calculation of what level of opportunity cost would be 'too high' for a firm to deal with buying groups. (RX2967 (Wu, Dep. at 149-150)).

also handle doing business with buying groups. <sup>91</sup>	doing business with buying groups?  A. I did not. <sup>92</sup>
It was more costly for Patterson than for Schein to deal with buying groups. <sup>93</sup>	Q. Did you do any quantitative analysis comparing Patterson's cost of dealing with buying groups with Schein's cost of dealing with buying groups?  A. No, I did not. <sup>94</sup>
Patterson had unilateral reasons for declining to work with the buying groups it had rejected (addressed in Section 5.3.1 of Dr. Wu's report). <sup>95</sup>	Q. There is no quantitative analysis anywhere in Section 5.3.1, correct?  A. That's correct. <sup>96</sup>
Patterson's decision to not work with Kois was based on the lack of profitability due to unreasonably low margins it saw in contracting Kois. <sup>97</sup>	Q. Did you perform any analysis showing that it would not have been profitable for Patterson to work with Kois?  A. No. I have not. <sup>98</sup>

This Proposed Finding is incomplete and misleading to the extent that it suggests that Dr. Marshall did not specifically study the effects of cannibalization in relation to Respondents, including Benco, in this matter and conclude that it was still profitable for Respondents to do business with buying groups – he did. Specifically, Dr. Marshall examined the effects of potential cannibalization in his five profitability studies and found that the distributor-buying

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<sup>91</sup> RX2967 (Wu, Dep. at 150).

<sup>92</sup> RX2967 (Wu, Dep. at 151); Wu, Tr. 5073.

<sup>93</sup> RX2967 (Wu, Dep. at 160).

<sup>94</sup> RX2967 (Wu, Dep. at 160); Wu, Tr. 5074.

<sup>95</sup> RX2967 (Wu, Dep. at 249); RX2833 at 037-040 (Section 5.3.1) ("Patterson's Rationale for Not Dealing with Buying Groups Was Unilateral and in Its Own Self-Interest") (Wu Expert Report).

<sup>96</sup> RX2967 (Wu, Dep. at 250); Wu, Tr. 5076.

<sup>97</sup> RX2967 (Wu, Dep. at 258).

<sup>98</sup> RX2967 (Wu, Dep. at 258); Wu, Tr. 5080-5081. Dr. Wu further admitted that he did not do any analysis to determine what constitutes an unreasonably low margin as he used that term in paragraph 82 of his expert report discussing this opinion. (RX2967 (Wu, Dep. at 258)). In fact, the only source Dr. Wu cited for his conclusions about Kois in paragraph 82 of his expert report is a single email. (RX2967 (Wu, Dep. 259)).

groups relationships were profitable for the distributor despite the potential for cannibalization.

(CCFF ¶¶ 1637-1684). Even going further than just analyzing distributor-buying group

relationships in his profitability studies, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In addition to analyzing Burkhart's profitability in Washington State, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

1077. For example, Schein had a division in place to deal with sizeable customers; Patterson viewed buying groups as a potentially costly opportunity because they weren't set up to deal with sizeable customers, and might have to make investments in infrastructure. (Wu, Tr. 5051-5053).

**Response to Proposed Finding No. 1077**

The Proposed Finding is incorrect, incomplete, and not supported by any valid methodology in the field of economics. Patterson, like Schein, did have a Special Markets Division to deal with large customers, and Dr. Wu admitted at trial that he did not do any quantitative analysis showing that Patterson's Special Markets Division could not also handle doing business with buying groups. (Wu, Tr. 5073).

1078. If Patterson had to make investments to serve a large group, that would make an opportunity with a buying group a less profitable opportunity than for Schein. (Wu, Tr. 5053).

**Response to Proposed Finding No. 1078**

The Proposed Finding is incorrect, incomplete, and not supported by any valid methodology in the field of economics. Dr. Wu had no economic basis to conclude that it was more costly for Patterson to serve buying groups than for Schein. He admitted at trial that he did not do any quantitative analysis comparing Patterson's costs of dealing with buying groups with Schein's cost of dealing with buying groups. (Wu, Tr. 5074).

1079. Because the economics for Schein were different from the economics for Patterson, the contention that working with buying groups may have been a good profit opportunity for Schein does not imply that it also would have been a good opportunity for Patterson. (Wu, Tr. 5054).

**Response to Proposed Finding No. 1079**

The Proposed Finding is incorrect, incomplete, and not supported by any valid methodology in the field of economics. Dr. Wu had no economic basis to conclude that it was more costly for Patterson to serve buying groups than for Schein. He admitted at trial that he did not do any quantitative analysis comparing Patterson's costs of dealing with buying groups with Schein's cost of dealing with buying groups. (Wu, Tr. 5074).

e. **Dr. Marshall Conducted An "After-The-Fact" Review That Failed To Account For Risk and Uncertainty**

1080. Distributors had to evaluate buying groups at the time buying groups approached them. (Wu, Tr. 5055-5056).

**Response to Proposed Finding No. 1080**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Wu is Patterson's expert.

This Proposed Finding is irrelevant and incomplete because the testimony cited as support fails to acknowledge and does not include a response to Dr. Marshall's opinion that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that "[s]ales force interest in supplying



buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight.”); *see also* Marshall, Tr. 3387, 3384 (“I’m noting, though, that again that they’re making a blanket statement here: We don’t do business with buying groups,” “I am just noting again that they have made statements of a blanket nature: We don’t do business with buying groups,” “It says right here ‘we would consider them a GPO,’ group purchasing organization these types of affiliations as single customer.’ It’s just a blanket statement Buying club, we don’t do business with it. That’s it. It doesn’t reflect any incremental evaluation.”); Marshall, Tr. 3266 (“I’m looking at this quotation and it says ‘Typical approach of an upstart buying group’ ...and it’s passing on this as a matter of policy.’”).

1081. Distributors faced considerable uncertainty when evaluating whether a buying group would generate incremental revenues. (Wu, Tr. 5055-5056).

### **Response to Proposed Finding No. 1081**

Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Wu is Patterson’s expert.

This Proposed Finding is irrelevant and incomplete because the cited testimony does not acknowledge or respond to Dr. Marshall’s opinion that it was against Respondents’ self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that “[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight.”); *see also* Marshall, Tr. 3387, 3384 (“I’m noting, though, that again that they’re making a blanket statement here: We don’t do business with buying groups,” “I am just noting again that

they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."); Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group'...and it's passing on this as a matter of policy.'").

This Proposed Finding is also unreliable because it only cites to Patterson's economic expert Dr. Wu's conclusory, self-serving, and unsupported trial testimony. Because many of Dr. Wu's primary opinions involve claims about Patterson's costs (cost savings and opportunity costs related to dealing or not dealing with buying groups), his opinions should be grounded in a quantifiable framework. However, despite his background as an economist and his \$1,100 hourly fees to offer economic support for Patterson (CCFF ¶ 2005), Dr. Wu admitted that he failed to perform any quantitative analysis to support his central opinions, including whether it was profitable for Patterson (or any other Respondent) to do business with buying groups. Rather, Dr. Wu conceded that he merely interpreted documents and testimony to form these opinions.<sup>99</sup> For reasons explained in Complaint Counsel's Response to Benco Proposed Finding No. 1062, Dr. Wu's unsupported primary opinions and his many corresponding admissions that he failed to perform the necessary analysis to support his claims, rendering Dr. Wu's opinions regarding the evaluation and profitability of buying groups unreliable.<sup>100</sup>

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<sup>99</sup> Wu, Tr. 5079-5080 (admitting that his opinions regarding Patterson's unilateral interest to do business with these buying groups was his "review of the...documents in the record, yes, which reflects, deposition testimony, documents, contemporaneous business documents, and that would include emails."); *see also* (Wu, Tr. 5085 ("Q. Similar to what we saw before, the only source you cited in paragraph 85, which provides your opinion on ADC, is a single Patterson document; correct? A. Yes.")).

<sup>100</sup> *See also* CXD15 (demonstrative from cross-examination of Dr. Wu summarizing his failure to perform quantitative analysis for many key opinions).

1082. Distributors faced considerable uncertainty when evaluating what costs they would incur to serve a buying group. (Wu, Tr. 5055-5056).

**Response to Proposed Finding No. 1082**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Wu is Patterson's expert. This Proposed Finding is also unreliable because it only cites to Patterson's economic expert Dr. Wu's conclusory, self-serving, and unsupported trial testimony. Because many of Dr. Wu's primary opinions involve claims about Patterson's costs (cost savings and opportunity costs related to dealing or not dealing with buying groups), his opinions should be grounded in a quantifiable framework. However, despite his background as an economist and his \$1,100 hourly fees to offer economic support for Patterson (CCFF ¶ 2005), Dr. Wu admitted that he failed to perform any quantitative analysis to support his central opinions, including whether it was profitable for Patterson (or any other Respondent) to do business with buying groups. Rather, Dr. Wu conceded that he merely interpreted documents and testimony to form these opinions.<sup>101</sup> For reasons explained in Complaint Counsel's Response to Benco Proposed Finding No. 1062, Dr. Wu's unsupported primary opinions and his many corresponding admissions that he failed to perform the necessary analysis to support his claims, rendering Dr. Wu's opinions regarding the evaluation and profitability of buying groups unreliable.<sup>102</sup>

This Proposed Finding is irrelevant and incomplete because in the cited testimony, Patterson's economic expert Dr. Wu did not acknowledge or respond to Dr. Marshall's opinion that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed

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<sup>101</sup> Wu, Tr. 5079-5080 (admitting that his opinions regarding Patterson's unilateral interest to do business with these buying groups was his "review of the...documents in the record, yes, which reflects, deposition testimony, documents, contemporaneous business documents, and that would include emails."); *see also* (Wu, Tr. 5085 ("Q. Similar to what we saw before, the only source you cited in paragraph 85, which provides your opinion on ADC, is a single Patterson document; correct? A. Yes.")).

<sup>102</sup> *See also* CXD15 (demonstrative from cross-examination of Dr. Wu summarizing his failure to perform quantitative analysis for many key opinions).

employees to reject buying groups as an entire customer segment. (CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that “[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight.”); *see also* Marshall, Tr. 3387, 3384 (“I’m noting, though, that again that they’re making a blanket statement here: We don’t do business with buying groups,” “I am just noting again that they have made statements of a blanket nature: We don’t do business with buying groups,” “It says right here ‘we would consider them a GPO,’ group purchasing organization these types of affiliations as single customer.’ It’s just a blanket statement Buying club, we don’t do business with it. That’s it. It doesn’t reflect any incremental evaluation.”); Marshall, Tr. 3266 (“I’m looking at this quotation and it says ‘Typical approach of an upstart buying group’ ...and it’s passing on this as a matter of policy.”)).

1083. When Qadeer Ahmed approached Patterson on behalf of the Kois Buyers Group in 2013, the Kois Buyers Group did not have any members. (Wu, Tr. 5057-5058).

### **Response to Proposed Finding No. 1083**

Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Wu is Patterson’s expert. This Proposed Finding is inaccurate, incomplete, and misleading to the extent that it suggests that Qadeer Ahmed misrepresented the number of Kois Buyers Group members: that notion is contradicted by the record evidence – specifically, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1084. When Qadeer Ahmed approached Patterson on behalf of the Kois Buyers Group in 2013, he claimed that the Kois Buyers Group had 1,700 members, and made other claims that Patterson couldn't verify. (Guggenheim, Tr. 1822-29; Wu, Tr. 5057-5058).

**Response to Proposed Finding No. 1084**

The Proposed Finding is not supported by the cited testimony. The testimony cited does not indicate that Qadeer Ahmed approached Patterson claiming that the Kois Buyers Group had 1,700 members. (Guggenheim, Tr. 1822-29). Additionally, this Proposed Finding is contradicted by the record evidence. Specifically, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing, at least in part, to the testimony of an expert for a proposition of fact. Dr. Wu is Patterson's expert. Additionally, the Proposed Finding is misleading and irrelevant to the extent that it suggests that Ahmed's discussion with Patterson about the number of members in Kois Buyers Group would change the results of Dr. Marshall's data-driven profitability studies indicating that it would have been profitable and in Respondents' self-interest to bid for the business of Kois Buyers Group. (CCFF ¶¶ 1655, 1657-1659).

1085. [REDACTED]

**Response to Proposed Finding No. 1085**

The Proposed Finding is incomplete because it omits the fact that [REDACTED]

[REDACTED]. Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing, at least in part, to the testimony of an expert for a proposition of fact. Dr. Marshall is Complaint Counsel's expert.

1086. [REDACTED]

**Response to Proposed Finding No. 1086**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. CX7100 is Dr. Marshall's expert report.

1087. [REDACTED]

**Response to Proposed Finding No. 1087**

The Proposed Finding is misleading and inaccurate. The evidence cited as support actually states that [REDACTED]

[REDACTED]. But the Proposed Finding omits Dr.

Marshall's explanation that Schein over time lost profits due to the growth of Smile Source and additional business flowing away from Schein towards Burkhart and Atlanta Dental due to their later partnerships with Smile Source: "And so that's a source of incremental profit as those dentists stayed with Schein after the termination of the agreement with Smile Source, but as Smile Source obtains contracts with Burkhart and Atlanta Dental, there's a commensurate loss

associated with the business that flows away from Schein towards Burkhart and Atlanta Dental.

I took those factors into account in this fourth analysis.” (Marshall, Tr. 2873; *see also* [REDACTED])

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1088. [REDACTED]

The Proposed Finding is inaccurate, incomplete, and misleading because it suggests that Dr. Marshall reached his conclusion “only by” taking into account the fact that [REDACTED]

\_\_\_\_\_

\_\_\_\_\_



1089. [REDACTED]

The Proposed Finding is inaccurate, misleading, and incomplete in suggesting that Dr. Marshall's profitability analyses hinge on any anticipation of buying group growth or that the conclusions of his profitability analyses is limited to his study of Schein's Smile Source relationship end in 2012. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive

incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents' unilateral self-interest to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also* Marshall, Tr. 3387, 3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."); Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group' ...and it's passing on this as a matter of policy.'").

**1090.** [REDACTED]

**Response to Proposed Finding No. 1090**

The Proposed Finding is inaccurate, misleading, and incomplete in suggesting that Dr. Marshall's profitability analyses hinge on any anticipation of buying group growth or that the conclusions of his profitability analyses is limited to his study of Schein's Smile Source relationship end in 2012. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents' unilateral self-interest to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also* Marshall, Tr. 3387, 3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."); Marshall, Tr. 3266 ("I'm looking at this quotation

and it says ‘Typical approach of an upstart buying group’...and it’s passing on this as a matter of policy.’”).

1091. Smile Source had between 100 and 200 members when it approached Patterson in 2013. (CX7100 at 67 ¶ 160; Wu, Tr. 5058-5059).

**Response to Proposed Finding No. 1091**

Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to the testimony of experts for a proposition of fact. CX7100 is Dr. Marshall’s Expert Report and Dr. Wu is Patterson’s expert.

1092. Smile Source grew to about 566 members by 2017. (CX7100 at 67 ¶ 160; Wu, Tr. 5058-5059).

**Response to Proposed Finding No. 1092**

Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. CX7100 is Dr. Marshall’s Expert Report and Dr. Wu is Patterson’s expert.

1093. Dr. Marshall performed an after-the-fact analysis to try to show that it would have turned out to be profitable for Patterson, Benco and Schein to do business with the Kois Buyers Group and Smile Source. (Wu, Tr. 5056-5057).

**Response to Proposed Finding No. 1093**

The Proposed Finding is unreliable because it only cites to Patterson’s economic expert Dr. Wu’s conclusory, self-serving, and unsupported trial testimony. This Proposed Finding is inaccurate, misleading, and incomplete in suggesting that Dr. Marshall’s profitability analyses hinge on any anticipation of buying group growth or that the conclusions of his profitability analyses is limited to his study of Schein’s Smile Source relationship end in 2012. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684;

[REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents' unilateral self-interest to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also* Marshall, Tr. 3387, 3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."); Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group'...and it's passing on this as a matter of policy.'").

1094. Dr. Marshall's analysis is like Monday morning quarterbacking; he judges the decisions of Patterson, Benco and Schein at the time based on later outcomes. (Wu, Tr. 5056-5057).

#### **Response to Proposed Finding No. 1094**

The Proposed Finding is misleading and irrelevant in that it is improper argument rather than material appropriate for a factual finding. The Proposed Finding is also unreliable because it only cites to Patterson's economic expert Dr. Wu's conclusory, self-serving, and unsupported

trial testimony. This Proposed Finding is irrelevant, inaccurate, misleading, and incomplete in suggesting that Dr. Marshall's profitability analyses hinge on any anticipation of buying group growth or that the conclusions of his profitability analyses is limited to his study of Schein's Smile Source relationship end in 2012. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents' unilateral self-interest to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also* Marshall, Tr. 3387, 3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."; Marshall, Tr. 3266 ("I'm looking at this quotation

and it says ‘Typical approach of an upstart buying group’...and it’s passing on this as a matter of policy.’”).

1095. Dr. Marshall’s analysis ignored the changes that took place in the marketplace between the time that Patterson, Benco and Schein decided whether to do business with the Kois Buyers Group and Smile Source and the time that Dr. Marshall’s studies concluded. (Wu, Tr. 5056-5057).

### **Response to Proposed Finding No. 1095**

The Proposed Finding is misleading, incomplete, and vague insofar as it relies on term phrase “changes that took place in the marketplace” without identifying what they were. Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Wu is Patterson’s expert. This Proposed Finding is also unreliable because it only cites to Patterson’s economic expert Dr. Wu’s conclusory, self-serving, and unsupported trial testimony. *See* Complaint Counsel’s Response to Benco Proposed Finding No. 1043. Additionally, the Proposed Finding is irrelevant and inaccurate, misleading, and incomplete in suggesting that Dr. Marshall’s profitability analyses hinge on any marketplace change. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents’ unilateral self-interest to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall’s review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents’ self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire

customer segment. CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that “[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight.”); *see also* Marshall, Tr. 3387, 3384 (“I’m noting, though, that again that they’re making a blanket statement here: We don’t do business with buying groups,” “I am just noting again that they have made statements of a blanket nature: We don’t do business with buying groups,” “It says right here ‘we would consider them a GPO,’ group purchasing organization these types of affiliations as single customer.’ It’s just a blanket statement Buying club, we don’t do business with it. That’s it. It doesn’t reflect any incremental evaluation.”); Marshall, Tr. 3266 (“I’m looking at this quotation and it says ‘Typical approach of an upstart buying group’ ...and it’s passing on this as a matter of policy.”).

1096. Dr. Marshall’s analysis ignored changes in distributors over time and changes in buying groups over time. (Wu, Tr. 5056-5057).

#### **Response to Proposed Finding No. 1096**

Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Wu is Patterson’s expert. This Proposed Finding is also unreliable because it only cites to Patterson’s economic expert Dr. Wu’s conclusory, self-serving, and unsupported trial testimony. *See* Complaint Counsel’s Response to Benco Proposed Finding No. 1043. Additionally, the Proposed Finding is irrelevant and inaccurate, misleading, and incomplete in suggesting that Dr. Marshall’s profitability analyses hinge on any marketplace change. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups



drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents' unilateral self-interest to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also* Marshall, Tr. 3387, 3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."); Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group' ...and it's passing on this as a matter of policy.'").

1097. Dr. Marshall's analysis ignored the factors that were relevant at the time that the distributors were making the decisions whether to do business with buying groups. (Wu, Tr. 5056-5057; Wu, Tr. 5060).

#### **Response to Proposed Finding No. 1097**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Wu is Patterson's expert. This Proposed

Finding is also unreliable because it only cites to Patterson's economic expert Dr. Wu's conclusory, self-serving, and unsupported trial testimony. *See* Complaint Counsel's Response to Benco Proposed Finding No. 1043. Additionally, the Proposed Finding is irrelevant and inaccurate, misleading, and incomplete in suggesting that Dr. Marshall's profitability analyses hinge on any marketplace change. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents' unilateral self-interest to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also* Marshall, Tr. 3387, 3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."); Marshall, Tr. 3266 ("I'm looking at this quotation

and it says ‘Typical approach of an upstart buying group’...and it’s passing on this as a matter of policy.’”).

f. Dr. Marshall Limited His Analysis To Only Those Dentists Who Made Purchases From the Contracting Distributor

1098. Dr. Marshall limited his analysis to only those dentists who made purchases from the buying group’s contracting distributor. (RX2833 at 43, ¶ 98).

**Response to Proposed Finding No. 1098**

The Proposed Finding is misleading, incomplete, and vague insofar as it does not identify to which analysis of Dr. Marshall’s it is referring. To the extent that the Proposed Finding is referring to Dr. Marshall’s five profitability analyses, the Proposed Finding is incomplete. Dr. Marshall’s profitability analyses were based on studies of natural experiments presented in the data, and Dr. Marshall correctly focused the analyses on the dentists who made purchases from the buying group’s contracted distributor. As Dr. Marshall explained at trial, “for a given episode, for example, of a distributor signing up with a -- with buying group, I’m looking at those dentists who made purchases after that point in time, any amount of purchases from that distributor, and then I look back in time to see what those same dentists were doing with their purchases prior to that point in time. That’s the way I can assess the impact of the distributor supplying the buying group in terms of the substitution behavior of the dentists in the buying group.” (Marshall Tr. 2861).

1099. For example, Dr. Marshall excluded from his analysis Kois Buyers Group members that did not purchase from Burkhart after the first quarter of 2014. (RX2833 at 43, ¶ 98).

**Response to Proposed Finding No. 1099**

To the extent that the Proposed Finding is referring to Dr. Marshall’s profitability analyses, the Proposed Finding is wrong, misleading, and incomplete. As Dr. Marshall explained, the referenced analysis studied [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

1100. Dr. Marshall's limitation of his analysis to only those dentists who made purchases from the buying group's contracting distributor exaggerated both the amount of switching to, and the share of sales won, by the buying group's contracting distributor. (RX2833 at 43, ¶ 98).

**Response to Proposed Finding No. 1100**

The Proposed Finding is misleading, incomplete, and vague insofar as it does not identify to which analysis of Dr. Marshall's it is referring. To the extent that the Proposed Finding is referring to Dr. Marshall's five profitability analyses, the Proposed Finding is wrong and misleading. Dr. Marshall's profitability analyses were based on studies of natural experiments presented in the data, and Dr. Marshall correctly focused the analyses on the dentists who made purchases from the buying group's contracted distributor. As Dr. Marshall explained at trial, "for a given episode, for example, of a distributor signing up with a -- with buying group, I'm looking at those dentists who made purchases after that point in time, any amount of purchases

from that distributor, and then I look back in time to see what those same dentists were doing with their purchases prior to that point in time. That's the way I can assess the impact of the distributor supplying the buying group in terms of the substitution behavior of the dentists in the buying group.” (Marshall Tr. 2861). For example, Dr. Marshall explained at trial that the group of dentists he studied in his analysis of [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

g. Dr. Marshall Improperly Mixed Data From Different Years

1101. [REDACTED]

[REDACTED]

**Response to Proposed Finding No. 1101**

Complaint Counsel has no specific response.

1102. [REDACTED]

[REDACTED]

**Response to Proposed Finding No. 1102**

Complaint Counsel has no specific response.

1103. [REDACTED]

[REDACTED]

**Response to Proposed Finding No. 1103**

The Proposed Finding is misleading and vague in that it does not identify to which of Dr. Marshall’s analyses it is referring.

1104. [REDACTED]

[REDACTED]

**Response to Proposed Finding No. 1104**

The Proposed Finding is misleading and vague in that it does not identify to which of Dr. Marshall's analyses it is referring. To the extent that the Proposed Finding is referring to Dr. Marshall's profitability study of Atlanta Dental supplying Smile Source, the Proposed Finding is incomplete and misleading because it omits that Dr. Marshall explained that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

1105. [REDACTED]

**Response to Proposed Finding No. 1105**

The Proposed Finding is misleading, incomplete, and vague in that it does not identify to which of Dr. Marshall's analyses it is referring. To the extent that the Proposed Finding is referring to Dr. Marshall's profitability study of Atlanta Dental supplying Smile Source, the Proposed Finding is incomplete and misleading because it omits Dr. Marshall's testimony that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

1106. [REDACTED]

**Response to Proposed Finding No. 1106**

The Proposed Finding is misleading, incomplete, and vague in that it does not identify to which of Dr. Marshall's analyses it is referring. To the extent that the Proposed Finding is referring to Dr. Marshall's profitability study of Atlanta Dental supplying Smile Source, the Proposed Finding is inaccurate and misleading because the testimony cited does not support the Proposed Finding. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1107. [REDACTED]

[REDACTED]

**Response to Proposed Finding No. 1107**

The Proposed Finding is misleading, incomplete, and vague in that it does not identify to which of Dr. Marshall's analyses it is referring. To the extent that the Proposed Finding is referring to Dr. Marshall's profitability study of Atlanta Dental supplying Smile Source, the Proposed Finding is incomplete and misleading because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1108. [REDACTED]

[REDACTED]

**Response to Proposed Finding No. 1108**

The Proposed Finding is misleading, incomplete, and vague in that it does not identify to which of Dr. Marshall's analyses it is referring. To the extent that the Proposed Finding is referring to Dr. Marshall's profitability study of Atlanta Dental supplying Smile Source, the Proposed Finding is incomplete and misleading because [REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1109. [REDACTED]

**Response to Proposed Finding No. 1109**

The Proposed Finding is misleading, incomplete, and vague in that it does not identify to which of Dr. Marshall's analyses it is referring. To the extent that the Proposed Finding is referring to Dr. Marshall's profitability study of Atlanta Dental supplying Smile Source, the Proposed Finding is incomplete and misleading because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1110. [REDACTED]

**Response to Proposed Finding No. 1110**

The Proposed Finding is misleading, incomplete, and vague in that it does not identify to which of Dr. Marshall's analyses it is referring. To the extent that the Proposed Finding is referring to Dr. Marshall's profitability study of Atlanta Dental supplying Smile Source, the Proposed Finding is incomplete and misleading because [REDACTED]

1111. [REDACTED]

The Proposed Finding is misleading, incomplete, and vague in that it does not identify to which of Dr. Marshall's analyses it is referring. To the extent that the Proposed Finding is referring to Dr. Marshall's profitability study of Atlanta Dental supplying Smile Source, the Proposed Finding is incomplete and misleading because [REDACTED]

\_\_\_\_\_

\_\_\_\_\_

[REDACTED]

1112. [REDACTED]

**Response to Proposed Finding No. 1112**

The Proposed Finding is misleading, incomplete, and vague in that it does not identify to which of Dr. Marshall's analyses it is referring. To the extent that the Proposed Finding is referring to Dr. Marshall's profitability study of Atlanta Dental supplying Smile Source, the Proposed Finding is also incomplete and misleading because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1113. [REDACTED]

**Response to Proposed Finding No. 1113**

The Proposed Finding is misleading, incomplete, and vague in that it does not identify to which of Dr. Marshall's analyses it is referring. To the extent that the Proposed Finding is referring to Dr. Marshall's profitability study of Atlanta Dental supplying Smile Source, the Proposed Finding is incomplete and misleading because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1114. [REDACTED]

**Response to Proposed Finding No. 1114**

The Proposed Finding is misleading, incomplete, and vague in that it does not identify to which of Dr. Marshall's analyses it is referring. To the extent that the Proposed Finding is referring to Dr. Marshall's profitability study of Atlanta Dental supplying Smile Source, the Proposed Finding is incomplete and misleading because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1115. [REDACTED]

**Response to Proposed Finding No. 1115**

The Proposed Finding is misleading, incomplete, and vague in that it does not identify to which of Dr. Marshall's analyses it is referring. To the extent that the Proposed Finding is referring to Dr. Marshall's profitability study of Atlanta Dental supplying Smile Source, the Proposed Finding is also incomplete and misleading because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1116. [REDACTED]

**Response to Proposed Finding No. 1116**

The Proposed Finding is misleading, incomplete, and vague in that it does not identify to which of Dr. Marshall's analyses it is referring. To the extent that the Proposed Finding is referring to Dr. Marshall's profitability study of Atlanta Dental supplying Smile Source, the Proposed Finding is also incomplete and misleading because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1117. [REDACTED]

**Response to Proposed Finding No. 1117**

The Proposed Finding is misleading, incomplete, and vague in that it does not identify to which of Dr. Marshall's analyses it is referring. To the extent that the Proposed Finding is referring to Dr. Marshall's profitability study of Atlanta Dental supplying Smile Source, the Proposed Finding is inaccurate and misleading because the testimony cited does not support the Proposed Finding. [REDACTED]

1118. [REDACTED]

The Proposed Finding is misleading, incomplete, and vague in that it does not identify to which of Dr. Marshall's analyses it is referring. To the extent that the Proposed Finding is referring to Dr. Marshall's profitability study of Atlanta Dental supplying Smile Source, the Proposed Finding is inaccurate and misleading because the testimony cited does not support the Proposed Finding. [REDACTED]

1119. [REDACTED]

The Proposed Finding is inaccurate and misleading because the testimony cited does not support the statement that buying groups “often require distributors to pay administrative fees.” The testimony is limited to only a couple of buying groups. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Additionally, Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing, at least in part, to the testimony of an expert for a proposition of fact. Dr. Marshall is Complaint Counsel's expert.

1120. Buying groups often require distributors to pay rebates as a condition of entering into an agreement. (Steck, Tr. 3789).

**Response to Proposed Finding No. 1120**

The Proposed Finding is inaccurate, misleading, and unsupported because the testimony cited does not support the statement that buying groups "often require distributors to pay rebates as a condition of entering into an agreement." The cited testimony discussed a Schein Privileges Program for preferred customers that is open to everyone who purchases from Schein. (Steck, Tr. 3789).

1121. [REDACTED]

**Response to Proposed Finding No. 1121**

Complaint Counsel has no specific response.

1122. [REDACTED]

**Response to Proposed Finding No. 1122**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Marshall is Complaint Counsel's expert. Additionally, the Proposed Finding is also misleading and inaccurate because the testimony cited does not support the Proposed Finding. [REDACTED]

[REDACTED]



[REDACTED]

[REDACTED]

1123. [REDACTED]

[REDACTED]

**Response to Proposed Finding No. 1123**

The Proposed Finding is inaccurate and misleading to the extent that it suggests that it was not profitable for Schein to win Smile Source's business in 2017. Dr. Marshall's profitability analysis, based only on data, demonstrated that it was profitable for Schein to win Smile Source's business again in 2017, even when taking administrative and other fees that Schein raises into account. (CCFF ¶¶ 1681-1684; *see also* [REDACTED])

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1124. [REDACTED]

[REDACTED]

**Response to Proposed Finding No. 1124**

The Proposed Finding is inaccurate and misleading to the extent that it suggests that it was not profitable for Schein to win Smile Source's business in 2017. Dr. Marshall's profitability analysis, based only on data, demonstrated that it was profitable for Schein to win Smile Source's business again in 2017, even when taking administrative and other fees that Schein raises into account. (CCFF ¶¶ 1681-1684; *see also* [REDACTED])

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1125. [REDACTED]

[REDACTED]

**Response to Proposed Finding No. 1125**

The Proposed Finding is inaccurate and misleading to the extent that it suggests that it was not profitable for Schein to win Smile Source's business in 2017. Dr. Marshall's profitability analysis, based only on data, demonstrated that it was profitable for Schein to win Smile Source's business again in 2017, even when taking administrative and other fees that Schein

raises into account. (CCFF ¶¶ 1681-1684; *see also* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1126. [REDACTED]

[REDACTED]

**Response to Proposed Finding No. 1126**

The Proposed Finding is inaccurate and misleading to the extent that it suggests [REDACTED]

[REDACTED]. Dr. Marshall's profitability

analysis, based only on data, demonstrated that it was profitable for Schein to win Smile

Source's business again in 2017, even when taking administrative and other fees that Schein

raises into account. (CCFF ¶¶ 1681-1684; *see also* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1127. Dr. Marshall’s failure to account for the costs of administrative fees and rebates renders his results unreliable.

**Response to Proposed Finding No. 1127**

The Proposed Finding is unsupported.

i. **Dr. Marshall Relied On Unsupported Assumptions**

1128. Dr. Marshall assumed that no additional dentists would have become buying group members had a different distributor entered into an agreement with the buying group. (RX2832 at 54, ¶ 81).

**Response to Proposed Finding No. 1128**

To the extent this Proposed Finding refers to a counter-factual or but-for world analysis, it is irrelevant and misleading because Dr. Carlton’s but-for world criticisms are misplaced. (Dr. Carlton’s Report, RX2832, is cited as support for this Proposed Finding.) The Proposed Finding is irrelevant to an analysis of any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five natural experiments (profitability analyses) to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report); Marshall, Tr. 2860 (“Part of my analysis was to look at five natural experiments that presented to me by the data to make a determination [about whether Respondents were acting against their own unilateral economic self-interest].”)). These analyses

showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents' unilateral self-interest to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also* Marshall, Tr. 3387, 3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."); Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group' ...and it's passing on this as a matter of policy.'"). Dr. Marshall's five studies examined real-world examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups. (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)). They inform whether the Respondents would have found it profitable to supply such buying groups, leading to Dr. Marshall's conclusion that Respondents acted against their unilateral self-interest. (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)). "The fact that the studies do not directly

estimate lost profits in particular counter-factual scenarios that would have existed but-for Respondents' anticompetitive conduct is irrelevant as a response to what the studies show." (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)).

Additionally, this Proposed Finding is irrelevant and unreliable because its assertions are based on flawed and unsupported "formula" that Dr. Carlton presented in his expert report (at RX2832 at 051 (¶ 76) (Carlton Expert Report)). *See* Complaint Counsel's Response to Benco Proposed Finding No. 1006.

1129. In particular, Dr. Marshall assumed that no additional Schein customers would have become Kois Buyers Group members had Schein entered into an agreement with the buyers group. (RX2832 at 54, ¶ 81).

**Response to Proposed Finding No. 1129**

The Proposed Finding is irrelevant and misleading for reasons explained in Complaint Counsel's Response to Benco Proposed Finding No. 1128.

1130. Dr. Marshall also provided no explanation for his assumption that, had Schein provided a discount to Kois Buyers Group, not only the buying group's members, but also their purchases, would have remained unchanged. (RX2832 at 54, ¶ 81).

**Response to Proposed Finding No. 1130**

The Proposed Finding is irrelevant and misleading for reasons explained in Complaint Counsel's Response to Benco Proposed Finding No. 1128.

1131. Dr. Marshall assumed that the entirety of any changes he observed in sales shares were due to partnering with a buying group. (J. Johnson, Tr. 4838-4840; [REDACTED]).

**Response to Proposed Finding No. 1131**

The Proposed Finding is misleading, incomplete, and vague in that it does not describe with enough specificity to which of Dr. Marshall's observations of changes in sales shares the Proposed Finding is referring. To the extent that the Proposed Finding is referring to Dr. Marshall's five profitability studies (natural experiments), the Proposed Finding is misleading, incomplete, and inaccurate in that Dr. Marshall did not attempt to put forth an empirical analysis

with a control group – or a difference in differences approach. (CX7101 at 061 (¶155) (Marshall Rebuttal Expert Report)). Instead, Dr. Marshall’s analysis was one of differences. (CX7101 at 061 (¶155) (Marshall Rebuttal Expert Report)). Thus, the Proposed Finding criticizing assumptions that would be made if one was to use a control group is irrelevant in that Dr. Marshall’s analysis did not require a control group. Dr. Marshall’s profitability analyses “examined real-world examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups.” (CX7101 at 051 (¶129) (Marshall Rebuttal Expert Report)). The studies were not intended to “estimate lost profits in particular counter-factual scenarios that would have existed but-for Respondents’ anticompetitive conduct.” (CX7101 at 051 (¶129) (Marshall Rebuttal Expert Report)). Moreover, the Proposed Finding is misleading, incomplete and unsupported insofar as it suggests that Dr. Johnson’s analyses in this matter provide him a basis for testifying about if (or what) controls could be used in Dr. Marshall’s buying group profitability studies. When asked what he would have used as a control group if he were to conduct Marshall’s studies of the profitability of working with a buying group, Dr. Johnson said he did not know. (RX2965 (J. Johnson, Dep. at 209)). Additionally, Exhibits 8, 9, 10, 11, and 12 of Dr. Johnson’s Expert Report in this matter, which Dr. Johnson used to try and rebut Dr. Marshall’s five profitability studies, do not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ( [REDACTED] [REDACTED]; RX2965 (J. Johnson, Dep. at 218, 232)).

1132. Dr. Marshall performed no assessment of whether anything else would have changed the behavior of member dentists. (J. Johnson, Tr. 4838-4840).

### **Response to Proposed Finding No. 1132**

The Proposed Finding is misleading, incomplete, and vague in that it relies on the phrase “changed the behavior of member dentists” without describing in what ways or towards what the

behavior may have changed. To the extent that the Proposed Finding is referring to Dr. Marshall's five profitability studies (natural experiments) of distributors doing business with buying groups, the Proposed Finding is misleading, incomplete, and inaccurate in that Dr. Marshall did not attempt to put forth an empirical analysis with a control group – or a difference in differences approach. (CX7101 at 061 (¶155) (Marshall Rebuttal Expert Report)). Instead, Dr. Marshall's analysis was one of differences. (CX7101 at 061 (¶155) (Marshall Rebuttal Expert Report)). Thus, the Proposed Finding criticizing assumptions that would be made if one was to use a control group is irrelevant in that Dr. Marshall's analysis did not require a control group. Dr. Marshall's profitability analyses "examined real-world examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups." (CX7101 at 051 (¶129) (Marshall Rebuttal Expert Report)). The studies were not intended to "estimate lost profits in particular counter-factual scenarios that would have existed but-for Respondents' anticompetitive conduct." (CX7101 at 051 (¶129) (Marshall Rebuttal Expert Report)). Moreover, the Proposed Finding is misleading, incomplete and unsupported insofar as it suggests that Dr. Johnson's analyses in this matter provide him a basis for testifying about if (or what) controls could be used in Dr. Marshall's buying group profitability studies. When asked what he would have used as a control group if he were to conduct Marshall's studies of the profitability of working with a buying group, Dr. Johnson said he did not know. (RX2965 (J. Johnson, Dep. at 209)). Additionally, Exhibits 8, 9, 10, 11, and 12 of Dr. Johnson's Expert Report in this matter, which Dr. Johnson used to try and rebut Dr. Marshall's five profitability studies, do not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ( [REDACTED] ; RX2965 (J. Johnson, Dep. at 218, 232)).



1133. Dr. Marshall performed no assessment of whether there was any other reason why any of the member dentists would have bought more product from one of the distributors versus another. (J. Johnson, Tr. 4838-4840).

**Response to Proposed Finding No. 1133**

The Proposed Finding is misleading, incomplete, and vague in that it relies on the phrase “any *other* reason” (emphasis added) without identifying the reason to which the Proposed Finding is trying to compare the other reasons. To the extent that the Proposed Finding is referring to distributors offering discounts to buying groups and Dr. Marshall’s five profitability studies (natural experiments) of this, the Proposed Finding is misleading, incomplete, and inaccurate in that Dr. Marshall did not attempt to put forth an empirical analysis with a control group – or a difference in differences approach – to account for other reasons. (CX7101 at 061 (¶155) (Marshall Rebuttal Expert Report)). Instead, Dr. Marshall’s analysis was one of differences. (CX7101 at 061 (¶155) (Marshall Rebuttal Expert Report)). Thus, the Proposed Finding criticizing lack of a control group is irrelevant in that Dr. Marshall’s analysis did not require a control group. Dr. Marshall’s profitability analyses “examined real-world examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups.” (CX7101 at 051 (¶129) (Marshall Rebuttal Expert Report)). The studies were not intended to “estimate lost profits in particular counter-factual scenarios that would have existed but-for Respondents’ anticompetitive conduct.” (CX7101 at 051 (¶129) (Marshall Rebuttal Expert Report)). Moreover, the Proposed Finding is misleading, incomplete and unsupported insofar as it suggests that Dr. Johnson’s analyses in this matter provide him a basis for testifying about if (or what) controls could be used in Dr. Marshall’s buying group profitability studies. When asked what he would have used as a control group if he were to conduct Marshall’s studies of the profitability of working with a buying group, Dr. Johnson said he did not know. (RX2965 (J. Johnson, Dep. at 209)). Additionally, Exhibits 8, 9, 10, 11, and 12 of Dr. Johnson’s Expert

Report in this matter, which Dr. Johnson used to try and rebut Dr. Marshall's five profitability studies, do not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ( [REDACTED] ; RX2965 (J. Johnson, Dep. at 218, 232)).

1134. Dr. Marshall assumed that no other economic factors would cause the sale shares to change. (J. Johnson, Tr. 4838-4840; [REDACTED]).

**Response to Proposed Finding No. 1134**

The Proposed Finding is misleading, incomplete, and vague in that it relies on the phrase “no *other* economic factors” (emphasis added) without identifying the factor or factors to which the Proposed Finding is trying to compare the other economic factors. To the extent that the Proposed Finding is referring to distributors offering discounts to buying groups and Dr. Marshall's five profitability studies (natural experiments) of this, the Proposed Finding is misleading, incomplete, and inaccurate in that Dr. Marshall did not attempt to put forth an empirical analysis with a control group – or a difference in differences approach – to account for other economic factors. (CX7101 at 061 (¶155) (Marshall Rebuttal Expert Report)). Instead, Dr. Marshall's analysis was one of differences. (CX7101 at 061 (¶155) (Marshall Rebuttal Expert Report)). Thus, the Proposed Finding criticizing Marshall's lack of a control group is irrelevant in that Dr. Marshall's analysis did not require a control group. Dr. Marshall's profitability analyses “examined real-world examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups.” (CX7101 at 051 (¶129) (Marshall Rebuttal Expert Report)). The studies were not intended to “estimate lost profits in particular counter-factual scenarios that would have existed but-for Respondents' anticompetitive conduct.” (CX7101 at 051 (¶129) (Marshall Rebuttal Expert Report)). Moreover, the Proposed Finding is misleading, incomplete and unsupported insofar as it suggests that Dr. Johnson's

analyses in this matter provide him a basis for testifying about if (or what) controls could be used in Dr. Marshall's buying group profitability studies. When asked what he would have used as a control group if he were to conduct Marshall's studies of the profitability of working with a buying group, Dr. Johnson said he did not know. (RX2965 (J. Johnson, Dep. at 209)). Additionally, Exhibits 8, 9, 10, 11, and 12 of Dr. Johnson's Expert Report in this matter, which Dr. Johnson used to try and rebut Dr. Marshall's five profitability studies, do not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ( [REDACTED]; RX2965 (J. Johnson, Dep. at 218, 232)).

1135. Dr. Marshall assumed that nothing else changed during the five-year time period of his studies. (J. Johnson, Tr. 4838-4840; [REDACTED]).

#### **Response to Proposed Finding No. 1135**

The Proposed Finding is misleading, incomplete, and vague in that it relies on the phrase "nothing else changed" without identifying what the Proposed Finding is claiming did change. To the extent that the Proposed Finding is referring to distributors offering discounts to buying groups and Dr. Marshall's five profitability studies (natural experiments) of this, the Proposed Finding is misleading, incomplete, and inaccurate in that Dr. Marshall did not attempt to put forth an empirical analysis with a control group – or a difference in differences approach – to account for anything else that might change over time. (CX7101 at 061 (¶155) (Marshall Rebuttal Expert Report)). Instead, Dr. Marshall's analysis was one of differences. (CX7101 at 061 (¶155) (Marshall Rebuttal Expert Report)). Thus, the Proposed Finding criticizing Marshall's lack of a control group is irrelevant in that Dr. Marshall's analysis did not require a control group. Dr. Marshall's profitability analyses "examined real-world examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups." (CX7101 at 051 (¶129) (Marshall Rebuttal Expert Report)). The studies were not intended to

“estimate lost profits in particular counter-factual scenarios that would have existed but-for Respondents’ anticompetitive conduct.” (CX7101 at 051 (¶129) (Marshall Rebuttal Expert Report)). Moreover, the Proposed Finding is misleading, incomplete and unsupported insofar as it suggests that Dr. Johnson’s analyses in this matter provide him a basis for testifying about if (or what) controls could be used in Dr. Marshall’s buying group profitability studies. When asked what he would have used as a control group if he were to conduct Marshall’s studies of the profitability of working with a buying group, Dr. Johnson said he did not know. (RX2965 (J. Johnson, Dep. at 209)). Additionally, Exhibits 8, 9, 10, 11, and 12 of Dr. Johnson’s Expert Report in this matter, which Dr. Johnson used to try and rebut Dr. Marshall’s five profitability studies, do not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ( [REDACTED] ; RX2965 (J. Johnson, Dep. at 218, 232)).

1136. Dr. Marshall assumed that the margin for the limited number of dentists in those groups represented the profitability trade-offs that Benco was actually facing. (J. Johnson, Tr. 4838-4840; [REDACTED]).

#### **Response to Proposed Finding No. 1136**

The Proposed Finding is misleading, incomplete, and vague insofar as it relies on the phrase “those groups” without identifying to what groups the Proposed Finding is referring. To the extent that the Proposed finding is referring to the margin for the dentists in the buying groups considered in each of Dr. Marshall’s profitability studies, the Proposed Finding is misleading, incomplete, and irrelevant. Dr. Marshall’s five studies were not meant to prove that it would be profitable for a distributor to do business with buying groups in all circumstances. Instead, Dr. Marshall’s profitability analyses “examined real-world examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups.” (CX7101 at 051 (¶129) (Marshall Rebuttal Expert Report)). The studies were not intended to “estimate lost

profits in particular counter-factual scenarios that would have existed but-for Respondents' anticompetitive conduct." (CX7101 at 051 (¶129) (Marshall Rebuttal Expert Report)).

1137. Dr. Marshall assumed that the treatment-period margin for a limited set of buying group customers was representative of the profitability that Benco would have earned had it bid for the business of the buying groups. (J. Johnson, Tr. 4838-4840; [REDACTED]).

**Response to Proposed Finding No. 1137**

The Proposed Finding is misleading, incomplete, and vague insofar as it does not identify the study or analysis in which Dr. Marshall allegedly made the described assumption. Insofar as the Proposed Finding is referring to Dr. Marshall's five profitability studies of distributors discounting to buying groups, the Proposed Finding is misleading, incomplete, and irrelevant. Dr. Marshall's five studies were not meant to prove that it would be profitable for a distributor to do business with buying groups in all circumstances. Instead, Dr. Marshall's profitability analyses "examined real-world examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups." (CX7101 at 051 (¶129) (Marshall Rebuttal Expert Report)). The studies were not intended to "estimate lost profits in particular counter-factual scenarios that would have existed but-for Respondents' anticompetitive conduct." (CX7101 at 051 (¶129) (Marshall Rebuttal Expert Report)).

1138. None of the assumptions made by Dr. Marshall in his profitability analyses were realistic. (J. Johnson, Tr. 4838-4840; [REDACTED]).

**Response to Proposed Finding No. 1138**

The Proposed Finding is misleading, incomplete, and vague in that it does not identify the assumptions it claims Dr. Marshall made in his five profitability studies (natural experiments). The Proposed Finding is also inaccurate. In the cited support from Dr. Johnson's Expert Report (RX2834 at 37 (¶ 58)), Dr. Johnson argued that Dr. Marshall made unsupported assumptions and these assumptions all related to Dr. Marshall's lack of a control group in his analyses. However,

Dr. Marshall did not attempt to put forth an empirical analysis with a control group – or a difference in differences approach – in his profitability studies. (CX7101 at 061 (¶155) (Marshall Rebuttal Expert Report)). Instead, Dr. Marshall’s analysis was one of differences. (CX7101 at 061 (¶155) (Marshall Rebuttal Expert Report)). Thus, the Proposed Finding criticizing Marshall’s unsupported assumptions (or really lack of a control group) is irrelevant in that Dr. Marshall’s type of analysis did not require a control group. Dr. Marshall’s profitability analyses “examined real-world examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups.” (CX7101 at 051 (¶129) (Marshall Rebuttal Expert Report)). The studies were not intended to “estimate lost profits in particular counter-factual scenarios that would have existed but-for Respondents’ anticompetitive conduct.” (CX7101 at 051 (¶129) (Marshall Rebuttal Expert Report)). Moreover, the Proposed Finding is misleading, incomplete and unsupported insofar as it suggests that Dr. Johnson’s analyses in this matter provide him a basis for testifying about if (or what) controls could be used in Dr. Marshall’s buying group profitability studies. When asked what he would have used as a control group if he were to conduct Marshall’s studies of the profitability of working with a buying group, Dr. Johnson said he did not know. (RX2965 (J. Johnson, Dep. at 209)). Additionally, Exhibits 8, 9, 10, 11, and 12 of Dr. Johnson’s Expert Report in this matter, which Dr. Johnson used to try and rebut Dr. Marshall’s five profitability studies, do not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ( [REDACTED]; RX2965 (J. Johnson, Dep. at 218, 232)).

1139. As a result of his unsupported assumptions, Dr. Marshall cannot tie his calculations to doing business with buying groups. (J. Johnson, Tr. 4838-4840).

**Response to Proposed Finding No. 1139**

The Proposed Finding is misleading, incomplete, and vague insofar as it relies on the term “calculations” without identifying to what Dr. Marshall calculations the Proposed Finding is referring. To the extent that the Proposed Finding is referring to Dr. Marshall’s five profitability studies (natural experiments) of distributors offering discounts to buying groups, the Proposed Finding is misleading, incomplete, and inaccurate in that the studies were not meant to *prove* that it would be profitable for a distributor to do business with buying groups in all circumstances. Instead, Dr. Marshall’s “five studies examined real-world examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups.” (CX7101 at 051 (¶129) (Marshall Rebuttal Expert Report)). Dr. Marshall noted that “[t]he fact that the studies do not directly estimate lost profits in particular counter-factual scenarios that would have existed but-for Respondents’ anticompetitive conduct is irrelevant as a response to what the studies show.” (CX7101 at 051 (¶129) (Marshall Rebuttal Expert Report)). Additionally, Exhibits 8, 9, 10, 11, and 12 of Dr. Johnson’s Expert Report in this matter, which Dr. Johnson used to try and rebut Dr. Marshall’s five profitability studies, do not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ( [REDACTED] [REDACTED] ; RX2965 (J. Johnson, Dep. at 218, 232)).

1140. Dr. Marshall simply assumes his result, that discounting to Kois Buyers Group would have been profitable to Schein. (RX2832 at 54-55, ¶82).

#### **Response to Proposed Finding No. 1140**

The Proposed Finding is misleading, incomplete, and vague in that it does not identify in which opinion or analysis Dr. Marshall “simply assumes his result.” To the extent that the Proposed Finding is referring to Dr. Marshall’s five profitability studies (natural experiments) of distributors offering discounts to buying groups, the Proposed Finding is misleading, incomplete, and inaccurate in that the studies were not meant to *prove* that it would be profitable for a

distributor to do business with buying groups in all circumstances. Instead, Dr. Marshall’s “five studies examined real-world examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups.” (CX7101 at 051 (¶129) (Marshall Rebuttal Expert Report)). Dr. Marshall noted that “[t]he fact that the studies do not directly estimate lost profits in particular counter-factual scenarios that would have existed but-for Respondents’ anticompetitive conduct is irrelevant as a response to what the studies show.” (CX7101 at 051 (¶129) (Marshall Rebuttal Expert Report)).

j. Dr. Marshall Failed To Control For Other Factors

1141. When economists try to attribute causality to a given phenomenon, they must make sure that nothing else was changing at the same time. (J. Johnson, Tr. 4855-4856).

**Response to Proposed Finding No. 1141**

The Proposed Finding is misleading, incomplete, and irrelevant insofar as it is referring to Dr. Marshall’s five profitability studies of distributors discounting to buying groups. Dr. Marshall’s five studies were not meant to prove that it would be profitable for a distributor to do business with buying groups in all circumstances. Instead, Dr. Marshall’s profitability analyses “examined real-world examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups.” (CX7101 at 051 (¶129) (Marshall Rebuttal Expert Report)). The studies were not intended to “estimate lost profits in particular counter-factual scenarios that would have existed but-for Respondents’ anticompetitive conduct.” (CX7101 at 051 (¶129) (Marshall Rebuttal Expert Report)). Thus, Dr. Marshall did not attempt to put forth an empirical analysis with a control group – or a difference in differences approach – to account for other factors. (CX7101 at 061 (¶155) (Marshall Rebuttal Expert Report)). Instead, Dr. Marshall’s analysis was one of differences. (CX7101 at 061 (¶155) (Marshall Rebuttal Expert Report)). Thus, the Proposed Finding alleging that Dr. Marshall ignored several factors is



irrelevant in that Dr. Marshall's analysis did not require a control group, which would account for other factors.

1142. Dr. Marshall ignored several factors that would affect his share calculations and his margin calculations in his five studies. (J. Johnson, Tr. 4855-4856).

**Response to Proposed Finding No. 1142**

The Proposed Finding is misleading, incomplete, and vague in that it relies on the phrase "several factors" without identifying the factors to which the Proposed Finding is referring. The Proposed Finding is misleading, incomplete, and inaccurate in assumption of what Dr. Marshall was attempting to do in his profitability studies. Dr. Marshall's profitability analyses "examined real-world examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups." (CX7101 at 051 (¶129) (Marshall Rebuttal Expert Report)). The studies were not intended to "estimate lost profits in particular counter-factual scenarios that would have existed but-for Respondents' anticompetitive conduct." (CX7101 at 051 (¶129) (Marshall Rebuttal Expert Report)). Thus, Dr. Marshall did not attempt to put forth an empirical analysis with a control group – or a difference in differences approach – to account for other factors. (CX7101 at 061 (¶155) (Marshall Rebuttal Expert Report)). Instead, Dr. Marshall's analysis was one of differences. (CX7101 at 061 (¶155) (Marshall Rebuttal Expert Report)). Thus, the Proposed Finding alleging that Dr. Marshall ignored several factors is irrelevant in that Dr. Marshall's analysis did not require a control group, which would account for other factors. Moreover, the Proposed Finding is misleading, incomplete and unsupported insofar as it suggests that Dr. Johnson's analyses in this matter provide him a basis for testifying about if (or what) controls could be used in Dr. Marshall's buying group profitability studies. When asked what he would have used as a control group if he were to conduct Marshall's studies of the profitability of working with a buying group, Dr. Johnson said he did not know. (RX2965 (J. Johnson, Dep.

at 209)). Additionally, Exhibits 8, 9, 10, 11, and 12 of Dr. Johnson's Expert Report in this matter, which Dr. Johnson used to try and rebut Dr. Marshall's five profitability studies, do not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ( [REDACTED] ; RX2965 (J. Johnson, Dep. at 218, 232)).

1143. If product mix across regions changed during the years of Dr. Marshall's five studies, that would affect margins. (J. Johnson, Tr. 4855-4856).

**Response to Proposed Finding No. 1143**

The Proposed Finding is misleading, incomplete, and vague in that it does not identify to whose product mix and to whose margins it is referring. The Proposed Finding is speculative and unsupported by the testimony of Dr. Johnson. The cited testimony does not reference any factual basis or study that Dr. Johnson did to demonstrate that if product mix across regions changed, that would affect margins. Additionally, Exhibits 8, 9, 10, 11, and 12 of Dr. Johnson's Expert Report in this matter, which Dr. Johnson used to try and rebut Dr. Marshall's five profitability studies, do not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ( [REDACTED] ; RX2965 (J. Johnson, Dep. at 218, 232)).

1144. If product makes changed over time, that would affect margins. (J. Johnson, Tr. 4855-4856).

**Response to Proposed Finding No. 1144**

The Proposed Finding is misleading, incomplete, and vague insofar as it relies on the term "product makes" without specifying what that means. The Proposed Finding is speculative and unsupported by the testimony of Dr. Johnson. The cited testimony does not reference any factual basis or study that Dr. Johnson did to demonstrate that if "product makes changed over time that

would affect margins.” The Proposed Finding is also misleading, incomplete, and vague insofar as the Proposed Finding does not specify to what opinion or analysis it is meant to apply.

1145. If any sources of local competition changed at all over time, that would affect margins. (J. Johnson, Tr. 4855-4856).

**Response to Proposed Finding No. 1145**

The Proposed Finding is speculative and unsupported by the testimony of Dr. Johnson. The cited testimony does not reference any factual basis or study that Dr. Johnson did to demonstrate that margins are affected by changes in sources of local competition. The Proposed Finding is also misleading, incomplete, and vague insofar as the Proposed Finding does not specify to what opinion or analysis it is meant to apply.

1146. Sales and margins to non-buying group dentists could also have changed over time. (J. Johnson, Tr. 4855-4856).

**Response to Proposed Finding No. 1146**

The Proposed Finding is misleading, incomplete, and vague insofar as the Proposed Finding does not specify to what opinion or analysis it applies. The Proposed Finding is not appropriate for a factual finding as it is a statement of something that “could” have happened. Thus it is also a statement of something that might not have happened, so it is irrelevant as a Proposed Finding. The Proposed Finding is speculative and unsupported by the testimony of Dr. Johnson. The cited testimony does not reference any study that Dr. Johnson did of sales and margins to non-buying groups.

1147. Dr. Marshall failed to control for any of these economic factors that could have changed. (J. Johnson, Tr. 4837-4838).

**Response to Proposed Finding No. 1147**

The Proposed Finding is misleading, incomplete, and vague in that it relies on the phrase “any of these economic factors” without identifying the economic factors. The Proposed Finding is also misleading, incomplete, and vague in that it does not identify to which opinions or analyses of

Dr. Marshall it is referring. To the extent that the Proposed Finding is referring to Dr. Marshall's five profitability studies (natural experiments) of discounting to buying groups, the Proposed Finding is misleading, incomplete, and inaccurate in that Dr. Marshall did not attempt to put forth an empirical analysis with a control group – or a difference in differences approach. (CX7101 at 061 (¶155) (Marshall Rebuttal Expert Report)). Instead, Dr. Marshall's analysis was one of differences. (CX7101 at 061 (¶155) (Marshall Rebuttal Expert Report)). Thus, the Proposed Finding criticizing Marshall's lack of a control group is irrelevant in that Dr. Marshall's analysis did not require a control group. Dr. Marshall's profitability analyses "examined real-world examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups." (CX7101 at 051 (¶129) (Marshall Rebuttal Expert Report)). The studies were not intended to "estimate lost profits in particular counter-factual scenarios that would have existed but-for Respondents' anticompetitive conduct." (CX7101 at 051 (¶129) (Marshall Rebuttal Expert Report)). Moreover, the Proposed Finding is misleading, incomplete and unsupported insofar as it suggests that Dr. Johnson's analyses in this matter provide him a basis for testifying about if (or what) controls could be used in Dr. Marshall's buying group profitability studies. When asked what he would have used as a control group if he were to conduct Marshall's studies of the profitability of working with a buying group, Dr. Johnson said he did not know. (RX2965 (J. Johnson, Dep. at 209)). Additionally, Exhibits 8, 9, 10, 11, and 12 of Dr. Johnson's Expert Report in this matter, which Dr. Johnson used to try and rebut Dr. Marshall's five profitability studies, do not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ( [REDACTED] [REDACTED]; RX2965 (J. Johnson, Dep. at 218, 232)).

1148. Without doing that analysis, Dr. Marshall can't draw conclusions regarding the what the effects of doing business with buying groups would have been to Benco or anyone else. (J. Johnson, Tr. 4855-4856).

**Response to Proposed Finding No. 1148**

The Proposed Finding is misleading, incomplete, and vague in that it does not identify to which analysis (that Dr. Marshall allegedly did not do) it is referring. To the extent that the Proposed Finding is referring to Dr. Marshall's five profitability studies (natural experiments) of distributors offering discounts to buying groups, the Proposed Finding is misleading, incomplete, and inaccurate in that the studies were not meant to prove that it would be profitable for a distributor to do business with buying groups in all circumstances. Instead, Dr. Marshall's "five studies examined real-world examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups." (CX7101 at 051 (¶129) (Marshall Rebuttal Expert Report)). Dr. Marshall noted that "[t]he fact that the studies do not directly estimate lost profits in particular counter-factual scenarios that would have existed but-for Respondents' anticompetitive conduct is irrelevant as a response to what the studies show." (CX7101 at 051 (¶129) (Marshall Rebuttal Expert Report)). Additionally, to the extent the Proposed Finding is suggesting that Dr. Marshall's profitability studies should be disregarded due to a lack of controls or a control group, the Proposed Finding is misleading, incomplete, and inaccurate in that Dr. Marshall did not attempt to put forth an empirical analysis with a control group – or a difference in differences approach. (CX7101 at 061 (¶155) (Marshall Rebuttal Expert Report)). Instead, Dr. Marshall's analysis was one of differences, a method which does not utilize a control group. (CX7101 at 061 (¶155) (Marshall Rebuttal Expert Report)).

- k. Dr. Marshall Failed To Perform a Counter-Factual Analysis of Any Respondent's Actual Customer Gains, Costs, Cannibalization, or Expected Profit or Loss of Dealing With the Kois or Smile Source Buying Groups

1149. In the field of economics, a counterfactual analysis is understood to mean an assessment of the alternative to the conduct studied or a but-for world absent the conduct. (J. Johnson, Tr. 4842-4843).

**Response to Proposed Finding No. 1149**

The Proposed Finding is irrelevant and misleading because Dr. Johnson's but-for world criticisms (i.e. that Dr. Marshall failed to perform a counterfactual regarding Benco's partnerships with Kois Buyers Group and Smile Source) are misplaced. *See*, in part, Complaint Counsel's Response to Benco Proposed Finding No. 1147-1148. This Proposed Finding is irrelevant to an analysis of any blanket or categorical policy not to do business with buying groups as explained in more detail in Complaint Counsel's Response to Benco Proposed Finding No. 1164.

1150. Counterfactual analyses are used every day in the field of economics; they are the "bread and butter" of what economists do. (J. Johnson, Tr. 4843).

**Response to Proposed Finding No. 1150**

The Proposed Finding is irrelevant and misleading because Dr. Johnson's but-for world criticisms are misplaced for reasons explained in Complaint Counsel's Response to Benco Proposed Finding No. 1149.

1151. Assuming that the other flaws inherent in Dr. Marshall's five case studies could have been resolved and proper studies structured, a counterfactual analysis would have been the appropriate method of analysis. (J. Johnson, Tr. 4843-4844).

**Response to Proposed Finding No. 1151**

The Proposed Finding is irrelevant and misleading because Dr. Johnson's but-for world criticisms (i.e. that Dr. Marshall failed to perform a counterfactual regarding Benco's partnerships with Kois Buyers Group and Smile Source) are misplaced for reasons explained in detail in Complaint Counsel's Response to Benco Proposed Finding No. 1149.

1152. [REDACTED]

**Response to Proposed Finding No. 1152**

The Proposed Finding is irrelevant and misleading because Respondents' experts' but-for world criticisms (i.e. that Dr. Marshall failed to perform a counterfactual regarding Benco's

partnerships with Kois Buyers Group and Smile Source) are misplaced for reasons explained in detail in Complaint Counsel's Response to Benco Proposed Finding No. 1149.

1153. Dr. Marshall did not do a counterfactual analysis of what a distributor's profits would be if they had made an offer to a buying group compared to what they would have been if they didn't make an offer to the buying group. (Carlton, Tr. 5393-5395).

**Response to Proposed Finding No. 1153**

The Proposed Finding is irrelevant and misleading because Dr. Carlton's but-for world criticisms are misplaced for reasons explained in detail in Complaint Counsel's Response to Benco Proposed Finding No. 1149.

1154. [REDACTED]

**Response to Proposed Finding No. 1154**

The Proposed Finding is irrelevant and misleading because Dr. Carlton's but-for world criticisms are misplaced. This Proposed Finding is irrelevant to an analysis of any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five natural experiments (profitability analyses) to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report); Marshall, Tr. 2860 ("Part of my analysis was to look at five natural experiments that presented to me by the data to make a determination [about whether Respondents were acting against their own unilateral economic self-interest.']). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents' unilateral self-interest to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall

opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also* Marshall, Tr. 3387, 3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."; Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group' ...and it's passing on this as a matter of policy.'"). Dr. Marshall's five studies examined real-world examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups. (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)). They inform whether the Respondents would have found it profitable to supply such buying groups, leading to Dr. Marshall's conclusion that Respondents acted against their unilateral self-interest. (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)). "The fact that the studies do not directly estimate lost profits in particular counter-factual scenarios that would have existed but-for Respondents' anticompetitive conduct is irrelevant as a response to what the studies show." (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)).

Additionally, this Proposed Finding is irrelevant and unreliable because its assertions are based on flawed and unsupported "formula" that Dr. Carlton presented in his expert report. (RX2832



at 051 (¶ 76) (Carlton Expert Report)). *See* Complaint Counsel’s Response to Benco Proposed Finding No. 1006. Dr. Carlton failed to do any quantitative analysis to support the assertions in this Proposed Finding. While Dr. Carlton identified a formula in paragraph 75 of his expert report purporting to show opportunity and profitability costs related to Schein working with or not working with Kois Buyers Group (RX2832 at 051 (¶ 76) (Carlton Expert Report)), Dr. Carlton never actually applied the formula to any data to support his assertion. The support and foundation for this purported “formula” is unreliable because it is solely based on Dr. Carlton’s memory and interpretation of facts conveyed to him by Schein executives. Dr. Carlton testified that his understanding of the formula is based solely on his interviews with Schein executives for which he did not even bother to keep his notes. (Carlton, Tr. 5460-5461). He describes that the formula is “based on his understanding of speaking to Schein executives.” (Carlton, Tr. 5460-5461). In Dr. Carlton’s own words, the formula is “basically, my summary of what [Schein executives are] telling me.” (Carlton, Tr. 5460-5461). Dr. Carlton admitted that he never showed this equation to anybody at Schein or even asked if Schein uses this equation to make business decisions. (Carlton, Tr. 5464). He further admitted that he solely relied on the interviews and did not cite any other evidence. (Carlton, Tr. 5465-5466).

**1155.** [REDACTED]

#### **Response to Proposed Finding No. 1155**

The Proposed Finding is irrelevant and misleading because Dr. Carlton’s but-for world criticisms are misplaced for reasons explained in detail in Complaint Counsel’s Response to Benco Proposed Finding No. 1154.

**1156.** [REDACTED]

**Response to Proposed Finding No. 1556**

This Proposed Finding is irrelevant to an analysis of any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five natural experiments (profitability analyses) to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report); Marshall, Tr. 2860 (“Part of my analysis was to look at five natural experiments that presented to me by the data to make a determination [about whether Respondents were acting against their own unilateral economic self-interest.”]). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents’ unilateral self-interest to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall’s review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents’ self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that “[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight.”); *see also* Marshall, Tr. 3387, 3384 (“I’m noting, though, that again that they’re making a blanket statement here: We don’t do business with buying groups,” “I am just noting again that they have made statements of a blanket nature: We don’t do business with buying groups,” “It says right here ‘we would consider them a GPO,’ group purchasing organization these types of affiliations as single customer.’ It’s just a blanket statement Buying club, we don’t do business with it. That’s it. It doesn’t reflect any incremental

evaluation.”; Marshall, Tr. 3266 (“I’m looking at this quotation and it says ‘Typical approach of an upstart buying group’...and it’s passing on this as a matter of policy.”). Dr. Marshall’s five studies examined real-world examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups. (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)). They inform whether the Respondents would have found it profitable to supply such buying groups, leading to Dr. Marshall’s conclusion that Respondents acted against their unilateral self-interest. (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)). “The fact that the studies do not directly estimate lost profits in particular counter-factual scenarios that would have existed but-for Respondents’ anticompetitive conduct is irrelevant as a response to what the studies show.” (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)). Additionally, this Proposed Finding is irrelevant and unreliable because its assertions are based on flawed and unsupported “formula” that Dr. Carlton presented in his expert report. (RX2832 at 051 (¶ 76) (Carlton Expert Report)). *See* Complaint Counsel’s Response to Benco Proposed Finding No. 1006. Dr. Carlton failed to do any quantitative analysis to support the assertions in this Proposed Finding. While Dr. Carlton identified a formula in paragraph 75 of his expert report purporting to show opportunity and profitability costs related to Schein working with or not working with Kois Buyers Group (RX2832 at 051 (¶ 76) (Carlton Expert Report)), Dr. Carlton never actually applied the formula to any data to support his assertion. The support and foundation for this purported “formula” is unreliable because it is solely based on Dr. Carlton’s memory and interpretation of facts conveyed to him by Schein executives. Dr. Carlton testified that his understanding of the formula is based solely on his interviews with Schein executives for which he did not even bother to keep his notes. (Carlton, Tr. 5460-5461). He described that the formula is “based on his understanding of speaking to Schein executives.” (Carlton, Tr. 5460-5461). In Dr. Carlton’s own words, the formula is “basically, my summary of what [Schein

executives are] telling me.” (Carlton, Tr. 5460-5461). Dr. Carlton admitted that he never showed this equation to anybody at Schein or even asked if Schein uses this equation to make business decisions. (Carlton, Tr. 5464). He further admitted that he solely relied on the interviews and does not cite any other evidence. (Carlton, Tr. 5465-5466).

1157. [REDACTED]

**Response to Proposed Finding No. 1157**

The Proposed Finding is irrelevant to an analysis of any blanket or categorical policy not to do business with buying groups and for reasons explained in more detail in Complaint Counsel’s Response to Benco Proposed Finding No. 1156.

1158. Dr. Marshall didn’t consider who would have belonged to the Kois Buyers Group if Schein had won the Kois bid. (Carlton, Tr. 5395-5396).

**Response to Proposed Finding No. 1158**

The Proposed Finding is irrelevant and misleading because Dr. Carlton’s but-for world criticisms in the testimony cited as support for this proposed finding are misplaced. This Proposed Finding is irrelevant to an analysis of any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five natural experiments (profitability analyses) to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report); Marshall, Tr. 2860 (“Part of my analysis was to look at five natural experiments that presented to me by the data to make a determination [about whether Respondents were acting against their own unilateral economic self-interest.”])). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents’ unilateral self-interest to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups.

(CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also* Marshall, Tr. 3387, 3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."; Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group'...and it's passing on this as a matter of policy.'"). Dr. Marshall's five studies examined real-world examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups. (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)). They inform whether the Respondents would have found it profitable to supply such buying groups, leading to Dr. Marshall's conclusion that Respondents acted against their unilateral self-interest. (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)). "The fact that the studies do not directly estimate lost profits in particular counter-factual scenarios that would have existed but-for Respondents' anticompetitive conduct is irrelevant as a response to what the studies show." (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)).

Additionally, this Proposed Finding is irrelevant and unreliable because its assertions are based on flawed and unsupported “formula” that Dr. Carlton presented in his expert report. (RX2832 at 051 (¶ 76) (Carlton Expert Report)). *See* Complaint Counsel’s Response to Benco Proposed Finding No. 1006. Dr. Carlton failed to do any quantitative analysis to support the assertions in this Proposed Finding. While Dr. Carlton identified a formula in paragraph 75 of his expert report purporting to show opportunity and profitability costs related to Schein working with or not working with Kois Buyers Group (RX2832 at 051 (¶ 76) (Carlton Expert Report)), Dr. Carlton never actually applied the formula to any data to support his assertion. The support and foundation for this purported “formula” is unreliable because it is solely based on Dr. Carlton’s memory and interpretation of facts conveyed to him by Schein executives. Dr. Carlton testified that his understanding of the formula is based solely on his interviews with Schein executives for which he did not even bother to keep his notes. (Carlton, Tr. 5460-5461). He described that the formula is “based on his understanding of speaking to Schein executives.” (Carlton, Tr. 5460-5461). In Dr. Carlton’s own words, the formula is “basically, my summary of what [Schein executives are] telling me.” (Carlton, Tr. 5460-5461). Dr. Carlton admitted that he never showed this equation to anybody at Schein or even asked if Schein uses this equation to make business decisions. (Carlton, Tr. 5464). He further admitted that he solely relied on the interviews and does not cite any other evidence. (Carlton, Tr. 5465-5466).

**1159.** [REDACTED]

#### **Response to Proposed Finding No. 1159**

The Proposed Finding is irrelevant and misleading because Dr. Carlton’s but-for world criticisms are misplaced. This Proposed Finding is irrelevant to an analysis of any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five natural experiments

(profitability analyses) to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report); Marshall, Tr. 2860 (“Part of my analysis was to look at five natural experiments that presented to me by the data to make a determination [about whether Respondents were acting against their own unilateral economic self-interest.”]). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents’ unilateral self-interest to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall’s review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents’ self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that “[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight.”); *see also* Marshall, Tr. 3387, 3384 (“I’m noting, though, that again that they’re making a blanket statement here: We don’t do business with buying groups,” “I am just noting again that they have made statements of a blanket nature: We don’t do business with buying groups,” “It says right here ‘we would consider them a GPO,’ group purchasing organization these types of affiliations as single customer.’ It’s just a blanket statement Buying club, we don’t do business with it. That’s it. It doesn’t reflect any incremental evaluation.”; Marshall, Tr. 3266 (“I’m looking at this quotation and it says ‘Typical approach of an upstart buying group’...and it’s passing on this as a matter of policy.”)). Dr. Marshall’s five studies examined real-world examples of profits gained and lost

in actual circumstances involving full-service distributors and buying groups. (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)). They inform whether the Respondents would have found it profitable to supply such buying groups, leading to Dr. Marshall's conclusion that Respondents acted against their unilateral self-interest. (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)). "The fact that the studies do not directly estimate lost profits in particular counter-factual scenarios that would have existed but-for Respondents' anticompetitive conduct is irrelevant as a response to what the studies show." (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)).

Additionally, the Proposed Finding is irrelevant and unreliable because its assertions are based on flawed and unsupported "formula" that Dr. Carlton presented in his expert report. (RX2832 at 051 (¶ 76) (Carlton Expert Report)). *See* Complaint Counsel's Response to Benco Proposed Finding No. 1006. Dr. Carlton failed to do any quantitative analysis to support the assertions in this Proposed Finding. While Dr. Carlton identified a formula in paragraph 75 of his expert report purporting to show opportunity and profitability costs related to Schein working with or not working with Kois Buyers Group (RX2832 at 051 (¶ 76) (Carlton Expert Report)), Dr. Carlton never actually applied the formula to any data to support his assertion. The support and foundation for this purported "formula" is unreliable because it is solely based on Dr. Carlton's memory and interpretation of facts conveyed to him by Schein executives. Dr. Carlton testified that his understanding of the formula is based solely on his interviews with Schein executives for which he did not even bother to keep his notes. (Carlton, Tr. 5460-5461). He described that the formula is "based on his understanding of speaking to Schein executives." (Carlton, Tr. 5460-5461). In Dr. Carlton's own words, the formula is "basically, my summary of what [Schein executives are] telling me." (Carlton, Tr. 5460-5461). Dr. Carlton admitted that he never showed this equation to anybody at Schein or even asked if Schein uses this equation to make



business decisions. (Carlton, Tr. 5464). He further admitted that he solely relied on the interviews and does not cite any other evidence. (Carlton, Tr. 5465-5466).

**1160.** [REDACTED]

**Response to Proposed Finding No. 1160**

The Proposed Finding is irrelevant to an analysis of any blanket or categorical policy not to do business with buying groups and for reasons explained in more detail in Complaint Counsel's Response to Benco Proposed Finding No. 1156.

**1161.** [REDACTED]

**Response to Proposed Finding No. 1161**

The Proposed Finding is irrelevant to an analysis of any blanket or categorical policy not to do business with buying groups and for reasons explained in more detail in Complaint Counsel's Response to Benco Proposed Finding No. 1156. This Proposed Finding is inaccurate, incomplete, and misleading to the extent that it suggests that Dr. Marshall did not study whether doing business with buying groups would have been profitable for Schein. [REDACTED]

[REDACTED]. Dr. Marshall testified that buying group opportunities were profitable even for a larger full-service distributor and describes that in the state of Washington, Burkhart, Patterson, and Schein have roughly equivalent market share,

so by analogy, “what is profitable in that case for Burkhart would be profitable for Schein or Patterson to engage in.” (Marshall, Tr. 2874-2875); *see also* [REDACTED]

[illegible]

1162.

### **Response to Proposed Finding No. 1162**

The Proposed Finding is inaccurate and misleading to the extent that it suggests that Dr. Marshall should have studied a broader group of buying group member dentists. The purpose of Dr. Marshall's five profitability studies was to examine different episodes of dentist purchasing pattern before and after a distributor starts (or stops) supplying a buying group. (Marshall, Tr. 2861-2862). In his other profitability studies (including Atlanta Dental-Smile Source), Dr. Marshall looked at which distributors buying group member dentists' purchased from *before* the distributor started supplying the buying group and which distributors buying group member dentists' purchased from *after* the distributor started supplying the buying group. (Marshall, Tr.

2865). By performing the five profitability analyses, Dr. Marshall was able to assess the substitution behavior patterns of buying group member dentists before and after a distributor begins (or stops) supplying a buying group. (Marshall, Tr. 2861).

The Proposed Finding is also irrelevant and misleading to the extent that Benco attempts to use it to support misplaced but-for world criticisms. This Proposed Finding is irrelevant to an analysis of any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five natural experiments (profitability analyses) to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report); Marshall, Tr. 2860 (“Part of my analysis was to look at five natural experiments that presented to me by the data to make a determination [about whether Respondents were acting against their own unilateral economic self-interest.”]). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents’ unilateral self-interest to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall’s review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents’ self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that “[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight.”); *see also* Marshall, Tr. 3387, 3384 (“I’m noting, though, that again that they’re making a blanket statement here: We don’t do business with buying groups,” “I am just noting again that they

have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."; Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group'...and it's passing on this as a matter of policy.'"). Dr. Marshall's five studies examined real-world examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups. (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)). They inform whether the Respondents would have found it profitable to supply such buying groups, leading to Dr. Marshall's conclusion that Respondents acted against their unilateral self-interest. (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)). "The fact that the studies do not directly estimate lost profits in particular counter-factual scenarios that would have existed but-for Respondents' anticompetitive conduct is irrelevant as a response to what the studies show." (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)).

1163. In his study of Smile Source, Dr. Marshall didn't study how many members of Smile Source were already customers of Patterson in December 2013 and how much they were buying from Patterson. (Marshall, Tr. 3289).

### **Response to Proposed Finding No. 1163**

The Proposed Finding is irrelevant to an analysis of any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five natural experiments (profitability analyses) to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report); Marshall, Tr. 2860 ("Part of my analysis was to look at five natural experiments that presented to me by the data to make a determination [about whether Respondents were acting against their own unilateral economic self-interest.'"). These analyses showed that buying groups drive incremental business to the

distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents' unilateral self-interest to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also* Marshall, Tr. 3387, 3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."); Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group' ...and it's passing on this as a matter of policy.'"). Dr. Marshall's five studies examined real-world examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups. (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)). They inform whether the Respondents would have found it profitable to supply such buying groups, leading to Dr. Marshall's conclusion that Respondents acted against their unilateral self-interest. (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)). "The fact that the studies do not directly estimate lost profits in particular counter-factual

scenarios that would have existed but-for Respondents' anticompetitive conduct is irrelevant as a response to what the studies show." (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)).

1164. Dr. Marshall did not perform a counterfactual analysis of Benco winning any of his five case studies. (Marshall, Tr. 3375 ("I did not perform a counterfactual exercise."); J. Johnson, Tr. 4842).

#### **Response to Proposed Finding No. 1164**

The Proposed Finding is also irrelevant and misleading to the extent that Benco attempts to use it to support misplaced but-for world criticisms. The Proposed Finding is irrelevant to an analysis of any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five natural experiments (profitability analyses) to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report); Marshall, Tr. 2860 ("Part of my analysis was to look at five natural experiments that presented to me by the data to make a determination [about whether Respondents were acting against their own unilateral economic self-interest.")). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents' unilateral self-interest to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also*

Marshall, Tr. 3387, 3384 (“I’m noting, though, that again that they’re making a blanket statement here: We don’t do business with buying groups,” “I am just noting again that they have made statements of a blanket nature: We don’t do business with buying groups,” “It says right here ‘we would consider them a GPO,’ group purchasing organization these types of affiliations as single customer.’ It’s just a blanket statement Buying club, we don’t do business with it. That’s it. It doesn’t reflect any incremental evaluation.”; Marshall, Tr. 3266 (“I’m looking at this quotation and it says ‘Typical approach of an upstart buying group’...and it’s passing on this as a matter of policy.”)). Dr. Marshall’s five studies examined real-world examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups. (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)). They inform whether the Respondents would have found it profitable to supply such buying groups, leading to Dr. Marshall’s conclusion that Respondents acted against their unilateral self-interest. (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)). “The fact that the studies do not directly estimate lost profits in particular counter-factual scenarios that would have existed but-for Respondents’ anticompetitive conduct is irrelevant as a response to what the studies show.” (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)).

1165. Dr. Marshall did a calculation, but he didn’t implement the right calculation. (Carlton, Tr. 5393-5395).

#### **Response to Proposed Finding No. 1165**

The Proposed Finding is irrelevant and unreliable because it relies on a flawed and unsupported “formula” that Dr. Carlton presented in his expert report. Dr. Carlton failed to do any quantitative analysis to support the assertions in this Proposed Finding. While Dr. Carlton identified a formula in paragraph 75 of his expert report purporting to show opportunity and profitability costs related to Schein working with or not working with Kois Buyers Group

(RX2832 at 051 (¶ 76) (Carlton Expert Report)), Dr. Carlton never actually applied the formula to any data to support his assertion. The support and foundation for this purported “formula” is unreliable because it is solely based on Dr. Carlton’s memory and interpretation of facts conveyed to him by Schein executives. Dr. Carlton testified that his understanding of the formula is based solely on his interviews with Schein executives for which he did not even bother to keep his notes. (Carlton, Tr. 5460-5461). He described that the formula is “based on his understanding of speaking to Schein executives.” (Carlton, Tr. 5460-5461). In Dr. Carlton’s own words, the formula is “basically, my summary of what [Schein executives are] telling me.” (Carlton, Tr. 5460-5461). Dr. Carlton admitted that he never showed this equation to anybody at Schein or even asked if Schein uses this equation to make business decisions. (Carlton, Tr. 5464). He further admitted that he solely relied on the interviews and does not cite any other evidence. (Carlton, Tr. 5465-5466).

In contrast to Dr. Carlton, Dr. Marshall conducted five natural experiments (profitability analyses) based on data to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report); Marshall, Tr. 2860 (“Part of my analysis was to look at five natural experiments that presented to me by the data to make a determination [about whether Respondents were acting against their own unilateral economic self-interest.”]). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). To the extent that Schein claims that these profitability analyses are not representative of other buying groups, Dr. Marshall explained that he studied five different relationships with the Kois Buyers Group and Smile Source because, in addition to having gotten off the ground, these buying groups operate in geographies (Seattle and Atlanta) in which Schein, Patterson, and Benco are likely to have their lowest collective share of sales and



another distributor was likely to have a high share of sales. (CX7101 at 045-046, 064 (¶¶ 107-112, 165) (Marshall Rebuttal Expert Report)). These facts addressed potential concerns that the relative sizes of Schein and Patterson make it more costly for them to supply buying groups, both because (1) Schein and Patterson are likely to find itself more profitable to discount when they have a lower share of sales and (2) where Burkhart and Atlanta Dental are large, it illuminates whether a full-service distributor found it profitable to supply a buying group so in a geographic area in which its share of sales was relatively large. (CX7101 at 64 (¶ 165) (Marshall Rebuttal Expert Report)). Differences between the Kois Buyers Group, with its single regional full-service distributor, and Smile Source, with its changing network of distributors over time, provide further reasons to believe that the experiences of distributors with these two groups provides some information about likely outcomes with other potential buying groups that went nowhere as a result of being rejected by Schein, Patterson, and/or Benco. (CX7101 at 64 (¶ 166) (Marshall Rebuttal Expert Report)). Dr. Marshall also explained that a common feature of the buying groups that he studied and other buying groups was that [REDACTED]

[REDACTED]  
[REDACTED]; *see also* CX8040

(Marshall, Dep. at 212) (explaining that Kois and Smile Source are “the same in the sense of the definition I offer in paragraph 139.”)). Dr. Marshall elaborated that for buying groups generally “[a]ll these groups will have different management and they’ll be issues that are different between them. But, again, these fall within what’s identified in paragraph 139 of my report.” (CX8040 (Marshall, Dep. at 212)).

[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]

[REDACTED].

This Proposed Finding is irrelevant to the extent that Benco asserts that it supports that a but-for world analysis is necessary. This Proposed Finding are irrelevant to an analysis of any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five profitability analyses to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report)). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED]). Accordingly, Dr.

Marshall opined that it was against Respondents' unilateral self-interest to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall's review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents' self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that "[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight."); *see also* Marshall, Tr. 3387, 3384 ("I'm noting, though, that again that they're making a blanket statement here: We don't do business with buying groups," "I am just noting again that they have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."; Marshall, Tr. 3266 ("I'm

looking at this quotation and it says ‘Typical approach of an upstart buying group’...and it’s passing on this as a matter of policy.’”).

1166. Because he did not perform a counter-factual analysis, Dr. Marshall “didn’t do the full work he needed to do” to reach his conclusions. (J. Johnson, Tr. 4844).

**Response to Proposed Finding No. 1166**

The Proposed Finding is irrelevant and misleading to the extent that Benco attempts to use it to support misplaced but-for world criticisms for reasons explained in detail in Complaint

Counsel’s Response to Benco Proposed Finding No. 1164.

1167. Because he did not perform a counter-factual analysis, Dr. Marshall “has no basis to draw the conclusions he has.” (J. Johnson, Tr. 4844).

**Response to Proposed Finding No. 1167**

The Proposed Finding is irrelevant and misleading to the extent that Benco attempts to use it to support misplaced but-for world criticisms for reasons explained in detail in Complaint

Counsel’s Response to Benco Proposed Finding No. 1164.

I. **Dr. Marshall Failed To Perform a Counter-Factual Analysis, and Thus Failed to Consider Benco’s Alternatives to Dealing With Buying Groups**

1168. Assuming that the other flaws inherent in Dr. Marshall’s five case studies could have been resolved and proper studies structured, a counterfactual analysis would have been the appropriate method of analysis. (J. Johnson, Tr. 4843-4844).

**Response to Proposed Finding No. 1168**

The Proposed Finding is irrelevant and misleading to the extent that Benco attempts to use it to support misplaced but-for world criticisms. This Proposed Finding is irrelevant to an analysis of any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five natural experiments (profitability analyses) to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report); Marshall, Tr. 2860 (“Part of my analysis was to look at five natural experiments that presented to me by the data to make a determination [about whether Respondents were acting

against their own unilateral economic self-interest.”]). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents’ unilateral self-interest to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall’s review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents’ self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that “[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight.”); *see also* Marshall, Tr. 3387, 3384 (“I’m noting, though, that again that they’re making a blanket statement here: We don’t do business with buying groups,” “I am just noting again that they have made statements of a blanket nature: We don’t do business with buying groups,” “It says right here ‘we would consider them a GPO,’ group purchasing organization these types of affiliations as single customer.’ It’s just a blanket statement Buying club, we don’t do business with it. That’s it. It doesn’t reflect any incremental evaluation.”; Marshall, Tr. 3266 (“I’m looking at this quotation and it says ‘Typical approach of an upstart buying group’...and it’s passing on this as a matter of policy.”)). Dr. Marshall’s five studies examined real-world examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups. (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)). They inform whether the Respondents would have found it profitable to supply such buying groups, leading to Dr. Marshall’s conclusion that Respondents acted against their unilateral self-interest. (CX7101

at 051 (¶ 129) (Marshall Rebuttal Expert Report)). “The fact that the studies do not directly estimate lost profits in particular counter-factual scenarios that would have existed but-for Respondents’ anticompetitive conduct is irrelevant as a response to what the studies show.” (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)).

1169. A counterfactual analysis would have been appropriate because it considers the “alternative world” to doing business with buying groups. (J. Johnson, Tr. 4843-4844).

**Response to Proposed Finding No. 1169**

The Proposed Finding is also irrelevant and misleading to the extent that Benco attempts to use it to support misplaced but-for world criticisms for reasons explained in detail in Complaint Counsel’s Response to Benco Proposed Finding No. 1168.

1170. Benco’s resources were limited. (Marshall, Tr. 3375; [REDACTED]).

**Response to Proposed Finding No. 1170**

The Proposed Finding is irrelevant and, Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Marshall is Complaint Counsel’s Expert and RX2834 is Dr. Johnson’s (Benco’s) Expert Report. Thus, the Proposed Finding should be disregarded.

1171. Dr. Marshall admitted that Benco’s resources were limited. (Marshall, Tr. 3375).

**Response to Proposed Finding No. 1171**

The Proposed Finding is irrelevant and, Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Marshall is Complaint Counsel’s Expert. Thus, the Proposed Finding should be disregarded.

1172. All companies have limited resources. (Marshall, Tr. 3375).

**Response to Proposed Finding No. 1172**

The Proposed Finding is irrelevant and, Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Marshall is Complaint Counsel's Expert. Thus, the Proposed Finding should be disregarded.

1173. Dr. Marshall admitted that all companies have limited resources. (Marshall, Tr. 3375).

**Response to Proposed Finding No. 1173**

The Proposed Finding is irrelevant and, Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Marshall is Complaint Counsel's Expert. Thus, the Proposed Finding should be disregarded.

1174. Because its resources were limited, Benco had to decide how to allocate its resources. (Marshall, Tr. 3375-3376; [REDACTED]).

**Response to Proposed Finding No. 1174**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Marshall is Complaint Counsel's Expert and RX2834 is Dr. Johnson's (Benco's) Expert Report.

1175. Dr. Marshall admitted that because its resources were limited, Benco had to decide how to allocate its resources. (Marshall, Tr. 3375-3376).

**Response to Proposed Finding No. 1175**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Marshall is Complaint Counsel's Expert.

1176. Dr. Marshall admitted that, because all companies have limited resources, every firm has to decide how to allocate its resources. (Marshall, Tr. 3375-3376).

**Response to Proposed Finding No. 1176**

The Proposed Finding is irrelevant and, Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Marshall is Complaint Counsel's Expert. Thus, the Proposed Finding should be disregarded.

1177. Dr. Marshall completely ignored any trade-offs that occurred as a result of partnering with buying groups rather than pursuing an independent customer base. (J. Johnson, Tr. 4840-4842).

**Response to Proposed Finding No. 1177**

The Proposed Finding is also irrelevant and misleading to the extent that Benco attempts to use it to support misplaced but-for world criticisms. The Proposed Finding is irrelevant to an analysis of any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five natural experiments (profitability analyses) to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report); Marshall, Tr. 2860 (“Part of my analysis was to look at five natural experiments that presented to me by the data to make a determination [about whether Respondents were acting against their own unilateral economic self-interest.”]). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents’ unilateral self-interest to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall’s review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents’ self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that “[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight.”); *see also* Marshall, Tr. 3387, 3384 (“I’m noting, though, that again that they’re making a blanket statement here: We don’t do business with buying groups,” “I am just noting again that they

have made statements of a blanket nature: We don't do business with buying groups," "It says right here 'we would consider them a GPO,' group purchasing organization these types of affiliations as single customer.' It's just a blanket statement Buying club, we don't do business with it. That's it. It doesn't reflect any incremental evaluation."); Marshall, Tr. 3266 ("I'm looking at this quotation and it says 'Typical approach of an upstart buying group' ...and it's passing on this as a matter of policy.'"). Dr. Marshall's five studies examined real-world examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups. (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)). They inform whether the Respondents would have found it profitable to supply such buying groups, leading to Dr. Marshall's conclusion that Respondents acted against their unilateral self-interest. (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)). "The fact that the studies do not directly estimate lost profits in particular counter-factual scenarios that would have existed but-for Respondents' anticompetitive conduct is irrelevant as a response to what the studies show." (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)).

1178. Dr. Marshall ignored the fact that Benco has to choose how to use its limited resources to grow most profitably. (J. Johnson, Tr. 4840-4842).

#### **Response to Proposed Finding No. 1178**

The Proposed Finding is also irrelevant and misleading to the extent that Benco attempts to use it to support misplaced but-for world criticisms. The Proposed Finding is irrelevant to an analysis of any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five natural experiments (profitability analyses) to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report); Marshall, Tr. 2860 ("Part of my analysis was to look at five natural experiments that presented to me by the data to make a determination [about whether Respondents were



acting against their own unilateral economic self-interest.”].). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents’ unilateral self-interest to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall’s review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents’ self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that “[s]ales force interest in supplying buying groups, and the steps that Schein, Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight.”); *see also* Marshall, Tr. 3387, 3384 (“I’m noting, though, that again that they’re making a blanket statement here: We don’t do business with buying groups,” “I am just noting again that they have made statements of a blanket nature: We don’t do business with buying groups,” “It says right here ‘we would consider them a GPO,’ group purchasing organization these types of affiliations as single customer.’ It’s just a blanket statement Buying club, we don’t do business with it. That’s it. It doesn’t reflect any incremental evaluation.”; Marshall, Tr. 3266 (“I’m looking at this quotation and it says ‘Typical approach of an upstart buying group’...and it’s passing on this as a matter of policy.”)). Dr. Marshall’s five studies examined real-world examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups. (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)). They inform whether the Respondents would have found it profitable to supply such buying groups, leading to Dr. Marshall’s conclusion that Respondents acted against their unilateral self-interest. (CX7101

at 051 (¶ 129) (Marshall Rebuttal Expert Report)). “The fact that the studies do not directly estimate lost profits in particular counter-factual scenarios that would have existed but-for Respondents’ anticompetitive conduct is irrelevant as a response to what the studies show.” (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)).

1179. Apart from Benco’s entry into Southern California, Dr. Marshall did not undertake any analysis of the alternatives available to Benco between 2011 and 2015 when it was deciding how to allocate its resources. (Marshall, Tr. 3376).

#### **Response to Proposed Finding No. 1179**

The Proposed Finding is also irrelevant and misleading to the extent that Benco attempts to use it to support misplaced but-for world criticisms. The Proposed Finding is irrelevant to an analysis of any blanket or categorical policy not to do business with buying groups. Dr. Marshall conducted five natural experiments (profitability analyses) to determine whether a buying group can be incrementally profitable for the contracted distributor. (CX7100 at 150 (¶ 349) (Marshall Expert Report); Marshall, Tr. 2860 (“Part of my analysis was to look at five natural experiments that presented to me by the data to make a determination [about whether Respondents were acting against their own unilateral economic self-interest.”]). These analyses showed that buying groups drive incremental business to the distributor. (CCFF ¶¶ 1647-1684; [REDACTED] [REDACTED]). Accordingly, Dr. Marshall opined that it was against Respondents’ unilateral self-interest to have a no-buying group policy whereby they instructed their employees to categorically reject all buying groups. (CCFF ¶¶ 630-650). As such, based in part on Dr. Marshall’s review of Kois and Smile Source in his profitability studies, Dr. Marshall opined that it was against Respondents’ self-interest to have a categorical or blanket policy whereby they instructed employees to reject buying groups as an entire customer segment. CX7100 at 149 (¶ 346) (Marshall Expert Report) (explaining in his Report that “[s]ales force interest in supplying buying groups, and the steps that Schein,

Patterson, and Benco took jointly to arrest their sales force from doing so, generally by having a policy against pursuing such business, is a plus factor that also carries much weight.”); *see also* Marshall, Tr. 3387, 3384 (“I’m noting, though, that again that they’re making a blanket statement here: We don’t do business with buying groups,” “I am just noting again that they have made statements of a blanket nature: We don’t do business with buying groups,” “It says right here ‘we would consider them a GPO,’ group purchasing organization these types of affiliations as single customer.’ It’s just a blanket statement Buying club, we don’t do business with it. That’s it. It doesn’t reflect any incremental evaluation.”; Marshall, Tr. 3266 (“I’m looking at this quotation and it says ‘Typical approach of an upstart buying group’...and it’s passing on this as a matter of policy.”)). Dr. Marshall’s five studies examined real-world examples of profits gained and lost in actual circumstances involving full-service distributors and buying groups. (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)). They inform whether the Respondents would have found it profitable to supply such buying groups, leading to Dr. Marshall’s conclusion that Respondents acted against their unilateral self-interest. (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)). “The fact that the studies do not directly estimate lost profits in particular counter-factual scenarios that would have existed but-for Respondents’ anticompetitive conduct is irrelevant as a response to what the studies show.” (CX7101 at 051 (¶ 129) (Marshall Rebuttal Expert Report)).

1180. Apart from Benco’s entry into Southern California, Dr. Marshall did not analyze Benco’s strategy objectives between 2011 and 2015. (Marshall, Tr. 3377).

#### **Response to Proposed Finding No. 1180**

The Proposed Finding is also irrelevant and misleading to the extent that Benco attempts to use it to support misplaced but-for world criticisms for reasons explained in detail in Complaint Counsel’s Response to Benco Proposed Finding No. 1168.

1181. Apart from Benco's entry into Southern California, Dr. Marshall did not know what strategic goals Benco was pursuing between 2011 and 2015. (Marshall, Tr. 3377).

**Response to Proposed Finding No. 1181**

The Proposed Finding is also irrelevant and misleading to the extent that Benco attempts to use it to support misplaced but-for world criticisms for reasons explained in detail in Complaint Counsel's Response to Benco Proposed Finding No. 1168.

1182. Dr. Marshall did not undertake any analysis of how much profit Benco could have earned by deploying its resources to alternatives other than serving Kois or Smile Source. (Marshall, Tr. 3376-3377).

**Response to Proposed Finding No. 1182**

The Proposed Finding is also irrelevant and misleading to the extent that Benco attempts to use it to support misplaced but-for world criticisms for reasons explained in detail in Complaint Counsel's Response to Benco Proposed Finding No. 1168.

1183. Dr. Marshall did not undertake any study to determine what impact it would have had on Benco's strategy of nationwide expansion if Benco had promised to use its resources to support buying groups. (Marshall, Tr. 3380).

**Response to Proposed Finding No. 1183**

The Proposed Finding is also irrelevant and misleading to the extent that Benco attempts to use it to support misplaced but-for world criticisms for reasons explained in detail in Complaint Counsel's Response to Benco Proposed Finding No. 1168.

1184. Dr. Marshall did not perform a counterfactual analysis of Benco winning any of his five case studies. (Marshall, Tr. 3375 ("I did not perform a counterfactual exercise."); J. Johnson, Tr. 4842).

**Response to Proposed Finding No. 1184**

The Proposed Finding is also irrelevant and misleading to the extent that Benco attempts to use it to support misplaced but-for world criticisms for reasons explained in detail in Complaint Counsel's Response to Benco Proposed Finding No. 1168.

1185. [REDACTED]

**Response to Proposed Finding No. 1185**

The Proposed Finding is also irrelevant and misleading to the extent that Benco attempts to use it to [REDACTED] for reasons explained in detail in Complaint

Counsel's Response to Benco Proposed Finding No. 1168.

D. RESPONSES TO PROPOSED FINDINGS REGARDING "THE DATA UNDERLYING DR. MARSHALL'S KOIS AND SMILE SOURCE STUDIES, PROPERLY ANALYZED, CONFIRM THAT BENCO ACTED CONSISTENTLY WITH ITS UNILATERAL ECONOMIC SELF-INTEREST"

**1. Benco Acted Consistently With Its Unilateral Economic Self-Interest By Pursuing Its Existing Strategy and Its Own Business Opportunities Rather Than Offering Discounts To Buying Groups**

1186. Benco successfully pursued its business plan before, during and after the alleged conspiracy period. (Cohen, Tr. 401, 637-29)

**Response to Proposed Finding No. 1186**

The Proposed Finding is vague and unintelligible as to what "business plan" Benco "successfully" pursued. To the extent that this Proposed Finding is used to support Benco's criticisms of Dr. Marshall's profitability analyses, those criticisms are unfounded and unreliable for reasons explained in Complaint Counsel's Response to Benco Proposed Finding Nos. 1190-1194.

1187. Benco successfully pursued its business plan from 2011 to 2015. (Cohen, Tr. 823-34).

**Response to Proposed Finding No. 1187**

The Proposed Finding is vague and unintelligible as to what "business plan" Benco "successfully" pursued. To the extent that this Proposed Finding is used to support Benco's criticisms of Dr. Marshall's profitability analyses, those criticisms are unfounded and unreliable

for reasons explained in Complaint Counsel’s Response to Benco Proposed Finding Nos. 1190-1194.

1188. Benco successfully completed its expansion into Southern California. (Cohen, Tr. 632-33).

**Response to Proposed Finding No. 1188**

The Proposed Finding is misleading and inaccurate because the testimony cited does not support the Proposed Finding – there is nothing in the testimony cited as support for this Proposed Finding indicating that Benco “successfully completed...expansion into Southern California.” Rather, Cohen testified that Benco “opened primarily in Southern California, where we thought there was a good opportunity, and I believe – mostly Southern California, some Central California as well.” (Cohen, Tr. 632). To the extent that this Proposed Finding is used to support Benco’s criticisms of Dr. Marshall’s profitability analyses, those criticisms are unfounded and unreliable for reasons explained in Complaint Counsel’s Response to Benco Proposed Finding Nos. 1190-1194.

1189. Benco successfully completed its expansion into the Pacific Northwest. (Cohen, Tr. 632-33).

**Response to Proposed Finding No. 1189**

The Proposed Finding is misleading and inaccurate because the testimony cited does not support the Proposed Finding – there is nothing in the testimony cited indicating that Benco “successfully completed...expansion into the Pacific Northwest.” Rather, Cohen testified that before Benco hired people in Seattle, Benco could ship its Pacific Northwest customers products from its warehouse in Reno. (Cohen, Tr. 632). He also testified that Benco had a series of independent service technicians that Benco outsourced to the Pacific Northwest prior to hiring people in Seattle. (Cohen, Tr. 633). To the extent that this Proposed Finding is used to support Benco’s criticisms of Dr. Marshall’s profitability analyses, those criticisms are unfounded and

unreliable for reasons explained in Complaint Counsel's Response to Benco Proposed Finding Nos. 1190-1194.

**1190.** [REDACTED]

**Response to Proposed Finding No. 1190**

The Proposed Finding is misleading, incomplete, and vague in that it does not identify to which "five examples" of Dr. Marshall's the Proposed Finding is referring. The Proposed Finding is also misleading, incomplete, and vague in that it does not specify to which "alternative business opportunities" the Proposed Finding is referring. To the extent the Proposed Finding is referring to Dr. Marshall's five natural experiments of when a distributor started or stopped partnering with a buying group to determine the impact on prices, margins, and customer switching (Marshall, Tr. 2859-2860; [REDACTED]

[REDACTED], the Proposed Finding is not supported by the cited testimony of Dr. Johnson or Dr. Johnson's Expert Report in this matter. In the testimony cited by Respondents as support for this Proposed Finding, Dr. Johnson is referring to Exhibits 8-12 of his expert report. Dr. Johnson testified that the purpose of his Exhibits 8 through 12 was to "show for each of the [5] MSAs [one in each exhibit] different sales and customer accounts for Benco." (RX2965 (J. Johnson, Dep. at 218); CCFF 1995). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Further, Dr. Johnson admitted that he did not assess whether Schein or Patterson acted in their unilateral self-interest with respect to buying groups. CCFF ¶¶ 1997, 1998. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] CCFF ¶¶ 1999-

2003. Additionally, the Proposed Finding is misleading and not supported by the cited testimony to the extent that it suggests that doing business with buying groups would not have been profitable for Benco. Dr. Johnson admitted that Exhibits 8, 9, 10, 11, and 12 do not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ([REDACTED]; RX2965 (J. Johnson, Dep. at 232)).

**1191.** [REDACTED]

### **Response to Proposed Finding No. 1191**

The Proposed Finding is misleading, incomplete, and contrary to evidence in this matter insofar as it suggests that sales to buying group members were stagnant or declining. In the testimony cited by Respondents as support for this Proposed Finding, Dr. Johnson is referring to Exhibits



8-12 of his expert report. Dr. Johnson testified that the purpose of his Exhibits 8 through 12 was to “show for each of the [5] MSAs [one in each exhibit] different sales and customer accounts for Benco.” (RX2965 (J. Johnson, Dep. at 218)). [REDACTED]

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CCFF 1999-2003

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██████████, P.X2065 (L. Johnson, Dep. at 222)) ██████████

\_\_\_\_\_

\_\_\_\_\_

**1192.**

1192. [REDACTED]

### **Response to Proposed Finding No. 1192**

The Proposed Finding is misleading and not supported by the cited testimony to the extent that it suggests that doing business with buying groups would not have been profitable for Benco. In the testimony cited by Respondents as support for this Proposed Finding, Dr. Johnson is referring to Exhibits 8-12 of his expert report. Dr. Johnson admitted that Exhibits 8, 9, 10, 11, and 12 from his report (and about which he is testified in the cited testimony) do not indicate anything about the profitability or trade-offs for Respondents of doing business or not doing business with buying groups. (CCFF ¶ 1996; [REDACTED]; RX2965 (J. Johnson, Dep. at 232)). [REDACTED]

[REDACTED]. Additionally, the Exhibits cited as support for this Proposed Finding are themselves misleading and do not support the Proposed Finding. Dr. Johnson testified that the purpose of his Exhibits 8 through 12 was to “show for each of the [5] MSAs [one in each exhibit] different sales and customer accounts for Benco.” (RX2965 (J. Johnson, Dep. at 218)). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] CCFF ¶¶ 1999-

2003.

1193. [REDACTED]

**Response to Proposed Finding No. 1193**

The Proposed Finding is misleading, incomplete, and vague in that it does not identify to which “five examples” of Dr. Marshall’s the Proposed Finding is referring. To the extent the Proposed Finding is referring to Dr. Marshall’s five natural experiments of when a distributor started or stopped partnering with a buying group to determine the impact on prices, margins, and customer switching (Marshall, Tr. 2859-2860; [REDACTED] [REDACTED], the Proposed Finding is not supported by the cited testimony of Dr. Johnson or Dr. Johnson’s Expert Report in this matter. In the testimony cited by Respondents as support for this Proposed Finding, Dr. Johnson is referring to Exhibits 8-12 of his expert report. Dr. Johnson testified that the purpose of his Exhibits 8 through 12 was to “show for each of the [5] MSAs [one in each exhibit] different sales and customer accounts for Benco.” (RX2965 (J. Johnson, Dep. at 218)). [REDACTED]

[REDACTED]. Further, Dr. Johnson admitted that he did not assess whether Schein or Patterson acted in their unilateral self-interest with respect to buying groups. CCF ¶¶ 1997, 1998. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] CCFF ¶¶ 1999-2003. Additionally, the Proposed Finding is misleading and not supported by the cited testimony to the extent that it suggests that doing business with buying groups would not have been profitable for Benco. Dr. Johnson admitted that Exhibits 8, 9, 10, 11, and 12 do not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ([REDACTED]; RX2965 (J. Johnson, Dep. at 232)).

**2. Dr. Marshall's Burkhardt-Smile Source Study Confirms That Benco's Unilateral Economic Self-Interest Was To Use Its Resources To Pursue Business Opportunities Other Than Buying Groups**

**1194.** [REDACTED]

**Response to Proposed Finding No. 1194**

Complaint Counsel has no specific response.

**1195.** [REDACTED]

**Response to Proposed Finding No. 1195**

The Proposed Finding is misleading and inaccurate in that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

1196. [REDACTED]

[REDACTED]

**Response to Proposed Finding No. 1196**

The Proposed Finding is misleading and inaccurate in that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

The Dallas-Fort Worth metropolitan statistical area was the top MSA in terms of *total purchases* involved in Dr. Marshall's Burkhardt-Smile Source study. (RX2834 at 041 (¶¶65-66) (Johnson Expert Report) [REDACTED].

1197. [REDACTED]

[REDACTED]

**Response to Proposed Finding No. 1197**

The Proposed Finding is misleading and incomplete insofar as it relies on [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Additionally, the Proposed Finding is misleading

and incomplete insofar as it suggests it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 8 of his report covering the Dallas-Fort Worth Region did not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ([REDACTED]; RX2965 (J. Johnson, Dep. at 232)).

**1198.** [REDACTED]

**Response to Proposed Finding No. 1198**

The Proposed Finding is misleading and incomplete insofar as it relies on [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Additionally, the Proposed Finding is misleading and incomplete insofar as it suggests it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 8 of his report covering the Dallas-Fort Worth Region did not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ([REDACTED]; RX2965 (J. Johnson, Dep. at 232)).

**1199.** [REDACTED]

**Response to Proposed Finding No. 1199**

The Proposed Finding is misleading and incomplete insofar as it relies on the customer counts for only one of the MSAs in Dr. Marshall's Burkhardt-Smile Source profitability study. The Proposed Finding does not include information about the rest of the MSAs across the entire country in Dr. Marshall's study. Additionally, the Proposed Finding is misleading and incomplete insofar as it suggests it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 8 of his report covering the Dallas-Fort Worth Region did not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ([REDACTED]; RX2965 (J. Johnson, Dep. at 232)).

**1200.** [REDACTED]

**Response to Proposed Finding No. 1200**

The Proposed Finding is misleading and incomplete insofar as it relies on [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Additionally, the Proposed Finding is misleading and incomplete insofar as it suggests it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 8 of his report covering the Dallas-Fort Worth Region did not indicate anything about the profitability to Respondents of doing business or not

doing business with buying groups. ([REDACTED]; RX2965 (J. Johnson, Dep. at 232)).

**1201.** [REDACTED]

**Response to Proposed Finding No. 1201**

The Proposed Finding is misleading and incomplete insofar as it suggests it would not have been profitable for Benco to pursue Smile Source's business and/or that it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 8 of his report covering the Dallas-Fort Worth Region did not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ([REDACTED]; RX2965 (J. Johnson, Dep. at 232)). The Proposed Finding is also misleading and incomplete in that it is relying on [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

**1202.** [REDACTED]

**Response to Proposed Finding No. 1202**

The Proposed Finding is misleading and incomplete insofar as it suggests it would not have been profitable for Benco to pursue Smile Source's business and/or that it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 8 of his report



covering the Dallas-Fort Worth Region did not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ([REDACTED]); RX2965 (J. Johnson, Dep. at 232)). The Proposed Finding is also misleading and incomplete in that it relies on [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].

**1203.** [REDACTED]  
[REDACTED]

**Response to Proposed Finding No. 1203**

The Proposed Finding is misleading, incomplete, and vague insofar as it does not identify to what “pattern” it is referring – Benco sales or Smile Source’s members’ purchases. The Proposed Finding is also misleading and incomplete in that it relies on [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]. The Proposed Finding is misleading and incomplete insofar as it suggests it would not have been profitable for Benco to pursue Smile Source’s business and/or that it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 8 of his report covering the Dallas-Fort Worth Region did not indicate anything about the

profitability to Respondents of doing business or not doing business with buying groups. ( [REDACTED]  
[REDACTED]; RX2965 (J. Johnson, Dep. at 232)).

**3. Dr. Marshall’s Burkhart-Kois Buyers Group Study Confirms That Benco’s Unilateral Economic Self-Interest Was To Use Its Resources To Pursue Business Opportunities Other Than Buying Groups**

**1204.** [REDACTED]  
[REDACTED]

**Response to Proposed Finding No. 1204**

Complaint Counsel has no specific response.

**1205.** [REDACTED]  
[REDACTED]

**Response to Proposed Finding No. 1205**

The Proposed Finding is misleading and inaccurate in that Dr. Johnson chose the top ten metropolitan statistical areas for his analysis “based on *total purchases* during the relevant periods” (emphasis added) and not based on the number of dentists as the Proposed Finding suggests. (RX2834 at 041 (¶65) (Johnson Expert Report) (*see also* [REDACTED]  
[REDACTED])).

**1206.** [REDACTED]  
[REDACTED]

**Response to Proposed Finding No. 1206**

The Proposed Finding is misleading and inaccurate in that Dr. Johnson chose the top ten metropolitan statistical areas for his analysis “based on total purchases during the relevant periods” and not based on the number of dentists as the Proposed Finding suggests. (RX2834 at 041 (¶65) (Johnson Expert Report) (*see also* [REDACTED])). The Los Angeles metropolitan statistical area was one of the top MSAs in terms of *total purchases*

involved in Dr. Marshall's Burkhardt-Kois study. (RX2834 at 041, 43 ¶¶65, 68) (Johnson Expert Report) (*see also* [REDACTED]).

1207. [REDACTED]

**Response to Proposed Finding No. 1207**

The Proposed Finding is misleading and incomplete insofar as it relies on [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Additionally, the Proposed Finding is misleading and incomplete insofar as it suggests it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 9 of his report covering the Los Angeles Region did not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ([REDACTED]; RX2965 (J. Johnson, Dep. at 232)).

1208. [REDACTED]

[REDACTED]

**Response to Proposed Finding No. 1208**

The Proposed Finding is misleading and incomplete insofar as it relies on [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Additionally, the Proposed Finding is misleading and incomplete insofar as it suggests it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 9 of his report covering the Los Angeles Region did not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ([REDACTED]; RX2965 (J. Johnson, Dep. at 232)).

**1209.** [REDACTED]

**Response to Proposed Finding No. 1209**

The Proposed Finding is misleading and incomplete insofar as it relies on the customer counts for only one of the MSAs in Dr. Marshall's Burkhardt-Kois profitability study. The Proposed Finding does not include information about the rest of the MSAs across the entire country in Dr. Marshall's study. Additionally, the Proposed Finding is misleading and incomplete insofar as it suggests it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 9 of his report covering the Los Angeles Region did not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ([REDACTED]; RX2965 (J. Johnson, Dep. at 232)).

**1210.** [REDACTED]

**Response to Proposed Finding No. 1210**

The Proposed Finding is misleading and incomplete insofar as it relies on [REDACTED]

[REDACTED]. Additionally, the Proposed Finding is misleading and incomplete insofar as it suggests it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 9 of his report covering the Los Angeles Region did not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ([REDACTED]; RX2965 (J. Johnson, Dep. at 232)).

**1211** [REDACTED]

**Response to Proposed Finding No. 1211**

The Proposed Finding is misleading and incomplete insofar as it suggests it would not have been profitable for Benco to pursue the Kois Buyers Group's business and/or that it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 9 of his report covering the Los Angeles Region did not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ([REDACTED]; RX2965 (J. Johnson, Dep. at 232)). The Proposed Finding is also misleading and incomplete in that it is relying on [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

1212. [REDACTED]

**Response to Proposed Finding No. 1212**

The Proposed Finding is misleading and incomplete insofar as it suggests it would not have been profitable for Benco to pursue the Kois Buyers Group's business and/or that it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 9 of his report covering the Los Angeles Region did not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ([REDACTED])

[REDACTED]; RX2965 (J. Johnson, Dep. at 232)). The Proposed Finding is also misleading and incomplete in that it relies on [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

1213. [REDACTED]

**Response to Proposed Finding No. 1213**

The Proposed Finding is misleading, incomplete, and vague insofar as it [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. The Proposed Finding is

misleading and incomplete insofar as it suggests it would not have been profitable for Benco to pursue the Kois Buyers Group's business and/or that it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 9 of his report covering the Los Angeles Region did not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ([REDACTED]; RX2965 (J. Johnson, Dep. at 232)).

**4. Dr. Marshall's Atlanta Dental-Smile Source Study Confirms That Benco's Unilateral Economic Self-Interest Was To Use Its Resources To Pursue Business Opportunities Other Than Buying Groups**

**1214.** [REDACTED]

**Response to Proposed Finding No. 1214**

Complaint Counsel has no specific response.

**1215.** [REDACTED]

**Response to Proposed Finding No. 1215**

Complaint Counsel has no specific response.

**1216.** [REDACTED]

**Response to Proposed Finding No. 1216**

The Proposed Finding is misleading and inaccurate in that Dr. Johnson chose the top metropolitan statistical areas for his analysis “based on total purchases during the relevant periods” and not based on the number of dentists as the Proposed Finding suggests. (RX2834 at 041 (¶65) (Johnson Expert Report) (*see also* [REDACTED])). The Atlanta metropolitan statistical area was the top MSA in terms of *total purchases* involved in Dr. Marshall’s Atlanta Dental-Smile Source study. (RX2834 at 041, 044 (¶¶65, 70) (Johnson Expert Report) (*see also* Figure D3 at 089)).

**1217.** [REDACTED]

**Response to Proposed Finding No. 1217**

The Proposed Finding is misleading and incomplete insofar as it suggests it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 10 of his report covering the Atlanta region did not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ([REDACTED]; RX2965 (J. Johnson, Dep. at 232)).

**1218.** [REDACTED]

**Response to Proposed Finding No. 1218**

The Proposed Finding is misleading and incomplete insofar as it suggests it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 10 of his report covering the Atlanta region did not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ([REDACTED]; RX2965 (J. Johnson, Dep. at 232)).



1219. [REDACTED]

**Response to Proposed Finding No. 1219**

The Proposed Finding is misleading and incomplete insofar as it suggests it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 10 of his report covering the Atlanta region did not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ([REDACTED]; RX2965 (J. Johnson, Dep. at 232)).

1220. [REDACTED]

**Response to Proposed Finding No. 1220**

The Proposed Finding is misleading and incomplete insofar as it suggests it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 10 of his report covering the Atlanta region did not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ([REDACTED]; RX2965 (J. Johnson, Dep. at 232)).

1221. [REDACTED]

**Response to Proposed Finding No. 1221**

The Proposed Finding is misleading and incomplete insofar as it suggests it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 10 of his report covering the Atlanta region did not indicate anything about the profitability to Respondents of

doing business or not doing business with buying groups. ( [REDACTED] ;  
RX2965 (J. Johnson, Dep. at 232)).

1222. [REDACTED]

**Response to Proposed Finding No. 1222**

The Proposed Finding is misleading and incomplete insofar as it suggests it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 10 of his report covering the Atlanta region did not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ( [REDACTED] ;  
RX2965 (J. Johnson, Dep. at 232)).

1223. [REDACTED]

**Response to Proposed Finding No. 1223**

The Proposed Finding is misleading, incomplete, and vague insofar as it does not identify to what “pattern” it is referring – Benco sales or Smile Source’s members’ purchases. The Proposed Finding is incorrect in that it refers to “the other top nine metropolitan statistical areas” when there were only six total metropolitan statistical areas in the study. (RX2834 at 093 (Figure D8) (Johnson Expert Report)). The Proposed Finding is misleading and incomplete insofar as it suggests it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 10 of his report covering the Atlanta region did not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ( [REDACTED] ; RX2965 (J. Johnson, Dep. at 232)).

**5. Dr. Marshall’s First Schein-Smile Source Study Confirms That Benco’s Unilateral Economic Self-Interest Was To Use Its Resources To Pursue Business Opportunities Other Than Buying Groups**

**1224.** [REDACTED]

**Response to Proposed Finding No. 1224**

Complaint Counsel has no specific response.

**1225.** [REDACTED]

**Response to Proposed Finding No. 1225**

The Proposed Finding is misleading and inaccurate in that Dr. Johnson chose the top ten metropolitan statistical areas for his analysis “based on *total purchases* during the relevant periods” (emphasis added) and not based on the number of dentists as the Proposed Finding suggests. (RX2834 at 041 (¶65) (Johnson Expert Report) (*see also* [REDACTED])).

**1226.** [REDACTED]

**Response to Proposed Finding No. 1226**

The Proposed Finding is misleading and inaccurate in that Dr. Johnson chose the top ten metropolitan statistical areas for his analysis “based on total purchases during the relevant periods” and not based on the number of dentists as the Proposed Finding suggests. (RX2834 at 041 (¶65) (Johnson Expert Report) (*see also* [REDACTED])). The Houston metropolitan statistical area was the top MSA in terms of *total purchases* involved in Dr. Marshall’s first Smile Source study. (RX2834 at 041, 045 (¶¶65, 72) (Johnson Expert Report) (*see also* [REDACTED])).

1227. [REDACTED]

**Response to Proposed Finding No. 1227**

The Proposed Finding is misleading and incomplete insofar as it suggests it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 11 of his report covering the Houston region did not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ([REDACTED]; RX2965 (J. Johnson, Dep. at 232)).

1228. [REDACTED]

**Response to Proposed Finding No. 1228**

The Proposed Finding is misleading and incomplete insofar as it suggests it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 11 of his report covering the Houston region did not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ([REDACTED]; RX2965 (J. Johnson, Dep. at 232)).

1229. [REDACTED]

**Response to Proposed Finding No. 1229**

The Proposed Finding is misleading and incomplete insofar as it suggests it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 11 of his report covering the Houston region did not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ([REDACTED]; RX2965 (J. Johnson, Dep. at 232)).

1230. [REDACTED]

**Response to Proposed Finding No. 1230**

The Proposed Finding is misleading and incomplete insofar as it suggests it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 11 of his report covering the Houston region did not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ([REDACTED]; RX2965 (J. Johnson, Dep. at 232)).

1231. [REDACTED]

**Response to Proposed Finding No. 1231**

The Proposed Finding is misleading and incomplete insofar as it suggests it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 11 of his report covering the Houston region did not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ([REDACTED]; RX2965 (J. Johnson, Dep. at 232)).

1232. [REDACTED]

**Response to Proposed Finding No. 1232**

The Proposed Finding is misleading and incomplete insofar as it suggests it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 11 of his report covering the Houston region did not indicate anything about the profitability to Respondents of

doing business or not doing business with buying groups. ( [REDACTED] );  
RX2965 (J. Johnson, Dep. at 232)).

**1233.** [REDACTED]

**Response to Proposed Finding No. 1233**

The Proposed Finding is misleading, incomplete, and vague insofar as it does not identify to what “pattern” it is referring – Benco sales or Smile Source’s members’ purchases. The Proposed Finding is misleading and incomplete insofar as it suggests it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 11 of his report covering the Houston region did not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ( [REDACTED] );  
RX2965 (J. Johnson, Dep. at 232)).

**6. Dr. Marshall’s Second Schein-Smile Source Study Confirms That  
Benco’s Unilateral Economic Self-Interest Was To Use Its Resources  
To Pursue Business Opportunities Other Than Buying Groups**

**1234.** [REDACTED]

**Response to Proposed Finding No. 1234**

Complaint Counsel has no specific response.

**1235.** [REDACTED]

**Response to Proposed Finding No. 1235**

The Proposed Finding is misleading and inaccurate in that Dr. Johnson chose the top ten metropolitan statistical areas for his analysis “based on *total purchases* during the relevant periods” (emphasis added) and not based on the number of dentists as the Proposed Finding

suggests. (RX2834 at 041 (¶65) (Johnson Expert Report) (*see also* [REDACTED]  
[REDACTED])).

**1236.** [REDACTED]

**Response to Proposed Finding No. 1236**

The Proposed Finding is misleading and inaccurate in that Dr. Johnson chose the top ten metropolitan statistical areas for his analysis “based on total purchases during the relevant periods” and not based on the number of dentists as the Proposed Finding suggests. (RX2834 at 041 (¶65) (Johnson Expert Report) (*see also* [REDACTED])). The Denver metropolitan statistical area was the top MSA in terms of *total purchases* involved in Dr. Marshall’s 2<sup>nd</sup> Smile Source study. (RX2834 at 041, 047 (¶¶65, 74) (Johnson Expert Report) (*see also* [REDACTED])).

**1237.** [REDACTED]

**Response to Proposed Finding No. 1237**

The Proposed Finding is misleading and incomplete insofar as it relies on [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]. Additionally,

the Proposed Finding is misleading and incomplete insofar as it suggests it is not profitable for a

distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 12 of his report covering the Denver region did not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ( [REDACTED] ; RX2965 (J. Johnson, Dep. at 232)).

**1238.** [REDACTED]

**Response to Proposed Finding No. 1238**

The Proposed Finding is misleading and incomplete insofar as it relies on [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]. Additionally,

the Proposed Finding is misleading and incomplete insofar as it suggests it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 12 of his report covering the Denver region did not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ( [REDACTED] ; RX2965 (J. Johnson, Dep. at 232)).

**1239.** [REDACTED]

**Response to Proposed Finding No. 1239**



The Proposed Finding is misleading and incomplete insofar as it relies on [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Additionally, the Proposed Finding is misleading and incomplete insofar as it suggests it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 12 of his report covering the Denver region did not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ([REDACTED]; RX2965 (J. Johnson, Dep. at 232)).

**1240.** [REDACTED]

**Response to Proposed Finding No. 1240**

The Proposed Finding is misleading and incomplete insofar as it suggests it would not have been profitable for Benco to pursue Smile Source's business and/or that it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 12 of his report covering the Denver Region did not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ([REDACTED]; RX2965 (J. Johnson, Dep. at 232)). The Proposed Finding is also misleading and incomplete in that it is relying on [REDACTED]

[REDACTED]

[REDACTED].

1241. [REDACTED]

[REDACTED]

**Response to Proposed Finding No. 1241**

The Proposed Finding is misleading and incomplete insofar as it suggests it would not have been profitable for Benco to pursue Smile Source's business and/or that it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 12 of his report covering the Denver Region did not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ([REDACTED]; RX2965 (J. Johnson, Dep. at 232)). The Proposed Finding is also misleading and incomplete in that it is relying on [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

1242. [REDACTED]

[REDACTED]

**Response to Proposed Finding No. 1242**

The Proposed Finding is misleading, incomplete, and vague insofar as it [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. The Proposed Finding is misleading and incomplete insofar as it suggests it would not have been profitable for Benco to pursue Smile Source's business and/or that it is not profitable for a distributor to do business with buying groups. Dr. Johnson admitted that Exhibit 12 of his report covering the Denver Region did not indicate anything about the profitability to Respondents of doing business or not doing business with buying groups. ([REDACTED]; RX2965 (J. Johnson, Dep. at 232)).

**XV. RESPONSES TO PROPOSED FINDINGS REGARDING “DR. MARSHALL’S ASSERTION OF A “STRUCTURAL BREAK” IS WRONG ON THE ECONOMICS AND ON THE FACTS”**

**A. RESPONSES TO PROPOSED FINDINGS REGARDING “DR. MARSHALL MISAPPLIED THE ECONOMIC CONCEPT OF STRUCTURAL BREAK”**

1243. “Structural break” is a statistical concept from the field of econometrics. (J. Johnson, Tr. 4858-4859). The term “structural break” represents a method of empirical testing to determine if the fundamentals in the data have changed. (J. Johnson, Tr. 4858-4859).

**Response to Proposed Finding No. 1243**

The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests the term “structural break” must be accompanied by econometric analysis. Dr. Marshall used the term “structural break” to describe a significant change in behavior. (CX7101 at 068-069 (¶177, n. 321)). Additionally, Dr. Marshall looked at observed structural breaks for purposes of determining whether the time period for the alleged conspiracy was reasonable (Marshall, Tr. 2889-2890 (looking at structural breaks to determine reasonableness of the start and end of conspiracy)), and as an indicator supporting collusive behavior rather than oligopolistic interdependence (CCFF ¶ 1625 (citing CX7100 at 190 (¶ 427) (Marshall Expert Report))). (*See also* CCRF (Schein) ¶¶ 1640). The Proposed Finding is irrelevant and should be disregarded.

1244. Structural break uses statistical testing on a model to show whether the various factors in the model have changed. (J. Johnson, Tr. 4859).

**Response to Proposed Finding No. 1244**

The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests the term “structural break” must be accompanied by econometric analysis. Dr. Marshall used the term “structural break” to describe a significant change in behavior and not in an econometric sense. (CX7101 at 068-069 (¶177, n. 321)). Additionally, Dr. Marshall looked at observed structural breaks for purposes of determining whether the time period for the alleged conspiracy was reasonable (Marshall, Tr. 2889-2890 (looking at structural breaks to determine reasonableness of the start and end of conspiracy)), and as an indicator supporting collusive behavior rather than oligopolistic interdependence (CCFF ¶ 1625 (citing CX7100 at 190 (¶ 427) (Marshall Expert Report)). (*See also* CCRF (Schein) ¶¶ 1640). The Proposed Finding is irrelevant and should be disregarded.

1245. The point of the economic definition is to have an objective standard by which to judge whether there has been a structural break. (J. Johnson, Tr. 4859).

**Response to Proposed Finding No. 1245**

The Proposed Finding is misleading, incomplete, and vague in that it does not identify what “economic definition” it is referring to and is thus unverifiable. The Proposed Finding is misleading and irrelevant in that it is not a statement of fact and is rather argument. Additionally, the Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests the term “structural break” must be accompanied by econometric analysis. Dr. Marshall used the term “structural break” to describe a significant change in behavior and not in an econometric sense. (CX7101 at 068-069 (¶177, n. 321)). Additionally, Dr. Marshall looked at observed structural breaks for purposes of determining whether the time period for the alleged conspiracy was reasonable (Marshall, Tr. 2889-2890 (looking at structural breaks to determine

reasonableness of the start and end of conspiracy)), and as an indicator supporting collusive behavior rather than oligopolistic interdependence (CCFF ¶ 1625 (citing CX7100 at 190 (¶ 427) (Marshall Expert Report)). (*See also* CCRF (Schein) ¶¶ 1640). Thus, the Proposed Finding should be disregarded.

1246. Dr. Marshall did not use the term “structural break” in accordance with its econometric meaning. (J. Johnson, Tr. 4859).

**Response to Proposed Finding No. 1246**

The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests the term “structural break” must be accompanied by econometric analysis. Dr. Marshall used the term “structural break” to describe a significant change in behavior and not in an econometric sense. (CX7101 at 068-069 (¶177, n. 321)). Additionally, Dr. Marshall looked at observed structural breaks for purposes of determining whether the time period for the alleged conspiracy was reasonable (Marshall, Tr. 2889-2890 (looking at structural breaks to determine reasonableness of the start and end of conspiracy)), and as an indicator supporting collusive behavior rather than oligopolistic interdependence (CCFF ¶ 1625 (citing CX7100 at 190 (¶ 427) (Marshall Expert Report)). (*See also* CCRF (Schein) ¶¶ 1640). The Proposed Finding is irrelevant and should be disregarded.

1247. Dr. Marshall did not perform any statistical testing with respect to his asserted “structural breaks.” (J. Johnson, Tr. 4858-4859). Dr. Marshall did not perform any objective, measurable test. (J. Johnson, Tr. 4858-4859).

**Response to Proposed Finding No. 1247**

The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests the term “structural break” must be accompanied by econometric analysis. Dr. Marshall used the term “structural break” to describe a significant change in behavior and not in an econometric sense. (CX7101 at 068-069 (¶177, n. 321)). Additionally, Dr. Marshall looked at observed structural

breaks for purposes of determining whether the time period for the alleged conspiracy was reasonable (Marshall, Tr. 2889-2890 (looking at structural breaks to determine reasonableness of the start and end of conspiracy)), and as an indicator supporting collusive behavior rather than oligopolistic interdependence (CCFF ¶ 1625 (citing CX7100 at 190 (¶ 427) (Marshall Expert Report)). (See also CCRF (Schein) ¶¶ 1640). The Proposed Finding is misleading, incomplete, and vague insofar as it does not identify what the Respondent means by an “objective, measurable test” and in which of Dr. Marshall’s analyses he allegedly did not perform such a test. The Proposed Finding is thus unverifiable. The Proposed Finding is misleading, incomplete, and inaccurate to the extent it suggests that Dr. Marshall did not perform economic analyses to demonstrate that Respondents engaged in conduct against their unilateral self-interests. Dr. Marshall conducted five natural experiments using data that examined whether or not it was profitable for dental supply distributors, including Respondents, to bid for and obtain the business of buying groups. (Marshall, Tr. 2859-2861; [REDACTED]; [REDACTED]; CCFF ¶¶ 1637-1684). The Proposed Finding should thus be disregarded.

1248. Dr. Marshall gave a subjective assessment of some characteristics of behavior and said he had determined that it was a structural break. (J. Johnson, Tr. 4858-4860).

#### **Response to Proposed Finding No. 1248**

The Proposed Finding is misleading and irrelevant in that it is not a statement of fact and is instead a statement of economic argument. The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests the term “structural break” must be accompanied by econometric analysis. Dr. Marshall used the term “structural break” to describe a significant change in behavior and not in an econometric sense. (CX7101 at 068-069 (¶177, n. 321)). Additionally, Dr. Marshall looked at observed structural breaks for purposes of determining whether the time

period for the alleged conspiracy was reasonable (Marshall, Tr. 2889-2890 (looking at structural breaks to determine reasonableness of the start and end of conspiracy)), and as an indicator supporting collusive behavior rather than oligopolistic interdependence (CCFF ¶ 1625 (citing CX7100 at 190 (¶ 427) (Marshall Expert Report)). (*See also* CCRF (Schein) ¶¶ 1640). The Proposed Finding is misleading, incomplete, and inaccurate to the extent it suggests that Dr. Marshall did not perform economic analyses to demonstrate that Respondents engaged in conduct against their unilateral self-interests. Dr. Marshall conducted five natural experiments using data that examined whether or not it was profitable for dental supply distributors, including Respondents, to bid for and obtain the business of buying groups. (Marshall, Tr. 2859-2861; [REDACTED]; CCFF ¶¶ 1637-1684).

1249. Dr. Marshall did not review characteristics of behavior in a complete fashion; he ignored critical factors. (J. Johnson, Tr. 4859-4860).

**Response to Proposed Finding No. 1249**

The Proposed Finding is misleading, incomplete, and vague in that it relies on the phrase “characteristics of behavior” without identifying what are the characteristics. The Proposed Finding is also vague and incomplete in that it does not identify the “critical factors” that Dr. Marshall is alleged to have ignored. The Proposed Finding is thus unverifiable. The Proposed Finding should be disregarded. Additionally, the Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that Benco’s decision to partner with the Elite Dental Alliance in 2016 was not a structural break. Benco had a longstanding no buying group policy. (CCFF ¶¶ 132, 395). This policy applied to all buying groups, regardless of the services the group provided. (CCFF ¶¶ 396 (quoting 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.”) (emphasis in original))). Record evidence also establishes that Elite was the first buying group that Benco partnered with. (CCFF ¶ 1369). The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that Dr. Johnson did any analyses to compare the Elite Dental Alliance with other offers Benco received from buying groups and made an informed opinion that the Elite Dental Alliance was a unique opportunity for Benco. Dr. Johnson admitted that he did not review any proposals from buying groups to Benco other than the Elite Dental Alliance (EDA) proposal. (J. Johnson, Tr. 4898-4899, RX2965 (J. Johnson, Dep. at 184)).

1250. Dr. Marshall did not perform an appropriate analysis. (J. Johnson, Tr. 4859-4860).

**Response to Proposed Finding No. 1250**

The Proposed Finding is misleading, incomplete, and vague in that it does not identify to which of Dr. Marshall’s analyses it is referring. The Proposed Finding is also thus unverifiable. The Proposed Finding should be disregarded. *See also* Complaint Counsel’s Response to Benco Proposed Finding No. 1249.

**B. RESPONSES TO PROPOSED FINDINGS REGARDING “DR. MARSHALL’S OWN METHOD OF ANALYSIS, IF APPLIED CONSISTENTLY, WOULD PROVE THE ABSENCE OF ANY CONSPIRACY”**

1251. Dr. Marshall did not apply any recognized methodology to his structural break analysis. (J. Johnson, Tr. 4858-4860).

**Response to Proposed Finding No. 1251**

The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests the term “structural break” must be accompanied by econometric analysis. Dr. Marshall used the term “structural break” to describe a significant change in behavior. (CX7101 at 068-069 (¶177, n. 321)). Additionally, Dr. Marshall looked at observed structural breaks for purposes of determining whether the time period for the alleged conspiracy was reasonable (Marshall, Tr. 2889-2890 (looking at structural breaks to determine reasonableness of the start and end of



conspiracy)), and as an indicator supporting collusive behavior rather than oligopolistic interdependence (CCFF ¶ 1625 (citing CX7100 at 190 (¶ 427) (Marshall Expert Report))). (*See also* CCRF (Schein) ¶¶ 1640). Thus, the Proposed Finding is irrelevant and should be disregarded.

1252. Dr. Marshall’s “analysis” can’t be replicated; it is just his subjective assessment. (J. Johnson, Tr. 4858-4860).

**Response to Proposed Finding No. 1252**

The Proposed Finding is misleading, incomplete, and vague in that it relies on the term “analysis” without stating to which of Dr. Marshall’s analyses it is referring. To the extent it is referring to Dr. Marshall’s structural break analysis, the Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests the term “structural break” must be accompanied by econometric analysis. Dr. Marshall used the term “structural break” to describe a significant change in behavior. (CX7101 at 068-069 (¶177, n. 321)). Additionally, Dr. Marshall looked at observed structural breaks for purposes of determining whether the time period for the alleged conspiracy was reasonable (Marshall, Tr. 2889-2890 (looking at structural breaks to determine reasonableness of the start and end of conspiracy)), and as an indicator supporting collusive behavior rather than oligopolistic interdependence (CCFF ¶ 1625 (citing CX7100 at 190 (¶ 427) (Marshall Expert Report))). (*See also* CCRF (Schein) ¶¶ 1640). The Proposed Finding is irrelevant and should be disregarded.

1253. Dr. Marshall’s method of analysis, if applied consistently, would establish a “structural break” by Benco to start dealing with buying groups in 2013, contrary to the terms of the alleged conspiracy, in the middle of the alleged conspiracy period. (Marshall, Tr. 3395-96).

**Response to Proposed Finding No. 1253**

The Proposed Finding is misleading, incomplete, and vague insofar as it does not identify with enough specificity the alleged structural break by Benco in 2013. Thus the Proposed Finding

cannot be verified as it is unknown to what episode Respondent is referring. The Proposed Finding should be disregarded.

1254. For purposes of his analysis, Dr. Marshall identified as a buying group any entity or individual (1) that was recognized as a buying group by at least one of the respondents, and (2) for whose business at least one of the respondents did not bid. (Marshall, Tr. 3393-3394; *see also* Marshall, Tr. 3256; Marshall, Tr. 3260-3261).

#### **Response to Proposed Finding No. 1254**

The Proposed Finding is misleading, incomplete, and vague insofar as it does not identify to which of Dr. Marshall's analyses it is referring. The Proposed Finding is misleading, incomplete, and inaccurate insofar as it mischaracterizes Dr. Marshall's testimony. In the testimony that is cited as support for this Proposed Finding, Dr. Marshall is clearly testifying about a list of 38 buying groups in his report at Paragraph 491 that includes buying groups that approached Benco, Schein, and/or Patterson between 2011 and 2015 and were turned down. (Marshall, Tr. 3393-3394, 3256, and 3260-3261 (testifying about CX7100 at 209 (¶491) (Marshall Expert Report))). Given that Dr. Marshall's testimony limits this identification of buying groups to Paragraph 491 of the Marshall Expert Report, the Proposed Finding is misleading insofar as it suggests Dr. Marshall used this characterization of buying groups in his structural break analysis. Elsewhere in his report, Dr. Marshall identifies a buying group or group purchasing organization as "an organization 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." (CX7100 at 013 (¶16) (Marshall Expert Report)).

1255. Patterson considered Atlantic Dental Care to be a buying group, and Patterson did not bid for the business of Atlantic Dental Care. (Guggenheim, Tr. 1616-17).

#### **Response to Proposed Finding No. 1255**

The Proposed Finding is misleading, inaccurate, and incomplete insofar as it suggests Atlantic Dental Care was a buying group. Record evidence demonstrates that Atlantic Dental Care was a DSO. (CCFF ¶¶ 575-576, 1045-1048).

1256. If Dr. Marshall had applied his own definition consistently, he would have defined Atlantic Dental Care as a buying group. (Marshall, Tr. 3394).

**Response to Proposed Finding No. 1256**

The Proposed Finding is misleading and vague in that it does not identify with specificity to which of Dr. Marshall's definitions the proposed finding is referring and the testimony cited for support does not identify the definition. Thus the proposed finding is not verifiable. The Proposed Finding is misleading, inaccurate, and incomplete insofar as it suggests Atlantic Dental Care was a buying group. Record evidence demonstrates that Atlantic Dental Care was a DSO. (CCFF ¶¶ 575-576, 1045-1048).

1257. Dr. Marshall deviated from his own definition, and considered Atlantic Dental Care to be a DSO rather than a buying group, because he accepted Benco's factual assessment and its view that Atlantic Dental Care was a DSO. (Marshall, Tr. 3395).

**Response to Proposed Finding No. 1257**

The Proposed Finding is misleading and vague in that it does not identify with specificity to which of Dr. Marshall's definitions the proposed finding is referring. Thus the proposed finding is not verifiable. The Proposed Finding is misleading, inaccurate, and incomplete insofar as it suggests Atlantic Dental Care was a buying group. Record evidence demonstrates that Atlantic Dental Care was a DSO. (CCFF ¶¶ 575-576, 1045-1048). In his Expert Report, Dr. Marshall identifies a buying group or group purchasing organization as "an organization 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." (CX7100 at 013 (¶16) (Marshall Expert Report)).

1258. Dr. Marshall admitted that the facts relating to Atlantic Dental Care were important. (Marshall, Tr. 3396).

**Response to Proposed Finding No. 1258**

Complaint Counsel has no specific response.

1259. If Dr. Marshall had applied his own definition consistently, he would have found a change of behavior by Benco, contrary to the terms of the alleged conspiracy, in the middle of the alleged conspiracy period. (Marshall, Tr. 3395).

**Response to Proposed Finding No. 1259**

The Proposed Finding is misleading, incomplete, and vague insofar as it does not identify with enough specificity the alleged “change in behavior” by Benco in the middle of the alleged conspiracy period. Thus the Proposed Finding cannot be verified as it is unknown to what episode Respondent is referring. Insofar as the Proposed Finding is attempting to refer to the bidding for the Atlantic Dental Care organization, the Proposed Finding is misleading, inaccurate, and incomplete insofar as it suggests Atlantic Dental Care was a buying group.

Record evidence demonstrates that Atlantic Dental Care was a DSO. (CCFF ¶¶ 575-576, 1045-1048). For all these reasons, the Proposed Finding should be disregarded.

1260. If Dr. Marshall had not deviated from his own definition, and instead had applied his own “methodology” consistently, he would have found a “structural break” by Benco in 2013 that would have proven the allegation of conspiracy to be false. (Marshall, Tr. 3395).

**Response to Proposed Finding No. 1260**

The Proposed Finding is misleading, incomplete, and vague insofar as it does not identify which definition Dr. Marshall is alleged to have deviated from. Additionally, the Proposed Finding is misleading, incomplete, and vague insofar as it does not identify the “methodology” to which the proposed finding is referring. And, the Proposed Finding is misleading, incomplete, and vague insofar as it does not identify with enough specificity the alleged structural break by Benco in 2013. Thus the Proposed Finding cannot be verified. The Proposed Finding is misleading, incomplete, vague, and inaccurate insofar as it suggests that there is no evidence of the

conspiracy by the Respondents not to discount to buying groups. Record evidence establishes a conspiracy by Benco, Schein, and Patterson not to discount to buying groups. (CCFF ¶¶ 474-1108).

C. **RESPONSES TO PROPOSED FINDINGS REGARDING “DR. MARSHALL MISINTERPRETED THE FACTS TO CREATE IMAGINARY ‘STRUCTURAL BREAKS’”**

**1. Schein’s Decision Not to Bid for the Business of Unified Smiles and the Termination of Its Agreement With Smile Source in 2011-2012 Did Not Constitute a “Structural Break”**

1261. Before 2011, Schein evaluated the opportunity to bid for buying group business on a case by case basis; sometimes Schein bid for buying group business, and sometimes Schein decided not to bid for buying group business. (Titas, Tr. 5192-94; RX2957 at 12-13).

**Response to Proposed Finding No. 1261**

Complaint Counsel has no specific response.

1262. Between 2011 and 2015, Schein evaluated the opportunity to bid for buying group business on a case by case basis; sometimes Schein bid for buying group business, and sometimes Schein decided not to bid for buying group business. (Titas, Tr. 5192-94; RX2957 at 12-13).

**Response to Proposed Finding No. 1262**

The Proposed Finding is misleading, incomplete, and contrary to the weight of evidence in this matter insofar as it suggests that between 2011 and 2015, Schein did not have a policy not to bid for the business of buying groups. Record evidence established that starting in 2011 and continuing at least through 2015, Schein had a policy not to bid for the business of or discount to buying groups, and Schein executives and employees communicated this policy. (CCFF ¶¶ 717-954).

1263. Dr. Marshall opined that Schein’s decision not to bid for the business of Unified Smiles in 2011 constituted a “structural break.” (CX7100 at 190, ¶ 428).

**Response to Proposed Finding No. 1263**

Complaint Counsel has no specific response.

1264. Dr. Marshall didn't know whether Schein said no to buying groups before Unified Smiles in 2011. (Marshall, Tr. 2949).

**Response to Proposed Finding No. 1264**

The Proposed Finding is misleading and incomplete in that it mischaracterizes Dr. Marshall's testimony about the buying group Unified Smiles. Dr. Marshall testified that "what was stated in Unified Smiles is that Schein does not do business with buying groups. That's different from just turning down Unified Smiles." (Marshall, Tr. 2949-2950). Dr. Marshall was referring to CX2062, a December 21, 2011 email in which Schein's Foley writes to Unified Smiles: "[U]nless 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." (CX7100 at 190 (¶428, n. 689) (Marshall Expert Report)).

1265. Dr. Marshall didn't review the entire record before 2011. (Marshall, Tr. 2950-2951).

**Response to Proposed Finding No. 1265**

Complaint Counsel has no specific response.

1266. [REDACTED]

**Response to Proposed Finding No. 1266**

The Proposed Finding is unsupported. Complaint Counsel notes that CX2548 is not in evidence in this matter. (JX00002 (Attachment 1) (Complaint Counsel's Exhibit List)). Additionally, Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. Dr. Marshall is Complaint Counsel's expert.

1267. Dr. Marshall ignored the instances between 2011 and 2015 when Schein bid for the business of buying groups. (Carlton, Tr. 5366-67).

**Response to Proposed Finding No. 1267**

The Proposed Finding is misleading and unsupported by the cited testimony. In the cited testimony, Dr. Carlton does not testify about instances that Dr. Marshall allegedly ignored. In this cited testimony, Dr. Carlton does not refer to Dr. Marshall or the Marshall Expert Report at all. The Proposed Finding is misleading, inaccurate, incomplete, and contrary to the weight of evidence insofar as it suggests that Schein was not a part of the conspiracy because it bid on some buying groups between 2011 and 2015. Indeed, record evidence clearly shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

1268. Even if Schein said no to some buying groups before Unified Smiles in 2011 and said yes to some buying groups after Unified Smiles in 2011, Dr. Marshall opined that Schein's statement that it would not bid for the business of Unified Smiles would be a structural change "in terms of the characterization that was offered by Schein as to why they were turning down Unified Smiles." (Marshall, Tr. 2950). But Dr. Marshall didn't know whether Schein articulated its reasons for turning down Unified Smiles differently than it articulated its reasons for turning down other buying groups before that. (Marshall, Tr. 2950).

#### **Response to Proposed Finding No. 1268**

The Proposed Finding is misleading, incomplete, and vague insofar as it does not include the "characterization" that Schein offered as to why they were turning down Unified Smiles. In the cited testimony, Dr. Marshall was referring to CX2062, a December 21, 2011 email in which Schein's Foley writes to Unified Smiles: "[U]nless 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.*" (CX7100 at 190 (¶428, n. 689) (Marshall Expert Report) (emphasis added)).

1269. Dr. Marshall hadn't reviewed the entire record before 2011, but he opined that Schein's statement that it would not bid for the business of Unified Smiles was a structural change merely because it was "the first piece of evidence that I have in my possession of that kind of communication from Schein to a buying group." (Marshall, Tr. 2950-2951).

**Response to Proposed Finding No. 1269**

The Proposed Finding is misleading, incomplete, and vague insofar as it relies on the phrase "that kind of communication" and does not include the text of the communication that Schein offered as to why they were turning down Unified Smiles. In the cited testimony, Dr. Marshall was referring to CX2062, a December 21, 2011 email in which Schein's Foley writes to Unified Smiles: "[U]nless 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.*" (CX7100 at 190 (¶428, n. 689) (Marshall Expert Report) (emphasis added)).

1270. Dr. Marshall's assertion that Schein's behavior at the beginning of the alleged conspiracy period constituted a structural break was "just wrong." (Carlton, Tr. 5372-5373).

**Response to Proposed Finding No. 1270**

The Proposed Finding is misleading, incomplete, and vague in that it relies on the phrase "just wrong." The Proposed Finding is misleading, inaccurate, incomplete, and contrary to the weight of evidence insofar as it suggests that Schein was not a part of the conspiracy because it bid on some buying groups between 2011 and 2015. Indeed, record evidence clearly shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).



1271. Schein's sales data indicate that there was no break. (Carlton, Tr. 5373-5374; *see also* RX2832 at 22).

**Response to Proposed Finding No. 1271**

The Proposed Finding is misleading, incomplete, and vague in that it relies on the phrase "there was no break" without indicating what this phrase means. To the extent that the Proposed Finding is suggesting that Schein did not change its policy over time of how it dealt with buying groups or that Schein was not a part of the conspiracy not to bid on buying groups, the Proposed Finding is misleading, incomplete, inaccurate, and contrary to the weight of the evidence. Indeed, record evidence clearly shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco's settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel's Post-Trial Brief, at Attachment C).

1272. Schein's sales data do not show that Schein's sales to buying groups were zero in the alleged conspiracy years 2013, 2014 and 2015. (Carlton, Tr. 5373-5374; Carlton, Tr. 5376-5379; *see also* RX2832 at 22).

**Response to Proposed Finding No. 1272**

The Proposed Finding is misleading, incomplete, irrelevant and contrary to the weight of evidence insofar as it suggests that Schein did not participate in the conspiracy not to bid on buying groups. Record evidence establishes that some buying group relationships and sales that occurred during the relevant period are either pre-existing, legacy relationships formed prior the conspiracy or those that were entered into after the conspiracy became difficult to maintain and Schein began competing for buying groups. (CCFF ¶¶ 440-444). Schein executives did not even know that some of these "legacy" buying groups were customers and referred to some as

“inherited messes.” (CX2287 at 001; CX2286 at 001). The Proposed Finding is also incomplete, inaccurate, and misleading to the extent that it relies on data from Dr. Carlton’s Table 1, which purports to show Schein sales to buying groups during the relevant period. (RX2832 at 022 (Table 1) (Carlton Expert Report)). In response to Dr. Carlton’s Table 1, Dr. Marshall explained that if sales for admitted non-buying groups and contested groups are removed from Table 1 in Dr. Carlton’s Expert Report, the total sales reported in that table would be reduced by more than 95 percent. (CCFF ¶ 2036). Dr. Marshall determined that, once sales for admitted non-buying groups and contested groups are removed from Dr. Carlton’s Table 1, the data show that Schein’s sales to dentists in buying groups decreased considerably from 2013 to 2015, followed by a significant increase from 2016 to 2017. (CCFF ¶ 2037). When Dr. Marshall removed Schein’s sales to the admitted non-buying groups and contested groups from Dr. Carlton’s Table 1, the pattern of Schein’s sales to buying groups is contrary to Schein’s representation that there was no change in its conduct during the conspiracy period and entirely consistent with a collusive agreement to avoid doing business with buying groups, as illustrated by Figure 3 in Dr. Marshall’s Rebuttal Report. (CX7101 at 034, Figure 3 (¶ 82) (Marshall Rebuttal Expert Report)). To summarize the results, Schein’s sales to dentists in buying groups decreased considerably from 2013 to 2015, followed by a significant increase from 2016 to 2017, which is consistent with Schein participation in the conspiracy. (CX7101 at 034, Figure 3 (¶ 82) (Marshall Rebuttal Expert Report)). *See also* Complaint Counsel’s Responses to Benco Proposed Findings No. 830 and 1271.

1273. Schein’s sales data indicate that Schein’s business with buying groups remained high, and in fact was even higher during the alleged conspiracy period than it was in the non-conspiratorial period. (Carlton, Tr. 5373-5374; *see also* RX2832 at 22).

**Response to Proposed Finding No. 1273**

The Proposed Finding is misleading, incomplete, irrelevant and contrary to the weight of evidence insofar as it suggests that Schein did not participate in the conspiracy not to bid on buying groups. Record evidence establishes that some buying group relationships and sales that occurred during the relevant period are either pre-existing, legacy relationships formed prior the conspiracy or those that were entered into after the conspiracy became difficult to maintain and Schein began competing for buying groups. (CCFF ¶¶ 440-444). Schein executives did not even know that some of these “legacy” buying groups were customers and referred to some as “inherited messes.” (CX2287 at 001; CX2286 at 001). The Proposed Finding is also incomplete, inaccurate, and misleading to the extent that it relies on data from Dr. Carlton’s Table 1, which purports to show Schein sales to buying groups during the relevant period. (RX2832 at 022 (Table 1) (Carlton Expert Report)). In response to Dr. Carlton’s Table 1, Dr. Marshall explained that if sales for admitted non-buying groups and contested groups are removed from Table 1 in Dr. Carlton’s Expert Report, the total sales reported in that table would be reduced by more than 95 percent. (CCFF ¶ 2036). Dr. Marshall determined that, once sales for admitted non-buying groups and contested groups are removed from Dr. Carlton’s Table 1, the data show that Schein’s sales to dentists in buying groups decreased considerably from 2013 to 2015, followed by a significant increase from 2016 to 2017. (CCFF ¶ 2037). When Dr. Marshall removed Schein’s sales to the admitted non-buying groups and contested groups from Dr. Carlton’s Table 1, the pattern of Schein’s sales to buying groups is contrary to Schein’s representation that there was no change in its conduct during the conspiracy period and entirely consistent with a collusive agreement to avoid doing business with buying groups, as illustrated by Figure 3 in Dr. Marshall’s Rebuttal Report. (CX7101 at 034, Figure 3 (¶ 82) (Marshall Rebuttal Expert Report)). To summarize the results, Schein’s sales to dentists in buying groups decreased considerably from 2013 to 2015, followed by a significant increase from 2016 to 2017,

which is consistent with Schein participation in the conspiracy. (CX7101 at 034, Figure 3 (¶ 82) (Marshall Rebuttal Expert Report). *See also* Complaint Counsel’s Responses to Benco Proposed Findings No. 830 and 1271.

1274. Dr. Marshall asserted that the end of the Schein-Smile Source relationship in early 2012 was a structural break. (CX7100 at 192, ¶ 434).

**Response to Proposed Finding No. 1274**

The Proposed Finding is misleading and contrary to the cited evidence insofar as it uses the word “asserted.” Rather, Dr. Marshall *observed* a structural break at the end of the Schein-Smile Source relationship in early 2012. (CX7100 at 192 (¶ 434) (Marshall Expert Report) (emphasis added)).

1275. In fact, Schein sought to continue its relationship with Smile Source in 2012.

**Response to Proposed Finding No. 1275**

The Proposed Finding is unsupported.

1276. Schein offered discounts to Smile Source in an effort to win Smile Source’s business.

**Response to Proposed Finding No. 1276**

The Proposed Finding is unsupported.

1277. Smile Source decided to discontinue its relationship with Schein.

**Response to Proposed Finding No. 1277**

The Proposed Finding is unsupported.

1278. In order to portray the end of the relationship as a “structural break,” Dr. Marshall asserted that Schein constructively ended the relationship with Smile Source by reducing the amounts of discounts and the services offered. (CX7100 at 193, ¶ 439).

**Response to Proposed Finding No. 1278**

The Proposed Finding is misleading in that it is not supported by the cited testimony. In paragraph 439 (Respondent's citation for this proposed finding), Dr. Marshall did not describe evidence of reduced discounts.

1279. Dr. Marshall's assertion that Schein terminated its relationship with Smile Source is contrary to the evidence.

**Response to Proposed Finding No. 1279**

The Proposed Finding is unsupported.

1280. Schein executives sought to continue Schein's relationship with Smile Source.

**Response to Proposed Finding No. 1280**

The Proposed Finding is unsupported.

1281. Schein offered discounts to Smile Source that were competitive and in line with the expectations of Smile Source representatives.

**Response to Proposed Finding No. 1281**

The Proposed Finding is unsupported.

1282. The data confirm that Schein's discounts to Smile Source were consistent in 2010, all four quarters of 2011, and the first quarter of 2012. (Carlton, Tr. 5380-5381).

**Response to Proposed Finding No. 1282**

The Proposed Finding is misleading, incomplete, and contrary to record evidence. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED], *see also*

CCFF ¶¶ 909-912). The Proposed Finding is not supported by the cited testimony as Dr. Carlton ignored the testimony of Goldsmith in preparing his report. Dr. Carlton admitted at trial that he

had not reviewed Goldsmith's deposition before he submitted his expert report. (Carlton, Tr. 5470).

1283. The data refute Dr. Marshall's assertion that Schein reduced its discounts in order to induce a change in its dealings with Smile Source. (Carlton, Tr. 5381-5382).

**Response to Proposed Finding No. 1283**

The Proposed Finding is misleading, incomplete, and contrary to record evidence. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED], *see also*

CCFF ¶¶ 909-912). The Proposed Finding is not supported by the cited testimony as Dr. Carlton ignored the testimony of Goldsmith in preparing his report. Dr. Carlton admitted at trial that he had not reviewed Goldsmith's deposition before he submitted his expert report. (Carlton, Tr. 5470).

1284. Schein executives and contemporaneous documents confirm that Smile Source terminated its relationship with Schein.

**Response to Proposed Finding No. 1284**

The Proposed Finding is unsupported.

**2. Benco's Decision To Partner With Cain Watters to Form Elite Dental Alliance Was Not a "Structural Break"**

**a. Benco Did Not Change Its Approach To Buying Groups**

1285. Since 1996, Benco had a policy of not doing business with buying groups that could not guarantee volume or help Benco reduce its costs to serve. (Cohen, Tr. 692-94).

**Response to Proposed Finding No. 1285**

The Proposed Finding is misleading, incomplete, inaccurate, and contrary to the weight of evidence in this matter that establishes that prior to 2011, Benco's policy of not doing business with buying groups rested on its belief that its competitors were not discounting to buying groups. Record evidence establishes that prior to 2011, Benco did not discount to buying groups because it believed neither Schein nor Patterson had yet "open[ed] this door." (CCFF ¶¶ 261, 266-268, *see also* CCFF ¶¶ 527-528). Record evidence irrefutably shows that Benco believed it would have been forced to discount to buying groups if its largest rivals began discounting to buying groups. (CCFF ¶¶ 261, 527). *See also* Complaint Counsel's Response to Benco Proposed Finding No. 934.

1286. Benco did not offer discounts to any buying groups between 1996 and 2011. (Cohen, Tr. 445-45).

**Response to Proposed Finding No. 1286**

The Proposed Finding is misleading and inaccurate in that the cited testimony does not support the proposed finding. The cited testimony contains no reference to the years between which Benco did not offer discounts to buying groups. The cited testimony is as follows:

"Q. And as part of that policy Benco does not sell or discount to buying groups; is that right?

A. Well, we sell to dentists who are members of buying groups. We don't offer a discount because a dentist is a member of a buying group." (Cohen, Tr. 445-446).

1287. Dr. Marshall understood that Benco had a policy of not dealing with buying groups before 2011. (Marshall, Tr. 3391).

**Response to Proposed Finding No. 1287**

Complaint Counsel has no specific response.

1288. With the possible exception of Atlantic Dental Care, Benco did not offer discounts to any buying groups between 2011 and 2015. (Cohen, Tr. 444-45; 451; 570).

**Response to Proposed Finding No. 1288**

The Proposed Finding is misleading, inaccurate, and incomplete insofar as it suggests Atlantic Dental Care was a buying group. Record evidence demonstrates that Atlantic Dental Care was a DSO and Benco understood Atlantic Dental Care was a DSO when Benco bid on Atlantic Dental Care's business. (CCFF ¶¶ 575-576, 1045-1048).

1289. Dr. Marshall continued to observe Benco declining to offer discounts to buying groups during the time period from 2011 to 2015. (Marshall, Tr. 3392).

**Response to Proposed Finding No. 1289**

Complaint Counsel has no specific response.

1290. Apart from its arrangement with Cain Watters to form Elide Dental Alliance, Dr. Marshall never observed Benco dealing with a buying group after 2015. (Marshall, Tr. 3398).

**Response to Proposed Finding No. 1290**

The Proposed Finding is misleading, incomplete, and contrary to evidence in this matter insofar as [REDACTED]

[REDACTED]

[REDACTED].

1291. Benco's arrangement with Cain Watters to form Elite Dental Alliance was consistent with Benco's unilateral business objectives, its policy with respect to buying groups, and its course of behavior from 1996 to the present. (Cohen, Tr. 445; 451; 816-24; 863).

**Response to Proposed Finding No. 1291**

The Proposed Finding is misleading, incomplete, and vague in that it relies on the phrase "business objectives" without identifying what those were. The Proposed Finding is also misleading and incomplete insofar as it suggests there is no evidence of a conspiracy between Benco and the other Respondents to not do business with buying groups. Record evidence establishes this conspiracy. (CCFF ¶¶ 269-393, 474-1158).



- b. Dr. Marshall’s Claim of a “Structural Break” Ignored the Unique Structure and Terms of Elite Dental Alliance That Set It Apart from Other Buying Groups and Made It Worthwhile For Benco To Agree With Cain Watters to Form EDA

1292. Dr. Marshall concluded that Benco changed its behavior with respect to buying groups based solely on Benco’s arrangement with Cain Watters to form Elite Dental Alliance. (Marshall, Tr. 3397-3399; Marshall, Tr. 3405-3406).

**Response to Proposed Finding No. 1292**

The Proposed Finding is misleading and incomplete insofar as it suggests that Benco’s decision to partner with the Elite Dental Alliance buying group was not a break from Benco’s previous policy of not doing business with buying groups. Record evidence shows that post Benco’s April 2015 settlement of an antitrust investigation into its refusal to attend the TDA annual meeting by entering an Agreed Final Judgment and Stipulated Injunction with the Texas Attorney General’s Office, Benco was under order to log its communications with other distributors and enjoined Benco agreeing with competitors about not doing business with certain customers. (CCFF ¶¶ 1159-1162). After this settlement, in July of 2015, Cohen’s emails show he was considering partnering with the Elite Dental Alliance, and ultimately partnered with Elite, a buying group. (CCFF ¶¶ 1165, 1367-1387). The Proposed Finding is also misleading insofar as [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

1293. Elite Dental Alliance was newly formed in 2016. (Cohen, Tr. 823).

**Response to Proposed Finding No. 1293**

The Proposed Finding is misleading, incomplete, and relies on the vague term “newly formed.”

The Proposed Finding is misleading and incomplete insofar as it suggests Benco had not been in

discussions with Cain Watters about forming a buying group since at least June 2015. (CCFF ¶¶ 1165, 1367).

1294. Dr. Marshall acknowledged that Elite Dental Alliance was newly formed in 2016. (Marshall, Tr. 3397).

**Response to Proposed Finding No. 1294**

The Proposed Finding is misleading, incomplete, and relies on the vague term “newly formed.” Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to the testimony of an expert for a proposition of fact.

1295. Although Benco could not have changed its conduct with respect to Elite Dental Alliance because it was a brand-new entity, Dr. Marshall concluded that supplying a buying group was a change in Benco’s conduct. (Marshall, Tr. 3397).

**Response to Proposed Finding No. 1295**

The Proposed Finding is misleading and incomplete insofar as it suggests Benco’s partnership with the buying group Elite Dental Alliance was not a change in conduct for Benco. Record evidence establishes that for several years up until approximately mid-2015, Benco refused to do business with and/or negotiate with buying groups. (CCFF ¶¶ 394-431). Record evidence establishes that post its settlement of an antitrust investigation with the Texas Attorney General, Benco was considering partnering with the Elite Dental Alliance, and ultimately partnered with Elite, a buying group. (CCFF ¶¶ 1159-1162, 1165, 1367-1387).

1296. Dr. Marshall did not undertake any investigation to determine if Elite Dental Alliance was representative of buying groups in general. (Marshall, Tr. 3399).

**Response to Proposed Finding No. 1296**

The Proposed Finding is irrelevant. Record evidence establishes that Elite Dental Alliance was a buying group. (CCFF ¶ 1368). Record evidence also establishes that Elite was the first buying group that Benco partnered with. (CCFF ¶ 1369).

1297. The Elite Dental Alliance arrangement had critical attributes that, from Benco's perspective, set it apart from other buying groups and resolved many of Benco's concerns about doing business with buying groups. (Cohen, Tr. 818-23).

**Response to Proposed Finding No. 1297**

The Proposed Finding is misleading, incomplete, and relies on the vague term "critical attributes." The Proposed Finding does not identify what are the alleged "critical attributes," and the testimony cited to support this proposed finding also does not include the term "critical attributes. Thus the Proposed Finding should be disregarded as it is misleading, incomplete, vague, and unverifiable.

1298. From an economic perspective, the specific features of the Elite Dental Alliance arrangement made it fundamentally more attractive than most buying groups. (J. Johnson, Tr. 4862).

**Response to Proposed Finding No. 1298**

The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that Dr. Johnson did any analyses to compare the Elite Dental Alliance with other offers Benco received from buying groups. Dr. Johnson admitted that he did not review any proposals from buying groups to Benco other than the Elite Dental Alliance (EDA) proposal. (J. Johnson, Tr. 4898-4899, RX2965 (J. Johnson, Dep. at 184)). Thus Dr. Johnson had no basis for stating that the specific features of the EDA arrangement made it fundamentally more attractive than most buying groups. Dr. Johnson also admitted that he did no econometric analysis or other type of statistical analysis of the Elite Dental Alliance. (J. Johnson, Tr. 4898). Thus the Proposed Finding should be disregarded.

1299. From an economic perspective, the specific features of the Elite Dental Alliance arrangement made it a unique business opportunity for Benco. (J. Johnson, Tr. 4860-4862).

**Response to Proposed Finding No. 1299**

The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that Dr. Johnson did any analyses to compare the Elite Dental Alliance with other offers Benco received

from buying groups and make an informed opinion that the Elite Dental Alliance was a unique opportunity for Benco. Dr. Johnson admitted that he did not review any proposals from buying groups to Benco other than the Elite Dental Alliance (EDA) proposal. (J. Johnson, Tr. 4898-4899, RX2965 (J. Johnson, Dep. at 184)). Thus Dr. Johnson had no basis for stating that the Elite Dental Alliance was a unique business opportunity for Benco. Dr. Johnson also admitted that he did no econometric analysis or other type of statistical analysis of the Elite Dental Alliance. (J. Johnson, Tr. 4898). Thus the Proposed Finding should be disregarded.

1300. The unique attributes of the arrangement regarding Elite Dental Alliance made Benco willing to enter into the agreement with Cain Watters. (Cohen, Tr. 469; 820-23).

#### **Response to Proposed Finding No. 1300**

The Proposed Finding is misleading, incomplete, and relies on the vague term “unique attributes.” The Proposed Finding is also misleading, incomplete, and inaccurate insofar as it suggests that Benco had evaluated other buying group opportunities. Benco had a longstanding no buying group policy. (CCFF ¶¶ 132, 395). This policy applied to all buying groups, regardless of the services the group provided. (CCFF ¶ 396 (quoting 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.”) (emphasis in original))).

1301. The specific characteristics of Elite Dental Alliance are pretty important if one is going to try to determine whether doing business with it represented a change in behavior. (J. Johnson, Tr. 4860-4862).

#### **Response to Proposed Finding No. 1301**

The Proposed Finding is misleading, incomplete, and vague in that it relies on the phrase “specific characteristics” without identifying what are those characteristics. Thus the Proposed Finding is not verifiable. The Proposed Finding is not supported by the cited testimony and opinions of Dr. Johnson. Dr. Johnson admitted that he did not review any proposals from buying

groups to Benco other than the Elite Dental Alliance (EDA) proposal. (J. Johnson, Tr. 4898-4899, RX2965 (J. Johnson, Dep. at 184)). Thus Dr. Johnson had no basis for testifying that the Elite Dental Alliance had special characteristics or was a unique business opportunity for Benco. Dr. Johnson also admitted that he did no econometric analysis or other type of statistical analysis of the Elite Dental Alliance. (J. Johnson, Tr. 4898).

1302. Dr. Marshall was unaware of, forgot, or chose to ignore critical attributes that set Elite Dental Alliance apart from other buying groups. (Marshall, Tr. 3399-3406).

**Response to Proposed Finding No. 1302**

The Proposed Finding is misleading, incomplete, inaccurate, and mischaracterizes Dr. Marshall's testimony. In the testimony cited for support of this proposed finding, Respondent's Counsel asked Dr. Marshall repeated questions about Cohen's testimony, and not Dr. Marshall's opinions on the Elite Dental Alliance. For example, Respondent's attorney asked "Q. So in fact, I'm going to be trying to limit my questions to what Mr. Cohen discussed here in court. So you're aware then that Mr. Cohen did testify about unique aspects to the arrangement between Benco and Elite Dental Alliance; right?" and Dr. Marshall answered "A. Right. . . ." (Marshall, Tr. 3400). Moreover, in his Expert Report, Dr. Marshall presented a detailed view of the Elite Dental Alliance and Benco documents discussing the buying group. [REDACTED]

1303. Benco partnered with its trusted partner Cain Watters to form Elite Dental Alliance. (Cohen, Tr. 814-16).

**Response to Proposed Finding No. 1303**

The Proposed Finding is misleading, incomplete, and relies on the vague term "trusted." In the testimony cited to support this proposed finding, Cohen did not use the word "trusted." Instead, Cohen testified that the Elite Dental Alliance was "a joint venture between Cain Watters and Benco" and he identified Cain Waters as "the largest financial services group dealing with

dentists and dental practices, independent dentists and dental practices.” (Cohen, Tr. 814).

Cohen also testified that Benco had a prior relationship with Cain Waters and that both groups provided referrals to the other. (Cohen, Tr. 815).

1304. Dr. Marshall was unaware of, forgot, or chose to ignore that Benco partnered with Cain Watters to form Elite Dental Alliance. (Marshall, Tr. 3400).

**Response to Proposed Finding No. 1304**

The Proposed Finding is misleading, incomplete, inaccurate, and mischaracterizes Dr. Marshall’s testimony. In the testimony cited for support of this proposed finding, Respondent’s Counsel asked Dr. Marshall repeated questions about Cohen’s testimony, and not about Dr. Marshall’s knowledge of the Elite Dental Alliance. For example, Respondent’s attorney asked “Q. So in fact, I’m going to be trying to limit my questions to what Mr. Cohen discussed here in court. So you’re aware then that Mr. Cohen did testify about unique aspects to the arrangement between Benco and Elite Dental Alliance; right?” and Dr. Marshall answered “A. Right. . . .”

(Marshall, Tr. 3400). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

1305. Benco viewed Elite Dental Alliance as equivalent to a joint venture between Cain Watters and Benco. (Cohen, Tr. 814-16).

**Response to Proposed Finding No. 1305**

Complaint Counsel has no specific response.

1306. The partnership with Cain Watters, which could encourage customers to purchase from Benco during their annual financial counseling, provided Benco with additional assurance that EDA could actually drive compliance. (J. Johnson, Tr. 4860-4862).

**Response to Proposed Finding No. 1306**

Complaint Counsel notes that, contrary to this Court’s order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. J. Johnson refers to Dr. J. Johnson, Benco’s expert in this matter.

1307. Dr. Marshall was unaware of, forgot, or chose to ignore that Elite Dental Alliance was equivalent to a joint venture between Cain Watters and Benco. (Marshall, Tr. 3401).

**Response to Proposed Finding No. 1307**

The Proposed Finding is misleading, incomplete, inaccurate, and mischaracterizes Dr. Marshall’s testimony. In the testimony cited for support of this proposed finding, Respondent’s Counsel clearly asked Dr. Marshall about Cohen’s testimony about the Elite Dental Alliance, and not about Dr. Marshall’s knowledge. Respondent’s attorney asked “Q. Okay. Do you recall that [Cohen] said it would be appropriate to call Elite Dental Alliance a joint venture between Cain Watters and Benco?” and Dr. Marshall answered “A. Yeah, I’d have to review that, too. I don’t recall that.” (Marshall, Tr. 3401). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

1308. The membership of Elite Dental Alliance was limited to practices that were clients of Cain Watters or had more than \$2 million in gross revenues. (Cohen, Tr. 818-22).

**Response to Proposed Finding No. 1308**

Complaint Counsel has no specific response.

1309. From an economic perspective, the fact that Elite Dental Alliance members were larger practices addressed Benco’s concerns regarding the cost to serve individual members of most buying groups. (J. Johnson, Tr. 4860-4862). It put Benco in a better position to be able to negotiate discounts from manufacturers. (J. Johnson, Tr. 4862).

**Response to Proposed Finding No. 1309**

Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for propositions of fact. J. Johnson refers to Dr. Johnson, Benco's expert in this matter. The second sentence of the Proposed Finding is vague in that it relies on the phrase "better position." The Proposed Finding is misleading and not supported by the cited testimony and opinions of Dr. Johnson insofar as it suggests that Elite Dental Alliance was a unique buying group opportunity. Dr. Johnson admitted that he did not review any proposals from buying groups to Benco other than the Elite Dental Alliance (EDA) proposal. (J. Johnson, Tr. 4898-4899, RX2965 (J. Johnson, Dep. at 184)). Thus Dr. Johnson had no basis for testifying that the Elite Dental Alliance had special characteristics or was a unique business opportunity for Benco. Dr. Johnson also admitted that he did no econometric analysis or other type of statistical analysis of the Elite Dental Alliance. (J. Johnson, Tr. 4898).

1310. Dr. Marshall was unaware of, forgot, or chose to ignore that the membership of Elite Dental Alliance would be limited to practices that were clients of Cain Watters or had more than \$2 million in gross revenues. (Marshall, Tr. 3401).

**Response to Proposed Finding No. 1310**

The Proposed Finding is misleading, incomplete, inaccurate, and mischaracterizes Dr. Marshall's testimony. In the testimony cited for support of this proposed finding, Respondent's Counsel clearly asked Dr. Marshall about Cohen's testimony about the Elite Dental Alliance, and not about Dr. Marshall's knowledge. Respondent's attorney asked "Q. Well, he did testify that the membership of Elite Dental Alliance would be limited to practices that were clients of Cain Watters or had more than two million in gross revenues; correct?" and Dr. Marshall answered "A. I don't recall that right now." (Marshall, Tr. 3401).

1311. Benco was entitled to 50 percent of any profits earned by Elite Dental Alliance. (Cohen, Tr. 816).

**Response to Proposed Finding No. 1311**



Complaint Counsel has no specific response.

1312. Dr. Marshall was unaware of, forgot, or chose to ignore that Benco was entitled to 50 percent of any profits earned by Elite Dental Alliance. (Marshall, Tr. 3401-3402).

**Response to Proposed Finding No. 1312**

The Proposed Finding is misleading, incomplete, inaccurate, and mischaracterizes Dr. Marshall's testimony. In the testimony cited for support of this proposed finding, Respondent's Counsel clearly asked Dr. Marshall about Cohen's testimony about the Elite Dental Alliance, and not about Dr. Marshall's knowledge. Respondent's attorney asked "Q. Okay. Mr. Cohen also testified that Elite Dental Alliance agreed that if they earned profits, those profits will be split 50/50 with Benco; right?" and Dr. Marshall answered "A. I don't recall that right now." (Marshall, Tr. 3401). Moreover, in his Expert Report, Dr. Marshall clearly discusses Benco's intention to be more than just an "interchangeable vendor" to the Elite Dental Alliance. Dr. Marshall wrote: "Benco expressed to [Cain Waters] that Benco wanted to be a partner with [Cain Waters], rather than 'an interchangeable vendor.'" (CX7100 at 196 (¶453) (Marshall Expert Report)).

1313. Benco was the sole distributor to Elite Dental Alliance. (Cohen, Tr. 817).

**Response to Proposed Finding No. 1313**

The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that there are no other vendor partners of the Elite Dental Alliance. At the cited testimony, Cohen testifies that while Benco is the "exclusive dental distributor with EDA, . . . there are direct sellers of products like Brasseler, which is a division of Henry Schein, that is actually a vendor partner of EDA's." (Cohen, Tr. 817).

1314. From an economic perspective, Benco knew that it was the exclusive distributor to Elite Dental Alliance, so it resolved Benco's concern that a buying group could set up another favored distributor. (J. Johnson, Tr. 4860-4862).

**Response to Proposed Finding No. 1314**

The Proposed Finding is unsupported insofar as it states that Benco's concern that a buying group could set up another favored distributor was resolved. There is no support for that proposition in the cited testimony. Also, as to the proposed finding that Benco was the exclusive distributor to Elite Dental Alliance, Complaint Counsel notes that, contrary to this Court's order, Respondent is improperly citing to the testimony of an expert for a proposition of fact. J. Johnson refers to Dr. Johnson, Benco's expert in this matter.

1315. Dr. Marshall remembered, but apparently chose to ignore, that Benco was the sole distributor to Elite Dental Alliance. (Marshall, Tr. 3402).

**Response to Proposed Finding No. 1315**

The Proposed Finding is misleading, incomplete, inaccurate, and mischaracterizes Dr. Marshall's testimony. In the testimony cited for support of this proposed finding, Respondent's Counsel clearly asked Dr. Marshall about Cohen's testimony about the Elite Dental Alliance, and not about whether Dr. Marshall ignored a fact. Respondent's attorney asked "Q. Mr. Cohen also testified that Elite Dental Alliance agreed that Benco would be the sole dental distributor to the group; correct?" and Dr. Marshall answered "A. That's right." (Marshall, Tr. 3402). There is no support for the proposed finding that Dr. Marshall "apparently chose to ignore" that Benco was the sole distributor. Thus the Proposed Finding should be disregarded.

1316. Elite Dental Alliance members had to satisfy minimum volume commitments to qualify for discounts from Benco. (Cohen, Tr. 468; 817).

**Response to Proposed Finding No. 1316**

The Proposed Finding is misleading, inaccurate, and incomplete insofar as it suggests that Elite Dental Alliance members are required to purchase from Benco. There are no purchase requirements; a dentist can choose not to buy from Benco and still be a member of the Elite Dental Alliance. (Cohen, Tr. 467-468).

1317. From an economic perspective, Elite Dental Alliance's minimum purchase requirements in order to qualify for a discount addressed Benco's concerns regarding the absence of minimum volume guarantees with most buying groups. (J. Johnson, Tr. 4860-4862). Benco knew that it would have guaranteed volume for the discounts it gave. (J. Johnson, Tr. 4862).

**Response to Proposed Finding No. 1317**

The Proposed Finding is misleading, inaccurate, and incomplete insofar as it suggests that Elite Dental Alliance members are required to purchase from Benco. There are no purchase requirements; a dentist can choose not to buy from Benco and still be a member of the Elite Dental Alliance. (Cohen, Tr. 467-468). Dr. Johnson admitted that a dentist could still be a member of Elite Dental Alliance and not make any purchases from Benco. (RX2965 (J. Johnson, Dep. at 171)).

1318. Dr. Marshall was unaware of, forgot, or chose to ignore that Elite Dental Alliance members had to satisfy minimum volume commitments to qualify for discounts from Benco. (Marshall, Tr. 3402).

**Response to Proposed Finding No. 1318**

The Proposed Finding is misleading, incomplete, inaccurate, and mischaracterizes Dr. Marshall's testimony. In the testimony cited for support of this proposed finding, Respondent's Counsel clearly asked Dr. Marshall about Cohen's testimony about the Elite Dental Alliance, and not about Dr. Marshall's knowledge. Respondent's attorney asked "Q. Okay. Mr. Cohen also testified that the dentist members of Elite Dental Alliance must make and satisfy minimum volume commitments to qualify for discounts from Benco; right?" and Dr. Marshall answered "A. I don't recall that" meaning Cohen's testimony. (Marshall, Tr. 3402).

1319. Benco had a say in the selection of direct manufacturers that were included in the arrangement. (Cohen, Tr. 817; 820-21).

**Response to Proposed Finding No. 1319**

Complaint Counsel has no specific response.

1320. From an economic perspective, Benco actually had some control over the development of the program, which helped set it apart from other buying groups. (J. Johnson, Tr. 4860-4862).

**Response to Proposed Finding No. 1320**

The Proposed Finding is misleading, incomplete, and contradicted by other evidence in this matter insofar as it suggests that Dr. Johnson compared the Elite Dental Alliance group to other buying group proposals that Benco received. Dr. Johnson admitted that he did not review any proposals from buying groups to Benco other than the Elite Dental Alliance (EDA) proposal. (J. Johnson, Tr. 4898-4899, RX2965 (J. Johnson, Dep. at 184)). Additionally, Dr. Johnson admitted that he did no econometric analysis or other type of statistical analysis of the Elite Dental Alliance. (J. Johnson, Tr. 4898). And, Dr. Johnson does not recall if he saw or if Benco did a break-even profitability analysis of the EDA opportunity. (RX2965 (J. Johnson, Dep. at 165)).

1321. Dr. Marshall was unaware of, forgot, or chose to ignore that Benco had a say in the selection of direct manufacturers that were included in the arrangement. (Marshall, Tr. 3402).

**Response to Proposed Finding No. 1321**

The Proposed Finding is misleading, incomplete, inaccurate, and mischaracterizes Dr. Marshall's testimony. In the testimony cited for support of this proposed finding, Respondent's Counsel clearly asked Dr. Marshall about Cohen's testimony about the Elite Dental Alliance, and not about Dr. Marshall's knowledge. Respondent's attorney asked "Q. Okay. Mr. Cohen testified that Benco has a say in the selection of direct manufacturers that are included in the arrangement; right?" and Dr. Marshall answered "A. I don't recall that" meaning Cohen's testimony. (Marshall, Tr. 3402).

1322. Benco believed that the specific attributes of the Elite Dental Alliance arrangement made it more likely that members of Elite Dental Alliance would comply with the program and Benco would actually realize incremental revenue from the arrangement. (Cohen, Tr. 463; 818-23).

**Response to Proposed Finding No. 1322**

The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that the only buying group from which Benco could have realized incremental revenue was the Elite Dental Alliance. Benco had a longstanding no buying group policy. (CCFF ¶¶ 132, 395). This policy applied to all buying groups, regardless of the services the group provided. (CCFF ¶ 396 (quoting 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.”) (emphasis in original))).

1323. From an economic perspective, Elite Dental Alliance was a different type of organization which addressed many of Benco’s concerns about the buying group model. (J. Johnson, Tr. 4863-4864).

#### **Response to Proposed Finding No. 1323**

The Proposed Finding is misleading, incomplete, inaccurate, vague, and unsupported insofar as it suggests that that the Elite Dental Alliance was different from other buying groups. Dr. Johnson, whose testimony is cited as support for this proposed finding, admitted that he not review any proposals from buying groups to Benco other than the Elite Dental Alliance (EDA) proposal. (J. Johnson, Tr. 4898-4899, RX2965 (J. Johnson, Dep. at 184)). Additionally, Dr. Johnson admitted that he did no econometric analysis or other type of statistical analysis of the Elite Dental Alliance. (J. Johnson, Tr. 4898). And, Dr. Johnson does not recall if he saw or if Benco did a break-even profitability analysis of the EDA opportunity. (RX2965 (J. Johnson, Dep. at 165)).

1324. Dr. Marshall was unaware of, forgot, or chose to ignore Mr. Chuck Cohen’s testimony that the specific attributes of the Elite Dental Alliance arrangement made it more likely that members of Elite Dental Alliance would comply with the program and Benco would actually realize incremental revenue from the arrangement. (Marshall, Tr. 3403).

#### **Response to Proposed Finding No. 1324**

The Proposed Finding is irrelevant and should be disregarded. It is not relevant to the allegations in this matter whether or not Dr. Marshall, while testifying at trial, recalled another and prior

witness' trial testimony. Dr. Marshall had formed his opinions and submitted his Expert Report and Rebuttal Expert Report before Cohen testified at trial.

1325. In Benco's view, the specific attributes of Elite Dental Alliance made it more like an integrated entity than a buying club. (Cohen, Tr. 818-22).

**Response to Proposed Finding No. 1325**

The Proposed Finding is misleading, incomplete, and vague insofar as the term "integrated entity" is not defined. It cannot be determined from the text of this Proposed Finding whether the Respondent means an integration between Benco and Cain Waters and between Elite Dental Alliance and the dentists' offices or between the dentists' offices themselves, or some other integration. Additionally, the Proposed Finding is misleading and unsupported by the cited testimony in that Cohen never used the term "integrated" in his testimony and he was not asked a question with the word "integrated" in it. (Cohen, Tr. 818-822). Thus the Proposed Finding should be disregarded.

1326. From an economic perspective, the specific attributes of the Elite Dental Alliance arrangement avoided many of the problems that the typical buying group model had for Benco. (J. Johnson, Tr. 4862).

**Response to Proposed Finding No. 1326**

The Proposed Finding is misleading, incomplete, inaccurate, vague, and unsupported insofar as it suggests that that the Elite Dental Alliance was different from other buying groups, or that Dr. Johnson had evaluated the "typical buying group" models that had approached Benco in the past. Dr. Johnson, whose testimony is cited as support for this proposed finding, admitted that he not review any proposals from buying groups to Benco other than the Elite Dental Alliance (EDA) proposal. (J. Johnson, Tr. 4898-4899, RX2965 (J. Johnson, Dep. at 184)). Additionally, Dr. Johnson admitted that he did no econometric analysis or other type of statistical analysis of the Elite Dental Alliance. (J. Johnson, Tr. 4898). And, Dr. Johnson does not recall if he saw or if

Benco did a break-even profitability analysis of the EDA opportunity. (RX2965 (J. Johnson, Dep. at 165)). The Proposed Finding is misleading and incomplete insofar as it suggests that Benco's policy against buying groups was not a strict no buying groups policy. Benco had a longstanding no buying group policy. (CCFF ¶¶ 132, 395). This policy applied to all buying groups, regardless of the services the group provided. (CCFF ¶¶ 396 (quoting 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.")) (emphasis in original))).

1327. Dr. Marshall was unaware of, forgot, or chose to ignore Mr. Chuck Cohen's testimony that the specific attributes of Elite Dental Alliance made it more like an integrated entity than a buying club. (Marshall, Tr. 3403-3404).

**Response to Proposed Finding No. 1327**

The Proposed Finding is irrelevant and should be disregarded. It is not relevant to the allegations in this matter whether or not Dr. Marshall, while testifying at trial, recalled another and prior witness' trial testimony. Dr. Marshall had formed his opinions and submitted his Expert Report and Rebuttal Expert Report before Cohen testified at trial.

1328. Dr. Marshall claimed that he relied on Benco's view that Elite Dental Alliance was a buying club, but he paid no attention to Mr. Cohen's testimony that he viewed Elite Dental Alliance more like an integrated entity than a buying club. (Marshall, Tr. 3404).

**Response to Proposed Finding No. 1328**

The Proposed Finding is misleading, vague, incomplete, and inaccurate insofar as it suggests that Cohen testified that he viewed Elite Dental Alliance more like an "integrated entity" than a buying club. Cohen gave no such testimony: Cohen never used the term "integrated" in his testimony and he was not asked a question with the word "integrated" in it. (Cohen, Tr. 818-822). Additionally, the Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that the Elite Dental Alliance was not a buying group. Record evidence establishes that the Elite Dental Alliance was a buying group. (CCFF ¶¶ 1368).

1329. Dr. Marshall was unable to identify a single buying group that offered terms similar to those of Elite Dental Alliance. (Marshall, Tr. 3404).

**Response to Proposed Finding No. 1329**

The Proposed Finding is misleading, vague, and incomplete in that it does not specify what terms it is referring to. The Proposed Finding is also misleading, inaccurate, and incomplete insofar as it suggests that Dr. Marshall did not study other buying groups. For one example, Dr. Marshall in his Expert Report did present a December 2015 email from Cohen (CX1218), which contains “Case Study: Elite Dental Alliance.” (CX7100 at 141 (¶340) (Marshall Expert Report)). In the case study, Cohen compares the proposal from Cain Waters for the Elite Dental Alliance with the Kois proposal to Benco the prior year. Cohen wrote:

“Last summer, CWA, with 1500 active clients, approached us about becoming a vendor for Elite Dental Alliance, a GPO that they were starting. They explained that their clients, who are concerned/frightened about competing with corporate dental chains (Aspen, Heartland), have pushed them to create a GPO that delivers discounts on the products and services they purchase every day. Also, like Kois, CWA is looking for ways to add more client value. CWA explained that, while Benco is their first choice for a vendor partner, they will go elsewhere if we declined the opportunity. It was a conversation similar to the one I had with Dr. Kois in 2014 that led to his partnering with Burkhardt on their GPO.” (CX1218 at 003).

1330. Dr. Marshall has no basis to opine that Benco’s dealings with respect to Elite Dental Alliance represented a “structural break” if he didn’t know the salient features that mattered for purposes of doing the assessment. (J. Johnson, Tr. 4863).

**Response to Proposed Finding No. 1330**

The Proposed Finding is misleading, incomplete, and vague insofar as it relies on the term “salient features” but does not identify what it means by this. The Proposed finding is argumentative and not appropriate for a factual finding. The Proposed Finding is unsupported by Dr. Johnson’s testimony or opinions insofar as it suggests that Dr. Johnson compared the Elite Dental Alliance group to other buying group proposals that Benco received and has a basis to testify that Elite was different from other buying groups. Dr. Johnson admitted that he did not



review any proposals from buying groups to Benco other than the Elite Dental Alliance (EDA) proposal. (J. Johnson, Tr. 4898-4899, RX2965 (J. Johnson, Dep. at 184)). Additionally, Dr. Johnson admitted that he did no econometric analysis or other type of statistical analysis of the Elite Dental Alliance. (J. Johnson, Tr. 4898). And, Dr. Johnson does not recall if he saw or if Benco did a break-even profitability analysis of the EDA opportunity. (RX2965 (J. Johnson, Dep. at 165)).

1331. Dr. Marshall failed to consider the full factual story and failed to understand how Elite Dental Alliance was different from other buying groups. (J. Johnson, Tr. 4858-4859).

**Response to Proposed Finding No. 1331**

The Proposed Finding is misleading, incomplete, and vague insofar as it relies on the phrase “full factual story.” The Proposed Finding is misleading and unsupported by the cited testimony insofar as it does not cite to Dr. Marshall or the Marshall report for a claim about Dr. Marshall. The Proposed Finding is misleading, incomplete, and contradicted by other evidence in this matter insofar as it suggests that Dr. Johnson compared the Elite Dental Alliance group to other buying group proposals that Benco received and has a basis to testify that Elite was different from other buying groups. Dr. Johnson admitted that he did not review any proposals from buying groups to Benco other than the Elite Dental Alliance (EDA) proposal. (J. Johnson, Tr. 4898-4899, RX2965 (J. Johnson, Dep. at 184)). Additionally, Dr. Johnson admitted that he did no econometric analysis or other type of statistical analysis of the Elite Dental Alliance. (J. Johnson, Tr. 4898). And, Dr. Johnson does not recall if he saw or if Benco did a break-even profitability analysis of the EDA opportunity. (RX2965 (J. Johnson, Dep. at 165)).

1332. Benco’s partnership with Cain Watters to form Elite Dental Alliance was consistent with Benco’s value proposition. (J. Johnson, Tr. 4862).

**Response to Proposed Finding No. 1332**

The Proposed Finding is misleading, incomplete, and vague insofar as it relies on the word “consistent” and the phrase “value proposition.” The Proposed Finding is misleading, incomplete, and contradicted by other evidence in this matter insofar as it suggests that Dr. Johnson compared the Elite Dental Alliance group to other buying group proposals that Benco received and has a basis to testify whether other buying groups were not consistent with Benco’s value proposition. Dr. Johnson admitted that he did not review any proposals from buying groups to Benco other than the Elite Dental Alliance (EDA) proposal. (J. Johnson, Tr. 4898-4899, RX2965 (J. Johnson, Dep. at 184)). Additionally, Dr. Johnson admitted that he did no econometric analysis or other type of statistical analysis of the Elite Dental Alliance. (J. Johnson, Tr. 4898). And, Dr. Johnson does not recall if he saw or if Benco did a break-even profitability analysis of the EDA opportunity. (RX2965 (J. Johnson, Dep. at 165)).

1333. Benco’s partnership with Cain Watters to form Elite Dental Alliance did not represent a change in Benco’s economic behavior. (J. Johnson, Tr. 4860).

**Response to Proposed Finding No. 1333**

The Proposed Finding is misleading and vague insofar as it relies on the phrase “economic behavior.” The Proposed Finding is misleading and incomplete insofar as it suggests Benco’s partnership with the buying group Elite Dental Alliance was not a change in conduct for Benco. Record evidence establishes that for several years up until approximately mid-2015, Benco refused to do business with and/or negotiate with buying groups. (CCFF ¶¶ 394-431). Record evidence establishes that post its settlement of an antitrust investigation with the Texas Attorney General, Benco was considering partnering with the Elite Dental Alliance, and ultimately partnered with Elite, a buying group. (CCFF ¶¶ 1159-1162, 1165, 1367-1387). Additionally, the Proposed Finding is misleading, incomplete, and contradicted by other evidence in this matter insofar as it suggests that Dr. Johnson compared the Elite Dental Alliance group to other buying

group proposals that Benco received and has a basis to testify that Elite was different from other buying groups. Dr. Johnson admitted that he did not review any proposals from buying groups to Benco other than the Elite Dental Alliance (EDA) proposal. (J. Johnson, Tr. 4898-4899, RX2965 (J. Johnson, Dep. at 184)). Additionally, Dr. Johnson admitted that he did no econometric analysis or other type of statistical analysis of the Elite Dental Alliance. (J. Johnson, Tr. 4898). And, Dr. Johnson does not recall if he saw or if Benco did a break-even profitability analysis of the EDA opportunity. (RX2965 (J. Johnson, Dep. at 165)).

1334. Dr. Marshall's assertion that Benco's partnership with Cain Watters to form Elite Dental Alliance constituted a "structural break" with respect to Benco's dealings with buying groups in general "just has it wrong." (J. Johnson, Tr. 4863-4864).

#### **Response to Proposed Finding No. 1334**

The Proposed Finding is misleading, misleading, and vague insofar as it relies on the quoted phrase "just has it wrong." The Proposed Finding appears to be an argumentative statement of Benco's expert Dr. Johnson rather than an appropriate proposed finding of fact. The Proposed Finding is misleading and incomplete insofar as it suggests Benco's partnership with the buying group Elite Dental Alliance was not a change in conduct for Benco. Record evidence establishes that for several years up until approximately mid-2015, Benco refused to do business with and/or negotiate with buying groups. (CCFF ¶¶ 394-431). Record evidence establishes that post its settlement of an antitrust investigation with the Texas Attorney General, Benco was considering partnering with the Elite Dental Alliance, and ultimately partnered with Elite, a buying group. (CCFF ¶¶ 1159-1162, 1165, 1367-1387). The Proposed Finding is misleading, incomplete, and contradicted by other evidence in this matter insofar as it suggests that Dr. Johnson compared the Elite Dental Alliance group to other buying group proposals that Benco received and thus has a basis to testify that Elite was different from other buying groups. Dr. Johnson admitted that he did not review any proposals from buying groups to Benco other than the Elite Dental Alliance

(EDA) proposal. (J. Johnson, Tr. 4898-4899, RX2965 (J. Johnson, Dep. at 184)). Additionally, Dr. Johnson admitted that he did no econometric analysis or other type of statistical analysis of the Elite Dental Alliance. (J. Johnson, Tr. 4898). And, Dr. Johnson does not recall if he saw or if Benco did a break-even profitability analysis of the EDA opportunity. (RX2965 (J. Johnson, Dep. at 165)).

### **3. Smile Source's Acceptance of Schein's Offer in 2017 Did Not Constitute A Structural Break**

**1335.** [REDACTED]

#### **Response to Proposed Finding No. 1335**

The Proposed Finding is misleading, incomplete, and vague insofar as it does not include a reference to a time period. [REDACTED]

[REDACTED]

**1336.** [REDACTED]

#### **Response to Proposed Finding No. 1336**

The Proposed Finding is misleading, incomplete, and vague in that it does not include a reference to a date. The Proposed Finding is misleading and contrary to record evidence insofar as it suggests [REDACTED]

[REDACTED]. Record evidence establishes that Sullivan was happy that Schein's relationship with Smile Source ended in 2012. (CCFF ¶¶ 923, *see also* ¶¶ 899-922, 924).

1337. In February 2014, Schein submitted a bid for the business of Smile Source. (Maurer, Tr. 4942-43; CX4105).

#### **Response to Proposed Finding No. 1337**

The Proposed Finding is misleading, inaccurate, incomplete, and contrary to the weight of evidence insofar as it suggests that Schein was not a part of the conspiracy because [REDACTED]

[REDACTED]. *See also* Complaint Counsel’s Reply to Benco Proposed Finding No. 1338. Indeed, record evidence clearly shows that Schein worked with buying groups before the conspiracy, had a policy to turn down buying groups during the conspiracy and did so, and then competed for buying groups when the conspiracy became difficult to maintain after April 2015 following Benco’s settlement with the Texas Attorney General requiring it to log all communications with its competitors, including Schein. (CCFF ¶¶ 432-453, 661-954, 1159-1166, 1316-1322; *see also* Complaint Counsel’s Post-Trial Brief, at Attachment C).

1338. Economic analysis indicates that Schein’s offer was more comparable to Burkhart’s offer than Dr. Marshall suggests. (RX2832 at 59, ¶ 88).

#### **Response to Proposed Finding No. 1338**

Complaint Counsel notes that, contrary to this Court’s Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. RX2832 is Dr. Carlton’s (Schein’s) Expert Report in this matter. The Proposed Finding is inaccurate, misleading, and contrary to the weight of the evidence to the extent it asserts that Schein’s 2014 bid was “competitive” or “comparable” to Burkhart’s offer. The record evidence shows that Schein’s February 13, 2014 bid on Smile Source offered a 7% discount off of catalog for private label brand merchandise,

[REDACTED] (CCFF ¶¶ 1827-1829). Schein’s 7% proposal “bombed.” (CCFF ¶ 1831 (quoting CX2508 at 001)). [REDACTED]

[REDACTED] (CCFF ¶ 1833-1834). In addition,

Maurer's testimony that the 2014 proposal was comparable to the Burkhart discount is not supported by the record evidence. [REDACTED]

[REDACTED] which is not similar to the 7% discount Schein offered in 2014. (*Compare* CCFF ¶ 181 with Maurer, Tr. 4945).

1339. Smile Source turned down Schein's offer because it was equivalent to Burkhart's discounts at the time and Smile Source felt a sense of loyalty to Burkhart. (Maurer, Tr. 4942-43).

#### **Response to Proposed Finding No. 1339**

The Proposed Finding is inaccurate, misleading, and contrary to the weight of the evidence to the extent it asserts that Schein's 2014 bid was "competitive" or "comparable" to Burkhart's offer.

The record evidence shows that Schein's February 13, 2014 bid on Smile Source offered a 7% discount off of catalog for private label brand merchandise, [REDACTED]

[REDACTED] (CCFF ¶¶ 1827-1829). Schein's 7% proposal "bombed." (CCFF ¶ 1831 (quoting CX2508 at 001)). [REDACTED]

[REDACTED] (CCFF ¶ 1833-1834). In addition, Maurer's testimony that the 2014 proposal was comparable to the Burkhart discount is not supported by the record evidence. [REDACTED]

[REDACTED] which is not similar to the 7% discount Schein offered in 2014. (*Compare* CCFF ¶ 181 with Maurer, Tr. 4945).

1340. [REDACTED]  
[REDACTED] Maurer, Tr. 4946-49).

#### **Response to Proposed Finding No. 1340**

The Proposed Finding is misleading, incomplete, and vague in that it relies on the vague phrase [REDACTED]

1341. [REDACTED]

**Response to Proposed Finding No. 1341**

Complaint Counsel has no specific response.

1342. In 2016, Schein submitted a bid for the business of Smile Source. (Maurer, Tr. 4986).

**Response to Proposed Finding No. 1342**

Complaint Counsel has no specific response.

1343. In 2017, Smile Source accepted Schein's bid because its membership had grown to the point where Smile Source wanted a nationwide distributor. (Maurer, Tr. 4954-55).

**Response to Proposed Finding No. 1343**

The Proposed Finding is misleading insofar as it suggests that the desire for a nationwide distributor was the only reason Smile Source accepted Schein's 2017 bid. [REDACTED]

(CCFF ¶¶ 1393-1395). Record evidence also shows that Patterson made a "competitive" and "similar" bid, which offered discounts for members. (CCFF ¶¶ 1396-1397).

1344. Schein's behavior towards Smile Source was consistent from 2011 to 2017, and did not constitute structural breaks as alleged by Dr. Marshall. (RX2832 at 59-60, ¶¶ 88-90).

**Response to Proposed Finding No. 1344**

Complaint Counsel notes that, contrary to this Court's Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. Additionally, the Proposed Finding is misleading and inconsistent with the record evidence in this matter that establishes that Schein's behavior towards Schein varied over this time, including in 2012 when Schein's Sullivan was happy that Schein's relationship with Smile Source ended (CCFF ¶¶ 899-924) and in 2017 when Schein won back Smile Source's business (CCFF ¶ 1319).

**XVI. RESPONSES TO PROPOSED FINDINGS REGARDING “DR. MARSHAL’S ASSERTION THAT RESPONDENTS’ CONDUCT CAUSED HARM TO COMPETITION IS FUNDAMENTALLY FLAWED AND CONTRADICTED BY THE EVIDENCE”**

**A. RESPONSES TO PROPOSED FINDINGS REGARDING “DR. MARSHALL FAILED TO FIND ANTICOMPETITIVE HARM IN ANY RELEVANT MARKET”**

1345. Dr. Marshall never identified harm to competition in any specific relevant product and geographic markets. (Marshall, Tr. 3406-3408).

**Response to Proposed Finding No. 1345**

The Proposed Finding is misleading, incomplete, inaccurate, and vague insofar as it suggests that Dr. Marshall did not identify harm to competition from the Respondents conspiracy not to do business with buying groups. The evidence establishes that Respondents’ conspiracy harmed competition. (CCFF ¶¶ 1412-1445). And in his Expert Report, Dr. Marshall did identify harm to competition (or the competitive impact of Respondents’ conduct), i.e., the Respondent’s conduct was anticompetitive. [REDACTED]

[REDACTED].

1346. Dr. Marshall never looked at Chicago to define the relevant market and analyze what the harm to competition was in the relevant market encompassing Chicago. (Marshall, Tr. 3371-3372; Marshall, Tr. 3406-3407).

**Response to Proposed Finding No. 1346**

The Proposed Finding is misleading, incomplete, and vague insofar as it suggests that Dr. Marshall did not define the relevant geographic market. Dr. Marshall opined in his Expert Report in this matter that “the relevant geographic markets are no larger than the United States, and local in nature.” (CX7100 at 010-011, 090-110 (¶¶ 11, 227-280) (Marshall Expert Report)). Moreover, Dr. Marshall illustrates two of these local relevant geographic markets (Atlanta and Seattle) in his expert report. (CX7100 at 092-109 (¶¶ 233-277) (Marshall Expert Report)). In Dr. Marshall’s opinion, these geographic markets are “representative of similar analyses that could be performed throughout the United States” and that “Atlanta and Seattle are local markets



in which [the Respondents] are least likely to have collective market power.” (CX7100 at 109 (¶ 278) (Marshall Expert Report)). Dr. Marshall continued that “delineating the bounds of many separate local geographic markets is neither relevant to nor necessary for my subsequent analysis of Respondents’ conduct and its effects.” (CX7100 at 109 (¶ 278) (Marshall Expert Report)). Additionally, the Proposed Finding is misleading, incomplete, inaccurate, and vague insofar as it suggests that Dr. Marshall did not identify harm to competition from the Respondents conspiracy not to do business with buying groups. The evidence establishes that Respondents’ conspiracy harmed competition. (CCFF ¶¶ 1412-1445). And in his Expert Report, Dr. Marshall did identify harm to competition (or the competitive impact of Respondents’ conduct), i.e., the Respondent’s conduct was anticompetitive. [REDACTED]

1347. Dr. Marshall never looked at Boston or Massachusetts or Southern New England or all of New England to define the relevant market, identify the competitors, customers and competitive conditions in that market, and then analyze the extent of anticompetitive harm in that relevant market. (Marshall, Tr. 3372; Marshall, Tr. 3407).

#### **Response to Proposed Finding No. 1347**

The Proposed Finding is misleading, incomplete, and vague insofar as it suggests that Dr. Marshall did not define the relevant geographic market. Dr. Marshall opined in his Expert Report in this matter that “the relevant geographic markets are no larger than the United States, and local in nature.” (CX7100 at 010-011, 090-110 (¶¶ 11, 227-280) (Marshall Expert Report)). Moreover, Dr. Marshall illustrates two of these local relevant geographic markets (Atlanta and Seattle) in his expert report. (CX7100 at 092-109 (¶¶ 233-277) (Marshall Expert Report)). In Dr. Marshall’s opinion, these geographic markets are “representative of similar analyses that could be performed throughout the United States” and that “Atlanta and Seattle are local markets in which [the Respondents] are least likely to have collective market power.” (CX7100 at 109 (¶

278) (Marshall Expert Report)). Dr. Marshall continued that “delineating the bounds of many separate local geographic markets is neither relevant to nor necessary for my subsequent analysis of Respondents’ conduct and its effects.” (CX7100 at 109 (¶ 278) (Marshall Expert Report)). Additionally, the Proposed Finding is misleading, incomplete, inaccurate, and vague insofar as it suggests that Dr. Marshall did not identify harm to competition from the Respondents conspiracy not to do business with buying groups. The evidence establishes that Respondents’ conspiracy harmed competition. (CCFF ¶¶ 1412-1445). And in his Expert Report, Dr. Marshall did identify harm to competition (or the competitive impact of Respondents’ conduct), i.e., the Respondent’s conduct was anticompetitive. [REDACTED]

1348. Dr. Marshall never determined the relevant market for the region that encompasses Houston and then analyzed the extent of harm to competition in that relevant market. (Marshall, Tr. 3371; Marshall, Tr. 3407-3408).

#### **Response to Proposed Finding No. 1348**

The Proposed Finding is misleading, incomplete, and vague insofar as it suggests that Dr. Marshall did not define the relevant geographic market. Dr. Marshall opined in his Expert Report in this matter that “the relevant geographic markets are no larger than the United States, and local in nature.” (CX7100 at 010-011, 090-110 (¶¶ 11, 227-280) (Marshall Expert Report)). Moreover, Dr. Marshall illustrates two of these local relevant geographic markets (Atlanta and Seattle) in his expert report. (CX7100 at 092-109 (¶¶ 233-277) (Marshall Expert Report)). In Dr. Marshall’s opinion, these geographic markets are “representative of similar analyses that could be performed throughout the United States” and that “Atlanta and Seattle are local markets in which [the Respondents] are least likely to have collective market power.” (CX7100 at 109 (¶ 278) (Marshall Expert Report)). Dr. Marshall continued that “delineating the bounds of many separate local geographic markets is neither relevant to nor necessary for my subsequent analysis

of Respondents' conduct and its effects." (CX7100 at 109 (¶ 278) (Marshall Expert Report)).

Additionally, the Proposed Finding is misleading, incomplete, inaccurate, and vague insofar as it suggests that Dr. Marshall did not identify harm to competition from the Respondents' conspiracy not to do business with buying groups. The evidence establishes that Respondents' conspiracy harmed competition. (CCFF ¶¶ 1412-1445). And in his Expert Report, Dr. Marshall did identify harm to competition (or the competitive impact of Respondents' conduct), i.e., the Respondent's conduct was anticompetitive. [REDACTED]

[REDACTED].

1349. Dr. Marshall never determined the relevant market for other regions of the United States and then analyzed the extent of harm to competition in those relevant markets. (Marshall, Tr. 3370; Marshall, Tr. 3372-3373; Marshall, Tr. 3407-3408 ("If you're asking me did I do this analysis for Houston, no, I didn't do it for Houston, and we can keep enumerating cities.")).

#### **Response to Proposed Finding No. 1349**

The Proposed Finding is misleading, incomplete, and vague insofar as it suggests that Dr.

Marshall did not define the relevant geographic market. Dr. Marshall opined in his Expert

Report in this matter that "the relevant geographic markets are no larger than the United States, and local in nature." (CX7100 at 010-011, 090-110 (¶¶ 11, 227-280) (Marshall Expert Report)).

Moreover, Dr. Marshall illustrates two of these local relevant geographic markets (Atlanta and Seattle) in his expert report. (CX7100 at 092-109 (¶¶ 233-277) (Marshall Expert Report)). In

Dr. Marshall's opinion, these geographic markets are "representative of similar analyses that could be performed throughout the United States" and that "Atlanta and Seattle are local markets in which [the Respondents] are least likely to have collective market power." (CX7100 at 109 (¶ 278) (Marshall Expert Report)). Dr. Marshall continued that "delineating the bounds of many separate local geographic markets is neither relevant to nor necessary for my subsequent analysis of Respondents' conduct and its effects." (CX7100 at 109 (¶ 278) (Marshall Expert Report)).

Additionally, the Proposed Finding is misleading, incomplete, inaccurate, and vague insofar as it suggests that Dr. Marshall did not identify harm to competition from the Respondents conspiracy not to do business with buying groups. The evidence establishes that Respondents' conspiracy harmed competition. (CCFF ¶¶ 1412-1445). And in his Expert Report, Dr. Marshall did identify harm to competition (or the competitive impact of Respondents' conduct), i.e., the Respondent's conduct was anticompetitive. [REDACTED]

[REDACTED].

1350. [REDACTED]

#### **Response to Proposed Finding No. 1350**

The Proposed Finding is misleading, incomplete, and vague insofar as the proposed finding does not specify what is meant by [REDACTED]. Dr. Marshall conducted numerous analyses in his Expert Report. For example, in his Expert Report, Dr. Marshall identified the competitive impact of Respondents' conduct. (CX7100 at 206-218 (¶¶ 482-507) (Marshall Expert Report); *see also* CCFF ¶¶ 1391-1445). The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests [REDACTED]

[REDACTED]. Dr. Marshall opined in his Expert Report in this matter that "the relevant geographic markets are no larger than the United States, and local in nature." (CX7100 at 010-011, 090-110 (¶¶ 11, 227-280) (Marshall Expert Report); *see also* CCFF 1581-1592). The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests [REDACTED]. Dr.

Marshall opined that the full line of dental products and services sold through full-service distributors to independent dentists is a relevant product market. (CX7100 at 010, 072-073 (¶¶

10, 176-179) (Marshall Expert Report); *see also* CCFF ¶¶ 1446-1566). Thus the Proposed Finding should be disregarded.

**1351.** [REDACTED]

**Response to Proposed Finding No. 1351**

The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests [REDACTED]

[REDACTED]. Dr. Marshall opined in his Expert Report in this matter that “the relevant geographic markets are no larger than the United States, and local in nature.” (CX7100 at 010-011, 090-110 (¶¶ 11, 227-280) (Marshall Expert Report); *see also* CCFF 1581-1592). The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests [REDACTED]

[REDACTED]. Dr. Marshall opined that the full line of dental products and services sold through full-service distributors to independent dentists is a relevant product market. (CX7100 at 010, 072-073 (¶¶ 10, 176-179) (Marshall Expert Report); *see also* CCFF ¶¶ 1446-1566). The Proposed Finding is misleading, incomplete, inaccurate, and vague insofar as it suggests [REDACTED]

[REDACTED]. The evidence establishes that Respondents’ conspiracy harmed competition. (CCFF ¶¶ 1412-1445). And in his Expert Report, Dr. Marshall did identify harm to competition (or the competitive impact of Respondents’ conduct), i.e., the Respondent’s conduct was anticompetitive. [REDACTED]

**1352.** [REDACTED]

**Response to Proposed Finding No. 1352**

The Proposed Finding appears to be an argumentative statement [REDACTED]

[REDACTED]. The Proposed Finding is misleading, incomplete, and inaccurate to the extent it suggests [REDACTED]

[REDACTED]. Dr. Marshall opined in his Expert Report in this matter that “the relevant geographic markets are no larger than the United States, and local in nature.” (CX7100 at 010-011, 090-110 (¶¶11, 227-280) (Marshall Expert Report); *see also* CCFF 1581-1592). Additionally, Dr. Marshall opined that the full line of dental products and services sold through full-service distributors to independent dentists is a relevant product market. (CX7100 at 010, 072-073 (¶¶10, 176-179) (Marshall Expert Report); *see also* CCFF ¶¶1446-1566).

**B. RESPONSES TO PROPOSED FINDINGS REGARDING “THE RECORD EVIDENCE CONTRADICTS DR. MARSHALL’S ASSERTION THAT RESPONDENTS’ CONDUCT CAUSED ANTICOMPETITIVE HARM”**

1353. In section VI of his report, Dr. Marshall discussed competitive impact. (Marshall, Tr. 3411).

**Response to Proposed Finding No. 1353**

Complaint Counsel has no specific response.

1354. In Section VI of his report, Dr. Marshall did not perform any analysis of the extent to which Benco, Schein and Patterson competed for the business of individual dentists who were members of buying groups. (Marshall, Tr. 3411-3412).

**Response to Proposed Finding No. 1354**

The Proposed Finding is misleading, inaccurate, and incomplete insofar as it suggests that there is no evidence in the record of Benco, Schein, and Patterson competing for the business of individual dentists. There is evidence in the record of this competition. (CCFF ¶¶48-56). The Proposed Finding is misleading, inaccurate, and incomplete insofar as it suggests that Dr. Marshall did not analyze the competition among Respondents. Dr. Marshall cited evidence of

the competition among Respondents in his Expert Report, including in Section V (CX7100 at 203 (¶476) (Marshall Expert Report)), and in earlier sections of the report where Dr. Marshall analyzed how Benco entered markets and acquired customers from Patterson and Schein by selling at lower margins and offering better prices. (CX7100 at 078-081 (¶¶196-205, Section III.A.3.b) (Marshall Expert Report)).

1355. In Section V of his report, Dr. Marshall noted that there seemed to be substantial competition for the business of individual dentists. (Marshall, Tr. 3412).

**Response to Proposed Finding No. 1355**

The Proposed Finding is misleading, vague, incomplete, and inaccurate in that in Section V of his Expert Report, Dr. Marshall wrote that “Benco, Patterson, and Schein characterize the full-service distribution business as highly competitive.” (CX7100 at 204 (¶476) (Marshall Expert Report)). Dr. Marshall did not refer to “individual dentists.” The Proposed Finding is vague in that it is unclear to what Respondent is referring with the term “individual dentists.” It is unclear whether the term refers to solo practice dentists or individual dentist offices or even to chain practices. Thus the Proposed Finding should be disregarded.

1356. From the analysis that Dr. Marshall did perform, he had no reason to believe that Benco did not compete aggressively for the business of individual dentists. (Marshall, Tr. 3412).

**Response to Proposed Finding No. 1356**

The Proposed Finding is misleading, incomplete, and vague in that it does not specify to which of Dr. Marshall’s analyses it is referring. The Proposed Finding is thus unverifiable. In the cited testimony, Dr. Marshall states: “I believe [Respondents are] competing for independent dentists. I’m taking that as a given.” (Marshall, Tr. 3412). The Proposed Finding is misleading and inaccurate insofar as it suggests that an analysis of Dr. Marshall’s showed that Benco or the other Respondents competed for the business of *buying groups*.

1357. [REDACTED]

**Response to Proposed Finding No. 1357**

The Proposed Finding is misleading, incomplete, and vague in that it does not specify to which of Dr. Marshall's analyses it is referring. The Proposed Finding is thus unverifiable. In the cited testimony, Dr. Marshall states: "I believe [Respondents are] competing for independent dentists. I'm taking that as a given." (Marshall, Tr. 3412). The Proposed Finding is misleading and inaccurate insofar as it suggests that an analysis of Dr. Marshall's showed that Benco and the other Respondents competed for the business of *buying groups*.

1358. [REDACTED]

**Response to Proposed Finding No. 1358**

The Proposed Finding is misleading, vague, and inaccurate insofar as it suggests that an analysis of Dr. Marshall's showed or that Dr. Marshall saw evidence that Benco and the other Respondents competed for the business of *buying groups*. Dr. Marshall did not conduct an analysis that showed competition among the Respondents for buying groups.

1359. [REDACTED]

**Response to Proposed Finding No. 1359**

The Proposed Finding is misleading, vague, and inaccurate insofar as it suggests that Dr. Marshall had a reason to believe that Benco and the other Respondents competed for the business of *buying groups*.

1360. [REDACTED]



**Response to Proposed Finding No. 1360**

The Proposed Finding is misleading, vague, and inaccurate insofar as it suggests that with respect to the 2011-2015 time period, Dr. Marshall had a reason to believe that Benco had changed its policy of not competing for the business of *buying groups*.

1361. A distributor that enters into an agreement with a buying group does not necessarily provide the lowest margins to the members of that buying group.

**Response to Proposed Finding No. 1361**

The Proposed Finding is unsupported.

1362. A distributor that enters into an agreement with a buying group does not necessarily provide the lowest prices to the members of that buying group.

**Response to Proposed Finding No. 1362**

The Proposed Finding is unsupported.

1363. [REDACTED]

**Response to Proposed Finding No. 1363**

The Proposed Finding is misleading, inaccurate, and incomplete insofar as Dr. Johnson's analysis does not show that Benco's margins were *generally* lower than Burkhart's margins.

(Emphasis added.) [REDACTED]

[REDACTED]. Exhibit 13 includes Burkhart and Benco's profit margins from Smile Source members' purchases. (RX2965 (J. Johnson, Dep. at 253)). [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]. The Proposed Finding is also misleading, vague, and incomplete as it does not speak to the issue of whether doing business with buying groups would have increased or decreased Benco's profits. (RX2965 (J. Johnson, Dep. at 256);

[REDACTED]. Dr. Johnson admitted that he did not do his own analysis of Benco customers and their potential profitability to Benco. (RX2965 (J. Johnson, Dep. at 258)). The Proposed Finding is also misleading, inaccurate, and incomplete in that [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].

**1364.** [REDACTED]  
[REDACTED]  
[REDACTED]

**Response to Proposed Finding No. 1364**

The Proposed Finding is misleading, inaccurate, and incomplete insofar as the Proposed Finding relies on [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]

[REDACTED] The Proposed Finding is also misleading, inaccurate, and incomplete insofar as Exhibit 13, which includes Burkhart and Benco's profit margins from Smile Source members' purchases, would include purchases where a Smile Source member chose to purchase an item from Benco rather than another distributor because they were getting a good price from Benco. (RX2965 (J. Johnson, Dep. at 253);

[REDACTED]

[REDACTED]

[REDACTED]. The Proposed Finding is also misleading, vague, and incomplete as it does not speak to the issue of whether doing business with buying groups would have increased or decreased Benco's profits. (RX2965 (J. Johnson, Dep. at 256);

[REDACTED].

**1365.** [REDACTED]

**Response to Proposed Finding No. 1365**

The Proposed Finding is misleading, inaccurate, and incomplete insofar as the Proposed Finding

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Proposed Finding is also misleading, vague, and incomplete as it does not speak to the issue of whether doing business with buying groups would have increased or decreased Benco's profits. (RX2965 (J. Johnson, Dep. at 256); [REDACTED]

[REDACTED]

**1366.** [REDACTED]

**Response to Proposed Finding No. 1366**

The Proposed Finding is misleading, inaccurate, and incomplete insofar as the Proposed Finding

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The Proposed Finding is also misleading, vague, and incomplete as it does not speak to the issue of whether doing business with buying groups would have increased or decreased Benco's profits. (RX2965 (J. Johnson, Dep. at 256);

[REDACTED]

1367. [REDACTED]

**Response to Proposed Finding No. 1367**

The Proposed Finding is misleading, inaccurate, and incomplete insofar as the Proposed Finding

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. The

Proposed Finding is also misleading and incomplete insofar as it does not account for Benco's strategic growth plan in this same time period of 2011 to 2016. (Cohen, Tr. 628, 631-633).

1368. [REDACTED]

**Response to Proposed Finding No. 1368**

The Proposed Finding is misleading, inaccurate, and incomplete insofar as the Proposed Finding

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

1369. [REDACTED]

[REDACTED]

[REDACTED]

**Response to Proposed Finding No. 1369**

The proposed finding is misleading, vague, and incomplete insofar as the Proposed Finding

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

**1370.** [REDACTED]

**Response to Proposed Finding No. 1370**

The Proposed Finding is misleading, inaccurate, and incomplete insofar as the Proposed Finding

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. The

Proposed Finding is also misleading and incomplete insofar as it does not account for Benco's strategic growth plan in this same time period of 2011 to 2016. (Cohen, Tr. 628, 631-633).

**1371.** [REDACTED]

**Response to Proposed Finding No. 1371**

The Proposed Finding is misleading, inaccurate, and incomplete. [REDACTED]

[REDACTED]. Dr. Johnson himself identifies how Benco reduced prices to customers, “pricing aggressively” when entering new territories. (RX2965 (J. Johnson, Dep. at 65, 67-68, 263-264)).

**1372.** [REDACTED]

**Response to Proposed Finding No. 1372**

The Proposed Finding is misleading, incomplete, and inaccurate. [REDACTED]

[REDACTED]. The Proposed Finding is also misleading, vague, and incomplete as it does not speak to the issue of whether doing business with buying groups would have increased or decreased Benco’s profits. (RX2965 (J. Johnson, Dep. at 256); [REDACTED]

[REDACTED].

**1373.** [REDACTED]

**Response to Proposed Finding No. 1373**

The Proposed Finding is misleading, incomplete, inaccurate, and unsupported insofar as it suggests that there is no evidence of anticompetitive harm in the record due to the conspiracy.

Dr. Marshall found evidence of anticompetitive harm from the conspiracy. (CCFF 1416-1441).

The Proposed Finding is misleading, incomplete, and vague insofar as [REDACTED]

[REDACTED]

[REDACTED]. It is irrelevant that

Dr. Johnson identified two MSAs where one of the distributor's (Burkhart's) margins increased (RX2834 at 50 (¶ 80) (Johnson Expert Report), because this was out of a total of over 100 MSAs

in Dr. Marshall's five studies of sales to buying group members. (CX7101 at 061 (¶ 156)

(Marshall Rebuttal Expert Report)). Dr. Marshall looked across multiple geographic regions,

multiple distributors, and multiple time periods to confirm his finding that dentists paid lower

prices and margins upon joining a buying group. (CCFF ¶¶ 1416-1441). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. By aggregating data—a standard economic

tool that has been identified as one of the pillars of statistical analysis—Dr. Marshall's analysis

provides a much more robust conclusion than the two MSAs cherry-picked by Dr. Johnson.

(CX7101 at 062 (¶ 159) (Marshall Rebuttal Expert Report)). Dr. Johnson's observations of two

MSAs do not provide any evidence of the lack of anticompetitive effects. Neither do Dr. Wu's

analyses provide any evidence of the lack of anticompetitive effects. Dr. Wu's analyses suffer

from other fundamental flaws that make it impossible for the Court to rely on them. For

example, he neglected to control for obvious factors relevant to the prices in his studies, such as



purchasing volume. Indeed, at trial,

[REDACTED]. Finally, all of Dr.

Wu's competitive effects analyses examined only the pricing for a single dental product in a single state. CCFF ¶ 2007.

**1374.**

### **Response to Proposed Finding No. 1374**

The Proposed Finding is misleading, incomplete, inaccurate, and unsupported insofar as it suggests that there is no evidence of anticompetitive harm in the record due to the conspiracy. Dr. Marshall found evidence of anticompetitive harm from the conspiracy. (CCFF 1416-1441).

The Proposed Finding is misleading, incomplete, and vague insofar [REDACTED]

[REDACTED]. It is irrelevant that Dr. Johnson identified two MSAs where one of the distributor's (Burkhart's) margins increased (RX2834 at 50 (¶ 80) (Johnson Expert Report)), because this was out of a total of over 100 MSAs in Dr. Marshall's five studies of sales to buying group members. (CX7101 at 061 (¶ 156) (Marshall Rebuttal Expert Report)). Dr. Marshall looked across multiple geographic regions, multiple distributors, and multiple time periods to confirm his finding that dentists paid lower prices and margins upon joining a buying group. (CCFF ¶¶ 1416-1441). [REDACTED]

[REDACTED]. By aggregating data—a standard economic tool that has been identified as one of the pillars of statistical analysis—Dr. Marshall's analysis provides a much more robust conclusion than the two MSAs cherry-picked by Dr. Johnson. (CX7101 at 062 (¶ 159) (Marshall Rebuttal Expert Report)). Dr. Johnson's observations of two MSAs do not provide any evidence of the lack of anticompetitive effects. [REDACTED]

[REDACTED]. Neither do Dr. Wu's analyses provide any evidence of the lack of anticompetitive effects. Dr. Wu's analyses suffer from other fundamental flaws that make it impossible for the Court to rely on them. For example, he neglected to control for obvious factors relevant to the prices in his studies, such as purchasing volume. Indeed, at trial, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Finally, all of Dr. Wu's competitive effects analyses examined only the pricing for a single dental product in a single state. CCFF ¶ 2007.

**1375.** [REDACTED]

**Response to Proposed Finding No. 1375**

The Proposed Finding is misleading, incomplete, inaccurate, and vague insofar as it suggests that Dr. Marshall did not identify harm to competition from the Respondents conspiracy not to do business with buying groups. The evidence establishes that Respondents' conspiracy harmed competition. (CCFF ¶¶ 1412-1445). And in his Expert Report, Dr. Marshall identified harm to

competition or the competitive impact of Respondents' conduct (i.e., the conduct was anticompetitive). [REDACTED].

1376. [REDACTED]

**Response to Proposed Finding No. 1376**

The Proposed Finding is beyond the scope of what Dr. Johnson included in his Expert Report submitted in the matter. In his report, Dr. Johnson did not address Dr. Marshall's analysis of competitive effects. (CX7101 at 071 (¶184) (Marshall Rebuttal Expert Report); *see also* RX2834 at 005-007 (¶7) (Johnson Expert Report) (an assessment of Dr. Marshall's analysis of anticompetitive effects is not listed in Dr Johnson's Summary of Conclusions, nor found elsewhere in the Johnson report)). The Proposed Finding is misleading, inaccurate, vague, and incomplete insofar as it suggests that Dr. Marshall did not find evidence of elevated margins and prices on the part of Respondents. Dr. Marshall did find such evidence. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]. The Proposed Finding is also misleading, inaccurate, and incomplete insofar as Exhibit 13, which includes Burkhart and Benco's profit margins from Smile Source members' purchases, would include purchases where a Smile Source member chose to purchase an item from Benco rather than another distributor because they were getting a good price from Benco. (RX2965 (J. Johnson, Dep. at 253); [REDACTED])

\_\_\_\_\_

\_\_\_\_\_

[REDACTED] The Proposed Finding is also misleading, vague, and incomplete as it does not speak to the issue of whether doing business with buying groups would have increased or decreased Benco's profits. (RX2965 (J. Johnson, Dep. at 256); [REDACTED]

\_\_\_\_\_

1377. [REDACTED]

**Response to Proposed Finding No. 1377**

The Proposed Finding is misleading and vague in that it does not identify the alleged examples in Dr. Marshall's analyses where margins and prices are not elevated, and the Proposed Finding does not identify whose margins and prices are not elevated. The Proposed Finding is misleading, incomplete, and inaccurate insofar as it suggests that Dr. Marshall did not find evidence of elevated margins and prices of dental products as a result of the conspiracy. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (CCFF ¶¶ 1420-1421, 1424-1433; *see also* CCFF ¶ 1422, 1434-1438). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The Proposed Finding is also misleading, inaccurate, and incomplete insofar as Exhibit 13, which includes Burkhart and Benco's profit margins from Smile Source members' purchases, would include purchases where a Smile Source member chose to purchase an item from Benco rather than another distributor because they were getting a good price from Benco. (RX2965 (J. Johnson, Dep. at 253); [REDACTED]

[REDACTED]

[REDACTED]. The Proposed Finding is misleading and incomplete insofar as it also relies on Dr. Johnson's analysis that identified two MSAs, out of a total of over 100 MSAs in Dr. Marshall's five studies, where Burkhart's margins increased. (RX2834 at 050 (¶80) (Johnson Expert Report)). Dr. Marshall, however, looked across multiple geographic regions, multiple distributors, and multiple time periods to confirm his finding that dentists paid lower prices and margins upon joining a buying group. (CCFF ¶¶ 1416-1441). By aggregating data—a standard economic tool that has been identified as one of the pillars of statistical analysis—Dr. Marshall's analysis provides a much more robust conclusion than the two MSAs cherry-picked by Dr. Johnson. More importantly, Dr. Marshall's conclusions confirm the factual record (while Benco's argument contradicts the record), including [REDACTED]



[REDACTED]. (CCFF ¶¶ 1391-1411).

The Proposed Finding is also misleading, vague, and incomplete as it does not speak to the issue of whether doing business with buying groups would have increased or decreased Benco's profits. (RX2965 (J. Johnson, Dep. at 256); [REDACTED]

[REDACTED].

1378. [REDACTED]

### **Response to Proposed Finding No. 1378**

The Proposed Finding is beyond the scope of what Dr. Johnson included in his Expert Report submitted in the matter. In his report, Dr. Johnson did not address Dr. Marshall's analysis of competitive effects. (CX7101 at 071 (¶184) (Marshall Rebuttal Expert Report); *see also* RX2834 at 005-007 (¶7) (Johnson Expert Report) (an assessment of Dr. Marshall's analysis of anticompetitive effects is not listed in Dr Johnson's Summary of Conclusions, nor found elsewhere in the Johnson report)). The Proposed Finding is misleading, inaccurate, vague, and incomplete insofar as it suggests that Dr. Marshall did not find evidence of elevated margins and prices on the part of Respondents and thus competitive impact of the Respondents conspiracy. Dr. Marshall did find such evidence. [REDACTED]

[REDACTED]

[REDACTED]. (CCFF ¶¶ 1420-1421, 1424-1433; *see also* CCFF ¶ 1422, 1434-1438). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. The Proposed Finding is also misleading, inaccurate, and incomplete insofar as Exhibit 13, which includes Burkhart and Benco's profit margins from Smile Source members' purchases, would include purchases where a Smile Source member chose to purchase an item from Benco rather than another distributor because they were getting a good price from Benco. (RX2965 (J. Johnson, Dep. at 253); [REDACTED])

[REDACTED]

[REDACTED]. The Proposed Finding is misleading and incomplete insofar as it also relies on Dr. Johnson's analysis

that identified two MSAs, out of a total of over 100 MSAs in Dr. Marshall's five studies, where Burkhart's margins increased. (RX2834 at 050 (¶80) (Johnson Expert Report)). Dr. Marshall, however, looked across multiple geographic regions, multiple distributors, and multiple time periods to confirm his finding that dentists paid lower prices and margins upon joining a buying group. (CCFF ¶¶ 1416-1441). By aggregating data—a standard economic tool that has been identified as one of the pillars of statistical analysis—Dr. Marshall's analysis provides a much more robust conclusion than the two MSAs cherry-picked by Dr. Johnson. More importantly, Dr. Marshall's conclusions confirm the factual record (while Benco's argument contradicts the record), including [REDACTED]

[REDACTED]. (CCFF ¶¶ 1391-1411).

The Proposed Finding is also misleading, vague, and incomplete as it does not speak to the issue of whether doing business with buying groups would have increased or decreased Benco's profits. (RX2965 (J. Johnson, Dep. at 256); [REDACTED]

[REDACTED]. Finally, the Proposed Finding is misleading, incomplete, inaccurate, and vague insofar as it suggests that Dr. Marshall did not identify harm to competition from the Respondents conspiracy not to do business with buying groups. The evidence establishes that Respondents' conspiracy harmed competition. (CCFF ¶¶ 1412-1445).

And in his Expert Report, Dr. Marshall identified harm to competition or the competitive impact of Respondents' conduct (i.e., the conduct was anticompetitive). [REDACTED]

[REDACTED].

Respectfully submitted,

/s/ Lin W. Kahn

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 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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June 13, 2019

By: /s/ Lin W. Kahn

Attorney

CERTIFICATE OF ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed documents that is available for review by the parties and the adjudicator.

June 13, 2019

By: /s/ Lin W. Kahn

Attorney