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

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| **In the Matter of**<br><br>**BENCO DENTAL SUPPLY CO.,**<br>**a corporation,**<br><br>**HENRY SCHEIN, INC.,**<br>**a corporation, and**<br><br>**PATTERSON COMPANIES, INC.,**<br>**a corporation.** | **Docket No. 9379** |

# RESPONDENT BENCO DENTAL SUPPLY CO.'S POST TRIAL REPLY BRIEF

Dated: June 6, 2019

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## INTRODUCTION

Benco has had a consistent policy for over 20 years of not dealing with middlemen who come between it and its customer. BFF[1] 166, 167 & 450. The policy was part of the customer and service-focused business strategy and philosophy that allowed Benco to grow from a small, regional distributor in Northeast Pennsylvania into a nationwide business and the country's third-largest distributor of dental products. Benco followed this policy prior to, during, and after the claimed conspiracy. Complaint Counsel does not dispute that Benco adopted its no-middleman policy unilaterally in the mid-1990's. Thus, Complaint Counsel admits that, for at least 15 years (until some unidentified point during or after 2011), it was in Benco's unilateral self-interest to refrain from doing business with middlemen, including buying groups. Similarly, the record established that, with one arguable exception based on a unique business opportunity,[2] Benco has continued to follow its policy since 2015, when Complaint Counsel claims the conspiracy ended. Thus, it has been apparently in Benco's unilateral self-interest to refrain from doing business with middlemen, including buying groups, since 2015.

Complaint Counsel's theory, then, is that for a brief interval over the past 20 years, from sometime during or after 2011 until sometime in 2015, Benco's "no-middleman" policy was not in Benco's unilateral self-interest, and Benco had refused to deal with buying groups during that brief period as a result of an alleged conspiracy with Schein and Patterson. Complaint Counsel's claim is far-fetched and, not surprisingly, could not be established by the evidence at trial. Indeed, Complaint Counsel is unable to answer one of the most basic questions in the case: When did the alleged conspiracy begin? Complaint Counsel also mischaracterizes the

[1] "BFF" refers to Benco's previously filed Proposed Findings of Fact and Conclusions of Law.

[2] The facts behind Benco's involvement in Elite Dental Alliance ("EDA") – a joint venture between Benco and Cain Watters (a financial services group dealing with independent dentists and dental practices) – establishing why Benco's involvement in EDA was not inconsistent with its policy, are set forth in Benco's Post-Trial Brief at pages 17-19 & 21 and in Benco's Proposed Findings of Fact 233-70.

circumstantial evidence, and states as "facts" propositions that are wholly made up or are flatly contradicted by the record.

Complaint Counsel's case cannot surmount the fact that Respondents did not engage in parallel conduct with regard to buying groups during the alleged conspiracy period. The behaviors of the individual Respondents were materially different. Benco continued to follow its long-standing policy and did not work with buying groups from 2011 to 2015, as it had for the previous 15 years and as it did (with one arguable exception) after the alleged conspiracy supposedly fell apart. BFF 166-270. Patterson, whose customers had been almost exclusively composed of independent dental offices and which had lagged behind Benco and Schein in pursuing the growing DSO segment of the market, engaged in a lengthy evaluation, assisted by management consultants, to determine the best strategy for moving beyond independent practices. Patterson established a Special Markets Division that focused its efforts on the DSO segment. PFF 74-92.[3] However, Patterson allowed its local branches to deal with buying groups. BFF 827-828. Schein, at the opposite end of the spectrum from Benco, was consistently willing to work with buying groups when it made economic sense for Schein to do so. The evidence establishes that Schein did work with various buying groups before, during, and after the alleged conspiracy period. BFF 829-878.

Complaint Counsel's other evidence likewise falls far short of proving the existence of a conspiracy. To support its assertion that the Respondents acted contrary to their unilateral economic self-interest, Complaint Counsel leans heavily on its expert's studies – based on a flawed economic theory and citing no accepted economic methodology – of other distributors' dealings with two non-representative buying groups, accounting for a tiny fraction of dentists,

[3] "PFF" refers to Patterson's Proposed Findings of Fact.

that contained multiple errors, including failure to account for risk and uncertainty, improper mixing of data from different years, failure to consider all relevant costs, reliance on unsupported assumptions, and failure to conduct counter-factual analyses. (BFF 1000-1242; RRFF[4] 1684).

Nor has Complaint Counsel demonstrated anticompetitive harm. Lacking evidence of actual harm to competition, Complaint Counsel asks Your Honor to adopt a presumption of harm. But Complaint Counsel has failed to present an established judicial record of decisions or an existing body of empirical economic work that would permit a confident conclusion that an alleged agreement with respect to intermediaries or middlemen, but leaving unaffected ongoing aggressive competition with respect to actual customers, would always or almost always cause harm to competition.

Complaint Counsel has failed to prove the existence of any conspiracy, the existence of any economic harm, or the need for any remedy.

## ARGUMENT

### I. Complaint Counsel Failed to Prove the Existence of any Agreement Among Respondents.

#### A. Complaint Counsel Failed to Deliver Its Promised Direct Evidence of the Alleged Conspiracy.

In its post-trial submissions, Complaint Counsel has largely abandoned its prior position that there was direct evidence of the alleged conspiracy. Complaint Counsel's Pre-Trial Brief was replete with claims that there was such direct evidence of an agreement. (*See, e.g.*, CC Pre-Trial Brief at 4 ("direct evidence will show that Benco and Patterson agreed in writing to refuse to 'recognize, work with, or offer discounts to buying groups'"); *id.* at 22 (describing an email chain as "direct evidence of a meeting of the minds"); *see also* Opening, Tr. 32 ("So we need not

[4] "RRFF" refers to Respondents' Reply to Complaint Counsel's Post-Trial Proposed Finding of Fact and Conclusions of Law.

go to a world where we are only looking at parallel conduct and trying to infer a conspiracy from that. We have direct evidence."). Having promised much, Complaint Counsel failed to deliver at trial. Instead, in its Post-Trial Brief, Complaint Counsel shifts its argument to focus on circumstantial evidence. CC Br. at 39-40. But as explained below, the circumstantial evidence fails to demonstrate – and, in fact, positively refutes – Complaint Counsel's alleged agreement.

**B. Circumstantial Evidence Fails to Support Complaint Counsel's Allegations**

Although it is possible to prove an agreement with circumstantial evidence, Complaint Counsel has failed to do so in this case. The circumstantial evidence does not show the required "unity of purpose or common design and understanding, or a meeting of minds in an unlawful arrangement." *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946); *see also United States v. Apple, Inc.*, 791 F.3d 290, 313, 315 (2d Cir. 2015). Circumstantial evidence of a conspiracy must "tend to rule out the possibility of independent action." *In re McWane, Inc. & Star Pipe Prods.*, FTC No. 9351, 2012 WL 5375161, at *6 (Aug. 9, 2012) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 764 (1986)). The Supreme Court has limited "the range of permissible inferences from ambiguous evidence," because "mistaken inferences in [antitrust] cases . . . are especially costly . . . ." *Matsushita Elec. Indus. Co.*, 475 U.S. at 588, 594. Therefore, circumstantial evidence that is ambiguous or is equally consistent with permissible competition as with illegal conspiracy does not permit an inference of conspiracy. *Anderson News L.L.C. v. Am. Media, Inc.*, 899 F.3d 87, 98, 104-05 (2d Cir. 2018).

Courts have described a three-step process to determine whether the circumstantial evidence suffices to prove an agreement in a parallel conduct case: "First, the court must determine whether the plaintiff has established a pattern of parallel behavior. Second, it must decide whether the plaintiff has demonstrated the existence of one or more plus factors that 'tends to exclude the possibility that the alleged conspirators acted independently'…. Third, if

the first two steps are satisfied, the defendants may rebut the inference of collusion by presenting evidence" that negates the inference "that they entered into a . . . conspiracy." *Williamson Oil Co. v. Philip Morris USA*, 346 F. 3d 1287, 1301 (11th Cir. 2003).

Complaint Counsel's case fails on the first two prongs. The record does not support a finding that there was parallel conduct by the Respondents, and the circumstantial evidence does not tend to exclude the possibility that Benco acted independently.

**1. The Record Confirms the Absence of Parallel Conduct.**

Without direct evidence of a conspiracy, Complaint Counsel is basing its circumstantial case upon parallel conduct – that the Respondents supposedly agreed amongst themselves to refrain from doing business with buying groups. Acknowledging the fundamental role of parallel conduct to any claim of conspiracy, Complaint Counsel has asserted that Respondents acted in concert. But the evidence says otherwise.

As has been emphasized repeatedly throughout the course of this litigation, Benco, Schein, and Patterson had starkly different approaches to buying groups. Benco did not deal with buying groups. Benco adopted this policy in 1996, and followed this policy from 1996 until the present (with one arguable exception in 2016). (BFF 166-270). Between 2011 and 2015, Patterson generally did not do business with buying groups, but it allowed its local branches to deal with buying groups. (BFF 827-828). During this same period, Schein evaluated buying groups on a case-by-case basis, and was frequently willing to work with them. Despite Complaint Counsel's claims to the contrary, the record confirms that Schein dealt with multiple buying groups during the alleged conspiracy period, including both buying groups with which it continued pre-existing business and buying groups with which it established new business. Schein also bid for business from additional buying groups between 2011 and 2015, sometimes successfully, and sometimes not. (BFF 829-878).

Furthermore, even if Complaint Counsel had been able to prove parallel conduct by Benco, Schein, and Patterson, parallel conduct alone cannot support an inference of conspiracy unless it consists of "complex and historically unprecedented changes . . . made at the very same time by multiple competitors, and made for no other discernible reason." *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 137 (2d Cir. 2013) (internal quotation marks omitted); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) ("[W]hen allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.").

Recognizing the importance of proving a change in conduct, Complaint Counsel has claimed to have evidence of this, but again has fallen short. In fact, the evidence shows that each of the Respondents acted consistently over time. Benco applied its policy consistently from 1996 to the present to refuse to enter into an agreement with any intermediary or middle-man that could not guarantee volume and reduce Benco's costs to serve. (BFF 166-189; BFF 903-928; BFF 1285-1290). The only instance in which Benco agreed to offer discounts to what may appear to be a buying group – to Elite Dental Alliance, in 2016 – was because Elite Dental Alliance could drive compliance and assist Benco to reduce its costs to serve. (BFF 232-270; BFF 1290-1334). Benco has an ownership interest in Elite Dental Alliance and receives 50% of the profits, Benco has control over the member selection and members must meet volume purchase requirements in order to qualify for discounts, and Benco has control over the vendors supplying Elite Dental Alliance. (BFF 246). Similarly, the other Respondents followed a consistent approach to buying groups before, during and after the alleged conspiracy period. (BFF 1261-1284; BFF 1335-1344).

### 2. The Evidence Fails to Exclude the Possibility That Respondents Acted Independently.

Even had it been able to demonstrate parallel conduct, Complaint Counsel has failed to present evidence sufficient to exclude the possibility that Respondents acted independently. Each of Benco, Schein, and Patterson acted consistently with its own unilateral economic self-interest. (BFF 879-886, 903-928; BFF 936-955). It is not surprising that not only Benco and Patterson, but also Schein on a number of occasions, independently refused to do business with various buying groups, because many buying groups presented similar disadvantages to each. Even Schein, which had a business unit in place to engage with buying groups and therefore could deal with them more efficiently than could either Benco or Patterson (BFF 1077-1079), had to consider certain down-sides of dealing with buying groups. Potential disadvantages of dealing with buying groups included the fact that they could not ensure compliance by their members, the risk of cannibalization, the disincentives to sales representatives due to the reduction in commissions, the costs and fees associated with dealing with buying groups, and the potential misalignment with a distributor's strategic goals. (BFF 1003-1019). Because Benco, Patterson, and, to some extent, Schein faced similar issues with respect to buying groups, it is not surprising that, on certain occasions, they made similar decisions. (*See* BFF 787-790).

For this reason, courts have held repeatedly that they must evaluate circumstantial evidence of conspiracy in a concentrated industry with particular care. "Oligopolies pose a special problem under § 1 because rational, independent actions taken by oligopolists can be nearly indistinguishable from [concerted action]. This problem is the result of 'interdependence,' which occurs because 'any rational decision [in an oligopoly] must take into account the anticipated reaction of other firms." *Valspar Corp. v. E.I. Du Pont De Nemours & Co.*, 873 F.3d 185, 192 (3d Cir. 2017) (*quoting In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 359 (3d Cir.

2004)). Furthermore, because "competitors in concentrated markets watch each other like hawks[,]" internal discussions about what other competitors might be doing does not give rise to an inference of agreement. *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 875 (7th Cir. 2015). (*See also* Joint COL 30). This is why the failure of Complaint Counsel's expert, Dr. Marshall, to distinguish between lawful interdependence and conspiracy was such a serious flaw in his analysis. (BFF 786-790).

Similarly, to evaluate an allegation of conspiracy, it is necessary to differentiate between communications of information and actual agreement. Competing firms may exchange information that is of common interest, and such information exchanges do not violate the antitrust laws where the parties then make independent business decisions on the basis of that information. *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1048 (2d Cir. 1976) ("[I]t is not a violation of [Sherman Act §] 1 to exchange such information, provided that any action taken in reliance upon it is the result of each firm's independent judgment, and not of agreement."); *see also Interborough News Co. v. Curtis Publ'g Co.*, 225 F.2d 289, 293 (2d Cir. 1955) (explaining that customers' "past preference for maintaining an exclusive relationship with a single wholesaler provides a legitimate reason for defendants' lobbying efforts to persuade each other . . . to consider dealing with an alternative wholesaler"). *Ross v. Citigroup, Inc.*, 630 Fed. Appx. 79, 82 (2d Cir. 2018) (affirming grant of summary judgment in favor of defendants where, despite a high level of inter-firm communications, "the district court found that the 'final decision to adopt class-action-barring clauses was something the Issuing Banks hashed out individually and internally.'"). Complaint Counsel cites repeatedly to a small number of exchanges of information between Respondents, but the critical element of conspiracy is missing

– Benco, Schein and Patterson made independent decisions regarding whether and how to interact with buying groups.

### C. Complaint Counsel's Claims About the Start of the Alleged Conspiracy Are Inconsistent and Self-Contradictory.

How did the alleged conspiracy start? Complaint Counsel has offered varying answers to this fundamental and necessary question. An agreement is a "conscious commitment to a common scheme," *United States v. Apple, Inc.*, 791 F.3d at 315, yet Complaint Counsel cannot establish how and when that "conscious commitment" supposedly took place.

Before trial, Complaint Counsel was deliberately vague, and alleged only that the supposed conspiracy began as one between Benco and Schein "no later than July 2012." (Complaint ¶ 32).

At the commencement of trial, Complaint Counsel asserted that Benco and Schein had reached an agreement some time in 2011 not to work with buying groups, (Opening, Tr. 19 ("We allege that Schein and Benco entered into the conspiracy in the year 2011, and that's the start of the conspiracy between Schein and Benco."); *see al*so Opening, Tr. 33), and that Patterson joined the conspiracy in February 2013. (*See* Opening, Tr. 44-45). Complaint Counsel relied heavily on phone calls between Mr. Cohen of Benco and Mr. Sullivan of Schein in 2011 and 2012. (Opening, Tr. 34, 42-43). Complaint Counsel emphasized a call between them on January 13, 2012 as evidence of Benco allegedly "enforcing the agreement against Schein." (*Id*. at 42-43). When Your Honor pointed out that Complaint Counsel did not know the contents of the phone call, Complaint Counsel responded, "To us," "it's pretty clear why the two executives were talking." (*Id*. at 43).

At trial, however, it became clear why the executives were talking. Benco presented detailed evidence regarding the competitive hiring agreement between Benco and Schein which

was crucial to the ability of Benco to expand as an effective competitor without becoming entangled in expensive and debilitating litigation with Schein. BFF 546-560. Mr. Cohen explained the need for him to talk to Mr. Sullivan on multiple occasions with respect to that agreement, and the procompetitive benefits that resulted. *Id*. Benco presented Mr. Cohen's phone records for January 2013 showing calls to Benco's outside labor counsel, Joe Dougherty, on January 12 and 13, 2012 that, together with Mr. Cohen's recollection, established that the January 13, 2012 phone call highlighted by Complaint Counsel during the opening argument actually concerned employment issues in California related to the competitive hiring agreement. BFF 577-594. Contrary to Complaint Counsel's confident assertion during opening argument that it was "pretty clear" to Complaint Counsel that Messrs. Cohen and Sullivan must have been conspiring with respect to buying groups, the evidence at trial established a totally different, benign, and procompetitive purpose for these communications.

Complaint Counsel nowhere acknowledges that a fundamental piece of its conspiracy theory has collapsed. Rather, in its post-trial brief, Complaint Counsel tries to embrace a different, later conspiracy theory without fully relinquishing its earlier theory. Thus, Complaint Counsel's post-trial submissions *start* with an alleged agreement between Benco and Patterson in February 2013 (CC Br. at 17-19), and then suggest that the alleged agreement between Benco and Schein *came after* the alleged agreement with Patterson. (*See* CC Br. at 25-26 ("*As a result of these communications* [between Benco and Schein] Benco gained an understanding that Schein, *just like Benco and Patterson*, *would adopt a policy* against recognizing buying groups.") (emphasis added). The communications between Benco and Schein that Complaint Counsel cites

for this proposition are from March and October 2013.[5][6] Thus, in this section of the brief, Complaint Counsel asserts that Schein did not adopt a policy against recognizing buying groups until March 2013, at the earliest.

On the very next page, however, Complaint Counsel asserts that *by July 2011*, as a result of communications between Cohen and Sullivan *in 2011*, Schein's position on dealing with buying groups had changed. (CC Br. at 27 ("By July 2011, Sullivan's position had changed.")). This assertion, in turn, conflicts with other evidence presented by Complaint Counsel in support of its assertion that "Benco knew Schein was working with buying groups in 2011."[7] The cited evidence in support is an email from Dr. Goldsmith at Smile Source to Benco, dated *September 30, 2011* – more than two months after Schein had supposedly changed its policy in *July 2011* at Benco's behest.

In summary, Complaint Counsel is claiming, simultaneously and without logical explanation, that:

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[5] Benco will explain below how Complaint Counsel has misrepresented these communications; this discussion is limited to showing Complaint Counsel's failed effort to establish a plausible timeline for the alleged conspiracy.

[6] (*See* CC Br. at 25, n. 213). Complaint Counsel also cites to an unidentified communication between Cohen and Sullivan "in which Cohen informed Sullivan of Benco's no buying group policy." *Id.* But the evidence does not establish that any such communication took place. Mr. Sullivan testified that Mr. Cohen never informed him about Benco's policy and that he was unaware of Benco's policy. (RRFF 679). Moreover, Mr. Cohen could not recall any specific communication in which he told Sullivan about Benco's policy, and believed he might have made such a communication based upon a document he had seen, but no such document is in the record. (RRFF 662). Cohen further testified that he only spoke to Sullivan about buying groups *once*, in the conversation about whether or not Atlantic Dental was a buying group, and that took place in March 2013.

Complaint Counsel speculates that a January 13, 2012 call from Cohen to Sullivan concerned a buying group called Unified Smiles. (CC Br. at 25, n. 213; *id.* at 30). But that is completely contradicted by the record. Both participants to the call denied that it concerned Unified Smiles or any buying group. (RRFF 1422, 1436-40). Mr. Cohen testified that the call concerned an employment issue arising under the "Competitive Hiring Agreement" that Benco and Schein had entered into to avoid litigation over non-compete agreements when employees changed companies. (BFF 586-94). Cohen's testimony about this call is consistent with contemporaneous documents showing phone calls between Cohen and Benco's outside counsel on employment matters immediately before and immediately after the call between Cohen and Sullivan. (BFF 590-91).

[7] As Schein has extensively established, Schein continued to work with buying groups from 2012 to 2015, as it had in 2011 and before the alleged conspiracy. Moreover, the record is replete with field reports in which Benco representatives noted that they had heard that Schein was working with buying groups during that period.

- Schein changed its position and reached an agreement with Benco to not deal with buying groups by July 2011; but
- In September 30, 2011, Benco knew that Schein was dealing with buying groups; and
- Through communications between Benco and Schein in March 2013, "Benco gained an understanding that Schein… *would adopt a policy* against recognizing buying groups."

Thus, Complaint Counsel's own summary of the evidence disproves a July 2011 start date. And an alleged start date of March 2013 or later would concede that none of (1) the communications between Benco and Schein in 2011 and 2012 regarding employee disputes and other issues, (2) Complaint Counsel's speculation that Benco tried to "enforce" the agreement in 2012 and 2013 (CC Br. 29-30, 31-32), or (3) Schein's rejection of doing business with Unified Smiles in 2011, and Smile Source's ending of its relationship with Schein in January 2012, were circumstantial evidence of a conspiracy. Similarly, Benco's internal emails concerning Schein's doing business with buying groups and how Benco might react – which both pre-date and post-date March 2013 – were instances of normal, expected market intelligence among competitors and not evidence of the alleged conspiracy.

### D. Complaint Counsel Misrepresents the Evidence in Its Efforts to Support Its Allegation of Collusion.

#### 1. Complaint Counsel's Assertion That Benco Enacted Its "No-Middleman" Policy to Forestall the Emergence of Buying Groups is Demonstrably False.

In its Introduction, Complaint Counsel claims that Benco adopted its no-middleman policy in the mid-1990's to "forestall [the] threat" that competition from buying groups would lead to a "race to the bottom" and "drive down margins across the board." CC Br. at 1-2. This is unsupported by any reference to the record and is simply not true. Indeed, this assertion is not

repeated later in the brief when Complaint Counsel describes the creation of Benco's policy. (*See* CC Br. at 15-16).

In fact, contrary to Complaint Counsel's claim, the record shows that in 1996, Chuck Cohen formalized an existing policy that Benco did not recognize middlemen who get in between Benco and its customers. (BFF 166-67). The policy existed before buying groups emerged and was not limited to buying groups (groups of independent dentists who band together to negotiate a discount) or intended to forestall the growth of buying groups. Before buying groups emerged, 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. (BFF 168).[8] Cohen testified that the policy grew out of his own experience as a territory representative and represented the kind of vision that he wanted Benco to be. (BFF 169). The policy is reflected in Benco's "high-touch" customer-focused business model that offer customers the best value based on a combination of price and customer support, and Benco's striving to offer the best customer experience. (BFF 879-80).

[8] Additional evidence that Benco's policy was targeted to "middlemen" generally and not buying groups is Benco's reaction to the overture made to Benco on behalf of the proposed Kois Buyers Group. Benco had had a prior relationship with Dr. Kois, who is one of the most respected individuals in dentistry in the country and who was a "success partner" of Benco. Benco had an existing agreement with Dr. Kois and the Kois Center whereby Benco would promote the activities of the Kois Center and market the Center's courses in Benco's magazine. (BFF 338-44). In October 2014, Dr. Kois, by email, introduced Chuck Cohen to Qadeer Ahmed, of Pro-Equalizer services, writing that Kois "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." (BFF 346-47). Cohen wrote back to Dr. Kois, that Benco was confidentially looking at buying club options and should have some ideas to discuss with Dr. Kois in early 2015, but that "*whatever we do, I don't think that we'll need to involve an outside company like Equalizer Pro Services or anyone else.*" (BFF 353-54. (emphasis added)).

### 2. Complaint Counsel's Characterization of the Relevant Communications is not Supported by the Record.

A number of Complaint Counsel's assertions regarding the relevant communications are also misleading. For example, Complaint Counsel asserts that "In a clear admission of the agreement, Cohen testified that after he communicated with Sullivan and Guggenheim about buying groups, he 'underst[ood] that Schein, Patterson, and Benco all had a similar policy with respect to buying groups in September of 2013.'" (CC Brief at 47). In fact, Cohen admitted no such thing. Indeed, there is no evidence to relate Cohen's general understanding of Schein's and Patterson's policies with any communications. There is no evidence that Cohen ever discussed Schein's policy with anyone from Schein. (*See* SFF 677 (quoting Cohen, Tr. 845 (Sullivan never told him "what Schein's policy was with respect to buying groups"), 848 (No one from Schein told him "how it feels about buying groups") and CX 8015 (Cohen, Dep. at 490 ("I don't recall ever hearing from anyone at Schein what Schein's policy was on buying groups."))). The only communication between Benco and Patterson that even remotely concerned Patterson's practices with regard to buying groups was the February 2012 email from Guggenheim to Cohen, in which Guggenheim curtly noted, "We feel the same way about these," but Cohen testified that, even before this communication with Guggenheim it was his understanding that Patterson was not working with buying groups. (BFF 431-33). In short Cohen never testified that he reached any understanding about Schein's and Patterson's policies with regard to buying groups through communications with Schein or Patterson. By stringing together the unrelated assertions that Cohen communicated with Sullivan and Guggenheim and that Cohen had an understanding of Schein's and Patterson's policies regarding buying groups, Complaint Counsel seeks to imply, without evidence, that Cohen learned about Schein and Patterson's policies about buying groups

from communications with Schein and Patterson. Complaint Counsel's assertion that Cohen has "clearly admitted" this is false.

### E. Benco and the Other Respondents Acted Consistently with Their Unilateral Economic Self-Interest When They Declined to Offer Discounts to Buying Groups

Complaint Counsel claims that Benco, Schein, and Patterson acted contrary to their unilateral economic self-interest when declining to offer discounts to buying groups, and that this is evidence of an agreement among them. (CC Brief at 62-64). The evidence simply does not support Complaint Counsel's assertions.

Benco, Schein, and Patterson had different strengths, business strategies, and goals. It is no surprise, therefore, that each responded differently to buying groups. Schein, a nationwide distributor, had a special division to deal with large customers. Schein thus had experience dealing with buying groups and had an infrastructure in place to allow it to do so efficiently and cost-effectively. (BFF 1077-1079). Schein was therefore the most willing of Respondents to deal with buying groups. Patterson also had a nationwide presence, but its experience was primarily with independent dentists. It did not have infrastructure in place to handle sizeable customers, and to create such an infrastructure might have required investments. (*Id*.) Patterson was interested in exploring business with large customers, but it was still evaluating its options. Patterson was also a decentralized organization, however, so on occasion local offices entered into arrangements with buying groups. Benco did not have a national presence before 2011, and its top strategic objective was to complete its expansion across the continental United States. (BFF 48-59, 1186-1189). In order to maintain as close contacts with customers as possible, Benco followed a policy of not dealing with intermediaries or middle-men, including buying groups. (BFF 166-189).

Despite Respondents' different circumstances and strategies, buying groups presented a number of common concerns. Potential disadvantages of dealing with buying groups included the absence of any means of ensuring compliance by their members, the risk of cannibalization, the absence of any possibility of reducing a distributor's costs, the reduction of incentives to sales representatives as a result of the reduced commissions, the costs and fees associated with buying groups, and the potential misalignment with a distributor's strategic goals. (BFF 1003-1010). As a result, even Schein – the most willing of Respondents to deal with buying groups – was wary, evaluated each buying group opportunity carefully, and often decided not to bid for a particular buying group opportunity. But each Respondent acted consistently with its unilateral economic self-interest:

- Schein, with its large customer experience, existing infrastructure and low cost base, evaluated individual buying group opportunities and decided on a case-by-case basis whether to bid for the business of selected buying groups;

- Patterson, with its lack of experience, cautiously explored the large customer segment while individual regional offices occasionally entered into arrangements with buying groups; and

- Benco, with its focus on using its resources to complete its expansion across the United States and its goal of staying as close to customers as possible, refused to do business with middle-men that could not drive compliance or reduce Benco's costs to serve.

Complaint Counsel's assertions that Respondents acted contrary to their unilateral economic self-interest fail to take any of these business realities into consideration. Rather, Complaint Counsel bases its claims almost entirely on five so-called profitability studies conducted by its economic expert, Dr. Marshall. However, Dr. Marshall's narrow, artificial, and deeply flawed profitability studies provide no basis to draw general conclusions regarding whether "buying group opportunities" would be profitable to various types of distributors.

First, Dr. Marshall's studies had no proper theoretical foundation because his analysis conflated conspiratorial behavior with non-conspiratorial oligopolistic behavior. (Carlton, Tr. 5384-95). He did not follow any accepted method of economic analysis. (BFF 1020-1025; J. Johnson, Tr. 4837-38). It is telling that Dr. Marshall's expert report did not cite to a single academic, peer-reviewed study endorsing the type of analysis he performed. (Marshall, Tr. 3241; CX7100 at 150-190, ¶¶ 347-426). Although there are multiple reasons why a distributor might choose not to deal with a buying group, Dr. Marshall ignored them all except for cannibalization. (BFF 1000-19).

Second, Dr. Marshall's profitability studies say nothing about the general ability of a buying group to drive purchasing volume to any distributor, because the Kois Buyers Group and Smile Source are not representative of buying groups in general and Burkhart, Atlanta Dental, and Schein are not representative of Benco or other distributors.

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). Kois and Smile Source were highly unusual, and were not representative of buying groups in general. Buying groups differ in many important ways that affect whether they are likely to be a profitable opportunity or not, including how they are organized, who their representatives are, how many members they have, where they are located, and what services they provide their members, among other factors. (BFF 1040-1047).

The Kois Buyers Group was not representative of other buying groups at the time it approached Patterson, Schein, and Benco because it was represented by Mr. Qadeer Ahmed, who was unknown, had no experience in the dental industry, was running a company named ProService out of his house, used his personal "hotmail" email account to contact prospects, and

falsely claimed to represent 1,700 members when he didn't have any. (BFF 1048-57). Smile Source was not representative of other buying groups because [redacted].

In addition, the distributors studied were not representative of Benco. Burkhart was not representative of Benco (or Schein or Patterson) because Burkhart had different cost structures, strengths, weaknesses, opportunities, and business plans than Benco (or Schein or Patterson). (BFF 1063-1079). For example, Burkhart had a substantial presence and extensive name recognition in the Seattle region and therefore was well positioned to increase its business with Kois Buyers Group members by entering into an agreement with the Kois Buyers Group. (BFF 1072). Benco, by contrast, had only a miniscule presence, didn't have people on the ground, and had very little name recognition in Seattle at the time. (BFF 1073). There is no reason to think, simply because Burkhart increased its business with Kois Buyers Group and Smile Source members, that Benco would have profited by working with the Kois Buyers Group or Smile Source. (BFF 1074). Likewise, Atlanta Dental was not representative of Benco (or Schein or Patterson), and simply because Atlanta Dental gained incremental volume and share is no indication that any other distributor would have done so. (Wu, Tr. 5046-55). And of course Schein is fundamentally different from Benco, and whether Schein would or would not have found it profitable to enter into an agreement with Smile Source says nothing about whether it would have been profitable for Benco.

Third, Dr. Marshall's studies were extremely limited in scope, and the dentists involved are not a representative sample of dentists in the United States. His studies of Burkhart's, Atlanta Dental's, and Schein's dealings with the Kois Buyers Group and Smile Source included a total of

only [redacted].

Fourth, Dr. Marshall's implementation of his five studies involved multiple flaws, including failure to account for risk and uncertainty, improper mixing data of different years, failure to consider the cost of administrative fees and rebates, reliance on unsupported assumptions, and failure to control for other factors. (BFF 1080-1148). These errors alone were sufficient to render any results unreliable. *Id.*

Fifth, Dr. Marshall failed to conduct counter-factual analyses for Benco (or Patterson or Schein). The only proper way to determine whether Benco (or Schein or Patterson) was foregoing profits by not seeking to deal with a buying group is to conduct a counter-factual analysis for Benco (or Schein or Patterson) and that specific buying group. (BFF 1149-67). Dr. Marshall failed to perform such an analysis. *Id.*

Indeed, during the time period of Dr. Marshall's studies, Benco used its resources to pursue its own business strategy, including pursuit of opportunities with other, more profitable customers. (BFF 1186-89). During the time period of Dr. Marshall's studies, Benco successfully completed its expansion into Southern California and the Pacific Northwest. *Id.* Further, Dr. Johnson demonstrated that proper counter-factual analysis of Dr. Marshall's data shows that Benco's refusal to offer discounts to the Kois Buyers Group and Smile Source, and its use of its resources to pursue other opportunities instead, was profitable. Dr. Johnson demonstrated that, [redacted].

These multiple flaws and short-comings render Dr. Marshall's five profitability studies inherently unreliable.

Complaint Counsel also claims that Respondents changed their conduct with respect to buying groups. (CC Brief at 64-66). This is simply not true for Benco – its conduct has been fully consistent since 1996.

By claiming that Benco has changed its practice with respect to buying groups, Complaint Counsel implies that Benco responded differently over time to similar buying groups. But this is not the case. In fact, Benco has routinely declined to offer discounts to entities that are unable to drive compliance or to help Benco reduce costs. (BFF 903-928). Most buying group agreements offered Benco the equivalent of a "hunting license," but no assurances that Benco would actually realize increased volume and nothing to reduce Benco's costs to serve. (BFF 177-80). As a result, since 1996, Benco has steadfastly declined to offer discounts to buying groups

that can't drive compliance or reduce Benco's costs. (BBF 166-80, 187-89). This remains Benco's policy today. (BFF 232).

Benco's dealing with Elite Dental Alliance may, on the surface, look inconsistent with its policy, but Elite Dental Alliance is fundamentally different from other buying groups, and those differences went a long way towards resolving Benco's concerns with buying groups. (BFF 232-270, 1292-1334). Complaint Counsel blindly ignores every individual aspect of Elite Dental Alliance, and its argument is deliberately misleading.[9]

Specifically, the partnership with Cain Watters, which could encourage customers to purchase from Benco during their annual financial counseling, provided Benco with additional assurance that Elite Dental Alliance could actually drive compliance. (BFF 242-244, 246, 255, 258, 1306). 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. (BFF 254, 258, 1316-1317). 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. (BFF 242-258, 1322-1323).

The fact that Elite Dental Alliance members were larger practices put Benco in a better position to be able to negotiate discounts from manufacturers and addressed Benco's concerns regarding the cost to serve individual members of most buying groups. (BFF 257, 1308-1309). 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. (BFF 252, 1314). Benco actually had some control over the selection of direct manufacturers and the development of the

[9] Indeed, Complaint Counsel's refusal to even consider any of the factual circumstances surrounding Elite Dental Alliance is particularly disingenuous in light of the lengths to which it goes to try to distinguish, on factual grounds, the various buying groups that Schein dealt with between 2011 and 2015.

program, which helped set it apart from other buying groups. (BFF 253, 1319-1320). Benco was also entitled to 50 percent of any profits earned by Elite Dental Alliance. (BFF 246, 1311).

Economic analysis confirms the Elite Dental Alliance arrangement had critical attributes that set it apart from other buying groups. Those unique attributes resolved many of Benco's concerns about doing business with buying groups and created an economic incentive for Benco to work with Elite Dental Alliance that did not exist for any other buying group. (BFF 1297-1301, 1306, 1309, 1314, 1317, 1320, 1323, 1326). Indeed, in Benco's view, the specific attributes of Elite Dental Alliance avoided many of the problems Benco saw with the typical buying group model and made it more like an integrated entity than a buying club. (Cohen, Tr. 818-22; J. Johnson, Tr. 4862). From an economic perspective, 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). 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; BFF 1292-1334).

## II. Complaint Counsel Has Failed to Prove That Independent Dentists Suffered Harm to Competition.

### A. The Purported Agreement Alleged by Complaint Counsel was not a *Per Se* Violation of the Antitrust Laws.

Complaint Counsel asks Your Honor to extend the law, and take the unprecedented step of declaring that an alleged agreement with respect to intermediaries or middle-men, but that leaves robust competition for end-customers unaffected, is *per se* unlawful. Complaint Counsel has provided no support for this novel position.

Complaint Counsel invokes the *per se* rule in a manner contrary to the trend of Supreme Court precedent in recent decades, which has emphasized that the "prevailing" standard of evaluation of a restraint on competition is the rule of reason. *See, e.g., Continental T.V., Inc. v.*

*GTE Sylvania Inc.*, 433 U.S. 36, 49, 59 (1977); *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5 (2006) ("[T]his Court presumptively applies rule of reason analysis . . . ."); *Business Electronics Corp. v. Sharp Electronics Corp*., 485 U.S. 717, 723 (1988) ("Ordinarily, whether particular concerted action violates § 1 of the Sherman Act is determined through case-by-case application of the so-called rule of reason."); *id*. at 726 ("[T]here is a presumption in favor of a rule-of-reason standard."); *Leegin Creative Leather Products, Inc. v. PSKS, Inc*., 551 U.S. 877, 885 (2007) ("The rule of reason is the accepted standard for testing whether a practice restrains trade"). Accordingly, the Court has "expressed reluctance to adopt *per se* rules . . . 'where the economic impact of certain practices is not immediately obvious.'" *Texaco Inc. v. Dagher*, 547 U.S. at 5 (internal citations omitted).

Complaint Counsel's argument for applying the *per se* rule is built on a fundamental mischaracterization of the role of buying groups. Complaint Counsel's arguments assume that buying groups are equivalent to customers. In its post-trial brief, Complaint Counsel states, "Horizontal Agreements to Refuse to Serve *a Customer* are Per Se Unlawful." (CC Brief at 41 (emphasis added)). Complaint Counsel cites to cases applying the *per se* rule to agreements setting prices to *customers* who purchase the products or services at issue.

But buying groups are not customers – they are intermediaries or middle men. The record is clear that buying groups do not perform any of the functions of customers. To the contrary, the evidence is uncontroverted: buying groups are not customers. (BFF 903). Buying groups do not buy anything. Buying groups do not select products for purchase or decide what to purchase. (BFF 904). Buying groups do not place orders. (BFF 905). Buying groups do not take delivery of products or stock inventory for future use. (BFF 906). Buying groups do not use the purchased

products. Buying groups do not pay invoices due. (BFF 907-908). Buying groups perform none of the functions of a customer.

Rather, individual dentists who are members of buying groups are the customers. Individual dentists perform all the functions of customers – they decide what to purchase, place orders, take delivery, and pay for the products ordered. (BFF 910). Buying groups are "middle-men" between distributors and the ultimate customers – individual dentists. (Cohen, Tr. 444-45; BFF 909). Buying groups do nothing other than negotiate terms and take their cut. (BFF 354).

This highlights the fundamental problem with Complaint Counsel's approach. It eschews empirical analysis of actual economic results in favor of simplistic labels. And if it gets the labels wrong, its entire argument is misplaced. This was precisely the approach criticized by the Supreme Court when it stated, "easy labels do not always supply ready answers." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc*., 441 U.S. 1, 8 (1979).

And Complaint Counsel gets its labels wrong. Nowhere in its legal analysis does Complaint Counsel properly convey the fundamental economic feature of the agreement that it has alleged: regardless of whether one thinks an agreement may have been formed, or if so, when, or how long it supposedly lasted, or precisely which buying groups may or may not have been implicated, one fact is clear: the robust competition among Benco, Schein and Patterson for the business of independent dentists – including dentists who belonged to buying groups – continued unabated. (BFF 383-87; [redacted]). Even Complaint Counsel's economic expert admitted as much. (Marshall, Tr. 3411-12; [redacted].

Nowhere in its post-trial brief does Complaint Counsel properly reflect this fundamental fact. Complaint Counsel struggles to pigeon-hole this matter into a narrow *per se* category, but

none fits. As noted above, Complaint Counsel refers to agreements to refuse to serve "a Customer." (CC Brief at 41). But of course, buying groups aren't customers. (BFF 354, 903-910). Complaint Counsel refers to an agreement to refuse to discount to buying groups. (CC Brief at 41-42). But Complaint Counsel does not cite a single case holding that a refusal to grant a discount to middlemen, while still competing vigorously for the business of (and granting discounts to) end customers, is *per se* unlawful.[10] (*Id*.). Complaint Counsel analogizes to an exchange of assurances among competitors. (CC Brief at 42-44). But the cases cited by Complaint Counsel all involved conduct directed at *customers*, which is clearly absent in the present matter. *Gainesville Utilities Department v. Florida Power & Light Co*., 573 F.2d 292, 299 (8th Cir. 1978) (involving an agreement not to serve *customers* in certain territories); *United States v. Foley*, 598 F.2d 1323, 1332 (4th Cir. 1979) (agreement to charge home sellers – *customers* – a certain commission rate); *Esco Corp. v. United States*, 340 F.2d 1000 (9th Cir. 1965) (agreement among distributors to reduce the discounts, and thus increase the effective sales price, on sales of stainless steel pipe and tubing to jobbers).

Complaint Counsel tries using the label of a price-fixing agreement. (CC Brief at 70). But again, the cases cited by Complaint Counsel involved fixing the prices paid by *customers*, which clearly was not true in the present matter. *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978) (agreement not to negotiate fees with a customer until after the customer had selected an engineer); *United States v. Container Corp. of America*, 393 U.S. 333 (1969) (agreement to exchange information regarding prices charged, prices quoted, and other

[10] The situation in the present matter must be distinguished from an agreement with respect to distributors, retailers, or others in a distribution chain where the distributors or retailers are themselves customers (i.e., they purchase products) and the parties to the agreement do not compete independently for the business of customers. Thus, courts have held, for example, that an agreement among wholesalers with respect to an element of prices paid by retailers can be *per se* unlawful. *Catalano, Inc. v. Target Sales, Inc*., 446 U.S. 643, 644-45 (1980). In the present situation, by contrast, Respondents compete aggressively with respect to the customers – individual dentists – regardless of whether intermediaries are present.

information on specific sales to identified customers). Complaint Counsel cites *Catalano* for the proposition that an agreement that raises prices may be *per se* unlawful even absent agreement as to the specific price to be charged. (CC Brief at 70 fn. 561). But that case involved an agreement among wholesalers with respect to an element of prices paid by retailers – the customers of the wholesalers. In sharp contrast to the facts of the present matter, the *Catalano* decision did not involve any indication that the wholesalers were competing aggressively for the business of customers outside the scope of the agreement at issue. *Catalano, Inc. v. Target Sales, Inc*., 446 U.S. at 644-45.

Complaint Counsel also tries describing the alleged agreement as "a horizontal group boycott of a customer," citing *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990). (CC Brief at 70). Complaint Counsel quoted Areeda & Hovenkamp for the proposition that a "concerted refusal to deal directed at the customer itself is simply a price fixing device." (CC Brief at 70 fn. 564). But of course, these sources are also completely inapposite; in the present matter, there was continued, aggressive competition for all customers, including members of buying groups.

Complaint Counsel has provided Your Honor with no support for extending the *per se* rule to apply to the circumstances of this matter – an alleged agreement involving intermediaries or middle-men, where the parties continued to engage in robust competition for customers. Complaint Counsel has not identified a single case that reflects the fundamental economic reality of the present matter – that regardless of the alleged agreement, Benco, Schein and Patterson continued to compete vigorously for the business of independent dentists, including dentists who belonged to buying groups. Complaint Counsel has failed to present any authority demonstrating that an alleged agreement with respect to middlemen in the face of such ongoing aggressive

competition for end-customers would "always or almost always" result in anticompetitive harm. *Broadcast Music*, 441 U.S. at 19-20. Complaint Counsel has not provided any reliable basis for Your Honor to reject the trend towards greater reliance on the rule of reason, ignore record evidence of absence of economic harm, and instead create new law by extending the *per se* rule to a novel factual situation.

### B. The Purported Agreement Alleged by Complaint Counsel was not Inherently Suspect or Unlawful Under a Truncated Rule of Reason.

#### 1. Complaint Counsel Has Failed to Provide the Empirical Record of Prior Experience with Agreements Regarding Middlemen Necessary to Support a Finding That Such an Agreement is Inherently Suspect.

Perhaps recognizing the stretch of asking Your Honor to make new law by extending the *per se* rule in the absence of supporting precedent, Complaint Counsel also asserts that Your Honor should create new law by presuming that the alleged agreement caused anticompetitive harm. (CC Brief at 71). Complaint Counsel claims that the alleged agreement is "inherently suspect," and thus presumptively anticompetitive. (*Id*.). Complaint Counsel cites *In re Polygram Holding, Inc.*, 136 F.T.C. 310, 2003 WL 25797195 (July 24, 2003) prominently in support of its position. Yet this case, more than any other, demonstrates the flaw in Complaint Counsel's position. It is therefore instructive to consider more carefully the origins of the *Polygram* matter, the decision itself, and its progeny.

*In re Polygram* had its genesis in the Supreme Court's decision in *California Dental Association v. Federal Trade Commission*. In that case, the Commission found restraints on advertising implemented by the dental association to be violations of the Sherman and FTC Acts under a *per se* theory of liability or, in the alternative, under an abbreviated rule-of-reason analysis. *California Dental Ass'n v. Fed. Trade Comm'n*, 526 U.S. 756, 763 (1999). The court of appeals overturned the finding that the restraints were *per se* unlawful, but upheld the finding

pursuant to the abbreviated rule of reason analysis. *Id*. at 763. The Supreme Court overturned the latter finding as well. The Court criticized "the indulgently abbreviated review" of the evidence by both the court of appeals and the Commission. *Id*. at 778. The Court was particularly critical of the appellate court's (and implicitly, the Commission's) "aversion to empirical evidence" and "leniency of its enquiry into evidence of the restrictions' anticompetitive effects" before shifting to Respondent the burden of establishing absence of harm to competition. *California Dental*, 526 U.S. at 776. The Court made clear that a truncated examination must be justified based on "the circumstances, details, and logic" of the specific restraint at issue, and is appropriate only if the marketplace experience has been "so clear" that a truncated analysis will permit "a confident conclusion about the principal tendency of a restriction." *Id*.

The Supreme Court's ruling caused considerable consternation at the Commission. The Commission wrestled in particular with the question of how it could present "empirical evidence" in a less "lenien[t]," more rigorous "enquiry into evidence of [a] restriction's anticompetitive effects" in order to establish "a confident conclusion about the principal tendency of a restriction," *id*. at 776, without conducting a full-blown rule of reason analysis.

The Commission's answer came in the form of *In re Polygram*. And in particular, as demonstrated in that case, the answer was that proof of likely anticompetitive effect could come in the form of a substantial body of rigorously-conducted, empirically-based, peer-reviewed and published econometric studies establishing that a particular practice has consistently caused anticompetitive harm in multiple different industries, across different locations, and in different circumstances, combined with expert testimony establishing that that body of empirically-based econometric work would predict anticompetitive harm in the particular case in question. This body of evidence – derived from experience with a restriction in multiple other circumstances –

would permit "a confident conclusion" that the same type of restriction would be highly likely to cause anticompetitive harm in a particular case, even in the absence of a traditional rule-of-reason analysis of actual harm in the case in question.

The Commission filed its complaint in *In re Polygram* in 2001, just two years after the Supreme Court's decision in *California Dental*. The Commission alleged that Polygram had agreed with Warner Music not to discount or advertise Three Tenors I & II albums to customers. The Commission alleged that the agreement not to advertise was inherently suspect, and gave rise to a rebuttable presumption of anticompetitive harm.

At trial, Complaint Counsel presented evidence that, not only did economic theory predict, but a substantial body of empirically-based published studies established, a correlation between advertising restrictions and higher prices. Complaint Counsel called an economic expert, Dr. Stephen Stockum, to testify as to both antitrust theory and empirical research relating to advertising restrictions. 136 F.T.C. 310 at 355. In particular, Dr. Stockum presented 17 peer-reviewed, published studies of advertising restrictions, conducted using accepted econometric methodology, in industries as diverse as eyeglasses, pharmaceuticals, legal services, groceries, cigarettes, and toys. *Id*. at 355 fn. 52 (listing the 17 empirical studies presented by Dr. Stockum). Dr. Stockum testified about the consistent correlation established between a restriction on advertising and higher prices. He explained why those 17 empirical studies were directly applicable to the specific restraint in question in *Polygram*. And he concluded, based on the combination of economic theory and the body of published empirical studies, that the restraint in question was likely to cause anticompetitive harm. *Id*. at 357.

Importantly, Dr. Stockum was subjected to cross-examination by Respondent on all aspects of his opinion, including his reliance on the 17 published empirical studies and the

applicability of those studies to the specific restraint at issue. Additionally, Respondent had the opportunity (had it chosen to use it) to present any contrary opinion from its economic expert and to introduce through its expert any empirical studies reaching a different result. Any finally, Complaint Counsel and Respondent had the opportunity to develop fully, in their briefs and reply briefs, their arguments as to why Dr. Stockum's conclusions were or were not accurate.

It was based on this rich, detailed and thorough record that the Administrative Law Judge in that matter was able to reach "a confident conclusion," based on "empirical evidence" and a rigorous "enquiry into evidence of [a] restriction's anticompetitive effects," *California Dental* at 776, that the restraint at issue in that case was highly likely to cause harm to competition and thus could be classified as presumptively anticompetitive. *In re Polygram*, 136 F.T.C. 310, at 399 (Intitial Decision) . The Administrative Law Judge cited to the empirical economic studies of advertising restrictions "in numerous industries," and emphasized that it was not just economic theory, but also "empirical findings," that supported Dr. Stockum's conclusion that the restraint was very likely to be anticompetitive. *Id*. at 447-48. The Administrative Law Judge even entered a specific finding of fact regarding one empirical study that found that supermarket prices rose by 5.8 percent during a 60-day loss of advertising due to a newspaper strike in Queens, New York. *Id*. at 448.

This extensive record also provided the basis for the Commission to affirm the Administrative Law Judge's opinion. 136 F.T.C. 310 (2003) (Commission Decision). In light of the Supreme Court's *California Dental* decision, the Commission clearly acknowledged the requirement to structure an analytical framework that is "sound in substance, transparent in revealing [its] operational criteria, and administrable" in specific cases. *Id*. at 351-52. The Commission determined that the combination of detailed theoretical analysis and empirical

economic studies presented by Complaint Counsel's expert met that standard. Indeed, the Commission specific discussed both Dr. Stockum's conclusions and the empirical studies underlying his conclusions in its decision, and cited all 17 of the empirical economic studies presented by Dr. Stockum in its decision. *Id*. at 355 fn. 52.

The Commission's decision was appealed to the U.S. Court of Appeals for the D.C. Circuit. After review, the D.C. Circuit fully adopted the Commission's position. The court of appeals stated:

> At bottom, the *Sherman Act* requires the court to ascertain whether the challenged restraint hinders competition; the Commission's framework, at least as the Commission applied it in this case, does just that. We therefore accept the Commission's analytical framework. If, based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition, then the restraint is presumed unlawful[.]

*Polygram Holding, Inc. v. Fed. Trade Comm'n*, 416 F.3d 29, 36 (D.C. Cir. 2005).

As Your Honor is well aware, the Commission recently had the opportunity to revisit its standard for establishing that a particular restraint is inherently suspect. In *In re 1-800 Contacts, Inc.*, the Commission issued a complaint alleging, *inter alia*, that a series of agreements between 1-800 Contacts and a number of competitors settling trademark infringement claims violated Section 5 of the FTC Act. The complaint alleged that the agreements in question both caused anticompetitive effects under a traditional rule of reason and were inherently suspect as restrictions of non-misleading advertising. *In re 1-800 Contacts, Inc*., Dkt. No. 9372, Complaint ¶¶ 28-32 (August 8, 2016).

Once again, Complaint Counsel called upon an economic expert, in this case Professor David Evans, to testify with respect to the theoretical underpinnings and the record of empirical economic analysis (this time a total of 21 separate peer-reviewed, published econometric studies

involving multiple industries, geographies, restrictions, and durations) establishing a clear correlation between advertising restrictions and higher prices. As in *Polygram*, Respondent had an opportunity to cross-examine Complaint Counsel's expert with respect to his conclusions as well as the details and applicability of the 21 underlying empirical studies. Once again, the parties had the opportunity to address the relevant evidence in their briefs, including the extent to which the empirical studies presented by Professor Evans actually fit the factual allegations at issue in the case. *See, e.g.*, *In re 1-800 Contacts, Inc.*, Dkt. No. 9372, Complaint Counsel's Corrected Post-Trial Brief and Exhibits at 76-84 (June 22, 2017). And indeed, Respondent argued that specific characteristics of the alleged agreements – that they were good faith settlements of trademark disputes and arose in the unique context of paid search advertising – rendered the extensive empirical economic experience cited by Complaint Counsel's expert inapplicable to the specific matter. *See In re 1-800 Contacts, Inc*., Dkt. No. 9372, Respondent 1-800 Contacts' Post-Trial Brief at 62-73 (June 15, 2017).

Although Complaint Counsel's proof of actual anticompetitive effects in a properly defined relevant market in that case made it unnecessary to reach the issue of whether the agreements in question were inherently suspect (*see In re 1-800 Contacts, Inc*., Dkt. No. 9372, Initial Decision at 138-39, 2017 FTC LEXIS 125 (Oct. 27, 2017)), the body of empirical evidence presented by Complaint Counsel made such a finding possible. Indeed, on appeal, the Commission chose to reach the issue, and decided that the evidence supported a finding that 1-800 Contacts' agreements were inherently suspect. *In re 1-800 Contacts, Inc*., Dkt. No. 9372, Opinion of the Commission at 20-21, 2018 FTC LEXIS 184 (Nov. 7, 2018). The Commission cited both Professor Evans' testimony and the body of 21 peer-reviewed, published empirical economic studies that he presented in his testimony as support for its conclusion that Complaint

Counsel had satisfied the *California Dental* standard of "empirical evidence" sufficient to establish "a confident conclusion about the principal tendency of a restriction." *California Dental*, 526 U.S. at 776.

In the present matter, by contrast, Complaint Counsel has offered nothing but hollow assertions. Where is the body of empirical economic studies (whether peer-reviewed and published or otherwise) demonstrating a statistical correlation between alleged agreements directed at middle-men but leaving competition for end customers intact and higher prices? Complaint Counsel offered none. Where was the expert testimony from a professional economist offering the carefully considered opinion that the alleged agreements should be treated as inherently suspect?[11] Dr. Marshall expressly testified that he did not take any position as to whether the conduct alleged in this matter should be treated as *per se* unlawful or inherently suspect, or analyzed pursuant to a truncated rule of reason. (BFF 636-38). Indeed, he was so unfamiliar with the concept that, when asked if he was offering any opinion of whether the conduct alleged in the Commission's complaint should be treated as inherently suspect, he responded, "I don't know what that means." (RX2964 (Marshall, Dep. 141)). What other empirically-based evidence has Complaint Counsel offered to demonstrate a historical record of

[11] Complaint Counsel refers in passing to a footnote in Dr. Carlton's expert report stating that he did not discuss market definition, "as I understand that in the context of the conspiracy as alleged by the FTC," market definition would not be relevant. (CC Brief at 80 fn. 610). Dr. Carlton's statement (drafted several weeks before trial) reflected his understanding of the counts alleged in the Commission's complaint, not any actual marketplace evidence. Furthermore, the evidence at trial demonstrated that buying groups are not customers, but rather are middle-men or intermediaries. Thus, the context in which Dr. Carlton wrote footnote 15 of his expert report turned out to be inapplicable in light of the evidence presented at trial. (*See* RRFF 1523-24).

Complaint Counsel also quotes Dr. Wu, but completely misses the import of his statement. Complaint Counsel quotes Dr. Wu's deposition testimony: "[a]s an economist, if there is an agreement among competitors, not to discount *to customers*, then I would view that as being anticompetitive." (CC Brief at 73; RX2967 (Wu, Dep. at 279) (*emphasis added*)). But of course, this is precisely the point – there was no agreement with respect to *customers*. Buying groups are not customers, and this testimony is no evidence as to the likely effect of an alleged agreement not to discount to buying groups.

experience showing that alleged agreements regarding middle-men always or almost always cause higher prices? None. Nada. Zip. Zilch.

In the absence of a body of empirical evidence, Complaint Counsel offers Your Honor no objective standard to determine whether an alleged agreement with respect to intermediaries or middle-men – despite aggressive competition for end customers – will always or almost always harm competition. Complaint Counsel's assertion that the alleged agreement is inherently suspect is entirely subjective; it is based entirely in the eye of the beholder. Complaint Counsel thinks the alleged agreement is superficially similar to practices condemned in past cases, and therefore urges that Your Honor create a new category of agreements as to which harm to competition will be presumed to exist. This concern was at the heart of the Supreme Court's objection to the inappropriate reliance on labels on *Broadcast Music* and its concern with the "indulgently abbreviated review" conducted by the Commission and the court of appeals in *California Dental*. *Broadcast Music*, 441 U.S. at 8; *California Dental*, 526 U.S. at 778. Whether a practice may be declared inherently suspect and the burden of persuasion shifted to a defendant requires more than labels or the mere say-so of Complaint Counsel.

**2. Citations to Isolated Factoids From the Record in this Matter Cannot Support a Finding That an Agreement Regarding Middlemen is Inherently Suspect.**

Recognizing that it must do more than simply assert that it knows inherently suspect conduct when it sees it, Complaint Counsel offers isolated pieces of evidence from the record in this matter. (CC. Brief at 74-79, 88-90). Complaint Counsel's entire premise is backwards. If *past* marketplace experience permits a confident conclusion that a specific practice always or almost always harms competition, anticompetitive harm may be presumed (subject to rebuttal) without the need to conduct a full rule of reason analysis of the record in a present matter. As the Supreme Court stated in *California Dental*, a truncated analysis is appropriate if "the experience

of the market has been so clear" that a confident conclusion can be drawn as to the likely effect of a restriction. *California Dental*, 526 U.S. at 781; *see also Polygram Holding*, 416 F.3d at 36 (a restraint may be presumed unlawful "based upon economic learning and the experience of the market"). The Commission explained in *In re Polygram*, a practice may be designated as "inherently suspect," giving rise to an initial presumption of anticompetitive effects, only if "past judicial experience and current economic learning" warrant summary condemnation without the need to conduct a full rule of reason analysis of the record at issue. *In re Polygram*, 136 F.T.C. at 344-45; *see also id.* at 382-83 ("experience and economic learning" demonstrate that a restraint on advertising is inherently suspect); *Polygram Holding*, 416 F.3d at 36-37. In other words, in limited circumstances, significant past economic and marketplace experience with a particular practice may permit an initial presumption of anticompetitive harm without the need to conduct a full rule of reason analysis of the record in the specific matter at issue. Complaint Counsel turns that articulation on its head. Complaint Counsel asserts that, in the absence of any past economic and marketplace experience, isolated pieces of evidence taken from the record *in this case* are sufficient to support a presumption of anticompetitive harm, and thus to avoid a rule of reason analysis in this case. (CC Brief at 77-79). Complaint Counsel engages in the ultimate boot-strapping exercise: it asserts that it can avoid having to conduct a full rule of reason analysis of the evidence in this matter, because it says the alleged agreements are inherently suspect, which it says it can confirm based on isolated bits of evidence from the record in this matter, thereby avoiding the need to conduct a full rule of reason analysis of the evidence in this matter. It would be the perfect end-around to avoid having to prove a rule of reason case. But of course, that is not the law.

Even if Complaint Counsel could, in theory, rely upon isolated pieces of evidence from the record to establish that a practice is inherently suspect, the evidence cited by Complaint Counsel in its brief is woefully inadequate to do so. Complaint Counsel's selected handful of factual assertions are a poor substitute for the Commission's approved procedure of relying on a substantial body of peer-reviewed, published econometric studies conducted using accepted econometric methodology demonstrating a consistent correlation between a restraint and competitive harm across multiple circumstances and industries. *In re Polygram*, 136 F.T.C. at 354-57, 355 fn. 52; *In re 1-800 Contacts*, Opinion of the Commission at 20-21.

Complaint Counsel cite evidence that Burkhart [redacted] to Kois Buyers Group members [redacted] (CC Brief at 68-69). Benco does not contest that Burkhart [redacted] But tellingly, Complaint Counsel carefully avoids mention of other record evidence indicating that, in multiple instances, [redacted] Complaint Counsel's hand-picked example of prices paid by members of a single buying group to a single distributor provides no basis from which Your Honor can confidently conclude that the absence of agreements between Benco (or Patterson or Schein) and some number of buying groups always or almost always caused economic harm to members of those buying groups. ([redacted]).

Complaint Counsel also lists 29 buying groups to which either Benco, or Patterson, or Schein, declined to offer discounts. (CC Brief at 74-75). This, of course, tells us nothing as to whether *dentists* suffered anticompetitive harm.

Complaint Counsel also cites specific discounts or ranges of discounts off of catalog prices that either Schein, Patterson or Benco allegedly offered to six selected buying groups before 2011 or after 2016, which Complaint Counsel implies is "but-for" world pricing. (CC Brief at 76-77). Complaint Counsel contrasts this with catalog price, which it describes as "the price that many dentists paid during the conspiracy period" – implying that catalog price was the actual price paid by dentists who were members of buying groups between 2011 and 2016. (CC Brief at 76). From this, Complaint Counsel apparently hopes that Your Honor will infer that prices paid by dentists who were members of buying groups between 2011 and 2016 were higher than the prices they paid before 2011 or after 2016.

There is a reason Complaint Counsel does not cite any economic support for this "analysis" – it is replete with errors, omissions and assumptions. Complaint Counsel provides no basis for its assumption that its six selected examples of pre-2011 and post-2016 discounts are representative of discounts in general, let alone that they represent a measure of the "but-for world" in 2011-2016. Indeed, the record is clear that the cited discount for Benco is NOT representative of anything else – Complaint Counsel selected the only instance in the past 23 years in which Benco entered into an agreement to supply a buying group, specifically because the Elite Dental Alliance presented Benco with a unique opportunity. (BFF 232-270). Yet Complaint Counsel implies that this represents what Benco would have been willing to do with every buying group that approached it between 2011 and 2016.

Equally misleading is Complaint Counsel's assertion that catalog price was "the price that many dentists paid during the conspiracy period." (CC Brief at 76). With respect to Benco, there is no evidentiary support for the statement that many dentists **paid** catalog prices for their dental supplies. During trial, Complaint Counsel asked about the number or percentages of independent dentists "at" or "on" Tier 1 pricing. (Cohen, Tr. 413-24; RRFF 1415). But Mr. Cohen testified during trial at length about Benco's Hug Pricing philosophy, Fair and Flexible pricing strategy, and multi-factor discounting strategy. (Cohen, Tr. 413-424, 652-662, 670-677; CX1100; RX1113; BFF ¶¶ 121-157). In short, prices paid by independent dentists vary greatly even within each Price Tier. (BFF ¶ 149). 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. (BFF ¶ 149). 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). As a result of Benco's individualized pricing strategies, generalizations regarding the prices paid by independent dentists to Benco for dental supplies are meaningless. (BFF ¶ 150). To determine the prices that an independent dentist actually pays, it would be necessary to examine 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). Complaint Counsel never did this.

Complaint Counsel also willfully ignores the extensive record of discounts, promotions, and pricing exceptions offered by Patterson and Schein. Complaint Counsel makes no effort to determine the actual prices paid by dentists between 2011 and 2016.

In sum, Complaint Counsel lists a very small number of carefully selected, and in at least some cases clearly non-representative, discounts from other time periods, and states that they were lower than catalog prices between 2011 and 2016, regardless of what prices the members of the selected buying groups actually paid during the time period in question. This also provides no basis from which Your Honor can confidently conclude that the absence of agreements between Benco (or Patterson or Schein) and some number of buying groups between 2011 and 2016 always or almost always caused economic harm to members of those buying groups

Complaint Counsel cites to samples of prices and gross margins paid by Smile Source members to Schein over time. (CC Brief at 77-79). But of course, these figures were derived from Dr. Marshall's deeply flawed studies, in which he did not follow any accepted method of economic analysis, covered only a tiny fraction of dentists, failed to ensure that Smile Source was representative of buying groups in general, failed to ensure that Schein was representative of other distributors, failed to account for risk, uncertainty, and the changes in buying groups over time, failed to include administrative fees and rebates in his calculations, failed to control for other factors, and simply assumed that all changes that occurred were the result of Schein dealing or not dealing with Smile Source. (BFF 1023-47, 1058-62, 1075-97, 1119-1148).

Finally, Complaint Counsel asserts that "Respondents collectively have market power" with respect to the full line of dental products and services sold through full-service distributors to independent dentists in local markets in the United States.[12] CC Brief at 80; *see also* CC Brief at 88-89. But collective market power is irrelevant in determining potential anticompetitive harm to individual dentists where Complaint Counsel's expert concedes that Respondents compete

[12] Complaint Counsel implies in its Conclusions of Law, although not in its post-trial brief, that it has proven a full rule of reason case. In fact, it has not; some of the reasons why not are explained in this brief. But in any event, a full rule of reason analysis is irrelevant in this matter. The Complaint does not allege a rule of reason violation, and therefore evidence of a full rule of reason violation is outside the scope of this case. (*See* Complaint ¶¶ 80-88).

aggressively for the business of individual dentists. (BFF 1354-56; [redacted]. Complaint Counsel draws a meaningless conclusion from a fundamentally flawed analysis.

Share figures are meaningless if they reflect shares of an improperly defined market. And Complaint Counsel's expert committed a number of errors defining the relevant product market. Dr. Marshall failed to include direct-selling manufacturers in the relevant product market. (BFF 662-682). Dr. Marshall failed to include non-full-service distributors in the relevant product market. (BFF 696-721). And Dr. Marshall erred by combining sales of equipment and consumables in a single relevant product market. (BFF 683-695). As a result, Complaint Counsel's market definition is inherently unreliable.

Complaint Counsel argues that no direct-selling manufacturer, and no non-full-service distributor, is a perfect substitute for full-service distributors. (CC Brief at 81-84). This is the wrong standard. The issue is whether direct-selling manufacturers and non-full-service distributors can constrain pricing of full-service distributors. (J. Johnson, Tr. 4802-03). Because most dentists regularly purchase supplies from multiple sources, direct-selling manufacturers and non-full-service distributors don't have to offer the full range of products that a full-service distributor does in order to constrain pricing of full-service distributors; it is sufficient if they compete for a portion of that range of products. (*Id*.; BFF 698-718).

Complaint Counsel also cites Dr. Marshall's so-called hypothetical monopolist analysis. (CC Brief at 83-84). But this analysis is replete with errors that rendered Dr. Marshall's conclusions inherently unreliable. First, in his purported study of Benco's entry into Southern California, Dr. Marshall included only 257 dentists out of the thousands of dentists in Southern California. (RRFF 2019). Second, Dr. Marshall hypothesized a price increase by Benco only, rather than by "a hypothetical profit-maximizing firm . . . that was the only present and future

seller of those products" in the candidate relevant market, as required by § 4.1.1 of the Horizontal Merger Guidelines. (RX1139 at 7, § 4.1.1). Third, Dr. Marshall implemented a SSNIP test involving just one product in a candidate relevant market without first determining whether "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; see also RXD0104 at p. 5). Fourth, Dr. Marshall tested diversion only to Darby, rather than to all other suppliers, as is required by the Horizontal Merger Guidelines. (RRFF 2019). Fifth, Dr. Marshall erroneously compared the recapture rate, rather than the predicted loss, to the critical loss. (RX1139 at 9, § 4.1.3 (Horizontal Merger Guidelines: a SSNIP is profitable "if the *predicted loss* is less than the critical loss.") (emphasis added)). Sixth, Dr. Marshall improperly combined elements of a symmetric SSNIP test and elements of an asymmetric test. (RRFF 2019). 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. (RRFF 2019).

Furthermore, Dr. Marshall never applied his analysis in properly defined geographic markets. (BFF 643-658). The only two regions where he came close to actually defining a geographic market were Atlanta and Seattle, but even there, he never actually defined the markets. (RRFF 1583). Even in those regions, he never properly assessed the competitive options available to dentists in Atlanta or Seattle. (BFF 654).

As a result of these errors, the purported relevant markets proposed by Complaint Counsel are inherently flawed, and any shares of such purported markets are meaningless.

But the collective shares asserted by Complaint Counsel has a more fundamental problem. The entire concept is flawed, because combined shares are irrelevant to proving harm to competition in this matter.

To prove harm to competition, Complaint Counsel must demonstrate that individual dentists are paying more for dental supplies than they would in a but-for world. There is no allegation that Respondents conspired with respect to individual dentists (including members of buying groups), and Complaint Counsel's expert admitted that he observed robust competition among Respondents for the business of individual dentists, including members of buying groups. Because Complaint Counsel acknowledge that Respondents acted independently with respect to, and competed aggressively against one another for the business of, individual dentists (including members of buying groups), Respondents' combined shares are meaningless with respect to whether individual dentists suffered competitive harm.

### 3. Benco Has Presented Evidence to Rebut Complaint Counsel's Claims That an Alleged Agreement Regarding Middlemen is Inherently Suspect.

#### a) Complaint Counsel's Assertion That Rebuttal Must Consist of "Cognizable Justifications" is Wrong as a Matter of Law.

Complaint Counsel compounds its failure to establish that the alleged agreement is inherently suspect by insisting that Respondents may respond only by providing "cognizable justifications." (CC Brief at 73). Not true. That is not the standard adopted by the Commission and approved by the D.C. Circuit. The Commission clearly articulated its standard in *In re Polygram*. It explained that, if a plaintiff demonstrates that the conduct in question is inherently suspect, the defendant can respond by advancing a legitimate justification. Critically, the Commission stated explicitly that this justification may take one of two forms: it "may consist of plausible reasons why practices that are competitively suspect as a general matter may not be

expected to have adverse consequences in the context of the particular market in question," or, it may consist of reasons the practice is likely to have beneficial effects for consumers. *In re Polygram*, 136 F.T.C. at 344-45. (The Commission echoed the language of the Supreme Court, which, when considering the advertising restriction imposed by the California Dental Association, stated, "the CDA's advertising restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition." *California Dental*, 526 U.S. at 771.)

This standard was explicitly affirmed by the D.C. Circuit. Indeed, the court articulated the standard three times. *Polygram Holding, Inc v. Fed. Trade Commission*, 416 F.3d 29 at 36 (a justification "may consist of plausible reasons why practices that are competitively suspect as a general matter may not be expected to have adverse consequences in the context of the particular market in question," or of reasons why the practices are likely to have beneficial effects for consumers); *id*. (if Complaint Counsel overcomes a defendant's justification, "the evidentiary burden shifts to the defendant to show the restraint in fact does not harm consumers or has 'procompetitive virtues' that outweigh its burden upon consumers"); *id*. (if a restraint is presumed unlawful, a defendant "must either identify some reason the restraint is unlikely to harm consumers or identify some competitive benefit that plausibly offsets the apparent or anticipated harm."). For good measure, the court emphasized that an inherently suspect practice gives rise to a "rebuttable presumption of illegality." *Id*. at 37.

The Commission clearly stated, and the D.C. Circuit confirmed, that the presumption of anticompetitive harm resulting from a practice being considered inherently suspect is rebuttable – a defendant can rebut it by demonstrating the likely absence of anticompetitive harm in the particular market at issue. *In re Polygram*, 136 F.T.C. at 344-45; *Polygram Holding*, 416 F.3d at

37. This makes perfect sense. Because the inherently suspect standard is typically based on an established record of empirical economic evidence in other industries, it is completely logical that a defendant should have the opportunity to establish that, even if a practice has caused anticompetitive harm in other industries, those general conditions do not apply in the individual case and the differing circumstances of the particular industry in question are likely to lead to a different result. Stated bluntly, Complaint Counsel's attempt to convert the Commission's rebuttable presumption of anticompetitive harm into an irrebuttable presumption is contrary to Commission precedent and not supported by the law. Put another way, Complaint Counsel cannot avoid evidence of the absence of anticompetitive effects by hiding behind a presumption; rather, it must respond to evidence that the alleged agreement may not have adverse consequences in the particular market in question with specific evidence of anticompetitive harm. *In re Polygram*, 136 F.T.C. at 348-49 (if a defendant advances a plausible justification – including that the practice in question may not be expected to have adverse consequences in the context of the particular market in question – the plaintiff "must make a more detailed showing that the restraints at issue are indeed likely, in the particular context, to harm competition.").

**b) Sales Data Demonstrate That Respondents' Decisions not to Offer Discounts to Buying Groups Have not Caused Harm to Competition.**

In this matter, even if Complaint Counsel had presented an established body of empirical evidence to demonstrate that an alleged agreement regarding intermediaries (but leaving competition for end-customers in place) has a demonstrated history of causing harm to competition in other industries (which it has not), Benco has presented significant rebuttal evidence based on specific sales data in this matter. Indeed, this evidence goes well beyond "plausible reasons why practices that are competitively suspect as a general matter may not be expected to have adverse consequences in the context of the particular market in question,"

*Polygram Holding*, 416 F.3d at 36; *see also In re Polygram*, 136 F.T.C. at 348-49, and actually demonstrates that Complaint Counsel's hypothesized harm has not occurred in the dental distribution business.

Although Complaint Counsel focused on buying groups, the critical issue is competition for sales to dentists. As noted above, buying groups are not customers. Buying groups don't decide what to order, place orders, take delivery of orders, receive invoices, pay for products, or use products. (BFF 903-09). Dentists are the customers. They decide which products to purchase at what price, place orders, take delivery, use, and pay for dental supplies and products. (BFF 910). The relevant issue is whether dentists suffered anticompetitive harm.

It is undisputed that competition for the business of dentists, including dentists who were members of buying groups, was robust and continued unabated. Dr. Marshall admitted that he observed substantial competition for the business of individual dentists. (BFF 1354-56). [redacted]

Furthermore, sales data indicate that competition for individual dentists was effective. The data indicate that a distributor that entered into an agreement with a buying group did not necessarily provide the lowest margins or the lowest prices to the members of that buying group, and one or more competing distributors often sold to members of the buying group at similar or lower margins and prices. For example, [redacted]

[redacted]

In sum, not only has Complaint Counsel failed to present any established body of empirical evidence that would support a presumption that an alleged agreement regarding intermediaries (but leaving competition for end-customers in place) causes harm to competition, but Benco has presented significant rebuttal evidence showing that independent dentists (including members of buying groups) have benefitted from continued robust competition and have not suffered anticompetitive harm. Complaint Counsel has no response, other than to argue that Your Honor should ignore the market-based, data-driven evidence presented by Dr. Johnson and decide this case instead based on a presumption that harm has occurred. Complaint Counsel presents no persuasive precedent for doing so.

## III. Benco did not Invite Burkhart to Collude in Violation of Section 5.

Complaint Counsel maintains that Benco violated Section 5 of the FTC Act by inviting Burkhart to stop discounting to buying groups. (CC Brief at 101-06). Complaint Counsel is misguided in both its interpretation of the law and its evaluation of the factual record.

Complaint Counsel's legal argument is misplaced. As explained in Benco's Post-Trial Brief, although the Supreme Court has held that Section 5 of the FTC Act is potentially broader than the antitrust statutes, there are limits to its reach. The U.S. Court of Appeals for the Ninth Circuit's decision in *Boise Cascade* specifies that actual anticompetitive effects are a critical element of delineating conduct that violates Section 5. *Boise Cascade Corp. v. Fed. Trade Comm'n*, 637 F.2d 573, 577 (9th Cir. 1980); *see also* Fed. Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015) (to be challenged by the Commission under Section 5, an act or practice "must cause, or be likely to cause, harm to competition or the competitive process.").

And because a rejected invitation has not "actually had [an] effect" on competition, *Boise Cascade*, 637 F.2d at 577, and creates no prospect of future harm, there is no basis for the Commission to issue an order. *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953) (injunctive relief permitted only if there is a "cognizable danger of recurrent violation"); *Borg-Warner Corp. v. F.T.C.*, 746 F.2d 108, 110 (2d Cir. 1984) (no basis for Commission order regarding already terminated conduct); *TRW, Inc. v. F.T.C.*, 647 F.2d 942, 954 (9th Cir. 1981) (no basis for Commission order when the company was not infringing at the time of the Commission's order absent proof of a "cognizable danger of recurrent violation").

Complaint Counsel continues to rely on the Commission's prehearing summary judgment decision in *In re McWane*, 2012 WL 4101793. But as previously noted, the Commission never considered the implications of *Boise Cascade* in its decision, and its applicability is questionable

following the Commission's subsequent adoption of its Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act.

Complaint Counsel relies on *Liu v. Amerco*, 677 F.3d 489 (1st Cir. 2012) in support of its assertion that an invitation to collude may violate Section 5 of the FTC Act. Of course, *Amerco* did not involve the FTC Act, but rather Chapter 93A of the Massachusetts General Laws. *Liu v. Amerco*, 677 F.3d at 492. As the court in that case noted, Chapter 93A's relevant language parallels that of Section 5. *Id*. at 94. Chapter 93A is, nevertheless, a distinct statute. It has never been subject to the type of analysis applicable to Section 5. In particular, the court in *Amerco* did not evaluate whether the application of Chapter 93A to an invitation to collude would pass muster under the standards articulated by the Ninth Circuit in *Boise Cascade*. Thus, *Amerco* fails to address the most important issue regarding application of Section 5 to an alleged invitation to collude.

Complaint Counsel's assessment of the factual evidence is also mistaken. As discussed in Benco's Post-Trial Brief, in none of the brief conversations with Jeff Reese was there an invitation for Burkhart to do anything. Indeed, the core concept of an invitation to collude is one company proposes to a second company that the two companies align some aspect of their business conduct. But there is no evidence of a discussion of Benco's policy regarding buying groups – indeed, Reese testified that he believed Benco was working with buying groups – and Reese confirmed that the discussions did not address Burkhart's work with buying groups or suggest how Burkhart should conduct its business. (BFF 641-43; 649). When directly asked at trial, Mr. Reese denied that Benco had ever suggested how Burkhart should conduct its business. (BFF 648 (Reese, 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.")))).

Not only does this evidence fail to support Complaint Counsel's assertion that Benco engaged in an invitation to collude, it also fails to satisfy legal standards of clarity for application of Section 5 of the FTC Act. As explained in Benco's Post-Trial Brief, application of Section 5 to conduct that does not violate Section 1 or Section 2 of the Sherman Act "must be formulated to discriminate between normally acceptable business behavior and conduct that is unreasonable or unacceptable." *E.I. du Pont de Nemours & Co. v. Fed. Trade Comm'n*, 729 F.2d 128, 137 (2d Cir. 1984). The U.S. Court of Appeals for the Second Circuit expressed concern with possible "arbitrary or capricious administration" of Section 5 of the FTC Act if enforcement of Section 5 were not limited to carefully defined situations. Attempts to apply Section 5 to ambiguous communications as alleged invitations to collude raise precisely these concerns.

For this reason also, Complaint Counsel's reliance on *Amerco* is misplaced. In contrast to the present matter, the complaint in *Amerco* described a clear, repeated, and unambiguous set of invitations to a competitor to increase prices. In the words of the U.S. Court of Appeals for the First Circuit, "[w]hat is alleged here are express proposals to a competitor to raise prices, which are unambiguous[.]" *Liu v. Amerco*, 677 F.3d at 494-95. That is clearly not true in the present matter. Thus, the invitation to collude alleged in *Amerco* appears likely to have satisfied the standard set by the U.S. Court of Appeals for the Second Circuit in *DuPont*, whereas the evidence relating to the alleged invitation in the present matter does not.

In sum, the legal theory of invitation to collude as articulated in this matter is at odds with the Ninth Circuit decision in Boise Cascade, and the evidence in this record fails to support

Complaint Counsel's claim that Benco invited Burkhart to collude or to satisfy the Second Circuit standard set forth in *DuPont*.

## CONCLUSION

For the foregoing reasons, and for the reasons set forth in Benco's Post-Trial Brief, Benco's Proposed Findings of Fact and Conclusions of law, the post-trial briefs and proposed findings of fact and conclusions of Patterson and Schein, and Respondents Reply to Complaint Counsel's Proposed Findings of Fact and Conclusions of Law, Complaint Counsel has failed to establish that Benco has violated Section 5 of the FTC Act, and Complaint Counsel's request for an order granting the relief sought in the Notice of Contemplated Relief should be denied.

Dated: June 6, 2019

Respectfully submitted,

By: */s/ Kenneth L. Racowski*

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## Notice of Electronic Service

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